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LEAST RESTRICTIVE ENVIRONMENTS: ASSESSING CLASSROOM PLACEMENT OF STUDENTS WITH DISABILITIES UNDER THE IDEA

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Abstract: The Individuals with Disabilities Education Act (IDEA) requires school districts to educate all students receiving special education in the "least restrictive environment" appropriate for each student's needs. This provision reflects Congress' preference that children with disabilities be educated alongside their non-disabled peers to the maximum extent possible. The U.S. Supreme Court has never determined how to test whether a school district has complied with this provision, so the federal circuits have developed several different tests. However, these circuit tests all arose prior to the most recent 1997 Amendments to the IDEA. This Comment explores the development and subsequent application of those tests, and argues that the Supreme Court should resolve this circuit split by adopting a single national test. This Comment then proposes a new analysis that synthesizes the best elements of the current tests and reflects the intent behind the 1997 Amendments.

Kevin is a high-school student with Down syndrome who just moved to a school in Maryland.[1] He has developmental delays and difficulty with some academic subjects; however, he is not disruptive in class. Kevin holds an after-school job and participates in social activities with his friends. Nevertheless, if Kevin's new school were to place him in a segregated vocational setting, federal courts in Kevin's state would likely uphold the segregated placement.

Across the country in Oregon, Rina is an eight-year-old girl with autism whose academic and communication skills are significantly delayed.[2] Like Kevin, Rina has many friends, behaves well in class, and is motivated to learn. If Rina were placed in a segregated special education classroom, and if her parents objected, a federal court in Rina's state would likely rule against her school, and required placement in an integrated classroom.

The disparate outcomes for these two similar students illustrate the problems that can arise when courts across the country assess a school district's compliance the Individuals with Disabilities Education Act (IDEA).[3] The IDEA requires school districts to educate special education

1. Hypothetical based on DeVries v. Fairfax County Sch. Bd., 882 F.2d 876 (4th Cir. 1989).

2. Hypothetical based on Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

3. 20 U.S.C. §§ 1400–1487 (1997).

students in the "least restrictive [appropriate] environment"[4] in order to receive federal funding.[5] However, the U.S. Supreme Court has not provided guidance on how to determine whether a student is receiving services in the least restrictive environment.[6] The federal circuit courts have filled that void by creating differing tests by which to measure school district compliance with the least restrictive environment provision (LRE provision).

Part I of this Comment introduces the IDEA and discusses the text, history, purpose and structure of the LRE provision, as well as the Department of Education's implementing regulations. Part II traces the historical development and subsequent application of the federal circuit tests for assessing whether school districts are complying with the LRE provision. Part III argues that the U.S. Supreme Court should adopt a uniform test. Part III also suggests a test that incorporates the best aspects of the four circuit tests and reflects the new vision of the 1997 Amendments to the IDEA.

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The 1997 Amendments to the IDEA created the most recent version of a law that has changed many times since its inception.[7] For most of the nation's history, students with disabilities were excluded from public schools and segregated from other children.[8] On the wave of the civil rights movements of the 1960s, courts and Congress finally addressed the segregation of students with disabilities.[9] Since the first education laws passed in the 1960s, the IDEA has endured many revisions[10] and continues to change as Congress better understands how to serve students with disabilities.[11]

4. *Id.* § 1412(a)(5)(A).

5. *Id.* §§ 1411; 1412(a) (providing that states may be eligible for financial assistance under IDEA if they meet the conditions listed in 20 U.S.C. § 1412(1)–(22) (1997)).

6. The Supreme Court has denied certiorari on two leading cases on this issue. Sacramento City Unified Sch. Dist., 14 F.3d 1398, *cert. denied*, 512 U.S. 1207 (1994); Roncker v. Walters, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983).

7. *See infra* Part I.B.

8. Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 603–04 (1995).

9. *See infra* Part I.A.

10. *See infra* Part I.B.

11. 20 U.S.C. § 1400 (c)(5) (1997).

A. *Early Developments in the Recognition of Civil Rights for Students with Disabilities*

As recently as the 1970s, students with disabilities were routinely denied educational opportunities.[12] The National Council on Disability reports that:

> [before the 1970s,] schools in America educated only one in five students with disabilities. More than 1 million students were excluded from public schools, and another 3.5 million did not receive appropriate services. [Laws excluded] certain students, including those who were blind, deaf, or labeled "emotionally disturbed" or "mentally retarded." Almost 200,000 school-age children with mental retardation or emotional disabilities were institutionalized.[13]

Poor, rural, and minority students with disabilities had an even greater chance of being institutionalized.[14]

The first major legislative reform to address these inadequacies came in 1965 when Congress enacted the Elementary and Secondary Education Act (ESEA)[15] to provide federal funds to improve education for children with disabilities and other disadvantages.[16] The Education of the Handicapped Act (EHA) in 1970 also dramatically increased federal funding for special education.[17] However, these reforms were not sufficiently comprehensive to meet the needs of many disabled students.[18]

Following the path forged by *Brown v. Board of Education*,[19] in which the U.S. Supreme Court found racially segregated schools to be

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12. JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 167, 165–66 (Random House 1994).

13. NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO LEAVE NO CHILD BEHIND 6 (2000).

14. *Id.* Minority students continue to be disproportionately placed in special education. *See* 20 U.S.C. § 1400(c)(8)(A)–(D) (1997).

15. Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965), *amended by* Title VI, Pub. L. No. 89-750, 161, 80 Stat. 1204 (1966).

16. *Id.*

17. Education of the Handicapped Act, Pub. L. No. 91-230, 601–62, 84 Stat. 175, 175–88, *amended by* Title VI, Pub. L. No. 93-380, 611–21, 88 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1400–1485 (1988 and Supp. V. 1993)).

18. SHAPIRO, supra note 12, at 165–66 (explaining that even after the early reforms of the ESA and the EHA, children with severe disabilities were still routinely excluded from public schools).

19. 347 U.S. 483 (1954).

unconstitutional,[20] parents of disabled children began to take their grievances to court. Two landmark cases in the early 1970s established that children with disabilities have a constitutional right to be equally included in public schools.[21] In *Pennsylvania Association for Retarded Children (P.A.R.C.) v. Pennsylvania*,[22] a federal district court reasoned that because the school district could show no rational basis for excluding students with disabilities from school, the students had a constitutional right to public education under the Equal Protection Clause.[23] Furthermore, the court held that the school district had violated parents' due process rights by failing to provide a hearing before denying the children access to public schooling.[24] Therefore, the court granted students with mental retardation the right to attend Pennsylvania's public schools.[25] Additionally, the district court required the school district to presume that placement in a regular class was preferable to placement in a special education class.[26]

Subsequently, in 1972, the Federal Circuit for the District of Columbia considered whether a school district had violated the Fifth Amendment by excluding children with disabilities from public school. In *Mills v. Board of Education*,[27] the D.C. school district admitted that "an estimated 12,340 handicapped children were not to be served in the 1971–1972 school year."[28] The seven children named in the suit were African-American, had disabilities ranging from behavior disorders to brain damage, and were excluded from public education.[29] Relying on *Brown*[30] and other racial segregation cases,[31] the D.C. Circuit held that the children had been denied equal protection and due process of law because they had not received a hearing prior to exclusion.[32] The court

20. Mills v. Bd. of Educ., 348 F. Supp. 866, 874-75 (D.D.C. 1972).

21. *Id.*; Pa. Ass'n for Retarded Children (P.A.R.C.) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *subsequent proceedings at* 343 F. Supp. 279 (E.D. Pa. 1972).

22. 334 F. Supp. 1257 (E.D. Pa. 1971).

23. *P.A.R.C.*, 343 F. Supp. at 297.

24. *Id.* at 295.

25. *Id.* at 302.

26. *P.A.R.C.*, 334 F. Supp. at 1260.

27. 348 F. Supp. 866 (D.C. 1972).

28. *Id.* at 869.

29. *Id.* at 869–70.

30. *Id.* at 875 ("[Education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."), *quoting* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

31. *Mills*, 348 F. Supp. at 874–75.

32. *Id.* at 875.

considered the school district's claim of severely inadequate funds but found that the school's available funds must be spent equitably so that "[t]he inadequacies of the District of Columbia Public School System . . . [would not] bear more heavily on the . . . handicapped child than on the normal child."[33]

In sum, in the late 1960s and early 1970s both Congress and the courts began to remedy the segregation of students with disabilities from public schools.[34] Most importantly, courts recognized that under the Fifth and Fourteenth Amendments students with disabilities could not be excluded from public school or unequally impacted when the school district complained of insufficient funds.[35]

B. *Legislative History of the Education for All Handicapped Children Act and the IDEA*

With *P.A.R.C.* and *Mills* providing the impetus for change, Congress passed the Education for All Handicapped Children Act[36] (EAHCA) in 1975.[37] This was Congress' first attempt to create a comprehensive solution to special education and to extend equal access to public schools to students with disabilities across the country.[38] The Senate recognized that funding was a major barrier for school districts trying to comply with court decisions mandating inclusion.[39] In response, Congress increased federal funding for special education[40] to help school districts meet their constitutional obligations.[41]

The EAHCA made funding contingent on certain core requirements.[42] A school district accepting funding had to provide a free appropriate public education (FAPE)[43] in the least restrictive environment[44] for all

33. *Id.* at 876.

34. *See supra* notes 12–18 and accompanying text.

35. *See supra* notes 19–33 and accompanying text.

36. Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1400–1485 (1988 and Supp. V 1993)).

37. S. REP. No. 94-168, at 6–7, (1975) *reprinted in* 1975 U.S.C.C.A.N. 1430-31.

38. *Id,* at 17, 1425, 1441.

39. *Id.* at 7, 1431.

40. *Id.* at 14, 1438.

41. *Id.* at 9, 1433 ("It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school.").

42. 20 U.S.C. § 1412 (1975) (98 Stat. 773, 781).

43. *Id.* §§ 1401 (18), 1412(2)(B) and (3) (89 Stat. 775, 780–81), currently found at 20 U.S.C. § 1412 (a)(1)(A) (1997).

special education students. The districts also had to ensure due process for aggrieved families[45] and create written education plans outlining placement and services for each student.[46]

In 1990, the EAHCA was reauthorized as the IDEA.[47] The 1990 law included a new mandate for transition services[48] to help older students transition into post-school education, employment, or independent residential settings.[49] Congress most recently amended the IDEA in 1997,[50] following two years of analysis and hearings.[51]

C. *Overview of the Text and Structure of the IDEA's Mandates*

As a grant-in-aid statute, the IDEA conditions federal funding on compliance with certain conditions,[52] some related to funding and procedure, and some that specify the services states[53] must provide to each special education student.[54] First, states must provide a FAPE to all students with disabilities from age 3 to 21 "regardless of the severity of [the] . . . disability."[55] "Appropriate" in this context does not mean that schools must *maximize* the educational opportunities for students with disabilities.[56] Rather, the school must provide "personalized instruction with sufficient support . . . to permit the child to benefit educationally from that instruction."[57]

Second, the school district must maintain a written individualized education plan (IEP) for every child receiving special education.[58] The IEP must be developed annually by an IEP team consisting of parents, the student, if appropriate, the special education teacher, an

44. The EAHCA least restrictive environment provision was enacted as 20 U.S.C. § 1412(5)(B) (1975) and is substantially the same as the current provision at 20 U.S.C. § 1412(a)(5)(A) (1997).

45. 20 U.S.C. § 1415 (1975) (ensuring a hearing before an impartial administrative officer).

46. *Id.* § 1414(a)(5).

47. Individuals with Disabilities Education Act, Pub.L.No 101-476, 104 Stat. 1103 (1990).

48. 20 U.S.C. § 1414(d)(1)(A)(vii) (1997).

49. *Id.* § 1401(30).

50. *Id.* §§ 1400–1487.

51. 143 Cong. Rec. E951 (1997) (Statement of Representative George Miller of California).

52. 20 U.S.C. § 1412(a)(1)–(22) (1997).

53. Local school districts must also demonstrate that they are in compliance with all state requirements under § 1412. *Id.* § 1413(a)(2)–(7).

54. *Id.* § 1412(a)(1)–(22).

55. *Id.* § 1412(a)(1).

56. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 198–201 (1982).

57. *Id.* at 203.

58. 20 U.S.C. § 1412(a)(4) (1997).

administrator, and other service providers as needed.[59] The IEP team must work together to create a document reflecting the child's current levels of performance,[60] a statement of annual goals,[61] a list of supplementary aids and services the student needs to benefit from instruction,[62] an explanation of the extent to which the student will not be included with the regular class,[63] and a list of transition services for older students.[64] Parents participate in any team that makes a placement decision for their child.[65]

Finally, the law requires school districts to ensure that each student with a disability receives services in the least restrictive environment, stating "to the maximum extent appropriate, children with disabilities [must be] educated with children who are not disabled...."[66] Furthermore, children can only be removed from the regular classroom when education there cannot be satisfactorily achieved with the use of supplementary aids and services.[67] Therefore, the LRE provision creates a two-pronged requirement.[68] First, schools must attempt to educate students with supplementary aids and services in the regular integrated classroom.[69] Second, if attempts to educate a disabled student in a regular classroom do not work, the school may place the student in a more segregated setting while mainstreaming the student to the maximum extent appropriate.[70]

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59. *Id.* § 1414(d)(1)(B).

60. *Id.* § 1414(d)(1)(A)(i).

61. *Id.* § 1414(d)(1)(A)(ii).

62. *Id.* § 1414(d)(1)(A)(iii).

63. *Id.* § 1414(d)(1)(A)(iv).

64. *Id.* § 1414(d)(1)(A)(vii).

65. *Id.* § 1414(f).

66. *Id.* § 1412(a)(5). This provision is known as the "mainstreaming" or "inclusion" requirement. Mainstreaming refers to the practice of allowing children to attend the common or *mainstream* school. Inclusion is the current term used to describe the integration of children with disabilities into regular classrooms within those schools. *See* SHAPIRO, *supra* note 12, at 167. Inclusion is the preferred term in the field of special education. *See* Mavis v. Sobol, 839 F. Supp. 968, 971 (N.D.N.Y. 1993). The terms are used interchangeably in this Comment.

67. 20 U.S.C. § 1412(a)(5) (1997). Supplementary aids and services are "aids, services, and other supports that are provided in regular education classes . . . to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate." *Id.* § 1401(29) (1997).

68. *Id.* § 1412(a)(5) (1997).

69. *Id.*

70. *Id.*

D. Congressional Intent Behind the 1997 Amendments to the IDEA

Congress amended the IDEA in 1997 in an effort to strengthen the Act by utilizing more current information about how students with disabilities should be served.[71] The primary goals of the 1997 amendment were to "strengthen the least restrictive environment requirement"[72] and "increase participation of children with disabilities in the general curriculum and regular . . . classroom."[73] In doing so, Congress responded to circuit cases interpreting the LRE provision[74] by recognizing the importance of inclusion of students with disabilities in the regular classroom.[75]

Then-President Clinton's statement upon signing the amendments into law emphasized inclusion.[76] He noted that the amendments would "[put a] sharper focus on improving educational results for these children through greater access to the general curriculum."[77] This greater access is aided by a new requirement that the regular education teacher be included in the IEP team to ensure that special education students receive appropriate support in the regular classroom.[78]

A second goal of the 1997 Amendments was to strengthen the role of families in the special education process.[79] Parents must be members of any group that makes decisions about placement, including the child's IEP team.[80] Furthermore, parents must receive more frequent updates on

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71. *See* 143 CONG. REC. E972-01, 972 (1997) (Representative Matthew G. Martinez of California, stating that Congress received "significant input from groups and individuals who are affected and served by the act").

72. 20 U.S.C. § 1414(d)(1)(B)(ii) (1997) (including the regular teacher in the IEP team, thereby ensuring appropriate support in the regular classroom).

73. 143 CONG. REC. E951-01, 951 (1997) (statement of Representative George Miller of California).

74. Oberti v. Bd. of Educ., 995 F.2d 1204, 1207 (3d Cir. 1993); Greer v. Rome City Sch. Dist., 950 F.2d 688, 695-96 (11th Cir. 1991); Bd. of Educ. v. Holland, 786 F. Supp. 874, 878 (E.D. Cal. 1992).

75. 143 CONG. REC. E972-01, 972 (1997) (Representative Matthew G. Martinez of California, stating that inclusion and integration were fundamental to the amendments, which "underscore[] the strong presumption in the law recognized by innumerable courts, that children with disabilities should be educated with children without disabilities in the general . . . classroom.").

76. 1997 U.S.C.C.A.N. 147 (1997) (Statement by President William J. Clinton Upon Signing H.R. 5).

77. *Id.*

78. 20 U.S.C. § 1414(d)(1)(B)(ii) (1997).

79. S. REP. No. 105-17, at 4 (1997), H.R. REP. No. 105-95, at 3 (1997).

80. S. REP. No. 105-17, at 23.

their child's progress toward the IEP goals.[81] The IDEA guarantees students the opportunity to participate in the planning and placement process[82] by participating as members of their own IEP team if they are able to do so.[83] Older students may participate in their transition team, which facilitates entry into the community after school ends.[84] Therefore, the 1997 Amendments prenewed the importance of the LRE provision by providing that the regular classroom must be the default placement and emphasized the role of parent and student input into the decision-making process.

E. The Department of Education's Implementing Regulations for the LRE Mandate

The Department of Education promulgated its final regulations to the 1997 Amendments in 1999,[85] to clarify how school districts can remain in compliance.[86] One requirement is that school districts must make available[87] a "continuum of alternative placements"[88] ranging from less restrictive—like regular classes, special classes, and special schools—to more restrictive—like home instruction or instruction in hospitals or institutions.[89] Each student receiving special education must be placed in the least restrictive appropriate setting on that continuum.[90] If the student is placed in the regular classroom, supplementary aids and services must be provided as needed,[91] and students may not be removed from the regular classroom simply because the general curriculum must be modified for them.[92]

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81. *Id.* at 22.

82. 20 U.S.C. §§ 1414(d)(1)(B)(vii); 1414(d)(1)(A)(vii) (1997).

83. *Id.* § 1414(d)(1)(B)(vii).

84. *Id.* § 1414(d)(1)(A)(vii).

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

86. 34 C.F.R. §§ 300.550–556 (1999).

87. A small school district need not create and fund a whole range of settings, but may "borrow" more specialized services or settings from nearby school districts. *See infra* notes 135–39 and accompanying text.

88. 34 C.F.R. § 300.551 (1999).

89. *Id.* § 300.551(b)(1).

90. *Id.* § 300.551(a).

91. *Id.* § 300.551(b)(2).

92. *Id.* § 300.552(e).

Furthermore, if students with disabilities cannot be included in a regular class for academic work, then they should participate in non-academic activities to the maximum extent appropriate.[93] For example, a student should be allowed to join his or her regular education classmates for activities like meals and recess periods.[94] In doing so, a student with a disability can maintain contact with non-disabled peers "to the maximum extent appropriate to the needs of that child."[95]

The Department of Education's regulations remind school districts of the strong Congressional preference for mainstreaming students with disabilities.[96] Before a child can be placed outside of the regular classroom, "the full range of supplementary aids and services that if provided would facilitate the student's placement in the regular classroom setting must be considered."[97] To this end, the Department of Education emphasized using a continuum of placements[98] to ensure the appropriate setting for each student. The default placement on that spectrum must be a regular classroom, and a student with a disability should only be removed if education with supplementary aids and services cannot be achieved satisfactorily.[99] Finally, if a student with a disability is segregated, he or she must still be included with regular peers for non-academic activities like lunch and recess to the maximum extent appropriate.

II. CURRENT JUDICIAL TESTS FOR ASSESSING SCHOOL DISTRICT COMPLIANCE WITH THE LRE REQUIREMENT

Given the historical purpose of the IDEA to remedy segregation of students with disabilities[100] and Congress' current strong preference for their inclusion,[101] how do courts determine when a student's exclusion from the regular classroom violates the LRE provision? Although the U.S. Supreme Court has interpreted the IDEA's FAPE provision,[102] the

93. *Id.* § 300.553.
94. *Id.*
95. *Id.*
96. *Id.* Appendix A to Part 300 (Question 1).
97. *Id.*
98. *Id.* § 300.551.
99. *Id.* § 300.550(b)(2).
100. *See infra* Part I.A.
101. *See infra* Part I.D.
102. Bd. of Educ. v. Rowley, 458 U.S. 176, 198–201 (1982).

Court has not yet heard a case involving the LRE provision, thereby leaving the circuit courts to devise their own tests.[103] The tests created by the circuits have taken different forms and emphasize varying aspects of the LRE provision. One test emphasizes the feasibility of providing supplementary services,[104] while a second test employs a two-part framework derived from the language of IDEA.[105] The third is a four-factor balancing test incorporating elements from prior cases.[106] Finally, some district courts have used a hybrid test that blends two prior approaches.[107]

A. *The* Roncker *Portability/Feasibility Test*

1. Roncker v. Walters

Neill Roncker was a nine-year-old boy with severe mental retardation and seizures.[108] Neill's school district decided to place him in a school that exclusively served students with retardation;[109] thus Neill would have had no interaction with non-disabled students.[110] Neill's parents refused the placement[111] and appealed to an impartial hearing officer.[112] Subsequently, they filed suit in a federal district court, claiming that the placement violated the LRE provision.[113] The district court ruled in the school's favor, holding that the LRE provision gave school officials broad discretion to choose Neill's placement.[114]

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103. *See, e.g.*, Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1046 (5th Cir. 1989); Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994).

104. *Roncker*, 700 F.2d at 1063.

105. *Daniel R.R.*, 874 F.2d at 1046.

106. *Rachel H.*, 14 F.3d at 1404.

107. *See, e.g.*, D.F. v. W. Sch. Corp., 921 F. Supp. 559, 567 (S.D. Ind. 1996).

108. *Roncker*, 700 F.2d at 1060.

109. *Id.*

110. *Id.*

111. *Id.* at 1061.

112. *Id.* Parents may request an impartial due process hearing to review a district's placement decision. 20 U.S.C. § 1415(f) (1997); 34 C.F.R. §§ 300.507–300.508 (1999). Parents may appeal to the state board of education, 20 U.S.C. § 1415(g), and then to a federal district court. *Id.* § 1415(i)(2).

113. *Roncker*, 700 F.2d at 1060.

114. *Id.*

On appeal, the Sixth Circuit Court of Appeals found no available test[115] to assess whether the school district had violated the LRE provision under the 1975 EAHCA.[116] The Sixth Circuit developed its own test, holding that "[i]n a case where a segregated facility is considered superior, the court should determine whether the services which make that placement superior can feasibly be provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."[117]

The Sixth Circuit justified this feasibility-based test by explaining that it respected Congress' strong preference for mainstreaming, but also recognized that inclusion is inappropriate for some children.[118] This analysis required the court to balance the benefits Neill would receive in the regular classroom against the benefits of a segregated setting.[119] The Sixth Circuit further held that this test required courts to honor Congress' "strong preference" for mainstreaming by requiring that the benefits of a segregated setting "far outweigh" the benefits of mainstreaming to justify a segregated placement.[120]

The *Roncker* court suggested factors that might impact this balance.[121] When deciding whether the benefits of segregation are strong enough, courts may consider whether the student is a "disruptive force" in the classroom.[122] If the student is too disruptive to the other students or requires too much supervision by the teacher, those facts may favor a segregated setting.[123] In addition, if the disruptive student would only receive "marginal benefit" in the regular classroom, a more restrictive environment may be appropriate.[124]

The *Roncker* court also considered the cost of inclusion.[125] If a student requires extensive resources to the detriment of other students in the district, it may not be practically possible to keep the student in the

115. The *Rowley* case only addressed the FAPE provision, not the LRE provision. *Rowley*, 458 U.S. at 202–03.

116. *Roncker*, 700 F.2d at 1059.

117. *Id.* at 1063.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* (basing its discussion of cost on a single case without citing any statutory authority).

integrated setting.[126] However, a school district claiming cost as a defense must show that it has used its federal funds to create a "proper continuum of alternative placements for handicapped children."[127]

2. *Subsequent Application Of The* Roncker *Test*

The Sixth Circuit framed the *Roncker* test in terms of feasibility of integration based on the portability of services from segregated settings into integrated ones, and suggested a variety of factors for courts to consider.[123] The Eighth Circuit adopted the *Rockner* test in *A.W. v. Northwest R-1 School District*,[129] a case involving an elementary school student with Down syndrome.[130] The Eighth Circuit focused heavily on the issue of cost by citing a state's need to properly allocate resources[131] and approved an inquiry into whether the cost of mainstreaming one student would take financial resources away from the education of other students with disabilities.[132] Based on the *Roncker* test, which suggested that cost is a "proper factor to consider since excessive spending on one handicapped child deprives other handicapped children,"[133] the Eighth Circuit held that the regular placement of A.W. was not feasible based on cost.[134]

In *Age v. Bullitt County Schools*,[135] the Sixth Circuit considered the placement of a deaf student, Michael Age, whose IEP required an oral method for communication rather than sign language.[136] Because the school district did not have an oral program, it paid for transportation to another school that did.[137] Michael's parents claimed that the school

126. *See id.*

127. *Id.*

128. The Fourth Circuit in *DeVries v. Fairfax County School District*, 882 F.2d 876, 879–80 (4th Cir. 1989) gave this test cursory treatment. The court recited the *Roncker* test but did not apply its "feasibility" analysis when discussing the benefits and detriments of two placement options. *Id.* Deferring instead to the district court's findings that the student could not be educated at the local high school, the court affirmed the segregated placement of a student with autism. *Id.* at 880.

129. 813 F.2d 158, 163 (8th Cir. 1987).

130. *A.W.*, 813 F.2d at 160.

131. *Id.* at 163–64.

132. *Id.* at 164 ([A]vailable financial resources must be equitably distributed among all handicapped students.").

133. Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

134. *A.W.*, 813 F.2d. at 165.

135. 673 F.2d 141 (6th Cir. 1982).

136. *Id.* at 143.

137. *Id.*

district should pay for an oral program at his local school, but a district court found the commuting program was appropriate.[138] The Sixth Circuit agreed, holding that the school district should not have to create a program just for Michael and that the district had fairly reconciled Michael's needs with the need to allocate scarce funds among as many handicapped children as possible.[139]

Still, the Sixth Circuit in *Roncker* argued that the cost of including a particular student cannot be properly considered without first finding that a school district has used its available funds to create a continuum of alternative placements for all students with disabilities.[140] Proper use of federal funds was thus shown to be a threshold that a school district must overcome before it can claim the high cost of mainstreaming as a defense.[141]

In summary, the *Roncker* test asks courts to assess whether it is feasible to provide the needed services in a regular classroom, based on the portability of the services. To do so, courts must balance the benefits of an integrated setting against a segregated setting but can only approve a segregated setting if its benefits "far outweigh"[142] those of the integrated classroom. Courts may consider factors like disruptiveness or cost of providing services in the regular classroom. However, as subsequent courts have noted, school districts may only raise the issue of high cost if they first show that they have used their federal funds to create a continuum of appropriate placements.

B. The Daniel R.R. *Two-Prong Test*

1. Daniel R.R. v. State Board of Education

In 1989, the Fifth Circuit declined to follow the *Roncker* test[143] and formulated its own test in *Daniel R.R. v. State Board of Education.*[144] Daniel was a six-year-old boy with Down syndrome who attended a

138. *Id.* at 145.

139. *Id. See also A.W.*, 813 F.2d at 163–64.

140. *See* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

141. *See* Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 517 (6th Cir. 1984) (reaffirming *Roncker* by holding that "cost considerations are only relevant when choosing [among] several options, all of which offer an 'appropriate' education").

142. *Roncker*, 700 F.2d at 1063.

143. 874 F.2d 1036, 1046 (5th Cir. 1989).

144. *Id.*

regular pre-kindergarten class.[145] Although the regular teacher modified both the curriculum and her teaching methods, Daniel required constant attention and failed to master basic skills.[146] Based on the teacher's complaints, the school district assigned Daniel to a special education class where his only interaction with non-disabled peers occurred during lunch and recess.[147] Daniel's parents appealed the decision to the district court, claiming that Daniel's new placement was a violation of the LRE provision.[148]

The district court reviewed the administrative record and granted summary judgment in favor of the school district,[149] noting Daniel's inability to receive "educational benefit" in the regular classroom.[150] After considering the history of the EAHCA and the dual mandates of free appropriate education and least restrictive environment, the Fifth Circuit declined to follow the *Roncker* analysis.[151] The court found that *Roncker's* feasibility test required "too intrusive an inquiry" into educational policy choices that Congress intended to leave to local school officials.[152] Furthermore, the *Roncker* test made "little reference to the language of the [Act]."[153]

Looking to the text of the LRE provision of the EAHCA,[154] the Fifth Circuit created a two-part test: (1) Can education in the regular classroom, with supplemental aids and services, be achieved satisfactorily? (2) If it cannot and the school intends to remove the student from regular education, is the student then mainstreamed to the maximum extent appropriate?[155] The *Daniel R.R.* court derived this test directly from the language of the LRE provision.[156]

The Fifth Circuit recognized that its least restrictive environment analysis is individualized and fact-specific.[157] In order to apply its first

145. *Id.* at 1039.

146. *Id.*

147. *Id.*

148. *Id.* at 1038, 1040.

149. *Id.* at 1040.

150. *Id.* (affirming the hearing officer's ruling).

151. *Id.* at 1046.

152. *Id.*

153. *Id.*

154. *Id.* EAHCA's LRE provision, 20 U.S.C. § 1412 (5)(B) (1991), is substantially the same in the current version of IDEA, 20 U.S.C. § 1412(a)(5)(A) (1997).

155. *Daniel R.R.*, 874 F.2d at 1050.

156. *See supra*, notes 66–70 and accompanying text.

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

prong,[158] the court looked to a non-exhaustive list containing "a variety of factors [that] will inform . . . our inquiry."[159] The Fifth Circuit determined that first courts should consider whether the school has taken sufficient steps to accommodate the student in a regular classroom by means of supplementary aids and services.[160] The court cautioned that this requirement is not limitless: courts may consider the impact on the regular education teacher's workload and the extent of the modifications required[161] but must take more than token steps to accommodate a student's needs.[162] In this case, the Fifth Circuit found that the school district had made a genuine effort to accommodate Daniel in the regular classroom.[163]

Second, the Fifth Circuit examined whether Daniel was receiving "educational benefit" from regular education and concluded he was receiving little educational benefit in the pre-kindergarten class.[164] The court explained that other benefits must still be considered, such as improved communication or social skills.[165] A student who might "be able to absorb only a minimal amount of the [regular academic curriculum], but may benefit enormously from the language models that his nonhandicapped peers provide for him" could still be placed in the regular classroom.[166] However, the Fifth Circuit also found that Daniel received only marginal non-academic benefits.[167]

The Fifth Circuit then considered the impact of Daniel's presence on the classroom environment.[168] The court noted that a student might be either so disruptive or require so much individual attention that the

158. *Id.* at 1050.

159. *Id.*

160. *Id.* at 1048.

161. *Id.* at 1048–49 ("[M]ainstreaming would be pointless if we forced instructors to modify the regular . . . curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student.").

162. *Id.* at 1048.

163. *Id.* at 1050 (finding the regular education teacher made "creative efforts" to reach Daniel, devoted substantial time attending to him, and modified the curriculum).

164. *Id.* (finding that Daniel's developmental level was much lower than the other students, so the only real benefit was the "opportunity to associate" with non-disabled peers).

165. *Id.* at 1049.

166. *Id.*

167. *Id.* at 1051.

168. *Id.* at 1049–51.

quality of education for the rest of the class suffers.[169] In Daniel's case, he required so much one-on-one assistance from the teacher that other students were negatively impacted.[170] Finally, although the cost of supplementary aids and services was not an issue in this particular case, the Fifth Circuit did mention that cost may be considered as well.[171]

Applying these factors under the first prong of the test, the Fifth Circuit upheld Daniel's removal to a segregated special education class[172] because all the factors weighed against placement in the regular classroom.[173] As to the second prong of their test, the court found that Daniel had been mainstreamed as much as possible because he remained integrated for lunch and recess.[174]

2. *Subsequent Application of the* Daniel R.R. *Test*

The *Daniel R.R.* test was adopted by the Third Circuit in *Oberti v. Board of Education*.[175] Rafael Oberti, an eight-year-old boy with Down syndrome, was removed from a regular class and placed in a segregated classroom.[176] Rafael's parents objected and requested a due process hearing.[177] After mediation, a due process hearing, and a trial in district court where the Obertis won, the school district appealed.[178]

On appeal, the Third Circuit chose to apply the *Daniel R.R.* test.[179] The court noted the similarities between the two-part test and the language of IDEA, including the test's emphasis on inclusion to the "maximum extent appropriate" and the requirement of individualized programs to meet "each child's specific needs."[180] However, the Third Circuit

169. *Id.* at 1049.

170. *Id.* at 1051.

171. *Id.* at 1049 n.9.

172. *Id.* at 1052.

173. *Id.* at 1050.

174. *Id.* at 1051.

175. Oberti v. Bd. of Educ., 999 F.2d 1204, 1212 (3d Cir. 1993). The Eleventh Circuit also adopted the two-part test because it "adheres so closely to the language of the Act, and, therefore, clearly reflects Congressional intent[.]" Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991). The *Greer* court applied the following factors under the first prong: (1) a comparison of the benefits of regular education with supplementary supports versus segregated special education; (2) the disruptive effect of the student; and (3) the cost of providing supplementary services. *Id.* at 697.

176. *Id.*

177. *Id.* at 1208.

178. *Id.* at 1208–12.

179. *Id.* at 1215.

180. *Id.*

balanced its own list of factors under the first prong, including: (1) whether the school took reasonable steps to include the student in a regular classroom with supplementary aids and services; (2) a balance of the benefits the student received in the regular classroom with the benefits of a segregated special education classroom; and (3) any disruptive or negative impact on the classroom.[181] Furthermore, the *Oberti* court was the first to recognize the reciprocal benefits for students without disabilities, such as learning to communicate and interact with persons with disabilities.[182]

Applying this test to Rafael's setting, the Third Circuit made a detailed examination of the school district's efforts[183] and found that (1) the school district had only made negligible attempts to accommodate Rafael with supplementary aids and services;[184] (2) Rafael would receive educational benefit in the regular classroom;[185] and (3) Rafael's disruptive behavior problems would likely be minimized or eliminated if appropriate aids and services were provided.[186] Therefore, according to the Third Circuit, the school district had not provided Rafael with an education in the least restrictive environment under the first prong of the *Daniel R.R.* test,[187] leaving no need to apply the second prong.[188]

Like the *Roncker* test,[189] subsequent application of the *Daniel R.R.* test has revealed that some factors involve threshold questions, which require proof of one element before a particular factor can be properly considered. For example, in *Girty v. School District of Valley Grove*,[190] a district court held that before a court can compare the educational benefits of a regular classroom with those of a special education classroom, the school district must first show that it has attempted to provide supplementary aids and services in the regular classroom.[191] In *Girty*, the court assessed a proposed segregated placement[192] and applied

181. *Id.* at 1216–17. Cost may also be a factor but the parties did not raise it in this case. *Id.* at 1218 n.25.

182. *Id.* at 1217 n.24.

183. *Id.* at 1220–21.

184. *Id.* at 1220.

185. *Id.* at 1221.

186. *Id.* at 1222.

187. *Id.*

188. *Id.* at 1223.

189. *See supra* Part II.A.2.

190. 163 F. Supp. 2d 527 (W.D. Pa. 2001).

191. *Id.* at 535–37.

192. *Id.* at 528.

the first prong of the *Daniel R.R.* test: whether "education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily."[193] The court determined that the school district never made a good-faith effort to include the student or provide supplementary services, thereby failing the first factor.[194] The second factor—balancing the educational benefits of regular education with supplementary aids and services against the benefits of a segregated classroom[195]—was impossible for the court to consider, given that the school district had not ever made an effort to provide those services.[196]

Therefore, the threshold for any comparison between the benefits of regular education and segregated education is a school district showing that it has in fact made a reasonable attempt to educate the student in a regular classroom with supplemental aids or services. Unless the first factor under the first prong of the *Daniel R.R.* test has been met, a court cannot properly consider the second factor.[197]

A district court in the Second Circuit[198] applied the *Daniel R.R.* test in *Mavis v. Sobol*[199] and was one of the first courts to acknowledge the relationship between the provision of supplementary aids and services and the student's level of classroom disruption.[200] Under the *Daniel R.R.* third factor—the disruptive effect of the student's presence in the classroom—the *Mavis* court reasoned that Emily Mavis might have been less disruptive had she been provided with adequate supplemental aids and services.[201] Because the school district could not know if her behavioral problems would cease if she received proper assistance, the court held that the school district "cannot rely on Emily's asserted behavioral difficulties as justification for removing her from a regular

193. Oberti v. Bd. of Educ., 999 F.2d 1204, 1215 (3d Cir. 1993) (quoting Daniel R.R. v. Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989)).

194. *Girty*, 163 F. Supp. 2d at 535.

195. *Oberti*, 995 F.2d at 1216.

196. *Girty*, 163 F. Supp. 2d at 535–37.

197. *Daniel R.R.*, 874 F.2d at 1048 ("If the state has made no effort to take such accommodating steps, our inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education."). However, this statement was dictum because the school district had taken "creative" steps to try to include Daniel and provide him with support. *Id.* at 1050.

198. The Second Circuit has not formally adopted a test. In *Briggs v. Board of Education*, 882 F.2d 688, 693 (2d Cir. 1989) the Second Circuit found the *Rowley* analysis controlling, and overturned a district court opinion applying *Roncker*.

199. 839 F. Supp. 968 (N.D.N.Y. 1993).

200. *Id.* at 991.

201. *Id.* at 989–91.

classroom."[202] The *Mavis* court indicated that the school district must show that it has attempted education in the regular classroom with supplementary aids and services, or it may fail the third factor of the *Daniel R.R.* test as well.[203]

Other courts have agreed that a relationship exists between a student's disruptiveness and the provision of supplementary aids and services under the first prong of the *Daniel R.R.* test. The *Oberti* court noted that "[a]n adequate individualized program with . . . aids and services may prevent disruption that would otherwise occur."[204] In *D.B. v. Ocean Township Board of Education*,[205] another district court in the Second Circuit held that "in considering the possible negative effect of the child's presence on the other students, the court must keep in mind the school's obligation under the Act to provide supplementary aids and services to accommodate the child's disabilities."[206] Thus, a school district's failure to demonstrate that it has reasonably attempted mainstreaming in the regular classroom with supplementary aids and services may prevent the district from successfully arguing that the student's disruptiveness should weigh against mainstreaming.

As shown above, subsequent applications of the *Daniel R.R.* test reveal that when courts are considering the first prong—whether education in the regular classroom with supplementary aids and services can be satisfactorily achieved—a school district's reasonable attempt at providing services in the regular classroom is key to the analysis.[207] Unless a school district can show that it has attempted to provide supplementary aids and services in the regular classroom, a court will not be able to appropriately weigh the benefits of the regular classroom against a segregated one or properly assess a school's claim that a student is disruptive.[208]

202. *Id.* at 991; *see also* Oberti v. Bd. of Educ., 995 F.2d 1204, 1222 (3d Cir. 1993).

203. *Mavis*, 839 F. Supp. at 991.

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

205. 985 F. Supp. 457 (D.N.J. 1997).

206. *Id.* at 489 (quoting *Oberti*, 995 F.2d at 1217).

207. *See supra* notes 191, 201 and accompanying text.

208. *See supra* notes 195, 201–02 and accompanying text.

D. *The* Rachel H. *Balancing Test*

1. Sacramento City Unified School District v. Rachel H.

In 1994, the Ninth Circuit adopted a district court's least restrictive environment test,[209] which drew elements from both *Daniel R.R.* and *Roncker*.[210] In *Sacramento City Unified School District v. Rachel H.*,[211] the court considered the placement of Rachel Holland, a moderately retarded eleven-year-old girl.[212] After spending years in special education programs, Rachel's parents advocated for full-time placement in a regular classroom.[213] The school district proposed splitting Rachel's time between special education classes for academic subjects, and regular classrooms for art, music, lunch, and recess.[214] Rachel's parents rejected this proposal and appealed, alleging a violation of the LRE provision.[215]

The district court did not adopt an established test and did not offer any rationale for not doing so.[216] Instead it looked to the variety of factors that had been considered by the other courts.[217] The *Rachel H.* court concluded that the four most important factors were: (1) the educational benefits available in a regular classroom with supplementary aids and services, compared to the benefits of a special education classroom; (2) the non-academic benefits of interaction with non-disabled students; (3) the impact of the student with a disability on the teacher and other children in the regular classroom; and (4) the cost of supplementary aids and services required for mainstreaming the student.[218]

Applying these factors, the court found: (1) Rachel could be satisfactorily educated in the regular classroom if she had supplementary services;[219] (2) Rachel's improved self-esteem and enthusiasm were

209. Bd. of Educ. v. Holland, 786 F. Supp. 874, 878 (E.D. Cal. 1992).

210. Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994), *reaffirmed in* Poolaw v. Bishop, 67 F.3d 830, 836 (9th Cir. 1995).

211. *Rachel H.*, 14 F.3d 1398.

212. *Id.* at 1400.

213. *Id.*

214. *Id.*

215. *Id.*

216. Bd. of Educ. v. Holland, 786 F. Supp. 874, 878 (E.D. Cal. 1992).

217. *Id.*

218. *Id.* at 878. *See also* Kevin D. Stanley, Note, *A Model for Interpretation of Mainstreaming Compliance Under the Individuals with Disabilities Education Act:* Board of Education v. Holland, 65 UMKC L. REV. 303, 317 (1996) (noting that school districts can often save money by mainstreaming students as opposed to maintaining separate, segregated classroom facilities).

219. *Holland*, 786 F. Supp. at 880.

important non-academic benefits of inclusion;[220] (3) Rachel was not disruptive in the classroom;[221] and (4) the district had not met its burden of showing excessive cost.[222] Because all four factors favored inclusion, the court ruled that Rachel be placed in the regular classroom.[223] Reasoning that the district court's analysis directly addressed the issue of appropriate placement in the least restrictive environment, the Ninth Circuit, in a brief opinion, affirmed the decision and adopted the test set forth by the district court.[224]

Later in *Seattle School District v. B. S.*,[225] the Ninth Circuit clarified that "educational benefit" should be broadly interpreted to include "academic, social, health, emotional, communicative, physical, and vocational needs."[226] Thus, the first prong need not be strictly "academic" in nature, but may include any social, communicative, or physical goals that are part of the student's individualized education program.[227]

2. *Subsequent Application of the* Rachel H. *Factors*

Recently a district court in the Seventh Circuit devised a mixed test using the two-part framework of *Daniel R.R.*, and the four factors from *Rachel H.*[228] In *D.F. v. Western School Corporation*,[229] the court

220. *Id.* at 882.

221. *Id.* at 883.

222. *Id.* at 883–84.

223. *Id.* at 884

224. Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994). (noting this "analysis directly addresses the issue of the appropriate placement for a child with disabilities[,] . . . we approve and adopt the test employed by the district court.").

225. 82 F.3d 1493 (9th Cir. 1996). A high school student was expelled and hospitalized due to severe emotional/behavioral problems. *Id.* at 1496. The court found the regular classroom placement inappropriate because although the student was bright and did well on standardized tests, "educational benefit" included considerations beyond mere academic performance. *Id.* at 1500. Therefore the court could consider the student's behavioral and emotional progress as well. *See id.* at 1500–01.

226. *Id.* at 1500.

227. *Id.*

228. D.F. v. W. Sch. Corp. 921 F. Supp. 559 (S.D. Ind. 1996). The Seventh Circuit has considered the existing tests but declined to adopt one. *See, e.g.*, Beth B. v. Van Clay, 282 F.3d 493, 499 (7th Cir. 2002); Monticello Sch. Dist. v. George L., 102 F.3d 895, 906 (7th Cir. 1996).

229. 921 F. Supp. 559. This blended approach was used again in the Seventh Circuit in *Beth B. v. Van Clay*, 2001 U.S. Dist. LEXIS 14094 (N.D. Ill. 2001), *affirmed at* 282 F.3d 493 (7th Cir. 2002), which used the *Daniel R.R.* framework but applied the *Rachel H.* factors and added a *Roncker* analysis as well. *Id.* at *24.

considered the first two *Rachel H.* factors[230] and found they both weighed strongly *against* inclusion of an autistic student who tended to engage in disruptive stereotypic behaviors.[231] Because the first two factors weighed against mainstreaming, the court found it unnecessary to consider the two other countervailing factors that may have weighed *in favor* of inclusion.[232] The court's analysis indicates that it did not view the *Rachel H.* factors as being equally weighted because even if the last two factors favored inclusion, they could not overcome the disfavor created by the first two.[233] *D.F.* demonstrates that the factors may be of unequal importance and that unfavorable findings on certain factors may "trump" other factors completely. The *Rachel H.* opinion itself gives no guidance on the proper weight of each factor or the result in case of a tie.[234] Therefore, the *Rachel H.* test may have some inherent complexities similar to the "threshold" analyses noted by courts applying *Roncker* and *Daniel R.R.*[235]

Application of the varying tests for determining compliance with the LRE provision leads to potential disparity in outcomes, depending solely on geographic location. Such disparity could be avoided with the adoption of a single, nationwide test. Although all of the current tests contain positive aspects, none has been applied without question or alteration. Therefore, a synthesis of the existing tests that accounts for their full development would remedy the wide variations that exist in courts across the country.

III. A PROPOSED SYNTHESIS OF THE EXISTING TESTS

The various tests that courts have developed for determining compliance with the IDEA's requirement that school districts educate

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230. *See supra* note 207.

231. *D.F.*, 921 F. Supp. at 570 (emphasis added). Stereotypic and repetitive motor movements (also known as "self-stimulatory" behaviors) are common in some students with autism, and may include rocking back and forth, flapping hands, and shaking the head repeatedly. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 67 (4th ed. 1994).

232. The third and fourth *Rachel H.* factors are the potential negative impact on the classroom and the cost of mainstreaming. *See Rachel H.*, 14 F.3d 1398, 1404. *See also supra* note 218.

233. Bd. of Educ. v. Holland, 921 F. Supp. 559, 570–71 (E.D. Cal. 1992).

234. *Rachel H.*, 14 F.3d at 1404. Rachel H., 14 F.3d at 1404; *see also Poolaw v. Bishop*, 67 F.3d 830, 837 (9th Cir. 1995) (finding two factors weighing in favor of mainstreaming and two against, yet upholding a more segregated setting due mainly to lack of educational benefit)

235. *See supra*, Parts II.A.2 and B.2.

special education students in the least restrictive environment can become quite complex depending on the factual situations to which they are applied. The tests for assessing school district compliance with the LRE provision vary widely across the country. However, a uniform test that adopts the best elements of the current tests and emphasizes congressional intent behind the LRE provision could eliminate disparate impacts on students and provide a predictable framework under which school districts and courts can analyze least restrictive environment issues. Furthermore, an additional factor considering parent and student participation could ultimately ensure that disabled students are adequately served in compliance with congressional intent.

A. *The Need for a Uniform, Nationwide Test*

The U.S. Supreme Court should adopt a uniform national test for determining compliance with the LRE provision that adopts the best aspects of the circuit tests while accounting for subsequent development and recent IDEA amendments. First, adoption of a uniform test would ensure that courts apply the IDEA provision equally across the country. The tests for assessing compliance with the LRE provision vary widely;[236] thus the same case could be resolved quite differently depending on where the student's school is located,[237] as Kevin and Rina illustrate in the introduction.[238] Parents of students with disabilities who want their child to receive an integrated education may be forced to "forum shop" for a school located in a federal district that applies a favorable law.[239] Most importantly, Congress and the courts consider the integration of students with disabilities to be an issue of constitutional magnitude.[240] It is critical that these vital civil rights be fairly applied to each student no matter where he or she happens to live.

Second, the Supreme Court should not merely adopt one of the existing tests because each has been either criticized or further developed since its inception. In short, none of the tests has proven as

236. *See supra* Part II.

237. *See supra* Part II.

238. *See supra* notes 1–2 and accompanying text.

239. *See* Rebecca Weber Goldman, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 DAYTON L. REV. 243, 290 (1994).

240. *See supra* notes 23–24, 32 and accompanying text; *see also* S. REP. 94-168, at 6–7, (1975), *reprinted* in 1975 U.S.C.C.A.N. 1430-31.

comprehensive as first hoped. In resolving the circuit split, the Supreme Court should address the criticisms and improvements suggested by courts with the practical experience of applying these tests. For example, the *Roncker* test was criticized by the *Daniel R.R.* court as being both too intrusive into decisions best left to school districts and not faithful to the language of the statute.[241] The *Daniel R.R.* test uses factors that may require "threshold" inquiries before the factors can be properly considered.[242] The *Rachel H.* test fails to provide appropriate guidance as to the proper weight given to each of the four factors in case of a tie.[243] Thus none of the current circuit tests adequately defines the scope of analysis and a new test should explicitly address these concerns.

Third, the resolution of the circuit split should be responsive to Congress' changing goals and better understanding about how to educate students with disabilities.[244] Since the *Roncker* decision in 1983, the EAHCA has been reauthorized and renamed, amended, and has spawned new implementing regulations.[245] All of the current tests were created before the 1997 amendments and the 1999 regulations.[246] Adopting a new uniform test at this time would provide an opportunity to reassess both the framework and the factors in light of changes in the law since 1997. Congress' goals in adopting the 1997 Amendments included strengthening the role of parents by increasing their involvement in decision-making[247] and improving access to the general education curriculum by including the regular education teacher as part of the IEP team.[248] These goals should be clearly reflected in a new test. In sum, the Supreme Court should resolve this circuit split in order to create a nationwide rule that remedies the shortcomings of the current circuit analyses and adequately reflects Congress' 1997 Amendments to the IDEA.

241. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1046 (5th Cir. 1989).

242. *See supra* notes 190–97, 201–03 and accompanying text.

243. *See* Sacramento City Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994).

244. *See supra* note 71.

245. *See supra* Part I.B.

246. The *Roncker* decision occurred in 1983, *Daniel R.R.* in 1989, *Rachel H.* in 1994, and *W. Sch. Corp.* in 1996. *See supra* Parts II.A–C.

247. *See supra* notes 79–81 and accompanying text.

248. *See supra* notes 77–78 and accompanying text.

B. *The Appropriate Basic Test*

It is important to address the appropriate basic test before considering which relevant factors will assist with the analysis under that test. As noted by the *Daniel R.R.* court, the appropriate starting place for any test should be the language of the statute it purports to interpret.[249] Therefore, the two-prong structure adopted by *Daniel R.R.* is the most appropriate test for assessing school district compliance with the LRE mandate because it closely follows the language and intent of IDEA.[250] The test consists of two questions: (1) Can the student be educated satisfactorily in the regular classroom when provided supplementary aids and services? (2) If the student must be placed in a more segregated setting, has the student been mainstreamed to the maximum extent possible?[251] The factors listed by the circuit courts would then be used to guide the analysis of the first prong, because the second prong is a fairly simple test to apply.[252]

Furthermore, this framework adheres to the intent behind the LRE requirement by making inclusion the default setting so that a student is only removed if education with supplemental aids and services cannot be achieved satisfactorily.[253] In addition, the test acknowledges that not every child can be placed in the regular classroom, but if a student is segregated, he or she must be mainstreamed for non-academic activities to the maximum extent possible.[254]

This framework is superior to the *Roncker* test because it follows congressional intent while retaining proper deference toward local decision-makers. It simply does not require as intrusive an inquiry into the feasibility of providing certain services as the *Roncker* test does.[255] The two-part framework also has advantages over the *Rachel H.* test. The *Rachel H.* test requires consideration of factors like cost and student

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

250. *See* Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 (3d Cir. 1993) ("We think this two-part test, which closely tracks the language of [the LRE requirement], is faithful to IDEA's directive that children with disabilities be educated with nondisabled children 'to the maximum extent appropriate.'"); *See also* Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991) ("Because this test adhers so closely to the langauge of the Act and, therefor, clearly reflects Congressional intent, we adopt it.").

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

252. *See supra* note 174 and accompanying text.

253. *See* 20 U.S.C. § 1412(a)(5)(A) (1997); *see generally supra* Part I.D.

254. *See* 34 C.F.R. § 300.553; *see supra* note 95 and accompanying text.

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

disruptiveness that might not be relevant in every case. For example, the *Rachel H.* test included cost as a factor,[256] yet several courts have declined to address cost if it was not raised by the parties.[257] In contrast, the two-part framework would allow courts to pick and choose relevant factors to consider under the first prong depending on the facts of each case.[258] Therefore, the two-part framework reflects the structure and intent of the LRE provision while maintaining the flexibility necessary for case-by-case analysis.

C. Analysis of Relevant Factors

To assess the first prong of the framework—whether education in the regular classroom can be satisfactorily achieved with supplemental aids and services—there are several factors that courts have used to guide their analysis. The factors that have emerged over the years include: the steps taken to provide supplementary aids and services in the regular classroom, the academic and non-academic benefits to the student, the reciprocal benefits to the other students in the class, the student's disruptive impact on the regular class, the impact on the workload or time of the regular teacher, and the cost of inclusion.[259] Although only factors relevant to a student's unique case should be considered,[260] all of these factors deserve discussion in addition to a proposed new factor—a consideration of parent and student involvement in the decision-making process.

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256. Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994).

257. *See Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1401 (9th Cir 1994) (applying the first three Rachel H. factors, but discarding the "cost" factor because it was not relevant to the case); *see also* Oberti v. Bd. of Educ., 995 F.2d 1204, 1218, n.25 (3d Cir. 1993) (same); Greer v. Rome City Sch. Dist., 950 F.2d 688, 698–99 (11th Cir. 1991) (same); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1049 n.9 (5th Cir. 1989) (same); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (same).

258. *See supra* note 229 and accompanying text; *see also* Beth B. v. Van Clay, 2001 U.S. Dist. LEXIS 1404 *23, *24 (N.D. Ill. 2001) ("We do not find anything in [the *Rachel H.* test] objectionable. The factors considered are all relevant to a determination of whether the placement is both appropriate and least restrictive. But we agree with the Fifth Circuit that the factors must be case-specific. *Daniel R.R.* draws on the statutory language to set a general framework—a test—and then examines several factors in its application of that test.").

259. *See supra* Parts II.A.–D.

260. *See supra* note 258 and accompanying text.

1. Has the School District Taken Steps to Educate the Student in a Regular Education Classroom with Supplementary Aids and Services?

Initially, courts should ask whether the school district has taken steps to educate the student in the regular classroom with the use of supplementary aids and services.[261] This factor should be considered first, in part because it is derived from the language of IDEA.[262] The IDEA requires school districts to make an attempt to educate students in the regular classroom, removing them only if education with supplementary aids and services cannot be achieved satisfactorily.[263] This reflects Congress' intent that the regular classroom would be the default setting.[264] Congress also intended the 1997 Amendments to improve disabled students' access to the general curriculum and regular classrooms.[265] For many students, this inclusion would not be possible without supplementary aids and services.

Courts should further consider this factor first because several courts have correctly held it to be part of a threshold analysis that must be met before other factors can be properly considered.[266] Unless a school district can show that it has tried to educate a student in the regular classroom with the use of supplementary aids and services,[267] a court cannot properly conduct a comparison of the benefits of regular and segregated special education, nor can it assess whether the student's level of disruption should weigh against inclusion—if that disruption might be lessened or eliminated with proper supplementary assistance.[268] Therefore, because this factor gives effect to the language of the LRE

261. *See Daniel R.R.*, 874 F.2d at 1048.

262. *Id.* at 1048; *see also* 30 C.F.R. Part 300, Appendix A (Question) ("[B]efore a disabled child can be placed outside of the regular educational environment, the full range of supplementary aids and services that if provided would facilitate the student's placement in the regulare classroom setting must be considered.").

263. 20 U.S.C. § 1412(a)(5)(A) (1997); *see supra* Part I.C.

264. 20 U.S.C. § 1412(a)(5)(A) (1997).

265. *See supra* notes 77–78 and accompanying text.

266. *See supra* notes 190–97, 201–03 and accompanying text.

267. A student's needs may be so severe that it would not be appropriate to even attempt education in a regular classroom. In those situations, a student need not fail first in an integrated setting in order to be placed in a more appropriate, yet more segregated, setting. *See* 34 C.F.R. Appendix A to Part 300 (Question 1) (1999).

268. *See supra* notes 190–97, 201–03 and accompanying text.

provision and provides a threshold that must be met before other factors can be properly considered,[269] it should be considered first.

2. *Compare the Educational Benefit the Student Received With Supplementary Aids and Services in Regular Education With the Educational Benefits of a More Segregated Setting*

Once a school district has attempted regular education with supplementary aids and services, courts can then compare the educational benefit the student received in the regular class to the educational benefits of a more restrictive setting. This factor has been used by several courts[270] and should be an important part of a uniform test. It not only echoes the concerns of the courts, but also tracks both Congressional intent and the language of the statute itself.[271] Comparing the benefits of different settings permits courts to assess whether a school district has effectively balanced its dual tasks of providing an appropriate education[272] in the least restrictive environment.[273] However, this comparison cannot occur unless the school district has complied with the first factor—actually attempting to include the student in a regular classroom and to provide supplementary aids and services as needed.[274] A court would be unable to make a fair comparison of educational benefits if there were no evidence of how the student could function in the regular classroom.[275]

3. *What Are the Non-Academic Benefits of Inclusion That Would Be Unavailable in a More Segregated Setting?*

Next, if applicable to the case at hand, courts may consider any non-academic benefits the student could receive by remaining in an integrated classroom. Assessment of the non-academic benefits of inclusion is one of the recently developed factors; it was first mentioned in passing by the

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269. *See supra* notes 190–97, 201–03 and accompanying text.

270. *See* Oberti v. Bd. of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993); Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989).

271. *See supra* Part I.C.–D.

272. *See* 20 U.S.C. § 1412(a)(1) (1997).

273. *Id.* § 1412(a)(5)(A).

274. *See supra* Part II.C.2.

275. *See supra* Part II.C.2.

Daniel R.R. court[276] and has been subsequently echoed by other courts[277] This factor recognizes that academic achievement is not the sole criterion by which to measure success; skills like communication and social interaction are also relevant to the analysis of proper placement.[278] The *Oberti* court also recognized the importance of the reciprocal benefits of inclusion for students who do not have disabilities in the class, such as learning how to get along with or communicate with a person with a disability.[279]

Not only has this factor been recognized and approved by several courts, but it also fulfills Congress' intent behind the passage of the IDEA.[280] One of the main purposes of the statute was to remedy past segregation and exclusion.[281] Courts should respect Congress' recognition of the importance of social interaction and integration of all children by allowing non-educational benefits to tip the scales in favor of inclusion where the educational benefits would be the same in a segregated or integrated classroom.

4. *What Potentially Disruptive Impact Does the Child Have in the Regular Classroom, Which Cannot Be Remedied With Supplementary Aids and Services?*

If it is relevant to the case courts may consider any disruptive impact the student may have on the students or the teacher in the regular classroom. A key feature of the least restrictive environment mandate is that students must be mainstreamed to the "maximum extent appropriate."[282] Use of the word "appropriate" recognizes that full inclusion with peers who are not disabled may not be possible for some students because the student's behavior either disrupts the work of the other students or causes the teacher to spend too much time addressing those behaviors.[283] As the Department of Education's regulations state,

276. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989).

277. Oberti v. Bd. of Educ., 995 F.2d 1204, 1216–17 (3d Cir. 1993); Greer v. Rome City Sch. Dist., 950 F.2d, 688, 697 (11th Cir. 1991) ("We caution, however, that 'academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself.'").

278. *Oberti*, 995 F.2d at 1217; *Greer*, 950 F.2d at 697.

279. *See supra* note 182 and accompanying text.

280. *See supra* Part I.D.

281. *See supra* Part I.A.

282. 20 U.S.C. § 1412 (a)(5)(A) (1997); *see also supra* Part I.C.

283. *See* 34 C.F.R. Appendix A to Part 300 (Question 39) (1999).

the placement determination for children with behavior issues hinges on whether behavioral strategies, supports, and interventions can allow the child to succeed in the regular classroom.[284]

However, as district courts interpreting *Daniel R.R.* have stated,[285] it is not sufficient for a school district to show that a student is too disruptive to be included in a classroom; there is a threshold hurdle to overcome.[286] Because supplemental aids and services might result in the reduction of the problematic behaviors, a reasonable, good-faith attempt to remedy the behavior with aids and services must occur before a student can be removed from the regular classroom for disruptive behavior.[287]

Furthermore, Congress anticipated that a student's potentially disruptive behavior problems would be addressed by the team charged with developing the student's IEP.[288] For children whose behavior "impedes [their] learning or that of others," the IEP team must consider positive behavior strategies, interventions, and supports to address the behavior.[289] These types of strategies must be attempted before a student can be removed to a more restrictive setting[290] or subject to disciplinary action.[291] Therefore, disruptive behavior can only be considered if the school district has attempted to provide supplementary aids and services in the regular classroom to remedy that behavior. If the student remains disruptive, then a court could determine that a segregated setting is appropriate despite educational and social benefits. In such cases, once schools have made a reasonable attempt to include the disruptive student, courts should defer to the school district's determination that the detriment to the teacher and other students outweighs any educational or social benefits.

5. *The Cost of Inclusion May Be Considered if Appropriate*

Next, if it is relevant, the cost of inclusion may be considered when determining whether a district has complied with the least restrictive

284. *Id.*
285. *See supra* Part II.B.2.
286. *See supra* Part II.B.2.
287. *See supra* Part II.B.2
288. 20 U.S.C. § 1414(d)(3)(B)(i) (1997).
289. *Id.*
290. S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir. 1981).
291. 20 U.S.C. § 1415(k)(1)(B)(i) (1997).

environment provision.[292] Although not explicitly mentioned in the IDEA, most courts agree that it may be appropriate in some situations to consider the potentially high cost of including some students.[293] Yet this factor also requires a preliminary threshold analysis: the Department of Education's regulations suggest that a school district cannot plead excessive cost of inclusion as a defense unless it first shows that it has used its available federal funds to create a continuum of alternative placements in the district.[294] For example, the *Bullitt County* court noted that schools must allocate their limited funds to provide appropriate placements for all special education students in the district, which might require providing expensive services at a central, more segregated location.[295]

If considered, the cost of inclusion should be accorded less weight than other factors. The placement of children with disabilities in the least restrictive environment is founded on equal protection principles and Congress has made it clear that lack of funds does not remove the obligation to provide school services in a non-discriminatory manner.[296] Therefore, courts should be cautious about permitting the cost of inclusion for a particular student to weigh in favor of a more segregated setting. A court may only do so if the school district has made available a continuum of appropriate placements and has fairly allocated resources among all disabled students.

6. *Courts Should Ensure that Parents and Students Participated in the Placement Decision-Making Process*

Finally, one factor that is conspicuously absent from any of the three tests is a consideration of the role played by parents and students as

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292. *See supra* Part I.A.1.–2.

293. *See* Sacramento City Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994); Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); A.W. v. N.W. R-1 Sch. Dist., 813 F.2d 158, 164 (8th Cir. 1987); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

294. *See supra* Part I.A.2. *See also* Goldman, *supra* note 239, at 286 (proposing that the school district bear the burden of proving that it they have supplied a continuum of alternative placements before being permitted to argue that the student should be placed in a more restrictive setting).

295. *See* Age v. Bullitt County Sch. Dist., 673 F.2d 141, 145 (6th Cir. 1982).

296. *See supra* text accompanying note 33. In the Senate discussion about cost, Iowa Senator Harkin, in addressesing Washington State Senator Gorton's concerns about the IDEA potentially being an unfunded mandate, stated "IDEA is a civil rights statute that implements the equal protection clause of the U.S. Constitution. IDEA helps States and local school districts pay for the costs of implementing their constitutional obligation to disabled children." *See* 143 CONG. REC. S4401-04, S4403 (1997); 143 CONG. REC. S4354-02 at S4361 (1997).

mandatory participants in the decision-making process.[297] The current tests focus heavily on factors under the exclusive control of the school district.[298] To remedy this imbalance, any uniform test should include a consideration of the family's placement preference and ability to participate in the placement decision.

One of Congress' goals for the 1997 Amendments to IDEA was to improve the participation of parents in the IEP process.[299] A practical way to include this goal into a test of school district compliance is to require a showing that parent or student input was considered when making the placement decision.[300] When parents challenge a school district's ultimate placement decision, the district should be able to show that the parents had an opportunity to participate in any IEP meetings[301] and as members of any group responsible for making placement decisions.[302]

Furthermore, the placement location preferred by students and parents should also be explicitly factored into the analysis. Courts should specifically consider any countervailing evidence presented by the family at hearings or at trial. Parents are permitted to bring an attorney and any experts to their impartial hearing and may present evidence and witnesses there if they wish.[303] On appeal to a district court they may also supplement the record with additional evidence.[304] Such evidence reflecting a failure to provide supplementary aids and services or challenging assertions regarding academic and social benefit, level of disruption, or cost should be explicitly factored into the analysis.

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297. *See supra* Parts II.A.–C.

298. For example, finances, and teacher/aide staffing are exclusively under the control of the school district. *See* 20 U.S.C. §§ 1401 (d), (g)(2) (1997) (stating that federal funds are allocated to state governments, which in turn allocate the money to local educational agencies to use for special education); *see also* Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (stating that every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities—is under the local control of the school district).

299. *See supra* Part I.D. *See generally* 34 C.F.R. § 300.345 (1999) (listing the steps a school district must take to ensure parental participation).

300. Documentation might be required to show that parents participated as members of the IEP team or as members of any team making a placement decision. 20 U.S.C. §§ 1414(d)(1)(B), 1414(f) (1997). Schools may also be required to show that students participated as members of their own IEP teams if appropriate, *Id.* § 1414(d)(1)(B)(vii), or members of their transition teams. *Id.* § 1414(d)(1)(A)(vii).

301. *Id.* § 1414(d)(1)(B).

302. *Id.* § 1414(f).

303. 34 C.F.R. § 300.509(a)(1)–(3) (1999).

304. 20 U.S.C. § 1415(i)(2)(B)(ii) (1997).

The above five factors should guide a court's analysis of the first prong of the framework—whether education in the regular classroom with supplementary aids and services can be satisfactorily achieved. If, after full consideration of those factors, a court determines that the segregated setting would indeed be appropriate, the court must then consider the second prong—has the student then been mainstreamed to the maximum extent appropriate. This second prong should be relatively straightforward, asking courts to assess whether the student can be integrated for activities like recess, lunch, gym, or art and music classes. This model test in its entirety incorporates both current jurisprudence and Congressional intent behind the 1997 Amendments. The consolidated test emphasizes aids and services to improve students' access to the regular curriculum and includes input from parents in the analysis.

III. CONCLUSION

In an attempt to fill the void left by the Supreme Court's lack of guidance on the LRE provision, the circuit courts have developed several tests that have been used to determine compliance with that part of the IDEA. District courts have further refined those tests. The proposed synthesis of the tests that capitalizes on their strengths, using a two-prong framework and employing a list of relevant factors derived from statutory language. This proposed test should be adopted to avoid the disparate enforcement of the LRE provision across the country.

Courts should also be required to consider whether parents and students had an opportunity to participate in the placement decision-making process. If so, their preference for placement should be explicitly taken into account. Congress intended to strengthen the role of parents and students, and their participation should be included among the other relevant factors used to determine compliance with the LRE requirement.