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An “IDEA” to Consider: Adopting a Uniform Test to Evaluate Compliance with the IDEA’s Least Restrictive Environment Mandate

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An “IDEA” to Consider: Adopting a Uniform Test to Evaluate Compliance with the IDEA’s Least Restrictive Environment Mandate

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AN “IDEA” TO CONSIDER

The Individuals with Disabilities Education Act (IDEA) is a federal spending program that assists school districts in educating students with disabilities. To receive federal funding, school districts must educate disabled students in the “least restrictive environment” appropriate for each child. This provision indicates a strong congressional preference to educate students with disabilities in regular education classrooms. The U.S. Supreme Court has yet to interpret the IDEA’s least restrictive environment (LRE) mandate. Consequently, the federal circuit courts employ different tests to assess whether a school district has satisfied the LRE requirement. These divergent interpretations highlight the need to implement a clear and uniform approach to evaluating states’ educational placement decisions. This note first examines the history and purpose underlying the IDEA’s requirements. Next, this note discusses the various judicial tests used to evaluate school district compliance with the LRE provision. This note contends that the courts should adopt the two-prong test formulated by the Fifth Circuit because that framework best reflects Congress’s intent and resolves the tension between the IDEA’s competing mandates.

I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) is a federal spending program that assists school districts in educating disabled children.¹ To receive federal funds, school districts must provide disabled children with a “free appropriate public education” in the “least restrictive environment.”² The IDEA’s least restrictive environment (LRE) provision requires school districts to educate disabled students with nondisabled students in the regular classroom to the greatest extent possible.³

1. 20 U.S.C. §§ 1400–1482 (2013).

2. *Id.* § 1412(a)(1), (5).

3. Integrating students with disabilities into the regular education curriculum is commonly referred to as “mainstreaming.” *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989). However, in the context of the Individuals with Disabilities Education Act (IDEA), the term “mainstreaming” should not be treated as interchangeable with “inclusion.” Whereas inclusion connotes a normative philosophical commitment to educating disabled students in the regular classroom, with or without use of supplementary aids, the mainstreaming requirement underlying the least restrictive environment (LRE) provision envisions a “continuum” of appropriate educational placements, rather than an inclusion-exclusion dichotomy. See Susan C. Bon, *Confronting the Special Education Inclusion Debate: A Proposal to Adopt New State-Wide LRE Guidelines*, 249 EDUC. L. REP. 1, 5–6 (2009) (“[T]he emphasis on inclusion rather than LRE limits the range of placement options considered for meeting a child’s educational needs. . . . As long as the least restrictive principle is perceived as interchangeable with inclusion[,] . . . decisions about the appropriate placement are likely to cause conflict in school districts and in the courts.”); see also Patrick Howard, *The Least Restrictive Environment: How to Tell?*, 33 J.L. & EDUC. 167, 169 (2004) (defining “mainstreaming” as “the philosophy that if [a disabled] student cannot be educated in the general classroom, then the student should still spend as much time as possible integrated into regular school day activities”).

However, determining when it is appropriate to remove a disabled child from the general classroom is a highly contested issue.⁴

The U.S. Supreme Court has yet to interpret the IDEA's LRE provision.⁵ Consequently, the lower federal courts employ different tests to determine whether a school district has complied with the LRE requirement.⁶ This note contends that the courts should adopt a uniform, nationwide standard for assessing school district compliance with the LRE provision. Part II of this note discusses the IDEA and examines the history and purpose underlying its LRE requirement. Part III presents the differing judicial tests that the circuit courts have developed for determining whether school districts' educational placement decisions satisfy the LRE mandate. Part IV argues that federal courts should adopt the two-prong test formulated by the Fifth Circuit.

II. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Numerous disabled children have been denied educational opportunities throughout our nation's history:

In 1970, before enactment of the federal protections in IDEA, 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. Many states had laws excluding 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.⁷

As the civil rights movement seized the nation in the 1960s, the need for education reform became glaringly clear.⁸ In response to the segregation and inadequate

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4. See generally Bon, *supra* note 3; see also Stacy Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 190 (2006), available at <http://digitalcommons.law.byu.edu/elj/vol2006/iss1/5> ("The debate over the education of students with disabilities continues to be a battle over competing interests and priorities.").
 5. In *Board of Education v. Rowley*, the U.S. Supreme Court recognized that the IDEA requires "educat[ing] handicapped children with nonhandicapped children whenever possible." 458 U.S. 176, 202 (1982). However, the Court "failed to provide a specific test or clear guidance to schools with respect to decisions about LRE and the educational placement." Bon, *supra* note 3, at 2.
 6. Bon, *supra* note 3, at 2-3 ("In response to parental challenges of school districts' LRE placement decisions, three distinct tests have emerged in the federal circuit courts.").
 7. NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS 6 (2000), available at http://www.ncd.gov/rawmedia_repository/7bfb3c01_5c95_4d33_94b7_b80171d0b1bc?document.pdf. Notably, disabled children "living in low-income, ethnic and racial minority, or rural communities" were more susceptible to exclusion. *Id.* Today, the IDEA defines "mental retardation" as "significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(6) (2014).
 8. See *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 234 (1964) ("The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying . . . school children their constitutional rights to an education equal to that afforded [to other students]."); see also *Green v. Cnty. Sch. Bd.*, 391 U.S. 430,

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education of disabled children, Congress enacted the Education for All Handicapped Children Act (EAHCA) in 1975,⁹ which was renamed “IDEA” in 1990.¹⁰ Since its inception, the IDEA has created a multitude of educational opportunities for previously excluded children.¹¹

A. *The Civil Rights Movement and Education Reform*

The Supreme Court’s decision in *Brown v. Board of Education*¹² ultimately sparked the desegregation of students with disabilities.¹³ Although the decision specifically concerned segregation based on race, it highlighted the importance of providing an equal education to all students—including students with disabilities.¹⁴ In the early 1970s, two monumental district court opinions seized on the Court’s holding in *Brown* to prevent states from denying public education to disabled students.¹⁵

In *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, parents of thirteen intellectually disabled children brought a class action on behalf of all intellectually disabled school-age students who had been excluded from Pennsylvania public schools.¹⁶ These children were excluded because Pennsylvania law exempted the state’s school districts from educating children who, on account of their mental disability, were considered “uneducable and untrainable”¹⁷—a standard then defined by the state’s Public School Code as having a mental age below five years of age.¹⁸

439 (1968) (“It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation.”).

9. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

10. Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, 104 Stat. 1103.

11. Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons from Special Education Legislation*, 29 *FORDHAM URB. L.J.* 759, 759 (2001).

12. 347 U.S. 483 (1954). In *Brown v. Board of Education*, the Supreme Court held that racially segregated schools were unconstitutional, finding that “[s]eparate educational facilities are inherently unequal.” *Id.* at 495.

13. In the wake of the Supreme Court’s decision in *Brown*, some lower courts sought to extend *Brown*’s constitutional promise of equal education to disabled children. See, e.g., *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 874–75 (D.D.C. 1972) (relying partly on *Brown* to prohibit the categorical exclusion of disabled children from public school education); see also *Pa. Ass’n for Retarded Children v. Pennsylvania (PARC)*, 343 F. Supp. 279, 297 (E.D. Pa. 1972).

14. “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” *Brown*, 347 U.S. at 493 (emphasis added). Thus, while the Supreme Court’s holding in *Brown* was limited to racial segregation, its opinion spoke in broad and neutral terms, on which some lower courts seized to extend *Brown*’s protections to disabled children. See *Mills*, 348 F. Supp. at 874–75; *PARC*, 343 F. Supp. at 297.

15. See *Mills*, 348 F. Supp. at 874–75; *PARC*, 343 F. Supp. at 297.

16. *PARC*, 343 F. Supp. at 281–82.

17. *Id.* at 282 (citing 24 PA. CONS. STAT. § 13-1375 (West 1965)).

18. 24 PA. CONS. STAT. § 13-1304. Section 1304 of the Pennsylvania Public School Code provided at the time that “[t]he board of school directors may refuse to accept or retain beginners who have not attained

Referencing the Court's decision in *Brown*, the Eastern District of Pennsylvania found that the state could not exclude students from public school based on their disability¹⁹ and must at the very least provide a hearing before denying a disabled child a public education.²⁰ Significantly, the court also required the school district to presume that "placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training."²¹ The decision ultimately highlighted two policies: (1) disabled children are entitled to the same educational opportunities as their nondisabled classmates; and (2) disabled children should be educated in the regular classroom with their nondisabled peers whenever possible.²²

In *Mills v. Board of Education*, school-age children brought a class action challenging the D.C. Board of Education's denial of public education to children who were classified as intellectually disabled, hyperactive, or emotionally disturbed.²³ Similar to *PARC*, the *Mills* court referenced *Brown's* rationale regarding racial desegregation,²⁴ holding that the District of Columbia was required to educate disabled children since the school district had undertaken to provide education to those without disabilities.²⁵

Although *Mills* and *PARC* were only binding in Pennsylvania and the District of Columbia, they provided momentum for equal educational benefits to disabled students.²⁶ The principles established by these two decisions ultimately resulted in the desegregation of students with disabilities in public schools, paving the way for a legislative policy that would soon bring about significant education reform.²⁷

a mental age of five years, as determined by the supervisor of special education or a properly certificated public school psychologist." Pa. Ass'n for Retarded Children v. Pennsylvania (*PARC*), 334 F. Supp. 1257, 1260 (E.D. Pa. 1971), amended by 343 F. Supp. 279 (E.D. Pa. 1972).

19. *PARC*, 343 F. Supp. at 297.

20. *Id.* at 284–85.

21. *PARC*, 334 F. Supp. at 1260.

22. *See id.*

23. 348 F. Supp. 866, 868 (D.D.C. 1972).

24. *Id.* at 874–75 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

25. *Id.*

26. As recognized by the Supreme Court in *Rowley*, "the principles which [*Mills* and *PARC*] established are the principles which, to a significant extent, guided the drafters of the [Education of the Handicapped Act]." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 194 (1982).

27. "[E]ncouraging access of handicapped students to public schools[,] [*Mills* and *PARC*] spurred Congress in 1974 to increase federal funding for existing programs and require, for the first time, that states adopt as their goal to 'provide full educational opportunities to all handicapped children.'" Heather J. Russell, *Florence County School District Four v. Carter: A Good "IDEA"; Suggestions for Implementing the Carter Decision and Improving the Individuals with Disabilities Education Act*, 45 AM. U. L. REV. 1479, 1482 (1996) (footnote omitted) (quoting Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 579, 580).

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B. Statutory Developments: Education for All Handicapped Children Act and the IDEA

The pervasive practice of excluding disabled students from public school education inspired immense congressional concern in the wake of the *Mills* and *PARC* decisions.²⁸ As the judicial system embraced education reform, Congress recognized that deficient state funds and failing initiatives were depriving disabled children of meaningful educational opportunities,²⁹ and was thus concerned that a majority of disabled children “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out.’”³⁰ Consequently, Congress enacted the EAHCA in 1975.³¹

In passing the EAHCA, Congress exhibited a strong federal commitment to educating children with disabilities.³² The EAHCA’s legislative history shows that Congress intended through the collective efforts of federal, state, and local government³³ to extend equal education access to children with disabilities and, as a result, the federal government increased funding for special education to assist school districts in meeting their statutory and constitutional obligations.³⁴

The EAHCA was renamed in 1990 as the IDEA³⁵ and was subsequently amended in 1997.³⁶ These amendments “both renewed the importance of the LRE provision by providing that the regular classroom must be the default placement and

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28. Congress became especially concerned with the fact that at least “1.75 million handicapped children [were] receiving no educational services at all, and 2.5 million handicapped children [were] receiving an inappropriate education.” S. REP. NO. 94-168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432 [hereinafter SENATE REPORT]; *see also* *Rowley*, 458 U.S. at 180–81 (defining the minimum educational standard required under the IDEA).
 29. *See* SENATE REPORT, *supra* note 28, at 7 (“In recent years decisions in more than 36 court cases in the States have recognized the rights of handicapped children to an appropriate education. States have made an effort to comply; however, lack of financial resources [] prevented the implementation of the various decisions which have been rendered.”).
 30. *Rowley*, 458 U.S. at 179 (alteration in original) (quoting H.R. REP. NO. 94-332, at 2 (1975)).
 31. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1485 (1988 and Supp. V 1993)).
 32. Congress also hoped that, “[w]ith proper education services, many [intellectually disabled students] would be able to become productive citizens, contributing to society instead of being forced to remain burdens.” SENATE REPORT, *supra* note 28, at 9.
 33. Caryn Gelbman, Note, *Suspensions and Expulsions Under the Education for All Handicapped Children Act: Victory for Handicapped Children or Defeat for School Officials?*, 36 WASH. U. J. URB. & CONTEMP. L. 137, 142–43 (1989).
 34. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, 775 (“[I]t is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.”).
 35. Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400–1482 (2013)).
 36. Individuals with Disabilities Education Act Amendments, Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as amended at 20 U.S.C. §§ 1400–1482).

emphasized the role of parent and student input into the decision-making process.”³⁷ Notwithstanding these revisions, educating disabled students with their nondisabled peers remained a core principle of the IDEA.³⁸

C. *The IDEA's Requirements*

The IDEA provides federal financial assistance to state and local agencies to educate children with disabilities.³⁹ Covered disabilities include “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance[,] . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.”⁴⁰ Federal grants to states under the IDEA are divided into permissive and mandatory uses: funds may be used for various “authorized activities,” such as professional development and training, technological equipment, and mental health services;⁴¹ on the other hand, funds must be used to monitor, enforce, and investigate complaints, as well as to implement the IDEA’s mediation process.⁴²

However, eligibility to receive financial assistance under the IDEA is contingent on states: (1) providing disabled children with a “free appropriate public education,”⁴³ (2) devising an “individualized education program,”⁴⁴ and (3) educating disabled children in the “least restrictive environment.”⁴⁵

1. *Free Appropriate Public Education*

To qualify for federal financial assistance under the IDEA, a state must demonstrate that its educational policy ensures that all disabled children have access

37. Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 817 (2002). In 2004, Congress amended and reauthorized the IDEA as the Individuals with Disabilities Education Improvement Act (IDEIA). 20 U.S.C. § 1400 (2004). Despite the IDEA’s reauthorization, the act is still commonly referred to as the “IDEA.” See LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* § 1:2 (4th ed. 2014).

38. Integration is indeed the linchpin of the IDEA. The principle of integration is codified in the IDEA’s LRE provision, under which children with disabilities must be educated with due regard to their special needs, but in an environment that allows for the maximum possible interaction with their nondisabled peers. 20 U.S.C. § 1412(a)(5)(A) (2013). To this end, the default placement for children with disabilities is the regular classroom. 34 C.F.R. § 300.114(a)(2) (2014).

39. See 20 U.S.C. § 1411.

40. *Id.* § 1401(3)(A)(i).

41. *Id.* § 1411(e)(2)(B)–(C).

42. *Id.* § 1411(e)(2)(B).

43. *Id.* § 1412(a)(1).

44. *Id.* § 1412(a)(4).

45. *Id.* § 1412(a)(5).

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to a free appropriate public education.⁴⁶ IDEA § 1401(9) defines “free appropriate public education” as:

- [S]pecial education and related services that—
- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.⁴⁷

Section 1401(29) defines “special education” as:

- [S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—
- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.⁴⁸

“Related services” are defined as “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.”⁴⁹

The U.S. Supreme Court decision in *Board of Education v. Rowley* shed light on the free appropriate public education provision, explaining that “[i]mplicit in the congressional purpose of providing access to a free appropriate public education is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.”⁵⁰ Emphasizing that schools need only provide a “basic floor of opportunity”⁵¹ to disabled students, the Court clarified that an “appropriate education” does not mean “a potential-maximizing education.”⁵²

Drawing from the statute’s text and legislative history, the Court posited a two-part test for assessing whether a school has provided a free appropriate public education. First, a court must determine whether the state complied with the procedural requirements of the IDEA.⁵³ Second, the court must evaluate whether the IEP is “reasonably calculated to enable the child to receive educational benefits.”⁵⁴

46. *Id.* § 1412(a)(1).

47. *Id.* § 1401(9).

48. *Id.* § 1401(29).

49. *Id.* § 1401(26) (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, counseling services, and social work services among others).

50. 458 U.S. 176, 200 (1982) (internal quotation marks omitted).

51. *Id.* at 201.

52. *Id.* at 197 n.21.

53. *Id.* at 206.

54. *Id.* at 206–07.

2. *Individualized Education Program*

The IDEA requires the “development of an individualized educational program (IEP) for each child that incorporates his or her special needs, so that the child may benefit from the program offered.”⁵⁵ An IEP is a written statement for each child with a disability, which includes the child’s “present level of academic and functional performance, measurable annual goals, special-education and supplemental services, and any program modifications for the child, along with an explanation of the extent to which the child will not participate with non-disabled children in regular classes and activities.”⁵⁶ Additionally, the start date, frequency, location, and duration of any special supplementary services or modifications must be included in the IEP.⁵⁷ The “IEP Team,” which creates and revises the IEP,⁵⁸ is comprised of the child’s parents, the child’s regular education teacher, a special education teacher, a representative of the local educational agency, and any other individuals who may be acquainted with the child’s cognitive and mental capacities.⁵⁹

In developing the IEP, the team must consider the child’s strengths, the parents’ concerns, the child’s most recent evaluation results, and the child’s academic, developmental, and functional needs.⁶⁰ In addition, the team must consider “special factors” in specific circumstances, such as using behavioral interventions if the child has behavioral problems or providing Braille instruction for children who are blind or visually impaired.⁶¹ The team reviews the IEP at least once a year “to determine whether the annual goals for the child are being achieved.”⁶² The IEP may be revised “as appropriate” to address the child’s lack of progress or anticipated needs.⁶³ Importantly, the IDEA requires that the IEP enable a student with disabilities to receive an education in the “least restrictive environment.”⁶⁴

3. *Least Restrictive Environment*

Federal funding is also contingent on ensuring that students with disabilities are educated in the least restrictive environment.⁶⁵ IDEA § 1412(a)(5)(A) states:

55. FRANCIS AMENDOLA ET AL., 78A C.J.S. SCHOOLS AND SCHOOL DISTRICTS § 967 (West 2015).

56. *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 114 (2d Cir. 2008).

57. 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2013).

58. *Id.* § 1414(d)(1)(B).

59. *See id.*

60. *Id.* § 1414(d)(3)(A).

61. *Id.* § 1414(d)(3)(B).

62. *Id.* § 1414(d)(4)(A)(i).

63. *Id.* § 1414(d)(4)(A)(ii).

64. *Id.* § 1412(a)(5).

65. *Id.* § 1412(a)(5)(B)(i)–(ii).

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To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁶⁶

Thus, the IDEA requires schools to educate nondisabled students and disabled students in an integrated setting to the maximum possible extent. Educating a disabled student in a regular education classroom with nondisabled students is commonly referred to as “mainstreaming.”⁶⁷ A disabled student may only be removed from the regular education environment and placed in a separate specialized classroom or school if the student cannot be educated in regular classes with supplemental aids and services at a satisfactory level.⁶⁸

The Department of Education’s (DOE) regulations enforce the IDEA’s LRE provision and offer guidance on the kinds of services and placements a school district must provide.⁶⁹ In addition to educating the disabled with their nondisabled peers whenever possible, a school district “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.”⁷⁰ The types of alternative placements range from regular class instruction (the least restrictive) to special class instruction (more restrictive) to hospital and institutional instruction (the most restrictive).⁷¹ If a disabled child is educated in the regular classroom, the school district must provide supplementary services such as resource rooms or itinerant instruction.⁷² Resource rooms provide special instruction to disabled students in a small group or in an individualized setting for a portion of the day.⁷³ This type of service reinforces the IDEA’s intent to maximize disabled students’ opportunity to be educated with their peers.

Ultimately, the LRE requirement and DOE regulations reflect a strong congressional preference to educate disabled students alongside nondisabled students in regular classrooms.⁷⁴ However, the preference for mainstreaming must be balanced against the IDEA’s primary goal of ensuring that public schools provide disabled

66. *Id.* § 1412(a)(5)(A).

67. *See supra* note 3 and accompanying text.

68. 20 U.S.C. § 1412(a)(5)(A).

69. 34 C.F.R. § 300.114–.120 (2014).

70. *Id.* § 300.115(a).

71. *See id.* § 300.115(b)(1).

72. *Id.* § 300.115(b)(2).

73. Sue Watson, *What Is the Special Education Resource Room?*, <http://specialed.about.com/od/idea/a/resourceroom.htm> (last visited Apr. 25, 2015).

74. *See* 20 U.S.C. § 1412(a)(5)(A) (2013); 34 C.F.R. § 300.114(a)(2)(i).

children with a free appropriate public education.⁷⁵ There is thus an inherent tension between the IDEA requirement of a free appropriate public education and the IDEA policy of educating disabled children in the regular classroom, since regular classes generally do not provide a specifically tailored education for a disabled child's individual needs⁷⁶ and, in some cases, special education is the only appropriate placement.⁷⁷ For these children, education in the regular classroom would fail to meet their unique and specialized needs and would therefore prevent them from receiving the IDEA's mandated educational benefit—a free appropriate public education.⁷⁸

Reconciling these two fundamental objectives is problematic in light of the act's lack of any substantive standards for striking the proper balance between its LRE mandate and its free appropriate public education requirement. "This tension invokes the choice between specialized services and some degree of separate treatment on the one side and minimized labeling and minimized segregation on the other."⁷⁹

Moreover, the Supreme Court has yet to interpret the IDEA's LRE provision—which has led to a three-way circuit split among the lower federal courts over the proper criteria to consider in evaluating state compliance with the LRE requirement.⁸⁰

D. Procedural Safeguards

The IDEA affords disabled children and their parents procedural safeguards in the event that a dispute arises between the parents and the school district. If a child's IEP or educational placement is changed, the child's parents must be notified.⁸¹ The parents may file a complaint with a designated state agency if they disagree with their child's IEP or educational placement,⁸² and an "impartial due process hearing" will be held.⁸³ Either party may appeal the hearing officer's decision in a "[s]tate court of competent jurisdiction or in a district court of the United States."⁸⁴

75. AMENDOLA ET AL., *supra* note 55, § 998.

76. *See, e.g.*, *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044–45 (5th Cir. 1989) ("[T]he [IDEA]'s mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom."); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695 (11th Cir. 1991); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1214 (3d Cir. 1993) ("[T]he apparent tension within the [IDEA] between the strong preference for mainstreaming, and the requirement that schools provide individualized programs tailored to the specific needs of each disabled child." (citations omitted)).

77. *See Daniel R.R.*, 874 F.2d at 1044 ("The nature or severity of some children's handicaps is such that only special education can address their needs.").

78. *See id.*

79. Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 181 (1985); *see also Daniel R.R.*, 874 F.2d at 1045.

80. *See* discussion *infra* Part III.

81. 20 U.S.C. § 1415(b)(3) (2013).

82. *Id.* § 1415(b)(6).

83. *Id.* § 1415(f)(1)(A).

84. *Id.* § 1415(i)(1)–(2), (g).

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These procedural safeguards have opened the gates to the courthouse.⁸⁵ Litigation over a disabled child’s educational placement has become a controversial issue and will continue to be so until the federal courts adopt a clear and uniform interpretation of the LRE provision.⁸⁶

III. DIFFERING JUDICIAL APPROACHES TO DETERMINING COMPLIANCE WITH THE LRE MANDATE

Determining whether a state has educated a disabled student in the least restrictive environment to the maximum extent appropriate is controversial, due in large part to the lack of Supreme Court guidance.⁸⁷ As a result, there is currently a three-way circuit split over which test to apply when evaluating state compliance with the LRE mandate. The Fourth, Sixth, and Eighth Circuits apply a three-factor test, which focuses on the feasibility of providing special services in a regular classroom setting.⁸⁸ In contrast, the Second, Third, Fifth, Tenth, and Eleventh Circuits employ a two-prong test that mimics the statute’s text and turns on “the school’s proper use of supplementary aids and services, which may enable the school to educate a child with disabilities for a majority of the time within a regular classroom, while at the same time addressing that child’s unique educational needs.”⁸⁹ Refusing to adopt either of these approaches, the Ninth Circuit devised its own four-factor balancing test.⁹⁰

A. The Three-Factor Feasibility Test

In 1983, the Sixth Circuit was the first to establish the three-factor feasibility test to inform school district decisions in determining the appropriate placement for children with disabilities;⁹¹ the test was subsequently adopted by the Fourth and Eighth Circuits.⁹²

85. See Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLINICAL L. REV. 271, 277–78 (2005) (describing the various types of IDEA violations on the basis of which parents of disabled children file compliance complaints).

86. See Bon, *supra* note 3, at 3 (arguing that the “adoption of clear state-wide LRE guidelines” would alleviate “the educational, financial, and emotional strains that are placed on parents and educators when special education litigation reaches the courts”).

87. See *supra* note 5 and accompanying text.

88. See *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989); *A.W. v. Nw. R-1 Sch. Dist.*, 813 F.2d 158 (8th Cir. 1987); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).

89. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1214 (3d Cir. 1993) (citation omitted) (internal quotation marks omitted); see also *P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2d Cir. 2008); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989).

90. *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994) (adopting the district court’s four-factor balancing test).

91. See *Roncker*, 700 F.2d at 1063.

92. See *DeVries*, 882 F.2d at 878–79; *A.W.*, 813 F.2d at 163–64.

1. *Established by the Sixth Circuit*

Neill Roncker was a nine-year-old boy with severe intellectual disability.⁹³ He also suffered from seizures and required constant supervision due to his inability to identify dangerous situations.⁹⁴ In 1976, Neill attended the Arlitt Child Development Center, where he had contact with nondisabled children—contact from which he was believed to benefit.⁹⁵ In 1979, Neill’s parents, school psychologists, and a member of the Hamilton County Board of Mental Retardation held a conference to evaluate Neill’s IEP as required by the IDEA.⁹⁶ The evaluation resulted in the school district’s decision to place Neill in a school exclusively for the disabled where Neill would have no interaction with nondisabled children.⁹⁷ Refusing to accept the placement, the Ronckers sought a due process hearing.⁹⁸ The impartial hearing officer determined that the school district failed to establish that placing Neill in a school exclusively for children with disabilities afforded the maximum appropriate contact with nondisabled children, as required by the IDEA’s LRE provision.⁹⁹

The school district appealed to the Ohio State Board of Education, which agreed that Neill would benefit from placement in a specialized school, but reasoned that Neill should also be afforded contact with nondisabled children “during lunch, recess and transportation to and from school.”¹⁰⁰ However, the board did not explain how to implement this “split program.”¹⁰¹

The Ronckers subsequently filed suit in the U.S. District Court for the Southern District of Ohio, alleging that Neill “could be provided the special instruction he needed in a setting where he could have contact with non-handicapped children.”¹⁰² During the pendency of the litigation, Neill attended a regular public school and interacted with nondisabled students during lunch, gym, and recess.¹⁰³ The school district asserted that the educational benefits of placing Neill at a special facility outweighed the marginal benefits he would gain from attending a regular public school.¹⁰⁴ Finding that Neill did not make any significant progress while attending

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

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1061.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

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the regular public school, the district court upheld Neill’s placement in the school for intellectually disabled children.¹⁰⁵

On appeal, the Sixth Circuit considered whether the school district complied with the LRE mandate.¹⁰⁶ Distinguishing the Supreme Court’s decision in *Rowley*, the Sixth Circuit noted that *Rowley* failed to address the LRE provision,¹⁰⁷ setting forth the first standard for determining whether a disabled child’s educational placement satisfies the LRE requirement of educating disabled children with nondisabled children to the maximum extent appropriate. The court noted:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the [IDEA]. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.¹⁰⁸

Under this framework, the initial inquiry is whether it is feasible to provide additional services in a regular setting that satisfy the disabled child’s educational, physical, and emotional needs.¹⁰⁹ If so, the school district should assess the following three factors: (1) whether the benefits of educating the student in the regular classroom outweigh the benefits of placing the child in a special education classroom (which provides services that cannot be provided in a non-segregated setting); (2) whether the disabled child is disruptive in the regular setting (e.g., the child distracts other students or requires excessive supervision); and (3) whether the cost of placing the child in the regular classroom requires excessive resources (such that other disabled students would be deprived of essential resources).¹¹⁰

The court explained that framing the analysis in this manner promotes Congress’s preference for mainstreaming, yet acknowledges that a regular setting is inappropriate

105. *Id.*

106. *Id.* at 1062.

107. *Id.* at 1062 (“[T]his case involves the mainstreaming provision of the [IDEA] while *Rowley* involved a choice between two methods for educating a deaf student.”).

108. *Id.* at 1063.

109. *See id.*

110. *See id.* Although cost is an appropriate consideration, it is not a defense “if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children. The provision of such alternative placements benefits all handicapped children.” *Id.*

for some disabled students.¹¹¹ The case was consequently remanded back to the district court to determine “whether Neill’s educational, physical or emotional needs require some service which could not feasibly be provided in a class for handicapped children within a regular school or in the type of split program advocated by the State Board of Education.”¹¹²

2. *Adopted by the Fourth and Eighth Circuits*

In *A.W. v. Northwest R-1 School District*, the Eighth Circuit endorsed the Sixth Circuit’s feasibility test.¹¹³ The court focused on the third factor identified in *Roncker*—the cost of educating a child with severe disabilities in the regular classroom.¹¹⁴ The court emphasized that the LRE requirement must be viewed in light of the reality of limited public funds.¹¹⁵ Affirming the district court’s decision, the Eighth Circuit held that it was permitted “to consider both cost to the local school district and benefit to the child” from placement in regular school.¹¹⁶

The Fourth Circuit also adopted the Sixth Circuit’s feasibility test in *DeVries v. Fairfax County School Board*.¹¹⁷ The court contemplated the benefits of educating a seventeen-year-old autistic student in the regular classroom, and whether those benefits substantially outweighed the benefits of placing the child in a segregated vocational center located in a regular high school campus.¹¹⁸ Finding that he would “glean little from the lectures,” perform at a lower level, and barely communicate even with an aide’s assistance, the Fourth Circuit affirmed the decision to place the child in the vocational school rather than the regular public high school.¹¹⁹

B. *The Two-Prong Test*

Declining to follow the Sixth Circuit’s approach, the Fifth Circuit formulated its own test for evaluating school district compliance with the LRE requirement.¹²⁰ The standard espoused by the Fifth Circuit is currently the most prevailing test among the circuit courts.¹²¹ While only three circuits follow the three-factor feasibility test,

111. *Id.*

112. *Id.*

113. 813 F.2d 158, 163–64 (8th Cir. 1987).

114. *Id.* at 163.

115. *Id.* at 164.

116. *Id.* at 163.

117. 882 F.2d 876 (4th Cir. 1989).

118. *Id.* at 877.

119. *Id.* at 879–80.

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

121. *See P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2d Cir. 2008); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004); *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991).

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five circuits have adopted the two-prong test over the span of nineteen years—the most recent being the Second Circuit in 2008.¹²²

1. *Established by the Fifth Circuit*

Six years after *Roncker* was decided, the Fifth Circuit confronted the issue of school district compliance with the IDEA’s mainstreaming requirement.¹²³ In *Daniel R.R. v. Board of Education*, the Fifth Circuit declined to follow the Sixth Circuit’s analysis in *Roncker* and instead devised its own two-prong test.¹²⁴ Daniel suffered from Downs Syndrome;¹²⁵ although Daniel was six-years-old, he possessed communication skills of a two-year-old and had a developmental age of a two- to three-year-old.¹²⁶ When Daniel attended a regular pre-kindergarten class, the teacher had to alter her teaching methods and modify the curriculum.¹²⁷ However, Daniel still required constant individual attention and could not master basic skills.¹²⁸ Consequently, the school district’s Admission, Review and Dismissal Committee decided that pre-kindergarten was inappropriate for Daniel and accordingly changed his placement.¹²⁹ Under the new placement, Daniel would attend the special education pre-kindergarten class, eat lunch with nondisabled students three days each week, and interact with nondisabled students during recess.¹³⁰ Arguing that the Committee “improperly shut the door to regular education for Daniel,” Daniel’s parents appealed to an impartial hearing officer who affirmed the Committee’s decision.¹³¹ Daniel’s parents subsequently filed an action in the U.S. District Court for the Western District of Texas, alleging that Daniel’s new placement violated the LRE provision;¹³² however, the court upheld the Committee’s decision.¹³³

On appeal, the Fifth Circuit rejected the *Roncker* test, claiming that the Sixth Circuit’s feasibility standard encroaches upon state and local school officials’ delegated authority.¹³⁴ The court reasoned that educational policy choices, such as determining the feasibility of providing a particular service in a regular or special

122. See cases cited *supra* note 121.

123. *Daniel R.R.*, 874 F.2d 1036.

124. *Id.* at 1046–48.

125. *Id.* at 1039.

126. *Id.*

127. *Id.* (“Modifying the Pre-kindergarten curriculum and her teaching methods sufficiently to reach Daniel would have required [the schoolteacher] to modify the curriculum almost beyond recognition.”).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1040.

133. *Id.*

134. *Id.* at 1046.

education setting, are deliberately left to state and local school authorities whose expertise in the field counsels against second-guessing by the courts.¹³⁵ Moreover, the court criticized the *Roncker* test because it barely referenced the language of the statute,¹³⁶ contending that the proper standard for evaluating compliance with the mainstreaming requirement should instead mimic the statutory text.¹³⁷

Adhering to the text of the statute, the Fifth Circuit set forth a two-prong test for determining compliance with the mainstreaming requirement.¹³⁸ First, the court must determine “whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily.”¹³⁹ If appropriate education cannot be achieved satisfactorily in the regular classroom, and specialized placement is therefore necessary, the court must then determine “whether the school has mainstreamed the child to the maximum extent appropriate.”¹⁴⁰

Compliance with the mainstreaming requirement is determined on a case-by-case basis. Courts consider the following factors when applying the first prong of the Fifth Circuit test: (1) the efforts the school district has made to accommodate the child in the regular classroom (such as modifying the regular curriculum or providing teacher aides); (2) the educational benefits the child receives from regular education; (3) the overall educational experience the child has in a regular education environment (such as learning language and behavior skills from nondisabled students); and (4) the effect the disabled child’s presence has on the regular classroom (such as being disruptive to other students or burdensome to the instructor).¹⁴¹ Under this framework, “no single factor is dispositive.”¹⁴²

Upon analyzing these factors as a whole, the court concluded that the school district could not educate Daniel satisfactorily in the regular education classroom.¹⁴³ First, the court evaluated the steps the school district had taken to accommodate Daniel in the regular classroom.¹⁴⁴ Daniel’s pre-kindergarten teacher had made substantial efforts to modify the pre-kindergarten curriculum but, unfortunately, those efforts yielded minimal benefits for Daniel.¹⁴⁵ The court explained that states need not “provide every conceivable supplementary aid or service to assist the

135. *Id.* (contending that the *Roncker* test “necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials”).

136. *Id.*

137. *See id.* at 1048.

138. *See id.*

139. *Id.*

140. *Id.*

141. *See id.* at 1048–49.

142. *Id.* at 1048.

143. *Id.* at 1051.

144. *Id.* at 1050.

145. *Id.*

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[disabled] child.”¹⁴⁶ Regular education instructors are neither required “to devote all or most of their time to one handicapped child” nor should they “modify the regular education program beyond recognition.”¹⁴⁷ Tailoring the curriculum to Daniel’s needs would have required a ninety to one hundred percent modification—an effort that mainstreaming does not require.¹⁴⁸ Thus, the court found that the school district had taken sufficient steps to accommodate Daniel.¹⁴⁹

Second, the court considered the educational benefits that Daniel received from regular education. This factor focuses “on the student’s ability to grasp the essential elements of the regular education curriculum.”¹⁵⁰ In light of Daniel’s disability, which had severely impeded his developmental capabilities, and considering the pre-kindergarten curriculum’s focus on developmental skills, Daniel could not master the class’s basic lessons.¹⁵¹ The court concluded that interacting with nondisabled students was the only benefit Daniel received from regular education.¹⁵² While conceding that “academic achievement is not the only purpose of mainstreaming,” the court concluded that specialized education was the more appropriate placement.¹⁵³

The third factor contemplates the benefits a disabled child may receive from non-academic experiences in the regular education environment—for instance, whether the overall regular education experience offers beneficial language and behavior models through interaction with nondisabled students.¹⁵⁴ These models may enhance a disabled child’s ability to develop social and communication skills.¹⁵⁵ Thus, mainstreaming may be favored when a child benefits from the interaction with nondisabled students, despite the child’s inability to excel academically. In contrast, mainstreaming is not desirable if regular education fails to address the child’s unique educational needs.¹⁵⁶ In *Daniel R.R.*, the court found the exhausting and strenuous nature of the regular education program to be detrimental to Daniel, as it caused him to fall asleep at school and develop a

146. *Id.* at 1048.

147. *Id.*

148. *Id.* at 1050.

149. *Id.*

150. *Id.* at 1049.

151. *Id.* at 1050.

152. *Id.* at 1051 (“[T]he only value of regular education for Daniel is the interaction which he has with nonhandicapped students.”).

153. *Id.* at 1049, 1051.

154. *See id.* at 1049 (“[A] child may be able to absorb only a minimal amount of the regular education program, but may benefit enormously from the language models that his nonhandicapped peers provide for him.”).

155. *See id.* at 1047–48 (“[M]ainstreaming may have benefits in and of itself. For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child’s development.”).

156. *Id.* at 1049.

stutter.¹⁵⁷ When balanced against the benefits of special education (an environment in which Daniel was making progress), the court found that the opportunity for Daniel to interact with nondisabled students did not warrant mainstreaming.¹⁵⁸

Finally, courts consider whether the child's presence in the regular classroom is disruptive to other students or burdensome on the teacher. Mainstreaming is not required when a disabled child's disruptive behavior impairs the education of other students or when a child requires "so much of the instructor's attention that the instructor will have to ignore the other student's needs in order to tend to the handicapped child."¹⁵⁹ Although a teaching assistant may be able to "minimize the burden on the teacher," if the disabled child "requires so much of the teacher or the aide's time that the rest of the class suffers, then the balance will tip in favor of placing the child in special education."¹⁶⁰ In *Daniel R.R.*, the court found that Daniel's presence in regular pre-kindergarten was unfair to the rest of the class, as he required all or most of the teacher's attention.¹⁶¹

Based on the foregoing, the court concluded that the factors—individually and in the aggregate—tipped the scale in favor of placing Daniel in special education and suggested that the school district could not educate Daniel satisfactorily in the regular education classroom.¹⁶²

Accordingly, the court applied the test's second prong, which evaluates whether the school district mainstreamed the child to the maximum extent appropriate.¹⁶³ To satisfy the second prong, "the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess."¹⁶⁴ In *Daniel R.R.*, the school district mainstreamed Daniel for lunch and recess.¹⁶⁵ The court found that this intermediate step of mainstreaming satisfied the LRE provision.¹⁶⁶ Consequently, the court held that the school district had complied with the mainstreaming requirement since (1) education in the regular classroom, even with the use of supplementary aids and services, could not be achieved satisfactorily, and (2) the school district's specialized placement enabled Daniel to interact with nondisabled students to the maximum extent appropriate.¹⁶⁷

157. *Id.* at 1051.

158. *Id.*

159. *Id.* at 1049.

160. *Id.* at 1049–50.

161. *Id.* at 1051.

162. *Id.*

163. *Id.* at 1050–51.

164. *Id.* at 1050 (footnote omitted).

165. *Id.* at 1039.

166. *Id.* at 1051.

167. *Id.*

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2. *Adopted by the Second, Third, Tenth, and Eleventh Circuits*

Four circuits have adopted the two-prong test since the Fifth Circuit’s decision in *Daniel R.R.*¹⁶⁸ In *Greer v. Rome City School District*, the Eleventh Circuit adopted the Fifth Circuit’s two-prong test, emphasizing the importance of considering the “full range of supplemental aids and services, including resource rooms and itinerant instruction, that could be provided to assist [the disabled child] in the regular classroom.”¹⁶⁹ The Eleventh Circuit reasoned that the two-prong test “adheres so closely to the language of the [IDEA] and, therefore, clearly reflects Congressional intent.”¹⁷⁰

Similarly, the Third Circuit in *Oberti v. Board of Education* adopted the two-prong test to determine whether the school district satisfied the LRE mandate.¹⁷¹ Building on the Eleventh Circuit’s analysis in *Greer*, the court identified the vast range of supplemental aids and services that schools must consider, such as “speech and language therapy, special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child’s particular disabilities.”¹⁷²

In 2004, the Tenth Circuit followed suit and embraced the two-prong test¹⁷³ and, four years later, the Second Circuit did the same in *P. v. Newington Board of Education*.¹⁷⁴

C. *The Four-Factor Balancing Test*

The Ninth Circuit devised its own four-factor balancing test to determine whether a school district’s placement decision violates the LRE provision,¹⁷⁵ and is the only circuit court to employ this test.

1. *Established by the Ninth Circuit*

In 1994, the Ninth Circuit formulated a new standard for gaging compliance with the LRE requirement—a standard which derives some of its elements from both the *Roncker* feasibility test and *Daniel R.R.*’s two-prong test.¹⁷⁶ Rachel Holland

168. *P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2d Cir. 2008); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004); *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991).

169. 950 F.2d at 698.

170. *Id.* at 696.

171. *See* 995 F.2d at 1215.

172. *Id.* at 1216.

173. *See Nebo Sch. Dist.*, 379 F.3d at 977 (“[T]his court is persuaded by the *Daniel R.R.* test and by the reasoning of the other circuits which have adopted it.”).

174. 546 F.3d 111, 119–20 (2d Cir. 2008) (“[T]he two-pronged approach adopted by the Third, Fifth, Ninth, Tenth, and Eleventh Circuits provides appropriate guidance to the district courts without ‘too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials.’” (quoting *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1046 (5th Cir. 1989))).

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

176. *See id.* at 1404.

was a moderately intellectually disabled eleven-year-old.¹⁷⁷ While Rachel's parents wanted her to be placed full-time in a regular classroom, the school district rejected their request.¹⁷⁸ Instead, the school district "proposed a placement that would have divided Rachel's time between a special education class for academic subjects and a regular class for non-academic activities such as art, music, lunch, and recess."¹⁷⁹ Rachel's parents appealed the school district's decision to an impartial hearing officer.¹⁸⁰ Finding that the school district did not make sufficient efforts to educate Rachel in a regular class pursuant to the LRE mandate, the impartial hearing officer ordered the school district "to place Rachel in a regular classroom with support services, including a special education consultant and a part-time aide."¹⁸¹ The school district appealed the decision to the district court.¹⁸²

In determining whether the school district's proposed educational placement complied with the LRE provision, the district court evaluated the following four factors:

- (1) the educational benefits available to Rachel in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom;
- (2) the non-academic benefits of interaction with children who were not disabled;
- (3) the effect of Rachel's presence on the teacher and other children in the classroom; and
- (4) the cost of mainstreaming Rachel in a regular classroom.¹⁸³

Applying this framework, the district court found that: (1) Rachel received substantial educational benefits in a regular classroom "with some modification to the curriculum and with the assistance of a part-time aide";¹⁸⁴ (2) Rachel developed her social skills and gained self-confidence from placement in a regular classroom; (3) "Rachel followed directions and was well-behaved and not a distraction in class";¹⁸⁵ and (4) the school district failed to satisfy its burden of proving that "educating Rachel in a regular classroom with appropriate services would be significantly more expensive than educating her in the District's proposed setting."¹⁸⁶ Since each of the four factors weighed in favor of mainstreaming Rachel, the district court "concluded that the

177. *Id.* at 1400.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 1400-01.

184. *Id.* at 1401.

185. *Id.*

186. *Id.* at 1401-02.

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appropriate placement for Rachel was full-time in a regular second grade classroom with some supplemental services.”¹⁸⁷

On appeal, the Ninth Circuit adopted wholesale the district court’s balancing test.¹⁸⁸ To date, no other circuit court has adopted this four-factor balancing test.

IV. A PROPOSED SOLUTION TO ADOPT THE TWO-PRONG TEST USED BY A MAJORITY OF CIRCUIT COURTS

The Supreme Court’s silence has triggered a three-way circuit split over the proper standard for assessing school district compliance with the IDEA’s LRE requirement.¹⁸⁹ In turn, the differing judicial approaches have produced disparate outcomes for special education students across the nation.¹⁹⁰ Fashioning a solution that helps (and is well suited to) the wide range of students with disabilities poses a great challenge. But the lack of clear and uniform guidelines amid the lower courts’ divergent interpretations highlights the need to devise a clear, uniform, and nationwide approach to evaluating educational placement decisions under the LRE provision.¹⁹¹

The two-prong test formulated by the Fifth Circuit in *Daniel R.R.* is currently the most widely adopted framework among the circuit courts. The two-prong test is also the most workable and most appropriate standard for three reasons: (1) it best reflects congressional intent; (2) it resolves the tension between the IDEA’s free appropriate public education requirement and its LRE mandate; and (3) it comports best with notions of federalism and the states’ traditional authority over educational policy.

A. The Two-Prong Test Better Reflects Congressional Intent

The two-prong test asks: (1) “whether the child can be educated satisfactorily in a regular classroom with supplemental aids and services”,¹⁹² and (2) “whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate.”¹⁹³ By tracing the language of the statute, this two-step approach fully effectuates the congressional intent behind the LRE provision.

For instance, the first prong is reflected in the LRE provision, which prohibits school districts from taking a disabled child out of the regular classroom unless “the nature or severity of the disability . . . is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”¹⁹⁴

187. *Id.* at 1402.

188. *Id.* at 1404.

189. Farley, *supra* note 37, at 818–19.

190. *See id.* at 831 (“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.”).

191. *See id.* at 819, 832.

192. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215–16 (3d Cir. 1993).

193. *Id.* at 1218 (citing *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048, 1050 (5th Cir. 1989)).

194. 20 U.S.C. § 1412(a)(5)(A) (2013).

Furthermore, the factors used to evaluate whether the first prong has been met—(1) the steps taken to accommodate the disabled child in the regular classroom, (2) the educational benefits from regular education, (3) the overall educational experience, and (4) the effect of the disabled child’s presence on the regular classroom environment¹⁹⁵—clearly reflect Congress’s intent to enhance disabled students’ access to the regular classroom and to educate them along with their nondisabled peers.¹⁹⁶

Additionally, the second prong closely follows the IDEA’s language as it contemplates whether the child has received an education with nondisabled children to the maximum extent appropriate.¹⁹⁷ Further, unlike the other two tests, the Fifth Circuit two-prong test allows courts to assess under the first prong which factors are relevant based on the particular facts and circumstances of each case.¹⁹⁸ Thus, in addition to better reflecting congressional intent, the Fifth Circuit’s two-part test allows for much needed flexibility under the first prong’s case-by-case approach.¹⁹⁹

Finally, unlike the other two tests, the Fifth Circuit’s flexible framework recognizes the non-academic benefits flowing from a desegregated education.²⁰⁰ There are inherent, non-academic benefits in maintaining disabled students in an integrated environment, namely “social interaction” and regular “communication” with nondisabled students.²⁰¹ The benefits of inclusion are reciprocal because it also teaches nondisabled students how to interact and communicate with their disabled peers.²⁰² Considering the reciprocal non-academic benefits of integration is essential for achieving Congress’s objective in passing the IDEA, as one principal purpose of

195. See *Daniel R.R.*, 874 F.2d at 1048–49.

196. See 20 U.S.C. § 1412(a)(5)(A); see also *Oberti*, 995 F.2d at 1216 (emphasizing that a school will likely violate the LRE’s mainstreaming directive if it fails to modify or supplement the regular education curriculum in order to accommodate a disabled child).

197. Compare *Daniel R.R.*, 874 F.2d at 1050 (stating that schools fulfill their obligations under the IDEA if they “have provided [students with disabilities with] the maximum appropriate exposure to non-handicapped students”), with 20 U.S.C. § 1412(a)(5)(A) (requiring schools to educate children with disabilities alongside nondisabled children “[t]o the maximum extent appropriate”); see also *Oberti*, 995 F.2d at 1215 (“We think this two-part test, which closely tracks the language of [the LRE provision], is faithful to the IDEA’s directive that children with disabilities be educated with nondisabled children ‘to the maximum extent appropriate.’” (quoting § 1412(a)(5)(A)); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991) (“Because this test adheres so closely to the language of the [IDEA] and, therefore, clearly reflects Congressional intent, we adopt it.”).

198. See *Daniel R.R.*, 874 F.2d at 1048–49; see also *Beth B. v. Van Clay*, 211 F. Supp. 2d 1020, 1031 (N.D. Ill. 2001) (“[W]e 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.”).

199. Farley, *supra* note 37, at 834–35.

200. *Daniel R.R.*, 874 F.2d at 1049 (“[A]cademic achievement is not the only purpose of mainstreaming.”); see also *Greer*, 950 F.2d at 697 (“Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself.” (quoting *Daniel R.R.*, 874 F.2d at 1049)).

201. Farley, *supra* note 37, at 838.

202. See *Oberti*, 995 F.2d at 1217 n.24.

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the act was to address and remedy the social harm wrought by segregated educational facilities.²⁰³

Based on the foregoing, the Fifth Circuit two-prong test promotes best the intent underlying the LRE provision.

B. The Two-Prong Test Resolves the Tension Between the IDEA’s Conflicting Mandates

The school’s use of supplementary aids and services is foundational to striking the proper balance between the IDEA’s commitment to provide a free appropriate public education and its preference for educating students in the least restrictive environment. Providing additional services to disabled students enables the school to simultaneously educate them in the regular classroom while addressing their individual education needs.²⁰⁴ Therefore, the two-prong framework, unlike the feasibility test, strikes the proper balance between educating disabled students in the regular classroom and ensuring a free appropriate public education for all.²⁰⁵

The Fifth Circuit’s two-part framework consists of two separate inquiries: (1) would the disabled student receive a satisfactory education in the regular classroom by way of supplementary aids and services; and (2) if the first question yields a negative answer—i.e., if a more segregated environment would better serve the student’s unique educational needs—then the question turns on whether the school’s specialized placement mainstreams the child to the maximum extent possible (for example, by enabling interaction with nonhandicapped students during lunch, recess, and other non-academic activities). The first prong adheres to congressional intent by making placement in the regular classroom the default educational setting, as required by the LRE provision.²⁰⁶ More importantly, the test’s second prong recognizes that regular classroom placement is not a one-size-fits-all solution, especially considering Congress’s command that all disabled children receive a free appropriate public education.²⁰⁷ However, even when a more segregated educational placement is warranted, the second prong demands that the school district take steps to mainstream the student to the maximum extent possible.²⁰⁸ Accordingly, the Fifth Circuit’s two-part framework resolves the tension (and strikes the proper balance) between the IDEA’s competing mandates: integration and satisfactory education.

203. See discussion *supra* Part II.

204. See *Oberti*, 995 F.2d at 1215.

205. The Ninth Circuit’s four-factor balancing test is flexible in nature and would thus, in theory, allow courts to strike a sensible balance between the IDEA’s seemingly conflicting mandates. However, the test provides no guidance as to the relative weight to be accorded each of its four factors. See *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). This inevitably leads to inconsistent and arbitrary placement determinations. See, e.g., *Poolaw v. Bishop*, 67 F.3d 830, 836–37 (9th Cir. 1995) (finding two factors militating in favor of regular classroom placement and two against, yet upholding the school’s restrictive placement).

206. See 20 U.S.C. § 1412(a)(5)(A) (2013).

207. *Id.* § 1412(a)(1).

208. See 34 C.F.R. § 300.117 (2014).

C. The Two-Prong Test Best Comports with Principles of Federalism

Education has always been an area of state regulation. And educational policy is one of the few spheres of authority that have been traditionally recognized as exclusively committed to the states.²⁰⁹ In recent years, the federal government has employed its spending power to incentivize states to adopt or modify educational policy goals as applied to discrete segments of the student population.²¹⁰ However, even under conditional spending programs such as the IDEA, courts must remain careful not to impute to Congress an intent of upsetting the federalism status quo and, specifically, the states' traditional authority over their own educational policy.²¹¹ While the Supreme Court has yet to address the IDEA's mainstreaming requirement, the *Rowley* Court did warn the lower courts not "to substitute their own notions of sound educational policy for those of the school authorities which they review."²¹² Thus, while federal courts have a duty to ensure that recipient states comply with the IDEA's substantive standards, they may not "impose substantive standards of review which cannot be derived from the Act itself."²¹³

The Fifth Circuit's two-part framework heeds the Supreme Court's warning in *Rowley* because, unlike the feasibility test, it does not excessively intrude "into the educational policy choices that Congress deliberately left to state and local school officials."²¹⁴ Rather, by closely tracking the language of the IDEA, the two-prong test guarantees that courts would not meddle with the states' educational policy, except insofar as Congress has provided.²¹⁵ The feasibility test, by contrast, is "too intrusive an inquiry"²¹⁶ into the states' educational policy judgments because it fails to accord local school officials the deference that difficult educational policy questions ought to

209. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."). "Traditionally, policymakers have supported state and local control rather than federal directives and federal education legislation has normally contained strong prohibitions against federal control of education." GAIL L. SUNDERMAN & JIMMY KIM, *EXPANSION OF FEDERAL POWER IN AMERICAN EDUCATION: FEDERAL-STATE RELATIONSHIPS UNDER THE NO CHILD LEFT BEHIND ACT, YEAR ONE 4* (The Civil Rights Project at Harvard Univ. eds., 2004).

210. Michael Heise, *The Political Economy of Education Federalism*, 56 *EMORY L.J.* 125, 127 (2006).

211. *See generally* John F. Manning, *Clear Statement Rules and the Constitution*, 110 *COLUM. L. REV.* 399 (2010).

212. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). "It is clear that Congress was aware of the States' traditional role in the formulation and execution of educational policy. 'Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level.'" *Id.* at 208 n.30 (quoting 121 *CONG. REC.* 19,498 (1975) (remarks of Sen. Dole)).

213. *Rowley*, 458 U.S. at 206 (holding that IDEA § 1415(e)'s directive that "the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings" (alteration in original)).

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

215. *See Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1214 (3d Cir. 1993); *see also* Farley, *supra* note 37, at 834.

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

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receive.²¹⁷ Therefore, the feasibility test runs counter to the deferential stance the Supreme Court has mandated when reviewing school districts’ placement decisions under the IDEA.²¹⁸

Similarly, by requiring states to prove that mainstream education “would be significantly more expensive than [placement in a specialized program],”²¹⁹ the Ninth Circuit’s four-factor balancing test entails the same sort of second-guessing of state educational policies that *Rowley* warns against.²²⁰ Thus, it is clear that the Fifth Circuit two-prong test is the most comprehensive, effective approach—consistent with federalism principles—to evaluating educational placement decisions.

V. CONCLUSION

By enacting the IDEA, Congress sought to rectify the pervasive practice of denying students with disabilities access to publicly funded education.²²¹ The act’s LRE provision ultimately reflects the congressional intent to educate disabled children in the regular classroom to the maximum extent appropriate for each child’s particular needs. Unfortunately, discerning congressional intent has produced multiple interpretations, partly due to the Supreme Court’s silence on the standard by which to determine state compliance with the LRE provision.

As this note has explained, the two-prong test espoused by the Fifth Circuit—and subsequently adopted by four other circuits—should be uniformly adopted. As the most widely accepted standard among the circuit courts, the trend in case law reveals that this framework best reflects Congress’s intent in passing the IDEA and resolves the tension between the IDEA’s seemingly conflicting mandates. Importantly, the two-part framework ensures school district compliance with the LRE provision without unnecessarily encroaching on the states’ traditional authority over educational policy. Implementing a clear nationwide approach, such as the two-prong framework, would ensure equal educational access to students with disabilities while eliminating disparate educational placements across the nation—just as Congress intended.

217. *See* *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 118 (2d Cir. 2008) (“[W]hile our review is de novo, it is tinged with a significant degree of deference to the state educational agency, as we are essentially acting in an administrative-law-style capacity.”).

218. “The very importance which Congress has attached to compliance with [IDEA procedures] . . . would be frustrated if a court were permitted simply to set state decisions at naught.” *Rowley*, 458 U.S. at 206.

219. *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1401–02 (9th Cir. 1994).

220. *See Rowley*, 458 U.S. at 206; *see also* *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004) (“[The Fifth Circuit’s framework] acknowledge[s] the *fiscal* reality that school districts with limited resources must balance the needs of each disabled child with the needs of other children in the district.” (emphasis added)).

221. *See* discussion *supra* Part II.