THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: WHY CONSIDERING INDIVIDUALS ONE AT A TIME CREATES UNTENABLE SITUATIONS FOR STUDENTS AND EDUCATORS

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America's public schools and teachers face a growing but currently unaddressed problem: How to comply with the law requiring teachers to meet the needs of all students with disabilities when those needs are incompatible. The Individuals with Disabilities Education Act requires schools to meet the individual needs of each student with disabilities. As the number of students with disabilities grows, the number of children with disabilities per classroom is increasing. When the varied classroom needs of these students clash, schools are forced to choose which students' needs to meet—a violation of the law. The added pressure on schools to maximize student potential under the No Child Left Behind Act limits the flexibility of schools to meet the varied needs of all students. Though circuits are split about whether to consider the effect a child with disabilities will have on a generic classroom when determining the appropriateness of a child's placement, all circuits myopically consider the needs of only one student with disabilities at a time. Nonetheless, courts and lawmakers continue to view and address the needs of each child with disabilities outside the context of the actual classroom. By considering each individual without considering the actual school context that the decision affects, the law and courts are setting schools up to fail their students and to violate the law.

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INTRODUCTION

Imagine a middle school English classroom filled with thirty seventh-graders, of which three have learning disabilities, four have Attention Deficit Hyperactivity Disorder (ADHD), two have severe physical and mental disabilities that require them to have one-on-one aides in attendance, and three have "Gifted and Talented Education" (GATE) status. When one child with a disability types on his computer, the computer emits beeping sounds to inform him of his letter choices. With each beep, the children with ADHD crane their heads backwards and bounce out of their seats. The teacher must rein in these students while simultaneously attending to the needs of other students with and without disabilities as they perform a variety of lessons geared to meet their various needs. Meanwhile, most of the students continue with their assignments, while those with ADHD remain consumed with the noises and commotion around them.[1] This scenario illustrates how a teacher in such a situation would be unable to fully meet all students' needs simultaneously; yet this is what the law requires.

The Individuals with Disabilities Education Act (IDEA),[2] its predecessors, and its successor have required public schools and courts to look at each student with disabilities as an individual. This individualized consideration, though beneficial for the student, has sparked much debate about the

1. This hypothetical situation is drawn from a collection of the author's personal experiences as a public school teacher in California. The author taught in a midsize, middle-class school where many of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–85 (2000), goals were being realized: Teachers modified and individualized curriculum for students with disabilities; the school adhered to Individualized Education Plan (IEP) procedural requirements; and most students with disabilities spent a significant part of the school day in general education classrooms. Although this hypothetical situation may be atypical, it is noteworthy nonetheless because it demonstrates problems faced by educators in some of those schools in which the IDEA is being successfully implemented. Under the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §§ 1400–85 (Supp. 2005), teachers must modify the classroom environment and lessons to meet the individual needs of each child with a disability, disorder, or "Gifted and Talented Education" (GATE) label. Thus, this active classroom environment, required under law to meet the varied needs of its students, is in legal conflict with the IEPs of those students with ADHD, whose plans guarantee them a quiet, focused learning environment. This required individual consideration can be problematic when more than one child with a disability is present in a given classroom, but the law has not yet addressed the growing dilemma of conflicting needs. Lawmakers and courts must address and resolve such conflicts before schools are left in the untenable position of trying to meet conflicting and competing needs without violating the law, as such conflicts are likely to increase as the number of students with disabilities increases. *See* J. Matt Jameson & Dixie S. Huefner, *"Highly Qualified" Special Educators and the Provision of a Free Appropriate Public Education to Students With Disabilities*, 35 J.L. & EDUC. 29, 29 (2006) (noting that "the number of students with disabilities has continued to grow at an average of 150,000 new students each year").

2. 20 U.S.C. §§ 1400–85 (2000).

financial and social costs associated with specialized education.[3] As schools work within tight budgets and are pressured to help all students meet high standards, and as the number of students with disabilities continues to rise,[4] there will likely be more controversy and litigation in the area of educating students with special needs.[5] Furthermore, with 6.8 million students qualifying under the IDEA nationwide,[6] the large and growing number of students needing specialized education will create circumstances in which students' needs conflict or simply cannot be met. This untenable situation will result not only in a reduction in learning for all students, but also may introduce a new reason for suits against school districts.

Even those courts that consider an individual student's effect on the class as a whole still fail to consider the class's complex makeup. This failure, combined with the preference that disabled students be included in regular classes, leads to conflict between the needs of students with and without disabilities in the class. It is no longer enough for courts that review cases regarding the placement of students with disabilities to consider only the impact a student with disabilities will have "*on* the classroom;" they also should consider the impact on the other individuals *in* the classroom, especially those with disabilities of their own.[7] The U.S. Congress has conflicting goals to maximize each student's potential (under the No Child Left Behind Act[8]) and to place each student in the least restrictive environment appropriate for that child (under the IDEA). Thus, together these acts demand

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3. *See, e.g.*, Melissa Burden, *Special Education Retooled: Flint District Takes New Look at Serving Students With Needs*, FLINT J., Oct. 11, 2006, at A3 (recognizing that there are issues of "crowding and cases of academic incompatibility and social clashes").

4. *See* Jameson & Huefner, *supra* note 1, at 29.

5. There are four main reasons that disputes arise in the area of special education law: (1) identifications, that is, whether children were eligible for IDEA services and how their eligibility determinations were made; (2) the types of special education and related services, if any, they needed; (3) whether schools carried out the education programs as written; and (4) whether schools could provide an appropriate educational environment for certain students.

U.S. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATIONS AND OTHER STRATEGIES TO RESOLVE CONFLICTS 10 (2003) (hereinafter GAO REPORT), *available at* http://www.gao.gov/new.items/d03897.pdf (basing this finding on the four states surveyed for the report).

6. *See* Office of Special Education Programs (OSEP), http://www.ed.gov/about/offices/list/osers/osep/index.html (last visited Nov. 10, 2007).

7. The No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002), places pressure on schools to maximize student performance, but this requirement may conflict with socially beneficial but academically marginal results that courts sometimes allow as support for a less restrictive environment. *Id.*; *see infra* Part II.

8. 115 Stat. 1425.

that teachers maximize every student's potential in the same setting. This impractical, and often impossible, goal places schools on the front lines of tomorrow's lawsuits and condemns today's students to education in inappropriate environments. Because this clash of needs and requirements is newly developing and not yet central to cases being litigated, Congress has yet to address the problem in its amendments to the IDEA.

The impending conflict grows out of the history of disabilities education legislation. For decades, students with disabilities have been fighting their way into schools and classrooms. Congress has eased their struggle by passing various acts, from the Education of the Handicapped Act of 1970 to the Individuals with Disabilities Education Improvement Act of 2004.[9] All of Congress's acts in this area have required schools to educate all students with disabilities in the least restrictive environment appropriate.[10] Nonetheless, conflict over special education has not ceased in recent years, as evidenced by the thousands of disputes that go through formal resolution processes[11] when parents and school districts disagree about the services provided for and the placement of students with disabilities.[12] Furthermore, as the number of students with disabilities continues to grow, even those school districts that have been successfully meeting the needs of students with disabilities may find themselves unable to meet the needs of all students within the existing federal framework.

With the majority of legal disputes under the IDEA involving the placement of students with disabilities,[13] the IDEA's least restrictive environment

9. The Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 175 (1970), was reauthorized as the Education for All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, 89 Stat. 773 (1975); EAHCA was reauthorized as the Individuals with Disabilities Education Act (IDEA), Pub. L. No. 101-476, 104 Stat. 1103 (1990); IDEA was reauthorized as IDEIA, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. §§ 1400–85 (Supp. 2005)).

10. *See* sources cited *supra* note 9.

11. *See* GAO REPORT, *supra* note 5, at intro.

12. *Id.* at 10.

13. *See* James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469, 478 (1999) (stating that the student's placement was at issue in 63 percent of a representative sample of litigated cases between 1975 and 1995); GAO REPORT, *supra* note 5, at 3 (stating that in six of eight school districts visited, "disputes had resulted from decisions over students' educational placements"). Interestingly, in three out of four disputes involving placement, parents desire a more restrictive placement than the school district does. *See* Newcomer & Zirkel, *supra*, at 478. For students with profound disabilities, parents often feel that their children will gain more from specialized programs than from modification of the regular classroom. *See, e.g.*, John Mooney, *The High Cost of Special Education: Families Say That Inclusion Will Leave Autistic Behind*, STAR-LEDGER (Newark, N.J.), Oct. 9, 2006,

(LRE) requirement and its case-by-case, circuit-by-circuit interpretation provides a confusing body of education law and hampers good decisionmaking in local school districts. Some advocates for students with disabilities believe that the IDEA's LRE requirement entitles students with disabilities to a place in the regular classroom regardless of any potential negative effects that the students might have on the classroom—on other students' learning and on the teacher's time and effectiveness.[14] Most circuit courts, however, have considered the possible negative effects that these students with disabilities have had or may have on the classroom, although how this is weighed in the overall decision varies greatly from circuit to circuit.[15]

While circuits are split about how to interpret the IDEA's LRE requirement for students with disabilities, they uniformly give no consideration to the makeup of the students' classes. Some circuits consider the "effect the student will have on the classroom and on the teacher's time" when determining what placement will be the least restrictive one available to a student with disabilities, but even these courts imagine the class as a faceless mass, not as a collection of other individuals.[16]

The reality of the modern classroom, however, is the presence of many students with particular and diverse needs, including many with disabilities.[17] The result of courts' judging placements for students with disabilities

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at 13 (describing the migration of families with autistic children to New Jersey because of the availability and regularity of placements in specialized programs there).

14. Tamara Wong, Note, *Falling Into Full Inclusion: Placing Socialization Over Individualized Education*, 5 U.C. DAVIS J. JUV. L. & POL'Y 275, 275 (2001).

15. *See, e.g.*, Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994); Oberti v. Bd. of Educ., 995 F.2d 1204, 1217–18 (3d Cir. 1993); Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); DeVries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048–50 (5th Cir. 1989); Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983).

16. No courts mention the potential conflict between the needs of the child before the court and those of other students in the class.

17. With 13 percent of students qualifying as disabled under the IDEA, the average thirty-student classroom will have at least three children with disabilities. *See* Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons From Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 760 (2001). This picture is not complete with only these students with special needs, for in every class there are also regular education students who do not qualify as disabled under any federal labels but who still require attention, and often specialized attention, from the teacher in order to learn. Because more than half of all students with disabilities were included in the regular classroom for at least 80 percent of the school day in the 2004–2005 school year, the number of students with recognized special needs in regular classrooms is great already. NAT'L CTR. FOR EDUC. STATISTICS, INDICATOR 31: INCLUSION OF STUDENTS WITH DISABILITIES IN GENERAL CLASSROOMS (2007), http://nces.ed.gov/programs/coe/2007/section4/table.asp?tableID=717.

in their current manner is that students with conflicting individual education plans[18] may end up in the same class. Moreover, some classes could end up with so many students with disabilities that there would be no feasible way for a teacher to meet each of their needs, much less to meet the needs of the rest of the class.

This Comment presents the possible problems with and solutions to situations in which too many students with disabilities, or students with conflicting disabilities, are in one classroom, so that meeting the needs of one conflicts with the rights of others. Part I of this Comment presents the history of federal legislation aimed at educating students with disabilities. Part II presents the complexity of the IDEA and its many interpretations by the circuits, including courts' consideration of the effects of students with disabilities on the regular classroom. Part III explains how the growing number of students with disabilities is creating potential for conflicts between the respective rights of students to learn and is forcing school districts into an untenable situation likely to lead to increased litigation. Finally, this Comment discusses the possibilities for the courts and Congress to reconsider the IDEA to help states avoid costly litigation and educational clashes.

I. THE HISTORY AND PREDECESSORS OF THE IDEA AND IDEIA[19]

A. The IDEA and Congressional Intent

From its creation of the Education of All Handicapped Children Act (EAHCA) in 1975 through its 2004 amendments to the Individuals with Disabilities Education Act, Congress has affirmed and reaffirmed the importance it places on educating all of America's children. When it passed the EAHCA, Congress sought to rectify the great injustice suffered by students with disabilities: 1.75 million were excluded from schools entirely and 2.2 million languished in classrooms without help or curriculum adapted to their needs.[20] These students were essentially denied any meaningful access to learning in schools. The original intent of the EAHCA—to provide

18. These plans, required by federal law, include IEPs and Section 504 of the Rehabilitation Act Plans, which will be discussed in more detail later in this Comment. *See infra* pp. 1052–53, 1056–57.

19. Because the Act is commonly known as the "IDEA," and because cases and articles discussed in this comment refer to the Act as the "IDEA," I will use "IDEA" and "IDEIA" interchangeably after Part I's discussion of their differences.

20. *See* Mark C. Weber, *Reflections on the New Individuals With Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 10 (2006).

an educational opportunity to all children—has been preserved through later amendments, though the original standard of a basic floor of opportunity is no longer considered sufficient.[21] Schools today are expected to provide students with meaningful educational opportunities and the tools with which to gain from those opportunities.[22] Additionally, schools are expected to provide these meaningful educational opportunities in the "least restrictive environment" appropriate.[23]

1. The Education for the Handicapped Act of 1970 and the Education of All Handicapped Children Act of 1975

Congress's passage of the Education of the Handicapped Act[24] (EHA) of 1970 marked the beginning of significant efforts by the federal government to include children with disabilities in public schools. The EHA did not achieve its goals, however, and in 1975, Congress became aware that around four million of the nation's handicapped students were not being adequately educated.[25] This startling statistic, along with significant court decisions,[26] motivated Congress to seek to rectify the lack of adequate educational opportunities for students with disabilities by passing the Education for All Handicapped Children Act[27] (EAHCA).[28]

This groundbreaking legislation mandated that all states receiving federal funding for education ensure that students not be denied an educa-

21. *See* sources cited *supra* note 9.

22. *See* Cynthia L. Kelly, *Individuals With Disabilities Education Act—The Right "IDEA" for All Childrens' Education*, 75 J. KAN. BUS. ASS'N 24, 26 (Mar. 2006) (referencing Pub. L. No. 105-17, 111 Stat. 88 (1997), and Pub. L. No. 108-446, 118 Stat. 2715 (2004), and noting that the IDEA's "[f]ocus [has] shifted from access to educational opportunities to improvement of performance and educational achievement").

23. 20 U.S.C. § 1412(5) (2000).

24. Pub. L. No. 91-230, §§ 601–685, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1400–1485 (2000 & Supp. 2005)).

25. *See* Weber, *supra* note 20, at 10.

26. The decisions in two class action suits brought on behalf of students with disabilities who were denied meaningful opportunities to learn demonstrated a need for legislation in the area of educating students with disabilities. *See* Pa. Ass'n for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); *see also* Weber, *supra* note 20, at 10 (noting that the decisions in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* and *Mills v. Board of Education* established "entitlements to education" for students with disabilities before Congress took action).

27. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1485 (2000 & Supp. 2005)).

28. *See id.* at 774; Weber, *supra* note 20, at 10.

tion as a result of their handicaps.[29] School districts were thus required to provide the special education and related services necessary for students to benefit from the educational experience.[30] To achieve this goal, the EAHCA included certain key provisions that have remained consistent throughout the many later versions of the Act; three fundamental and continuing requirements of the EAHCA are (1) that children with disabilities receive Individualized Education Programs (IEPs);[31] (2) that schools provide to students with disabilities a free and appropriate public education (FAPE); and (3) that this education occur in the least restrictive environment (LRE) appropriate.[32] Just as these provisions have remained constant since the Act's inception, so too has disagreement over what constitutes a FAPE and how to determine the appropriate placement for a given child under the LRE requirement.[33]

2. The Individuals With Disabilities Education Act

In 1990, the EAHCA was renamed the Individuals with Disabilities Education Act.[34] (IDEA). With the new name came a few significant amendments. For one, autism and traumatic brain injury were included as categories of disabilities recognized by the Act.[35] Additionally, the amendment stated that schools must provide assistive technology aids and

29. *See* 89 Stat. at 780–83.

30. *Id.*

31. A child is eligible for an IEP when the child's educational progress is adversely affected by his or her disability such that special services or accommodations are needed. *See* 20 U.S.C. § 1414(d)(1)(A)(i). The child's parents (and the child, if old enough) join a team of school officials (a regular education teacher, an administrator or other school official knowledgeable about district resources, a special education teacher, and a psychologist or other person qualified to interpret the student's testing results) to design an IEP. *See* 20 U.S.C. § 1414(d)(1)(B). The IEP will take into account the child's current academic performance, how the child's disabilities affect his or her learning, and any special services or accommodations that the child needs in order to meet measurable performance goals set by the team. *See* 20 U.S.C. § 1414(d)(1)(A). Parents and the school team must agree on the services the school will provide and the manner in which these services will be provided. *See* 20 U.S.C. § 1414(d)(2)(b)(ii). Each IEP is created on a child-by-child basis, without reliance on other students' placements and IEPs. *See* 20 U.S.C. § 1414(d)(3).

32. *See* 20 U.S.C. § 1412.

33. *See* GAO REPORT, *supra* note 5, at intro. (presenting the increasing number of students from 1996 to 2000 requesting due process hearings under the IDEA).

34. Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141–42 (1990) (codified as amended 20 U.S.C. §§ 1400–85).

35. *See id.*; *see also* Stanley S. Herr, *Special Education Law and Children With Reading and Other Disabilities*, 28 J.L. & EDUC. 337, 345–46 (1999). By broadening the types of disabilities covered by the law, Congress increased the number of students who would qualify for services.

services to students with disabilities.[36] The 1990 IDEA also required school districts to provide students with transition services to assist them upon their exit from the public school system.[37] The addition of these obligations demonstrates Congress's reaffirmation of the importance of enabling the disabled.

3. The 1997 and 2004 Amendments to the IDEA

Later amendments to the 1990 IDEA have not significantly altered the original Act. A few of the changes are noteworthy, however, because they raise questions about what constitutes the least restrictive environment and how a school district can ensure that it is procedurally and substantively fulfilling this requirement for each child. Unfortunately, the amendments do not fully answer these questions.

a. The 1997 Amendments to the IDEA

Some of the changes to the IDEA in 1997 made clear that with regard to the least restrictive environment requirement, Congress preferred "mainstreaming"—the practice of including students with disabilities with their nondisabled peers.[38] One important change, for instance, was to explicitly recognize a presumption that placing the child with disabilities in the regular education classroom is appropriate.[39] Having found that students with disabilities benefited from being in the regular education classroom with supplemental aids and services,[40] Congress amended the Act to provide that before a school removes a student from the regular educational setting, the school must include in the student's IEP an explanation for this removal.[41]

36. *See* 104 Stat. 1103.

37. *See id.*

38. *See, e.g.*, 20 U.S.C. § 1401(c)(5)(D) (1994 & Supp. 1999); § 1414(d)(1)(A).

39. *See* S. REP. NO. 105-17, at 21 (1997) (stating that "the law and this bill contain a presumption that children with disabilities are to be educated in regular classes").

40. *See* § 1401(c)(5)(D).

41. *See* § 1414(d)(1)(A) (requiring "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class"). Thus, Congress clearly intended for schools to place a student with disabilities in regular educational settings with appropriate aids and services before determining that a more restrictive environment would be appropriate for the student. In contrast, the previous version of the IDEA required schools to include in a child's IEP an explanation of "the extent" to which "[the] child will be able to participate in regular educational programs." H.R. REP. No. 105-95, at 149 (1997); 34 C.F.R. § 300.346(a)(3) (2006).

Because the determination of whether a setting is the appropriate one for a particular child necessarily requires individualized consideration, it would be difficult to define the LRE requirement in a way that could apply uniformly to all children with disabilities. In its 1997 amendments, Congress did not explain the substance of appropriate placement but rather focused on procedural aspects of determining this placement, starting with a presumption that every child belongs in a regular classroom.[42] Thus, apart from establishing that it favored a presumption of inclusion, Congress's 1997 amendment to the IDEA did little to alleviate the confusion that continues to swirl around the LRE determination.

b. The 2004 Amendments to the IDEA—The Individuals With Disabilities Education Improvement Act

In 2004, the IDEA was amended and renamed the Individuals with Disabilities Education Improvement Act[43] (IDEIA). Despite its new name, the IDEIA did not significantly change the IDEA.[44] Regarding LRE and litigation, however, the IDEIA did bring two important changes to the realm of special education.

One important change involves the prevailing party's right to recover attorney fees.[45] Previously, under the IDEA, only parents could recover attorney fees when they prevailed.[46] The IDEIA, however, enables school districts to recover attorney fees when parents bring suit to harass the school district or when the suit is frivolous or unreasonable.[47] Some worry that this change will have a chilling effect on parents who might have legitimate reasons for bringing suit.[48] But this provision may also lead to

42. Pub. L. No. 105-17, § 101 (1997). Some have argued that the wording of the LRE section indicates that "the provision describing LRE begins with 'to the maximum extent appropriate[,]' . . . [so s]ubstance (the IEP) comes before setting (LRE)." Julie F. Mead, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 WEST'S EDUC. L. REP. 511, 517 (1998).

43. *See* Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. § 1415 (Supp. 2005)).

44. *See id.* The IDEIA does amend the Act in a few ways, such as requiring that special education teachers be highly qualified, but these are not relevant to this Comment.

45. *Compare* 20 U.S.C. § 1415(i)(3)(B) (2000), *with* 20 U.S.C. § 1415(i)(3)(B) (Supp. 2005).

46. *See* 20 U.S.C. § 1415(i)(3)(B) (Supp. 2005).

47. *See id.*

48. *See, e.g.*, Eileen M. Blackwood, *Special Education: Will the "Improvements" Decrease Protections for Parents and Students?*, 32 VT. B.J. & L. DIG. 52, 54 (2006).

fewer illegitimate suits, reducing the time and money schools are forced to spend on litigation, even if some legitimate suits might be stayed in the process.

Another important change that the IDEIA brings is some alignment with the No Child Left Behind Act[49] (NCLB). Both acts require schools to fully educate their students with disabilities and hold schools accountable for the students' success.[50] While the IDEA is often interpreted to require consideration of both the social and academic benefits of including students with disabilities in regular classrooms, however, the NCLB focuses strictly on student performance and achievement.[51] Even with more alignment of the two Acts, it will be difficult for schools to comply with both because for some students the goals conflict.

The changes in the IDEA over time have done nothing to address the serious problem schools face trying to accommodate students with conflicting or competing needs. As more students with disabilities are placed in regular classrooms, a teacher's ability to meet the needs of all students may be compromised, and one student's needs may directly interfere with another's. Thus, even while disputes in some areas decrease, the potential for legal and educational conflict concerning incompatible learning environments will likely increase.

B. Explanation of FAPE

With the EHA and IDEA came the requirement that all students receive a free and appropriate public education (FAPE).[52] While seemingly uncontroversial, the FAPE concept has led to thousands of lawsuits over what constitutes "appropriate" and "free."[53]

1. What Must Be Covered to Constitute an Appropriate Education?

There is no way to define "appropriate" both generally and precisely in the educational context, because what is appropriate varies from student to

49. Pub. L. No. 107-110, 115 Stat. 1425 (2002); *see* Weber, *supra* note 20, at 16–17 (noting that both the IDEA and NCLB require that special education teachers be highly qualified). The NCLB also requires that students with disabilities take the same standardized tests as their nondisabled peers, holding schools accountable for educating their disabled students as the IDEIA likewise seeks to do. *Id.* at 19–21.

50. *See id.* at 19–21.

51. *Id.* at 16–21.

52. 20 U.S.C. § 1400.

53. GAO REPORT, *supra* note 5.

student. A student's Individualized Education Program (IEP) is meant to set out a program that, when followed, will provide the child with an appropriate education.[54] Thus, the IEP has become the cornerstone for the education of students with disabilities, as it allows a school to consider each child's unique needs and goals within the educational context.[55] The IEP allows educators and parents to work together to develop a plan aimed at providing the child with a FAPE in the least restrictive environment.[56] Thus, "appropriateness" is determined primarily by those involved in creating the IEP. When they disagree about what is appropriate, however, legal disputes may arise.

When determining whether a child has received a FAPE, courts generally consider whether procedural requirements for the IEP have been met, and if so, they often give deference to the school district.[57] An IEP is found to be in compliance with the IDEA's requirements when the IDEA's procedures have been followed and when the IEP has been designed to provide the child with some educational benefits.[58] Courts generally find that the student has been provided with an appropriate education when the child has been provided with: an IEP that sets forth attainable and reasonable goals with the necessary supplemental aids and services, classroom opportunities commensurate with the IEP, and the inclusion of the child's parents in meetings in which their views were considered in forming the IEP.[59]

2. What Must Be Covered to Constitute a Free Education?

What constitutes a "free" education has been somewhat more easily categorized. For controversies regarding whether a school district must pay for certain services, the overwhelming consensus among courts has been that a service need not be the best available, but rather that a school must provide adequate services reasonably calculated to allow the student to receive meaningful benefits from the educational setting.[60] There have

54. 20 U.S.C. § 1414.
55. *Id.*
56. *Id.*
57. *See, e.g.*, Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 193 (2d Cir. 2005) (finding that because parents had an opportunity to participate in designing the IEP, procedural requirements were not violated). *But see* M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 646 (9th Cir. 2005) (noting that the lack of a regular education teacher on the IEP team was significant and violated the IDEA procedural requirements).
58. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982).
59. *See, e.g.*, *Cerra*, 427 F.3d 186.
60. *See id.*

also been controversies over whether parents may recover tuition costs for placing their children in private or parochial schools.[61] If the child's IEP was substantively flawed, and if the public school district was given the opportunity to accommodate the student before the parents unilaterally placed the student in the private or parochial schools, the district may be held accountable for these costs.[62]

C. The "Least Restrictive Environment Appropriate" Requirement

Much of the litigation involving students with disabilities arises over what the "least restrictive environment" is.[63] Because each student with disabilities is uniquely situated, the least restrictive environment (LRE) has no blanket definition. The law, however, requires that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and . . . 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."[64]

Thus, fundamentally the LRE is meant to be the environment in which a student, with essential supplemental aids and services, can benefit from academic and social opportunities.[65] Because the statute refers to the least restrictive environment "appropriate",[66] however, there is much room for disagreement between parents and educators as to what constitutes the appropriate environment for the child.[67] Although the U.S. Supreme Court in *Board of Education v. Rowley*[68] did not have the LRE issue before it, its determination that a FAPE requires that the IEP be "reasonably calculated to enable the child to receive educational benefits"[69] has sometimes

61. *See, e.g.*, Jacobsen v. District of Columbia Bd. of Educ., 564 F. Supp. 166 (D.D.C. 1983); Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 (E.D. Pa. 1996).

62. *See* 20 U.S.C. § 1415(i)(2)(C)(iii) (Supp. 2005).

63. *See* Newcomer & Zirkel, *supra* note 13, at 478 (stating that the student's placement was at issue in 63 percent of a representative sample of litigated cases between 1975 and 1995).

64. 20 U.S.C. § 1412(a)(5) (quoting from the section headed, "Least Restrictive Environment").

65. *See id.*

66. *Id.* (emphasis added).

67. It is important to note that the appropriateness of the setting selected for the child is judged prospectively, so the setting need not result in the sought-after results in order for the school district to be in compliance with LRE requirements. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 (3d Cir. 1995) (noting that "appropriateness is judged prospectively so that any lack of progress under a particular IEP . . . does not render that IEP inappropriate").

68. 458 U.S. 176 (1982).

69. *Id.* at 207.

been used as a starting point for determining whether a school district has provided the FAPE in the LRE.[70]

The reality is that what parents believe is least restrictive is often different from what educators on the school site level believe is appropriate.[71] There are some who believe the social benefits of inclusion justify all students' inclusion in all classes, regardless of ability or capacity to learn the material.[72] Others believe that full inclusion would interfere with regular classroom activities and would recreate the pre-EHA model of education in which millions of students with disabilities languished in classrooms with programs they could not access.[73] The potential for conflicts between students' needs in a single class, like the debate over placements, will only grow with NCLB's focus on academic outcomes as the number of students qualifying under the IDEA increases.

D. The No Child Left Behind Act's Requirements for *All* Children and for Those With Special Needs Specifically

With the passage of the NCLB in 2001, Congress began to align the requirements of the IDEA with those of the NCLB. The NCLB requires schools to show progress toward meeting state standards for each of its subgroups, and students with disabilities are no exception.[74] This alignment ensures that schools cannot ignore students with disabilities, lest the schools come under corrective sanctions.[75] While the NCLB does not dramatically alter the landscape of special education, it does increase the

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

71. Many of the famous cases in which circuit courts present a test for determining whether a student is being educated in the least restrictive environment originated because the parents wanted their children in less restrictive environments. *See, e.g.*, Beth B. v. Van Clay, 282 F.3d 493 (7th Cir. 2002); Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994); *Daniel R.R.*, 874 F.2d 1036; Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983). However, the majority of cases brought regarding placement involve parents seeking a more restrictive environment for their children with disabilities. Newcomer & Zirkel, *supra* note 13, at 478.

72. *See, e.g.*, JEAN B. CROCKETT & JAMES M. KAUFFMAN, THE LEAST RESTRICTIVE ENVIRONMENT: ITS ORIGINS AND INTERPRETATIONS IN SPECIAL EDUCATION 21 (Lawrence Erlbaum Assocs. 1999); Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 211–12 (2006).

73. *See, e.g.*, Gordon, *supra* note 72, at 212–13.

74. Over 90 percent of students with disabilities identified under the IDEA must take the standardized tests with accommodations, while those whom the school districts find to have the "most significant cognitive disabilities" can take an alternate form of assessment. *U.S. Education Department Allows Alternate Testing of Some Students With Disabilities*, ANDREWS DISABILITY LITIG. REP., Jan. 2004, at 13.

75. *See* 34 C.F.R. § 200.13(c)(1) (2007).

pressure on schools to ensure that each special education student receives whatever he or she needs to succeed and to improve on standards-based standardized tests alongside his or her peers without disabilities.[76] It is a difficult balance required of schools to provide students with disabilities a FAPE in the LRE, but the increased pressure on schools to maximize the potential of every student under the NCLB may tip this balance. If schools are required to ensure that each student progress toward achieving the standards, then the emphasis that some courts have placed on mainstreaming students even when academic benefits are marginal will have to be cast aside in favor of whatever environment will most likely result in an improved, maximized academic product. Not only will schools have to consider where their various students with disabilities will learn best, but they will also have to weigh into their placement decisions "the effect the student with disabilities will have on the rest of the classroom" in selecting a placement, as the progress and success of all students will depend on making the most of every learning environment.

E. Section 504 of the Rehabilitation Act: Increasing the Complexity of Meeting the Needs of All Students in a Single Classroom

In addition to those students who qualify for services under the IDEA, there are many students who qualify for accommodations only under Section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA).[77] A student can qualify for special accommodations under Section 504 when he or she has a disability that creates a "substantial limitation on a major or life activity."[78] A student who qualifies for a Section 504 program can receive specialized services, modifications to the regular education curriculum, or accommodations necessary to provide the student with a FAPE in the LRE (which is generally the regular classroom).[79]

76. The NCLB includes students with disabilities as one of the four disaggregated groups, making the improvement and success of this group paramount to a school's overall progress and success. *See* Perry A. Zirkel, *Initial Implications of the NCLB for Section 504*, 191 WEST'S EDUC. L. REP. 541, 542 (2004) (acknowledging that the pressure on schools to maintain passing scores of the disaggregated group of students with disabilities might lead to schools manipulating data); *see also* Weber, *supra* note 20, at 20–21.

77. *See* 20 U.S.C. § 1401(3)(a) (Supp. 2005).

78. Tom E.C. Smith, *Section 504, the ADA, and Public Schools*, LD ONLINE, 2001, http://www.ldonline.org/article/6108 (indicating that major life activities include, for example, "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

79. *Id.*

All students who qualify under the IDEA are covered by Section 504 and the ADA, but not all students who qualify under Section 504 and the ADA qualify for services under the IDEA.[80] Additionally, parents may find that their children do not qualify under the IDEA because there is not a significant difference in measured ability and performance or because their children's disabilities do not fall into one of the categories recognized by the IDEA.[81] For these groups of parents, Section 504 provides an alternative avenue for their children to receive support.[82]

Although a student who qualifies for an individualized program under Section 504 may not qualify under the IDEA, the student still must have special accommodations in the regular education classroom. Over six and a half million students qualify for some sort of accommodation under the IDEA and Section 504.[83]

The circuits are split on how to determine whether a special education student has an appropriate placement, and so this area of special education law lacks clarity. Without clarity, the LRE debate easily becomes contentious and emotional because of what is at stake, especially for parents. After parents exhaust their administrative remedies, some take their case before a court.[84] In each case, the court must conduct an extensive fact-based inquiry, which imposes a burden on the parties and the courts without clarifying how a school can determine the LRE generally. If special education litigation continues to proliferate as an increasing proportion of students becomes eligible under the law and requires diverse accommodations and services, the LRE determination will have to change to include more of the realities of the classroom and less of what judges sitting far away from those classrooms imagine them to be.

II. THE SPLIT IN CIRCUIT COURTS' TESTS FOR FAPE/LRE

Since 1975, federal law has required schools to provide to each student with a disability a free and appropriate public education in the least

80. *See* 20 U.S.C. § 1401(3)(a) (explaining that only those students whose disabilities necessitate their receiving special education and related services qualify for such under the IDEA).

81. *See* Smith, *supra* note 78.

82. *See id*.

83. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 17 (providing statistics about students with disabilities through school year 2004–2005).

84. *See* GAO REPORT, *supra* note 5, at intro. (noting that there were about three thousand due process hearings per year from 1996 to 2000 regarding placements, any of which could be appealed to district court eventually).

restrictive environment available, and since then courts have interpreted the federal mandate using a variety of tests. Each of the Circuit Courts of Appeals' tests considers a variety of factors in determining whether a given child with disabilities has received a FAPE in the LRE, but the factors applied vary among circuits. Of particular concern to this Comment is the way in which the circuit courts evaluate (or fail to evaluate) the effect that one child with disabilities has on the rest of the class, both in terms of cost and in terms of educational impact. The inconsistent interpretation of what constitutes an LRE has led to unpredictable outcomes in the law and unequal results for various students with disabilities. Additionally, as this Part will explain, though some of the Courts of Appeals have attempted to consider the effects of a child with disabilities on his peers and on the availability of resources for other children with disabilities generally,[85] some do not, and all fail to consider the effects that a given child has on the particular children in his class and school, and they on him.

A. The Supreme Court's FAPE Test

In 1982, the Supreme Court decided *Board of Education v. Rowley*.[86] This case established a two-pronged test to determine whether a school district has complied with the IDEA's FAPE requirements. In order to have provided a child with a FAPE, the district must have (1) complied with procedures set forth in the IDEA and (2) developed an IEP through the Act's procedures that was "reasonably calculated to enable the child to receive educational benefits."[87]

In *Rowley*, the Court evaluated a claim by the parents of Amy, a deaf first-grader who was taking part in a regular classroom for most of the day. The Rowleys claimed that the school was in violation of the IDEA because

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85. For example, the Fifth Circuit's opinion in *Daniel R.R.* states:

> When a parent is examining the educational opportunities available for his handicapped child, he may be expected to focus primarily on his own child's best interest. Likewise, when state and local school officials are examining the alternatives for educating a handicapped child, the child's needs are a principal concern. But other concerns must enter into the school official's calculus. Public education of handicapped children occurs in the public school system, a public institution entrusted with the enormous task of serving a variety of often competing needs. *In the eyes of the school official, each need is equally important and each child is equally deserving of his share of the school's limited resources.*

Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1052 (5th Cir. 1989) (emphasis added).

86. 458 U.S. 176 (1982).

87. *See id.* at 206–07. The first prong—procedural requirements—was met but is not relevant to discuss here. *See id.* at 206–07, 209.

it would not provide their daughter with a sign interpreter during her time in the regular classroom. The school district argued that Amy had been successful in the classroom using a hearing aid and that it had tried having an interpreter work with Amy but had found it to be unnecessary. The Court held that Amy's IEP was satisfactory because it was designed to provide her with an appropriate education and because she was receiving an educational benefit from it; therefore, the school district was providing Amy with an appropriate public education.[88]

This ruling established the test for determining an IEP's adequacy, but it did not set forth a test for determining whether a student is in the least restrictive environment appropriate. Because Amy was in the regular education class and the issue at bar was whether she required more services in that setting, mainstreaming issues were not raised in *Rowley*. In establishing only that an IEP must be "calculated to enable the child to receive education benefits,"[89] *Rowley* left many questions unanswered, some of which have spilled into the LRE debate. Despite the seemingly simple message in *Rowley*, circuits are split on what factors to consider in determining whether an IEP is appropriate, whether the education provided must be only a "floor of opportunity" or something more, and how to determine what the LRE is.[90]

B. The *Roncker* Multifactor Test and Its Kin—Standards for Determining IDEA Compliance and LRE

Several circuits apply a multifactor test in determining whether a student has received a FAPE, including LRE issues. Multifactor tests are not entirely divorced from *Rowley*'s two-pronged analysis, but they do place less emphasis on the procedural requirements of the IDEA as they evaluate the entire educational situation at issue. Unlike the Supreme Court's consideration of FAPE and IDEA compliance, courts applying a multifactor test consider issues such as the cost of various services and the effect that the student with disabilities will have on the regular classroom.[91]

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88. *See id.* at 209–10.

89. *Id.* at 206–07.

90. *See supra* Part II.

91. The issue of the effect of the student with a disability on the regular classroom will be the focus of Part III. Though this topic receives much attention, it has been inadequately addressed by the circuits thus far, leaving schools open to a catch-22 in which they will be unable to adhere to some of the requirements of IDEA as interpreted by the courts without simultaneously violating other requirements. *See generally* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994); Oberti v. Bd. of Educ., 995 F.2d 1204, 1217–18 (3d Cir. 1993); Greer v. Rome

1. The *Roncker* Test for Determining FAPE and LRE Compliance

a. The Sixth Circuit's *Roncker* Test

Demonstrating a preference for the general education setting, the Sixth Circuit Court of Appeals in *Roncker v. Walter*[92] presented six factors that should be considered to determine the appropriate placement for a child: (1) which facility is better (a regular school or a school segregated for special education); (2) whether services could feasibly be provided in a nonsegregated setting; (3) whether the disabled student would benefit from mainstreaming; (4) whether the benefits of mainstreaming are outweighed by the benefits of services that cannot be provided in a nonsegregated setting; (5) the disruptive behavior of the student; and (6) the cost of providing services in the least restrictive environment.[93]

In *Roncker*, the court considered the case of Neill Roncker, a nine-year-old with severe mental retardation, an IQ of less than fifty, and a mental age of two to three.[94] Because of Neill's need for constant supervision to keep him safe, the school district recommended to his parents at the IEP meeting that he be educated at a county school serving only mentally retarded children.[95] Neill's parents disagreed, as Neill would have no contact with his nondisabled peers at this site, and requested a due process hearing.[96] The Sixth Circuit remanded the case for consideration using the six factors outlined above.[97]

b. The Eighth and Fourth Circuits' Adoption of the *Roncker* Test

The Eighth and Fourth Circuit Courts of Appeals have followed the *Roncker* test, as seen in *A.W. v. Northwest R-1 School District*[98] and *DeVries v.*

City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048–50 (5th Cir. 1989); DeVries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (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).

92. 700 F.2d 1058 (6th Cir. 1983).

93. *See id.* at 1063 (noting that "[c]ost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children," but that "[c]ost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children").

94. *See id.* at 1060.

95. *Id.*

96. *Id.* at 1060–61.

97. *See id.* at 1063–64.

98. 813 F.2d 158, 163 (8th Cir. 1987).

Fairfax County School Board,[99] respectively. Each of these circuits considers multiple factors in determining whether a student is appropriately placed and receiving a FAPE. Additionally, both emphasize the academic benefits available to the child in each setting when determining whether the LRE requirement has been violated.[100] Additionally, the Eighth Circuit considers the relative toll on limited resources of providing services and aids in the regular education setting against the cost of doing so in the segregated or more restrictive setting,[101] while the Fourth Circuit considers the potential effects of various placements on a child.[102]

In *A.W.*, the Eighth Circuit determined that placement in a segregated facility for the severely mentally retarded was appropriate for A.W.,[103] an elementary school boy with Down syndrome who functioned "'at or below one-half of the level expected of children of his age'" and who required supervision at all times.[104] The court found that although it might be possible to educate A.W. in the less restrictive environment of the local school where he could interact with nondisabled peers, this was not the right placement when all the factors were considered.[105] Mainly, the court considered the cost of educating A.W. in a regular school where there was no teacher qualified to work with the severely disabled. This scenario would have required an additional teacher to be placed at the local school, which would have negatively affected the education of other disabled students at the segregated facility, as they would have had to have more students per class after the loss of the teacher for A.W.[106] Thus, the cost to educate A.W. in the least restrictive environment was found to be prohibitive because of the effect this disproportionate use of limited resources would have had on other disabled children.[107]

In *DeVries*, the Fourth Circuit applied the *Roncker* test in determining that the placement of a seventeen-year-old autistic student in a vocational

99. 882 F.2d 876, 879 (4th Cir. 1989).

100. These two courts' consideration of whether the placement *violates* the LRE requirement demonstrates some deference to school officials, as opposed to those courts that consider whether the placement *meets* the LRE requirement. While the former assume the school district's choice of placements was reasonable unless proven otherwise, the latter force the school to demonstrate the appropriateness of the placement over other alternatives.

101. *A.W.*, 813 F.2d at 161–63.

102. *DeVries*, 882 F.2d at 878–79.

103. *A.W.*, 813 F.2d at 163–64.

104. *Id.* at 160.

105. *Id.* at 163–64.

106. *Id.* at 161–62.

107. *See id.* at 162–63.

school rather than in the local high school did not violate the LRE requirement.[108] Because the child, Michael, was cognitively and socially far behind his peers, the court determined that he would not have been able to benefit academically or socially from a placement in a regular high school, even with an aide to assist him.[109]

In another important Fourth Circuit case, *Hartmann v. Loudoun County Board of Education*,[110] the court determined that in evaluating whether a student has received a FAPE and in considering factors such as educational and financial cost,[111] the IDEA's mainstreaming provision should be interpreted to be "a presumption, not an inflexible mandate." In *Hartmann*, plaintiff Mark was an autistic second-grader whose behavior in the regular education classroom, even with a one-on-one aide and an individually modified curriculum, included bouts of whining, screeching, biting, taking off his clothes, and throwing himself on the ground. This behavior resulted in his receiving little to no educational benefit from his placement in the regular education setting.[112] The Fourth Circuit admonished the lower court for ignoring how this behavior would affect other students when considering whether the least restrictive environment appropriate was a regular classroom or a more segregated setting.[113]

Thus, the Fourth Circuit has gone further than the Sixth and Eighth Circuits in its balancing of the FAPE and LRE requirements, as it does not find that social benefits alone—such as observing nondisabled peers—would justify placement of students with disabilities in regular classrooms or schools where they will receive little to no academic benefit.[114] The Fourth Circuit

108. *See DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879–80 (4th Cir. 1989).

109. *See id.*

110. 118 F.3d 996 (4th Cir. 1997).

111. *Id.* at 1001. *See also* Cheltenham Sch. Dist. v. Joel P., 949 F. Supp. 346, 352 (E.D. Pa. 1996) (paraphrasing the court's reasoning in *Barnett v. Fairfax County School Board*, 927 F.2d 146, 153–54 (4th Cir. 1991)).

112. 118 F.3d at 999–1000.

113. *See id.* at 1004 (noting that "[t]he district court also gave little or no weight to the disruptive effects of Mark's behavior in the classroom, stating that '[g]iven the strong presumption for inclusion under the IDEA, disruptive behavior should not be a significant factor in determining the appropriate educational placement for a disabled child.' This statement simply ignores *DeVries*, where we specifically held that mainstreaming is inappropriate when 'the handicapped child is a disruptive force in the non-segregated setting'" (citing to *DeVries*, 882 F.2d at 879)).

114. *See Hartmann*, 118 F.3d at 1002 ("Any such [social] benefits, however, cannot outweigh his failure to progress academically in the regular classroom. The mainstreaming provision represents recognition of the value of having disabled children interact with non-handicapped students. The fact that the provision only creates a presumption, however, reflects a congressional judgment that receipt of such social benefits is ultimately a goal subordinate to the requirement that disabled

has construed the LRE requirement to mean that though students should be placed with nondisabled peers "to the maximum extent appropriate,"[115] the "appropriate" modifier allows school districts to "take into account . . . the impact a proposed placement would have on limited educational and financial resources"[116] and to consider whether "'the handicapped child is a disruptive force in the non-segregated setting.'"[117]

Just as the Sixth Circuit begins an important inquiry when it considers the effect of the student with disabilities on the regular classroom, the Fourth and Eighth Circuits also weigh the student's effect on the rest of the class. However, like the Sixth Circuit, this inquiry stops short of what would make it a truly useful and complete analysis. In considering only the costs and effects of a single student with disabilities on the class as a whole, but not the collective effect of multiple students with disabilities on the class and on its individual members, the courts may be requiring something of schools that forces them to violate the IDEA in other ways.[118] These courts ignore the potential problem of requiring schools to educate together in the regular class students whose special needs are incompatible or whose needs together greatly interfere with the learning environment for everyone.

2. The *Daniel R.R.* Two-Pronged Test for Determining FAPE and LRE Compliance

a. The Fifth Circuit's *Daniel R.R.* Balancing Test

Unlike the *Roncker* test, under which courts consider the cost of educating a student with disabilities in the least restrictive environment, the *Daniel R.R.* test does not consider cost as a factor in placement determination. While the *Roncker* test considers whether the benefits of mainstreaming are outweighed by the benefits of services that cannot be provided in a nonsegregated setting, the *Daniel R.R.* test instead considers whether a child would receive even a minimal educational benefit from the regular

children receive educational benefit."); *DeVries*, 882 F.2d at 879–80 (finding that "'Michael would simply be monitoring classes' with nonhandicapped students" and would be unable to effectively "bridge the 'disparity in cognitive levels' between him and the other students," so that such a placement would not be the appropriate one (quoting the lower court)).

115. *Hartmann*, 118 F.3d at 1001.

116. *Joel P.*, 949 F. Supp. at 352 (paraphrasing the court's reasoning in *Barnett*, 927 F.2d at 153–54).

117. *Hartmann*, 118 F.3d at 1005 (citing to *DeVries*, 882 F.2d at 879).

118. *See infra* Part III.

classroom, thus indicating a heightened preference for including children with disabilities.

In *Daniel R.R. v. State Board of Education*,[119] the Fifth Circuit Court of Appeals laid out a two-pronged test[120] that others have followed in determining whether a student has received a FAPE in light of LRE requirements.[121] The test asks two major questions: (1) Can "education in the regular classroom, with the use of supplemental aids and services . . . be achieved satisfactorily?"; and (2) "If it cannot and the school intends to provide special education or to remove the child from regular education," has the school "mainstreamed the child to the maximum extent appropriate"?[122] In determining the answer to the first question, the court considers four factors: (1) whether the school has taken steps to accommodate the disabled student in a regular classroom; (2) if so, whether those efforts were sufficient; (3) whether the child would receive an educational benefit from the regular classroom (even a minimal educational benefit, such as benefiting from language models of nondisabled peers); and (4) what effect the disabled student's presence would have on the regular classroom environment (and therefore on the education that other students would be receiving).[123] Thus, the Fifth Circuit interprets the IDEA to favor inclusion whenever possible, but it does not go so far as to make inclusion a requirement.[124] Requiring inclusion in all cases would, in the court's view, violate the requirement that educational decisions be individually tailored to the unique needs of the child.[125] Some have interpreted this case to indicate that "'when the provisions of FAPE and mainstreaming are in conflict, the mainstreaming mandate becomes secondary to the appropriate education mandate.'"[126]

In *Daniel R.R.*, Daniel was a six-year-old boy with Down syndrome and speech impairments. After Daniel enrolled part-time in a regular education kindergarten class, his teacher found that the placement was not working,

119. 874 F.2d 1036 (5th Cir. 1989).
120. *See id.* at 1048.
121. *See, e.g.*, Greer v. Rome City Sch. Dist., 950 F.2d 688, 695–96 (11th Cir. 1991); Oberti v. Bd. of Educ., 995 F.2d 1204, 1220 (3d Cir. 1993).
122. *Daniel R.R.*, 874 F.2d at 1048.
123. *See id.* at 1048–50.
124. *See id.* at 1045.
125. *See id.* at 1044.
126. Michael Hazelkorn, *Reasonable v. Reasonableness: The* Littlegeorge *Standard*, 182 WEST'S EDUC. L. REP. 655, 662 (2004) (citing to Mitchell L. Yell, *Least Restrictive Environment, Inclusion, and Students With Disabilities: A Legal Analysis*, 28 J. SPECIAL EDUC. 389, 393 (1995)).

as he required constant one-on-one attention and was not learning the skills being taught.[127] Additionally, modifications to the curriculum to allow Daniel to benefit from the instruction would have required the teacher "to modify the curriculum almost beyond recognition," as Daniel's needs required the curriculum to be downgraded 90 to 100 percent.[128] Daniel's parents felt that his being mainstreamed only during lunch violated the LRE requirement, so they requested a due process hearing, the result of which they appealed twice.[129] The court found that the district had not violated the LRE requirement because the school had attempted to modify and supplement the curriculum to meet Daniel's needs and had considered a continuum of placements before selecting the one in which it believed Daniel would receive the most educational benefit.[130]

While the Fifth Circuit considers even nonacademic benefits to signal that a child is receiving a FAPE in the LRE, this factor can conflict with the fourth factor—the effect of the disabled child on the education of others. Clearly, if a student is not able to benefit from the academic material presented, he or she may require more teacher attention and classroom alterations, which could affect other students' education. However, in the case of an average student with a disability, it would be unlikely for a court to find that the fourth factor (effect of the disabled student on the classroom) weighed so heavily against the student as to result in a finding that a more restrictive setting was appropriate.[131]

The Fifth Circuit's analysis falls short, however, because when it considers the effect of the one child before it, it regards the class not as a complex group of individuals, many of whom have their own special needs, but rather as a generic class. If what Mitchell Yell proposes is accurate—that

127. 874 F.2d at 1039.

128. *Id.* Additionally, the court noted that it was not that Daniel's behavior was disruptive in the traditional sense, but rather that the hearing officer had found that Daniel was "disruptive by so absorbing the efforts and energy of the staff as to impair the quality of the entire program for the other children." *Id.* at 1043.

129. *Id.* at 1039–40.

130. *See id.* at 1043.

131. Because the majority of students with disabilities have learning disabilities that would likely require only minor alterations in teaching style or small amounts of additional teacher attention, the presence of one of these students would not likely affect the educational experience of others in any significant way. John Mazzeo et al., U.S. Dep't of Educ., Increasing the Participation of Special Needs Students in NAEP: A Report on 1996 NAEP Research Activities (Feb. 2000), *available at* http://nces.ed.gov/nationsreportcard/pubs/main1996/200473.asp (noting that "learning disability was by far the most frequently reported category for students with disabilities, with close to three out of four students so identified").

in the Fifth Circuit, when a child's being mainstreamed and receiving an appropriate education are in conflict, educational mainstreaming is secondary[132]—then the more students with disabilities who are together in a regular classroom, the more potential there will be for some such students to have their originally appropriate LRE replaced by a more restrictive placement in order for them to receive educational benefits. Because the collective demand of students with disabilities on a teacher's time and attention will limit what each will receive, it may not always be possible to accommodate students requiring more attention and time in the regular classroom.

b. The Eleventh Circuit's Application of the *Daniel R.R.* Test

The Eleventh Circuit Court of Appeals has adopted the *Daniel R.R.* test.[133] In *Greer v. Rome City School District*,[134] this court evaluated the appropriateness of the placement of a ten-year-old girl with Down syndrome.[135] In considering the effects of the girl's speech and learning disabilities on the classroom, the court determined that "[a] handicapped child who merely requires more teacher attention than most other children is not likely to be so disruptive as to significantly impair the education of other children."[136]

To determine the appropriateness of the child's placement, the court considered three factors, though these did "not constitute an exhaustive list."[137] First, it compared the benefits available to the child in the regular classroom versus in the special education classroom.[138] Then it considered "what effect the presence of the handicapped child in a regular classroom would have on the education of other children in that classroom."[139] In evaluating this factor, the court determined that if a "child [were] so disruptive" as to "significantly impair" other children's educations, mainstreaming might not be appropriate, but that this would not be true if a child merely

132. *See* Yell, *supra* note 126, at 393.
133. *See* Greer v. Rome City Sch. Dist., 950 F. 2d 688, 696 (11th Cir. 1991).
134. 950 F.2d 688.
135. *See id.* at 690.
136. *Id.* at 697.
137. *Id.*
138. *See id.*
139. *Id.* (noting that "34 C.F.R. § 300.552 Comment (quoting 34 C.F.R. part 104–Appendix, Paragraph 24)" states, "[w]here a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment").

required more teacher attention than others.[140] Finally, the court considered "the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the handicapped child in a regular classroom."[141] In evaluating whether the cost of educating the student in the regular classroom would be determinative, the court distinguished between the slightly higher costs of educating a student in the regular setting and the possibility that such a setting would cost so much as to "significantly impact upon the education of other children in the district."[142]

For purposes of determining placement, the Eleventh Circuit, like the Fifth Circuit, considers the effect the child with disabilities will have on the classroom. In *Greer*, the court held that because the child stopped being "unusually disruptive in the regular classroom,"[143] her mainstreaming was not inappropriate. While this analysis may have upheld the child's rights under the LRE provision, it, arguably, did not go far enough as it failed to consider the individual needs of other students with and without disabilities in the classroom. Again, the presence of multiple students with disabilities who "merely require[ ] more teacher attention than most other[s]"[144] might, in fact, impair the education not only of other nondisabled children but also of other children with disabilities. The court's failure to recognize that a requirement of mere additional teacher attention could, in the aggregate, have a great impact on other students demonstrates the trouble with the courts' individual-versus-homogenous-class approach.

c. The Third Circuit's Application of the *Daniel R.R.* Test

The Third Circuit Court of Appeals adopted the *Daniel R.R.* test in *Oberti v. Board of Education*.[145] The Third Circuit considers the factors required by the *Daniel R.R.* test: (1) whether the state has taken steps to

140. *Id.* at 697. As many students' disabilities require only moderate amounts of extra time and attention from the teacher, in most cases the cost factor will not be determinative.

141. *Id.*

142. *Id.* (noting that while "a school district may [not] decline to educate a handicapped child in a regular classroom because the cost of doing so, with the appropriate supplemental aids and services, would be incrementally more expensive than educating the child in a self-contained special education classroom[,] . . . a school district cannot be required to provide a handicapped child with his or her own full-time teacher, even if this would permit the child to be satisfactorily educated in the regular classroom. The school district must balance the needs of each handicapped child against the needs of other children in the district").

143. *Id.* at 698.

144. *Id.* at 697.

145. 995 F.2d 1204, 1215 (3d Cir. 1993).

accommodate the disabled student in the regular classroom; (2) the possible benefits of a regular classroom with services and aids versus the benefits of the special education classroom; and (3) the possible negative effects of the disabled student on other students.[146] Unlike the Fifth Circuit, however, the Third Circuit also considers the reciprocal benefits that can flow between students with disabilities and students without disabilities.[147]

In *Oberti*, the child, Rafael, was an eight-year-old boy with Down syndrome.[148] Rafael had been placed in a special education class after being violent and disruptive and having toilet accidents in the regular education kindergarten class.[149] Rafael's parents requested that their son's placement be reevaluated (so that he would be included in a regular education class), both immediately after the placement decision was made and again at the time of the case when his behavior had improved.[150]

Because the school failed to consider placement options other than the regular classroom without aids and services or a special education classroom, the court held that the school had failed to meet the first prong of the *Daniel R.R.* test by not making an effort to include Rafael in the regular classroom using supplemental aids and services.[151] The school also failed under the second prong of the test, as the evidence supported the claim that Rafael would benefit socially and academically from being in a regular classroom and his nondisabled peers would benefit from his presence.[152] Although the court found that the curriculum would require modification, this did not outweigh the benefits that Rafael would receive from the regular classroom.[153] Finally, the court found that although Rafael had had behavior problems in the past, were he to be provided adequate supplemental aids and services, he might not disrupt the class such that exclusion from it would be appropriate.[154] By considering the potential reciprocal benefits of inclusion for the child with a disability and for other students, and by emphasizing the importance of the use (or at least consideration) of supplemental aids and services

146. *See id.* at 1217–18.
147. *See id.* at 1217 n.24.
148. *Id.* at 1207.
149. *Id.* at 1208.
150. *Id.* at 1208–09.
151. *See id.* at 1220.
152. *Id.* at 1221–22.
153. *See id.* at 1222.
154. *See id.* at 1222–23. The Third Circuit's test for whether a child's behavior qualifies as disruptive enough to justify exclusion is "whether the child's disabilities will demand so much of the teacher's attention that the teacher will be required to ignore the other students." *Id.* at 1217.

to allow the child to participate in the regular classroom, the Third Circuit's application of the Fifth Circuit's *Daniel R.R.* test reduces the likelihood that placement of a child in a special education class will be found appropriate. Thus, in the Third Circuit there is more potential for a student with greater needs to be placed in the regular classroom, and therefore for multiple students with significant needs to end up in the regular classroom together. The result might be increasing conflicts between students' needs, inability of the teacher to devote the necessary time to each student, or a class where multiple lessons would have to be conducted simultaneously.

3. The Ninth Circuit's *Rachel H.* Balancing Test

Drawing on other circuits' analyses of special education cases, the Ninth Circuit Court of Appeals has established its own test for determining if a child has received a FAPE under the IDEA. This test combines aspects of the *Roncker* test and the *Daniel R.R.* test, resulting in a balancing test. In the case of *Sacramento City Unified School District, Board of Education v. Rachel H.*,[155] the Ninth Circuit determined that to evaluate a child's placement under FAPE, a court should consider: (1) the benefits to the child in the regular classroom as well as in the special education classroom; (2) the nonacademic benefits of interaction with nondisabled peers; (3) the impact of the disabled student on the teacher and on other students in the regular classroom; and (4) the cost of supplementary aids and services required for mainstreaming.[156]

Rachel H. was an eleven-year-old girl with mental retardation and an IQ of 44 whose parents wanted her in regular classrooms full-time, rather than only for nonacademic classes, as proposed by the district.[157] The Ninth Circuit upheld the findings of the district court that Rachel had received considerable benefits from inclusion and that inclusion could be continued with a modified curriculum and the help of a part-time aide.[158] Additionally, the district court found that Rachel had benefited in nonacademic ways from her inclusion and that she was not disruptive to the class (either through her

155. 14 F.3d 1398 (9th Cir. 1994).
156. *See id.* at 1400–04.
157. *Id.* at 1400.
158. *See id.* at 1401.

own behavior or through needing excessive attention from the teacher) nor was her inclusion more expensive than her placement in a specialized class.[159]

In considering the first factor in the balancing test, the Ninth Circuit determined that the standard for determining LRE was not the *Rowley* requirement that the child's placement be "reasonably calculated to provide the child with educational benefits."[160] Rather, the Ninth Circuit looked to *Taylor v. Honig*,[161] where it found that under the IDEA students are entitled to special education and related services and that related services are those "as may be required to assist a handicapped child to benefit from special education."[162] Extrapolating from *Taylor*'s findings, the Ninth Circuit reasoned that students must actually *receive* a benefit in order for the FAPE requirement to be met.[163] The Ninth Circuit's extension of *Rowley*'s requirements forces schools not only to set forth a plan that theoretically would help the child meet his or her goals, but also to take necessary measures for the child to "progress toward the goals set forth in [his or] her IEP."[164] Because a school can only determine whether a child had progressed toward the goals set forth in his or her IEP over time, under this standard a student's progress, rather than the IEP itself, will be afforded great weight in determining whether a child has received a FAPE. Thus, under the Ninth Circuit's test, mere adherence to the IDEA's procedural requirements as interpreted in *Rowley*[165] would be insufficient.

The Ninth Circuit's second factor—the nonacademic benefits of interaction with nondisabled peers—is controversial, as there is debate about the importance and the appropriateness of weighing nonacademic benefits in considering the appropriate and least restrictive environment for

159. *Id.* at 1401–02 (noting that Rachel only required a part-time aide to participate without detracting from the learning going on).

160. County of San Diego v. Cal. Special Educ. Hearing Office, 93 F.3d 1458, 1467 (9th Cir. 1996).

161. 910 F.2d 627 (9th Cir. 1990).

162. *Id.* at 629.

163. *See County of San Diego*, 93 F.3d at 1467. Additionally, if the court finds that, in considering the first factor, the child would receive *no* educational benefit from a given placement, then the three other factors need not be considered, as "'the IDEA is primarily concerned with the long term educational welfare of disabled students.'" Katherine G. v. Kentfield Sch. Dist., 261 F. Supp. 2d 1159, 1173–74 (N.D. Cal. 2003) (quoting Poolaw v. Bishop, 67 F.3d 830, 836 (9th Cir. 1995)).

164. *County of San Diego*, 93 F.3d at 1467.

165. Though this case provided the analysis a court would need to evaluate whether a child received a FAPE generally, it did not address the LRE requirement, as there was no dispute over placement. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982).

a student.[166] Advocates of including disabled students with their nondisabled peers in order that they gain nonacademic benefits present familiar arguments such as "separate is not equal" and a primary purpose of schools is to socialize children to function in the real world, with the disabled and nondisabled alike.[167] The latter argument is supported by the IDEA's requirement that schools include in students' IEPs a transition plan for students exiting high school.[168] Opponents of giving weight to the nonacademic benefits of inclusion argue that the primary purpose of public education is to teach students prescribed material and that one of the primary goals of the IDEA was to ensure that students with disabilities were no longer languishing in regular classrooms where they received no educational benefit.[169] Thus, putting students with disabilities once again where there is no academic benefit denies them the opportunity to have academic material presented at an appropriate pace or in an appropriate manner.[170] Despite the heated, ongoing debate over whether to weigh nonacademic benefits in the consideration of whether a school has met the LRE requirement, the Ninth Circuit continues to do so.[171] When students are placed in a regular classroom despite their inability to access the academic material presented, the result will likely be conflicting learning goals among the students with disabilities in that class and between the disabled and nondisabled students in the class.

The third factor in the balancing test—the impact of the disabled student on the teacher and on other students in the regular classroom—suggests that courts might seek to avoid the problem of conflicting learning goals and needs between various students' IEPs and 504s. However, despite the fact that courts take into account the effect the student will have on the classroom and on the teacher (in terms of disruptiveness and required teacher attention, for example),[172] courts do not look at the students in the class as individuals with their own particular needs. Rather, to determine

166. *See* CROCKETT & KAUFFMAN, *supra* note 72, at 21.
167. *See, e.g.*, *id.* at 21.
168. *See* 20 U.S.C. § 1414(d)(1)(A) (Supp. 2005).
169. *See, e.g.*, Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion"*, 72 WASH. L. REV. 775, 820–24 (1997).
170. *See, e.g.*, DeVries v. Fairfax County Sch. Bd., 882 F.2d 876, 879–80 (4th Cir. 1989); Dupre, *supra* note 169, at 824. *But see* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1046 (5th Cir. 1989).
171. *See, e.g.*, Sacramento Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994).
172. *See, e.g.*, *id.*

whether a student will monopolize the teacher's time or be disruptive to the class, a court in the Ninth Circuit need only consider that student. Like the Fifth and Eleventh Circuits, the Ninth Circuit does not consider whether the class includes other students with disabilities who have particular needs and require additional teacher attention and time. Thus, it is possible that students whose needs conflict or who collectively require more time and attention than the teacher can give will be placed in the same regular classroom, to their detriment.

III. THE PERIL OF NOT CONSIDERING STUDENTS' NEEDS IN THE AGGREGATE

Where once there were too few students with disabilities being included in regular classrooms across the nation,[173] today there are many students with various disabilities in every school, and, for at least part of the day,[174] most regular education classrooms have students with disabilities in them.[175] This reality has intensified the difficulty of balancing the competing mandates of the IDEA; as the Fifth Circuit Court of Appeals noted, it is the "task [of courts and schools] to balance competing requirements of the EHA's dual mandate: a free appropriate public education that is provided, to the maximum extent appropriate, in the regular education classroom."[176] As more disabilities are recognized under the IDEA, and with growing pressure on schools to identify students with disabilities, the number of students with

173. Immediately after the EAHCA was implemented in 1975, there were about 3.7 million students (or school-age children) with disabilities being served under the Act, while today there are over 6 million. Seligmann, *supra* note 17, at 765.

174. *See, e.g.*, Burden, *supra* note 3 ("Nationwide, three of every four students with disabilities are in a general-education classroom part or all of the day, according to [the] National Education Association.").

175. Even as early as 1997, scholars noted that "every teacher [was] likely to have at least one learning disabled student during each class period." Rosemarie Kolstad, Mary M. Wilkinson & L.D. Briggs, *Inclusion Programs for Learning Disabled Students in Middle Schools*, 117 EDUC. 419, 421 (1997). This number does not reflect the inclusion or exclusion of the 50 percent of students with disabilities who were not learning disabled. "As of 2000–2001 . . . 47 percent of students with disabilities spent at least 80 percent of their school day in the general-education classroom, up from 31 percent in 1988–1989." Ann Christy Dybvik, *Autism and the Inclusion Mandate: What Happens When Children With Severe Disabilities Like Autism Are Taught in Regular Classrooms? Daniel Knows*, EDUC. NEXT, Winter 2004, at 43, 44. Currently 50 percent of *all* students with disabilities spend 80 percent or more of the school day in regular classrooms. All Things Considered: *Inclusion the Latest Trend in Educating Disabled*, (NPR radio broadcast Nov. 19, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=16435563&ft=1&f=1007.

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

disabilities has grown significantly since the inception of the EAHCA,[177] as evidenced by the 30 percent increase in the number of students served under the IDEA.[178] Currently, about 13 percent of students (or well over six million of America's nearly fifty million students) qualify as having a disability under the IDEA.[179] The possible explanations for this trend include the IDEA's recognition of more disabilities[180] and schools' misidentification of certain groups of students as disabled.[181] Whatever the cause, the number of students diagnosed with learning disabilities has grown over the past thirty years, faster than the population growth

177. Kelly, *supra* note 22, at 26–27 n.23. Around 50 percent of students with disabilities have a specific learning disability, 19 percent have speech or language impairments, 10 percent have some form of mental retardation, and 8 percent are emotionally disturbed. *Id.* at 27.

178. Jameson & Huefner, *supra* note 1, at 29.

179. Seligmann, *supra* note 17, at 760; *see also* Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540 (Aug. 14, 2006) (to be codified at 34 C.F.R. pts. 300 & 301).

180. Increases in the number of students with autism, attention deficit disorder (ADD), and attention deficit hyperactivity disorder (ADHD)—all disabilities under the IDEA—have contributed to overall growth in the number of students qualifying for IDEA services. *See* Nat'l Ctr. for Educ. Statistics, Fast Facts (2001), http://nces.ed.gov/fastfacts/display.asp?id=64 (last visited Oct. 17, 2007) (providing statistics about students with disabilities through school year 2003–2004). *See generally* Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1149 (June 2007).

181. *See* 20 U.S.C. § 1400(c)(10)–(14) (Supp. 2005). The challenge of identifying and appropriately diagnosing students with disabilities (especially minority students) is still a problem today. *See* Herr, *supra* note 35, at 345–47. Minority students continue to be overrepresented in special education numbers even decades after courts first recognized the use of biased testing for disability determinations. *See id.* at 346–47; *see, e.g.*, Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (describing the biased and inappropriate nature of the IQ tests used to identify students as having disabilities and the resulting overidentification of African American students as disabled). For example, Congress found that in the 1998–1999 school year, African American students constituted around 15 percent of the school-aged population but accounted for over 20 percent of students with disabilities. *See* 20 U.S.C. § 1400(c)(12)–(13). Similarly, students with limited English proficiency are often mislabeled as having disabilities. *See id.* § 1400(c)(10)–(13). With a steadily increasing number of students with limited English proficiency and the difficulty of assessing their abilities due to language barriers, identifying students with disabilities can be a difficult task. *See id.* § 1400(c)(10)–(14). As a result, many students who are not proficient in English or who are minorities are incorrectly identified as having a disability and are inappropriately placed in special education or are overlooked when they do have a disability. *See id.* § 1400(c)(10)–(14); Herr, *supra* note 35, at 346–47. On the other end of the spectrum is the overrepresentation of upper-middle-class students in special education. Because of the benefits that stem from the IDEA, such as individualized attention, supplementary aids and services, and accommodations and modifications to the curriculum, many parents seek to have their children found eligible for such benefits. Wade F. Horn & Douglas Tynan, *Revamping Special Education*, PUB. INT., Summer 2001, at 36. Thus, parents who understand how the system works end up seeking special education diagnoses for their underperforming children. *Id.*

rate.[182] Many students with disabilities are likely benefiting from inclusion and mainstreaming, but when there are several students with disabilities in a single classroom or students with conflicting needs in a single classroom, the potential for impaired learning situations and increased grievances is great. Students with disabilities may again languish in regular classrooms without the help they need (as they did before the EHA), as more students in one classroom will have conflicting and competing IEPs and 504s, making it impossible to appropriately modify the curriculum to meet all needs.

Moreover, with the increased accounting of academic outcomes (including the requirement that students with disabilities show significant academic advancements), it may no longer be sufficient to place students with disabilities in a socially appropriate but academically marginal setting. As a result, those evaluating a child's placement and the potential benefits available in the regular classroom must be able to evaluate the unique situation presented by that class's student makeup in a detailed and specific manner. Additionally, there is a great danger that regular education students will also have their education compromised by the overwhelming collective demands of students whose educational needs require more attention. In order to better meet the needs of all students, with and without disabilities,[183] Congress must reevaluate and clarify its conflicting educational mandates for students with disabilities.

182. *See* Nat'l Ctr. for Educ. Statistics, *supra* note 180. An increased diagnosis of disabilities does not necessarily mean that there are more students who have disabilities than existed before, but rather only proves that more students' special needs are being recognized. The importance of the rising numbers, through increasing diagnosis or otherwise, however, is that students with recognized, diagnosed disabilities have a legal right to special programs, services, and accommodations that they did not have before diagnosis. So, while the challenges in dealing with such students might not differ before and after diagnosis, what a teacher will be legally required to do to accommodate the child will likely be different and might conflict with the way in which she runs her classroom and accommodates other students, with or without disabilities.

183. "In a survey sponsored by the American Federation of Teachers (AFT), 60 percent of the teachers surveyed said they could not devote enough time to special education students. Forty-seven percent said they couldn't pay enough attention to other students." Constitutional Rights Foundation, Including the Disabled Student, http://www.crf-usa.org/brown50th/disabeled_students.htm (last visited Dec. 2, 2007).

A. When Parents and Schools Disagree: The Lengthy and Costly Dispute Resolution Process

There are four main reasons that disputes arise in the area of special education law:

> "(1) identifications, that is, whether children [are] eligible for IDEA services and how their eligibility determinations [are] made; (2) the types of special education and related services, if any, they need[ ]; (3) whether schools carr[y] out the education programs as written; and (4) whether schools [can] provide an appropriate educational environment for certain students."[184]

Disputes add to one of the realities of the public school system: chronic budget difficulties. In the arena of special education, the IDEA has long been an underfunded[185] and costly mandate.[186] Because state and local educational bodies currently receive funding on the basis of estimated population[187] rather

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184. GAO REPORT, *supra* note 5, at 10 (basing findings on four states surveyed).

185. *See* Seligmann, *supra* note 17, at 783–84 (citing the findings of Thomas B. Parrish & Jean Wolman, *Trends and New Developments in Special Education Funding: What the States Report*, *in* FUNDING SPECIAL EDUCATION 215 (Thomas B. Parrish et al. eds., 1999)). Federal funding for special education under the IDEA in the 2001–2002 school year was about $8 billion, and state funding for special education under the IDEA in the same year was about $48 billion. GAO REPORT, *supra* note 5, at 1. Far from funding its intended 40 percent of the cost of special education, the federal government provides an average of just over 12 percent of per-disabled-pupil expenditures; the effect this has in various states is great, as federal funding can range from 3 to 65 percent of funds spent by states on special education. *Id.*; Seligmann, *supra* note 17, at 783–84 (citing the findings of Parrish & Wolman, *supra*, at 215). Because of this insufficient federal contribution to special education, some school districts cut programs benefiting all students in order to fund federally mandated special education. *See id.* For example, despite the fact that the federal government contributes to the cost of special education and related services, and despite the fact that special education students constitute only 13 percent of all students, special education costs required nearly 25 percent of Boston's general funds for education. Susan Milligan, *Jeffords' Special-Ed Plan Revived: As Power Shifts, Democrats Press for Full Funding*, BOSTON GLOBE, June 4, 2001, at A1. Although some courts allow some consideration of cost in determining what an appropriate placement is for children under the IDEA's LRE requirement, even those courts that acknowledge the limited resources of the public school system do not allow cost to be a primary consideration. *See supra* Part II.

186. There are many costs associated with special education and the IDEA's requirements, some of which are less obvious than others. For example, IEP meetings, which occur at least annually for each student with disabilities, require preparation and attendance by both special educators and regular classroom teachers. 20 U.S.C. § 1414. When disputes arise, the costs associated with preparing for and going to trial are significant, from expensive expert and attorney fees to the educator and administrator time spent in preparation for trial; even before a dispute goes to trial, it will have cost the school a large amount of time and money.

187. Herr, *supra* note 35, at 382.

than the number of students with disabilities or the expense of serving the students they have, state and local educational bodies end up footing most of the bill for educating students with disabilities.[188] The increase in students qualifying for special education and related services will not, however, lead to increased funding. Where previously there was an incentive for schools to identify students with disabilities in order to receive additional per-pupil funding, the current funding scheme does not create a financial incentive for schools to identify students with disabilities, although the threat of costly litigation stemming from neglected identification of students with disabilities could offset this.[189]

The monetary and emotional cost to parents and school districts can be great when the parties disagree about what services a child should receive and how and where those services should be provided.[190] Thus, the majority of students with disabilities and their parents never file complaints or request due process hearings or mediation.[191] Additionally, many cases are never

188. Seligmann, *supra* note 17, at 783–84. Under the current scheme, if a state or local educational body becomes known for better serving particular students with disabilities, it may become a magnet for such students and their families. Mooney, *supra* note 13 (describing New Jersey's placement of autistic students in specialized programs leading to a migration of families with autistic children to these areas of New Jersey); *see also* Weber, *supra* note 20, at 25 (noting that districts with private schools that are attractive for students with disabilities end up with less funding per disabled pupil than those that do not have such schools).

189. The estimated cost to school districts of resolving conflicts in the 1999–2000 school year, for example, was $90 million. GAO REPORT, *supra* note 5, at 1 (citing to the findings of the Special Education Expenditure Project).

190. *Id.* at 8.

191. More mediation sessions were requested than due process hearings in the 1999–2000 school year, but only 13 percent of school districts surveyed reported even having a mediation case during that year. *Id.* at 15. The number of formal disputes is fairly low, with "[a]bout 5 due process hearings . . . per 10,000 students with disabilities," "no more than an estimated 7 mediations per 10,000 students and about 10 state complaints per 10,000 students" in 2000. *Id.* at intro. Currently, about one disabled child out of every 1,000 nationwide requests a due process hearing under the IDEA. *See* Seligmann, *supra* note 17, at 782 (citing Summary of Potential Benefits and Costs, Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,656, 12,660–61 (1999)). Although the number of due process hearings being requested has increased, the number of cases going through the due process hearing process has declined. GAO REPORT, *supra* note 5, at intro. (indicating that the number of due process hearings requested went up from 7,532 in 1996 to 11,068 in 2000, but that the number of due process hearings carried out went down from 3,555 in 1996 to 3,020 in 2000); s*ee also* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989) (noting that "[t]he Supreme Court has observed that administrative and judicial review of an IEP is 'ponderous' and usually will not be complete until a year after the IEP has expired" (quoting Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 370 (1985))); Bd. of Educ. v. Rowley, 458 U.S. 176, 186 n.9 (1982) ("[J]udicial and administrative review of an IEP invariably takes more than nine months[.]"); Candace Cortiella, *IDEA 2004 Close Up: Resolving Disagreements Between Parents and Schools*, SCHWABLEARNING.ORG, Feb. 9, 2006, http://www.schwablearning.org/articles.asp?r=1092 (noting

litigated, but rather parents and schools come to mutually agreeable terms through mediation.[192] However, with about 6.8 million students qualifying as disabled,[193] if even a small percentage of disputes requires one of these three forms of resolution, the costs can add up.

There are four primary ways in which parents can air their dissatisfaction with their child's IEP or with how it is being carried out. The approach taken by most parents is to discuss their concerns with school site personnel.[194] As many parents are satisfied with the way the schools are carrying out their children's IEPs,[195] this informal type of complaint resolution is clearly working for most. When this approach fails, parents may file a grievance with the state if they believe their local educational agency is not complying with the procedural safeguards or substantive requirements of their child's IEP.[196] If, on the other hand, parents are denied some aid, service, or

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that "[i]ncreases in the number of due process hearings . . . formed the rationale for the provision of additional, less formal avenues for dispute resolution included in IDEA 2004"). Because mediation is a legislative preference, is less contentious, and is a more economical choice for parents and schools, its increased availability may be a reason that many cases never reach a due process hearing. *See* 34 C.F.R. § 300.506 (2006) (mandating that states offer voluntary mediation as an option to aggrieved parties seeking due process hearings). Congress has since required that states offer mediation even if neither party is seeking a due process hearing. *See id.* § 300.152(a)(3)(ii). As for cost effectiveness, statistics for one state indicate that mediation is far more economical than due process hearings: The GAO reported that "the Texas [State Education Agency] estimated that over the past decade it had saved about $50 million in attorney fees and related due process hearing expenses by using mediation rather than due process hearings." GAO REPORT, *supra* note 5, at 18. The number of due process hearings is relatively low, which may reflect parties' efforts to avoid the cost and contentiousness of such hearings. Thousands of cases do get to the hearing stage every year, however, and these hearings can be appealed. *See id.* at intro.; *see also id.* at 1 n.2 (noting that in the 1998–1999 school year, 301 (of about 3,315) due process rulings were appealed, bringing about a civil action).

192. *See* GAO REPORT, *supra* note 5, at 15. Congress sought to decrease the amount of litigation surrounding the IDEA, as evidenced by its promotion of mediation in the 2004 reauthorization. *See* Pub. L. No. 108-446, 118 Stat. 2647, 2666 (codified as amended at 20 U.S.C. § 1415 (Supp. 2005)).

193. GAO REPORT, *supra* note 5, at 1 (reporting that $90 million was spent by state and local educational agencies in the 1999–2000 school year to resolve disputes). With about 6.5 million students with disabilities and twenty-seven complaints per 10,000 students being carried through formal channels (mediation, due process hearing, and state complaint) per year, about 17,550 special education disputes are settled formally every year. *See id.* at 3. The cost of so many disputes is significant; for example, in California in 2003, the average cost per mediation was $1,800 and per due process hearing was $18,600. *Id.* at 18.

194. *See id.* at 6.

195. *See id.*

196. State educational agencies report that "disagreements involving potential technical violations of federal or state law or regulations [are] generally pursued through the state complaint procedures." *Id.* at 10 n.15 (citing OSEP, Complaint Resolution Procedures under Part B of the IDEA (Part B), Memorandum (July 17, 2000)). Under the IDEA, states are required to make

placement for their children, they sometimes seek a due process hearing.[197] Because of exhaustion requirements,[198] parents and school districts are required to go through some form of mediation before obtaining a due process hearing.[199] Parties may also choose to participate in voluntary mediation that will result in a binding agreement.[200] Because the number of requests for due process hearings and mediations and the number of state complaints is small

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a grievance procedure available to parents who have a complaint either about their own child's situation or about a systemic problem. *See* 20 U.S.C. § 1415(a); *see also* GAO REPORT, *supra* note 5, at 6–7; *id.* at 7 tbl.1. This method of dispute resolution is much less costly for the parties than a due process hearing, as the review is done at no cost to the parents or to the local educational agency, and it "primarily consists of staff cost to resolve the complaint." *Id.* If the parent of a child with disabilities files a written complaint with the state, then the state educational agency investigates by requesting information from or visiting the school district named in the complaint; if the state educational agency finds the school district to be in violation, then it will dictate what the school district must do to be in compliance. *Id.* at 6. The benefits of this form of dispute resolution are the lower cost and that there is much less required of the parents and school district, but the drawback is that each party has less opportunity to present its side of the story. *See* GAO REPORT, *supra* note 5, at 3, 6–7.

197. *See* 20 U.S.C. § 1415(f); GAO REPORT, *supra* note 5, at 10 n.15 (noting that "disagreements involving judgment such as student identification and educational placements were generally resolved through due process hearings or mediations"). For a family to have a court hear its grievances, the dispute will have gone through many stages already, resulting in high costs for both the family and the school district. Before proceeding to court on an IDEA, 42 U.S.C. § 1983, or Section 504 claim, parents must exhaust all administrative remedies under the IDEA. *See* Frazier v. Fairhaven Sch. Comm., 276 F.3d 52 (1st Cir. 2002) (stating that plaintiffs cannot avoid the IDEA's exhaustion requirements by seeking monetary damages, as this would undermine the IDEA's goal of providing schools with an opportunity to remedy the problems with a child's IEP); Robb v. Bethel Sch. Dist. No. 403, 308 F.3d 1047 (9th Cir. 2002). These administrative remedies include, for example, that the parents file a due process complaint notice to alert the school to the problem that the parents believe exists. *See* 20 U.S.C. § 1415(b)(7). Once this complaint has been filed, parents and the relevant members of the IEP team have a meeting with a hearing officer, followed by a period of thirty days in which the school may attempt to remedy the problem identified by the parents. *See id.* § 1415(f)(1)(B). Once this period is up, if the parties have not come to an agreement, they continue on to the due process hearing. *See id.* If either party is not satisfied with the outcome, that party's appeal is reviewed by the state educational agency. *Id.* § 1415(g). Finally, if either party appeals the state educational agency's decision, that party may bring a civil action within ninety days of the agency's decision. *Id.* § 1415(i)(2)(B).

198. 20 U.S.C. § 1415 (2000 & Supp. 2005).

199. 20 U.S.C. § 1415(f)(B) (Supp. 2005) (requiring parties to discuss the complaint and how it might be resolved, potentially leading to resolution before the administrative hearing is reached). The benefits of mediation include much lower costs and a more timely resolution than a due process hearing. GAO REPORT, *supra* note 5, at 7 tbl.1. The inclusion of mediation as a required offering by states has indicated Congress's preference for less contentious, costly, and time-consuming forms of complaint resolution. *See* 20 U.S.C. § 1415(e)(2)(D) (making states responsible for covering the costs of voluntary mediation); Kelly, *supra* note 22, at 34 ("The average time for resolution [at mediation] is 20 to 30 days. In contrast, the time for resolution of issues at due process ranged from 10 to 151 days.").

200. *See* 20 U.S.C. § 1415(e) (requiring that states offer voluntary mediation services to settle disputes between parties).

nationwide,[201] it appears that schools and parents are working out many problems through more cooperative means.

At the conclusion of a dispute, a school district will have spent significant money and time on a single grievance filed by parents.[202] The costs are not limited to those spent in resolving a dispute, however. If parents prevail, schools may end up being required to pay not only for the services or aids sought by parents, but also for the parents' attorney fees,[203] for compensatory education,[204] and, in some cases, for costly private schooling.[205]

With Congress's 2004 amendments to the IDEA and the Supreme Court's recent decision in *Schaffer v. Weast*,[206] parents who previously might have sued will likely think twice before doing so. Because the threat of litigation and its associated costs[207] are very real concerns for school districts, these changes may bring a sense of relief. Prior to Congress's amendment of the statute to allow school districts to recover attorney fees, only parents

201. GAO REPORT, *supra* note 5, at intro. (noting both that though the number of due process hearings requested increased from 1996 to 2000, the number of hearings actually carried out went down, and also that the number of due process hearings, state complaints, and mediations per 10,000 students with disabilities is only five, ten, and seven, respectively).

202. A single due process hearing alone costs a school district about $8,000 to $12,000. Schaffer v. Weast, 546 U.S. 49, 59 (2005) (citing to statistics from a Department of Education report). Some cost far more, however, as evidenced by the $2 million payout by the state in *Gaskin v. Pennsylvania*, 389 F. Supp. 2d 628, 636, 643 (E.D. Pa. 2005) (requiring that the state pay the plaintiffs and their attorneys $1,825,000 for attorney fees and costs (only 62 percent of the actual attorney fees and costs), and that the state pay the plaintiffs themselves $350,000).

203. *See* 20 U.S.C. § 1415(i)(3) (limiting the recovery of attorney fees in some situations).

204. *See* 20 U.S.C. § 1415(i)(2)(C)(iii) (allowing courts to determine what relief is available to parents who prevail).

205. In some cases, schools must pay for private schooling if the public school is unable to provide a FAPE in the LRE, and the public school sometimes is forced to pay for students' services at private schools even if parents placed students there unilaterally. *See* 20 U.S.C. § 1415(i)(2)(C)(iii); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 9–10 (1993).

206. 546 U.S. 49. In this much-anticipated ruling, the Supreme Court held that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Id.* at 62. In the past, many courts required the school district to prove that the IEP written for a child was valid, even when the child's parents had brought the suit. *See, e.g.*, Brian S. v. Vance, 86 F. Supp. 2d 538 (D. Md. 2000). *Schaffer* indicates some deference for the decisions of school site IEP teams, while also acknowledging that parents have been protected by the IDEA's procedural safeguards: Parents must now demonstrate that their child's IEP is not valid, rather than the school district being required to prove the validity of the IEP. 546 U.S. at 60 (noting that "Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances" and that parents have the right to information gathered by the school district and "'to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency'" (quoting 34 C.F.R. § 300.502(b)(1) (2005)).

207. A single due process hearing alone costs a school district about $8,000 to $12,000. *Schaffer*, 546 U.S. at 59 (citing to statistics from a Department of Education report).

could recover the costs associated with disputes.[208] With school districts previously unable to recover any costs associated with litigation and often bearing the burden of proof regardless of who brought suit, the *Schaffer* decision and the 2004 amendments might be seen as leveling the playing field. Alternatively, they might be viewed as a setback for parents, especially those who would already have been reluctant to bring suit due to their financial limits, and who now will have even more fear of financial loss. For most parents who are willing and financially able to exercise their legal rights, however, these changes may not have the chilling effect that critics are worried about, but rather will limit their suits and threats to those situations in which their children's rights are clearly being violated.

Despite the potential chilling effect, the number of disputes and associated costs are unlikely to decline to a level at which they will not significantly affect school budgets and influence administrators' decisionmaking. Thus, schools will likely continue to try to meet the needs of students with disabilities, even when doing so is financially or logistically difficult. When costs and logistics make meeting students' needs in the manner sought by parents impracticable, however, disputes will arise and schools will find themselves in the unsustainable position of carrying out court decisions based solely on consideration of the needs of one child.

B. When One Child's Needs Conflict With Another's: New Conflicts Under the IDEA

Dissatisfaction and grievances are likely to increase with the growing number of students with disabilities and the continuing presumption that inclusion in the regular classroom is best for them. Though conflicts between disabled students' needs and those of nondisabled students and among the needs of various disabled students have not yet been widespread, they are beginning to be apparent.[209] Current law does not address this potential quandary, but with the high percentage of students with disabilities and the high expectations for all students, this is an area that is ripe for disputes.

Parents are not currently filing complaints with the state education agencies regarding other children's IEPs or 504s that conflict with their

208. *See* Pub. L. No. 101-476, 104 Stat. 1103 (1990). Parents who prevail can recover the costs of private school tuition (in-state and out-of-state) and transportation to those private schools, other compensatory relief, and reasonable attorney fees. § 1415(i)(2)(C)(iii).

209. *See, e.g.*, Burden, *supra* note 3 (noting recent issues of "crowding and cases of academic incompatibility and social clashes").

children's, as there is no precedent for doing so. This is not surprising because the law looks at each student as an individual and the classroom as a placement option, rather than as a group of other students with their own needs. Therefore, there is no developed case law under the IDEA for courts to consider the needs—whether they are in conflict or not—of the many students with disabilities in each classroom. While a nondisabled child may not have standing to sue regarding the fulfillment of disabled students' needs, other disabled students eventually will find that they do. Parents will likely file grievances regarding the school's inability to meet their children's needs in the regular classroom, as the number of students with disabilities in each classroom increases to the point that some students with disabilities receive what they need at the expense of others or in direct conflict with the needs of others.

The appropriate placement for a child who requires more teacher attention than others, for example, might be the regular classroom, but if the class already contains a number of students requiring extra attention from the teacher, the addition of this student in the same classroom might result in insufficient teacher attention for others to succeed. For example, to return to the scenario outlined in the Introduction, imagine a classroom in which one student's physical disabilities necessitate his typing on a computer that beeps or speaks when keys are pressed so that he knows what he is writing. Because this technological assistance is necessary for his success and placement in the regular classroom, he must be allowed to use it under current law. However, this classroom also contains four students with ADHD who cannot concentrate with the computer noise. While the child using the computer would be using necessary accommodations, the learning environment for the four children with ADHD would be significantly impaired. This conflict could lead the parents of these children to argue that their children, though included, are not being provided with an "appropriate" setting in which they can succeed because of the presence of the other child.[210]

210. Though it does not emphasize students' competing needs, the following excerpt is a real-life example of a classroom in which a teacher's time is strained, limiting her ability to fully meet the needs of the student in question or those of other students.

> Daniel [a child with autism] has a full-time educational aide, known as a "paraprofessional," to support him during the school day. He also receives help from a speech and language therapist, an occupational therapist, and an adaptive physical education teacher. Daniel's kindergarten teacher, who is in her second year of teaching, has a class of 19 students. Two of her students have significant special needs, while one other is learning English as a second language. She holds a bachelor's degree in education

As more and more students qualify under the IDEA,[211] there will be increased conflict as the fulfillment of one student's IEP leads to conflict with that of another. Schools that find that one child's needs cannot be met without creating a situation in which the needs' of other students with disabilities cannot be met[212] could eventually be forced to recommend a more restrictive environment for the child in order to more adequately meet the needs of the others, but will be faced with objections from the child's parents. Alternatively, the school might be forced to clump students with certain disabilities together in regular classrooms to minimize the problematic effect of conflicting needs arising in the same class. Moreover, small schools might not have more than one regular classroom per grade level, making the separation of students with conflicting needs impossible. With increasing frequency, the appropriate LRE for one student may not exist in the manner originally intended by the IDEA if all students' special needs are to be considered.

Although courts do not consider the specific needs of any student other than the one before them, schools do not have the same luxury. When one student's placement as required by the IDEA unavoidably results in conflict with the needs of another, the school will nonetheless be required to make the placement and will then be forced to deal with the resulting disputes with parents of other students with disabilities whose learning is negatively

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> and is certified to teach kindergarten through 5th grade. During her training, she took one class on teaching students with disabilities. . . . Daniel's team of teachers meets once every two weeks for half an hour. During this time they discuss not only Daniel but also the 18 other children they are responsible for. Teachers are given no extra planning time during the day, so this half hour is all the time together most of them can manage.

Dybvik, *supra* note 175, at 47–48.

211. Jameson & Huefner, *supra* note 1, at 29.

212. In the aggregate, then, students with even slight disabilities who require more teacher attention or alterations in classroom activities could cause major changes in the education of others. With a growing number of students classified as being seriously emotionally disturbed or as having attention deficit hyperactivity disorder (ADHD) or attention deficit disorder (ADD), it is not difficult to imagine a classroom in which some students' behavior would require serious teacher attention to limit the distractions that could interfere with the education of others. *See* Nat'l Alliance on Mental Illness N.C., Understanding Serious Emotional Disorders in Children, http://www.naminc.org/understanding_children.htm (last visited Oct. 17, 2007) (noting that 3 to 5 percent of kids may suffer from severe emotional disorders); Nat'l Inst. of Mental Health, Attention Deficit Hyperactivity Disorder, http://www.nimh.nih.gov/health/publications/adhd/complete-publication.shtml (last visited Oct. 17, 2007) (estimating that 3 to 5 percent of students have ADHD). Furthermore, because students with more profound disabilities require more significant changes to activities and a larger percentage of teacher time, having multiple students with severe disabilities or one such student along with a few others with less severe but conflicting disabilities could interfere with other students' learning.

affected. Additionally, parents of children without disabilities may eventually argue that their children's education has been negatively affected by conflicting IEPs and 504s or by so many students with special needs being placed in the single classroom that the teacher cannot meet the needs of *any* student adequately.

C. Changing Goals: Shifting From Socializing and the LRE Requirement to Educating and Maximizing Potential

Congress must not wait until it has an educational crisis on its hands as it did in 1975, when the educations of millions of children with disabilities were being neglected. Though today's intensifying predicament is not the same as that of 1975, the nature of its threat very much is. With an emphasis on test scores and standards,[213] there will be less room in the regular classroom for the flexibility in teaching approaches that has allowed for more curricular modification for students with disabilities.[214] As a result, students with disabilities may again find that their needs are not being met, and in fact cannot be met, in the regular classroom.[215]

In the past, minimal academic benefits might have been considered enough to make the regular classroom the LRE appropriate for a student;[216] but with the NCLB pressuring schools to demonstrate measurable academic improvement for every student, including all disabled students, the benefits available today in the academic setting must be maximized. Thus, the

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213. *See* 34 C.F.R. § 200.1 (2007).

214. *See id.* § 200.1(b)(1)(iii) (stating that academic content standards must "[e]ncourage the teaching of advanced skills"); Joanne L. Huston, *Inclusion: A Proposed Remedial Approach Ignores Legal and Educational Issues*, 27 J.L. & EDUC. 249, 249 (1998) (describing one of today's educational conflicts as being "between the teaching methods required for the regular education model currently in place (large class sizes and lockstep progression through set amounts of material) and the teaching methods required for simultaneously meeting the individual, unique needs of each disabled child").

215. For example, imagine a scenario in which eight students with IEPs and/or 504s are already in the class, along with twenty other students. If those eight students require on average about 8 percent of the teacher's time each (40 percent total), then the rest of the students are receiving only 60 percent total, or 3 percent each. When a severely disabled student is added to the class, despite his needing only, say, 20 percent of the teacher's time, the availability of the teacher to other students drops below what they need to succeed and learn. Alternatively, that severely disabled student will not be able to receive the 20 percent of the teacher's attention he or she needs to succeed in this environment. These types of situations exist, but adequate legal solutions so far do not.

216. *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1046 (5th Cir. 1989) (stating that courts should not "place[ ] too much emphasis on the handicapped student's ability to achieve an educational benefit").

NCLB's emphasis on ensuring that all children are achieving at high levels[217] will likely tip the scales of the IDEA's competing goals—educational benefits and least restrictive environment (where some benefit is conferred)—in favor of more restrictive but more measurably improved academic outcomes for students with disabilities. Parents may continue to argue that the social and emotional benefits their child receives from mainstreaming outweigh the educational benefits and measurable progression toward the standards more readily available in a specialized setting, but schools will have more motivation to resist. Additionally, schools that feel pressure to improve results for all students may argue for more restrictive placements because of their desire to create more homogenous classroom settings in which to teach students and maximize each student's potential.[218]

With the many costs involved in litigation, however, it is clearly in a school district's best financial interest to accommodate a child's needs almost all of the time, though this often is not what occurs.[219] Despite the efforts that many schools are making to meet the needs of their students, conflicts between parents and schools are not likely to decrease. It is hard to imagine that parents and educators will ever see eye to eye, as there will always be situations in which parents' wishes may make sense emotionally (they want what they perceive to be best for their child), but not educationally (where educators also want what is best for the child and are better equipped to determine what that means in the educational setting). In an apparent effort to stem some of the litigation it has allowed under the IDEA, Congress has placed some limits on suits and recovery and has given to school districts some of the deterrents to litigation, such as the threat of recovering attorney fees.

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217. *See* Office of Special Educ. Programs, Topic Briefs, IDEA Reauthorized Statute Alignment With the No Child Left Behind Act, http://www.ed.gov/policy/speced/guid/idea/tb-nclb-align.pdf (last visited Feb. 10, 2008).

218. *See* Huston, *supra* note 214, at 253–54 (noting the incongruent goals of maximizing student potential and modifying curriculum to meet the needs of students who "are unable to perform at the same level as nondisabled students"). Huston notes that when a teacher is also expected to improve test scores, she must make a choice between "allocating more time to the production of expected mean outcomes for the group, which sacrifices gains of the least capable learners" and "allocating more time to the least capable learners to narrow the variance among students, which inevitably sacrifices achievement of the students who learn most easily." *Id.* at 256 (internal citation omitted).

219. *See* Oberti v. Bd. of Educ., 995 F.2d 1204, 1214 n.20 (3d Cir. 1993) (citing to the U.S. DEP'T OF EDUC., FOURTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES ACT (1992), which reported "that nearly two-thirds of the state plans submitted for DOE approval in 1991 under the Act were not in compliance with the mainstreaming requirements of IDEA").

It is now time for Congress to look ahead in order to prevent a new wave of litigation. By ignoring the rising numbers of students with disabilities and the increasing financial and logistical toll on schools of including all students with disabilities despite their potential effects on one another, on their classmates, and on limited resources, Congress is setting up schools to fail students and to be sued. By considering emerging statistics regarding the increasing number of students with disabilities, the percentages of those students placed in regular classrooms, and their successes or failures there, Congress could enact new legislation that could stop litigation in the area of conflicting and competing IEPs before it begins.

D. The Risk of Modifying for Many: "Modifying Beyond Recognition" and Re-creating the Specialized Education Setting

Every day, teachers modify the curriculum that they would otherwise present in a particular way, in order to meet the needs of students with disabilities. While this modification might require more of a teacher's time than he or she would spend creating a single lesson or an unmodified lesson, the IDEA clearly requires (and courts have upheld the requirement) that teachers make modifications to the curriculum in order to meet a child's needs, so long as curricular modification for a given student is not unduly burdensome and does not "require modification beyond recognition."[220] Modification becomes more complicated, however, when there are multiple students requiring alterations to the curriculum in a single class. Just as the IDEA and its provisions have been applied to each student individually, as no two students are alike, so too are modifications often different for different students. Nonetheless, students with disabilities are often grouped together in regular classrooms based on their resource or special education teacher (for scheduling reasons) or based on the type of disability they have.[221] As a

220. *Daniel R.R.*, 874 F.2d at 1048–49 ("The Act does not require regular education instructors . . . to modify the regular education program beyond recognition.").

221. *See, e.g.*, Burden, *supra* note 3. There are some benefits to the first way of grouping, as grouping may enable teachers of the same disabled students to coordinate. The latter grouping basis may benefit students and teachers by allowing for more uniform modification requirements, which could make inclusion more efficient by decreasing the chances that students with disabilities will have conflicting needs. Of course, the usefulness of grouping students with the same disabilities would vary depending on the type of disability and the similarity of needs that such students might have. Additionally, having multiple students with disabilities in a single classroom, whether the disabilities are similar or not, encourages more variety in teaching approaches. It is arguable that this will make lessons better suited to meet all students' learning needs. On the other hand, it is also arguable that many disabled students

result, teachers are being asked to modify the curriculum not to meet the needs of one student, but rather to meet the needs of each of many students with disabilities.

When a teacher is told to modify a given lesson in multiple directions, this arguably creates a situation that is unduly burdensome when such modifications are considered in the aggregate. An average teacher has only an hour or so of paid time to prepare lessons, so this multiple modification might not be possible. Because the IDEA is interpreted and applied to only one student at a time (ignoring the presence of other students with disabilities), there has been no consideration by the courts or Congress of the heavy demand that modification for many students will have on teachers and the effect that this will, in turn, have on those and other students.

The IDEA requires that the school consider a continuum of placements before selecting a more restrictive one than the regular classroom.[222] In finding that the school had violated the LRE requirement in placing Rafael, the *Oberti* court identified some of the possible placements that the school should have considered, such as: "(1) modifying some of the curriculum to accommodate Rafael's different level of ability; (2) modifying only Rafael's program so that he would perform a similar activity or exercise to that performed by the whole class, but at a level appropriate to his ability; (3) 'parallel instruction,' i.e., having Rafael work separately within the classroom on an activity beneficial to him while the rest of the class worked on an activity that Rafael could not benefit from; and (4) removing Rafael from the classroom to receive some special instruction or services in a resource room, completely apart from the class."[223] While any of the placement and accommodation options on this continuum might have worked for Rafael, the first three options would clearly be preferred under the IDEA.[224]

Noticeably absent from the court's consideration, however, is the possibility that there might be a number of other students in Rafael's class

require significant extra one-on-one attention from the teacher. These interactions may do little to advance the learning of the other students if they pertain to a simplified or modified lesson that the other students are not following. *See id.* at 1036. Regardless, having multiple students with disabilities per class, even if their disabilities are similar enough to reduce modification difficulties, means that there is less time per pupil for disabled and nondisabled students alike. Because inclusion is clearly here to stay, educators, parents, and Congress should work out ways to make it more efficient and effective.

222. *See* 34 C.F.R. § 300.551 (2006).

223. *Oberti*, 995 F.2d at 1211.

224. *See* 34 C.F.R. § 300.551.

who also need personalized and modified curricula. Designing lessons for the regular education students is already a lot of work for any teacher, and creating specialized instruction to meet the needs of one child with disabilities would add to that, but if the teacher were expected to create four or five parallel lessons, the demand might be more than is possible. For example, the current law could force a teacher modifying a lesson to meet the needs of four students, each with a different disability, and the needs of the twenty-seven students without disabilities. Thus, while the court determines the appropriate setting for a child from a place far from the realities of the classroom and from the complexity of modifying or creating curriculum to meet the needs of diverse students, those who work daily with these students are faced with the challenges and limitations of meeting the needs of every student.

Finally, given that a regular classroom usually has a single lesson being taught at one time, if a teacher is required to teach many different lessons within the classroom at the same time, then that regular education teacher would have become a de facto special education teacher, which courts have noted is not what inclusion is meant to provide.[225] Just as a special educator must design multiple lessons, each appropriate for at least one of her three to nine students, the regular education teacher would be asked to accomplish this same challenging task while also managing thirty students in a single room. Such a task could certainly be considered unduly burdensome.

Though it may not lie within any court's power to consider the individual needs and requirements of students besides the one before the court, such consideration must be made somewhere. If school districts are forced to accommodate each child with a disability in the manner ordered by a court that is not faced with or capable of considering the complexity of accommodating many children with different disabilities in a single classroom, schools may end up with a new wave of suits on their hands as they fail to meet the needs of one or all students as directed by the court. And students with system-savvy parents may end up with their children's needs being fully accommodated at the expense of other children whose parents are unaware of what is happening in the classroom or are naive about their legal rights.

225. *See, e.g.*, *Daniel R.R.*, 874 F.2d at 1048–49 ("If a regular education instructor must devote all of her time to one handicapped child, she will be acting as a special education teacher in a regular education classroom.").

E. The "Effect on Others" and Cost Inquiries: Application to *Actual* "Other" Students With and Without Disabilities

1. Examining Conflicts Through the Lens of Disruptive Analysis

In determining the appropriate LRE for a student, most courts consider what effect that child will have on the classroom environment and on others in that environment. Moderate misbehavior or a requirement of moderate amounts of extra time and attention from the teacher are tolerated because neither will have a large negative effect on other students' learning.[226] Courts, however, do not consider placement in the regular classroom appropriate for children with disabilities when the result would be serious disruption or great demands on the teacher's time and attention.[227] Because most students with disabilities will alone not create huge disturbances or require huge amounts of a teacher's time, such an inquiry is unlikely to be determinative in the consideration of most placements. The result will be that many students with disabilities who can be somewhat disruptive or who will require extra attention from the teacher will end up included in regular classrooms. While courts are legally correct to consider each case and each child individually, in the aggregate, a group of students with disabilities might be considerably more disruptive and might require larger amounts of the teacher's attention than would any single student.

If the Fifth Circuit's reasoning about the LRE and the effect of a child on the class in *Daniel R.R.* were applied to students with disabilities in the aggregate, what constitutes the LRE would change. The effect that such students would have on their nondisabled peers would be more significant. Likewise, the effects that the needs or demands of some students with disabilities would have on other students with disabilities would also be more significant. If the "one child" language in the Fifth Circuit's application of its test to the facts in *Daniel R.R.* were replaced with "multiple children with disabilities," it would read as follows: "The Act does not require regular education instructors to devote all or most of their time to [multiple children

226. *See* Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991) ("A handicapped child who merely requires more teacher attention than most other children is not likely to be so disruptive as to significantly impair the education of other children.").

227. *Daniel R.R.*, 874 F.2d at 1049–50 (limiting the appropriateness of inclusion to those situations in which a child does not demand too much of the teacher's attention and noting that if "the handicapped 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").

with disabilities] . . . . If moreover, she will be focusing her attentions on [multiple children with disabilities it may be] to the detriment of her entire class, including, perhaps, other, equally deserving, handicapped children who also may require extra attention."[228] Such a reading would not only be aligned with court decisions,[229] but would also benefit children with and without disabilities, as it would allow educators to arrange classrooms in which no single child or group of children would have their needs placed above those of others.

2. Looking at Conflicts Through the Lens of Cost Analysis

Just as courts consider the effect that a single child would have on the rest of the class in terms of disruptiveness, courts also consider the cost of educating a single child in the regular classroom.[230] Because there are limited funds generally and limited funds allocated to the education of students with disabilities specifically, courts have found that schools may place a student in a more restrictive environment when not doing so would be too expensive, such that "excessive spending on one handicapped child deprives other handicapped children."[231] Courts currently consider the cost of educating the single student with disabilities whose case is before them in isolation. If they were, instead, to consider the aggregate cost of educating not just that one student, but many or all of the students with disabilities in the school, they might find that although the single child's monetary requirements are not singularly unreasonable when considered in light of the expense to educate others, the amount needed could deprive others of commensurate opportunities. Such a result would be inconsistent with court holdings if such decisions were read with "multiple students with disabilities" instead of "one handicapped child."[232]

228. *Id.* at 1048–49.

229. *See id.* at 1051 ("Although regular education instructors must devote extra attention to their handicapped students, we will not require them to do so at the expense of their entire class.").

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

231. *Id.*; *see also* A.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158, 162–63 (8th Cir. 1987) ("The cost to educate [the student with disabilities] in the least restrictive environment was found to be prohibitive because of the effect this disproportionate use of limited resources would have had on other disabled children.").

232. *Roncker*, 700 F.2d at 1063 ("Cost is a proper factor to consider since expensive spending on [multiple students with disabilities] deprives other handicapped children.").

F. Suggestions for Avoiding These Conflicts

Altering the way LRE decisions are made could improve the quality of education for all students. For example, if courts and educators were able to consider the appropriateness of an educational placement based on the actual makeup of the student's class,[233] that child and other children would benefit. With such consideration, a child could then be placed in a setting in which the student and his or her classmates could all succeed and benefit from each other's presence. Courts have some freedom (though not necessarily the responsibility) to adjust the tests they use in determining whether a child is appropriately placed to account for schools' more specific consideration of the effect of a given child's needs and behaviors on his classmates and theirs on him. Changes to the structure and amount of funding could also improve the education that both children with disabilities and their nondisabled peers receive. Finally, much of the responsibility for and the ability to improve education lies with Congress and can be effectuated through clearer congressional objectives and preferences and with the funding to enable schools to accomplish these objectives.

1. Giving More Deference to Schools

Giving deference to school districts in making fact-based placement decisions that take into account all children in a given classroom could improve the educational experience for all involved. Schools would be better able to meet the needs of various students with special needs if they could arrange their placements based on the realities of their options. This would mean that before placing a student, a school could consider the number of students with disabilities in the class, the types of disabilities they have, the level of attention they require, the assistive technology and adult aides required for success, and the total number of students in the class. By considering the IEPs of other students with disabilities in the grade level, schools would be able to avoid placing a student with an IEP in a class where

233. While the makeup of the placement would likely change from year to year, the actual makeup of the student's class would be that facing the IEP team from the beginning of the school year. Educators (and parents) would be expected to consider the actual students in various placement options when they select a placement. Under existing law, judges often hear cases after placements occur, but this does not limit judges from making appropriateness determinations based on the facts as they were at the time in dispute. My proposal would simply alter the sorts of facts the IEP would need to consider in selecting the placement from the start, which would, in turn, alter the facts that the judge would consider in this later appropriateness determination.

his or her needs could not be met without conflicting with the IEPs of other students.[234] If schools were able to place students together based on compatibility of needs, then they could maximize the LRE for each child with disabilities without compromising the education of others.

Additionally, deference to schools regarding such decisions could reduce formal disputes. While there would be some danger in giving too much deference to schools, this could be offset by creating regular, site-based evaluations[235] of special education programs and students' placements by local or state educational agencies. Moreover, parent complaints to the state could trigger school site visits to ensure that students' needs are not being ignored or undervalued.

2. Grant Programs for Schools in Compliance

Another way that education could be improved without sacrificing the needs and rights of students with disabilities would be to create a grant program. Such a program, like that employed by Federal Emergency Management Agency (FEMA) to help meet fire departments' needs,[236] would reward those schools accomplishing mainstreaming objectives by providing funding in the form of grants. If a school were mainstreaming students effectively but found that the sheer number of students with disabilities created untenable situations for teachers, such a school could ask for a grant to pay for another teacher in order to reduce class size. Such a grant would ensure that all students with disabilities would be able to benefit from their inclusion time to the fullest extent by minimizing the potential for conflicting IEPs and 504s, as there would be fewer students with

234. While avoiding conflicts will be possible in many situations, even where it is impossible to avoid conflicts altogether, at least schools would be allowed to consider the needs of those involved when making placements in order to mitigate such conflicts.

235. Such site-based evaluations could be modeled after existing site-based evaluation programs currently used in public K–12 schools, such as the school evaluation for accreditation done by associations such as the Western Association of Schools and Colleges (WASC), Accrediting Commission for Schools. More information is available at WASC Accrediting Commission for Schools, http://www.acswasc.org (last visited Mar. 12, 2008). If parents knew that an outside association evaluated the school's special education placements and programs, they might be reassured about their children's placements such that they would be less likely to dispute appropriate placements. Parents would still retain their right to sue for egregiously inappropriate placements, of course, while oversight agencies could evaluate schools' efforts to appropriately place students with disabilities where the needs of all students can best be met.

236. *See* Federal Emergency Management Agency (FEMA), Assistance to Firefighters Grant Program, http://www.firegrantsupport.com (last visited Oct. 18, 2007) (allowing individual fire departments to apply for needed assistance).

disabilities per class. This would result in an improvement in educational outcomes for everyone, as teachers would have fewer students for whom to modify the curriculum and to focus on during class time. While a grant program would not necessarily aid all schools in need, it could work as an incentive to get schools thinking about how best to meet the collective needs of their students with disabilities.

3. Standing of Parents of Regular Education Students

Another area of the law that has yet to be explored is the standing of parents of nondisabled students to sue regarding the education their children receive and the effects that the needs of children with disabilities have in their classrooms. Arguably, the rights of those without disabilities need protection as well, to ensure that they are not being overrun and ignored as a result of students with disabilities having more statutory rights.[237] As the number of students with disabilities being placed in each classroom, and the collective effect that such students have on the classroom, increases, there could be infringement on the important right to an education enjoyed by all students. Moreover, as courts have recognized that the education of all children can be negatively affected by the extreme needs of some children with disabilities,[238] it would not be farfetched for the parents of students without disabilities to begin to consider their legal options when their children are in a class with multiple students with specialized needs.

4. Congressional Responsibility for Reducing Conflict

Courts cannot fully solve the policy problems and classroom challenges that their decisions have created. Instead, Congress must understand the realities in classrooms created by schools' reactions to court decisions and the unintended consequences, such as conflicting IEPs, that follow. Congress needs to amend the IDEA with an eye on different court tests and classroom realities, in order to create a law that is both uniform and flexible enough to work in all jurisdictions and classrooms. By clarifying its goals in future

237. Some states, such as California, make the right to an education fundamental, so education is clearly regarded as important for all children. CAL. CONST., art. IX, § 1.

238. The court in *Daniel R.R.* noted that a situation could arise in which a child's disruptiveness might "so absorb[ ] the efforts and energy of the staff as to impair the quality of the entire program for the other children." Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1043 (5th Cir. 1989).

amendments to the IDEA, Congress can better protect the educational rights of all students and enable schools to act within the law.

With changes to the basis for and manner of determining placements, nondisabled students' rights could be protected along with those of their disabled peers. Clarification of Congress's goals and replacement of the faceless classroom image with the reality of a group of individuals with diverse needs would help schools to better meet the needs of all individuals.

CONCLUSION

In a nation as diverse as the United States, the issues surrounding the LRE are far from standardized. There are places in which inclusion is recommended for students far too rarely, other places where inclusion has been applied to all students indiscriminately, some places in which minority or non–English-speaking students are being classified as disabled at inappropriate rates, and others in which system-savvy parents are getting their way, possibly at others students' expense.[239] Nonetheless, disputes regarding placement continue and are unlikely to go away with time. Just as the circuit courts are unable to agree on one clear standard by which to judge the LRE appropriate for a student, there is no uniformity among educators as to what the primary goals of public schooling should be or how to best meet the needs of all students.

What we do know, however, is that when Congress created the IDEA, it did not create the *Individual* with Disabilities Education Act, but rather sought to address the educational needs of millions of *individuals* with disabilities. It is the "s" in individuals that must be the focus of congressional change—the interests of one student with disabilities cannot properly be considered alone, but rather must be considered against those of other individuals with disabilities in the same classroom. Congress must never have considered the constituents of an actual classroom in creating the IDEA, for the image that has emerged through judicial interpretation and congressional amendments is that of a faceless, homogenous class in which a student with disabilities is placed. Such an image fails to consider the effect that the collective needs of students with disabilities may have on the education of others or to recognize that the needs of a

239. *See* GAO REPORT, *supra* note 5, at 15 n.22 (noting that wealthier parents are more likely to sue, as median household income has a significant relationship to number of disputes); *supra* note 181.

single student with disabilities might create an environment in which another student with disabilities cannot learn.

In order to prevent disputes regarding conflicting needs or collectively excessive needs of students with disabilities, Congress must live up to its end of the IDEA bargain by providing states with the 40 percent of the cost of educating students with disabilities it once pledged. Additionally, to help schools avoid placing students inappropriately, Congress must clarify how it ranks its conflicting mandates. For example, if maximizing student achievement under the NCLB is the most important goal that schools should be striving for, then Congress should clarify how this affects the LRE placements and weighs against the social benefits that many students with disabilities may receive in the general classroom. With the added challenges of having multiple students with disabilities in most classes, the pressure on schools only mounts as educators attempt to create maximized learning environments that are simultaneously individually adapted to address each student's special needs. Until Congress clarifies and prioritizes its goals, there is little hope that schools will be able to avoid costly litigation or to meet the needs of all students as they balance these many considerations within their tight budgets.