LEAST RESTRICTIVE ENVIRONMENT: FULFILLING THE PROMISES OF IDEA

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Andrew sits at his desk staring blankly at the assignment he was just given as his teacher instructs the class. His school district decided that he did not need any special classroom instruction, but without any individualized help, Andrew is unable to complete his assignment. Given the large size of his fourth grade class and his teacher's lack of training for teaching students with special needs, the teacher is unable to give him the individualized attention he needs while still monitoring the rest of the class. Andrew is like many children with disabilities nationwide who suffer as a result of flawed special education practices as teachers and school officials across the country struggle to meet the needs of their students.

The Individuals with Disabilities Education Act ("IDEA")[1] requires public schools across the United States to provide special education supports and services for all students with one of the enumerated disabilities who need such supports and services to benefit educationally.[2] IDEA guarantees students with disabilities[3] access to "free, appropriate public education" ("FAPE") in the "least restrictive environment" ("LRE") with accommodating supports and services.[4] Although these requirements have existed since IDEA was originally enacted as the Education for All Handicapped Children Act in 1975,[5] the interpretation and implementation of the mandates remain controversial as professionals, parents, and policymakers alike struggle to understand what each provision requires and when school districts have fulfilled the Act's guarantees.[6]

This Comment calls for multi-level reconsiderations of what is necessary to successfully implement the LRE provision and satisfy its requirements. Part I introduces the history of special education rights in America's schools

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[1] Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400(a) (2012).

[2] *See* 20 U.S.C. § 1400(d). Even if a student has one of the enumerated disabilities, he or she will not qualify for special education unless he or she has an *academic need* for such services. 20 U.S.C. § 1412(a)(3)(B).

[3] *See* 20 U.S.C. § 1401(3)(A)(i) (defining "child with a disability" as a child "with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . .").

[4] 20 U.S.C. § 1412(a)(1), (a)(5).

[5] Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (amending Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970)).

[6] Kathryn E. Crossley, *Inclusion: A New Addition to Remedy a History of Inadequate Conditions and Terms*, 4 WASH. U. J.L. & POL'Y 239, 245-52 (2000) (explaining there is no clear judicial test to determine when a child with disabilities should be mainstreamed into a general classroom environment).

and the development of special education legislation. Part II distinguishes the LRE from other placement practices often confused as being one in the same and highlights the debate surrounding the movement toward inclusive education. Part III details the various federal circuit tests for assessing whether school districts are in compliance with the LRE provision. Part IV calls on the Supreme Court to adopt a uniform test for determining school district compliance with the requirements and identifies multiple levels of reform for education systems, which are necessary for the successful implementation of the LRE provision.

I. HISTORY OF RIGHTS FOR STUDENTS WITH DISABILITIES

Less than fifty years ago, the idea of a child with a disability learning in a regular classroom alongside his non-disabled peers was unthought-of.[7] As recently as 1970, only one in five children with disabilities received public education.[8] Many states prohibited children from attending public schools based on the category of their disability, including those who were deaf, blind, emotionally disturbed, or mentally handicapped.[9] The future of those individuals with disabilities appeared bleak, as many were sequestered to state institutions where they only received minimal care for their basic needs.[10]

A. Setting the Stage for Change

Our country's view and treatment of individuals with disabilities began to change in in the mid-twentieth century.[11] The Supreme Court's decision in *Brown v. Board of Education*[12] propelled the movement for equal educational rights for children forward. In *Brown,* the Court held that segregating schools on the basis of race created inherently unequal education systems in violation of the Constitution.[13] Parents and advocates of children with disabilities seized the opportunity to end the common practice of segregating those with disabilities from the general student population, claiming that segregating students by virtue of disability resulted in similar inherently unequal education systems.[14]

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[7] U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS TOWARD EDUCATING CHILDREN WITH DISABILITIES THROUGH *IDEA* 3 (2010) ("These last 35 years have witnessed significant changes as the nation has moved from paying little attention to the special needs of individuals with disabilities to merely accommodating these individuals' basic needs and then eventually to providing programs and services for all children with disabilities and their families.").

[8] *Id.*

[9] *Id.*

[10] *Id.* ("In 1967, for example, state institutions were homes to almost 200,000 persons with significant disabilities.").

[11] *Id.* at 4.

[12] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[13] *Id.* at 495.

[14] *See* Michael A. Rebell & Robert L. Hughes, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 532-33 (1996) (citing Note, *Enforcing*

The crusade resulted in two landmark cases[15] affirming the right of every child with a disability to be educated, laying the foundation for the much-needed reform in special education. *Pennsylvania Association for Retarded Children v. Pennsylvania* involved a class-action lawsuit challenging the constitutionality of certain Pennsylvania education laws that operated to deny mentally retarded children access to public education.[16] The court approved a consent agreement enjoining the state, its officials, and its school districts from applying the law in any way "so as to deny any mentally retarded child access to a free public program of education and training."[17] Similarly, *Mills v. Board of Education* involved handicapped children plaintiffs who were excluded from free, public education or deprived of publicly-supported education due to their disabilities.[18] The court granted the children's motion for summary judgment and ordered "no child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment" unless "adequate alternative educational services suited to the child's needs" and "a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative" are provided.[19]

B. Legislative Action

Recognizing the need for legislation that protects the right to education for children with disabilities, Congress enacted the Education for All Handicapped Children Act of 1975 ("EAHCA").[20] The Act was designed to guarantee access to public education[21] by offering federal funding to states that established policies to assure that all children with disabilities were given access to a free and appropriate public education ("FAPE").[22] The Act further required that children with disabilities receive a FAPE in the least

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the Right to an Appropriate Education: The Education for All Handicapped Children Act of 1975, 92 HARV. L. REV. 1103, 1107 (1979)).

15 Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

16 *Pa. Ass'n for Retarded Children*, 334 F. Supp. at 1259.

17 *Id.* at 1258.

18 *Mills*, 348 F. Supp. at 869-70.

19 *Id.* at 878.

20 Education for All Handicapped Children Act of 1975, sec. 3(b), § 601, Pub. L. No. 94-142, 89 Stat. 774 (codified as amended at 20 U.S.C. § 1401 (2012)); *see also* U.S. DEP'T OF EDUC., *supra* note 7, at 5-6. Research showed that the educational needs of more than eight million handicapped children living in the United States were not being met. Education for All Handicapped Children Act of 1975, sec 3(b), § 601. More than half of the children with disabilities in the 1970s were not receiving "appropriate educational services which would enable them to have full equality of opportunity" and one million handicapped children were excluded from the public school system completely. *Id.* These congressional findings supporting the need to enact the EAHCA are codified at 20 U.S.C. § 1400(c)(2)(A)-(D) (2012).

21 Education for All Handicapped Children Act of 1975, sec 3(c), § 601.

22 Education for All Handicapped Children Act of 1975, sec. 5(a), § 612(1).

restrictive environment ("LRE") appropriate to fit the needs of each individual student.[23]

EAHCA was renamed the Individuals with Disabilities Education Act ("IDEA") in 1990,[24] and has been amended several times.[25] There have been substantial changes to the law,[26] but the original guarantees that students with disabilities will receive a FAPE in the LRE remains intact.[27] However, despite multiple opportunities to do so, Congress has provided very little context for understanding or implementing the FAPE or LRE mandates. Therefore, determining what each IDEA provision really requires and whether those requirements have been met has been left to the judiciary branch and policymakers.

C. Principles of IDEA

To fully understand the goals of IDEA, it is important to understand how the key principles of the Act affect one another. First, a school must determine that the child has a disability and is eligible for special education.[28] Second, the school must design an individualized education plan that

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[23] Education for All Handicapped Children Act of 1975, sec. 5(a), § 618(d)(2)(a).

[24] Lain, *IDEA: A Breakdown of Its Components, Amendments, and Referral Process*, YAHOO VOICES (July 24, 2006) (on file with the *Widener Law Review*). The 1990 amendments were designed "to provide a greater variety of better services" to a "wider range of students to ensure that each and every student needing the service was ensured to receive it." *Id.*

[25] *Id.* Congress reauthorized and/or amended PL 94-142 in 1986, 1990, 1997, and 2004. *Id.*

[26] Each of the various amendments to the Act expanded on IDEA's core principles in order to better provide students with disabilities with the best education possible. *See* WILLIAM L. HEWARD, EXCEPTIONAL CHILDREN: AN INTRODUCTION TO SPECIAL EDUCATION 29-30 (Pearson, 10th ed. 2012). The 1986 amendments guaranteed early intervention and family services for children with disabilities from birth to age two. *See* Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, sec. 101, §§ 671-672, 100 Stat. 1145, 1145-47. Congress also expanded the right to a free, appropriate education to preschool-aged children. *See id.* The 1990 amendments and reauthorization broadened the range of students protected by the Act by changing the word "handicapped" to "disabled" and by increasing the age range to ages three to twenty-one. *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, secs. 101, § 602, 203, § 618, 104 Stat. 1103, 1103-14. These amendments also expanded the kinds of services guaranteed to students with disabilities by requiring that IEPs include plans for transportation and transition services for independent living and employment. *Id.* The 1997 amendments emphasized the importance of including students with disabilities in the regular classroom by providing that the regular classroom is the presumed LRE and encouraged parent and student input in decisions regarding the student's education. *See* Individuals with Disabilities Education Act (*IDEA*) Amendments of 1997, Pub. L. No. 105-17, sec. 101, §§ 611, 614, 111 Stat. 37, 61, 81-8; *see also* Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 817 (2002). The 2004 amendments increased accountability for educating children with disabilities and required that states use research-based interventions when identifying students with disabilities. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, sec. 101, §§ 601, 614, 118 Stat. 2647, 2651, 2706.

[27] 20 U.S.C. § 1412(a)(1), (a)(5) (2012).

[28] HEWARD, *supra* note 26, at 71.

guarantees the child will receive appropriate special education.[29] Third, the school uses that plan to determine the appropriate placement setting for the child.[30] Each of these principles is explained below.

1. Free, Appropriate Public Education

IDEA clearly provides that a state must enact policies that assure a free, appropriate public education for all students with disabilities from age three to twenty-one.[31] FAPE is defined as "special education and related services . . . that have been provided at public expense, under public supervision and direction, and without charge."[32] However, missing from that definition is any indication as to Congress' intended standard for "appropriate" education.[33] The United States Supreme Court attempted to fill that void when it decided *Board of Education v. Rowley ex rel. Rowley* in 1982.[34] *Rowley* involved a deaf first grade student named Amy Rowley whose parents requested a sign-language interpreter to help her achieve in the general education classroom.[35] The school district denied the request and her parents turned to the court system to help get the assistance she needed.[36]

The Supreme Court employed a two-part test examining (1) whether the state complied with procedural requirements of the IDEA[37] and (2) if so, whether the student's individualized education program was designed to enable the student with a disability to receive educational benefit.[38] If both are answered in the affirmative, then the school district is in compliance with IDEA's requirements.[39] The Court explained that Congress intended for the Act to serve as a "basic floor of opportunity"[40] by making public education available for disabled students without imposing any "greater substantive educational standard than would be necessary to make such access

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[29] HEWARD, *supra* note 26, at 71.

[30] *Id.*

[31] 20 U.S.C. § 1412(a)(1)(A) (2012).

[32] 20 U.S.C. § 1401(9). "The term 'related services' means transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(26)(A).

[33] *See* 20 U.S.C. § 1401 (failing to define "appropriate" within definition section).

[34] Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176 (1982).

[35] *Id.* at 184-85.

[36] *Id.* at 185. The District Court defined FAPE as "an opportunity to achieve his full potential commensurate with the opportunity provided to other children" and therefore found that Amy was being deprived of a FAPE since she was "not learning as much, or performing as well academically, as she would without her handicap." Rowley *ex rel.* Rowley v. Bd. of Educ., 483 F. Supp. 528, 532, 534 (S.D.N.Y. 1908). On appeal, the Supreme Court held that the lower court's definition of appropriate imposed a standard much higher than that intended by Congress. *Rowley*, 458 U.S. at 200.

[37] *Rowley*, 458 U.S. at 206.

[38] *Id.* at 206-07.

[39] *Id.* at 207.

[40] *Id.* at 201.

meaningful."[41] The Court therefore defined "appropriate education" as "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[42] Without attempting to set a standard for the adequacy of educational benefit, the Court found that Amy Rowley's education plan complied with the statute's requirements.[43]

2. Individualized Education Plan

Providing a FAPE for children with disabilities depends largely on the development of an individualized education plan ("IEP")[44] for each child. IDEA requires that schools develop and implement an IEP for each student with disabilities between the ages of three and twenty-one.[45] A team composed of the student's teachers, parents, and administrators[46] develops and implements an IEP that specifies the student's current performance levels, identifies measurable annual goals, and describes the special education and related services that will be provided to help him or her reach those goals and benefit from education.[47] The IEP guides the team in determining which education setting is appropriate to help the student progress toward those goals.[48] Schools must review and revise each child's IEP on an annual basis.[49]

3. Least Restrictive Environment

Implementing the LRE component in public schools has become a grey area filled with questions, concerns, and confusion. IDEA requires that school districts place students in the LRE.[50] The LRE provision requires children with disabilities to be educated "[t]o the maximum extent appropriate" in the general education classroom with other students who do not have disabilities.[51] Restrictiveness in this context is defined by proximity to the regular classroom.[52] School districts must provide students with appropriate supplementary aids and services to enable satisfactory achievement in the general classroom.[53]

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41 *Rowley*, 458 U.S. at 192.

42 *Id.* at 203.

43 *Id.* at 209.

44 20 U.S.C. § 1401(14) (2012).

45 20 U.S.C. § 1412(a)(4). For children with disabilities age three through five, schools must develop an individualized family service plan for infants and toddlers with disabilities. 20 U.S.C. § 1414(d)(2)(B).

46 *See* 20 U.S.C. § 1414(d)(1)(B).

47 *See* 20 U.S.C. § 1414(d)(1)(A)(i).

48 34 C.F.R. § 300.552(b) (1997).

49 20 U.S.C. § 1414(d)(4)(A)(i).

50 20 U.S.C. § 1412(a)(5)(A).

51 *Id.* The LRE provision applies to children with disabilities in both private and public schools or institutions. *Id.*

52 M.L. YELL, THE LAW AND SPECIAL EDUCATION 310-14 (2d ed. 2006).

53 *See id.*; *see also* 34 C.F.R § 300.115(b)(2) (2007). Such aids and support services might include classroom aides, integrated therapy services, peer support, "buddy systems" and

In making LRE placement determinations, the student's IEP team begins by considering placement in the regular classroom.[54] Students may only be removed from the general classroom if "the nature or severity of the disability of a child is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily."[55] Therefore, although an inclusive placement in the general education classroom is the presumed starting placement, more restrictive settings may be deemed appropriate based on the needs of each individual student.[56] School districts must provide a continuum of alternative placements to be considered in the event that education in the regular classroom cannot be achieved satisfactorily.[57] However, even when students are placed in more restrictive environments, school districts still have a duty to ensure that they are integrated with their non-disabled peers during periods of the day, for example, during lunch, recess, or other less instructional activities such as physical education.[58]

II. DECIPHERING THE REAL MEANING OF THE LRE PROVISION

The LRE provision of IDEA remains hotly debated today.[59] There are various positions regarding what IDEA specifically requires and whether LRE placements truly improve students' education. This section differentiates the LRE principle from terms that are frequently confused as having the same meaning. It further highlights the arguments for and against inclusive education.

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assistive technology. DOROTHY KERZNER LIPSKY & ALAN GARTNER, INCLUSION AND SCHOOL REFORM: TRANSFORMING AMERICA'S CLASSROOMS 102 (Paul H. Brookes Publ'g Co., 1997).

[54] *See* 34 C.F.R. § 300.550(b)(2) (1997). The 1997 Amendments to IDEA strengthened the guarantee that students with disabilities would be educated in the LRE by identifying the regular classroom as the presumed LRE for children with disabilities. *See* Memorandum from Richard P. Mills on Least Restrictive Environment Implementation Policy Paper to Dist. Superintendents et al. (May 1998), *available at* http://www.p12.nysed.gov/specialed/publications/policy/lrepolicy.htm (outlining "significant" events that have redefined national policy regarding the rights of individuals with disabilities).

[55] 20 U.S.C. § 1412(a)(5)(A). If a student is placed outside the regular classroom, the IEP must include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class" and in extracurricular and other nonacademic areas. 20 U.S.C. § 1414(d)(1)(A)(i)(V).

[56] *See* Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 181 n.4 (1982).

[57] 34 C.F.R. § 300.551(a) (1997). The continuum includes placements in regular classrooms (least restrictive), special classrooms, special schools, home instruction, and hospitals or institutions (most restrictive). 34 C.F.R. § 300.551(b).

[58] 34 C.F.R. § 300.553.

[59] Susan C. Bon, *Confronting the Special Education Inclusion Debate: A Proposal to Adopt New State-Wide LRE Guidelines*, 249 EDUC. L. REP. 1, 7 (2009) ("Determining whether 'the best placement for a child with a disability is in a general classroom or in a separate educational setting,' is an ongoing controversy that is frequently contested in administrative due process hearings and in the federal courts.").

A. Differentiating the Terms[60]

In understanding the LRE mandate, it is also helpful to understand what is not required. LRE is often used synonymously with mainstreaming, inclusion, and integration.[61] Despite similarities in meaning, the terms must be understood as distinct practices.[62] As previously explained, LRE is a legal principle ensuring the rights of students with disabilities to be educated in the regular classroom.[63] LRE is not defined by any one specific setting.[64] Mainstreaming and inclusion are two methods of fulfilling the LRE requirement. Mainstreaming refers to the physical placement of students with disabilities within the regular classroom with their non-disabled peers.[65] Mainstreaming emphasizes physical placement in the regular classroom.[66] Mainstreamed students generally receive education without supplementary aids and services, and are expected to perform at similar levels to those of their non-disabled peers.[67] In contrast, inclusion[68] refers to a more comprehensive education practice in which students learn exclusively in the regular classroom and "involves bringing the support services to the child (rather than moving the child to the services) and requires only that the child will benefit from being in the class (rather than having to keep up with the other students)."[69]

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[60] Scholars vary in the definitions they assign to each practice, but the author has adopted the expressed definitions for purposes of this paper.

[61] Courts often, albeit misleadingly, referred to early efforts to comply with the LRE requirement as "mainstreaming." LIPSKY & GARTNER, *supra* note 53, at 77. *See, e.g.*, Daniel R.R. v. Bd. of Educ., 874. F.2d 1036, 1039 (5th Cir. 1989) (referring to the "mainstreaming requirement").

[62] Richard Tompkins & Pat Deloney, *Toward a Definition of Inclusion*, SEDL (1995), http://www.sedl.org/change/issues/issues43/definition_inclusion.htm [hereinafter SEDL, *Toward a Definition of Inclusion*].

[63] 20 U.S.C. § 1412(a)(5)(A) (2012); *see also* Tex. Woman's Univ., *Least Restrictive Environment (LRE), Inclusion and Mainstreaming*, PROJECT INSPIRE, http://www.twu.edu/inspire/least-restrictive.asp (last updated Jan. 2, 2013).

[64] *See* YELL, *supra* note 52.

[65] SEDL, *Toward a Definition of Inclusion*, *supra* note 62. The "somewhat dated" term mainstreaming has developed a negative connotation, referred to as "dumping" students into regular classrooms without necessary support. Tex. Woman's Univ., *supra* note 63; *see also* SEDL, *Toward a Definition of Inclusion*, *supra* note 62 (recognizing the "connotative baggage" associated with the term).

[66] LIPSKY & GARTNER, *supra* note 53, at 77.

[67] *Chapter Four: Least Restrictive Environment and Inclusion*, STATEWIDE PARENT ADVOCACY NETWORK, http://www.spannj.org/BasicRights/least_restrictive_environment.htm (last visited Jan. 14, 2013) [hereinafter STATEWIDE PARENT ADVOCACY NETWORK]. Mainstreaming is typically deemed more appropriate for students with less severe disabilities. LIPSKY & GARTNER, *supra* note 53, at 77.

[68] Inclusion should not be confused with "full inclusion," which requires all students, regardless of the nature or severity of disability, to be educated in the regular classroom full time, with all services brought to the student in that setting. Katie Schultz Stout, *Special Education Inclusion*, WIS. EDUC. ASS'N COUNCIL (Mar. 15, 2007), http://weac.org/articles/specialedinc/ [hereinafter WIS. EDUC. ASS'N COUNCIL].

[69] Joy Rogers, *The Inclusion Revolution*, 11 PHI DELTA KAPPA RES. BULL. 1, 1 (May 1993), *available at* http://files.eric.ed.gov/fulltext/ED367087.pdf.

Integration refers to the more general concept of including children with disabilities in the regular classroom.[70] Although IDEA expresses Congress' preference for inclusive education, the law requires only that children with disabilities are educated in the LRE without indicating any preferred method for doing so.[71]

B. Arguments Fueling the Inclusion Debate

As school districts have grappled with the challenges of complying with the LRE provision, heated debate has arisen surrounding the practices school districts have employed.[72] While IDEA does not expressly require inclusion, it suggests that schools must make a "significant effort" to include students with disabilities in the regular classroom.[73] The inclusion debate has gained advocates on all ends of the spectrum, ranging from those who are weary of inclusive education in any form to those who support full inclusion of all students regardless of the severity of a student's disability.[74] Still others support inclusive practices to varying degrees.[75]

Advocates for inclusive education argue that segregated classrooms stigmatize children with disabilities by implying they are inferior.[76] Additionally, proponents argue that many students "fall through the cracks" in the current dual education system because of specific eligibility criteria.[77]

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[70] Mark T. Keaney, *Examining Teacher Attitudes Toward Integration: Important Considerations for Legislatures, Courts, and Schools*, 56 ST. LOUIS U. L.J. 827, 828 (2012). The term embodies "a civil rights focus" aimed to end discrimination toward those with disabilities. LIPSKY & GARTNER, *supra* note 53, at 77. "[T]his change is meant to be not only in terms of physical proximity, but of academic and social integration as well." SEDL, *Toward a Definition of Inclusion*, *supra* note 62.

[71] The terms "inclusion" and "mainstreaming" are not mentioned anywhere in IDEA. *See Frequently Asked Questions About Inclusive Education for Students with Significant Disabilities*, TASH (Apr. 9, 2013), http://ecac-parentcenter.org/userfiles/PTI/Resource%20pages/Inclusion/Inclusion/TASH%20Frequently%20Asked%20Questions%20About%20Inclusive%20Education.pdf (referring to Congress' refusal to include "language around educational best practices related to inclusive education . . . because of the requirement that special education programs be individualized, and a reluctance to standardize what good educational practices are for all students with disabilities").

[72] *See* Bon, *supra* note 59, at 10.

[73] Rogers, *supra* note 69, at 3.

[74] *See* Keaney, *supra* note 70, at 840-41 (presenting arguments on either side of the inclusion debate).

[75] *See* Crossley, *supra* note 6, at 258, 259 (suggesting that the courts' understanding that the LRE might not always be the regular classroom for all students is the appropriate approach to take in resolving the circuit split).

[76] Richard Tompkins & Pat Deloney, *Educational Support for Inclusion*, SEDL (1995), http://www.sedl.org/change/issues/issues43/support_for_inclusion.html [hereinafter SEDL, *Educational Support for Inclusion*]. Critics of inclusion often reject this argument citing to "gifted" programs, in which research supports the notion that students are better served when they are educated alongside peers with comparable levels of achievement. Richard Tompkins & Pat Deloney, *Concerns About and Arguments Against Inclusion and/or Full Inclusion*, SEDL (1995), http://www.sedl.org/change/issues/issues43/concerns.html [hereinafter SEDL, *Concerns About and Arguments Against Inclusion*].

[77] SEDL, *Educational Support for Inclusion*, *supra* note 76.

Education in the regular classroom provides social and behavioral benefits for both students with disabilities and their peers.[78] Students with disabilities learn through peer models in the regular classroom while their non-disabled peers develop skills for communicating with others with disabilities.[79] For all students, inclusive education "pav[es] the way for the formation of rewarding adult relationships with a variety of people in the community, home, and workplace."[80]

Critics of the movement toward inclusive education are concerned that the practice imposes a heavy burden on regular education teachers, which will impact the quality of education afforded to other students in the class.[81] Critics worry that general education teachers do not have the knowledge, skills, or support to adequately educate children with disabilities in the regular classroom.[82] Furthermore, many parents and educators have fought for individualized special education services and fear that placement in the regular classroom will cause children with disabilities to lose important support.[83] Still other critics argue that non-academic benefits receive too much attention in determining LRE placements while the essential goal of educating students is ignored.[84]

III. WHEN TO PLACE A CHILD IN THE GENERAL EDUCATION CLASSROOM: THE CIRCUIT SPLIT

The inclusion debate has reached the judicial system through multiple lawsuits, but the Supreme Court has never interpreted the LRE mandate.[85] Therefore, federal circuit courts have been left to tackle particularly challenging questions with little guidance. How does one determine the appropriate extent of classroom integration? What *is* "satisfactory achievement"? Courts that have addressed these issues generally agree that IDEA's LRE provision encourages inclusive education for children with disabilities.[86] However, developing a uniform standard to be applied equally across the nation has proven difficult.[87] As a result of courts employing varying standards, the LRE mandate is inconsistently implemented such that a

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78 *See* LIPSKY & GARTNER, *supra* note 53, at 187-90 (documenting social and behavioral outcomes for students with disabilities and students without disabilities, respectively).

79 STATEWIDE PARENT ADVOCACY NETWORK, *supra* note 67.

80 STATEWIDE PARENT ADVOCACY NETWORK, *supra* note 67.

81 *See* SEDL, *Concerns About and Arguments Against Inclusion*, *supra* note 76 (expressing concern that children with disabilities will monopolize the teacher's individualized attention in regular classroom placements).

82 *Id.*

83 *See id.*

84 *See* Crossley, *supra* note 6, at 255.

85 Bon, *supra* note 59, at 11.

86 *See, e.g.*, Daniel R.R. v. Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989) (referring to Congress' "statutory preference for mainstreaming"); Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (recognizing the "strong preference in favor of mainstreaming").

87 *See infra* Part III.A-C.

student with a disability could be placed in a general education classroom in one part of the country while another student with similar abilities and learning needs could be placed in a separated class or building solely based on geographic location.[88]

A. Roncker *Feasibility Test*

The Court of Appeals for the Sixth Circuit developed the first test for assessing whether school districts complied with the LRE provision in *Roncker ex rel. Roncker v. Walter*.[89] Neil Roncker was a nine-year-old student with severe mental retardation and seizures.[90] His school district placed him in a school that exclusively served mentally retarded children, eliminating any opportunity for Neil to have contact with non-disabled students.[91] Neil's parents refused the placement and turned to the legal system for help.[92]

The Sixth Circuit overturned the district court's finding in favor of the school district's placement[93] and addressed the issue by examining "whether the services which make [a segregated] placement superior could be feasibly provided in a non-segregated setting."[94] To determine feasibility, the court compared the benefits of education in both segregated and non-segregated settings.[95] In recognition of Congress' "strong preference" for mainstreaming students with disabilities, the court held that the benefits of education in a segregated setting must "far outweigh" the benefits of education in a regular classroom to justify a more restrictive placement.[96] The Sixth Circuit

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[88] *See* Farley, *supra* note 26, at 809-10 (comparing placement of similar students in completely different settings as a result of different geographic locations).

[89] *Roncker*, 700 F.2d 1058.

[90] *Id.* at 1060.

[91] *Id.*

[92] *Id.* at 1061. At a due process hearing, the hearing officer found that the school district failed to satisfy the burden imposed by the LRE requirement. *Id.* The school district appealed to the Ohio State Board of Education, which found that Neil's placement in the special school was appropriate "so long as some provision was made for him to receive contact with non-handicapped children." *Id.*

[93] *Id.* The district court reviewed the school district's placement decision under an "abuse of discretion" standard. *Id.* The Sixth Circuit found that the standard set forth in *Rowley*, giving greater deference to the state's placement decision if the procedural requirements of the Act are met, could not be applied to the present case. *Id.* at 1062. The *Roncker* issue involved the LRE provision of the Act, while *Rowley* involved the FAPE provision. *Id.*; *see also* Daniel R.R. v. Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) (explaining that the "mainstreaming requirement was not an issue presented for the Court's consideration" in *Rowley*).

[94] *Roncker*, 700 F.2d at 1063. After developing a test for determining whether a student with disabilities has been placed in the appropriate LRE, the court remanded the case to determine whether Neil could be placed in a less restrictive setting. *Id.* at 1063-64. The Fourth and Eighth Circuits adopted the *Roncker* test. *See* Devries *ex rel.* DeBlaay v. Fairfax Cnty. Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989); A.W. *ex rel.* N.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987).

[95] *Roncker*, 700 F.2d at 1063.

[96] *Id.* Recognizing that more restrictive placements may be appropriate in some cases, the court held that children might be placed in more restrictive settings when they would not

identified the level of disruptiveness the student presented in the regular classroom, and the amount of individual attention the student required as factors that might warrant placement in a more segregated setting.[97] The court held that cost might also be a factor for consideration, but only where the school district has first used federal funds to create a proper continuum of alternative placements for students with disabilities.[98]

B. Daniel R.R. *Two-Prong Analysis*

In 1989, the Fifth Circuit created its own LRE test in *Daniel R.R. v. Board of Education*.[99] Daniel was a six-year-old with Downs Syndrome who attended pre-kindergarten in a regular classroom.[100] Daniel's teacher modified her teaching methods and curriculum, but without constant individualized attention, Daniel did not participate in the classroom and failed to make any progress in the skills being taught.[101] As a result, the school district placed him in a special education classroom where he would have the opportunity to interact with his non-disabled peers at lunch and recess.[102] Unhappy with this placement, Daniel's parents filed suit claiming that the district violated the LRE provision.[103] The Fifth Circuit recognized that a challenge to a particular placement cannot be evaluated in the abstract, and must instead be balanced with IDEA's principal goal of ensuring that children with disabilities are provided a free and appropriate public education.[104] It noted that the LRE analysis requires an individualized assessment of the child's abilities and needs.[105]

The Fifth Circuit established a two-prong test,[106] which examined whether a child with disabilities can be satisfactorily educated in the regular classroom with the use of supplemental aids and services.[107] The *Daniel R.R.* test first

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benefit from placement in the regular classroom, or when the student is a "disruptive force" in the classroom. *Roncker*, 700 F.2d at 1063.

[97] *Id.*

[98] *Id.* ("Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.").

[99] Daniel R.R. v. Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989). The *Daniel R.R.* court declined to adopt the *Roncker* test, finding it to be "too intrusive an inquiry" that relied too little on the language of the Act. *Id.* at 1046.

[100] *Id.* at 1039.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 1040. The court found that placement in the regular classroom was inappropriate based on Daniel's needs, and that he was mainstreamed as much as possible during lunch and recess. *Id.* at 1050-51.

[104] *Id.* at 1044-45.

[105] *Daniel R.R.*, 874 F.2d at 1048.

[106] *Id.* (citing 20 U.S.C. § 1412(5)(B) (2012)). The Third and Eleventh Circuits adopted the *Daniel R.R.* two-prong framework, but included various additional factors for consideration under the first prong. *See* Oberti *ex rel.* Oberti v. Bd. of Educ., 995 F.2d 1204, 1212, 1215 (3d Cir. 1993); *see also* Greer *ex rel.* Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991).

[107] *Daniel R.R.*, 874 F.2d at 1048.

asks whether the school has provided sufficient aids and services.[108] Only if that question is answered affirmatively does the inquiry continue[109] by asking whether and to what extent the student will receive academic and/or non-academic benefit in the regular classroom,[110] and determining how the presence of student with disabilities in the regular classroom affects the education that other students in the regular classroom receive.[111] If an analysis of those factors leads to a conclusion that the child cannot be satisfactorily educated in the regular classroom,[112] the next inquiry under the Fifth Circuit's test is whether the school has mainstreamed the child to the maximum extent appropriate in accordance with the Act.[113] If so, then the school district is in compliance with the provision.

C. Rachel H. *Four-Factor Balancing Test*

The Ninth Circuit developed a third test for LRE compliance in *Sacramento City Unified School District v. Rachel H. ex rel. Holland*.[114] Rachel's parents advocated for their moderately mentally disabled eleven year-old to be placed in a regular classroom after years of education in special education programs.[115] The school district suggested an alternative placement in which

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[108] *Daniel R.R.*, 874 F.2d at 1048. States must make sufficient efforts to provide supplementary aids and services, and modifications to the general education program. *See* 20 U.S.C. § 1412(a)(5)(A). However, they are not required to provide every conceivable supplement or service. *Daniel R.R.*, 874 F.2d at 1048. In setting limits on the state's obligation to provide supplementary aids and services for students with disabilities, the court explained that "mainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education." *Id.* at 1049.

[109] This is a threshold factor that must be proven before any subsequent factor can be considered. *See Daniel R.R.*, 874 F.2d at 1048 ("If the state has made no effort to take such accommodating steps, our inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education.").

[110] *Id.* at 1049. The court recognized that academic achievement is not the only purpose of placement in the regular classroom. *Id.* In the event that a student benefits enormously non-academically, for example by improved communication skills, from placement in the regular classroom, the balance may tip in favor of that placement despite the student's inability to progress academically. *Id.* (citing Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983)).

[111] *Id.* at 1049.

[112] *Id.* at 1049-50 (holding that where a student's handicap results in excessive disruptions or requires so much individual attention from the instructor such that the education of other students is significantly hindered, placement in the regular classroom is not appropriate).

[113] *Id.* at 1048. "The [Act] and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education." *Id.* at 1050. To ensure that students are provided the maximum appropriate exposure, "the school must take intermediate steps . . . such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with non-handicapped children during lunch and recess." *Id.*

[114] Sacramento City Unified Sch. Dist. v. Rachel H. *ex rel.* Holland, 14 F.3d 1398, 1404 (9th Cir. 1994).

[115] *Id.* at 1400.

Rachel would be placed in a special education classroom for academic subjects and a regular classroom for non-academic activities.[116] The Hollands appealed the placement decision, claiming that the school district violated the LRE provision.[117]

The Ninth Circuit declined to adopt either the *Roncker* or *Daniel R.R.* test, and instead adopted the test employed by the district court, which drew considerations from each of the existing tests.[118] The court used a balancing test to weigh four factors: (1) the educational benefits of full-time placement in a regular class with supplementary aids and services compared to the benefits of placement in a special education classroom; (2) the non-academic benefits of interaction with non-disabled peers; (3) the effect of the student's presence on the teacher and other students in the regular classroom; and (4) the cost of providing the supplementary aids and services necessary for successful mainstreaming.[119]

IV. PROPOSAL FOR REFORM

There has been nationwide progress in providing meaningful education for children with disabilities.[120] IDEA's mandates have expanded both educational and employment opportunities for those with disabilities in the United States.[121] Despite such progress in this area, challenges remain in successfully protecting the rights of those with disabilities. These challenges can be resolved by innovative action on multiple levels. First, the Supreme Court should resolve the existing circuit split by adopting a nationwide standard for determining whether a child has been placed in the appropriate LRE. Second, education systems across the country should be reformed to accommodate inclusive education.

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116 *Rachel H.*, 14 F.3d at 1400.

117 *Id.* A hearing officer ordered the school district to place Rachel in a regular classroom with supplementary aids and services. *Id.* The school district appealed the decision, and following an evidentiary hearing, the district court affirmed, holding that the appropriate placement for Rachel was the regular classroom. *Id.*

118 *Id.* at 1404.

119 *Id.*

120 U.S. DEP'T OF EDUC., *supra* note 7, at 12. IDEA supports the use of early identification measures, improved teacher training and intervention techniques designed to "maximize student achievement and reduce behavior problems." *Id.* at 10. One such method of intervention, response to intervention ("RTI"), consists of increasingly intensive research based interventions before a child is referred for assessment for special education eligibility. HEWARD, *supra* note 26, at 175-78. Use of scientifically validated instruction eliminates quality of instruction as a possible explanation for a student's poor educational achievements and instead suggests evidence of a disability. *Id.*

121 U.S. DEP'T OF EDUC., *supra* note 7, at 2. More students with disabilities are graduating high school and finding success in employment than ever before. *Id.*

A. The Supreme Court Should Adopt a Uniform Test

The LRE provision was intended to create "an educational system whereby all students, regardless of the severity of their disabilities, would be educated in an environment as close as possible to what is considered to be normal."[122] However, the existing tests vary widely with different considerations and preferences, resulting in students with disabilities enjoying different levels of benefits state by state.[123] Adopting a uniform test would guarantee that children with disabilities receive equal rights regardless of where they live.

The Supreme Court should not simply adopt one of the existing tests, as none of them fully determine whether a school district has fulfilled the duty imposed by the LRE provision.[124] Each test has been criticized or expanded upon since its creation and "none . . . has proven as comprehensive as first hoped."[125] Furthermore, all of the tests were developed prior to the 1997 amendments to IDEA, which "renewed the importance of the LRE provision by providing that the regular classroom must be the default placement."[126] Therefore, the Supreme Court should resolve the existing circuit split by drawing from the strengths of the existing tests to create a new, nationwide rule that adequately serves the goals of IDEA.

In keeping with the spirit of the IDEA, the Supreme Court should adopt the *Daniel R.R.* two-prong analysis as a basic framework for a new test. The new test should first ask whether the student can be satisfactorily educated in the regular classroom with the use of supplemental aids and services.[127] If the student cannot be satisfactorily educated in the regular classroom and must be placed in a more restrictive setting, the second inquiry should consider whether the student has been mainstreamed to the maximum extent possible.[128] This approach is superior to both the *Roncker* and *Rachel H.* tests. The *Roncker* test resembles a full inclusion approach to satisfying the LRE requirement by assuming that all students should always be placed in the regular classroom unless such placement would place an unreasonable burden on the school, which strays from the intended goal of the Act.[129] Unlike *Roncker*, the two-prong approach is derived directly from the language of the Act, embodying the congressional preference of placement in the regular classroom[130] while still recognizing that it may be more appropriate to educate

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122 Allan G. Osborne, Jr., *The IDEA's Least Restrictive Environment Mandate: Legal Implication*s, 61 EXCEPTIONAL CHILDREN 6, 12 (1994).

123 *See supra* Part IV.

124 *See* Farley, *supra* note 26, at 832-33.

125 *Id.*

126 Farley, *supra* note 26, at 817.

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

128 *Id.*

129 *See* 20 U.S.C. § 1412(a)(5)(A) (2012) (allowing placement outside of the regular classroom where supplementary aids and services do not allow for satisfactory achievement).

130 *See* 143 CONG. REC. 6, 8785 (1997) (statement of Hon. Matthew G. Martinez) (stating that the "principle of inclusion is so fundamental and central to the purpose and principles of the bill"); *see also* Patrick Howard, *The Least Restrictive Environment: How to Tell?*, 33 J.L. & EDUC.

some students in more segregated settings[131] and providing opportunities for interaction with non-disabled peers during non-academic activities.[132] Furthermore, this analysis allows for flexibility in determining which factors are relevant to a child's placement on a case-by-case basis, whereas the *Rachel H.* test requires analysis of certain factors which may not always be applicable.[133]

Although any number of factors may be relevant to this inquiry,[134] the Court should adopt a set of basic factors and assign an appropriate weight to each.[135] Three inquiries should always occur: (1) whether the school district has made sufficient effort to provide supplementary aids and services; (2) the benefits—both academic and non-academic—to the student with disabilities of placement in the regular classroom versus a more segregated setting; and (3) the effects—both positive and negative—of the student's presence in the regular classroom on his nondisabled peers.

The test's primary consideration should be whether a school district has taken steps to provide a student with disabilities supplementary aids and services in the regular classroom. School districts must provide supplementary aids and services to support students with disabilities in the regular classroom.[136] Thus, there can be no question as to whether courts should consider the sufficiency of a school district's efforts. Access to supplementary aids and services surely impacts the level of achievement and benefit that a student with disabilities can reach in the regular classroom.[137] Therefore, if the school district has not made an effort to provide supplementary aids and services to the student, no further analysis is necessary.[138]

Next, courts should weigh the academic benefit of a regular classroom placement against the academic benefit of placement in a more segregated setting. Doing so "effectively balance[s the] dual tasks of providing an

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167, 179 (2004) ("The current congressional policy of preferring inclusion, rather than requiring inclusion, is appropriate.").

131 *See* 20 U.S.C. § 1412(a)(5)(A).

132 *See* 34 C.F.R. § 300.553 (1997).

133 Farley, *supra* note 26, at 834-35.

134 *See* Daniel R.R. v. Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) ("A variety of factors will inform each stage of our inquiry; the factors that we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases.").

135 The *Rachel H.* test received criticism for a balancing test without any specific weight assigned to any of the factors considered. *See* Farley, *supra* note 26, at 831 (cautioning against the "inherent complexities" related to the lack of guidance in weighing the *Rachel H.* factors).

136 34 C.F.R. § 300.551(b)(2) (1997).

137 *See* 20 U.S.C. § 1414(d)(3)(B) (2012) (requiring the IEP team to consider interventions and supplementary supports that address disruptive behavior); *see also* Mavis *ex rel.* Mavis v. Sobol, 839 F. Supp. 968, 991 (N.D.N.Y. 1993) (recognizing the relationship between available supplementary aids and services and the level of the student's disruptiveness in the regular classroom).

138 *See Daniel R.R.*, 874 F.2d at 1048 ("If the state has made no effort to take such accommodating steps, our inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education.").

appropriate education in the least restrictive environment."[139] Children go to school to learn, and therefore, academic benefits should be of the utmost importance in determining the appropriate placement for a student with disabilities.[140] Only after academic benefits are considered should courts look to the collateral social benefits of placing the student in the regular classroom, such as interpersonal development.[141] Non-academic benefits might tip the scale in favor of inclusion, where academic benefits would be the same regardless of placement.[142]

Lastly, courts should consider the degree to which the student's presence impacts his or her peers' education, both positively and negatively. This ensures that non-disabled children's rights to an appropriate education are also protected.[143] As several cases have noted, where a child is excessively disruptive or requires an unreasonable amount of individualized attention from the teacher, the regular classroom may not be the appropriate placement.[144] If a student with disabilities would receive only marginal benefits from placement in a regular classroom, doing so at the expense of his peer's education defeats the underlying purpose of the Act: to provide equal education rights to *all* students regardless of disability. Cost might also be considered under this factor, but only if the school district has used its funding to create an adequate continuum of alternative placements.[145] Where providing supplementary aids and services in the regular classroom is so expensive that it affects the education of other students in the school district, courts have held that placement in a more segregated setting may be appropriate.[146] It is also important to recognize the reciprocal benefits[147] that non-disabled students experience in inclusive classrooms. When students with disabilities are placed in the regular classroom, their non-disabled peers also grow socially and behaviorally.[148] Studies show that students who learn alongside peers with disabilities demonstrate increased responsiveness to the

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139 Farley, *supra* note 26, at 837.

140 *See* Allan G. Osborne, Jr., *The IDEA's Least Restrictive Environment Mandate: Implications for Public Policy*, 71 EDUC. L. REP. 369, 379 (1992) ("School districts and the courts must realize that the central issue in placement decisions is the provision of a free appropriate public education. Mainstreaming is only one of several components of an appropriate education and it should not be elevated to the status of being the primary consideration in a placement decision.").

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

142 Farley, *supra* note 26, at 838.

143 *See* Crossley, *supra* note 6, at 255 (warning that "courts and the advocates of inclusion pay little attention to the needs of the 'normal' child").

144 *See, e.g.*, *Daniel R.R.*, 874 F.2d at 1049-50. When students are disruptive, schools must first check to see if they are providing adequate support to ensure that the student's disruptiveness cannot be eliminated without being removed from the regular classroom. *See Dispelling the Myths of Inclusive Education,* TASH (2012), http://intraprisedevelopment.com/Uploads/PATashUploads/PdfUpload/Dispelling%20the%20Myths%20of%20Inclusive%20Education-TASH.pdf.

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

146 *See Id.*

147 Reciprocal benefits for students without disabilities were first recognized by the court in Oberti *ex rel.* Oberti v. Bd. of Educ, 995 F.2d 1204, 1217 n.24 (3d Cir. 1993).

148 LIPSKY & GARTNER, *supra* note 53, at 188-90.

needs of others, increased acceptance of disabilities, and learn to effectively communicate with others who are different from them.[149]

Using the aforementioned factors, in conjunction with any other factor that may prove relevant for consideration in an individual case, a court may determine that a student with disabilities will be better served in a more restrictive setting than the regular classroom. The Court should adopt a new test that addresses such instances by requiring an additional straightforward inquiry that determines whether the student has been mainstreamed to the maximum extent appropriate. This question is easily answered by assessing the extent to which the child is integrated during lunch, recess, and other non-academic activities.

B. Systemic Reform

Adopting a nationwide rule is a positive step toward ensuring equal education rights for all students with disabilities on an individual level. However, such protection will only be available to those students who have the resources to maneuver the justice system for individualized review.[150] Despite the thirty-plus years since the inception of the LRE requirement, school districts still struggle to successfully implement its mandates.[151] To properly serve all students with disabilities, the existing education system needs to experience reform physically, economically, and systematically.[152]

First, schools must develop a physical environment that supports students with disabilities to fully effectuate inclusive education.[153] Schools should be designed to promote social interaction, thereby reducing the stigmatizing effect of segregated placements when necessary.[154] Buildings can be made accessible to all students, for example, by ensuring that students in wheelchairs

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[149] LIPSKY & GARTNER, *supra* note 53, at 188-90.

[150] Elizabeth Palley, *Challenges of Rights-Based Law: Implementing the Least Restrictive Environment Mandate*, 16 J. DISABILITY POL'Y STUD. 229, 234 (2006) ("[W]hat is clear is that these problems will not be resolved merely by considering the individual rights of students whose parents file suit against the school system . . . .").

[151] *See* SAMI KITMITTO, NAT'L CTR. FOR EDUC. STATISTICS, MEASURING STATUS AND CHANGE IN NAEP INCLUSION RATES OF STUDENTS WITH DISABILITIES: RESULTS 2007-2009 18 (2011), *available at* http://nces.ed.gov/nationsreportcard/pdf/studies/inclusion_highlights_2009.pdf. Between 2007 and 2009, most jurisdictions (thirty-four to forty out of fifty-one) experienced no change in inclusion rates. *Id.* at 11.

[152] Palley, *supra* note 150, at 234 ("A federal mandate for LRE cannot be effectively accomplished without addressing the structural and economic environments in which schools operate.").

[153] *See* B. LYNN HUTCHINGS & RICHARD V. OLSEN, N.J. INST. OF TECH., A SCHOOL FOR EVERYONE: SCHOOL DESIGN TO SUPPORT THE INCLUSION OF STUDENTS WITH DISABILITIES 3 (2008) (on file with the *Widener Law Review*) (explaining how school architecture impacts inclusion efforts). Researchers conducted a study indicating that school designs can support or undermine education efforts. *Id.* The study included input from administrators, teachers, specialists and students evaluating how the design of their schools impacted, positively or negatively, inclusive education. *Id.* at 4. Researchers used the input to compile a guide for building inclusion-supporting environments in schools. *Id.* at 3.

[154] *Id.* at 5.

are not barred from any area of the building.[155] Accessibility is also improved by providing appropriate technology that makes participation in the classroom possible.[156] Classrooms should be designed with flexibility to accommodate any type of instruction from group activities to individualized instruction.[157] Class sizes must also be decreased to allow teachers to respond to the unique needs of all of the students without becoming overwhelmed.[158] Smaller class sizes afford all students more individualized attention resulting in increased academic success.[159]

Fulfillment of the LRE provision also requires funding reform.[160] Appropriate education and supplementary services cannot be provided without sufficient financial support.[161] As a result of limited federal funding and varying state funding models, school districts are often without the financial resources to ensure successful implementation of IDEA's mandates.[162] Although some courts currently consider cost when evaluating LRE placements, individual lawsuits are unlikely to address large-scale funding; thus, economic factors "need to be addressed outside of the individual rights of students with disabilities."[163] Without funding reform, school districts may never be able to fulfill IDEA's promises to students with disabilities.[164]

Perhaps the most influential reform to take place is that of educators' approach to education itself and the ways in which it is delivered.[165] General education and special education teachers have historically trained differently as a result of the existing dual-system.[166] To accommodate increasing numbers of students with disabilities in the regular classroom, school districts must provide general education teachers with appropriate training to enable them to effectively and confidently teach in inclusive classrooms.[167] Ongoing professional development that emphasizes situation-specific problem solving

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155 HUTCHINGS & OLSEN, *supra* note 153, at 5

156 LIPSKY & GARTNER, *supra* note 53, at 103.

157 HUTCHINGS & OLSEN, *supra* note 153, at 5.

158 *See* Keaney, *supra* note 70, at 851; *see also* Rogers, *supra* note 69, at 4 (explaining how large class sizes, including multiple students with disabilities, impede successful inclusion practices).

159 *See* Am. Educ. Res. Ass'n, *Class Size: Counting Students Can Count*, 1 RESEARCH POINTS 1, 2 (2003), *available at* http://files.eric.ed.gov/fulltext/ED497644.pdf (noting a correlation between smaller class sizes, individualized attention, and "statistically significant improvements in reading and mathematics . . . .").

160 *See* LIPSKY & GARTNER, *supra* note 53, at 102.

161 *Id.* at 278.

162 *See* Palley, *supra* note 150, at 232.

163 *Id.* at 233.

164 *See*, *Background of Special Education and the Individuals with Disabilities Education Act (IDEA)*, NAT'L EDUC. ASS'N, http://www.nea.org/home/19029.htm (last visited July 20, 2014).

165 Keaney, *supra* note 70, at 848 ("The single most important factor for any successful integration program is the unequivocal, genuine support of those being asked to implement it on a daily basis—teachers.").

166 Palley, *supra* note 150, at 233.

167 WIS. EDUC. ASS'N COUNCIL, *supra* note 68 ("Areas of emphasis [should] include . . . higher-order thinking skills, integrated curricula, interdisciplinary teaching, multicultural curricula, [and] life-centered curricula.").

strategies and best practices for teaching and adapting curriculum is an important component of any successful inclusion program.[168] Research shows that administrative attitudes are also important tools for fostering successful inclusion practices.[169] Administrators should encourage and empower educators to approach teaching in inclusive classrooms with positive attitudes.[170] Proper implementation of the LRE mandate also requires adequate provision of support staff and time designated collaborative planning between general education and special education teachers.[171] One of the most widely used methods of collaboration, co-teaching, allows general and special educators to plan for and effectively provide successful inclusive instruction.[172]

Only once our existing schools are restructured and repurposed can the full benefits of IDEA's mandates be realized. With sufficient funding, school districts can renovate and build schools that welcome all students and provide resources and training to general education teachers to effectively instruct in inclusive classrooms.

CONCLUSION

IDEA has drastically improved academic opportunities for students with disabilities like Andrew since its inception. However, there are improvements to be made in order to fulfill IDEA's promises of equal education for all students. This can only be fully achieved by setting national standards for compliance with the LRE mandate and encouraging reform in the education system. The Supreme Court can ensure equal implementation of the LRE provision across the country by adopting a test that resembles the *Daniel R.R.* two-prong analysis: examining whether education can be satisfactorily achieved in a regular classroom with supplementary supports, and in cases where placement in a segregated classroom is warranted, whether the school has mainstreamed the student to the maximum extent appropriate during lunch, recess, or other non-academic classes. In addition, policymakers, administrators, and educators should demand a large-scale system reform that improves the physical environment and funding structure and empowers educators to effectively educate students in inclusive classrooms.

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168 LIPSKY & GARTNER, *supra* note 53, at 136-37.

169 *See* Palley, *supra* note 150, at 234. Researchers found that if principals were not supportive of the LRE provision, successful inclusion was unlikely. *Id.* Where principals supported inclusive education, they were more accommodating to teachers' needs, resulting in more successful inclusion practices. *Id.*; *see also* LIPSKY & GARTNER, *supra* note 53, at 101 ("[A]mong both general and special educators the degree of administrative support emerged as the most powerful predicator of positive attitudes toward full inclusion.") (emphasis omitted).

170 *See* WIS. EDUC. ASS'N COUNCIL, *supra* note 68 (calling for reformed approach to education that "focus[es] on high expectations for all and rejects the prescriptive teaching, remedial approach that tends to lower achievement") (citation omitted).

171 *NEA Policy Statement on Appropriate Inclusion*, NAT'L EDUC. ASS'N, http://www.nea.org/home/18673.htm (last visited Sept. 9, 2014).

172 LIPSKY & GARTNER, *supra* note 53, at 125-27.

With the these changes, Andrew's story could be different: In a school district that has made significant progress in implementing IDEA's guarantees, Andrew sits at his desk with an assignment that was uniquely designed to meet his academic needs and works confidently to complete his work. His teacher has received hours of special education training and is able to identify the proper supplementary supports needed to help Andrew succeed. Andrew no longer worries about falling behind the rest of his fourth grade classmates, and his plans of someday going to college no longer seem so far-fetched.