

REMEMBERING THE “INDIVIDUALS” OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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INTRODUCTION

The ideological debate over how best to educate children with disabilities was raging long before the federal law formally recognized disabled children’s right to an education.¹ Finally, in 1975, spurred by the systemic exclusion of students with disabilities from the public education system, Congress passed the Education of All Handicapped Children Act (EAHCA), which was reauthorized as the Individuals with Disabilities Education Act (IDEA) in 1990.² At the time of its passage, the EAHCA was a groundbreaking statute that called for state educators to rethink their education policies.³ It revolutionized public education in America by recognizing that all students with disabilities should be provided access to a “free appropriate public education.”⁴ Rather than warehousing children with disabilities in so-called “schools” or excluding children with disabilities from the education system altogether, school districts were now required to consider every disabled child as an individual student and, accordingly, provide

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1. 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, 531–36 (1996) (outlining history of debate over special education in United States).

2. Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (amending Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975)). The IDEA was amended again in 1997. Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified at 20 U.S.C. §§ 1400–87 (2000)).

3. Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 282 (1994).

4. Rebell & Hughes, *supra* note 1, at 545–46.

each with an appropriate education.⁵ The EAHCA ensured access to public education for all children with disabilities, encouraged states to accept this policy by providing money to those states in compliance with the EAHCA, and set forth an extensive list of procedures for the states to follow in developing their special education systems.⁶ By recognizing disabled children as independent, educable human beings rather than a marginal and homogeneous group, Congress laid the groundwork for the subsequent growth and development of the special education system in the United States. Although much progress has been made in the twenty-seven years since the original passage of the EAHCA,⁷ the debate over how to best educate children with disabilities rages on. Today, with the emphasis President George W. Bush has placed on his policy to “leave no child behind,” the escalating costs of special education, and the reauthorization of the IDEA in 2002, concerns about special education in the United States have arisen anew.⁸ It may be time for Congress and the federal courts to rethink the current interpretations of the IDEA and to remember the “individuals” whom the Act protects.

Focused on “appropriate” education for “individuals” with “unique needs,” Congress recognized with its passage of the IDEA that students with disabilities have unique needs that require special consideration in order to assure that each disabled child receives an appropriate education. In developing the legislation, Congress was careful to recognize the unique needs of students with disabilities and specifically created legislation that took those needs into account.⁹ The IDEA identifies a wide range of disabilities, from physical im-

5. See OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., TWENTY-SECOND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT v–viii (2000) [hereinafter OSEP REPORT] (describing difference between special education prior to IDEA and subsequent to its passage).

6. *Id.* at vii.

7. See Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(3) (2000); OSEP REPORT, *supra* note 5, at v.

8. See Exec. Order No. 13,227, 3 C.F.R. 793 (2001). (“One of the most important goals of my Administration is to support States and local communities in creating and maintaining a system of public education where no child is left behind.”); Press Release, David Griffith, Nat’l Ass’n of State Bds. of Educ., State Education Board Members Discuss ‘Individuals with Disabilities Education Act’ on Capitol Hill (Mar. 12, 2002), available at <http://www.vwcdexpo.com/newsread.cfm?nid=N4086318>.

9. See S. CONF. REP. NO. 94-455, at 38 (1975), reprinted in 1975 U.S.C.A.N. 1480, 1491 (“The conference committee did not intend to make a judgment in the legislation as to which disability is most severe. It is cognizant that disability is unique to the individual.”); OSEP REPORT, *supra* note 5, at vi–vii (chronicling background and history of IDEA legislation).

pairments, to emotional disturbances, to mental disabilities,¹⁰ and specifically requires that a detailed Individual Education Plan (IEP) be independently created for every child.¹¹ By creating the requirement for an IEP, Congress recognized that in order to be “appropriate,” the education of a disabled child must be uniquely tailored to that child’s particular needs, and that it was inappropriate to assume that all disabled children could be educated in the same manner.

In addition, Congress was acutely aware that education has traditionally been the province of the states and crafted its legislation in a manner that provided protections for students with disabilities, while still leaving their education in the hands of the state governments.¹² To that end, the primary purpose of the IDEA is its guarantee of a “free appropriate public education” for all children with disabilities.¹³ The IDEA established vast procedural requirements that must be met in order for states to receive federal funding, including provisions guaranteeing that the parents of students with disabilities have a prominent role in the education of their children,¹⁴ offering strict guidelines on due process, and ensuring that no educational placement decision is made without the knowledge and input of each child’s parents. The IDEA also provides parents with a variety of mechanisms for enforcing the Act’s mandates.¹⁵

Nonetheless, the federal courts diverge significantly as to their understanding of the guarantees of the IDEA. The most litigated provision of the IDEA is its “least restrictive environment” provision—the instruction to educate disabled students with regular students to the “maximum extent appropriate”—also known as the “mainstreaming” requirement.¹⁶ This placement provision is often the subject of intense debate and is frequently considered to be in tension with the IDEA’s guarantee of an individualized education. The issue is generally the extent to which mainstreaming, or inclusion, is appropriate for each individual student.¹⁷ Although the Supreme Court has never is-

10. See 20 U.S.C. § 1401(3)(A) (2000) (defining “child with a disability”), § 1401(26) (defining “specific learning disability”).

11. See *infra* Part I.B (relating in detail provisions of IDEA relating to IEP).

12. See *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982). See also *id.* at 208 n.30 (“It is clear that Congress was aware of the State’s traditional role in the formulation and execution of educational policy.”) (citing 121 CONG. REC. 19,498 (1975) (statement of Sen. Dole)).

13. 20 U.S.C. § 1400(d).

14. See *infra* Part I.B.

15. See *infra* Part I.B.

16. 20 U.S.C. § 1412(a)(5).

17. “Mainstreaming” is the terminology used in the IDEA. Although the term “inclusion” does not appear in the Act itself, it is the preferred terminology of most

sued a decision on the application of the “least restrictive environment” provision, it has provided the lower federal courts with instructions for reviewing cases brought under the IDEA. Yet despite the Supreme Court’s decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, which recognized the role of the states in implementing the IDEA and cautioned the lower federal courts against substituting their judgment for that of the state educators,¹⁸ the federal courts have struggled to create a single test by which a state’s compliance with the “least restrictive environment” provision of the IDEA may be evaluated. The current law is in disarray, leaving state administrators baffled as to how they are to comply with the IDEA.

The majority of federal courts have either interpreted the Supreme Court decision in a strikingly narrow way, or else ignored the Supreme Court’s warnings altogether in an attempt to fashion a single test for the evaluation of the state educational placement of individual students with disabilities.¹⁹ These decisions are curious, not just because the IDEA is focused on ensuring that decision-making is done on an individual basis, but also because they raise a more fundamental question: Are the courts or the state educators best situated to make educational decisions regarding students with disabilities? Although the IDEA explicitly provides for federal judicial review,²⁰ it does not place decision-making power regarding the educational placement of students with disabilities in the hands of the federal courts—a fact that the Supreme Court has made very clear.²¹

So who should be making decisions about the educational placement of students with disabilities? This Note argues that it is dangerous for the federal courts to take on the role of educator by interfering with the educational judgment of state educators. By doing so, the courts have lost sight of the purposes of the Act and the interests the Act is designed to protect. The educational placement of a disabled child is a complex inquiry based upon the very unique needs of that

educators. *Mavis v. Sobol*, 839 F. Supp. 968, 971 n.7 (N.D.N.Y. 1993). Mainstreaming and inclusion are often used interchangeably to indicate the education of disabled children in the regular classroom for at least some portion of the school day. The term “full inclusion” is used to denote the education of disabled children in the regular classroom for the entire school day. *See, e.g.*, Albert Shanker, *Inclusion and Ideology*, EXCEPTIONAL PARENT, Sept. 1994, at 39.

18. *See Rowley*, 458 U.S. at 208 (noting that Congress did not intend to displace “primacy of the States in the field of education” and stating that courts lack expertise to resolve issues of educational policy).

19. *See infra* Part II.B.

20. 20 U.S.C. § 1415(i)(2).

21. *See Rowley*, 458 U.S. at 206.

individual child and the appropriate structure that will enable the child to learn. The only people in the position to make adequate decisions regarding the educational placement of children with disabilities are the people already entrusted to do so by the IDEA: the group of parents, teachers, administrators, and experts who evaluate the abilities of the individual child and who have the knowledge and expertise to make a decision based upon the individual needs of the child and the myriad of factors that must be considered in the analysis.²² The role of the courts should be to examine independently the evidence presented to them, in order to ensure that the state educators have complied with the procedures set forth in the IDEA and have made an assessment based on the totality of the information available that is reasonably calculated to ensure that the disabled child receives an educational benefit. The courts should not, however, use their independent examination to make ideological judgments regarding educational policy or methodology, nor is it appropriate for the courts to attempt to fashion one test to evaluate all students with disabilities. Congress has clearly established a particular role for the federal courts in the implementation of the IDEA and, in doing so, did not give the courts *carte blanche* to interpret educational policy. If the states are ever to be able to ensure that each disabled child receives a particularized, individualized education as mandated by Congress, the federal courts must recognize that the state educators may have a better understanding of what is “appropriate” for educating an individual child under the IDEA, and accept that regular interference with that expertise is a detriment, rather than a help, to students with disabilities.

Part I of this Note provides a brief overview of the history of the IDEA and its relevant provisions. Part II discusses the Supreme Court’s decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley* and the federal courts’ subsequent response to that decision. Part III briefly reviews the theories put forth by various scholars, analyzing the possible reasons behind the federal court decisions regarding the “least restrictive environment” provision of the IDEA. Finally, Part IV explores the legal, social, and practical reasons why the courts should adhere to the level of discretion set forth in *Rowley* and identifies the problems created by regular federal court interference with state educational placement decisions for children with disabilities.

22. See 20 U.S.C. § 1414(d)(1)(B) (listing people who must be included in group that develops and evaluates IEP), § 1414(d)(3) (listing factors to be considered in developing IEP).

I.

THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

A. *The History of Special Education in the United States*

The early legal history of special education in the United States is rife with neglect and riddled with the deliberate exclusion of children with disabilities from the education system.²³ Until 1966, the federal government did very little to further the education of children with disabilities.²⁴ Although, by the mid-1970s, some school districts were providing disabled children with a public education, the disparities in educational opportunities for disabled children in contrast to those provided to non-disabled children were still significant.²⁵ One reporter recalls the “old days” of special education prior to the passage of the EAHCA:

I remember a day in New Mexico in one of that state’s schools for handicapped children: rows and rows of children and adults strapped to their chairs in a dimly lit room, a cacophony of moans and screams. Four or five attendants stood watch over what seemed to be about a hundred “students.”²⁶

Such treatment of children with disabilities was not uncommon before the intervention of the federal government in 1975. Prior to the passage of the EAHCA, most children with disabilities were considered “uneducable” and kept at home or in institutions.²⁷ When children with disabilities were provided schooling, they were often relegated to

23. See MARK C. WEBER, *SPECIAL EDUCATION LAW AND LITIGATION TREATISE* §§ 9.1–9.3 (1992) (describing early litigation arising under IDEA’s mainstreaming requirements); *Watson v. City of Cambridge*, 32 N.E. 864 (Mass. 1893) (permitting expulsion from public school of student who was “weak in the mind”); *State ex rel. Beattie v. Bd. of Educ.*, 172 N.W. 153 (Wis. 1919) (allowing exclusion of student with speech impediment, facial contortions, and uncontrollable drooling). Several states even passed statutes legalizing the exclusion of disabled children from public education. For examples of such statutes, see Richard C. Handel, *The Role of the Advocate in Securing the Handicapped Child’s Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 351–52 (1975).

24. See S. REP. NO. 94-168, at 5 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1429. Congress passed the Elementary and Secondary Education Act of 1965, which allocated funds for the improvement of educational opportunities for all disadvantaged children, a description which included disabled children. See Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 605 (1995) (citing Pub. L. No. 89-10, 79 Stat. 27 (1965)). For an in-depth discussion of the history of federal special education legislation in the United States, see *id.* at 603–06.

25. See Melvin, *supra* note 24, at 605.

26. John Merrow, *What’s So Special About Special Education?*, EDUC. WEEK, May 8, 1996, at 48 (describing school he visited in 1975).

27. *Id.*

the worst available facilities. For example, prior to the passage of the EAHCA, in the District of Columbia, eight of the ten buildings used for disabled children had already been condemned for use by non-disabled children.²⁸ In its study of the state of special education in the United States prior to the passage of the EAHCA, Congress found that of the eight million children with disabilities in the United States, only 3.9 million were receiving appropriate education, 2.5 million were receiving an inappropriate education, and 1.75 million were receiving no educational services at all.²⁹

In 1972, two major federal court decisions provided the impetus that would lead to major congressional involvement in the field of special education. *Pennsylvania Association for Retarded Children v. Pennsylvania*³⁰ (*P.A.R.C.*) and *Mills v. Board of Education*³¹ both recognized the right of disabled children to a free appropriate public education.³² In *P.A.R.C.*, the court of the Eastern District of Pennsylvania found that the plaintiff class of disabled children had made out a colorable constitutional claim on both equal protection and due process grounds.³³ The court found that once the state decided to provide a public education for some students, it could not thereby deny an education to all disabled students without implicating constitutional protections.³⁴ The Court heard testimony claiming that state efforts at special education had become mere “dumping grounds” for unmanageable students, and that classes for disabled children were consid-

28. *Id.* Geraldo Rivera exposed one famous example of the inhumane treatment of children with disabilities in 1972, at the Willowbrook State School of the Mentally Retarded in Staten Island, New York. Geraldo Rivera, *Willowbrook: The Last Great Disgrace* (WABC television broadcast, 1972).

29. S. REP. NO. 94-168, at 8 (defining “children” as those between birth and twenty-one years of age). For more information about the history of special education in the United States, see Philip T.K. Daniel & Karen B. Coriell, *Traversing the Sisyphean Trails of the Education for all Handicapped Children’s Act: An Overview*, 18 OHIO N.U. L. REV. 571, 571–74 (1992).

30. 343 F. Supp. 279 (E.D. Pa. 1972).

31. 348 F. Supp. 866 (D.D.C. 1972).

32. See Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against “Inclusion”*, 72 WASH. L. REV. 775, 785 (1997). See S. REP. NO. 94-168, at 6 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1430 (noting that these cases found guaranteed right to free publicly supported education for handicapped).

33. *P.A.R.C.*, 343 F. Supp. at 295–97. *P.A.R.C.* involved the court approving a consent agreement between the parties. The court found that the consent agreement, whereby the state agreed to provide due process hearings before removing a disabled student from regular classes and to pay excess costs for the education of disabled children, was fair and reasonable. *Id.* at 302. Although *P.A.R.C.* revolved around a consent agreement, it is generally considered the first case addressing the right to an education for the disabled. See Dupre, *supra* note 32, at 784.

34. *P.A.R.C.*, 343 F. Supp. at 295–97.

ered classes for the “feebleminded” or “classes for idiots,” rather than genuine educational vehicles.³⁵ The court further stated that the expert testimony had established that “all mentally retarded persons are capable of benefiting from a program of education and training,” and that many such persons were being denied any public education services at all.³⁶

In *Mills*, the district court for the District of Columbia found that the exclusion of children with disabilities from public schools violated their due process rights.³⁷ The court stated that due process required a hearing before the exclusion or the termination of classification as a special education student.³⁸ The court decreed that “[t]he District of Columbia shall provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child’s mental, physical or emotional disability or impairment.”³⁹ Furthermore, the court held that the failure to provide disabled children with a publicly-supported education and due process hearings could not be excused by a claim that the district had insufficient funds to do so.⁴⁰ The decisions in *P.A.R.C.* and *Mills* inspired similar litigation in some states, including similar decisions in at least twenty-seven other states,⁴¹ before Congress decided to get involved.

B. *An Overview of the IDEA*

Inspired by the *P.A.R.C.* and *Mills* decisions, and in response to the growing national concern over the education of children with disabilities, Congress promulgated the EAHCA in 1975.⁴² According to

35. *See id.* at 294 (referring to testimony by Dr. Goldberg).

36. *Id.* at 296.

37. *Mills*, 348 F. Supp. at 875 (“[T]he defendant’s conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause.”).

38. *Id.*

39. *Id.* at 878.

40. *Id.* at 876 (“The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the ‘exceptional’ or handicapped child more than on the normal child.”).

41. S. REP. NO. 94-168, at 6 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1430.

42. *See id.* at 5–7; Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1461 (1976)). Congress had taken interim measures before passing the comprehensive Act in 1975. In 1970, Congress passed the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970–1971), which established a grant program to states for improving special education. In 1974, Congress increased funding under this Act. Pub. L. No. 93-380, 88 Stat. 579 (1974). The 1974 statute was adopted as an interim measure in order to give Congress time to study the issue of special education in the

Congress, the EAHCA was created as a “comprehensive mechanism which [would] insure . . . maximum benefits to handicapped children and their parents.”⁴³ The Act was intended to remedy the problems in special education by requiring states to provide all disabled children with a “free appropriate public education,” and by providing funding to states to defray the costs of special education.⁴⁴ In 1990, the EAHCA was amended and renamed the Individuals with Disabilities Education Act (IDEA).⁴⁵ The IDEA was amended again in 1997.⁴⁶

Despite undergoing numerous changes over the years, the major provisions of the IDEA have remained intact since 1975.⁴⁷ Today, the Act is carefully crafted to provide services to individual disabled children whose disabilities range from minor learning disabilities, to severe mental retardation, to general physical impairments.⁴⁸ The central purposes of the IDEA continue to be “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;”⁴⁹ “to ensure that the rights of children with disabilities and their parents or guardians are protected; to assist the States and localities to provide for the education of all children with disabilities; and to assess and ensure the effectiveness of efforts to educate children with disabilities.”⁵⁰ Under the Act, special education is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability,”⁵¹ and includes “instruction conducted in the “classroom, in the home, in hospitals and institutions, and in other settings as well as physical education.”⁵² Related services include transportation and developmental, corrective, or other supportive services that may be required to allow a disabled

states. It was this study that resulted in the EAHCA. *See* Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 179–81 (1982).

43. *See* S. REP. No. 94-168.

44. OSEP REPORT, *supra* note 5, at vi.

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

46. Individuals with Disabilities Education Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified at 20 U.S.C. §§ 1400–1487 (Supp. 1997)).

47. OSEP REPORT, *supra* note 5, at vii.

48. *Id.* at vi–vii.

49. 20 U.S.C. § 1400(d)(1)(A) (2000).

50. OSEP REPORT, *supra* note 5, at vii (citing U.S. DEP’T OF EDUC., INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS OF 1995: REAUTHORIZATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) 1 (1995)). *See also* 20 U.S.C. § 1400(d).

51. § 1401(25).

52. *Id.*

child to benefit from special education.⁵³ According to Congress, the statute is designed to improve the educational results for children with disabilities, which is “an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”⁵⁴

Primarily a procedural statute,⁵⁵ the IDEA was passed pursuant to Congress’ spending powers, and as such provides monetary incentives for the states to improve the educational opportunities provided to children with disabilities.⁵⁶ Accordingly, states are eligible for federal assistance under the IDEA “if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets [the enumerated] conditions.”⁵⁷ The state must also establish a “goal of providing full educational opportunity to all children with disabilities.”⁵⁸ Participating states must provide a “free appropriate public education to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.”⁵⁹ In addition, § 1412 instructs that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁶⁰

53. § 1401(22). Developmental, corrective or supportive services may include, but are not limited to speech-language pathology, psychological services, physical and occupational therapy, and counseling services. *Id.*

54. § 1400(c)(1).

55. As one scholar has noted, the promulgation of the IDEA and its predecessors occurred during a period when the use of procedural guarantees to constrain government agencies was increasing. See Dupre, *supra* note 32, at 788 n.67 (citing Richard J. Pierce Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1974–84 (1997)).

56. See U.S. CONST. art. I, § 8 (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”), see, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (finding that federal government could withhold portion of federal highway funds from states that do not prohibit purchase of alcohol by people under age twenty-one; only restriction on spending power is that condition of federal grant must be related to federal interest in particular project or program).

57. 20 U.S.C. § 1412 (2000).

58. § 1412(a)(2).

59. § 1412(a)(1)(A).

60. § 1412(a)(5)(A).

Congress recognized that “disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society.”⁶¹ As a reflection of Congress’ commitment to the appropriate education of children with disabilities and its recognition of the individual dignity of each disabled child, the IDEA was crafted with a focus on the needs and abilities of each individual disabled child. The Act does not engage in generalizations or apply standard criteria to all disabled children. For example, in determining the appropriate placement for a disabled child, the state must provide each child with an IEP.⁶² An IEP is “a written statement for each child with a disability that is developed, reviewed and revised” in accordance with the provisions of the IDEA.⁶³ A detailed document, it must include statements of (1) the child’s present levels of educational performance; (2) measurable annual goals, including benchmarks or short-term goals; (3) the special education and related services to be provided to the child; (4) an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom; (5) any individual modifications in the administration of assessments that are needed for the child to participate in an assessment; (6) the projected date for the beginning of the services and modification, and the frequency, location, and duration of those services and modifications; (7) needed transition services at applicable ages; and (8) how the child’s progress will be measured and how the child’s parents will be regularly informed of their child’s progress and the extent to which the progress is sufficient to meet the child’s goals by the end of the year.⁶⁴

The IEP is considered a “cornerstone” of the IDEA.⁶⁵ It is the primary vehicle for implementing Congress’ educational goals for children with disabilities.⁶⁶ The exhaustive details provided in each child’s IEP guarantee that the education a disabled child receives is specifically tailored to his or her unique needs and abilities. Each child’s educational placement must be based on that child’s IEP,⁶⁷ and the parents of the disabled child must be included in any group that

61. § 1400(c)(1).

62. § 1412(a)(4).

63. § 1414(d).

64. § 1414(d)(1)(A).

65. OSEP REPORT, *supra* note 5, at x; *Honig v. Doe*, 484 U.S. 305, 311 (1988) (calling IEP “the centerpiece of the statute’s education delivery system for disabled children”).

66. *Honig*, 484 U.S. at 311.

67. 34 C.F.R. § 300.552(b)(2) (2002).

makes decisions regarding the educational placement of their child.⁶⁸ Each state must ensure that a “continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.”⁶⁹ This “continuum” must include alternative placements—“instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions”—and must make supplementary services available when a child is placed in a regular classroom.⁷⁰

The purpose of the IEP is to “tailor the education to the child; not tailor the child to the education.”⁷¹ Accordingly, in securing the development of an appropriate and comprehensive IEP tailored to the child, the IDEA requires that a team of individuals with knowledge of the disabled child be assigned the responsibility of developing the child’s IEP. The IEP Team must be composed of (1) the child’s parents; (2) at least one of the child’s regular education teachers, if applicable; (3) at least one special education teacher; (4) a representative of a local education agency who is qualified to supervise the provision of special education, is knowledgeable of the general education curriculum, and is knowledgeable about the availability of resources; (5) an individual who can interpret the instructional implications of evaluation results; (6) any other individual who has knowledge or special expertise regarding the child; and (7) the disabled child, if appropriate.⁷² The IEP Team, in creating the IEP must consider a variety of factors, including the strengths of the child and the concerns of the parents, the results of the most recent evaluations of the child, appropriate behavior strategies, language needs, communications needs, and any necessary assistive technology devices and services.⁷³ The inclusion of a variety of knowledgeable people on the IEP Team assures that all aspects of the child’s educational needs and educational options will be considered in the development of the IEP.

The IEP Team must review the IEP at least annually to determine whether the child’s annual goals are being achieved and to revise the IEP, if necessary.⁷⁴ During the initial evaluation of a child and during subsequent re-evaluations, the IEP Team must determine (1) whether the child has or continues to have a particular disability; (2) the present levels of performance and the educational needs of the child; (3)

68. 20 U.S.C. § 1414(f).

69. 34 C.F.R. § 300.551 (2002).

70. *Id.*

71. S. REP. NO. 105-17, at 24 (1997).

72. 20 U.S.C. § 1414(d)(1)(B) (2000).

73. § 1414(d)(3).

74. § 1414(d)(4).

whether the child needs or continues to need special education and related services; and (4) whether any modifications are needed to enable the child to meet the IEP goals.⁷⁵ This review provides the IEP Team with the opportunity to review and revise the IEP in accordance with the child's changing educational needs.

Congress was acutely aware that, prior to the existence of federal legislation protecting the disabled child's right to a free appropriate public education, school districts often denied disabled children appropriate educations without consulting the children's parents.⁷⁶ "Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in . . . the development of the IEP"⁷⁷ Therefore, § 1415 sets forth an elaborate scheme requiring states to establish procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards in the provision of a free appropriate education for the child.⁷⁸ Those procedures include access to all information regarding the child, participation in all meetings with respect to the child's identification, evaluation and placement, written notice whenever the state proposes to take any action regarding the child and the provision of a free appropriate education for the child, the provision of a copy of the procedural safeguards available to all parents with a full explanation of those procedures, and an opportunity for mediation.⁷⁹

The most significant of the procedural safeguards is the right to an impartial due process hearing whenever the parent files a complaint with respect to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education.⁸⁰ If the impartial hearing is held before a local education agency, any party aggrieved by the findings of the hearing officer may appeal the findings to the state educational agency, which must conduct an impartial review of the decision.⁸¹ Ultimately, any party aggrieved by the findings made by the state education agency may bring a civil action in any state court or district court of the United States, and that court will receive the records of the administrative proceedings, hear additional evidence at the request of a party, and make an independent decision based on a preponderance of the evidence.⁸² The court may

75. § 1414(c)(1)(B).

76. See *Honig v. Doe*, 484 U.S. 305, 311 (1988).

77. *Id.*

78. 20 U.S.C. § 1415 (2000).

79. *Id.*

80. § 1415(f).

81. § 1415(g).

82. § 1415(i)(2).

grant such relief as it determines appropriate and may also, in its discretion, award reasonable attorneys' fees to the parents of a disabled child who is the prevailing party.⁸³ It is from these provisions that federal court review of the educational placements of individual children with disabilities will arise.

The IDEA is remarkable in both its focus on the unique needs of every individual disabled child and the extensive measures required of the states to ensure that those unique needs are met. Congress clearly recognized that every disabled child is different, and that in order to provide a free appropriate public education for each child, a great deal of time and energy would need to be focused on each child's individual needs. Indeed, some critics have remarked that, in a perfect world, such individualized attention would be provided to every child, regardless of whether that child has a disability.⁸⁴ For its part, Congress chose not to provide substantive standards in the Act for balancing the numerous factors that contribute to a free appropriate public education for each individual child, allowing the IEP Team to use their "best professional judgment" in striking the balance.⁸⁵ It is this ambiguity that has lent fuel to the fierce debate in the education community regarding the appropriate educational placement of disabled children.

II.

JUDICIAL INTERPRETATIONS OF THE IDEA: FROM *ROWLEY* TO THE FEDERAL COURTS

A. *Interpreting the Act: The Supreme Court*

In 1982, the Supreme Court examined the meaning of "free appropriate public education" under the EAHCA⁸⁶ in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁸⁷ In *Rowley*, the parents of Amy Rowley, a deaf student in the Hendrick Hudson School District, brought a civil suit protesting the school district's refusal to provide a sign language interpreter for Amy in her regular classroom.⁸⁸ Although Amy's IEP provided that she would be

83. § 1415(i)(2)-(3).

84. See, e.g., Dupre, *supra* note 32, at 813.

85. Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 425 (1998).

86. *Rowley*, like many of the cases discussed in this Note, was decided under the EAHCA. However, the EAHCA "remains the foundation for IDEA," and those cases decided under the EAHCA remain binding precedent for issues decided under the IDEA. See *Heldman v. Sobol*, 962 F.2d 148, 150 n.1 (2d Cir. 1992); Dupre, *supra* note 32, at 777 n.3.

87. 458 U.S. 176 (1982).

88. *Id.* at 184-85.

educated in the regular classroom, the Rowleys insisted that Amy also be provided with a sign language interpreter.⁸⁹ The school had provided Amy with a sign language interpreter for a two-week trial period, but the interpreter had reported that Amy did not need his services at that time.⁹⁰ The school administration concluded that Amy did not need a sign language interpreter in her first grade classroom.⁹¹ Upon the denial of their request, the Rowleys requested a hearing before an independent examiner.⁹² Both the hearing officer and the New York Commissioner of Education found that Amy did not require an interpreter, because she was achieving “educationally, academically, and socially” without one.⁹³ The Rowleys brought suit in the Southern District of New York under § 1415 of the EAHCA.⁹⁴

The district court found that although Amy was a good student who communicated well with her classmates and teachers, she was “not learning as much, or performing as well academically, as she would without her handicap.”⁹⁵ The court found that as a result of this disparity Amy was not receiving a free appropriate public education, and a divided panel of the Court of Appeals for the Second Circuit affirmed.⁹⁶ The Supreme Court granted certiorari to consider the “free appropriate public education” requirement of the EAHCA, and the role of the state and federal courts in exercising review under 20 U.S.C. § 1415.⁹⁷

The Court, referring to the language of the Act itself, stated that a free appropriate public education means:

89. *Id.* at 185.

90. *Id.* at 184.

91. *Id.* at 184–85.

92. *Id.* at 185.

93. *Id.*

94. *See id.* (Respondents claimed administrators’ denial of request for interpreter constituted denial of “free appropriate public education” guaranteed by Act).

95. *Id.* at 185–86.

96. *Id.* at 186.

97. *Id.* The Court does not specifically consider in this decision the “least restrictive environment” provision of the EAHCA. It does, however, discuss the appropriate role of the courts under § 1415, which is the provision under which all challenges to the EAHCA (and the IDEA) are brought. The Court does specifically note that:

Despite the preference for “mainstreaming” handicapped children—educating them with nonhandicapped children—Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that “the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” The Act thus provides for the education of some handicapped children in separate classes or institutional settings.

Id. at 181 n.4.

[S]pecial education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program⁹⁸

Therefore, a child is provided with a free appropriate public education where the child is provided individualized instruction with “sufficient support services to permit the child to benefit educationally from that instruction.”⁹⁹ The Court noted that by passing the Act, Congress’ primary intent was to make public education available to disabled children, and not to guarantee any particular level of education.¹⁰⁰ Recognizing that the Act required states to educate a wide variety of disabled children—“from the marginally hearing-impaired to profoundly retarded and palsied”¹⁰¹—the Court stated that “[w]e do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.”¹⁰²

In the course of its analysis, the Court contrasts the “elaborate and highly specific procedural safeguards” of the Act, with its “general and somewhat imprecise substantive admonitions,” and concludes that Congress placed immense significance on those procedural safeguards.¹⁰³ The Court reasoned that the establishment of these procedures indicated the “legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in way of substantive content in an IEP.”¹⁰⁴ According to the Court, this meant that the provision in the

98. *Id.* at 188.

99. *Id.* at 203.

100. *Id.* at 192. The Court, admittedly, faced a unique situation in this case: Amy Rowley had a normal I.Q. and was passing easily from grade to grade. *Id.* at 185. Furthermore, Amy had already been placed in a regular class, and the controversy was not over her placement, but over the services to be provided to her in that setting. *Id.* at 184–85. Nonetheless, the Court’s extensive discussion of the Act and its implications remains highly relevant to any interpretation of the IDEA.

101. *Id.* at 202.

102. *Id.* The Court placed great emphasis on Amy Rowley’s continued success in her regular classroom and the fact that she was able to pass easily from grade to grade. *Id.* at 185. However, the Court did not intend to establish general criteria for assessing the adequacy of educational benefits conferred upon a disabled child. *Id.* at 202. Since Amy was being educated in the regular classroom, was receiving substantial specialized instruction and related services, and was performing above average in the regular classroom, the Court limited its finding that a “free appropriate public education” under the EAHCA was being received under these specific facts. *See id.*

103. *Id.* at 205.

104. *Id.* at 206.

Act granting a court the ability to review a case under the Act based upon a preponderance of the evidence was “by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.”¹⁰⁵ For a court to do so would frustrate the purposes of Congress in creating the procedures in the first instance.¹⁰⁶ Thus, the “sketchy” substantive requirements in the Act simply did not indicate that the reviewing courts should take a “free hand” in imposing substantive standards of review.¹⁰⁷

Justice Rehnquist, writing for a majority of the Court, also clearly laid out the test for a court’s inquiry in suits brought under § 1415(e)(2):¹⁰⁸

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.¹⁰⁹

The Court noted that the primary responsibility for developing an educational plan for a child and for determining which educational method was most suitable to the individual child’s needs was deliberately left by Congress to the state and local educational agencies, in cooperation with the child’s parents.¹¹⁰ Courts should be “careful to avoid imposing their view of preferable educational methods upon the States,” as it was “highly unlikely that Congress intended courts to overturn a State’s choice of appropriate educational theories” in a case brought under the Act.¹¹¹ Finally, the Court reiterated its position that courts lack the “specialized knowledge and experience” necessary to resolve “persistent and difficult questions of educational policy.”¹¹²

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 206–07. In the current IDEA, the provision under which parties may bring civil suits is § 1415(f). Section 1415(e)(2) now relates to the procedural provisions for mediation. *See* 20 U.S.C. § 1415(e)(2), (f) (2000).

109. *Rowley*, 458 U.S. at 206–07.

110. *Id.* at 207–08. The Court specifically noted that Congress was “aware of the States’ traditional role in the formulation and execution of educational policy.” *Id.* at 208 n.30 (citing 121 CONG. REC. 19,498 (1975) and *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

111. *Id.* at 207–08.

112. *Id.* at 208 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

The Court then reversed the decision of the Court of Appeals, and remanded the case for further proceedings.¹¹³

Although the Supreme Court did not directly consider the “least restrictive environment” provision of the EAHCA in *Rowley*, its decision nonetheless provides explicit guidance to the lower courts in reviewing cases brought under § 1415 of the Act. The Court unequivocally stated that a court’s place is to evaluate a state’s compliance with the procedures of the Act and whether the child’s IEP is calculated to enable a child to receive educational benefits. The Court unmistakably interpreted Congress’ impressive provision of procedural protections as an indication that those procedures were to be the guiding force in ensuring the rights of disabled students and their parents, as well as a state’s compliance with the Act itself. It is curious to observe, then, that many of the federal circuits have taken on a much different role than that prescribed by the Supreme Court.

B. Interpreting the Act: The Federal Courts

Navigating the decisions of the federal circuits regarding the IDEA is a difficult and oftentimes perplexing task. The courts range from near total deference to the determination of the state administrative proceedings, to strict *de novo* review whereby the administrative proceedings provide merely a factual backdrop for the court’s own evaluation. The result is that state educators receive mixed messages regarding their obligations under the IDEA. Often, despite carefully adhering to the procedural requirements of the Act and utilizing the best professional judgment of the IEP Team in determining the appropriate educational placement for a disabled child, a school district’s decision will nonetheless be second-guessed by the federal courts, at a considerable cost to the school district—and therefore to its students. School districts are frequently left evaluating how to avoid litigation rather than how to best educate disabled children, and children are forced to fit an education model rather than having the education model tailored to fit them. Although the actual decisions of the federal courts are less significant than the concerns raised by the implications of those decisions, understanding the opinions of the various federal courts can shed light on the problems underlying federal court intervention in the educational placement of disabled children under the IDEA. This section provides a brief overview of the leading decisions in the federal circuit courts.

113. *Id.* at 210.

In *Roncker v. Walter*,¹¹⁴ the Sixth Circuit held that the *Rowley* decision, decided in the context of a dispute over a school's choice between two educational methodologies, did not apply to cases involving the question of whether the state had met the mainstreaming requirements of the Act.¹¹⁵ The court adopted *de novo* review, but noted that courts should give "due weight" to the state administrative proceedings.¹¹⁶ The court stated, that in some situations, "[A] placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming."¹¹⁷ In setting forth the standard under which an educational placement decision should be reviewed, the court held:

In a case where the segregated facility is considered superior, the court should determine whether the services that make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.¹¹⁸

Parsing this analysis, one sees that the court decided it could evaluate the placement of a disabled child based on (1) which facility was superior; (2) whether services could feasibly be provided in a non-segregated setting; (3) whether the disabled child would benefit from mainstreaming; (4) whether the benefits of mainstreaming were out-

114. 700 F.2d 1058 (6th Cir. 1983). Nine-year-old Neill Roncker was classified as Trainable Mentally Retarded (TMR) and had an I.Q. below 50. *Id.* at 1060. He had a mental age of two or three and regularly suffered from seizures. *Id.* He was not considered to present a danger to other students, but did require constant supervision. *Id.* The school district decided that Neill should be placed in a school exclusively for mentally retarded children, but Neill's parents insisted that he be educated in a setting where he would have some contact with non-disabled children. *Id.*

115. *Id.* at 1062.

116. *Id.* The district court had used an "abuse of discretion" standard in reviewing the school district's decision to place Neill in a school exclusively for disabled children. *Id.* at 1061.

117. *Id.* at 1063.

118. *Id.*

weighed by the benefits of services that can not be provided in the non-segregated setting; (5) the disruptive behavior of the disabled child; and (6) the cost of providing services. Taking on this herculean task, the court noted that “[s]ince Congress has chosen to impose that burden . . . the courts must do their best to fulfill their duty.”¹¹⁹

The Eighth Circuit adopted the *Roncker* test in *A.W. v. Northwest R-1 School District*.¹²⁰ The court upheld the district court’s decision that the school district was not required to educate the disabled child, A.W., in a mainstream school because “the marginal benefit of A.W.’s mainstreaming was outweighed by the deprivation of benefit to other handicapped children.”¹²¹ Acknowledging the test set forth in *Rowley*, the Eighth Circuit nonetheless agreed with the Sixth Circuit that *Rowley* was not applicable to mainstreaming cases.¹²² Although the Court of Appeals did not examine the record of the administrative hearing, other than to note the “lower court’s review of it,” the Court of Appeals did acknowledge the Supreme Court’s admonition that educational decision-making for disabled children should be left to the state and local agencies.¹²³

In *Daniel R.R. v. State Board of Education*, the Fifth Circuit rejected the *Roncker* test, and instead fashioned a test of its own.¹²⁴ The court felt that the *Roncker* test intruded too much into the “educational policy choices” that Congress had left to state and local school officials.¹²⁵ In reviewing the provisions of the Act, the court identified a tension in the Act between the mainstreaming provision and the mandate for a free appropriate public education, thus framing the mainstreaming requirement as equal to, rather than a condition of, the guarantee of access to a free appropriate public education.¹²⁶

119. *Id.*

120. 813 F.2d 158, 163 (8th Cir. 1987) (“We believe that the Sixth Circuit in *Roncker* correctly interpreted the Act’s mainstreaming provisions as allowing a court to consider both cost to the local school district and benefit to the child.”).

121. *Id.* at 163. A.W. was an elementary-aged boy with Down’s Syndrome classified as severely handicapped. *Id.* at 160. His speaking abilities were severely limited and he had only limited intellectual capabilities. *Id.* A.W. required constant supervision and often engaged in disruptive behavior. *Id.* The school district recommended placement in a school exclusively attended and designed for disabled children. *Id.* A.W.’s parents challenged his classification as “severely handicapped” and demanded that he be mainstreamed in a regular school. *Id.*

122. *Id.* at 163.

123. *Id.* at 164.

124. 874 F.2d 1036 (5th Cir. 1989). Daniel R. was a six-year-old boy with Down’s Syndrome. *Id.* at 1039. He was both mentally retarded and speech impaired, and his developmental age was between that of a two and three-year-old. *Id.*

125. *Id.* at 1046.

126. *See id.* at 1043–44.

Like the Sixth and Eighth Circuits, the Fifth Circuit rejected the *Rowley* test as inapplicable to evaluating the mainstreaming provision.¹²⁷ The Fifth Circuit's test requires the court to consider (1) whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily¹²⁸; and (2) "whether the school has mainstreamed the child to the maximum extent appropriate."¹²⁹ In conducting its analysis, the court looked to several factors, which it considered probative, but not exhaustive.¹³⁰ Those factors include: (1) whether the state has taken steps to accommodate the child in regular education; (2) whether the child will receive an educational benefit from regular education; (3) the overall educational experience of the child in a regular classroom; and (4) the effect the child has on the regular classroom environment.¹³¹ The court is insistent in noting the non-academic benefits of mainstreaming (interestingly, never mentioned by Congress), noting that the "language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development."¹³²

The Eleventh Circuit aligned itself with the Fifth Circuit in *Greer v. Rome City School District*, agreeing that *Rowley* is inapplicable to mainstreaming cases and adopting the *Daniel R.R.* test.¹³³ Like the court in *Daniel R.R.*, the Eleventh Circuit provides a list of factors the court may consider, including (1) comparing the benefits received in a

127. *Id.* After a trial period, the school district determined that placement in the regular classroom was inappropriate for Daniel R. *Id.* at 1039. Instead, the school district determined that Daniel R. should be educated in a special education classroom and mainstreamed with regular children during lunch and recess. *Id.* Daniel R.'s parents brought suit claiming that this placement improperly denied Daniel R. a regular education. *Id.* The hearing officer affirmed the school district's placement of Daniel R. and the district court affirmed this decision. *Id.* at 1040.

128. *Id.* at 1048.

129. *Id.* at 1048 (citing 20 U.S.C. § 1412(5)(b)).

130. *Id.*

131. *Id.* at 1048–50.

132. *See id.* at 1047–48. The court also felt that the district court "placed too much emphasis on educational benefits." *Id.* at 1047.

133. 950 F.2d 688, 695–96 (11th Cir. 1991). *Greer* involved Christy Greer, a ten-year-old girl with Down's Syndrome and speech and learning disabilities. *Id.* at 690. For several years, Christy's parents resisted the school district's attempts to evaluate her, and the school district eventually initiated administrative proceedings to compel the Greers to allow Christy to be evaluated. *Id.* at 690–91. Christy was finally evaluated when a decision was rendered in favor of the school district. *Id.* at 691. The school district recommended that Christy be educated in a special education classroom and mainstreamed with non-disabled children for physical education, music, and lunch. *Id.* Christy's parents disagreed with this placement, and the school district initiated administrative proceedings to have the proposed IEP and placement for Christy reviewed. *Id.* at 692.

regular classroom with that of a separate special education classroom; (2) the effect of the disabled child on the regular classroom environment; and (3) the cost of the services needed for the disabled child to benefit from education in the regular classroom.¹³⁴ Most concerned with its determination that the school district did not consider what benefit the disabled child would receive from an education in the regular classroom with appropriate supplemental services, the court found that because the school district did not offer evidence that it considered alternative methods for educating the disabled child, it had not met the requirements of the Act.¹³⁵

In *Oberti v. Board of Education of the Borough of Clementon School District*, the Third Circuit joined the Eleventh Circuit in adopting the *Daniel R.R.* test.¹³⁶ Despite an in-depth analysis of the school district's placement of the disabled child, including (1) whether the school district made a reasonable effort to include the disabled child in the regular classroom; (2) whether the educational benefits of the special education class outweighed those of the regular classroom; and (3) the possible negative effects of the disabled child on the regular classroom,¹³⁷ the Third Circuit explicitly noted that it was not attempting to create an IEP or to determine a placement for the child, as that was a job left to the Child Study Team.¹³⁸ Like the Fifth Circuit, the Third Circuit extolled the benefits of mainstreaming, noting the potential "development of social and communication skills from interaction with nondisabled peers," that mainstreaming may work to eliminate

134. *Id.* at 697.

135. *Id.* at 698. The district court overturned the administrative findings in favor of the school district's proposed IEP and placement for Christy. *Id.* at 693. In making its decision, the district court was faced with conflicting expert testimony as to whether Christy could be appropriately educated in a regular classroom. *Id.*

136. 995 F.2d 1204, 1215 (3d Cir. 1993). In *Oberti*, the school district proposed placing Rafael, an eight-year-old child with Down's Syndrome and severe behavioral problems, in a separate special education classroom. *Id.* at 1207-08. Rafael's parents objected, insisting that Rafael be included in a regular class in his neighborhood school. *Id.* at 1209. The administrative hearing officer determined that Rafael was not ready for mainstreaming and affirmed the school district's placement decision. *Id.* The district court, after hearing testimony from numerous experts for both parties, determined that the school district had erred in its placement decision for Rafael and found in favor of the *Obertis*. *Id.* at 1211-12. The Third Circuit affirmed the district court's decision. *Id.* at 1223.

137. *Id.* at 1216-18.

138. *Id.* at 1224. However, the court does note its disagreement with Rafael's IEP because "Rafael's IEP for the 1989-90 school year included no provision for supplementary aids and services . . . aside from stating that there will be 'modification of regular class expectations' to reflect Rafael's disability." *Id.* at 1221. Rafael was moved to a separate special education classroom after attempts at including him in the regular classroom failed. *Id.* at 1208.

stigma, and claiming, without citations, that “Congress understood that a fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers.”¹³⁹ According to the Third Circuit, a court is “free to accept or reject the agency findings” based upon new testimony and whether the findings are consistent with the requirements of the Act.¹⁴⁰

The Ninth Circuit, in rejecting the application of *Rowley* to mainstreaming cases, declined to follow either the *Roncker* test or the *Daniel R.R.* test, and instead fashioned a test that is a combination of the two. In *Sacramento City Unified School District v. Rachel H.*,¹⁴¹ the Ninth Circuit upheld the district court’s decision that the school district had failed to make an adequate effort to educate Rachel H. in a regular class.¹⁴² In doing so, the Ninth Circuit also adopted the test used by the district court in its analysis: a four factored balancing test considering “(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the disabled child] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [the disabled child].”¹⁴³ The court makes no mention of the *Rowley* deference test, although the district court had upheld the findings of the state hearing officer.¹⁴⁴

Despite the willingness of some federal courts to delve into the debate over the appropriate educational placement of disabled children under the IDEA, other circuits have adopted a more deferential approach. The most extreme of these is the Second Circuit, which in *Briggs v. Board of Education*,¹⁴⁵ stated that the issue was “whether

139. *Id.* at 1216–17.

140. *Id.* at 1220.

141. 14 F.3d 1398 (9th Cir. 1994). Rachel H. was an eleven-year-old mentally retarded girl with an I.Q. of 44. *Id.* at 1400. Her parents sought to have her educated full-time in a regular classroom, and the school district proposed placing Rachel H. in a special education classroom for academic subjects and a regular class for non-academic activities. *Id.* Rachel H.’s parents maintained that she would not benefit from a special education class. *Id.*

142. *See id.* at 1398.

143. *Id.* at 1404.

144. *Id.* at 1400. *But see* *Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1183 (9th Cir. 1984) (citing *Rowley* and stating that “we must grant deference to the sound judgment of the various state educational agencies”).

145. 882 F.2d 688 (2d Cir. 1989). James Briggs was a six-year-old boy with moderate to severe sensorineural hearing loss in both ears and mild to moderate speech and language delays. *Id.* at 689. James’s Planning and Placement Team (PPT) determined that he should be placed in a separate pre-school program for the hearing impaired, and indicated in his IEP that when his speech and language problems no longer interfered with his ability to communicate with his teachers and peers, a different placement would be considered. *Id.* at 689–90. James’s parents insisted that James be provided with more interaction with non-disabled children. *Id.* at 690. The

the IEP developed for [the disabled child] was ‘reasonably calculated to enable [him] to receive educational benefits.’”¹⁴⁶ Claiming that the “presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students,”¹⁴⁷ the Second Circuit criticized the district court for adopting the *Roncker* test and for “substituting its judgment for that of the agency experts and the hearing officer.”¹⁴⁸ In addition, the court questioned the district court’s finding that the social benefits of mainstreaming outweighed the educational benefits of the PPT placement.¹⁴⁹ The court held that it was not its decision to determine whether or how supplemental services could be provided in the regular classroom.¹⁵⁰

The Fourth Circuit, in *Hartmann v. Loudon County Board of Education*, also criticized a district court for substituting its own judgment for that of the local school authorities.¹⁵¹ The court found that “[t]he IDEA embodies important principles governing the relationship between local school authorities and a reviewing district court,”¹⁵² and that “the IDEA does not grant federal courts a license to . . . disregard the findings developed in state administrative proceedings.”¹⁵³ The court stated that “the IDEA’s mainstreaming provision establishes a presumption, not an inflexible federal mandate,”¹⁵⁴ and noted that “‘Congress’ intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist

hearing officer determined that the program developed by the PPT was “reasonably designed to meet J[ames’s] special education needs” (alteration in original) and so was an appropriate placement at that time. *Id.* at 690–91. The district court disagreed, finding that James’s placement was inappropriate under the Act. *Id.* at 690.

146. *Id.* at 692 (citing Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982)).

147. *Id.* (citing *Wilson v. Marana Sch. Dist.*, 735 F.2d 1178, 1183 (9th Cir. 1989)).

148. *Id.* at 693.

149. *Id.* (disagreeing with lower court because IEP was ultimately focused on providing James with “best educational program feasible”).

150. *Id.*
 151. 118 F.3d 996 (4th Cir. 1997). Mark Hartmann was an eleven-year-old autistic child who was unable to speak and suffered from severe problems with his fine motor skills. *Id.* at 999. After placing Mark in a regular classroom for his second-grade year, Mark’s IEP Team found that he was making no academic progress in the regular classroom, and recommended that he be educated in a special class for autistic children and mainstreamed for non-academic activities. *Id.* at 1000. Mark’s parents disagreed with this placement, but the hearing officer and state review officer found in favor of the school district. *Id.* The district court reversed the hearing officer’s decision because “the Board simply did not take enough appropriate steps to try to include Mark in a regular class.” *Id.*

152. *Id.* at 1000.

153. *Id.* at 999.

154. *Id.* at 1001.

their educational systems to the handicapped.’”¹⁵⁵ Furthermore, the court stated that “[t]he IDEA encourages mainstreaming, but only to the extent that it does not prevent a child from receiving educational benefit.”¹⁵⁶ Any social benefits of mainstreaming were not enough to outweigh the disabled child’s failure to progress academically in the regular classroom.¹⁵⁷

The Seventh Circuit has taken a similar approach. In *Board of Education of Murphysboro Community Unit School District v. Illinois State Board of Education*,¹⁵⁸ the court noted:

[T]he mainstreaming requirement was developed in response to school districts which were reluctant to integrate mentally impaired children and their non-disabled peers. It was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements and is applicable only if the IEP meets IDEA minimums.¹⁵⁹

In making its decision, the Seventh Circuit focused on the individual nature of mainstreaming decisions and the importance of maintaining a “continuum of program options.”¹⁶⁰ The court found that the district court acted appropriately in recognizing that it was not an expert in educational policy and therefore deferring to the state hearing officers.¹⁶¹

Finally, the First Circuit in *Roland M. v. Concord School Committee*¹⁶² uses the test set forth in *Rowley* in advocating a “bounded,

155. *Id.* at 1004 (quoting Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982)). The court also recognized that “federal courts cannot run local schools” and that “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child.” *Id.* at 1001.

156. *Id.* at 1005. The Fourth Circuit’s emphasis on deference in this case is somewhat puzzling; it criticized the district court for violating the holding of *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989), a decision applying the *Roncker* test. *Hartmann*, 118 F.3d at 1001.

157. *Hartmann*, 118 F.3d at 1002.

158. 41 F.3d 1162 (7th Cir. 1994). This case involved Marjorie S., a mentally retarded girl whose speech and language were impaired and who was possibly autistic. *Id.* at 1165. The school district recommended placing Marjorie in a program that allowed for mainstreaming, but Marjorie’s parents requested placement in a private residential school. *Id.* The administrative hearing officers determined that Marjorie’s IEP did not meet the requirements of the IDEA and directed that Marjorie be placed in the private residential school. *Id.* The district court upheld these findings. *Id.* at 1166.

159. *Id.* at 1168.

160. *Id.*

161. *Id.*

162. 910 F.2d 983 (1st Cir. 1990). Matthew M. was a child with normal intelligence who had a number of disabilities, including problems with his visual motor skills, visual perception, visual tracking, fine motor coordination, and gross motor coordina-

independent” review by the courts under the Act, and describes the court’s role as one of oversight.¹⁶³ The review must be “thorough yet deferential” and must recognize the expertise of the administrative agency.¹⁶⁴ The ultimate question for a court under the IDEA is “whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.”¹⁶⁵ The court acknowledged that whether an IEP is “reasonably calculated” to confer an educational benefit “necessarily involves choices among educational policies and theories,” choices that the courts are not equipped to make.¹⁶⁶

III.

EXPLAINING THE DIVERGENCE OF THE FEDERAL COURTS IN INTERPRETING THE IDEA

Given the clear guidance provided by the Supreme Court on the issue of judicial review under the IDEA, it is perplexing to encounter the clear resistance of the federal courts to accept a deferential role with regard to issues surrounding the “least restrictive environment” provision. Rather than focusing on whether the school district followed the required procedures under the IDEA to develop an IEP that ensured that the child was provided a free appropriate public education—a process which includes the assessment of the “least restrictive environment” for the disabled child—many of the federal courts have treated the “least restrictive environment” provision as a central requirement of the IDEA, independent of both the procedures required by the IDEA and the ultimate purpose of providing the child with a free appropriate public education. It is significant to note that of those federal courts that have not accepted a deferential role in this area, only one circuit mentions the child’s IEP in its analysis of the

tion. *Id.* at 988. Matthew’s parents wanted him placed in a residential school, but the school district determined that a residential placement would be too restrictive and did not address Matthew’s needs. *Id.* The state hearing officer and the district court upheld the school district’s decision. *Id.* at 988–89.

Although the Massachusetts legislature has chosen to provide greater protections to disabled children than the IDEA—assuring the “maximum possible development” of the child—this does not alter its standard of review under the Act, and the First Circuit explicitly relies on *Rowley* in its analysis. *See id.* at 987, 993; MASS. GEN. LAWS ANN., ch. 71B, §§ 1–14 (West 2003). The court states that “[j]ust as the least restrictive environment cannot be applied to cure an otherwise inappropriate placement, similarly, a state standard cannot be invoked to release an educational agency from compliance with the mainstreaming provisions.” *Roland M.*, 910 F.2d at 993 (quoting *Burlington v. Dep’t of Educ.*, 736 F.2d 773, 789 n.19 (1st Cir. 1984)).

163. *Id.* at 990 (quoting *Burlington*, 736 F.2d at 791).

164. *Id.* at 989.

165. *Id.* at 990 (quoting *Burlington*, 736 F.2d at 788).

166. *Id.* at 992.

child's educational placement, despite the provision under the Act indicating that the child's placement should be based upon the IEP¹⁶⁷ and the Supreme Court's assertions that the IEP was intended to be the "centerpiece" of the Act.¹⁶⁸

The absence of any reference to the IEPs is telling. The federal courts are attempting to draw a larger philosophical meaning from the "least restrictive environment" provision of the IDEA, a choice that necessitates an avoidance of the emphasis in the Act on individualized education. They seem to be desperately working to fashion a one-size-fits-all test by which to evaluate the "least restrictive environment" provision, rather than acknowledging that the "least restrictive environment" for each individual child defies a simple and easily quantifiable solution. Fashioning an IEP is a complex, sensitive, and careful balancing act done by a team of experts and the people who know the individual child the best, including the child's parents. In attempts to focus on the bigger picture, however, the courts are not only substituting their own views of educational policy for that of the state and local educational agencies, they are cheating disabled children out of the highly individualized and personalized education to which they are entitled by law.

Of course, one factor that may play a role in the full inclusion controversy is that of the escalating costs of special education.¹⁶⁹ Since the original passage of the IDEA, the number of students identified as disabled has increased dramatically, and the costs of educating each disabled child have risen apace.¹⁷⁰ Coupled with the limited

167. See *supra* Part II.B.

168. *Honig v. Doe*, 484 U.S. 305, 311 (1988).

169. See SUZANNE RABER & VIRGINIA ROACH, CTR. FOR POLICY RESEARCH ON THE IMPACT OF GENERAL AND SPECIAL EDUCATION REFORM, *THE PUSH AND PULL OF STANDARDS-BASED REFORM* 16 (1998) (claiming that growing cost of special education is factor that inhibits increased funding for other education initiatives); Joanne L. Huston, *Inclusion: A Proposed Remedial Approach Ignores Legal and Educational Issues*, 27 J.L. & EDUC. 249, 254-55 (1998) (identifying budget restraints on education programs); see also Martin C. Evans, *A Leader in Cost, Isolation*, NEWSDAY, Nov. 9, 1997, at A59 (describing how escalating costs have affected special education in one district in Long Island, NY).

170. See Dorothy Kerzner Lipsky & Alan Gartner, *Capable of Achievement and Worthy of Respect: Education for Handicapped Students as If They Were Full-Fledged Human Beings*, EXCEPTIONAL CHILDREN, Sept. 1987, at 69; John Hildebrand, *Extra Help That Is Falling Short*, NEWSDAY, Nov. 12, 1997, at A6 (pointing out that rapid growth of number of special education students in Long Island is partially due to greater numbers of students considered learning disabled, speech-impaired or attention-deficient); Kirsten Mack, *A Swing in the System*, HOUSTON CHRONICLE, Feb. 24, 2002, at A37 (noting that number of students placed in special education has more than doubled since 1975); Joseph P. Shapiro et al., *Separate and Unequal*, U.S. NEWS & WORLD REPORT, Dec. 13, 1993, at 46.

budgets for education in general in many states, concerns with how to best allocate sparse education funds have risen to a fever pitch.¹⁷¹ However, the concerns over cost do not appear to favor either side of the inclusion debate. School districts often allege that the costs of providing the supplemental services necessary to include a disabled child in a regular classroom are prohibitive, a factor that even the federal courts have been forced to recognize.¹⁷² Nonetheless, it is simultaneously alleged that the benefit of a full inclusion system would reduce costs by aggregating all of the resources at the school districts' disposal in one place.¹⁷³ This factor may have been an influence in the creation of the Regular Education Initiative (REI) in the 1980s—said to be the precursor to the full inclusion movement.¹⁷⁴ In either case, it does not appear that costs have been a significant factor in the federal courts' decisions regarding the IDEA and its mainstreaming

171. See *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991) (finding that “[i]f the cost of educating a handicapped child is so great [as to] impact upon the education of other children in the district, then education in a regular classroom is not appropriate”); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (stating that costs of including disabled child should be considered because “excessive spending on one handicapped child deprives other handicapped children”); John Hildebrand & Jack Sirica, *Growing Costs, Growing Failure*, *NEWSDAY*, Nov. 9, 1997, at A4 (noting that cost of special education was increasing at twice rate of increase in regular education spending); *Huston*, *supra* note 169, at 254–55 (identifying cost impediments to implementing full inclusion programs); *Shapiro et al.*, *supra* note 170, at 46.

172. See *Dupre*, *supra* note 32, at 856 (noting that “some researchers have concluded that implementing inclusion requires more resources than special pull-out programs”); *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1402 (9th Cir. 1993) (including costs of mainstreaming as factor in considering appropriate placement); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991) (finding that “Congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions”); *Greer*, 950 F.2d at 697 (approving as consideration in placement decisions “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”).

173. See *Dupre*, *supra* note 32, at 793 (claiming that full inclusion proponents attack separate special education facilities as ineffective and costly); Ann T. Halvorsen et al., *A Cost-Benefit Comparison of Inclusive and Integrated Classes in One California School District*, in *CAL. STATE DEP'T OF EDUC., CALIFORNIA PEERS OUTREACH PROJECT: APPLICATION AND REPLICATION OF INCLUSIVE MODELS AT THE LOCAL LEVEL* (L. Sandoval et al. eds., 1996); Samuel L. Odom et al., *The Costs of Inclusive and Traditional Special Education Preschool Services*, 14 *J. OF SPECIAL EDUC. LEADERSHIP* No. 1, available at http://csef.air.org/odom_hik.html#1 (last visited Mar. 31, 2003).

174. See discussion *infra* Part III.A; James M. Kauffman, *The Regular Education Initiative as Reagan-Bush Education Policy: A Trickle-Down Theory of Education of the Hard-to-Teach*, 23 *J. OF SPECIAL EDUC.* 256, 257–59 (1989) (indicating that one of primary hypotheses on which REI is based is notion that costs are lowered by eliminating special budget and administrative categories).

provisions.¹⁷⁵ However, as described below, there are several theories that can begin to explain the federal courts' divergence from the deference standard articulated by the Supreme Court. While it is difficult to know for certain the reasons behind the courts' decisions, these explanations are important in understanding the problems with leaving decision-making power in this area to the courts.

A. *Interest Group Pressures and Civil Rights*

Mainstreaming, or inclusion,¹⁷⁶ embodies the notion of educating disabled students in the same classrooms as regular students, "including" the disabled student in the regular classroom, regardless of his disability.¹⁷⁷ The terminology used to describe this phenomenon is somewhat confusing due to the continuing development of the inclusion movement.¹⁷⁸ Originally, mainstreaming was the term used for educating disabled students in a separate special education classroom but including them in regular classrooms for at least part of the day.¹⁷⁹ Today, the focus is on "full inclusion," which promotes including the disabled student in the regular classroom for the entire school day.¹⁸⁰ However, "inclusion" is commonly used to refer to the mainstreaming concept, and "full inclusion" to denote educating the disabled student in a regular classroom for the entire school day. The idea of full inclusion is said to be an outgrowth of the REI, which was developed in the 1980s.¹⁸¹ The REI was proposed by Madeleine Will, the Assistant Secretary for the Office of Special Education and Rehabilitative Services under President Reagan.¹⁸² The REI is based on the idea that

175. Those courts that have included cost as a factor have generally found that the school district did not provide evidence that the costs of mainstreaming were excessive. *See, e.g., Rachel H.*, 14 F.3d at 1404 (finding that school district was not persuasive on issue of cost); *Greer*, 950 F.2d at 698-99 (stating that school district did not show that educating disabled child in regular classroom with appropriate supplemental aids and services would be cost-prohibitive); *Roncker*, 700 F.2d at 1063 ("Cost 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.").

176. As noted earlier, mainstreaming is the terminology utilized in the Act, and therefore by the courts, but educators prefer the term inclusion. *See supra* note 17. For purposes of this argument, I will use the term inclusion.

177. *See Shanker, supra* note 17.

178. *See Rebell & Hughes, supra* note 1, at 531-45.

179. Dupre, *supra* note 32, at 779. Under a less inclusive model, disabled children might be included in non-academic activities with non-disabled children, for example music, art, recess, lunch, and physical education. *Id.* at 827.

180. *Id.* at 779-80.

181. Carol E. Westby et al., *The Vision of Full Inclusion: Don't Exclude Kids by Including Them*, 16 J. OF CHILDHOOD COMMUNICATION DISORDERS 13, 13 (1994); *see also* Kauffman, *supra* note 174, at 257-59.

182. Westby et al., *supra* note 181, at 14.

disabled students will be best served by improving education for all students, such that disabled students are fully included in the regular classroom, no student is labeled, costs are lowered, and the focus is on excellence in education for all regardless of one's disability.¹⁸³ President George W. Bush's "leave no child behind" policy is strikingly similar to the REI,¹⁸⁴ and as a result has raised new concerns for advocates of the IDEA's current provisions.

Inclusion advocates cite numerous benefits attributable to the full inclusion of disabled students in regular classrooms. First, inclusionists contend that labeling a child as "disabled" and removing him from the regular classroom stigmatizes the child as inferior or unworthy to an extent that outweighs any potential benefit of separate special education classrooms.¹⁸⁵ The lowered self-esteem and discouraged motivation to learn that result from stigma negatively impact the quality of education provided to disabled children, and even lead to higher dropout rates.¹⁸⁶ Second, proponents believe that inclusion in the regular classroom affords disabled children access to the regular curriculum, which encourages them to challenge themselves and to reach their maximum potential.¹⁸⁷ Third, inclusion advocates propose that dis-

183. See Kauffman, *supra* note 174, at 256–57. Some advocates have claimed that the REI's true focus is on cutting the costs of special education, and have warned proponents of the REI to be wary of the initiative's apparent progressive position. See, e.g., *id.*

184. Compare Exec. Order No. 13,227, *supra* note 8, at 794 (stating that "[i]t is imperative that special education operate as an integral part of a system that expects high achievement of all children, rather than as a means of avoiding accountability for children who are more challenging to educate or who have fallen behind"), with Kaufmann, *supra* note 174, at 256 (explaining that primary hypothesis for REI is that students with disabilities are best served by improving education for all students so that focus is on achieving excellence for all students).

185. Jacqueline Thousand, *Are We Moving Too Fast on Full Inclusion for Students with Disabilities?*, 78 AMERICAN TEACHER 6 (1993); Westby et al., *supra* note 181, at 14; Susan Stainback & William Stainback, *Letter to Dr. Wiederholt*, 21 J. OF LEARNING DISABILITIES 452, 452–53 (1988) ("[I]t is simply unfair and morally wrong to segregate any students, including those defined as disabled, from the mainstream of regular education.").

186. See Rebell & Hughes, *supra* note 1, at 538–39 (stating that focusing on students' deficits tends to stigmatize students and minimize their strengths); Thomas Hehir, *A National Agenda for Achieving Better Results*, 24 EXCEPTIONAL PARENT, at 41, 41 (Sept. 1994) (citing thirty-eight percent dropout rate for students with disabilities in United States—almost double rate for students without disabilities); Karol A. Reganick, *Full Inclusion's Ethical Dilemma, Who's Included and Who Decides*, CASE IN POINT 1, 4 (1997).

187. See Lipsky & Gartner, *supra* note 170, at 70–71 (pointing out that students labeled as disabled are often excused from general academic, social, or behavioral expectations, rather than being encouraged to meet these expectations); Joseph A. Patella, Note, *Missing the "IDEA": New York's Segregated Special Education System*, 4 J.L. & POL'Y 239, 259 (1995) (alleging that special education classrooms "re-

abled children can develop better social and communication skills by imitating their non-disabled peers in the regular classroom, and that through inclusion disabled children can interact and create friendships with their non-disabled peers, allowing disabled children to become full members of their communities and non-disabled children to learn to appreciate differences.¹⁸⁸ Finally, inclusionists maintain that the nature and quality of education in general is inexorably linked to the integration of disabled and non-disabled students—that it is a fundamental necessity to the appropriate education of all children.¹⁸⁹

The inclusion movement has been rapidly growing in prominence,¹⁹⁰ which may account for the courts' desire to analyze the IDEA's mainstreaming provision as equal to the Act's mandate for the provision of a free appropriate public education. This is likely influenced by the growth of the civil rights movement in the United States and the organized interest groups propelling that movement.¹⁹¹ Full inclusionists draw upon the rich rhetorical language of the civil rights movement, claiming that educating disabled children in separate classrooms is a moral outrage that violates the civil rights of disabled children and hearkens to notions of slavery and inferiority.¹⁹² Courts are

semble counselling [sic] centers rather than centers for academic learning"); Patricia J. Rea et al., *Outcomes for Students with Learning Disabilities in Inclusive and Pullout Programs*, 68 EXCEPTIONAL CHILDREN 203 (2002) (indicating that reasons for negative outcomes in special education are lower expectations and uninspiring curriculum).

188. Westby et al., *supra* note 181, at 13 (describing inclusion perspective as "matter of learning to deal with diversity and difference"); Dorothy Kerzner Lipsky & Alan Gartner, *Inclusion: What It Is, What It's Not, and Why It Matters*, 24 EXCEPTIONAL PARENT, at 36, 36 (Sept. 1994) (goal of inclusion is to prepare disabled students to participate in society); Lipsky & Gartner, *supra* note 170, at 71 (proposing that including disabled children in regular classrooms can lead to changes in beliefs toward people with disabilities); Mary Amoroso, *In the Mix Special-Ed Mainstreaming Extends to Extracurricular Activities*, RECORD (Bergen County, N.J.), Apr. 8, 2001, at L1, LEXIS, NJREC File (discussing social benefits of including disabled children with non-disabled children at young age); Betty A. Hallenbeck & James M. Kauffman, *How Does Observational Learning Affect the Behavior of Students with Emotional or Behavior Disorders?*, 29 J. SPECIAL EDUC. 45, 46 (1995) (examining evidence supporting contention that regular educational environments, by definition, provide better peer models than special environments).

189. See Rebell & Hughes, *supra* note 1, at 540–41 (explaining that inclusionists believe that integration is part of good education and is beneficial to all students).

190. See Shanker, *supra* note 17 (stating that inclusion movement is rapidly taking hold in United States and warning that this could have destructive effects).

191. See CHARLES EPP, THE RIGHTS REVOLUTION (1998); see also, e.g., VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME (2001) (tracing development of hate crime law and ease of its institutionalization due to existence of several rights-based movements).

192. See, e.g., Rebell & Hughes, *supra* note 1; Lipsky & Gartner, *supra* note 170, at 69; Stainback & Stainback, *supra* note 185, at 452.

often faced with two experts advocating different philosophical positions—one with the powerful language of civil rights, and the other presenting the practical language of education.¹⁹³

Evidence of the power of the civil rights rhetoric and interest group pressures can be observed in court decisions utilizing this language to justify overturning placement decisions made by the various school districts. In *Oberti v. Board of Education*, for example, the Third Circuit overturned the school district's decision to place an eight-year-old child with Down's Syndrome in a "segregated special education class."¹⁹⁴ Based on testimony of the eight witnesses for the school district, including the child's kindergarten teacher, regarding the child's academic progress, his severe disruptive behavior in the regular classroom, and the progress the child had made in his special education class, the administrative law judge found that the child had achieved no meaningful educational benefit in the regular classroom and that he was not yet ready for mainstreaming.¹⁹⁵ The circuit court, however, discounted the testimony of the school district's witness who worked with the child on a day-to-day basis, and deferred to the testimony of experts presented by the parents, one of whom had never observed the child in a classroom and had met with him only twice.¹⁹⁶ The court pointed out that the parents' experts testified that "integrating [the child] in a regular class . . . would enable [him] to develop social relationships with nondisabled students and to learn by imitating appropriate role models, important benefits which could not be realized in a segregated, special education setting."¹⁹⁷ Later in the opinion, the court claimed that the mainstreaming provision in the IDEA demonstrated Congress' understanding that "a fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers,"¹⁹⁸ and noted that academic progress may not justify placing a child in a special education classroom.¹⁹⁹

In *Sacramento City Unified School District v. Rachel H.*,²⁰⁰ the school district contested the parents' desired placement of their eleven-year-old mentally retarded daughter in a regular classroom because she was too severely disabled to benefit from full-time place-

193. See notes accompanying Part II.B; see also Westby et al., *supra* note 181, at 15.
194. 995 F.2d 1204, 1206 (3d Cir. 1993) (emphasis added).

195. *Id.* at 1207–10.

196. *Id.* at 1209–12, 1221–22.

197. *Id.* at 1211.

198. *Id.* at 1216–17.

199. *Id.* at 1217.

200. 14 F.3d 1398 (9th Cir. 1994).

ment in a regular class; the school instead proposed a plan of mixed special education classes and regular classes, which would have required moving the child from classroom to classroom at least six times each day.²⁰¹ The child's parents maintained that their daughter could best learn social skills in a regular classroom.²⁰² The district court justified its decision to place the child in a regular class full-time by noting that the benefits of inclusion of a disabled child in a regular classroom included development of social skills and generally improved self-esteem, and the court claimed that the child "learned by imitation and modeling."²⁰³ Despite the strong concerns articulated by the school district that the child was not making academic progress and was isolated from her classmates,²⁰⁴ the Ninth Circuit refused to disturb the findings of the district court.²⁰⁵

Most interest groups will agree that inclusion is appropriate for many, if not most, disabled students. However, despite the strength of the full inclusion rhetoric, many groups do not support the idea of full inclusion, and have even called full inclusion "destructive" for special education.²⁰⁶ For example, the Learning Disabilities Association of America (LDA) has come out against full inclusion.²⁰⁷ So, too, has the National Joint Committee on Learning Disabilities (NJCLD),²⁰⁸ the Council for Learning Disabilities (CLD),²⁰⁹ the American Federation of Teachers (AFT),²¹⁰ the National Association of State Directors of Special Education (NASDSE), and the Council of Administrators of Special Education (CASE).²¹¹ Those groups in favor of full inclusion include the ARC (formerly the Association for Retarded Citizens), the National Association for State Boards of Education (NASBE), and the Council for Exceptional Children.²¹² Even the American Civil Liberties Union (ACLU) has become involved with

201. *Id.* at 1400.

202. *Id.*

203. *Id.* at 1400–01.

204. *Id.* at 1401.

205. *Id.* at 1404.

206. Shanker, *supra* note 17.

207. Westby et al., *supra* note 181, at 14.

208. *Id.*

209. *Id.*

210. AFT *Urges Moratorium on Inclusion*, AM. TEACHER, Feb. 1994, at 3 (calling for moratorium so that "policymakers at all levels can work to balance the needs of special education and regular students for the long term").

211. Dixie Snow Huefner, *The Mainstreaming Cases: Tensions and Trends for School Administrators*, 30 EDUC. ADMIN. Q. 27, 48–50 (Feb. 1994).

212. *Id.*

the debate.²¹³ Faced with powerful legal language with which they are intimately familiar,²¹⁴ it is not surprising that federal courts in the United States would find legal arguments in favor of full inclusion—or against school districts, who are perceived to be biased against including disabled children in regular classrooms—to be persuasive.

B. *Brown v. Board of Education and Integration Concerns*

Brown v. Board of Education,²¹⁵ the well-known Supreme Court decision holding the doctrine of “separate but equal” as a justification for racial segregation in public schools to be illegal, has often been identified as the root of the movement to achieve rights for the disabled.²¹⁶ The separation of disabled children from non-disabled children, by educating them in special education classrooms, has been compared to the segregation of African-American school children from white schools.²¹⁷ The Senate Report uses some of the reasoning of *Brown*, stating that “[i]n 1954, the Supreme Court of the United States established the principle that all children be guaranteed equal educational opportunity.”²¹⁸ Indeed, in *Brown* the Supreme Court stated, “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms.”²¹⁹

In the context of the IDEA, many scholars have taken the integration principle of *Brown* and applied it to special education. The claim is that separate special education schools are inherently unequal, and therefore the existence of such schools deprives disabled students of

213. See *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (filing brief *amicus curiae* on behalf of parents in support of broad reading of Act).

214. See JENNESS & GRATTET, *supra* note 191 (arguing that courts construed hate crime legislation in manner similar to discrimination legislation because they were familiar with legal language).

215. 347 U.S. 483 (1954).

216. Dupre, *supra* note 32, at 829–30. Dupre also notes that full inclusion advocates have compared exclusion of disabled children from public schools to apartheid and slavery. *Id.* at 830.

217. *Id.* at 829–30 (citing DANIEL D. SAGE & LEONARD C. BURELLO, *POLICY AND MANAGEMENT IN SPECIAL EDUCATION* 39 (1986)); see also Melvin, *supra* note 24, at 605–06 (noting that parents and advocates used *Brown* as basis for protesting disparity of educational opportunities between disabled and non-disabled children).

218. S. REP. NO. 94-168, at 6 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1430. However, the Senate Report does not refer at any time to the segregation issue addressed in *Brown* and cites that case only for its emphasis on the importance of providing all children with educational opportunities. *Id.*

219. *Brown*, 347 U.S. at 493.

equal protection.²²⁰ This is embodied in the inclusion philosophy, which draws upon the notions of the stigma of segregation and the impact on a child's self-esteem.²²¹ Although opponents point out the inherent differences between racial segregation in education based solely on skin color and separation of disabled students based on identifiable educational needs,²²² it is possible that the courts have applied concerns about equality to the mainstreaming provision of the IDEA.²²³ This is illustrated in the language of some of the federal courts regarding the negative impact of segregation on disabled students and the social benefits of mainstreaming.²²⁴ The courts often subvert concerns with educating a disabled child in favor of concerns for the socialization of the disabled child and his or her non-disabled peers, a concern that is not evident in the text of the IDEA itself.

For example, in *Oberti*, the Third Circuit comments that courts should consider the benefit of inclusion when evaluating the educational placement of a disabled child. The court notes that “[t]eaching nondisabled children to work and communicate with children with disabilities may do much to eliminate the stigma, mistrust and hostility that have traditionally been harbored against persons with disabilities.”²²⁵ Notably, the court does not cite the IDEA—or even a Congressional report—for this proposition, and instead must rely on academic articles and a report to NASBE.²²⁶ The court, in justifying its decision to overrule the placement decision of the school district, comments that “the court must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers.”²²⁷

Another example is the decision of the Eleventh Circuit in *Greer v. Rome City School District*, where the court claims that:

220. See Melvin, *supra* note 24, at 599 (opening his Comment with quotation from *Brown*).

221. Dupre, *supra* note 32, at 818–26 (criticizing arguments in favor of full inclusion).

222. See Shanker, *supra* note 17; Huston, *supra* note 169.

223. See Dupre, *supra* note 32, at 797–806.

224. See *supra* Part II.B; see also Melvin, *supra* note 24, at 607 (noting court's holding in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1971), that isolation of disabled students represented impediment to their success, implicating equal protection and due process concerns).

225. *Bd. of Educ. v. Oberti*, 995 F.2d 1204, 1217 n.24 (3d Cir. 1993).

226. See *id.*

227. *Id.* at 1216.

Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself [so that] a determination . . . that a child will make *academic* progress more quickly in a self-contained special education environment may not justify *educating* the child in that environment if the child would receive considerable *non-academic* benefit, such as language and role modeling, from association with his or her nonhandicapped peers.²²⁸

The recommendation for the disabled child's placement in a special education classroom had been the result of the collaboration of a team of people (including the school district's special education director, the regular kindergarten teacher, the psychologist and psychometrist, a speech/language pathologist, a special education teacher, the school principal, and the child's parents) and was based on the determination that the goals of the child's IEP could not be met in a regular classroom at that time.²²⁹ Nevertheless, the court found this evidence insufficient to support the school district's placement of the child in a restricted environment.²³⁰ The court heard testimony that the child required more attention than other students in her regular class, could not keep up with the curriculum, required repeated rehearsal and practice of basic skills in an individualized setting, and that the school district and the child's teacher had considered modifying the curriculum and providing special aids and service in the regular classroom in order to accommodate the child prior to making their placement decision.²³¹ However, the court still decided that the benefits of being included in a classroom with non-disabled students might outweigh the school district's academic concerns.²³²

C. *The Federal Courts and Lower Education*

One scholar has proffered that the reason for the federal courts' refusal to afford proper deference to the state and local educational agencies is because the federal courts hold "[a] certain disdain for the education, training, and experience of public school teachers."²³³ Anne Dupre, in *Disability, Deference, and the Integrity of the Academic Enterprise*, argues that "[e]ducators in public schools are simply not valued very highly by society."²³⁴ Dupre contrasts the marked deference afforded to institutions of higher learning by the federal

228. *Greer*, 950 F.2d 688, 697 (11th Cir. 1991) (emphasis added).

229. *Id.* at 690-93.

230. *Id.* at 699.

231. *Id.* at 691-93, 698.

232. *Id.* at 698.

233. Dupre, *supra* note 85, at 454.

234. *Id.* at 454.

courts, with the apparent lack of deference given to public schools, and concludes that social class bias may factor into the courts' reluctance to recognize the professional judgment of public school educators.²³⁵ For example, she analyzes the deference courts have afforded to institutions of higher learning in the context of § 504 of the Rehabilitation Act of 1973²³⁶ and the Americans with Disabilities Act of 1990 (ADA),²³⁷ both of which prohibit discrimination against disabled persons. She points out that both the Supreme Court and the lower federal courts have gone to great lengths to protect determinations of institutions of higher learning as to whether individual students are qualified for particular programs, with or without the provision of accommodations.²³⁸ In doing so, the courts are frequently required to evaluate the "reasonableness" of an institution's decision, and will generally defer when the institution can present a reasoned basis for its decision.²³⁹

In contrast, Dupre considers the federal courts' decisions questioning the judgment of middle and high school educators in applying the IDEA. In *Roncker v. Walter*, the Sixth Circuit overturned the district court's decision upholding the school district's determination that the disabled child would not benefit from mainstreaming.²⁴⁰ The district court reasoned that the school district had "broad discretion in the placement of handicapped children,"²⁴¹ but the Sixth Circuit claimed that the "perception" by educators "that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept."²⁴² As Dupre notes in her article, the *Roncker* court clearly indicated in its decision

235. *Id.* at 453–54.

236. Rehabilitation Act of 1973, Pub. L. No. 93-112, 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2000)). Section 504 prohibits discrimination against persons with disabilities in programs receiving federal financial assistance. *Id.* As virtually all colleges and universities receive federal assistance of some type, these educational institutions become subject to § 504. *See* Dupre, *supra* note 85, at 399.

237. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000). The ADA extended § 504's protections to the areas of employment, public services, public accommodations, transportation, and telecommunications. *See* Dupre, *supra* note 85, at 403.

238. Dupre, *supra* note 85, at 406–19.

239. *Id.* at 412–19. *See, e.g.,* *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850 (5th Cir. 1993) (advocating deference to university's academic decisions relating to disabled persons unless there is evidence of malice or ill-will); *Doe v. N.Y. Univ.*, 666 F.2d 761, 776 (2d Cir. 1981) (stating that courts should refrain from questioning institution's judgment except where decision serves "no purpose other than to deny an education to handicapped persons").

240. *Roncker*, 700 F.2d 1058 (6th Cir. 1983).

241. *Id.* at 1061.

242. *Id.* at 1063.

that the school district's judgment had been based on the improper motives rather than a reasoned judgment.²⁴³ The court also dismissed as mere "perception" the evidence presented by the school district that the minimal benefits from mainstreaming were overwhelmingly outweighed by the educational advantages of the special classroom.²⁴⁴

Meanwhile, in *Greer*, the Eleventh Circuit determined that the school district's finding (that the disabled child would benefit more from a placement in a special education class) should be afforded "no deference" because the educators did not fully consider the use of supplemental aids and services to accommodate the student in the regular classroom.²⁴⁵ The court made this determination despite testimony from the special education director and the child's teacher that such aids and services, as well as modification of the regular curriculum, had been considered.²⁴⁶ The court implied that both the special education director and the child's teacher had lied when the court stated that "the school officials [had] determined that [the child's] 'severe impairment' justified placement in a self-contained special education classroom without considering whether [the child] could be accommodated, with appropriate supplemental aids and services, in a regular classroom" and that the teacher made "no effort to adjust the kindergarten course materials that made up the curriculum."²⁴⁷ The court surmised these conclusions based on the fact that the minutes from the IEP meeting, at which the placement determination was made, contained only a brief summary of the meeting.²⁴⁸

Dupre argues that the federal courts distrust the ability of professionals in lower education to make qualitative educational judgments (rather than merely imposing their own "perceptions" on disabled children), which leads the courts to second-guess the decisions of lower educational institutions.²⁴⁹ She points toward the difference in social class between most judges and public school teachers, the predominance of female teachers in the public education system, and the negative perception of the unionization of teachers as some of the reasons why the courts appear to hold prejudices against lower education.²⁵⁰ Dupre concludes that the courts, by refusing to accord proper defer-

243. Dupre, *supra* note 85, at 429–31.

244. *Id.* at 431–32.

245. *Greer*, 950 F.2d at 698.

246. *Id.* at 691–93, 698.

247. *See id.* at 698.

248. *Id.* at 692, 698.

249. Dupre, *supra* note 85, at 452–54.

250. *Id.* at 453, 455–56.

ence to the state and local educational agencies, undermine the integrity of the academic enterprise.²⁵¹

IV.
WHY GREATER DEFERENCE TO STATE EDUCATORS IS
CRUCIAL TO THE EFFECTIVE IMPLEMENTATION
OF THE IDEA

The decision to include a disabled student in a regular classroom is not, as some scholars have claimed, about whether the student is “qualified” to participate in the regular classroom.²⁵² The decision to include a disabled student in a regular classroom is about whether the individual disabled student can benefit educationally from a particular placement. If a student would not benefit from the placement in a regular classroom, it is not an “appropriate” placement. The question cannot, and should not, center on a disabled student’s educational “qualifications”—presumably all students, disabled or not, are “qualified” to learn—nor should the decision center on general theories of acceptable social norms. The inclusion decision should be about the best environment for enabling an individual disabled child to learn. When the question is approached from this perspective, it becomes clear that the courts, in reviewing records and hearing testimony, are not capable of making the highly individual decision for the appropriate educational placement of a disabled child. By moving away from the *Rowley* deference standard, the federal courts are encroaching into a field of expertise that they simply do not possess. They are losing sight of the true focus of the IDEA and they are making decisions based upon abstract notions of social and legal theory, rather than on the needs of individual disabled children. To be sure, the regular classroom is often the “least restrictive environment” for a disabled child, but it is only one right option, not the only right option.²⁵³

251. *Id.* at 472–73.

252. *Id.* at 426 (stating that inclusion decision is not about whether student may participate in education process, but whether student is qualified to participate in regular classroom).

253. *See* Westby et al., *supra* note 181, at 14–15, 22. Although the IDEA defines the “least restrictive environment” in terms of mainstreaming disabled children to the maximum extent appropriate, inclusion does not always represent the least restrictive environment. For some students, separate special education schools offer fewer restrictions on movement, teaching methods, and individual growth than does the regular classroom. *See* Interview with Kathy L., Special Education Teacher in Exclusive Program, New York (Mar. 18, 2002); Interview with Kathy R., Special Education Teacher in Exclusive Program, New York (Mar. 18, 2002); Interview with Amy K., Special Education Teacher in Inclusion Program, New York (Mar. 18, 2002); Interview with Charles F., Special Education Administrator in Exclusive Program, New

The danger in losing sight of the individual child is that the courts begin to feel comfortable making complex individual decisions based upon general standards. When this occurs, special education becomes more about social preferences than about children in particular, a focus that subverts the purposes of the IDEA. The state administrative agencies are stripped of their decision-making power and are left to flounder amidst uncertain court opinions in an effort to avoid litigation and legal sanctions.²⁵⁴ Decisions based upon avoiding legal repercussions, rather than on how to best educate disabled children, necessarily deprive disabled children of a free appropriate public education.²⁵⁵ Those entrusted with the education of disabled children—because of their expertise in both regular and special education, their awareness of state resources, and their intimate knowledge of the individual child—find themselves at the mercy of the legal system. The result is that disabled children are neither appropriately educated, nor appropriately socialized. Instead of being considered individual human beings, disabled children are reduced to the status of a marginal, homogeneous group subject to the same standard as every other disabled child, and the IDEA is reduced to symbolic, rather than functional, purposes. The IDEA is not merely a symbolic piece of legislation; it is an effective piece of legislation that, while not perfect, has opened the doors of education and opportunity for disabled children. It is therefore crucial to understand the legal and social reasons for leaving decisions regarding the educational placement of individual disabled children primarily in the hands of state and local education agencies.

York (Mar. 18, 2002) (all interview notes on file with the *New York University Journal of Legislation and Public Policy*). In an effort to get a sense of how educators view the IDEA, I conducted eight sixty-minute in-person interviews with teachers in both special and mainstream education in New York State. The teachers were asked a series of twenty open-ended questions regarding how they viewed the IDEA, how the IDEA impacted their teaching methods, and their perspectives on the educational placement of special education students. They were also given the opportunity to share their personal views of special education in general. The teachers I interviewed were promised anonymity as a condition to their agreement to be interviewed. Accordingly, the names of the interviewees have been changed to preserve their privacy.

254. Huefner, *supra* note 211, at 46–51. Huefner notes that some school administrators have responded by creating parallel placement options that simply allow parents to choose their child's placement, regardless of the child's educational needs. *Id.* at 50–51.

255. *Id.* (claiming that school administrators find themselves “caught between the proverbial rock and a hard place”).

A. *Congressional Intent and the Structure of IDEA*

Congress' focus in creating the IDEA was on ensuring an appropriate, personalized education for all disabled children.²⁵⁶ Borne against a backdrop of no education for disabled children,²⁵⁷ the IDEA sought to encourage states to fulfill the guarantee of a free appropriate public education to disabled children, as had already been promised to their non-disabled peers.²⁵⁸ The most basic goal of the IDEA is to support the disabled child's right to a free appropriate public education and to provide incentives for the states to enact procedures that protect the right to that education.²⁵⁹ The Act was drafted with an emphasis on individuality, a result of Congress' recognition of the variety in the range of disabilities and the impossibility of applying one standard to all children with disabilities.²⁶⁰ It contains vast procedural components to make sure that the creation of a disabled child's IEP is deliberate, specific, and particularized, that the child's parents are included in every decision made regarding the disabled child's education, and that a variety of people with educational expertise and knowledge of the disabled child are a part of all educational evaluations.²⁶¹ The assumption is clearly that where the procedural components are followed, the correct placement will result—an idea that is echoed by the Supreme Court.²⁶² The procedural components of the Act ensure that a decision about the disabled child's education is not made in a vacuum, and that all competing educational viewpoints are considered.

256. 20 U.S.C. § 1400(d) (2000); see OSEP REPORT, *supra* note 5, at vii (indicating that despite difficulties with servicing greatly heterogeneous group of children, purposes of IDEA remain same as when it was promulgated, including providing free appropriate public education that is designed to meet each child's particular needs).

257. See *supra* Part I.A.

258. See S. REP. NO. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433 ("It is contradictory to [the] philosophy [of the right to a free appropriate public education] when that right is not assured equally to all groups of people within the Nation.").

259. 20 U.S.C. § 1400(d); see S. REP. NO. 94-168, at 6 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1430. (stating intent of Act is "to establish in law a comprehensive mechanism which will insure . . . maximum benefits to handicapped children and their families").

260. S. CONF. REP. 94-455, at 38 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1480, 1491-92.

261. See discussion *supra* Part I.B.

262. See *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982) ("[There was] legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.").

However, the decision-making responsibility for the education of disabled children has been left to the states.²⁶³ It is not the job of the federal courts to prescribe the substantive academic criteria for students, whether disabled or not.²⁶⁴ The IDEA is meant to ensure that the states have in place some mechanism for appropriately educating disabled students. It is not meant to prescribe the criteria by which they are educated. As the Supreme Court has stated, once a court determines that the procedural requirements of the Act have been met and that the IEP is reasonably calculated to provide an educational benefit, a court can do no more.²⁶⁵ It is simply not a court's job to structure the education of disabled children. A court's role is limited to ensuring that the states are in compliance with IDEA. There is a difference.

It is clear that the IDEA does not contemplate the level of deference generally given to administrative agency decisions.²⁶⁶ However, the Supreme Court has made clear, and several circuits have so held, that this does not give the courts free reign to substitute their own educational judgments for that of the state and local educational agencies.²⁶⁷ Courts are required to review administrative findings independently and to hear new testimony at the request of the parties, but they may not disregard the hearing officer's decision or supplant the decision with their own decision on policy.²⁶⁸ The IDEA does indicate a

263. *See id.* ("The fact that § 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings.").

264. By deferring to state and local educational agencies, the courts would by no means abdicate their review power under the Act, nor would they be required to be complacent in the face of states that are not meeting the requirements of the Act. In fact, in the Second Circuit, which affords the most deference to state and local agencies, one school district has been under the oversight of the federal court for twenty years for refusal to comply with the IDEA. Kim Breen, *Special-Education Case in City at a Crossroads*, DEMOCRAT & CHRONICLE (Rochester, NY), Dec. 17, 2001, at A1. The scope of review is simply narrowed by the *Rowley* deference standard.

265. *Rowley*, 458 U.S. at 207.

266. *Compare Id.* at 206 (recognizing that courts should not simply defer to administrative decision, but must give due weight to those decisions), and *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989 (1st Cir. 1990) (quoting *Colin K. v. Schmidt*, 715 F.2d 1, 5 (1st Cir. 1983) in finding that judicial review is "something short of a complete de novo review" and must be "thorough yet deferential"), with *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864-66 (1983) (establishing highly deferential standard of review for administrative agency decisions such that courts should defer if agency decision is "reasonable").

267. *Rowley*, 458 U.S. at 206; *see, e.g.*, *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 999 (4th Cir. 1997); *Bd. of Educ. of Murphysboro v. Ill. State Bd. of Educ.*, 41 F.3d 1162, 1166 (7th Cir. 1994).

268. *Rowley*, 458 U.S. at 206 (stating that provision allowing courts to review state administrative decisions regarding Act based on preponderance of evidence is "by no

preference for mainstreaming.²⁶⁹ Nonetheless, that provision emerged as a result of the reluctance of school districts to mainstream students with disabilities at all—or to provide for any education whatsoever.²⁷⁰ It was not intended to mandate mainstreaming at all costs to the education of the individual disabled child.²⁷¹ The Supreme Court has also noted that Congress' clear emphasis on the procedures to be afforded special education students and their parents at the administrative level would be frustrated if courts could freely disregard the results of the administrative hearing.²⁷²

A look at the most recent amendments to the IDEA, which occurred in 1997, provides further insight into Congress' intent under the Act. When updating the IDEA, Congress noted that expectations for educational achievement by disabled children had risen in the twenty-two years since the passage of the EAHCA.²⁷³ Congress viewed the 1997 amendments as an opportunity to review, strengthen and improve the IDEA to better educate children with disabilities to enable them to achieve quality education.²⁷⁴ Clearly satisfied with the progress under the Act, Congress' changes were primarily directed at improving the special education process by expanding the IDEA's procedural protections.²⁷⁵ The term "least restrictive environment" was formally included in the Act itself, although only as the heading of the mainstreaming provision.²⁷⁶ The amendments require states to

means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review").

269. *Rowley*, 458 U.S. at 181 n.4.

270. *Bd. of Educ. of Murphysboro*, 41 F.3d at 1168.

271. *Id.*

272. *Rowley*, 458 U.S. at 206.

273. H.R. REP. NO. 105-95, at 84 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 81; 20 U.S.C. § 1400(c)(3) (2000).

274. *See* H.R. REP. NO. 105-95, at 85 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 82 ("[I]n developing these amendments the Committee distinguished between problems of implementation and problems with law, and responded appropriately in addressing any issue raised.").

275. *See* Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 *DICK. L. REV.* 613, 628 (1998) ("Although the IDEA proved successful at ensuring access to education . . . [a] particular concern [for Congress] was the significant number of special education students continuing to fail courses and drop out of school.").

276. 20 U.S.C. § 1412(a)(5) (2000). Prior to these amendments, the term "least restrictive environment" was found only in the regulations for implementing the Act. Julie F. Mead, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 *EDUC. L. REP.* 511, 513 (1998) (citing 34 *C.F.R.* §§ 300.550–300.556 (1996)). The addition of the heading adds little in the way of substantive changes, as the "least restrictive environment" regulation and the "mainstreaming" requirement had commonly been associated with one another prior to the amendments. *See id.* at 513–15.

officially include in the IEP an indication of “how the disability affects the child’s involvement and progress in the general curriculum,”²⁷⁷ as well as a written statement of the extent to which the child will not participate in regular education programs.²⁷⁸ The Act also currently includes a mediation provision for resolving parental concerns.²⁷⁹ Despite the confusion in the circuit courts over the *Rowley* decision, Congress did not attempt to clarify the meaning of “least restrictive environment” and did not directly address the *Rowley* decision.²⁸⁰

The 1997 IDEA amendments make clear that there is indeed a presumption of regular classroom placement for disabled children.²⁸¹ The modifications to the IEP requirements, which instruct the IEP Team to include explanations of the extent to which the child *will not* participate in the regular classroom,²⁸² and the focus on making program modifications that would enable the child to participate in the regular education classroom,²⁸³ combined with Congress’ statement that research in the twenty-plus years since the passage of the EAHCA had demonstrated that “education of children with disabilities can be made more effective by . . . providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate,”²⁸⁴ and the addition of a statement of how the disabled child’s disability affects the child’s involvement in the “general curriculum,”²⁸⁵ serve to strengthen Congress’ commitment to the mainstreaming directive.²⁸⁶

However, Congress did not strengthen its commitment to the mainstreaming directive by providing a substantive standard by which educational placement decisions were to be evaluated. Instead, Congress deliberately chose to emphasize this intent by strengthening the procedural requirements of the Act and by looking to the IEP Team to implement the goals of the IDEA.²⁸⁷ Congress adopted this approach because it remains committed to providing an individualized educa-

277. 20 U.S.C. § 1414(d)(1)(A)(i)(I).

278. § 1414(d)(1)(A)(iv).

279. § 1415(e)(1).

280. Mead, *supra* note 276, at 515.

281. *Id.*

282. 20 U.S.C. § 1414(d)(1)(A)(iv). Prior to the 1997 amendments, this provision required a statement of the extent to which a disabled child would be able to participate in the regular education classroom. See Mead, *supra* note 276, at 515–16.

283. 20 U.S.C. § 1414(d)(1)(A)(iii).

284. § 1400(c)(5).

285. § 1414(d)(1)(A)(i)(I).

286. Mead, *supra* note 276, at 515–17.

287. See *id.*

tion to every disabled child, as determined by the IEP and the state educators, in cooperation with the child's parents. Since a free appropriate public education is primarily procedural, the most effective way to raise the level of the free appropriate public education is to strengthen the existing procedures.²⁸⁸ This action indicates once again that Congress intended the procedural requirements of the Act to be the primary safeguard for access to a free appropriate public education, and that it is the states—those responsible for implementing the procedures—that should make educational placement decisions.²⁸⁹

By relying on procedural, rather than substantive, mandates, Congress has given the states the freedom they need to make independent and substantive educational decisions for disabled children. If the Act contained substantive provisions, this freedom would evaporate in favor of generally applicable standards.²⁹⁰ Clearly, this is not what Congress intended to do. It is possible to claim that Congress, in its promulgation and maintenance of the IDEA, holds the same view as do special educators: disabled children can be effectively educated only when they are considered individuals with unique needs and abilities, and when teachers are given the flexibility to accommodate those needs with innovative and specialized teaching methods in an appropriate educational setting. The ability to provide such an education can only be hindered by the looming presence of the federal courts. Perhaps most telling are the responses of special educators themselves. All of the special education teachers with whom I spoke reported that the mandates of the IDEA did not affect their teaching methods or the way they interacted with their students because they “already do that in special education.”²⁹¹ According to those special educators, they entered the field with a preference for individualized

288. Eyer, *supra* note 275, at 631 (stating that as result of procedural nature of IDEA, “the most facile and effective method to raise the level of substantive rights under the IDEA is to heighten its procedural requirements”).

289. *See* Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207–08 (1982) (“[I]t seems highly unlikely that Congress intended courts to overturn a State’s choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2).”); Mead, *supra* note 276, at 517 (noting that mainstreaming determination remains individual decision and that it is secondary to concept of appropriateness).

290. *See* Mead, *supra* note 276, at 517 (discussing how imprecision of least restrictive environment provision is reflection of Congress’ desire to provide states with flexibility they need to provide education tailored to each child’s particular needs).

291. Interview with Kathy L., *supra* note 253.

education and were educated to provide individualized education. The IDEA merely legalized what they already knew.²⁹²

B. *Philosophical Differences Regarding Inclusion*

The Supreme Court made clear in *Rowley* that the courts are not to substitute their judgments on educational policy for that of the administrative agency.²⁹³ The Court specifically noted that it had previously warned the lower courts that the judiciary lacks the “specialized knowledge and experience” necessary to resolve “persistent and difficult questions of educational policy.”²⁹⁴ There can be no more “persistent and difficult question of educational policy” than the degree to which disabled children should be included in the regular education classroom. Teachers, parents, administrators and scholars alike have hotly contested the appropriate degree of inclusion for disabled children.²⁹⁵ Congress may have created a presumption for inclusion, but it has carefully qualified that presumption and has

292. *See id.*; *see also* Interview with Kathy R., *supra* note 253; Interview with Charles F., *supra* note 253; Interview with Amy K., *supra* note 253; Interview with Claire A., Special Education Teacher in Exclusive Program, New York (Mar. 18, 2002); Interview with Charles J., Special Education Teacher in Inclusion Program, New York (Mar. 18, 2002) (interview notes on file with the *New York University Journal of Legislation and Public Policy*).

293. *Rowley*, 458 U.S. at 206, 208.

294. *Id.* at 208 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

295. Compare Shanker, *supra* note 17, and J. Michael Coleman & Ann M. Minnett, *Learning Disabilities and Social Competence: A Social Ecological Perspective*, 59 EXCEPTIONAL CHILDREN 234 (Dec./Jan. 1993), and Dupre, *supra* note 32, and Theresa Bryant, *Drowning in the Mainstream: Integration of Children with Disabilities After Oberti v. Clementon School District*, 22 OHIO N.U. L. REV. 83 (1995), and Interview with Kathy R., *supra* note 253, and Interview with Amy K., *supra* note 253, and Interview with Melissa H., Regular Education Music Teacher (Mar. 17, 2002), and Interview with Charles J., *supra* note 292, with Stainback & Stainback, *supra* note 185, and Lipsky & Gartner, *supra* note 170, and Rebell & Hughes, *supra* note 1, and Patella, *supra* note 187, at 239. Although most special educators appear to be skeptical of the value of full inclusion, and most regular education teachers are opposed to the idea as well, parents of children with disabilities vary in their opinions of inclusion. *See* Shanker, *supra* note 17; Huefner, *supra* note 211 at 48; Rea et al., *supra* note 187, at 203; Reganick, *supra* note 186, at 1. Compare Greer v. Rome City Sch. Dist., 950 F.2d 688, 691 (11th Cir. 1991) (parents seeking full-time regular class placement and disagreeing with school district’s decision to mainstream disabled child during physical education, music, and lunch), and Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1039 (5th Cir. 1989) (parents seeking placement of disabled child in regular classroom and disagreeing with school district decision to mainstream child for lunch and recess), with Bd. of Educ. of Murphysboro v. Ill. State Bd. of Educ., 41 F.3d 1162, 1165 (7th Cir. 1994) (parents seeking residential placement for disabled child), and Roland M. v. Concord Sch. Comm., 910 F.2d 983, 988 (1st Cir. 1990) (parents seeking residential placement).

ultimately left the policy balancing between individualized education and inclusion to the state and local educational agencies.²⁹⁶

The categorical choice of inclusion over separate schools is fundamentally a policy choice and, in fact, such a categorical choice would be illegal under the Act.²⁹⁷ Under the IDEA, inclusion is not the superior educational choice; it is one placement option, to be considered only if it would be adequate to meet an individual child's needs.²⁹⁸ The adequacy of an inclusion placement depends on the child's IEP and is intertwined with the type and severity of a child's disability and the likelihood that related services could be provided to make mainstreaming appropriate for the child. It is significant to note that most writings on inclusion are largely philosophical, and do not include discussions of individual instruction or IEPs.²⁹⁹ Surprisingly, there is very little empirical data to support the underlying concepts of the inclusion movement.³⁰⁰

Proponents of inclusion cite the civil rights of students with disabilities,³⁰¹ the educability of all disabled children,³⁰² the moral outrage of excluding children with disabilities from the regular classroom,³⁰³ the benefits of social interaction between disabled and non-disabled children,³⁰⁴ and the stigma associated with being labeled as disabled.³⁰⁵ Opponents of inclusion cast doubts on its value as an educational tool for all children.³⁰⁶ They maintain that the nature of a

296. See Huston, *supra* note 169, at 250–52.

297. Huefner, *supra* note 211, at 50.

298. See 34 C.F.R. § 300.551 (2002) (calling for continuum of educational placements for disabled children); see also Melvin, *supra* note 24, at 645–46, 649 (noting Act's focus on providing individualized education in "continuum of alternative placements" to ensure that each child's unique needs are met).

299. See Westby et al., *supra* note 181, at 15 (stating that most writings on inclusion in United States are philosophical rather than practical).

300. See Shanker, *supra* note 17, at 40 (pointing out lack of data or research supporting full inclusion); Rea et al., *supra* note 187, at 204 (indicating that disagreements over inclusion are fueled by lack of empirical evidence).

301. See DANIEL D. SAGE & LEONARD C. BURELLO, POLICY AND MANAGEMENT IN SPECIAL EDUCATION 39 (1986) (noting application of *Brown* principles to classifications that discriminate against disabled); Dupre, *supra* note 32, at 829–30 (noting comparisons between civil rights movement and inclusion movement).

302. See, e.g., Hehir, *supra* note 186, at 41.

303. See, e.g., Lipsky & Gartner, *supra* note 170, at 69–70; Stainback & Stainback, *supra* note 185.

304. See, e.g., Coleman & Minnett, *supra* note 295, at 234.

305. See, e.g., Stainback & Stainback, *supra* note 185 ("[I]t is simply unfair and morally wrong to segregate any students, including those defined as disabled . . .").

306. See, e.g., Westby et al., *supra* note 181, at 14 ("Not everyone is certain that full inclusion is the best way to educate students with disabilities."); Shanker, *supra* note 17, at 40 ("Where are our figures on how well students with disabilities in regular classrooms do in comparison with those in special education settings?"); Dupre, *supra*

child's disability may often require alternative teaching methods or environments—which simply cannot be provided in a regular classroom—in order for the child to learn, and point out that included children are often isolated and stigmatized in the regular classroom environment.³⁰⁷ They note the value of learning in a supportive environment where the focus is on one's ability, rather than disability, and where achievement is defined in terms of meeting one's personal goals and not in comparison with other children.³⁰⁸ They question the viability of modeling theories and the idea that a disability can be “cured” by association with regular children, and claim that the life skills necessary for successful participation in the community are not taught in regular education classrooms.³⁰⁹

The degree to which a disabled child should be included in the regular classroom is fundamentally a methodological and educational decision; it is a question of what works best for an individual disabled child. One court has noted that the inclusion choice and methodology simply cannot be separated from one another.³¹⁰ Others, relying on *Rowley*, have explicitly recognized educational placement as a methodological decision, which should be left to the states.³¹¹ When courts make educational placement decisions for disabled children by deciding between competing experts, the courts make policy decisions based on social concerns that are not apparent in the IDEA itself. This is exactly the type of decision that Congress did not intend for the federal courts to make. The complexity of the inclusion decision and the lack of agreement among the various parties illustrate the tensions surrounding the balancing required by the Act between individualized

note 32, at 823 (“[R]esearchers are concluding that there is little ‘if any evidence that children’s academic performance is causally determined by their global self-concept.’”); Interview with Charles F., *supra* note 253.

307. See, e.g., Westby et al., *supra* note 181, at 15; Interview with Charles F., *supra* note 253; Interview with Kathy R., *supra* note 253; Interview with Kathy L., *supra* note 253.

308. See, e.g., Interview with Amy K., *supra* note 253; Interview with Charles J., *supra* note 292.

309. See, e.g., Dupre, *supra* note 32, at 819–25; Interview with Charles F., *supra* note 253. For a more in-depth discussion of the various viewpoints on inclusion, see Rebell & Hughes, *supra* note 1, at 537–45.

310. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) (stating that reasonable calculation necessarily involves choices among educational policies and theories).

311. See, e.g., *Briggs v. Bd. of Educ. of the State of Conn.*, 882 F.2d 688, 693 (2d Cir. 1989); *Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290, 296 (7th Cir. 1988); *Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1183 (9th Cir. 1984). *But see Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 698–99 (11th Cir. 1991) (noting that mainstreaming is requirement of Act, not methodology).

education and inclusion to the maximum extent appropriate. These tensions clarify why Congress found it prudent to leave such decisions to the educational experts and the people who know the disabled child best.

C. Individualized Decision-Making

The IDEA defines “child with a disability” to mean a child “with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . who, by reason thereof, needs special education and related services.”³¹² “Specific learning disability” is further defined as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations” and includes “perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.”³¹³ Considering the above definitions and the possibility that a child may have any combination of the identified disabilities, the variety and breadth of the disabilities covered by the Act is staggering.³¹⁴ Consider the following hypotheticals:³¹⁵

Brian is a fourteen-year-old child with autism. He has very little impulse control and very limited speech capabilities. Because of this disability, he can be unintentionally aggressive and requires a full-time aide to keep him from inadvertently hurting himself or someone else. He has an I.Q. of 60, an academic age of the average seven-year old, and the social age of the average five-year old. Frank is a seventeen-year-old child who is mentally retarded and learning disabled. He has an I.Q. of 64. He has no physical limitations, but is slow to react to outside stimuli. Academically, he is at a third grade level, and he has limited reading and science skills.

312. 20 U.S.C. § 1401(3)(A) (2000).

313. *Id.* § 1401(26).

314. See Lawrence C. Levy, *Series on Special Ed Needs a Lot of Help*, *NEWSDAY*, Nov. 19, 1997, at A51 (stating that IDEA always intended to provide help for children with wide range of disabilities); Breen, *supra* note 264 (noting that students in special education have wide range of disabilities, including learning problems, physical impairments, and emotional trouble).

315. All hypotheticals were created with the assistance of Charles F., who has been an educator and administrator in special education for thirty-seven years. Although based on Charles F.’s experiences, the hypotheticals do not refer to actual children. The I.Q. of the average person is about 100, plus or minus 16.

He can operate a computer, but he will generally require some help. He is able to recognize coins and make change, but becomes confused calculating the change for anything more than one dollar. He can do small jobs with appropriate supervision. However, he has only a limited ability to do things independently and has trouble making basic decisions. Socially, he is at a fifth grade level.

Kim is seventeen years old and was born with a serious form of cerebral palsy. She is confined to a wheelchair and has no use of her arms or legs. She is unable to speak, but can communicate on a limited basis through a computerized device by using her head to move a switch. She requires a full-time aide to act as her "hands" and to assist her ability to move and to do basic activities. She has an I.Q. of 39 and the academic ability of the average five-year old. Her social age is that of the average twelve-year-old.

John is twenty-two and attends American University. He is learning disabled and has difficulty with reading. He must have all his textbooks read out loud on audiotape in order to keep up with his classmates. He also receives unlimited time to take tests because of his disability. He does very well both academically and socially at school. He has an I.Q. of 125.

Lisa is twenty-one and is mentally retarded. She has an I.Q. of 73. She lives at home with her mother and holds a job at the local Giant Supermarket. She is considered an excellent worker, and her boss praises her dependability and reliability. She has a driver's license and is able to drive back and forth to work. Academically she is at an eighth grade level, and socially she is at a tenth grade level. She could potentially live independently, but might have problems paying the rent, cooking, paying bills, and making meal choices.

All of the children described in the preceding hypotheticals would fall under the protection of the IDEA. Nonetheless, it should be clear that no one plan could address the needs of all the students described above. Instead, upon identification,³¹⁶ each child would have an IEP Team who would develop a distinct IEP for him or her and make a determination as to his or her appropriate educational placement.³¹⁷ That IEP would then be reviewed at least once a year for the remainder of the child's educational career.³¹⁸

This regular review of a disabled child's IEP reflects Congress' recognition that the appropriate educational placement for a disabled

316. See 20 U.S.C. § 1412(a)(3) (requiring states to identify all children with disabilities residing in state). Many critics have raised serious concerns with how and why some children are identified as disabled. This issue is separate from the educational placement decision for already identified disabled children and is beyond the scope of this Note.

317. See discussion *supra* Part I.B.

318. See discussion *supra* Part I.B.

child is not static, but rather is constantly changing. All of the special education teachers with whom I spoke expressed the view that inclusion at early ages is generally an appropriate placement for many disabled children.³¹⁹ They expressed doubts, however, as to the value of inclusion for children as they grow older.³²⁰ The “gap” between a disabled child and a non-disabled child is less apparent at earlier ages, where the disabled child’s capabilities are similar to that of her non-disabled peers.³²¹ As students progress toward middle and high school, the gap widens, making it more and more difficult for the disabled child to successfully learn in a regular classroom, even with the requisite related services.³²² The disparity in social awareness and social skills begins to grow as well. One teacher remarked that her sixteen- and seventeen-year-old students would not be able to interact with students of the same age because they simply did not comprehend social graces.³²³ For instance, if a student saw a piece of dry skin on the teacher’s face, he might begin yelling “You have a booger on your face!”³²⁴ Even when his teacher explains that it is not appropriate to begin yelling about the “booger,” he will repeatedly engage in the same type of behavior.³²⁵

The idea that non-disabled students will befriend disabled students, thus incorporating the disabled student into the community, is frequently not the experience of many special education students.³²⁶ In one IEP Team meeting, the parents of a disabled child were insisting that she continue to be included in the regular curriculum, despite their acknowledgement that she was not benefiting educationally from

319. See Interview with Kathy L., *supra* note 253; Interview with Kathy R., *supra* note 253; Interview with Claire A., *supra* note 292; Interview with Amy K., *supra* note 253; Interview with Charles J., *supra* note 292; Interview with Charles F., *supra* note 253.

320. See Interview with Kathy L., *supra* note 253; Interview with Kathy R., *supra* note 253; Interview with Claire A., *supra* note 292; Interview with Amy K., *supra* note 253; Interview with Charles J., *supra* note 292; Interview with Charles F., *supra* note 253.

321. See Interview with Claire A., *supra* note 292; Interview with Amy K., *supra* note 253.

322. See Interview with Claire A., *supra* note 292; Interview with Amy K., *supra* note 253.

323. Interview with Kathy R., *supra* note 253; see also Reganick, *supra* note 186 (noting that social needs of disabled students far exceed resources and talents of general educators).

324. Interview with Kathy R., *supra* note 253.

325. *Id.*

326. See, e.g., Westby et al., *supra* note 181, at 15–16 (describing experiences of disabled child who was socially ostracized and physically attacked by classmates within two weeks of her placement in regular classroom).

that placement.³²⁷ They insisted that inclusion in the regular classroom gave her the opportunity to develop normal friendships with non-disabled children.³²⁸ Finally, one of the special educators asked the parents about the last time one of the child's non-disabled friends called her on the telephone to talk or to invite her to go roller skating.³²⁹ The parents' response was silence because they could not recall that ever happening.³³⁰

Perhaps most telling are the words of the students and parents themselves. In December 1993, one special education school in up-state New York launched a letter campaign to New York State Senator Thomas Libous protesting the proposed closing of their BOCES special education school.³³¹ The letters from parents, students, and other proponents of the program, present passionate pleas to the senator to keep the school open.³³² As one student explained to Senator Libous, "I've been to eight different school [sic] before I came here, and did not like any of them because kids and teens pick on me. But here it's different, no one pick [sic] on anyone, the teachers are very nice and kind, and everybody here are [sic] friends. Please do not take our school away."³³³ Another student told Senator Libous about his experience at the special education school, "Senator Libous, I like [this] program. I have learned how to printer [sic] better. I have more friends then [sic] in my other school."³³⁴

The parents of the disabled children were equally protective of their special education program. One mother told Senator Libous that when she visited the school for the first time, she viewed it as a last resort to finding an appropriate placement for her daughter after several other placements had proved unsuccessful.³³⁵ However, she was immediately impressed because:

All of the children looked happy and we could see how focused on the children the staff are, along with how each child's dignity is

327. Interview with Charles F., *supra* note 253.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*; Compilation of letters from students, teachers, and parents to New York State Senator Thomas Libous (Dec. 1993) (on file with author).

332. Compilation of letters from students, teachers, and parents to New York State Senator Thomas Libous (Dec. 1993) (on file with the author).

333. Letter from D.T. to New York State Senator Thomas Libous (Dec. 1993) (on file with author). The names have been changed to preserve the writer's anonymity.

334. Letter from D.L. to New York State Senator Thomas Libous (Dec. 1993) (on file with author).

335. Letter from B.W. to New York State Senator Thomas Libous (Dec. 1993) (on file with author).

maintained. The public school cannot begin to offer the vocational component that is the focus of the BOCES program. We have never felt so 'right,' so good, about any of her other placements.³³⁶

One child's grandparents told the Senator that while attending his regular school, their grandson hated school, skipped school frequently, and had no friends.³³⁷ Since his placement in the separate special education school, they observed, "He now has a high level of confidence and self-esteem. He is outgoing and participates in every possible activity, including some not associated with [the program]. He enjoys school We are convinced that in a regular classroom [our grandchild] would have drifted hopelessly and faced a very bleak future."³³⁸ These are just a few examples of individual students who have found success in separate special education programs after inclusion programs had failed as an "appropriate" placement.

Of course, generalizations about socialization are impossible to make. Many children with disabilities *can* be successfully integrated in the regular classroom and can form genuine friendships with non-disabled children. The potential for successful socialization, as with education, is an individual consideration. Even if the social benefits of inclusion were an appropriate factor in determining educational placement, the relevance of those benefits for an individual child would remain a particularized decision that the courts are not equipped to make.

Similarly, most students with disabilities can be effectively and appropriately educated in the regular classroom when provided with related services.³³⁹ One special education teacher that I interviewed works in a "push-in" inclusion program in a public middle school.³⁴⁰ As a special education teacher, she "pushes in" to her students' core classes—math, science, language arts, and social studies.³⁴¹ Her students are primarily learning disabled or "other[wise] health impaired."³⁴² In her opinion, all of her students are appropriately placed at this time.³⁴³ For some of her students, however, she predicts a time

336. *Id.*

337. Letter from D.A. & F.A. to New York State Senator Thomas Libous (Dec. 1993) (on file with author).

338. *Id.*

339. Rea et al., *supra* note 187, at 219 (discussing instances of successful inclusion of learning disabled children); Shanker, *supra* note 17, at 40; Interview with Charles F., *supra* note 253.

340. Interview with Amy K., *supra* note 253.

341. *Id.*

342. *Id.* Some of her students have Attention Deficit Disorder (ADD), one student has Cerebral Palsy, and one student has ADD and Bi-Polar Disorder.

343. *Id.*

when the gap between themselves and their classmates will grow too large, and if they are not transitioned to a more appropriate program, they are likely to drop—or fail—out of school.³⁴⁴ The problem is that it is difficult to determine where a child can be appropriately educated at a given point in time. There are too many factors and too many disparities in type of disability to apply one standard to all disabled children.

The federal courts frequently acknowledge that the IDEA requires a “balance” to be struck between the mainstreaming provision and the need to construct individual programs tailored to the needs of each child, but they lament that Congress did not provide a substantive standard to strike the balance.³⁴⁵ To remedy this deficiency, the federal courts claim that it is a court’s responsibility to provide standards for the evaluation of a school district’s educational placement determinations.³⁴⁶ This observation entirely ignores *Rowley* and the thrust of the IDEA. Courts are not equipped with the expertise and knowledge to strike the educational balance between inclusion and specific individualized education. They are not equipped to create an IEP or to evaluate whether the IEP indeed fits the child’s needs. That is why the IEP is created with the input and collaboration of a number of different people. In fact, in those courts that have bypassed the deferential *Rowley* standard, the IEP is ignored altogether.³⁴⁷ By neglecting the substance of the IEP itself, the courts are substituting their own judgment of “substantive” education for the individualized substantive educational goals of the child’s IEP, as developed and reviewed by the IEP Team. The result is that disabled children may be individually deprived of the appropriate education that suits their unique needs.

344. *Id.*

345. *See* *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987) (finding that benefit of mainstreaming must be weighed against variety of factors, including cost to local school district and benefits gained from services that could not be provided in non-segregated setting); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (claiming that although mainstreaming imposes difficult burden on courts, Congress has chosen to impose that burden and courts must therefore fulfill their duty).

346. *See, e.g.*, *Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1214 (3d Cir. 1993) (stating that principal task of court is to provide standards for determining when school district’s decision to place disabled child in segregated environment violates presumption in favor of mainstreaming).

347. *See* discussion *supra* Part III.

*D. The Differences Between Regular Education and
Special Education*

Education itself has been viewed as the center of American society since the nation's beginning.³⁴⁸ It has been described as crucial that citizens be educated in order to be able to participate fully in a constitutional society and to protect the individual rights that the Constitution guarantees.³⁴⁹ The Supreme Court has recognized that "it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education."³⁵⁰ This mantra rings true for disabled and non-disabled students alike. For the disabled student, however, the focus on "education" in American society can be misleading. With the continued growth of standards-based education, the goals in education have shifted to test results and accountability.³⁵¹ "Teachers are told that the nation expects its students to out-perform those from other countries on standardized tests, while at the same time, they are told they need to modify the curriculum to accommodate students who, because of a . . . disability, are unable to perform at the same level as non-disabled students."³⁵² The focus in education today is "testing and going to college,"³⁵³ and regular education teachers today find themselves "teaching to the test" and pressuring students to achieve high marks on standardized tests.³⁵⁴ Meanwhile, special education teachers desperately search for ways to

348. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring) (stating that Constitution presupposes existence of educated citizenry and that public schools are essential to preparing individuals to be citizens and preserve values of society); JOSEPH TUSSMAN, *GOVERNMENT AND THE MIND* 54 (1977) (arguing that natural right of self-preservation lies fundamentally in inherent power of state to establish and direct teaching activity and educational institutions required to ensure its stability and further its legitimate purposes).

349. See *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (noting importance of education in preparing individuals for active citizenship and in preserving societal values, which has long been recognized by Supreme Court); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 132 (1995) (arguing that education is necessary to prepare individuals for responsibility of exercising citizenship rights).

350. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

351. See Margaret E. Goertz, *Redefining Government Roles in an Era of Standards-Based Reforms*, PHI DELTA KAPPAN, Sept., 2001, at 62, 63 (stating that since mid-1990s, educational policy has focused on high academic standards and accountability for student outcomes); Huston, *supra* note 169, at 254–55 (noting pressure on educators to make sure students progress through curriculum rapidly and advance to next grade).

352. Huston, *supra* note 169, at 254.

353. See Interview with Jim M., Regular Education Mathematics Teacher (Mar. 18, 2002); Interview with Claire A., *supra* note 292.

354. Interview with Melissa H., *supra* note 295.

keep their students from being forced to take standardized tests—tests that many of their students are bound to perform poorly on.³⁵⁵ One of the most striking, and alarming, aspects of standards-based reform is that academic standards should not only be high, but also be the same for all students.³⁵⁶

The notion of treating all students the same is a facially appealing idea. However, for many special education students, the application of such rigid standards merely sets them up to fail.³⁵⁷ One student said quite plainly, “I don’t want to go back to my [home] school because I would fail my classes there I want to stay here at [my special education school] because I learned how to cook and how to look up at the store signs and find them.”³⁵⁸ Although most disabled children are capable of significant academic achievement, this is simply not the reality for all disabled children.³⁵⁹ Many disabled children cannot intellectually meet the academic standards established for non-disabled children. It is a very painful and heart-breaking realization, especially for the parents of disabled children.³⁶⁰ One special education teacher told the story of her attempts to explain to the parents of a sixteen-year-old mentally retarded boy why he could only read at a second-grade level: “They just could not understand. I finally had to say to them that their child was mentally retarded—He was missing the part of his brain that he needed.”³⁶¹ In another case, referring to their early efforts to find an appropriate placement for their Down’s Syndrome child, one family painfully recalled:

We admit that when she was around 4 years old that our goal was to somehow get her mainstreamed—we thought it was best for her, but actually as we ponder[ed] that thought—it was to fulfill a need of ours—because if she was in a regular school setting we would feel we did our part as parents giving her the ‘normalcy’ that she deserved. However, as the years have gone by our views have changed and we would have actually done her an injustice. Over

355. See Interview with Kathy R., *supra* note 253; Interview with Kathy L., *supra* note 253; see also Levy, *supra* note 314 (noting that low test scores are often reason children are in special education in first place and are not measure of success of school system).

356. Michael Dannenberg, *A Derivative Right to Education: How Standards-Based Education Reform Redefines the Individuals with Disabilities Education Act*, 15 *YALE L. & POL’Y REV.* 629, 637 (1997).

357. See Dupre, *supra* note 32, at 819–20.

358. Letter from D.P. to New York State Senator Thomas Libous (Dec. 1993) (on file with author).

359. Cf. Levy, *supra* note 314 (decrying media coverage that criticized parents who identify their children as learning disabled).

360. *Id.*

361. Interview with Kathy R., *supra* note 253.

the years she has blossomed socially and in every area we could imagine. . . . In her eyes—she doesn't see a handicap, only a person—someday maybe the rest of the world will see things the way she does³⁶²

For many disabled children, the goal is to learn basic living skills, which does not comport with the regular education notions of grade promotion.³⁶³ They need to learn how to write a check, how to shop for groceries, how to pay bills, how to maintain personal hygiene—the basic everyday living skills that most children learn naturally by observation. Regular education simply does not prepare the disabled child who needs constant repetition to learn how to make change at the department store for independent living.³⁶⁴ Furthermore, the focus on applying the same standards to all students often makes parents reluctant to identify their child's disability, which can deprive the disabled child of the necessary educational services to which he or she is entitled.³⁶⁵

Regular education has been formulated on notions of “lock-step” education, where one group of students is taught the same curriculum by one teacher in the same classroom.³⁶⁶ Not all disabled children, regardless of their intellectual capacity, are able to learn in this way. Special education teachers use adapted or differentiated teaching strategies, and are trained in using individualized teaching techniques. This is not to say that all disabled children are unable to learn in a typical regular education classroom, or that accommodation cannot be made to account for the learning needs of individual disabled students. However, forcing all children into one classroom is just as problematic

362. Letter from T.T. & E.T. to New York State Senator Thomas Libous (Dec. 1993) (on file with author).

363. See Robert Caperton Hannon, *Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency*, 50 VAND. L. REV. 715, 729 (1997) (arguing that Rowley standard, which measures educational benefit primarily by grade advancement, is difficult to apply in cases where child's goal is to learn basic life skills to overcome emotional disturbance).

364. See S. REP. NO. 94-168, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (“With proper education services, many [disabled children] would be able to become productive citizens Others, through such services, would increase their independence, thus reducing their dependence on society.”).

365. Levy, *supra* note 314.

366. See Huston, *supra* note 169, at 255 (identifying basic framework of public education as oriented toward “large-group, lock-step progression”); Dupre, *supra* note 32, at 842–43 (“No two students are exactly alike In an ideal world, each student would be given one-on-one instruction tailored specifically to his needs. Because of limited time and resources however, this kind of individual attention is not possible in the regular classroom”).

as forcing all students into separate classrooms.³⁶⁷ This is why Congress mandates a detailed IEP outlining the disabled child's educational goals and needs—so that educators can make an informed, reasoned decision about the abilities, needs, and appropriate educational placement of the individual child. The decision is not simple, and it is not linear. It defies the application of one single standard applied under all circumstances.

CONCLUSION

Special education is an essential component of the American public education system; not an independent educational system.³⁶⁸ While it is true that there must be greater integration of the typical regular education model and the special education model in order to maximize the extent to which disabled children can be appropriately educated in the regular education classroom, such methodological decisions are the responsibility of the state and local governments, not the federal judiciary. Despite the structure and language of the IDEA, the complex, contextual educational decisions being made, the specialized, individualized education mandated for disabled children, and the immense differences between individual disabled children, the federal courts have nonetheless continued to search for a single test by which to determine the appropriate educational placement for every disabled child. Whether the result of interest group pressures, the influence of *Brown v. Board of Education*, or the lack of trust in the public education system, the choice by federal judges to treat all disabled children's educational needs the same presents difficult and persistent problems in the application of the IDEA. The focus has shifted away from the individuals protected by the Act, and toward greater, theoretical societal concerns. This not only violates the provisions and purposes of the IDEA, it is antithetical to the purposes and goals of special education itself. Congress left the careful balancing of individualized education and inclusion to the expertise of state educators—a choice that the Supreme Court has validated. It is only in recognizing the significance of Congress' decision that the importance of identifying the decision-maker can be understood. When courts fail to recognize this, they fail to recognize whom it is the Act is charged with protecting; and it is the individuals of the IDEA who must bear the consequences.

367. Reganick, *supra* note 186, at 4.

368. See Kauffman, *supra* note 174, at 275 (describing special education as identifiable, integral, and special part of educational system).