Vanderbilt Law Review

Volume 55
Issue 5 *Issue 5 - October 2002*

Article 7

10-2002

# A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals With Disabilities Education Act

Joshua A. Wolfe

# A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals With Disabilities Education Act



## I. INTRODUCTION

One issue that is consistently at the forefront of political debate in America is the educational system.[1] The debate over education involves funding, accountability, and curriculum issues, among others.

1. *See, e.g.*, Allec Gallup, *Education: A Vital Issue in Election 2000*, Poll Analyses, Oct. 2, 2000 (stating that "the public ranks education as one of the most important issues in this year's presidential campaign, with ninety-one percent saying it is 'very' or 'extremely' important").

One education issue that does not receive as much attention as some of the more politically charged issues is special education.

The goal of the American public school system is to educate all children, but how should that goal be implemented with regard to learning-disabled children? How does the educational system meet the individualized needs of disabled students while ensuring that these students are not isolated from the rest of the student body? Congress attempted to address these problems with the Individuals with Disabilities Education Act ("IDEA" of "the Act").[2] The Act sought to promote mainstreaming[3] by promising augmented education funding to states that increased mainstreaming in their school systems.[4]

Over the years the court system has had the unenviable task of interpreting Congress' intent in enacting the IDEA. This task is made more difficult because the Act itself has conflicting mandates[5] and because the Supreme Court has provided little guidance.[6] As discussed below,[7] the courts' main problem has been trying to reconcile the Act's mandate that all students receive an individualized and appropriate education[8] with its emphasis on mainstreaming those students with special needs to the greatest extent possible.[9]

Thus far, the task of interpreting the Act and reconciling its conflicting mandates has fallen to the courts of appeals. The courts that have attempted to reconcile the Act's conflicting mandates have utilized at least four different methodological approaches,[10] leaving

---

2. 20 U.S.C. §§ 1400-1485 (2000).

3. The terms mainstreaming and inclusion, though commonly used interchangeably, do not embody the same concepts. Mainstreaming includes the concept that "a student must 'earn' his or her opportunity to" attend the regular classroom by demonstrating "the ability to 'keep up' with the work assigned." Joy Rogers, *The Inclusion Revolution*, Phi Delta Kappa Research Bulletin 11 (May 1993), *available at* http://www.pdkintl.org/edres/resbul11.htm. Inclusion, on the other band, deals with "bringing the support services to the child . . . and requires only that the child will benefit from being in the class." *Id.* Likewise, the Third Circuit has pointed out that inclusion has a "greater emphasis on the use of supplementary aids and support services" in the regular classroom. Oberti v. Bd. of Educ., 995 F.2d 1204, 1207 n.1 (3d Cir. 1993). The Third Circuit described mainstreaming as "[i]ntegrating children with disabilities in regular classrooms." *Id.* Though inclusion is a more correct term when discussing the IDEA because of its focus on supplementary services, this Note will employ the term mainstreaming because "it is currently the common parlance." *Id.*

4. *See* § 1411(a)(1) ("The Secretary shall make grants to States and the outlying areas, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this part.").

5. *See infra* Part I.B.

6. The only Supreme Court case in this area is *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982), and its usefulness is limited. *See infra* Part II.A.

7. *See infra* Part I.B.

8. *See generally* § 1412(a)(1).

9. *See generally id.* § 1412(a)(5).

10. *See infra* Part II.B.

the status of the law unclear.[11] This Note will attempt to evaluate the different tests that circuit courts have devised by focusing on how well they each reflect the concerns of the parties affected by the mainstreaming decisionmaking process. Part II describes the background and origins of the problem beginning with the constitutional principles underlying the IDEA. This part will then trace the development of the issue through the passage of the IDEA. In Part III, this Note examines the scant Supreme Court jurisprudence dealing with the Act. Part III then explores the various methods that the circuit courts have employed while attempting to balance the conflicting provisions of the IDEA as well as the implications that result from each of these approaches. In Part IV, this Note analyzes the various approaches by examining the interests reflected in each. The discussion will focus on the interests of school systems, classroom teachers, non-learning-disabled students, the court system, and finally, disabled students. While much has been written on mainstreaming and on courts' approaches to the topic, the practical effects of the different approaches on these groups have not always been addressed. This Note will attempt to shed more light on these practical issues. Finally, this Note will conclude with a call for the adoption of a four-factor balancing test proposed by the Ninth Circuit and recommend congressional clarification.

In order to place the various issues in context, this Note will use the case of *Beth B. v. Van Clay*[12] to illustrate the challenges facing courts that are involved in the mainstreaming inquiry. The case concerns the plaintiff-student Beth B., a thirteen-year-old girl who suffers from a neurodevelopmental disorder called Rett syndrome.[13] This disorder causes Beth to suffer from serious "disabilities to motor functioning, communication and cognition."[14] Grounding discussion throughout this Note in the facts of the *Beth B.* case will clarify the issues involved and the options available to the courts.

---

11. *See* 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, 275 (1994) (noting that there is confusion in the law and stating that "[u]ntil the courts become consistent, either by action from the United States Supreme Court or by the evolution of the law at the appellate court level, IDEA will continue to guarantee different rights for children in different parts of the country").

12. No. 00-C-4771, 2001 U.S. Dist. LEXIS 14094 (N.D. Ill. Sept. 10, 2001).

13. *Id.* at *2.

14. *Id.*

## II. BACKGROUND

The IDEA is the necessary starting point for any inquiry into mainstreaming methodology. This section will describe how the Act was created in response to court decisions interpreting *Brown v. Board of Education*[15] and how the Act applies that decision's lessons to the issue of special education in segregated classrooms. A discussion of the Act, its history, and its provisions will follow.

### *A. Constitutional Foundations*

The IDEA and its "[c]onstitutional theories of equal educational opportunity for children with disabilities are rooted . . . in *Brown v. Board of Education*."[16] In *Brown*, the Supreme Court determined that "where the state has undertaken to provide [education, it] must be made available to all on equal terms."[17] The Court rested this determination on the finding that education is of utmost importance for the success of the child and the continued good of society.[18] Additionally, the Court found that segregating African-American children into separate classrooms created "feeling[s] of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[19] The Court felt that this de jure segregation harmed the segregrated child's development and prevented the child from receiving benefits that he or she would receive in an integrated classroom.[20]

In the 1970s, advocates for mentally disabled students latched onto this language and began to challenge the exclusion of mentally disabled children from regular classrooms. They used the holding and rationale of *Brown* as the basis for arguing that mentally disabled students were being impermissibly excluded from the regular education process.[21]

---

15. 347 U.S. 483 (1954).

16. Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 606 (1995).

17. 347 U.S. at 493.

18. The Court stated that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education" and that "[c]ompulsory school attendance laws" and "great expenditures for education . . . demonstrate . . . the importance of education to our democratic society." *Id.*

19. *Id.* at 494.

20. The Court stated that "[s]egregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Id.*

21. *See, e.g.*, Mills v. Bd. of Educ., 348 F. Supp. 866, 874-75 (D.D.C. 1972) (analyzing the plaintiff's claims under the *Brown* rationale).

The first important case dealing with the constitutionality of segregating mentally disabled students in the educational system was *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* ("PARC").[22] The *PARC* case was brought by thirteen children and PARC "on behalf of all mentally retarded" children who were being excluded by the Pennsylvania educational system.[23] Drawing heavily from the language and rationale of *Brown*, the plaintiffs alleged that certain Pennsylvania statutes effectively prevented mentally disabled children from attending public schools and thus violated the children's due process rights.[24] The plaintiffs claimed that the statutes lacked "any provision for notice and a hearing before" exclusion, and they "arbitrarily and capriciously den[ied]" mentally disabled students the right to an education.[25] The plaintiffs also alleged that the statutes violated equal protection principles because they "assume[d] that certain retarded children are uneducable and untrainable," and that this assumption "lack[ed] a rational basis in fact."[26] The court determined that it had jurisdiction to approve a consent agreement because it found that the plaintiffs had made proper due process and equal protection claims.[27]

Soon after the *PARC* case, the district court in *Mills v. Board of Education* held that excluding mentally disabled children from public education violates their due process rights.[28] The *Mills* case concerned seven children who sought to enjoin the District of Columbia school district from excluding them from the school system because of their mental disabilities.[29] Citing *Brown*, the court held that the school district had violated the Due Process Clause of the Fifth Amendment by not offering an education to plaintiffs while providing "such education to other children."[30] The court further held that suspending and expelling these students "without any prior hearing" and without "periodic review thereafter" violated the Due Process Clause.[31] The court held that these violations entitled the plaintiffs to summary judgment and ordered the school district to "provide to each child of

22. 343 F. Supp. 279 (E.D. Pa. 1972).
23. *Id.* at 281-82.
24. *Id.* at 283.
25. *Id.*
26. *Id.*
27. *Id.* at 295-96.
28. 348 F. Supp. 866, 876-83 (D.D.C. 1972).
29. *Id.* at 868.
30. *Id.* at 875.
31. *Id.*

school age a free and suitable publicly-supported education regardless of the degree of the child's . . . impairment."[32]

The importance of the *Mills* and *PARC* cases for the development of mainstreaming cannot be understated. By applying the basic *Brown* framework to mentally disabled children, the courts opened the door for challenges to the practice of segregating and excluding mentally disabled children from the regular educational environment. The cases caught the attention of the public[33] and, eventually, the attention of the public's representatives in Congress.[34] Although it is unclear exactly how willing the Supreme Court would be to apply this reasoning to disabled students,[35] the impact of these cases led directly to the development of the IDEA.[36]

### *B. Legislative Reaction: The IDEA is Born*

Congress passed the forerunner of the IDEA, the Education for All Handicapped Children Act, in 1975[37] with the goal of assuring "all children with disabilities . . . a free appropriate public education."[38] The early cases dealing with education for special-needs students were clearly a major factor in the development of the IDEA.[39] Congress, "drawing on the principles articulated in *PARC*," created a statutory scheme that mandated mainstreaming[40] in the "least restrictive

32. *Id.* at 875, 878.

33. According to one author, the cases "spawned substantial popular and scholarly attention and similar lawsuits in more than thirty states." MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 719 (1992).

34. *See infra* notes 39-43 and accompanying text.

35. There is some uncertainty as to how the Supreme Court would apply Fourteenth Amendment analysis to disabled children today. The Court's holding in *City of Cleburne v. Cleburne Living Center* casts doubt on the reach of the *PARC* and *Mills* cases, because in *Cleburne* the Court held tbat mentally retarded persons are not a suspect, or even a quasi-suspect, class. 473 U.S. 432, 445-46 (1984). Although the Court's holding in *Cleburne* arguably limits the force of the *PARC* and *Mills* cases, the importance of these decisions remains evident in their influence on Congress. *See infra* notes 39-43 and accompanying text.

36. *Id.*

37. Pub. L. No. 94-142, 89 Stat. 773 (codified as 20 U.S.C. § 1400 (2000)).

38. 20 U.S.C. § 1400(d)(1)(A) (2000).

39. *See* Melvin, *supra* note 16, at 615 (stating that the "legislative history of the IDEA makes clear that the Act was intended to address the equal protection and due process concerns raised in the early 'right to education cases' "); *see also* Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775, 791 (1997) (concluding that "the *PARC* and *Mills* opinions were forces behind the initial passage of the IDEA in 1975").

40. Melvin, *supra* note 16, at 617 (stating that "Congress viewed the 'mainstreaming' mandate as a central component of the Act").

environment."[41] Following the decisions in *PARC* and *Mills*, Congress believed that the IDEA was a necessary constitutional measure to aid disabled school children[42] and that it "incorporated the major principles of the right to education cases."[43]

Congress based the statute on its finding that "the special educational needs of children with disabilities were not being fully met."[44] The IDEA attempts to meet these needs by requiring states to implement certain substantive provisions. Under the IDEA, if states successfully implement the necessary provisions of the Act, the federal government will provide special education money to the states.[45] Under the Act, states are entitled to receive "[forty] percent of the average per-pupil expenditure" from the federal government.[46]

The two main substantive requirements of the IDEA are the "free appropriate public education" ("FAPE")[47] and the "least restrictive environment" ("LRE") provisions.[48] These two key provisions are the basis for most mainstreaming difficulties. In addition to these two substantive requirements, the Act contains procedural safeguards to protect special-needs children and their parents.[49]

One of the most significant portions of the IDEA is the Act's "free appropriate public education" requirement. The Act requires that states provide a FAPE "to all children with disabilities residing in the State between the ages of [three] and [twenty-one], inclusive, including children with disabilities who have been suspended or expelled from school."[50] The language of the FAPE requirement does not provide detailed guidelines as to how to measure an "appropriate" education. Providing a free education seems intuitive, but what exactly rises to the level of an appropriate education under the IDEA?

---

41. Dupre, *supra* note 39, at 792 (discussing Congress's reliance on *PARC* and pointing to that reliance as the way in which the "concept of education in the least restrictive environment was . . . incorporated into IDEA").

42. Melvin, *supra* note 16, at 616 ("The legislative history evinces Congress's view that desegregating children with disabilities is a matter of constitutional dimension.").

43. S. REP. NO. 94-168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432.

44. 20 U.S.C. § 1400(c)(2)(A) (2000).

45. § 1412(1).

46. § 1411(a)(2)(B). Interestingly, there is some information that suggests that the federal government provides only nine percent of the funding for special education. Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost be a Factor in Special Education Cases?*, 71 EDUC. L. REP. 11, 11 (1992).

47. § 1412(a)(1).

48. § 1412(a)(5).

49. *See infra* text accompanying notes 64-70.

50. § 1412(a)(1)(A).

The Supreme Court has provided some guidance,[51] but the issue is still unclear.[52]

The second significant provision of the IDEA, the least restrictive environment provision,[53] conflicts with the FAPE requirement and results in the problems at the heart of the *Beth B. v. Van Clay* case.[54] As with the FAPE provision, the basic language of the LRE provision appears straightforward. The statute provides that, "to the maximum extent appropriate," disabled children should be "educated with children who are not disabled."[55] Further, the provision requires disabled children should only be removed "when the nature or severity of the disability . . . is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[56] Though seemingly clear, "there has been deep confusion over what is meant by the term 'least restrictive environment' " since the beginning of federal legislation on the subject.[57] The LRE requirement was not intended to require an either-or approach to integrating special-needs students into the normal classroom; rather, the LRE decision is to be made "from a 'continuum' of placement options."[58] Again, however, the problem is reconciling the need to provide a free appropriate education with the need to ensure maximum exposure to the regular classroom environment. A related question is whether and to what extent the LRE provision of the IDEA should be subordinated to the FAPE provision. Both of these issues have been solved in different ways by the courts that have reviewed them.[59]

In addition to the FAPE and LRE requirements, the IDEA contains several other significant provisions. The first of these is the "individualized educational program" ("IEP") provision.[60] The IEP is

---

51. *See* Bd. of Educ. v. Rowley, 458 U.S. 176 (1982); *see infra* Part II.A.

52. *See infra* Part II.B.

53. § 1412(a)(5)(A).

54. 2001 U.S. Dist. LEXIS 14094, at *17 (stating that the "IDEA's twin goals, tailoring each child's placement to her special needs and maximizing integration with non-disabled students, are frequently difficult to reconcile, and the statute itself provides little guidance").

55. § 1412(a)(5)(A).

56. *Id.*

57. Jean B. Crockett, *Special Education: The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & EDUC. 543, 554 (1999).

58. Goldman, *supra* note 11, at 261; *see also* 34 C.F.R. § 300.551(a)-(b) (2001) (requiring a "continuum of alternative placements" composed of "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions" in addition to "provision [of] supplementary services . . . to be provided in conjunction with regular class placement").

59. *See infra* Part II.B.

60. § 1414(d).

the manner in which a school system evaluates a child and then makes a placement decision under the IDEA. The IEP is "a written statement"[61] composed of, among other things:

> statement[s] of the child's present levels of educational performance, . . . measurable annual goals, . . . special education and related services and supplementary aids and services to be provided to the child . . . [including] a statement of the program modifications or supports for school personnel that will be provided for the child, . . . how the child's progress toward the annual goals . . . will be measured; and how the child's parents will be regularly informed.[62]

The IEP is written in a collaborative way with a team including the parents of the child, regular and special education teachers, a school system representative, the child when appropriate, and other individuals if needed.[63] By including a wide variety of individuals and by requiring a clear statement of needs and goals, the IEP provision ensures that input from a wide variety of different parties will focus the placement decision on the individual needs of the student.

Another important provision in the Act is its set of procedural safeguards. The Act grants parents the right to examine any and all documents and records regarding their child.[64] In addition, parents have the right to be notified if the school system either proposes or refuses to grant a placement change.[65] Parents are also allowed to make complaints to the school system regarding placement choices.[66] If the parents feel those complaints are not dealt with adequately, they have the right to an impartial due process hearing.[67] Furthermore, parents may appeal an adverse hearing decision to the state education agency.[68] Finally, the Act gives parents the right to bring suit in state or federal court if they are still dissatisfied with the placement decision.[69] If parents are successful in either state or federal court, the Act authorizes the court to award them the attorneys' fees incurred through the process.[70]

The *Beth B.* case is a useful illustration of the IDEA's provisions in action. Beth began her school career in a regular kindergarten class.[71] An IEP was conducted annually to evaluate

---

61. § 1414(d)(1)(A).
62. § 1414(d)(1)(A)(i)-(viii).
63. § 1414(d)(1)(B)(i)-(vii).
64. § 1415(b)(1).
65. § 1415(b)(3).
66. § 1415(b)(6).
67. § 1415(f).
68. § 1415(g).
69. § 1415(i)(2).
70. § 1415(i)(3).
71. 2001 U.S. Dist. LEXIS 14094, at *3 (N.D. Ill. Sept. 10, 2001).

Beth's performance.[72] After her second-grade year, the school system suggested that Beth be moved from the regular classes that she had been attending to a segregated environment.[73] Beth's parents disagreed with the school system and exercised their right to an impartial due process hearing under the IDEA.[74] At the hearing, the impartial hearing officer found for the school system.[75] Beth's parents then brought suit in federal court, in accordance with their rights under the IDEA.[76]

The IDEA's administrative remedies having been exhausted, the issue was presented for judicial determination. The District Court for the Eastern District of Illinois had only one Supreme Court case to rely upon for precedent,[77] and that case dealt exclusively with the FAPE provision.[78] The circuit courts' disparate approaches rounded out what little the court had in the way of guidance.[79]

The court in *Beth B.* was thus faced with the question of how to reconcile the FAPE requirement with the LRE requirement. Reviewing courts must decide the proper relationship between these two provisions, and in doing so, they will have to decide which factors and interests should be considered, and how much weight these factors should be given. Most significantly, however, courts are charged with ensuring the best possible educational outcome for a disabled student—a task which may well be beyond the expertise of the judicial system. This Note will next examine the options the district court considered in *Beth B.* These approaches attempt, in different ways, to resolve the conflict created by the FAPE and LRE provisions of the IDEA.

## III. JUDICIAL APPLICATIONS

Where the administrative proceedings provided for by the IDEA end, the job of the court system begins. This section examines the various judicial reactions to the IDEA and reveals the conflict that exists between its provisions. The discussion will begin with the decision in *Rowley*, the only Supreme Court case interpreting any relevant part of the IDEA. Ultimately the *Rowley* decision is more

72. *Beth B.*, 2001 U.S. Dist. LEXIS 14094, at *3.
73. *Id.*
74. *Id.* at *4.
75. *Id.*
76. *Id.*
77. *Rowley*, 458 U.S. 176 (1982); *see also infra* Part II.A.
78. *See id.* at 187-205.
79. *See infra* Part II.B.

important for its influence on the circuit courts than for any substantive doctrine. Accordingly, the discussion will progress to an examination of the circuit courts' attempts to balance the IDEA's provisions.

### *A. Supreme Court*

The only Supreme Court case interpreting the IDEA's provisions is *Board of Education v. Rowley*.[80] The *Rowley* case dealt with a deaf first-grade student who was denied a qualified sign-language interpreter in her IEP.[81] The student was performing "better than the average child" in her class but was understanding "considerably less of what goes on in class than she could if she were not deaf."[82] The parents brought suit in accordance with the Act.[83] The case presented the courts with an opportunity to determine the meaning of the term "free appropriate public education" and the proper role of the court in reviewing cases under the IDEA.[84] The district court determined that the student was not receiving a free appropriate education under the IDEA and defined a free appropriate education as "an opportunity to achieve [a student's] full potential commensurate with the opportunity provided to other children."[85] Because the court found that there was a disparity between the student's abilities and her performance, it determined that she was not receiving a free appropriate education.[86] On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the district court's holding.[87]

The Supreme Court reversed, finding that the IDEA did not require the school to provide an interpreter.[88] The Court began its analysis with an interpretation of the term "free appropriate public education."[89] By examining the language and the legislative history of the IDEA, the Court concluded that the FAPE requirement is satisfied when a school system "provide[s] personalized instruction with

80. 458 U.S. 176.
81. *Id.* at 184-85.
82. *Id.* at 185.
83. *Id.*
84. *Id.* at 185-86.
85. *Id.* at 186.
86. *Id.* at 185-86.
87. *Id.* at 186.
88. *Id.* at 210.
89. *Id.* at 188-89.

sufficient support services to permit the child to benefit educationally from that instruction."[90]

The Court proceeded to determine the proper role of lower courts in adjudicating placement cases under the IDEA, concluding. that there is a two-part inquiry that lower courts should apply.[91] First, courts should ask whether "the State complied with the procedures set forth in the Act."[92] Second, the court should ask if the IEP developed according to the IDEA is "reasonably calculated to enable the child to receive educational benefits."[93] The Court pointed out that it was important for courts examining decisions of school systems to give "due weight" to the school system's determination in order to avoid imposing "their view of preferable educational methods upon the States."[94] Ultimately, the Supreme Court held that the IDEA did not require an interpreter for the hearing-impaired student in *Rowley*.[95]

The IDEA has two conflicting mandates: to give every special-needs student a free appropriate education that is tailored to her individual educational goals and to mainstream special-needs students to the greatest extent possible.[96] The Supreme Court has made it clear that the FAPE requirement is not meant to ensure that all students achieve their "maximum potential."[97] Instead, according to the Court, the FAPE requirement mandates only that a special-needs student be given personal instruction and support services sufficient to allow the student to benefit educationally.[98]

These statutory and jurisprudential principles are the only guidance courts have been given regarding placement decisions under the IDEA. This lack of guidance has consequently left the lower federal courts to determine their own methods of properly balancing the conflicting goals of the IDEA. Currently, courts of appeals are split on this issue.

### *B. Circuit Courts*

The minimal guidance of the Court's decision in *Rowley* resulted in different methods of balancing the competing tensions of

90. *Id.* at 203.
91. *Id.* at 206-07.
92. *Id.* at 206.
93. *Id.* at 207.
94. *Id.*
95. *Id.* at 210.
96. *See* 20 U.S.C. § 1412(a)(1)(A), (a)(5) (2000).
97. Bd. of Educ. v. Rowley, 458 U.S. 176, 204 n.26 (1982).
98. *Id.* at 203.

the FAPE and LRE requirements. There are at least four different views on the correct way for courts to balance these mandates. The Sixth Circuit was the first to address the problem in the 1983 case of *Roncker v. Walter*.[99] The Fifth Circuit later announced its own test in the 1989 case of *Daniel R. R. v. State Board of Education*.[100] Finally, the Ninth Circuit developed a different test in its 1994 decision in *Sacramento City Unified School District v. Holland*.[101] In addition to these three main tests, courts of appeal sometimes employ a deferential approach.[102] In order to better understand the choices the district court faced in the *Beth B.* case when reviewing Beth's placement decision under the IDEA, this Note will next discuss the four different approaches separately.

### 1. The *Roncker* Test

The *Roncker* case was the first in which a court of appeals had to decide how to balance the FAPE requirement with the LRE requirement. The case concerned a mentally disabled nine-year-old student named Neill.[103] After Neill's IEP, the school system placed him in a setting where he would only have contact with other mentally handicapped children.[104] His parents disagreed with this placement decision and sought an impartial hearing.[105] After losing that hearing, Neill's parents appealed the decision to the state education agency.[106] They eventually brought suit in federal district court when the State Board of Education also ruled against them.[107]

On appeal, the Sixth Circuit began its analysis by addressing the *Rowley* decision.[108] The court stated that the first prong of the *Rowley* test, "whether the state has complied with the Act's procedural requirements," had clearly "been satisfied in [the] case."[109] The court then moved to the second prong of the *Rowley* test and asked whether the IEP was "reasonably calculated to enable the child to receive

99. 700 F.2d 1058, 1059-64 (6th Cir. 1983).

100. 874 F.2d 1036, 1043-52 (5th Cir. 1989).

101. 14 F.3d 1398, 1403-05 (9th Cir. 1994).

102. *See, e.g.*, Wilson v. Marana Unified Sch. Dist., 735 F.2d 1178, 1183-84 (9th Cir. 1984).

103. *Roncker*, 700 F.2d at 1060. Neill Roncker, the plaintiff's son, was classified as "Trainahle Mentally Retarded," which meant that he had an IQ below 50. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1061.

107. *Id.*

108. *Id.* at 1062.

109. *Id.*

educational benefits."[110] The court also acknowledged that the IDEA "does not require mainstreaming in every case" but only requires it "to the *maximum* extent appropriate."[111]

With that foundation established, the court determined that the proper test in placement cases involves an initial determination of the factors which make the segregated environment superior to the nonsegregated environment.[112] Then, the reviewing court should determine if it is possible to provide those factors in a nonsegregated setting.[113] The court went on to explain that there are three scenarios in which mentally disabled children could not be educated in a nonsegregated environment.[114] These situations occur when the special-needs student would not benefit from mainstreaming, when the benefits that could be provided in a segregated environment far outweigh the "marginal benefit[s] from mainstreaming," and when the handicapped student might disrupt other students.[115] However, since these three situations are arguably dicta and not part of the *Roncker* test, it is unclear whether reviewing courts should consider themselves bound by the Sixth Circuit's position on these three scenarios. The court added that cost was "a proper factor to consider" but was not a defense if the school has failed to offer a "proper continuum of alternative placements."[116]

The *Roncker* test was a significant first step in attempting to reconcile the FAPE provision of the IDEA with the LRE provision. However, to some, the *Roncker* test appears intrusive and inconsistent with the statute.[117] An additional criticism leveled against the decision is that the test arguably "transformed the inclusion requirement 'from a negative one—do not segregate unnecessarily—to a positive one—provide all the services that render segregation unnecessary.' "[118] In spite of this criticism, the *Roncker* test was adopted by both the

110. *Id.* (citing *Rowley*, 458 U.S. at 207 (1982)).

111. *Id.* at 1063.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Daniel R. R.*, 874 F.2d at 1046 (refusing to adopt the *Roncker* test because it "necessitate[d] too intrusive an inquiry [and] . . . ma[de] little reference to the language of the [Act]").

118. Dupre, *supra* note 39, at 798 (quoting Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 391 (1990)).

Eighth Circuit in *A.W. v. Northwest R-1 School District*,[119] and the Fourth Circuit in *DeVries v. Fairfax County School Board*.[120]

### 2. The *Daniel R. R.* Test

The next approach to the resolution of the LRE-FAPE tension came in 1989 with the Fifth Circuit's decision in *Daniel R. R. v. State Board of Education*.[121] The plaintiff in the *Daniel R. R.* case was a six-year-old boy suffering from Down's syndrome.[122] Daniel had been placed in a prekindergarten class for half of the school day and in an early childhood program devoted to special education for the other half of the school day.[123] Daniel's prekindergarten teacher soon discovered that Daniel was not benefitting from his participation in the prekindergarten class and proposed at his IEP meeting that he only attend the special education class.[124] Subsequently, Daniel was removed from the prekindergarten class.[125] Daniel's parents disagreed with the placement decision and sought an impartial due process hearing under the IDEA, which they lost.[126] The parents then sought review of the adverse decision by filing an action in federal district court.[127]

The Fifth Circuit considered the *Roncker* test while examining Daniel's claim but ultimately rejected that test.[128] The court found two main flaws in the *Roncker* test. First, the *Roncker* test "necessitate[d] too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials."[129] The Fifth Circuit held that whether services can feasibly be provided in a regular or special education classroom is a determination best made

119. 813 F.2d 158, 163-64 (8th Cir. 1986). The *A.W.* case concerned A.W., an elementary school–aged child with Down's syndrome. *Id.* at 160. After noting "strong congressional preference for mainstreaming," the court accepted the *Roncker* test because the *Roncker* court "correctly interpreted the Act's mainstreaming provisions." *Id.* at 162-63.

120. 882 F.2d 876, 878-80 (4th Cir. 1989). The special-needs student in *DeVries* was "a seventeen-year-old autistic student" who had been placed in a vocational center instead of the public high school that was closer to his home. *Id.* at 877. The court adopted the *Roncker* methodology and quoted extensively from the case. *Id.* at 878-79.

121. 874 F.2d 1036.

122. *Id.* at 1039.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1039-40.

127. *Id.* at 1040.

128. *Id.* at 1046.

129. *Id.*

by local school systems and not by courts of law.[130] The second flaw with the *Roncker* test, according to the court in *Daniel R. R.*, is that it does not follow the language of the IDEA closely enough.[131] The court found that the *Roncker* test was unwarranted, since the statute itself provided a "workable test for determining whether a state has complied with the Act's mainstreaming requirement."[132]

Focusing on the statutory language, the Fifth Circuit created its own two-part test.[133] First, the court asked "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child."[134] The court emphasized that the inquiry under the first part of its new test "is an individualized, fact-specific" one "that requires [careful examination of] the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs."[135]

The court listed four factors, which, while not official steps in the test, nevertheless "assist the first stage of [the] inquiry."[136] The first of these factors was "whether the state has taken steps to accommodate the handicapped child in regular education."[137] Next, the court considered the educational benefit, if any, the handicapped child would receive from education in the regular classroom.[138] The "child's overall educational experience in the mainstreamed environment" was also examined.[139] Finally, the court found it necessary to look at the effect of the mainstreaming on the "regular classroom environment

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1048.

134. *Id.* (citing 20 U.S.C. § 1412(5)(B)).

135. *Id.*

136. *Id.*

137. *Id.* The Fifth Circuit opined that the school system was clearly violating the Act if no steps had been taken to accommodate the disahled. *Id.* Furthermore, the court stated that even if steps had been taken to mainstream the student, the court must still determine if those steps were adequate. *Id.* The court also noted that "[a]lthough broad, the requirement is not limitless . . . [and school systems] need not provide every conceivable supplementary aid or service." *Id.* Note that this is a less stringent requirement than in *Roncker*, where the Sixth Circuit's test implies that any and all services that can be transported to the regular classroom have to be transported to enable the mainstreaming of the disabled child. *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (stating that "where the segregated facility is considered superior" the court must decide "whether the services which make that placement superior could be feasibly provided in a nonsegregated setting. If they can, the placement in a segregated school would be inappropriate under the Act").

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

139. *Id.* The court suggested that this factor meant that sometimes other positive aspects of the regular classroom, such as the language models of nondisabled students, might outweigh the fact that the disabled student is "absorb[ing] only a minimal amount" of the material in the regular classroom. *Id.*

and, thus, on the education that the other students are receiving."[140] These four factors are the criteria that determine whether a child can receive a satisfactory education in the regular classroom, and consequently whether a mainstreaming decision will pass muster under the first stage of the *Daniel R. R.* test. However, it is unclear how much weight is actually accorded to the factors and whether all four must be met to satisfy the first stage of the test. Therefore, although the language of the first step of the *Daniel R. R.* test seems straightforward, its actual application is less clear.

After reviewing the situation in light of the four factors discussed above, if the court believes that a disabled child's education cannot be achieved satisfactorily in the regular classroom, the court will then ask whether the school has mainstreamed the special-needs student "to the maximum extent appropriate."[141] In this second stage of the *Daniel R. R.* test, a reviewing court must look at whether the school system has attempted to place the disabled student in contact with her nondisabled peers as much as possible given the child's individual situation.[142] Applying this new test, the court found that Daniel could not be successfully educated in the regular classroom and that the school system had taken steps to provide "access to nonhandicapped students."[143] The court therefore upheld the school system's placement decision.[144]

The *Daniel R. R.* approach improves upon the *Roncker* test. Although on its face the *Daniel R. R.* decision rejected the *Roncker* test,[145] its first prong is in many ways identical to the *Roncker* test, because both are concerned with whether special-needs students can be educated in the regular classroom with assistance. The improvement made by the Fifth Circuit in *Daniel R. R.* is the addition of the four factors. Although their exact role in the application of the test is somewhat unclear, their inclusion is an improvement over the *Roncker* test's vagueness with regard to which factors should inform the application of that test.[146] Especially significant is the court's inclusion of the effects on the regular classroom environment in

140. *Id.*

141. *Id.* at 1048 (citing 20 U.S.C. § 1412(5)(B) (2000)).

142. *Id.* at 1050. The court emphasized that the "mix will vary from child to child and . . . from school year to school year." *Id.* The court also described several possibilities for appropriate mixes under the second stage of their test, such as including the disabled child in the regular classroom for some classes, but not others, including them in nonacademic classes only, and providing interaction with nondisabled students during lunch and recess. *Id.*

143. *Id.*

144. *Id.* at 1052.

145. *Id.* at 1048.

146. *See supra* text accompanying notes 112-16.

determining whether the education of the disabled student is being achieved satisfactorily. The other factors also reflect the court's view that the mainstreaming of a disabled child is not always practical. Although the *Roncker* court noted that the IDEA does not always require mainstreaming,[147] the test the Sixth Circuit devised does not seem to agree with that contention.[148] The *Daniel R. R.* test, however, gives substance to those words by including the four factors as part of the analysis.

The *Daniel R. R.* decision has been quite influential. Since the case was decided, no court of appeals has adopted the *Roncker* test. The *Daniel R. R.* test, on the other hand, has been adopted by the Eleventh Circuit in *Greer v. Rome City School District,*[149] and by the Third Circuit in *Oberti v. Board of Education.*[150]

### 3. The *Holland* Test

The most recent method of dealing with the LRE-FAPE conflict was developed in the Ninth Circuit's 1994 *Sacramento City Unified School District v. Holland* decision.[151] The *Holland* case dealt with Rachel, an eleven-year-old student with moderate mental retardation.[152] Rachel was placed part-time in a regular classroom and part-time in a special education classroom.[153] Because her parents felt that she would be better served by being in the regular classroom full-time, they requested an impartial due process hearing.[154] In contrast to the *Roncker* and *Daniel R. R.* cases, the due process hearing resulted in a victory for the parents and the school district was ordered to place Rachel in a regular classroom full-time.[155] In this

147. 700 F.2d 1058, 1063 (6th Cir. 1983).

148. Dupre, *supra* note 40, at 798.

149. 950 F.2d 688, 696-99 (11th Cir. 1991). The case concerned a ten-year-old girl with Down's syndrome. *Id.* at 690. Applying the *Daniel R. R.* test, the court determined that the school system bad failed the first stage because it did not consider "alternative metbods for educating" the disabled student. *Id.* at 699.

150. 995 F.2d 1204, 1220-24 (3d Cir. 1993). *Oberti* dealt with an eigbt-year-old student with Down's syndrome. *Id.* at 1206. The court upheld the district court's ruling and found for the parents, again because of the school system's failure to pass the first stage of the *Daniel R. R.* analysis. *Id.* at 1222-23. Some commentators see the *Oberti* decision as a subtle extension of the *Daniel R. R.* analysis because it applied tbe test "even more stringently" than the court did in *Daniel R. R.*. Melvin, *supra* note 16, at 634.

151. 14 F.3d 1398, 1403-05 (9th Cir. 1994).

152. *Id.* at 1400.

153. *Id.*

154. *Id.*

155. *Id.*

case, the school system appealed the decision to the district court pursuant to the IDEA.[156]

The Ninth Circuit first acknowledged the other tests that had been devised in this area,[157] but rather than adopting any of those tests, the court adopted the district court's "four-factor balancing test."[158] In developing this test, the district court and the Ninth Circuit drew upon factors from both the *Roncker* and *Daniel R. R.* cases.[159] The test is comprised of four factors that a reviewing court must examine in order to strike a balance between an appropriate education and the mainstreaming requirement.[160] The first factor to consider is "the educational benefits of placement full-time in a regular class."[161] The court must also look at the "non-academic benefits of such placement, . . . the effect [the disabled student has] on the teacher and children in the regular class, and . . . the costs of mainstreaming" the disabled student.[162] The Ninth Circuit accepted this multifactor balancing test because it "directly addresse[d] the issue of the appropriate placement" under the IDEA.[163] After describing its new test, the *Holland* court did not discuss how the test applied in that particular case.[164] Instead, the court quickly dismissed the school system's objections to full-time regular classroom placement for Rachel and affirmed the district court's ruling in favor of the parents.[165]

The *Holland* decision was a deviation from the earlier modes of analysis. The Ninth Circuit rejected the more formalistic tests set forth in *Roncker* and *Daniel R. R.* in favor of a more realist balancing approach. Arguably, a balancing test is more subjective and less likely to be applied uniformly by the various courts ruling on this issue. However, this lack of uniformity is in many ways consistent with the IDEA's underlying purpose because the IDEA and its provisions are meant, at least in part, to force educational decisions regarding

156. *Id.*

157. *Id.* at 1403-04.

158. *Id.* at 1404.

159. Beth B. v. Van Clay, No. 00-C-4771, 2001 U.S. Dist. LEXIS 14094, at *21 (N.D. Ill. Sept. 10, 2001) (noting that the Ninth Circuit's approach "includes elements drawn from hoth *Roncker* and *Daniel R. R.*").

160. *Holland*, 14 F.3d at 1404.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 1403-05.

165. *Id.* at 1405.

disabled children to be made on an individual basis.[166] The Ninth Circuit's balancing test is consistent with this notion because it allows courts to examine many factors in making an individualized decision without being constrained by the strictures of a more formalistic test.

One can see the above tests as an evolution from the narrow *Roncker* test to the more open test used by the court in *Holland*. The *Roncker* test dominated the period between 1982 and 1989[167]—it was a formalistic test that gave judges less leeway than did later tests. Then, the *Daniel R. R.* test controlled from 1989 until 1993—it was a somewhat more open test because it required judges to consider certain general factors.[168] Finally, in 1994, the *Holland* case employed a new and very open test. The progression was linear: As soon as a new test developed, the courts that were free to adopt the new approach did so and rejected the older approach.[169] Throughout this progression, the trend was to increase the amount of freedom given to judges in making these decisions. This increased discretion has ensured that more interests are taken into account when making IDEA placement decisions and also has ensured that the decision is based on the individual needs of the child and is in his best educational interests.[170]

### 4. The Deferential Approach[171]

One final method for dealing with the IDEA's conflicting provisions has been applied by many different circuits, including circuits that have created or adopted one of the clear tests discussed above. This approach is characterized by describing the placement decision "as a question of methodology" and as long as "the placement decision is incidental to a decision of educational methodology or

166. *See* Crockett, *supra* note 57, at 550 (describing the "revolutionary part" of the Act as "the shift from substantive to procedural policy," which meant that the educational system was "making the [placement] decision individually, not by classes or groups of individuals").

167. The dates correspond to the decisions in the *Roncker* case (1982) and the *Devries* case (1989), the latter of which was the last court of appeals case to adopt the *Roncker* methodology.

168. These dates relate to the decisions in the *Daniel R. R.* case (1989) and the *Oberti* case (1993); the *Oberti* case was the last court of appeals case to adopt the *Daniel R. R.* analysis. *See supra* text accompanying notes 136-40.

169. After *Daniel R. R.* was decided, circuit courts discontinued the use of the *Roncker* approach. Since *Holland*, no court of appeals has adopted the analysis applied in either *Roncker* or *Daniel R. R.*

170. *See* Crockett, *supra* note 57, at 550.

171. Melvin, *supra* note 16, at 639. The name for this method was borrowed from Daniel Melvin, who developed the concept. Much of the discussion in this section is based on Melvin's article.

policy," it will be upheld based on *Rowley*.[172] The support from the *Rowley* case comes from the Supreme Court's statement that "questions of methodology are for resolution by the States."[173]

The deferential approach gives the school system freedom to place the disabled student anywhere it wishes, so long as its decision can be described as a methodological one, since under *Rowley,* methodological decisions are for the states. While laudable as a preservation of states' rights, this approach may permit courts to shirk their duties and let school systems avoid the strictures of the IDEA. Further, the support for this approach seems weak when the language from *Rowley* is examined closely. *Rowley* holds that courts must first ensure that the provisions of the IDEA have been satisfied and *then* leave questions of methodology to the states.[174] By being overly deferential, courts thus ignore the first mandate of *Rowley*: to ensure enforcement of the IDEA and its various provisions. Although the deferential approach is the least legitimate approach to the problem because of its end run around the IDEA and its weak support, it must be considered as a viable alternative, because courts have often employed this method.

## IV. AFFECTED GROUPS

The district court that adjudicated *Beth B. v. Van Clay* was free to decide which test to apply because the Seventh Circuit had not clearly aligned itself with any of the then-existing tests.[175] Ultimately, the court concluded that "the *Daniel R. R.* test [was] superior" because "it tracks the statutory language more closely than . . . *Roncker* and . . . strikes a better balance between the competing policies."[176] Confronted with the uncertainty in the Seventh Circuit regarding the correct placement test, the court analyzed the case under the *Roncker* model as well.[177] Under both forms of analysis, the court found for the

172. *Id.* at 640; *see, e.g.*, Wilson v. Marana Unified Sch. Dist., 735 F.2d 1178, 1183-84 (9th Cir. 1984).

173. Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982).

174. 458 U.S. at 208 (concluding that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States").

175. No. 00-C-4771, 2001 U.S. Dist. LEXIS 14094, at *21-22 (N.D. Ill. Sept. 10, 2001).

176. *Id.* at *23.

177. *Id.* at *24. This uncertainty shows that the tensions between the FAPE and LRE provisions need to be resolved so that reviewing courts and all other affected parties can be confident of the manner in which placement decisions are reviewed.

school system and affirmed the decision regarding Beth's placement.[178]

The court then had to determine the differences between the tests and which one was preferable. In *Beth B.*, the court treated the tests similarly, because the courts in both *Roncker* and *Daniel R. R.* had applied them in a similar manner.[179] The resulting obfuscation is problematic, since the different tests have significant consequences for various groups in the placement decisionmaking process, including school systems, classroom educators, nondisabled students, courts, and disabled students. These differences lead to the conclusion that the *Holland* test is the best approach for all parties involved in the process.

Before analyzing the impact of the tests on the affected parties, it is necessary to make one important remark. In the following discussion, this Note does not impute a bad-faith motive on the part of any of these groups. When the Note discusses the factors that are important to these groups, it does not mean to suggest that the different groups are *only* concerned about that factor. Rather, the Note assumes that the primary motivating goal for each of these groups is the best possible education for the disabled student. That said, each of the groups will approach the problem from its own perspective and the factors that may be important to one group may be of no concern to another group.

### *A. School Systems*

Clearly one of the most affected parties in the mainstreaming decisionmaking process is the local school system. School systems are motivated by many different factors, but arguablythe primary concern for a school system in the mainstreaming process is the financial impact of a potential IEP decision. Funding woes chronically plague school systems, and the costs of supplementary services for a

178. *Id.* at *33, *35. The district court's decision was upheld by the Seventh Circuit in *Beth B.*, 282 F.3d 493 (7th Cir. 2002). Interestingly, the court explicitly refused to "adopt a formal test for district courts uniformly to apply when deciding LRE cases," because it felt that "the Act itself provides enough of a framework." *Id.* at 499. The court made clear that it felt *Rowley* had nothing to say about the LRE analysis and that the existence of "some educational benefit" to the disabled child would not be enough to require mainstreaming under the Act. *Id.* at 497-99. Reflecting a merger of the LRE and FAPE analysis, the court praised the decision of the hearing officer because he examined whether the placement was the "least restrictive *appropriate* environment." *Id.* at 497.

179. *Beth B.*, 2001 U.S. Dist. LEXIS 14094 at *24 (stating that "[b]ecause the Seventh Circuit has not adopted either test . . . [it would] evaluate Beth's situation under *Roncker* as well").

mainstreamed, disabled child can be a heavy burden.[180] The problem of cost is further complicated by the fact that, although the IDEA commits the federal government to provide forty percent of the funds required to be expended under the Act,[181] in reality, the government provides a much lower percentage.[182]

This lack of resources leaves school systems heavily influenced by cost when determining an appropriate education and the least restrictive environment under the IDEA. In a school system's ideal world, the best test would clearly be the deferential approach, because the school system would be virtually assured that its cost-conscious decision would be upheld.[183] Even though the deferential approach is based on describing the placement decision as one of methodology,[184] school systems would easily be able to clothe a decision based on cost in the language of a methodological decision.

Realistically, the first three approaches are the only practical alternatives. Of those three, the *Holland* test is the most attractive to the interests of local school systems because it is the only one that considers cost as the primary factor. The *Roncker* court stated that cost could be considered when applying its two-part test, but the court made clear that cost is "no defense" to a school system's failure to provide a range of placement options.[185] It is clear that the Sixth Circuit felt that cost could only be considered in "a limited fashion."[186] Moreover, the *Daniel R. R.* court also did not leave room for any real consideration of cost.[187] To be fair, though, the court explicitly stated that it was not considering whether cost could be a relevant factor because the parties did not raise the issue.[188] Even so, the court's test does not appear to allow cost considerations. In deciding the first prong of its test, the court looked to four factors,[189] but none of the factors clearly addressed the cost of mainstreaming a child.[190] One

180. Some research suggests that the cost of educating a disabled child is close to two-and-one-half times more than the cost of educating a nondisabled child. Collins & Zirkel, *supra* note 46, at 11.

181. 20 U.S.C. § 1411(a) (2000). The maximum amount of federal funding is determined by multiplying the number of disabled students by "[forty] percent of the average per-pupil expenditure . . . in the United States." § 1411(a)(2).

182. One 1992 article reported that the federal government was only providing nine percent of funding. Collins & Zirkel, *supra* note 46, at 11.

183. *See supra* Part II.B.3.

184. *See supra* note 172 and accompanying text.

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

186. Daniel R. R. v. Bd. of Educ., 874 F.2d 1039, 1049 n.9 (5th Cir. 1989).

187. *See supra* notes 136-40 and accompanying text.

188. *Daniel R. R.*, 874 F.2d at 1049 n.9.

189. *See supra* note 136 and accompanying text.

190. *See Daniel R. R.*, 874 F.2d at 1048-50.

might argue that an examination of the "effect [of] the . . . child's presence" in the regular classroom includes cost, but the court's language is far from clear.[191] In any event, the four factors are only intended "to assist the first stage of [the *Daniel R. R.*] inquiry," making it unclear how much weight courts could give to any one of the factors even assuming that cost could be included.[192]

Overall, the best test for the school systems is the *Holland* test. Most significantly, the *Holland* formulation expressly includes cost as one of the factors a court must weigh.[193] Although the *Holland* court held that the school system had not properly conducted the cost analysis in the case before it, the court did not suggest that the school system could not use the cost issue as a justification for its placement decision.[194] Indeed, by chastising the school system for its cost calculation errors, the court showed that it was willing to consider cost as a defense as long as it was calculated properly.

### *B. Classroom Teachers*

Another group that is clearly affected by the different approaches of the courts of appeals is classroom teachers. For classroom teachers, there are two major issues that cause concern regarding the mainstreaming of a disabled child. The first of these concerns is the extent to which classroom teachers will have to modify their instructional methods and curriculum to meet the needs of the mainstreamed student in their classroom.[195] A second concern is the increased time and attention that teachers may be forced to spend on the mainstreamed student.[196]

As with the school system, the classroom teacher's preferred method might well be the deferential approach because it would give the most latitude to schools when making the placement decision.[197] However, as mentioned above, this approach seems impractical because it could gut the IDEA of any substantive effect by allowing school systems to do as they please.[198] The *Roncker* test also seems to be a weak test for protecting the interests of teachers. The Sixth

191. *Id.* at 1049.

192. *Id.* at 1048.

193. Sacramento City Unified Sch. Dist. v. Holland, 14 F.3d 1398, 1400-01 (9th Cir. 1994).

194. *Id.* at 1401-02.

195. Dupre, *supra* note 39, at 850 (noting that one important concern is "the extent to which the teacher must modify the curriculum that is being taught to the rest of the class to accommodate the disabled student").

196. *Id.* at 848.

197. *See supra* text accompanying notes 183-90.

198. *See supra* Part II.B.4.

Circuit notes that a child may not be suitable for mainstreaming because she may be "a disruptive force in the nonsegregated setting," but the court does not elaborate on that issue.[199] Further, the language is dicta, and technically not a part of the court's test.[200] The *Daniel R. R.* court slightly improves upon the *Roncker* test by including "the effect the . . . child's presence has" on the classroom as a guiding factor in the first part of its test.[201]

Again, however, the *Holland* court does the best job of reflecting the concerns of the teachers. The Ninth Circuit test clearly includes "the effect [the disabled child] has on the teacher" as a main factor.[202] The *Daniel R. R.* court only uses the teacher-effect factor as a general guide to inform the first stage of its two-part test, while the *Holland* court uses the teacher-effect factor as one of the four main aspects of its test. The *Holland* court thus clarifies the issue and makes this aspect more central to a reviewing court's analysis.

### *C. Nondisabled Students*

An issue that is closely related to the effect on teachers is the effect that the mainstreamed child will have on the nondisabled children in the classroom. For nondisabled children, the best test may not be the deferential test because that approach may allow the school system to put its institutional interests over those of the nondisabled children.[203] The analysis for this group is similar to the analysis for schoolteachers.[204] The *Roncker* court mentions the fact that mainstreamed students could possibly be a "disruptive force," without any further explanation. Furthermore, it is not actually a part of the court's test.[205] The *Daniel R. R.* court, on the other hand, includes the effect "on the education that the other students are receiving" as a factor in the first stage of its test.[206] As discussed above, however, the

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

200. *Id.*

201. Daniel R. R. v. Bd. of Educ., 874 F.2d 1039, 1049 (5th Cir. 1989).

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

203. This analysis could work the opposite way, though. The important point is that the deferential approach allows school systems to trump virtually all competing interests, whether those of disabled or nondisabled students.

204. *See supra* Part III.B.

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

206. 874 F.2d at 1049. For the sake of clarity, it should be noted that the Fifth Circuit felt that looking at the effect on students was a logical part of examining the disabled student's effect on the regular classroom. *Id.* The court stated that the factor to be considered was the "effect the handicapped child's presence has on the regular classroom environment and, thus, on the education that the other students are receiving." *Id.* In the discussion regarding teachers, only

exact weight accorded to this factor in the *Daniel R. R.* test is not clear.[207] Certainly, it is less than the weight allotted to it by the *Holland* court. As with teachers, the *Holland* court makes the disabled child's effect on the nondisabled students a major part of its analysis.[208] Again, although both the *Daniel R. R.* approach and the *Holland* approach allow the court to consider the effect of the disabled child on the nondisabled students, the *Holland* court makes the issue more central to its analysis and therefore best represents the interests of nondisabled students.

### *D. The Court System*

Though the court system may not have an obvious interest in the mainstreaming debate, it is critical to consider the needs of the courts. The central concern for courts when choosing among possible approaches should be ensuring that they make the correct choice according to the law. In the realm of the IDEA, the correct decision according to the law must be based on an effort to reconcile the conflicting goals of the statute with the individual needs of the disabled student.

The question for courts is which of the approaches ensures that they are able to make the best and most individualized mainstreaming decision in the cases they decide. Again, it seems that the *Holland* approach is superior. The deferential approach would in many ways be the easiest for courts to apply because it would replace their job of strenuous review with mere rubber-stamping. In addition to the argument that the deferential approach too readily allows school systems to circumvent the provisions of the IDEA, it would make courts superfluous and would undermine their authority by allowing school systems to do as they please regardless of the IDEA's legal mandate.

Again, the realistic choices appear to be the three major tests. It is significant that the *Roncker* and *Daniel R. R.* approaches are each more formal than the *Holland* approach. The presence of certain constraining steps through which courts must progress to make their decisions characterize both of the formal approaches. In the *Daniel R. R.* approach, the court sets forth criteria to consider when applying

---

the first part of the passage was quoted because it was more applicable to that discussion, but the court viewed them as one in the same. *See id.* at 1048-52.

207. *See supra* text accompanying notes 112-16, 146.

208. Sacramento City Unified Sch. Dist. v. Holland, 14 F.3d 1398, 1404 (9th Cir. 1994) (adopting the district court's test and stating that one of the factors to be analyzed is "the effect [the disabled student] had on the teacher and children in the regular class").

the test,[209] thereby freeing the court to a certain extent. The approach is more constraining on reviewing courts than the four-factor balancing test in *Holland*, however.[210] The *Roncker* approach is even more constraining and is without any indication of what factors should be part of a reviewing court's analysis.[211]

To be sure, courts sometimes abuse balancing tests. Balancing tests can allow a court to make a ruling based on its personal judgment rather than legal principles. However, in the context of the IDEA, a court's job is made easier by a more realistic balancing test such as the *Holland* test. The *Holland* approach gives the court more freedom to uphold the spirit of the IDEA by making individualized mainstreaming decisions.

### *E. Disabled Students*

Clearly the most important group impacted by the selection of one approach over another is disabled children. The question of which interest is most significant to disabled children is a matter of debate. While some have taken the view that the most important goal for disabled children is full inclusion,[212] others have strongly criticized valuing inclusion of disabled students over ensuring educational benefits for them.[213]

If the argument favoring total inclusion is accepted, the *Roncker* test may be the best approach for disabled children. Recall that the *Roncker* test only asks whether the services that make the segregated environment superior can be transported to the regular classroom.[214] This language creates a presumption in favor of inclusion and would therefore be acceptable to those favoring total inclusion.

On the other hand, if the most important goal for disabled children is purely educational benefit, then the best test would be the *Daniel R. R.* or the *Holland* analysis because of those decisions' more neutral stance on integration. Again, the *Holland* test appears superior for two reasons. First, the test explicitly addresses both

209. 874 F.2d 1039, 1048 (5th Cir. 1989).

210. *See* 14 F.3d at 1404.

211. 700 F.2d 1058, 1063 (6th Cir. 1983).

212. *See, e.g.*, Ann M. Hocutt et al., *Historical and Legal Context of Mainstreaming*, *in* THE REGULAR EDUCATION INITIATIVE: ALTERNATIVE PERSPECTIVES ON CONCEPTS, ISSUES, AND MODELS 17 (John Wills Lloyd et al. eds., 1991) (arguing that the current segregated system "has created a dual educational system which is dysfunctional, ineffective, and excessively costly").

213. *See, e.g.*, Dupre, *supra* note 39, at 795 (arguing that the courts have "elevat[ed] . . . 'appropriate' integration over 'appropriate' education").

214. 700 F.2d at 1063.

"educational benefits of placement full-time in a regular class,"[215] representing those who question total inclusion, and "non-academic benefits"[216] of regular class placement, representing the advocates of total inclusion. The *Daniel R. R.* court also attempts to resolve this tension by including an examination of the "child's overall educational experience . . . balancing the benefits of regular and special education" as well as an examination of "whether the child will receive an educational benefit from regular education."[217] However, the *Daniel R. R.* test is inferior to the *Holland* test because it subordinates the interests of the disabled child to other interests. The *Holland* test, on the other hand, makes both academic and nonacademic benefits to the disabled child fully half of its test, while in the *Daniel R. R.* test, the same benefits comprise only one half of the first step. Even then, it is unclear exactly how influential they should be in the first step of the *Daniel R. R.* analysis.

The second reason that the *Holland* test is better for disabled students is that the freedom of the balancing test allows courts to make more individualized placement decisions. The realist *Holland* balancing approach gives courts more discretion to maneuver than the more formal tests of the Fifth and Sixth Circuits.

## V. CONCLUSION

The IDEA is a well-intentioned statute. It attempts to ensure that the educational needs of disabled students are met in a manner that gives them an appropriate education while at the same time ensuring that they are included in the regular school environment to the greatest extent possible. The Act is far from clear, however, on how to resolve conflicts between appropriate education and education in the least restrictive environment. With statutory ambiguity and the relative silence from the Supreme Court on this issue, courts have attempted to reconcile the conflicting provisions in a variety of ways. At this point in the life of the IDEA, action must be taken to resolve the conflict between the FAPE and LRE provisions.

One option is for the Supreme Court to grant certiorari on an IDEA placement case and resolve this issue. All parties affected by the mainstreaming decisionmaking process deserve to know the manner in which their decision will be reviewed. This outcome will, in turn, affect how placement decisions are made in the first place.

---

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

216. *Id.*

217. Daniel R. R. v. Bd. Of Educ., 874 F.2d 1039, 1049 (5th Cir. 1989).

If and when the Supreme Court reviews a placement case, it should adopt the Ninth Circuit approach from the *Holland* decision. The Ninth Circuit's test has two main advantages over the alternatives. First, the test gives reviewing courts latitude to shape the best result for disabled students based on their individual needs, as the IDEA envisions. The *Holland* test's second strong point is that it clearly represents the major interests of all of the affected parties. First, cost is included as a factor, which is a central concern of school systems. Additionally, the effect on both nondisabled students and classroom teachers is considered. Since the Ninth Circuit approach is more flexible, it helps courts to review placement decisions made under the Act in a more productive manner. Finally, the test clearly takes the needs of disabled students into account by examining the academic and nonacademic benefits of regular classroom education.

Even though a Supreme Court decision could resolve this conflict, the best solution to the problem ultimately lies with Congress. The root of the conflict is that the IDEA is unclear on how to balance the FAPE and LRE provisions. Congress should intervene and clearly establish guidelines on how to balance these provisions. A congressional resolution would be superior to a judicial one because Congress, a representative body, could better balance the countervailing interests in a way that would best serve disabled students, while taking into account the needs of school systems, teachers, nondisabled students, and the courts. Until Congress acts, however, courts can best resolve the tension in the IDEA by adopting and applying the Ninth Circuit's four-factor balancing test developed in the *Holland* case.

*Joshua Andrew Wolfe*[*]

* I would like to first thank Thomas Wedeles and James Cirincione for their invaluable editorial advice. Thanks must also go to Shawn Johnson and Eunice Kang for their work below the line. This Note would not have heen ready for publication without the hard work of these four individuals. I also must thank my friends and family for their support and encouragement throughout my law school experience. Finally, I want to dedicate this Note to the two most important teachers in my life, Jamie and Carol, and to thank them for all they have taught me over the years.

* * *