

**Examining the Least Restrictive Environment Provision  
of the Individuals with Disabilities in Education Act**

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## **ABSTRACT**

The phrase least restrictive environment as used in the Individuals with Disabilities in Education Act and interpreted by the federal courts provides school districts and state agencies with little guidance as to complying with the law. A more concrete standard should be established that provides objective guidelines to the schools and Congress or the courts should reconsider the importance currently placed on mainstreaming students with disabilities into regular education classrooms.

## **Introduction**

The phrase least restrictive environment as used in the Individuals with Disabilities in Education Act and interpreted by the federal courts provides school districts and state agencies with little guidance as to complying with the law. A more concrete standard should be established that provides objective guidelines to the schools and Congress or the courts should reconsider the importance currently placed on mainstreaming students with disabilities into regular education classrooms.

Part One of this article discusses the history and requirements of the Individuals with Disabilities in Education Act ("IDEA").<sup>1</sup> The history begins with early efforts by Congress to promote education for students with disabilities, then moves to the first federal court decisions finding that students with disabilities have a right to an education, and then discusses the IDEA and its predecessors. The current requirements of the IDEA are then discussed, with an emphasis on the requirement that all students with disabilities be afforded a free appropriate education as well as the requirement for that education to occur in the least restrictive environment. Rights of parents under the statute are also discussed.

Part Two of this article discusses the current state of the law. The two major tests used by the circuit courts, the *Rockner* test<sup>2</sup> and *Daniel R.R.* test<sup>3</sup> are explained and discussed; followed by the Ninth Circuit hybrid test.<sup>4</sup> The language of the tests employed by the circuits is vague and has provided little guidance for schools; this problem is also discussed in part two.

Part Three of this article discusses possible solutions to the vagueness problem discussed in Part Two. The first possible solution is for Congress to provide more concrete and objective standards in determining the least restrictive environment. A second solution would be to rethink the level of emphasis placed on mainstreaming and look instead to placements that best serve the academic needs of students with disabilities.

This article proposes that the requirement under the IDEA of placing students with disabilities into the least restrictive environment with their non-disabled peers to the maximum extent possible is too currently too vague. As the tests for satisfying this requirement have provided little guidance to schools trying to comply with the law, changes should be made.

## **Part One: History and Requirements of the IDEA**

### **History of the IDEA**

The 1954 Supreme Court decision, *Brown v. The Board of Education*, forever altered the face of American education. The Court found that “in the context of education, separate is inherently unequal.”<sup>5</sup> The following year in *Brown II*, the Court ordered that schools across the country be desegregated “with all deliberate speed.”<sup>6</sup> The years following the Brown decision brought marked social change throughout the country. Encouraged by Brown, there was a push for integration in other public facilities as well as for civil rights for African-Americans.

Advocates for other minority groups began to fight against discrimination as well. Similar to the African-American struggle for civil rights, groups advocating greater rights for the disabled began in the education setting. This was the path taken by advocates for the disabled. The exclusion of students with disabilities from public schools was once commonplace in the United States. Students with disabilities were often relegated to institutions with minimal educational services or simply denied any type of education at all.

In 1966, Congress amended the Secondary Education Act of 1965<sup>7</sup>, and in so doing, established a grant program to assist the states with the education of students with disabilities.<sup>8</sup> Again in 1970 under the Education of the Handicapped Act,<sup>9</sup> Congress continued a similar grant program. The underlying purpose of both grant programs was to motivate the states to “develop educational resources and to train personnel for educating the handicapped.” Neither statute provided guidelines for how states were to use the grant money.<sup>10</sup>

Two federal cases in the early 1970's, *Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania*<sup>11</sup> ("PARC") and *Mills v. Board of Education of the District of Columbia*<sup>12</sup>; involved the rights of disabled children to receive a public education. The PARC court required the state of Pennsylvania to provide disabled children (specifically children with mental retardation) with a free public program of training and education appropriate to the child's capability. The court also presumed that placing disabled students in public classrooms would be the most preferable placement, followed by placement in a special public school over placement in some other educational setting.<sup>13</sup> The Mills court found that by denying disabled children a public education, the Board of Education had violated the children's due process rights. Accordingly, no child could be excluded from a public school unless that child was provided with both "adequate alternative educational services suited to the child's needs" and also " a constitutionally adequate prior hearing."<sup>14</sup>

These early cases paved the way for Congressional action and in 1975, Congress enacted the Education for All Handicapped Children Act ("EAHC").<sup>15</sup> EAHC required that all children with disabilities receive a free and appropriate public education. EAHC covered all children with disabilities; running the gamut from those children with severe physically and mental disabilities to those with diagnosed with learning disabilities.<sup>16</sup> Congress sought to eradicate two shortcomings common to public education nationally at the time: most children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"<sup>17</sup> EAHC sought to protect the rights of children with disabilities as well as their parents, seeking to ensure that a "free appropriate education" designed to meet the unique needs of the students was available to all children with disabilities.<sup>18</sup> Furthermore, EAHC was to assist the States in providing this education and assess the effectiveness of that education.<sup>19</sup> The Individuals with Disabilities in Education Act ("IDEA") replaced the EAHC in 1991, but continued its basic purpose of providing children with disabilities

access to public education.<sup>20</sup> When Congress last amended the IDEA in 2004; the basic scheme of the law was left intact.<sup>21</sup>

### **Requirements of the IDEA**

The two major requirements of the IDEA are that children with disabilities are to receive (1) a free appropriate education ("FAPE") and (2) are to be educated with their non-disabled chronological peers to the maximum extent possible; that is, they are to be placed in the least restrictive environment ("LRE").<sup>22</sup> The requirements of the IDEA apply to all children with disabilities from the age of three to twenty-one.<sup>23</sup> Disability is defined broadly to include children suffering from medically diagnosed physical and mental disabilities to those children diagnosed with learning disabilities by school district personnel. To ensure that these requirements are met, the IDEA requires that schools create an Individualized Educational Program ("IEP") for each student with a disability.<sup>24</sup> The IEP takes into account the unique needs of the student and is created at an IEP conference with input from special education teachers; other school staff such as speech pathologists and school psychologists; regular education teachers; parents; doctors; and the student, if appropriate.<sup>25</sup> Each student's IEP sets forth education placement and goals for that student and is reviewed each year.<sup>26</sup>

One of the complaints about the IDEA from school officials, legal scholars and other interested parties is that the definitions provided by Congress provide little guidance for complying with the law. For example, the definition of a free appropriate education within the context of the IDEA is as follows:

Free appropriate public education. The term "free appropriate public education" means special education and related services that-- (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d).<sup>27</sup>

In the first case it decided under the IDEA, the Supreme Court confronted the issue of defining free appropriate education in *Board of Education v. Rowley*.<sup>28</sup> At issue in *Rowley* was the

education of Amy Rowley, who was deaf.<sup>29</sup> Amy was an intelligent child, performing better than the average child in her class and she advanced easily from grade to grade.<sup>30</sup> At her IEP conference, the district proposed placing Amy in a regular education classroom and supplementing her education through the use of an FM hearing aid which amplified words spoken into a receiver; a tutor for the deaf for one hour each day and a speech therapist three hours a week.<sup>31</sup> Amy's parents insisted that the school provide Amy with a full time sign-language interpreter.<sup>32</sup> Their argument was that the interpreter was necessary to provide her with an equal educational opportunity.<sup>33</sup> A hearing was conducted before an independent examiner, who heard expert testimony, and found that the interpreter was not necessary because Amy was making achievements without the interpreter.<sup>34</sup> The issue presented to the federal courts was how broadly free appropriate education should be defined; what level of education are schools required to provide students with disabilities.<sup>35</sup>

The Court looked first to the statutory decision, which it described as tending "towards the cryptic rather than the comprehensive."<sup>36</sup> The Court further noted that the language of the statute lacked any substantive standard for the level of education that States need to provide for children with disabilities.<sup>37</sup> Looking at the language of the statute and the purposes behind it, the Court held that "A state satisfies the FAPE requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."<sup>38</sup> In so holding, the Court rejected the argument that the States were required to maximize the educational benefit to the child or to equalize the educational opportunity of a child with a disability to that of a child without a disability.<sup>39</sup>

Under *Rowley*, a school must provide some educational benefit to the student to meet the requirement of providing a free appropriate education. However, the requirement of a FAPE is not the only requirement set forth by the IDEA; the law also requires that students be placed in the least restrictive environment.<sup>40</sup> The LRE provision is often called mainstreaming or inclusion.

Like the requirement for FAPE, parties attempting to comply with the IDEA have complained that the LRE requirement is too vague. Within the IDEA, Congress defined LRE as

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.<sup>41</sup>

The requirement of LRE is that students with disabilities are exposed to their non-disabled peers as much as is appropriate for that student's educational needs. The IDEA provides no standards for determining how to balance the requirement for a free appropriate public education with the requirement to place students with their non-disabled peers to the maximum extent possible.<sup>42</sup> Unlike the FAPE requirement, the Supreme Court has never ruled on the definition of LRE; nor has it ruled how the need to place students with disabilities with their non-disabled peers should be balanced against the need to provide an appropriate education for the students with disabilities.<sup>43</sup> Courts have shown a strong preference towards mainstreaming, even advocating for mainstreaming where the child would gain more educational benefit from a special education setting.<sup>44</sup> However, as will be discussed further below, there is a lack of consistency across circuits as to how to determine the least restrictive environment. The result is confusion among schools and parents as to how much exposure to non-disabled students is required to make a placement for a student with a disability fall under the least restrictive environment.

If a parent feels that his or her child's individualized educational program fails to provide the child with a free appropriate education in the least restrictive environment, that parent is entitled to request a due process hearing before an impartial hearing officer.<sup>45</sup> The decision of the officer can be appealed to the State's educational agency and then to a state court of competent jurisdiction or a federal court.<sup>46</sup>

Because of the lack of guidelines for determining the LRE, and the tension between the mandates for an appropriate education and an education with non-disabled peers to the

maximum extent possible, parents and school districts often disagree on placement decisions for students with disabilities. Schools are faced with a Hobson's choice: if the school places a student with a disability in a placement where he spends all to most of his time with other students with disabilities, the parents can challenge the placement as not providing the LRE; if the school places the student in a regular classroom, it faces a challenge that it has failed to provide the student with an appropriate education. What was enacted to provide students with disabilities with access to public education has become a "litigation ordeal."<sup>47</sup> Parents can and do challenge placements beyond the hearing officer and educational agency levels and into state and federal courts. Litigating these challenges becomes expensive for schools, especially in light of the fee shifting provision of the IDEA, which allows prevailing parents to receive an award of attorneys' fees.<sup>48</sup> These challenges change the nature of the educational relationship, which should be that of a partnership between parents and schools with the common goal of educating the child from a cooperative one to an adversarial one.

## **Part Two: The Current State of the Law**

### **Circuit Courts' Interpretation of the Least Restrictive Environment**

As parents have challenged the education placement of their children with disabilities, the courts have been called on to determine whether the educational placements provided by the schools meet the IDEA's least restrictive environment requirement. Two tests have been established; the *Rockner* test established by the Sixth Circuit and followed by the Fourth and Eighth Circuit and the *Daniel R.R.* test established by the Fifth Circuit and followed by the Third and Eleventh Circuit.<sup>49</sup> The Ninth Circuit uses a test blending factors of both the *Rockner* and the *Daniel R.R.* test.<sup>50</sup> These tests are discussed below.

*Rockner* Standard (6<sup>th</sup> Circuit)

The dispute at issue in *Rockner* arose from the educational placement of nine year-old Neill Rockner.<sup>51</sup> Neill was severely mentally retarded with an IQ of less than 50; his mental age for most functions was two to three years old.<sup>52</sup> Because of his condition he required almost constant supervision.<sup>53</sup> After evaluating Neill, the school district decided the appropriate placement for him would be a county school exclusively for the mentally retarded.<sup>54</sup> This placement would allow for no contact with non-disabled children in the school setting.<sup>55</sup> Neill's parents requested a due process hearing to challenge the placement.<sup>56</sup> The hearing officer ordered a placement for Neill in a special education classroom within a regular school.<sup>57</sup> Throughout the dispute, Neill remained in a class for the severely mentally retarded that was housed in a regular public school where he had contact with his non-disabled peers only at lunch, gym and recess.<sup>58</sup>

After discussing the requirements of the IDEA, the court reasoned that even if a placement might be better for academic reasons, that placement might not be appropriate because of a lack of mainstreaming with non-disabled peers.<sup>59</sup> Therefore, even if the special education placement provides a better academic education, if there is not enough contact with non-disabled peers, it will be unacceptable. Showing a preference for mainstreaming students with disabilities into regular classrooms, the court said: "The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate."<sup>60</sup> The court held that a placement in a "segregated" setting is inappropriate under the IDEA if the services that cause the segregated placement to be considered superior can be provided feasibly in the "non-segregated" setting.<sup>61</sup> Next the court set out a three factors that courts should consider: (1) a comparison of the benefits the student would receive in a special educational setting to the benefits the student would receive in a regular education setting; (2) the extent to which the placement of the student in a regular education

setting would be disruptive to that learning environment; (3) the costs associated with the student's placement.<sup>62</sup> The case was remanded to the district court for a determination in line with the test set forth.<sup>63</sup>

The strong preference for mainstreaming students with disabilities set forth by the *Rocker* court was directly adopted by the Fourth Circuit.<sup>64</sup> The Eighth Circuit has also completely adopted the *Rockner* test, finding it to be a correct interpretation of the mainstreaming provision of the IDEA that was consistent with the act's language.<sup>65</sup>

#### *Daniel R.R.* Standard

Unlike the Fourth and Eighth Circuits, the Fifth Circuit considered the *Rockner* test and expressly rejected it.<sup>66</sup> As in *Rockner*, the plaintiff in *Daniel R.R.*, suffered from a mental disability.<sup>67</sup> Daniel was a six year-old boy with Down's Syndrome.<sup>68</sup> His developmental age was between the two and three years old, and he had the communication skills of a two year-old.<sup>69</sup> Daniel was placed in a regular pre-kindergarten class for half of the school day.<sup>70</sup> During that placement, he did not participate in class, he required constant attention from his teacher or an aide, he failed to master any of the skills being taught to the children and in order for Daniel to gain academically from the curriculum, the teacher needed to modify 90 to 100 percent of the lessons.<sup>71</sup> Because of the results of Daniel's placement in a regular education classroom, the school district proposed a placement for Daniel in an early childhood special education class.<sup>72</sup> Daniel could have contact with his non-disabled peers three days a week at lunch time, with his mother supervising him, and he would also have contact with his non-disabled peers at recess.<sup>73</sup> Daniel's parents believed that Daniel had improperly been denied access to regular education and fought the placement.<sup>74</sup> Both the impartial hearing officer and the district court found that the special education placement was the appropriate place for Daniel.<sup>75</sup>

When determining the proper test to analyze whether Daniel's placement had met the requirements of the IDEA, the court expressly rejected *Rockner*, finding the test to be "too

intrusive an inquiry into educational policy” reserved to state and local school officials.<sup>76</sup> The court further criticized the *Rockner* test as making little reference to the language of the statute.<sup>77</sup> Although the *Daniel* court rejected the *Rockner* court’s factors, it similarly showed a strong preference for mainstreaming students with disabilities, even over academic achievement. According to the court, requiring a student with a disability to learn at about the same level as her non-disabled peers as a prerequisite to mainstreaming is inconsistent principles set forth in *Rowley* by the Supreme Court.<sup>78</sup> Schools must accept a wide range of student learning abilities.<sup>79</sup> Taking this a step further, the court said that a student cannot be denied access to a regular education placement just because his educational achievement falls below his non-disabled classmates.<sup>80</sup> Continuing to explain the preference for placement with non-disabled peers, the court said that “mainstreaming may have benefits in and of itself,” offering as examples the use of non-disabled peers as essential or helpful appropriate language and behavior models.<sup>81</sup>

Next the court set forth a two-part test for determining whether a student’s placement meets the least restrictive environment requirement of the IDEA. Looking to the language of the statute, the first part of the inquiry is to “ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child.”<sup>82</sup> Even if the student cannot be educated successfully in a regular classroom with appropriate modifications, the inquiry is not complete. In the second prong of the test, the court required an inquiry into “whether the school has mainstreamed the child to the maximum extent appropriate” whenever a school intends to provide special education or remove a student with a disability from regular education.<sup>83</sup> Although the *Daniel* court had rejected the *Rockner* test in part because it found it too intrusive to the decisions of local school officials, it characterized its own reasoning: “[O]ur analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child’s handicapping condition, his needs and abilities, and the schools’ response to the child’s needs.”<sup>84</sup>

The court also set forth several factors to guide the inquiry.<sup>85</sup> As to the first prong of the test, where a determination as to whether the student with a disability could be placed within a regular classroom, the court looked initially to whether the state has ‘taken steps to accommodate the handicapped child in regular education.’<sup>86</sup> Although the court does not affirmatively define what steps must be taken, it does explain what is not required. These steps would not require every “conceivable aid”; nor that teachers devote all or most of their time to the student with a disability; nor are teachers required to modify the curriculum beyond recognition.<sup>87</sup>

The next factor is the whether the child would receive an educational benefit from being placed in a regular education classroom.<sup>88</sup> Here the court again expressed a preference for mainstreaming over more pure educational concerns, stating: “academic achievement is not the sole purpose” of mainstreaming.<sup>89</sup> After examining the overall experience for the student with a disability in the mainstreamed environment, the court required a balance be struck between the benefits of regular education and those of special education.<sup>90</sup> Finally, in making a placement decision, the effect of the presence of the student with a disability in the regular classroom should be considered in regards to that student’s impact on the education of the other students in the classroom.<sup>91</sup>

If these factors tip the balance towards a special education placement, the inquiry is not ended. In determining whether the placement affords for contact with non-disabled students to the maximum extent appropriate, the court looked to what steps the school has taken to provide this contact.<sup>92</sup> Looking to the statute, the court required schools to offer a “continuum of services.”<sup>93</sup> For example, students with disabilities who cannot be placed in a regular classroom full-time should be placed in special education classes for some academic classes, but in regular education classrooms for other or students requiring more special education instruction should be mainstreamed with non-disabled students for non-academic times like lunch and recess.<sup>94</sup>

The *Daniel R.R.* test has been expressly adopted by both the 3rd and 11th Circuits.<sup>95</sup> In applying the test, both circuits put an even stronger emphasis on mainstreaming as well as what

a school must do to keep a student with a disability in the regular classroom to the greatest extent possible.<sup>96</sup> In describing the steps a school was required to take to keep a student in a regular education placement, the *Greer* court found the school needed to consider “the whole range of supplemental aids and services”<sup>97</sup> and the *Oberti* court said “The school must consider an astounding range of supplemental aids and services to accommodate one child in the regular classroom.”<sup>98</sup>

### *The Ninth Circuit*

When faced with a parents’ challenge of the placement of their child in a special education classroom instead of a regular education classroom, the Ninth Circuit combined portions of the *Rockner* and *Daniel R.R.* tests.<sup>99</sup> The combined test balanced four factors: (1) the educational benefits of such placement full-time in a regular classroom; (2) the non-academic benefits of placement in a regular education classroom; (3) the effect the non-disabled student has on the teacher and the children in the regular classroom; and (4) the costs of placing a student with disabilities in a regular classroom.<sup>100</sup> The court did not elaborate on the weight of each factor.

### **Problems Created by the Current State of the Law**

The requirements of the IDEA to provide a free appropriate public education to all students with disabilities and to place those students in the least restrictive environment are clearly in tension with one another. Given the unique needs of all children, there will be situations where students with disabilities can easily receive an appropriate education alongside their non-disabled peers in regular education classrooms, as well as situations where children with severe disabilities will receive absolutely no educational benefit from a regular education classroom. As with many legal problems, the dilemma falls with what to do about the students with disabilities that fall in the grey area in between.

As the IDEA is currently interpreted and applied, school districts are not provided with much substantial guidance as to when a student's placement is in the least restrictive environment. How many supplemental aids and services must a school provide? How much may a student lag behind his non-disabled peers before he will be deemed to be receiving no educational benefit? How far must a school modify the curriculum? How much disruption to the learning environment must be tolerated? When do the costs become excessive?

The courts clearly prefer mainstreaming students with disabilities into regular classrooms instead of placing them in exclusively special education settings. This represents a policy choice on behalf of the courts in interpreting the IDEA, the courts could have given more importance to the academic achievement of students with disabilities. A focus on academic achievement may be easier for courts and schools to apply. Schools could then make placement decisions armed with objective data from test results and other academic evaluations of student achievement in a regular classroom.

Originally, the push for mainstreaming students with disabilities came from the woeful conditions of state schools for children with mental retardation or other severe disabilities.<sup>101</sup> If a child with a disability was categorized as uneducable, she received no education at all.<sup>102</sup> Those characterized as trainable were sometimes used to perform menial labor without adequate compensation.<sup>103</sup> Schools established for the disabled most often took them far from their homes and isolated them not only from the community, but from their families as well.<sup>104</sup> These types of institutions, which are radically different from schools servicing the disabled that exist today were what Congress was considering when it first established the least restrictive environment concept.<sup>105</sup> Thirty years have elapsed since the passage of the IDEA's predecessor, the Education for All Handicapped Children Act, and despite the legislative and judicial intervention, schools are struggling with mainstreaming.<sup>106</sup> Many factors contribute to the problems faced by schools trying to successfully mainstream students with disabilities. Regular education teachers are not properly trained in teaching students with disabilities (and are often asked to teach

students with a wide range of disabilities from year to year).<sup>107</sup> Students with disabilities often require smaller student-teacher ratios than are feasible in a regular classroom setting.<sup>108</sup> Furthermore, non-disabled students, and sometimes adults in the regular classroom often harass and otherwise mistreat students with disabilities to the point of stigmatization.<sup>109</sup> These non-disabled students are the same ones who are supposed to provide the benefit of mainstreaming by being appropriate language and behavior role models.<sup>110</sup> Finally, despite all the efforts that courts require of schools, there is a strong criticism for inclusion based on the lack of properly controlled studies showing inclusion to be a more effective educational model for students with disabilities.<sup>111</sup>

The *Brown v. Board of Education* decision that “in the context of education, separate is inherently unequal” undoubtedly helped to pave the way for children with disabilities to gain access to public education.<sup>112</sup> The push for students with disabilities to be included in regular education classrooms bears some resemblance to the push to racially integrate this nation’s public schools. In the years following *Brown*, courts struggled with determining how far schools needed to go in order to desegregate.<sup>113</sup> Factors were determined to establish when a school system had achieved unitary status, meaning there were no vestiges of a dual system based on race remaining.<sup>114</sup> Yet despite the judicial efforts and the millions of dollars spent on integration,<sup>115</sup> fifty years after *Brown*, most African-American children are educated in schools that have racial minorities as the majority.<sup>116</sup> Furthermore, empirical studies have tended to show that socioeconomics instead of race is the underlying problem in educational achievement.<sup>117</sup> Which begs the question, were the efforts of the federal courts following *Brown* worth the efforts for education in this nation in generally and for African-American students in particular? In more recent years, there has been a withdrawal from the integration efforts that followed *Brown*. In the past fifteen years, more than 100 school districts across the nation have been released from federal desegregation orders.<sup>118</sup> Some in the African-American community are questioning the

value of forced integration for the sake of integration itself, and pushing for changes in school districts that would in effect create segregated schools.<sup>119</sup>

Like the aftermath to *Brown*, schools and courts are struggling with determining when enough efforts to integrate students have been made. Also like the aftermath to *Brown*, it is difficult to know when the goal has been met; in fact in the case of integration of students with disabilities the task may even be more difficult. Purposeful segregation based on skin color is not grounded in any legitimate educational difference between African-Americans and white students. Placing students with disabilities into exclusively special educational placements is often warranted by the nature of the students' disabilities. For segregation based on race, once the vestiges of purposeful discrimination were removed, schools had met their responsibilities.<sup>120</sup> Yet the courts struggled for years in deciding when schools had successfully eliminated the effects of de jure racial discrimination. Certainly the requirement of the IDEA that all students with disabilities receive a FAPE would eliminate the wholesale denial of education to students with disabilities that occurred previously. However, the push for mainstreaming has created a problem in deciding when schools have done enough to include students with disabilities in the regular classroom. Determining that line when dealing with race was fuzzy enough; finding when schools have done enough to include students with disabilities is proving to be even fuzzier.

### **Part Three: Possible Solutions**

There are several possible solutions to the problem created by the tension in the IDEA between the provisions requiring schools to provide students with disabilities with a free appropriate education and the other requiring those students to be placed in the least restrictive environment. One solution would be to establish a test with more substantive factors that would provide guidance to schools (and courts) in determining when the least restrictive environment requirement has been met. A second solution would be to rethink the current preference for mainstreaming over special educational placements.

### *Creating a More Concrete Test*

Currently, the power to determine the definition of least restrictive environment rests with the courts. The definition within the IDEA is vague, and Congress has been criticized for not providing more substantial guidance in its latest amendment of the act.<sup>121</sup> The courts have struggled with what is required as evidenced by the circuit split. The dissent in the *Rockner* case showed frustration with the IDEA's language, stating, "When Congress imposes a requirement in legislation enacted pursuant to the spending power, it must do so unambiguously."<sup>122</sup>

The tests followed in all of the circuits leave a myriad of questions for schools attempting to comply when making their placement decisions. Many of the factors are subjective and little guidance is given as to the weight of a particular factor. For example, schools are required to provide a range of supplemental services to a student with a disability.<sup>123</sup> But how wide is that range? Schools are required to mainstream students with disabilities, even if they are behind their peers academically. How far behind academically would be permissible? Schools can consider costs, but there is no guidance as to when costs become excessive. Placement in a regular classroom is inappropriate where the student with a disability would be too disruptive to the educational setting, yet there is no guidance as to what would be too disruptive. Regular education curriculum must be modified, but how far?

Some of the factors are almost impossible to quantify or make less subjective. However, many of the factors could be provided with some concrete standards, thereby shrinking the number of situations that would fall in the grey areas.\. The four major areas that each of the tests used in the circuit courts touch upon in some form are the educational achievement of the student with a disability, that student's ability to interact with his non-disabled peers, the effect the mainstreaming of students will have on the regular classroom and the cost of mainstreaming the student with a disability. What follows are some possible guidelines which could be adopted to provide school districts guidance in determining whether a placement is in the least restrictive environment considering the four areas the courts have already found to be determinative. These

suggested standards attempt provide ceilings and floors of what is acceptable and what must be tolerated. While no factor alone would be determinative, taken together, they would give a more concrete, objective picture of the realities of mainstreaming a particular student. These factors were designed with the idea of maximizing the educational benefit for all students: non-disabled students in the regular classroom, disabled students who would benefit educationally from inclusion and disabled student who would be better served academically in a special education setting.

#### Educational Achievement

Despite the courts preference for mainstreaming, the fundamental purpose of schools is to provide students with an academic education. Although in *Rowley* the Court was looking at the requirement of a free appropriate education, the reasoning of the Court provides some guidance as to what should be expected of students with disabilities in a regular education classroom: “If the child is being educated in the regular classrooms of the public education system, [the IEP] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>124</sup> This language seems to suggest that the student with a disability would be somewhat close to his or her peers academically. In this area, there could be some concrete limits established where mainstreaming is completely inappropriate.

In the core academic subjects; reading, writing, math, science and social studies, a limit could be set at which mainstreaming would be considered inappropriate. If a student is more than two years behind his non-disabled peers in an academic subject, a placement in the regular classroom setting would be inappropriate. For example, if a student with a disability would chronologically be placed in a fifth grade classroom, she would need to function at least at a third grade level in the subjects she was mainstreamed. Students could be evaluated using a multitude of standardized assessments widely available to schools and the results of those

evaluations would provide clear guidance to the schools as to when the regular classroom would be inappropriate.

Standardized assessments could be used in another way to provide a concrete standard for schools. Many of the students whose placement is being challenged have been placed in both regular classrooms and special education classrooms during different periods of their academic careers. Where assessments have been conducted in both settings, a comparison of the progress of the student in the different environments can easily be made. If data from standardized assessments shows that the student has made significantly higher academic gains. more than fifty percent higher achievement in a special education setting, there should be a strong presumption that the special education setting is the appropriate setting. In practice that would look like this: in a regular education classroom, the child made only three months of academic progress, but in the special education classroom, the child achieved nine months of academic progress; that child would have made three hundred percent more academic progress in the special education classroom. While this factor should not be determinative because of possible problems with the assessments, when taken in conjunction with other factors, it can provide guidance to the ambiguous factors requiring balancing the academic achievement in special education versus regular education.

Students with disabilities often require modifications of the regular curriculum to function in a regular classroom. Often these modifications are simple: more time on a project, fewer problems on an assignment, having writing directions read aloud to them. These types of modifications do not change the substance of the assignment. However, some students require modifications that change the curriculum in a more substantive way. For example, the non-disabled students are required to research a planet and make a presentation to the class about it, but the student with a disability is required to draw a picture of that planet and list facts found in the text about it. The student with the disability is doing an assignment that is substantively different from his or her peers. Should a student require more than fifty percent of the

assignments to be modified substantively that should also create a strong presumption against mainstreaming. Requiring massive modifications to curriculum creates a situation where the student with the disability is in reality being educated as a class of one within a regular classroom instead of participating with the other students in a meaningful way.

Both the *Daniel R.R.* case and the *Rockner* case involved children with Down's Syndrome whose cognitive functions were several years below that of their chronological peers.<sup>125</sup> Neither court explicitly considered these cognitive differences in fashioning their analysis of IDEA's requirement of least restrictive environment. Furthermore, the hearing officer in *Daniel R.R.* found the fact that Daniel required 90 to 100 percent of the curriculum to be modified to be significant in determining the proper placement for Daniel.<sup>126</sup> Yet the tests developed by the courts do not use these facts in any concrete way. Had either court used cognitive functioning of the student or the level of modification required in a way, lower courts, hearing officers, schools and parents would have some objective guidance to begin discussions about placement and to ultimately make decisions on those placements.

Applying standards such as these to the inquiry as to whether a placement is appropriate academically for a student with disability would allow those who can benefit academically from a regular classroom setting to be placed there, while also providing schools with some level of guidance as to appropriate placements. It would also protect the right of students with disabilities to receive an academic education appropriate to their educational level. Although there would certainly be cases where factors pushed for different presumptions, it would reduce the ambiguity of what academic achievement was required.

#### Interaction with Non-disabled Peers

In explaining the preference for mainstreaming, the *Rockner* court explained that there were benefits to mainstreaming in and of itself.<sup>127</sup> Students without disabilities could serve as language and behavior models for students with disabilities.<sup>128</sup> Yet, the very same students who

are supposed to be serving as appropriate models for the students with disabilities are often less than welcoming. Other students often mock or tease students with disabilities, sometimes to a level that reaches stigmatization.<sup>129</sup> Researchers looking at students with learning disabilities have found that many of them prefer being pulled out of the regular classroom into a special education “resource room” where they are educated with other students with learning disabilities.<sup>130</sup> The students with learning disabilities described the special education setting as more supportive and enjoyable.<sup>131</sup> These researchers concluded that “social acceptance did not accompany integration.”<sup>132</sup> Aside from the argument that this modeling may not be occurring, it absolutely cannot occur if the nature of the child’s disability will not allow for interaction with her non-disabled peers.

As with academic achievement, there are normalized psychological assessments which can be used to determine a student’s functional age and communication level.<sup>133</sup> A student who falls too far behind his or her chronological peers functionally or communicatively will not be able to meaningfully interact with them, no matter how much time they spend together. Pushing these students into a regular classroom is no guarantee they will receive any social benefit. If a student is more than three years behind their non-disabled peers in functional age or communication level, the presumption should be that a special education setting is more appropriate. As with the other factors, this alone would not be determinative.

#### Effect on the Regular Education Classroom

Students with disabilities often affect the educational environment in two ways. First, due to the nature of their disabilities, they often require substantially more teacher attention than their non-disabled peers. Second, behavioral manifestations of their disabilities often cause disruption to the learning environment. Turning first to teacher attention, regular education classrooms, even in elementary schools, most often have teacher-student ratios of more than 20-1. With just twenty students in a classroom, each student should receive five percent of the teacher’s

attention during instructional time. Should a child without a disability require more than ten percent of a teacher's attention during instruction time, the presumption should be that the regular education setting is inappropriate. A student taking twice as much teacher time as should be expected is clearly effecting the educational environment of the regular classroom and should be placed in a setting with a lower teacher-student ratio.

Many students, disabled or not will at times engage in behavior that is disruptive to the learning environment. The type of disruptive behavior by a student with a disability that would cause a presumption for placement in a special education setting is behavior that is pervasive and that stops instruction. Quantifying disruptive behavior is difficult, but when behavior is disruptive to the point of actually stopping instruction repeatedly and consistently, a problem arises. School psychologists are part of the IEP team under the IDEA.<sup>134</sup> As part of the placement decision the school psychologist can observe the student in the classroom on several occasions, he or she can then provide data as to the disruptive effect that the student has on the classroom. Should the psychologist report disruptive behavior that repeatedly and consistently interrupts learning, the presumption should be against inclusion. These students could also benefit from a more structured setting with teachers who are specially trained to help them manage their behaviors.

#### Cost of Mainstreaming

Cost is perhaps the easiest to quantify. However the courts have been vague about how much cost may factor in the decision to mainstream students. School districts should be able to quantify and verify the costs of different placements for a student with a disability. Again as with the other factors, cost should not be the sole determination for placement decisions, just one of the factors considered. While it would be wonderful if schools had unlimited budgets and could provide every child with the ideal education regardless of cost, that is simply not the reality. Schools have finite resources, and spending excessively on one student will effect the education

of all the others. While cost should certainly not be the determinative factor, the costs of mainstreaming a student should be balanced against the benefit of that placement.

In an Eighth Circuit case, the court took costs into consideration.<sup>135</sup> The case considered the placement of a student with severe mental retardation.<sup>136</sup> To place that child in a regular school, the school would need to set up a classroom and hire a teacher that would service very few children, perhaps just the plaintiff.<sup>137</sup> The court said that in this situation, it was appropriate for the school to consider costs.<sup>138</sup>

This list of factors is in no way exhaustive and is far from perfect. However, with no clear guidelines as to what is required, schools are struggling with the definition of vague terms like appropriate, significant, substantial, etc. currently used by courts to explain the steps the schools need to take to place students in the least restrictive environment. Much empirical research would need to be conducted as to the appropriateness of the standards, providing data that is unavailable now. These proposed standards are a way of providing some objectiveness and concreteness to a currently vague and inconsistent application of the law.

#### *Rethinking the emphasis on inclusion*

Education is not a one-size fits all proposition. The IDEA recognizes this in its requirement that all students with disabilities be afforded an individualized education program that takes the unique needs of that child into account.<sup>139</sup> Students with disabilities are often diagnosed because they are not succeeding in a regular education setting.<sup>140</sup> Yet, when it comes to placement, the IDEA as interpreted by the federal courts makes the presumption that mainstreaming, keeping these students in the educational setting where they are not succeeding, is the best placement for these students.<sup>141</sup> The courts have made strong statements about how far the preference for mainstreaming extends, for example, saying that even though a “segregated” placement might be better academically, a lack of opportunity for mainstreaming

with non-disabled children may make that placement inappropriate.<sup>142</sup> Perhaps it is time to revisit the purpose of the IDEA and of education in general.

The most recent federal endeavor into the field of education is the No Child Left Behind Act ("NCLBA".) Foremost in the NCLBA is the requirement that all children meet minimum standards in core academic subjects such as reading and math.<sup>143</sup> This would indicate that the federal government sees the key purpose of schools as providing an academic education to students. The current push for mainstreaming above academics is at odds with that key purpose. With that in mind, mainstreaming should not necessarily be abandoned. Some students with disabilities can thrive in regular classrooms, but many cannot. To assume that mainstreaming is appropriate for all students ignores the educational reality.

Courts often cite non-academic reasons for mainstreaming, but as discussed above, there is some research showing that students with disabilities may actually be suffering teasing, stigmatization and emotional harm from being in a regular classroom. Therefore, academic achievement is being sacrificed for a social situation which may be providing students with disabilities with little to no social benefits; situations which in fact may be socially harmful to those students.

Congress needs to take another look at the IDEA. Its purpose is to benefit students with disabilities educationally. If the presumption for mainstreaming is not ensuring that these students are benefiting, then that presumption should be eliminated.

## **Conclusion**

The IDEA was enacted to provide students with disabilities access to public schools. In interpreting the meaning of the IDEA's requirements, the courts have made a policy decision that mainstreaming students with disabilities into regular classroom can take priority even over the educational achievement of those students. Two distinct tests have emerged in determining when students have been placed in the least restrictive environment; a placement that allows for

the maximum extent of mainstreaming with non-disabled students. Each of these tests is vague and consists of prongs and factors, which are highly subjective and provide little substantive guidance to the schools making the placement decisions for students with disabilities. Therefore, changes must be made. If the standard is truly so vague that the courts cannot lay down concrete factors, then the courts should defer to the state and local educational agencies who are better equipped to make the complex educational choices for their students. If consistent concrete standards can be set, the courts or Congress should do so. This article has set forth several possible factors, which are concrete and quantifiable. These factors would provide guidance to schools as to at least the boundaries of what is required under the law. While these might not be the perfect factors, they represent a start to finding some way out of the quagmire in which schools and parents trying to educate and protect children with disabilities are currently stuck.

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<sup>1</sup> 20 USC § 1400 et seq

<sup>2</sup> *Rockner v. Walter, et al.*, 700 F.2d 1058, (6th. 1983), *cert denied*, 464 U.S. 864 (1983)

<sup>3</sup> *Daniel R.R. v. St. Bd. of Ed.*, 874 F.2d 1036, (5th Cir. 1989)

<sup>4</sup> *Sacramento City Unified Sch. Dist., Bd. Of Educ. v. Rachel H.*, 14 F.3d. 1398 (9th Cir. 1994)

<sup>5</sup> *Brown, et. al., v. Bd. of Ed. Of Topeka Kan.*, 347 U.S. 483, 495 (1954)

<sup>6</sup> *Brown, et. al., v. Bd. of Ed. Of Topeka Kan.*, 349 U.S. 294, 301(1955)

<sup>7</sup> Pub. L. 89-750, § 161, 80 Stat. 1204

<sup>8</sup> *Bd. of Ed. of the Hendrick Hudson C. Sch. Dist, Westchester County, et al. v. Rowley*, 458 U.S. 176, 179-180 (1982)

<sup>9</sup> Pub. L. 91-230, § 84 Stat. 175, Part B

<sup>10</sup> *Rowley*, 458 U.S. 176, 179-180

<sup>11</sup> *Pa. Ass'n for Retarded Children v. Cmmw. of Pa*, 343 F.Supp. 279 (E.D. Pa. 1972)

<sup>12</sup> *Mills v. Board of Education of the District of Columbia* 348 F.Supp. 866, (D.D.C., 1972.)

<sup>13</sup> *Pa. Ass'n for Retarded Children v. Cmmw. of Pa*, 334 F.Supp. 1257, 1260 (E.D. Pa. 1972)

<sup>14</sup> *Mills*. 348 F.Supp. 866, 878

<sup>15</sup> 20 USCS § 1400 (c)(2)

<sup>16</sup> 20 USCS § 1401 (b)

<sup>17</sup> *Rowley*, 458 U.S. 176, 179 (quoting H. R. Rep. No. 94-332, p. 2 (1975) (H. R. Rep.))

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- <sup>18</sup> La Donna Boeckman, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students*, 46 Drake L.Rev. 855, 864 (1998)
- <sup>19</sup> *Id.* at 865
- <sup>20</sup> *Id.* at 865
- <sup>21</sup> Mark Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 Fla. L. Rev. 7, 8 (2006)
- <sup>22</sup> 20 USC § 1400 et seq.
- <sup>23</sup> 20 USC § 1412(2)(B)
- <sup>24</sup> 20 U.S.C.A. § 1414
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.*
- <sup>27</sup> 20 USC § 1401(9))
- <sup>28</sup> *Rowley*, 458 U.S. 176
- <sup>29</sup> *Id.* at 184
- <sup>30</sup> *Id.* at 185
- <sup>31</sup> *Id.* at 184
- <sup>32</sup> *Id.* at 185
- <sup>33</sup> *Id.* at 198
- <sup>34</sup> *Id.* at 185
- <sup>35</sup> *Id.* at 188
- <sup>36</sup> *Id.*
- <sup>37</sup> *Id.* at 189
- <sup>38</sup> *Id.* at 203
- <sup>39</sup> *Id.* at 198
- <sup>40</sup> 20 USCA § 1412(a)(5) – LRE requirement
- <sup>41</sup> 20 USCA § 1412(a)(5)
- <sup>42</sup> *Daniel R.R.*, 874 F.2d 1036, 1045
- <sup>43</sup> Anne Dupre, *Disability and the Public Schools: The Case Against Inclusion*, 72 Wash. L. Rev. 775, 795 (1997)
- <sup>44</sup> *Oberti v. Bd. of Ed.*, 995 F.2d 1204, 1215; (3rd Cir. 1993) and *Greer v. Rome City Sch. Dist.* 950 F.2d. 688, 697 (11th Cir. 1991)
- <sup>45</sup> 20 U.S.C.A. § 1415(b)(2)
- <sup>46</sup> *Id.*
- <sup>47</sup> La Donna Boeckman, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students*, 46 Drake L.Rev. 855, 881 (1998)
- <sup>48</sup> 20 USCA §1415(i)(3)(B)
- <sup>49</sup> *Sacramento.*, 14 F.3d. 1398, 1403-4
- <sup>50</sup> *Id.* at 1404
- <sup>51</sup> *Rockner*, 700 F.2d 1058, 1060
- <sup>52</sup> *Id.*

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<sup>53</sup> *Id.*  
<sup>54</sup> *Id.*  
<sup>55</sup> *Id.*  
<sup>56</sup> *Id.* at 1061  
<sup>57</sup> *Id.*  
<sup>58</sup> *Id.*  
<sup>59</sup> *Id.* at 1063  
<sup>60</sup> *Id.*  
<sup>61</sup> *Id.*  
<sup>62</sup> *Id.*  
<sup>63</sup> *Id.*  
<sup>64</sup> see *Devires v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4<sup>th</sup> Cir. 1989)).  
<sup>65</sup> *A.W. v. Northwest R-1 Sch. Dist.* 813 F.2d 158, 163 (8<sup>th</sup> Cir.) *cert denied*, 484 U.S. 847 (1987)  
<sup>66</sup> *Daniel R.R.*, 874 F.2d 1036, 1046  
<sup>67</sup> *Id.*  
<sup>68</sup> *Id.*  
<sup>69</sup> *Id.*  
<sup>70</sup> *Id.*  
<sup>71</sup> *Id.* at 1039-40  
<sup>72</sup> *Id.* at 1039  
<sup>73</sup> *Id.*  
<sup>74</sup> *Id.*  
<sup>75</sup> *Id.* at 1039-40  
<sup>76</sup> *Id.* at 1046  
<sup>77</sup> *Id.*  
<sup>78</sup> *Id.*  
<sup>79</sup> *Id.*  
<sup>80</sup> *Id.* at 1047  
<sup>81</sup> *Id.* at 1048  
<sup>82</sup> *Id.* at 1048 (citing 20 USC § 1412(5)(B))  
<sup>83</sup> *Id.* at 1048  
<sup>84</sup> *Id.*  
<sup>85</sup> *Id.*  
<sup>86</sup> *Id.*  
<sup>87</sup> *Id.*  
<sup>88</sup> *Id.* at 1049  
<sup>89</sup> *Id.*  
<sup>90</sup> *Id.*  
<sup>91</sup> *Id.*  
<sup>92</sup> *Id.*  
<sup>93</sup> *Id.* at 1048 (citing 34 CFR 300.551)

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- <sup>94</sup> *Id.* at 1050
- <sup>95</sup> see *Oberti*, 995 F.2d 1204, 1215; and *Greer*, 950 F.2d. 688, 696
- <sup>96</sup> *Oberti*, 995 F.2d 1204, 1216; and *Greer*, 950 F.2d. 688, 697
- <sup>97</sup> *Greer*, 950 F.2d. 688, 696
- <sup>98</sup> *Oberti*, 995 F.2d 1204, 1216
- <sup>99</sup> *Sacramento*, 14 F.3d. 1398 at 1404
- <sup>100</sup> *Id.*
- <sup>101</sup> Mark Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 Fla. L. Rev. 7, 43 (2006)
- <sup>102</sup> Ruth Cokler, *The Disability Integration Presumption: Thirty Years Later*, 154 U. Pa. L. Rev. 789, 802 (2006)
- <sup>103</sup> *Id.*
- <sup>104</sup> *Id.* at 796
- <sup>105</sup> *Id.*
- <sup>106</sup> La Donna Boeckman, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students*, 46 Drake L.Rev. 855, 875 (1998)
- <sup>107</sup> Mark Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 Fla. L. Rev. 7, 44 (2006)
- <sup>108</sup> *Id.*
- <sup>109</sup> *Id.*
- <sup>110</sup> *Daniel R.R.*, 874 F.2d 1036, 1047-8
- <sup>111</sup> Mark Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 Fla. L. Rev. 7, 44 (2006)
- <sup>112</sup> *Brown, et. al., v. Bd. of Ed. Of Topeka Kan.*, 347 U.S. 483, 495 (1954)
- <sup>113</sup> see *Green, et. al., v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1969); *People Who Care, et. al. v. Rockford Bd. of Ed., Sch. Dist. No. 205*, 246 F.3d 1073, (7th Cir. 2001); *Milliken v. Bradley* 433 U.S. 257, (1977), *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971); *Mo. v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467, (1992)
- <sup>114</sup> *Green* 391 U.S. 430 (1969)
- <sup>115</sup> see *People Who Care*, 246 F.3d 1073
- <sup>116</sup> Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* The Harvard Civil Rights Project, Harvard University, January 2003
- <sup>117</sup> *Id.*
- <sup>118</sup> *Id.*
- <sup>119</sup> Scott Bauer, *Omaha Schools to Split Along Racial Lines*, Chicago Tribune (April 14, 2006)
- <sup>120</sup> *Green*, 391 U.S. 430
- <sup>121</sup> Mark Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 Fla. L. Rev. 7, 8 (2006)
- <sup>122</sup> *Rockner*, 700 F.2d 1058, 1065-6(Kennedy, J., dissenting)

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- <sup>123</sup> *Oberti*, 995 F.2d 1204, 1216 and *Greer*, 950 F.2d. 688, 696
- <sup>124</sup> *Rowley*, 458 U.S. 176, 203-4
- <sup>125</sup> *Rockner*, 700 F.2d 1058, 1060 and *Daniel R.R.*, 874 F.2d 1036, 1046
- <sup>126</sup> *Daniel R.R.*, 874 F.2d 1036, 1039-1040
- <sup>127</sup> *Daniel R.R.*, 874 F.2d 1036, 1047-8
- <sup>128</sup> *Daniel R.R.*, 874 F.2d 1036, 1047-8
- <sup>129</sup> Ruth Cokler, *The Disability Integration Presumption: Thirty Years Later*, 154 U. Pa. L. Rev. 789, (2006)
- <sup>130</sup> *Id.* at 829-835
- <sup>131</sup> *Id.* at 833
- <sup>132</sup> *Id.* at 834
- <sup>133</sup> see *Daniel R.R.*, 874 F.2d 1036, 1039 and *Rockner*, 700 F.2d 1058, 1060, the court finds a functional and communicative age for the child as a matter of fact from assessments presented to the lower court
- <sup>134</sup> 20 U.S.C.A. § 1414
- <sup>135</sup> *A.W. v. Northwest R-1 Sch. Dist.* 813 F.2d 158 (FIND PINPOINT)
- <sup>136</sup> *Id.*
- <sup>137</sup> *Id.*
- <sup>138</sup> *Id.*
- <sup>139</sup> 20 U.S.C.A. § 1414
- <sup>140</sup> Ruth Cokler, *The Disability Integration Presumption: Thirty Years Later*, 154 U. Pa. L. Rev. 789, 797 (2006).
- <sup>141</sup> *Id.*
- <sup>142</sup> *Rockner*, 700 F.2d 1058, 1063
- <sup>143</sup> 20 USCS § 6301 *et seq.*

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