

## IS INCLUSION MISSING THE WHOLE *IDEA*?

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### **ABSTRACT:**

The Individuals with Disabilities Education Act requires that states provide all disabled students with a free appropriate public education in the least restrictive environment. Without clear guidance explaining the intent of Congress, the inclusion debate has become the struggle to determine the extent to which mainstreaming, or inclusion, is appropriate for each individual student. This article purports that the courts have strayed too far toward inclusion, placed too much emphasis on social benefits of inclusion. The emphasis on inclusion often subverts IDEA's promises for disabled students and harms the learning environment as a whole, and education of nondisabled students.

### **OUTLINE**

I. Introduction

II. History of Disabled Students in the Public Schools

A. Historically Closed Doors

a. *Pennsylvania Association for Retarded Children v. Commonwealth* and *Mills v. Board of Education* open doors of the courts to disabled children seeking education.

b. The Civil Rights Movement brings support to disabled students.

B. Congress has an IDEA

a. The Individuals with Disabilities Education Act is created and provides that every disabled child should receive a "free appropriate public education" in the least restrictive environment appropriate.

C. Least Restrictive Environment becomes the Inclusion Debate

III. Tests for Inclusion

- a. The Supreme Court comes close to the issue of inclusion in *Board of Education v. Rowley*
- b. District courts struggle to interpret the least restrictive environment provision of IDEA
  - i. *Roncker v. Walter* rules that the benefits of the segregated setting must “far outweigh” the benefits available in a regular classroom
  - ii. *Daniel R.R. v. State Board of Education* is more deferential to school districts and evaluates education placements considering a number of different criteria.
  - iii. *Sacramento City Unified School District v. Rachel H* uses a four factor test to evaluate placements, including non-academic benefits.
  - iv. *Beth B. v. Van Clay* uses the most deferential test and only requires that the minimal requirements of IDEA are met.

#### IV. Full Inclusion may be Missing the IDEA

##### A. Arguments for Inclusion

- *Oberti v. Board of Education* recognizes social benefits of inclusion for disabled and nondisabled students.

##### B. Problems with Inclusion

##### C. Full Inclusion is not a Mandate

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- Effects on nondisabled students
- Effects on the learning community including curriculum modifications and stress to teachers regarding classroom and time management
- Effects on the disabled student

E. Deference to Teachers

V. Conclusion

## TEXT:

### I. Introduction

In 1975, Congress chose to tackle an enormous problem: the education of disabled children in public schools. Congress examined the plight of disabled students and discovered that the public schools were failing to meet the educational needs of millions of disabled children.<sup>1</sup> Disabled children were not receiving adequate educational services; schools often did not even have access to adequate services; many children were struggling in the classroom with undiagnosed disabilities; and perhaps worst of all, many public schools completely excluded disabled students.<sup>2</sup> To address the problem, Congress enacted legislation guaranteeing every disabled child a “free appropriate public education” in the “least restrictive environment” and conditioned federal special education funding on state compliance with the Act’s requirements.<sup>3</sup> IDEA has dramatically changed the public schools’ relationship with disabled and nondisabled students, and after 30 years, the schools’ relationship with these students has generally improved because of EAHCA and IDEA.<sup>4</sup>

While IDEA has led to many educational successes, it has also created intense national debate, especially related to the issue of inclusion. At the center of the inclusion debate is the statutory requirement that

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<sup>1</sup> See e.g. Tara L. Eyler, *Greater Expectations: How the 1997 Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 Dick. L. Rev. 613 (1999) footnote 18 citing Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982) “discussing legislative history indicating that the IDEA was enacted in response to the Congressional perception that a majority of 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.” (quoting H.R. Rep. No. 94-332, at 2 (1975)),” Eyler also recounts Congress’ finding that over half of the nation’s eight million children were not receiving appropriate educational services and one million of those children were completely excluded from the educational system.

<sup>2</sup> 20 U.S.C. § 1400(c) (2005).

<sup>3</sup> Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491 (2005). Education of All Handicapped Children Act (EAHCA), was passed in 1975, and later amended to be what is now IDEA. The provisions of EAHCA and IDEA are effectually the same and cases decided under EAHCA are still applicable under IDEA. IDEA was most recently amended effective November 11, 2005. All references to IDEA in this article include the 2005 amendments; however, are not discussed individually.

<sup>4</sup> Therese Craparo, *Remembering the Individuals in the Individuals with Disabilities Act*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 467, 467-469 (2002/2003) (discussing the general history of special education).

to the maximum extent appropriate, children with disabilities...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>5</sup>

Without clear guidance explaining the intent of Congress in this provision, the inclusion debate has become the struggle to determine “the extent to which mainstreaming, or inclusion, is appropriate for each individual student.”<sup>6</sup> This struggle to determine the appropriate placement of a disabled student has spilled over into the courts; decisions frequently turn on whether or not the school has satisfied the, often subjective, mainstreaming provision of IDEA.<sup>7</sup> Courts frequently substitute their own judgment for that of the educators designing the disabled student’s placement, and the social benefits a disabled child might receive through placement in a general education classroom may weigh heavily in the court’s decision.<sup>8</sup> The interpretation of

This article asserts that the courts have strayed too far into the ideology of inclusion, placed too much emphasis and importance on the purported social benefits of inclusion and have done so to the detriment of disabled students. The emphasis on inclusion in the general classroom environment often subverts IDEA’s promise of a free, appropriate public education for disabled students and harms the learning environment as a whole, negatively affecting the education of nondisabled students as well. In addition, this article examines with a critical eye the arguments

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<sup>5</sup> 20 U.S.C. § 1412(5) (2005).

<sup>6</sup> Craparo, *supra* note 4, at 469.

<sup>7</sup> Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against “Inclusion”*, 72 WASH. L. REV. 775, 776 (1997).

<sup>8</sup> Anne Proffitt Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 395 (1998) (discusses that the determination of whether IDEA requirements have been met will depend on the jurisdiction or other factors because many courts have shown a lack of deference to decisions of educators in lower education settings). *See also* Theresa Bryant, *Drowning in the Mainstream: Integration of Children With Disabilities After Oberti v. Clementon School District*, 22 OHIO N.U.L. REV. 83, 84 (1995) (discusses the court’s addition of “social benefit” to all students in the inclusion debate).

for inclusion and explores why inclusion is not always beneficial for disabled students and the public school as a whole.

Part II examines the history of disabled students and the public schools. First, looking at the history of exclusion and indifference to the education of disabled, second, looking at IDEA and the education it promises disabled students, and third, considers how IDEA's least restrictive environment provision created the inclusion movement. Part III analyzes the tests applied by different circuits to determine if a placement meets the requirements of IDEA. Part IV investigates the problems of inclusion. First, looking at the arguments for inclusion and their validity, then examining how these theories function in practice and what affects they may have on disabled and nondisabled students, and the learning community. Finally, Part IV, Section E, explores a possible solution to avoid situations of inappropriate inclusion; greater deference to the determinations of educators.

## II The History of Disabled Students in the Public Schools

### A Historically Closed Doors

Public schools have not always greeted disabled students with open arms. Educating the disabled was not a national priority and public schools often deliberately excluded disabled students.<sup>9</sup> If a disabled student did attend school, there was little to no emphasis on academics and "schools" often served as inept day care centers for America's handicapped.<sup>10</sup> "Millions of handicapped children were either totally excluded from schools or [were] sitting idly in regular classrooms waiting for the time when they were old enough to 'drop out.'"<sup>11</sup> According to the

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<sup>9</sup> Marissa L. Antoinette, *Examining How Inclusion of Disabled Students Into the General Classroom May Affect Non-Disabled Classmates*, 30 FORDHAM URB. L. J. 2039, 2040-2041 (2003).

<sup>10</sup> See John Merrow, *What's so Special about Special Education?*, EDUCATION WEEK, May 8, 1996 at 48. Merrow describes a school he visited in 1975 in New Mexico. Disabled students were merely contained, and there was no attempt at providing an education. Students were bound to their desks, grouped together in a large classroom and left screaming the entire day.)

<sup>11</sup> Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 191 (1982). This case dealt with an eight-year-old deaf child. The child was achieving successfully in the general classroom utilizing her skills as a lipreader and a hearing aid. The parents requested that a sign language interpreter also be present in the classroom to maximize their child's learning potential. The court upheld the school's denial of the parent's request for an interpreter and ruled

National Council on Disability, before the 1970s public schools educated only one in five students with disabilities, completely excluded over 1 million students and an additional 3.5 million students did not receive appropriate services.<sup>12</sup>

In the middle of the Twentieth Century, medical and scientific advancements led to an increase in the number of children with disabilities that survived to childhood and beyond, creating a need for increased services and education to serve the growing disabled population.<sup>13</sup> At the same time, the Civil Rights Movement and the decision in *Brown v. Board of Education* brought ideas of equality and desegregation to the forefront of the American public discourse.<sup>14</sup> Capitalizing on the momentum of the civil rights movement, advocates for the disabled used the courts to challenge the exclusion of disabled students from public schools and obtained two landmark decisions, *Pennsylvania Association for Retarded Children v. Commonwealth*<sup>15</sup> (*PARC*) and *Mills v. Board of Education*,<sup>16</sup> gaining disabled students' access to a public education.<sup>17</sup>

In *PARC*, the plaintiffs objected to the placement of disabled students in inadequate special education programs and the exclusion of disabled students from public schools all together.<sup>18</sup> The court held that "all mentally retarded persons are capable of benefiting from a program of education and training," and that Pennsylvania was obligated to place each disabled child in a "free, public program of education and training appropriate to the child's capacity."<sup>19</sup>

*Mills v. Board of Education*<sup>20</sup> included all disabled children excluded from public education.<sup>21</sup>

The court held that public schools cannot exclude a child eligible for a public education unless

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that it is not the goal of special education to maximize the potential of every child; instead, it is that the child obtains some educational benefit.

<sup>12</sup> Sarah E. Farley, M. Ed., *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under IDEA*, 77 WASH. L. REV. 809, 809 (2002).

<sup>13</sup> Dupre, *supra* note 7, at 784.

<sup>14</sup> Antoinette, *supra* note 9, at 2041.

<sup>15</sup> 343 F. Supp. 279 (E.D. Pa. 1972).

<sup>16</sup> 348 F. Supp. 866 (D.D.C. 1972).

<sup>17</sup> Dupre, *supra* note 7, at 784.

<sup>18</sup> *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279, 307 (E.D. Pa. 1971).

<sup>19</sup> *Id.* at 307.

<sup>20</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

<sup>21</sup> Dupre, *supra* note 7, at 785. *Mills* represented a broader class of plaintiffs. *PARC* included only retarded children, *Mills* included all disabled children.

there is an adequate alternative appropriate for the child's unique needs and a prior hearing to discuss the possible alternatives and the child's status.<sup>22</sup> The court also held that a failure to offer the child an education in the public schools was a violation of the child's due process rights.<sup>23</sup> *PARC and Mill's* recognition of disabled children as worthy recipients of a public education showed a dramatic change from the previous treatment of disabled children.<sup>24</sup> However, not all states, schools and teachers were ready to embrace the idea of educating the disabled.<sup>25</sup>

## B Congress has an IDEA

The holdings of *PARC* and *Mills* brought national attention to the education of disabled children, led to similar litigation in other states<sup>26</sup> and prompted Congress to take action.<sup>27</sup> In 1975, Congress responded to the issue of the education of disabled students and passed the Education for All Handicapped Children Act (EAHCA).<sup>28</sup> In 1990, Congress amended EAHCA and it became the Individuals with Disabilities Act (IDEA).<sup>29</sup> IDEA's main purpose, as stated by

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<sup>22</sup> *Mills*, 348 F. Supp. at 872.

<sup>23</sup> *Id.* at 872.

<sup>24</sup> *E.g.*, *Rowley*, 458 U.S. at 191. The court recounts deplorable conditions for disabled students and the complete lack of education in the experience of disabled students in public schools.

<sup>25</sup> See Antoinette *supra* note 9, at 2052 discussing the frustration felt by many educators when disabled students are included in their classrooms, specifically the resistance felt by many general education teachers. Much of teacher's resistance was based on fear and inadequate training to meet the needs of disabled students.

<sup>26</sup> See *e.g.* *St. Louis Developmental Disabilities Treatment Center Parents Asso. v. Mallory*, 591 F. Supp. 1416 (D. Mo. 1984) where plaintiffs challenged separate special education facilities as denying disabled students maximum educational opportunities. *Timothy W. v. Rochester, School Dist.*, 875 F.2d 954 (1<sup>st</sup> Cir. 1989) the court determined that all children, despite the severity of their handicap deserve a public education. *Georgia Asso. of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263 (D. Ga. 1981) debated if the statutory 180 days of public education met the needs of disabled students.

<sup>27</sup> See Craparo, *supra* note 4, at 472-474 (discussing the judicial and general history of special education and the legislative action that followed action in the courts).

<sup>28</sup> Martin R. Gardner & Anne Proffitt Dupre, *CHILDREN AND THE LAW: CASES AND MATERIALS* 743 (2002).

<sup>29</sup> *Id.* at 743.

Congress, is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>30</sup> Equipping disabled children with the tools they need to become productive citizens and eventually give back to their communities is a central goal of IDEA.<sup>31</sup> To meet this goal, Congress conditions federal special education funding for states on the state’s compliance with the regulations of IDEA.<sup>32</sup>

IDEA provides that all disabled children are entitled to a free appropriate public education.<sup>33</sup> To ensure that each child receives the education IDEA promises; schools are required to develop an Individual Education Program, IEP, identifying the student’s goals and designing how to accomplish those goals.<sup>34</sup> IDEA also requires that the disabled student is educated in the “least restrictive environment” appropriate.<sup>35</sup>

The main goals of IDEA may seem simple and direct—that all disabled children receive a “free appropriate public education” in the “least restrictive environment;” however, the practical application of these goals has proved difficult for schools and courts alike.<sup>36</sup>

#### 1) A Free Appropriate Public Education

The first core provision of IDEA is that all disabled students are entitled to a “free appropriate public education.” The statute does not explicitly define what constitutes a “fee

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<sup>30</sup> 20 U.S.C. § 1400(d)(1)(A) (2005).

<sup>31</sup> *Campbell v. Talladega County Bd. of Educ.*, 518 F. Supp. 47, 54 (N.D. Ala., 1981). The court refers to Senate Reports discussing EAHCA and focuses on the goals of having disabled children become productive citizens and gain independence through education. The court cites to S. REP. NO. 94-168, 94th Cong., 1st Sess., *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433.

<sup>32</sup> *See, e.g., Dubois v. Connecticut State Board of Education*, 727 F.2d 44, 48 (2<sup>nd</sup> Cir. 1984) (examined school’s failure to exhaust administrative remedies under EAHCA, citing dicta explaining EAHCA); *See also Campbell*, 518 F. Supp. 51-52 (discussing the standards states must meet to qualify for federal funding assistance for special education).

<sup>33</sup> 20 U.S.C. § 1401(9) (2005).

<sup>34</sup> 20 U.S.C. § 1414(d) (2005).

<sup>35</sup> 20 U.S.C. § 1412(5) (2005).

<sup>36</sup> Joshua Andrew Wolfe, *A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals With Disabilities Education Act*, 55 VAND. L. REV. 1627, 1633 (2002) (discussing the various tests and standards applied by different circuits and specifically the role cost plays in the various tests and standards).

appropriate public education," thus, schools and courts have struggled to satisfy this requirement."<sup>37</sup> IDEA generally defines a free appropriate public education as an education and related services provided at public expense, under public supervision and direction, without charge; that meets the standards of the State educational agency; includes an appropriate preschool, elementary school, or secondary school education in the state involved; and is provided in conformity with the Individualized Education Program.<sup>38</sup>

The Supreme Court held that for education to be adequate under IDEA, it must be appropriate for the disabled child, meet his or her individual and unique needs, and provide an educational benefit.<sup>39</sup> The Supreme Court sets out a test that "if personalized instruction is being provided with sufficient support services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, then the child is receiving a "free appropriate public education" as defined by the Act."<sup>40</sup> To provide such an education, IDEA uses the Individual Education Program, IEP, a plan developed through a series of evaluations and collaboration of educators with special education expertise and parents to determine how a child can receive educational benefits and the plan must be likely produce progress in the child's education.<sup>41</sup> While the free appropriate public education must result in academic progress for the child, it is not necessary that the education provided maximize the child's potential or provide the absolute best possible education; IDEA only requires that the child receive an education that is likely to produce meaningful progress.<sup>42</sup>

## 2) The Least Restrictive Environment

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<sup>37</sup> *Id.* at 1633-1634.

<sup>38</sup> 20 U.S.C. § 1401(9) (2005).

<sup>39</sup> *Rowley*, 458 U.S. at 188-189.

<sup>40</sup> *Id.* at 189. The court refers to the provisions of IDEA and creates a definitional checklist to determine if all provisions of IDEA are met.

<sup>41</sup> 20 U.S.C. § 1414(d) (2005).

<sup>42</sup> See e.g., *Ash v. Lake Oswego Sch. Dist.*, No. 7J, 980 F.2d 585, 587 (9<sup>th</sup> Cir. 1992) (to satisfy the requirements of IDEA, an IEP must confer appropriate educational benefits on the disabled student); *Mather v. Hartford Sch. Dist.*, 928 F. Supp. 437, 445 (D. Vt. 1996) (court determines that IDEA did not require the school district to provide the best possible program, only a program that provides an educational benefit is required).

IDEA also requires that to the maximum extent appropriate schools must educate disabled children with their nondisabled peers.<sup>43</sup> Again, because the statute does not define explicitly what is “appropriate” the courts have struggled to determine what amount of contact with nondisabled students is enough to satisfy IDEA’s “maximum extent appropriate” requirement.<sup>44</sup> Finding the least restrictive environment for a disabled student is complicated further by the tension between the provisions of IDEA; schools must educate a disabled student with nondisabled peers and at the same time provide an education tailored to that child’s specific and unique needs.<sup>45</sup>

In determining how to educate a disabled child to the maximum extent appropriate, IDEA provides a range of educational environments, from the general education classroom, the least restrictive environment, to a completely segregated classroom of special education students, to a hospital or institution, the most restrictive environment.<sup>46</sup> Placing the disabled student in the least restrictive appropriate setting in this continuum while still meeting the educational goals of the child satisfies the least restrictive environment provision of IDEA.<sup>47</sup> If a child cannot meet educational goals or obtain any educational benefit from inclusion in the general classroom, even with the use of aids or supplements, then a more restrictive setting is appropriate while still including the disabled child with nondisabled peers at other times, such as lunch, art or music.<sup>48</sup>

IDEA recognizes the importance of disabled and nondisabled students interacting, but social benefits are arguably less important than academic goals.<sup>49</sup> The social benefits of IDEA seem to

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<sup>43</sup> 20 U.S.C. § 1412(a)(5) (2005).

<sup>44</sup> Wolfe, *supra* note 36, at 1634.

<sup>45</sup> Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5<sup>th</sup> Cir. 1989). This case dealt with the removal of a six-year-old child with Downs Syndrome from the regular classroom. The court used a balancing test to determine that a separate classroom for the child was appropriate. The court asked (1) “whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily” for the child in question, (2) “whether the school has mainstreamed the child to the maximum extent appropriate” and (3) what effect the disabled child has on the general classroom.

<sup>46</sup> 20 U.S.C. § 1412(a)(5)(A) (2005).

<sup>47</sup> Farley, *supra* note 12, at 815.

<sup>48</sup> *Id.* at 815.

<sup>49</sup> See Brillion v. Klein Indep. Sch. Dist., 100 Fed. Appx. 309 (5<sup>th</sup> Cir. 2004). The court recognized that academic achievement is not the only reason to mainstream a student but was unpersuaded

be icing on the cake, secondary to academic progress. If the disabled child can reach academic goals while learning in conjunction with nondisabled peers then that placement is ideal, however, if such a placement were to result in diminished academic achievement then the disabled child should gain social benefits of interaction with nondisabled students in other ways.

### C Least Restrictive Environment becomes the Inclusion Debate

Some in the education community have not subscribed to this “icing on the cake” theory of inclusion. The requirement that a disabled child be educated with nondisabled students to the maximum extent appropriate<sup>50</sup> has led many advocates for the disabled to push for “inclusion” or “full inclusion” of disabled students in general education classrooms.<sup>51</sup> The inclusion movement has grown into an intense and polarized national debate.<sup>52</sup> Inclusion critics have warned that inclusion could be the demise of all special education;<sup>53</sup> while others believe that IDEA’s mainstreaming provision is nothing more than a cost-saving provision from a Congress that refuses to fund special education.<sup>54</sup> Despite criticism, inclusion advocates believe that inclusion is a fundamental education initiative, essential to dealing with our diverse society.<sup>55</sup>

The movement for inclusion did not begin immediately with the passage of IDEA.<sup>56</sup> The discussion of inclusion began as advocates for the disabled started to examine the social benefits of moving disabled students toward regular classroom placements and away from separate environments.<sup>57</sup> The first term used to describe the integration of disabled students into the

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in this situation and ruled that a separate placement was superior to mainstreaming as it better met the child’s educational goals.

<sup>50</sup> 20 U.S.C. § 1412(5) (2005).

<sup>51</sup> Dupre, *supra* note 8, at 395. See Robert L. Osgood, THE HISTORY OF INCLUSION IN THE UNITED STATES 180-181 (2005) (discusses the movement to move more disabled students with more varied disabilities into the general education classroom); Tamera Wong, *Falling Into Inclusion: Placing Socialization Over Individualized Education*, 5 UC DAVIS J. JUV. L. & POL’Y 275, 278-279 (2001) (examining the rise of the inclusion movement, the growing importance of social benefits of education and the potential problems of inclusion).

<sup>52</sup> Dupre, *supra* note 7, at 778.

<sup>53</sup> Osgood, *supra* note 51, at 189.

<sup>54</sup> James W. Noll, TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL EDUCATIONAL ISSUES 259 (13<sup>th</sup> ed. 2006).

<sup>55</sup> *Id.* at 254-256.

<sup>56</sup> Dupre, *supra* note 8, at 395.

<sup>57</sup> *Id.* at 427.

general classroom was mainstreaming.<sup>58</sup> Mainstreaming is still part of the inclusion debate, and refers to the philosophy that if the student cannot be educated in the general classroom, then he or she should still spend as much time as possible integrated into regular school day activities, i.e. recess, art, music or lunch.<sup>59</sup>

While the concept of mainstreaming is still present in the inclusion debate, “inclusion” is the term preferred by most educators.<sup>60</sup> Inclusion refers to educating students with disabilities in the regular classroom;<sup>61</sup> and full inclusion builds upon this theory and advocates, “all disabled children [should be] included in the general education classroom ‘for all of every school day in every school setting, preschool through high school.’”<sup>62</sup> Advocates of full inclusion often call for the elimination of separate classes, teachers and programs specifically tailored for special education and the education of all, or nearly all, children with disabilities within the general classroom.<sup>63</sup> According to inclusion advocates, special education classrooms are overly restrictive environments, create a social stigma for the children educated there and the best way to eliminate that stigma is to eliminate special education in separate classrooms and assimilate disabled students into the general classroom environment.<sup>64</sup> Opponents of inclusion counter the above arguments by focusing on actual educational benefits to disabled children which may be maximized in a more individualized setting and the often exorbitant cost of inclusion to the public school.<sup>65</sup>

### III Tests for Inclusion—How do schools know when they have the right IDEA?

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<sup>58</sup> Dupre, *supra* note 8, at 427.

<sup>59</sup> Patrick Howard, *The Least Restrictive Environment: How to Tell?*, 33 J.L. & EDUC. 167, 169 (2004) (discusses the inclusion movement and the movement’s general history).

<sup>60</sup> *Mavis ex rel. Mavis v. Sobol*, 839 F. Supp. 968, 971 n.7 (D.N.Y. 1993). The court notes that educators now prefer inclusion over the term mainstreaming, however both are used to indicate concept of the integration of disabled children into the general classroom. See also Craparo, *supra* note 4, at 469 n. 17.

<sup>61</sup> Howard, *supra* note 59, at 169.

<sup>62</sup> Dupre, *supra* note 43, at 395.

<sup>63</sup> Terry Jean Seligmann, *An Idea Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 776 (2001) (discussing the general history, possible problems and potential successes of inclusion).

<sup>64</sup> Wong, *supra* note 51, at 277-279 discussing the goals of inclusion and the available definitions for “inclusion”).

<sup>65</sup> See Dupre *supra* note 7.

IDEA never uses the term inclusion, nor has the Supreme Court explicitly defined the term<sup>66</sup>, yet the legislature and the courts often prefer that a disabled child's placement be in the regular classroom.<sup>67</sup> IDEA provides that only when the nature or severity of a child's disability is such that education in a regular class with the use of supplementary aids and services cannot be achieved satisfactorily will a child's placement be outside the general education classroom.<sup>68</sup> This provision of IDEA requires schools to explore and experiment with all possible options for integrating the child into the general classroom, demonstrating Congress's preference for inclusion.<sup>69</sup> Courts have struggled with exactly how to apply this requirement while still providing the disabled student with a meaningful education.<sup>70</sup> Silence in the statute and in the Supreme Court have led to chaos and division in the circuits as courts search for an appropriate test to determine if a placement meets the least restrictive environment requirement of IDEA.<sup>71</sup>

The closest the Supreme Court has come to ruling directly on inclusion was in *Board of Education v. Rowley*, where the Supreme Court laid out a two-part test to determine if a state complied with IDEA.<sup>72</sup> The court looked first to see if the placement met the procedural requirements of IDEA, and second, to see if the IEP is calculated to enable the disabled child to

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<sup>66</sup> Wong, *supra* note 51 at 279.

<sup>67</sup> Dupre, *supra* note 7, at 797. "In essence, many of the courts addressing the inclusion issue discount the academic benefit of the disabled child to serve the so-called non-academic benefits of inclusion." *Id.* See also *Roncker v. Walter*, 700 F.2d 1058, 1063 (6<sup>th</sup> Cir. 1983) ("maximum extent appropriate indicates a very strong congressional preference"); *Lisicio v. Woodland Hills Sch. Dist.*, 734 F. Supp. 689, 699-702 (D. Pa. 1989) (the court found that even though an alternative placement was academically superior, a general classroom placement should be the school's goal to further the goal of mainstreaming).

<sup>68</sup> 20 U.S.C. § 1412(5)(A) (2005).

<sup>69</sup> *Id.* § 1412(5) (2005).

<sup>70</sup> *Cf. Mavis*, 839 F. Supp. at 981. The court refers to the *Daniel R.R.* court and discusses the balance that the schools must meet between tailoring a program to an individual child's specific needs and integrating that child into the general education classroom. (internal citations omitted).

<sup>71</sup> Dupre, *supra* note 7, at 794-805 (discussing the different tests applied by different circuits to determine if the least restrictive environment requirement is met). See also *Craparo*, *supra* note 4, at 470 (discussing different interpretations of IDEA's provisions in the federal courts); *Howard*, *supra* note 59, at 170-176 (detailing each test applied by Courts of Appeals in determining the least restrictive environment).

<sup>72</sup> *Rowley*, 458 U.S. at 176.

receive educational benefits.<sup>73</sup> In *Rowley*, the Court determined the appropriateness of the placement of a hearing-impaired elementary school student; the student was succeeding in the general education classroom utilizing lip-reading skills and a hearing aid.<sup>74</sup> The student's parents requested that the school provide a sign language interpreter in the classroom to help the student maximize her potential.<sup>75</sup> Using Senate notes to clarify IDEA's purpose and goals, the court determined that the sign language interpreter was not necessary because Congress did not intend to maximize the potential of each student, but to achieve "equality of opportunity to services."<sup>76</sup> While *Rowley* is the closest the Supreme Court has come to addressing the issue of inclusion, *Rowley* is distinguishable because at issue in *Rowley*, was not the restrictiveness of the educational setting, but rather the appropriateness of the special education services provided.<sup>77</sup>

Without a clear directive from the legislature or the Supreme Court, district courts have devised tests of their own to determine the intent of Congress regarding inclusion.<sup>78</sup> Some districts "have tacitly accepted the premises of the inclusion advocates" and placed the possible social benefits of inclusion above academic achievement and the success of the general learning community, while other districts have refused to accept that social benefits of inclusion outweigh potential academic harm.<sup>79</sup>

In *Roncker v. Walter*, the Sixth Circuit developed a balancing test to evaluate an educational placement.<sup>80</sup> The court required that the school show that it is not feasible to achieve the same results outside of a segregated classroom and the benefits of the segregated setting

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<sup>73</sup> *Id.* at 207. See also Howard, *supra* note 59, at 170-171 (discussing the *Rowley* decision and its implications in the inclusion debate).

<sup>74</sup> *Id.* at 184-185.

<sup>75</sup> *Id.* at 185.

<sup>76</sup> *Id.* at 198 (internal citations omitted).

<sup>77</sup> Howard, *supra* note 59, at 170.

<sup>78</sup> *Id.* at 170.

<sup>79</sup> Gardner, *supra* note 28, at 764.

<sup>80</sup> *Roncker*, 700 F.2d at 1063. The court dealt with the placement of a nine-year old boy with moderate retardation. The child was placed in a separate school that served disabled students; the court ruled that the school must prove more conclusively that the needs of the students could not be met in the general classroom to justify a segregated placement.

must “far outweigh” the benefits available in a regular classroom.<sup>81</sup> The Eighth Circuit chose to follow this reasoning and adopted the *Roncker* test in *A.W. v. Northwest School District*<sup>82</sup> holding that the “student in question would only receive a marginal benefit from mainstreaming and the extensive resources required by such a setting would lead directly to the reduction of other student’s education.”<sup>83</sup> The Eighth Circuit determined that these effects were enough to conclude that the benefits of the segregated placement *far outweighed* the benefits of the general classroom.<sup>84</sup>

In *Daniel R.R. v. State Board of Education*, the Fifth Circuit devised another test for determining if a placement is appropriate.<sup>85</sup> The *Daniel R.R.* court felt that the *Roncker* test had taken too much power from school officials and had diverged from Congress’ intent.<sup>86</sup> They looked at the language of the least restrictive environment provisions and set out two questions.

First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.<sup>87</sup>

The court also included a list of factors to consider in answering these questions including past efforts made by the school to include the child through the use of aids and services, the impact of the student on the teacher’s workload, the extent of modification to the curriculum needed, the effect on the general students’ learning and the social interaction benefits of integration.<sup>88</sup> In considering these factors, the court advised that the states must “tolerate a wide range of

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<sup>81</sup> *Id.* at 1063.

<sup>82</sup> *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8<sup>th</sup> Cir. 1987). The Court applied the test from *Roncker*, but determined that placement in a general classroom was not appropriate.

<sup>83</sup> Howard, *supra* note 59, at 172.

<sup>84</sup> *Id.* at 172 (emphasis added).

<sup>85</sup> *Daniel R.R.*, 874 F.2d 1048.

<sup>86</sup> Howard, *supra* note 59, at 173.

<sup>87</sup> *Daniel R.R.*, 874 F.2d at 1048. See e.g. 20 USC § 1412(5)(B) (2005).

<sup>88</sup> *Id.* at 1048.

educational abilities in their schools and, specifically, in regular education” because that is the setting preferred by Congress.<sup>89</sup> The Third and Eleventh Circuits have also chosen to follow the *Daniel R.R.* test.<sup>90</sup>

In *Sacramento City Unified School District v. Rachel H.* the Ninth Circuit developed yet another test for dealing with the issue of appropriate placement.<sup>91</sup> The Ninth Circuit combined parts of both the *Daniel R.R.* and *Roncker* tests to develop a four-factor test.<sup>92</sup> The test balances four factors: “(1) the educational benefits of full-time placement in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class, and (4) the costs of mainstreaming the student.”<sup>93</sup> The Ninth Circuit court later added more clarification to this test, saying that when the court considers what educational benefits the child derives from the setting or what the child’s educational needs are, that the court should look broadly to social, health, emotional, physical, vocational and communicative benefits and needs, not just traditional academic gains and achievement.<sup>94</sup>

The Seventh Circuit has refused to adopt any test outside or beyond the word of IDEA.<sup>95</sup> In *Beth B. v. Van Clay*, the court examined the two provisions of IDEA; the free appropriate public education provision which focuses on the school’s proposed placement, and the least restrictive environment provision that determines which placement in a range of choices is most appropriate.<sup>96</sup> The court acknowledged Congress’ preference for mainstreaming, but did not feel that preference was so strong that it would place a student in a regular classroom when such a

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<sup>89</sup> *Id.* at 1047.

<sup>90</sup> See Howard, *supra* note 59, at 173-17. See also *Oberti v. State Bd. of Educ.*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11<sup>th</sup> Cir. 1991).

<sup>91</sup> *Sacramento Unified City Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9<sup>th</sup> Cir. 1994).

<sup>92</sup> Howard, *supra* note 59, at 174-175 (discussing the test developed and applied by the Ninth Circuit court).

<sup>93</sup> *Rachel H.*, 14 F.3d at 1404.

<sup>94</sup> *Seattle Sch. Dist., Number 1 v. B.S.*, 82 F.3d 1493 (9<sup>th</sup> Cir. 1996) The court examined the appropriate placement of a child that was achieving on standardized tests but also had emotional problems that resulted in behavior problems and eventually expulsion from school. The parent wanted a private placement designed to treat such problems. The court determined that a private placement was appropriate because the it met the child’s other non-academic needs. *Id.* at 1501-1502. See also Howard, *supra* note 59, at 175.

<sup>95</sup> Howard, *supra* note 59, at 175. See *Beth B. v. Van Clay*, 282 F.3d 493, 497 (7<sup>th</sup> Cir. 2002).

<sup>96</sup> *Beth B.*, 282 F.3d at 497.

placement would provide an unsatisfactory education.<sup>97</sup> The Seventh Circuit ensured the school met the basic requirements of IDEA and then deferred to the decisions of school officials whom the court saw as better suited to make placement decisions.<sup>98</sup>

The divergent standards and tests in the Courts of Appeals have created a situation where the same child could receive disparate treatment depending on which circuit hears the child's case.<sup>99</sup> Further, the fact that many courts exercise such expansive review over the decisions of educators leaves schools in the precarious position of having no right choice or standard to follow when educating disabled students.<sup>100</sup>

## II Full Inclusion often misses the whole IDEA

At the core of IDEA is the guarantee of a free appropriate public education provided in the least restrictive environment for all disabled students.<sup>101</sup> Advocates for full inclusion use the least restrictive environment provision of IDEA as the basis for inclusion and has led some to assert that all disabled students, regardless of unique individual needs, should be included in the general education classroom at all times in every school setting.<sup>102</sup> The courts in many districts have created a Catch-22 for their schools, requiring social benefits even at the cost of academic gains and also requiring academic gains as a top priority.

### A. Arguments for Inclusion

The moral imperative, that separate but equal schools are inherently unequal, forms the basis for the theory of inclusion.<sup>103</sup> The primary justification for inclusion is that disabled children have a right to be educated in the regular classroom and can benefit from inclusion in a regular environment whenever possible.<sup>104</sup> Three main arguments generally support the position of

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<sup>97</sup> *Id.* at 497.

<sup>98</sup> *Id.* at 496. "Because school authorities are better suited than are federal judges to determine educational policy, the district court is required, in its independent evaluation of the evidence, to give due deference to the results of the administrative proceedings."

<sup>99</sup> Howard, *supra* note 59, at 170.

<sup>100</sup> Farley, *supra* note 12, at 818-819.

<sup>101</sup> 20 U.S.C. § 1412(a) (2005).

<sup>102</sup> Dupre, *supra* note 8, at 395.

<sup>103</sup> Howard, *supra* note 59, at 178.

<sup>104</sup> Noll, *supra* note 54, at 249.

inclusion.<sup>105</sup> The first presumption is not often stated, but can be inferred from examining the ideology of inclusionists, is that “all children learn best in the regular education classroom.”<sup>106</sup> Second, inclusionists believe “social equity [is] a goal of greater importance than how much a child learns and can only be achieved by allowing all children the opportunity to mix and interact with their peers.”<sup>107</sup> Third, inclusion advocates believe that separation of students because of their special needs violates the child’s civil rights; this theory is derived from *Brown v. Board of Education* that separate but equal is inherently unequal.<sup>108</sup>

Advocates for full inclusion assert that to separate disabled children because of difference is harmful, but to expose disabled children to nondisabled peers helps to cure the harm caused by separation.<sup>109</sup> The “harm” that many inclusion advocates feel separate education causes is that separation stigmatizes the disabled child to feel inferior because they are separated and therefore different.<sup>110</sup> Inclusionists feel that this feeling of inferiority causes low self-esteem, which in turn hinders academic performance.<sup>111</sup> The belief that more interaction of disabled students with their non-disabled peers will improve self-esteem, increase social growth, interactive skills and provide other social benefits for the disabled student.<sup>112</sup>

In addition, inclusion advocates also believe that nondisabled students will benefit from the presence of disabled students in the general education classroom. The court in *Oberti v. Board of Education* was one of the first courts to assert that nondisabled students would experience

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<sup>105</sup> LaDonna L. 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, 873 (1998) (discussing the ideology and theory behind the inclusion movement).

<sup>106</sup> *Id.* at 873.

<sup>107</sup> *Id.* at 873.

<sup>108</sup> *Id.* at 873. See also Richard W. Smelter et al., *Thinking of Inclusion for All Special Needs Students? Better Think Again*, PHI DELTA KAPPAN, Sept. 1, 1994, at 36, available at <http://static.highbeam.com/p/phil deltakappan/september011994/index.html> (citation refers to last three sentences of paragraph).

<sup>109</sup> Dupre, *supra* note 7, at 817.

<sup>110</sup> *Id.* at 819.

<sup>111</sup> *Id.* at 819.

<sup>112</sup> Howard, *supra* note 59, at 178.

benefits from inclusion.<sup>113</sup> The court noted, “teaching nondisabled children to work and communicate with children with disabilities may do much to eliminate the stigma, mistrust and hostility that have traditionally been harbored against persons with disabilities.”<sup>114</sup>

#### B. Problems with Inclusion

Advocates of inclusion present lofty and optimistic goals and the idea of having all children learn together in the same environment seems attractive. While these ideas do seem wonderful, they present a picture of education that is overly simplified.<sup>115</sup> Inclusion, even if it is possible, may not always be a good idea. A critical examination of the ideology behind inclusion is necessary to determine if inclusion is in fact a worthwhile educational goal.

The assumption that all children learn better in the general education classroom is fallible because “statistics, studies and research have all shown that children are individuals that learn best in different environments.”<sup>116</sup> When Congress stated the purpose of IDEA, the notion that disabled children are unique and have unique needs was at the core of the statute.<sup>117</sup>

The requirement that each disabled child have a detailed IEP outlining their educational goals and needs<sup>118</sup> counters the idea that all children can be successfully educated in one environment.<sup>119</sup> “The purpose of the IEP is to ‘tailor the education to the child; not tailor the child to the education.’”<sup>120</sup> The IEP enables educators to “make an informed, reasoned decision about the abilities, needs, and appropriate educational placement of the individual child.”<sup>121</sup> Congress explicitly recognized the need for segregated placement when it described that special education

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<sup>113</sup> *Oberti*, 995 F.2d at 1217 n.24. “Courts should also consider the reciprocal benefits of inclusion to the nondisabled students in the class.” (internal citations omitted).

<sup>114</sup> *Id.* at 1217 n.24.

<sup>115</sup> See Antoinette, *supra* note 9 at 2048. The author cites an unpublished manuscript saying that the goals of inclusionists are oversimplified and utopian.

<sup>116</sup> Boeckman, *supra* note 101, at 874.

<sup>117</sup> 20 U.S.C. § 1400(d)(1)(A) (2005).

<sup>118</sup> 20 U.S.C. § 1414 (2005).

<sup>119</sup> See Boeckman, *supra* note 101, at 874 (discussing the provisions of IDEA that require schools to identify students that struggle to learn in large environments).

<sup>120</sup> Craparo, *supra* note 4, at 478 (discusses the purposes and requirements of the IEP, the author cites to S. Rep. No. 15017, at 24 (1997)).

<sup>121</sup> Craparo, *supra* note 4, at 524.

can be provided in the home, hospitals and institutions,” creating a continuum of placements to serve disabled students.<sup>122</sup>

Broadly requiring inclusion would subvert the goals of IDEA and IEPs. IDEA seeks to provide each disabled child with an appropriate education; to limit the places where that education can be provided is limiting the tools educators have to work with to meet the special needs of disabled students. Furthermore, if inclusion in the general classroom were truly the optimal placement for all students then why would IDEA require the development of an IEP to meet the unique needs of each disabled student?

The theory of inclusion also asserts that the social benefits of inclusion outweigh the possible academic gains of a separate classroom.<sup>123</sup> This idea seems to contradict the fundamental principle of IDEA, that each disabled child receives a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>124</sup> The stated purpose for IDEA focuses on educational goals, not social goals. The court and inclusion advocates should not place social education in higher esteem than academic goals.; to do so would frustrate the goals of IDEA and deprive disabled students of the meaningful education they deserve.<sup>125</sup>

The inclusionists’ assertion based on *Brown*, that separate is inherently unequal fails on its face.<sup>126</sup> In *Brown*, schools separated students based on an arbitrary difference, race, which had nothing to do with education or how to serve a child in a classroom best.<sup>127</sup> The differences potentially used to separate children under IDEA are not arbitrary; separation based on special needs and to facilitate special education is legitimate because some children “have been shown

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<sup>122</sup> Wong, *supra* note 51, at 291. *E.g.*, T.R. *ex rel.* N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 579-580 (3<sup>rd</sup> Cir. 2000). The court considered the placement of a preschool child classified as preschool handicapped. The court determined that the school was required to consider a continuum of placement options.

<sup>123</sup> 20 U.S.C. § 1400(d)(1)(A) (2005).

<sup>124</sup> *Id.*

<sup>125</sup> See Boeckman, *supra* note 101, at 874.

<sup>126</sup> Boeckman, *supra* note 101, at 874.

<sup>127</sup> *Id.* at 874.

to learn better in different settings.”<sup>128</sup> To separate children based on an arbitrary and artificial characteristic is a violation of the child’s civil rights as decided by *Brown*, however, to separate children based on relevant and real characteristics and place them in a separate environment to better meet their unique needs is facially distinguishable.<sup>129</sup>

Inclusionists also contend that the label “disabled” and a placement outside the regular classroom creates a stigma that the child is “inferior or unworthy to an extent that outweighs any potential benefit of separate special education classrooms.”<sup>130</sup> Even if separation in educational settings does create such a stigma and cause a subsequent decrease in self-esteem, it is not clear that inclusion would erase stigma or increase the self-esteem of disabled children.<sup>131</sup> It seems natural to want students to feel secure and confident in their abilities; but schools can better instill this confidence and self-esteem in disabled students by building a student’s self-worth based on personal academic achievements rather than the label on his or her academic placement.<sup>132</sup> To state that any separation based on a difference is wrong on its face is overly simplistic. Students can be separated based on differences, not to make one group feel inferior, but to provide both groups with an environment in which their unique needs can be met and “they can flourish.”<sup>133</sup> Perhaps a better goal of inclusionists would be working to discover the intent of separation and then eliminate inappropriate separation based on stereotypes that might further negative stigma associated with special education. There is no stigma associated with success. Providing disabled children with a useful education and real academic achievement is perhaps the best way schools can improve the self-esteem of disabled students.<sup>134</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Craparo, *supra* note 4, at 496.

<sup>131</sup> Dupre, *supra* note 7, at 825.

<sup>132</sup> *Id.* at 819.

<sup>133</sup> *Id.* at 826.

<sup>134</sup> See *id.* at 819-826 (discussing the motivations for separating students and when there can be separation without stigma).

The inclusion theory also purports that disabled students will benefit from modeling their own behavior after the behavior of their nondisabled peers.<sup>135</sup> Some courts have accepted this argument as valid, yet there is no clear evidence showing that modeling is in fact a real phenomena or beneficial to the disabled student.<sup>136</sup> Further, for anyone who has ever observed a classroom of children, with or without disabilities, knows that there are many behavior patterns one could follow, not all of them exemplary. There is no guarantee that even if a disabled student were to model the behavior of a nondisabled classmate that the modeled behavior would be desirable.<sup>137</sup> The idea of modeling also reinforces the stereotype that disabled students will behave abnormally and therefore should learn how to act properly from their nondisabled peers.<sup>138</sup>

### C IDEA Does Not Mandate Full Inclusion

Many advocates of full inclusion interpret IDEA's least restrictive environment provision as a mandate requiring full inclusion of all disabled students.<sup>139</sup> The language of IDEA shows Congress's preference for inclusion, stressing that "to the maximum extent appropriate" a child should be included in the regular classroom at all possible times.<sup>140</sup> The least restrictive environment requirement in IDEA is not an either-or approach—full inclusion or segregated special education—to the integration of disabled students in the regular classroom, rather it requires that schools offer a continuum of educational environments to meet the needs of a diverse student population.<sup>141</sup> The language of the provision full inclusion advocates build their theory upon shows that Congress anticipated situations when inclusion would not be appropriate and set a limitation of "to the maximum extent appropriate" for when disabled students should be

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<sup>135</sup> *Id.* at 826.

<sup>136</sup> *Id.* at 827.

<sup>137</sup> *Id.* at 828.

<sup>138</sup> *Id.* at 827.

<sup>139</sup> Wong, *supra* note 51, at 283. See Seligmann, *supra* note 60, at 776 (discussing the belief that "inclusion" requires that all children be educated in the general classroom and calls for the complete elimination of separate special education classes).

<sup>140</sup> 20 U.S.C. § 1412(5)(A) (2005). See also *Oberti*, 995 F.2d at 1213; *Daniel R.R.*, 874 F.2d at 1044. Both *Oberti* and *Daniel R.R.* recognize the "strong congressional preference" for placing disabled students in general education classrooms.

<sup>141</sup> Wolfe, *supra* note 36, 1634.

educated in the general classroom.<sup>142</sup> IDEA recognizes and endorses the need to educate special needs students in a variety of settings, which further shows that Congress does not mandate full inclusion.<sup>143</sup> The Congressional preference for mainstreaming does not extend to situations where inclusion in a general classroom would hinder the academic achievement of the disabled student; to press for inclusion in such a scenario would be to deprive the student of the free appropriate public education IDEA promises.<sup>144</sup> “Children with disabilities should be mainstreamed in classes with nondisabled children to the maximum extent appropriate, mainstreaming is neither required nor appropriate where it results in total failure and where separate teaching would produce superior results.”<sup>145</sup> While there is a preference for inclusion, the top priority of schools and courts should be the academic education all students. Placing social benefits above academic achievement would cut against the purpose of IDEA.

#### D Costs of Inclusion

If the goals of inclusion are even possible, they will not come without a price. The cost of inclusion is likely to be high, both financially and otherwise. The financial cost of inclusion is considerable, but there are other costs; the price paid by other students, teachers, the learning community as a whole and the disabled student him or herself.<sup>146</sup> The statutory language of IDEA focuses on the disabled student, not the other students in the general education

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<sup>142</sup> Wong, *supra* note 51, at 283.

<sup>143</sup> *Id.* at 292. *E.g.*, 20 U.S.C. § 1412(5)(A) (2005).

<sup>144</sup> *Mavis*, 839 F. Supp. at 981. *E.g.*, *Daniel R.R.*, 874 F.2d at 1044-1045. “Regular classes, however, will not provide an education that accounts for each child’s particular needs in every case. The nature or severity of some children’s handicaps is such that only special education can address their needs. For these children, mainstreaming [may not] ...provide a free appropriate public education.”

<sup>145</sup> *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 897 (9<sup>th</sup> Cir. 1995). The court examined the placement of a high school student with learning disabilities and behavior problems. The court concluded that the child was not achieving in school because of the learning disability and was entitled to an appropriate education, which in this case consisted of placement in a private facility.

<sup>146</sup> See Boeckman, *supra* note 101, at 869-870 (discussing the increasing financial cost of special education); Antoinette, *supra* note 9, at 2047-2055; Dupre, *supra* note 7, at 842-858. Both Antoinette and Dupre examine the cost incurred by the entire educational community to afford inclusion.

classroom.<sup>147</sup> In determining the appropriate least restrictive environment, IDEA prescribes that consideration should be given to “any potential harmful effect on the child or on the quality of services that he or she needs.”<sup>148</sup> IDEA provides safeguards for “any potential harmful effect” to the disabled child.<sup>149</sup> Despite this safeguard for disabled children, courts have not interpreted the statute to consider with equal weight the possible negative effects on the education of nondisabled students or the learning community as a whole.<sup>150</sup>

1) Effects on the nondisabled student

The effect on nondisabled students is a relevant factor in determining the appropriate placement of a disabled child.<sup>151</sup> An IDEA explanatory note states, “where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore placement would not be appropriate to his or her needs.”<sup>152</sup> This provision seems to be concerned with how the inclusion of disabled students may affect nondisabled students in the general classroom’s education; however, a closer reading, “...the needs of the *handicapped child* cannot be met in that environment,” reveals that the needs of the disabled child are still the focus of the provision.<sup>153</sup>

While the court has determined that the disruption a disabled child may cause in the general education classroom is a valid factor to consider when determining placement,<sup>154</sup> it has been difficult to find situations where it is clear that the removal of a disabled child is appropriate. The Third Circuit found that removing a kindergarten student, with Downs Syndrome and serious behavior problems that included toileting accidents, temper tantrums and violence toward the

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<sup>147</sup> 24 C.F.R 300.552(d-e) (2005). This article focuses on cost of inclusion that are not financial.

<sup>148</sup> 24 C.F.R 300.552(d) (2005).

<sup>149</sup> 24 C.F.R 300.552(d).

<sup>150</sup> Dupre, *supra* note 7, at 845.

<sup>151</sup> M.R. by R.R. v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236, 1238 (N.D. Ill. 1994). *E.g.*, 24 C.F.R 300.552 (2005).

<sup>152</sup> Dupre, *supra*, note 7, at 845 (citing 24 CFR 300.552 explanatory note, internal citations omitted).

<sup>153</sup> See *id.* (emphasis added).

<sup>154</sup> 24 C.F.R 300.552 note (2005).

teacher and other students, from the general education classroom was inappropriate.<sup>155</sup> The Third Circuit court felt that the school could have tried harder to find an adequate IEP that used aides in such a way as to prevent disruptions,<sup>156</sup> and in failing to find such an IEP or the failure to show by a preponderance of the evidence that such an IEP was impossible, the removal of the child was improper.<sup>157</sup>

In trying to apply this statute in everyday classroom settings, schools are without a clear directive of how much disruption is too much and when the school has done enough to justify the removal of a child from a regular classroom.<sup>158</sup> Placing such a premium on inclusion, so much so that a *significant* amount of learning may be lost by an entire classroom of students, seems to convey a disturbing message from the courts<sup>159</sup>—that the social gain of a disabled student in a general classroom is more important than the educational gains of an entire classroom of peers.

## 2) Effects on the learning community

Outside of the scenario where a child obviously disrupts the entire classroom, there are other ways that the inclusion of a disabled child can have a negative affect on the entire class. The inclusion of disabled students into the regular classroom may require modification of the normal curriculum, increase in the workload of the teacher, lead to additional teacher stress, and strain already limited teacher time.<sup>160</sup> In considering these potential negative effects on the learning community the court has generally applied the same “significant impairment” standard used for behavioral disruptions.<sup>161</sup>

### (a) Curriculum modification

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<sup>155</sup> *Oberti*, 995 F.2d at 1208.

<sup>156</sup> *Id.* at 1210.

<sup>157</sup> *Id.* at 1223.

<sup>158</sup> Dupre, *supra* note 7, at 846-847.

<sup>159</sup> *Oberti*, 995 F.2d at 1223 (emphasis added).

<sup>160</sup> See Wong, *supra* note 51, at 287-288; Antoinette, *supra* note 9, at 2049-2051.

<sup>161</sup> Antoinette, *supra* note 9, at 2049-2050. Many of these issues are only discussed in the academic theory realm, not in legislative or judicial capacities. The courts nor the legislature have addressed these effects of inclusion; thus far only educational and legal scholars have examined these effects.

In American public schools, there is a general pressure upon educators to have students rapidly progress through subject matter and outperform other nations on standardized testing.<sup>162</sup> The inclusion of a disabled child into the general education classroom often requires modification of the curriculum.<sup>163</sup> In *Oberti*, the court based its decision to integrate a disabled child into the regular environment on non-academic reasons and ruled that the need to modify the curriculum to accommodate the disabled child was not a legitimate reason to exclude the child from the regular classroom unless the education of the other students was significantly impaired.<sup>164</sup> While curriculum modification may not seem to be a significant impairment at first, including the disabled child in the classroom requires the teacher to accommodate the different aptitudes and learning curves of disabled and nondisabled students.<sup>165</sup> Trying to serve the needs of several disabled and nondisabled children with what could possibly be very different abilities can create a scenario in which the lesson is either slowed-down and the nondisabled student will be unchallenged or the lesson is presented at a normal or an accelerated pace and the disabled child will feel overwhelmed and experience a decrease in academic value.<sup>166</sup> Teaching a classroom of children with varying ability levels is difficult, but when there is the added variable of a disabled student, the range of ability levels the teacher must reach with one lesson broadens and the chance of creating a successful lesson plan for all students diminishes.<sup>167</sup>

(b) Stress Levels of Teachers

Inclusion of disabled students into the general classroom places additional stress and work onto the general classroom teacher.<sup>168</sup> Inclusion requires the general education teacher to meet not only the needs of her classroom of students, but also to meet the special needs of disabled students integrated in the regular classroom.<sup>169</sup> Many general education teachers have

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<sup>162</sup> Antoinette, *supra* note 9, at 2049.

<sup>163</sup> *Id.*

<sup>164</sup> *Oberti*, 995 F.2d at 1222. *E.g. Mavis*, 839 F. Supp. at 990.

<sup>165</sup> Antionette, *supra* note 8, at 2049.

<sup>166</sup> *Id.*

<sup>167</sup> *See Id.*

<sup>168</sup> *Id.* at 2052.

<sup>169</sup> *Id.*

inadequate training to plan and deliver instruction to special needs children and lack knowledge and experience in educating disabled students, making all students less likely to receive the education they deserve.<sup>170</sup> Teachers may feel poorly equipped to meet the needs of the special education students in their classrooms.<sup>171</sup> Even when teachers have a general knowledge base about disabilities, they may still lack the classroom management methods and techniques to allow them to meet the needs of a particular disabled student included in the classroom successfully.<sup>172</sup>

The presence of disabled students in the general classroom is overwhelming and stressful when the educator has no special training about how to meet the unique needs of the student.<sup>173</sup> Teachers may feel unprepared to manage the classroom in a way that meets the needs of all students, especially the unique needs of disabled students.<sup>174</sup> Managing a classroom where often over half of the students are included students with special needs is a daunting task, even for a specially trained educator.<sup>175</sup> Further, special education training is not comprehensive and it would be virtually impossible to train every teacher to handle every disability. General classroom teachers are an integral part of successful education; and the education of all students, not just those who are disabled, will suffer if teachers are in situations where they are not happy, comfortable and prepared.<sup>176</sup>

(c) Teacher attention allocation

Teachers may also feel stress from the amount of time and attention required by an included disabled child. The Fifth Circuit ruled that if a disabled child requires so much teacher attention that “the instructor will have to ignore the other student's needs in order to tend to the

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<sup>170</sup> Osgood, *supra* note 48, at 190.

<sup>171</sup> See Wong, *supra* note 51, at 287.

<sup>172</sup> Telephone Interview with Ashley Baker, Math Teacher, Mill Creek High School, October 18, 2005.

<sup>173</sup> *Id.* See Wong, *supra* note 51, at 287.

<sup>174</sup> *Id.*

<sup>175</sup> Telephone interview, *supra* note 172. It is a misconception that only a few disabled students are included in a classroom. Often a teacher deals with many included disabled students of differing abilities and needs. It is common for as many as one-third to one-half of a classroom to consist of included disabled students.

<sup>176</sup> Antoinette, *supra* note 9, at 2052.

handicapped child” then the court may find that the disabled child is better suited in a separate special education placement.<sup>177</sup> However, before the school will remove the disabled child from the general classroom, the school must attempt to provide supplementary services, such as a teacher’s aid, to try to minimize the burden on the teacher and keep the disabled child in the classroom.<sup>178</sup> Only when the disabled student still requires so much of the teacher and the aid’s attention that the rest of the class suffers, will removal be appropriate.<sup>179</sup>

The addition of a teacher’s aid to a classroom may help alleviate some of the direct time burden of dealing with the disabled student from the general classroom teacher, but the teacher’s aid may also bring further complications into the classroom.<sup>180</sup> The presence of an aid may crowd an already crowded classroom or give the general education teacher another person to coordinate with and accommodate<sup>181</sup> and possibly create another distraction in the classroom.<sup>182</sup> The aid that attends to a disabled child in the general classroom may be a teacher with special education training.<sup>183</sup> Many special education teachers are resistant to the idea of collaborating with a general education teacher or working merely as in-class aids as they have special training as educators and are, or consider themselves to be, better trained and qualified than a general education teacher to meet the needs of disabled students.<sup>184</sup>

One example where inclusion created a distracting and negative situation in the general education classroom was where a special education teacher was paid to teach a severely brain damaged child.<sup>185</sup> The child required constant physical care and needed his trachea suctioned

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<sup>177</sup> *Daniel R.R.*, 874 F.2d at 1049.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Antoinette*, *supra* note 9, at 2054.

<sup>181</sup> *Id.*

<sup>182</sup> *Noll*, *supra* note 54, at 258. A special education teacher is paid to teach a severely brain damaged child that requires constant physical care and must have his trachea suctioned every 20 minutes to prevent choking. The child is included in a general classroom for part of the school day. The teacher describes the distraction the suctioning procedure created in the general classroom. “The other kids are frightened by his constant choking, and they can’t just ignore the suctioning procedure.”

<sup>183</sup> *Antoinette*, *supra* note 9, at 2054.

<sup>184</sup> *Id.*

<sup>185</sup> *See Noll*, *supra* note 54 at 258.

every 20 minutes to prevent choking. The general education teacher described the suctioning procedure as distracting and frightening to the other children.<sup>186</sup> While, the intention behind placing an aid in the classroom is to help relieve the burden placed on the general education teacher, the actual result may be adding yet another task to the already overworked general education classroom teacher.

### (3) Effects of the disabled student

Many advocates for the disabled are reluctant to consider inclusion the optimal method of education for those with special needs.<sup>187</sup> Many that helped fight for the rights of disabled students are especially wary of inclusion, fearing that it will be destructive to special education.<sup>188</sup> The deaf community in particular has been slow to embrace inclusion.<sup>189</sup> The deaf see inclusion as an attack on deaf culture, and while they agree that it might be possible to structure a general education classroom to meet the needs of deaf students, any benefits gained in the general education classroom would not outweigh what is lost in the absence of a “close-knit, independent group of deaf children as peers.”<sup>190</sup> The deaf community sees its interdependence and group identity as a major support system for the deaf and a valuable reason to opt out of inclusion.<sup>191</sup>

“Inappropriate inclusion of a disabled student into the general classroom may perpetuate or even enlarge the stigma of disability.”<sup>192</sup> An inappropriately included disabled student may hold back classmates by slowing down the speed at which material is introduced, limiting the depth of material covered in the curriculum, requiring an inordinate amount of the teacher’s time or disrupting the class either because of the presence of supplements and aids or because the child is literally disruptive.<sup>193</sup> Also, the disabled student may receive special accommodations or allowances that the general students views as unfair and may cause resentment toward the

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<sup>186</sup> *Id.*

<sup>187</sup> Osgood, *supra* note 51, at 196-197.

<sup>188</sup> Craparo, *supra* note 4, at 499.

<sup>189</sup> Osgood, *supra* note 51. at 186-187.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 25-27.

<sup>192</sup> Antoinette, *supra* note 9, at 2055.

<sup>193</sup> *Id.*

disabled student in their classroom or disabled students in general.<sup>194</sup> In one instance, an ADHD student included in a high trigonometry class, had an IEP stating that he was to be given copies of class notes from a high-achieving student at the end of each class period because his disability prevented him from paying attention and taking complete notes.<sup>195</sup> When other students learned of this accommodation, they expressed anger, resentment and bitterness toward the included student.<sup>196</sup> This does not represent the harmonious learning environment IDEA seeks to promote. Further, this experience contradicts the idea purported by full inclusion advocates that inclusion will decrease the stigma of the disabled; in this case, the stigma is increased. While there are exceptions to every rule, this experience presents the possibility that there are times when full inclusion is not appropriate and potentially harmful to the included student.

#### 4 Education may not be the top priority in educating the disabled

One of the most disturbing aspects of full inclusion is the loss of academic achievement as the top priority in the education of disabled students. In *Oberti*, the court determined that there should be special attention paid to “those unique benefits a child can obtain only from integration” in deciding the proper placement of a disabled student.<sup>197</sup> Using this “special attention” idea, the court determined that mainstreaming the child was appropriate even when local educators testified that the child could not obtain even a minimal benefit from mainstreaming.<sup>198</sup> Replacing the possibility of academic achievement with a minimal benefit from mainstreaming is contradictory to the goals of IDEA.

The U.S. Department of Education research may indicate that students with disabilities included in general education classrooms fail more often than do those taught in special classrooms.<sup>199</sup> Often a child is removed from a special education setting to improve his or her self-esteem and to help remove the stigma of special education only to be placed in an

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<sup>194</sup> *Id.* See also, Telephone Interview with Ashley Baker, *supra* note 172.

<sup>195</sup> Telephone Interview with Ashley Baker, *supra* note 172.

<sup>196</sup> *Id.*

<sup>197</sup> *Oberti*, 995 F.2d at 1216.

<sup>198</sup> Bryant, *supra* note 8, at 103. *E.g.*, *Oberti*, 995 F.2d at 1222-1223.

<sup>199</sup> Noll, *supra* note 54, at 259. This is not clear, but research suggests such an effect.

environment that can offer him or her nothing more than a minimal educational benefit and set him or her up for academic failure.<sup>200</sup> Choosing such a placement seems to subvert the Congressional goals of IDEA and go against the best interest of the disabled student.

#### E Defer to teachers

Many reports and advocacy statements in support of full inclusion lack the support of professional literature, but rather base their arguments on more emotional appeals of parents and students.<sup>201</sup> Many rationales for inclusion use arguments of socialization and modeling and frequently rely on anecdotal evidence and the attitudes, feelings and thoughts of parents and students to support inclusion.<sup>202</sup> Inclusion arguments often rely on emotion, and many claims cannot be validated, lack an empirical basis and lack the practical aspects required of an educational plan to meet the real needs of disabled students.<sup>203</sup>

If inclusion is to be a viable part of the education of disabled students in the public schools, then the courts must give greater deference to the educators that make placement decisions, evaluate and work with disabled students everyday. Teachers and other members on the IEP team are “in the trenches” and see what is practically working for each child. If the courts are to honor the intent of Congress and IDEA, to provide all disabled children with a free appropriate public education, then the decisions, evaluations and assessments of specially trained educators must be respected in order to provide each disabled child, and their nondisabled classmates, an environment within which they can succeed.

#### V Conclusion

The idea of treating all students the same seems very appealing at first blush. However, the general education classroom is simply not always the best place for all children. The inclusion debate has always been with us, from eighteenth century teachers who tried to socialize

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<sup>200</sup> See Dupre, *supra* note 7, at 828-829 (discussing the idea of modeling and the frustration many students feel when asked to imitate the behavior of another student fundamentally unlike them).

<sup>201</sup> Osgood, *supra* note 51, at 186-187.

<sup>202</sup> *Id.* at 186-187.

<sup>203</sup> *Id.* at 188-189

disabled students with nondisabled peers; to the current movement to include all children of all disabilities into the regular classroom. There has always been an idea that disabled students should be educated with nondisabled children.<sup>204</sup> There is a definite preference for the placement of children in the general classroom, but until they are adequately trained teachers, properly funded schools, adequate resources, and the physical ability accommodate all students, full inclusion will be nothing more than short-changing those students that inclusion seeks to benefit.<sup>205</sup>

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<sup>204</sup> *Id.* at 191-192.

<sup>205</sup> *Id.* at 194-196.

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