The Desegregation of Children with Disabilities

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THE DESEGREGATION OF CHILDREN WITH DISABILITIES*

We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.¹

Inclusion is a right, not a privilege for a select few.²

The perception that a segregated institution is academically superior for a [disabled] child may reflect no more than a basic disagreement with the mainstreaming concept.³

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3. Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (citation omitted). "Mainstreaming" is the term commonly used to denote the integration of children with disabilities in the regular classroom. See Board of Educ. v. Holland, 786 F. Supp. 874, 878 n.6 (E.D. Cal. 1992) (noting that "mainstreaming" is technically distinguishable from "inclusion" by the fact that children whose primary placement is a special education class may be "mainstreamed" in the regular education classroom for parts of the day, while under "inclusion" a child's primary placement is the regular education classroom), aff'd sub nom. Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994). For purposes of this Comment, "mainstreaming" and "inclusion" will be used interchangeably to denote the integration of disabled children into the regular education classroom.
II. CONCLUSION

In 1975, Congress passed the Education for All Handicapped Children Act (now part of the Individuals with Disabilities Educa-
tion Act)\(^4\) ("IDEA" or "Act"). The Act held out hope for parents of children with disabilities that their children would not be denied a "free appropriate public education" on the basis of their disability.\(^5\) For other parents, however, whose children were already being educated in segregated special education classes, the Act held out a different hope — the hope that their children would now be given an opportunity to be educated along side their non-disabled peers.\(^6\) The provision in the IDEA that ignited this hope obligates the states to "assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled," and that children are not removed from the regular classroom unless they cannot be satisfactorily educated there with the use of "supplementary aids and services."\(^7\) Notwithstanding this expression of Congressional preference for educating children with disabilities with non-disabled children, only about one-third of the approximately five million disabled children receiving a special education in the 1990-91 school year were educated entirely in the regular education classroom.\(^8\) Few children with severe intellectual disabilities are educated in the regular classroom. For example, only 7.4% of the mentally retarded children were educated in the regular classroom. For example, only 7.4% of the mentally retarded children were educated in the regular classroom in the 1990-91 school year.\(^9\)

The question of whether all children with disabilities should be educated in the regular classroom has become a topic of intense national debate involving educators, parents, and advocates for the disabled.\(^10\) In the meantime, parents and school boards continue to go

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7. Id. Popularly termed the "mainstreaming mandate" or "least restrictive environment" provision, this Comment draws no distinction between the two terms.
8. U.S. DEPT OF EDUCATION, FIFTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES ACT 16 (1993) [hereinafter DOE 15TH ANNUAL REPORT]. In Illinois, only 3.2 percent of all categories of children with disabilities were fully included in the regular classroom for the 1990-91 school year. ILLINOIS PLANNING COUNCIL ON DEVELOPMENTAL DISABILITIES & ILLINOIS STATE BOARD OF EDUCATION, THE IDENTIFICATION OF FINANCIAL DIS INCENTIVES TO EDUCATING CHILDREN AND YOUTH WITH MODERATE TO SEVERE AND MULTIPLE DEVELOPMENTAL DISABILITIES IN THEIR HOME SCHOOLS 47-48 (1993) [hereinafter FINANCIAL DIS INCENTIVES]. Of those children that were fully included, 97% had physical rather than cognitive impairments. Id. at 49.
9. DOE 15TH ANNUAL REPORT, supra note 8, at 21 (Table 1.6).
10. Compare NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION, WINNERS ALL: A CALL FOR INCLUSIVE SCHOOLS 4 (1992) (calling for state and local school boards to make a
to court to resolve disputes over what the IDEA's mainstreaming mandate requires. Recently, two federal courts issued decisions that have garnered national attention. In *Oberti v. Board of Education*, the Third Circuit affirmed a district court decision holding that the school district had not proven that a six-year-old boy with Down's Syndrome — a genetic defect seriously impairing the child's intellectual functioning and ability to communicate — could not be educated in the regular classroom with supplementary aids and services. In *Sacramento City Unified School District v. Rachel H.*, the Ninth Circuit affirmed a district court decision holding that a moderately retarded eleven-year-old girl should be educated in the regular classroom with supplemental services. These decisions only
sharpen the conflict in the federal appellate courts over precisely what is the substantive standard for mainstreaming children with disabilities.17

This Comment aims to illuminate the contours of that conflict and to advance an interpretation of the mainstreaming provision that is consistent with other key provisions of the IDEA and the Americans with Disabilities Act.18 Next, the broad implications of such an interpretation are discussed, underscoring the important role of independent judicial review of educational placement decisions.19

II. BACKGROUND

A. A History of De Jure Exclusion

The history of educating children with disabilities in the United States is a tale of neglect and exclusion.20 One study found that as late as 1969, only seven states were educating more than fifty-one percent of their disabled children.21 Until recently, exclusion of children with disabilities from public schools enjoyed the imprimatur of state courts and legislatures.22 In 1893, the highest court of Massachusetts upheld the expulsion from the public schools of a child who was "weak in mind."23 In 1919, the Wisconsin Supreme Court approved the exclusion of a child who was capable of benefiting from a public school education, but had a speech impediment and displayed facial contortions and uncontrollable drooling.24

17. See infra notes 182-340 and accompanying text (discussing the mainstreaming mandate and the courts' responses to that mandate). The Supreme Court has never heard a case that clearly presented the question of what the "mainstreaming" mandate requires.

18. 42 U.S.C. § 12101 (West Supp. 1994); see infra notes 105-81 and accompanying text (discussing in depth the IDEA and Americans with Disabilities Act provision).

19. See infra notes 502-13 and accompanying text (discussing the effects of desegregating children with disabilities).


As late as 1958, the Illinois Supreme Court held that the state compulsory education statute did not require the state to provide a free public education to children with mental impairments; and in 1965, a North Carolina statute made it a crime for parents to "persist[] in forcing . . . [the] attendance" of a child with disabilities who school authorities had determined could not "profit from instruction."

B. Early Legislative Reforms

Early legislative reforms in the education of children with disabilities began with the establishment of state and city schools for the deaf and blind in the nineteenth century. The state of Kentucky established the first state school for the deaf in 1823, and other states followed. The first public day school for deaf children was established in Boston in 1869, and by 1900, various large cities had created public school programs for disabled children. The federal government contributed in 1864 when Abraham Lincoln signed a bill creating Gallaudet College, a college for the deaf.

Significant developments occurred in the first quarter of this century as New Jersey, New York, and Massachusetts passed the first mandatory special education programs. Minnesota created special education certification requirements in 1915, and in 1919, Pennsylvania provided for cooperative agreements between school districts for the delivery of special education. Oregon began funding classes for "educationally exceptional children" in 1923.

The federal government's first significant commitment to special education occurred in 1958 with the appropriation of funds for the

28. Id.
29. Id.
30. Id. The federal government first got involved in special education in 1827 when it sold land to Kentucky for use by the state school for the deaf. WEBER, supra note 11, § 1.1 at 1:2 n.9.
33. Id. Oregon's program for "educationally exceptional children" included classes for "gifted" children. Id.
training of teachers of the mentally retarded. That same year, Congress also enacted the National Defense Education Act of 1958 which provided the first substantial federal subsidies to public schools.

The Elementary and Secondary Education Act of 1965 ("ESEA") provided funds to improve educational opportunities for disadvantaged children including children with disabilities. One year later, the ESEA was amended to add Title VI, establishing grants for the education of children with disabilities. These federal efforts were expanded in 1970 when Congress passed the Education of the Handicapped Act ("EHA"). In the years immediately following the passage of the EHA, federal subsidies for special education increased substantially.

Thus, by the early 1970s, school districts were providing more and more disabled children with a free, public education. However, the disparity between educational opportunities for children with disabilities and non-disabled children remained conspicuous and systemic. Drawing on the landmark Supreme Court decision in Brown v. Board of Education, parents and advocates went to court in unprecedented numbers in the early 1970s, claiming that an equal educational opportunity for disabled children was guaranteed by the Due Process and Equal Protection clauses of the Fourteenth


35. Pub. L. No. 85-864, 72 Stat. 1580 (1958). The Act was categorical, focusing on "specific national needs and populations." One of its primary purposes was to advance "the education of gifted and talented children." Weintraub & Ballard, supra note 27, at 2.


37. Id.


39. WEBER, supra note 11, § 1.3(1) at 1:4 (citing Donald W. Keim, Note, The Education of All Handicapped Children Act of 1975, 10 U. MICH. J.L. REF. 110, 119 (1976)). A number of state legislative reforms were also enacted in the early 1970s. See H.R. REP. No. 332, 94th Cong., 1st Sess. 10 (1975); Merle McClung, Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?, 3 J.L. & EDUC. 153, 167-71 (1974) (discussing state constitutions, statutes, and regulations which explicitly provide or imply a right to an adequate or minimally adequate education).

40. See H.R. REP. No. 332, 94th Cong., 1st Sess. 11 (1975) (finding that "over 50 percent of the [disabled] children in this Nation . . . are denied a fundamental educational opportunity").

C. Constitutional Theories of Educational Opportunities for Children with Disabilities

1. A Constitutional Right to Education

Constitutional theories of equal educational opportunity for children with disabilities are rooted in the United States Supreme Court's decision in Brown v. Board of Education. The Court's decision in Brown rested on several findings. First, the Court noted the importance of education to a democratic society and to a child's ability to succeed in life. Consequently, the Court held that an educational opportunity is so important that "where the state has undertaken to provide it, [it] is a right which must be made available to all on equal terms." Secondly, the Court found that segregating school children on the basis of race engendered feelings of inferiority and that such de jure segregation had "a tendency to [retard] the educational and mental development of negro children." Thus, the Court ruled that "separate but equal" educational facilities for black students was inherently unequal, depriving black children of the equal protection of the laws guaranteed by the Fourteenth Amendment.

42. Weber, supra note 11, § 1.2 at 1:3 (citing Alan Abeson, Movement and Momentum: Government and the Education of Handicapped Children-I, 41 Exceptional Children 109, 113 (1974)).
43. 347 U.S. 483 (1954). The Brown decision was foreshadowed by the Supreme Court's decisions in Sweatt v. Painter, 339 U.S. 629, 634 (1950) (holding that a black law school was not in fact equal and citing not only the tangible but the intangible inequalities between the two schools) and McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950) (finding that physical segregation of a black student within a previously all-white university prevented the student from receiving an equal educational opportunity because the segregation "[impaired] and [inhibited] his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession").
44. Brown, 347 U.S. at 493 ("[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship."").
45. Id. ("Today, [education] is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.").
46. Id.
47. Id. at 494.
48. Id. (citation omitted).
49. Id. at 495. For a concise discussion of the rationales for the Court's holding in Brown, see Geoffrey R. Stone, et al., Constitutional Law 499-504 (2d ed. 1991); Laurence H. Tribe, American Constitutional Law 1474-80 (2d ed. 1988).
While *Brown v. Board of Education* addressed the equal protection concerns raised by the segregation of black children, *Pennsylvania Association for Retarded Children v. Pennsylvania* ("P.A.R.C.") is one early case to consider the implications of the Fourteenth Amendment for the disparate treatment of children with disabilities. In that case, a three-judge federal district court panel held that the plaintiff class of mentally retarded children had made out a colorable constitutional claim on both equal protection and due process grounds.

Crediting expert testimony that mentally retarded children can benefit from education and training, the court decided that there was no rational basis for the school districts' complete denial of an educational opportunity to mentally retarded children. Thus, the court held that the disparate treatment the plaintiffs were accorded presented a colorable equal protection claim. The panel also found that the danger of misdiagnosis or placement in overly restrictive environments, and the attendant stigmatization, implicated a child's "liberty" interest which cannot be infringed without due process. Since the school districts did not provide aggrieved parents with a hearing, the court held that the plaintiffs had made out a colorable due process claim. *P.A.R.C.* resulted in a consent decree whereby mentally retarded children were guaranteed "access to a free public program of education and training appropriate to [the] capacities" of each child. Further, the school districts were obligated to presume that "placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program."

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51. *P.A.R.C.* resulted in a consent decree to which only one school district objected. 334 F. Supp. at 1258. Thus, the court's second proceeding was confined to the narrow issue of whether the plaintiffs presented a colorable or plausible constitutional claim sufficient to support the court's jurisdiction to approve the decree. *P.A.R.C.*, 343 F. Supp. at 279.
52. *Id.*
53. *Id.*
54. *Id.* at 297.
55. *Id.* at 293-95.
56. *Id.* at 295.
57. *Id.* at 314.
58. *Id.* at 307. The consent decree also entitled the parents of mentally retarded children, or children thought to be mentally retarded, to notice and an opportunity for a hearing before any change in the child's educational status. *Id.* at 303. Also, reevaluation was required every two years and the child's parents could request reevaluation annually. *Id.* at 314.
Mills v. Board of Education is another early case where a district court addressed a constitutional challenge to the exclusion of children with disabilities from public schools. Applying the Due Process Clause of the Fifth Amendment, the court found that complete denial of an educational opportunity to children with disabilities or exclusion from a special education program without a prior hearing violated the children's constitutional rights. Further, the cost of educating disabled children was not a sufficient cause for exclusion. The burden of the school district’s inadequacies could not be permitted to fall heavier on children with disabilities than on children without disabilities.

P.A.R.C. and Mills are but two cases from the 1970s that found a constitutional right to educational opportunity for disabled children. However, not all courts that addressed the issue during that time period found such a constitutional right. Further, the United States...
States Supreme Court's 1973 decision in *San Antonio School District v. Rodriguez* cast doubt on the notion that disabled children had a constitutional right to a particular level of educational benefit. In that case, the Court upheld a school financing system where schools were funded primarily with local property taxes, even though it resulted in disparities in the amount of funding from district to district. The Court rejected an equal protection argument, concluding that education is not a fundamental right triggering the "strict scrutiny" test. However, the Court warned that it was not passing on the constitutionality of an "absolute denial of educational opportunity" and expressly assumed that all children in the state were receiving an opportunity to acquire basic skills. Thus, *Rodríguez* did not foreclose equal protection claims by disabled children receiving no education or an inadequate education.

More recent Supreme Court opinions have plainly held that education is not a "fundamental right" triggering "heightened" or "strict scrutiny" in the absence of a suspect or semi-suspect classification. And, in *City of Cleburne v. Cleburne Living Center*, the

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68. Id.
69. Id.
70. Id. at 33-36. For purposes of equal protection analysis, the Supreme Court has authorized three tests—"rational basis," "strict scrutiny," and "intermediate or heightened scrutiny." Normally, the Court applies the rational basis test; the state's classifications are only required to have "some fair relationship to a legitimate public purpose." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (5-4 decision). The "strict scrutiny" test requires the state to demonstrate that the classification employed is "precisely tailored to serve a compelling governmental interest." *Id.* at 217. The strict scrutiny test is applied to discrimination claims involving either a "fundamental right" or "suspect classifications." *Maher v. Roe*, 432 U.S. 464, 471 (1977). "Fundamental rights" include the right to vote, the right to interstate travel, and the right to access to the judicial process. * Tribe, supra* note 49, at 1454-65. The archetypal "suspect classification" is one based on race. *Id.* at 1465. Sex, national origin, alienage, and illegitimacy have, with exceptions, triggered "heightened" or "intermediate" scrutiny. *Id.* at 1610. "Intermediate scrutiny" requires that the asserted classification serve "important governmental objectives and be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to gender-based classifications).
72. Id.
73. Id.
74. See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-62 (1988) (upholding a fee for transporting students between home and school on the grounds that wealth is not a "suspect classification" and the right to attend school does not trigger strict or heightened scrutiny in the absence of a suspect or semi-suspect class); *Martinez v. Bynum*, 461 U.S. 321, 328 n.7 (1983)
United States Supreme Court held that the mentally retarded are not a suspect or semi-suspect class. However, Congress recently found that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.” Thus, while the United States Supreme Court has not found the Fourteenth Amendment to accord special protection to individuals with disabilities, Congress has invoked “the sweep of congressional authority, including the powers to enforce the fourteenth amendment... to address the major areas of discrimination faced day-to-day by people with disabilities.”

2. A Constitutional Right to Education in the Least Restrictive Environment

Children with disabilities have been segregated from children without disabilities not only by their exclusion from the public schools, but by their placement in separate schools and classrooms. The United States Supreme Court held in Brown v. Board of Education that a segregated education for black school children was an “inherently unequal” education due to the possibly irreparable injury to a child’s motivation caused by the feelings of inferiority engendered by segregation. No court has ruled on whether the segregation of children with disabilities in separate schools or classrooms is “inherently unequal” because of the stigma that attaches from exclusion from the regular educational program. However, the
consent agreement approved by the court in *P.A.R.C.* obligated the state to adopt a policy of preferring placement in a regular classroom over placement in a special education classroom; and placement in a special education classroom over placement in another institution.82

One commentator concludes that the early judicial remedy of preferring that children with disabilities be educated with their non-disabled peers is an application of the principle that when legitimate state interests conflict with the constitutional rights of individuals, the state must adopt the "least restrictive alternative" to attaining its objective.83 A segregated education, it is argued, implicates the disabled child's First Amendment right of association with non-disabled children,84 and the child's liberty interest in reputation (avoidance of stigma).85

The countervailing state objective, however, is the goal of providing disabled children with an education "appropriate to [their] capacity."86 Providing an "appropriate" education is presumed to require an alternative placement where the child's educational needs cannot be satisfactorily met in the regular classroom.87 Thus, the "least restrictive alternative" principle serves to protect the rights of disabled children by requiring the state to achieve its educational objectives in a fashion that places the "least restrictions" on the ex-


84. TURNBULL, supra note 83, at 148; see also Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 34 (1959) (recasting the issue of state-enforced segregation as one involving the freedom to associate).

85. See P.A.R.C., 343 F. Supp. at 293-95 (discussing the stigma that attaches to the labeling of children as mentally retarded); cf. Bolling v. Sharpe, 347 U.S. 497, 500 (1957) ("Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children [a] burden that constitutes an arbitrary deprivation of their liberty.") (emphasis added). Professor Turnbull suggests that equal protection concerns are also implicated since the separate educational programs for children with disabilities, not unlike the separate education programs for black children, were generally unequal to that provided for non-disabled children. TURNBULL, supra note 83, at 150.


87. TURNBULL, supra note 83, at 163; see P.A.R.C., 343 F. Supp. at 297 (noting that plaintiffs did not object to separate special education classes or the "proper assignment" of retarded children to special classes).
exercise of fundamental rights.\(^8\)

The United States Supreme Court has never ruled that the segregated education of children with disabilities implicates a child’s right of association or that the stigma of segregation violates the Fourteenth Amendment guarantees of equal protection and due process. Nor has the Supreme Court ever held that the Constitution requires states to educate children with disabilities in the “least restrictive” setting. Nevertheless, the notion that children with disabilities have a right to be educated in the “least restrictive” setting has been codified in three federal statutes.

**D. The Rehabilitation Act of 1973 - Congress Recognizes the Civil Rights of the Disabled**

Passage of the Rehabilitation Act of 1973 was the first significant legislation by Congress to address discrimination against the disabled.\(^8\) Section 504 of the Rehabilitation Act bars discrimination against persons with disabilities in connection with all federally assisted activity.\(^9\) Since children in need of special education are

\(^8\) TURNBULL, supra note 83, at 148. For an instructive discussion of the “least restrictive alternative” principle in a related area, see David L. Chambers, Alternatives to Civil Commitment of the Mentally Ill: Practical Guidelines and Constitutional Imperatives, 70 Mich. L. Rev. 1108, 1145-54 (1972). See generally TASK FORCE ON LEAST RESTRICTION, supra note 83 (discussing the “least restrictive alternative” principle as it relates to treatment of the mentally retarded).


The time has come when we can no longer tolerate the invisibility of the handicapped in America. I am talking about over 1 million American children who are excluded from school . . . [T]oo often we keep children whom we regard as “different” or a “disturbing influence,” out of our schools and community activities altogether, rather than help them develop their abilities . . .


No otherwise qualified individual with handicaps in the United States . . . shall,
deemed to have disabilities under Section 504, and public education is a federally assisted activity, Section 504 protects children with disabilities from discrimination in the provision of education.91

A fundamental issue in the implementation of Section 504 is whether the statute bars only intentional discrimination, or whether it also requires accommodation to those disparately impacted by program characteristics.92 The United States Supreme Court clarified its position in Alexander v. Choate,93 stating that Section 504 does not require “fundamental” or “substantial” modifications to accommodate “otherwise qualified” disabled persons.94 However, “reasonable accommodations” necessary for meaningful access is

solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.


92. Wegner, Equal Opportunity, supra note 90, at 401; see, e.g., Smith v. Robinson, 468 U.S. 992, 1018 (1984) (stating that § 504 “does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination”); Southeastern Community College v. Davis, 442 U.S. 397, 410-12 (1979) (distinguishing between the “even handed treatment of qualified [disabled] persons,” which is required by § 504, and “affirmative action” which is not).

93. 469 U.S. 287, 306-309 (1985) (unanimous decision) (holding that state Medicaid policy of limiting benefits for hospitalization stays to a 14-day maximum, though having a disparate impact on the disabled, did not violate § 504 in view of the “meaningful access” currently enjoyed by the disabled, and the burdens that expanded coverage for the disabled would impose on the state).

94. Id. at 300 n.20.
required.96 Notwithstanding the Supreme Court’s views, the regulations issued pursuant to Section 504 for preschool, elementary, and secondary education require schools to make substantial accommodations for disabled students.96 Specifically, the regulations require “that a recipient of federal assistance that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s handicap.”97 An appropriate education is defined by the regulations as one that is “designed to meet individual educational needs of [disabled] persons as adequately as the needs of [non-disabled] persons are met.”98

In addition, the regulations require that students with disabilities be educated in the “least restrictive environment”99 and that facilities for disabled students be comparable to those for non-disabled students.100 Students are insured non-discriminatory evaluation and placement guarantees,101 procedural safeguards,102 and an equal opportunity to participate in non-academic and extracurricular activities,103 preschool, and adult education programs.104

E. Education for All Handicapped Children Act of 1975.

The passage of the Education for All Handicapped Children Act of 1975 (now part of the IDEA)106 heralded an unprecedented com-
mitment by Congress to address in a comprehensive way the inade-
quacies and inequities it perceived in the education of children with
disabilities.\textsuperscript{106} Congress expressly found that the "special educa-
tional needs of . . . children [with disabilities] are not being fully
met;"\textsuperscript{107} and that "it is in the national interest that the Federal Gov-
ernment assist State and local efforts to provide programs to . . .
children with disabilities \textit{in order to assure equal protection of the
law.}\textsuperscript{108}

1. \textbf{The Legislative History of IDEA}

The legislative history of the IDEA makes clear that the Act was
intended to address the equal protection and due process concerns
raised in the early "right to education" cases.\textsuperscript{109} Quoting \textit{Brown v.
Board of Education}, the Senate Committee on Labor and Public
Welfare stated that the Supreme Court had established the principle
that "all children be guaranteed equal educational opportu-

the Education for All Handicapped Children Act of 1975, Congress enacted an interim measure
intended to redress what it perceived to be the continuing inequities in the education of disabled
175; see H.R. Rep. No. 332, 94th Cong., 1st Sess. 4-5 (1975) (explaining that the Education
Amendments of 1974 required states receiving federal special education funding to (a) set a goal
for providing educational opportunities to all children with disabilities, (b) provide procedural
safeguards for parents of children denied appropriate services; and (c) give assurances that chil-
dren with disabilities would be educated in the least restrictive environment).


\textsuperscript{108} Id. § 1400(b)(9) (Supp. V 1993) (emphasis added). The foregoing language was carefully
considered by the House-Senate Conference Committee, the House acceding to the Senate bill
statement that assuring "equal protection of the laws" was an objective of the Act. Joint Explanatory
Statement of the Committee of Conference, S. CONF. REP. No. 455, 94th Cong., 1st Sess. 28-

\textsuperscript{109} See S. Rep. No. 168, 94th Cong., 1st Sess. 8 (1975) (stating that the Education Amend-
ments of 1974 — which include requirements of "full educational opportunity," procedural pro-
tections, and placement in the "least restrictive environment" for all children with disabilities —
incorporated the principles of the right to education cases), reprinted in 1975 U.S.C.C.A.N. 1432;
H.R. Rep. No. 332, 94th Cong., 1st Sess. 5 (1975) (stating that the IDEA was intended to effec-
tuate the purposes of the 1974 amendments) \textit{discussed and quoted in} Board of Educ. v. Rowley,
458 U.S. 176, 194, n.18. For legislative history discussing the right of children with disabilities to
equal protection, see H.R. Rep. No. 332, 94th Cong., 1st Sess. 3, 10, 14 (1975); S. Rep. No. 168,
94th Cong., 1st Sess. 5-6, 9, 22-23 reprinted in 1975 U.S.C.C.A.N. 1429-30, 1433, 1446-47; S.
CONF. REP. No. 455, 94th Cong., 1st Sess. 28-29 (1975), reprinted in 1975 U.S.C.C.A.N. 1481-
83; 121 CONG. REC. 19,478-511, 23,701-10, 25,526-48 (1975). For a discussion of early "right to
education" cases, see \textit{supra} notes 43-78 and accompanying text.
Committee's Report further stated that "Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." Moreover, the Senate Committee recognized the states' "primary responsibility" to uphold the Constitution of the United States, rejecting the argument that state compliance should hinge on the federal government's ability to cover the full cost of educating all children with disabilities.

The legislative history evinces Congress's view that desegregating children with disabilities is a matter of constitutional dimension. The drafters of the Act were concerned about the threat to individual liberty posed by risks of mislabeling, placement in needlessly restrictive environments, and the attendant stigma that would attach. These concerns were directly raised in P.A.R.C., a case that established principles which to a "significant extent" guided the drafters of the IDEA. There, the court concluded that the risks of mislabeling, placement in overly restrictive environments, and the attendant stigmatization, implicated the "liberty" interest of mentally retarded children. Thus, due process guarantees for parents were made a part of the consent decree approved by the court, as well as a stated preference for educating children in the least restrictive environment. Drawing on the principles articulated in


117. Id. at 308.

118. Id. at 307.
P.A.R.C., Congress viewed the “mainstreaming” mandate as a central component of the Act, a crucial right of parents and children meriting due process protection. As the House Report issued by the Committee on Education and Labor explains, the elaborate due process procedures mandated by the Act are designed, inter alia, to assure that every child with a disability is “in fact” afforded an education in the “least restrictive environment.”

Notably, members of Congress believed that educating disabled children with non-disabled children would have as much effect on children without disabilities as it would on children with disabilities. Senator Stafford, a sponsor of the Act, wrote of the disabled child’s “invisibility” — kept out of sight, and when seen by others, seen not as an individual, but as a manifestation of a disabling condition. Once disabled children are mainstreamed, it was hoped, other children would come to see the disabled children as having a disability, not as a disability. Children would grow up realizing that their peers with disabilities are “neither threatening nor evil.” This would have the salutary effect of advancing the integration of individuals with disabilities — children and adults — into

119. A Senate Conference Report stated:

while instruction may take place in such locations as classrooms, the child’s home, or hospitals and institutions, the delivery of such instruction must take place in a manner consistent with the requirements of law which provide that to the maximum extent appropriate handicapped children must be educated with children who are not handicapped, and that handicapped children should be placed in special classes, separate schooling, or any other educational environment only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and supportive services cannot be achieved satisfactorily.


121. Id.


123. Id.


125. Id.
the "mainstream" of society.\textsuperscript{126}

The integration of individuals with disabilities into the main-
stream of society was not only a constitutional concern to Congress
but an economic concern as well.\textsuperscript{127} Congress viewed the prevalence
of dependency and unproductivity among the adult disabled popu-
lation as a problem that begins in the schools.\textsuperscript{128} Artificial barriers to
the full participation of individuals with disabilities not only perpet-
uate the stigma and indignity of institutionalization and dependen-
cy, but impose substantial financial burdens on families and ulti-
mately society as a whole.\textsuperscript{129} Consequently, Congress believed that
money spent on educating children with disabilities to be self-suffi-
cient adult members of society would be more humane, and less ex-
pensive to society than maintaining such persons as welfare depen-
dents or in institutions.\textsuperscript{130}

2. Overview of the Act\textsuperscript{131}

The concerns raised in the legislative history of the IDEA also
find expression in the Congressional statement of findings and pur-
pose that begin the Act.\textsuperscript{132} The findings include:

(1) "more than half of the children with disabilities in the United
States do not receive appropriate educational services which would
enable them to have full equality of opportunity,"\textsuperscript{133}

(2) "one million of the children with disabilities in the United
States are excluded entirely from the public school system and will

\textsuperscript{126.} Id.
\textsuperscript{127.} See S. REP. No. 168, 94th Cong., 1st Sess. 9 (1975) (noting that "billions of dollars are
expended each year to maintain [disabled] persons in these subhuman conditions"), \emph{reprinted in}
\textsuperscript{128.} Id. (noting that providing educational services to children with disabilities will "ensure
against persons needlessly being forced into institutional settings").
\textsuperscript{129.} Id.
\textsuperscript{130.} Id.; see also John Harrison, Comment, \emph{Self-Sufficiency Under the Education for All
Handicapped Children Act: A Suggested Judicial Approach}, 1981 DUKE L.J. 516, 521-28 (em-
phasizing Congress' perception that children with disabilities need to achieve self-sufficiency so as
not to become a burden to society or the child's family, and to avoid the indignity of institutional-
(stating "the Nation's proper goals regarding individuals with disabilities are to assure equality of
opportunity, full participation, independent living, and economic self-sufficiency for such
individuals").
\textsuperscript{131.} For a more comprehensive overview of the IDEA, see generally Weber, \emph{supra} note 11;
Wegner, \emph{Statutory Maze, supra} note 90.
\textsuperscript{133.} Id. § 1400(b)(3) (Supp. V 1993).
not go through the educational process with their peers;”  

(3) "because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;”

(4) "developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services . . . .”

The principle purposes of the Act are to assist and assure that states and localities provide children with disabilities a "free appropriate public education which emphasizes special education and related services designed to meet their unique needs," and "that the rights of children with disabilities and their parents . . . . are protected.”

The IDEA is a grant-in-aid statute which conditions receipt of funds on meeting specified obligations. To qualify for funding, the state must pursue a "zero-reject" policy that "assures all children with disabilities the right to a free appropriate public education".

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134. Id. § 1400(b)(4).
135. Id. § 1400(b)(6) (1988).
137. Id. § 1400(c).
138. Id. § 1412 (1988 & Supp. V 1993). The question whether the IDEA was enacted under authority of the Fourteenth Amendment or the spending power, and the implications this would have for interpreting the IDEA, is beyond the scope of this Comment. See generally ZELIN, supra note 74, at 3-9.

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, or other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services.


"Special education" is defined as specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.

Id. § 1401(a)(16).

"Related services" means
In addition, the state must submit a plan detailing the policies and procedures the state will undertake to assure, among other things, that all children with disabilities in need of special education are identified and evaluated, procedure safeguards mandated by the Act will be observed, and testing and evaluation materials used will not be racially or culturally discriminatory.

The Act also requires the State to establish procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

"Free appropriate public education" is defined in the Act as 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, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

The term "individualized education program" is defined as:

a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include —(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting, (E) the projected date for initiation and anticipated duration of such services, and (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.
severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.\textsuperscript{148}

This provision is popularly known as the "mainstreaming" mandate or "least restrictive environment (LRE) requirement."\textsuperscript{149} In addition, the Act contains provisions that assure instructional and support personnel for education in the least restrictive environment. The IDEA requires that "consistent with the purposes" of the Act, states develop and implement a comprehensive plan for personnel development which includes "the continuing education of regular and special education [teachers]."\textsuperscript{144}

The Act imposes requirements on the local education agency of the state ("LEA") as well.\textsuperscript{146} The LEA must submit an application to the state educational agency ("SEA") providing, \textit{inter alia}, assurances that funds will be used for the excess costs of a program that is in compliance with the mainstreaming provisions of the Act.\textsuperscript{146} Another specific requirement for the LEA is that consistent with the mainstreaming requirements of the Act, the agency agrees to provide "special services to enable children [with disabilities] to participate in regular educational programs."\textsuperscript{147}

The IDEA's goals of providing children with disabilities a free, appropriate public education in the least restrictive environment are achieved in part through provisions insuring the meaningful involvement of parents or guardians.\textsuperscript{148} First, the IDEA includes parents or guardians in the process whereby an "individualized educational program" ("IEP") is developed for the child.\textsuperscript{149} The local educational agency is then required to educate the child in conformity

\begin{footnotesize}
\begin{enumerate}
\item 142. \textit{Id.} § 1412(5)(B).
\item 143. \textit{See} Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1039 (5th Cir. 1989) (referring to section 1412(5)(B) as the "mainstreaming requirement"); 34 C.F.R. §§ 300.550-556 (1992) (organizing implementing regulations under the heading "Least Restrictive Environment").
\item 146. \textit{Id.} § 1414(a)(1).
\item 149. \textit{Id.} § 1401(a)(20) (Supp. V 1993). For the statutory definition of "individualized educational program," see \textit{supra} note 139.
\end{enumerate}
\end{footnotesize}
with the child's IEP.\textsuperscript{150}

Secondly, parents and guardians are accorded specific procedural rights. These rights include (1) prior written notice whenever an agency "proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, special education placement of the child;"\textsuperscript{151} (2) an opportunity to present complaints with respect to the identification, evaluation, placement, or provision of a "free appropriate public education" to such child;\textsuperscript{152} and (3) subsequent to the filing of a complaint, an opportunity for "an impartial due process hearing" to be conducted by a hearing officer not employed by the agency involved in the education of the child.\textsuperscript{153}

Any party aggrieved by the outcome of the administrative process has the right to bring suit in either state or federal court without regard to the amount in controversy.\textsuperscript{154} In such actions, the court is to receive the records of the administrative proceedings, hear additional evidence at the request of a party, and "basing its decision on the preponderance of the evidence," grant appropriate relief.\textsuperscript{155} Also, once administrative relief under the IDEA has been exhausted, parents and guardians are free to seek similar or additional relief available to children with disabilities under other federal statutes such as Section 504 of the Rehabilitation Act of 1973.\textsuperscript{156}

\footnotesize
\begin{itemize}
  \item \textsuperscript{151} Id. § 1415(b)(1)(C).
  \item \textsuperscript{152} Id. § 1415(b)(1)(E).
  \item \textsuperscript{153} Id. § 1415(b)(2). The due process hearing may be a one-tier or two-tier process depending on state law or agency regulation. Id. If a two-tier process is used, then any party aggrieved by the decision of the local hearing officer may appeal the decision to the state educational agency who is bound to conduct an "impartial review" of the decision and "make an independent decision." Id. § 1415(c).
  \item \textsuperscript{154} Id. § 1415(e)(2). During the pendency of any proceedings under the Act, a "stay-put" provision requires that the child remain in the then current placement for the child, unless the parent or guardian agrees otherwise. Id. § 1415(e)(3). Parents or guardians who prevail in suits under the IDEA are entitled to an award of reasonable attorney fees. Id. § 1415(e)(4)(B)-(G). The 1990 amendments to the IDEA prospectively abrogated Eleventh Amendment immunity for actions brought under the Act. Pub. L. No. 101-476, § 1403 (Supp. V 1993)).
  \item \textsuperscript{155} 20 U.S.C. § 1415(e)(2)(1988). As was stated in the Joint Explanatory Statement of the Committee of Conference, the IDEA was intended to "clarify[y] and strengthen[]" existing law relating to judicial action, assuring \textit{inter alia} that the court "shall make an independent decision based on the preponderance of the evidence." S. CONF. REP. No. 455, 94th Cong., 1st Sess. 50 (1975), reprinted in, 1975 U.S.C.C.A.N. 1480, 1503 (emphasis added).
3. **Least Restrictive Environment Regulations**

The mainstreaming mandate of the IDEA has been the subject of Department of Education regulations which fall under the heading of "The Least Restrictive Environment." The regulations use language identical to that found in the mainstreaming mandate to state the broad obligation of the local educational agency. However, the regulations specifically require participating educational agencies to provide a "continuum of alternative placements" to meet the needs of children in need of special education and related services. The continuum of alternative placements is to range from the least restrictive to the most restrictive (regular classroom, special classes, special schools, home instruction, and instruction in hospitals and institutions). Further, the school district must provide for supplementary services such as resource room or itinerant instruction in conjunction with a regular class placement.

Placements of children with disabilities are to be based on the child's individual education program ("IEP") which should include any modifications to the regular educational program necessary for the child to participate. The rules mandate placement as close to the child's home as possible, and placement in the child's home school unless the child's IEP requires otherwise. Notwithstanding such a preference for mainstreaming, consideration is to be

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- Each public agency shall ensure —
  1. That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are non-disabled; and
  2. That 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 is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

159. 34 C.F.R. § 300.551(a) (1993).
160. Id. § 300.551(b)(1).
161. Id. § 300.551(b)(2).
162. Id. § 300.552(a)(2).
163. Id. at App. C — Notice of Interpretation, Question No. 48, *cited as authority in* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) and Oberti, 995 F.2d at 1216.
164. Id. § 300.552(a)(3)(c).
given to the potential harm the placement poses to the child, and to the quality of services the child needs.\textsuperscript{165} The Comment to section 300.552 of the regulations emphasizes that the overriding requirement for schools is that placement decisions be made on an individual basis.\textsuperscript{166} This emphasis on individualized placement underscores the importance of a continuum of placement alternatives to accommodate individual requirements.\textsuperscript{167}

F. The Americans with Disabilities Act of 1990 and the Education of Children with Disabilities

The Americans with Disabilities Act of 1990\textsuperscript{168} ("ADA") is another statute under which children with disabilities and their parents are afforded sweeping protections against the exclusionary and discriminatory practices of local educational agencies. An in-depth analysis of the significance of the ADA for special education is beyond the scope of this Comment.\textsuperscript{169} However, a familiarity with some of its provisions will later inform the analysis of the mainstreaming mandate of the IDEA.

Congress's overall policy with respect to individuals with disabilities is nowhere more strongly stated than in the findings voiced in the ADA.\textsuperscript{170} Three findings are of particular relevance to this Comment. First, Congress notes that discrimination against individuals with disabilities persists in education.\textsuperscript{171} Secondly, Congress specifically identified the following as forms of discrimination: the "failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria," and segregation.\textsuperscript{172} Finally, Congress stated that individuals with disabilities are deserving of "equality of opportunity, full participation, independent living, and

\textsuperscript{165} Id. § 300.552(d).
\textsuperscript{166} Id. § 300.552 cmt. ("The overriding rule on this section is that placement decisions must be made on an individualized basis.").
\textsuperscript{167} See id. (stating that regulations "require[] each agency to have various alternative placements available in order to ensure that each [disabled] child receives an education that is appropriate to his or her individual needs") (emphasis added).
\textsuperscript{169} For a discussion of the accessibility requirements imposed on schools by Title II of the ADA, see WEBER, supra note 11, §§ 23.1 - 23.5 (Supp. 1994).
\textsuperscript{170} 42 U.S.C. § 12101(a) (Supp. V 1993) (listing nine Congressional findings which inspired the drafting of the ADA).
\textsuperscript{171} Id. § 12101(a)(3).
\textsuperscript{172} Id. § 12101(a)(5).
economic self-sufficiency."

In general, the ADA bars discrimination on the basis of disability in the areas of employment, public services, private provision of public accommodations and services, and telecommunications. Title II of the ADA, which bans discrimination in the provision of public services, is most relevant for the purposes of this Comment since state and local educational agencies are covered under this title. The ADA requires that a "qualified individual with a disability" not be "excluded from participation in or be denied the benefits of the services, programs, or activities of a [State or local government]" or be otherwise discriminated against by such entity. An individual with a disability is "qualified" if

with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication, and transportation barriers, or the provision of auxiliary aids and services, [he or she] meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a[n] [agency of a state or local government].

As suggested by the foregoing provision, there are limits to what public entities must do to make public programs and activities accessible to individuals with disabilities. Regulations promulgated by the Department of Justice state that a public entity does not have to modify its programs or activities if the result would be a "fundamental alteration in the nature of . . . the program, or activity or [impose] undue financial and administrative burdens."

The foregoing statutory and regulatory provisions of the ADA may help to elucidate the precise dimensions of the IDEA's mainstreaming mandate. However, the courts have yet to consider the implications of the ADA for the mainstreaming issue. Rather, judicial opinions on the issue have focused on (1) what test the IDEA
mandates for child placement decisions,\textsuperscript{180} and (2) the proper scope of judicial review of placement decisions.\textsuperscript{181}

\textbf{G. The Mainstreaming Mandate and the Courts}

It was inevitable that the broad language of the mainstreaming mandate would require the courts to step in and define the precise obligation the mandate imposed on the states.\textsuperscript{182} Although the United States Supreme Court has not interpreted the mainstreaming mandate, the Court’s landmark decision in \textit{Board of Education v. Rowley}\textsuperscript{183} is the starting point for any discussion of the subject.

1. \textit{Board of Education v. Rowley}

In \textit{Board of Education v. Rowley},\textsuperscript{184} the Supreme Court resolved two issues: (1) what is the substantive standard the states must satisfy to comply with the IDEA’s requirement that states provide a “free appropriate public education” to children with disabilities;\textsuperscript{185} and (2) what is the proper scope of review for cases brought under the IDEA.\textsuperscript{186}

\textit{Rowley} involved the special education of a deaf child named Amy.\textsuperscript{187} After Amy was denied the services of a sign-language interpreter in her regular first-grade classroom, her parents brought a complaint under the IDEA.\textsuperscript{188} The hearing examiner ruled for the school administration, concluding that Amy was “achieving educationally, academically, and socially” with the services already provided — a hearing aid, tutoring and speech therapy.\textsuperscript{189} The examiner’s decision was affirmed on appeal to the State Commissioner of Education, but reversed by the federal district court.\textsuperscript{190} The district court’s decision was then affirmed by a divided panel of the United States Court of Appeals for the Eighth Circuit.

\begin{itemize}
\item \textsuperscript{180} See infra notes 184-340 and accompanying text (discussing the different tests used by the courts in applying the mainstreaming mandate).
\item \textsuperscript{181} See infra notes 184-340 and accompanying text (discussing the differing interpretations of the appropriate scope of judicial review).
\item \textsuperscript{182} For examples of the differing interpretations of the mainstreaming mandate, see infra notes 184-340 and accompanying text.
\item \textsuperscript{183} 458 U.S. 176 (1982).
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{Id.} at 179-203.
\item \textsuperscript{186} \textit{Id.} at 205-07.
\item \textsuperscript{187} \textit{Id.} at 184.
\item \textsuperscript{188} \textit{Id.} at 185.
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} \textit{Id.} at 185-86.
\end{itemize}
Then Justice Rehnquist, writing for the majority, flatly rejected the federal district court's conclusion that a "free appropriate public education" requires that children with disabilities receive "an opportunity to achieve [their] full potential commensurate with the opportunity provided other children." The Court declined to interpret the IDEA's requirement that children with disabilities receive a "free appropriate public education" to mean that the states are required to provide educational opportunity or services equal to that provided children without disabilities. After reviewing the legislative history, Justice Rehnquist concluded that Congress did not think that equal protection for children with disabilities required anything more than equal or meaningful access to a free public education.

However, the Court acknowledged that Congress' financial commitment to educating children with disabilities implied a requirement that the education provided "confer some educational benefit upon the handicapped child." Thus, the Court concluded that the "basic floor of opportunity" which Congress requires consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. Additionally, the instruction and services must be provided at no cost to the child, meet the state's educational standards, "approximate the grade levels used in the State's regular education," and comport with the child's IEP developed in compliance with the Act.

The Court did not establish a single test for determining the adequacy of the educational benefit conferred on a child with disabili-

191. Id. at 186.
192. Id. at 185-86 (quoting Rowley v. Board of Educ., 483 F. Supp. 528, 534 (1980)).
193. Id. at 198.
194. Id. at 192. The Court stated "the intent of the Act was more to open the door of public education to handicapped children . . . than to guarantee any particular level of education once inside." Id. It went on to note that "neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access." Id. at 200.
195. Id.
196. See id. (noting the need for a "precise guarantee for handicapped children, i.e. a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection") (quoting HOUSE REP. NO. 332, 94th Cong., 1st Sess. 14 (1975)).
197. Id. at 201.
198. Id. at 203. The IEP is an "individualized educational plan" developed by the child's parents or guardians, teacher and qualified representative from the school district. For the statutory definition, see supra note 139.
ties, saying only that where the child is being educated in the regular classroom, the school's grading and advancement system is an "important factor" in appraising the educational benefit. Thus, the Court held as dispositive the district court's own finding that the child "is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade."

Turning to the issue of the proper standard of review under the Act, the Court steered a middle path between the views of the Rowleys and the school district. After reviewing the legislative history, Justice Rehnquist concluded that the Act required more than a "substantial evidence" standard of review and rejected the school district's view that the scope of judicial review was limited to procedural matters. The Court, however, also rejected the Rowley's position that the Act required de novo review of both procedural and substantive issues. Acknowledging that the Act required courts to make independent decisions based on a "preponderance of the evidence," the Court nevertheless read the Act to limit the scope of review to two inquiries: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program . . . reasonably calculated to enable the child to receive educational benefits?" While this standard requires a minimal inquiry into the level of education the child is receiving, the Court emphasized that courts are precluded from questioning the educational methods adopted by the schools. Extending judicial review to matters of educational methodology, it

201. For a description of the judicial review provisions of the IDEA, see *supra* notes 151-56 and accompanying text.
203. *Id.* "[Substantial evidence] is more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *BLACK'S LAW DICTIONARY* 1428 (6th ed. 1990). While the "substantial evidence" standard of review is broader than the "arbitrary and capricious" standard, a rational distinction between "substantial evidence," "clearly erroneous," and "clear error of judgment" is difficult to make in light of conflicting Supreme Court precedent. 5 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29:5 (2d ed. 1984).
205. *Id.* at 204-06.
206. *Id.* at 206-07.
207. *Id.* at 207-08 (emphasis added). "[O]nce a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Id.*
argued, would involve the courts in "persistent and difficult questions of educational policy" they are not competent to resolve, a result the majority did not believe Congress intended when it passed the IDEA.\textsuperscript{208} Thus, if the reviewing court finds that the school has complied with the procedural requirements of the Act, and the child's IEP is "reasonably calculated" to confer an educational benefit, "the courts can require no more."\textsuperscript{209} Since, in the instant case, the district court had expressly found that Amy was receiving an "adequate" education, and the district court had not ruled on the parents' claim that the school had failed to comply with procedural requirements, the Supreme Court reversed and remanded for consideration of the procedural issue.\textsuperscript{210}

The mainstreaming mandate was not at issue in \textit{Rowley} because Amy had been "mainstreamed" and was capable of mastering the regular education curriculum.\textsuperscript{211} Nevertheless, the lower courts have at times based their review of placement decisions on the two-step inquiry set forth in \textit{Rowley}.\textsuperscript{212} Whether the \textit{Rowley} formulation is appropriate for analyzing placement decisions will be more fully explored in a latter discussion.\textsuperscript{213}

\textsuperscript{208} \textit{Id.} at 208 (citation omitted) (quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)).

\textsuperscript{209} \textit{Id.} at 206-07 (emphasis added). The Court cited two grounds in support of its limitation of judicial review to primarily procedural matters. \textit{Id.} at 206. First, the court concluded that contrasting the elaborate procedural safeguards enumerated in the Act with the "imprecise substantive" provisions of the Act evinced Congress's view that procedural safeguards insuring the participation of parents and guardians would "in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." \textit{Id.} The Act's emphasis on the procedural obligations assumed by the states, the Court argues, would be frustrated by de novo review of the IEP's substance. \textit{Id.; see also id.} at 208-09 (citing the protections accorded children through parental involvement on "advisory boards" and in the formulation of state plans and IEPs). Secondly, the Court quoted from section 1413(a)(3) of the Act, which requires states to "acquir[e] and disseminat[e] to teachers and administrators of programs for [disabled] children significant information derived from educational research, demonstration and similar projects, and [to] adopt[[]], where appropriate, promising educational practices and materials." \textit{Id.} at 207. Based on this "clear statutory directive," the Court concluded that it was "highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories." \textit{Id.} Rather, the foregoing provision was evidence of Congress's historic and current awareness of the States' primary role in formulating educational policy. \textit{Id.} at 208.

\textsuperscript{210} \textit{Id.} at 210.

\textsuperscript{211} \textit{Id.} at 202.

\textsuperscript{212} \textit{See infra} notes 303-32 and accompanying text (discussing the deferential approach to the mainstreaming mandate).

\textsuperscript{213} \textit{See infra} notes 468-500 and accompanying text (arguing that the courts should limit the application of the \textit{Rowley} test to its facts).
2. Decisions of the Federal Courts of Appeals\textsuperscript{214}

Since Rowley, the lower courts have not only had to grapple with the question of what the mainstreaming mandate requires, but have also had to discern what, if any, significance the two-step Rowley inquiry has for judicial review of placement decisions. One of the first federal appellate court decisions to confront these issues was \textit{Roncker v. Walter}\textsuperscript{215}.

a. The \textit{Roncker} Feasibility Test

\textit{Roncker v. Walter}\textsuperscript{216} involved a severely mentally retarded child who was denied placement in a setting where he could have contact with non-disabled children.\textsuperscript{217} A panel of the Sixth Circuit distinguished Rowley, concluding that the issue of whether a disabled child's education is "appropriate" is different from the issue of whether the child has been placed in compliance with the mainstreaming mandate.\textsuperscript{218} Nevertheless, the court ambiguously concluded that the "proper [mainstreaming] inquiry is whether a proposed placement is appropriate under the Act."\textsuperscript{219}

The test announced by the court requires that where a segregated facility is found to be superior to a non-segregated facility, the court is to determine whether the services which make the facility superior "could be feasibly provided in a non-segregated setting."\textsuperscript{220} If education in the non-segregated facility is feasible, then it would not be appropriate to confine the child to the segregated facility.\textsuperscript{221} The court's feasibility test allowed consideration of the following factors: (1) whether the child would benefit from mainstreaming; (2) whether the benefits from mainstreaming are far outweighed by the benefits of receiving services not available in the mainstream setting; (3) whether the child would be a "disruptive force" in the mainstream setting; and (4) the cost of mainstreaming the child.\textsuperscript{222}

\textsuperscript{214}This discussion describes federal appellate court cases representative of leading approaches to the mainstreaming issue. For a more detailed description of the relevant cases, see \textit{WEBER}, supra note 11, §§ 9.1-9.2.
\textsuperscript{215}700 F.2d 1058 (6th Cir. 1983).
\textsuperscript{216}Id.
\textsuperscript{217}Id. at 1060.
\textsuperscript{218}Id. at 1062.
\textsuperscript{219}Id. at 1063.
\textsuperscript{220}Id.
\textsuperscript{221}Id.
\textsuperscript{222}Id.
court noted, however, that cost is not a defense where the school has failed to provide a continuum of alternative placements.\textsuperscript{223} Finding that the lower court had erroneously applied an "abuse of discretion" standard to the school's placement decision, the \textit{Roncker} court remanded the case for re-examination of the mainstreaming issue.\textsuperscript{224}

b. The \textit{Daniel R.R.} Two-Step Inquiry

In \textit{Daniel R.R. v. State Board of Education},\textsuperscript{228} a panel of the Fifth Circuit agreed with the court in \textit{Roncker} that the two-part \textit{Rowley} test did not apply to mainstreaming cases.\textsuperscript{228} However, the court declined to adopt the \textit{Roncker} feasibility test, contending that the \textit{Roncker} test was too intrusive an inquiry into the educational policy choices of educators.\textsuperscript{227} Consequently, the court formulated its own two-step inquiry to analyze the placement decision for a six-year-old boy named Daniel afflicted with Downs Syndrome.\textsuperscript{228} The test is derived from the language of the mainstreaming requirement: (1) whether, with the use of supplementary aids and services, the child's education can be achieved satisfactorily in the regular classroom; and (2) if not, whether the child has been mainstreamed to the maximum extent appropriate.\textsuperscript{229}

Acknowledging that the mainstreaming analysis is an "individual-

\textsuperscript{223} \textit{Id.}\textsuperscript{224} \textit{Id.} at 1062-63. The \textit{Roncker} test has been adopted by panels of the Eighth and Fourth Circuits as well. In A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158 (8th Cir. 1987), the court approved the cost/benefit analysis the trial court applied to the placement of a boy with Down's Syndrome. \textit{Id.} at 163. The court held that the cost of removing the child from an institution for disabled children was not justified by the marginal benefits of educating the child in a regular school. \textit{Id.} at 163-64. The court refused to consider the parents' contention that the school's arguments based on cost were undermined by the failure of the school to provide a "continuum of alternative placements" as required by 30 C.F.R. § 300.551. \textit{Id.} at 164 n.9. Judicial inquiry into the range of placement options available for disabled children would in the court's view require review of the school's educational policies — review beyond the scope of review permitted by the United States Supreme Court in \textit{Rowley}. \textit{Id.}\textsuperscript{225} \textit{Id.} at 1036 (5th Cir. 1989).

In DeVeules v. Fairfax County Sch. Bd., 882 F.2d 876 (4th Cir. 1989), a panel affirmed the school's decision to place a seventeen-year-old autistic boy named Michael in a county vocational school rather than his local high school. \textit{Id.} at 877. The court held that even with the assistance of an aide, Michael would be "simply monitoring classes" with non-disabled students. \textit{Id.} at 879. The court did not contemplate any accommodations in addition to the provision of an aide and concluded that Michael's particular educational needs could not be accommodated in the regular high school. \textit{Id.} at 879-80.

\textsuperscript{225} \textit{Id.} at 1045.\textsuperscript{226} \textit{Id.} at 1046.\textsuperscript{227} \textit{Id.} at 1039.\textsuperscript{228} \textit{Id.} at 1048 (citing 20 U.S.C. § 1412(5)(B)).
ized, fact-specific inquiry” and that the factors employed by the
court are not exhaustive, the court identified the four relevant fac-
tors for part one of its inquiry.230 First, the court looked to see if the
school had taken more than token steps to accommodate Daniel’s
needs in the regular education classroom through the provision of
supplementary aids and services.231 Though the court stated that the
requirement to accommodate is broad, it does not require the
teacher to act as a special education teacher in a regular education
class.232 Nor is the school expected to so radically modify the curric-
ulum that the child is receiving a special education in the regular
education classroom.233 The court concluded that here the school
had taken sufficient steps to accommodate Daniel’s disability — the
child’s teacher made “genuine and creative efforts to reach Daniel,”
modified his curriculum, and spent a disproportionate amount of her
time attending to him.234

Secondly, the court examined whether, given Daniel’s mental re-
tardation and speech impairment, he was receiving an educational
benefit from mainstreaming.235 The court concluded that Daniel was
receiving little, if any educational benefit from participation in regu-
lar pre-kindergarten other than the “opportunity to associate with
nonhandicapped students.”236

Thirdly, the court balanced the benefits of mainstreaming against
the benefits of a segregated setting allowing for greater attention to
Daniel’s unique needs.237 Here, the court had no trouble concluding
that the marginal social benefits Daniel received from mainstream-
ing were outweighed by the clear educational benefits he received
from a self-contained special education program.238

Finally, the court inquired into what negative effect Daniel would
have on the education of other children in the regular education
classroom.239 Citing the regulations implementing the mainstream-
ing mandate, the court held that where a disabled “child is so dis-
ruptive in a regular classroom that the education of other students is

230. Id. at 1048-50.
231. Id. at 1048.
232. Id. at 1048-49.
233. Id.
234. Id. at 1050.
235. Id. at 1049.
236. Id. at 1050.
237. Id. at 1049.
238. Id. at 1051.
239. Id.
significantly impaired,” mainstreaming is not appropriate.\textsuperscript{240} Here, the court agreed with the school that the demand Daniel made on the teacher’s time was not fair to the other students.\textsuperscript{241} Taking all four factors into account,\textsuperscript{242} the court held that Daniel could not be educated satisfactorily in the regular classroom, and that mainstreaming him for lunch and recess satisfied the requirement to mainstream the child to the “maximum extent appropriate.”\textsuperscript{243}

Nominally more deferential to school authority than the Roncker test, the “individualized, fact-specific” inquiry advanced by Daniel R.R. proved to be anything but deferential in Greer v. Rome City School District.\textsuperscript{244} In that case, a panel of the Eleventh Circuit also followed those circuits rejecting the applicability of the Rowley test for mainstreaming cases.\textsuperscript{245} Instead, the court adopted the two-part inquiry set forth in Daniel R.R. Greer involved a ten-year-old child named Christy who had Downs Syndrome. Applying the two-part Daniel R.R. inquiry to the facts of the case, the court held that the school had failed the first step of the inquiry by not taking sufficient action to accommodate Christy in the regular classroom.\textsuperscript{246} Specifically, the school had not considered the “full range of supplemental aids and services, including resource rooms and itinerant instruction, that could be provided to assist Christy in the regular classroom.”\textsuperscript{247} The court charged the school with basing its placement decision on its assessment of the severity of Christy’s disability without consideration of what supplemental aids and services could have been provided to accommodate her disability.\textsuperscript{248} In fact, the court noted that the only supplemental service considered by the school was “some speech therapy.”\textsuperscript{249} The school also failed to consider modification of the regular education curriculum, and developed Christy’s IEP before meeting with the child’s parents.\textsuperscript{250}

\textsuperscript{240} Id. (quoting 34 C.F.R. § 300.552 cmt. (1993)).
\textsuperscript{241} Id.
\textsuperscript{242} The panel noted that the Sixth Circuit considered cost as a limited factor in the mainstreaming analysis. However, the court did not consider cost here since neither party had raised it as an issue. Id. at 1049 n.9.
\textsuperscript{243} Id. at 1050.
\textsuperscript{244} 950 F.2d 688 (11th Cir. 1991), vacated on other grounds, 956 F.2d 1025 (11th Cir. 1992).
\textsuperscript{245} Id. at 696 n.25.
\textsuperscript{246} Id. at 698.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
The court would not credit the school's determination that Christy would benefit more from a self-contained special education than an education in the regular classroom, since the school had not compared the segregated educational opportunity with education in the regular classroom with supplementary aids and services.251 Finally, the court noted that Christy was no longer "unusually disruptive" in the classroom, and that the school adduced no evidence that educating Christy in the regular classroom would be too costly.252

Significantly, the court noted that its analysis was not a foray into the educational methodology choices of the school.253 If the school complies with the mainstreaming requirements of the Act, "due deference will be accorded to school officials' choice of methodologies for educating Christy."254

More recently, the two-part Daniel R.R. inquiry was applied even more stringently by a panel of the Third Circuit in Oberti v. Board of Education.255 In that case, the plaintiff-appellee Rafael Oberti, an eight-year-old boy suffering from Downs Syndrome, sought inclusion in a regular education class.256 At the outset, the court deemed the two-step test formulated in Rowley inapplicable to the mainstreaming issue.257 Acknowledging that the Act reserves questions of educational policy for state and local governments,258 the court nevertheless cited Rowley for the proposition that the Act "'requires participating States to educate [disabled] children with [non-disabled] children whenever possible.'"259 The Supreme Court's admonition not to interfere in decisions relating to educational methodology was not, in the court's view, inconsistent with the court's duty to enforce the statutory mainstreaming requirement.260

Taking up the Daniel R.R. inquiry, the court reiterated the first factor, which requires the school to give "serious consideration" to including the child in the regular classroom with the provision of

251. Id.
252. Id. at 698-99.
253. Id. at 699.
254. Id.
255. 995 F.2d 1204 (3d Cir. 1993).
256. Id. at 1206-07.
257. Id. at 1214.
258. Id. (citing Board of Educ. v. Rowley, 458 U.S. 176, 207 (1982)).
259. Id. (quoting Rowley, 458 U.S. at 202).
260. Id. (citing Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989)).
supplementary aids and services and modifications to the regular education program. The court followed *Greer* in requiring the school to consider "the whole range of supplemental aids and services, including resource rooms and itinerant instruction." In addition, the court expanded the list of services in *Greer* to include "speech and language therapy, special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child's particular disabilities." This goes beyond the expectation imposed by the court in *Daniel R.R.*, where the court concluded that "[s]tates need not provide every conceivable supplementary aid or service to assist the child [in the regular classroom]."

The *Oberti* court then turned to the second factor: consideration of whether the benefits of inclusion with supplementary aids and services outweighs the benefits conferred in a segregated, special education classroom. Here, the court noted that the school is not only to consider the non-academic benefits of inclusion, for example, the development of social and communication skills and improved self-esteem, but it also must be mindful that because "a child with disabilities will learn differently... within a regular classroom does not justify exclusion from that environment."

While the *Oberti* court cited *Daniel R.R.* for the proposition that children with disabilities may learn differently from their non-disabled peers in the regular classroom, the court in *Daniel R.R.* saw the second factor of its inquiry as "focus[ing] on the student's ability to grasp the essential elements of the regular education curriculum." Also, notwithstanding the *Daniel R.R.* court's expectation that the curriculum should be modified for the child, when applying the second factor the court noted that Daniel could not master the skills developed by the regular curriculum and could not master

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261. *Id.* at 1215-16.
262. *Id.* (quoting *Greer* v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991), vacated on other grounds, 956 F.2d 1025 (11th Cir. 1992)).
263. *Id.* at 1216.
265. *Oberti*, 995 F.2d at 1216. The second factor of the first step of the *Daniel R.R.* test is here combined with the third factor. Thus, the four factors in *Daniel R.R.* are reduced to three.
266. *Id.* at 1217. The "reciprocal benefits of inclusion to the nondisabled students in the class" should also be considered. *Id.* at 1217 n.24.
267. *Id.* at 1217.
269. *Id.* at 1048.
most of the lessons. Thus, the Oberti court expanded the second factor of the Daniel R.R. inquiry by not limiting the educational benefits of inclusion to those which non-disabled children are expected to derive from the regular classroom curriculum.

Finally, the court set forth the "excessive disruption" factor in the Daniel R.R. inquiry. However, here the court emphasized that "[a]n adequate individualized program with . . . aids and services may prevent disruption that would otherwise occur." Thus, a behavioral problem incident to the child's disability is an issue that should initially be addressed through the provision of supplementary aids and services and modification of the curriculum.

The Oberti court also adopted the second step of the Daniel R.R. inquiry, requiring that children not placed in the regular classroom be mainstreamed to "the maximum extent appropriate." This requirement contemplates that schools provide a "continuum of alternative placements . . . to meet the needs of [disabled] children."

Engaging in the first step of the Daniel R.R. inquiry, the court applied all three factors to the placement of Rafael Oberti. The court held that the district court's findings that the school had not taken "meaningful steps" to include Rafael in the regular classroom with supplementary aids and services was not "clearly erroneous."

The district court determined that the school district had made only negligible or perfunctory efforts to include Rafael in the regular classroom. For instance, one year Rafael was placed in a developmental kindergarten class without a curriculum plan, a behavior management plan, or adequate special education support to the teacher.

270. Id. at 1050.
271. See Oberti, 995 F.2d at 1217 (stating that a child with disabilities may learn differently from his education in the regular classroom and that states are not required to provide disabled children with "the same educational experience . . . as is generally provided for nondisabled children") (citing Board of Educ. v. Rowley, 458 U.S. 176, 189, 202 (1982)).
272. Id. The Oberti court recognized that cost may be a relevant factor, but since the parties did not raise the issue, the court did not consider it. Id. at 1218 n.25.
273. Id. (citing Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991), vacated on other grounds, 956 F.2d 1025 (11th Cir. 1992)).
274. Id.
275. Id. at 1218.
276. Id. (quoting 34 C.F.R. § 300.551(a) (1993)).
277. Id. at 1221.
278. Id. at 1220.
279. Id.
As to the second factor, a comparison of the benefits of a segregated versus non-segregated education, the court agreed with the trial court that the Oberti's experts demonstrated that educational methods effective for teaching Rafael could be used in the regular classroom. Furthermore, despite conflicting testimony, the court did not find clearly erroneous the trial court's determination that the teacher could be trained to implement these methods and communicate effectively with Rafael without disrupting the class or converting it into a special education class. Additionally, the court agreed with the trial court's legal conclusion that modification of the curriculum is "not a legitimate basis upon which to justify excluding a child" unless the education of other students is significantly impaired.

The record on the third factor — the potentially disruptive effect of Rafael's presence — also contained conflicting evidence. However, the court did not find clearly erroneous the trial court's conclusion that with adequate supplementary aids and services — such as special education training for the teacher, the assistance of an itinerant special education instructor, parallel instruction to allow Rafael to learn at his academic level, modification of the curriculum, and use of a resource room — Rafael would not pose a disruption. Thus, the court affirmed the decision of the trial court that the school district had failed to meets its burden of proof that Rafael could not be "satisfactorily" educated in the regular classroom with supplementary aids and services.

c. The Rachel H. Balancing Test

In Sacramento City Unified School District v. Rachel H., a panel of the Ninth Circuit recently adopted a test that draws on factors found in both Roncker and Daniel R.R. The court applied a four-factor balancing test to the placement decision for Rachel
Holland, a moderately retarded girl who is now eleven years old. The factors the court considered were: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Rachel had on the teacher and children in the regular class; and (4) the costs of mainstreaming Rachel." Reviewing the district court's fact findings for "clear error," the court affirmed the lower court decision upholding Rachel's full-time placement in a regular classroom.

Specifically, the court would not disturb the lower court's findings, after a full evidentiary hearing and analysis, that Rachel's educational goals could be implemented in the regular classroom with some modification of the curriculum and assistance of a part-time aid. The court also did not find clear error in the lower court's finding that Rachel derived valuable non-academic benefits from full inclusion in the regular education classroom. Addressing the issue of what adverse effect educating Rachel in the regular classroom would have on the education of other students, the panel simply noted that both parties agreed that Rachel was not disruptive in class. In addition, Rachel's second grade teacher testified that with the assistance of a part-time aid, Rachel did not interfere with her ability to teach the other children in the class. Finally, the panel agreed that the school district's contention that mainstreaming Rachel would be cost-prohibitive was not persuasive.

The Ninth Circuit in Rachel H. did not even consider the two-part Rowley formula, nor did it consider the United States Supreme Court's admonition to refrain from engaging in review of disputes involving educational methodology. Rather, the court implicitly approved of the trial court's full evidentiary hearing, including the introduction of expert testimony, on the issue of

288. Id. at 1400.
289. Id. at 1404.
290. Id. at 1402. The "clearly erroneous" standard permits reversal only when "the reviewing court on entire evidence is left with [the] definite and firm conviction that a mistake has been committed." BLACK'S LAW DICTIONARY 251 (6th ed. 1990).
291. Rachel H., 14 F.3d at 1405.
292. Id. at 1401, 1404.
293. Id.
294. Id. at 1401.
295. Id.
296. Id. at 1401-02, 1404.
297. Board of Educ. v. Rowley, 458 U.S. 176 (1982), is only cited once in a footnote to explain the purpose of the IEP. Rachel H., 14 F.3d at 1400 n.2.
298. Rowley, 458 U.S. at 207-08 n.29.
whether Rachel was receiving academic benefits in the regular classroom. Resolution of this issue required the district court to evaluate the extent to which special educational methods could be successfully used in the regular classroom. The district court found the testimony of Rachel's experts more credible, having "more background in evaluating [disabled] children placed in regular classrooms, and . . . greater opportunity to observe Rachel over an extended period of time." The Ninth Circuit did not disturb this finding or criticize the district court's scope of review.

d. The Deferential Approach

The Ninth Circuit's decision in Rachel H. is in stark contrast with its decision in Wilson v. Marana Unified School District, a case representative of a highly deferential approach to the placement decision. In Wilson, the Ninth Circuit was faced with an appeal by parents seeking to block the transfer of their physically disabled daughter Jessica from a regular classroom to a segregated special education program. The school's position was that it was required by state law to provide Jessica with a special education teacher certified in physical disabilities. The court, however, did not find this point of state law to be the controlling issue. Rather, the court defined the issue as whether, after having determined that a student with disabilities is not making "satisfactory progress" in the then current placement, the school has the power to transfer the student to a school where she can receive assistance from a teacher especially qualified in her disability. The parents argued that transferring Jessica violated the mainstreaming mandate of the IDEA. The court disagreed, holding that transferring a child to a

299. Rachel H., 14 F.3d at 1401, 1404.
300. See Board of Educ. v. Holland, 786 F. Supp. 874, 880-82 (E.D. Cal. 1992) (appraising the conflicting testimony of experts on what setting is more conducive to achieving Rachel's academic goals), aff'd sub nom. Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).
301. Id. at 881.
302. See Rachel H., 14 F.3d at 1404 (noting that the district court conducted a complete and thorough evidentiary hearing and analysis).
303. 735 F.2d 1178 (9th Cir. 1984).
304. Id. at 1180.
305. Id.
306. Id.
307. Id. at 1182-83.
308. Id. at 1183.
more restrictive environment was permissible provided that it was "reasonably calculated to furnish Jessica a free, appropriate education." Notably, the court characterized the placement decision as one of educational policy requiring deference to the judgment of local school authorities. As in the cases that follow, the placement decision was analyzed as a question of methodology — the two-part Rowley test is applied, and the mainstreaming mandate is satisfied provided that the placement decision is incidental to a decision of educational methodology or policy.

Another case illustrating this approach is Mark A. v. Grant Wood Area Education Agency, decided by a panel of the Eighth Circuit. Here, the parents of a physically and developmentally disabled girl named Alleah contested the school's decision to remove her from a private program serving both children with and without disabilities to a segregated special education program in the public school. The court upheld the transfer, analyzing the issue as one of "appropriateness." The IDEA, the court found, did not require the school to provide Alleah with the "best educational opportunities." Once the requirements of the Act have been met, "questions of methodology [were] for resolution by the States." Presumably, the methodology referred to by the court was the setting where Alleah was to be educated.

The potential conflict between concerns about mainstreaming and methodology came into sharp relief in Lachman v. Illinois State Board of Education. Lachman involved a dispute between the parents of a seven-year-old deaf boy named Benjamin and the local school district. The parents wanted Benjamin to be educated in the regular education classroom of his neighborhood school with the

309. Id.
310. Id. (citing Board of Educ. v. Rowley, 458 U.S. 176, 208 (1982)).
311. (1) Has the state complied with the procedural requirements of the Act; and (2) is the IEP reasonably calculated to confer an educational benefit on the child. Rowley, 458 U.S. at 206-07.
312. Wilson, 735 F.2d at 1183.
314. Id. at 53.
315. Id. at 54.
316. Id.
317. Id. (quoting Board of Educ. v. Rowley, 458 U.S. 176, 208 (1982)).
318. See id. (stating in dicta that Iowa does not have integrated public pre-school education programs and that the mainstreaming mandate does not require that the state provide them).
320. Id.
assistance a full-time cued speech instructor. The school district, on the other hand, wanted to educate Benjamin at a regional institution for the deaf which employed a “total communication” method consisting primarily of sign language.

The trial court analyzed the dispute as one over methodology and, applying the two-part Rowley test, concluded that the school district had provided Benjamin with a “free appropriate public education.” On appeal, the parents contended that the controlling issue was not methodology, but whether Benjamin’s individualized education program (“IEP”) complied with the mainstreaming requirement. The Seventh Circuit agreed that a mainstreaming issue was properly presented; however, the court concluded that the mainstreaming determination “can be made only within the context of the methodology employed to facilitate [Benjamin’s] education.” Under Rowley, the primary responsibility for “choosing the educational method most suitable to the child’s needs, was left by the Act to state and local educational agencies.” Since the school believed that the “total communication” method was the most appropriate method of communication for Benjamin, the court deferred to the school’s judgment.

While the dispute in Lachman was at least in part over methodology, the dispute in Briggs v. Board of Education was solely one of whether James, a hearing-impaired child, was mainstreamed as required by law. Here, the Second Circuit overturned a district court decision which, following the analysis in Roncker, held that the educational services proposed for James could be provided in a less restrictive setting. The court opined that the district court’s scope of review is confined to the two-part Rowley formula: (1) whether the state complied with the procedural requirements of the Act; and (2) whether the IEP was reasonably calculated to confer educational benefits on the child. Observing that the decision to

321. Id. at 291.
322. Id. at 291-92.
323. Id. at 293-94.
324. Id. at 294.
325. Id. at 296.
326. Id. (citing Board of Educ. v. Rowley, 458 U.S. 176, 207 (1982)).
327. Id. at 297.
328. 882 F.2d 688 (2d Cir. 1989).
329. Id. at 689-91.
330. Id. at 691.
331. Id.
place James in a segregated program was the outcome of the IEP process involving the best judgment of local educational experts, the court held that disturbing the decision of the school was tantamount to imposing on the state the court’s own views on educational policy.332

3. Two Points of Conflict in the Federal Circuits

As the foregoing discussion illustrates, judicial approaches to the mainstreaming issue are marked by considerable disagreement. Two significant points of conflict will be identified now, and fully analyzed in the next section of this Comment.

First, courts are divided on the issue of whether the IDEA requires schools to make modifications to the regular education curriculum and instructional methodology to accommodate the inclusion of children with disabilities.333 One view, illustrated by Daniel R.R., is that the mainstreaming mandate does not require provision of special education in the regular classroom.334 Rather, the focus should be on whether the child can “grasp the essential elements of the regular education curriculum.”335 In contrast, the Oberti court concluded that “the fact that a child with disabilities will learn differently . . . within a regular classroom does not justify exclusion from that environment.”336 Thus, the educational benefits that inclusion can confer on a disabled child should not be adjudged by reference to the child’s capacity to grasp the regular education curriculum, but rather, the child’s ability to make satisfactory progress toward the goals developed in his or her “individualized education program.”337

Secondly, some courts have characterized the educational placement decision as one of “methodology,” and thus, under the United States Supreme Court’s decision in Board of Education v. Rowley,338 a decision within the sole discretion of local school au-

332. Id. at 693. The Briggs court did not appear troubled by the fact that the parents disagreed with the IEP.
333. See infra notes 377-96 and accompanying text (discussing whether the requirement to facilitate inclusion through the provision of “supplementary aids and services” includes a requirement to make reasonable modifications to the regular educational program).
335. Id. at 1049.
337. See id. (discussing school’s obligation under the Act to provide supplementary aids and services to accommodate the child’s disabilities in the regular classroom).
thorities. Other courts, however, have taken the view that enforcing the mainstreaming mandate is not inconsistent with concerns for local autonomy in matters of educational methodology.

While these two conflicts are by no means exhaustive, they involve issues notable for their divisiveness. Resolution of these issues involves an interpretation of the Act in general, and the mainstreaming provision specifically. The following section advances one such interpretation of the Act that, at the outset, requires an awareness of the inherent tension that pervades the Act — the tension between the goals of integration and "special" education.

III. Analysis

A. The Mainstreaming Mandate and the Threshold Problem of Interpretation

The difficulty encountered in interpreting the IDEA stems in part from the tension courts and commentators have observed between the requirement that children with disabilities be provided special education — an individualized education which recognizes their unique needs — and Congress's strong preference that children with disabilities be desegregated. In other words, Congress requires schools to treat children with disabilities differently than children without disabilities, underscoring their uniqueness, while on the other hand preferring that schools educate children with disabilities alongside non-disabled children, emphasizing their commonality with other children.

339. See supra notes 303-32 and accompanying text (discussing the deferential approach fostered by Rowley).

340. See infra notes 468-500 and accompanying text (discussing educational methodology and the mainstreaming issue).

341. 20 U.S.C. §§ 1401(a)(20), 1414(a)(5) (Supp. V 1993); see id. § 1412(4) (requiring local educational agencies to maintain records of each disabled child).

342. Id. § 1412(5)(B); see Oberti v. Board of Educ., 995 F.2d 1204, 1214 n.18 (3d Cir. 1993) (stating that the IDEA "embodies an express tension between its two substantive commitments to the 'appropriate education' and to the 'least restrictive alternative' ") (quoting Minow, supra note 124, at 181)); Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991) (noting tension between two goals of mainstreaming and "meeting each child's unique needs"), vacated on other grounds, 956 F.2d 1025 (11th Cir. 1992); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989) (concluding that the statutory preference for mainstreaming creates a tension between two provisions of the Act).

343. This tension is also manifested in other provisions of the Act. For example, children are not eligible for "special education and related services" unless they are labeled as having one or more of the qualifying disabilities. See 20 U.S.C. § 1401(a)(1)(A)(i) (Supp. V 1993) (defining the disabilities). Thus, parents are faced with the dilemma of subjecting their children to the
The mainstreaming provision itself embodies this tension by limiting inclusion to those instances where it is “appropriate” and the child’s education can still be “achieved satisfactorily.” Such ambiguity, however, does not mean the mainstreaming mandate is without clear substance. As this Comment attempts to demonstrate, related provisions and statutes, as well as the Act’s legislative history, provide considerable guidance on the substantive requirement for inclusion. However, the mainstreaming requirement the Act imposes is not a monolithic test, but rather a substantive inquiry the schools are expected to make concerning a child’s educational placement, and a process by which such placement decisions are to be made and reviewed.

This inquiry and process derives from a holistic interpretation of the mainstreaming mandate. This means not only harmonizing the mainstreaming mandate with other parts of the Act and the Act as a whole, but also reading the mandate in pari materia with related statutory schemes. Such an interpretative approach has long been a canon of statutory construction and is amply supported by the case law. Thus, the mainstreaming inquiry and process outlined here

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stigma and limiting effects of being labeled as “disabled” in order to obtain for their children the “special education and related services” they need. David M. Engel, Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference, 1991 DUKE L.J. 166, 186. The elaborate procedural protections against inappropriate “identification, evaluation, and educational placement” that the IDEA accords parents suggests that Congress was aware of the potentially adverse consequences of being labeled “handicapped.” See 20 U.S.C. § 1415(b)(1)(A) (Supp. V 1993) (allowing parents to examine records concerning placement of the child). Thus, the procedural protections of the Act which in part guard against identifying some children as different than others creates tension with the provisions conditioning delivery of “special education and related services” on the presence vel non of one or more specified differences, i.e., disabilities. Minow, supra note 124, at 179.


346. See 2A SUTHERLAND STAT. CONST. § 46.05 (5th ed. 1992) (discussing statute interpretation and the supporting case law). The “whole statute” interpretation has been expressed in a number of ways: “A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.” Id. § 46.05, at 103 (citation omitted).

[S]tatutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme; a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter . . . .
attempts to construe relevant statutory provisions on the disparate treatment of disabled children to create a consistent whole.\textsuperscript{847}

\textit{B. The Mainstreaming Inquiry}

The mainstreaming inquiry is a placement decision based on a set of rules, values, and relevant considerations. The first rule is that the placement decision is to be individualized.

\textit{1. An Individualized Decision}

The most fundamental requirement with respect to the "mainstreaming" decision is that the decision must be made on an \textit{individual basis} as part of the child's individualized education program ("IEP").\textsuperscript{848} The "placement" decision is part of the larger inquiry into what is needed to meet the unique educational needs of the child.\textsuperscript{849} The child's IEP involves the parents, teachers, and special education staff in a "team" inquiry to assess the child's educational needs, arrive at educational objectives, identify the educational and related services necessary to achieve those objectives, and determine the "extent to which [the] child will be able to participate in regular educational programs."\textsuperscript{360} The Act's emphasis on providing an individualized education was implemented in part by the regulation requiring school districts to provide a "continuum of alternative place-
ments” for disabled children. This was intended to ensure that a setting would be available “in which the unique needs of [the] child can be met...” with the least restrictions.

The Act is also clear that the placement decision must not be based on categorical assumptions about the potential of children with any given disability or label to be satisfactorily educated in the regular classroom. Additionally, schools are barred from making placement decisions based on the general perception that a “segregated institution is academically superior for a [disabled] child.”

While the Act may contemplate the need for more restrictive placements than the regular education classroom, nothing in the Act contemplates that any particular disability is a legitimate basis for segregating children. Only if the individual child cannot be satisfactorily educated in the regular classroom is the child to be excluded. Thus, regardless of the child’s disability, the child should be educated in the regular education classroom unless it is determined by the IEP team that the child’s unique educational needs cannot be met there with the provision of supplemental aids and services.

2. The Congressional Preference for Inclusion

While Congress may have contemplated the need for more restrictive placements, Congress left no doubt that educating disabled children alongside their non-disabled peers was to be preferred. State receipt of federal funding for special education is conditioned on the state establishing procedures to assure that, to the maximum extent appropriate, children with

352. Id. § 300.552 and cmt.
355. See Board of Educ. v. Rowley, 458 U.S. 176, 181 n.4 (1982) (pointing out that Congress “recognized that regular classrooms simply would not be a suitable setting for the education of many [disabled] children”); see also 34 C.F.R. § 300.551 (1993) (requiring schools to provide a continuum of alternative placements ranging from completely segregated institutionalization to inclusion in the regular classroom).
357. Id.
358. Id.
disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal . . . from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 1975 U.S.C.C.A.N. 1425, 1457.

This provision clearly evinces a strong Congressional preference for educating children with disabilities with their non-disabled peers. 1975 U.S.C.C.A.N. 1425, 1457.

Specific provisions of the IDEA other than the mainstreaming mandate also demonstrate that Congress expected the schools to prepare for, and prefer, placement of disabled children in the regular classroom. For example, participating states are required to develop and implement personnel training programs which include in-service training of "general" as well as "special education" instructors and support personnel. The Senate Report expressly identifies in-service training as a necessary prerequisite to achieving "integration of [disabled] children into the classroom" and the "goal of least restrictive environment[s] for [disabled] children." In addition, participating local school agencies agree to pursue a goal of providing "to the maximum extent practicable . . . special services to enable . . . children [with disabilities] to participate in regular educational programs." Regulations promulgated under the authority of the Act echo this preference for educating children with disabilities alongside their non-disabled peers. For example, the regulations mandate placement as close to the child's home as possible, and placement in the child's home school unless the child's

359. Id.
IEP requires otherwise.\textsuperscript{365}

Not only does the language of the statute clearly evince Congress’s preference for mainstreaming, the legislative history of the Act shows that Congress viewed the categorical segregation of children with disabilities as a matter of constitutional dimension.\textsuperscript{366} Due process protections were enacted in part to assure that every child with a disability is “in fact” afforded an education in the “least restrictive environment.”\textsuperscript{367} Further, segregating students on the basis of a disability involves labeling children, a practice which itself poses a threat to individual liberty.\textsuperscript{368}

In addition, Congressional concern that disabled children achieve economic self-sufficiency and full participation in the mainstream of society\textsuperscript{369} has, with the passage of the Americans with Disabilities Act ("ADA") in 1990, become a manifest national objective.\textsuperscript{370} Moreover, in the ADA, Congress expressly found that discrimination on the basis of disability persists in education and that segregation is a form of discrimination that “individuals with disabilities continually encounter.”\textsuperscript{371} In light of our national commitment to eradicating discrimination on the basis of disability, Congressional concerns that non-disabled children learn to work and play alongside disabled children take on even greater significance.\textsuperscript{372} Since the eradication of prejudice and debilitating stereotypes is a slow and uncertain process in the best of worlds, children, and their educational communities, may afford the best opportunity the country has to bring individuals with disabilities into the mainstream.\textsuperscript{373}

Thus, it is clear that placement in the regular education class-
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room is, in the view of Congress, the preferred placement for children with disabilities. The all-important implication of this conclusion is that school districts should consider placing children with disabilities in the regular education classroom before exploring other more restrictive alternatives. No court has more clearly recognized this than the Oberti court. There, a panel of the Third Circuit plainly stated that “[i]f the school has given no serious consideration to including the child in a regular class with . . . supplementary aids and services . . . then it has most likely violated the Act’s mainstreaming directive.” Thus, while the placement decision can be characterized as an individualized, educational decision, it is not made in an ideological or political vacuum. Congress has spoken, and it wants children with disabilities to learn, play, and someday work alongside non-disabled children.

3. Assistance to Achieve Inclusion

The mainstreaming mandate bars the exclusion of disabled children from the regular classroom unless, given the nature or severity of the disability, the child’s educational goals cannot be “achieved satisfactorily” in the regular classroom through the provision of “supplementary aids and services.” Understandably, the question of just what “supplementary aids and services” a school is obligated to provide raises thorny questions. For example, is the obligation open-ended as suggested by the court in Oberti v. Board of Education, or limited as suggested by the court in Daniel R.R. v. State Board of Education? However, the issue that fundamentally divides the federal courts of appeals is whether the mainstreaming mandate requires schools to modify the regular education curriculum, in effect providing special education in the regular class-

375. 995 F.2d 1204 (3d Cir. 1993).
376. Id. at 1216.
378. See generally Weber, supra note 11, § 9.3 (discussing the “related services” provision of the IDEA and its relationship to the “least restrictive environment” provisions of the IDEA).
379. Oberti, 995 F.2d at 1216 (“[T]he Act and its regulations require schools to provide supplementary aids and services to enable children with disabilities to learn whenever possible in a regular classroom.”).
380. 874 F.2d 1036, 1048 (5th Cir. 1989) (“States need not provide every conceivable supplementary aid or service to assist the child.”).
This issue takes on added significance in view of the fact that courts addressing the mainstreaming issue have routinely considered the educational benefits of inclusion in terms of the benefits of the unmodified regular education program. Since an unmodified regular education program, even with supplementary aids and services, is not likely to confer an appreciable educational benefit on disabled children with moderate to severe learning or intellectual impairments, these children are effectively denied access to the regular classroom on the grounds that a segregated placement is educationally superior.

Courts that have adopted the Daniel R.R. test in whole or in part have scrutinized the efforts made by the school to accommodate the disabled child in the regular classroom. However, in Daniel R.R., the court took the position that the Act does not require the school to modify the regular education program beyond recognition; nor is the school required to provide to provide special education in the regular classroom. Rather, the school's inquiry should focus "on the student's ability to grasp the essential elements of the regular education curriculum." In contrast, the Oberti court concluded that "the fact that a child with disabilities will learn differently... within a regular classroom does not justify exclusion from that environment." Consequently, the court required the school to seriously consider modifying the regular education curriculum to accommodate the child's disability, provide for parallel instruction, and train regular education instructors in special education techniques.

While the Act clearly contemplates provision of "supplementary aids and services" to assist the disabled child in receiving a satisfactory education in the regular classroom, modification of the regular

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381. Compare Daniel R.R., 874 F.2d at 1048-49 (noting that the Act does not require the school to modify the regular education program beyond recognition) with Oberti, 995 F.2d at 1217 (concluding that "the fact that a child with disabilities will learn differently... within a regular classroom does not justify exclusion from that environment").

382. See, e.g., Daniel R.R., 874 F.2d at 1048-49 (discussing the instructor's role in the regular classroom curriculum); DeVries v. Fairfax County Sch. Bd., 882 F.2d 876, 879-80 (4th Cir. 1989) (discussing "appropriate public education" in the "least restrictive environment").


384. Daniel R.R., 874 F.2d at 1048.

385. Id.; see also DeVries, 882 F.2d at 879-80 (assessing the appropriateness of mainstreaming a seventeen-year-old autistic youth by considering the youth's ability to master the academic subjects of his non-disabled peers).


387. Id. at 1222.
education program is not specifically mentioned.\textsuperscript{388} However, the Act's provision for an "individualized education program" ("IEP") provides that a disabled child's education will involve goals, instructional objectives, and evaluation procedures that will vary from those of the regular education program.\textsuperscript{389} Moreover, the IEP provision is interpreted by the Office of Special Education and Rehabilitation Services to include consideration of modifications to the regular education program.\textsuperscript{390} Thus, read consistently with the IEP provision, the mainstreaming mandate assumes that inclusion will involve modification of the regular education program to the extent necessary to accommodate the child's IEP.

Other statutes concerned with the rights of disabled individuals also speak to this issue. First, Title II of the Americans with Disabilities Act of 1990 ("ADA") bars exclusion of "qualified individual[s] with a disability" from participation in the programs of public entities.\textsuperscript{391} The ADA defines such a person as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for . . . participation."\textsuperscript{392} This provision clearly requires modifications to public programs to accommodate the disabilities of participating individuals. Moreover, the United States Supreme Court has interpreted Section 504 of the Rehabilitation Act of 1973\textsuperscript{393} to require reasonable modifications to accommodate "otherwise qualified" individuals wishing to participate in federally assisted activities.\textsuperscript{394} Thus, interpreted \textit{in pari materia} with the ADA and Section 504,\textsuperscript{395} the mainstreaming mandate's provision for "supplementary aids and services" should

\begin{itemize}
  \item \textsuperscript{388} See 20 U.S.C. § 1412(5)(B) (Supp. V 1993) (requiring "supplementary aids and services").
  \item \textsuperscript{389} \textit{Id.} § 1401(a)(20).
  \item \textsuperscript{390} 34 C.F.R. Part 300, App. C. (Question 48), \textit{cited as authority in} Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) and \textit{Oberti}, 995 F.2d at 1216.
  \item \textsuperscript{391} 42 U.S.C. § 12132 (Supp. IV 1992).
  \item \textsuperscript{392} \textit{Id.} § 12131(2) (emphasis added). "Public entity" includes "any State or local government . . . special purpose district, or other instrumentality of a State . . . or local government." \textit{Id.} § 12131(1)(A), (B).
  \item \textsuperscript{394} Alexander v. Choate, 469 U.S. 287, 306-09 (1985).
  \item \textsuperscript{395} \textit{See 2A SUTHERLAND STAT. CONST., supra note 346, § 46.05, at 103 ("[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter . . . .") (emphasis added) (citations omitted)).
\end{itemize}
include reasonable modification of the regular education curriculum and instructional methodology.

Finally, there is simply no good reason for limiting accommodation of disabled children to the provision of supplementary aids and services. "Reasonable modification" of the regular education curriculum and instructional methodology serves the same salutary purpose as "supplementary aids and services" — to facilitate the integration of children with disabilities. Thus, schools should be expected to make reasonable modifications to the regular education program where necessary to give disabled children meaningful access, unless of course the modification is shown to unduly burden other disabled or non-disabled students.396

4. The Multifactor Approach

The mainstreaming provision of the IDEA uses broad language, requiring schools to educate disabled children to the "maximum extent appropriate," and removing children from the regular classroom only when their "education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."397 Hence, by necessity, courts have developed multifactor formulas to assist in analyzing the mainstreaming issue.398 The principle two formulas are the Roncker feasibility test,399 and the Daniel R.R. two-step inquiry.400 However, as one commentator has observed, "the differences in the formulas may be more verbal than real."401

For instance, both formulas compare the educational benefits the child is likely to derive from inclusion with the benefits of a more restrictive placement.402 Further, both formulas require school dis-
 utils to seriously consider providing services to facilitate inclusion;\textsuperscript{408} and to consider what, if any, disruptive effect will have on the education of non-disabled students.\textsuperscript{404} Finally, cost was expressly made a factor in Roncker\textsuperscript{408} and Rachel H.,\textsuperscript{408} as well as Greer,\textsuperscript{407} a decision that adopted the Daniel R.R. formula.\textsuperscript{408}

Viewed in light of the language and purposes of the Act, these factors are all relevant to the mainstreaming inquiry. However, proper application of these factors requires clarification. The first factor is the relative educational benefits to be derived from a mainstream placement as opposed to a more restrictive placement.\textsuperscript{409} Since education of the disabled is a stated purpose of the IDEA, a comparison of the educational benefits to be derived from a mainstream placement, as opposed to a more restrictive placement, is certainly a relevant consideration.\textsuperscript{410} However, two points should be kept in mind when making such a comparison. First, the definition of "education" must be drawn from the IDEA. The IDEA defines "special education" as "specially designed instruction . . . to meet the unique needs of a child with a disability."\textsuperscript{411} Each disabled child's instruction is specially designed in the development of the child's "individualized education program" ("IEP"). Thus, the comparison should not focus on the child's ability to derive educational benefit from a general as opposed to a special education curriculum, but rather on the capacity of each environment to promote progress towards the child's IEP goals.\textsuperscript{412} Only if the disabled child is permitted to learn differently than non-disabled children will the IEP provision, as well as the mainstreaming provision, be served.

\textsuperscript{403} See supra notes 216-85 and accompanying text (discussing the Roncker test and the Daniel R.R. test).
\textsuperscript{404} See supra notes 216-85 and accompanying text (discussing the tests in Roncker and Daniel R.R.).
\textsuperscript{405} 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864 (1983).
\textsuperscript{406} 14 F.3d 1398, 1404 (9th Cir. 1994).
\textsuperscript{407} 950 F.2d 688 (11th Cir. 1991), vacated on other grounds, 956 F.2d 1025 (1992).
\textsuperscript{408} Id. at 696.
\textsuperscript{409} See supra notes 216-302 and accompanying text (developing this factor in relation to tests enunciated in Roncker, Daniel R.R., and Rachel H.).
\textsuperscript{410} See 20 U.S.C. § 1412(2)(B) (Supp. V 1993) (requiring that children be provided an "appropriate public education").
\textsuperscript{411} Id. § 1401(a)(16).
\textsuperscript{412} See, e.g., Oberti v. Board of Educ., 995 F.2d 1204, 1217 (3d Cir. 1993) (concluding that "the fact that a child with disabilities will learn differently from his or her education within a regular classroom does not justify exclusion from that environment").
Secondly, as the *Greer* court aptly noted, the appropriate comparison is between an education in a restricted environment and an education in the regular classroom with *supplementary aids and services*.\textsuperscript{413} As has already been pointed out, this phrase should be interpreted to include reasonable modification to the regular education program, a step that began with the development of the child's individualized education program ("IEP").\textsuperscript{414} Thus, the comparison should account for the whole range of services that are available to assist the teacher and the child, as well as reasonable modifications to the regular education program.\textsuperscript{416}

The second factor scrutinizes the efforts made to assist the child in succeeding in the regular classroom.\textsuperscript{416} The *Daniel R.R.* court held that the obligation to provide services and modifications to accommodate the disabled child is broad, but not limitless.\textsuperscript{417} However, "mere token gestures to accommodate [disabled] students" is insufficient.\textsuperscript{418}

The limit on the school's obligation to provide support services necessary to mainstream a disabled child is generally expressed as a financial limit.\textsuperscript{418} Such a limit is consistent with the terms of the IDEA. Disabled children are to be included to the "maximum extent appropriate,"\textsuperscript{420} and in the words of the *Greer* court, "[i]f the cost of educating a [disabled] child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate."\textsuperscript{421} Furthermore, the Act expressly limits the obligation

\textsuperscript{413} *Greer* v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991), vacated on other grounds, 956 F.2d 1025 (11th Cir. 1992).

\textsuperscript{414} See *supra* notes 377-96 and accompanying text (discussing assistance used to achieve inclusion).

\textsuperscript{415} *Oberti*, 995 F.2d at 1216.

\textsuperscript{416} See *supra* notes 225-85 and accompanying text (discussing the *Daniel R.R.* two-step inquiry).

\textsuperscript{417} *Daniel R.R.* v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989).

\textsuperscript{418} *Id.*

\textsuperscript{419} See, e.g., *Greer* v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991) (allowing the school district to consider the cost of providing supplemental aids and services necessary to include a disabled child), vacated on other grounds, 956 F.2d 1025 (11th Cir. 1992); *Roncker* v. Walter, 700 F.2d 1058, 1063 (6th Cir.) (concluding that the cost of mainstreaming is a relevant factor in the analysis, provided that the school district is providing disabled children with a continuum of alternative placements) (citing *Age* v. Bullitt County Public Sch., 673 F.2d 141, 145 (6th Cir. 1982)), cert. denied, 464 U.S. 864 (1983).


\textsuperscript{421} *Greer*, 950 F.2d at 697 (citing the provision of a full-time teacher for the child as an example of a service the school district is not required to provide).
of local school districts to provide services in support of inclusion to that which is "practicable."\textsuperscript{422} Thus, the Act contemplates a financial limit on the school's obligation to accommodate the education of disabled children in the regular classroom.

However, this does not mean that a school district may deny disabled children a mainstream placement because it is incrementally more expensive than a segregated one.\textsuperscript{423} Although it is not clear that educating disabled children in the regular classroom with adequate support systems costs incrementally more over time than educating them in segregated environments, school districts, already operating under increasing financial constraints, are likely to focus on the initial additional costs of inclusion.\textsuperscript{424} Therefore, if a mere incremental increase in cost were a permissible basis for denying inclusion to disabled children, many disabled children could be legally excluded; a result hardly contemplated by the mainstreaming mandate. Moreover, the Act requires that school districts provide services in support of inclusion,\textsuperscript{425} and apply federal funding to the excess costs of educating disabled children.\textsuperscript{426} Thus, a merely

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\item \textsuperscript{423} Greer, 950 F.2d at 697.
\item \textsuperscript{424} MATHEW D. COHEN, OVERCOMING BARRIERS TO INCLUSION OF CHILDREN WITH DISABILITIES IN THE LOCAL SCHOOLS: A BLUEPRINT FOR CHANGE 60 (1994) (a report prepared for the Illinois Planning Council on Developmental Disabilities).
\item \textsuperscript{426} Id. (requiring, \textit{inter alia}, that local school agencies provide satisfactory assurance that federal funding will be used for the excess costs of educating disabled children, including "to the maximum extent practicable . . . the provision of special services to enable such children to participate in regular education programs"). For a variety of historical, administrative, and political reasons, many states fund special education in a manner that puts school districts at risk of losing funding for disabled children placed in the regular education classroom. \textit{See generally Financial Disincentives, supra note 8, at 127-48 (discussing financial disincentives to inclusion in Illinois)}; Howard P. Blackman, \textit{Special Education Placement: Is It What You Know or Where You Live?} 55 EXCEPTIONAL CHILDREN 459, 461 (1989) (discussing the role of state financing in the widely varying rates of implementation among the states); Susan B. Hasazi et al., \textit{A Qualitative Policy Study of the Least Restrictive Environment Provision of the Individuals with Disabilities Education Act}, 60 EXCEPTIONAL CHILDREN 491, 496-97, 504 (1994) (discussing the role of financing in the implementation of the mainstreaming mandate in six states and twelve local school districts); James A. Tucker, \textit{Less Required Energy: A Response to Danielson and Bellamy}, 55 EXCEPTIONAL CHILDREN 456, 457-58 (1989) (discussing the role of state financing in the widely varying rates of implementation among the states). Thus, the school district may not only be faced with the incremental increase in the cost of educating a disabled child in the regular classroom, but also with the possibility of losing substantial funding for that child altogether. \textit{See, e.g., Sacramento City Unified Sch. Dist. v. Rachel H.}, 14 F.3d 1398, 1404 (9th Cir. 1994) (discussing the school district's argument that it stood to lose $190,764 in state special education funding if the child was not enrolled in a special education class for at least 51% of the day). Such financial disincentives to mainstreaming should not be allowed to subvert implementation of the mainstreaming mandate. Hence, the prospect of lost funding for children that are mainstreamed should
incremental increase in the cost of educating a disabled child in the regular classroom is not a legitimate ground for placing that child in a segregated classroom.

The third factor employed by the courts is the possible adverse impact of the mainstream placement on the education of non-disabled children in the classroom. This factor is certainly relevant to the mainstreaming issue since a mainstream placement that results in undue disruption of the education of other students can hardly be said to be "appropriate." However, as the Oberti court observed, this factor cannot be considered in isolation from the school's obligation to provide supplementary aids and services to accommodate the child's need for additional attention. The IEP should, in these instances, address the behavioral problems that are presented. Therefore, when a child's disability results in behavior so disruptive that it significantly impairs the education of other children, the child should be excluded from the regular classroom only after reasonable efforts to address the problem has failed.

The Roncker and Daniel R.R. formulas neglect to consider two other factors that merit discussion. First, in view of Congress's manifest objective to bring individuals with disabilities into the mainstream of society, the court should consider the benefits of inclusion on the non-disabled children in the class. Non-disabled children will hopefully come to understand and tolerate the differences presented by disabilities if they are given the opportunity to interact with disabled children. At the very least, non-disabled children can learn, first-hand, that the disabled have certain rights.

Moreover, a disabled child brings a different perspective to the classroom. The child may model a degree of determination in the

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not be considered in the mainstreaming decision. Cf. id. (finding the school district's argument on the issue of cost unpersuasive since the district had not sought a waiver to the law cutting off special education funding for students not enrolled in the special education classroom for at least 51% of the day).


429. Id.


431. Oberti, 995 F.2d at 1217 n.24; see supra notes 122-26 and accompanying text (discussing references in the legislative history to the benefits of mainstreaming for non-disabled students).
face of adversity that will inspire classmates. A non-disabled child who suffers a disabling illness or injury may be assisted by the experience of having had successfully functioning disabled peers. In sum, the decision-makers should not forget the contribution that a disabled child will make to the regular education program.

Finally, courts should remember the important role that Congress reserved for parents, guardians, and when appropriate, the children, themselves, in the placement decision. Parents and guardians, and when appropriate, their children or wards with disabilities, are guaranteed a place at the table where the placement decision is made. Thus, what the parent/guardian or child thinks is an appropriate placement should be a relevant factor to consider. The parent/guardian has the benefit of living with or maintaining a close relationship with the child, and thereby acquiring an intimate familiarity with the child’s needs. Furthermore, they are privy to personal and confidential information that may have a significant bearing on the placement decision — including information derived from independent evaluations and consultations with experts. Thus, the parent/guardian’s view should be given due weight in the placement decision.

This goes as well for the disabled child who is able to participate in the development of the IEP. Not only is respect for the views of the child vital to the child’s self-esteem and right of self-determination, but the very high drop-out rate among the disabled points to the need to involve them early in the goal-setting process.

To summarize, the multifactor approach, especially as applied in Greer, Oberti, and Rachel H., appropriately shifts the focus of the placement decision away from the child’s disability, something over which the child has no control, to the capacity of the regular education program to accommodate the “differences” presented by children with disabilities. If the multifactor analysis includes considera-

432. See 20 U.S.C. § 1401(a)(20) (Supp. V 1993) (providing for parents or guardians, and when appropriate the disabled child herself, to participate in the development of the child’s IEP); see also Linda S. Abrahamson, Comment, The Probative Weight of the “Mainstreaming” Requirement Under the EHA, 12 N. Ill. U. L. Rev. 93, 128 (1991) (observing that an “appropriate” and “individualized” education for disabled children will require that the placement choice of the parents or child be “given positive weight in a multi-factor analysis”).

433. See 20 U.S.C. § 1401(a)(20) (Supp. V 1993) (providing for parents or guardians, and when appropriate the disabled child herself, to participate in the development of the child’s IEP).

434. Id.

435. Almost one fourth of all students with disabilities dropped out of school in the 1990-91 school year. DOE 15TH ANNUAL REPORT, supra note 8, at 29.
tion of the benefits of inclusion for non-disabled children, as well as the concerns of parents/guardians and the children themselves, it can effectively assist all those involved in arriving at a placement decision based on considerations contemplated by the Act.

5. Conclusion

The decision whether to educate a child with disabilities in the regular classroom involves consideration of a variety of factors. Thus, only an individualized, fact-specific, and multifactor inquiry can do justice to the daunting task of reviewing the appropriateness of a disabled child's placement. Such an inquiry will no doubt involve close questions of fact that will turn on the credibility of parents, educators, and administrators. However, the inquiry is made easier by the fact that Congress clearly prefers placement in the regular classroom. Hence, courts reviewing the appropriateness of placement decisions should, in close cases, err on the side of inclusion, not exclusion, from the regular education classroom.

The mainstreaming inquiry is only part of what ultimately determines the placement of a child. Such a potentially difficult decision is bound to give rise to disputes between parents or guardians and school authorities. Therefore, the process by which the placement decision is ultimately arrived at is equally if not more important than the substantive factors that should guide the inquiry. Thus, we turn to the issue of what process the Act requires for the placement decision.

C. The Mainstreaming Process

Influenced by such early "right to education" cases as Pennsylvania Ass'n for Retarded Children v. Commonwealth and Mills v. Board of Education, one of the principle purposes of the IDEA is to insure that the rights of children with disabilities and their par-

436. See supra notes 331-39 and accompanying text (discussing individualized decision-making); see also supra notes 397-435 and accompanying text (discussing the multifactor approach to the mainstreaming decision).
438. See supra notes 358-76 and accompanying text (discussing the Congressional preference for inclusion).
ents are protected. Hence, the IDEA takes the extraordinary step of vesting parents and guardians with due process protections. As the House Report explains, the elaborate procedural safeguards found in the IDEA are designed, among other things, to assure that every child with a disability is "in fact" afforded an education in the "least restrictive environment." The most elemental procedural protection accorded parents and guardians is the opportunity to participate in the development of their child's IEP (individualized education program). The IEP is a plan to address the unique educational needs of the child, and is to include a statement of the "extent to which [the] child will be able to participate in regular educational programs." Hence, the IEP assures a measure of parental involvement as well as the documentation of an educational plan for which the school is held accountable. Inevitably, however, the parents or guardians and the school district do not always agree on the appropriate educational program and placement for the child. Therefore, a mechanism for resolving disputes is necessary. The Act gives parents and guardians standing to contest "any matter relating to the [school's] identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." Thus, parents and guardians are entitled to make their case at "an impartial due process hearing," the disposition of which may ultimately be appealed to federal or state court. The courts, in turn, are bound to review the issues raised by the parties and make "independent decision[s] based on a preponderance of the evidence." Hence, on its face, the Act clearly vests parents and guardians of

444. Id. § 1401(a)(20)(C).
446. Id. § 1415(b)(2).
447. See id. § 1415(e)(2) (providing alternative civil actions to aggrieved parties).
448. S. CONF. REP. No. 455, 94th Cong., 1st Sess. 50 (1975), reprinted in 1975 U.S.C.C.A.N. 1480, 1503. The Supreme Court has interpreted this provision to mean that the courts are to review IDEA claims under a standard of review short of "de novo" but less deferential than "substantial evidence." Board of Educ. v. Rowley, 458 U.S. 176, 205 (1982). Specifically, the courts are to accord "due weight" to the administrative proceedings, the records of which the court is to receive. Id. at 206.
disabled children with the right to challenge the substantive educational judgments — determinations of appropriate educational goals, methodology, and placement — of local school districts. This interpretation is not only warranted by the language of the Act, but the manifest lack of deference it shows to local government decision-making comports with what we know of Congress's constitutional concerns; concerns about exclusion, segregation, disparate treatment, and other threats to the liberty and equal protection of the disabled by local government. However, in Board of Education v. Rowley, the United States Supreme Court held that the due process provisions of the IDEA do not mean what they say.

Discussing the standard of review in IDEA cases, the majority in Rowley acknowledged that the scope of review mandated by the Act extends beyond mere matters of state compliance with the Act's procedural requirements. However, the Court went on to argue that the emphasis Congress placed on procedural requirements, which assure "parents and guardians a large measure of participation at every stage of the administrative process," contrasted with the general and vague "substantive admonitions" in the Act, indicates that Congress intended courts to largely focus their review on questions of procedural compliance. Hence, courts should defer to the substantive judgments of local school authorities on matters of educational methodology or policy. Thus, in a remarkable display of obfuscation, the majority averred that the IDEA's elaborate scheme of procedural protections for parents or guardians, including an opportunity to present complaints concerning "any matter relating to the . . . educational placement of the child" is only really intended to guarantee "parental involvement." The majority sought to buttress its argument by stressing that "Congress" [sic]
intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them.”

However, it is difficult to square this statement with that of the Senate Report: “Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that [disabled] children are provided equal educational opportunity.” State indifference to the Fourteenth Amendment, not mere state impecuniosity, animated Congress’s passage of the IDEA.

Judicial review of placement decisions remains a linchpin in the IDEA’s comprehensive scheme of protecting the rights of children with disabilities and bringing them into the mainstream of their communities. Notwithstanding the Supreme Court’s cramped interpretation of the IDEA’s judicial review provisions, numerous lower courts have freely reviewed the placement decisions of school districts for compliance with the mainstreaming mandate. Such review not only ensures that “parental involvement” will be meaningful, but it acts as a necessary check on the discriminatory policies that have historically plagued the education of disabled children.

Congress only recently reiterated that discrimination against individuals with disabilities persists in education, and a United States Department of Education report to Congress found that nearly two-thirds of the state special education plans submitted for approval in 1991 were not in compliance with the mainstreaming requirements of the IDEA.

Additionally, uniformity in the implementation of the mainstreaming mandate at the state and local level is woefully lacking.

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459. Id.
461. See supra notes 109-30 and accompanying text (discussing the legislative history of the IDEA); see also DOE 15TH ANNUAL REPORT, supra note 8, at 119 (reporting that nearly two-thirds of the state plans submitted to the DOE for approval in 1991 were not in compliance with the mainstreaming requirements of the IDEA).
462. See supra notes 216-332 and accompanying text (discussing federal appellate opinions reviewing the mainstreaming issue).
463. See supra notes 107-24 and accompanying text (discussing the constitutional concerns raised in the legislative history).
465. DOE 15TH ANNUAL REPORT, supra note 8, at 119.
466. See id. at A-62 (observing the disparity between the states with rates for mainstreaming mentally retarded children, defined as children spending at least 40% of the school day in the regular education classroom); see also SUBCOMMITTEE TO THE PUBLIC POLICY COMMITTEE, ILLINOIS PLANNING COUNCIL ON DEVELOPMENTAL DISABILITIES, FINAL REPORT: KEEPING KIDS IN THEIR HOME SCHOOLS 17, Tables 2-4 (Sept. 1990) (disclosing a wide disparity among Illinois
It is doubtful that Congress intended for inclusion in the regular classroom to depend on the vicissitudes of residency.\textsuperscript{467} Judicial review, therefore, affords an opportunity to bring more rationality to the placement process by giving parents, educators, and state and local administrators and hearing officers the concrete guidance they need on implementation of the mainstreaming mandate. However, the courts will only make matters worse unless they arrive at a degree of consensus on the mainstreaming issue. Unfortunately, the Supreme Court's analysis in \textit{Rowley} generated a judicial approach to the mainstreaming provision that continues to foster confusion and uncertainty.

\textbf{D. Educational Methodology and the Mainstreaming Issue}

The Supreme Court's analysis of the IDEA in \textit{Rowley} yielded a two-part formula for judicial review of cases brought under the IDEA: (1) did the school district comply with the procedures of the Act, and (2) is the individualized education program "reasonably calculated" to confer educational benefits on the child.\textsuperscript{468} Commenting on this formula, then Justice Rehnquist stated: "[O]nce a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States."\textsuperscript{469} This comment is the source of a fundamental conflict among the federal courts of appeals. A number of courts have concluded that the placement decision is one of methodology, and therefore beyond the scope of judicial review.\textsuperscript{470} Other courts, however, do not read the Supreme Court's concern for local autonomy in matters of educational methodology as an excuse for not enforcing the mainstreaming mandate.\textsuperscript{471}

\begin{itemize}
\item 467. For a policy study comparing states and local school districts having high rates of segregation with those with low rates, see Hasazi, \textit{supra} note 426, at 495-506.
\item 469. \textit{Rowley}, 458 U.S. at 208.
\item 470. \textit{See supra} notes 303-32 and accompanying text (explaining the deferential approach employed by some of the federal circuits).
\item 471. \textit{See supra} notes 216-302 and accompanying text (discussing the \textit{Roncker} feasibility test,
The educational placement of a child with disabilities is arguably by definition a matter of educational methodology, requiring as it does an expert assessment of the best environment for meeting the child’s unique educational needs.\textsuperscript{472} Whenever the IEP team considers how to best educate a child with disabilities, it must also consider where best to educate the child, be it a regular education classroom, special education classroom, special education day school, residential facility, hospital, or the child’s home. Consequently, the court’s decision to cast the issue in \textit{Lachman v. Illinois State Board of Education}\textsuperscript{473} as a “how” (cued speech or total communication) rather than a “where” (integrated or segregated classroom) misses the point.\textsuperscript{474} For, at bottom, the “how” and the “where” of educating a child with disabilities are two sides of the same coin that is the subject of the individualized, fact-specific inquiry mandated by the Act.\textsuperscript{475} Both the “how” and the “where” are potentially questions of methodology, and the mistake the \textit{Lachman} and other federal appellate courts have made applying the \textit{Rowley} formula to the mainstreaming issue, is to think that once they determine “methodology” is at issue in the case, \textit{Rowley} requires deference to the placement decisions of local school officials.\textsuperscript{476}

This conclusion is flawed for several reasons. First, the mainstreaming mandate was not at issue in \textit{Rowley}.\textsuperscript{477} In fact, the court explicitly confined its analysis to the facts of Amy Rowley’s case: a hearing-impaired child who was receiving “substantial specialized instruction and related services, and . . . performing above average in the regular classrooms of a public school system.”\textsuperscript{478} Consequently, the court’s counsel that educational methodology and policy
is beyond the scope of judicial review is properly confined to those cases where the child is already being educated in the regular classroom, using the regular education curriculum. Secondly, the dispute over educational methodology in Rowley did not bear on the child's access to the regular education classroom. The question whether Amy was entitled to a sign-language interpreter had no bearing on whether Amy would be educated alongside her non-disabled peers. In other words, not only was the mainstreaming mandate not at issue in Rowley, the mainstreaming mandate was not even implicated by the dispute over methodology.  

The final and most decisive reason the Rowley test should not be applied to mainstreaming cases is that it effectively renders the mainstreaming mandate a dead letter. Educational placement is so intertwined with questions of methodology that school districts can simply cast the educational placement issue as one of methodology, thereby evading the mainstreaming obligation altogether. For example, in Briggs v. Board of Education, the mainstreaming mandate was satisfied when a school district moved a child to a more restrictive setting "reasonably calculated" to provide a "free, appropriate education." Provided the school could articulate educational reasons for the placement, the decision was deemed one of methodology left to the discretion of local school authorities. Similarly, in Mark A. v. Grant Wood Area Education Agency, the court analyzed the dispute over where the child would be placed as a dispute over how the child would be educated. Finding that the child was receiving an "appropriate" education, the court viewed the question of where the child would be educated as one of methodology for resolution by the school.

Other courts, in contrast, have recognized that concerns for local autonomy in matters of educational policy cannot justify ignoring Congress's mandate to bring children with disabilities into the regul-

479. See Greer, 950 F.2d at 695 (observing that "the Rowley test assumes that the Act's mainstreaming requirement has been met").

480. It is an "'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (quoting Colautti v. Franklin, 439 U.S. 379, 392 (1979)).

481. 882 F.2d 688 (2d Cir. 1989).

482. Id. at 693.

483. Id. (citing Board of Educ. v. Rowley, 458 U.S. 176, 207-08 (1982)).

484. 795 F.2d 52 (8th Cir. 1986), cert. denied, 480 U.S. 936 (1987).

485. Id. at 54.

486. Id. (citing Rowley, 458 U.S. at 208).
lar education classroom. For example, in *Greer v. Rome City School District*, a panel of the federal Eleventh Circuit held that the school’s determination that a segregated educational setting would confer a greater educational benefit on the child was due no deference because the school had not considered the “full range of supplemental aids and services . . . that could be provided to assist [the child] in the regular classroom.” Interestingly, the court construed *Rowley* only to require deference to local school districts in matters of educational methodology after the requirements of the Act, including the mainstreaming requirement, have been met. Thus, the court was not deterred from analyzing the placement decision as a mainstreaming issue, despite the school’s conclusion that a segregated placement would be educationally superior.

Likewise, the court in *Oberti v. Board of Education* concluded that the United States Supreme Court’s admonition not to interfere with the educational methodology decisions of local school districts was not inconsistent with the court’s duty to enforce the Act’s mainstreaming provision. At the trial on the merits, the school district contended that educational techniques and methodologies necessary to appropriately educate a child with severe intellectual disabilities could not be feasibly introduced in the regular education classroom. However, as the federal appellate court observed, the Oberti’s experts cogently refuted this claim, describing a variety of methods and techniques that a regular education teacher with appropriate training could successfully import into the regular education classroom without undue disruption. Thus, *Oberti* graphically illustrates the inevitable interaction between questions of method and educational placement, which if left to the sole discretion of local school districts, would render the mainstreaming mandate a dead letter. The school board in *Oberti* asserted an educational policy that it is not appropriate to educate children with severe intellectual disabilities in the regular classroom. Had the *Oberti* court,

487. 950 F.2d 688 (11th Cir. 1991).
488. Id. at 698.
489. Id. at 699.
490. Id. at 698.
491. 995 F.2d 1204 (3d Cir. 1993) (*Oberti II*).
492. Id. at 1214.
494. *Oberti II*, 995 F.2d at 1222.
out of deference to local autonomy in matters of educational policy and methodology, declined to consider the methodological issues debated by the parties, the mainstreaming mandate would have held no meaning for children with severe intellectual disabilities.

Methodology was also at the heart of *Rachel H.*496 However, the court found nothing improper about the war between the experts that waged in the lower court on the issue of Rachel’s educational progress under different educational regimes.497 The trial court found that Rachel’s experts were more credible on the issue of whether education in the regular classroom would be educationally superior to an education in a more restricted setting.498 Noting that the lower court held a full evidentiary hearing on the issue, the appellate court would not disturb the lower court’s decision that Rachel was entitled to placement in the regular education classroom.499

The individualized, multi-factored, and fact-specific mainstreaming analysis employed in *Greer, Oberti,* and *Rachel H.* compels school districts to adduce evidence and reasons, not merely conclusions or policy statements, to support restrictive placements. Consequently, this approach effectively unmask[s] the false or unverified methodological assumptions, and legally insufficient provision of “supplemental aids and services,” that have historically barred so many disabled children from the regular classroom. The mainstreaming mandate would clearly be frustrated if school districts are spared scrutiny of their placement decisions on the grounds that such scrutiny is an improper intrusion into matters of policy and methodology. Accordingly, courts should properly limit the application of the *Rowley* test to its facts, and heed its discourse on educational methodology with great circumspection. In the words of one court: “[W]e do not read the Supreme Court’s salutary warnings against interference with educational methodology as an invitation to abdicate our obligation to enforce the statutory provisions [of the Act].”500

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497. Id. at 1404.
499. Rachel H., 14 F.3d at 1404.
IV. IMPLICATIONS FOR THE DESEGREGATION OF CHILDREN WITH DISABILITIES

The IDEA does not mandate formal equality between disabled and non-disabled children, recognizing that the unique educational needs of disabled children may at times warrant disparate treatment. Accordingly, the Act contemplates more restrictive settings where necessary to satisfactorily meet the unique educational needs of the disabled. However, the IDEA also contemplates that, through developments in diagnostic and instructional procedures, training of regular, as well as special education teachers, the provision of “supplementary aids and services” by local school districts, and the infusion of federal funds, most disabled children previously excluded can now be successfully educated in the regular education classroom. Notwithstanding Congress's clear preference for including disabled children in the regular classroom, only about one-third of the approximately five million children who received special education in the 1990-91 school year were educated in the regular classroom. Studies suggest this is largely due to systemic barriers, such as state funding disincentives, dual systems of general education and special education, separate higher education and cer-

501. See supra notes 341-47 and accompanying text (discussing the mainstreaming mandate and problems of determining when inclusion is appropriate); cf. Mark C. Weber, ADA Recognizes Formal Equality is Not Equal Enough, HUM. RTs., Spring 1992, at 2 (finding that disabilities can create differences that are relevant to some programs and activities, and thus require different treatment to achieve functional equality). For a newspaper article that raises issues of formal and functional equality in competitive sports for the disabled, see Janita Poe, Whole New Game, Chi. TRIB., May 2, 1994, § 2, at 1.

502. See 20 U.S.C. § 1412(5)(B) (Supp. V 1993) (requiring mainstreaming to the “maximum extent appropriate” and exclusion from the regular education classroom only when the child cannot be satisfactorily educated there “with the use of supplementary aids and services”); 34 C.F.R. § 300.552(d) (1993) (“In selecting the LRE [least restrictive environment], consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.”).


508. DOE 15TH ANNUAL REPORT, supra note 8, at 16.
tification of general and special education teachers, vested interests in disability categories, and a history of delivering special education services through regional centers.\textsuperscript{509} Such systemic impediments to inclusion of disabled children are not a legitimate ground for denying a disabled child access to the regular classroom.\textsuperscript{510} They effectively deprive the child of an \textit{individualized} education, compromising the integrity of the placement decision through the tacit introduction of improper considerations.\textsuperscript{511}

The presence of systemic barriers to inclusion underscores the importance of the judiciary in enforcing the mainstreaming mandate of the Act. The judiciary’s obligation to independently review the issues raised,\textsuperscript{512} and grant relief it deems appropriate means, among other things, that courts have the crucial responsibility to scrutinize school district “findings” and “conclusions” having the effect of excluding disabled children from the regular classroom. Only then will the procedural safeguards accorded disabled children operate to ensure that segregated placements are based on proper considerations and fact-finding, and not “disagreement with the mainstreaming concept.”\textsuperscript{513}

V. CONCLUSION

Despite state legislative reforms that found nearly every state in the Union with some form of mandatory education of disabled children,\textsuperscript{514} in 1975, the House Committee on Education and Labor found that over fifty percent of the disabled children in the nation were denied a fundamental educational opportunity.\textsuperscript{515} Such a con-

\begin{itemize}
  \item \textsuperscript{509} See generally Hasazi, supra note 426, at 498-504 (detailing structural causes behind the widely varying rates of inclusion at the state and local level).
  \item \textsuperscript{510} See, e.g., Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1405 (9th Cir. 1994) (noting that a state law requirement that disabled children be educated by a special education teacher would be inconsistent with the mainstreaming mandate).
  \item \textsuperscript{511} See supra notes 397-435 and accompanying text (discussing the factors that are appropriate to consider in the placement decision).
  \item \textsuperscript{512} See S. CONF. REP. NO. 455, 94th Cong., 1st Sess. 50 (1975) (giving that courts are bound to make independent decisions after reviewing the issues raised by parents or guardians), \textit{reprinted in} 1975 U.S.C.C.A.N. 1480, 1503.
  \item \textsuperscript{513} Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.), \textit{cert. denied}, 464 U.S. 864 (1983); see H.R. REP. NO. 332, 94th Cong., 1st Sess. 15 (1975) (noting that the elaborate procedural safeguards accorded disabled children by the IDEA are intended to assure that disabled children are “in fact” educated in the “least restrictive environment”).
  \item \textsuperscript{514} See H.R. REP. NO. 332, 94th Cong., 1st Sess. 10 (1975) (discussing the first state laws mandating programs for disabled children).
  \item \textsuperscript{515} Id. at 7.
\end{itemize}
stitutionally suspect disparity in the educational opportunities provided to non-disabled and disabled children prompted Congress to pass what is now titled the Individuals with Disabilities Education Act ("IDEA" or "the Act"). To assure equal protection of the law for children with disabilities, Congress fashioned a grant-in-aid statute that would financially assist state and local governments in providing appropriate educational opportunities for the disabled.

However, Congress did not merely throw money at the problem of bringing states into compliance with the Constitution. As a condition for receipt of funding, Congress mandated the adoption of principles for educating disabled children, principles first enunciated in the early right to special education cases. Specifically, the Act requires that children with disabilities be provided (1) a "free appropriate public education designed to meet their unique needs;" (2) an education in the least restrictive environment; and (3) procedural safeguards including the right to notice and a hearing.

Congress recently reaffirmed its commitment to eradicate discrimination in education on the basis of disabilities with passage of the Americans with Disabilities Act of 1990 ("ADA"). The ADA bars state and local public entities from denying disabled individuals

519. 20 U.S.C. § 1400(c) (Supp. V 1993). Compare id. (mandating a free appropriate public education designed to meet the unique needs of the child) with Mills, 348 F. Supp. at 876 (holding that the additional cost of educating children with disabilities could not serve to exclude them from a public education) and P.A.R.C., 343 F. Supp. at 314 (mandating "access to a free public program of education and training appropriate to [the] capacities" of each child).
participation in programs and activities that, with reasonable modifications or the provision of auxiliary aids and services, such individuals would otherwise qualify for. Both the IDEA and the ADA make clear Congress's intent to bring children and adults with disabilities into the mainstream of their communities.

The mainstreaming mandate of the IDEA is clearly the favored legal mechanism by which disabled children are to be integrated into their communities. However, there is uncertainty over what is (a) the substantive standard for inclusion, and (b) the proper scope of judicial review of placement decisions. Such uncertainty can only contribute to the statistically significant lack of inclusion for disabled children, especially children with intellectual disabilities. This uncertainty stems in part from federal appellate court decisions that diverge on two critical points.

First, courts are divided on the issue of whether the mainstreaming mandate requires schools to make reasonable modifications to the regular education curriculum and instructional methodology to accommodate the inclusion of children with disabilities. Second, courts are in disagreement on whether the educational placement decision is one of "methodology," and thus, under Board of Education v. Rowley, a decision within the sole discretion of local school authorities.

Analyzing these and related issues, this Comment advances an interpretation of the IDEA that recommends a mainstreaming inquiry and process. Educational placement decisions for disabled children should be individualized and based on a searching factual inquiry guided by relevant factors. Moreover, the decision should be made in light of Congress's manifest preference for including disabled children in the regular classroom, and involve serious consid-

523. Id. § 12131(2).
524. See supra notes 369-74 and accompanying text (discussing Congress's objectives in outlawing discriminatory barriers for disabled children and adults).
525. See supra notes 8-9 and accompanying text (relating the statistics of those disabled children actually included in the regular classroom).
526. See supra notes 377-96 and accompanying text (discussing whether the requirement to facilitate inclusion through the provision of "supplementary aids and services" includes a requirement to make reasonable modifications to the regular educational program).
528. See supra notes 439-500 and accompanying text (discussing the scope of judicial review of substantive placement decisions and the United States Supreme Court's admonitions that questions of educational "methodology" are reserved for local school authorities).
529. See supra notes 348-467 and accompanying text (delineating a mainstreaming inquiry process).
eration of what reasonable modifications to the regular education program can be made to facilitate a child's inclusion.530

The mainstreaming decision also involves a process that begins with parental, and, where appropriate, student participation in the development of an "individualized education program." If necessary, the process culminates in an independent judicial review of the placement decision. Although questions of educational methodology are invariably incident to a disabled child's placement decision, judicial review of such decisions is not an inappropriate intrusion into the domain of local governance. Rather, an independent review is necessary to preserve any meaningful place for mainstreaming in the Act's scheme of educational reform.531

Moreover, evidence of the systemic segregation of children with disabilities nineteen years after the passage of the IDEA suggests that an independent judicial review of mainstreaming decisions is vital to realizing Congress's manifest goals of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.532 Hence, courts should not hesitate to scrutinize placement decisions for disabled children, ever mindful that "[i]nclusion is a right, not a privilege for a select few."533

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530. See supra notes 348-438 and accompanying text (discussing the relevant factors in the mainstreaming inquiry).

531. See supra notes 439-500 and accompanying text (concluding that an independent and broad judicial review of placement decisions for disabled children is warranted by the language of the Act and necessary to realize its objectives).

