

LEAST RESTRICTIVE ENVIRONMENTS:
WHERE SEGREGATED, SELF-CONTAINED
SPECIAL EDUCATION CLASSROOMS FALL ON
THE CONTINUUM OF PLACEMENTS AND WHY
MAINSTREAMING SHOULD OCCUR WITH
SAME-AGE PEERS

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INTRODUCTION

According to the United States Department of Education and most education communities, school-age children with disabilities in the United States are to be guaranteed a free and appropriate public education (FAPE).¹ Congress enacted FAPE in the Individuals with Disabilities Education Act (IDEA).² Despite this guarantee, some schools struggle to implement proper special education.³ Consider the following hypothetical illustration about Smith Elementary School and its interpretation of FAPE under IDEA:⁴

Smith Elementary School in Michigan has two buildings to accommodate its large student population. The kindergarten, first grade, and second grade classrooms at Smith Elementary School are all in building A. The third grade through fifth grade classrooms at the school are in building B. Both buildings have self-contained special education classrooms, which are classrooms in the general education building consisting only of students with disabilities.⁵ Due to arbitrary placement decisions, some third, fourth, and fifth grade students with disabilities are educated in a self-contained

1. See, e.g., *Free Appropriate Public Education for Students with Disabilities: Requirements under Section 504 of The Rehabilitation Act of 1973*, U.S. DEP'T OF EDUC. (Aug. 2010), <https://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html> [<https://perma.cc/DP25-64HK>] (explaining that “regardless of the nature or severity” of the disability, school districts must “provide a ‘free appropriate public education’”); see also 20 U.S.C. § 1412(a)(1)(A) (2012) (enacting FAPE). FAPE does not usually include children that are not a typical school age. See *id.* For an understanding of special education voucher programs for private schooling, see generally Marie Rauschenberger, *Resolving the Lack of Private-School Accountability in State-Funded Special Education Voucher Programs*, 2015 MICH. ST. L. REV. 1125.

2. See § 1412(a)(1)(A); Daniel H. Melvin II, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 619 (1995) (explaining that “IDEA . . . conditions receipt of funds on meeting specified obligations”). In *Board of Education v. Rowley*, the Supreme Court ruled that for schools to meet FAPE requirements, the special education simply must “confer some educational benefit” on the student. 458 U.S. 176, 200 (1982). Later, the Supreme Court articulated a slightly more specific standard for FAPE: for a school to “meet its substantive obligation under the IDEA, a school must offer an individual education plan (IEP) reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017).

3. See Interview with Heather Hall, Dir. of Advocacy, Advocates for Basic Legal Equality (July 2017) (providing the hypothetical below based on a true scenario of a school’s failure to implement IDEA); see also *infra* Section II.B (describing courts’ decisions about schools’ interpretations of IDEA).

4. This hypothetical is based off an analogous situation at an elementary school in Toledo, Ohio. See Interview with Heather Hall, *supra* note 3.

5. See JOHN WILLIAM COLLINS & NANCY P. O’BRIEN, *THE GREENWOOD DICTIONARY OF EDUCATION* 419 (Nancy Patricia O’Brien ed., 2d ed. 2011) (defining self-contained classrooms).

*classroom in building A without participating in lunch, recess, gym, or any other nonacademic courses with peers in building B. These students have no interactions with their nondisabled, same-age peers, but interact only with kindergarten, first grade, and second grade students, which contradicts IDEA's mainstreaming requirements and discounts the nonacademic benefits students receive by interacting with their nondisabled peers.*⁶

IDEA mandates that children with disabilities may only be removed from their regular educational environments when education in regular settings cannot be achieved satisfactorily.⁷ This mandate is known as a child's least restrictive environment,⁸ commonly known as LRE in education communities.⁹ IDEA requires a continuum of alternative placements ranging from least restrictive regular classrooms to the most restrictive institutionalization.¹⁰ As part of this

6. Interview with Heather Hall, *supra* note 3. See 20 U.S.C. § 1412(a)(5)(A) (2012) (explaining the need for mainstreaming students with disabilities); Bd. of Educ. v. Holland, 786 F. Supp. 874, 879 (E.D. Cal. 1992), *aff'd sub nom.* See also Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994) (noting the language and behavior model benefits for students with disabilities from nondisabled students); Melvin, *supra* note 2, at 646 (“[S]chools 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.” (quoting Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983))). For a list of cases that evince the preference for education alongside nondisabled peers, see Melvin, *supra* note 2, at 647 n.360. “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.” *Id.* at 649.

7. See § 1412(a)(5)(A) (“To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”).

8. See *id.* (defining least restrictive environments).

9. See, e.g., Letter from Melody Musgrove, Dir., Office of Special Educ. Programs, U.S. Dep’t Educ., to Colleague (Feb. 29, 2012), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/preschoollre22912.pdf> [<https://perma.cc/QSD9-AX9J>] (using LRE as an acronym for least restrictive environment).

10. See 3 AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL § 11:87 (2018) (illustrating that placements range from regular education classrooms to special classes).

continuum, schools must also provide supplementary services to students.¹¹ Unfortunately, as increased enrollment in schools has led to overcrowding, educational resources have not always expanded with the increased number of students.¹² This overcrowding can lead to problems like the arbitrary segregation at Smith Elementary School.¹³

In applying LREs under IDEA, circuit courts have created different tests to decide placements on the continuum.¹⁴ However, the Supreme Court has not addressed the issue of intra-school segregation of special education students, nor has it addressed whether the phrase “non-disabled peers” is supposed to mean same-age peers.¹⁵ This Comment addresses these issues by proposing that, on the continuum of placements, schools must differentiate between self-contained classrooms in segregated buildings that do not allow students to interact with same-age peers and self-contained classrooms in a building of same-age peers.¹⁶ If a student’s unique needs somehow only permit an LRE in a separate building from the student’s peers, the school must explain that placement based on an educational

11. See *id.* (explaining children should be segregated into special classes if supplementary services are unsuccessful).

12. See Susan Opotow, *Rationalities and Levels of Analysis in Complex Social Issues: The Examples of School Overcrowding and Poverty*, 19 SOC. JUST. RES. 135, 145 (2006) (explaining overcrowding and poverty).

13. See, e.g., *id.* (describing the relationship between overcrowding and poverty).

14. See ELENA M. GALLEGOS, LEAST RESTRICTIVE ENVIRONMENT (LRE) 4-14 (2010), <https://www.bie.edu/cs/groups/xbie/documents/text/idc-008303.pdf> [<https://perma.cc/LFM7-CPTS>] (explaining each circuit’s test for least restrictive environments).

15. See *id.* (explaining the only existing tests for LREs, which do not include any Supreme Court decisions).

16. See AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL, *supra* note 10, at § 11:86 (explaining the continuum of services). Courts typically defer to the school administration’s decisions regarding placements because of the lack of judicial knowledge on the subject. See also *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 184 (2d Cir. 2012). In *Campbell v. Talladega County Board of Education*, an 18-year-old student had “virtually no contact with nonhandicapped students outside of his lunch period[,]” and the court held that “significantly increased contact” with nondisabled peers was “essential to provide [the child] with role models and to increase his capacity to act independently.” 518 F. Supp. 47, 55-56 (N.D. Ala. 1981). The court suggested for the school to move the student’s self-contained classroom “into the main high school building nearby or [] educat[e] both disabled and nondisabled children in the building that housed only special education classes at the time of trial.” Brian L. Porto, Annotation, *Application of 20 U.S.C.A. § 1412(a)(5), Least Restrictive Environment Provision of Individuals with Disabilities Education Act (IDEA)*, 20 U.S.C.A. §§ 1400 *et seq.*, 189 A.L.R. FED. 297 (2003) (citing *Campbell*, 518 F. Supp. at 47).

methodology.¹⁷ Schools cannot arbitrarily place some self-contained classes in separate buildings away from students' same-age peers.¹⁸ This arbitrary separation limits proper mainstreaming and violates constitutional due process.¹⁹

Part I of this Comment explains the development of IDEA and the different least restrictive environments.²⁰ It also describes the history of special education laws and some of the leading circuit court tests for least restrictive environments.²¹ Part II presents the current legal challenges and varied scholarly views about the continuum of least restrictive environments and mainstreaming.²² Part III analyzes the benefits and shortcomings of ensuring that students with disabilities are mainstreamed to the maximum extent possible.²³ Finally, Part IV presents a solution and proposal for a new Supreme Court test about mainstreaming as required by IDEA.²⁴

I. THE HISTORY AND DEVELOPMENT OF SPECIAL EDUCATION LAWS

In the 1970s, Congress sought to remedy the fact that a substantial portion of students with disabilities failed to receive an adequate education in public schools.²⁵ Parents of children with

17. See Linda S. Abrahamson, *The Probative Weight of the "Mainstreaming" Requirement under the EHA*, 12 N. ILL. U. L. REV. 93, 129 (1991) ("[T]he Court should require that school districts support their decisions to offer only segregated or centralized programs as reasonable choices of educational methodology.").

18. See *id.* (explaining the need for schools to make decisions based on educational methodology).

19. See US CONST. amend. XIV, § 1; 20 U.S.C. § 1412(a)(5)(A) (2012) (explaining the need to mainstream students with disabilities).

20. See *infra* Part I (describing the development of IDEA); see also § 1412(a)(5)(A) (discussing least restrictive environments).

21. See *infra* Part I (describing the history of special education laws and leading circuit tests). See generally *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994) (implementing an LRE test); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) (implementing an LRE test); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) (implementing an LRE test).

22. See *infra* Part II (presenting scholarly views about mainstreaming).

23. See Abrahamson, *supra* note 17, at 125-27 (discussing critiques of mainstreaming); Melvin, *supra* note 2, at 642, 649-55 (explaining problems associated with modifying the regular classroom); *infra* Part III (analyzing mainstreaming).

24. See *infra* Part IV (proposing a new Supreme Court test); see also § 1412(a)(5)(A) (explaining the mainstreaming requirement).

25. See Jean B. Crockett, *The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & EDUC. 543, 545 (1999) (discussing how Congress enacted IDEA to remedy the exclusion of "millions of children from public instruction based solely upon their disabilities"); Melvin, *supra*

disabilities relied on *Brown v. Board of Education* to argue that their children were constitutionally entitled to education under the Due Process and Equal Protection clauses of the Fourteenth Amendment.²⁶ Further, parents argued that the arbitrary segregation of students with disabilities into separate classrooms and buildings denied students the procedural safeguards guaranteed in the Constitution.²⁷ As a solution to the education disparities and the “constitutional dimension” of this issue, Congress enacted the Education for All Handicapped Children Act (EAHCA) in 1975, now known as IDEA.²⁸ Circuit courts have applied a few main tests for least restrictive environments under IDEA,²⁹ and courts within those jurisdictions have subsequently developed more specific interpretations of these LRE tests.³⁰ Parents wishing to challenge LRE placements must follow certain procedural requirements.³¹

note 2, at 603 (explaining that in 1969, “only seven states were educating more than fifty-one percent of their disabled children”).

26. See Melvin, *supra* note 2, at 605-06 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)) (explaining parents’ reliance on *Brown v. Board of Education* to argue against the segregation of their children with disabilities).

27. See *id.* at 603 (detailing the exclusion of students with disabilities from the regular classroom). “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.’ Further, segregating students on the basis of a disability involves labeling children, a practice which itself poses a threat to individual liberty.” *Id.* at 648.

28. See Crockett, *supra* note 25 and accompanying text; see also 20 U.S.C. § 1412 (2012); Melvin, *supra* note 2, at 616 (“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.”).

29. For the three main LRE tests, see generally *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).

30. See *Tucker v. Calloway Cty. Bd. of Educ.*, 136 F.3d 495, 506 (6th Cir. 1998) (discussing same-age peer interactions); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1207 (3d Cir. 1993) (“We construe IDEA’s mainstreaming requirement to prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily.”); *Gillette v. Fairland Bd. of Educ.*, 932 F.2d 551, 554 (6th Cir. 1991) (explaining the need for even partial mainstreaming); *Jason O. v. Manhattan Sch. Dist. No. 114*, 173 F. Supp. 3d 744, 772 (N.D. Ill. 2016), *vacated as moot sub nom.* *Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677 (7th Cir. 2017) (holding in District Court that the school did not violate IDEA because the student was mainstreamed for lunch and recess as much as possible).

³⁰ See *Tucker*, 136 F.3d. at 506 (discussing the need for integration with peers of one’s own age).

31. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 182-83 (1982) (summarizing the procedural requirements of IDEA).

A. Least Restrictive Environments and the Main Circuit Tests for Mainstreaming

Congress deliberately wrote the LRE provision of IDEA ambiguously to allow for open interpretation.³² However, Congress, educators, and scholars still believe that the regular classroom is an optimal placement for students with disabilities.³³ Thus, an optimal placement includes a regular classroom in the regular building with a student's same-age peers.³⁴ Despite the general preference for education in regular classrooms, IDEA requires schools to provide students with disabilities with an Individualized Education Plan (IEP) that analyzes each student's individual needs for certain educational goals and environments.³⁵ This IEP is supposed to prioritize a student's needs over convenience for schools.³⁶ When composing IDEA, Congress focused not only on the needs of children with disabilities, but also on the benefits of integration for children without

32. See Crockett, *supra* note 25, at 547 (explaining the brief and vague nature of the LRE provision in § 1412(a)(5)(A)).

33. See *id.* at 553 (“Congress . . . viewed the regular classroom as the optimal setting but acknowledged that instruction would need to be offered in multiple environments if individual needs were to be appropriately met. In 1997, when amending the statute, Congress similarly recognized that decisions for students with disabilities are to be based on individual need but called for justification in the IEP when decisions require an alternative placement to regular classes.”); *infra* Section II.A (describing scholarly views); see also *N.S. ex rel. P.S. v. Stratford Bd. of Educ.*, 97 F. Supp. 2d 224, 233 (D. Conn. 2000). Mainstreaming has benefits for students with disabilities beyond academics. See *N.S. ex rel. P.S.*, 97 F. Supp. 2d at 233 (stating that the student “had enjoyed some degree of success as a result of peer modeling, sensory integration activities, and supplemental instruction”).

34. See *Sch. Dist. v. Grover*, 755 F. Supp. 243, 247 (E.D. Wis. 1990) (discussing how “it was essential for [a student’s] social development that she interact with age-appropriate non-handicapped peers”); Crockett, *supra* note 25, at 553 (explaining optimal education placements). The Supreme Court has not reviewed any placement test decisions, but it did recently enumerate a standard for students with disabilities in the general classroom. See *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017) (“When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum.”).

35. See Crockett, *supra* note 25, at 559 (explaining that “[t]he extent to which each child will participate in academic or non-academic activities is to be specifically prescribed for the child in his or her written individualized educational program so that he or she can benefit from instruction in the least restrictive appropriate placement . . . [because p]lacement decisions are to be child-centered, not system-centered”).

36. See *id.* at 561 (explaining that LRE placements are made on a case-by-case basis, but the regular classroom is generally the starting point for consideration).

disabilities.³⁷ By including students with disabilities in the general education environment, nondisabled students would grow to understand their differences and respect students and members of society with disabilities.³⁸

Under the LRE provision and dependent upon their individual needs, students with disabilities can be either entirely mainstreamed, mainstreamed only for part of the day, or not mainstreamed at all.³⁹ While in the mainstream, regular classroom, students can have special services, or they can leave for certain portions of the day to receive an education in a “resource room.”⁴⁰ Some students need to be separated from their peers for most of the day, but they may join their

37. See Melvin, *supra* note 2, at 617 (“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.’” (quoting Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 364 (1990))).

38. See *id.* (explaining Congress’s hopes for nondisabled children to better understand their peers with disabilities). Congress also had economic incentives for inclusivity. See *id.* at 618 (“Congress viewed the prevalence of dependency and unproductivity among the adult disabled population as a problem that begins in the schools. Artificial barriers to the full participation of individuals with disabilities not only perpetuate the stigma and indignity of institutionalization and dependency, but impose substantial financial burdens on families and ultimately society as a whole. Consequently, Congress believed that money spent on educating children with disabilities to be self-sufficient adult members of society would be more humane, and less expensive to society than maintaining such persons as welfare dependents or in institutions.”). Congress believed in certain benefits for both nondisabled students and students with disabilities:

[A] disabled child brings a different perspective to the classroom. The child may model a degree of determination in the 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.

Melvin, *supra* note 2, at 656-57.

39. See Allan G. Osborne, Jr., *When Has a School District Met Its Obligation to Mainstream Handicapped Students Under the EHA?*, 58 EDUC. L. REP. 445, 446 (1990) (describing the levels of mainstreaming).

40. See *id.* A resource room is a “[c]lassroom in which students with exceptional learning needs receive individualized services for part of the school day.” *Glossary*, IRIS CTR., <https://iris.peabody.vanderbilt.edu/glossary/> [https://perma.cc/KS9Z-7LUH] (last visited Oct. 8, 2018).

nondisabled peers for certain nonacademic activities.⁴¹ The congressional intent of the LRE provision is for students to be removed from mainstream environments only when their conditions are so severe that mainstreaming offers no benefit to the student and burdens other students.⁴² Without guidance from the Supreme Court, jurisdictions have followed their own tests or adopted the tests of other jurisdictions to determine students' LREs.⁴³ However, none of the tests explicitly address mainstreaming with same-age peers.⁴⁴ The main

41. See 7 C.F.R. § 15b.23(b) (2018) ("In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §15b.26(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question."); Osborne, *supra* note 39, at 446 ("Students with more severe handicaps may receive the major portion of their instruction in a special education class, but may join their nonhandicapped peers for lunch, recess, and other nonacademic activities. Students who are profoundly handicapped, or whose handicapping condition would present a significant disruption to the regular education environment may not be mainstreamed at all.").

42. See 20 U.S.C. § 1412(a)(5)(A) (2012) (stating that removal "from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily"); Melvin, *supra* note 2, at 617 (discussing Congress's thoughts on the positive effects of mainstreaming on students with disabilities and nondisabled students). See, e.g., *M.A. ex rel. G.A. v. Voorhees Twp. Bd. of Educ.*, 202 F. Supp. 2d 345, 369-70 (D.N.J. 2002), *aff'd*, 65 F. App'x 404 (3d Cir. 2003) (holding that a segregated placement was the LRE for a child who disrupted the regular classroom by having tantrums, assaulting students and teachers, and randomly leaving the classroom). While IDEA does not include traditional burdens of proof, other child welfare laws do include a clear and convincing evidence burden of proof. See MICH. COMP. LAWS § 722.27 (2016) ("The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that states must adhere to at least a clear and convincing evidence burden of proof for termination of parental rights).

43. See GALLEGOS, *supra* note 14, at 4-14 (explaining the LRE tests in each jurisdiction).

44. See *id.* Courts have considered some common factors in placement decisions:

[S]ix regulatory provisions . . . have traditionally guided placement decisions . . . (1) a continuum of alternative placements must be made available by a school district; (2) consideration must be given to any potential harmful effect on the child or his or her quality of service by a district in making placement decisions; (3) placement must be based on the IEP and determined at least annually. Three more LRE requirements are considered qualified, that is, they are preferences to be implemented to an extent indicated: (4) students with disabilities must be educated with their nondisabled peers to the maximum extent appropriate; (5) their removal

tests are the Sixth Circuit's *Roncker* test,⁴⁵ the Fifth Circuit's *Daniel R.R.* test,⁴⁶ and the Ninth Circuit's *Rachel H.* test.⁴⁷ Jurisdictions differ on which test to apply for LRE placements, but the most prominent tests emanated from *Roncker v. Walter* and *Daniel R.R. v. State Board of Education*.⁴⁸

1. *The Roncker Test for Least Restrictive Environments*

In *Roncker*, the Sixth Circuit Court of Appeals held that if schools decide that a segregated placement for a student is superior, the court must decide if the school could feasibly provide those same services from the segregated placement in the regular classroom.⁴⁹ If the school could provide the services in the regular setting, the school has violated IDEA.⁵⁰ Courts may consider certain factors to determine the feasibility of placements,⁵¹ such as: (1) the potential benefits of mainstreaming;⁵² (2) the benefits of services not available in the

from the regular education environment can only occur 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; (6) unless the IEP requires otherwise, the student should attend a neighborhood school, or if a non neighborhood placement is indicated, this should be as close to home as possible.

Crockett, *supra* note 25, at 557 (internal quotation marks omitted).

45. See *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (implementing an LRE test); GALLEGOS, *supra* note 14, at 4 (describing the *Roncker* test for LRE).

46. See *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (implementing an LRE test); GALLEGOS, *supra* note 14, at 6-8 (describing the *Daniel R.R.* test for LRE).

47. See *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994) (implementing an LRE test); GALLEGOS, *supra* note 14, at 10-12 (describing the *Rachel H.* test for LRE).

48. See GALLEGOS, *supra* note 14, at 4-15 (listing the jurisdictions that adopted the *Roncker* and *Daniel R.R.* tests). For the main LRE tests see *Roncker*, 700 F.2d at 1063; *Daniel R.R.*, 874 F.2d at 1048.

49. See *Roncker*, 700 F.2d at 1063 ("In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."); Melvin, *supra* note 2, at 630 (describing the *Roncker* test).

50. See Melvin, *supra* note 2, at 630 (explaining that if education is feasible in regular classrooms, segregation is inappropriate).

51. See *id.* (discussing the requirements of the *Roncker* test).

52. See *Roncker*, 700 F.2d at 1063 ("[S]ome handicapped children simply must be educated in segregated facilities . . . because the handicapped child would not benefit from mainstreaming."); see also Melvin, *supra* note 2, at 630 (listing the *Roncker* factors).

mainstream;⁵³ (3) the disruptiveness of the student;⁵⁴ and (4) the potential costs of mainstreaming.⁵⁵ However, cost is no defense if the court finds that a school does not properly offer a continuum of placements.⁵⁶ As the first main LRE test, three other circuits have either adopted *Roncker* or expanded the test, applying their own factors to determine students' LRE placements.⁵⁷

53. See *Roncker*, 700 F.2d at 1063 (explaining that some students with disabilities must be “educated in segregated facilities . . . because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting”); see also Melvin, *supra* note 2, at 630 (listing the *Roncker* factors).

54. See *Roncker*, 700 F.2d at 1063 (explaining that separation may be proper if “the handicapped child is a disruptive force in the non-segregated setting”); see also Melvin, *supra* note 2, at 630 (listing the *Roncker* factors).

55. See *Roncker*, 700 F.2d at 1063 (citing *Age v. Bullit Cty. Sch.*, 673 F.2d 141, 145 (6th Cir. 1982)) (“Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.”); see also Melvin, *supra* note 2, at 630 (listing the *Roncker* factors). The federal government is supposed to “pay 40 percent of the average per student cost for every special education student. The current average per student cost is \$7,552 and the average cost per special education student is an additional \$9,369 per student, or \$16,921.” *Background of Special Education and the Individuals with Disabilities Education Act (IDEA)*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/19029.htm> [<https://perma.cc/W2NU-PMPK>] (last visited Oct. 8, 2018). However, the federal government only provided “local school districts with just under 20 percent of its commitment” in 2004. *Id.* For detailed examples of states' cost analyses of education, see generally AUGENBLICK, PALAICH & ASSOCIATES, MICHIGAN EDUCATION FINANCE STUDY (2016), https://www.michigan.gov/documents/budget/Michigan_Education_Finance_Study_527806_7.pdf [<https://perma.cc/K6V6-JW6L>]; AUGENBLICK, PALAICH & ASSOCIATES, COSTING OUT THE RESOURCES NEEDED TO MEET PENNSYLVANIA'S PUBLIC EDUCATION GOALS (2007), <http://www.stateboard.education.pa.gov/Documents/Research%20Reports%20and%20Studies/PA%20Costing%20Out%20Study%20rev%2012%2007.pdf> [<https://perma.cc/XRN5-UH63>]; AUGENBLICK, PALAICH AND ASSOCIATES, UPDATE TO COLORADO COSTING OUT STUDY (2013), <https://www.greateducation.org/wp-content/uploads/2016/06/CostingOutUpdateReport2013.pdf> [<https://perma.cc/J85T-XE3P>].

56. See Melvin, *supra* note 2, at 631 (explaining that if a school fails to provide a continuum of services, it cannot use cost as a defense); see also *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 77-78 (1999) (“[IDEA] may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children, and the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA. But Congress intended ‘to open the door of public education’ to all qualified children and ‘require[d] participating States to educate handicapped children with nonhandicapped children whenever possible.’” (internal citations omitted) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982))).

57. See GALLEGOS, *supra* note 14, at 4-14 (describing each circuit's tests for LREs). The Eighth Circuit and Fourth Circuit use the *Roncker* test. See *id.* at 4-5. The

2. The *Daniel R.R.* Test for Least Restrictive Environments

The Fifth Circuit applied its own test in *Daniel R.R.* without considering feasibility factors, finding that the *Roncker* test intruded too far into schools' policy decisions.⁵⁸ First, the *Daniel R.R.* test asks if students can satisfactorily receive an education in regular classrooms with the help of supplemental services.⁵⁹ If the answer is no, the court then considers whether the school has mainstreamed the student as much as possible.⁶⁰ In *Daniel R.R.*, the court applied four additional factors in reaching its decision.⁶¹ The court asked: (1) whether the school made more than token efforts to educate a student in the regular environment;⁶² (2) whether the student received any educational benefit from mainstreaming;⁶³ (3) whether a segregated setting better served the student's unique needs;⁶⁴ and (4) whether the student had any negative impact on other students in the regular

Ninth Circuit combines *Roncker* with *Daniel R.R.* to form its own test. *See id.* at 11. However, the Eleventh Circuit follows the Fifth Circuit *Daniel R.R.* test, *see id.* at 8-9, and the Tenth Circuit follows a slightly modified version of the *Daniel R.R.* test, *see id.* at 14.

58. *See Daniel R.R.*, 874 F.2d at 1048; Melvin, *supra* note 2, at 631 (“[T]he court declined to adopt the *Roncker* feasibility test, contending that the *Roncker* test was too intrusive an inquiry into the educational policy choices of educators.”).

59. *See Daniel R.R.*, 874 F.2d at 1048 (“First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child.”).

60. *See id.* (“If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.”).

61. *See id.* (applying additional factors).

62. *See id.* (asking whether the school made more than token efforts to mainstream); Melvin, *supra* note 2, at 632 (“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. 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. Nor is the school expected to so radically modify the curriculum that the child is receiving a special education in the regular education classroom. 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.”) (quoting *Daniel R.R.*, 874 F.2d at 1050).

63. *See Melvin, supra* note 2, at 632 (“The court concluded that Daniel was receiving little, if any educational benefit from participation in regular pre-kindergarten other than the ‘opportunity to associate with nonhandicapped students.’” (quoting *Daniel R.R.*, 874 F.2d at 1050)).

64. *See id.* (“Here, the court had no trouble concluding that the marginal social benefits Daniel received from mainstreaming were outweighed by the clear educational benefits he received from a self-contained special education program.”).

classroom.⁶⁵ While the *Daniel R.R.* test is seemingly less intrusive than the *Roncker* test,⁶⁶ neither test leaves room for courts to consider the positive effects of students with disabilities.⁶⁷

3. *The Rachel H. Test for Least Restrictive Environments*

By combining factors from *Roncker* and *Daniel R.R.*, the Ninth Circuit created its own LRE test in *Sacramento City Unified School District v. Rachel H.*⁶⁸ The *Rachel H.* test considers: (1) the academic and nonacademic benefits a student receives in the regular classroom;⁶⁹ (2) the effects of the student on the teacher and classmates;⁷⁰ and (3) the costs of mainstreaming a student.⁷¹ At least one proponent of the multifactor *Rachel H.* analysis argues that it is superior to the LRE tests in *Roncker* and *Daniel R.R.* because it shifts the focus to the school's ability to appropriately accommodate the student instead of focusing on the student's disability.⁷² This argument emphasizes the idea that a school can control its ability to

65. See *id.* at 633 (“Citing the regulations implementing the mainstreaming mandate, the court held that where a disabled ‘child is so disruptive in a regular classroom that the education of other students is significantly impaired,’ mainstreaming is not appropriate. Here, the court agreed with the school that the demand Daniel made on the teacher’s time was not fair to the other students. Taking all four factors into account, 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.’” (quoting *Daniel R.R.*, 874 F.2d at 1049, 1051)).

66. See *Daniel R.R.*, 874 F.2d at 1048 (stating that the court’s “task is not to second-guess state and local policy decisions”); Melvin, *supra* note 2, at 631 (explaining the intrusive nature of the *Roncker* test into educational policy decisions).

67. See Melvin, *supra* note 2, at 657-58 (explaining the effectiveness of considering the positive effects of inclusion on nondisabled students).

68. See GALLEGOS, *supra* note 14, at 10-12 (describing the *Rachel H.* test for LRE). See generally *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994) (implementing an LRE test).

69. See *Rachel H.*, 14 F.3d at 1404 (“[T]he court considered . . . the educational benefits of placement full-time in a regular class[,] . . . [and] the non-academic benefits of such placement.”)

70. See *id.* (explaining that the court also considered “the effect Rachel had on the teacher and children in the regular class”).

71. See *id.* (explaining that the court also considered “the costs of mainstreaming Rachel”); Melvin, *supra* note 2, at 638 (“[T]he court affirmed the lower court decision upholding Rachel’s full-time placement in a regular classroom.”).

72. See Melvin, *supra* note 2, at 657 (“[T]he multifactor approach . . . 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.”).

accommodate students, but students cannot control the fact that they have a disability.⁷³ Unlike the *Rachel H.* test, the *Roncker* and *Daniel R.R.* LRE tests leave out a potentially crucial factor: the positive effects students with disabilities have on their nondisabled peers.⁷⁴ The *Rachel H.* test does not explicitly state that positive effects on peers are a factor,⁷⁵ but the test seemingly allows for a flexible analysis by not focusing exclusively on negative effects.⁷⁶ Students with disabilities can inspire their peers and bring a diverse outlook into the regular classroom.⁷⁷ In close cases, reviewing courts should favor inclusion with nondisabled peers.⁷⁸

B. Lower Courts' Interpretations of Least Restrictive Environments and Mainstreaming

Circuit courts have never had the benefit of an opinion from the Supreme Court on a universal test for mainstreaming and LREs; thus,

73. See *id.* (explaining the proper focus should be on schools). The *Roncker* test only allows analysis into the “disruptiveness” of the student with disabilities, not any positive effects the student may have on his or her nondisabled peers. See *supra* notes 52-55 and accompanying text. The *Daniel R.R.* test similarly only analyzes disruptiveness instead of potential positive effects. See Melvin, *supra* note 2, at 633.

74. See *id.* at 656-57 (describing the benefits of students with disabilities on their nondisabled peers).

75. See *Rachel H.*, 14 F.3d at 1404 (9th Cir. 1994) (listing the *Rachel H.* factors). The court simply asked about “the effect Rachel had on the teacher and children in the regular class.” *Id.*

76. See *id.* (listing the *Rachel H.* factors); see also Melvin, *supra* note 2, at 657-58 (explaining the effectiveness of considering the positive effects of inclusion on nondisabled students).

77. See Melvin, *supra* note 2, at 657-58 (“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 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.”). Further, the parents’ wishes and even potentially the children’s wishes deserve more deference and should be a factor in courts’ LRE analyses. See *id.* at 657 (“[C]ourts 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.”). “[O]nly an individualized, fact-specific, and multifactor inquiry” is proper for reviewing the appropriateness of a child’s placement.” *Id.* at 658.

78. See *id.* (explaining that based on Congress’s preferences “courts reviewing the appropriateness of placement decisions should, in close cases, err on the side of inclusion, not exclusion, from the regular education classroom”).

a student in a segregated building, like at Smith Elementary School, may only receive opportunities to mainstream with his or her same-age peers depending on that jurisdiction's test.⁷⁹ Despite this lack of clarity, the Supreme Court has stated that schools must mainstream students with their nondisabled peers to the maximum extent possible.⁸⁰ Additionally, the Supreme Court specified that schools may only segregate students with disabilities from their regular classroom when their disability is so severe that education cannot be achieved in regular classes.⁸¹ A regular classroom setting implies a classroom with students' same-age peers.⁸² Even if removal from the regular classroom is necessary, students usually must still be educated in the same school they would attend if they did not have disabilities.⁸³ While this rule does not directly apply to different intra-school buildings, one can infer that a separate *building* is far more restrictive on the continuum than simply a separate classroom in the same school.⁸⁴

Several other lower courts have addressed mainstreaming and the appropriate amount of interaction with peers, including same-age peers.⁸⁵ For example, courts have emphasized that, just because a

79. See Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 809-10 (2002) (providing an example of the discrepancies that can occur without a uniform test).

80. See *Honig v. Doe*, 484 U.S. 305, 311 (1988) (“[T]o the maximum extent appropriate, [s]tates will ‘mainstream’ disabled children, *i.e.*, that they will educate them with children who are not disabled” (quoting 20 U.S.C. § 1412(a)(5)(A) (2012))).

81. See *id.* (stating that schools “will segregate or otherwise remove such children from the regular classroom setting ‘only when the nature or severity of the handicap is such that education in regular classes . . . cannot be achieved satisfactorily’” (quoting 20 U.S.C. § 1412(a)(5)(A) (2012))).

82. See 34 C.F.R. § 300.116(e) (2017) (“A child with a disability is not removed from education in *age-appropriate regular classrooms* solely because of needed modifications in the general education curriculum.” (emphasis added)); see also Melvin, *supra* note 2, at 647 (“This provision clearly evinces a strong Congressional preference for educating children with disabilities with their non-disabled peers.”).

83. See § 300.116(c) (“Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled”).

84. See *id.* (explaining the proper school placement for students with disabilities). Also, if parents challenge a placement, “the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.” 20 U.S.C.A. § 1415(j) (West 2005).

85. See Michael A. Rebell & Robert L. Hughes, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 562-63 (1996) (explaining the trends and decisions in recent cases).

student is not progressing at the same academic and developmental level as his or her peers, schools are not entitled to further restrict that child's placement.⁸⁶ However, schools must set developmental and social goals particular to each student.⁸⁷ If a student cannot reach those goals in the regular classroom, then a more restrictive special education setting could be proper.⁸⁸ The following cases demonstrate the courts' preference for even partial mainstreaming,⁸⁹ the need for meaningful efforts to mainstream,⁹⁰ the view that same-age peer interactions are significant,⁹¹ and the interpretation that special education students in separate buildings should at least be mainstreamed in nonacademic activities.⁹²

1. Partial Mainstreaming Is Better Than No Mainstreaming at All

In 1991, the Sixth Circuit Court of Appeals decided in *Gillette v. Fairland Board of Education* that a school was not liable for educational expenses of dissatisfied parents who decided to remove their child from his public school to an entirely separate private school

86. See *id.* at 563 (“A second theme in recent cases emphasized that school officials cannot condition a disabled child’s right to participate in the mainstream class on his or her ability to meet or keep up with peers’ academic or developmental progress.”).

87. See *id.* at 562 (“But the courts have stressed school officials must include developmental and social goals as a part of the decision to place a child in special education.”).

88. See *id.* (explaining that the goals are part of the analysis of whether to “place a child in special education”).

89. See *Gillette v. Fairland Bd. of Educ.*, 932 F.2d 551, 554 (6th Cir. 1991) (“Removing a child from a partially mainstreamed program at a public school, which otherwise provides an appropriate academic instruction and the only objection to that program was a failure to fully mainstream, and placing that child in a non-mainstreamed program in a private school does not satisfy the goals of the Act.”).

90. See *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1221 (3d Cir. 1993) (“[T]he district court’s finding that the School District has not taken meaningful steps to try to include Rafael [Plaintiff] in a regular classroom with supplementary aids and services is not clearly erroneous.”).

91. See *Tucker v. Calloway Cty. Bd. of Educ.*, 136 F.3d 495, 506 (6th Cir. 1998) (“Moreover, although Barkley was six and one-half years old, at LCDC he had been in a class of three and one-half to four years olds. There was testimony that he needed integration with peers of his own age.”).

92. See *Jason O. v. Manhattan Sch. Dist. No. 114*, 173 F. Supp. 3d 744, 772 (N.D. Ill. 2016), *vacated as moot sub nom. Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677 (7th Cir. 2017) (holding in District Court that the school did not violate IDEA because the student was mainstreamed for lunch and recess as much as possible).

consisting mostly of students with disabilities.⁹³ The issue the court faced was whether the child could receive an “appropriate” education in the public school.⁹⁴ The private school the child attended only educated students with disabilities or students in need of remediation.⁹⁵ In contrast, the public school provided the child with opportunities to socialize with his nondisabled peers in several regular classes and at lunch.⁹⁶ The court noted that in the private school, the child was in classes with students at his academic level, not his age level.⁹⁷ However, in the public school he progressed through grades with his same-age peers.⁹⁸ While the court did not directly emphasize the importance of mainstreaming with same-age peers, it did include this evidence of same-age peer interaction in its reasoning that a partially mainstreamed program better served IDEA than an entirely non-mainstreamed program.⁹⁹

93. See *Gillette*, 932 F.2d at 553-54 (discussing the facts that led the parents to remove their son from public school).

94. See *id.* at 552 (“If a state is unable to provide an appropriate education in its own schools, then it must provide the tuition for a private education at a school which is able to provide an appropriate education.”).

95. See *id.* at 554 (describing the types of students in the private school).

96. See *id.* (“The record indicates, however, that P.T. had more of an opportunity to engage in activities with nondisabled children at Fairland School, where he would have attended several non-LD classes as well as the normal lunch hour . . .”).

97. See *id.* at 551-52 (explaining the types of children with which the student interacted).

98. See *id.* at 552. The inference of this progression is evident from comparing the student’s birthday—September 21, 1971—with the dates of the grades he was in. *Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343, 344 (S.D. Ohio 1989), *rev’d*, 932 F.2d 551 (6th Cir. 1991). In a subsequent district court case, the court found that a school district’s “practice of ‘mainstreaming’ students with learning or behavioral disabilities [wa]s an appropriate, if not essential, element to fostering academic and social development.” *Bd. of Educ. v. Patrick M.*, 9 F. Supp. 2d 811, 825-26 (N.D. Ohio 1998). That school actively encouraged “contact with non-learning disabled students.” *Id.* at 826. The student had difficulty with this mainstreaming, but his disabilities were not sufficient to “require private residential placement.” *Id.*

99. See *Gillette*, 932 F.2d at 554 (“Removing a child from a partially mainstreamed program at a public school, which otherwise provides an appropriate academic instruction and the only objection to that program was a failure to fully mainstream, and placing that child in a non-mainstreamed program in a private school does not satisfy the goals of the Act.”); see also *Reese v. Bd. of Educ.*, 225 F. Supp. 2d 1149, 1160 (E.D. Mo. 2002) (emphasizing the importance of exposing students with disabilities to the behavior of their nondisabled peers, stating that “[t]here was no evidence at the hearing that Spencer would have opportunities to be regularly exposed to the more appropriate behaviors of non-disabled peers”). The court found that the school “failed to provide Spencer with the opportunity to interact with nondisabled peers and benefit from exposure to positive behaviors . . .” *Id.* at 1163.

2. Schools Must Make Meaningful Efforts to Mainstream Students

In *Oberti v. Board of Education*, the Third Circuit Court of Appeals reviewed the placement of Rafael, a student with Down syndrome,¹⁰⁰ and found that the school only made “negligible” efforts—not any meaningful efforts—to mainstream Rafael into the regular classroom.¹⁰¹ The court also emphasized that problems with modifying the regular classroom curriculum are “not a legitimate basis upon which to justify excluding a child[] unless the education of other students is significantly impaired.”¹⁰² In short, a student’s different learning style does not automatically justify segregation from the regular classroom.¹⁰³ If schools can achieve effective education methods for the student in the regular classroom, segregation is improper.¹⁰⁴

100. See *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1207 (3d Cir. 1993) (discussing the placement of Rafael).

101. See *id.* at 1221 (discussing the school’s negligible efforts to mainstream); Melvin, *supra* note 2, at 636 (“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.” (quoting *Oberti*, 995 F.2d at 1221))).

102. Melvin, *supra* note 2, at 637 (quoting *Oberti*, 995 F.2d at 1222) (internal quotation marks omitted).

103. See *id.* at 642 (“[T]he *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.’ 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.’” (quoting *Oberti*, 995 F.2d at 1217)).

104. See *id.* at 637 (“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.”).

3. *Same-Age Peer Interaction Is a Crucial Factor in Mainstreaming*

One case from the Sixth Circuit is particularly relevant to the issue of segregating students from same-age peers.¹⁰⁵ In *Tucker v. Calloway County Board of Education*, the student's parents strongly opposed public-school placement in a self-contained classroom.¹⁰⁶ As a result, the parents enrolled their son in a private school, and the School District refused to reimburse the enrollment cost.¹⁰⁷ The District wanted to place Barkley, a six-year-old student, in a self-contained classroom with ten children who were between five and eight years old.¹⁰⁸ At the private school, he was in a general education setting, but he had been in a class of three to four-year-old students.¹⁰⁹ The court stated that some testimony expressed that Barkley "needed integration with peers of his own age."¹¹⁰ The Sixth Circuit considered his same-age peer interactions, among other factors, in ultimately deciding that the public-school placement would have been a FAPE under IDEA.¹¹¹ Thus, despite the fact that a self-contained class is technically more restrictive on the continuum than a general education private school, the court recognized the importance of same-age peer interactions in deciding the true LRE for an individual student.¹¹²

4. *Students in Segregated Buildings for Special Education Can Still Be Mainstreamed*

Along with the importance of same-age peer interactions in mainstreaming,¹¹³ courts have also discussed the need to find virtually

105. See *Tucker v. Calloway Cty. Bd. of Educ.*, 136 F.3d 495, 506 (6th Cir. 1998) (discussing the importance of same-age peer interactions).

106. See *id.* at 498 (discussing the parents' issues with their child's placement).

107. See *id.* (describing the parents' decision to remove their child from public education).

108. See *id.* at 506 (describing the school district's placement proposal).

109. See *id.* (describing the makeup of Barkley's private school class).

110. See *id.*

111. See *id.* ("The district court properly concluded that the school district's proposed placement of Barkley in the special education classroom at North Elementary School was an appropriate placement within the meaning of a free appropriate public education." (internal quotation marks omitted)).

112. See *id.* (noting the important of same-age peer interactions). Placements range from "regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL, *supra* note 10.

113. See *Tucker*, 136 F.3d at 506 (discussing the importance of same-age peer interactions).

all opportunities to mainstream students who are in segregated placements.¹¹⁴ For example, in *Jason O. v. Manhattan School District*, the Northern District of Illinois recently addressed the issue of students in self-contained classrooms in segregated buildings having opportunities to interact with nondisabled peers as much as possible.¹¹⁵ This case was later vacated only because the parents and school came to an agreement to educate the child, Jacob, in the regular classroom.¹¹⁶

In *Jason O.*, the student's parents were upset when the IEP team wanted to place Jacob in a self-contained program called SELF in a building that was 300 to 500 feet from the school.¹¹⁷ The court noted the importance of a least restrictive environment and explained that in SELF, Jacob would still interact with nondisabled peers in art, music, gym, lunch, recess, and some academic courses.¹¹⁸ The court did acknowledge the separation of buildings as a restriction on mainstreaming, but the separation was immaterial because Jacob would still interact with his peers during certain parts of the day in the main building.¹¹⁹ The parents were worried that their son would not have access to his nondisabled peers in the case of inclement weather.¹²⁰ However, during inclement weather SELF used a van to transport students to the school.¹²¹ Thus, the court found the segregated SELF program to be a proper placement because Jacob would still be mainstreamed to the greatest extent possible, and his placement in the regular school did not benefit him.¹²² Unlike the Smith Elementary School example where students have no interactions with nondisabled peers in the main building, SELF did allow for these peer interactions.¹²³ In cases where parents are unsatisfied with their

114. See *Jason O. v. Manhattan Sch. Dist.* No. 114, 173 F. Supp. 3d 744, 771-72 (N.D. Ill. 2016), *vacated as moot sub nom.* *Ostby v. Manhattan Sch. Dist.* No. 114, 851 F.3d 677 (7th Cir. 2017) (explaining the issue of the case and the importance of mainstreaming in even nonacademic activities).

115. See *id.* (discussing opportunities to mainstream).

116. See *Ostby*, 851 F.3d at 682 (“The District and the Ostbys have reached an agreement regarding Jacob’s IEP and his placement in general education for third grade, and the District has no pending proposal to move Jacob to the SELF program.”).

117. See *Jason O.*, 173 F. Supp. 3d at 758 (describing the SELF placement).

118. See *id.* at 772 (“Although structured, the SELF program does not wall-off Jacob entirely from his nondisabled peers. Children in the program can interact with their nondisabled peers in multiple arenas, including in: (1) special area subjects (e.g., art, music and gym); (2) lunch and recess; and (3) academic classes, based upon Jacob’s emotional ability to handle those classes.”).

119. See *id.* (discussing Jacob’s interactions with peers).

120. See *id.* (explaining the parents’ concerns).

121. See *id.*

122. See *id.* (holding that SELF was a proper placement).

123. See *id.*

children's placements, the parents have to follow certain procedural guidelines under IDEA to challenge schools' decisions.¹²⁴

C. Procedural Requirements for IDEA

The Fourteenth Amendment of the United States Constitution guarantees that no state can deprive a person "of life, liberty, or property, without due process of law."¹²⁵ States must comply with the procedural requirements of due process to receive federal funds under IDEA.¹²⁶ First, schools must notify parents or guardians of children with disabilities about any proposed changes to their children's education.¹²⁷ Second, those parents must be allowed to bring a complaint about their children's education or any proposed change to it.¹²⁸ Finally, those complaints must be resolved at a due process hearing.¹²⁹ States or parents dissatisfied with the findings at those hearings can bring a civil action in state or federal district court.¹³⁰

However, due process is vital not only at the hearing stage but also during the formation of children's IEPs.¹³¹ In order to comply with due process requirements, schools must collaborate with families in forming IEPs and provide individualized assessments and plans for each student.¹³² A lack of collaboration constitutes a per se violation of IDEA, but a lack of individualization requires further analysis.¹³³ Regardless, due process requires schools to focus on individual children's specific needs rather than blanket school policies.¹³⁴ Even with these due process requirements, several challenges can interfere

124. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 182-84 (1982) (explaining the procedural requirements under IDEA).

125. US CONST. amend. XIV.

126. See *Rowley*, 458 U.S. 176 at 182 (describing the funding requirements of IDEA).

127. See *id.* (setting forth the parents' rights under IDEA).

128. See *id.* (explaining complaint procedures for parents).

129. See *id.* at 183 (stating that "appeal to the state educational agency must be provided if the initial hearing is held at the local or regional level").

130. See *id.* (explaining procedures for parents).

131. See Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 446 (2011) (explaining the two layers of due process under IDEA – the due process hearing and due process in the formation of IEPs).

132. See *id.* at 449 (explaining families' rights under IDEA).

133. See *id.* at 454 (discussing collaboration requirements).

134. See *id.* at 454-55 (describing the need for individualized analyses).

with mainstreaming,¹³⁵ but scholars have proposed solutions to address some of these issues.¹³⁶

II. LEGAL CHALLENGES TO MAINSTREAMING AND POTENTIAL SOLUTIONS

Because of the individual needs of students, a building segregated from same-age peers might actually be the LRE for some students.¹³⁷ However, one scholar explains that schools need to make educated, calculated decisions in all of their placements.¹³⁸ Children with disabilities have unique needs and require individualized, special education that can conflict with inclusion at times.¹³⁹ Another scholar has generally accepted that “appropriate” education under FAPE connotes that full inclusion may not always be feasible when students are disruptive or require too much of the teacher’s attention.¹⁴⁰ However, some commentators have different opinions on the meaning

135. See *infra* Subsections II.A.1-II.A.3 (detailing scholars’ viewpoints about challenges with mainstreaming).

136. See *infra* Subsections II.B.1-II.B.2 (discussing scholars’ proposed solutions for issues related to mainstreaming).

137. See Rebell & Hughes, *supra* note 85, at 541 (“Proponents of placement diversity acknowledge significant problems in the present special education system prevent many children with disabilities from obtaining an appropriate education. In their view, however, improvements in the system must continue to be based on educators’ individual determinations concerning each child’s needs, which, at some times, require placements in integrated settings, and at others, in separate settings.”).

138. See *id.* at 538 (“The inclusionists’ critique of the existing system begins with the view that teachers’ decisions to refer children to special education often lack a sound pedagogic basis and are usually symptomatic of the broader, structural deficiencies inherent in the dual special education/general education system. Under the present regime, they maintain, special education and general education teachers rarely collaborate, and this enforced isolation, together with inadequate professional development, and a limited array of instructional strategies available in most classrooms, induces many teachers inappropriately to refer too many students to special education.”).

139. See Melvin, *supra* note 2, at 643 (“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.”).

140. See Farley, *supra* note 79, at 838 (“Use of the word ‘appropriate’ recognizes that full inclusion with peers who are not disabled may not be possible for some students because the student’s behavior either disrupts the work of the other students or causes the teacher to spend too much time addressing those behaviors.”).

of appropriate education.¹⁴¹ In addition, some scholars have even proposed their own tests or solutions to mainstreaming and LRE problems.¹⁴²

A. Different Scholarly Opinions About Special Education

On the spectrum of scholarly opinions and approaches about special education, some commentators have proposed an inclusion-only system of education to maximize mainstreaming.¹⁴³ On the other hand, other scholars have emphasized the importance of mainstreaming in nonacademic activities when inclusion in the regular classroom is not feasible.¹⁴⁴ Scholars have also stressed that, in deciding placements, schools must have pedagogic reasoning for the placement and not focus solely on costs or arbitrary factors.¹⁴⁵

141. Compare Rebell & Hughes, *supra* note 85, at 525 (explaining the proposal for an inclusion-only system of special education), with Farley, *supra* note 79, at 818 (discussing the importance of mainstreaming in any way possible), and Abrahamson, *supra* note 17, at 112-13 (noting the need for schools to justify placement decisions).

142. See, e.g., Julie Underwood O'Hara, *The Fate of Educational Malpractice*, 14 ED. LAW REP. 887, 895 (1984) (also discussing placement malpractice and the need for schools to relate placements of students to some education methodology); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 156 (2009) (explaining the need to fix overrepresentation of students in special education); Judith M. Wolf, *Roncker v. Walter: Another Step Toward Mainstreaming for All Children*, 21 ED. L. REP. 441, 446 (1985) (introducing a placement malpractice concept).

143. See Rebell & Hughes, *supra* note 85, at 525 (explaining commentators' proposals for an inclusion-only system of special education).

144. See, e.g., Farley, *supra* note 79, at 818 ("Furthermore, if students with disabilities cannot be included in a regular class for academic work, then they should participate in non-academic activities to the maximum extent appropriate. For example, a student should be allowed to join his or her regular education classmates for activities like meals and recess periods. In doing so, a student with a disability can maintain contact with non-disabled peers to the maximum extent appropriate to the needs of that child." (internal quotation marks omitted)); Osborne, Jr., *supra* note 39, at 446 ("Students with more severe handicaps may receive the major portion of their instruction in a special education class, but may join their nonhandicapped peers for lunch, recess, and other nonacademic activities. Students who are profoundly handicapped, or whose handicapping condition would present a significant disruption to the regular education environment may not be mainstreamed at all.").

145. See, e.g., Abrahamson, *supra* note 17, at 112-13 ("When a school district proposes a completely segregated program, it must justify that segregation by explaining why a child cannot have contact with non-handicapped peers."); O'Hara, *supra* note 142, at 895 (discussing the need for schools to relate placements of students to some educational methodology); Rebell & Hughes, *supra* note 85, at 538 (discussing teachers' decisions to refer students to special education that may lack a legitimate, pedagogic basis).

1. *Inclusion-Only Supporters Oppose Any Separate Classrooms*

At one end of the spectrum of scholarly opinions about mainstreaming, some inclusion supporters believe in entirely eliminating separate classes for special education, which could solve the issue of mainstreaming with same-age peers.¹⁴⁶ However, many opponents of inclusion-only education find this approach to be too simplistic.¹⁴⁷ The inclusion-only supporters may rely on the problem of teachers often referring students to special education with no sound pedagogic reasoning, arbitrarily segregating them from their same-age, nondisabled peers.¹⁴⁸ Further, inclusion-only proponents believe that strict inclusion practices may improve students' attitudes, peer interactions, and socialization abilities.¹⁴⁹ While this view may seem extreme to some parents and educators, an elimination of the continuum of services would supposedly maximize same-age peer mainstreaming without eliminating support in regular classrooms for students with disabilities.¹⁵⁰

2. *Inclusion Should Consider Nonacademic Activities as Much as Possible*

At a different point on this spectrum of opinions, many scholars have reasoned that mainstreaming should occur in nonacademic activities as much as possible if mainstreaming cannot feasibly occur in the regular classroom.¹⁵¹ These activities could even simply be

146. See Rebell & Hughes, *supra* note 85, at 525 ("Some commentators have concluded the only way to assure that all children are educated in the least restrictive environment is to eliminate separate special education systems; they call for the 'full inclusion' of all students with disabilities in the mainstream with appropriate supports and services.").

147. See *id.* ("Opponents of such 'inclusion' contend that its proponents offer a simplistic answer to complex problems of children at risk of academic failure.").

148. See *id.* at 538 (describing inclusionists' critiques of teachers' reasoning for referring students to special education).

149. See *id.* at 541 ("In addition to promoting greater academic achievement, full inclusion proponents believe a fully integrated school achieves better socialization skills, attitudes, and positive peer relations.").

150. See *id.* at 540-41 (explaining that eliminating a continuum of services can reduce labeling of students with disabilities but would not deprive them of supports altogether). Full inclusionists "would eliminate special education and maintain all students with disabilities in the mainstream classroom." *Id.* at 540.

151. See Farley, *supra* note 79, at 818 ("Furthermore, if students with disabilities cannot be included in a regular class for academic work, then they should participate in nonacademic activities to the maximum extent appropriate. For example, a student should be allowed to join his or her regular education classmates for activities like meals and recess periods. In doing so, a student with a disability can

lunch and recess.¹⁵² Along with this view, one scholar prefers the *Daniel R.R.* LRE test for mainstreaming because that test first asks whether a student can be properly educated in a regular classroom with supplemental services.¹⁵³ If education in the regular class is not possible, the test then asks whether the student is still mainstreamed as much as possible, which can include several nonacademic activities.¹⁵⁴ This scholar argues that the *Daniel R.R.* test appropriately adheres to the purpose of IDEA and the intent of the LRE provision, making the regular classroom the default setting for students.¹⁵⁵ Despite the alleged difficulty of analyzing the first prong of the *Daniel R.R.* test, the second prong is more direct.¹⁵⁶ Under the second prong, courts only need to examine whether students can be mainstreamed for music, art, gym, lunch, recess, and other similar activities, allowing students to have maximum interactions with their same-age, nondisabled peers.¹⁵⁷

maintain contact with non-disabled peers to the maximum extent appropriate to the needs of that child. . . . [I]f a student with a disability is segregated, he or she must still be included with regular peers for non-academic activities like lunch and recess to the maximum extent appropriate.”) (internal quotation marks omitted); Osborne, Jr., *supra* note 39, at 446 (explaining that students with severe handicaps may still “join their nonhandicapped peers for lunch, recess, and other nonacademic activities”). On the other hand, even if students struggle to absorb concepts in the regular classroom, placement in that class may be proper if they can benefit from language models of their peers. *See* Farley, *supra* note 79, at 824.

152. *See* Osborne, *supra* note 39, at 446 (describing nonacademic classes and activities like meals and recess).

153. *See* Farley, *supra* note 79, at 834 (explaining first the *Daniel R.R.* test, then explaining why the test is superior to *Roncker*).

154. *See id.* at 834 (“The test consists of two questions: (1) Can the student be educated satisfactorily in the regular classroom when provided supplementary aids and services? (2) If the student must be placed in a more segregated setting, has the student been mainstreamed to the maximum extent possible?”).

155. *See id.* (“Furthermore, this framework adheres to the intent behind the LRE requirement by making inclusion the default setting so that a student is only removed if education with supplemental aids and services cannot be achieved satisfactorily.”).

156. *See id.* at 842 (“This second prong should be relatively straightforward . . .”).

157. *See id.* (“[A]sking courts to assess whether the student can be integrated for activities like recess, lunch, gym, or art and music classes. This model test in its entirety incorporates both current jurisprudence and [c]ongressional intent behind the 1997 Amendments.”).

3. Schools Need to Provide a Detailed Explanation for Segregating Students

Under IDEA, schools cannot completely segregate students with disabilities without providing an explanation for why a child cannot be mainstreamed with his or her peers.¹⁵⁸ Schools can currently offer certain justifications for segregation, such as a lack of an educational benefit from mainstreaming or excessive costs of inclusion.¹⁵⁹ However, one scholar argues that the educational benefit argument should not matter because a true continuum would offer staggered levels of restriction.¹⁶⁰ Thus, switching to the next lesser restrictive program on the continuum should not eliminate all educational benefits for an individual.¹⁶¹ If a school only provides special education in a building entirely for students with disabilities, the school might incur excessive costs by mainstreaming those students in the main building.¹⁶² Nevertheless, if courts permit cost to be a factor, scholars have noted that schools can effectively circumvent the continuum of placement requirements by arguing the costs of mainstreaming excessively burden the school.¹⁶³

Unlike the *Daniel R.R.* test, the *Rachel H.* test includes cost as a factor, even though many courts do not even consider costs unless the

158. See Abrahamson, *supra* note 17, at 112-13 (“When a school district proposes a completely segregated program, it must justify that segregation by explaining why a child cannot have contact with non-handicapped peers.”).

159. See *id.* at 113 (“There is a presumptive preference for mainstream contacts for handicapped students, but a school district can sufficiently rebut this presumption by arguing either that the mainstream program would confer *no* educational benefit, or that mainstream contacts for this child would be cost prohibitive.”).

160. See *id.* (“The absence of educational benefit argument is a weak argument because, if the school district has a true continuum of programs in place, one step toward lesser restriction should not negate all educational benefit.”).

161. See *id.* (explaining that “one step toward lesser restriction should not negate all educational benefit”).

162. See, e.g., Melvin, *supra* note 2, at 625 (explaining that modifications are not necessary if those modifications would cause “undue financial and administrative burdens”).

163. See Abrahamson, *supra* note 17, at 113 (“[I]f the school district provides this segregated program in a building exclusively for handicapped children, it may not be able to offer any mainstream contacts without incurring potentially prohibitive cost, as one step toward lesser restriction might require a move to another school building. Because prohibitive cost is a permissible argument for the school district, the school district can indefinitely avoid creating a continuum of placements, following the letter of the law under *Rowley*, yet miss the spirit of the law – to afford handicapped students educational opportunity equal to that of their nonhandicapped peers.”); Melvin, *supra* note 2, at 631 (explaining that if a school fails to provide a continuum of services, it cannot use cost as a defense).

parties raise that issue.¹⁶⁴ One special education scholar believes the *Daniel R.R.* test may properly solve the cost analysis issue because courts can be flexible about what factors to consider in the first prong of the analysis.¹⁶⁵ The scholar believes that the *Daniel R.R.* test is more appropriate than the *Rachel H.* test for analyzing placements on a case-by-case basis while still adhering to the congressional intent of the LRE provision of IDEA.¹⁶⁶ She further argues that under the *Rachel H.* test, schools may inappropriately segregate students with disabilities and deprive them of interactions with same-age peers because of the costs of mainstreaming.¹⁶⁷

B. Scholarly Solutions to Improve Special Education

Based on the common critiques of current mainstreaming practices, some scholars propose possible solutions to improve special education.¹⁶⁸ Specifically, one scholar proposes increasing specialized accommodations for students with disabilities within the mainstream.¹⁶⁹ Scholars have also proposed retroactive solutions, such as placement malpractice causes of action, when schools err in deciding students' LRE placements.¹⁷⁰

1. Solutions to Problems with Special Education Include Expanding Services

Without specifically proposing a new LRE test, one scholar does propose certain solutions to the overrepresentation of students

164. See Farley, *supra* note 79, at 834-35 (explaining the *Rachel H.* test framework).

165. See *id.* at 835 (“In contrast, the two-part framework would allow courts to pick and choose relevant factors to consider under the first prong depending on the facts of each case. Therefore, the two-part framework reflects the structure and intent of the LRE provision while maintaining the flexibility necessary for case-by-case analysis.”).

166. See *id.* (explaining the preference for the *Daniel R.R.* test).

167. See *id.* (discussing that the *Rachel H.* test includes cost as a factor).

168. See Weber, *supra* note 142, at 152-59 (discussing ways to reform special education); *infra* Subsections II.B.1-II.B.2 (describing different scholars' proposed solutions).

169. See Weber, *supra* note 142, at 156 (explaining that accommodations in the mainstream are less restrictive than separating students with disabilities from regular classrooms).

170. See, e.g., O'Hara, *supra* note 142, at 895 (explaining the potential for placement malpractice); Wolf, *supra* note 142, at 446 (describing placement malpractice causes of action).

requiring special education.¹⁷¹ He believes in expanding and adapting supplemental services in the regular classroom, which can happen specifically as part of special education, or for the classroom in general.¹⁷² He also notes that these adaptations and accommodations would combat the forced separation of students from their nondisabled peers.¹⁷³ In addition, he argues that schools could increase after-school special education, which could even occur at students' homes.¹⁷⁴ Courts have edged toward beliefs that specialized, accommodating education programs within the mainstream are less restrictive placements for students, even if students would have fewer and therefore less restrictive services in a self-contained classroom.¹⁷⁵

2. *Scholars Propose Placement Malpractice*

After courts make the initial finding that an LRE placement is wrong, a more specific solution to remedy wrongful placement could be for courts to accept placement malpractice causes of actions.¹⁷⁶ Higher courts have not upheld any placement malpractice damages yet, but the concept has enough potential to be taken seriously.¹⁷⁷ In dissenting opinions, judges have recognized the potential benefits of

171. See Weber, *supra* note 142, at 156 (“[T]he forced separation of children into non-mainstream, low expectation programs, needs to be fixed.”).

172. See *id.* (“There are a number of remedies to be undertaken. One is to expand in-class assistance through curricular adaptations and accommodations, whether these are designated special education or something else.”).

173. See *id.* (“Courts have edged towards the recognition that specialized programs directed at enabling children to succeed in the mainstream are a less restrictive educational option than placing a child in a self-contained special education class in the public school . . .”).

174. See *id.* (“Another [remedy] is to increase the availability of after-school special education services delivered either at home or elsewhere.”).

175. See *id.* (“Courts have edged towards the recognition that specialized programs directed at enabling children to succeed in the mainstream are a less restrictive educational option than placing a child in a self-contained special education class in the public school, and so may be required irrespective of the fact that children might still benefit educationally from fewer services in a self-contained setting.”).

176. See Wolf, *supra* note 142, at 446 (“[L]egal forecasters predict a new form of professional accountability—placement malpractice. [One scholar] identifies placement malpractice as a legal case[,] which arises from the classification of, or services provided, to handicapped children. [She] notes that although damage awards to plaintiffs in educational malpractice suits have not been upheld by higher courts, placement malpractice is more like medical malpractice and is more likely to be taken seriously by the courts.”).

177. See *id.* (discussing placement malpractice).

applying placement malpractice damages.¹⁷⁸ Opponents of this concept argue that recognizing a new cause of action would flood the courts.¹⁷⁹ However, proponents of placement malpractice suits argue that increased litigation is irrelevant due to the need to protect students' interests.¹⁸⁰ Additionally, the courts would not be recognizing a new cause of action; rather, they would simply be eliminating the current defense that the professional is employed by an educational institution.¹⁸¹

Courts have been concerned with the appropriateness of monetary damages in cases where schools failed to provide proper education, finding the better remedy to be putting the plaintiff in the position he or she would have been in without the school's negligence.¹⁸² Schools have remediated their negligence by paying a student's tuition for a private school or increasing their services for the student.¹⁸³ Despite the alleged difficulty of deciding the value of an education, courts have decided values of certain body parts or functions in medical malpractice cases.¹⁸⁴ Thus, according to proponents of placement malpractice, courts could easily determine whether a professional's improper placement of a student caused an injury just as courts determine whether a medical practitioner's failure

178. See O'Hara, *supra* note 142, at 895 ("Judging from the dissenting opinions, a great possibility exists that placement malpractice rather than instructional malpractice will be recognized by the courts.").

179. See *id.* at 893 ("This argument was even made in the discussion of the recognition of students' due process rights. Justice Powell stated in the dissent to *Goss v. Lopez*: One can only speculate as to the extent to which public education will be disrupted by giving every school-child the power to contest *in court* any decision made by his teacher which arguably infringes the state-conferred right to education.").

180. See *id.* ("It is the business of the law to remedy wrongs that deserve it even at the expense of a 'flood of litigation,' and it is a *pitiful confession of incompetence* on the part of any court of justice to deny relief on such grounds." (quoting W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 12, at 51 (4th ed. 1971))).

181. See *id.* ("[T]he amount of litigation is irrelevant if the plaintiff has an interest that should be protected. Additionally, in placement malpractice situations there is really no recognition of a new cause of action. Recognition would merely disallow professionals use of their employment by an educational institution as a defense.").

182. See *id.* at 894 ("Additionally, courts have expressed concern in these cases that monetary damages would be an inappropriate remedy for the lack of an education. The more appropriate remedy would be in a more direct manner, to bring the plaintiff to the state he would have been in had the negligence not occurred.").

183. See *id.* ("This remediation might be a payment for tuition at private institutions or provision of other services to the plaintiff.").

184. See *id.* ("Certainly, quantification of the value of an education is extremely difficult. It is equally difficult to quantify the value of sight or use of a body part and yet the courts have accepted the latter tasks.").

to properly diagnose and treat a person caused injury.¹⁸⁵ While the future of placement malpractice is unclear, laws can adapt to meet society's needs.¹⁸⁶

One scholar's proposed LRE test requires schools to prove that their segregated or self-contained placements are related to an "educational methodology."¹⁸⁷ In order to decide whether schools have met this burden, courts can look to factors such as: (1) the cost-efficiency of these placements;¹⁸⁸ (2) the number of students with similar needs;¹⁸⁹ and (3) the lack of educational benefit for students in the regular class because of unique needs that can only be served in a segregated placement.¹⁹⁰ Under this test, each child would need an individual assessment, and schools could only justify a child's placement with some educational methodological reasoning or arguments about excessive costs.¹⁹¹ Despite scholars' proposed

185. *See id.* ("The causation argument seems inappropriate in the context of placement malpractice. These facts are closely analogous, if not identical, to medical malpractice situations in which failure to properly diagnose and treat a person is found to cause injury. Thus, in placement malpractice, determining that a practitioner's failure to properly diagnose and treat a student caused injury to the student should not be any more difficult.")

186. *See id.* at 895 ("[T]ort law is supposed to evolve to meet the changing needs of society.")

187. *See* Abrahamson, *supra* note 17, at 129 ("[T]he Court should require that school districts support their decisions to offer only segregated or centralized programs as reasonable choices of educational methodology.")

188. *See id.* (explaining that schools can prove they have met the "educational methodology" burden by showing they "can economize costs by centralizing its staff")

189. *See id.* (explaining that a school can next show that "the centralized program is needed because of a sufficient number of students with similar needs")

190. *See id.* (explaining that the school can finally show that "the students would not receive educational benefit elsewhere because their needs are unique, or . . . these unique needs can best be met in a segregated setting")

191. *See id.* (clarifying that schools cannot "rely on physical access alone as a choice of *educational methodology*"). Abrahamson offers another test when the only issue with placements is mainstreaming, not segregation. *See id.* ("First, it must be determined whether both of the proposed programs meet the *Rowley* test for 'appropriateness.' If so, a factor test should then be applied to determine which level of restriction is appropriate for this individual child. Courts should consider the following factors: the decisions of the state administrative agencies; the congressional preference for mainstreaming; cost when argued; *and* the choice of the parents or the student himself. It is not suggested that any of these factors be given a predetermined or precise weight, for the 'individualized' nature of the Act requires that each case be analyzed based on its individual merits."). Abrahamson recommends her mainstreaming test be used as a "totality of the circumstances" analysis, establishing the weight of each factor on a case-by-case basis. *Id.* at 130.

improvements for LRE placements, many barriers still prevent proper implementation of IDEA's mainstreaming requirement.¹⁹²

III. PROBLEMS THAT ACCOMPANY MAINSTREAMING

Regardless of the scholarly opinions about mainstreaming, certain problems do interfere with the congressional goal of maximum mainstreaming with nondisabled peers.¹⁹³ For example, teachers may have implicit biases about students with disabilities.¹⁹⁴ Furthermore, parents may have qualms about teachers' qualifications to handle both special education students and regular education students.¹⁹⁵ Additionally, Congress does not expect schools to modify their curriculum "beyond recognition" to mainstream students with disabilities.¹⁹⁶ Finally, schools could incur excessive financial burdens in attempting to mainstream students with same-age, nondisabled peers as much as possible.¹⁹⁷

A. Parent-Teacher Conflicts About Mainstreaming and Special Education

In some districts, teachers' salaries are tied to student performance on standardized tests.¹⁹⁸ Those teachers may believe nondisabled students' test performances will be lower because of the teachers' need to spend more time accommodating students with disabilities.¹⁹⁹ Thus, a teacher might be more likely to support a more

192. See *infra* Part III (detailing current problems and negative opinions about mainstreaming).

193. See Abrahamson, *supra* note 17, at 125 (discussing teachers' potential biases in mainstreaming); *id.* at 126 (explaining the parental fear of teachers' lack of qualifications and the fear of returning their child to a classroom where the child initially failed); see also Melvin, *supra* note 2, at 642, 649-50 (explaining the problem with modifying the regular classroom); *id.* at 654 (explaining the financial burdens of special education).

194. See Abrahamson, *supra* note 17, at 125 (explaining one issue with mainstreaming is teachers' biases).

195. See *id.* at 126 (discussing parents' concerns about teachers' qualifications for educating students with disabilities and explaining that parents may not want their children to return to a classroom where they once failed).

196. Melvin, *supra* note 2, at 642, 649-50 (explaining Congress's expectations for classroom modifications).

197. See *id.* at 654 (explaining the excessive costs of special education).

198. See Abrahamson, *supra* note 17, at 125 ("[O]ften educators' salary increases are tied to their students' performance on standardized tests.").

199. See *id.* ("Educators may oppose the application of the least restrictive environment because they fear that the presence of handicapped children in their mainstream classrooms will lower the standard of education for all students.").

restrictive placement for a student with disabilities.²⁰⁰ Even if a teacher does support the regular classroom for a student's LRE, that teacher may not have the qualifications to handle both diverse student populations and special education in the regular classroom.²⁰¹ If the teacher is qualified, parents still might fear sending their child back to the regular classroom if the child was initially unsuccessful there before being evaluated for an IEP.²⁰² Those parents might feel more comfortable leaving their child in a family-like, homogenous, self-contained environment.²⁰³ Therefore, many issues could arise with mainstreaming in the regular classroom.²⁰⁴ However, the problems with a teacher's desire to improve test scores or a teacher's lack of qualifications is that they seemingly only apply to academic subject areas.²⁰⁵ Accordingly, at a minimum, students could be mainstreamed in nonacademic courses with few issues from teachers.²⁰⁶

200. See *id.* (explaining teachers' implicit biases).

201. See *id.* at 126 ("Some educators and parents also may believe that a classroom teacher is not qualified to be both classroom teacher and 'special education' teacher. Another systemic problem may be that the least restrictive environment focus is on the individual child, which conflicts with the public education goal of mass education of large numbers of children. Parents may oppose their child's return to the regular classroom with skepticism because that was probably the place where their child failed initially. Additionally, it is understandable that parents may prefer to keep their children in a safe, homogeneous program in which their children have enjoyed relative success. Some special education programs foster student-teacher relationships[,] which are almost family-like. Many special education students are physically, educationally and emotionally needy, and justifiably rely on special educators who are extremely dedicated people. It is difficult for both parents and students when students must leave this type of nurturing environment. Finally, 'in implementing least restrictive environment, the courts have not focused on the *creation* of appropriate educational placements, only on the *selection* of one of two available choices.'" (internal citations omitted)).

202. See *id.* ("Another systemic problem may be that the least restrictive environment focus is on the individual child, which conflicts with the public education goal of mass education of large numbers of children. Parents may oppose their child's return to the regular classroom with skepticism because that was probably the place where their child failed initially.").

203. See *id.* (discussing parents' reluctance to remove their children from a nurturing classroom).

204. See *id.* (describing the potential issues with mainstreaming in the regular classroom). Opponents of the "Regular Education Initiative" find that total inclusion fails to adhere to the requirement for a "continuum of alternative placements based on students' individualized needs." Abrahamson, *supra* note 17, at 127.

205. See Abrahamson, *supra* note 17, at 126-27 (explaining the general issues with mainstreaming such as teachers' qualifications and biases).

206. See Farley, *supra* note 79, at 818 ("Furthermore, if students with disabilities cannot be included in a regular class for academic work, then they should participate in non-academic activities to the maximum extent appropriate.").

B. Problems with Modification of the Regular Classroom

Another problem with the mainstreaming requirement is that federal courts are divided as to whether IDEA's provision compels schools to modify their existing curriculum and methodology to accommodate special education in regular classrooms.²⁰⁷ The Department of Justice promulgated regulations directly stating that public entities do not need to make modifications that would fundamentally alter the entity or excessively burden the entity's finances.²⁰⁸ Further, the *Daniel R.R.* court found that IDEA does not mandate schools to modify their regular education curriculum "beyond recognition" in order to include students with disabilities.²⁰⁹ Rather, that court decided schools must inquire whether or not a student understands "essential elements" of the existing curriculum in the regular class.²¹⁰ In contrast, the *Oberti* court found that the unique learning style of students with special needs does not alone justify

207. See Melvin, *supra* note 2, at 642 (explaining the division in courts about whether "IDEA requires schools to make modifications to the regular education curriculum and instructional methodology to accommodate the inclusion of children with disabilities. One view, illustrated by *Daniel R.R.*, is that the mainstreaming mandate does not require provision of special education in the regular classroom"). Some courts inadvertently deny students with disabilities a proper education by only considering unmodified regular classrooms:

[T]he 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 classroom. 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.

Id. at 649-50.

208. See *id.* at 625 ("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.'" (quoting 28 C.F.R. § 35.150(a)(3) (1993))).

209. *Id.* at 650 ("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.").

210. *Id.* ("Rather, the school's inquiry should focus on the student's ability to grasp the essential elements of the regular education curriculum." (internal quotation marks omitted)).

exclusion from the regular class, leading at least one scholar to believe that some reasonable modifications to the classroom are necessary.²¹¹ That scholar argues these modifications provide “meaningful access” to education for students with disabilities and allow for mainstreaming with same-age, nondisabled peers.²¹²

C. Financial Burdens of Mainstreaming

Another difficulty with mainstreaming is that it may impose a financial burden on schools.²¹³ IDEA only mandates that schools make inclusion efforts that are practicable, so excessive financial burdens may render education in the regular classroom inappropriate.²¹⁴ However, the incremental cost of mainstreaming does not entitle schools to place students in a more affordable, segregated setting.²¹⁵ Otherwise, children’s segregated placements may be based on institutional abilities as opposed to individual needs, which contradicts the LRE provision of IDEA.²¹⁶ Furthermore, in cases involving constitutional rights, the Supreme Court has held that citizens must be afforded those rights even if greater expenses are involved.²¹⁷

Despite the Supreme Court’s opinion that citizens are entitled to constitutional rights no matter the cost,²¹⁸ rapidly increasing special

211. See *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 (3d Cir. 1993) (explaining that unique learning styles alone do not justify exclusion); Melvin, *supra* note 2, at 650 (describing the *Oberti* case and improper exclusion from regular classrooms).

212. Melvin, *supra* note 2, at 652 (“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.”).

213. See *id.* at 654 (“The limit on the school’s obligation to provide support services necessary to mainstream a disabled child is generally expressed as a financial limit. Such a limit is consistent with the terms of the IDEA.”).

214. See *id.* at 654-55 (“Furthermore, the Act expressly limits the obligation of local school districts to provide services in support of inclusion to that which is ‘practicable.’ Thus, the Act contemplates a financial limit on the school’s obligation to accommodate the education of disabled children in the regular classroom.”).

215. See *id.* at 655 (“However, this [financial limit] does not mean that a school district may deny disabled children a mainstream placement because it is incrementally more expensive than a segregated one.”).

216. See *id.* (“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.”).

217. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1969)) (explaining that the costs of special education are not a sufficient basis for exclusion).

218. See *id.* (weighing costs versus constitutional rights).

education costs do pose difficulties for schools.²¹⁹ Because of these costs, school districts struggle to fund proper implementation of special education reform.²²⁰ Some policymakers blame schools' overrepresentation of special education students for the cost increases.²²¹ However, one study found that the increased costs of special education were beyond the control of school district policies and practices.²²² The study noted that advances in medical technology,²²³ deinstitutionalization of children with disabilities,²²⁴ and social and economic factors were to blame for higher costs of special education.²²⁵ Despite school districts' alleged innocence regarding costs,²²⁶ these school districts still must find appropriate ways to guarantee all children a proper, free education under IDEA.²²⁷

IV. ADVOCATING FOR A NEW TEST FROM THE SUPREME COURT BASED ON AN ANALYSIS OF CURRENT MAINSTREAMING POLICIES

Schools must provide a continuum of services for students' LREs,²²⁸ but self-contained classrooms in separate buildings from same-age peers are not the equivalent of a self-contained classroom in the school building.²²⁹ Only students so severely handicapped that they

219. See Sheldon H. Berman & David K. Urion, *The Misdiagnosis of Special Education Costs*, AASA, <http://www.aasa.org/SchoolAdministratorArticle.aspx?id=9248> [<https://perma.cc/YUV9-FHPL>] (last visited Oct. 8, 2018) (discussing increases in special education costs).

220. See *id.* (explaining that costs are “compromising the ability of districts to effectively fund the implementation of these [special education] reforms”).

221. See *id.* (discussing how policymakers “claim schools are funneling too many children into special education to ease the burden on the classroom teacher of addressing behavioral and learning problems”).

222. See *id.* (citing medical advances, deinstitutionalization, and economic and social factors as the reasons for increased special education costs).

223. See *id.* (“Medical technology has advanced to such a degree that children who would not have otherwise survived due to prematurity or disability now live well beyond their school years.”).

224. See *id.* (detailing the shift away from institutionalization of public schooling).

225. See *id.* (explaining the sharp increase in poverty and discussing “[t]he correlation between poverty and special needs”).

226. See *id.* (discussing the reasons for cost increases in special education).

227. See 20 U.S.C. § 1412(a)(1)(A) (2012) (“A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21 . . .”).

228. See AMERICANS WITH DISABILITIES: PRACTICE & COMPLIANCE MANUAL, *supra* note 10, § 11:87 (detailing the continuum of services for students with disabilities).

229. See *id.* (describing the continuum); see also Michelle Moor, *Understanding LRE: What Is the Least Restrictive Environment?*, THE L. OFF. OF

cannot satisfactorily receive education in the regular building should be placed in entirely separate buildings.²³⁰ If schools place third through fifth grade students in a self-contained classroom in a building of only kindergarten through second grade students, the school must have deliberate reasons for excluding those students from the main building and their nondisabled, same-age peers.²³¹ If the school's decision is arbitrary or due to overcrowding, the school should be liable to the student for placement malpractice.²³²

In the Smith Elementary School example, students in the segregated building do not have opportunities to engage with same-age, nondisabled peers.²³³ Conversely, in *Jason O. v. Manhattan School District*, the court found a segregated placement to be acceptable because the student had plenty of opportunities to interact with his nondisabled peers.²³⁴ While the case was vacated, the district court mentioned that a segregated building *is* acceptable when students have opportunities to interact with nondisabled peers in art, gym, music, recess, and lunch.²³⁵ Smith Elementary School and many other schools with limited resources do not provide such mainstreaming opportunities for students educated in segregated buildings.²³⁶ Despite the financial or logistical burden schools may bear when mainstreaming, the Constitution and general public policy tend to show that students with disabilities have legitimate, protected

MICHELLE MOOR (Aug. 26, 2016), <http://michellemoor.com/understanding-lre-least-restrictive-environment/> [<https://perma.cc/5KHY-YSY6>] (explaining the levels of placements).

230. See § 1412(a)(5)(A) (limiting the situations where students with disabilities can be removed from the regular classroom).

231. See Abrahamson, *supra* note 17, at 112-13 (explaining that a school must justify its segregated special education programs).

232. See O'Hara, *supra* note 142, at 895; Wolf, *supra* note 142, at 446 (explaining placement malpractice).

233. See Interview with Heather Hall, *supra* note 3 (providing the basis for the Smith Elementary School example).

234. See *Jason O. v. Manhattan Sch. Dist. No. 114*, 173 F. Supp. 3d 744, 772 (N.D. Ill. 2016), *vacated as moot sub nom. Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677 (7th Cir. 2017) (holding in district court that the school did not violate IDEA because the student was mainstreamed for lunch and recess as much as possible).

235. See *id.* at 772 ("Although structured, the SELF program does not wall-off Jacob entirely from his nondisabled peers. Children in the program can interact with their nondisabled peers in multiple arenas, including in: (1) special area subjects (*e.g.*, art, music and gym); (2) lunch and recess; and (3) academic classes, based upon Jacob's emotional ability to handle those classes.").

236. See, *e.g.*, Opotow, *supra* note 12, at 145 ("Both internationally and domestically, overcrowding results from increases in student enrollment that are unmatched by an expansion of educational resources.").

interests in education.²³⁷ Even with existing constitutional and public policy arguments for mainstreaming,²³⁸ the Supreme Court should adopt a new, more individualized test for LREs.

A. Public Policy and Constitutional Bases for Mainstreaming

Segregation of children with disabilities violates due process and students' liberties when students are deprived of any meaningful opportunity to mainstream with nondisabled, same-age peers.²³⁹ IDEA's due process requirement entails individualized analyses of each student regardless of blanket policies or potential costs.²⁴⁰ A major problem with mainstreaming is that schools use the excessive cost of mainstreaming to justify their restrictive, segregated placements of students.²⁴¹ This current justification deprives students of their due process rights.²⁴² Furthermore, schools do not focus enough on the benefits that nondisabled students confer on students with disabilities and vice versa.²⁴³

237. See Melvin, *supra* note 2, at 605-06 ("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 Amendment."); O'Hara, *supra* note 142, at 893 ("[T]he amount of litigation is irrelevant if the plaintiff has an interest that should be protected.").

238. See, e.g., Melvin, *supra* note 2, at 605-06 (providing an example of some of the constitutional arguments about education).

239. See *id.* at 648 (explaining that separation of students with disabilities can deprive those students of their liberty); see also *id.* at 605-06 (discussing *Brown v. Board of Education's* impact on equal education opportunities for children with disabilities based on constitutional guarantees of Due Process and Equal Protection).

240. See Romberg, *supra* note 131, at 446 (explaining the two layers of due process under IDEA—the due process hearing and due process in the formation of IEPs).

241. See Abrahamson, *supra* note 17, at 113 ("There is a presumptive preference for mainstream contacts for handicapped students, but a school district can sufficiently rebut this presumption by arguing either that the mainstream program would confer *no* educational benefit, or that mainstream contacts for this child would be cost prohibitive.").

242. See Melvin, *supra* note 2, at 648 ("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.' Further, segregating students on the basis of a disability involves labeling children, a practice which itself poses a threat to individual liberty.").

243. See *id.* at 617 ("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

1. *Mainstreaming Can Be Cost Effective*

While costs of educating students with disabilities might increase with more emphasis on mainstreaming, Congress enacted IDEA with the belief that spending money on special education was more cost effective than taking responsibility for those students in institutions or as welfare dependents.²⁴⁴ The financial burdens imposed on schools are not entirely discounted, but society's financial interests are negatively impacted when children with disabilities are excluded from appropriate education.²⁴⁵ For schools with segregated buildings, these possible financial implications include either creating more classrooms in the main building or transporting students to the main building for nonacademic activities.²⁴⁶ Schools have no duty to fundamentally modify their programs, but the students' interests and congressional intent for mainstreaming should typically trump the potential costs for the schools.²⁴⁷ In fact, the presumption should always be that a student's individualized interests in mainstreaming with same-age peers trump the school's interest in saving money.²⁴⁸

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." (internal quotation marks omitted)).

244. See *id.* at 618 ("The integration of individuals with disabilities into the mainstream of society was not only a constitutional concern to Congress but an economic concern as well. Congress viewed the prevalence of dependency and unproductivity among the adult disabled population as a problem that begins in the schools. Artificial barriers to the full participation of individuals with disabilities not only perpetuate the stigma and indignity of institutionalization and dependency, but impose substantial financial burdens on families and ultimately society as a whole. Consequently, Congress believed that money spent on educating children with disabilities to be self-sufficient adult members of society would be more humane, and less expensive to society than maintaining such persons as welfare dependents or in institutions.").

245. See *id.* (explaining that money spent on education benefits society by decreasing future dependency on the state).

246. See, e.g., *Jason O. v. Manhattan Sch. Dist. No. 114*, 173 F. Supp. 3d 744, 772 (N.D. Ill. 2016), *vacated as moot sub nom. Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677 (7th Cir. 2017) (explaining that the school would transport students with a van to the main building in cases of inclement weather).

247. See *Melvin*, *supra* note 2, at 642, 649-50 (explaining the costs and problems with modification in the regular classroom for students with disabilities).

248. See, e.g., *id.* at 649-50 ("[T]he 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 classroom. 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

In specific cases, like at Smith Elementary School, where students with disabilities are in entirely separate buildings, possible financial implications do exist to mainstream those students.²⁴⁹ For example, schools might have to pay for a van or bus to transport those students to the main building for gym, recess, art, and other nonacademic activities if the building is too far for students to walk or in cases of inclement weather.²⁵⁰ If the school makes a good-faith effort to find space in the main building for a self-contained classroom and fails, the potential cost of transporting segregated students to the main building is insignificant in light of the congressional intent for all students to receive a free and appropriate public education.²⁵¹ Schools are not insulated from providing special education even if they are not at fault.²⁵² However, the state and federal governments need to provide adequate funding to help struggling schools follow IDEA.²⁵³

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.”).

249. See Abrahamson, *supra* note 17, at 113 (explaining that schools can rebut the “presumptive preference” for mainstreaming by arguing that mainstreaming “would be cost prohibitive”). *But see* Melvin, *supra* note 2, at 655 (explaining that if incremental increases in costs were bases for denying inclusion, “many disabled children could be legally excluded; a result hardly contemplated by the mainstreaming mandate”).

250. See *Jason O.*, 173 F. Supp. 3d at 772 (“[T]he SELF program instructor . . . testified that when the weather is bad, instead of the children walking to the general education classroom building, the School District, as it had done in the past, would call a van to transport the children the one-tenth of a mile distance between the two buildings.”).

251. See 20 U.S.C. § 1412(a)(1)(A) (2012) (describing the requirement for schools to provide a free and appropriate public education). While the increased costs of special education could affect schools’ abilities to reform their mainstreaming practices, see generally *Background of Special Education*, *supra* note 55, costs are irrelevant in comparison to the need to protect students with disabilities. See, e.g., O’Hara, *supra* note 142, at 893 (“[T]he amount of litigation is irrelevant if the plaintiff has an interest that should be protected.”). For detailed cost analyses, see generally COLORADO COSTING OUT STUDY, *supra* note 55; MICHIGAN EDUCATION, *supra* note 55; PENNSYLVANIA’S PUBLIC EDUCATION GOALS, *supra* note 55.

252. See § 1412(a)(1)(A) (enacting FAPE).

253. See *Background of Special Education*, *supra* note 55 (explaining that the federal government only provided “local school districts with just under 20 percent of its commitment” to special education funding in 2004).

2. Positive Effects on Nondisabled Students and Students with Disabilities Are Relevant

Even with the potential financial burdens of maximizing the mainstreaming of segregated students with disabilities, the positive effects of mainstreaming on nondisabled students and students with disabilities cannot be overlooked.²⁵⁴ Nondisabled students confer social and developmental benefits on peers with disabilities, and schools must consider these benefits when limited or no opportunities for academic inclusion exist.²⁵⁵ Correspondingly, students with disabilities can help their same-age peers develop a deeper understanding of disabilities.²⁵⁶ All three main LRE tests consider the benefits of mainstreaming on the students with disabilities, but none explicitly address the benefits of mainstreaming on nondisabled students.²⁵⁷

Unfortunately, students with disabilities might significantly disrupt students in general education settings, even during gym, recess, and other nonacademic courses.²⁵⁸ However, only disabilities that are so severe that education in the regular classroom is impossible mandate a more restrictive placement.²⁵⁹ If a student is severely disrupting his peers in even nonacademic activities like lunch, recess,

254. See Melvin, *supra* note 2, at 617 (explaining how Congress felt mainstreaming would benefit students with disabilities and nondisabled students).

255. See, e.g., *Bd. of Educ. v. Patrick M.*, 9 F. Supp. 2d 811, 825-26 (N.D. Ohio 1998) (“The Court also finds that the District’s practice of ‘mainstreaming’ students with learning or behavioral disabilities is an appropriate, if not essential, element to fostering academic and social development.”); see also *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1047-48 (5th Cir. 1989) (“For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child’s development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment.”).

256. See Melvin, *supra* note 2, at 617 (discussing Congress’s intent for mainstreaming to confer benefits on both nondisabled students and students with disabilities).

257. See *supra* notes 52-55 and accompanying text; *supra* notes 62-65 and accompanying text; *supra* notes 69-71 and accompanying text.

258. See, e.g., *Daniel R.R.*, 874 F.2d at 1049 (noting the effects of disruptive behavior in the regular education environment).

259. See 20 U.S.C. § 1412(a)(5)(A) (2012) (“To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”).

art, music, or gym, separation might be necessary.²⁶⁰ However, if an older student does not meet this disruption threshold with kindergarten students in nonacademic activities, he or she would also be unlikely to disrupt his same-age peers; thus, mainstreaming with those of the same-age would be entirely plausible and appropriate.²⁶¹

B. The Future of Special Education Law

If the Supreme Court does not issue LRE guidelines, circuit courts should, at the very least, adopt a placement malpractice cause of action.²⁶² This cause of action would not entirely solve the current problems with special education, but it would provide some retroactive solutions for parents of students with disabilities.²⁶³ However, an entirely new test from the Supreme Court or Congress could proactively improve the lives of students with disabilities and provide clear guidance for schools' decisions.²⁶⁴

1. Placement Malpractice Can Benefit Wronged Children

When a court has determined that a school did improperly place a student with disabilities, the court should accept causes of action for placement malpractice.²⁶⁵ While the values of an education and peer interactions are hard to quantify, courts have managed to quantify the value of body parts in medical malpractice cases.²⁶⁶ The issuance of damages would benefit wronged children and allow families to support their children's disabilities.²⁶⁷ Even if the schools employ additional services or pay for the student to attend a private school, a child might still need tutoring services at home to put the child in the

260. See *id.* (describing the removal threshold).

261. See *id.*

262. See Wolf, *supra* note 142, at 446 (explaining the possibility of placement malpractice causes of action).

263. See O'Hara, *supra* note 142, at 893 (discussing the need to protect the interests of plaintiffs through placement malpractice suits).

264. See generally *id.*

265. See Wolf, *supra* note 142, at 446.

266. See O'Hara, *supra* note 142, at 894.

267. See, e.g., Doe v. Bd. of Educ., 453 A.2d 814, 823 (Md. 1982) (Eldridge, J., dissenting) ("Moreover, it is not clear that money damages would be 'inappropriate' in the instant case. Taking the petitioners' allegations as true, Doe is now 23 years old and has completed his education. He has progressed to second grade reading and spelling levels and a third grade arithmetic level. He still has not learned to compensate for his dyslexia, and he has severe emotional problems. Doe is in need of psychological treatment and adequate special education, neither of which is being given by the school system and both of which cost money.").

position where he or she would have been had the school's negligence never happened.²⁶⁸ Additionally, placement malpractice may cause schools and teachers to be more meticulous with their decisions under IDEA.²⁶⁹ However, despite the potential benefits of placement malpractice, schools may suffer excessive financial losses from a malpractice suit and thus continue to justify their lack of a proper continuum of services.²⁷⁰ If placement malpractice is impracticable, schools can still improve their current mainstreaming practices with a new LRE test from the Supreme Court.²⁷¹

2. A New Test with Presumptions for States to Overcome Will Better Serve Students

A new, clearer test for determining LREs may mitigate the need for a malpractice cause of action.²⁷² Due process under IDEA requires schools to assess students' individual needs; a new test must reflect that principle.²⁷³ Further, schools should truly adhere to the continuum of services and only place students in more restrictive placements if the school can rebut certain presumptions about each placement.²⁷⁴

a. Initial Presumption of Regular Classroom Education

The presumption for each student should be placement in the regular classroom with same-age peers, not necessarily peers of the same academic level.²⁷⁵ Schools can add supplementary services based

268. See O'Hara, *supra* note 142, at 894 (explaining the remedies for students could be "payment for tuition at private institutions or provision of other services to the plaintiff").

269. See, e.g., Abrahamson, *supra* note 17, at 125 (explaining teachers' general biases in placement decisions). See generally O'Hara, *supra* note 142 (discussing overall pros and cons of placement malpractice).

270. See Abrahamson, *supra* note 17, at 113 ("There is a presumptive preference for mainstream contacts for handicapped students, but a school district can sufficiently rebut this presumption by arguing either that the mainstream program would confer *no* educational benefit, or that mainstream contacts for this child would be cost prohibitive.").

271. See *infra* Subsection IV.B.2 (proposing a new LRE test).

272. See *supra* note 176 and accompanying text.

273. See Romberg, *supra* note 131, at 446 (describing due process requirements of education).

274. See AMERICANS WITH DISABILITIES: PRACTICE & COMPLIANCE MANUAL, *supra* note 10, § 11:87 (explaining the continuum of services).

275. See, e.g., Tucker v. Calloway Cty. Bd. of Educ., 136 F.3d 495, 506 (6th Cir. 1998) (describing one child's needs for "integration with peers of his own age"); Gillette v. Fairland Bd. of Educ., 932 F.2d 551, 554 (6th Cir. 1991) (providing evidence that same-age peer interactions are valuable in partial mainstreaming); Sch.

on students' individual needs.²⁷⁶ Schools can rebut the presumption of placement in the regular classroom with clear and convincing evidence that a student is not receiving any academic or social benefit from a full education in the regular classroom.²⁷⁷ While no clear and convincing burden of proof exists in special education law, this standard is applied in other child welfare situations.²⁷⁸ For example, the Supreme Court has held that states can only terminate parental rights using at least clear and convincing evidence.²⁷⁹ Michigan will only remove a child from an established custodial environment if clear and convincing evidence proves removal is in the child's best interest.²⁸⁰ Similarly, schools should not remove students from their established educational environment—regular classrooms—without clear and convincing evidence that the students receive no benefit in the regular classroom.²⁸¹

Dist. v. Grover, 755 F. Supp. 243, 247 (E.D. Wis. 1990) (discussing how “it was essential for [a student’s] social development that she interact with age-appropriate non-handicapped peers”).

276. See 20 U.S.C. § 1412(a)(5)(A) (2012) (explaining that removal of a child from a regular classroom is only acceptable if “education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”); e.g., *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (describing the first step of the *Daniel R.R.* test, “whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child”); *supra* note 172 and accompanying text (describing the remediating supplemental services for regular classrooms).

277. See § 1412(a)(5)(A) (removal “from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”); Melvin, *supra* note 2, at 617-18 (describing academic and social benefits of mainstreaming); e.g., *M.A. ex rel. G.A. v. Voorhees Twp. Bd. of Educ.*, 202 F. Supp. 2d 345 (D.N.J. 2002), *aff’d*, 65 F. App’x 404 (3d Cir. 2003) (holding that a segregated placement was the LRE for a child who disrupted the regular classroom by having tantrums, assaulting students and teachers, and randomly leaving the classroom).

278. See MICH. COMP. LAWS § 722.27 (2016) (“The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.”); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that states must adhere to at least a clear and convincing evidence burden of proof for termination of parental rights).

279. See *Santosky*, 455 U.S. at 769.

280. See § 722.27.

281. Compare § 1412(a)(5)(A) (stating that students with disabilities cannot be removed from regular classroom unless education in that classroom is essentially impossible), with § 722.27 (explaining that a child cannot be removed from an established custodial environment without clear and convincing evidence to support removal).

If schools believe a student with disabilities negatively impacts other students in the regular classroom, schools must still make every practical effort to continue educating that student in the regular classroom until that student negatively impacts other students' academic performance.²⁸² However, schools must consider the social benefits of mainstreaming on students with disabilities and students without disabilities.²⁸³ Schools should weigh these benefits with the alleged burdens in determining whether removal from the regular classroom is truly in each student's best interest by clear and convincing evidence.²⁸⁴

b. Removal from the Regular Classroom

If schools decide to remove students with disabilities from the regular classroom, the next option should be educating those students partially in the regular classroom and partially in a resource room in the same building.²⁸⁵ However, if any education in the regular classroom is infeasible, based on clear and convincing evidence,²⁸⁶ the next option should be educating students in a self-contained classroom in the same building.²⁸⁷ If students are to be educated in the same school they would attend if they were not disabled, then education in a self-contained classroom in an entirely separate building without further inquiry seemingly violates IDEA.²⁸⁸ Students should not be segregated to a separate building unless they pose such a disruption to students in the main building that the school would not be able to achieve any order or goals relating to its educational methodology.²⁸⁹

282. See § 1412(a)(5)(A) (stating that children with disabilities are not to be removed from regular classrooms unless the "nature or severity" of the child's disability makes education in "regular classes with the use of supplementary aids and services" impossible). This negative impact can include excessive modifications to the regular classroom. See Melvin, *supra* note 2, at 652.

283. See Melvin, *supra* note 2, at 617 (explaining Congress's beliefs about the benefits of mainstreaming on both nondisabled students and students with disabilities).

284. See § 1412(a)(5)(A) (providing the standard for removing a child from the regular classroom).

285. See, e.g., AMERICANS WITH DISABILITIES: PRACTICE & COMPLIANCE MANUAL, *supra* note 10, § 11:87 (explaining the range of LRE placements).

286. See *supra* note 281 and accompanying text.

287. See, e.g., *supra* note 281 and accompanying text.

288. See 34 C.F.R. § 300.116(c) (2018) ("Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled . . .").

289. See § 1412(a)(5)(A) (providing the standard for removing a child from the regular classroom); e.g., Abrahamson, *supra* note 17, at 129 (discussing one

This burden should be high considering IDEA's preference for mainstreaming.²⁹⁰

Further, the cost of educating students with disabilities in the main building should not be a factor in separating students from the regular classroom because cost does not relate to any educational goal or methodology.²⁹¹ While taxpayers may take issue with the costs of special education,²⁹² IDEA is supposed to remediate the profound exclusion of students with disabilities from education.²⁹³ Cost is not a proper reason to justify the exclusion that IDEA was enacted to correct.²⁹⁴ Also, no person can be denied constitutional rights based on greater expenses incurred by the exercise of those rights.²⁹⁵ Because constitutional due process requires schools to focus on individual children's specific needs,²⁹⁶ the expenses of those individual needs do not justify a school's exclusion of students with disabilities.²⁹⁷

c. Removal from the Regular Building

Once a school determines by clear and convincing evidence that students with disabilities must be segregated from the main building,

scholar's belief that school districts must support segregated programs "as reasonable choices of educational methodology").

290. See Abrahamson, *supra* note 17, at 113 (describing the "presumptive preference" for mainstreaming students with disabilities based on § 1412(a)(5)(A)).

291. See Melvin, *supra* note 2, at 631, 655 (explaining that if a school fails to provide a continuum of services, it cannot use cost as a defense, and that denying inclusion based on incremental cost increases would violate IDEA's mainstreaming mandate). *But see* Abrahamson, *supra* note 17, at 129 (discussing one scholar's proposed LRE test that includes cost effectiveness as a factor of educational methodology).

292. For detailed cost analyses, see generally COLORADO COSTING OUT STUDY, *supra* note 55; MICHIGAN EDUCATION, *supra* note 55; PENNSYLVANIA'S PUBLIC EDUCATION GOALS, *supra* note 55.

293. See Crockett, *supra* note 25, at 545 (discussing how Congress enacted IDEA to remedy the exclusion of "millions of children from public instruction based solely upon their disabilities"); Melvin, *supra* note 2, at 603 (explaining that in 1969, "only seven states were educating more than fifty-one percent of their disabled children").

294. See Crockett, *supra* note 25, at 545 (discussing how Congress enacted IDEA to remedy the exclusion of children with disabilities).

295. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972) (citing *Goldberg v. Kelly*, 397 U.S. 254, 266 (1969)) (explaining that costs do not justify exclusion of special education students).

296. See Romberg, *supra* note 131, at 446 (explaining the two layers of due process under IDEA—the due process hearing and due process in the formation of IEPs).

297. See *Mills*, 348 F. Supp. at 876 (citing *Goldberg*, 397 U.S. at 266) (explaining that costs do not justify exclusion of special education students).

that school must mainstream those students in every possible nonacademic activity.²⁹⁸ Students with disabilities should, at a minimum, be able to participate in lunch, recess, art, gym, and music.²⁹⁹ Schools can transport students to the main building for any mainstreaming with nondisabled peers.³⁰⁰ Mainstreaming in these nonacademic areas would not affect how teachers treat students with disabilities because teachers would not be influenced by any effects on test scores.³⁰¹ Thus, parents could still feel comfortable with their children in the mainstream for nonacademic activities.³⁰² Additionally, based on several scholarly and judicial opinions noting the importance of same-age peer interactions, mainstreaming for students with disabilities must occur amongst same-age, nondisabled students.³⁰³

Through mainstreaming, both students with disabilities and nondisabled students can learn from each other.³⁰⁴ Nondisabled

298. See 7 C.F.R. § 15b.23(b) (2018) (“In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 15b.26(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.”); Farley, *supra* note 79, at 818 (“Furthermore, if students with disabilities cannot be included in a regular class for academic work, then they should participate in non-academic activities to the maximum extent appropriate. For example, a student should be allowed to join his or her regular education classmates for activities like meals and recess periods. In doing so, a student with a disability can maintain contact with non-disabled peers to the maximum extent appropriate to the needs of that child [I]f a student with a disability is segregated, he or she must still be included with regular peers for non-academic activities like lunch and recess to the maximum extent appropriate.” (internal quotation marks omitted)).

299. See Farley, *supra* note 79, at 818 (discussing some nonacademic alternatives to mainstreaming).

300. See, e.g., Jason O. v. Manhattan Sch. Dist. No. 114, 173 F. Supp. 3d 744, 772 (N.D. Ill. 2016), *vacated as moot sub nom.* Ostby v. Manhattan Sch. Dist. No. 114, 851 F.3d 677 (7th Cir. 2017) (explaining that the school would transport students with a van to the main building in cases of inclement weather).

301. See *supra* notes 198-200 and accompanying text (explaining the potential influence of test scores on teachers’ decisions about special education).

302. See *id.* (noting teachers’ implicit biases and parents’ fears).

303. See Tucker v. Calloway Cty. Bd. of Educ., 136 F.3d 495, 506 (6th Cir. 1998) (explaining the need for integration of same-age peers); Gillette v. Fairland Bd. of Educ., 932 F.2d 551, 554 (6th Cir. 1991) (providing some evidence that same-age peer interactions are valuable in partial mainstreaming); Sch. Dist. v. Grover, 755 F. Supp. 243, 247 (E.D. Wis. 1990) (discussing how “it was essential for [a student’s] social development that she interact with age-appropriate non-handicapped peers.”); Farley, *supra* note 79, at 818 (discussing the need to maximize mainstreaming in nonacademic activities); Osborne, Jr., *supra* note 39, at 446 (explaining the need for mainstreaming in nonacademic activities).

304. See Melvin, *supra* note 2, at 657-58 (describing the benefits of mainstreaming that apply to students without disabilities); see also Daniel R.R. v.

children provide language and behavior modeling for their peers with disabilities, even in nonacademic settings.³⁰⁵ At a minimum, students with disabilities can inspire their peers, and they can inform their peers, even indirectly, about the types of disabilities that those children will encounter beyond the classroom.³⁰⁶

d. Arbitrary Building Segregation

Sometimes, a school simply does not have room in its main building for all of its self-contained special education students, such as in the Smith Elementary school example.³⁰⁷ However, if those students do not need to be separated from their same-age peers by an entire building based on the aforementioned standards,³⁰⁸ the school must equally distribute its classrooms among the buildings so that special education students are not arbitrarily separated from their same-age peers.³⁰⁹ This distribution of classrooms should include a relatively equal number of regular classrooms of each grade level and self-contained classrooms in each building.³¹⁰ Despite these proposed solutions, some schools would likely still struggle to obtain proper funding to implement any changes.³¹¹ Regardless, under IDEA, students with disabilities need meaningful opportunities to interact with their same-age peers; sending twelve-year-old students with

State Bd. of Educ., 874 F.2d 1036, 1047-48 (5th Cir. 1989) (describing the benefits of mainstreaming that apply to disabled students).

305. See *Daniel R.R.*, 874 F.2d at 1047-48 (discussing the importance of language and behavior modeling for students with disabilities from their nondisabled peers in any educational environmental).

306. See Melvin, *supra* note 2, at 657-58 (describing the ways that mainstreaming students with disabilities can inspire and educate their nondisabled peers).

307. See Interview with Heather Hall, *supra* note 3 (providing the basis for the Smith Elementary School example).

308. See *supra* Subsections I.A.1-I.A.3 (describing three LRE tests).

309. See, e.g., 20 U.S.C. § 1412(a)(5)(A) (2012) (providing mainstreaming requirements); *Tucker*, 136 F.3d at 506 (describing one child's needs for "integration with peers of his own age"); *Gillette*, 932 F.2d at 554 (providing some evidence that same-age peer interactions are valuable in partial mainstreaming).

310. See § 1412(a)(5)(A). An equal distribution of regular classrooms and special education classroom in a separate building would comport with IDEA because the students could still be mainstreamed. See *id.*

311. See, e.g., *Background of Special Education*, *supra* note 55 (discussing the financial realities of special education and the federal government's inability to meet the proposed funding amounts).

disabilities into a building of only kindergarten students would violate IDEA.³¹²

While this new test could impact school policy decisions, due process and IDEA's mainstreaming requirements should outweigh school convenience.³¹³ Individualized analyses would prevent schools from making arbitrary placement decisions based on factors other than reasonable educational methodology.³¹⁴ By maximizing mainstream, same-age peer interactions in academic and nonacademic activities, schools would not only benefit students with disabilities, but they would also benefit nondisabled students by providing them with a deeper understanding of their peers.³¹⁵

CONCLUSION

IDEA mandates that students with disabilities be educated in their least restrictive environments.³¹⁶ These environments are a continuum of placements that must meet every individual students' needs.³¹⁷ Some placements include segregated environments from the general education classrooms, and some placements include segregated classrooms from the general education *buildings* like Smith Elementary School; however, schools cannot conflate the two environments as equivalent LRE placements.³¹⁸

Schools cannot remove students from mainstream environments with their same-age peers unless those students cannot possibly receive an education in the general building in a self-contained classroom.³¹⁹ If schools violate this proposed principle, they should be

312. See, e.g., *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1221 (3d Cir. 1993) (“[T]he district court’s finding that the School District has not taken meaningful steps to try to include [the student] in a regular classroom with supplementary aids and services is not clearly erroneous.”); Melvin, *supra* note 2, at 652 (explaining that reasonable modifications are important to give students with disabilities “meaningful access” to education, but noting that modification is unreasonable if it unduly burdens students).

313. See US CONST. amend. XIV; § 1412(a)(5)(A) (explaining the need to mainstream students with disabilities).

314. See Abrahamson, *supra* note 17, at 129 (“[T]he Court should require that school districts support their decisions to offer only segregated or centralized programs as reasonable choices of educational methodology.”).

315. See Melvin, *supra* note 2, at 617 (explaining Congress’s beliefs about the benefits of mainstreaming on both nondisabled students and students with disabilities).

316. See § 1412(a)(5)(A) (enacting the LRE mandate).

317. See AMERICANS WITH DISABILITIES: PRACTICE & COMPLIANCE MANUAL, *supra* note 10, § 11:87 (defining the continuum of placements).

318. See *id.*; Moor, *supra* note 229 (explaining the levels of placements).

319. See § 1412(a)(5)(A) (explaining the threshold for removal).

liable for placement malpractice and damages to the student and his or her family.³²⁰ The Supreme Court should create a universal LRE test that better comports with IDEA's intent to properly mainstream students with disabilities.³²¹ Without a proper Supreme Court test, children with disabilities will continue to suffer from improper educational segregation.³²² A Supreme Court test can help implement IDEA's curative purpose, but the Supreme Court will never be able to do enough to correct the former wrongs against children with disabilities.³²³

320. See Wolf, *supra* note 142, at 446 (describing the concept of placement malpractice).

321. See *supra* Subsection IV.B.2 (detailing a potential LRE test).

322. See Crockett, *supra* note 25, at 545 (discussing how Congress enacted IDEA to remedy the exclusion of "millions of children from public instruction based solely upon their disabilities"); Melvin, *supra* note 2, at 603 (explaining that in 1969, only a few states were educating more than half of their children with disabilities).

323. See Crockett, *supra* note 25, at 545; Melvin, *supra* note 2, at 603.