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A Good "IDEA" With No Clear Plan: The Lack of Uniformity in Evaluating Compliance with the IDEA's Least Restrictive Environment Provision Has Led to Arbitrary Segregation of Children with Disabilities Across the United States

Alexis Cherry[*]

ABSTRACT

The Individuals with Disabilities Education Act ("IDEA") states that students with disabilities are to be provided with a free appropriate public education in the least restrictive environment. Despite this requirement, children with disabilities continue to face segregation in the education system across the country. Although there have been several lawsuits regarding proper placement of children with disabilities, the United States Supreme Court refuses to establish a uniform standard for lower courts to adopt. As a result, there are currently four different approaches—employed across ten different circuits—on how to determine whether a child has been placed in the least restrictive environment. Because of this disagreement, a child with a disability could be placed in the least restrictive environment in one part of the country and the most restrictive environment in a different part of the country. This paper discusses what is required of school districts under the IDEA and how those requirements continue to be ignored throughout the United States. Additionally, this paper analyzes the current tests that each district court employs and provides suggestions on how both the judicial system and Congress can eliminate the arbitrary segregation of students with disabilities.

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INTRODUCTION

The inclusion of individuals with disabilities in society has been and continues to be one of the most controversial developments in America. The intent of the present analysis is to explore the protections given to students with disabilities through the enactment of the Individuals with Disabilities Education Act[1] and examine how those students continue to face ongoing barriers to a free and appropriate public education in the least restrictive environment. Although school districts are required to educate students with disabilities alongside nondisabled students in the regular classroom to the greatest extent possible,[2] determining when it is appropriate to remove a child with disabilities from the general classroom is a highly contested issue. A large reason behind this controversy is because the U.S. Supreme Court has refused to create a uniform standard for lower courts to implement, thus leading to a circuit split consisting of four different tests adopted amongst ten different circuits.

Part I of this paper provides a brief background on the history and development of federal disability law, focusing on the interplay with special education. Part II dives into the specific details and requirements of the Individuals with Disabilities Education Act. Part III provides examples of how students with disabilities are still facing unequal treatment in the education system through segregated placement. Part IV discusses the current circuit split and the different legal standards various courts use when determining what constitutes the proper placement in the least restrictive environment. Lastly, Part V explores the possibility of a uniform standard that the Supreme Court could adopt to alleviate arbitrary placement decisions and honor the procedural safeguards guaranteed to students by the Constitution.

I. BACKGROUND ON DISABILITY LAW AND SPECIAL EDUCATION

Historically in America, children with disabilities were excluded from public schools or segregated within those schools out of fear and lack of resources.[3] Due to court decisions striking down educational segregation based on race and ethnicity, parents of children with disabilities brought similar cases arguing for the non-segregated placement of students with

1. 20 U.S.C. §§ 1400-1500.
2. 20 U.S.C. § 1412(a)(5)(A).
3. *See* Sherman Dorn, Douglas Fuchs & Lynn S. Fuchs, *A Historical Perspective on Special Education Reform*, 35 THEORY INTO PRACTICE 12, 12-19. (1996).

disabilities.[4] According to the Centers for Disease Control and Prevention, approximately one in six, or about 17%, of children ages three through seventeen have one or more developmental disabilities that may impact their day-to-day functioning.[5] "Developmental disabilities are a group of conditions due to an impairment in physical, learning, language, or behavior areas."[6] Because these disabilities begin during the developmental period and usually last throughout a person's lifetime, improving educational opportunities for children with disabilities is an essential element in our nation's goal of ensuring equal opportunity.[7] As a result, Congress enacted three main federal laws that are aimed at protecting the rights of individuals with disabilities: the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and the Individual's with Disabilities Education Act ("IDEA").[8]

In 1990, the ADA was enacted as a means of providing individuals with disabilities greater civil rights protections by prohibiting discrimination on the basis of disability.[9] The ADA is broken up into five sections, called titles, that set out requirements for different kinds of organizations.[10] Title II of the ADA applies to all services, programs, and activities of state and local governments and thus specifically prohibits educational providers from discriminating based on disability and from denying education services to students with disabilities.[11]

4. *See* Sarah Prager, *An "IDEA" to Consider: Adopting a Uniform Test to Evaluate Compliance with the IDEA's Least Restrictive Environment Mandate*, 59 N.Y.L. SCH. L. REV. 653, 656 n.14; *see also* Pa. Ass'n for Retarded Child. v. Pa., 334 F. Supp. 1257 (E.D. Pa. 1971); Mills v. Bd. Of Educ., 348 F. Supp. 866 (D.D.C. 1972).

5. *Developmental Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/developmentaldisabilities/about.html [https://perma.cc/9CBV-TVJ6] (May 16, 2022).

6. *Id.*

7. 20 U.S.C. § 1400(c)(1) ("Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society."); *see also* Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964) (holding that children have a constitutional right to an education equal to that afforded to other students); Pa. Ass'n for Retarded Child., 334 F. Supp. at 1259 (E.D. Pa. 1971) (holding that segregating a child based solely on their disability violates due process and their equal protection rights); Mills v. Bd. Of Educ., 348 F. Supp. at 875 (holding that cost is no justifiable reason for denying children with disabilities an education).

8. Andrew M.I. Lee, J.D., *IDEA, Section 504, and the ADA: Which Laws Do What*, UNDERSTOOD, https://www.understood.org/en/articles/at-a-glance-which-laws-do-what [https://perma.cc/6J2M-4MKE].

9. *Introduction to the Americans with Disabilities Act*, ADA.GOV, https://www.ada.gov/topics/intro-to-ada/ [https://perma.cc/VYV7-4S2Q] (giving an overview of what the ADA is, who it covers, and what it requires).

10. *Id.* (listing the different types of organizations the ADA applies to and clarifying which titles are relevant for which organizations).

11. *Introduction to the Americans with Disabilities Act*, *supra* note 9.

Fifty years ago, Section 504 was enacted as the first disability civil rights law in the United States.[12] Its purpose is to prohibit discrimination against people with disabilities in programs that receive federal funding, including public school districts, private schools, and institutions of higher education.[13] Because Section 504 defines "disability" in broad terms, stating that any student with an impairment that substantially limits a major life activity is considered to be a student with a disability, children who may not qualify as "disabled" under the IDEA may nevertheless qualify under Section 504.[14]

Two years after Section 504's enactment, Congress enacted the IDEA––formerly known as the Education for all Handicapped Children Act—which is considered the most important piece of civil rights legislation for children with disabilities passed in the United States.[15] "Prior to its passage in 1975, at least one million children with disabilities in the United States were denied any public education, and at least four million more were segregated from their nondisabled peers."[16] To remedy this, the IDEA authorized a dramatic increase in the federal shares of funding for educating children with disabilities and established specific guidelines schools must follow to receive the increase in federal funding.[17] To receive these federal funds, states are required to submit a plan to the Department of Education[18] that guarantees all school-age children with disabilities[19] a free, appropriate, public education.[20] Eligible students are those identified as having a disability that adversely affects academic performance and as

12. *Laws*, DISABILITY RTS. EDUC. & DEF. FUND, https://dredf.org/legal-advocacy/laws/ [https://perma.cc/653Q-H33B]; *see also* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794).

13. Off. for Civ. Rts, *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html [https://perma.cc/DV7Z-QA4S] (describing who is covered under Section 504 and what protections it offers) (July 21, 2023).

14. *Id.*

15. *See Laws*, *supra* note 12 (providing a brief description of the purpose of the IDEA and its requirements); *see also* 20 U.S.C. § 1400(d)(1)(A) (defining the purpose of the IDEA).

16. *Laws*, *supra* note 12.

17. *See* 20 U.S.C. § 1411.

18. 20 U.S.C. § 1412(a).

19. 20 U.S.C. § 1401(3)(A)(i) (providing the following disabilities as covered under the IDEA: "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance [,] . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities").

20. 20 U.S.C. § 1412(a)(1).

being in need of special education and related services.[21] As of the 2020-21 school year, the number of students who received special education services under the IDEA was 7.3 million, roughly 15% of public school students.[22]

II. REQUIREMENTS UNDER THE IDEA

Under the IDEA, public schools must meet the following requirements, among others, to become eligible for financial assistance: (1) provide children with disabilities a free appropriate public education ("FAPE"), (2) devise an individualized education program ("IEP"), and (3) educate children with disabilities in the least restrictive environment ("LRE").[23]

A. FREE APPROPRIATE PUBLIC EDUCATION

The FAPE provision is satisfied if the school district provides eligible students personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction.[24] In *Board of Education v. Rowley*, the Supreme Court created a minimum standard for this provision by holding that a state is not required to maximize the potential of students with disabilities and instead just needs to provide some educational benefit.[25] The Court went on to clarify its reasoning by stating that the intent behind the IDEA requiring a FAPE was more to open the door of public education to students with disabilities by means of specialized education rather than to guarantee any particular substantive level of education once inside.[26] Thus, a two-part test was created to analyze whether a school provided a FAPE, under which courts ask (1) if the state complied with the procedural requirements of the IDEA[27] and (2) if the IEP is "reasonably calculated to enable the child to receive educational benefits."[28]

B. INDIVIDUALIZED EDUCATION PLAN

Once a student is found to be eligible under the IDEA, an IEP team—which includes the child's parents and other individuals involved in the

21. NAT'L CTR. FOR EDUC. STAT., *Students With Disabilities*, *in* THE CONDITION OF EDUCATION 1 (2023), https://nces.ed.gov/programs/coe/pdf/2023/cgg_508.pdf [https://perma.cc/5EXT-X8QG] [hereinafter *Students With Disabilities*] (providing a statistical report on students with disabilities in the 2020–21 U.S. school year).
22. *Id.*
23. 20 U.S.C. § 1412.
24. Bd. of Educ. v. Rowley, 458 U.S. 176, 177 (1982).
25. *Id.* at 189.
26. *Id.* at 189–90.
27. *Id.* at 206.
28. *Id.* at 206–07.

child's education—will develop an educational plan based on the child's specific needs.[29] The IEP is a written document that "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives."[30] In developing the IEP, the following factors must be considered: the child's strengths, the parents' concerns, the child's most recent evaluation results, and the child's academic, development, and functional needs.[31] The IEP must be reviewed at least once a year by the team and may be revised as appropriate to address the child's progress.[32]

C. LEAST RESTRICTIVE ENVIRONMENT

After the IEP is developed, the team must determine what type of placement will enable the student to meet their goals in the LRE.[33] Section 1412(a)(5)(A) of the IDEA, which defines the LRE provision, states:

> 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.[34]

Thus, to satisfy this provision, school districts must offer a range of placement alternatives that provide the appropriate program for each student and maximizes their contact with nondisabled peers.[35] The types of alternative placements range from regular class instruction (least restrictive), to special education instruction (more restrictive), to segregated instruction in a hospital or institution (most restrictive).[36]

In determining the educational placement of the child, the school district must ensure that the child's placement is (1) determined at least annually, (2) based on the child's IEP, and (3) as close as possible to the

29. *The IEP Cycle*, DISABILITY RTS. EDUC. & DEF. FUND, https://dredf.org/special-education/special-education-resources/the-iep-cycle/ [https://perma.cc/3XMH-8VF9].
30. Honig v. Doe, 484 U.S. 305, 311 (1988); *see also* 20 U.S.C. § 1414(d)(1)(A).
31. 20 U.S.C. § 1414(d)(3)(A).
32. 20 U.S.C. § 1414(d)(4)(A).
33. 20 U.S.C. § 1412(a)(5); *see also The IEP Cycle*, *supra* note 29.
34. 20 U.S.C. § 1412(a)(5)(A).
35. 34 C.F.R. § 300.115(a) (2017).
36. 34 C.F.R. § 300.115(b) (2017).

child's home.[37] Additionally, children with disabilities should be educated in their neighborhood schools that they would attend if nondisabled—unless their IEP requires some other arrangement.[38] If a student's unique needs permit only a LRE that is limited to an education that includes only other children with disabilities, the school must provide an explanation of why the student is unable to achieve "satisfactorily" in the regular classroom environment with supplemental aids and services.[39] This is meant to prevent schools from arbitrarily segregating students with disabilities, thus encouraging inclusion and ensuring procedural due process requirements are satisfied.[40]

Two terms that are often misused in the discussion of LRE placement are "inclusion" and "mainstreaming." "Inclusion" refers to educating students with disabilities in the regular classroom—a.k.a. the least restrictive environment.[41] "Mainstreaming" refers to the requirement that if a student cannot be educated in the regular classroom, the student should still spend as much time as possible integrated into regular school activities with nondisabled peers.[42] Both of these terms are goals of the IDEA and depending upon the particular disability and the unique needs of the child, one goal may be more feasible than the other.[43]

III. STUDENTS WITH DISABILITIES CONTINUE TO FACE BARRIERS IN PRIMARY AND SECONDARY EDUCATION

Despite Congress's attempt to remedy the fact that a substantial portion of students with disabilities failed to receive an adequate education, children with disabilities all over the nation continue to face challenges when attempting to access an equal opportunity to education. For example, in 2004, state officials in Texas quietly devised a system that kept thousands of disabled children out of special education to avoid over-identification in hopes of saving billions of dollars in costs.[44] By 2015, the

37. 34 C.F.R. § 300.116(b) (2017).

38. 34 C.F.R. § 300.116(c) (2017).

39. 20 U.S.C. § 1412(a)(5)(A) (noting the school's requirement to consider regular class placement first).

40. *See* 20 U.S.C. § 1415(b)(3) (stating that the IDEA procedural safeguards require that the parents be notified if their child's IEP is changed); *see also* 20 U.S.C. § 1412(a)(5)(A) (explaining the need to mainstream students with disabilities).

41. Allan G. Osborne, Jr., Ed.D., *Is the Era of Judicially-Ordered Inclusion Over?*, 114 ED. LAW REP. 1011, 1012 (1997).

42. *See* Kathryn E. Crossley, *Inclusion: A New Addition to Remedy A History of Inadequate Conditions and Terms*, 4 WASH. U. J. OF L. & POL'Y 239, 245–52 (2000).

43. *See id.* at 253-56.

44. Brian M. Rosenthal, *Denied: How Texas Keeps Tens of Thousands of Children Out of Special Education*, HOUS. CHRON. (Sept. 10, 2016), https://www.houstonchronicle.com/denied/1/ [https://perma.cc/QY9M-FXYN].

rate of Texas children receiving special education plummeted from near the national average of 13% to 8.5%, making it the lowest in the country by far.[45] Although a 4.5% gap may not seem like a lot, Texas was denying critical services to more than 250,000 children.[46] This discrimination had a significant negative impact on both the children who were being denied proper care and the parents who were often forced to quit their jobs to home school their child or enroll them in expensive private schools.[47] One child who was affected by this system had become depressed due to the suspensions and constant academic failures.[48] His depression became so severe that in the middle of his first-grade year he cried out to his mother, "I don't deserve to live."[49]

Not only are children with disabilities still being denied access to a FAPE, but they also continue to face barriers when it comes to receiving an education in the LRE because the interpretation and implementation of the mandates remain controversial as professionals, parents, and policymakers all struggle to understand what each provision requires.[50] Congress deliberately wrote the LRE provisions of the IDEA vaguely to allow for open interpretation and flexibility in addressing each students' unique needs; however, this ambiguousness has led to inconsistency throughout the nation.[51] As a result, students with disabilities are still facing challenges under the LRE provision regarding mainstreaming[52] and their educational placement's physical location,[53] evidenced by the following recent educational segregation cases.

45. *Id.* (noting that among the 100 largest school districts in the U.S., only ten serve fewer than 8.5% of their students and all ten are in Texas).

46. Rosenthal, *supra* note 44.

47. *See id.* (stating that parents have pulled thousands of students with disabilities out of public school because "[m]any have fallen behind, become depressed and been suspended or expelled . . . some have entered the criminal justice system or otherwise required intensive adult services that cost far more than special education"); *see also* Telephone Interview with Jeff Cherry, Father of J.T. (Apr. 1, 2023).

48. Rosenthal, *supra* note 44.

49. *Id.*

50. *See* Crossley, *supra* note 42, at 245-46 (explaining there is no clear judicial test to determine what constitutes the least restrictive environment for a child with disabilities).

51. VICKI M. PITASKY, THE CURRENT LEGAL STATUS OF INCLUSION 1 (1996), *quoted in* Jean B. Crockett, *The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & EDUC. 543, 547 (1999) (explaining the brief and vague nature of the LRE provision in 20 U.S.C. § 1412(a)(5)(A)).

52. *See* 34 C.F.R. § 300.114(a)(2) (requiring school districts to ensure that children with disabilities are educated with children who are nondisabled to the maximum extent appropriate).

53. *See* 34 C.F.R. § 300.116(b)(3) (stating that the child's placement should be as close possible to the child's home); *see also* 34 C.F.R. § 300.116(c) (stating that the child should be educated in the school they would attend if they were nondisabled).

A. THE DEPARTMENT OF JUSTICE STEPPED IN AND SUED GEORGIA FOR UNNECESSARILY SEGREGATING STUDENTS WITH DISABILITIES

In 2016, the Department of Justice ("DOJ") became the first to challenge a state-run school system for segregating students with disabilities when it filed a lawsuit against the state of Georgia ("Georgia").[54] The DOJ claims that Georgia "discriminates against thousands of public school students with behavior-related disabilities by unnecessarily segregating them, or by placing them at serious risk of such segregation, in a separate and unequal educational program known as the Georgia Network for Educational and Therapeutic Support Program."[55] To be eligible for the Georgia Network for Educational and Therapeutic Support Program ("GNETS"), a student must exhibit "intense social, emotional and/or behavioral challenges with a severity, frequency or duration such that the provision of education and related services in the general education environment has not enabled him or her to benefit educationally based on the IEP."[56]

For over forty years, Georgia has selected to plan, fund, administer, license, manage, and oversee mental health and therapeutic educational services for students with disabilities almost exclusively in segregated GNETS Centers and classrooms.[57] As a result, schools must often send students with behavior-related disabilities to GNETS for such services because the state refuses to make available the same services in integrated settings.[58] And in the 2014–15 school year, students from more than half of all Georgia public schools entered GNETS—equating to 1,355 schools.[59]

At the time of the complaint, more than two-thirds of all students in GNETS attended school in regional GNETS Centers, which are generally located in self-contained buildings that serve only students with disabilities and severely restrict interactions between students with disabilities and those without disabilities.[60] Even in GNETS classrooms that are physically

54. Press Release, U.S. Dep't of Just., Just. Dep't Sues Ga. for Unnecessarily Segregating Students with Disabilities (Aug. 23, 2016), https://www.justice.gov/opa/pr/justice-department-sues-georgia-unnecessarily-segregating-students-disabilities [https://perma.cc/YF7Y-ST44].

55. Complaint at 1, U.S. v. Ga., 461 F. Supp. 3d 1315 (N.D. Ga. 2020) (No. 16-CV-03088) [hereinafter DOJ Complaint].

56. *Georgia Network for Educational and Therapeutic Support (GNETS)*, GA. DEP'T OF EDUC., https://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/Georgia-Network-for-Special-Education-and-Supports.aspx [https://perma.cc/P5LK-ASAV].

57. DOJ Complaint, *supra* note 55, at 10.

58. *Id.*

59. *Id.* at 12.

60. *Id.*

located in general education buildings, many students in GNETS are unnecessarily segregated from their nondisabled peers because GNETS classrooms are located in isolated parts of the school.[61] Due to this segregation, the DOJ alleges that Georgia is depriving students in GNETS of the benefits that come from interacting with nondisabled peers.[62] Additionally, students placed in GNETS do not receive grade-level instruction that meets Georgia's State Standards like other students in general education.[63]

The DOJ further alleges that students in GNETS often lack access to electives, facilities, and extracurricular activities that are available to other students in general education settings.[64] Many of the GNETS Centers are inferior facilities that lack many of the features and amenities of general education schools, such as gyms, cafeterias, libraries, science labs, music rooms, or playgrounds.[65] Some GNETS Centers are even located in poor-quality buildings that formerly served as schools for black students during *de jure* segregation.[66] As a result, the DOJ claims that this unequal treatment and unnecessary segregation of students in GNETS is specific to and a direct consequence of students' disability status.[67]

Although the DOJ's claim is focused on violations under Title II of the ADA, Georgia filed a Motion to Dismiss in 2020, alleging that the relief the DOJ seeks would violate the IDEA.[68] Georgia contends that the IDEA requires the DOJ "to exhaust administrative remedies before seeking to overturn the decision of an individual IEP team regarding least restrictive environments."[69] In its opinion, the Northern District of Georgia noted that although the DOJ's claim "involves allegations that [Georgia] failed to provide a FAPE in a LRE for the wide population of students enrolled in the GNETS program[,] . . . the breadth of [the DOJ's] claims goes much

61. *See id.* at 13 (noting that some GNETS classrooms are locked and/or fenced off from spaces used for general education programs).

62. *See id.* at 12–13.

63. *See* DOJ Complaint, *supra* note 55, at 17 (stating that students in GNETS often receive only computer-based instructions whereas students in general education classrooms, with or without disabilities, receive instruction from teachers certified in subject matters they are teaching).

64. *Id.*

65. *Id.* at 18.

66. *Id.*; *see also* Legal Info. Inst., *Segregation*, CORNELL L. SCH., https://www.law.cornell.edu/wex/segregation [https://perma.cc/TP69-N3CH] (Mar. 2022) (defining "*de jure* segregation" as racial segregation that is imposed by law or by public authority).

67. DOJ Complaint, *supra* note 55, at 17.

68. *See* U.S. v. Ga., 461 F. Supp. 3d 1315, 1325 (N.D. Ga. 2020) (noting that by raising this defense, Georgia appears to contend that its compliance with the IDEA shields it from any liability).

69. *Id.*

further."[70] Citing the Supreme Court's decision in *Fry v. Napoleon Community Schools*,[71] the district court reasoned that the "'[e]xhaustion of the IDEA's administrative procedures is unnecessary where the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a FAPE.'"[72] And although the IDEA and the ADA are separate laws, the fact that the DOJ didn't explicitly bring an IDEA claim does not preclude the court from applying the IDEA's regulations because the same conduct might violate both statutes.[73] Ultimately, the district court refused to address whether Georgia's placement of students in GNETS violated the LRE provision of the IDEA.[74] Instead, the district court held that whether the DOJ can present adequate evidence that supports such a claim is a matter to be resolved after discovery, thus warranting the dismissal of Georgia's Motion to Dismiss.[75]

B. NEW YORK CITY IS UNDER FIRE FOR ITS SEGREGATION OF STUDENTS WITH DISABILITIES

In New York City, the Department of Education created a citywide school district, known as District 75, to serve as a wholly separate school district for students with moderate to severe disabilities.[76] Examples of eligible disabilities include: autism spectrum disorders, significant cognitive delays, sensory impairments, emotional disabilities, and multiple disabilities.[77] With about twenty locations spread across Bronx, Brooklyn, Manhattan, Queens, and Staten Island, District 75 serves over 25,000 students with disabilities.[78] Once enrolled, students are placed in either a separate District 75 campus that contains only students with disabilities or a co-located District 75 campus that is composed of classrooms located within a neighborhood school.[79] Regardless of their placement, District 75 students spend all or almost all of their school day segregated from students without disabilities.[80]

70. *Id.* at 1326.

71. *See* Fry v. Napoleon Cnty. Sch., 580 U.S. 154, 156 (2017) (distinguishing between the types of cases parents can bring alleging violations of the IDEA and the separate right to bring a lawsuit claiming an ADA discrimination).

72. *U.S. v. Ga.*, 461 F. Supp. 3d at 1325 (quoting *Fry*, 580 U.S. at 154-56).

73. *See U.S. v. Ga.*, 461 F. Supp. 3d at 1326 (noting that Section 504 of the IDEA could also apply to the DOJ's case).

74. *Id.*

75. *Id.*

76. *District 75*, N.Y.C. PUB. SCHS., https://www.schools.nyc.gov/learning/special-education/school-settings/district-75 [https://perma.cc/4DN4-AURZ].

77. *Id.*

78. *Id.*

79. *Id.*

80. Complaint at 2, E.F. v. N.Y.C. Dep't of Educ., No. 21-cv-419, 2022 U.S. Dist. LEXIS 180006 (E.D.N.Y. Sept. 30, 2022) [hereinafter E.F. Complaint].

In 2008, the Council of the Great City Schools ("CGCS") issued a report that recognized District 75's unacceptable segregation and highlighted that "the isolation of students [is] more pronounced in the New York City school system than in other major urban school systems known to the team."[81] With the issuance of this report, CGCS officially put New York City on notice of the concerns regarding District 75.[82] Despite this knowledge, the city refused to remedy the harm it was inflicting on students with disabilities and instead maintained the segregated District 75 system.[83] As a result, the city continued to "perpetuate stigma, misunderstanding, and fear and reinforce feelings of shame and unworthiness for students with disabilities who have been labeled as unfit to learn and unwelcome" in traditional public schools.[84] Additionally, the report noted that District 75 staff hesitated to reject referrals, even if they believed the student should be educated in a traditional public school, because they were unsure whether the traditional public school could provide the necessary supports and services needed for an appropriate education.[85]

On January 26, 2021, three Staten Island students and the Disability Rights New York Advocacy group ("Plaintiffs") filed a complaint against the New York City Department of Education (the "DOE") on behalf of almost 2,000 students with disabilities who are being educated in District 75.[86] The Plaintiffs claim that the DOE violated its obligation, under the ADA, Section 504, the IDEA, and local state disability rights law, to provide students with disabilities the opportunity to be educated alongside their nondisabled peers.[87] More specifically, they allege that District 75 denies these students "equal educational opportunities by forcing them into a segregated environment, providing them with an education that is not comparable to that which students without disabilities receive, and denying them access to electives, extracurricular activities, or other opportunities to interact with students without disabilities, such as lunch or recess."[88]

The Plaintiffs argue that students with disabilities are forced to enroll in District 75.[89] Once they are placed, the opportunity to return to a

81. COUNCIL OF THE GREAT CITY SCHOOLS, IMPROVING SPECIAL EDUCATION IN NEW YORK CITY'S DISTRICT 75, at 17 (2008), https://www.uft.org/files/attachments/nyc-cgcs-report.pdf [https://perma.cc/V68F-LV9J].
82. *Id.*
83. E.F. Complaint, *supra* note 80, at 3.
84. E.F. Complaint, *supra* note 80, at 3.
85. *Id.* at 13.
86. *Id.* at 1.
87. *Id*. at 3.
88. *Id.* at 2, 12.
89. *Id*. at 12.

traditional public school or engage in mainstreaming is nearly impossible.[90] E.F., one of the individual Plaintiffs, was told from the moment she enrolled in a traditional school in District 31 that she needed to be removed and transferred to a segregated school.[91] Mrs. Farrell, her mother, received calls from the school almost every day telling her E.F. needed to be picked up.[92] Additionally, the teachers and staff treated E.F. harshly.[93] They punished her for small outbursts, did not help her engage with other students, allowed her classmates to shun and isolate her, and refused to provide the appropriate academic support and services listed in her IEP.[94] When the school finally agreed to have a meeting with Mrs. Farrell it was to inform her that E.F. needed to leave and attend a District 75 school.[95] Believing this was the only option for E.F., Mrs. Farrell gave in and enrolled E.F. in the segregated District 75.[96] Although Mrs. Farrell would prefer for her daughter to attend the traditional high school in her neighborhood, she fears that sending her daughter back to a community school where she was treated so poorly would be detrimental to E.F.'s health.[97]

Not only are District 75 students being denied the many positive benefits of being educated in classrooms with their nondisabled peers, but they are also often placed without regard to the neighborhood in which they live.[98] Denying children with disabilities an appropriate education, interaction with nondisabled peers, and the ability to attend their neighborhood school all violate the IDEA's LRE provisions which explicitly state:

> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—
>
> (a) The placement decision—
>
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

90. *Id.*
91. *Id.* at 22.
92. *Id.*
93. *Id.*
94. *Id.*
95. E.F. Complaint, *supra* note 80, at 23.
96. *Id.*
97. *See id.* at 24.
98. *Id.* at 14.

> (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;
>
> (b) The child's placement—
>
> (1) Is determined at least annually;
>
> (2) Is based on the child's IEP; and
>
> (3) Is as close as possible to the child's home;
>
> (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;
>
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
>
> (e) 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.[99]

Because District 75 blatantly disregards these LRE provisions, some students are forced to commute over two hours daily to attend a segregated school in a district that refuses to provide them with the best educational opportunities possible.[100]

For example, A.S., another individual Plaintiff, was forced to leave his house at 6:55 a.m. for an hour-long commute when he was placed in a District 75 school.[101] Originally attending a traditional school in District 31, A.S. was also denied proper support and ostracized by the staff.[102] On the first day of kindergarten, and almost every day thereafter, A.S.'s mother would receive a phone call from school staff who told her that she needed to pick up A.S. due to his behavior.[103] These suspensions quickly escalated and began to negatively affect A.S. academically.[104] Instead of offering appropriate solutions or plans to address A.S.'s behavior—as it was legally required to do under the IDEA—the school implemented a new suspension

99. 34 C.F.R. § 300.116.

100. *See* E.F. Complaint, *supra* note 80, at 14 (stating that District 75 students sometimes commute two hours or more for a curriculum that is "substandard, inconsistently implemented, and does not emphasize learning outcomes that will result in a high school diploma").

101. *Id*. at 26.

102. *See id.* at 25.

103. *Id.*

104. *See id.* (stating A.S. was suspended multiple times over the four months he attended traditional school).

protocol that would immediately send A.S. off site to a different school.[105] Fearing that her five-year-old would be transported to a different location without any warning, A.S.'s mother "felt that she had no option other than to send A.S. to a Staten Island District 75 school because she felt that A.S. was being forced out of [his traditional school] by school administrators."[106] The District 75 school did not academically challenge A.S. and lacked any opportunities to interact with nondisabled peers, which ultimately resulted in a significant regression in A.S.'s reading level.[107] Troubled by this regression and isolation, A.S.'s mother began paying for a private tutor and recreational activities that involved nondisabled children.[108]

Additionally, E.F. has been denied proper academic education in District 75 for at least four years.[109] At the age of fourteen, the DOE staff changed the focus of E.F.'s education from "academic achievement" to "vocational skills" which often include "mopping, sweeping, picking up recycling, making office furniture, and setting tables at a catering facility."[110] Ever since the switch, E.F. has been at a first-grade level both in reading and math even though she is eighteen years old.[111] Despite Mrs. Farrell constantly advocating for the school to give her daughter more ambitious goals, District 75 continues to treat E.F. as a form of free labor rather than a child in need of care and an education.[112]

On August 31, 2021, the DOE filed a Motion to Dismiss for failure to state a claim and lack of subject matter jurisdiction.[113] More specifically, the DOE maintained that the Plaintiffs failed to satisfy the IDEA's requirement to exhaust administrative remedies, thus depriving the court of subject matter jurisdiction.[114] On September 30, 2022, the Eastern District of New York granted the DOE's Motion to Dismiss, holding that under the IDEA, challenges against individualized placements must first be brought before a hearing officer.[115] Despite this dismissal, advocates continue to work on exhausting the claims of other potential plaintiffs and class

105. *Id.*
106. *Id.* at 26.
107. *Id*. at 27.
108. *Id.*
109. *Id*. at 24.
110. E.F. Complaint, *supra* note 80, at 24.
111. *See id*.
112. *Id.*
113. *See* Defendants' Notice of Motion to Dismiss, E.F. v. N.Y.C. Dep't of Educ., No. 21-cv-419, 2022 U.S. Dist. LEXIS 180006 (E.D.N.Y. Sept. 30, 2022) (moving to dismiss the complaint "pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6)").
114. *E.F.*, 2022 U.S. Dist. LEXIS 180006, at *9.
115. *Id.* at 26-27.

representatives in hopes of bringing forth a successful case that will shut down District 75 once and for all.[116]

C. ORANGE COUNTY'S FAILED ATTEMPT AT SEGREGATING A STUDENT WITH DOWN SYNDROME

Over 2,500 miles away from New York, a twelve-year-old boy in Southern California also struggled with receiving an appropriate education in the LRE.[117] In 2013, J.T. was getting ready to enroll at his local middle school when he was faced with yet another hurdle in his education journey.[118] At his annual IEP meeting, the school officials stated that based on the progress J.T. had made in elementary school, he was not "high-functioning enough" to attend his local middle school.[119] Thus, the Orange Unified School District ("OUSD") denied him access and suggested placement at a different middle school located over an hour away.[120]

This news caught J.T.'s parents by surprise as they had purchased their home over 20 years ago specifically because of its proximity to the local schools.[121] Although they were a bit taken aback by the school's suggestion, they weren't entirely surprised because J.T. had faced issues regarding proper placement under the IDEA ever since he was in pre-school.[122] J.T.'s father, Mr. Cherry, recounts several frustrating IEP meetings over the years where he and his wife had to constantly advocate for J.T. and his needs.[123] "It started in elementary school where the individuals involved in J.T.'s IEP meetings would set very minimal goals. It was almost like they were afraid to push him to strive for more, and instead wanted to ensure they could show he was making some sort of progress every year."[124] Because the school continued to set small goals, J.T. became less "educationally productive" and began to show less improvement and engagement when at school.[125] Despite this lack of development in school, J.T. continued to be

116. Beth Hawkins, *Due Process, Undue Delays: Families Trapped in NYC's Decades-Long Special Ed Bottleneck*, THE 74 (June 7, 2023), https://www.the74million.org/article/due-process-undue-delays-families-trapped-in-nycs-decades-long-special-ed-bottleneck/ [https://perma.cc/7Z9V-8KZU].
117. Telephone Interview with Jeff Cherry, *supra* note 47.
118. *Id.*
119. *Id.*
120. *Id.*
121. Telephone Interview with Jeff Cherry, *supra* note 47 (stating that him and his wife purchased their home because it was directly across the street from the middle school, making the commute a simple ten-minute walk).
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

a very active boy at home with friends and family, constantly chatting and playing with his older sister and cousins.[126]

Knowing that he just needed the right kind of support to succeed in school, J.T.'s parents fought back against OUSD's placement suggestion.[127] J.T.'s parents' main argument was that because J.T. was much closer to the "high-functioning" range rather than the "low-functioning" range, he should be permitted to attend the local middle school with a one-on-one aide.[128] To support this argument, Mr. Cherry relied on the language of 34 C.F.R. section 300.116 which contains the IDEA regulations of how schools should determine the educational placement of a child in the LRE.[129] More specifically, Mr. Cherry argued that section 300.116(b)(3) states that the child's placement should be "as close as possible to the child's home," and section 300.116(c) clarifies that unless the IEP "requires some other arrangement, the child is [to be] educated in the school that he or she would attend if nondisabled."[130]

In response to this pushback, the school district requested that J.T. get an evaluation from a doctor to assess where he was at physically, mentally, educationally, and behaviorally.[131] Although J.T.'s parents were hesitant to receive an evaluation from a doctor affiliated with the OUSD because of the possible bias, they wanted to do everything in their power to get J.T. the appropriate education he needed in the LRE.[132] Therefore, J.T. underwent an evaluation that consisted of six different one-hour sessions.[133]

Once the evaluation was complete, the doctor submitted a report that stated J.T. should be given a chance to be placed in this "high-functioning" class with the support of a one-on-one aide because, in his evaluation, J.T. surpassed the proposed goals the OUSD required.[134] As a result, J.T.'s parents and the OUSD underwent arbitration where they were able to come to an agreement that (1) allowed J.T. to attend his local middle school with the proper supplementary aids and services, as required under the IDEA; (2) upon graduation from middle school, J.T. would then attend his local high school with the proper supplementary aids and services; and (3)

126. *Id.*
127. *Id.* (explaining that when the school officials stated J.T. couldn't do X, Y or Z—thus preventing him from attending—they argued that he does those things all the time at home and the only reason he doesn't do them at school is because no one is encouraging him or engaging with him).
128. *Id.*
129. *Id.*; *see also* 34 C.F.R. § 300.116.
130. Telephone Interview with Jeff Cherry, *supra* note 47; 34 C.F.R. § 300.116.
131. Telephone Interview with Jeff Cherry, *supra* note 47.
132. *Id.*
133. *Id.*
134. *Id.*

moving forward, J.T.'s IEP would consist of goals that had a range of difficulties so he could receive educational benefits and continue to progress.[135]

IV. HOW COURTS CURRENTLY DETERMINE COMPLIANCE WITH THE LRE PROVISION OF THE IDEA

Although the debate over what qualifies as proper placement under the IDEA has sparked several lawsuits nationwide, the Supreme Court has never interpreted the LRE provision.[136] Thus, federal circuit courts have been left to tackle this difficult question with little-to-no guidance.[137] Many courts that have addressed these issues tend to agree that the IDEA's LRE provision encourages an inclusive education for children with disabilities;[138] however, developing a uniform standard to be applied equally across the nation has proven difficult.[139] Because federal circuit courts employ varying standards, the LRE provision is inconsistently implemented in such a way that a student with a disability could receive the least restrictive placement in one part of the country and the most restrictive placement in another.[140] As a result, there are currently four different standards being applied among the different circuit courts: (1) the *Roncker* feasibility test[141] adopted by three circuits,[142] (2) the *Daniel R.R.* two-prong test[143] adopted by five circuits,[144] (3) the *Rachel H.* four-factor balancing

135. *Id.*

136. Susan C. Bon, *Confronting the Special Education Inclusion Debate: A Proposal to Adopt New State-Wide LRE Guidelines*, 249 ED. L. REP. 1, 3 (2009) ("Determining whether 'the best placement for a child with a disability is in a general classroom or in a separate educational setting,' is an ongoing controversy that is frequently contested in administrative due process hearings and in the federal courts.").

137. *Id.* at 6; Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 810 (2002).

138. *See, e.g.*, Beth B. v. Van Clay, 282 F.3d 493 (7th Cir. 2002); Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. ex rel. Holland, 14 F.3d 1398 (9th Cir. 1994); Daniel R.R. v. State Bd. Of Educ., 874 F.2d 1036 (5th Cir. 1989); Roncker ex rel. Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983).

139. Bon, *supra* note 136, at 11-14.

140. Farley, *supra* note 137, at 809 ("The disparate outcomes for these two similar students illustrates the problems that can arise when courts across the country assess a school district's compliance [with] the Individuals with Disabilities Education Act (IDEA).").

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

142. The Fourth, Sixth, and Eighth Circuits.

143. *Daniel R.R.*, 874 F.2d at 1048.

144. The Second, Third, Fifth, Tenth, and Eleventh Circuit.

test[145] developed by the Ninth Circuit, and (4) the *Beth B.* discretion test[146] developed by the Seventh Circuit.

A. THE *RONCKER* FEASIBILITY TEST

In 1983, the Sixth Circuit Court of Appeals[147] developed the first test for assessing whether schools complied with the LRE provision in *Roncker ex rel. Roncker v. Walter*.[148] The issue in that case was the placement of nine-year-old Neill Roncker who had severe intellectual disabilities and suffered from seizures.[149] The school district evaluated Neill's IEP and placed him in a county school that was exclusively for students with disabilities—meaning he would have no contact with nondisabled children.[150] At trial, the parties agreed that Neill should not be instructed in a regular classroom and instead tailored the dispute to whether he could benefit from mainstreaming.[151]

The Sixth Circuit overturned the district court's finding in favor of the school district's placement and noted that "[i]n 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."[152] The Sixth Circuit reasoned further that "[f]raming the issue in this manner . . . [recognizes] the strong preference in favor of mainstreaming[153] while still acknowledging that some disabled children simply must be educated in segregated facilities."[154]

Under this framework, the first inquiry is whether it is feasible to provide additional services in a regular classroom setting that satisfies the child's educational, physical, and emotional needs.[155] If yes, the school district should then assess the following factors: (1) whether the benefits of education in a segregated setting far outweigh the benefits of education in a regular classroom, (2) whether the disabled child is disruptive in a non-

145. *Rachel H.*, 14 F.3d at 1404.
146. *Beth B.*, 282 F.3d at 499.
147. *See Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links#appeals [https://perma.cc/B3VD-7NPQ] (illustrating the Sixth Circuit's jurisdiction includes the states Kentucky, Michigan, Ohio, and Tennessee) [hereinafter U.S. COURTS].
148. *Roncker*, 700 F.2d at 1058.
149. *Id.* at 1060.
150. *Id.*
151. *Id.* at 1061.
152. *Roncker*, 700 F.2d at 1063.
153. *Id.*
154. *Id.*
155. *Id.*

segregated setting, therefore disrupting the educational benefits of nondisabled students, and (3) whether the cost of placing the disabled child in the regular classroom requires excessive resources, but only if the school district has first used federal funds to create a proper range of alternative placements for students with disabilities.[156] Having created this standard, the Sixth Circuit remanded the case back to the district court to determine whether Neill's needs could be met in a regular classroom.[157]

In 1987, the Eighth Circuit[158] adopted the *Roncker* feasibility test in *A.W. ex rel. N.W. v. Northwest R-1 School District*.[159] There, the Eighth Circuit focused on the third factor—the cost of educating a child with severe disabilities in the regular classroom—and emphasized that available financial resources must be equitably distributed among all children with disabilities.[160] Applying the *Roncker* test, the court reasoned that A.W., an elementary school-aged boy with Down Syndrome, would only receive a marginal benefit from mainstreaming and the extensive resources required by such a placement would lead to the reduction of other students' education.[161] With this decision, the court clarified that, when evaluating a disabled student's school placement, the cost of inclusive placement is an important and relevant factor to consider.[162]

Two years later, the Fourth Circuit[163] also adopted the *Roncker* feasibility test in *Devries v. Fairfax County School Board*.[164] There, the Fourth Circuit focused on the first factor and whether the benefits of educating Michael, a seventeen-year-old autistic student, in a regular classroom substantially outweighed the benefits of placing him in a segregated vocational center.[165] Affirming the district court's decision to place Michael in the segregated vocational school, the Fourth Circuit found that even with additional services, "his disability would make it difficult for him to bridge the 'disparity in cognitive levels' between him and the other students, he would glean little from the lectures, and his individualized work would be at a much lower level than his classmates."[166]

156. *Id.*
157. *Id.* at 1062-63.
158. *See* U.S. COURTS, *supra* note 144 (illustrating the Eighth Circuit's jurisdiction includes the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota).
159. A.W. ex rel N.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987).
160. *Id.* at 163-64.
161. *Id.* at 161-62.
162. *See id.* at 163.
163. *See* U.S. COURTS, *supra* note 144 (illustrating that the Fourth Circuit's jurisdiction includes the states Maryland, North Carolina, Virginia, West Virginia, and South Carolina).
164. Devries v. Fairfax Cnty. Sch. Bd., 882 F.2d 876, 879-80 (4th Cir. 1989).
165. *Id.* at 877.
166. *Id.* at 879.

In contrast, placement at the vocational center represented the FAPE Michael required in the LRE because it provided an adequate educational benefit through one-to-one instruction.[167]

B. THE *DANIEL R.R.* TWO-PRONG TEST

In 1989, the Fifth Circuit[168] declined to adopt the Sixth Circuit's *Roncker* feasibility test, arguing it diverged too far from the actual IDEA language and intent of Congress to give school officials more leeway in policy decisions.[169] As a result, the Fifth Circuit opted for its own formulation of a two-prong test in *Daniel R.R. v. State Board of Education*,[170] a case that involved a six-year-old boy with Down Syndrome.[171] Here, Daniel attended two separate half-day programs: one in a regular classroom and the second in a special education classroom.[172] In the regular classroom, Daniel was unable to master basic skills, despite his teacher's constant attention and continual efforts to modify her teaching methods.[173] After his annual IEP review, the committee altered Daniel's placement by removing him from the half-day regular classroom program.[174] Under the new placement, Daniel would attend only the half-day special education program, eat lunch with nondisabled students three days a week, and interact with nondisabled students during recess.[175] Believing this new placement "improperly shut the door to regular education," Daniel's parents filed an action alleging this violated the LRE provision.[176]

In affirming the district court's decision to uphold Daniel's special education placement, the Fifth Circuit set out a two-pronged test derived from the LRE provision's actual language.[177] First, the court must ask "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child."[178] If appropriate education cannot be achieved satisfactorily in the regular classroom and "the school intends to provide special education or to remove the child from regular education, [the court must then determine],

167. *Id.*
168. *See* U.S. COURTS, *supra* note 144 (illustrating the Fifth Circuit's jurisdiction includes the states Louisiana, Mississippi, and Texas).
169. *Daniel R.R.*, 874 F.2d at 1046.
170. *Id.* at 1048.
171. *Id.* at 1039, 1048.
172. *Id.* at 1039.
173. *Id.*
174. *Id.*
175. *Daniel R.R.*, 874 F.2d at 1039.
176. *Id.* at 1039-40.
177. *Id.* at 1048.
178. *Id.* (citing 20 U.S.C. § 1412(5)(B)).

whether the school has mainstreamed the child to the maximum extent appropriate."[179] Despite the simplicity of the test, the court provided a laundry-list of factors that, while not exhaustive nor dispositive, should be taken into consideration when judging the placement of each child.[180]

In determining the first prong of the test, a court should look to the following factors: (1) the efforts the school district made to accommodate the child in the regular classroom;[181] (2) the educational benefits the child receives from regular education;[182] (3) the overall educational experience the child has in a regular education environment;[183] and (4) the effect the child's presence has on the regular classroom.[184] Upon analyzing these factors, the Fifth Circuit concluded that the school district could not educate Daniel satisfactorily in the regular education classroom.[185] Accordingly, the court moved on to the second prong of the test, which evaluates whether the school district mainstreamed Daniel to the maximum extent appropriate.[186]

To satisfy the second prong, "the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for non-academic classes only, or providing interaction with non-handicapped children during lunch and recess."[187] Because the school district mainstreamed Daniel for lunch and recess,[188] the Fifth Circuit concluded that this intermediate step was enough to satisfy the LRE provision.[189] Thus, the court held that the school district had complied with the IDEA's LRE provision since (1) education in the regular classroom could not be achieved, even with the use of aides and services, and (2) the school district's specialized placement enabled Daniel to interact with nondisabled students to the maximum extent appropriate.[190]

179. *Id.*.
180. *Id.* at 1048-50.
181. *See, e.g., id.* at 1048 (including modifying the regular curriculum or providing teacher aides).
182. *See, e.g., id.* (including the ability to grasp the essential elements of the regular education curriculum).
183. *See, e.g., id.* at 1049 (including learning language and behavior skills from nondisabled students).
184. *See, e.g., id.* (including disruptiveness to other students and/or burdensomeness to the instructor).
185. *Id.* at 1051.
186. *Id.*
187. *Daniel R.R.*, 874 F.2d at 1050.
188. *Id.* at 1039.
189. *Id.* at 1051.
190. *Id.*

Since its formation, the Second, Third, Tenth, and Eleventh Circuits have adopted the *Daniel R.R.* two-prong test.[191] The Eleventh Circuit[192] adopted the test in *Greer ex rel. Greer v. Rome City School District*, reasoning that "[b]ecause this test adheres so closely to the language of the Act . . . [it] clearly reflects Congressional intent."[193] In its decision, the Eleventh Circuit only reached the first prong of the test and emphasized the need to "consider the full range of supplemental aids and services, including resource rooms and itinerant instruction, that could be provided to assist [the child with disabilities] in the regular classroom."[194] Under this analysis, the school district failed the first prong because a statement made by the special education director implied that school officials determined that the severity of the Down Syndrome child's impairments justified placement in a self-contained special education classroom without considering whether she could be accommodated in a regular classroom.[195]

A year after the Eleventh Circuit's decision, the Third Circuit[196] also adopted the two-prong test to determine whether the school district's placement of an eight-year-old Down Syndrome child satisfied the LRE provision in *Oberti ex rel. Oberti v. Board of Education of Clementon School District*.[197] The Third Circuit believed the Fifth Circuit *Daniel R.R.* two-prong test was a better standard than the Sixth Circuit *Roncker* feasibility test because the *Roncker* test failed to make clear that "even if placement in the regular classroom cannot be achieved satisfactorily . . . the school is still required to include that child in school programs with nondisabled children (specific academic classes, other classes such as music and art, lunch, recess, etc.) whenever possible."[198] When applying the two-prong test, the Third Circuit built off of the Eleventh Circuit's analysis in *Greer* and identified "speech and language therapy, special education training for the regular teacher, [and] behavior modification programs" as examples of the supplemental aids and services the school must consider.[199] Additionally, the Third Circuit held that the IDEA

191. *See* P. *ex rel.* Mr. P. v. Newington Bd. of Educ., 546 F.3d 111, 119 (2d Cir. 2008); L.B. *ex rel.* K.B. v. Nebo Sch. Dist., 379 F.3d 966, 977 (10th Cir. 2004); Oberti *ex rel.* Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 (3d Cir. 1993); Greer *ex rel.* Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991).

192. *See* U.S. COURTS, *supra* note 144 (illustrating the Eleventh Circuit's jurisdiction includes the states of Alabama, Florida, and Georgia).

193. *Greer*, 950 F.2d at 696.

194. *Id.* at 698.

195. *Id.*

196. *See* U.S. COURTS, *supra* note 144 (illustrating the Third Circuit's jurisdiction includes the states of Delaware, New Jersey, and Pennsylvania).

197. *Oberti*, 995 F.2d at 1206, 1215.

198. *Oberti*, 995 F.2d at 1215.

199. *Id.* at 1216.

encompasses a presumption in favor of placing the child in the neighborhood school or as close to home as possible.[200]

In 2004, the Tenth Circuit[201] joined the party and also adopted the two-prong test.[202] In *L.B. ex rel. K.B. v. Nebo School District*, the court analyzed whether the school district's placement of a child with autism satisfied the LRE provision.[203] The Tenth Circuit declined to accept the Sixth Circuit's *Roncker* test because it found it to be "most apposite in cases where the more restrictive placement is considered a superior educational choice . . . [and thus] unsuitable in cases where the least restrictive placement is also the superior educational choice."[204] Choosing to apply the *Daniel R.R.* test because it "better tracks the language of the IDEA's [LRE] requirement and is applicable in all cases," the Tenth Circuit's decision turned on the first prong—upon which the court also adopted the non-exhaustive list of factors in *Daniel R.R.*[205]

The final circuit to adopt the two-prong test was the Second Circuit[206] with its 2008 decision in *P. ex rel. Mr. and Mrs. P. v. Newington Board of Education*.[207] There, the court determined that the two-prong test provided "appropriate guidance to the district courts without 'too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials.'"[208] Adopting the Third Circuit's analysis in *Oberti*, the Second Circuit affirmed the district court's decision that the school district's placement of a six-year-old child with Down Syndrome, hearing impairment, and other significant health problems was sufficient under the LRE provision of the IDEA.[209]

C. THE *RACHEL H.* FOUR-FACTOR BALANCING TEST

In 1994, the Ninth Circuit[210] devised its own standard for gauging compliance with the LRE provision in *Sacramento City Unified School*

200. *Id.* at 1224 n.31 (citing Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 153 (4th Cir. 1991)) (stating that the IDEA requires the school district to consider geographical proximity of placement).
201. *See* U.S. COURTS, *supra* note 144 (illustrating the Tenth Circuit includes the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming).
202. L.B. *ex rel.* K.B. v. Nebo Sch. Dist., 379 F.3d 966, 977 (10th Cir. 2004).
203. *Id.* at 977-78.
204. *Id.* at 977.
205. *Id.* at 976-78.
206. *See* U.S. COURTS, *supra* note 144 (illustrating the Second Circuit includes the states of Connecticut, New York, and Vermont).
207. P. *ex rel.* Mr. P. v. Newington Bd. of Educ., 546 F.3d 111, 119–20 (2d Cir. 2008).
208. *Id.* (quoting *Daniel R.R.*, 874 F.2d at 1046).
209. *Newington Bd. of Educ.*, 546 F.3d at 114, 120, 122.
210. *See* U.S. COURTS, *supra* note 144 (illustrating the Ninth Circuit includes the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington).

District, Board of Education v. Rachel H. ex rel. Holland.[211] There, Rachel was an intellectually disabled eleven-year-old whose parents sought full inclusion in a regular classroom.[212] The school district rejected this request and instead "proposed a placement that would have divided Rachel's time between a special education class for academic subjects and a regular class for non-academic activities such as art, music, lunch, and recess."[213] Deriving some of its elements from both the *Roncker* feasibility test and the *Daniel R.R.* two-prong test, the Ninth Circuit established a four-factor balancing test in which the court considers: (1) the educational benefits available to the disabled child in a regular classroom with appropriate aids and services versus the educational benefits of a special education classroom, (2) the non-academic benefits of interaction with nondisabled children, (3) whether there would be a disruptive effect if the disabled child were placed in a regular classroom, and (4) the cost of placing the disabled child in a regular classroom.[214]

Applying that framework, the court found that: (1) Rachel received substantial educational benefits in a regular classroom and that all of her IEP goals could be met with the assistance of a part-time aide,[215] (2) Rachel received non-academic benefits from placement in a regular classroom, such as the opportunity to develop her social skills and gain self—confidence,[216] (3) Rachel followed directions and was not disruptive in class,[217] and (4) the school district failed to satisfy its burden of proving that "educating Rachel in a regular classroom with appropriate services would be significantly more expensive than educating her in the District's proposed setting."[218] Because all four factors weighed in favor of full inclusion, the Ninth Circuit affirmed the decision of the district court that the appropriate placement for Rachel was full-time in a regular classroom with some supplemental services.[219] In a subsequent case, the Ninth Circuit clarified that an "educational benefit" should be broadly construed to include the disabled child's "academic, social, health, emotional, communicative, physical and vocational needs."[220]

211. *Rachel H.*, 14 F.3d at 1404.
212. *Id.* at 1400.
213. *Id.*
214. *Id.* at 1404.
215. *Id.* at 1401.
216. *Id.*
217. *Id.*
218. *Id.* at 1401–02.
219. *Rachel H.*, 14 F.3d at 1399-1400.
220. Seattle Sch. Dist., No. 1 v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996) (holding that placement in a regular classroom was inappropriate, despite the student's achievement on standardized tests and overall educational chances).

D. THE *BETH B.* DISCRETION TEST

In 2002, the Seventh Circuit[221] refused to adopt any of the three tests in the *Beth B. v. Van Clay* decision.[222] Beth was a thirteen-year-old, severely mentally and physically challenged student with Rhett Syndrome.[223] Beth had been educated in regular classrooms for seven years, but after her most recent IEP conference, the school district recommended that Beth be placed in a special education program.[224] Because no appropriate special education environment existed at her current school, she would have to attend school in a neighboring district.[225] In that program, students are "mainstreamed into regular education classrooms during music, library, art, computer, and certain social studies and science classes, and join other students at the school during lunch, recess, assemblies, and field trips."[226] Additionally, reverse mainstreaming is also employed, meaning that regular education students come into the special education classrooms to allow for interaction between disabled and nondisabled students.[227]

Believing that each student's educational situation is unique, and that the IDEA provides enough of a framework, the court concluded that it was unnecessary to adopt a formal test for district courts to apply when deciding LRE cases.[228] Instead, the Seventh Circuit emphasized that courts should place a great weight on the school official's expertise and grant deference to their placement decisions.[229] Under this approach, if the student's education in the general classroom was "satisfactory," the school district would violate the IDEA by removing the student.[230] If the setting is not "satisfactory," the recommended placement must mainstream the child to the maximum extent appropriate.[231] Agreeing with the school district's decision that "a modicum of developmental achievement does not constitute a satisfactory education," the court found that even with aides, communication devices, computerized books, and an individual curriculum, Beth's academic progress in a regular classroom was virtually nonexistent.[232] Accordingly, the Seventh Circuit upheld the school's

221. *See* U.S. COURTS, *supra* note 144 (illustrating the Seventh Circuit includes the states of Illinois, Indiana, and Wisconsin).
222. *Beth B.*, 282 F.3d at 499.
223. *Id.* at 495.
224. *Id.* at 495-96.
225. *Id.* at 496.
226. *Id.*
227. *Id.*
228. *Id.* at 499.
229. *Id.* (believing that the school officials' decision about how to best educate Beth should be granted deference because it is based on expertise that courts cannot match).
230. *Id.*
231. *Beth B.*, 282 F.3d at 499.
232. *Id.*

placement of Beth in a special education classroom because (1) she failed to benefit academically in a regular classroom, and (2) her new placement included reverse mainstreaming opportunities, as well as time spent with nondisabled peers in non-academic classes.[233]

V. PROPOSAL FOR REFORM

Although there has been nationwide progress over the years in providing meaningful access to an appropriate education for children with disabilities, challenges remain in successfully protecting the rights of those students. As evidenced throughout this paper, these challenges include the continued segregation of students with disabilities[234] and the disagreement amongst courts on how to handle those placement issues.[235] While there may not be a perfect solution that solves every problem, there is a lot of room for improvement. First, the U.S. Supreme Court should resolve the circuit split by adopting a uniform standard for determining whether a child has been placed in the appropriate LRE. Second, Congress should enact legislation that requires education systems to inform parents of children with disabilities about the specific protections they have under the IDEA.

A. THE SUPREME COURT SHOULD ADOPT A UNIFORM STANDARD

The LRE provision of the IDEA was intended to create an "educational system whereby all students, regardless of the severity of their disabilities, would be educated in an environment as close as possible to what is considered to be normal."[236] However, students with disabilities enjoy different levels of educational benefits across different states because of the existing circuit split.[237] Adopting a uniform standard would guarantee that children with disabilities receive equal protection regardless of where they live.

The Supreme Court should not simply adopt one of the existing tests for two reasons: (1) none of them fully determine whether a school district has accurately fulfilled the duty imposed by the LRE provision[238] and (2) all the tests—besides the *Beth B.* discretion test which simply defers to the exact language of the IDEA—were developed prior to the 1997 amendments to the IDEA, which "prenewed the importance of the LRE provision by providing that the regular classroom must be the default

233. *Id.*
234. *See supra* Part III.
235. *See supra* Part IV.
236. Allan G. Osborne, Jr. & Phillip Dimattia, *The IDEA's Least Restrictive Environment Mandate: Legal Implications*, 61 EXCEPTIONAL CHILD. 6, 12 (1994).
237. *See supra* Part IV.
238. Farley, *supra* note 137, at 832–33.

placement."[239] Therefore, the Supreme Court should analyze the different strengths and weaknesses of the existing tests to create a new, nationwide standard that adequately serves the goals of the IDEA and provides the best protection to children with disabilities.

Proposed is a modified version of the *Daniel R.R.* two-pronged test. The first prong of this test considers whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily.[240] If the student cannot be satisfactorily educated in the regular classroom and must be placed in a more restrictive environment, the second prong of this test considers whether the student has been mainstreamed to the maximum extent possible.[241] This approach is superior to the *Roncker* feasibility test, the *Rachel H.* four-factor balancing test, and the *Beth B.* discretion test because it adheres to the purpose of the IDEA, provides courts with flexibility, and acknowledges that the actual language of the IDEA is ambiguous.[242]

The *Roncker* feasibility test strays from the intended goal of the IDEA because it assumes that all students should be placed in the regular classroom unless such placement would put an unreasonable burden on the school.[243] Unlike *Roncker*, this two-prong test recognizes that some students with disabilities may need to be educated in more segregated settings, such as special education classrooms, to receive appropriate educational benefits.[244] Not only is this analysis derived directly from the language of the IDEA, but it also acknowledges Congress's preference for placement in the regular classroom when feasible.[245] And although adherence to the language and intent of the IDEA is important, the *Beth B.* discretion test does not acknowledge the vague nature of the LRE provision and how Congress's deliberate ambiguity is what has led to the current challenges.[246] Additionally, the *Rachel H.* four-factor balancing test is flawed because it requires analysis of specific factors that may not always

239. *Id.* at 817.
240. *Daniel R.R.*, 874 F.2d at 1048.
241. *Id.*
242. *See supra* Part IV.
243. *Roncker*, 700 F.2d at 1063.
244. *See* 20 U.S.C. § 1412(a)(5)(A) (allowing placement outside of the regular classroom when supplementary aids and services in the regular classroom do not allow for satisfactory education).
245. *See* 143 CONG. REC. E972 (1997) (statement of Hon. Matthew G. Martinez) (stating the "principle of inclusion is so fundamental and central to the purpose and principles of the bill"); *see also* Patrick Howard, *The Least Restrictive Environment: How to Tell?*, 33 J.L. & EDUC. 167, 179 (2004) ("The current congressional policy of preferring inclusion, rather than requiring inclusion, is appropriate.").
246. *See* PITASKY, *supra* note 51 (explaining the LRE provision in § 1412(a)(5)(A) was "deliberately . . . left open to interpretation").

apply to the case at hand.[247] For example, the *Rachel H.* test requires consideration of factors like cost and student disruptiveness—which may not always be at issue—and ignores the benefits that a student with disabilities could bring to a regular classroom.[248] Schools can also use the required cost factor in the *Rachel H.* test as a scapegoat—similar to what Texas did in 2004[249]—and claim that it cannot accurately provide students with disabilities an education in the LRE due to fiscal restraint. Because every child's situation is unique, this proposed two-prong test allows for the flexibility that is needed in determining which factors are relevant to a child's placement.

Although any number of factors may be relevant to the inquiry under the first prong of this proposed test, the Supreme Court should adopt the following factors—ranging from most important to least important—as a guiding baseline: (1) the level of compliance of the school district with the IDEA and the genuine attempt at past inclusion with supplemental aids and services,[250] (2) the benefits—both academic and non-academic—to the student with disabilities of placement in the regular classroom versus a more segregated setting, and (3) the effects—both positive and negative—of the student's presence in the regular classroom on their nondisabled peers.

The test's primary consideration should be whether the school district has taken the necessary steps to provide a student with disabilities supplementary aids and services in the regular classroom, as specifically required by the IDEA.[251] Because access to supplementary aids and services directly impacts the amount of educational benefits that a student with disabilities receives, there can be no question as to whether a school district has met this requirement. If, and only if, this first factor is satisfied, a court must then move onto the second factor which "effectively balance[s the] dual tasks of providing an appropriate education in the least restrictive environment."[252]

Under the second factor, the analysis of academic benefits should be of the utmost importance because children go to school to learn, and the

247. *Rachel H.*, 14 F.3d at 1404.
248. *Id.*
249. *See* Rosenthal, *supra* note 44 (revealing the Texas Education Agency has saved billions of dollars by denying or delaying special education to disabled students).
250. *See* 34 C.F.R. § 300.551(b)(2) (stating school districts must provide supplementary aids and services in the regular classroom).
251. *See* 20 U.S.C. § 1412(a)(5)(A) ("[R]emoval 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.").
252. Farley, *supra* note 137, at 837.

purpose behind the IDEA is to provide students with disabilities a FAPE.[253] If there isn't a significant difference between the academic benefits in a regular classroom and a more restrictive environment, the court should look at the social benefits of placing the student in a regular classroom. [254] Although socializing with one's peers is not necessarily "academic," students learn a great deal from interacting with other students at school.[255] They learn how to develop personal connections with other individuals, build language and communication skills, regulate emotions, and even gain self-confidence.[256] When the benefits of gaining these skills in a regular classroom are overlooked, students with disabilities who are placed in a more restrictive environment are robbed of that opportunity to grow both academically and socially.[257] Some students even regress in their academic and social skills when placed in those environments.[258]

Additionally, when analyzing the non-academic benefits the placement might have on the student, courts should also take into account the physical location of the placement.[259] As the Third Circuit highlighted in *Oberti*, the IDEA encompasses a presumption in favor of placing a child in the neighborhood school the child would attend if nondisabled.[260] Not only should courts acknowledge the plain language of the IDEA, but they should also consider the burden placed on both the student and their family when they are denied access to their neighborhood school. By forcing students to relocate to a different school, some families must embark on multi-hour commutes.[261] And by removing a student from their neighborhood school, families that have multiple children must make multiple commutes to

253. Allan G. Osborne, Jr., *The IDEA's Least Restrictive Environment Mandate: Implications for Public Policy*, 71 EDUC. L. REP. 369, 379 (1992) ("School districts and the courts must realize that the central issue in placement decisions is the provision of a free appropriate public education.").

254. Farley, *supra* note 137, at 838 (noting that where academic benefits would be the same regardless of placement, non-academic benefits might tip the scale in favor of inclusion.)

255. *Id.*

256. *Id.*

257. E.F. Complaint, *supra* note 80, at 8.

258. *See id.* at 14, 27.

259. 34 C.F.R. § 300.116(b)(3) (stating that the child's placement should be as close as possible to the child's home).

260. *Oberti*, 995 F.2d at 1224 n.31; *see also* 34 C.F.R. § 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.").

261. *See supra* Part III (noting that several students who were forced to attend segregated locations faced one to two-hour long commutes, with one student having to leave at 6:55 a.m.).

different locations.[262] This not only takes a toll on the education of the student with disabilities, but it also negatively affects their sibling's education.

Once the second factor has been analyzed, the court should consider the effect the student with disabilities has on their nondisabled peers. This final factor ensures that the underlying purpose of the IDEA, which is to provide equal education rights to *all* students regardless of disability, is upheld. Thus, if a student with disabilities would receive only a marginal benefit from inclusion in a regular classroom and is excessively disruptive, the regular classroom may not be the appropriate placement.[263] Under this analysis, cost may also be considered because if providing supplementary aids and services in the regular classroom is so expensive that it jeopardizes the education of other students, placement of the student with disabilities in a more segregated setting may be appropriate.[264] Furthermore, it is also important to recognize the reciprocal benefits that nondisabled students receive from inclusive classrooms.[265] Learning alongside peers with disabilities teaches nondisabled students how to interact and communicate with others who are different from them.[266] As a result, "full integration will help those without disabilities to fully accept those with disabilities as part of their everyday lives, and thus increase the overall societal treatment of persons with disabilities."[267]

Using the aforementioned factors, in conjunction with any other factors the court finds relevant for consideration in an individual case, a court may determine that a student with disabilities will be better served in a more restrictive setting as opposed to a regular classroom. Once that conclusion is reached, the court should move on to the second prong of the test which asks whether the student has been mainstreamed to the maximum extent possible. In assessing this prong, the court should look at whether the student with disabilities is allowed to interact with their nondisabled peers during lunch, recess, and other non-academic activities.[268]

262. Telephone Interview with Jeff Cherry, *supra* note 47 (stating his wife struggled with the daily commute to school because their daughter attended their neighborhood elementary school while J.T. was forced to attend a different elementary school on the other side of the city).

263. *See, e.g.*, *Daniel R.R.*, 874 F.2d at 1049-50.

264. *See Roncker*, 700 F.2d at 1063 (noting that cost may be considered as a factor, but only if the school district has used its funding to create an adequate continuum of alternative placements).

265. *See* Howard, *supra* note 245, at 177–80 (discussing the debate on full inclusion); Gary L. Peltier, *The Effect of Inclusion on Non-Disabled Children: A Review of the Research*, 68 CONTEMP. EDUC. 234, 235-36 (1997).

266. *See Oberti*, 995 F.2d at 1217 n.24.

267. Howard, *supra* note 245, at 178.

268. *See, e.g.*, *Daniel R.R.*, 874 F.2d at 1050.

B. THE PROTECTIONS PROSCRIBED IN THE IDEA NEED TO BE MORE ACCESSIBLE TO PARENTS OF CHILDREN WITH DISABILITIES

Although adopting a uniform standard is a step in the right direction of ensuring that students with disabilities receive an equal education, there is still more that can be done. The protections under the IDEA, and subsequently this proposed uniform standard for determining whether a child has been placed in the appropriate LRE, will only be available to those students who have the resources to maneuver the justice system for individualized review.[269] Despite nearly fifty years since the enactment of the IDEA, several parents of children with disabilities are unaware of the specific protections guaranteed to their children under federal law.[270]

To alleviate this issue, Congress should enact an additional provision under the IDEA that requires school districts to have an open, documented conversation with the parents of children with disabilities about the existence of the IDEA and what it truly entails. The purpose of this conversation is to (1) educate parents so that they may properly advocate for the protection of their child's rights in their IEP meetings, and (2) eliminate the power imbalance between school districts and families. Further, Congress should require official documentation of these conversations to hold school districts accountable and ensure that the information being shared is both accurate and provided in a timely manner.

Although all the individuals involved in a child's IEP meeting are meant to be a team, several parents end up leaving these discussions upset.[271] When a parent tries to advocate for their child in these meetings, they can feel very overwhelmed due to their lack of knowledge and resources. Additionally, school districts may capitalize upon this and further intimidate families by taking control of the meeting and refusing to validate the parents' concerns. Some common examples that arise throughout the IEP process include school officials inhibiting parental participation, compromising a student's FAPE, or depriving the student of their educational benefit.[272]

269. *See* Elizabeth Palley, *Challenges of Rights-Based Law: Implementing the Least Restrictive Environment Mandate*, 16 J. DISABILITY POL'Y STUD. 229, 234 (2006) ("[W]hat is clear is that these problems will not be resolved merely by considering the individual rights of students whose parents file suit against the school system.").

270. *See, e.g.*, E.F. Complaint, *supra* note 80, at 22 (stating the mother of a child with disabilities believed that segregated schooling was the only option).

271. *See* Suzanne Shaft, *Why the IEP Process Isn't Fair to Anyone*, VITALXCHANGE (May 24, 2021), https://vitalxchange.com/why-the-iep-process-isnt-fair-to-anyone [https://perma.cc/V8SJ-VCUR].

272. *See* Iris Ctr., *IEP Process: Common Errors*, VAND. PEABODY COLL., https://iris.peabody.vanderbilt.edu/wp-

Another factor that should be considered when analyzing the power imbalance is the lack of access to justice that plagues a large part of the country. Individuals from lower socioeconomic backgrounds are often denied access to justice, and even if they are provided with legal aid, it still tends to result in unfair treatment.[273] For example, a 2017 study showed that "86% of the civil legal problems reported by low-income Americans received inadequate or no legal help, and that 71% of low-income households had experienced at least one civil legal problem in the last year."[274] It is important to note that "this figure only includes civil legal problems that are reported in the first place, which are estimated to represent only about 20% of all civil legal challenges,"[275] and that the COVID-19 pandemic drastically exacerbated.[276] A central reason for this lack of reporting stems from one of the most important issues access to justice which is that "most Americans—particularly low and moderate-income Americans—do not recognize when the problems they encounter have potential legal solutions in the first place.[277]

While access to justice is a larger problem in and of itself, Congress has the opportunity to alleviate part of this problem by creating equal footing between school districts and families who have children with disabilities. By requiring school districts to properly communicate with families about the protections under the IDEA, students with disabilities can begin to truly reap the benefits of the laws that were enacted to protect them.

CONCLUSION

By enacting the IDEA, Congress intended to rectify the pervasive practice of denying children with disabilities access to equal opportunities for education. Unfortunately, thousands of children continue to face barriers when it comes to accessing an appropriate public education in the least restrictive environment. These challenges are partially due to the Supreme Court's silence on what standard should be used to determine compliance with the IDEA's LRE provision as well as a lack of knowledge

content/uploads/pdf_info_briefs/iep_process_common_errors_information_brief.pdf [https://perma.cc/N4GM-VLAP].

273. *See* LEGAL AID INTERAGENCY ROUNDTABLE, DEP'T. OF JUST., ACCESS TO JUSTICE IN THE AGE OF COVID-19 *passim* (2021), https://www.justice.gov/ag/page/file/1445356/download [https://perma.cc/4MSC-9ERH].

274. LEGAL AID INTERAGENCY ROUNDTABLE, *supra* note 273, at 13.

275. *Id.*

276. *Id.* at 13-4.

277. *Id.* at 13.

amongst parents regarding the requirements of the IDEA. To alleviate some of these challenges and ensure equal implementation of the LRE provision across the country, the Supreme Court should adopt the proposed two-prong test and its accompanying factors. In addition, policymakers should demand an amendment to the IDEA that requires school districts to communicate the provisions of the IDEA with parents of children with disabilities so that they may be properly informed of their children's rights.

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