

A Bright IDEA: The Need For Congress to Adopt Uniform Guidelines for Determining the Least Restrictive Environment

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I. INTRODUCTION

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. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.¹

In order to protect these rights, Congress passed the Education for All Handicapped Children Act² (“EAHCA”) in 1975. EAHCA has been reauthorized numerous times and is currently titled the Individuals with Disabilities in Education Act³ (“IDEA”). In the United States, more than 6.8 million students—under IDEA this includes individuals ages three through twenty-one—receive special education and related services.⁴

Although IDEA adequately protects special education students from being discriminated against, its conflicting provisions continually result in controversy and litigation between parents of disabled students and schools districts.⁵ One of the major points of contention relates to determining the least restrictive environment for a disabled student to be educated in. This paper will argue that Congress—using the Ninth Circuit’s test as a template—must adopt uniform guidelines for determining the least restrictive environment.

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¹ 20 U.S.C. § 1400(c)(1) (2006) (findings stated by Congress at the beginning of the Individuals with Disabilities Education Act).

² Pub. L. No. 94-142, 89 Stat. 773 (1975).

³ 20 U.S.C. §§ 1400-1500 (2006).

⁴ Lisa Kupper, *Questions Often Asked by Parents about Special Education Services*, NICHCY (Apr. 2009), <http://nichcy.org/publications/lgl>.

⁵ For the purpose of this paper “school districts” include teachers, administrators and all other officials and school employees who are responsible for a disabled child’s education.

II. BACKGROUND⁶

A. IDEA Overview

As with most federal statutes, Congress secures state compliance with IDEA through the promise of federal funding.⁷ IDEA mandates school districts provide disabled children with a “free appropriate public education” (“FAPE”) in the least restrictive environment (“LRE”).⁸ The LRE provision places an emphasis on placing disabled students in classes with non-disabled students, to the maximum extent possible.⁹ However, the provision also recognizes that placement of disabled students with non-disabled students is not always possible; accordingly, it authorizes schools to segregate disabled and non-disabled students “when a child’s disability is so significant that it is impossible to educate that child satisfactorily in an integrated environment.”¹⁰ Unfortunately, IDEA provides little guidance to those tasked—parents and school districts—with determining LRE for a particular student, resulting in courts concocting insufficient tests used for making these critically important determinations.

B. Sixth Circuit and Fifth Circuit LRE Tests

Due to the lack of guidance from the Supreme Court pertaining to the LRE provision of IDEA, circuit courts are forced to offer their own interpretations of the requirement. As a result, three circuits—the Sixth, Fifth and Ninth—established three different tests with varying factors, which parents and school districts must use when determining LRE for a child with a disability.

⁶ For more information and resources for IDEA see *Building the Legacy: IDEA 2004*, U.S. DEP’T OF ED., <http://idea.ed.gov/>.

⁷ Federal funding increased from \$10.94 billions to \$12.59 billion between 2005—the year after IDEA was amended—and 2010. ProQuest Statistical Abstract of the United States: 2013, *Table 227: Federal Funds For Education And Related Programs: 2005 To 2011 [By Level, Agency, And Program; Fiscal Years]*, NATIONAL CENTER FOR EDUCATION STATISTICS, available at <http://statab.conquestsystems.com/sa/abstract.html?table-no=227&acc-no=C7095-1.4&year=2013&z=99615ACB8B71B2CD364C2766C367E1A79C06F67C>.

⁸ Brian L. Porto, *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, 1 (2003).

⁹ 20 U.S.C. § 1412(5)(B) (2006) (“[P]rocedures to assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children what are not disabled . . .”).

¹⁰ Porto, *supra* note 8, at 1.

The Sixth Circuit was the first to establish a test—dubbed the “Feasibility Test” or “*Rockner* Test”¹¹—for determining the appropriate placement for children with disabilities.¹² When making an LRE determination, the Sixth Circuit’s test requires school districts consider three factors: (1) a comparison of the benefits received by a child with a disability in the segregated special education environment to the benefits received in the non-segregated setting; (2) consideration of whether the child will be a disruptive force in the non-segregated setting; and (3) consideration of the cost of mainstreaming the disabled student.¹³

In similar fashion, the Fifth Circuit adopted a two-prong test—“the *Daniel R.R.* Test.” The *Daniel R.R.* Test compels school districts weigh: (1) “whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily”; and (2) “whether the school has mainstreamed the child to the maximum extent appropriate.”¹⁴

Although the Sixth and Fifth Circuit tests attempt to address the factors and considerations implied by the text of IDEA, they are inadequate. Following the implementation of these tests, the Ninth Circuit adopted a third test. This test should be used as a template for passing uniform guidelines for determining LRE.

¹¹ Susan C. Bon, *Confronting the Special Education Inclusion Debate: A Proposal to Adopt New State-Wide LRE Guidelines*, 249 ED. LAW REP. 1, 6-7 (2009) (“[T]he court held that in order to justify placement in a segregated facility, a school district must ‘determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting’”) (quoting *Rockner v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983)).

¹² See generally *Rockner*, 700 F.2d 1058.

¹³ *Id.* at 1063. Following this opinion, the Eighth and Fourth Circuits adopted the Feasibility Test. See *A.W. v. Northwest*, 813 F.2d 158 (8th Cir. 1987) (emphasizing the cost factor); *DeVries v. Fairfax*, 882 F.2d 876 (4th Cir. 1989).

¹⁴ *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). This test has been adopted by the Eleventh, Third and Tenth Circuits. See *Greer v. Rome Cty. Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991); *Oberti v. Bd. of Edu.*, 995 F.2d 1204 (3d Cir. 1993); *L.B. v. Nebo*, 379 F.2d 966 (10th Cir. 2004).

III. ARGUMENT

A. Ninth Circuit Test

In *Rachel H.*¹⁵, the Ninth Circuit adopted a comprehensive approach to the LRE determination problem. This test is essentially a hybrid of the *Rockner* Test and the *Daniel R.R.* Test.¹⁶ It is a four-factor balancing test under which decision-makers consider: “(1) the educational benefits of placement fulltime in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the disabled student] ha[s] on the teacher and children in the regular class; and (4) the costs of mainstreaming [the disabled student].”¹⁷

The four-prong approach introduced by the Ninth Circuit is, as of now, the best LRE test. This test fully addresses the concerns and issues associated with determining and implementing the LRE for disabled students. Addressing many aspects of the problem is necessary because disabled students have varying needs which depend not only on the type of disability that each student has, but also the severity of the student’s disability. These variations necessitate a comprehensive balancing test to be applied on a case-by-case basis.

All three of the tests have some overlap but none of them are perfect or all-inclusive. The Fifth and Sixth Circuit tests miss some of the important prongs that the Ninth Circuit test addresses. The *Daniel R.R.* Test takes a broad approach at remedying the issue but fails to mention either non-academic benefits or the costs associated with mainstreaming a disabled student.¹⁸ On the other hand, the *Rockner* Test takes into account costs of mainstreaming but does not distinguish between the academic and non-academic benefits of placement in the non-

¹⁵ *Sacramento Cty. Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994)

¹⁶ *Id.*; see also *supra* Part II.B and accompanying notes.

¹⁷ *Id.* at 1404. This test and these factors were actually implemented by the district court in this case and the Ninth Circuit Court adopted the test. See *Sacramento Cty. Unified Sch. Dist. v. Rachel H.*, 786 F.Supp. 874, 878 (E.D. Cal. 1994).

¹⁸ The Tenth Circuit adopted the *Daniel R.R.* test and mentioned costs in its analysis of the case but did not clearly adopt costs of mainstreaming students as a factor to consider when applying the *Daniel R.R.* test. See *Bon*, *supra* note 11, at 6.

segregated setting. This can be detrimental because a court may reach a result that runs contra to Congress' intent of placing disabled students in non-segregated settings to the maximum extent possible. For example, a student may receive plenty of non-academic benefits—tipping the balance in favor of a non-segregated setting—but the court only analyzed academic benefits and found them to be minimal; thus, wrongfully placing the student in a segregated setting.

Although the Ninth Circuit test is the best all-encompassing test, it is not without flaws. It fails to adequately address the first factor of the *Daniel R.R.* Test—the use of supplemental aids and services. This inadequacy can easily be mended with the addition of a fifth factor specifically addressing the use of supplemental aids and services. In order to understand why the Ninth Circuit test is the best approach for remedying the conflicts surrounding LRE determinations, it is necessary to delve deeper into the five proposed prongs and examine why each independent prong is necessary to optimally determine LRE.

B. Proposal

Regrettably, the Ninth Circuit's test has not been adopted by any of the other federal circuits. Further, the adoption of the *Daniel R.R.* Test and the *Rockner* Test by other circuits has failed to curb the amount of litigation and controversy that continues to plague LRE decisions.¹⁹ Thus, due to the Supreme Court's silence, and disagreement amongst the federal circuits, Congress must act and pass uniform regulations adopting the Ninth Circuit's balancing test and integrating a fifth prong into an LRE determination test.²⁰ Although some may raise concerns that, by passing these guidelines, Congress would be encroaching on state rights because states

¹⁹ Bon, *supra* note 11, at 11.

²⁰ I interviewed three teachers—Teacher Nance, Teacher DDB and Teacher Diane—about the various prongs of the test and for each prong I noted their opinions and examples from their classroom experiences. For these specific examples and some of the teachers' commentary *see infra* notes 24-27, 33.

are traditionally responsible for education; in reality, IDEA provides for Congressional guidance and Congressional action promotes the stated purpose of IDEA.²¹

The first prong that Congress must pass addresses the educational benefits of placement fulltime in a regular class. This prong essentially asks the question: “are the educational opportunities available through special education better or equal to those available in a regular classroom?”²² This is the most important prong of LRE determinations for multiple reasons. First, a child must be given the opportunity to succeed and grow. This prong achieves this idea because success and growth are maximized when a child is educated in the best environment for that particular child. Second, based on the construction and history of IDEA, Congress intended the purpose encompassing this prong to have the most weight because it puts an emphasis on the disabled student being placed with non-disabled students to the maximum extent possible.²³ Finally, for many of the reasons stated above, the elementary school teachers interviewed felt

²¹ The stated purposes of IDEA are:

- (1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
- (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
- (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;
- (2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;
- (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and
- (4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. §1400(d) (2006).

²² There are many ways that a court can analyze this prong. For example, in *Rachel H.*, the district court found that the students’ experts were more credible due to their background in evaluating children with disabilities placed in regular classrooms. *Sacramento Cty. Sch. Dist.*, 14 F.3d at 1401. Moreover Rachel’s teacher testified that Rachel was “a full member of the class and participated in all activities.” *Id.* Further, the teacher testified “that Rachel was making progress on her IEP goals: She was learning one-to-one correspondence in counting, was able to recite the English and Hebrew alphabets, and was improving her communication abilities and sentence lengths.” *Id.* The district court found that all of this testimony demonstrated that Rachel received substantial benefits in the non-segregated classroom and that all of her IEP goals could be implemented in the non-segregated classroom by modifying the curriculum and introducing a part-time aid. *Id.*

²³ See *supra* note 9.

this was the most important issue when determining LRE and should be given the most weight. However, the teachers also recognized, and agreed, that sometimes the regular classroom is the most restrictive setting for a student's needs.²⁴ This prong is very important and must be at the forefront of a court's analysis because educational benefits are of the utmost importance.

A consideration of the non-academic benefits a student with disabilities receives from placement in a regular classroom need be the second prong of the LRE determination guidelines. Coincidentally, this prong placed second in the teachers' rankings of importance for each prong of the proposed guidelines. When analyzing non-academic benefits, courts should look at the benefits of interaction between disabled and non-disabled students. This prong is of equal importance to the academic benefits prong because it will assist disabled students in independent living skills, and will improve the students' ability to gain and hold employment by making the student more sociable. Furthermore, the implementation of the non-academic benefits consideration can benefit both disabled and non-disabled students.²⁵ Examples of non-academic benefits include, but are not limited to, improved communication and social skills, and an increase of self-confidence. Additionally, non-academic benefits consideration shall analyze whether, even though the student is placed in a regular classroom, the individual is isolated from

²⁴ According to the teachers interviewed, this is true in a number situations, including these: (1) if all or the majority of academic assignments need to be extensively modified; (2) if the length of time in whole group teaching or independent work is beyond the students' attention span; and (3) if the student requires a behavior modification monitoring prompt. The last situation also plays into the third prong of the test. For example a behavior modification monitoring prompt may require a ten-minute reinforcement check system where the general education teacher must interrupt his or her teaching every ten minutes to reinforce behavior. This results in the general education classroom becoming very restrictive for the student with disabilities because the teacher ends up not teaching as much but instead monitoring the child, thus diminishing the educational benefits for the student.

²⁵ Teacher DDB often sees a greater impact on a disabled student's non-academic development than on his or her academic development. Telephone Interview with Teacher DDB (Apr. 30, 2013). She explained, "[D]eveloping social skills that allow a child to participate fully in life cannot be underestimated. *Id.* It is crucial for students to develop the ability and willingness to actively participate in a community. *Id.* This includes appreciating diversity." *Id.* To promote this, Teacher DDB works hard to develop a strong classroom community, to teach her students respect and to help each student embrace diversity through understanding and respecting others' perspectives. *Id.* However, Teacher Diane felt that the benefits gained by the non-disabled students should never enter the conversation. Telephone Interview with Teacher Diane (Apr. 27, 2013).

classmates. If the student is isolated, then the benefit is minimal and may in fact be detrimental to the student's progression. Hence, the importance of considering the non-academic benefits that flow as a result of a disabled student's placement in a regular classroom cannot be disregarded or discounted.

Third, it is important for the Congressional guidelines to include a prong that accounts for the impact of the disabled student's presence on the teacher and children in the regular classroom. This prong can, and should, be broken down into two sub-parts: (1) whether there is detriment because the child is disruptive, distracting, or unruly; and (2) whether the child would take up so much of the teacher's time that the other students would suffer from lack of attention. This prong is quite necessary in determining LRE because, although quite important, the disabled student's interests are not the only interests that need to be taken into account. The rights of non-disabled students' must be kept in mind when analyzing this factor. However, it is also important to note that this prong may be a nonfactor because disabled students are not always disruptive.²⁶ However, if a child being disruptive is a factor, teachers differ as to the weight that the prong should be given. Some feel that the individual student's education is of paramount importance and, therefore, the teacher and the other student should be able to adjust to, and overcome, the disruptions posed by disabled students in the regular classroom.²⁷ While

²⁶ Teacher DDB explained that in her ten years of teaching she has only had two learning disabled students who have been disruptive enough to have a negative impact on the non-disabled students and her ability to give the non-disabled students appropriate attention. Telephone Interview with Teacher DDB. For the most part, all of the life skills students (those identified as mildly retarded or mentally retarded) have integrated into Teacher DDB's classroom with great success and inclusion by the other students. *Id.* The two students who have been disruptive have both been diagnosed with emotional issues and can be mildly violent in and out of the classroom. They also have low self-esteem and significant depression issues. *Id.*

²⁷ For example, Teacher Diane stated that she had an autistic student who could not lower his voice. Telephone Interview with Teacher Diane (Apr. 27, 2013). He was generally quiet but all of the sudden he would have an outburst about hedgehogs. *Id.* The student would continue on with his outburst at a loud volume for a good amount of time. *Id.* Eventually, after a lot of laughter from the other students in the class, the teacher just put the autistic student in the back of the class. *Id.* There he could continue having his outbursts but they were not as distracting to the other students. *Id.* Ultimately, the students and the teacher were able to adjust to his outbursts and they became less noticeable and less disruptive. *Id.*

others remain concerned that disabled students may infringe on the rights of the non-disabled students.

The fourth part of the Congressional guidelines must include an analysis of the costs associated with mainstreaming the disabled student. It is important to consider costs due to the budget problems afflicting public schools and local government. As previously mentioned, compliance with IDEA results in schools receiving federal funds, but these funds are not necessarily sufficient to cover the costs associated with educating students with disabilities. Therefore, this factor is essential to the LRE determination guidelines. School districts need to consider the costs associated with providing accommodations, aids, transportation and more for disabled students, but the school districts also need to ensure that costs are not disproportionate from one disabled student to another.

For example, costs are disproportionate and irresponsible if a school builds a bathroom for a single individual to use. Likewise, costs may outweigh other interests if the school must paint all of the walls of a classroom and change the lighting in order to accommodate a single student. On the other hand, costs that benefit a large population of disabled children will likely not be deemed burdensome or disproportionate. For example, in *Rachel H.*, neither the district court nor the Ninth Circuit were persuaded by the school district's argument that \$80,000 for school-wide sensitivity training was necessary.²⁸ However, if the training were necessary, the court also found it would be inappropriate to assign the total cost of the training to an individual when other children with disabilities would benefit.²⁹ Moreover, the court noted that such

²⁸ Sacramento Cty. Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1402 (9th Cir. 1994).

²⁹ *Id.* Additionally, the District argued that it would lose funding if child was not in special education classes 51% of the time. *Id.* However, there were waivers available for schools that adopted a program that did not fit neatly within the funding guidelines. *Id.*

training could be done at no cost per a California statute.³⁰ Therefore, although a technical and highly sensitive issue, the costs of mainstreaming a disabled student must be included in the LRE determination.

The final prong that Congress must adopt and implement as a nationwide standard pertains to supplemental aides and services. Arguably, this prong can either be added as a subsection of the first prong of the test—educational benefits of placement in fulltime in a regular class—or it can become a prong itself. Although adding this consideration as a subsection is a viable option, Congress should make supplemental aides and services a separate prong because it can affect each of the other four prongs in the guidelines, not just the first prong. This prong is necessary in analyzing whether the employment of supplemental aids and services would allow a disabled student to participate in a regular classroom when the student normally could not participate. Supplemental aids and services can be analogized to the “reasonable accommodation” requirement under the employment chapter of the Americans with Disabilities Act of 1990.³¹ Furthermore, again similar to reasonable accommodations under the ADA, costs must be considered when determining whether supplemental aides and services are appropriate. As the Fifth Circuit stated in *Daniel R.R.*, “school districts must show sufficient efforts to accommodate the child in a regular classroom with supplemental services and accommodations. While the efforts to accommodate should not be minimal, the services and accommodations are also not ‘limitless.’”³²

For example, Teacher Nance raised an interesting issue with regards to teacher aides in classrooms. Employing part-time aides in classrooms for one-on-one help is an expensive

³⁰ *Id.*

³¹ See the ADA definition of “reasonable accommodation” at Pub. L. No. 101-336, Title I, § 101, July 26, 1990 (codified as amended at 42 U.S.C. 12111 (2006)).

³² *Bon*, *supra* note 11, at 5 (citing *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989)).

endeavor, but every parent of a special education child would like his or her child to have an aide. Additionally, Teacher Nance noted that an aide does not have a special education degree and may come into the situation without the skills or educational background necessary to be an immediate and effective addition to the student's education. In this instance, the aide must be trained, and be trainable, because he or she will not know the curriculum or know how to modify it to the certain disabled student. This results in the general education teacher modifying the curriculum and training the aide based on these modifications.³³ All of this can be a very costly and perhaps not a very beneficial endeavor because the aide has to make time to be trained. Moreover, the aide may be a "time clock" position and thus can only work his or her "per day" contract hours. As a result the teacher and aide are unable to hold after school training for the aide on an on-going basis without either paying the aide overtime or the aide volunteering his or her time. Similar to the other four parts of the necessary LRE guidelines, supplemental aids and services is a very intricate issue that must be considered when determining the LRE for a student with a disability.

IV. CONCLUSION

Congressional legislation effectively advances the interests and opportunities for disabled individuals in the United States. However, the "system" is not perfect. There is still much that can be done in terms of the interests of students with disabilities. The adoption and implementation of uniform guidelines used to determine LRE for students with disabilities must

³³ Applying these issues, Teacher Nance has an aide in her classroom for a whole school year that the parent asked the district to hire for their special needs child because she had worked for the family and was familiar with the student's diagnosis. Telephone Interview with Teacher Nance (May 2, 2013). Teacher Nance worked with the aide and had the district trainer come and work with the aide multiple times. *Id.* Unfortunately, the aide did not understand curriculum basics and she did not know how to anticipate potential situations that ended up creating disruption. *Id.* The aide did not understand how to integrate herself or the disabled student into the classroom social or academic context (essentially negating the non-academic benefits of integration in the regular classroom). *Id.* Teacher Nance had to instruct the aide throughout the entire day and thus could not use her to the full potential of a classroom aide. *Id.* Moral of the story, it should not be assumed that an aide is the same as a highly qualified teacher; nor should it be assumed that an aide is always a positive addition to the equation. *Id.*

be at the forefront of Congressional and National concern. The uniform guidelines embodied above aim to curb the amount of litigation and inconsistencies involved with determining LRE for students. More importantly, these guidelines advance the educational and social interests of the approximately 6.8 million students with disabilities in the United States.

Some argue that the Supreme Court of the United States should resolve the circuit split; however, the Court has not chosen to hear an LRE determination case since the Sixth Circuit's adoption of the *Rockner* Test in 1983. Therefore, Congress must act if there is any hope of resolving this area of concern and litigation. Congress' adoption of the above guidelines is the next feasible step to resolving this issue and improving the educational opportunities and experiences for all disabled children in the United States.