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"To the Maximum Extent Appropriate":

A Call for Implementation Guidance for School Districts

I. Introduction

The notion that public education should be inclusive is in many ways a modern concept. It was not until 1918 that every state required all children to attend at least elementary school, and until 1954, segregation on the basis of race was legally permissible in the United States.[1] Riding on the *Brown v. Board of Education* movement to create equal education for all children, advocates of children with disabilities stepped up to argue that segregation of students on the basis of disability left those students with an inherently unequal education.[2] While some states responded by enacting laws to improve access and quality to the education of disabled students, most did not and many were wholly deprived of public education.[3] However, in 1971 and 1972, two landmark cases involving the rights of students with disabilities were decided, prompting Congress to take legislative action.[4]

The Individuals with Disabilities Education Act (formerly the Education for All Handicapped Children Act) required that students with disabilities be provided with a "free appropriate public education" ("FAPE") and mandated that disabled students should be given the opportunity to be educated with non-disabled students "to the maximum extent appropriate."[5]

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[1] *See* Brown v. Board of Education of Topeka 347 U.S. 483 (1954); Emily Richmond, Schools Are More Segregated Now Than During the Late 1960s, available at http://www.theatlantic.com/national/archive/2012/06/schools-are-more-segregated-today-than-during-the-late-1960s/258348/ (while no longer legally permissible, schools are more segregated now than in the late 1960s)

[2] Megan McGovern, *Least Restrictive Environment: Fulfilling the Promises of IDEA* 21 WIDENER L REV. 117, 118 (2015).

[3] Michael J. Kaufman & Sherelyn R. Kaufman, EDUCATION LAW, POLICY, AND PRACTICE CASES AND MATERIALS, 707 (2013).

[4] McGovern, *supra* note 2, at 119; Pennsylvania Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971); Mills v. Board of Education District of Columbia 348 F. Supp. 866 (D.C. 1972).

[5] 20 U.S.C. § 1412(a)(1), (a)(5).

This policy - that disabled students must be placed in the "least restrictive environment" ("LRE") - has led to disagreement because the law does not explicitly state what school districts must do to comply with the law.[6] In this article, I will show that despite Congress' clear intention for school districts to integrate children with disabilities into regular classrooms, the absence of specific guidance on how to implement the LRE provision has significantly harmed the goal of inclusion for children with disabilities. As a result, Congress must act to provide further guidance on the factors and/or questions that school districts must consider when making a LRE determination.

II. Individuals with Disabilities Education Act: Overview.

In the years leading up to Congress' enactment of the Individuals with Disabilities Education Act, judges in Pennsylvania and the District of Columbia struck down local laws that excluded disabled children from public schools.[7] At the time of the decisions, at least one million of the approximately eight million disabled children living in the United States had been fully excluded from the public school system because of laws similar to those struck down in Pennsylvania and the District of Columbia.[8] The decision in the Pennsylvania case laid the foundation for the legislation that was to come by creating an explicit presumption that it was preferable to place children with educational disabilities in a classroom with non-disabled students.[9] In a similar holding, the District of Columbia decision expounded on the school district's duty to provide a public education to all children, stating that "if sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system

[6] McGovern, *supra* note 2, at 118.
[7] Kaufman & Kaufman, *supra* note 3 at 707.
[8] *Id.*
[9] Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972)

then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education."[10]

Three years later, cognizant of both a need for protective legislation and state school districts' need for funding, Congress enacted the Education for All Handicapped Children Act of 1975 ("EAHCA"). The Act, through the spending clause, required all public schools that received federal funding to provide disabled students equal access to education. In 1990, Congress renamed the EAHCA to the name it is currently known as, the Individuals with Disabilities Education Act ("IDEA") and has since amended it several times to its present form.[11] Nonetheless, the goal of IDEA has largely remained the same since its original enactment in 1975. By way of federal funding, legislative guidance on tools meant to assist school districts such as Individualized Education Programs ("IEP"), and procedural safeguards such as "Stay Put" rights, IDEA aims to ensure that educationally disabled students are not deprived of an equal right to education.

At its core, IDEA requires that states provide a "free appropriate public education" for all disabled students ages three to twenty-one.[12] In *Board of Education v. Rowley ex rel. Rowley* the Supreme Court attempted to provide school districts guidance on whether or not their efforts complied with the FAPE mandate.[13] In particular, the Court indicated that if a school district complied with the procedural requirements set forth in IDEA and the student's IEP was "reasonably calculated to enable the child to receive educational benefits" the district was in compliance.[14] In connection with the second part of the test, IDEA requires that the parents of each disabled student and a team of administrators construct an IEP that outlines individualized

[10] Mills v. Board of Education District of Columbia 348 F. Supp. 866 (D.C. 1972).
[11] McGovern, *supra* note 2, at 120.
[12] 20 U.S.C. § 1412(a)(1)(A).
[13] *See* Bd. Ed. Hendrick Hudson Sch. Dist. v. Amy Rowley 458 U. S. 176 (1982).
[14] *Id.*

objectives designed to obtain specified educational goals.[15] However, IDEA also requires that the school district begin by providing supplementary aids and services necessary to achieve the stated goals of the IEP by placing the student in the LRE".[16] In other words, IDEA strives to ensure that each child meets the goals of their IEPs while being educated in the same setting as their non-disabled peers to the greatest extent possible. Unfortunately, beyond the plain words of the actual statute – "to the maximum extent appropriate" - school districts have not been given much guidance on how to determine the amount of integration required to comply with IDEA while still serving each child's needs. Without further specified guidance, the LRE mandate will go unfulfilled.

III. The Inclusion Movement

The most recent statistics from the U.S. Department of Education revealed that in 2011-2012, the percentage of children served under IDEA who spent eighty percent or more of their day in a regular classroom was the highest it has ever been.[17] Moreover, whereas only one in five disabled students were enrolled in regular schools when IDEA's predecessor was enacted in 1975, the percentage of students enrolled in regular schools in 2011-2012 was at ninety-five percent.[18] Thus, in terms of attendance, it is clear that IDEA has at least fulfilled the goal of working to ensure that students are not excluded from the public school system on the basis of a disability. However, the more important question is whether inclusion in the school system has benefited these children. Research indicates it does – one study found that reading skills for elementary-aged students with severe disabilities improved by 31.7% and mathematical skills

[15] 20 U.S.C. § 1412(a)(4).
[16] 20 U.S.C. § 1412(a)(5).
[17] http://nces.ed.gov/pubs2014/2014083.pdf
[18] *Id.* at 55.

improved by 23.9% when educated in inclusive settings.[19] Middle school-aged students also saw increased improvements by 13.8% in reading and by 12.5% in math.[20] In addition to the demonstrated improvements in performance, inclusive education also serves to reduce the stigmatization that students with disabilities face throughout the course of their education. Including disabled students in regular classrooms affords an invaluable opportunity for both the disabled and non-disabled students to learn from each other and helps to reduce that stigmatization. Nonetheless, IDEA's mandate does not require complete inclusion and thus school districts are left to grapple with how to determine the amount of time each student should spend in a regular classroom to achieve the above-stated results and how much time is needed in a more restrictive environment.

III. Least Restrictive Environment Provision

The LRE Provision mandates that each student's IEP be constructed so as to maximize inclusion with non-disabled students to the greatest extent appropriate. Because each student's needs vary, the LRE is not defined by statute in any greater detail. However, because schools are tasked with making the determination of how much time, if at all, a student should spend in regular classrooms, several of the circuits have developed tests to determine whether the school complied with the mandate. The United States Supreme Court has not taken any appeals on the issue and thus has not offered any guidance to resolve the split among the circuits.

A. Sixth Circuit Roncker Test

In 1983, eight years after the original enactment of IDEA's predecessor, the Court of Appeals for the Sixth Circuit developed the first test to determine whether an Ohio school district complied with LRE when it decided to place a nine-year-old student in a school "exclusively for

[19] Turki Abdullah Alquraini, *An analysis of legal issues relating to the least restrictive environment standards* 13 J. OF RESEARCH IN SPECIAL EDUCATIONAL NEEDS 152 (2013).
[20] *Id.*

mentally retarded children" wherein he would have "no contact with non-handicapped children."[21] The student's parents challenged the removal from the regular school and brought suit pursuant to IDEA.[22] The Sixth Circuit recognized that IDEA indicates a strong preference for keeping the student in an environment that permits interaction with non-disabled students.[23] However, the court acknowledged that when the decision involves a segregated facility that is considered to be academically superior for the student, the court must ask whether the services that make the facility superior could feasibly be provided in the non-segregated school.[24] In remanding the case to the lower court, the Sixth Circuit instructed the district court to engage in a balancing test to determine whether the student's educational, physical or emotional needs required services which could not feasibly be provided in a regular school.[25]

B. Fifth Circuit Daniel R.R. Test

Seven years later, the Fifth Circuit created its own analysis for determining when a school district complied with the LRE provision.[26] The facts of the case differed slightly from the Sixth Circuit's case. The student at issue was a six-year old with Downs Syndrome who had failed to make progress in his regular pre-kindergarten class.[27] As a result, the school district placed him in a special education, Early Childhood class but permitted that he eat lunch with non-disabled children, three days a week if his mother supervised him and also permitted him to go recess with the non-disabled children.[28] In its decision, the Fifth Circuit expressly declined to adopt the Sixth Circuit's test in *Roncker*.[29] Instead, the court spoke to legislative intent, deciding

[21] Roncker on behalf of Roncker v. Walter 700 F.2d 1058, 1060 (1983).
[22] *Id.* at 1058.
[23] *Id.* at 1063
[24] *Id.*
[25] *Id.*
[26] Daniel R.R. v. Board of Education, 874 F.2d 1036 (5th Cir. 1989).
[27] *Id.* at 1039.
[28] *Id.*
[29] *Id.*

that Congress deliberately left the decision of whether a particular service could feasibly be provided to state and local school officials.[30] Indicating that it is not the job of the court to second-guess school officials, the court derived a two-part test from the plain language of that contained in the LRE provision: first, the court must ask whether use of supplemental aids and services in the regular classroom can achieve a satisfactory education for each child; and second, whether the school has attempted to include the child to the maximum extent appropriate before removing the child from the regular classroom.[31]

C. Ninth Circuit Test

Shortly after the Fifth Circuit declined to employ the Sixth Circuit's *Roncker* test, the Ninth Circuit rejected both circuits' analyses on the LRE provision in favor of a four-factor balancing test.[32] The case involved an 11-year old girl whose parents requested that she be placed in a regular classroom after being in special education programs for four years.[33] However, the school district rejected the request, proposing that she remain in special education classes for academic coursework but permitted her to attend regular classes for subjects such as art, music, lunch, and recess.[34] In finding for the parents the Ninth Circuit applied the four-factor balancing test and considered (1) the educational benefits of a full-time regular class placement; (2) the non-academic benefits of such placement; (3) the effect of the student on the teacher and children in the regular class; and (4) the costs of including the student in the regular class.[35]

[30] *Id.* 1046.
[31] *Id.*
[32] Sacramento City Unified School District v. Rachel H. *ex rel.* Holland, 14 F.3d 1398, 1404 (9th Cir. 1994).
[33] *Id.* at 1400.
[34] *Id.*
[35] *Id.*

IV. Implementation

The split amongst the Circuits in determining what questions and/or factors must be considered to comply with the LRE provision has created confusion for school districts. At a basic level, many within the special education community believe that students with disabilities should be educated with non-disabled students as much as possible.[36] The Council for Exceptional Children endorsed the LRE to the extent the student's "educational and related needs can be satisfactorily provided;" the National Association of State Boards of Education and the Association for Retarded Citizens of the Unites States endorsed the LRE as a continuum advocating for inclusion in a regular classroom as much as possible; and the Association for Person with Severe Handicaps adopted the LRE advocating for a similar continuum model.[37]

Thus, Congress' mandate for inclusion of disabled students is well-supported in the special education community; however, when it comes to implementation school districts have little to look to other than the plain words of the advocates: "as much as possible." In response, one recent study looked at how principals in a southern state interpret implementation of LRE and found that while the principals were aware of the LRE provision, "these particular principals did not have any guideline or plan for how they were going to ensure students with disabilities were educated in the LRE."[38] Although the sample size of the study was small, the results are troubling. The researchers found that in all five schools, the relationship between students educated in regular classrooms and students educated in special education classrooms was bifurcated – "the notion of a continuum of services was not stated. Students either are in, or they

[36] *See generally* Alquraini *supra*, note 19.
[37] *Id*. at 154.
[38] Laura O'Laughlin and Jane Clark Lindle, *Principals as Political Agents in The Implementation of IDEA's Least Restrictive Environment Mandate* 29(1) EDUCATIONAL POLICY 140, 149-50 (2015). (the study was conducted through face-to-face interviews of five elementary school principals from a large urban district in a southern state with a history of segregation in both race and ability. At the time of the study the national average for the percentage of students with disabilities educated in exclusive settings for the majority of the day was 14%, this state's average was 19%).

are out."[39] Moreover, researchers did not find any evidence of an attempt to provide accommodations or services to disabled students in regular classrooms before removing them into the special education classes.[40]

The study indicates a low level of understanding the LRE mandate and begs the question of where the problem lies. While the principals did admit to deferring to the judgment of administrators who specialize in special education, it is still worrisome that the principals possessed little knowledge on an issue that affects many students. In 2011-2012, thirteen percent of American students received services through IDEA.[41] That is a significant number of students who are subject to the LRE mandate and principals must be aware of their responsibility to ensure they are in compliance. However, it is difficult to place too much fault on school administrators when Congress has not provided much guidance on how they are to comply. When the Fifth Circuit declined to employ the *Roncker* test it did so on the basis of legislative intent. The court indicated that Congress' omission of a precise implementation plan was purposeful – policy and methods on how best to implement the LRE mandate was to be left to school officials.[42] The court then went on to construct a test to determine whether the school district's chosen method was sufficient. However, the court's test did little to add any substance to the language of the LRE provision itself – leaving the school district with no further guidance as to whether their chosen method required modification. The second prong of the court's test asks whether the school has attempted to include the child to the maximum extent appropriate – leaving the question of what is appropriate unanswered.

[39] *Id.* at 154.
[40] *Id.*
[41] http://nces.ed.gov/pubs2014/2014083.pdf.
[42] *Id.* at 1044.

It is worth noting as the Court does that IDEA in and of itself creates tension between two of its provisions. School districts are charged with including disabled students in regular classrooms to the greatest extent possible but are also required to construct IEPs to tailor to each student's individual needs. Perhaps the tension between provisions that seek to include generally while also tailoring to individual needs is the source of why it would be difficult for Congress to create a bright line test for determining whether the school district complies with the mandate. Because the appropriate amount of inclusion in a regular classroom for each student will differ, creating a test is difficult. Nonetheless, Congress has created a clear mandate and research supports increased benefits for disabled and non-disabled students when the two are educated in the same classroom. While it may be difficult to create a test for compliance in the abstract for a mandate that involves the individualized assessment of a child, some clarification is needed if school districts are expected to comply with the mandate.

The Ninth Circuit's four-part test is the most comprehensive and has potential to lay the foundation for creating substantial guidance. The four-part test provides school districts with a framework from which to start. The school districts can begin by compiling lists of benefits both academic and otherwise that would be derived from time spent in a regular classroom against time spent removed from such environment. The test also permits the school district to weigh the effect of placement on other students, teachers, and the school at large. Providing a comprehensive list of questions or factors to consider when deciding the LRE for each individual student and making it available to school districts across the country has potential to increase awareness of the mandate and prompt administrators to make more considered decisions when removing students from regular classrooms. Such guidance would preserve the goal of

maximizing a student's participation in regular classes while maintaining the individualized assessment required of the process.

V. Conclusion

The current split in the circuits permits disabled students across the country to be subject to different levels of exclusion. The movement for children with disabilities to be included in the public school system has come a long way since the 1970s. However, given the demonstrated benefits of inclusion to both disabled and non-disabled students, school districts must proactively work to comply with the LRE mandate. Differing tests across the country with no clear guidance on defining the "maximum extent appropriate" risks the possibility that school districts will fall back on a bifurcated system. Undeniably, implementation of the LRE mandate will never be uniform given the need for individualized assessment; however, providing a workable framework with a comprehensive list of factors to consider will at least give schools a uniform starting point.