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A BRIGHT IDEA: RECONSTRUCTING FLORIDA'S CLASSROOMS BY "DESTIGMATIZING" SPECIAL EDUCATION

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I. INTRODUCTION

Florida's public school system is currently struggling with how to comply with the mandates of the Individuals with Disabilities Education Act (IDEA) where the needs of disabled students and nondisabled students conflict.[1] This is concerning because as the number of students with disabilities increases, along with the push to include students in the general education classroom, the chances of litigation also intensify as school personnel and parents debate the appropriate classroom placements for various students.[2]

Although there are a variety of disabilities afflicting children today, the focus of this Comment concerns school-aged children with learning disabilities caused by Autism Spectrum Disorder (ASD). ASD is a complex developmental disability, which affects a person's ability to communicate and interact with others.[3] Autism is defined by a certain set of behaviors that affect people in varying degrees based on the autism spectrum.[4] Currently, in the United States, about 1 in 88 children have been diagnosed with ASD; and ASD is 5 times more likely to appear in boys—about 1 in 54 cases, than in girls—about 1 in 252 cases.[5] ASD is present in all genders, races, ethnic backgrounds, and socioeconomic groups; hence, children with ASD are the largest minority group in the United States.[6]

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1. *See* Joanne L. Huston, *Inclusion: A Proposed Remedial Approach Ignores Legal and Educational Issues*, 27 J.L. & EDUC. 249, 254 (1998).

2. *See* Mark F. Kowal, *A Call to the Courts to Narrow the Scope of the Definition of Learning Disability Within the Americans with Disabilities in Education Act*, 6 RUTGERS J.L. & PUB. POL'Y 819, 819 (2009).

3. *About Autism*, AUTISM SOCIETY, http://www.autism-society.org/about-autism/ (last visited Jan. 11, 2014).

4. *Id.*

5. Jon Baio, *Prevalence of Autism Spectrum Disorders—Autism and Development Disabilities Monitoring Network, 14 Sites, United States, 2008*, CDC (Mar. 30, 2012), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6103a1.htm?s_cid=ss6103a1_w. In South Florida, the percentage of eight-year-old children diagnosed with ASD in 2008 based on ethnicity are as follows: Hispanic children were diagnosed with ASD at a rate of 52.9%; Caucasian children were diagnosed with ASD at a rate of 23.9%; African American children were diagnosed with ASD at a rate of 21.5%; and Pacific Islander or Asian children were diagnosed with ASD at a rate of 1.5%. *Florida Autism and Developmental Disabilities Monitoring Project (FL–AADM)*, CDC FLORIDA, http://www.cdc.gov/ncbddd/autism/states/addm-florida-fact-sheet.pdf (last visited Jan. 12, 2014).

6. Mary Tobin, *Put Me First: The Importance of Person-First Language*, VCU: VA. DEP'T OF EDUC.'S TRAINING & TECHNICAL ASSISTANCE CTR., INNOVATIONS & PERSPECTIVES (May 23, 2011), http://www.ttacnews.vcu.edu/2011/05/put-me-first-the-importance-of-person-first-language/#more-394 (citing

In order to fully assist this sprawling minority population in the public school systems, the purpose of this Comment is to discuss the history behind IDEA and how the statutory ambiguity has led to a variety of circuit splits across the United States.[7] Furthermore, because of the lack of statutory guidance from Congress and the courts to feasibly apply the mandates of IDEA, school personnel and parents are at odds when determining the appropriate placement for disabled students with varying degrees of uniqueness.[8] This Comment proposes a proper test for the Eleventh Circuit Court of Appeals to apply in determining the correct classroom placements for students with disabilities.

II. BACKGROUND

The congressional intent behind IDEA is to ensure that all children with disabilities have an "individualized education program" (IEP) in preparation for further education, employment, and independent living.[9] As federally mandated, schools across the nation are expected to provide to children with disabilities meaningful educational opportunities as part of each child's "free and appropriate public education" (FAPE) in the "least restrictive environment" (LRE).[10] The FAPE requirement of IDEA mandates that any special education program and related services provided for the disabled child are free of charge and catered to the child's unique needs.[11] In addition, children with disabilities are to be educated with nondisabled children to the maximum extent possible under the LRE component of IDEA.[12]

A. The History and Predecessors of IDEA

In the 1970s, Congress passed the Education of the Handicapped Act (EHA) and the Education for All Handicapped Children Act (EAHCA) to respond to the widespread recognition of the rights of handicapped children to an appropriate education.[13] Although the EHA did not achieve its goals, it marked the start of significant efforts by the federal government to include disabled children in public schools.[14] In response to the inadequacies of the EHA, the EAHCA mandated that schools shall not discriminate against children based on their handicaps and schools must provide special education programs for disabled students to benefit

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Kathie Snow, *New Ways of Thinking*, DISABILITY IS NATURAL, http://www.disabilityisnatural.com/ (last visited Oct. 5, 2014)).

7. *See* Kowal, *supra* note 2, at 819–20.

8. *See id.*

9. 20 U.S.C.A. § 1400(d)(1)(A) (West 2010).

10. *See id.*; 20 U.S.C.A. §§ 1412(a)(1)(A), (5)(A) (West 2005).

11. 20 U.S.C.A. §§ 1401(9)(A)–(D) (West 2010).

12. § 1412(a)(5)(A).

13. *Enforcing the Right to an Appropriate Education: The Education of All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979).

14. Megan Roberts, *Individuals with Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and Educators*, 55 UCLA L. REV. 1041, 1048 (2008).

academically.[15] To achieve this goal, the EAHCA mandated three requirements that have survived subsequent amendments to EAHCA and IDEA: (1) students with disabilities must receive an individualized education program; (2) schools must provide disabled students with a free and appropriate public education; and (3) education must be satisfied in the least restrictive environment most suitable for each disabled student.[16]

B. IDEA and Subsequent Amendments to IDEA

In 1990, the EAHCA was renamed IDEA; and under IDEA, schools are now required to provide technology aids and services to disabled students.[17] Also under IDEA, schools are now required to provide disabled students with transition services once the students graduate from the public school system.[18]

The 1997 and 2004 amendments to IDEA were very minor, yet the congressional intent regarding the least restrictive environment requirement called for "mainstreaming" the disabled students with their nondisabled peers to the maximum extent appropriate.[19] With mainstreaming, there is a rebuttable presumption in that the placement of the disabled student with their nondisabled peers is appropriate.[20] This presumption may be overcome if the nature of a student's disability is so severe that, even with the help of supplemental aids and services, education cannot be achieved satisfactorily.[21] In order for a disabled student's placement in the mainstream classroom to be challenged, a statement describing how the disability is affecting the student's progress in the mainstream classroom must be stipulated before a change in placement occurs.[22] Today, the terms "mainstreaming" and "mainstream classroom" are no longer used and have been replaced by the term "inclusion."[23]

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15. *Id.*
16. *Id.*
17. Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141–42 (1990) (codified as amended at 20 U.S.C. §§ 1400–85 (2010)); *see* Roberts, *supra* note 14, at 1049.
18. *Id.*
19. *See* S. REP. NO. 105-17, at 11 (1997).
20. *See id.*
21. *Id.*
22. 20 U.S.C.A. §§ 1414(d)(1)(A)(i)–(iii) (West 2005). The first step in ensuring that a disabled student receives a free and appropriate public education in the least restrictive environment under IDEA is to develop an individualized education program (IEP) annually. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 51 (2005) (citing § 1414(d)(1)(A)(i)). The IEP is an annual description of how the student with the disability will progress and meet their goals in the general education curriculum. §§1414(d)(1)(A)(i)(I)–(II). The IEP will also contain an explanation to the extent that the child will not participate with the nondisabled children in the mainstreamed classroom, and if there are any appropriate accommodations necessary to measure the academic achievement and functional performance of the child based on state assessments. §§ 1414(d)(1)(A)(i)(V)–(VI)(aa). Under IDEA, the IEP team discussing the disabled student's education program for the course of the year will consist of the parents of the disabled student, at least one regular classroom teacher of the disabled student, at least one special education teacher, a representative of the local educational agency qualified to supervise a specially designed instruction to meet the needs of disabled students, an individual who can interpret the evaluation results, and if the circumstances permit, the disabled student will be a part of the IEP meeting. §§ 1414(d)(1)(B)(i)–(vii).
23. Anne Proffitt Dupre, *Disability and the Public Schools: A Case Against "Inclusion"*, 72 WASH. L. REV. 775, 779 (1997).

In 2004, IDEA was renamed Individuals with Disabilities Education Improvement Act (IDEIA), which did not substantively change IDEA from the previous 1997 amendment.[24] However, one important change that resulted under IDEIA is that now school districts can recover attorneys' fees when parents file frivolous or unreasonable suits against the school districts.[25]

Despite the amendments to IDEA and the presumption that inclusion in the general education classroom is a satisfactory placement for the disabled student, there is a lack of clarity in the statute addressing the issue of what happens when the disabled students and the nondisabled students have conflicting needs, rendering the teacher incapable of meeting the needs of the entire class.[26] The statute provides little guidance in determining when it is no longer appropriate to include the disabled student in the nondisabled classroom.[27]

C. Requirements Under IDEA

Since the enactment of EAHCA of 1975, IDEA has fully adopted the proposition that a free and appropriate public education will be provided to students with disabilities to improve their educational goals.[28] In order for the school districts to provide disabled students with a free and appropriate public education, students with disabilities must have access to the general educational curriculum with their nondisabled peers to the maximum extent appropriate.[29] The ability for the disabled student to have access to the general educational curriculum is the least restrictive environment requirement of IDEA, which will only be altered to a more restrictive environment if the child is not benefitting from the curriculum, even with the help of aids and services.[30] Although IDEA is seemingly definitive, there is much litigation over how to interpret "free" and "appropriate" public education in the "least restrictive environment."[31] This is largely because each student with a disability has unique needs, and it is nearly impossible to enact legislation that is uniform and applicable to all disabled students.

1. Free and Appropriate Public Education Under IDEA

Under IDEA, a "free" education means any special education or related service that is provided for the disabled student at the public expense without charge to the student or the student's family.[32] The special education curriculum must meet the standards of the State's educational agency and in conformity with the disabled

24. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-466, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. § 1415 (2005)); *see* Roberts, *supra* note 14, at 1051.
25. *Id.*
26. *See id.*
27. *See id.* at 1054.
28. 20 U.S.C.A. § 1400(c)(3) (West 2010).
29. § 1400(c)(5)(A).
30. *See id.*; *see* S. REP. NO. 105-17, at 11 (1997), *see also* 20 U.S.C.A. §§ 1412(a)(1)(A), (5)(A) (West 2005).
31. *See* Roberts, *supra* note 14, at 1054.
32. 20 U.S.C.A. § 1401(9)(A) (West 2010).

student's individualized education program.[33] The "free" requirement of a free and appropriate public education is the least litigated component under IDEA.[34]

However, the "appropriate" component is more frequently litigated because each student's disability is unique and so a placement deemed appropriate for one student may be inappropriate for another student with a seemingly similar disability.[35] In order to determine what placement, aid, or service is necessary for each disabled student, an individualized education program will be assembled, with the help of an IEP team, to determine how the student with the disability will progress and reach his or her goals for that particular school year.[36] The IEP team will determine the appropriateness of the placement for each disabled student and whether or not supplemental aids and services will be necessary.[37] Nevertheless, there are times when members of the IEP team disagree regarding the educational curriculum and academic goals of a particular student with a disability, causing legal disputes to arise.[38]

33. §§ 1401(9)(B)–(D).
34. Roberts, *supra* note 14, at 1053.
35. *Id.* at 1052.
36. 20 U.S.C.A. § 1414(d)(1)(A)–(B) (West 2005).
37. *Id.*
38. Roberts, *supra* note 14, at 1052. If parents of the disabled student and the school administrators disagree regarding the educational curriculum discussed during the IEP meeting, the preliminary recourse would first be to have a sequential meeting with the IEP team to resolve the conflict. If a sequential meeting with the IEP team does not work, the parties must fulfill all the procedural safeguards set forth under section 1415 of IDEA. 20 U.S.C.A. § 1415 (West 2005). In general, either party may voluntarily request to attend mediation as a preliminary recourse. §§ 1415(e)(1)–(2). Once mediation is requested by either party, then a qualified and impartial mediator must facilitate the proceeding. § 1415(e)(2)(A)(iii). Lastly, the State shall bear the costs of the mediation process. § 1415(e)(2)(D). In the event that a resolution is reached after the mediation process, the parties shall execute a legally binding and enforceable agreement. § 1415(e)(2)(F).
If the parties are unable to resolve the issues that arose during the IEP meeting, then the parties may request an impartial due process hearing, which is conducted by the State or educational agency. § 1415(f)(1)(A). However, prior to the impartial due process hearing, the parents shall have a meeting with another member from the IEP team, who knows of the specific facts stipulated in the complaint, within fifteen days of receiving notice of the complaint. §§ 1415(f)(1)(B)(i)(I)–(IV).
If this preliminary hearing does not resolve the issues stipulated in the complaint to the satisfaction of the parents within thirty days, the school district receives the complaint, then the impartial due process hearing may occur within two years of the alleged action which formed the basis of the complaint. §§ 1415(f)(1)(B)(ii), (3)(C). If the parties are able to reach a settlement after the impartial due process hearing and it is signed by both parties, then this agreement is legally binding and enforceable. § 1415(f)(1)(B)(ii).
The hearing officer shall make a decision based on substantive grounds regarding whether or not the disabled child received a free and appropriate public education in the least restrictive environment possible. § 1415(f)(3)(E)(i). If the hearing officer finds that there has been a procedural violation, the hearing officer will look to see if the disabled child was deprived of a free and appropriate public education and whether this procedural violation caused a deprivation of educational benefits. §§ 1415(f)(3)(E)(ii)(I)–(III). If either party is aggrieved by the findings and decisions rendered during the impartial due process hearing, then such party may appeal the decision to the State educational agency, and the State educational agency shall conduct a review of the decision appealed. §§ 1415(g)(1)–(2).
If no settlement is reached, any aggrieved party may bring a civil action after filing a complaint in either a state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. § 1415(i)(2)(A). The party bringing the action shall have ninety days from the date of the decision of the hearing officer to file a complaint. § 1415(i)(2)(B). The court will also require the records of the administrative proceedings and any additional evidence. §§ 1415(i)(2)(C)(i)–(ii). Lastly, the court will base its decision on the preponderance of the evidence and grant relief that the court deems appropriate. § 1415(i)(2)(C)(iii).

2. Least Restrictive Environment Under IDEA

Under IDEA, students with disabilities, to the maximum extent possible, are to be included in the same classroom with their nondisabled peers, unless there is a finding that even with supplemental aids and services, serious education cannot be achieved satisfactorily.[39] The LRE requirement determines the appropriate classroom placement for the disabled student and whether that student will receive some educational benefit with the help of supplemental aids and services.[40] The LRE requirement is also a highly litigated topic because there is no uniform standard to be applied as each disabled student is uniquely situated.[41] Much of the litigation revolves around parents alleging that the school districts deprived their child of a free and appropriate public education as their child was placed in a more restrictive environment, as opposed to having their child included with the student's nondisabled peers.[42]

The proponents favoring inclusion, which are typically the parents, claim that by allowing the disabled students to remain and participate in the same classroom with their nondisabled peers, the entire classroom will benefit in learning concepts of freedom, equality, and community.[43] As a consequential benefit of including the disabled student in the general education classroom, the disabled student will learn from his or her nondisabled peers through observation and emulating their behavior.[44] Fully included disabled students will also develop the skills necessary to succeed; as a result, the disabled students will experience an increase in their self-esteem and perform substantially better academically.[45] Overall, by educating both the disabled students and nondisabled students together, the nondisabled students will learn to be more tolerant and accepting of their disabled peers, thereby destroying the cycle of separation.[46] Lastly, advocates of inclusion fear that if disabled students are not included with their nondisabled peers, those disabled students will have less self-esteem due to their cognizance of the separation.[47]

The critics of the full inclusion philosophy claim that a uniform standard for placing disabled students and nondisabled students in the same general education classroom is unrealistic and runs contrary to the individualized principles under IDEA.[48] Full inclusion also detracts from the purpose and observations made during the IEP meeting because it groups both nondisabled students and disabled

39. 20 U.S.C.A. § 1412(a)(5)(A) (West 2005).
40. *See* Roberts, *supra* note 14, at 1054 (citing § 1412(a)(5)(A)).
41. *Id.*
42. *See id.*
43. Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 210–11 (2006) (citing Colleen P. Tomko, *What is Inclusion?*, KIDS TOGETHER, INC., http://www.kidstogether.org/inclusion.htm (last modified June 29, 2010)).
44. *Id.* at 211 (citing JEAN B. CROCKETT & JAMES M. KAUFFMAN, THE LEAST RESTRICTIVE ENVIRONMENT: ITS ORIGINS AND INTERPRETATION IN SPECIAL EDUCATION 21 (Lawrence Erlbaum Assoc. 1999)).
45. *Id.*
46. *Id.*
47. *See id.*
48. *Id.* at 212 (citing Dupre, *supra* note 23, at 824).

students together, regardless of the disability impacting the student.[49] While full inclusion advocates purport the idea that full inclusion will decrease the social stigma of intolerance by having both disabled and nondisabled students placed together, the reality is that even in the general education classroom, the disabled students and the nondisabled students are still essentially separated, highlighting the disabled students' differences.[50] The notion that fully including disabled students with their nondisabled peers will essentially cure the disabled student through observation and emulation is not only completely erroneous, but it underscores the emphasis on societal acceptance.[51] All students should be taught acceptance of others, regardless of what classroom students receive their instruction.

In addition, inclusion detracts the teacher's attention away from the disabled students as the teacher must continue with his or her lesson plans; this creates an environment where the disabled students are not receiving enough individualized attention from the teacher, causing the disabled students to suffer academically.[52] As a result, a student with a disability who is not receiving enough individualized attention from the teacher may likely disrupt the classroom, thereby hindering the other students from serious learning.[53]

D. Florida's Adoption of IDEA

The State Board of Education in Florida has fully adopted IDEA and must comply with its subsequent amendments and regulations, which include providing disabled students with a free and appropriate public education in the least restrictive environment.[54] In Florida, the school districts are required to focus on including children with disabilities to the maximum extent appropriate in the general education classroom unless the nature of the student's disability is such that education would be satisfactorily achieved in a more restrictive classroom.[55]

Before a student with a disability is transferred to a more restrictive placement or given supplemental aids or services, the student must first undergo an evaluation to determine whether the student qualifies as an exceptional student.[56] After the evaluation is completed, the student's parent is notified of whether or not the student is eligible to be an exceptional student.[57] In addition, the parent is notified of his or her ability to request "a due process hearing on the identification, evaluation, and eligibility determination" of his or her child.[58] An administrative law judge (ALJ) from the Division of Administration Hearings must conduct the

49. Gordon, *supra* note 43, at 212.
50. *Id.* at 212–13.
51. *See id.* at 213 (citing Dupre, *supra* note 23, at 820).
52. *Id.*
53. *Id.* at 213–14 (citing Dupre, *supra* note 23, at 849–51).
54. FLA. STAT. ANN. §§ 1003.571(1)(a)–(c) (West 2009).
55. FLA. STAT. ANN. §§ 1003.57(1)(a)(2), (1)(e) (West 2013).
56. § 1003.57(1)(c).
57. *Id.*
58. *Id.*

due process hearing; and the decision of the ALJ is final.[59] However, any aggrieved party "has the right to bring a civil action in the state circuit court."[60] The court, in such a civil action, must receive the records of the due process hearing, and the court must hear any additional evidence at the insistence of either party.[61] During the pendency period, the student is required to remain in his or her current classroom.[62]

Once the student is found to have a disability, the student must have an IEP, which shall be completed with the consent and presence of the parent at the IEP meeting.[63] During the meeting, the parent has the right to accept or refuse actions, such as placing the student in an exceptional student education center or administering an alternative assessment to the student.[64] A school district may not proceed with any actions to the student without parental consent; unless, the school district can prove that it had to act and tried to obtain parental consent using reasonable means, but the parent failed to respond.[65] If a change in the student's IEP is necessary, the school must hold an IEP team meeting with the parent.[66] The school must give the parent written notice of the IEP team meeting at least ten days prior to the IEP meeting,[67] and the only way the meeting can be waived is through informed consent of the parent after the parent receives written notice of the IEP team meeting.[68]

Recently, the Florida Senate passed Bill Number 1108, which will expand parental rights in matters relating to the classroom placement and special needs and services of their child.[69] Parents will now be allowed to invite another person to attend an IEP meeting, and the school district personnel may not object to the attendance of such adult through any action or statement.[70] While permitting parents to bring another adult to their child's IEP meeting may sound seemingly appropriate, there have been instances of unbecoming aggression on behalf of such adults advocating for the child.[71] In such instances, a school district should not be hindered in controlling unwarranted aggression during IEP meetings, and this extended right given to parents may present itself as being a superfluous barricade on the school district personnel.

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59. *Id.*
60. *Id.*
61. *Id.*
62. FLA. STAT. ANN. § 1003.57(1)(d) (West 2013).
63. FLA. STAT. ANN. § 1003.5715(1) (West 2013).
64. § 1003.5715(2)(a).
65. § 1003.5715(3).
66. § 1003.5715(4).
67. *Id.*
68. *Id.*
69. *See* S.B. 1108, 115th Gen. Assemb., Reg. Sess. (Fla. 2013).
70. *Id.*
71. *See* Robert K. Crabtree, *Mistakes People Make—Advocates*, FETAWEB.COM, http://www.fetaweb.com/02/mistakes.advocates.crabtree.htm (last visited Oct. 24, 2014) (explaining situations in which non-lawyer advocates, such as another adult, may be overcome with: "excessive emotion that clouds judgment; giving advice in areas beyond the advocate's expertise; over-involvement in a case where the parents would be better off doing things for themselves; raising parents' expectations beyond what is feasible; and feeding parents' sense of outrage rather than helping them cultivate a calm, persistent approach").

III. UNITED STATES SUPREME COURT'S CONSTRUAL OF IDEA

In 1982, the Supreme Court of the United States decided *Board of Education of Hendrick Hudson Central School District v. Rowley*, which established a two-pronged test to determine whether a school district has complied with providing students with a free and appropriate public education in the least restrictive environment to the maximum extent possible.[72] The first inquiry is a procedural determination, in which a court must ascertain whether the State has complied with the procedures in IDEA.[73] The second inquiry must be of substantive nature, and the court must determine whether the IEP is reasonably calculated to enable the student to receive some basic floor of educational benefit.[74] If the school district complies with these requirements under IDEA, then the school district has met its burden and the court can require nothing further.[75]

In *Rowley*, Amy Rowley, a deaf student at Furnace Woods School, had "minimal residual hearing" and could lip-read with utmost accuracy.[76] Amy's IEP provided that she should be educated in a general education classroom with the use of a hearing aid, have supplemental education with a tutor for the deaf one hour each day, and a speech therapist for three hours each week.[77] The Rowleys agreed with much of the IEP, but also insisted on having a sign-language interpreter present in all of Amy's academic classes.[78] However, the sign-language interpreter and the school's administration found that Amy did not need such additional services because she was already receiving top marks in her academic classes and progressing socially.[79] Frustrated due to the denial of a sign-language interpreter present in Amy's classes, the Rowleys brought suit after exhausting the procedural remedies.[80]

The District Court for the Southern District of New York found that, although Amy was top in her class and a "well-adjusted child," the fact that Amy had a handicap causing her to hear considerably less than what she would hear without her handicap, it was necessary for the sign-language interpreter to be present in Amy's classes.[81] The disparity between Amy's achievement and her potential caused her not to receive a free and appropriate public education when compared to her nondisabled peers.[82] As a result, the district court found in favor of the

72. *See* Roberts, *supra* note 14, at 1058 (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176 (1982)).
73. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 206 (1982).
74. *Id.* at 206–07.
75. *Id.* at 207.
76. *Id.* at 184.
77. *Id.*
78. *Id.*
79. *Rowley*, 458 U.S. at 184–85.
80. *Id.* at 185.
81. *See id.*
82. *Id.* at 185–86.

Rowleys, and the United States Court of Appeals for the Second Circuit affirmed the lower court's decision.[83]

The Supreme Court of the United States reversed and remanded the holding to the lower court, finding that a "free [and] appropriate public education consists of [a specially designed] educational [program] to meet the unique needs of the handicapped child."[84] There is no additional requirement that a school district provide supplemental services to maximize each student's potential in comparison to other students.[85] The legislative intent is not to achieve equality of opportunity between disabled students and nondisabled students—that would be an "entirely unworkable standard requiring impossible measurements and comparisons."[86] Instead, the purpose of the Act is to provide disabled students with a "basic floor of opportunity" to receive some educational benefit in their classes—not to equalize or maximize their potential in comparison to nondisabled students.[87] The lower courts erred by applying an impracticable standard.[88]

The decision in *Rowley*, though helpful in explaining congressional intent pertaining to what is a free and appropriate public education, left many unanswered inquiries, including an assessment for setting forth the "least restrictive environment" requirement.[89] Amy Rowley is a bright girl that received top marks in her classes, and so the Court did not need to determine whether her placement in the general education classroom was appropriate because it was obvious that her placement was suitable based on her top academic performance.[90] However, many other students with disabilities are not as gifted and will need further academic assistance and a separate placement from their nondisabled peers. *Rowley*, although the seminal case in special education law,[91] still provides lower courts with little guidance in how to determine what an appropriate "least restrictive environment" is for a broad range of students under IDEA.

IV. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT'S "FAPE/LRE" TWO-PRONGED TEST

Since the enactment of EAHCA in 1975 and IDEA in 1990, federal law mandates that each state provide students with disabilities a free and appropriate public education in the least restrictive environment to the maximum extent possible.[92] As a result, the various Circuit Courts of Appeals of the United States

83. *Id.* at 186.
84. *Id.* at 188–89, 210.
85. *Rowley*, 458 U.S. at 189–90.
86. *Id.* at 198.
87. *Id.* at 200.
88. *See id.*
89. Roberts, *supra* note 14, at 1058.
90. *See Rowley*, 458 U.S. at 209–10.
91. *See generally id.* (created the two-pronged test to determine whether a school district complied with the free and appropriate public education requirements under IDEA's statutory mandates).
92. Roberts, *supra* note 14, at 1057 (citing 20 U.S.C.A. §§ 1412(a)(1)(A), (5)(A) (West 2005)).

have interpreted IDEA differently using varying tests and many circuit court splits have ensued.[93] This has led to volatile outcomes in the law and unequal results for students with disabilities in determining whether a student has received a free and appropriate public education in the least restrictive environment.[94]

The Eleventh Circuit Court of Appeals in *Greer v. Rome City School District* has adopted the two-pronged test established in *Daniel R.R. v. State Board of Education* of the Fifth Circuit Court of Appeals, to determine what is an appropriate least restrictive environment.[95] Overall, this two-pronged test considers whether a disabled student will receive a meaningful educational benefit from the general education classroom, thus supporting a heightened preference towards inclusion.[96] The first inquiry under the two-pronged test is, "whether education in the [general education] classroom, with the use of supplemental aids and services, can be achieved satisfactorily" for a given disabled student.[97] If the school cannot provide satisfactory education in the general education classroom and the school intends to provide education in a more restrictive environment, then the second inquiry the court must make is, "whether the school has [included] the [student] to the maximum extent appropriate."[98]

Under the first prong, the court must determine "whether the school district has taken steps to accommodate the [disabled student] in the [general education] classroom."[99] If the State has failed to take such accommodating measures, the court's inquiry ends; and the State will be found in violation of IDEA's "express mandate to supplement and modify" the general education curriculum.[100] IDEA will not permit the State to make "mere token gestures to accommodate" disabled students; yet the State is relieved from providing every conceivable aid or service to assist the student.[101] To resolve the issue of the first inquiry, the court must examine several components to determine whether education would be achieved satisfactorily in the general education classroom.[102] No single factor is dispositive, nor is this list of factors exhaustive.[103]

The first component the court will analyze in determining the appropriateness of the disabled student's placement is through a comparison of educational benefits in the general education classroom, supplemented by aids and services—versus a special education classroom in a more restrictive environment.[104] However, a disabled student will not necessarily be transferred from a general education classroom to a special education classroom simply because of poor academic

93. *Id.*
94. *Id.*
95. Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991) (citing Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989)).
96. Roberts, *supra* note 14, at 1063.
97. *Greer*, 950 F.2d at 696 (quoting *Daniel R.R.*, 874 F.2d at 1048).
98. *Id.*
99. *Id.*
100. *Daniel R.R.*, 874 F.2d at 1048.
101. *Id.*
102. *Greer*, 950 F.2d at 697.
103. *Id.*
104. *Id.*

performance.[105] Although the student with a disability might perform better academically in a special education classroom, the court will not mandate a switch in placement if the student would receive "considerable non-academic benefit[s]."[106] Such non-academic benefits the court will scrutinize include language improvement and "role modeling" from the student's nondisabled peers.[107] Nevertheless, if the student fails to improve academically through inclusion in the general education classroom, while the student's potential peers are progressing in the special education classroom, then inclusion may be disadvantageous to the student.[108]

The second component the court will evaluate is "what effect the presence of the [disabled student] in a [general education] classroom would have on the education of [the] other [nondisabled students] in that classroom."[109] If a disabled student is so disruptive that serious education is being severely impaired for the nondisabled students, then inclusion into the general education classroom would not be an appropriate placement for the disabled student.[110]

The third component the court may consider is the cost of educating the disabled student in the general education classroom with the assistance of supplemental aids and services.[111] A school district cannot simply refuse to educate a disabled student in a general education classroom because the cost of doing so, with the appropriate aids and services, would be incrementally more expensive than educating the student in a special education classroom.[112] Conversely, it would be flagrant for a school district to provide a disabled student with his or her own personal teacher, even if it would allow the student to perform adequately in the general education classroom.[113] In essence, the third component is a balancing test to determine how great the cost of educating the disabled student is in the general education classroom.[114] If the cost is too high, relative to the cost of educating other similarly situated students in the general education classroom in the same district, then perhaps including the student in the general education classroom is inappropriate.[115]

In *Greer*, Christy Greer, a child with Down's Syndrome, was five years old in 1986 when her parents decided to enroll her in kindergarten at Elm Street Elementary School.[116] The Greers noted that Christy had a disability on her registration form and when the school opted to evaluate Christy, the Greers refused.[117] The Greers were under the presumption that if Christy was evaluated,

105. *See id.*
106. *Id.*
107. *Id.*
108. *Greer*, 950 F.2d at 697.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *See Greer*, 950 F.2d at 697.
115. *See id.*
116. *Id.* at 690.
117. *Id.*

the results would be predetermined; Christy would have to attend a special education school other than Elm Street Elementary School.[118] Christy did not attend kindergarten at Elm Street Elementary School for the 1986–87 school year, but instead was homeschooled.[119] Then, when Christy was seven years old, the Greers decided to enroll Christy at Elm Street Elementary School for the 1988–89 school year, and the school again sought to evaluate Christy.[120] Although the Greers resisted the evaluation of their daughter, the school sought an evaluation after the administrative proceeding, which showed that Christy was "a moderately mentally handicapped child and that she had significant deficits in language and articulation skills."[121]

In January 1989, the school personnel and the Greers held a meeting to discuss Christy's IEP for the following year and to make a placement determination.[122] The school's psychologist explained to the Greers that, although Christy would make some academic progress in the general education classroom, Christy would make more academic progress in a special education classroom working with teachers who are better equipped to work with children with Down's Syndrome.[123] The Greers again resisted the School District's placement recommendation for Christy because their daughter would not have "peer models" to emulate, leading her to be cognitively deprived and cheated of an opportunity to a true education.[124]

In February 1989, the School District initiated an administrative proceeding to determine Christy's placement under the EAHCA of 1975.[125] A regional hearing officer held a hearing after one month to discuss Christy's IEP and the School District's recommendations for placement at an alternative elementary school.[126] While the School District offered no evidence showing that Christy may be educated at Elm Street Elementary School in a general education classroom with supplemental aids and services, the regional hearing officer rendered the decision in favor of the School District—claiming that Christy could not progress in the general education classroom and could academically progress in a special education curriculum.[127] Although this decision was appealed to the state hearing officer, the decision was affirmed.[128]

The Greers filed a civil action in the District Court for the Northern District of Georgia in July of 1989; and during this time, Christy spent one year in a general education kindergarten classroom without the support of supplemental aids and services.[129] The district court ruled in favor of the Greers and held that the School District, with the assistance of supplemental aids and services, could appropriately

118. *Id.* at 690–91.
119. *Id.* at 691.
120. *Greer*, 950 F.2d at 691.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 691–92.
125. *Id.* at 692.
126. *See Greer*, 950 F.2d at 692.
127. *Id.* at 693.
128. *Id.*
129. *Id.*

educate Christy in a general education classroom.[130] Furthermore, Christy's proposed IEP was not in compliance under the EAHCA because it called for placement in a special education classroom, which does not fulfill the "least restrictive environment" requirement.[131] Both parties appealed to the Eleventh Circuit.[132]

In applying the two-pronged test established in *Daniel R.R.*, the Eleventh Circuit found that the School District failed to satisfy the first prong, which questions whether Christy could be satisfactorily educated in the general education classroom with the assistance of supplemental aids and services.[133] Due to the fact that this prong was not addressed by the School District in Christy's IEP nor in the administrative proceeding presented in the district court, the Eleventh Circuit did not address the second inquiry of the two-pronged test.[134] In support of the Eleventh Circuit's conclusion, the Court found that the School District did not take steps to accommodate Christy in the general education classroom since Christy was not provided with any itinerant instruction or a resource room that could have assisted her while she was in kindergarten.[135] Additionally, the School District automatically came to the determination in the IEP that because Christy was mentally impaired, she belonged in a self-contained special education classroom, without considering the possibility that Christy may benefit from being in a general education classroom with some accommodations.[136]

Nevertheless, after *Greer* was decided in December of 1991, the opinion was withdrawn and remanded back to the district court in March of 1992 because there was uncertainty as to whether the district court's ruling was final in regard to the Greers' demands for (1) reimbursement of costs for educational services and independent assessments of Christy, and (2) reimbursement of costs for compensatory education services that were improperly delayed during the course of litigation.[137] "The [S]chool [D]istrict contended . . . that the Greers abandoned at least one of these [two] claims," but the record is unclear as to which claim the Greers abandoned.[138] As a result, the Eleventh Circuit remanded this case on a technicality to the district court to determine whether the Greers' claims for reimbursement of educational services, or independent assessments had been abandoned.[139] If these claims were still viable, then the district court must then render a decision and end this litigation on its merits.[140]

On May 18, 1992, the district court promptly abandoned or finalized the unanswered demands the Greers made after the Eleventh Circuit remanded the

130. *Id.*
131. *Id.*
132. *See Greer*, 950 F.2d at 693–94.
133. *Id.* at 699.
134. *See id*. at 698.
135. *Id.*
136. *Id.*
137. Greer v. Rome City Sch. Dist., 956 F.2d 1025, 1026–27 (11th Cir. 1992).
138. *Id.* at 1026 (citing *Greer*, 950 F.2d at 694 n.11).
139. *Id.* at 1026–27.
140. *Id.* at 1027.

case.[141] The Eleventh Circuit, on July 15, 1992, reinstated its previous opinion rendered on December 26, 1991, in *Greer.*[142] Despite the "bouncing-nature" of *Greer*, the two-pronged test the Eleventh Circuit adopted in *Daniel R.R.* is still viable, in addition to the non-exhaustive list of factors.[143]

V. INCONSISTENCIES IN APPLICATION OF *GREER'S* FAPE/LRE TEST IN FLORIDA DISTRICT COURTS

As the number of students with disabilities rises, the notion that inclusion in the general education classroom is the preferred method of instruction also rises.[144] Additionally, frustration and grievances will likely increase given that more students with disabilities are included in the general education classroom with their nondisabled peers.[145] Teachers are spending much of their energies planning and modifying the general education curriculum to adapt to the needs of the disabled students, when the academic and non-academic benefits the disabled students gain are minimal at best.[146] As a result of the increasing demands on the teacher, it is possible that less quality attention is given to the nondisabled students in the classroom, as the disabled students will require more individualized attention.[147] Furthermore, the amount of "quality" social interaction between the disabled and nondisabled students is diminished when the teacher ascribes completely different assignments for the disabled and nondisabled students.[148]

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141. Greer v. Rome City Sch. Dist., 967 F.2d 470 (11th Cir. 1992).

142. *Id.*

143. *See* K.I. *ex rel.* Jennie I. v. Montgomery Pub. Sch., 805 F. Supp. 2d 1283, 1296–97 (M.D. Ala. 2011) (citing *Greer*, 950 F.2d at 696–97); *see* Cobb Cnty. Sch. Dist. v. A.V. *ex rel.* W.V., 961 F. Supp. 2d 1252, 1264–66 (N.D. Ga. 2013) (citing *Greer*, 950 F.2d at 696–97). In order to determine whether a student's IEP provides for a free and appropriate public education in the least restrictive environment, the court will use a two-prong test. *Id.* at 1264.

Under the first prong, the court must inquire, "whether education in [a general education] classroom, with the [assistance] of supplemental aids and services, can be achieved satisfactorily." *Id.* at 1265 (quoting *Greer*, 950 F.2d at 696). If the school district violates this first prong by refusing to provide education in a general education classroom, with the assistance of supplemental aids and services, then the school district has violated IDEA's requirement that disabled students should be included in the general education curriculum to the maximum extent possible. *Id.* In addition, the court's inquiry would be complete, and the court would not need to analyze the second prong. *Id.*

However, if the disabled student was included in the general education program, with the assistance of supplemental aids and services, then the court must ask, "whether the school [district] has [included] the [student] to the maximum extent appropriate." *Id.* (quoting *Greer*, 950 F.2d at 696).

When determining whether the first prong is met, the court will look at a non-exhaustive list of components stipulated in *Greer*. *See Cobb Cnty. Sch. Dist.*, 961 F. Supp. 2d at 1266 (citing *Greer*, 950 F.2d at 697). First, the court will engage in a balancing test to determine whether the disabled student would benefit more academically by being included in a general education classroom, with the assistance of supplemental aids and services, or rather would the disabled student benefit more academically via placement in a more restrictive environment, such as a special education classroom. *Id.* Secondly, the court will evaluate "what effect the presence of the [disabled] student in [the general education] classroom would have on the education of other [nondisabled] students in that classroom." *Id.* Lastly, the court will assess the cost of supplemental aids and services essential to suitably educate the student in a general education classroom. *Id.*

144. Roberts, *supra* note 14, at 1080.

145. *Id.*

146. *See* Dupre, *supra* note 23, at 848–49.

147. *Id.*

148. *Id.*

This presumption that inclusion in the general education classroom is the preferred method of instruction because it can cure or improve the behavior of disabled students through peer imitation, thereby increasing self-worth, is erroneous;[149] and this pervasive belief has stigmatized the special education classroom as a degrading placement, unfit for any child, regardless of need.[150] The special education classroom gives disabled students the quality, individualized attention the students need under IDEA, in addition to promoting self-esteem, academic progress, and greater preparation for adult life.[151] The philosophy behind inclusion as an ideal placement not only deprives disabled students of their entitlement to an "appropriate" or individualized public education under IDEA, but it is maliciously ruining public education through the invidious belief that disabled students, separated by a special education classroom, are inferior.[152]

Unfortunately, inclusion is still a predominate movement in special education law, as exemplified by the many parents in various cases requesting that their children be placed in the general education classroom with supplemental aids and services.[153] Updating the attitudes and inclinations people have of the special education classroom will not only improve public education for all students, but it will also make IEP meetings more tolerant for all involved. Part of this change must come from the courts, as there is a lack of consistency in the standard used to determine the appropriate placements for students with disabilities.[154] Not only would more consistency stifle the need for litigation in this area of law, but it would better guide school districts and parents with developing an agreeable IEP that meets the benchmarks of a formalized standard.

149. *See id.* at 820.

150. *See id.*

151. *See id.*

152. Dupre, *supra* note 23, at 819.

153. *See* E.W. v. Sch. Bd. of Miami-Dade Cnty. Fla., 307 F. Supp. 2d 1363, 1366–67 (S.D. Fla. 2004) (charging School District with depriving a profoundly deaf child a FAPE in the LRE after incorrectly placing the profoundly deaf child "in a verbotonal (VT) therapy program for hearing impaired students at Kenwood Elementary School;" as opposed to the parent's preferred placement in general education with "exceptional student support therapy" at Ludlam Elementary School); *see* R.L. v. Miami-Dade Cnty. Sch. Bd., No. 07-20321-CIV, 2008 WL 3833414, at *12, *19, *25 (S.D. Fla. Aug. 12, 2008) (claiming the School District violated IDEA's requirement of providing disabled student with a FAPE in the LRE by "predetermining placement at [Palmetto Senior High School]," as opposed to a smaller school environment at MAST Academy); *see* Sch. Bd. of Lee Cnty., Fla. v. M.M., Nos. 2:05-cv-5-FtM-29SPC, 2:05-cv-7-FtM-29SPC, 2007 WL 983274, at *8, *13 (M.D. Fla. Mar. 27, 2007) (completing the IEP meeting without the parents' participation and attempting to change M.M.'s placement to a more restrictive environment without parental consent caused the parents to request a due process hearing to prevent M.M. from changing schools).

154. *Compare* Jane Parent *ex rel.* John Student v. Osceola Cnty. Sch. Bd., 59 F. Supp. 2d 1243, 1249 (M.D. Fla. 1999) (citing Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1401–02 (9th Cir. 1994)) (determining placement for the disabled student in the least restrictive environment based on factors such as: (1) the academic benefits in the general education classroom, with the appropriate aids and services; (2) the non-academic benefits of the general education classroom, including the imitation of language and behavior models of the nondisabled peers; (3) the disruptive behavior the disabled student might display, which distracts the classroom from serious learning; and (4) the cost of education the disabled student in the general education classroom), *with* L.G. v. Sch. Bd. of Palm Beach Cnty., Fla., 512 F. Supp. 2d 1240, 1246 (S.D. Fla. 2007) (claiming that B.G.'s least restrictive environment was determined based primarily on B.G.'s patterns of behavior; while B.G. was disruptive, he was manageable at school and willing to learn in the general education classroom).

VI. POSSIBLE SOLUTION: A FOUR-FACTORED BALANCING TEST FROM THE NINTH CIRCUIT COURT OF APPEALS

In order to resolve the ongoing obstacle regarding Florida district courts applying different standards to determine an appropriate placement for a disabled student in the least restrictive environment, these district courts should apply a balancing test using specific factors as stipulated in *Sacramento City Unified School District, Board of Education v. Rachel H.*, of the Ninth Circuit Court of Appeals.[155] Although originally, the District Court for the Eastern District of California relied on the *Daniel R.R.* and *Greer* two-pronged test and the *Roncker v. Walter* test, the district court later modified both tests to develop the *Rachel H.* test, which employs balancing four assessable factors.[156] After *Rachel H.* was appealed from the district court to the Court of Appeals for the Ninth Circuit, the Ninth Circuit fully adopted the balancing test originally proscribed in the district court.[157]

In order to evaluate a disabled student's placement under the *Rachel H.* test, the court must look at the following components: (1) the academic benefits the disabled child will receive in the general education classroom, with the assistance of supplemental aids and services, versus the academic benefits of a self-contained, special education classroom; (2) the non-academic benefits the disabled child gains by socializing with the student's nondisabled peers; (3) the effect the disabled student's presence has on the general education classroom; and (4) the cost of including the disabled student in the general education classroom.[158]

The *Rachel H.* test is a preferable standard to evaluate a disabled student's placement as opposed to the two-pronged test articulated in *Greer*, because the *Rachel H.* test assesses the disabled student's progress with the use of four concrete, measurable factors.[159] Conversely in *Greer*, the three components that assist in answering the first prong of the inquiry are merely suggestive, indeterminate factors that only apply to the particular facts of *Greer*.[160] Although the *Greer* two-pronged test provides the Eleventh Circuit, and its respective district courts, with more flexibility when it comes to determining the appropriateness of a disabled student's placement and IEP—especially since each disability is unique—

155. Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., 14 F.3d 1398, 1400–01, 1404 (9th Cir. 1994).

156. *Id.* at 1404; *see* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989); *see* Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991); *see* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (presenting six factors that could be applied in determining an appropriate placement for a disabled student including: (1) what program is better to meet the disabled student's needs, a general education curriculum or a self-contained special education classroom; (2) whether services could be provided to the disabled student in a "non-segregated environment;" (3) whether the disabled student would benefit academically from inclusion; (4) whether the benefits of inclusion are outweighed by the benefits in a self-contained, special education classroom; (5) the disruptive behavior of the disabled student in the general education classroom and its effect on serious learning taking place for other students in the classroom; and (6) the cost of providing services in the least restrictive environment, which is the general education classroom).

157. *Rachel H.*, 14 F.3d at 1404.

158. *Id.* at 1400–01, 1404.

159. *Id.*

160. *Greer*, 950 F.2d at 697.

the lack of a measureable test results in inconsistency in the courts.[161] It would be preferable if the Eleventh Circuit had determinate factors to apply, as opposed to elusive inquiries with factors that only pertain to one particular case.[162]

Rachel H. involved a mentally handicapped girl, and although Rachel had an IQ of 44, her parents sought to increase the time she spent in the general education classroom.[163] However, the School District rejected the Hollands's request, finding this to be an unsuitable placement, as it would require moving Rachel at least six times per day.[164] The Hollands appealed the School District's decision, claiming that Rachel learned best if she were included in the general education classroom, and would not benefit academically in a special education classroom.[165] While the School District argued that Rachel was "too severely disabled" to progress academically in the general education classroom with her nondisabled peers, the hearing officer found in favor of the Hollands, affirming Rachel's placement in the general education classroom.[166]

The aggrieved School District appealed to the District Court for the Eastern District of California.[167] In this landmark case, the district court articulated four factors it used to evaluate whether or not Rachel's placement in the general education curriculum was appropriate.[168] With regard to the first factor, the academic benefits, Rachel was shown to have academically progressed in the general education classroom versus the special education classroom because Rachel made progress with her IEP goals via learning to count and recite English and Hebrew alphabets, and Rachel fully participated in class despite her mental handicap.[169] Therefore, it was appropriate for her to stay in the general education classroom with a supplemental aid and a slight accommodation in the curriculum.[170]

Under the second component, the non-academic benefits of the general education classroom, the district court agreed that Rachel belonged in the general education curriculum because of her excitement about school and learning, her new friendships, and improved self-confidence.[171] Additionally, under the third factor, Rachel had a positive effect on the general education classroom because she was well behaved, not a distraction to others, and did not interfere with the teacher's ability to provide instruction to the classroom.[172] Lastly, the district court found that the School District failed to meet its burden of showing how educating Rachel in the general education classroom would be substantially more expensive than

161. *See id.* at 696–97.
162. *See id.* at 697 (noting that "[t]hese factors do not constitute an exhaustive list; they are factors that happen to be applicable to the facts of the case").
163. *Rachel H.*, 14 F.3d at 1400.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1400–01.
169. *Rachel H.*, 14 F.3d at 1401.
170. *Id.*
171. *Id.*
172. *Id.*

educating her in a special education classroom.[173] In addition, Rachel only needed a part time aid, and not a full time aid, which was a recommendation stemming from the School District.[174]

The district court found in favor of the Hollands, and the School District appealed to the Court of Appeals for the Ninth Circuit.[175] Although the Ninth Circuit could not determine an appropriate placement for Rachel after hearing the appeal, the court found that the determination the district court made was in compliance with the requirements set forth in IDEA based on the four-factored balancing test articulated in the district court's holding.[176] Rachel's placement in the general education classroom was affirmed.[177]

While many professionals in various school districts may find Rachel's placement determination controversial, the clarity in the balancing test employed in *Rachel H.* is a substantial improvement to having an elusive test with no concrete factors to apply uniformly.

VII. APPLICATION OF THE *RACHEL H.* TEST

The *Rachel H.* balancing test, promulgated in 1994, is a significant benchmark in special education law because it provides a clear list of tangible factors the IEP team can measure using objective data.[178] In a span of twenty years, the *Rachel H.* test is still a guideline for school districts and parents to utilize during IEP meetings within the jurisdiction of the Ninth Circuit.[179] Hence the rationale of why, the Eleventh Circuit, and its requisite school districts, should consider adopting a test that mirrors the *Rachel H.* four-factored balancing test.[180]

As an example of the how the *Rachel H.* test is applied, it is recommended to look at cases that abide by the four factors.[181] In *Yates v. Washoe County School District*, District Court for the District of Nevada applied the four factors of the *Rachel H.* test and held that the student, Stevie Yates, received a free and appropriate public education in the least restrictive environment by spending part of the day in a resource room for mathematics, and the remaining part of the day with his nondisabled peers in the general education classroom.[182]

173. *Id.* at 1401–02.
174. *Id.* at 1402.
175. *See Rachel H.*, 14 F.3d at 1402.
176. *Id.* at 1403, 1405.
177. *Id.* at 1405.
178. *Id.* at 1400–01, 1404.
179. *See* Yates v. Washoe Cnty. Sch. Dist., No. 03:07-CV-00200-LRH-RJJ, 2008 WL 4106816, at *4 (D. Nev. Aug. 28, 2008) (citing *Rachel H.*, 14 F.3d at 1400–01, 1404); *see also* C.L. v. Lucia Mar Unified Sch. Dist., No. CV 12-9713 CAS (PJWx), 2014 WL 117339, at *13 (C.D. Cal. Jan. 9, 2014) (citing *Rachel H.*, 14 F.3d at 1400–01, 1404) (applying the *Rachel H.* test to determine the amount of time C.L. spent in the general education classroom versus the special education classroom was compliant with the mandates under IDEA because C.L. receives a more meaningful, academic benefit in a smaller, more structured setting, than he does in a larger setting, where he is disruptive to his nondisabled peers).
180. *Rachel H.*, 14 F.3d at 1400–01, 1404.
181. *See id.*
182. *See* Yates v. Washoe Cnty. Sch. Dist., No. 03:07-CV-00200-LRH-RJJ, 2008 WL 4106816, at *4, *6 (D. Nev. Aug. 28, 2008) (citing *Rachel H.*, 14 F.3d at 1400–01, 1404).

However, the plaintiffs, which included Stevie's guardian ad litem and his parents, contended that Stevie did not receive a free and appropriate education in the least restrictive environment at Reno High School when he was removed from the general education classroom and moved to a special education classroom for further instruction in mathematics.[183] As a result, a civil action commenced after the plaintiffs exhausted their procedural remedies under IDEA.[184]

Stevie, a student that suffered from autism and apraxia—a motor disorder that inhibits speech—used technological devices to communicate; and over time, Stevie made progress articulating his thoughts to his teachers and peers via the technological devices.[185] Despite Stevie's progress with communicating to others, he was still functioning at a below-average cognitive level for his age; and therefore, Stevie would graduate with a special education diploma.[186]

During the 2004–05 school year, Stevie spent about eighty-eight percent of the school day in the general education classroom, where he accomplished some of his objectives and showed progress towards meeting his other goals, as set forth in his 2004–05 IEP.[187] Stevie's progress for that school year was measured through quarterly specialized progress reports, district report cards, and a communication log from Stevie's assistant.[188] Stevie's 2005–06 IEP was relatively the same as his 2004–05 IEP, except that Stevie would receive English instruction in the special education classroom because of his inability to receive a meaningful benefit in the general education classroom.[189]

However, controversy arose during the IEP team's annual meeting held on April 5, 2006, when discussing new goals for Stevie in his proposed IEP for the 2006–07 school year.[190] The Washoe County School District suggested, using data from Stevie's most recent progress reports, that it would academically benefit Stevie if he spent sixty percent of the school day in the general education classroom, as opposed to the eighty-eight percent of the school day Stevie was currently spending in the general education classroom.[191] With this newly proposed IEP, Stevie would receive mathematics instruction, English instruction, and vocational instruction in the special education classroom for forty percent of the school day, and then spend the remaining sixty percent of the school day in the general education classroom.[192] The plaintiffs rejected this proposed IEP for the 2006–07 school year and filed a due process complaint with the Hearing Officer.[193]

Ultimately, the Hearing Officer agreed with the School District, and found that in addition to English instruction and vocational instruction, mathematics

183. *Id.* at *1–2.
184. *See id.* at *1.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Yates*, 2008 WL 4106816, at *1.
189. *Id.*
190. *See id.* at *1–2.
191. *Id.* at *2.
192. *Id.*
193. *Id.*

instruction in a special education classroom would provide Stevie with more of a meaningful, academic benefit than the general education classroom, and this new placement would still remain compliant with the LRE requirement under IDEA.[194] The plaintiffs appealed the Hearing Officer's determination; yet, the State Review Officer affirmed Stevie's new placement for mathematics instruction using the *Rachel H.* four-factored balancing test.[195] Not surprisingly, the plaintiffs appealed the State Review Officer's decision to the District Court of Nevada, still claiming that this new placement violates Stevie's free and appropriate education in the least restrictive environment under IDEA.[196]

In order to determine whether Stevie's new placement for mathematics in the special education classroom was appropriate and in compliance with IDEA, the court applied the *Rachel H.* four-factored balancing test.[197] Under the first prong, the court considered "the educational benefits of placement full-time in a regular class."[198] Based on this first prong, the court also agreed that Stevie would receive a more meaningful benefit in the special education classroom for mathematics instruction than in the general education classroom.[199] This determination came from the School District's autism specialist, Jill Barlow, who was assigned to Stevie; and she testified that Stevie had not made any meaningful improvements in mathematics during the time when mathematics instruction was held in the general education classroom in the preceding school years.[200] In addition, Barlow recommended that Stevie would gain more of an academic benefit in mathematics if he were in a "smaller setting . . . [receiving] verbal instruction from an adult."[201]

Under the second prong of the *Rachel H.* four-factored test, the court considered "the non-academic benefits of such a placement [Stevie would receive in the general education classroom]."[202] In *Yates*, the court did not weigh this specific factor as heavily as the other four factors because Stevie still spent sixty percent of the school day in the general education classroom; and so Stevie was communicating with his nondisabled peers during this time frame when he was in the general education classroom.[203] Furthermore, the plaintiffs failed to provide evidence that Stevie was missing out on non-academic opportunities in the general education classroom when he left the class to attend mathematics instruction in the special education classroom.[204]

Under the third prong of the *Rachel H.* four-factored test, the Court considered "the effect [the student] had on the teacher and children in the regular class."[205]

194. *Yates*, 2008 WL 4106816, at *2.
195. *Id.* (citing Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., 14 F.3d 1398, 1400–01, 1404 (9th Cir. 1994)).
196. *Id.*
197. *Id.* at *4 (citing *Rachel H.*, 14 F.3d at 1403–04).
198. *Id.* (quoting *Rachel H.*, 14 F.3d at 1400–01, 1404).
199. *Id.* at *5.
200. *Yates*, 2008 WL 4106816, at *5.
201. *Id.*
202. *Id.* at *3, *5 (quoting *Rachel H.*, 14 F.3d at 1400–01, 1404).
203. *Id.* at *5.
204. *Id.*
205. *Id.* at *3, *5 (quoting *Rachel H.*, 14 F.3d at 1400–01, 1404).

Here, the court found that Stevie's presence in the general education classroom during mathematics instruction was distracting to his nondisabled peers because Stevie required direct instruction from an adult separate from the teacher.[206] This intensive instruction, necessary for Stevie to obtain his mathematics skills, was disruptive to the general education classroom, a place for serious learning to occur.[207]

In *Yates*, the court did not consider the final factor of the *Rachel H.* balancing test, which is "the costs of mainstreaming [the student]" because it was not applicable to the facts in the case.[208] Nevertheless, by using the straightforward guidelines of the *Rachel H.* four-factored test, IEP meetings will be more predictable and run smoother if objective data that meets each prong of the four-factored test can be clearly shown.[209]

VIII. CONCLUSION

Special education classes are helpful solutions that give students with disabilities the individual assistance they need to progress academically and build lifelong skills.[210] They are also a place where students can receive an educational curriculum catered to their unique needs, thereby meeting the "free and appropriate" requirement under IDEA.[211] Although the special education classroom is not in the "least restrictive environment" as per the second requirement under IDEA,[212] perhaps it is time for lawmakers and parents to realize that students with disabilities may progress better, academically and non-academically, in a more restrictive environment. The perceptions that "inclusion" will cure or improve the disabled student via imitation of the student's nondisabled peers, or that the special education room is an inferior placement, are not only erroneous, but are creating problems for educators, disabled students, and nondisabled students, as serious learning in the public school system is not taking place.[213] Additionally, as the needs of the disabled students and nondisabled students conflict, the presumption that inclusion is best for disabled students is not fully addressing the particular educational needs of either type of student.[214]

In order to improve this dilemma, the Eleventh Circuit should adopt a standardized test for the lower courts to adhere. A uniform list of components, measured by using data, is a solution that will enhance cohesiveness between school personnel and the parents of disabled students during IEP meetings.[215] A list

206. *Yates*, 2008 WL 4106816, at *5–6.
207. *Id.* at *6.
208. *Id.* at *4 (quoting *Rachel H.*, 14 F.3d at 1400–01, 1404).
209. *Rachel H.*, 14 F.3d at 1400–01, 1404.
210. *See* Dupre, *supra* note 23, at 828–29.
211. *See* 20 U.S.C.A. § 1412(a)(1)(A) (West 2005).
212. *See* § 1412(a)(5)(A).
213. *See* Dupre, *supra* note 23, at 819–20.
214. *See* Roberts, *supra* note 14, at 1072.
215. *See* Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., 14 F.3d 1398, 1400–01, 1404 (9th Cir. 1994).

of measurable factors will also objectively place students with disabilities in a classroom where the student would receive meaningful educational benefits, as opposed to a classroom where the student is arranged to have unattainable goals. If school districts and parents really worked for the best interest of the student during the IEP meeting, and placed students together based on their compatibility needs, then all students would increase their academic benefits without compromising the serious learning that must take place in the public school system.[216]

216. *See* Roberts, *supra* note 14, at 1090.