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DISABILITY AND THE PUBLIC SCHOOLS: THE CASE AGAINST "INCLUSION"

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Abstract: The Individuals with Disabilities Education Act (IDEA) requires states that wish to qualify for federal assistance to demonstrate that they have a policy ensuring all children with disabilities the right to a "free appropriate public education." IDEA also requires that disabled children be educated with nondisabled children "to the maximum extent appropriate." This Article focuses on the tension between IDEA's mandates for appropriate education and integration to the maximum extent appropriate. Advocates of full inclusion claim that, under IDEA, all disabled children—regardless of characteristics—must be placed in the general education classroom for the entire day. Many courts have tacitly accepted some of the premises of full inclusion advocates. In fact, some courts have strongly suggested that the purported social benefits of inclusion can be more important than either the academic achievement of the disabled child or the cost to the learning environment in the general classroom. This Article explains how the courts have erred in their analyses of the statute, and illustrates how some of the critiques that have been set forth in the education literature relate to the inclusion inquiry. The Article then discusses the critique of the racial integration model, a point of view that has been largely ignored by full inclusion advocates and the courts that have accepted their premises. Finally, the Article contends that in a community of learning such as the public school classroom, the primary objective must be to impart a serious education to all students.

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I. INTRODUCTION

Congress has created two categories of students in the public schools—those who are entitled under federal statute to receive a free appropriate education in the least restrictive environment and those who are not. When Congress passed the Education for All Handicapped Children Act (EAHCA)[1] in 1975, one educator predicted that the statute would "change the American public school system more drastically than the 1954 Supreme Court ruling on desegregation."[2] The statute, now

1. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1401–1461 (1976)).

2. National Sch. Pub. Relations Ass'n, *Educating All the Handicapped* 61 (1977) (quoting Careth Ellingson, educator, and referring to Brown v. Board of Educ., 347 U.S. 483, 493 (1954)). When President Ford signed EAHCA into law he stated, "Unfortunately, this bill promises more than the federal government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains." *Id.* at 6. *But see* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. Davis L. Rev. 349, 435–36 n.400 (1990) (claiming that although EAHCA is "radical" statute that called for major shift in resources, it does not threaten balance of economic power as did Wagner Act, nor does it threaten balance of economic and electoral power as did Reconstruction Civil Rights Acts).

called the Individuals with Disabilities Education Act (IDEA),[3] has indeed had a profound effect on the public schools. Without a doubt, many of the changes resulting from the passage of IDEA have been beneficial to disabled and nondisabled students alike. When Congress passed this legislation in 1975, there was a legitimate and serious concern that many students with special needs had been denied the opportunity for education in many of the nation's public schools.[4] Congress thus required any state that wished to qualify for federal special education financial assistance to demonstrate that it had a policy in effect that "assures all children with disabilities the right to a free appropriate public education."[5] This Article does not question either the legitimacy of those concerns or the sincerity of the legislation passed to correct the problem. It does question, however, as do a number of educators and researchers, both the direct and indirect costs of complying with Congress's mandate.

One cost of IDEA is the financial obligation it has placed on local school districts.[6] In the years since IDEA was passed, local public school districts have struggled to allocate the scarce dollar resources available for classroom instruction to meet the needs of disabled students who have the statutory right to a free appropriate education, without depriving nondisabled students who lack this federal guarantee.[7] But as spending on special education has soared, spending on general education has not kept pace.[8] For example, one city reported that providing aides and therapists for special education students resulted in a $25,000 annual per-

3. Pub. L. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400–1491 (1994)). Many cases discussed herein were decided under EAHCA. Nevertheless, EAHCA "remains the foundation for IDEA," and those cases are still guiding precedent for interpretations of issues in IDEA. Heldman v. Sobol, 962 F.2d 148, 150 n.1 (2d Cir. 1992). In this Article, the statute is referred to as IDEA or the Act. Congress recently amended IDEA. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, 111 Stat. 37 (to be codified at 20 U.S.C. § 1400 *et seq.*). Because the amendments were passed after the completion of this Article, they are not discussed herein.

4. 20 U.S.C. § 1400(b)(3) (finding that "more than half of the children with disabilities in the United States do not receive appropriate educational services . . . ").

5. 20 U.S.C. § 1412(1).

6. *See, e.g.*, Richard Whitmire, *Special Ed: Is the Price Too High?*, USA Today, June 17, 1996, at 6D (revealing soaring cost of special education). The federal government was to have paid 40% of the special education budget, but pays only six percent. *Id.*

7. 20 U.S.C. § 1400(c).

8. Whitmire, *supra* note 6 (reporting study of Council for Educational Development). In 1993, per-pupil costs for special education were 2.3 times the cost of regular education. Stephen Chaikind et al., *What Do We Know About the Cost of Special Education? A Selected Review*, 26 J. Special Educ. 344, 345 (1993).

pupil expenditure for disabled students, while the annual per-pupil expenditure for general education students was $5611.[9] Indeed, the federal courts determined that IDEA required taxpayers in the school district where I live—Clarke County, Georgia—to pay the tuition of one autistic boy who was sent to a private school in Japan to obtain an "appropriate" education.[10] The cost to taxpayers also may include the cost of family trips to visit the child.[11] Even those students who are expelled from school for severe behavior unrelated to their disabilities may be entitled to continue receiving educational services such as a home tutor at the taxpayer's expense.[12] The costs to schools as they attempt to comply with IDEA—including the litigation costs from lawsuits by parents challenging the school's treatment of their child—can be daunting.[13]

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9. Whitmire, *supra* note 6 (referring to Dayton, Ohio); *see also* Sam Dillon, *Special Education Absorbs School Resources*, N.Y. Times, Apr. 7, 1994, at B5 (explaining that in New York City, average annual cost per special education child is $19,208, whereas average annual cost per child is $6394).

10. Drew P. v. Clarke County Sch. Dist., 877 F.2d 927 (11th Cir. 1989). The "autistic and severely mentally retarded" boy sued the school district through his parents and next friends and was awarded "$42,637.00, representing tuition, school fees and uniform fees paid [by his parents] for [his] placement in the residential facilities in Tokyo and Boston." *Id.* at 928–29. The average per-pupil expenditures on public school students in Georgia in 1992–93 was $4636. *See* U.S. Dep't of Educ., *Digest of Educ. Statistics* 1, 174 tbl.164 (1995). The average per-pupil expenditure in the United States in the same time period was $5594. *Id. See generally* Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984) (determining $88,000 per year program was only program appropriate for child); T.G. v. Board of Educ., 576 F. Supp. 420 (D.N.J. 1983) (requiring school district to pay for psychotherapy services for one child totaling over $25,000); *60 Minutes: Special Education—Moneys Spent on Special Education Students Funds Are Decreased* (CBS television broadcast, June 9, 1996) (recounting that severely disabled boy was sent to special private school at cost of $100,000 per year).

11. Sam Allis, *The Struggle to Pay for Special Ed*, Time, Nov. 4, 1996, at 82 (discussing how annual cost to school district of sending autistic South Dakota boy to private school in Connecticut—including eight trips per year for his family to visit him—reached $125,000 per year; one quarter of 80% increase in school budget accounted for boy's special education needs, causing 55% increase in property taxes).

12. Thomas F. Guernsey & Kathe Klare, *Special Education Law* 138–39 (1993) (noting that courts are split as to whether obligation exists to provide alternative educational programming during disciplinary suspension). *But see* Virginia v. Riley, 106 F.3d 559, 561 (4th Cir. 1997). The court stated:

> [IDEA does not] condition the receipt of IDEA funding on the continued provision of educational services to disabled students who are expelled or suspended long-term due to serious misconduct wholly unrelated to their disabilities, and the United States Department of Education was without authority to condition the Commonwealth of Virginia's receipt of IDEA funding on the continued provision of free education to such students.

Id.

13. A study of trends in education law reveals that lawsuits charging discrimination against special education students are on the rise. *See generally* Robert Hanley, *A Test Case for Special*

Apart from matters of financial cost, much discussion has focused on the effect of IDEA upon the placement of disabled students. The most hotly debated issue among educators today—an issue that has bewildered both the schools and the courts—is IDEA's requirement that disabled children must be educated with nondisabled students "to the maximum extent appropriate."[14] This statutory requirement resulted, first, in a push for "mainstreaming." Under this model, a disabled child's primary placement is in a separate special education class, but the child is "mainstreamed" in a general education class for part of the day.[15] The mainstreaming concept has changed into what is now termed "inclusion."[16] Under the inclusion model, the disabled child is placed in the general education classroom for the entire day.[17] In the early 1980s, the concept of inclusion took on a life of its own as advocates of "full inclusion" argued that all disabled children—regardless of characteristics—must be placed in the general education classroom "for all of the school day in every school setting, preschool through high

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Education Rights, N.Y. Times, Feb. 18, 1996, at A18. Moreover, at least one court has held that, in addition to the attorneys fees allowed by the statute, *see* 20 U.S.C. § 1415(e)(4)(B) (1994), a school district that violates the rights of students with disabilities may be liable for compensatory damages. *See* W.B. v. Matula, 67 F.3d 484, 495 (3d Cir. 1995); *see also* Hanley, *supra* (describing case where court awarded $15,000 in damages against teacher of disabled child who gave child written test although child was entitled to oral test).

14. 20 U.S.C. § 1412(5)(B) (1994). *See* Dixie S. Huefner, *The Mainstreaming Cases: Tensions and Trends for School Administrators*, 30 Educ. Admin. Q. 27 (1994) (stating that of all legal issues arising out of IDEA, "none is thornier" than issue of when disabled child must be placed in regular education classroom); Daniel H. Melvin, *The Desegregation of Children with Disabilities*, 44 DePaul L. Rev. 599, 601 (1995) (noting "intense national debate" about inclusion); *cf.* Michael A. Rebell & Robert L. Hughes, *Special Education Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & Educ. 523, 549 (1996) (calling inclusion "the most unsettled and unsettling [legal] issue") (quoting Elena M Gallagos, *Beyond* Board of Educ. v. Rowley: *Educational Benefit for the Handicapped?*, 97 Am. J. Educ. 258, 283 (1989)); Albert Shanker, *Inclusion and Ideology*, 24 Exceptional Parent, Sept. 1994, at 39 (stating that "rush towards full inclusion" is likely to have "most profound—and most destructive—effect" on American education).

15. Board of Educ. v. Holland, 786 F. Supp. 874, 878 n.6 (E.D. Cal. 1992), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

16. Although some courts continue to use the term "mainstreaming," this term is not generally favored by educators and has been virtually replaced by the term "inclusion." *See, e.g.*, Mavis v. Sobol, 839 F. Supp. 968, 971 n.7 (N.D.N.Y. 1993) (noting preference in some educational circles for use of term "inclusion" instead of "mainstreaming"); *see also* Rebell & Hughes, *supra* note 14, at 525 (noting evolution of full inclusion). For consistency's sake, this Article uses the term "inclusion."

17. Carol A. Kochar & Lynda L. West, *Handbook for Successful Inclusion* 4 (1996) (pointing out that although inclusion is defined in many ways by many organizations and individuals, it generally refers to "maximum integration of students with disabilities into general classrooms or the increase in numbers and proportions of students who receive special services while attending general education classes") (citations omitted).

school."[18] Supporters of the full inclusion movement claim that separating disabled children by placing them in special education classrooms stigmatizes and deprives disabled students of appropriate nondisabled models.[19] These advocates compare the movement to include disabled students in the general education classroom to the movement for racial integration in the public schools.[20]

To address the placement of disabled students, IDEA sets forth affirmative substantive rights and detailed procedural rights.[21] In particular, IDEA allows parents who want their disabled child to be included to bring a lawsuit in federal or state court if school officials refuse to place the child in a general classroom for the entire school day.[22] The courts that have addressed the issue, primarily the federal circuit courts of appeals, have established a number of divergent tests to determine whether the statutory requirement of IDEA—to educate the disabled child with children who are not disabled to the maximum extent appropriate—has been met.[23] In developing these tests, some courts have tacitly accepted the premises of the full inclusion advocates and have suggested that the purported social benefits of inclusion can be more important than either the academic achievement of the disabled child or

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18. James McLeskey & Nancy Waldron, *Responses to Questions Teachers and Administrators Frequently Ask About Inclusive School Programs*, 78 Phi Delta Kappan 150, 152 (1996); *see* Claudine Sherrill, *Least Restrictive Environment and Total Inclusion Philosophies: Critical Analysis*, Palaestra, Spring 1994, at 25, 28 (noting that meaning of inclusion has broadened from early usage as specific placement or option to "independent status as a separate philosophy"); *see also* Janice M. Baker & Naomi Zigmond, *The Meaning and Practice of Inclusion for Students with Learning Disabilities: Themes from the Five Cases*, 29 J. Special Educ. 163 (1995) (noting that focus for students with learning disabilities has "shifted from an emphasis on *what* and *how* to teach to an emphasis on *where* to teach"); Betty A. Hallenbeck & James Kauffman, *How Does Observational Learning Affect the Behavior of Students with Emotional or Behavior Disorders?*, 29 J. Special Educ. 45 (1995) ("Special education reformers suggest that all students with disabilities—including those with emotional or behavioral disorders—should be placed in their neighborhood schools and in regular classes."). Not all advocates for the disabled support the full inclusion movement. *See, e.g.*, Huefner, *supra* note 14, at 48–49 (noting that ARC (formerly Association for Retarded Citizens) has "been outspoken in support of full inclusion," but that Learning Disabilities Association of America and some educators of the deaf do not support full inclusion movement).

19. *See, e.g.*, Huefner, *supra* note 14, at 49 (citing language modeling and social interaction as primary reasons for inclusion).

20. *See, e.g.*, Daniel D. Sage & Leonard C. Burrello, *Policy and Management in Special Education* 39 (1986) (asserting that principles established in Brown v. Board of Educ., 347 U.S. 483 (1954), are applicable to "other discriminatory classifications," including classification of disabled); Weber, *supra* note 2, at 393 (noting "powerful analogy" to race cases).

21. *See infra* Part II.B.

22. *See infra* notes 67–73 and accompanying text.

23. *See infra* Part II.D for an examination of the tests that have been developed by the circuit courts.

the cost to the learning environment in the general classroom.[24] This Article questions that conclusion and the assumptions upon which it is based.

Ensuring that our nation's citizens obtain a "serious education"[25] is at the core of the constitutional project.[26] Citizens must be educated so they can recognize, appreciate, and preserve the individual constitutional rights that are guaranteed to them.[27] Education is "the very foundation of good citizenship."[28] Students must first obtain a serious education so that when they are adults they will be able to participate knowledgeably in democratic institutions.[29] Obtaining a serious education, then, is perhaps the essential prerequisite to liberty.[30] It involves hard work, and it requires discipline of self and discipline of others, so that an environment will exist where serious learning can take place.[31] The position taken by

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24. *See infra* Part II.D.1.

25. Anne P. Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 Geo. Wash. L. Rev. 49, 98 (1996) (defining "serious education"); *see also infra* notes 206–13, 396 and accompanying text.

26. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring in part and concurring in the judgment) ("Indeed, the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs . . . ."); J. Tussman, *Government and the Mind* 54 (1977) (describing "teaching power" as inherent constitutional authority of state to establish and direct teaching activity and institutions needed to ensure continuity and further legitimate, general, and special purposes).

27. "[I]f free speech is to be meaningful, a citizen must have something worth saying, together with the maturity and the skill needed to say it." Dupre, *supra* note 25, at 97 (quoting Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 Ohio St. L.J. 663, 666 (1987)); *see also* Plyler v. Doe, 457 U.S. 202, 221 (1982) (noting "pivotal role of education in sustaining our political and cultural heritage"); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (recognizing role of public schools in "inculcating fundamental values necessary to the maintenance of a democratic political system").

28. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). As Professor Suzanna Sherry has stated, "[A] republican citizen needs an education that will enable her to exercise both the rights and responsibilities of citizenship." Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 132 (1995).

29. *See* Dupre, *supra* note 25, at 97–98 (writing that without serious education, citizen is left without necessary tools to challenge both government tyranny and tyranny of demagogues); *see also* Sherry, *supra* note 28, at 132 ("[E]ducation is necessary to the thoughtful or responsible exercise of citizenship rights."); *cf.* John Dayton & Carl Glickman, *American Constitutional Democracy: Implications for Public School Curriculum Development*, 69 Peabody J. Educ. 62, 63 (1994) (pointing out irony that public schools are facing challenges to their very existence at time when cohesive bond of school—"[the] vital public institution necessary to the perpetuation of a free and democratic nation"—is most needed).

30. *See* Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. Cal. L. Rev. 1671, 1697 (1990) ("The extent to which we take the commitment to democracy seriously is measured by the extent to which we take the commitment to education seriously.").

31. Dupre, *supra* note 25, at 98.

many of the courts that have addressed inclusion—that academic progress is less important than academic placement—does not allow schools to create an environment where serious learning will consistently occur for either the disabled or the nondisabled child. It is this erosion of the community of learning—for the disabled and nondisabled alike—that is the focus of this Article.

Part II provides an overview of the legal history of education for disabled children, describes the federal statutory scheme for students with disabilities, traces the development of the inclusion movement, and describes the judicial responses. Part III argues that the courts have erred in elevating inclusion over academic progress. Contrary to the suggestion by some courts of appeals, IDEA itself recognizes that educational progress for the disabled child is more important than educational placement. To claim otherwise defeats the primary mission of the public schools—the academic training of students—which includes preparing the young for life as adults "in our increasingly complex society and for the duties of citizenship in our democratic Republic."[32] For the disabled child in particular, education and training may make the difference between a life of dependency and a life as a productive citizen.

Part IV unravels the premise that underlies the inclusion crusade. The inclusion movement, often compared to the civil rights movement for racial equality, is founded on the belief that separating children because of difference causes harm, a harm that can be cured only by exposure to other children who are of the mainstream.[33] To illustrate the potential perniciousness of this premise, Part IV examines inclusion through the lens of a theory set forth by some scholars and commentators—a critique that has been largely ignored by disability inclusion advocates and the courts that have accepted their premises.[34] These scholars claim that the premises upon which the racial integration model is based—the same premises upon which the inclusion model is based—are seriously flawed and that they have been harmful to African American students. Examining the premises that sustain the disability inclusion movement through the prism presented by these critiques adds a new perspective to the inclusion debate.

Part V addresses the direct and indirect costs of inclusion to the community of learning in the regular classroom. Specifically, Part V

32. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting).

33. *See infra* notes 242–45 and accompanying text.

34. My focus here is on the political and social claim by some scholars that the civil rights movement failed to improve the status of African Americans in significant measure.

addresses the possibility that inclusion of a disabled child may interfere with the academic achievement of nondisabled students by disrupting classroom activities, by distracting other students from the task at hand, or by requiring a disproportionate amount of the teacher's time and energy. This Part concludes that many courts have set a standard for inclusion that would allow too much interference with the learning process of the nondisabled child. Finally, Part V reveals how the courts have failed to consider how the aggregate direct economic costs in resources, including the aids and services required to implement inclusion, will affect the academic educational enterprise for all students.

The Article ultimately concludes that the courts that have uncritically, albeit tacitly, accepted some of the premises of the full inclusionists should reconsider their position and refocus attention on the academic mission of the public schools. IDEA calls for a rational consideration of placement decisions on a case-by-case basis. "Full inclusion" is not required by IDEA.[35] In fact, full inclusion most likely violates IDEA because it fails to give each disabled child an educational program that meets his or her unique needs, thus depriving the child of the free appropriate public education that the statute requires. Under the terms of the statute, courts can and should elevate academic achievement over academic setting. In addition, Congress should revisit IDEA to make explicit what a logical reading of the statute already assumes: that no student—disabled or nondisabled—may interfere with another student's opportunity to obtain an appropriate education or inhibit the progress of the collective education enterprise.

II. THE ROAD FROM EXCLUSION TO INCLUSION

A. The History of Exclusion

Educating the disabled in the public schools was considered a matter of little importance until the latter half of the twentieth century.[36] A number of state statutes permitted public schools to exclude disabled children altogether if school officials determined that the child would not benefit from public education or would disrupt the classroom.[37] In one

35. *See supra* notes 179–205 and accompanying text.

36. *See generally* Philip T.K. Daniel & Karen B. Coriell, *Traversing the Sisyphean Trails of the Education for All Handicapped Children Act: An Overview*, 18 Ohio N.U. L. Rev. 571, 571–74 (1992) (describing history of special education).

37. *See generally* Richard C. Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 Ohio St. L.J. 349, 351 (1975) (discussing

state, if a school official had excluded a disabled child, parents who nonetheless insisted that the child attend school could be held criminally liable.[38]

Attitudes began to change in the second half of the twentieth century. New powerful antibiotics that became available for public use in the early 1950s helped control infection after surgical treatment.[39] Consequently, more children with severe disabilities survived early childhood.[40] As the population of the severely disabled increased, so did the need for social services.[41] The most common service option for the severely disabled at that time was institutionalization.[42]

During the 1960s, however, advocates for the disabled—with the civil rights movement for racial minorities as their guide—argued that the disabled, too, were a minority group that faced discrimination.[43] Following the lead of the racial civil rights movement, advocates for the disabled began the battle for civil rights in the federal courts. Again, like the racial civil rights movement, one of the first shots was fired at the school house.

Two landmark decisions, *Pennsylvania Ass'n for Retarded Children v. Commonwealth*[44] (*PARC*) and *Mills v. Board of Education*,[45] set the stage for the federal statute establishing the right to a free and appropriate education to children with disabilities. *PARC*, although a consent order, generally is considered the first "right to education case" regarding the disabled.[46] An association advocating rights for the disabled sued

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statutes); Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal For Change*, 27 U. Mich. J.L. Reform 331, 343 n.40 (1994) (citing statutes).

38. Act of May 18, 1965, ch. 584, 1965 N.C. Sess. Laws 641 (amending N.C. Gen. Stat. §§ 115–165 (1963)); *see also* Karen Sindelar, *How and Why the Law Has Failed: An Historical Analysis of Services for the Retarded in North Carolina and a Prescription for Change*, 48 Law & Contemp. Probs., Spring 1985, at 125.

The courts were no more sympathetic. Examples of court indifference include one early decision that upheld the expulsion of a child who was disruptive "either voluntarily or by reason of imbecility." Watson v. City of Cambridge, 32 N.E. 864, 865 (Mass. 1893). Another court determined that laws requiring compulsory education and setting up programs for "hand capped children" did not mandate the public education of a child who was mentally impaired. Department of Pub. Welfare v. Haas, 154 N.E.2d 265 (Ill. 1958).

39. Carole Murray-Seegert, *Nasty Girls, Thugs, and Humans Like Us* 17 (1989).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 21.

44. 343 F. Supp. 279 (E.D. Pa. 1972).

45. 348 F. Supp. 866 (D.D.C. 1972).

46. Mark G. Yudof et al., *Educational Policy and the Law* 718 (1992).

Pennsylvania on behalf of mentally retarded children who had been excluded from the state's public schools, assigned to inappropriate special education programs, or assigned to programs of questionable merit. The consent order required Pennsylvania to provide:

> a free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.[47]

The *Mills* court dealt with a class of students broader than that in *PARC*. The class included not only retarded children, but all disabled children excluded from public education. The *Mills* court determined that the Board of Education had violated the due process rights of disabled children by denying them a publicly supported education.[48] The court ordered that no child eligible for public education be excluded from regular public school assignment by rule, policy, or practice unless provided with "adequate alternative educational services suited to the child's needs" and with "a constitutionally adequate prior hearing."[49]

The decisions in *PARC* and *Mills* "spawned substantial popular and scholarly attention and similar lawsuits in more than thirty states."[50] Shortly thereafter, Congress enacted the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975.

B. The Statutory Response

The two federal statutory provisions that most affect the rights in education of children with disabilities are Section 504 of the Rehabilitation Act of 1973[51] and the Education for All Handicapped Children Act (EAHCA), passed in 1975.[52] EAHCA is now part of the

47. *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257, 1260 (E.D. Pa. 1971).

48. *Mills*, 348 F. Supp. at 875.

49. *Id.* at 878.

50. Yudof et al., *supra* note 46, at 719.

51. 29 U.S.C. § 794 (1994).

52. 20 U.S.C. §§ 1401–1461 (1976).

Individuals with Disabilities Education Act (IDEA).[53] Section 504 prohibits discrimination against individuals with disabilities in all programs receiving federal financial assistance.[54] Although Section 504's broad prohibition against discrimination includes public schools, it is not as detailed as IDEA, which specifies affirmative substantive and procedural rights for disabled children. In addition to the public school's duty to assure a free appropriate education, IDEA also requires that the disabled child be educated "to the maximum extent appropriate" with "children who are not disabled."[55] It is this provision in IDEA on which the inclusion movement and the judicial decisions have focused.

The cornerstone of the IDEA is its substantive requirement that to qualify for federal special education financial assistance under the Act, a state must demonstrate that it has a policy in effect that "assures all children with disabilities the right to a *free appropriate public education.*"[56] States must set forth a plan that has as its goal "full educational opportunity"[57] for disabled children. Schools must implement this plan by developing an "individualized educational program" (IEP) for each disabled child that contains instruction specially crafted to meet the unique needs of the child.[58] As interpreted by the

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53. Pub. L. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400–1491 (1994)).

54. "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794.

55. 20 U.S.C. § 1412(5)(B). Although section 504 does not have statutory language like that of IDEA, section 504 regulations require recipients of federal funds to educate children with disabilities with children without disabilities "to the maximum extent possible." 34 C.F.R. § 104.34 (1996). The IDEA regulations are found at 34 C.F.R. §§ 300.550–.556 (1996).

56. 20 U.S.C. § 1412(1) (emphasis added); *see also* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1043 (5th Cir. 1989) ("The cornerstone of [IDEA] is the 'free appropriate public education.'").

57. 20 U.S.C. § 1412(2)(A).

58. 20 U.S.C. § 1401(a)(20). The IEP is defined as a written statement developed annually for each child with a disability. It is developed in a meeting that must include the teacher, a representative of the public agency who is qualified to supervise or provide special education, the child's parents, and—whenever appropriate—the child. 20 U.S.C. § 1401(a)(20). The requirements for the IEP are specific and result in a detailed and lengthy document that must include the following:

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the educational instructional services to be provided to such child and the extent to which such child will be able to participate in regular educational programs, (D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting, (E) the projected date for initiation and anticipated duration of such services, and

courts, the most severely disabled children—even if profoundly mentally retarded and multiply disabled—are entitled to public school services and the free appropriate education guaranteed by the Act.[59]

The free appropriate education to which the disabled child is entitled includes (1) special education, which is defined as specially designed instruction, at no cost to parents to meet the unique needs of children with disabilities,[60] and (2) related services, which include a myriad of developmental, corrective, and other support services "as may be required to assist a child with a disability to benefit from special education."[61] IDEA requires education programming for all children aged three to twenty-one.[62] Further, its regulations require an annual review of the IEP to reconsider and revise the program, if appropriate.[63] Parents must receive prior notice of any change in the child's special education program.[64] If a disabled child will suffer "significant regression of skills or knowledge" during school vacation time, the public school may be required to provide an extended school day or an extended school year

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(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

20 U.S.C. § 1401(a)(20).

59. *See* Timothy W. v. Rochester Sch. Dist., 875 F.2d 954, 960 (1st Cir. 1989). The child in this case suffered from spastic quadriplegia, cerebral palsy, seizure disorder, and cortical blindness. *Id.* at 956. The school district proposed to offer no education because it claimed the child could not benefit from one. *Id.* One physician noted that the boy responded to sounds and recommended physical therapy and stimulation; another physician stated that the child had no educational potential. *Id.* The court determined that IDEA was intended to ensure that all children with disabilities receive a free appropriate education regardless of the severity of the disability. *Id.* at 960. The First Circuit remanded the case for the development of an appropriate individual education plan and for a determination of damages. *Id.* at 973.

60. 20 U.S.C. § 1401(a)(18).

61. 20 U.S.C. § 1401(a)(17). The services that a public school would be required to provide a disabled child include "speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only." 20 U.S.C. § 1401(a)(17). *See, e.g.*, Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 178 (3d Cir. 1988) (stating that school must provide fourteen-year-old, who was suffering from effects of encephalopathy and had mental and physical capacities of toddler, with services of licensed physical therapist).

62. 20 U.S.C. § 1412(2)(B).

63. 34 C.F.R. § 300.343 note (1996).

64. 34 C.F.R. § 300.504(a)(1). Changes in placement also are subject to the IEP requirements. *Id.*

for the disabled child.[65] If a disabled child's IEP determines that the child requires the structure of a residential program, the school district may be responsible for the entire cost of the residential program.[66]

In addition to the IEP meeting at which parents must participate, numerous other procedural protections permeate the Act.[67] Parents must receive written notice if a school proposes (or refuses) either to initiate or to change the educational placement of the child.[68] The school must provide the parents with an opportunity to present complaints relating to any matter respecting the child's educational placement.[69] If the parents' complaints are not resolved to their satisfaction, they are entitled to an impartial due process hearing before a hearing officer who is not employed by the school district or state education department.[70] If, after the hearing officer renders a decision, the parents still are not satisfied,

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65. *See* Cordrey v. Euckert, 917 F.2d 1460, 1470 (6th Cir. 1990) (quoting Rettig v. Kent City Sch. Dist., 539 F. Supp. 768, 778 (N.D. Ohio 1981) (noting potential of providing extended school year if necessary to permit child to benefit from instruction)); *see also* Battle v. Pennsylvania, 629 F.2d 269, 280 (3d Cir. 1980) (stating that state administrative policy setting a limit of 180 days of instruction per year for all children was incompatible with IDEA requirement of free appropriate education).

66. *See* McKenzie v. Smith, 771 F.2d 1527, 1534 (D.C. Cir. 1985); Kruelle v. New Castle County Sch. Dist., 642 F.2d 687 (3d Cir. 1981). Schools may not be required to pay for medical treatment that is not considered a "related service," *see* Field v. Haddonfield Bd. of Educ., 769 F. Supp. 1313, 1329 (D.N.J. 1991) (drug treatment program not related service), but schools are required to pay for transportation to residential placements, *see* Taylor v. Board of Educ., 649 F. Supp. 1253, 1259 (N.D.N.Y. 1986), and may be required to provide transportation to an after-school caretaker, even if the after-school caretaker is outside the school district, *see* Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 (5th Cir. 1986).

67. For an examination of the struggle to define the roles of parent and educator under IDEA, see David M. Engel, Essay, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 169. Professor Engel concludes that IDEA's "goal of creating a partnership has clashed repeatedly with community-level norms and expectations." *Id.* at 169.

This trend toward procedural rights coincided with the general trend during the same period that IDEA was enacted toward the use of procedural guarantees as a constraint on government agencies. *See* Richard J. Pierce Jr., *The Due Process Counterrevolution of the 1990s?*, 96 Colum. L. Rev. 1973, 1974–84 (1997).

68. 20 U.S.C. § 1415(b)(1)(C) (1994). Some states have established procedures parallel to those of IDEA to ensure that its requirements are met. *Compare* 20 U.S.C. §§ 1400–1415 (1994) *with, e.g.*, 105 Ill. Comp. Stat. 5/14-1.02, 5/14-8.02 (West 1993 & Supp. 1996). This Article addresses only the requirements of the federal statute.

69. 20 U.S.C. § 1415(b)(1)(E).

70. 20 U.S.C. § 1415(b)(2). Parents must receive an opportunity "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child" and "to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1)(A). At the hearing, parents have the right to counsel; the right to present evidence; the right to confront, cross-examine, and compel attendance of witnesses; the right to a written or electronic record of the proceedings; and the right to written findings of fact and decisions. 20 U.S.C. § 1415(d).

they may appeal and receive a hearing at the state educational agency, which must also conduct an impartial review of the first hearing.[71] If the parents still are not satisfied after the state educational agency has reached a final decision, a lawsuit may be commenced in either state court or federal district court.[72] If the parents prevail, the courts may award them attorneys fees.[73]

IDEA thus recognizes the singular demands that a disabled child may make in the educational setting:

> At the heart of IDEA's "individualized education program" provision is the idea that each disabled child's particular needs are unique and thus require an educational program specifically tailored to a child's particular disability. Courts have viewed the failure to provide a program specifically designed to meet the unique needs of a child as a failure to provide a free appropriate education.[74]

The U.S. Supreme Court has determined, however, that school districts are not *required* under the statute to maximize the potential of disabled children.[75] The Court stated that the intent of the Act was "to

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71. 20 U.S.C. § 1415(c).

72. 20 U.S.C. § 1415(e)(2). The statute provides that the court shall "receive the records of the administrative proceeding, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

73. 20 U.S.C. § 1415(e)(4)(B); *see also* David Neal & David Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, in *School Days, Rule Days: The Legalization and Regulation of Education* 343, 358–59 (David Kirp & Donald Jensen eds., 1986) (examining costs of placing parents and schools in conflict and suggesting use of alternative dispute resolution techniques).

74. *Students With Disabilities and Special Education* 16 (Data Research, Inc. ed., 1993). "The majority of due process hearings have dealt with parent requests for more restrictive (usually private) placements than those proposed by school personnel." Sage & Burello, *supra* note 20, at 56; *see, e.g.*, Board of Educ. v. Illinois Bd. of Educ., 41 F.3d 1162, 1165 (7th Cir. 1994) (parents claiming that modeling nondisabled students was less important than child's language skills and objecting to school's determination that child should be placed in integrated environment); G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 948 (1st Cir. 1991) (parents arguing for more restrictive placement); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 989 (1st Cir. 1990) (parents demanding that child be placed in residential program, rather than self-contained classroom for learning disabled in public school); Mather v. Hartford Sch. Dist., 928 F. Supp. 437, 439 (D. Vt. 1996) (parents arguing for residential placement for child and challenging IEP that provided that child would receive most of his education in mainstream classes supplemented by individual attention in resource room); Gladys J. v. Pearland Indep. Sch. Dist., 520 F. Supp. 869, 879 (S.D. Tex. 1981) (parent claiming that school district's placement in less restrictive self-contained day program inappropriate, and court ordering residential placement).

75. *See* Board of Educ. v. Rowley, 458 U.S. 176, 198 (1982). In this case, the parents of a deaf eight-year-old disputed a part of their daughter's IEP. Amy, an excellent lipreader, was placed in a

open the door of public education"[76] to disabled children and that "Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education."[77] A State has met the statutory requirement of providing a free appropriate education "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[78]

IDEA also requires—and this is the section on which the full inclusion advocates focus—the state to provide procedures that ensure that children with disabilities are educated "to the maximum extent appropriate" with children who are not disabled.[79] Removal of a disabled child from the regular classroom should occur "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[80] IDEA does not provide any guidance on how to strike the proper balance between its requirements that the disabled child receive an "appropriate education"[81] and that the disabled child be educated "to the maximum extent appropriate"[82] with nondisabled children. The next section describes how the disability inclusion movement has evolved and how its proponents would strike that balance.

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regular kindergarten program, a placement with which the parents agreed, and she was provided with a hearing aid that amplified words spoken into a wireless receiver. Though Amy successfully completed her kindergarten year, her parents insisted that she be provided with a sign-language interpreter in all of her academic classes in the first grade. The school district and an interpreter who had been assigned to Amy for two weeks during the kindergarten year both agreed that Amy did not need the services of an interpreter at that time. The parents demanded and received a due process hearing when their request for an interpreter was denied, and the case eventually was heard by the United States Supreme Court.

76. *Id* at 192 ("The intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.").

77. *Id.* at 200.

78. *Id.* at 203.

79. 20 U.S.C. § 1412(5)(B) (1994). The regulations promulgated pursuant to IDEA refer to this provision as requiring the "least restrictive environment." 34 C.F.R. § 300.552 note (1996). Courts and commentators also refer to the "least restrictive environment." *See, e.g.*, County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458, 1468 (9th Cir. 1996) (noting that every effort must be made to place handicapped child in "least restrictive environment").

80. 20 U.S.C. § 1412(5)(B).

81. 20 U.S.C. § 1412(1).

82. 20 U.S.C. § 1412(5)(B).

C. *The Inclusion Movement*

The passage of IDEA solved the problem of excluding disabled students from educational services.[83] In fact, government reports show that few disabled students are now segregated in separate facilities. Although "proponents of total inclusion imply that many children are still in residential schools and other segregated facilities,"[84] the U.S. Department of Education reported in 1992 that ninety-three percent of students with disabilities receive their education in regular schools, with much of the remaining seven percent in residential placements because of parent demand.[85]

The call for full inclusion in the regular classroom for all students with disabilities did not commence immediately after the statute was passed. Rather, it emerged over time as its advocates began to question the idea of special placement for disabled students within regular schools. IDEA requires a continuum of alternative placements for children with disabilities that ranges from full-time placement in general classrooms to placement in residential schools or hospitals.[86] At first, arguments about placement centered on the social benefits that would occur when students with disabilities were moved from segregated special schools to regular schools where they could interact with nondisabled peers.[87] "Mainstreaming" was the term first used to describe the integration of children with disabilities into the regular classroom. As explained above, the *PARC* and *Mills* opinions were forces behind the initial passage of IDEA in 1975,[88] and they also greatly influenced the mainstreaming movement.[89] The *PARC* consent agreement stated that separate classes

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83. William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 Law & Contemp. Probs., Winter 1985, at 7, 52 ("[T]he most obvious and shocking problem with which the legislation was concerned—the complete exclusion of handicapped children from schools—was the most completely solved.").

84. Sherrill, *supra* note 18, at 28.

85. *Id.* (citing U.S. Dep't of Educ., *Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* 22 (1992)).

86. 20 U.S.C. § 1401(a)(16)(A) (1994).

87. Murray-Seegert, *supra* note 39, at 23.

88. *See* S. Rep. No. 94-168, at 6 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1430; *see also* Yudof et al., *supra* note 46, at 719–20; Stephen R. Goldstein et al., *Law and Public Education: Cases and Materials* 977 (3d ed. 1995) ("As a direct response to these cases," Congress passed several federal statutes, including the EAHCA, which later was renamed IDEA).

89. *See* Note, *Enforcing the Right to an "Appropriate Education": The Education for All Handicapped Children Act of 1975*, 93 Harv. L. Rev. 1103, 1120 (1979) (noting that concept of mainstreaming gained legal significance following consent decree in *PARC*).

give rise to social stigma and that placement in a regular public school class is "preferable to placement . . . in any other type of program."[90] Under the mainstreaming model, a disabled child's primary placement would be in a special education class, but the child would be mainstreamed in the general education class for part of the day.[91] The concept of education in the least restrictive environment was thus incorporated into IDEA.

Beginning in the 1980s, advocates of the full inclusion model built on this argument, and eventually completely shunned the special education classroom setting.[92] Some commentators believe that the inclusion movement had its origins in a 1986 article by Madeleine Will—then Assistant Secretary of Education—who described the limitations of educating children with learning disabilities in separate special classes and called for more effort from the regular education programs.[93] Others contend that the movement began years earlier when educators questioned the practice of educating the disabled, especially the mildly mentally retarded, in separate classes.[94] These reformers claimed that labeling a child and removing the child from the regular classroom stigmatized the child, a stigma that far outweighed the doubtful benefit of segregated classes.[95] But despite the problems they perceived with special classes, many reformers did not push for full inclusion of all disabled students. Rather, they argued for a "cascade" of services to

90. Pennsylvania Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257, 1260 (E.D. Pa. 1971).

91. *See* Martha M. McCarthy, *Inclusion of Children with Disabilities: Is It Required?*, 95 Educ. L. Rep. 823, 824 (1995).

92. *See* James M. Kauffman & Daniel P. Hallahan, *Full Inclusion in Historical Context*, in *The Illusion of Full Inclusion: A Comprehensive Critique of a Current Special Education Bandwagon* 3 (James M. Kauffman & Daniel P. Hallahan eds., 1995).

93. *See* Melvin, *supra* note 14, at 601–02 n.10 (referring to Madeleine C. Will, *Educating Children With Learning Problems: A Shared Responsibility*, 52 Exceptional Children 411 (1986)).

94. Some scholars assert that "two articles that were particularly influential in shaping advocacy for mainstreaming . . . and setting the course toward full inclusion" were written by Lloyd Dunn and Evelyn Deno. Kauffman & Hallahan, *Full Inclusion in Historical Context*, in *The Illusion of Full Inclusion*, *supra* note 92, at 4 (citing Lloyd Dunn, *Special Education for the Mildly Retarded—Is Much of it Justifiable?*, 35 Exceptional Children 5 (1968) and Evelyn Deno, *Special Education As Developmental Capital*, 37 Exceptional Children 229 (1970)); *see also* Murray-Seegert, *supra* note 39, at 22 (citing Dunn's article); Note, *Enforcing the Right*, *supra* note 89, at 1119 (same).

95. *See* Dunn, *supra* note 94, at 8–9. Another argument is that special classes were a way of maintaining racial segregation. *Id.* at 6–7.

accommodate the individual differences existing among children with disabilities.[96]

Many disabled students are currently included in regular and/or resource classrooms. By 1992, government reports showed that forty-three percent or more of all students in every disability category except mental retardation, multiple disabilities, and deaf-blindness had been placed in regular and/or resource classrooms.[97] Many inclusion advocates now propose that *all* students with disabilities should be placed in regular education classes.[98] As an outgrowth of a movement called the Regular Education Initiative, which began in the 1980s, full inclusion proponents claim that the combination of regular and special education classes "has created a dual educational system which is dysfunctional, ineffective, and excessively costly."[99] Advocates of full inclusion claim that the special education resource room as well as the special self-contained classroom is stigmatizing and segregationist.[100]

In addition, full inclusion advocates claim that placing the disabled child in a general education classroom setting will improve the behavior of the disabled child by providing the child with appropriate positive role models.[101] Those who oppose full inclusion claim that this "[i]deology backed by testimonial has led to advocacy for certain practices [like full inclusion] as being the panacea, with a blatant disregard for the individual differences inherent in the population classified as disabled or within any one of the disability categories."[102]

Despite the fact that the word "inclusion" does not appear anywhere in IDEA, many courts that have addressed IDEA's requirement that the disabled must be educated with the nondisabled "to the maximum extent

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96. *See* Deno, *supra* note 94, at 234–36 (describing "cascade of services" needed in special education).

97. *See* Sherrill, *supra* note 18, at 31 (citing U.S. Dep't of Educ., *Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* 25 (1992)). A resource classroom is defined as a model where the student is outside the regular class for 21% to 60% of the day, but included in the regular class at other times. *See id.* at 27.

98. *See supra* note 18 and accompanying text.

99. Ann M. Hocutt et al., *Historical and Legal Context of Mainstreaming*, in *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* 17 (John Wills Lloyd et al. eds., 1990).

100. James F. Kauffman & Daniel P. Hallahan, *From Mainstreaming to Collaborative Consultation*, in *The Illusion of Full Inclusion*, *supra* note 92, at 6.

101. Hallenbeck & Kauffman, *supra* note 18, at 46 (citing S. Stainback & W. Stainback, *Educating Children with Severe Maladaptive Behaviors* 62 (1980)).

102. Donald L. MacMillan et al., *The Social Context of Dunn: Then and Now*, 27 J. Special Educ. 466, 477 (1994).

appropriate"[103] have been greatly influenced by the arguments of full inclusion advocates.[104] The next section examines the snarled opinions that make up the jurisprudence of inclusion.

D. The Jurisprudence of Inclusion: Chaos in the Circuits

Congress has mandated that disabled children obtain a "free appropriate public education."[105] But Congress has also determined that disabled children should be educated with nondisabled children to the maximum extent appropriate and that a disabled child should be removed from the regular classroom "only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[106] It is the tension between the words "appropriate" that appear in these two different sections of IDEA that accounts for the chaotic state of the jurisprudence of inclusion.[107] Put simply, when determining the appropriate placement for a disabled child, the school is "damned if it does and damned if it doesn't." For example, the IEP committee from the child's school may assert that the child can receive an appropriate education in an environment comprised of varying degrees of segregation, ranging from a full-time segregated classroom to a part-time segregated classroom with integration for lunch, recess, gym, art, or music. Many parents institute due process hearings requesting a more restrictive environment claiming that their children will be unable to

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103. 20 U.S.C. § 1412(5)(B) (1994).

104. *See* McCarthy, *supra* note 91, at 826.

105. 20 U.S.C. § 1412(1) ("The state [must have] in effect a policy that assures all children with disabilities the right to a free appropriate public education.").

106. 20 U.S.C. § 1412(5)(B).

107. *See* Oberti v. Board of Educ., 995 F.2d 1204, 1214 (3d Cir. 1993) (noting tension embodied in IDEA); Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991) (noting "tension within the Act between two goals: mainstreaming and meeting each child's unique needs"); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989) (stating that "Congress . . . created a tension between two provisions of the Act").

Professor Martha Minow has examined the tension that exists when attempting to address the needs of persons with disabilities. *See generally* Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* 35–39 (1990) [hereinafter Minow, *Making All the Difference*] (explaining that educators have problems trying to address differences among students without stigmatizing those who are different); Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 Law & Contemp. Probs., Spring 1985, at 157 (pointing out tension between need for special services and problems that occur with labeling and segregation).

obtain an appropriate education elsewhere.[108] Many other parents, however, demand a less restrictive environment, claiming their child has not been integrated to the maximum extent appropriate.[109] These parents insist that the school provide whatever supplementary aids and services the child may need—a teacher's aide or a modified curriculum, for example—so that the child can be educated satisfactorily in the regular classroom.

The U.S. Supreme Court has yet to rule on inclusion, and the circuit courts of appeals have been unable to agree on how to address the issue. The courts of appeals have offered a bewildering array of opinions regarding the standard that federal courts must use to determine whether a school district has integrated disabled students to the maximum extent appropriate. Instead of emphasizing academic achievement, those who advocate the full inclusion of children with disabilities in the general education classroom—and now many federal courts—stress the social benefits of such integration.[110] Underlying the opinions on inclusion—with the exception of certain opinions from the Second and Seventh Circuits[111]—is the courts' uncritical acceptance of the assertions of these disability full inclusionists—that separation equals stigma and that inclusion equals increased self-esteem.[112] Implicit in these opinions is the elevation of "appropriate" integration over "appropriate" education.[113]

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108. *See supra* note 74 and accompanying text.

109. *See, e.g.*, Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1400 (9th Cir. 1994); *Oberti*, 995 F.2d at 1207–10; *Greer*, 950 F.2d at 690–92; Briggs v. Board of Educ., 882 F.2d 688, 689–91 (2d Cir. 1989); *Daniel R.R.*, 874 F.2d at 1039; Roncker v. Walter, 700 F.2d 1058, 1060–61 (6th Cir. 1983).

110. *See, e.g.*, J. Michael Coleman & Ann Minnett, *Learning Disabilities and Social Ecological Perspective*, 59 Exceptional Children 234, 234 (1992) (noting that justification for mainstreaming has always been based less on possible academic gains and more on potential social benefits); Huefner, *supra* note 14, at 49 (citing language modeling and social interaction as primary reasons for inclusion); Shanker, *supra* note 14, at 39 ("[T]hose demanding full inclusion are interested in only one thing—socialization.").

111. *See infra* Part II.D.2.

112. *See, e.g.*, Howard P. Blackman, *Surmounting the Disability of Isolation*, 49 Sch. Administrator 28, 29 (1992) (asserting that focus in special education should be on location where support is provided to disabled students because being removed from regular classroom results in stigma and isolation).

113. The Fourth, Sixth and Eighth Circuits have applied a test that focuses on the "feasibility" of transporting special services to the general education classroom. *See infra* notes 120–33 and accompanying text. The Third, Fifth and Eleventh circuits use a four-factor balancing test to determine if education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily. *See infra* notes 134–56 and accompanying text. The Ninth Circuit declined to follow either line of cases, and developed a test that includes some factors from each. *See infra* notes 157–61 and accompanying text. In contrast, the Second Circuit took a totally different course and

The next section attempts to untangle the perplexing collection of standards that has been set forth by the courts.[114]

Not surprisingly, with the amorphous term "appropriate" as the guide, the federal courts have struggled mightily with the contours of the statutory terms that mandate a free appropriate education for disabled children and that require integration with nondisabled students to the

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deferred to the judgment of the educators making the placement decision and the hearing officer that upheld it. *See infra* Part II.D.2.

114. In addition to the division in the circuits regarding the substantive standard for the least restrictive environment, there are other conflicts in the circuit courts regarding the interpretation of IDEA. First, the circuits are split with regard to which party has the burden of proof in the district court. Some circuits have held that the burden rests with the party that is challenging the administrative agency decision. *See, e.g.*, Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991 (1st Cir. 1990) (stating that burden rests with complaining party); Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988) (stating that party challenging administrative determination has burden of persuading court that hearing officer was wrong). But the Third Circuit expressly rejected these cases and held that the school district maintains the burden of proof throughout. *Oberti*, 995 F.2d at 1218–19.

Second, the standard for judicial review has presented a knotty problem. Parents may challenge a school district placement decision at two administrative levels: through the due process hearing before an impartial hearing officer and, where provided by the state, through subsequent appeal to the state administrative level. *See supra* notes 70–73 and accompanying text. Parents can then further appeal to the district courts, but the courts have disagreed concerning the proper standard of judicial review. IDEA requires a district court reviewing a challenge under IDEA to "receive the records of the administrative proceedings, . . . hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence," grant any appropriate relief. 20 U.S.C. § 1415(e)(2) (1994). Thus, "judicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1471 (9th Cir. 1993). Nonetheless, "[t]he fact that § 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings." Board of Educ. v. Rowley, 458 U.S. 176, 206 (1982). Not surprisingly, the courts have had great difficulty agreeing on a standard of judicial review, and the standards set forth by the courts of appeal range across a wide spectrum. Some courts describe the district court's review as "virtually de novo." *See, e.g.*, Teague Indep. Sch. Dist. v. Todd L., 999 F.2d 127, 131 (5th Cir. 1993). Other courts give "deference to the findings of the original administrative factfinder" and "even greater deference" when the original hearing officer and the state review officers agree. *See* Combs v. School Bd., 15 F.3d 357, 361 (4th Cir. 1994); *see also* Doe v. Board of Educ., 9 F.3d 455, 458 (6th Cir. 1993) (modified de novo review); *Roland M.*, 910 F.2d at 990 ("involved oversight").

Third, circuits disagree regarding IDEA's prescription that the district court "shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(e)(2). The First and Ninth Circuits have taken a restrictive approach to the term "additional," interpreting it to mean "supplemental." *See* Town of Burlington v. Department of Educ., 736 F.2d 773, 790 (1st Cir. 1984). The Sixth Circuit disagreed, stating that "the limitation on what can be joined inherent in the term 'supplement' is not present in the term 'add.'" Metropolitan Gov't v. Cook, 915 F.2d 232, 234 (6th Cir. 1990).

With this much conflict in the circuits over so many issues relating to inclusion and placement, there can be little doubt that different jurisdictions are likely to spawn different outcomes for litigants.

maximum extent appropriate. Although a disabled child can be removed from the regular classroom "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily,"[115] IDEA provides little guidance for determining how many aids and services might be required when attempting to educate a disabled child in the regular classroom or at what point education in the regular classroom becomes unsatisfactory.[116] The federal regulations state that children with disabilities must be educated in "the least restrictive environment,"[117] and the courts often use that term, together with "mainstreaming," to describe the statute's preference for integration.[118]

The courts generally have attempted to interpret the requirements of IDEA by using a cost/benefit analysis of sorts, weighing the academic and nonacademic benefits to the disabled child against the costs—both the cost in resources to the public school and the effect on the education of the nondisabled children in the regular classroom community.[119] At the heart of this analysis, however, is a more subtle contemplation of benefit. In essence, many of the courts addressing the inclusion issue discount the academic benefit to the disabled child to serve the so-called nonacademic benefits of inclusion.

1. Promoting "Appropriate" Integration Over "Appropriate" Education

When the mother of a nine-year-old severely mentally retarded child[120] challenged her son's placement in a county school for mentally retarded children, the district court determined that the school district had

115. 20 U.S.C. § 1412(5)(B) (1994).

116. *See* Note, *Enforcing the Right*, *supra* note 89, at 1119 (noting lack of guidelines for determining when education in regular classroom becomes unsatisfactory).

117. 34 C.F.R. §§ 300.550, .552(d) (1996).

118. *See supra* Part II.C for a discussion of the evolution of mainstreaming to inclusion.

119. *See infra* Part II.D.1. Some courts are more explicit than others in weighing cost against benefit, and the courts have not always agreed in describing the cost and benefit. *See infra* notes 137–39, 157–61. For instance, although the court in *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), did not expressly state it was doing so, the "feasibility" test is a shorthand method for weighing cost against benefit. *See also* A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987) (noting that *Roncker* allowed courts to consider cost to local school district and benefit to child).

120. The child, Neill, was classified as Trainable Mentally Retarded, a category of children with an IQ below 50. *Roncker*, 700 F.2d at 1060.

"broad discretion in the placement of handicapped children."[121] The district court maintained that the school district had not abused its discretion, especially because the boy, who had a mental age of two to three years and required almost constant supervision, had made *no significant progress* in the eighteen months he had spent in an integrated environment while the administrative and court actions were pending.[122] In fact, the district court had found that the boy "was not progressing in his present placement but was regressing. His ability to interact with the non-handicapped children was at best minimal. His opportunity to interact with the non-handicapped children there was also very minimal."[123]

The Sixth Circuit determined that the abuse of discretion standard was improper and set up a test for determining when placement is appropriate: "where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting."[124] If so, the segregated placement is inappropriate.[125] The court thus transformed the inclusion requirement "from a negative one—do not segregate unnecessarily—to a positive one—provide all the services that render segregation unnecessary."[126]

The court emphasized the overriding importance of integration above education by warning that "[i]n some cases, a placement that may be considered *better for academic reasons* may not be appropriate because

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121. *Id.* at 1061 (discussing district court determination).

122. *Id.* (describing procedural history of case). After evaluation, the school district decided to place Neill in a county school for mentally retarded children. His parents refused to accept the placement and sought the first level of administrative hearing provided for by IDEA, the due process hearing. The hearing officer found that the school district had not satisfied its burden of showing that the placement would afford Neill the maximum appropriate contact with nondisabled children. The school district appealed and the second level of administrative hearings was held before the State Board of Education. *Id.* at 1060–61. For a description of the levels of hearings provided for in IDEA, see *supra* notes 70–73 and accompanying text. The State Board determined that Neill should be placed in the county school, but that he should receive contact with nondisabled students during lunch, recess, and transportation to and from school. Neill's mother filed an action in district court. *Roncker*, 700 F.2d at 1061.

123. *Roncker*, 700 F.2d at 1064 (Kennedy, J., dissenting).

124. *Id.* at 1063. The standard had also been called the "portability" standard. *See* Huefner, *supra* note 14, at 31. Determining whether services could be provided feasibly may be problematic, "depending upon which definition of the word 'feasible' the panel intends, i.e., (1) capable of being done; (2) capable of being dealt with successfully, suitable; or (3) reasonable." *Roncker*, 700 F.2d at 1066 (Kennedy, J., dissenting).

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

126. Weber, *supra* note 2, at 391.

of the failure to provide for mainstreaming."[127] Even if a child obtains only marginal benefits in the regular classroom, the court indicated that those marginal benefits must be far outweighed by benefits obtained in the segregated setting for education in a special education classroom to be appropriate.[128] The court also seemed to suggest that any benefit at all to the disabled child would be enough to mandate placement in the regular classroom.[129]

The district court in *Roncker* relied on expert testimony that the education program in the segregated placement was superior to the program available in the regular classroom and that the child was making no progress in the regular classroom.[130] The Sixth Circuit stated that "[t]he perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept."[131] Of course, the testimony that a segregated placement is academically superior for a disabled child may also reflect the fact that in the particular case at hand segregated placement simply is academically superior.[132]

The Fourth and Eighth circuits have adopted the *Roncker* test,[133] but the Fifth Circuit expressly rejected it in *Daniel R.R. v. State Board of*

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127. *Roncker*, 700 F.2d at 1063 (emphasis added); *see also* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990) ("Mainstreaming may not be ignored, even to fulfill substantive educational criteria.").

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

129. *Id.* (discussing the "possibility that some handicapped children simply must be educated in segregated facilities... because 'the handicapped child would not benefit' from mainstreaming"); *see also id.* at 1065 (Kennedy, J., dissenting) (noting parent's argument for regular school setting unless child could learn "zero" in such environment); *cf.* DeVries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989) (stating that inclusion is not appropriate where disabled student "would simply be monitoring classes"); A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 161, 164 (8th Cir. 1987) (upholding separate class where district court found that only possible benefit was opportunity to observe nondisabled children); Liscio v. Woodland Hills Sch. Dist., 734 F. Supp. 689, 701 (W.D. Pa. 1989) (stating placement inappropriate where student received little or no educational benefit).

130. *Roncker*, 700 F.2d at 1061 (describing district court's decision).

131. *Id.* at 1063.

132. The court of appeals cited nothing in the record that would lead to the conclusion that the expert actually had a "basic disagreement with the mainstreaming concept." *Id.* at 1063. Nor did the court hint at how a future court could tell if such a disagreement was indeed the driving force behind the school's determination. According to the *Roncker* court then, the assertion that a segregated classroom is academically superior is to be given little or no weight. Any time it is claimed that a segregated classroom is academically superior, that statement may be disregarded as based on an improper motive, and the court can then substitute its own judgment.

133. *See* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1403 (9th Cir. 1994) (explaining disagreement among the circuits).

Education.[134] Daniel was a six-year-old boy with Down's Syndrome whose developmental age was between two and three years and whose communication skills were slightly less than a two-year-old. At his parent's request, he was placed in a regular, pre-kindergarten half-day class, and spent the other half of the day in a program devoted entirely to special education. His teacher in the general education classroom reported that Daniel did not master any of the skills she was trying to teach, that Daniel did not participate without constant, individual attention from the teacher or aide, and that she would need to modify her teaching method and curriculum almost beyond recognition to reach Daniel. The school's special education committee recommended that Daniel's placement be changed to full-time special education but also recommended that Daniel have contact with nondisabled children at lunch and during recess. His parents requested and obtained a due process hearing. After five days of testimony amounting to 2500 pages of transcript, the hearing officer determined that the regular classroom was not the appropriate placement for Daniel.[135] Daniel's parents then filed suit in district court, which affirmed the hearing officer's ruling.[136]

On appeal the Fifth Circuit declined "to adopt the [*Roncker*] approach that other circuits have taken."[137] Instead, the Fifth Circuit devised a new test based on a two-part inquiry: "whether education in the regular classroom, with the use of supplemental aids and services can be achieved satisfactorily" and, if not, "whether the school has mainstreamed the child to the maximum extent appropriate."[138] To aid in the first inquiry, the court pointed to four factors that should be considered: (1) whether the school has taken steps to accommodate the child in the regular classroom by providing supplementary aids and services and by modifying the curriculum; (2) if so, whether those steps are sufficient; (3) whether the child will receive an educational benefit; and (4) the effect the child's presence has on the regular classroom environment; that is, whether the child is so disruptive that the education of other students is significantly impaired, or the child requires so much attention that the teacher must "ignore" the needs of other students.[139]

134. 874 F.2d 1036, 1046 (5th Cir. 1989).

135. *Id.* at 1039.

136. *Id.* at 1040.

137. *Id.* at 1046.

138. *Id.* at 1048.

139. *Id.* at 1048–49. After applying its new test, the court determined that the school had integrated Daniel with nondisabled students to the maximum extent appropriate by including him with other students at lunch and recess. *Id.* at 1050–51.

The Fifth Circuit also decided that academic achievement is of lesser importance to the disabled child than social benefits. The court focused on the "overall growth and development benefits"[140] rather than the "potential for learning to read," because "academic achievement is not the only purpose of mainstreaming."[141] Indeed, the court cited *Roncker* for the proposition that even if "a child may be able to absorb only a *minimal amount* of the regular education program" and "even if the child *cannot flourish academically*," the child "may" benefit from "the language models that his nonhandicapped peers provide for him," and this benefit may "tip the balance in favor of mainstreaming" despite lack of academic progress.[142]

Both the Third and the Eleventh Circuits expressly adopted the *Daniel R.R.* test.[143] In its application by these courts, the *Daniel R.R.* test proved to be "anything but deferential" to the decision made by the school.[144] In *Greer v. Rome City School District*,[145] the school district proposed an IEP for a child with Down's Syndrome and several resulting disabilities, including speech and learning disabilities. The IEP recommended a special self-contained classroom because, as school officials explained to the child's parents, she required more attention than other children in the regular kindergarten class, she was not keeping up with the kindergarten curriculum, and she required repeated rehearsal and practice of basic skills in an individualized setting. The school psychologist expressed his belief that, although the child might make some progress in a regular kindergarten class, she would make more progress in a special education class. The *Greer* Court determined that the school officials had not met the requirements of IDEA because the school had not adequately considered the full range of supplemental aids and services that the school might have provided to accommodate the child's disabilities in the regular classroom, had failed to modify the curriculum to accommodate the child, and had developed the IEP before meeting with the parents.[146]

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140. *Id.* at 1047 n.8.

141. *Id.* at 1049; *see also* Mavis v. Sobol, 839 F. Supp. 968, 990 (N.D.N.Y. 1994) (noting that placement in regular classroom is beneficial in terms of social development).

142. *Daniel R.R.*, 874 F.2d at 1049 (emphasis added) (citing Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983)).

143. *See* Oberti v. Board of Educ., 995 F.2d 1204, 1215 (3d Cir. 1993); Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991).

144. Melvin, *supra* note 14, at 665–66.

145. 950 F.2d 688 (11th Cir. 1991).

146. *Id.* at 698.

The Third Circuit, in *Oberti v. Board of Education*,[147] applied the *Daniel R.R.* test in analyzing the segregated placement of a six-year-old boy with Down's Syndrome. The boy had a history of "serious behavioral problems" in a regular "developmental" kindergarten class—a general education class for children who were not fully ready for kindergarten.[148] The problems included "repeated toileting accidents, temper tantrums, crawling and hiding under furniture, touching, hitting and spitting on other children" and striking at and hitting the teacher and teacher's aide on several occasions. An extra aide in the class "did little to resolve the behavior problems."[149] The parents wanted the child to be placed in regular kindergarten but, after mediation, agreed to place the boy in a segregated class for the multiply handicapped with one teacher, one aide, and nine children. The boy's behavior gradually improved, his disruptiveness abated, and he made academic progress.[150] His parents nonetheless decided that they wanted the boy placed in a regular classroom and brought a due process complaint, which eventually was heard by the Third Circuit. The court upheld the district court's determination that the school district had violated IDEA because it had not adequately considered supplementary aids and services to accommodate the boy's disability in the regular classroom.[151] According to the court, the school must consider an astounding range of supplemental aids and services to accommodate one child in the regular classroom. These include "'resource rooms and itinerant instruction,' speech and language therapy, special education training for the regular teacher, behavior modification programs, or *any other available aids or services appropriate to the child's particular disabilities*."[152] In addition, the school must try to "modify the regular education program to accommodate [the] disabled child."[153] A child may be disruptive, said the court, because adequate aids and services have not been provided.[154]

147. 995 F.2d 1204 (3d Cir. 1993).

148. *Id.* at 1207–08.

149. *Id.*

150. *Id.* at 1209.

151. *Id.* at 1223.

152. *Id.* at 1216 (emphasis added) (quoting Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991)); *see also* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (explaining that placement in segregated classroom is inappropriate if services which make that placement superior could feasibly be provided in a non-segregated setting).

153. *Oberti*, 995 F.2d at 1216.

154. *Id.* at 1217. The Third Circuit thus would appear to require more aids and services than the Fifth Circuit requires. *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989)

The Eleventh and Third Circuits also have elevated inclusion over academic achievement. The Eleventh Circuit stated that even if a disabled child "will make academic progress more quickly in a self-contained special education environment," placement in such an environment may not be justified unless the child would make "*significantly more* progress" there *and* placement in the regular classroom might cause the disabled child to "fall behind" his or her disabled peers who are placed in the segregated classroom.[155] Thus, integration is inappropriate only when it would be measurably detrimental to the child, even if a special classroom would be better for the child's academic progress. Similarly, the Third Circuit stated that "a determination that a child with disabilities might make greater *academic* progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment."[156]

The Ninth Circuit put a slightly different gloss on the standard for inclusion.[157] The court of appeals expressly adopted a four-factor balancing test that had been used by the district court and that employed "factors found in both [the *Roncker* and *Daniel R.R.*] lines of cases."[158] The district court had determined, and the court of appeals appeared to accept, that a disabled child must be educated in a regular classroom even if "a special education placement may be *academically superior* to placement in a regular classroom" and "even if [the regular classroom] *is not the best academic setting* for the child."[159] The district court had conceded that if a child's disabilities are "so severe that he or she will

("States need not provide every conceivable supplementary aid or service" to accommodate the child in the regular classroom.).

155. *Greer*, 950 F.2d at 697 (emphasis added).

156. *Oberti*, 995 F.2d at 1216 (emphasis added). The Third Circuit has also noted the "unique benefits the child may obtain from integration" like social and communication skills and improved self-esteem. *Id.*

157. *See* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994) (affirming district court's decision that appropriate placement for child was in regular second grade classroom).

158. *Id.* The four factors are: (1) educational benefits of placement full time in a regular classroom; (2) nonacademic benefits of such placement; (3) effect on the teacher and children in the regular class; and (4) cost. *Id.*

159. Board of Educ. v. Holland, 786 F. Supp. 874, 879 (E.D. Cal. 1992) (emphasis added), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994). The *Rachel H.* decision is in contrast to an earlier Ninth Circuit opinion where the court deferred to the judgment of the educators seeking to transfer a child to a segregated classroom. In *Wilson v. Marana Unified School District*, 735 F.2d 1178, 1182–83 (9th Cir. 1984), the court determined that if a student with disabilities is not making satisfactory progress in the current placement, the school may transfer the child to a school where she can receive assistance from a teacher especially qualified regarding that disability.

receive *little or no academic benefit* from placement in a regular education class, then mainstreaming *may* not be appropriate."[160] Stressing the nonacademic social benefits like language modeling and "improved self-esteem" that a disabled child may obtain from placement in the regular classroom with nondisabled students, the court also opined that improved self-esteem was likely to increase academic achievement.[161]

2. *Promoting "Appropriate" Education Over "Appropriate" Integration*

Not every court addressing inclusion has elevated academic setting over academic progress. The Second Circuit expressly rejected the *Roncker* analysis and determined that it was not the role of the courts to decide whether the special education services provided to a disabled child could be provided in a less segregated setting than that proposed by the child's IEP committee.[162] In *Briggs v. Board of Education*,[163] the IEP committee had proposed that the child, who suffered from a moderate to severe sensorineural hearing loss in both ears and mild to moderate speech and language delays, be placed in a special pre-school that met in a regular elementary school. Because the child had significant speech and language problems that interfered with communication to peers and adults, the committee believed the child's needs would not be met in a general education program. The proposed special program consisted of seven children, two teacher aides, and a certified teacher of the hearing impaired who possessed a Master's degree in education of the deaf. The child also would have the services of a speech therapist. Students usually spent one or two years in the special program and were then placed in a general education program. The parents believed that the child should have more interaction with nondisabled children and exercised their right to a due process hearing. The hearing officer determined that the program proposed was appropriate for the child, and the parents then filed a lawsuit in federal district court.[164]

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160. *Holland*, 786 F. Supp. at 878 (emphasis added). Given the court's use of the term "may," rather than "will," inclusion apparently could be appropriate—according to this court—even in some instances where the disabled child receives little or no academic benefit from placement in the regular education class.

161. *Id.* at 879.

162. Briggs v. Board of Educ., 882 F.2d 688, 693 (2d Cir. 1989).

163. *Id.*

164. *Id.* at 690–91.

The district court applied the *Roncker* test, calling the test "insightful and useful,"[165] and reversed the decision of the administrative hearing officer, stating that the disabled child "could feasibly have been offered [services] in a much less segregated setting."[166] The Second Circuit reversed the district court, chastising it for substituting its judgment for that of the local education agency, which had expertise in the formulation of educational programs for the handicapped.[167] The court of appeals stressed that it was not the court's role to decide the very question that the *Roncker* test poses: whether the same services the child obtains in a segregated setting could be provided in a less segregated setting.[168] Instead, the *Briggs* court pointed out that the placement decision was calculated to provide the child with the best *educational* program feasible, and that the placement decision was reached after careful consideration by experts on teaching the hearing impaired and with full knowledge of the legislative preference for mainstreaming.[169] The court of appeals reasoned that the placement decision had been upheld by the hearing officer and the state agency; therefore, the district court erred in substituting its judgment for that of those entities.[170]

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165. Briggs v. Board of Educ., 707 F. Supp. 623, 626 (D. Conn. 1988), *rev'd*, 882 F.2d 688 (2d Cir. 1989).

166. *Id.* at 626–27.

167. *Briggs*, 882 F.2d at 693.

168. *Id.*

169. *Id.* at 692–93.

170. *Id. But see* Mavis v. Sobol, 839 F. Supp. 968, 987 (N.D.N.Y. 1994) (applying *Daniel R.R.* test to determine "compliance with IDEA's mainstreaming requirement").

The Seventh Circuit showed a similar deference to the educational policy judgments made by local and state officials, at least when the inclusion issue is intertwined with issues of educational methodology. In *Lachman v. Illinois Board of Education*, 852 F.2d 290 (7th Cir. 1988), the school proposed placing the child in a self-contained classroom for the hearing impaired for all or part of the day where the child would be taught based on the "total communication" approach to educating the hearing impaired. *Id.* at 291–92. The parents disagreed with the placement and claimed that the child could best be taught in a regular classroom with the assistance of a full-time cued speech instructor. The court determined that the inclusion issue was subsumed by the parties' disagreement over educational methodology—"cued speech" versus "total communication." *Id.* at 294. Because courts must give "substantial deference" to policy judgments regarding educational methodology made by local and state education officials, the court held that the placement proposed by the school was appropriate. *Id.* at 297. The court stated that the integration inquiry cannot be evaluated in the abstract. "Rather, that laudable policy must be weighed in tandem with the Act's principal goal of ensuring that the public schools provide handicapped children with a free appropriate education." *Id.* at 296. *But cf.* Board of Educ. v. Illinois Bd. of Educ., 938 F.2d 712, 718 (7th Cir. 1991) (determining that parents' hostility to proposed IEP can be considered in determining if IEP will benefit child).

The Second Circuit explained that "[w]hile mainstreaming is an important objective, we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students."[171] The *Briggs* court thus set up a standard that seems to allow courts and schools to elevate educational progress over educational setting. Many full inclusion advocates and the federal courts that have accepted the premises underlying the full inclusion movement, however, would allow the placement of the disabled child to outweigh that child's academic achievement.[172] The next section demonstrates that elevating inclusion over academic progress cannot be defended in terms of either IDEA's statutory language, its legislative intent, or by U.S. Supreme Court precedent describing the content of free appropriate education.

III. THE CORNERSTONE OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Advocates of full inclusion contend that the pronouncements of many federal courts have strengthened their hand.[173] Indeed, one federal court has stated that "[i]nclusion is a right, not a privilege for a select few."[174] Thus, "[a]rmed with a string of court decisions, [inclusion advocates] have made significant progress toward their goal of including all children with disabilities in the regular classroom."[175]

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171. *Briggs*, 882 F.2d at 692; *see also* Board of Educ. v. Illinois Bd. of Educ., 41 F.3d 1162, 1168 (7th Cir. 1994) ("[T]he mainstreaming requirement was developed in response to school districts which were reluctant to integrate mentally impaired children and their nondisabled peers. It was not developed to promote integration with nondisabled peers at the expense of other IDEA requirements and is applicable only if the IEP meets IDEA minimums.").

172. *See supra* Part II.D.1.

173. *See, e.g.*, Nancy Webb, *Special Education: With New Court Decisions Backing Them, Advocates See Inclusion as a Question of Values*, Harv. Educ. Letter, July-Aug. 1994, at 1, 1. Some claim that IDEA has been interpreted by courts as a "mandate for inclusion, 'if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily.'" *Id.*; *see also* Melvin, *supra* note 14, at 667 ("IDEA contemplates that . . . most disabled children . . . can now be successfully educated in the regular education classroom.").

174. Oberti v. Board of Educ., 801 F. Supp. 1392, 1404 (D.N.J. 1992), *aff'd*, 995 F.2d 1204 (3d Cir. 1993); *see also* Rebell & Hughes, *supra* note 14, at 560–61 (noting "marked shift in the outcome of federal litigation" toward upholding parental requests to place children in general education program, and observing that judges "have become more knowledgeable about, and more sympathetic to, inclusion").

175. *Inclusion Can Mean Exclusion to Deaf Students*, 2 Inclusive Educ. Programs, Dec. 1995, at 1, 1; *see also* McCarthy, *supra* note 91, at 826 (noting "judicial shift toward inclusion"). As a result of recent court opinions, some school districts in California feel the proper course of action is full inclusion: "place all handicapped children in regular education classes, regardless of their mental,

Full inclusion is superficially appealing. It is simple—one placement of all students—and it is egalitarian—when students are not physically separated they are assumed to be treated equitably.[176] Certainly, excluding disabled children from the public schools and segregating disabled students without regard to how and whether the difference caused by the disability affects their achievement in the classroom were serious wrongs that IDEA sought to correct. Yet the statutory language in IDEA does not mandate full inclusion, despite the inclusion advocates' claim. Furthermore, the statute does not require that a disabled child be included in a regular classroom when the child "cannot flourish academically"[177] and when another placement would be "academically superior" to placement in the regular classroom.[178]

A. "A Free Appropriate Public Education"

Of course, "[a] statute is passed as a whole and not in parts or sections, and is animated by one general purpose and intent."[179] "[E]ach part or section should be construed in connection with every other part or section so as to produce a harmonious whole."[180] A statutory subsection—like the integration provision of IDEA—must not be considered "in a vacuum," but in reference to the general purpose and intent of the statute in its entirety.[181] The Individuals with Disabilities Education Act and its predecessor, the Education for All Handicapped Children Act, by their titles alone, stress that the *education* of the disabled student—not the placement of the student—is the driving force behind the statute. The substantive standard set forth in IDEA is that of "free appropriate public education."[182] Moreover, the statute expressly

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physical or emotional disabilities." *See* Theresa Bryant, *Drowning in the Mainstream: Integration of Children With Disabilities After* Oberti v. Clementon School District, 22 Ohio N.U. L. Rev. 83, 116 (1995) (citing Sarah Lubman, *More Schools Embrace "Full Inclusion" of the Disabled*, Wall St. J., Apr. 13, 1994, at B1).

176. *See* James M. Kauffman & Patricia L. Pullen, *Eight Myths About Special Education*, Focus on Exceptional Children, Jan. 1996, at 1, 6.

177. *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989).

178. *See* Board of Educ. v. Holland, 786 F. Supp. 874, 878–79 (E.D. Cal. 1992), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994); *cf.* Kauffman & Pullen, *supra* note 176, at 6 (writing that placing all children in general education classroom has negative consequences for some students where neither disabled student nor their classmates can be well served).

179. 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.05, at 103 (5th ed. 1992).

180. *Id.*

181. *Id.*

182. 20 U.S.C. § 1412(1) (1994).

requires "special education" for the disabled child, which is defined as instruction designed to meet the disabled child's unique needs.[183] Indeed, in enacting IDEA, Congress expressly found that the "*special educational* needs of . . . children [with disabilities] are not being fully met."[184] It is not clear that those special educational needs would be met fully—if at all—when a child is included in a regular classroom even though the child would make greater academic progress in another setting.

Segregated placements may be necessary to meet the unique needs of a disabled child, and Congress explicitly recognized the need for segregated placement when it expressly provided that special education may include "instruction conducted in the classroom, in the home, in hospitals and institutions, and *in other settings* . . . ."[185] In fact, the U.S. Supreme Court has pointed out that Congress "recognized that regular classrooms simply would not be a suitable setting for the education of *many* handicapped children."[186] Thus, far from mandating full inclusion, the statute stresses that the needs of disabled children may be unique and thus different from the needs of nondisabled children, and it then sets forth various settings where the child's unique needs may be met.[187] Indeed, the very name of the plan that must be developed for each

183. 20 U.S.C. § 1401(a)(16) (1994).

184. 20 U.S.C. § 1400(b)(2) (1994) (emphasis added).

185. 20 U.S.C. § 1401(a)(16)(A) (emphasis added).

186. Board of Educ. v. Rowley, 458 U.S. 176, 181 n.4 (1982) (emphasis added). Of course, those who advocate full inclusion ignore this statement by the Court. *See, e.g.*, Melvin, *supra* note 14, at 667 ("IDEA contemplates that . . . *most* disabled children . . . can now be successfully educated in the regular education classroom.") (emphasis added). In addition, the Court's decision in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), in which the Court stated that parents were not barred from reimbursement for the cost of private school placement in a resident school that specialized in educating students with disabilities, "runs counter to the inclusionary movement under the IDEA that is currently being embraced by the courts and the Clinton Administration." Perry A. Zirkel, *A Somewhat Ironic Decision*, 75 Phi Delta Kappan 497, 498 (1994). To the extent that the Court has provided a "financial incentive or reward for parents to put their child in a segregated setting—here to the point of choosing a residential placement—it conflicts with the emphasis on educating students with disabilities as much as possible in regular classrooms." *Id.*

187. 20 U.S.C. § 1401(a)(16)(A). Kauffman and Hallahan comment:

> IDEA prescribes, first, the determination of appropriate education and related services and, only subsequently, that the least restrictive environment for delivery of those services be determined—in all instances, on a case-by-case basis. Contrary to IDEA, advocates of full inclusion call for a uniform placement decision *first*, followed by consideration of what might constitute an appropriate education and related services that could be delivered in that placement.

Kauffman & Hallahan, *Full Inclusion in Historical Context*, in *The Illusion of Full Inclusion*, *supra* note 92, at 3.

disabled child—the individualized education program—again emphasizes education, and it also contemplates the unique needs of the individual child.

IDEA's requirement that educators provide instruction that is designed to meet the child's unique needs further shows that the transfer of knowledge from the teacher to the disabled child is significant. In addition, the statute requires that the IEP contain instructional objectives,[188] again highlighting Congress's concern with the transfer of knowledge to the disabled child. In short, the statute does not require a school to place a disabled child in a setting where the child "cannot flourish academically"[189] where the child obtains only "marginal benefits,"[190] and where the child can "absorb only a minimal amount of the regular education program."[191]

Even the statutory language in the integration provision of IDEA does not elevate inclusion over the education of the disabled child. First, the statutory language "significantly qualifies the [inclusion] requirement by stating that it should be implemented 'to the maximum extent *appropriate*.'"[192] Moreover, the statute does not state that disabled children must be *placed* with children who are not disabled to the maximum extent appropriate. Rather, it provides that, to the maximum extent appropriate, disabled children should be *educated* with nondisabled children.[193] Finally, the integration provision is inapplicable when education with the "use of supplementary aids and services cannot be achieved satisfactorily."[194]

The regulations that implement the least restrictive environment requirement provide that each school district must maintain a continuum of program options including regular classes, special

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188. 20 U.S.C. § 1401(a)(20)(B).

189. *See* Daniel R.R. v. State Bd. of Educ, 874 F.2d 1036, 1049 (5th Cir. 1989).

190. *See* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

191. *See* Greer v. Rome City Sch. Dist., 950 F.2d 688, 692 (11th Cir. 1991).

The IDEA regulations regarding "educational placement" also emphasize that the purpose of the statute is "to ensure that each child with a disability receives an *education* which is appropriate to his or her *individual* needs." 34 C.F.R. § 300.552 note (1996) (emphasis added). To this end, the school must provide for "alternative placements." 300 C.F.R. § 300.551(a) (1996) ("Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."). In short, the "overriding rule . . . is that placement decisions must be made on an individual basis." 300 C.F.R. § 300.552 note.

192. A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987) (emphasis in original) (quoting 20 U.S.C. § 1412(5) (1982)).

193. 20 U.S.C. § 1412(5)(B) (1994).

194. 20 U.S.C. § 1412(5)(B); *see also A.W.*, 813 F.2d at 163.

schools, home instruction, and instruction in hospitals and institutions.[195] Thus, "the regulations contemplate that mainstreaming is not required in every case."[196]

Further, the legislative history—to the extent legislative history informs the interpretation of a statute[197]—does not displace academic benefit with inclusion. The House and Senate conference agreed that the purpose of the Act was "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs."[198] The Senate Report quoted *Brown v. Board of Education*: "In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied an opportunity of an education. Such the opportunity . . . is a right which must be made available to all on equal terms."[199] But the Report did not indicate that this pronouncement meant full inclusion for all disabled students. In fact, the Senate Report also cited *Mills v. Board of Education*[200] with approval in the next sentence, noting that the *Mills* court ordered that "no child eligible for a publicly supported education . . . shall be excluded from a regular public school assignment . . . unless such child is provided: (a) adequate alternative educational services suited to the child's needs, which may include special education . . . ."[201] The Report observed that "proper education services" would enable many disabled children to become productive citizens instead of a burden to society.[202]

Neither the statutory language nor its legislative history requires that the placement of the disabled child should subvert that child's

195. 300 C.F.R. § 300.551(b)(1).

196. Board of Educ. v. Illinois Bd. of Educ., 41 F.3d 1162, 1168 (7th Cir. 1994); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 444–45 (1985) (stating that IDEA "requires an 'appropriate' education, not one that is equal in all respects to the education of nonretarded children; clearly, admission to a class that exceeded the abilities of a retarded child would not be appropriate").

197. *See generally* Bank One Chicago v. Midwest Bank and Trust Co., 116 S. Ct. 637, 645–46 (1996) (Scalia, J., concurring) ("Our opinions using legislative history are often curiously casual . . . . Perhaps that is because legislative history is in any event a make-weight; the Court really makes up its mind on the basis of other factors.").

198. S. Conf. Rep. No. 94-455, at 29 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1480, 1482.

199. S. Rep. No. 94-168, at 6 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1430 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

200. 348 F. Supp. 866 (D.D.C. 1972). For a description of *Mills* and its influence on the passage of IDEA, see *supra* notes 45–50 and accompanying text.

201. S. Rep. No. 94-168, at 13–14 (quoting *Mills*, 348 F. Supp. at 872).

202. *Id.* at 18.

educational progress. "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[203] It is simply not appropriate to educate or instruct a disabled child in a setting where the child "cannot flourish academically,"[204] especially if another setting is "academically superior."[205] To claim otherwise destroys the mission of the public schools.

The primary purpose of the public schools must be the academic training of students—preparing the young for life as an adult "in our increasingly complex society and for the duties of citizenship in our democratic Republic."[206] This preparation—the pedagogical mission of the schools—involves the transfer from one generation to the next of the knowledge and values that are important for the individual citizen and for the preservation of a democratic society. It includes both the transfer of certain bases of knowledge—for example, how to read and write—and, incorporated within these intellectual exercises, the transfer of the "fundamental values of 'habits and manners of civility'" that are "indispensable to the practice of self-government."[207]

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203. Plyler v. Doe, 457 U.S. 202, 223 (1982) (discussing denial of education to illegal alien children).

204. *See* Daniel R.R. v. State Bd. Of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989).

205. *See* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

206. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting); *see also Plyler*, 457 U.S. at 221 (pointing out "pivotal role of education in sustaining our political and cultural heritage"); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (recognizing role of public schools in "inculcating fundamental values necessary to the maintenance of a democratic political system").

207. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, *New Basic History of the United States* 228 (1968)); *see also id.* at 683 (noting that inculcation of values necessary to maintenance of democratic political system is "work of the schools") (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969)); Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (emphasizing importance of public schools in preparing individuals for citizenship); *Plyler*, 457 U.S. at 222 n.20 (noting that "public schools are an important socializing institution"); *Ambach*, 441 U.S. at 76–79 (discussing importance of public schools in preparing individuals for participation as citizens); Murray-Seegert, *supra* note 39, at 36 (explaining that society depends on schools to transmit formal culture, such as history, politics, and literature, and less formal elements, such as values and social behaviors); Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 Cornell L. Rev. 1, 14 (1992) [hereinafter Brown, *De Jure Segregation*] (stating that schools perform "important academic role" of disseminating information, teaching basic academic skills, providing vocational skills and assisting in cognitive development of children). For a discussion of the Supreme Court's recognition of the function of values inculcation, see Kevin Brown, *Termination of Public School Desegregation, Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 Geo. Wash. L. Rev. 1105, 1117–20 (1990).

The "ideal education,"[208] or what I call a "serious education,"[209] is necessary so that when students reach maturity, they may participate knowledgeably in democratic and economic institutions.[210] The ability to participate knowledgeably in democratic and economic institutions as an adult depends on "a wide range of intellectual and social [competencies]."[211] A necessary, though often subtle, part of academic training includes socialization through value inculcation.[212] At a time when other institutions that instill values in children—family, church, community—have deteriorated, public schools shoulder more of the weight of the important function of value inculcation.[213] To fulfill its pedagogical mission, the public school must strive to ensure that every child—both disabled and non-disabled—has the opportunity to participate in a learning community where the transfer of knowledge and the corresponding value transfer that goes with it can and will occur.

Yet many of the circuit courts addressing the education of disabled children (without clear support from the language of the statute) have elevated placement over academic progress.[214] An examination of the opinions yields two reasons why these courts have been willing to elevate education setting over educational progress. First, the courts have been influenced by the language in the U.S. Supreme Court's opinion in *Board of Education v. Rowley*[215] and have subtly imported the standard set by *Rowley*—an opinion that interpreted the meaning of appropriate education—into their opinions interpreting appropriate integration. Second, the courts have been willing to accept—without rigorous analysis—the premises set forth by the full inclusion advocates.[216] In the

208. Robert Maynard Hutchins, *A Conversation on Education* 1 (1963) (An "ideal education is not an *ad hoc* education . . . . [I]t is an education calculated to develop the mind.").

209. Dupre, *supra* note 25, at 97; *see also* Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. Cal. L. Rev. 1671, 1697 (1990) ("The extent to which we take the commitment to democracy seriously is measured by the extent we take the commitment to education seriously.").

210. *See* Dupre, *supra* note 25, at 98. "'[I]f free speech is to be meaningful, a citizen must have something worth saying, together with the maturity and the skill needed to say it.'" *Id.* at 97 (quoting Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 Ohio St. L.J. 663, 685–86 (1987) (citation omitted)); *see also* Sherry, *supra* note 28, at 132 (discussing claim that "education is necessary to the thoughtful or responsible exercise of citizenship rights").

211. Richard Weissbourd, *The Feel-Good Trap*, New Republic, Aug. 19 & 26, 1996, at 12.

212. *Cf.* Brown, *De Jure Segregation*, *supra* note 207, at 13 (stating that two most important functions of public schools are value inculcation and academic training).

213. *See* Dayton & Glickman, *supra* note 29, at 63.

214. *See supra* Part II.D.1.

215. 458 U.S. 176 (1982).

216. *See* McCarthy, *supra* note 91, at 826–27.

next part, I explain why it is wrong to import the *Rowley* standard into the inclusion analysis. Immediately following, in Part IV, I examine the questionable premises upon which the full inclusion movement rests.

B. The U.S. Supreme Court's View

In an ideal world with unlimited resources, each child would be placed in a learning community in a public school where the transfer of knowledge would occur at the optimum level. This world with unlimited resources might have a one-to-one student-teacher ratio or even three teachers per student. In the real world where resources are limited, however, educators must make rationing trade-offs regarding the community of learning. For most students, the method used for knowledge transfer—considering the resources available—is in a classroom with twenty-five or so students, directed by a teacher. Disabled children, who—unlike nondisabled students—are entitled by statute to a free appropriate education, may challenge whether the community of learning in which they are placed is appropriate.

The U.S. Supreme Court addressed whether Congress intended free appropriate education to mean that the public school must maximize the potential of every disabled child. The Court held that Congress did not so intend.[217] Rather, the Act was intended to open the door of public education—to provide a "basic floor of opportunity," that is, "access to specialized instruction and related services which are individually designed to provide educational benefit to the [disabled] child."[218] Thus, once it determines that the procedures of IDEA have been followed, a reviewing court need only ask if the education provided is "reasonably calculated to enable the child to receive educational benefits."[219] If so, a school has met its statutory obligation to provide a free appropriate education. The Court in *Rowley* therefore did not require the school to maximize the potential of a deaf girl, who was making good academic progress in the regular classroom with a hearing aid and other special services, by providing her with a special sign-language interpreter.[220]

A determination that the school was obligated to maximize the academic potential of every disabled student would have further exacerbated the gap between the two classes of students in the public

217. *Rowley*, 458 U.S. at 198.

218. *Id.* at 201.

219. *Id.* at 207.

220. *Id.* at 176–78.

schools—the disabled student, who is statutorily entitled to a free appropriate education with all the resources needed to fulfill that entitlement, and the nondisabled student, who is not so entitled. And although it may seem harsh to assert that public schools do not have the duty to maximize the academic potential of its students, the lack of resources to do so requires this limitation. Indeed, it would be untenable to assert that some students are entitled to this extraordinary benefit, while others are not.[221]

Sometimes educators, when assessing whether the education program will meet the unique needs of the individual disabled child as required by statute, determine that the transfer of knowledge can best take place in a separate classroom.[222] It is here where the public school—even if it is attempting to maximize the academic potential of the disabled student—runs up against the baffling tension present in IDEA: the "free appropriate public education"[223] requirement versus the requirement of integration "to the maximum extent appropriate."[224] And it is here where the courts have subtly—perhaps unwittingly—imported the principles set forth in *Rowley* into the inclusion context.[225]

In *Rowley*, the parents of a deaf child requested additional services for the child in the regular classroom, claiming that the child needed these additional services to obtain an appropriate education. The *Rowley* opinion did not deal with inclusion to the maximum extent appropriate, as Amy Rowley was already included in a regular classroom.[226] Although some courts addressing inclusion have purported to distinguish *Rowley*,[227] they nonetheless have brought into the inclusion opinions

221. *See* Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 178 (3d Cir. 1988) ("However desirable the goal of maximizing each child's potential may be in terms of individuals . . . achieving such a goal would be beyond the fiscal capacity of state and local governments.").

222. *See* 20 U.S.C. § 1401(a)(20) (1994).

223. 20 U.S.C. § 1412(1) (1994).

224. 20 U.S.C. § 1412(5)(B).

225. Although courts addressing the inclusion issue attempt to distinguish the *Rowley* inquiry from inclusion, the essence of *Rowley* seems to creep back into the opinions. For example, in *Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir. 1983), the court stated that whether a disabled child's education is "appropriate" is different from the inclusion issue. However, the court later explained that the factor that makes a general classroom "feasible" is whether the disabled child would "benefit" from mainstreaming. *Id.* at 1063.

226. Board of Educ. v. Rowley, 458 U.S. 176, 184 (1982).

227. *See, e.g.*, Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) (noting that *Rowley* test is limited and does not advance court's inquiry regarding inclusion); *Roncker*, 700 F.2d at 1062 (noting that "case differs from *Rowley* in two significant ways").

some sense from *Rowley* that placement in the regular classroom is appropriate under the statute as long as the disabled child obtains "some" benefits.[228] These courts have never stated that a disabled child must be included in a regular classroom if the child receives no benefit whatsoever. Instead, these courts believe that the child will obtain some kind of social benefit—like modeling or increased self-esteem—in the general education classroom.[229] Under the standards set forth by these courts of appeals, once that minimum benefit "floor"[230] is reached, even the claim that the disabled child would make greater academic progress in a special classroom does not mean that inclusion would be inappropriate. Thus, under the feasibility standard adopted by the Sixth Circuit[231] and the factors adopted by the Fifth[232] and the Ninth Circuits,[233] obtaining some benefit in the general education classroom is enough.

This is exactly what the Court held in *Rowley* when the parents of a deaf child claimed the school was not giving her additional services—services that would allow her to maximize her potential. The school is not required to do more than institute a program that is "sufficient to confer some educational benefit."[234] For Amy Rowley, a hearing aid in

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228. *See, e.g.*, *Roncker*, 700 F.2d at 1063 ("Some handicapped children simply must be educated in segregated facilities . . . because the handicapped child would not benefit from mainstreaming . . . .").

229. *See, e.g.*, Oberti v. Board of Educ. 995 F.2d 1204, 1216 (3d Cir. 1993) (describing importance of "unique benefits" obtained from inclusion like "the development of social and communication skills from interaction with nondisabled peers"); Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991) (claiming that language and role modeling from association with nondisabled peers are essential benefits of inclusion); *Daniel R.R.*, 874 F.2d at 1048–49 (stating that "the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development"); Board of Educ. v. Holland, 786 F. Supp. 874, 882 (E.D. Cal. 1992) (noting benefits of social and communication skills and increased self-esteem), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994); *cf. Roncker*, 700 F.2d at 1065 (Kennedy, J., dissenting) (noting argument that disabled boy must be provided program within regular school environment "even if the only benefit from such placement is to avoid the stigma of attending special school").

230. *Rowley*, 458 U.S. at 201.

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

232. *Daniel R.R.*, 874 F.2d at 1048–50.

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

234. *Rowley*, 458 U.S. at 200. Some courts have interpreted free appropriate education after *Rowley* to mean that a disabled child must obtain more than mere de minimis educational benefit. *See, e.g.*, Doe v. Alabama Dep't of Educ., 915 F.2d 651, 665 (11th Cir. 1990) (noting that program offered to disabled student provided more than de minimis educational benefits); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3d Cir. 1988) (requiring meaningful benefit). Yet these same courts have set standards for inclusion that would allow a child to be placed in a general education classroom even if the child would achieve more academically under a special program. *See supra* Part II.D.1.

the regular classroom was all the school was required to provide because it was part of a program from which she obtained *some* benefit.[235]

Thus, the *Rowley* Court determined that Congress did not require state and local agencies to maximize the potential of each disabled child. The Third Circuit has also recognized that "[h]owever desirable the goal of maximizing each child's potential may be in terms of individuals . . . achieving such a goal would be beyond the fiscal capacity of state and local governments."[236] But surely Congress did not intend for the statute to be a bar for schools who *wish* to do more to ensure the academic progress of a disabled child by providing for the child's unique needs in a special classroom that is academically superior for the child.[237] And the Supreme Court has cautioned the courts against reviewing matters of educational methodology, noting that courts are not competent to resolve such "persistent and difficult questions of educational policy" and that Congress did not intend judicial review to stretch that far into the schools.[238]

Obtaining a "serious education" for the disabled child may perhaps be the ultimate liberation—it may be the difference between a life of dependence on the nondisabled for support and sustenance and a more independent and self-reliant existence.[239] An educational setting where the child will make greater academic progress is more likely to lead to self-sufficiency than a setting where a child "may be able to absorb only a minimal amount of the regular education program."[240] The unflagging insistence that academic achievement is somehow less important for the disabled child in relation to the goal of inclusion treats the disabled child differently from the nondisabled child in a matter of ultimate importance. Even if schools are not statutorily obligated to maximize the academic potential of disabled students, this does not mean that schools should not strive to do so, within the means of their limited resources. Given its

235. *Rowley*, 458 U.S. at 184, 209–10.

236. *Polk*, 853 F.2d. at 178–79.

237. *See* Wilson v. Marana Unified Sch. Dist. No. 6, 735 F.2d 1178, 1182 (9th Cir. 1984) (deciding that although IDEA does not require states to provide disabled children with best education possible, this does not mean that states do not have power to provide disabled children with education which they consider more appropriate than that proposed by parents). *But see* Johnson v. Lancaster-Lebanon Intermediate Unit 13, 757 F. Supp. 606, 519 (E.D. Pa. 1991) ("[U]nder *Rowley* mainstreaming is one indication of whether a handicapped child is receiving adequate benefits from his or her education.").

238. *Rowley*, 458 U.S. at 208 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)).

239. *See id.* at 205 n.23 (noting Congress's concern for self-sufficiency).

240. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989).

pedagogical mission, the public school must attempt to create a community of learning where the transfer of knowledge for all students can and will occur, and where every student reaches his or her potential.[241]

IV. A CRITICAL EXAMINATION OF THE ASSUMPTIONS THAT UNDERLIE THE INCLUSION MOVEMENT

In addition to the subtle importation of the *Rowley* benefit principle into the inclusion analysis, the courts' subordination of tangible academic benefit to intangible nonacademic benefits indicates that some courts—at least implicitly—accept the underlying premises of the full inclusion advocates—that separation because of difference is harmful and that the harm can be cured by exposure to children who are of the mainstream. According to the full inclusion advocates, exposure to nondisabled children helps to cure the harm created by separation in various ways.[242] Although some advocates simply assert that inclusion is morally and ethically the "right thing to do," the underlying presumption is that separation stigmatizes and causes the separated child to feel inferior because the child is different.[243] Including the child in a general education classroom with nondisabled students is viewed as a means to increase the child's self-esteem.[244] Greater self-esteem, in turn, may be presumed to lead to greater academic achievement.[245]

Besides curing the stigma caused by separation, full inclusion advocates also believe that inclusion helps to cure that which caused the

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241. *See infra* Part V.

242. *See, e.g.*, Kotler, *supra* note 37, at 358 n.102 ("Just as a sick child is given medical attention and then sent back to school to join his or her classmates, whenever possible the disabled child should receive highly intensive intervention and then join (or rejoin) the group.").

243. *See* Hocutt et al., *supra* note 99, at 23 (noting issue of stigma associated with students separated from their peers); Kauffman & Pullen, *supra* note 176, at 7 (noting belief that all special classes represent unethical treatment because separation from mainstream is always demeaning, whereas being with majority is always self-enhancing); Kotler, *supra* note 37, at 366 (describing goal of IDEA as integration to promote dignity of child).

244. *See* Board of Educ. v. Holland, 786 F. Supp. 874, 879 (E.D. Cal. 1992) (stating that "child may be better able to learn academic subjects because of improved self-esteem and increased motivation due to placement in regular education"), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994). Although the *Holland* court accepted this proposition explicitly, it is also implied in other opinions. *See, e.g.*, Roncker v. Walter, 700 F.2d 1058, 1065 (6th Cir. 1983) (Kennedy, J., dissenting) (noting argument that special education program must be provided within regular school environment "even if the only benefit . . . is to avoid the stigma of attending a special school").

245. *See Holland*, 786 F. Supp. at 879.

child to be viewed as different in the first place. In short, disabled children should use nondisabled children as models to help cure their deficiencies.[246]

The next section examines the premise that separation because of difference is stigmatizing. It then analyzes the claim that inclusion cures the stigma of inferiority that stems from segregation and thereby increases self-esteem and achievement. This claim deserves closer study, given the serious questions that are being raised about the self-esteem movement in the public schools.

A. Assessing the Curative Value of Inclusion

1. Stigma and Self-Esteem

The notion that separation because of difference must always be stigmatizing does not withstand close examination. Students who are segregated into special classes for those who are deemed gifted and those who are separated for special academic classes in, for example, science or music are not stigmatized. Indeed, school districts are praised when they create special schools—magnet schools—that separate out students because of their talent in foreign languages, mathematics, science, or the arts.[247] Members of the U.S. Wheelchair Basketball Team in the 1996 Paralympics were not stigmatized because they were separated—because of difference—from the Dream Team.[248]

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246. *See, e.g.*, Greer v. Rome City Sch. Dist., 950 F.2d 688, 692 (11th Cir. 1991) (noting concern of psychologist hired by parents that disabled child will not have peer models to imitate in self-contained special education class); *id.* at 697 (stating that even if disabled child makes academic progress more quickly in self-contained special education class, such progress might not justify placement in that environment "if the child would receive considerable nonacademic benefit, such as language and role modeling, from association with his or her nonhandicapped peers"); *see also* Kauffman & Pullen, *supra* note 176, at 8 (pointing out that modeling is "common argument" of inclusion advocates).

247. *See* Thomas Toch et al., *Schools That Work*, U.S. News & World Rep., May 27, 1991, at 58; *cf.* Huefner, *supra* note 14, at 49 (noting that Learning Disabilities Association of America and some educators of the deaf do not support full inclusion).

248. *See* Seth Coleman, *Paralympic Games*, Atlanta Const., Aug. 25, 1996, at 13E. A Team USA member described the bronze medal game crowd as "the loudest crowd I've ever played in front of—even louder than in Barcelona. They made the difference tonight.... They reacted to everything we did, and the whole team fed off that." *Id.*; *see also* Richard Hoffer, *Ready, Willing and Able; They Don't Want Pity or Teary Tributes*, Sports Ill., Aug. 14, 1995, at 67 ("Disabled athletes hope that what they do will be revealed as *sport*: the kind of rigorous and cut-throat activity that fans pay to watch, and kids want to try."); *id.* at 69 (describing ESPN program *Break Away*, which features sports for disabled, and magazines like *Sports 'n Spokes* and *Palaestra* that "treat disabled athletes as authentic sports figures").

Thus, it is not necessarily the separation, but the *meaning behind* the separation that stigmatizes the separated students.[249] If students are separated because they are viewed as inferior or unworthy, then they are stigmatized as being inferior and unworthy. But not all separation because of different abilities can be attributed to the invidious belief that the difference makes the individual inferior or unworthy.[250] Separation that places an individual with a disability in a setting where that individual can flourish—whether on the wheelchair basketball court or a special education classroom—may simply be based on the individual's unique needs. Instead of assuming that all separation because of disability is invidious, "discovering the intent of school officials seems to be the best method for determining the message attached to certain administrative rules used by public schools" and for "determin[ing] the values being inculcated by such rules in public schools."[251]

During parts of the nineteenth and twentieth centuries, when the disabled were excluded by law from all educational opportunity, it was apparent that the meaning behind separating the disabled from the nondisabled was a belief in the inherent inferiority of the disabled.[252] The full inclusion advocates (and the courts that have accepted their arguments) have assumed without question that—despite the demise of de jure segregation—the de facto segregation of disabled students inevitably stems from the invidious belief that the disabled are inferior.

Although it is possible that, in some instances, segregation of disabled students may stem from an improper motive, the segregation of a disabled child in a separate classroom may also be motivated by "sound educational justification"[253] or "legitimate school concerns"[254] instead of

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249. *See* Kauffman & Pullen, *supra* note 176, at 11 ("The real issues are the meanings we attach to disabilities, not the fact that we label them."); *cf.* Brown, *De Jure Segregation*, *supra* note 207, at 14 ("Establishing invidious intent is tantamount to proving that the meaning attached to the separation of blacks and whites in schools was a belief in the inferiority of African-Americans.").

250. *See* Brown, *De Jure Segregation*, *supra* note 207, at 11 (stating that not all racial separation in schools should be attributed to "invidious value" of racial inferiority).

251. *Id.* at 14 n.45; *cf.* Minow, *Making All the Difference*, *supra* note 107, at 108–10, 137–39, 144–45 (claiming that rights analysis as applied to disabled contains contradictions when one strand emphasizes "sameness" between disabled and nondisabled and one strand emphasizes "difference"—that certain entitlements are required because of special needs of disabled).

252. *See supra* Part II.A.

253. United States v. Fordice, 505 U.S. 717, 731 (1992). In *Fordice*, the Court addressed whether the State of Mississippi had taken the requisite affirmative steps to dismantle its prior de jure segregated system in light of its policies regarding historically black and historically white institutions of higher learning. The Court stated that if a State perpetuates policies that continue to have a segregative effect and if "such policies are without *sound educational justification* and can be

illegitimate notions of inferiority.[255] Researchers who have visited various school sites to study inclusion have noted that they observed "very little 'specially designed instruction' [for the disabled] in the regular classroom."[256] In fact, these researchers "saw almost no specific, directed, individualized, intensive, remedial instruction" in the regular classroom for the disabled students, "who were clearly deficient academically and struggling with the school-work they were being given."[257] Moreover, it is difficult to see how being placed in a situation where the disabled child cannot succeed and fairly compete with peers will help their self-esteem. Without individualized, intensive remedial instruction for the disabled child included in the general education classroom—a goal that may prove impossible, given the limits on teacher time and financial resources[258]—the disabled child may indeed receive superior academic training in a special classroom. In a special classroom the disabled child may better obtain training that meets the child's unique needs,[259] training that may eventually lead to greater academic achievement and greater preparation for adult life.[260] Thus, although

practically eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system." *Id.* (emphasis added).

254. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting). The Court determined that absent "substantial disruption" or "material interference" with the education process, the school cannot restrain student expression. *Id.* at 514. Justice Harlan would have allowed school officials "the widest authority in maintaining discipline and good order in their institutions." *Id.* at 526 (Harlan, J., dissenting). "[H]e assumed that the teacher—who is trained and experienced in the pedagogical needs of students—would act in the best or 'legitimate' interests of the students unless the student could show otherwise." Dupre, *supra* note 25, at 102; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (stating that school principal has power to control student speech in school-sponsored newspaper if restraint is "reasonably related to legitimate pedagogical concerns"). For an argument that a new definition of school power lies within Justice Harlan's dissent in *Tinker*, see Dupre, *supra* note 25, at 102–03.

255. Although de jure segregation by race clearly was designed to perpetuate the assumption of inferiority, courts determined that the meaning behind de facto segregation—separation that occurs in fact, but is not pursuant to statute—could be ascertained only by focusing on the intent of the school officials. *See* Brown, *De Jure Segregation*, *supra* note 207, at 13.

256. Baker & Zigmond, *supra* note 18, at 178.

257. *Id.*; *see also* James M. Kauffman, *How We Might Achieve the Radical Reform of Special Education*, 60 Exceptional Children 6, 8 (1993) (citing recent empirical studies that indicate that we do not "currently have effective and reliable strategies for improving and sustaining outcomes for *all* students in regular classrooms").

258. *See infra* Part V.A–B.

259. *Cf.* Minow, *Making All the Difference*, *supra* note 107, at 37–39 (stating that better educational opportunity may be available for some students in specialized setting rather than in general education classroom).

260. *See* Kauffman & Pullen, *supra* note 176, at 6 (stating that disabled student must be placed in environment where student can meet objective of IEP "without endangering self or others, and this environment almost certainly will not be the general education classroom for all students").

compelled separation to perpetuate a belief in inferiority is "an insult and an act of domination," separation to obtain superior academic training and to better meet a disabled child's needs may "reflect pride and a commitment to group self-determination."[261]

In addition to the superior academic training motive for special classes, there may be evidence that the disabled child would disrupt the learning community or take up a disproportionate amount of the teacher's time and the school's limited resources in the general education classroom so that other children will be unable to achieve academically.[262] If the segregation is not the result of the invidious belief that the disabled child is inferior but stems from another legitimate pedagogical motive, the meaning behind the separation is not the inferiority of the disabled, but respect for academic achievement in the community of learning within the public school institution.[263] Thus, any stigma that may result—if a stigma does indeed result—is not necessarily a result of the separation itself.[264]

If a disabled child is stigmatized when the child is educated in a special classroom, it may not be because of the separation itself, but a result of deeply ingrained social attitudes about people who are disabled. The full inclusion advocates assert that placing disabled children in a regular classroom with nondisabled children would help to change some of these deeply ingrained social attitudes.[265] By exposing nondisabled children to disabled children, they argue, the nondisabled children would

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261. Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 Wm. & Mary L. Rev. 685, 689 n.24 (1995) (citing Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728, 746 (1986)).

262. *See infra* Part V.A–B.

263. *See* James M. Kauffman, *The Regular Education Initiative as Reagan-Bush Education Policy: A Trickle-Down Theory of Education of the Hard-To-Teach*, 23 J. Special Educ. 256, 262 (1989) ("[S]eparateness may be required for equality of opportunity when separation is based on criteria directly related to teaching and learning . . . .").

264. *Cf.* Kauffman, *supra* note 257, at 8 (pointing out that "studies of the social status of children with disabilities do not show that the stigma and isolation they feel is necessarily a result of their being taught outside the regular classroom").

265. *See* Daniel P. Hallahan & James M. Kauffman, *Toward a Culture of Disability in the Aftermath of Deno and Dunn*, 27 J. Special Educ. 496, 506 (1994) ("[R]adical inclusionists" presume that "perceptions are so colored by where instruction takes place that they induce an inability to recognize a person's worth and individuality as separate from where they are educated."); *see also* Oberti v. Board of Educ., 995 F.2d 1204, 1217 n.24 (3d Cir. 1993) (noting "reciprocal benefits of inclusion to the nondisabled students in the class" when they learn to work and communicate with disabled students). Of course, inappropriately placing a child in a regular classroom may only serve to reinforce negative perceptions when the child cannot conform to the social norms there because of, for example, severe behavior problems.

learn that disability should neither be feared nor reviled.[266] In essence, inclusion would help to cure nondisabled students of their narrow-minded beliefs at the same time it cures the disabled child. This argument has some force, and there are indeed many disabled children who can and do achieve in the regular classroom, without hindering the academic progress of other students, and who may also teach some of their fellow students important lessons about tolerance. These children should certainly be included. But however important these lessons may be, they cannot subsume the primary purpose of the public school as an institution—to create a learning community for the transfer of knowledge where each student can and will obtain a serious education. Rather than forcing the disabled child to try to be "cured" and to be more "normal" by being included in the general education classroom, a better goal to strive for is "acceptance of people with disabilities regardless of where they receive their instruction."[267]

The value of self-esteem has been acclaimed in recent years as the solution for many of the problems plaguing children in the public schools.[268] The upshot for the public schools has been an emphasis on inculcating "intangible" sentiments like self-esteem, rather than stressing "tangible" academic achievement as a means towards self-esteem or even as an end unto itself.[269] Following this trend, increased self-esteem has been one of the rationales used by the disability inclusionists and then by the courts to elevate integration over education for students with disabilities.[270]

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266. *See generally* Susan Stainback & William Stainback, *Integration of Students with Severe Handicaps into Regular Schools* 8–10 (1985).

267. Hallahan & Kauffman, *supra* note 265, at 506; *see also* James M. Kauffman & Daniel P. Hallahan, *Toward a Comprehensive Delivery System for Special Education*, in *The Illusion of Full Inclusion*, *supra* note 92, at 157, 166–67 (noting need to balance focus on changing disabled person so as to be more normal with focus on changing society to accept people who have disabilities).

268. *See, e.g.*, Charles J. Sykes, *Dumbing Down Our Kids* 48–49 (1995) (noting that in 1990s many educators believe that self-esteem has "almost limitless application," including "inoculat[ing] us against the lures of crime, violence, substance abuse, teen pregnancy, child abuse, chronic welfare dependency and educational failure").

269. Weissbourd, *supra* note 211, at 12. "[M]any Americans place a higher priority on life adjustment and the enhancement of self-esteem than on academic learning." Harold W. Stevenson & James W. Stigler, *The Learning Gap* 111 (1992); *see also* Sykes, *supra* note 268, at 49 (noting how inflating self-image is part of therapeutic mindset that underlies hostility to intellectualism of traditional education).

270. *See, e.g.*, Board of Educ. v. Holland, 786 F. Supp. 874, 879 (E.D. Cal. 1992) (noting that self-esteem from being placed in regular classroom is likely to increase academic achievement), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994); National Sch. Pub. Relations Ass'n, *supra* note 2, at 88 (quoting Educational Facilities Laboratory Report stating that pride is most important scholastic achievement for retarded students).

But the self-esteem movement has been increasingly viewed as "not just useless but dangerous."[271] First, "there is little empirical evidence that American students suffer from a crisis of self-esteem."[272] In fact, some studies suggest that American students feel better about themselves than their abilities warrant.[273] Moreover, researchers are concluding that there is little "if any evidence that children's academic performance is causally determined by their global self-concept."[274] Most notably, although low self-esteem has been proposed as a cause of criminal behavior[275] as well as low academic performance, some studies show that violent criminals have high self-esteem.[276] Indeed, the increased violence

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271. Weissbourd, *supra* note 211, at 12.

272. Sykes, *supra* note 268, at 49.

273. *Id.* (pointing out that American students rank *first* when asked how they feel about their math abilities, but actually rank *last* in international comparisons of math abilities).

274. Thomas G. Moeller, *Self-Esteem: How Important Is It to Improving Academic Performance?*, Va. J. Educ., Nov. 1993, at 7, 11; *see also* Martin V. Covington, *Self-Esteem and Failure in School: Analysis and Policy Implications* in *The Social Importance of Self-Esteem* 72, 79 (Andrew M. Mecca et al. eds., 1989) (describing and citing studies that show generally low magnitude of association between self-esteem and achievement, with one study showing that 97% of variation in academic performance can be explained other than by self-concept); Sykes, *supra* note 268, at 53–54 (noting that although there is correlation between students with high academic achievement and high self-esteem, there is no evidence that one causes other); Weissbourd, *supra* note 211, at 12 (pointing out that host of studies show that "the very premise that greater self-esteem will boost academic achievement is simply wrong" and that "[s]elf-esteem has little or no impact on academic achievement, or on drug use violence or on any other serious problems"). Moreover, researchers that have tried to demonstrate that changes in self-concept lead to improved performance have reached contradictory results and the effects of the manipulation are short-lived. *See* Covington, *supra* at 79–80.

In addition to the lack of evidence that high self-esteem causes high academic performance, researchers have similarly concluded that "it will be very difficult indeed to identify a causal link between self-esteem and teenage pregnancy." Susan B. Crockenberg & Barbara A. Soby, *Self-Esteem and Teenage Pregnancy*, in *The Social Importance of Self-Esteem*, *supra*, at 125, 135. Although some research links low self-esteem to adolescent pregnancy, "these results do not necessarily demonstrate that low self-esteem increases the risk of pregnancy during adolescence." *Id.* at 145–46. In fact, researchers reviewing studies that examined the association between self-esteem and teenage pregnancy determined that, although low self-esteem "does contribute to the risk of an adolescent pregnancy . . . the association between low self-esteem and pregnancy is not strong." *Id.* at 149. These researchers "would not expect raising self-esteem to have a major impact on adolescent sexual behavior," although some data, "though imperfect," has led them to be hopeful that raising self-esteem might result in increased contraceptive use. *Id.* at 150. Factors other than self-esteem that affect the teen pregnancy rate are race or ethnicity, social class, age, availability of contraceptives, and the historical period during which the adolescent reached childbearing age. *Id.* at 132.

275. Thomas J. Scheff et al., *Crime, Violence and Self-Esteem: Review and Proposals*, in *The Social Importance of Self-Esteem*, *supra* note 274, at 165, 166.

276. *See* Roy F. Baumeister et al., *Relation of Threatened Egotism to Violence and Aggression: The Dark Side of High Self-Esteem*, 103 Psychological Rev. 5, 15–25 (1996) (examining patterns of self-esteem in individuals who have committed murder and assault, rape, or domestic violence, or

in schools may stem, not from low self-esteem, but from self-esteem that is so high that the student cannot abide by what the student sees as an act of disrespect.[277]

The alternative to the emphasis on self-concept is not neglecting or mistreating children. Rather, it is helping to instill the confidence that grows by overcoming challenges.[278] Disabled and nondisabled children alike can develop this kind of confidence built on achievement. On the other hand, children who are praised and rewarded merely in a misguided attempt to increase their self-worth—rather than for any kind of accomplishment—may learn to distrust the judgment of adults and to doubt their own abilities. Not allowing students to learn to cope with criticism or the disappointment that comes with failure is a major disservice to the child.[279]

One goal of IDEA is to help disabled children become productive members of society.[280] For many students this includes devising an IEP that sets academic standards geared towards obtaining skills that will enable them as adults to enter the workforce in some capacity.[281] To impart a serious education to these disabled students, educators must be able to set standards and then have the confidence to be judgmental about whether a student has reached that standard or not. Students who enter the twenty-first century's workforce thinking that their self-esteem is paramount to achievement on the job and who are not equipped to deal

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who have been involved in political terror, oppression, or genocide). *But compare* Scheff et al., *supra* note 275, at 170 (citing one study that proposed that delinquent behavior serves to enhance self-esteem for individuals who have experienced failure and lowered self-esteem) *with id.* at 177 (stating that "the vast body of quantitative studies does not establish level of self-esteem as a cause of crime and violence").

277. *See* Weissbourd, *supra* note 211, at 12. "Violent youths seem sincerely to believe that they are better than other people, but they frequently find themselves in circumstances that threaten or challenge these beliefs, and in those circumstances they tend to attack other people." Baumeister et al., *supra* note 276, at 22. "It also appears that they sometimes manipulate or seek out such challenges to their esteem, in order to enhance their esteem by prevailing in a violent contest." *Id.*

Studies addressing the relationship between self-esteem and welfare dependency have determined that "although cross-sectional studies might lean toward positing a relationship between low self-esteem and [welfare] dependency, the longitudinal data generally negate the observed finding." Leonard Schneiderman et al., *Self-Esteem and Chronic Welfare Dependency*, in *The Social Importance of Self-Esteem*, *supra* note 274, at 200, 233.

278. *See* Sykes, *supra* note 268, at 57.

279. "Children who learn to lose without being devastated and use failure experiences to grow will achieve in the classroom and in society. Learning to compete effectively is central to achievement in our schools." Sylvia B. Rimm, *Underachievement Syndrome: Causes and Cures* 4 (1986).

280. Board of Educ. v. Rowley, 458 U.S. 176, 201 n.23 (1982).

281. Of course the standards will vary depending on the disability involved.

with criticism will be unable to cope in a competitive multi-national market.[282]

Notwithstanding the controversy surrounding self-esteem, even if increased self-esteem is somehow desirable for disabled students, it is not clear that inclusion would increase self-esteem for many disabled children. Attending a special class may be less stigmatizing and less destructive of self-esteem for some disabled students than struggling in a general education classroom where they are constantly comparing themselves to nondisabled students.[283] Being part of a special class in which their unique instructional needs are met may be self-enhancing for disabled children.[284] Indeed, for some children, inclusion may exacerbate the stigma that inclusionists hope to eradicate.[285]

One message that arises from the inclusion movement is that the preferred method for disabled children to feel better about themselves is to sit next to nondisabled children. This contributes to a "self-fulfilling prophecy, in which students begin to feel stigmatized because we describe special classes as undesirable and general education classes as

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282. *See* Rimm, *supra* note 279, at 4 ("It is not possible to be productive in our society or in our schools until one learns to deal with competition, and dealing with competition means coping with losing in a productive way.").

283. *See* Kauffman & Pullen, *supra* note 176, at 7; *see also* Joanne Greenberg & Glenn Doolittle, *Can Schools Speak the Language of the Deaf?*, N.Y. Times Mag., Dec. 11, 1977, at 50 (reporting isolation in class when child is "different" and others are seen as "normal" more damaging than stigma of separation); Joseph R. Jenkins & Amy Heinen, *Students' Preferences for Service Delivery: Pull-out, In-class or Integrated Models*, 55 Exceptional Children 516, 519–20 (1989) (noting that interviews with children suggest that many feel more stigmatized when they are given special help in general education classrooms than when they are pulled out for special help in separate classrooms). For instance, a child who is performing four levels below the other students in the class as a result of her disability will at some point realize that she is not doing the same things nor is she able to do the same things that the other children are doing. Children often care very deeply about whether they are conforming to what others are doing. They may become angry and frustrated, or they may just withdraw quietly from any real effort to keep up with the others. Those of us who have taken a class where others have abilities far superior to ours may have experienced a mild version of this.

284. *See* Kauffman & Pullen, *supra* note 176, at 7–8 (explaining how disabled child lost motivation in general classroom and regained it in special class). A school attorney who handled the *Greer* case for the school district before the Eleventh Circuit, *see* Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991), visited the general education classroom where Christy Greer, now in middle school, is presently included. Interview with Sam Harben, attorney, Harben & Hartley, in Athens, Ga. (Feb. 26, 1997) (on file with author). According to Mr. Harben, Christy has withdrawn from the rest of the class, sits off by herself, and has little, if any, contact with other students. When Mr. Harben visited the special class in which Christy would have been placed, he stated that the students were happy and excited as they worked together to prepare for Parents' Day. *Id.*

285. *Cf.* Brown, *De Jure Segregation*, *supra* note 207, at 67 (stating that while "segregation in the past stood as a symbol of the inferiority of African-Americans, the remedies for de jure segregation . . . merely replicate the disease.").

better or preferable for everyone."[286] If the disabled child has increased self-esteem only because he is allowed to sit in the same classroom as his nondisabled peers, then we have allowed society to construct a wall of inferiority around the disabled students. Most disturbingly, we have used the school—an institution that should be stressing the virtues of academic achievement—to deny "the possibility that a positive self-identity can be fostered by associating with others who share one's exceptionality."[287] Instead of recognizing and accepting the difference—the exceptionality—that is disability, the disabled and nondisabled alike receive the signal that there is something "wrong" with being disabled that can only be cured by being with and being more like nondisabled children.[288] This sets an impossible task before some disabled children, because some disabled children simply can never be like nondisabled children. It fails to allow for the development of pride in difference and stifles the belief that separation because of difference is just that—because of difference and not because of inferiority.

2. *Modeling*

In addition to increasing self-esteem and avoiding stigma, the courts have also latched onto another "common argument"[289] of the inclusion advocates: when in a regular classroom, the disabled children can use the nondisabled children as models to help cure their deficiencies.[290] The courts that have accepted this premise allude to no evidence that this is

286. *See* Kauffman & Pullen, *supra* note 176, at 7.

287. *Id.* (citation omitted); *see also* Eric Minton, *What a Sport! Wheelchair Sports Are Becoming More Popular*, 10 Indep. Living Provider 52 (1995) (quoting wheelchair basketball player describing camaraderie from wheelchair athletics and importance of "being with other people in my situation").

288. *Cf.* Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, in *Children With Special Needs* 378 (Katharine T. Bartlett & Judith Welch Wegner eds., 1987) (describing "difference dilemma" as either labeling student and focusing on disability—thus risking stigma—or ignoring disability and risking stigma because majority practices are shaped without regard for difference).

289. Kauffman & Pullen, *supra* note 176, at 8.

290. *See, e.g.*, Oberti v. Board of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993) ("The court must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers."); Greer v. Rome City Sch. Dist., 950 F.2d 688, 692 (11th Cir. 1991) (noting concern of psychologist hired by parents that disabled child will not have peer models to imitate in self-contained special education class); *id.* at 697 (stating that even determination that disabled child will make academic progress more quickly in self-contained special education class might not justify placement in that environment "if the child would receive considerable nonacademic benefit, such as language and role modeling from association with his or her nonhandicapped peers").

true and set forth no standard for how much modeling must take place before the academic benefit to the disabled child is discounted to serve the modeling function of inclusion. They also fail to acknowledge that the modeling function may be sufficiently addressed when the disabled child is included during art, music, physical education, lunch, and recess.

The assumption by the courts that modeling—or observational learning—will improve the lot of the disabled student is open to question. "The mechanisms of peer influence, including observational learning, are not simple; the effects of peer models are highly dependent upon their social context, and models are but one factor among many influences on social status and social conduct . . . ."[291] Disabled students do not spontaneously imitate the appropriate behavior of nondisabled students.[292] Indeed, observing the behavior and reinforcement of a model sometimes results in acceleration of behavior the opposite of that exhibited by the model.[293] Even when the behavior of children with emotional or behavioral disorders improves after witnessing appropriate behavior in nondisabled peer models, studies suggest that the effects are temporary.[294]

Perhaps most troubling is the fact that, where examined critically, the modeling rationale itself is based in part on stereotypes about disabled and nondisabled children: the special classroom contains disabled students who will have both abnormal behavior and language patterns, whereas the general education classroom contains "normal" students who are well-behaved and adept at language skills. The underlying assumption is that students with disabilities will have a primarily negative influence on each other[295] and that "[s]tudents with disabilities need to be alongside those who don't have disabilities, because the

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291. Hallenbeck & Kauffman, *supra* note 18, at 46–47. "[Children need] instruction in what to pay attention to, how to remember and rehearse modeled behavior, how to judge when and where to produce imitative responses, as well as external and explicit motivation for appropriate imitation. These instructional needs go well beyond the social curriculum offered in the typical classroom." *Id.* at 61. *But cf.* Paul Sale & Doris M. Carey, *The Sociometric Status of Students with Disabilities in a Full-Inclusion School*, 62 Exceptional Children 6, 7 (1995) (pointing out differing results in studies of inclusion of children with severe disabilities, where one study showed social and communication benefits and others showed social isolation in general classroom).

292. Hallenbeck & Kauffman, *supra* note 18, at 63.

293. *Id.* at 57–58 (describing studies).

294. *Id.* at 59–61 (describing studies but noting some beneficial results for withdrawn children and children with relatively good behavior).

295. "How will children learn to behave if they have only the 'horrid examples' provided by others with disabilities?" Kauffman & Pullen, *supra* note 176, at 8.

normal ones know how to behave and will be good examples."[296] Left unexplained, however, is why the behavior of students in general education classrooms sometimes deteriorates and why the disabled child fails to imitate his or her peers' "appropriate behavior" before being referred for a special class. In fact, "[i]t is quite unlikely that [the disabled students] will display, by virtue of their being returned to regular classes, skills that they did not show prior to being removed from regular classes."[297]

Despite these stereotypical assumptions, of course, nearly every general education or special education classroom contains both desirable and undesirable models.[298] The full inclusion proponents and some courts of appeals have assumed not only that observational learning will take place, but also that what is learned will somehow have a positive influence on the disabled child.[299] But it is unclear to what degree students with disabilities learn from appropriate peer models, and students may learn from inappropriate models as well.[300] Students with emotional or behavioral disorders, for example, typically have demonstrated their proclivity for imitating inappropriate peer models in the general education class setting.[301] Moreover, to be effective, the observers must be able to identify with—to see something of themselves in—the model.[302] The special classroom provides children with a "reference group in which they may perceive their own capabilities within a more favorable light."[303] And models who are not already competent in a skill, but who are acquiring it through persistent effort, are more effective models for observers—like some disabled students—who are not competent.[304] The proponents of full inclusion would deprive disabled students of the opportunity to be role models for each other in

296. *Id.*

297. Hallenbeck & Kauffman, *supra* note 18, at 66.

298. *See* Kauffman & Pullen, *supra* note 176, at 8.

299. *See* cases cited *supra* note 290.

300. Kauffman & Pullen, *supra* note 176, at 8. ("[M]ost students with disabilities, like most other students, seem to learn unpredictably from appropriate peer models in the absence of an explicit imitation-training program.").

301. Hallenbeck & Kauffman, *supra* note 18, at 66.

302. *Id.* at 55 (describing studies); Kauffman & Pullen, *supra* note 176, at 8.

303. Coleman & Minnett, *supra* note 110, at 243. Some researchers claim that this comparison group is beneficial to the self-esteem of disabled children, particularly those who are socially rejected. *Id.* at 243–44; *see also* Hallahan & Kauffman, *supra* note 265, at 504 (suggesting that persons with learning disabilities consider themselves part of learning disability culture, that they embrace having learning disability as being part of their identity).

304. Hallenbeck & Kauffman, *supra* note 18, at 56.

special classes and—as with the self-esteem rationale—deny that there is a positive value that exists when those who share an exceptionality associate with each other.[305] In the rush to full inclusion, "we risk overlooking and discarding the discovery of identity, common will, and support that comes from the opportunity to congregate with those engaged in struggles that share characteristics of ability, culture, status, or environment."[306]

This is not the first time that the courts considering segregation issues have addressed the issue based on notions of stigma, self-esteem, and modeling. Court opinions dealing with racial integration, beginning with *Brown v. Board of Education*,[307] have taken a similar path. Full inclusion advocates claim that the *Brown* Court's statement that "separate educational facilities are inherently unequal"[308] means that separation of disabled students in a special education classroom is unlawful and/or unethical.[309] In the next section, I examine this premise, and I consider how some of the criticism of the racial school desegregation model—with its adherence to integration as the primary goal in educating African American students—relates to disability inclusion.

B. After Forty Years: The Curative Value and Racial Integration

The movement to achieve rights for the disabled has often been compared to the civil rights movement for racial equality.[310] Inclusion

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305. *See* Thomas W. Farmer et al., *The Social Behavior and Peer Relations of Emotionally and Behaviorally Disturbed Children in Residential Treatment*, 1 J. Emotional & Behavioral Disorders 223 (1993) (presenting research suggesting that children in well-taught, special education classes for students with emotional or behavioral disorders can develop social affiliations that foster pro-social behavior); Hallahan & Kauffman, *supra* note 265, at 505 (noting that among individuals with other identifying differences—senior citizens, veterans of foreign wars, recovering alcoholics, parents of children with specific disabilities—regular congregation is seen as vital part of identity and support).

Interestingly, many in the deaf community have been suspicious of the inclusion movement, and some prefer separate settings or residential institutions. *See* H. Lane, *Listen to the Needs of Deaf Children*, N.Y. Times, July 17, 1987, at A35. "In many ways, the deaf are proud of their deafness." Hallahan & Kauffman, *supra* note 265, at 503.

306. Hallahan & Kauffman, *supra* note 265, at 505 (quoting Eugene Edgar & Shepherd Siegel, *Postsecondary Scenarios for Troubled and Troubling Youth*, in *Issues in Educational Placement: Students with Emotional and Behavioral Disorders* 274 (James M. Kauffman et al. eds., 1995)).

307. 347 U.S. 483 (1954).

308. *Id.* at 495.

309. Kauffman & Pullen, *supra* note 176, at 9.

310. *See, e.g.*, Sage & Burello, *supra* note 20, at 39 (asserting that principles established in *Brown* are applicable to "other discriminatory classifications," including classification of disabled); *see also* Weber, *supra* note 2, at 393 (noting "powerful analogy to race cases").

advocates claim that the exclusion of disabled children from all educational services is similar to the exclusion of African American children from white schools. Some have compared special education to apartheid,[311] and even to slavery.[312] But, as explained below, although some parallels exist when assessing the harm of exclusion, the analogy fails when it comes to the remedy of inclusion.[313] Moreover, the forty-odd years since *Brown* was decided have allowed time for reflection regarding some of the underlying beliefs that fueled the racial integration movement in schools. Scholars have begun to examine the premises of the racial integration model in the public schools and to analyze its effects on African American children and on African American institutions. Some commentators and judges—with the acute vision of hindsight—have sharply criticized the path that the courts took in the racial integration cases,[314] and groups that have fought for inclusion in the past are now waging a fight for separate classrooms in the hope of achieving greater academic success.[315] Some African American leaders

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Moreover, "the existence of a disproportionate number of minority children in [special] classes opened them to critical scrutiny as pockets of segregation within schools." MacMillan et al., *supra* note 102, at 470. A discussion of this issue is beyond the scope of this Article. *Compare* Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 Wis. L. Rev. 1237, 1243–44 (claiming that unconscious and structural racism is pervasive in special education system) *with* Clune & Van Pelt, *supra* note 83, at 17 (pointing out possibility that factors other than racial discrimination might account for disproportionate number of black children in special education classes).

311. *See, e.g.*, Dorothy K. Lipsky & Alan Gartner, *Capable of Achievement and Worthy of Respect: Education for Handicapped Children as if They Were Full-Fledged Human Beings*, 54 Exceptional Children 69, 70 (1987) (citation omitted).

312. Susan Stainback & William Stainback, Letter to the Editor, 21 J. Learning Disabilities 452, 452–53 (1988).

313. *But see* Weber, *supra* note 2, at 393 n.233 (claiming that comparison between racial segregation and disability segregation is precise "[w]hen mainstreaming is at issue").

314. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 122 (1995) (Thomas, J., concurring) ("After all, if separation itself is a harm and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks.").

315. *See, e.g.*, Wendy Brown-Scott, *Justice Thurgood Marshall and the Integrative Ideal*, 26 Ariz. St. L.J. 535, 535 (1994) (pointing out argument by African Americans that historically black public colleges and universities should be preserved); Joshua E. Kimerling, Comment, *Black Male Academies: Re-Examining the Strategy of Integration*, 42 Buff. L. Rev. 829 (1994) (noting that as result of persistent educational achievement disparities between black and white American students, educators are proposing and implementing creation of all-black, male public academies); Anemona Hartocollis, *Groups: Get All-Girls School Off A-Gender*, N.Y. Daily News, July 16, 1996, at 14 (discussing how philanthropist Ann Rubenstein Tisch hopes to establish all-girls public school in East Harlem because statistics show that "top schools in England are single-sex and that girls do better in science and math when they are apart from boys"); David Sadker & Jacqueline Sadker, *Separate—But Still Short-Changed*, Wash. Post, Nov. 1, 1995, at A19 (discussing research that

stress that there is no evidence that blacks must attend school with whites to learn,[316] and both "African American advocates and parents have indicated a willingness to forego racial balance in favor of effective education when the two seem incompatible."[317]

Racial desegregation, similar to disability inclusion, was thought to enhance academic achievement, raise self-esteem for African American students, improve race relations, and produce other long-term benefits for all students in desegregated schools.[318] Yet some scholars have concluded that these standard justifications for desegregation lack any verifiable support.[319] The evolution of racial integration and the criticisms of the direction it has taken have been largely ignored by the full inclusion advocates and the courts that have accepted their strikingly similar justifications. Before careening toward full disability inclusion, its advocates should pause and reconsider whether inclusion actually advances the beneficial values it purports to advance for disabled students and whether the cost to the important functions of the public school is worth the benefit obtained. In this section, I begin this inquiry by examining the premises that sustain the disability inclusion movement

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suggests that many girls do better in single-sex schools, where they often attain higher levels of academic performance and career aspirations than girls in coeducational settings).

316. *See* Steven A. Holmes, *Look Who's Saying Separate Is Equal*, N.Y. Times, Oct. 1, 1995, at 2.

317. Yarbrough, *supra* note 261, at 686 (citing Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 479–80 (1976)); *see also* Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 Iowa L. Rev. 813, 820–21 (1993) (explaining that need for alternative education of African Americans to improve educational performance is embodied in concept of immersion schools); Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 Minn. L. Rev. 735, 811 (1985) (noting preferences of some black parents in St. Louis for improved schools over integrated schools); Christopher Steskal, *Creating Space for Racial Difference: The Case for African American Schools*, 27 Harv. C.R.-C.L. L. Rev. 187 (1992); Paul M. Barrett, *Busing Revisited: Court to Ponder Issue of School Integration as Some Blacks Shift*, Wall St. J., Oct 4, 1991, at A1 (noting that African American parents are more concerned with obtaining fair share of resources for neighborhood schools than with having integrated schools); James Traub, *Separate and Equal*, Atlantic, Sept. 1991, at 24 (pointing out support of black parents for school placement plan that returned many students to racially segregated schools based on improved achievement test scores); Larry Tye, *U.S. Sounds Retreat in School Integration*, Boston Globe, Jan. 5, 1992, at 1 (noting increasing numbers of segregated schools and support of black leaders for schools designed to meet needs of inner-city black youth).

318. *See* David J. Armor, *Forced Justice, School Desegregation and the Law* 61 (1995).

319. *Id.* at 112. Armor asserts that gains made by black students are primarily attributable not to desegregation, but to improved educational and economic status of black parents. *See id.* at 76–98. He sets forth evidence that implies that desegregation may in fact lower black self esteem. *Id.* at 101. He also notes that studies on the effect of desegregation on race relations and on other long-term benefits are inconclusive. *Id.* at 102–03, 107–08.

through the prism of the racial integration model, a critical perspective that adds rich insight to the disability inclusion issue.

Although, as discussed below, there are significant distinctions between school segregation because of race and school segregation because of disability, there are also undeniable similarities. Both African American children and disabled children were excluded by law from many public schools.[320] African American children were excluded by law from white schools in some states because they were viewed as different and inferior. Similarly, disabled children were also excluded from educational opportunity because they were viewed as different and inferior. The difference that excluded the African American child was the color of his skin. The difference that excluded the disabled child was his disability. In deciding that excluding African American children by law was unconstitutional, the U.S. Supreme Court in *Brown v. Board of Education* underscored the importance of education. Education is "the very foundation of good citizenship."[321] As a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment,"[322] the court understood that "education is necessary for individuals to function in a democratic society."[323] Thus, according to the Court, educational opportunity "must be made available to all on equal terms."[324]

The *Brown* Court's emphasis on the importance of education explains why disabled children should not be excluded from all educational opportunities because of their disabilities, but it does not support inclusion in the regular classroom for a disabled child if the disabled child would achieve better elsewhere. Indeed, the opinion's emphasis on the importance of education seems to point in the opposite direction. *Brown* is limited to irrational line-drawing based on race. At least for some mental and physical disabilities, there is a rational reason for differential treatment.

The "difference" that is a result of some kinds of disability—while it most certainly does not warrant excluding the child by law from all

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320. *Cf.* Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 Emory L.J. 791, 793–98 (1993) (describing historical debate over separate versus integrated education in African American community).

321. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

322. *Id.*

323. Sage & Burello, *supra* note 20, at 39.

324. *Brown*, 347 U.S. at 493.

educational services—is a difference that may have at least some relevance to academic achievement if the child were included in the general education classroom.[325] With race there is no question of degree—no child of whatever shade or hue should be excluded from a classroom because of color, because color is not related to any relevant educational consideration. But children have a wide range of disabilities; where few would argue that a child missing a leg should be excluded from the general education classroom because she is in a wheelchair, a child with no brain stem who cannot walk, talk or control bodily functions should be placed in a special segregated classroom.[326] A child with certain kinds of severe cognitive disabilities simply may not be able to achieve academically in the regular classroom. Because of the varied manifestations and limitations of the many cognitive, behavioral, and physical disabilities that can affect a child, segregation by disability, unlike by race, involves line drawing between those whose disability allows them to be included in the regular classroom and those whose disability is too severe for satisfactory inclusion. Indeed, some children with severe cognitive disabilities may become defeated and frustrated if they are placed in regular classrooms where they are unable to perform with their nondisabled peers.[327]

Thus, although the *result* of racial and disability discrimination was the same—outright exclusion from certain schools by law—this does not necessarily mean that the *remedy* for the wrong—full inclusion—should be the same in each and every disability case. It is true that the civil rights issue for racial minorities and for disabled students is one of access. But in the former case the issue is one of access to the same services provided to others, regardless of skin color; in the latter case, however, the issue is one of "access to a differentiated education designed specifically to accommodate [the special needs of the disabled

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325. *See* Kauffman, *supra* note 263, at 261–62. ("[T]he physical, cognitive and behavioral characteristics of handicapped children and youth are more complex and relevant to learning and to the function of schools . . . than is ethnic origin."); Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 Cornell L. Rev. 401, 429 (1984) (explaining how denial of equal opportunity on basis of disability can be distinguished from denial of equal opportunity on basis of race).

326. *See* Kauffman, *supra* note 263, at 262 ("[S]eparateness may be required for equality of opportunity when separation is based on criteria directly related to teaching and learning."). The child should, of course, be mainstreamed "to the maximum extent appropriate" for lunch, recess, art, music, or physical education. 20 U.S.C. § 1412(5)(B) (1994).

327. *See* National Sch. Pub. Relations Ass'n, *supra* note 2, at 63–64; Kauffman & Pullen, *supra* note 176, at 7–8.

child] even if accommodation requires separation."[328] In addition, as examined below, some commentators and judges have debated whether the integration remedy, even as conceived for racial exclusion, has itself exacerbated the "feelings of inferiority" that it was supposed to cure.[329]

Despite these differences between disability and racial segregation, the full inclusion advocates have insinuated much of the analytical framework used by the courts in the race cases into the disability inclusion rhetoric.[330] Full inclusionists argue that the stigma that results from segregation either by race or by disability is an overarching evil—a plague that only inclusion will cure.[331] This cry for total inclusion has emotional appeal and fosters the image of the full inclusion advocate as taking the moral high ground.

As H.L. Mencken once said, "For every complex issue there is a simple answer, and it is wrong."[332] Inclusion for all disabled students is viewed as the "simple answer"—the therapy necessary to cure a serious pathology—and, as such, it takes on a force of its own. In short, inclusion must be achieved, even at great cost. It must subjugate other values, even—in the case of the disabled child—the value of academic training. Yet after considering the arguments of some of the critics of the legal process of racial desegregation, it may well be that the path forged in the racial integration movement would best be left untraveled by children with disabilities.

The *Brown* Court established the premise that segregation inherently constitutes nonequality, a premise that advocates of full inclusion use to press their claim for including all students in general education classrooms in their neighborhood schools.[333] The Court described the harm caused by de jure racial segregation in very much the way inclusion advocates describe the harm caused by placing a disabled child in a separate special education classroom: "To separate [these black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that

328. Kauffman, *supra* note 263, at 262.

329. *See* Brown, *De Jure Segregation*, *supra* note 207, at 67; *see also* Brown-Scott, *supra* note 315, at 545 (pointing to possibility that integration itself caused stigma). Compare Brown-Scott's critique of *Brown* with the critique of the article by Lloyd Dunn, *see infra* note 341.

330. *See supra* note 20.

331. *Cf.* Kauffman, *supra* note 263, at 261 (pointing out that inclusion advocates cited *Brown* and "discredited doctrine of 'separate but equal' as justification for the integration of handicapped students into regular classrooms").

332. Macmillan et al., *supra* note 102, at 477 (quoting Mencken).

333. *See* Sage & Burello, *supra* note 20, at 39; Kauffman & Pullen, *supra* note 176, at 9.

may affect their hearts and minds in a way unlikely ever to be undone."[334] Moreover, the Court stated:

> Segregation of white and colored children in public school has a detrimental effect upon the colored children. . . . [F]or the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children.[335]

Ever since the *Brown* Court made this pronouncement, "[r]emedying and avoiding the recurrence of this stigmatizing injury"—promoting integration—have been the "guiding objectives of [the U.S. Supreme] Court's desegregation jurisprudence."[336]

The *Brown* opinion entered American cultural consciousness as the point at which the U.S. Supreme Court reached its most glorious moment. But in recent years the *Brown* opinion and its school desegregation progeny have come under increasing criticism by scholars who claim that some of the premises that formed the basis of the racial integration model harmed future generations of African American school children.[337] Much of the criticism of *Brown* and its progeny stems from the stigma theory and the implicit claim—similar to the disability inclusionists' claim—that African American students would obtain significant educational benefits and would feel less inferior by sitting in the same classroom with white children.[338] The *Brown* Court's analysis of the "intangibles" that were missing from the African American segregated schools is the genesis of this criticism. Because the *Brown* Court started with the assumption that the "Negro and white schools involved had been equalized . . . with respect to buildings, curricula,

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334. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

335. *Id.* at 494 (quoting Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951)).

336. Board of Educ. v. Dowell, 498 U.S. 237, 258 (1991) (Marshall, J., dissenting).

337. *See, e.g.*, Brown, *De Jure Segregation*, *supra* note 207, at 67–80 (criticizing ideological framework established by *Brown* and its progeny as replicating same disease they purported to cure); Alex M. Johnson, *Bid Whist, Tonk and* United States v. Fordice: *Why Integrationism Fails African-Americans Again*, 81 Cal. L. Rev. 1401, 1402 (1993) (stating that *Brown* was a mistake); Drew S. Days III, Brown *Blues: Rethinking the Integrative Ideal*, 34 Wm. & Mary L. Rev. 53 (1992) (asserting that growing number of African Americans are repudiating integrative ideal).

338. *See, e.g.*, Brown, *De Jure Segregation*, *supra* note 207, at 67–68.

qualifications and salaries of teachers, and other '*tangible* factors,'"[339] the Court needed to identify an *intangible* harm resulting from segregation that required a remedy. Like the full disability inclusion advocates, the Court focused on the impact on the sensibilities of the excluded students. The Court accepted the argument—based in part on certain social science studies—that segregation by law created feelings of inferiority and low self-esteem in African American children.[340] Scholars have roundly criticized the *Brown* Court for relying on these studies, because the disturbing results of the tests in those studies were never traced precisely to education segregation per se.[341] Critics of the stigmatic injury theory assert that it implicitly promoted the idea of black inferiority,[342] and "[s]ocial scientists overwhelmingly reject [the] theory today."[343]

The problem with the stigmatic injury theory may be its failure to distinguish for future cases—like disability inclusion—the difference

339. *Brown*, 347 U.S. at 492 (emphasis added). *But see* Brown, *supra* note 320, at 808 (explaining that "equal" part of "separate but equal" was generally ignored and that in three of four state cases before Court "the physical facilities and other tangible resources were not in fact equal").

340. *See, e.g.*, Brown-Scott, *supra* note 315, at 542 (asserting that *Brown* Court's stigma theory implied that "black children are inferior").

341. *See, e.g., id.* at 541–42 n.28 (citing recent studies that criticize studies presented to *Brown* Court); Philip Elam, *Response*, 100 Harv. L. Rev. 1949, 1955–56 (1987) (same); William E. Cross, Jr., *Shades of Black: Diversity in African-American Identity* 115–17 (1991) (arguing that psychologist confused racial group identity preference with self-esteem, assuming that racial group preference would automatically correspond with self-esteem). The studies—introduced into evidence in the trials leading to the U.S. Supreme Court appeal—showed that African American children viewed themselves as inferior to white people. *See* Brown-Scott, *supra* note 315, at 542. These studies bolstered the theory that state-sponsored separation stigmatized African American children, impairing their self-esteem and their ability to learn. *See id.*; *cf.* Kauffman, *supra* note 263, at 271 (pointing out that studies of social status of children with disabilities do not show that stigma and isolation they feel is necessarily result of their being taught outside regular classroom).

Along a similar vein, scholars are now criticizing the so-called "efficacy studies" that Lloyd Dunn relied on in his article that is said to have been the genesis of the inclusion movement. *See, e.g.*, Hallahan & Kauffman, *supra* note 265, at 496 (explaining why studies were flawed). According to Dunn, the studies consistently suggested that "retarded pupils make as much progress or more in the regular grades as they do in special education .... Efficacy studies on special day classes for other mildly handicapped children, including the emotionally handicapped, reveal the same results." Dunn, *supra* note 95, at 8. Scholars now point out that "virtually all of these studies were flawed because they did not include random assignment of students to classes." Hallahan & Kauffman, *supra* note 265, at 501. Researchers have difficulty dealing with the ethical and legal issues of random placement because placement is supposed to be in the best interest of the child. *Id.* Thus, those placed in special classes likely had "learning problems that were more severe and less tractable." *Id.* In the rare studies using random assignment, "the results were, if anything, favorable toward the efficacy of special classes." *Id.* (citing studies).

342. *See* Brown-Scott, *supra* note 315, at 541.

343. *Id.* at 541 n.28.

between separation and the meaning behind the separation.[344] De jure segregation was wrong—not simply because African American children were being educated in all-black schools, although that was a part of the problem. It was wrong because the meaning behind that forced segregation was the belief that African American children were inferior and did not belong in a classroom with Caucasian children. It was wrong because no child should be excluded by law from any public school classroom because of skin color. Unless the separation and the meaning behind that separation are analyzed separately, however, it can appear that the stigma occurs because of the separation itself, that is, because African American children were attending all-black schools.[345]

Critics of the racial integration model claim that its implicit message—that going to an all-black school somehow stigmatized black children—was "just as harmful to their self-esteem as the idea of forced segregation."[346] Thus, Professor Kevin Brown claims that "[a]t the same time that the country was dismantling de jure segregation and its concomitant message of African American inferiority, it was also constructing a policy of integration which carried its own message of African American inferiority."[347] He asserts that "[t]he very remedies that were undertaken in an attempt to eliminate a belief in African-American inferiority were also—like segregation that had preceded it—standing as symbols for it."[348]

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344. *See supra* notes 203–64 and accompanying text.

345. *Cf.* Missouri v. Jenkins, 515 U.S. 70, 120 (1995) (Thomas, J., concurring) ("[T]he District Court misunderstood the meaning of *Brown I*. *Brown I* did not say that 'racially isolated' schools were inherently inferior; the harm that it identified was tied purely to de jure segregation, not de facto segregation.").

346. Brown-Scott, *supra* note 315, at 545; *cf. Jenkins*, 115 S. Ct. at 2061 (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior.").

347. Brown, *supra* note 320, at 817.

348. *Id.* The theory that integration will raise self-esteem of African Americans echoes eerily with the claims of the full inclusion advocates. But, instead of increasing self-esteem, "many studies [have] found that desegregation actually had a negative impact on the self-esteem of African American school children." Brown, *De Jure Segregation*, *supra* note 207, at 80; *see also id.* at 80 n.333 (citing studies and stating that "[n]one of the desegregation studies [that were reviewed] found that desegregation had positive effects on [African American] self-esteem, but 25% found that desegregation had negative effects"); *cf.* James A. Washburn, Note, *Beyond* Brown: *Evaluating Equality in Higher Education*, 43 Duke L.J. 1115, 1150 (1994) (claiming that stigma may not exist for students in predominantly black colleges).

Furthermore, social scientists have never been able to establish that desegregation alone would lead to significant increases in the educational achievement of African Americans. *See* Brown, *De Jure Segregation*, *supra* note 207, at 59. As Professor Brown points out:

The stigmatic injury theory is a part of the ideological foundation that has supported the racial integration remedy,[349] and the Supreme Court has continued to accept it.[350] Despite criticism of the theory, it has taken on a power of its own, with a force field that has reached into the disability arena. But the criticism of Professor Brown and others should give pause to the full inclusion advocates. By failing to analyze separately the meaning behind separation and by failing to acknowledge that—unlike race—there may be legitimate pedagogical reasons for placing a disabled child in a special class, the full inclusion advocates have implied that there is something inferior about a classroom that contains only disabled students. To avoid the inevitable stigma that taints a "disabled-only" class, full inclusion advocates would include these children with the nondisabled in the general education classroom. Full inclusion advocates should consider whether, by enshrining the idea that an all-disabled class somehow stigmatizes the disabled, their "cure" for stigma—inclusion—has in reality injected more of the disease.[351]

In addition to curing the stigma that occurs from separation, there has been some suggestion that the racial integration model will also give African American students other students to model. For instance, the Court in *Milliken v. Bradley*[352] ("*Milliken II*"), "in reference to the African-American school children who would continue to attend segregated schools, stated that '[c]hildren who have been...

> [S]ocial scientists, taking their cue from the Supreme Court, have tried for years to establish that desegregation alone would lead to significant increases in the educational achievement of African-Americans. These studies, however, have not been able to establish consistently significant educational benefits for African-Americans derived from racial mixing alone.

Id. at 57–58; *see also id.* at 58–59 n.255 (citing major study finding African American students' achievements did not rise in proportion to presence of white classmates); Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 Emory L.J. 863, 871 (1993) (pointing to studies that question whether desegregation improves educational services to minority children).

Professor Brown has cautioned, "If desegregation does not succeed in significantly raising the academic achievement of African Americans, then from the perspective of the academic function of schools, its continued use as an appropriate remedy is open to serious question." Brown, *De Jure Segregation*, *supra* note 207, at 59–60 n.256. Some commentators who criticize the belief that racial integration is necessary for quality education argue that, to the extent that problems of low self-esteem still exist, they could be addressed by building on an Afrocentric curriculum. *See, e.g.*, Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 Yale L.J. 1285, 1286–87 (1992).

349. Brown, *De Jure Segregation*, *supra* note 207, at 52–73.

350. *See* Freeman v. Pitts, 503 U.S. 467, 485 (1992) (stating stigmatic injury is one of present harms of past de jure segregation).

351. *See* Brown, *De Jure Segregation*, *supra* note 207, at 67–68.

352. 433 U.S. 267 (1977).

educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct and attitudes reflecting their cultural isolation . . . ."[353] Twenty-three years earlier, the *Brown* Court had observed that "[s]egregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[354] Critics have asserted that the implicit message is that the confinement of African Americans to all-African American settings necessarily has a negative impact upon their development.[355] This notion fueled the belief "that 'white' schools had 'better' students whose achievement-oriented, achievement-ready backgrounds created a powerful environmental press for academic attainment."[356] Thus—much like the modeling rationale that underlies the inclusion movement—racial integration was viewed as a way to "provide social modeling of higher aspirations, skills and motivation to minority students whose segregated school environments produced a defeating climate of failure and hopelessness."[357] The "intimation that black children can only achieve academically when educated with white children"[358] reverberates with the assumption by full inclusion advocates that disabled children can improve themselves—and work to "cure" their disability—by modeling their nondisabled peers.[359] This assumption brushes aside themes of independence, pride, and competence[360] and fails

353. Brown, *supra* note 320, at 812 (quoting *Milliken II*, 433 U.S. at 287).

354. Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

355. *See* Brown, *supra* note 320, at 812 ("[T]he Court views the harm of de jure segregation as more than just stigmatic, but also as retarding the cognitive, psychological, and emotional development of African-Americans."); *see also* Brown, *De Jure Segregation*, *supra* note 207, at 63 ("The Court's reasoning rests upon the belief that racial isolation had damaged and would continue to damage *only* African-American children.") (emphasis in original). Professor Brown also criticizes the notion that racial isolation had damaged and would continue to damage only African American children. *Id.* at 67; *cf.* Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (asserting that Court majority reads Supreme Court cases to support theory that blacks suffer unspecified psychological harm from segregation that retards their mental and educational development, an approach that "rests on an assumption of black inferiority").

356. Melvin I. Semmel et al., *Twenty-Five Years After Dunn's Article: A Legacy of Policy Analysis Research in Special Education*, 27 J. Special Educ. 481, 485 (1994).

357. *Id.*

358. Yarbrough, *supra* note 261, at 691.

359. *See* Semmel et al., *supra* note 356, at 485 (acknowledging argument that "'white' schools had 'better' students" who would "provide social modeling of higher aspirations, skills, and motivation to minority students").

360. *See* Brown, *supra* note 320, at 819; *cf.* Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758, 795 (claiming that integration caused blacks to lose "the ability to control and shape their children's education").

to recognize that close association among minority groups may actually enhance self-esteem by promoting the "acceptance of group difference as positive."[361]

Education reform movements—like the disability inclusion movement—that have arisen in the wake of school desegregation have been profoundly affected by the Court's jurisprudence. Some educators, specifically inclusion advocates, have referred to language in *Brown* when discussing the need for educational reform.[362] This reliance on *Brown* is not surprising. Certainly the "public discourse of judges is given a preferred meaning and assumed to reflect accurately reality."[363] Indeed, court opinions on racial desegregation operate "to validate particular conceptions of society . . . ."[364] Yet by relying on *Brown*, inclusion advocates have also imported into the disability area some of the same troubling assumptions that critics claim have plagued racial integration. By "[c]onfusing the social *goal* of equal opportunity with *place* of opportunity,"[365] they have distracted attention and effort from the primary academic mission of the school. In so doing, inclusion advocates have also failed to recognize "the complexity of achieving equal educational opportunity for children to whom it so long has been denied."[366] Those who would set inclusion as the primary goal for disabled students—a goal that would supersede academic performance—should carefully study the racial integration model and reconsider whether they wish to follow that road to its ultimate destination.

In their concern over placement, stigma, and de facto segregation, the full inclusionists ignore "the overriding fact" that many children have "overwhelming learning problems" that will not simply disappear when

361. Brown-Scott, *supra* note 315, at 546 n.5; *see also* Johnson, *supra* note 337, at 1420 ("[T]he unique *nomos* of the African-American community is maintained, strengthened, and transmitted by African-American educational institutions . . . ."); *cf.* United States v. Fordice, 505 U.S. 717, 748 (1992) (Thomas, J., concurring) (stating that historically black colleges can be source of pride and source of hope).

362. *See* Brown, *De Jure Segregation*, *supra* note 207, at 74–75 n.309.

363. *Id.* at 73.

364. Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 San Diego L. Rev. 1043, 1050 (1988).

365. Semmel et al., *supra* note 356, at 485 (emphasis in original).

366. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 477–78 (1976); *cf.* Michael Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 Geo. L.J. 1435, 1436 (1986) (claiming that comparing disability discrimination to race discrimination often misleads courts).

the children are included in the regular classroom communities.[367] Children are seldom identified as candidates for placement in special education classes before they enter school.[368] Differences become apparent as the disabled child fails to make expected progress in the regular kindergarten or first grade classrooms.[369] Indeed, the primary reason that a child is referred for placement in special classes is the failure of the child to learn in the regular class.[370] Inclusion in that very same regular classroom will hardly resolve the child's serious learning problems—without a massive effort in additional individualized special aids and services.[371] I address the cost of such an effort to the community of learning in the regular classroom in the next section.

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367. Charles W. Telford & James M. Sawrey, *Exceptional Individual* 117 (3d ed. 1977). As discussed above, many federal courts that have addressed the disability inclusion issue have failed to consider carefully the extent to which inclusion affects the academic achievement of disabled students. *See supra* Part II.D.1. Indeed, the standard set by many courts would require inclusion even if inclusion would not significantly raise the academic achievement of the particular disabled student in question and even if the child would achieve better academically in a special classroom environment. As with racial integration, however, inclusion does not always result in satisfactory academic achievement. Although research on academic achievement and inclusion is still in the early stages, one recent study reported that only 54% of the included students with learning disabilities had moved up in relative standing after one year in general education classrooms. *See* Naomi Zigmond et al., *When Students Fail to Achieve Satisfactorily: A Reply to McLesky and Waldron*, 77 Phi Delta Kappan 303, 303 (1995). Another study reported that the students in question—students with learning disabilities—progressed academically in special resource programs but did not progress in the general classroom. *See* Douglas Fuchs & Lynn S. Fuchs, *What's 'Special' About Special Education?*, 76 Phi Delta Kappan 522, 522–30 (1995). *But see* Dorothy K. Lipsky & Alan Gartner, *Common Questions About Inclusion*, 25 Exceptional Parent, Sept. 1995, at 36 (stating that although there are few full-scale evaluations of inclusive education outcomes, some studies show more behavioral progress and increased social competence but limited difference in academic performance for students with mild and moderate disabilities).

368. Telford & Sawrey, *supra* note 367, at 117.

369. *Id.*

370. *Id.* at 117–18 (stating that in only "most flagrant" case would child who is successful educationally be referred and inappropriately placed in special class); *see also* MacMillan et al., *supra* note 102, at 472 (explaining that referral for special education by general classroom teacher is "based on the teacher's perceptions that a child deviated markedly from classmates in achievement and social/personal adjustment and on the premise that the teacher had tried but failed to minimize the observed deficit").

371. *See* MacMillan et al., *supra* note 102, at 472 (explaining that it is difficult to argue that child referred for special class because of severe problems in general classroom "would be successful in regular education with no ancillary support").

V. THE COMMUNITY OF LEARNING AND THE COST OF INCLUSION

The public school classroom consists of a community where students perform within a group that is propelled forward in academic competency. When the academic function of public school education is neglected, the school as a community of learning and the students within it suffer. The full inclusion advocates, in their zeal to elevate placement over academic achievement, seem uninterested in a searching examination of the extent to which academic achievement is a function of the classroom as a community. But, as any teacher knows, the success of a lesson and the progress of individual students in the classroom is often a function of the personality of the class and the community of learning that exists in that particular classroom.[372]

Professor Suzanna Sherry has pointed out that education is not something that is "merely provided by the government and consumed by the individual."[373] Rather, it is "an ongoing lesson in responsible citizenship that requires participation and dedication on the part of present and future citizens."[374] That participation and dedication takes place in the classroom community. The full inclusion advocates and the courts that have implicitly accepted their assumptions, however, give too little weight to some ingredients that are vital to the creation of a community of learning where all students can participate in the ongoing lesson of responsible citizenship.

In a typical general education classroom there are approximately twenty-five to thirty students, each of whom should be given the opportunity to achieve academically at their greatest potential. No two students are exactly alike; each has individual strengths and weaknesses. In an ideal world, each student would be given one-on-one instruction tailored specifically to his or her needs.[375] Because of limited time and resources, however, this kind of individual attention is not possible in the regular classroom, so the instructor must teach groups of students—sometimes the entire group, sometimes smaller groups—at the level at which they are most likely to progress to reach their full academic

372. *See, e.g.*, Semmel et al., *supra* note 356, at 491 (defining classroom as part of "complex organization of people and activity that manifests itself as a particular culture, climate and environment").

373. Sherry, *supra* note 28, at 133.

374. *Id.*

375. Ironically, this is precisely what many disabled students receive when they are educated in a segregated classroom.

potential. This is not an easy task. It requires, at a minimum, an assessment of the ability level of the group: Is the group ready for the next step in the learning process? How big or how small a step is the group ready for? Good instruction requires careful lesson planning that addresses how best to transfer knowledge to that particular group. It requires creating and gathering the materials to be used in teaching the lesson. A well-taught lesson requires the energy, enthusiasm, and patience of the teacher and the attention, reflection, and concentration of the students. It further requires assessment by both teacher and students to ascertain if the knowledge has been transferred to the students. It is not easy to establish a community of learning in which all of these elements work well together.[376]

Unfortunately, many general education classrooms in the public schools are not working well, even for nondisabled students. The problems of society—broken families, drugs, violence—often follow children from the streets to the classrooms and infect the community of learning. Overburdened teachers struggle to educate children as they take on more and more of the responsibilities that traditionally have been the concern of other institutions—family, church, and community.[377] Full inclusionists apparently believe that, despite these problems, the general education classroom will respond to full inclusion by improving dramatically so as to accommodate an increased number of disabled students. In the next section I explain how general education classrooms have been asked to respond to inclusion, and I analyze the effect of inclusion on the community of learning in the regular classroom.

A. The Effect on the Academic Achievement of Nondisabled Students

IDEA requires that removal of children with disabilities from the regular education environment occurs "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[378]

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376. *See generally* Richard A. Weatherly, *Reforming Special Education: Policy Implementation from State Level to Street Level* 73 (1979) (explaining difficulties inherent in educating large numbers of children and attending to each child's individual needs).

377. *See, e.g.*, Judith H. Cohen, *What Is a Teacher's Job?: An Examination of the Social and Legal Causes of Role Expansion and Its Consequences*, 14 Harv. J.L. & Pub. Pol'y 427, 427 (1991) (noting how school services have taken on expanded dimensions where family or community have failed to do so). The passage of IDEA significantly increased the number of children placed in regular classrooms, requiring teachers to serve a much broader range of students with diverse educational and psychological needs. *Id.* at 433.

378. 20 U.S.C. § 1412(5)(B) (1994).

The question then becomes at what point is the school allowed to say that education in the regular classes cannot be achieved satisfactorily so that the disabled child must be placed in a special education classroom. There are several reasons why education in a regular classroom may not be achieved satisfactorily. In Part IV, this Article addressed one of these reasons—the child may simply obtain greater academic benefit in a special education classroom. But even if the disabled child will obtain greater academic benefit in the regular classroom, education cannot be achieved satisfactorily for other students in the regular classroom if the child interferes with the learning of others in the classroom community. A disabled child may interfere with the learning of others by disrupting the classroom activities or because the child requires a disproportionate amount of the teacher's time and energy.[379]

The statutory language of IDEA fully contemplates that inclusion will not always work because sometimes "education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily"[380] for either the disabled child or for the nondisabled children in the regular classroom. The statute does not say that removal can occur only when education in the regular classroom is not achieved satisfactorily for the disabled child. A fair reading of the statute provides for removing a disabled child from the regular classroom if the education of the children in the classroom (which includes nondisabled children) cannot be achieved satisfactorily for the children in the classroom (which again includes nondisabled children). Yet, in part because of an explanatory note to a regulation promulgated under IDEA[381]—a note that is based on yet another explanatory note that is, in turn, based on another statute[382]—many courts considering inclusion have failed to give enough weight to the cost to the learning community.

379. A synthesis of numerous surveys of teachers—many of which were conducted long before the call for full inclusion—reports that while most agreed with the general concept of mainstreaming/inclusion, "[a] substantial minority believed that students with disabilities would be disruptive to their classes or demand too much attention." Thomas E. Scruggs & Margo A. Mastropieri, *Teacher Perceptions of Mainstreaming/Inclusion, 1958–1995: A Research Synthesis*, 63 Exceptional Children 59, 63 (1996). "Teachers are more willing to include students with mild disabilities than students with more severe disabilities, apparently because of teachers' perceived ability to carry on their teaching mission for the entire classroom." *Id.* at 64. Only about "one fourth to one third of teachers surveyed agreed they had sufficient time, training, or material/personnel resources to implement mainstreaming/inclusion successfully." *Id.* at 63.

380. 20 U.S.C. § 1412(5)(B).

381. *See* 34 C.F.R. § 300.552 note (1996).

382. *See* 34 C.F.R. pt. 104 app. A., subpt. D, para. 24 (1996) (analyzing final regulation promulgated under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994)).

1. Disruption

The comments to the regulations promulgated pursuant to IDEA state that "[i]n selecting the [least restrictive environment], consideration is given to any potential harmful effect on the child [with a disability] or on the quality of services that he or she needs."[383] As explained above, the statutory language is not so narrow, and it fairly contemplates the effect the placement will have on the education of all students. The explanatory notes after the IDEA regulation state, "The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 . . . includes several points regarding educational placements of children with disabilities that are pertinent to this section."[384] Yet Section 504[385] does not contain statutory language identical to IDEA regarding the circumstances under which removal from the regular classroom would be permissible, although the regulations promulgated under the Rehabilitation Act set forth similar language.[386] Thus, it is unclear why regulations analyzing Section 504 have any particular relevance for IDEA. Nevertheless, the IDEA regulation explanatory note states, "where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs."[387]

Although the explanatory note seems at first blush to consider the community of learning in the classroom, a close examination reveals that it is actually directed at the needs of the *disabled* child. Rather than focusing on the needs of all the children in the classroom, the explanatory note focuses on whether the "needs" of the disabled child are

383. 34 C.F.R. § 300.552(d).

384. 34 C.F.R. § 300.552 note.

385. 29 U.S.C. § 794 (1994). Section 504 provides, "No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

386. 34 C.F.R. § 104.34 (1996). The regulation states:

> A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 104.34.

387. 34 C.F.R. § 300.552 note.

being met when the disabled child is disruptive.[388] Although the statute does not require such a narrow reading, according to this explanatory note and the cases that have cited it,[389] until the education of the other students in the classroom is *significantly* impaired, inclusion is warranted. Inclusion is warranted because—until that point—the disabled child, despite being disruptive, may still be benefiting in some way from inclusion. Once the disabled child gets too disruptive, though, his needs cannot be met in the regular classroom and he should be placed in an environment where his needs can be better served.[390]

This explanatory note to the regulation would allow the claimed—yet untested—benefits of inclusion for one disruptive disabled child to harm the education of every child in the classroom. It demonstrates a fundamental misunderstanding of the working of the classroom as a community. Significant impairment is impairment "having or likely to have a major effect" or impairment that is "fairly large in amount or quantity."[391] Under this standard then, disruption that has a moderate effect or an effect that is only somewhat large in amount may nonetheless warrant inclusion. A substantial amount of learning is lost by many students before disruption becomes so severe their education is *significantly* impaired.[392] Students (these students may comprise other disabled children who are included but are not disruptive) should not be forced to endure this degree of impairment to their education merely to elevate the concept of inclusion. And it is not clear how many other students must thus be affected for the presumption of inclusion to be overcome. Note that the standard is set forth in the plural: it speaks to the impairment of the "other students."[393] This raises a variety of questions. If the education of one student is significantly impaired, is that enough impairment for the disruptive student to be excluded? What if a reasonable "other student" would not have been significantly impaired, but this one particular student was so impaired?

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388. *See* 34 C.F.R. § 300.552 note.

389. *See, e.g.*, Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048–49 (5th Cir. 1989).

390. *See* Oberti v. Board of Educ., 995 F.2d 1204, 1217 (3d Cir. 1993) ("[I]f a child is causing excessive disruption of the class, the child may not be benefiting educationally in that environment.").

391. American Heritage College Dictionary 1268 (3d ed. 1993).

392. Some inclusion advocates would disregard even significant impairment for nondisabled students. *See* Kotler, *supra* note 37, at 381 ("If a normal child has the occasional misfortune to be assigned an incompetent teacher for a year, typically the harm caused can be corrected later through a formal or informal remedial process.").

393. 34 C.F.R. § 300.552 note.

Moreover, establishing "significant" disruption as the only type of behavior that is important enough to affect the classroom community of learning ignores the fact that harm to the educational process takes many shapes. A palpable disturbance is not the only way to affect the learning of other students.[394] Even a low or moderate level of distraction that does not reach the level of disruption can harm the educational progress of the classroom community. "[C]hildren are easily diverted from their studies and indeed often welcome the smallest distraction as an excuse to attend to something other than the task at hand."[395] One child's distracting behavior can affect the teacher's ability to teach the class by interrupting both the teacher's and the other students' trains of thought. Restarting lessons after dealing with problems presented by one child may deprive all the children of valuable instruction time. "Obtaining a 'serious education' . . . is not easy. . . . [I]t most often involves hard work, concentration and constraints—discipline of self and discipline of others . . . ."[396] Distraction and breaks in concentration for individual students, as well as distraction and breaks in self-discipline within the classroom community, make it more difficult to create an environment where serious learning can and will take place.

Even with "disruption" and "significant impairment" as the standard, courts are ill-suited—as opposed to the child's IEP team or an administrative hearing officer—to determine how a disruption affects the learning in the classroom community.[397] The kind of disruption that will significantly impair the learning in a particular classroom community will vary from school to school and from class to class.[398]

The flawed explanatory note to a regulation promulgated under IDEA need not and should not drive the inclusion inquiry. This explanatory note merely addresses one scenario—when the disabled child is disruptive—where the educational needs of the handicapped child cannot

394. *See* Dupre, *supra* note 25, at 98.

395. *Id.* at 99.

396. *Id.* at 98.

397. *See* Briggs v. Board of Educ., 882 F.2d 688, 693 (2d Cir. 1989).

398. *See* Dupre, *supra* note 25, at 99; Semmel et al., *supra* note 356, at 494 (noting that school environments vary "greatly with respect to their potential to accommodate individual differences"); *cf.* Lipsky & Gartner, *supra* note 367, at 37 (citing to study that showed no difference between inclusive and noninclusive classrooms in terms of instructional time lost to interruptions). Of course, this determination is a function of the classes studied. The kindergarten class in which Raphael Oberti was included must certainly have lost considerable instructional time due to Raphael's "repeated toilet accidents, temper tantrums, crawling and hiding under furniture, and touching, hitting and spitting on other children" and striking at and hitting the teacher and teacher's aide. *See* Oberti v. Board of Educ., 995 F.2d 1204, 1208 (3d Cir. 1993).

be met satisfactorily in the regular classroom. It does not even purport to address all the scenarios where the needs of the disabled child cannot be met in the regular classroom. Most importantly, it does not purport to address any of the circumstances under which education cannot be achieved satisfactorily because the needs of the *nondisabled* children cannot be met. The explanatory note's failure to discuss other circumstances where education may not be achieved satisfactorily does not preclude a court from doing so. The language in the explanatory note does not indicate that it sets forth an exclusive list of circumstances where placement in a regular classroom would be improper. Rather, the note explicitly states that the analysis is merely "several points regarding educational placement of children with disabilities that are pertinent to this section."[399] Because the statute itself allows courts to consider whether education in the regular classroom can be achieved satisfactorily for all students, the language in the explanatory note should be not bar a court from making this assessment. In consequence, courts should not hesitate to assess the effect inclusion has on the community of learning and need not make this determination based only on "disruption" that results in "significant impairment."[400]

2. *Teacher Attention*

Some courts of appeals have recognized that disruption is not the only scenario where education in regular classes cannot be achieved satisfactorily. These courts have acknowledged that a disabled student who may not be disruptive may nonetheless require more of a teacher's time than other students.[401] A disabled child will often require an individualized lesson plan, individualized materials, a modified teaching style, extra time, individual attention during the lesson itself, and an individualized testing procedure.[402] Increasing the demands on a

399. 34 C.F.R. § 300.552 note (1996).

400. 34 C.F.R. § 300.552 note.

401. *See, e.g.*, Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989) (stating that disabled child "may require so much of the instructor's attention that the instructor will have to ignore the other student's needs in order to tend to the handicapped child"); Board of Educ. v. Holland, 786 F. Supp. 874, 879 (E.D. Cal. 1992) (stating that disabled child "may be disruptive or may unreasonably occupy the teacher's time to the detriment of other students"), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

402. *See* Thomas E. Scruggs & Margo A. Mastropieri, *What Makes Special Education Special? Evaluating Inclusion Programs with the Pass Variables*, 29 J. Special Educ. 224, 226–27 (1995) (noting that teachers must adapt materials, instructional strategies, and instructional environments to meet needs of disabled students); Baker & Zigmond, *supra* note 18, at 173 (noting time required to make accommodations for learning disabled student who needed "constant one-on-one guidance");

teacher's time can decrease the quality of education for all students.[403] Moreover, "these different activities and materials tend to separate students with and without disabilities, reducing the amount and quality of social interaction between them."[404] The question then becomes when the amount of time a teacher spends attending to a disabled child is so disproportionate to the time spent on other children that it will lead to a determination that education in the regular classroom cannot be achieved satisfactorily. Again, perhaps because of the influence of the explanatory note discussed above, the standard set by some federal courts of appeals gives insufficient consideration to the needs of the classroom community and too much consideration to the needs of the individual disabled student.

The teacher is the catalyst who ensures that learning takes place in the classroom community. The teacher—among many other duties—assesses the needs of the students in the class, plans the lessons, instructs the students, answers questions, reinforces concepts, and corrects mistakes. The teacher also must accomplish all the tasks that go along with instruction while supervising the students prudently.[405]

The courts have acknowledged that regular classroom teachers "must devote extra attention to their handicapped students."[406] But despite the importance of teacher time and attention to the learning process, some

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Douglas Fuchs & Lynn Fuchs, *Inclusive Schools Movement and the Radicalization of Special Education Reform*, 60 Exceptional Children 294, 302 (1994) (pointing out "that teachers attempting to accommodate a wide diversity of students must orchestrate a greater number of activities and materials, substantially complicating their job").

403. *See* William E. Davis, *The Regular Education Initiative Debate: Its Promises and Problems*, 55 Exceptional Children 440, 442 (1989) (explaining teacher frustration with "excellence versus equity trap" where there is increased "public pressure [for teachers], to improve the overall academic performance levels of their students" while they must also "attempt to 'accommodate' difficult-to-teach students within their classes—which may result in the overall decrease of student achievement scores").

404. Fuchs & Fuchs, *supra* note 402, at 302.

405. *See, e.g.*, Payne v. North Carolina Dep't of Human Resources, 382 S.E.2d 449, 451 (N.C. Ct. App. 1989) (holding that standard of care for teachers is what person of ordinary prudence charged with teacher's duties would exercise in same circumstances).

406. *Daniel R.R.*, 874 F.2d at 1051. *But see* Lipsky & Gartner, *supra* note 367, at 37 (citing to study that showed that even presence of students with severe disabilities had "*no effect*" on the amount of teacher attention received by students without disabilities). As the *Daniel R.R.* court and other courts have recognized, it is hard to comprehend how a teacher attempting to meet the unique needs of students with severe disabilities—for instance, students with severe behavioral problems who require individualized lesson plans, individualized materials, a modified teaching style, extra attention during lessons, and individualized testing—could meet the disabled child's IEP objectives without having *some* effect on the amount of teacher attention received by students without disabilities.

courts have intimated that a disabled student who takes up large amounts of teacher time and attention must nevertheless be included in the general education classroom. Although these courts have conceded that there is some point where a disabled student may demand too much from the teacher to the detriment of other children in the class, they have failed to set a workable standard. According to one court, the regular classroom teachers are not required to devote "all or most of their time to one handicapped child."[407] After all, the teacher who focuses on one child affects the achievement of the whole class, which may include "equally deserving handicapped children who also may require extra attention."[408] Another court has asserted that only when a disabled child requires so much of the teacher's attention that the teacher will be required to "ignore the other students" can the amount of teacher time and attention spent with a disabled child even be considered as a factor that could (it may not necessarily do so) overcome the presumption for inclusion.[409] Yet another court mixed the disruption factor and the teacher attention factor together, stating that "[a] handicapped child who merely requires more teacher attention than most other children is not likely to be so disruptive as to significantly impair the education of other children."[410] Of course, a nondisruptive child who "merely" requires more attention could impair the education of other children, if the teacher focuses primarily on that child instead of teaching the rest of the class.

One subset of the teacher time and attention factor is the extent to which the teacher must modify the curriculum that is being taught to the rest of the class to accommodate the disabled student. Again, although some courts have acknowledged that there is a point where the modification required to accommodate a disabled student may be too great, they have failed to set a workable standard in this area as well. According to the Fifth Circuit, the regular classroom teacher is not required "to modify the regular education curriculum to the extent that the handicapped child is not required to learn *any* of the skills normally taught in regular education."[411] Another court observed—without

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

408. *Id.* at 1049. Of course, although the court fails to say so, *nondisabled* children may also be deserving of and, depending on the lesson, may also require extra attention.

409. Oberti v. Board of Educ. 995 F.2d 1204, 1217 (3d Cir. 1993).

410. Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991).

411. *Daniel R.R.*, 874 F.2d at 1049 (emphasis added).

irony—that teaching two separate classes (the lesson for the regular class and the lesson for the disabled student) "could prove impossible."[412]

Although teachers need not "modify the regular education program beyond recognition,"[413] as with the disruption factor, a teacher may spend a great amount of time and energy with a disabled student before the teacher reaches the point where the teacher ignores the needs of other students or modifies the regular education program beyond recognition. Teaching a student with special needs requires evaluating the curriculum and giving the highest priority to the skills that are most important to the disabled student.[414] For instance, a teacher instructing a class on the use of a microscope will need to adapt the lesson for a disabled student with poorly developed fine motor skills who is attempting to collect and stain specimens, prepare them for mounting, and adjust the microscope. If the disabled student has poor organizational skills, the child will need an adaption for working through the collection, staining, and mounting process. If the science unit contains difficult vocabulary words that are critical to understanding the lesson, a disabled child who has trouble remembering will require special materials.[415]

The teacher may simply have to make compromises that affect the other students when presenting the lesson. A teacher may shorten a complicated lesson because time is required elsewhere to meet needs of a disabled child who is learning at a different level or with different materials. Because of time constraints, a teacher who must spend extra time individually with a disabled child to ensure that the child's needs are met may find it necessary to assign workbook problems to the students, rather than go over the analytical process with them. A teacher who must use classroom time attending to the special needs of the disabled child may lack the extra time at the end of a unit to try an enrichment lesson that may not be a required skill, but that may nonetheless add to the educational capital of the students. In these scenarios the teacher is not ignoring the needs of other students. Nor is it possible to measure precisely how much learning is lost each time the teacher's attention is directed elsewhere. Yet even if the teacher has not reached the point where the teacher is "ignoring" the needs of other students or spending "most" of the lesson time with one child, enough

412. Board of Educ. v. Holland, 786 F. Supp. 874, 880 (E.D. Cal. 1992), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

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

414. Scruggs & Mastropieri, *supra* note 402, at 225.

415. *Id.*

learning may be lost cumulatively over time such that the educational progress of many students in the learning community is harmed. The teacher attention factor should be weighed more heavily toward the progress of the learning community as a whole. If the needs of the disabled student are such that the time a teacher must devote to fulfilling those needs interferes with the academic progress of other students in the community of learning, "education" is not being achieved "satisfactorily" and inclusion in the regular classroom cannot be an "appropriate" placement.[416]

One additional aspect of the disruption and teacher attention factors that the courts have failed to consider adequately is the effect on teacher stress levels when the teacher is torn in many different directions while attempting to instruct students.[417] The inclusion of children with disabilities in the general education classroom increases the variance in student abilities with correlative in instructional demands.[418] All teachers vary in their ability to plan instruction that is suitable to the individual differences exhibited by learners and apply their motivation, knowledge, skills and experience in complex ways.[419] "With the increased numbers of high-need, developmentally unfinished children in regular classes today, many teachers find themselves fatigued to the point of zombie-like responses."[420] Constant distraction and concern over the needs of a disabled child may deplete the energy and enthusiasm levels of even the most dedicated teacher.[421] Planning and implementing a creative,

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416. *See* 20 U.S.C. § 1412(5)(B) (1994). Of course, under the statute, due consideration must be given as to whether supplementary aids and services provided to the disabled child would alleviate the problem. *See supra* notes 79–82 and accompanying text.

417. "The demands placed on teachers today are overwhelming. Not only are they being asked to do more than ever with regard to curriculum content, but they are faced with more and more students who are not identified for special education but who have a host of problems." Hallahan & Kauffman, *supra* note 267, at 499. Moreover, increases in poverty, drug abuse and family instability have led to more children at risk for both physical and psychosocial disabilities. *See id.* at 498–99.

One teacher discussing her problems dealing with a child with an emotional disability stated, "He would bite other students and blow in their faces. He wouldn't stay in one place for a minute. I spent the entire year worrying that he would seriously injure another student." Webb, *supra* note 173, at 2.

418. Hallahan & Kauffman, *supra* note 267, at 498.

419. *See* Semmel et al., *supra* note 356, at 490.

420. William C. Morse, *Comments From a Biased Viewpoint*, 27 J. Special Educ. 531, 539 (1994).

421. *See, e.g.*, John Leo, *Mainstreaming's 'Jimmy Problem,'* U.S. News & World Rep., June 27, 1994, at 22 (describing case where, after school district lost court battle for special education placement for child who threw chairs, toppled desks, and bit and kicked other children and teachers, teacher went on medical leave because of stress, and 12 of 31 children in class were removed by their parents).

challenging, and useful lesson is demanding work in and of itself. A teacher who foresees spending a significant amount of time modifying a lesson for a disabled child may lose the motivation to plan a complex lesson, or simply may become too tired to do so. In short, working to implement an IEP without letting the time and attention needed to do so interfere with the education of others may have a long term effect on teacher stress levels.

The upshot of full inclusion will sometimes lead to classrooms where the teacher must address the needs of several disabled students. The American Federation of Teachers has cited instances where teachers were responsible for classrooms with as many as sixteen disabled children.[422] One way to deal with the needs of disabled children in the general education classroom is to use a classroom model where teacher aides or other students are primarily responsible for teaching the disabled students. This model has been endorsed by some courts that have addressed what supplementary aids and services must be provided to a disabled child who is included in the regular classroom.[423] This model, however, presents some knotty questions regarding whether the included child is receiving an "appropriate education."[424] One study of numerous inclusion sites determined that instructional aides assumed significant responsibility for "teaching, monitoring and adapting instruction for students with learning disabilities."[425] In addition, a "study buddy" classmate often had responsibility for accommodating the individual needs of the learning disabled student.[426] The researchers observed that this model raised some concerns, specifically the lack of training of the persons working with the disabled student and the informal nature of the assistance that was merely reacting to an immediate need of the disabled student.[427] In short, the least well trained individuals were teaching the most difficult to teach.[428] Moreover, although there may be some benefit

422. Webb, *supra* note 173, at 2. One class with 36 students included 16 with disabilities. *Id.* Another with 40 students included 10 with disabilities. *Id.*

423. *See, e.g.*, Board of Educ. v. Holland, 786 F. Supp. 874, 879 (E.D. Cal. 1992) ("A teacher's aide can minimize the burden on the teacher if the handicapped child is not disruptive but needs special assistance."), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

424. *See* 20 U.S.C. § 1412(1) (1994) (requiring that states assure disabled children right to appropriate education).

425. Baker & Zigmond, *supra* note 18, at 177.

426. *Id.*

427. *Id.*

428. *Id.*

to a study buddy who teaches a disabled student, the study buddy may forego valuable learning time acting as a peer teacher.[429]

B. Supplementary Aids and Services

Even if a disabled child is so disruptive that he or she significantly impairs the education of others or demands most or all of a teacher's attention, courts may nevertheless require inclusion. The full inclusion advocates—with support from some courts—claim that a disabled child who interferes with the learning of others merely needs additional aids and services to be able to be educated satisfactorily in the regular classroom.[430] To be sure, IDEA states that removal from the regular classroom should occur "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[431] To interpret this provision, the courts have undertaken a complex inquiry: how many aids and services must the school provide to accommodate the disabled child in the regular classroom? Although the Fifth Circuit has implied that the requirement may have some limit and that the school need not provide so many aids and services that the classroom learning community is turned into a special education classroom within a regular classroom,[432] the Third Circuit has suggested that the obligation to provide aids and services is expansive.[433] According to the Third Circuit, IDEA "require[s] schools to provide supplementary aids and services to enable children with disabilities to learn whenever possible in a regular classroom."[434] Keeping this obligation in mind, the school must consider whether an "adequate individualized program" with the necessary aids and services would prevent any negative effect on other children in the class.[435]

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429. In addition, researchers have cautioned against placing nondisabled peers in the role of peer-tutor because they "suspect that the status inequality inherent in the teacher-student relationship mitigates against the possibility of friendly relations developing between disabled and nondisabled students." Murray-Seegert, *supra* note 39, at 33.

430. *But see* Shanker, *supra* note 14, at 39 (stating that those who argue that necessary supports will follow disabled children into regular classrooms should consider how the mentally ill were left without promised support when they were de-institutionalized).

431. 20 U.S.C. § 1412(5)(B) (1994).

432. *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989).

433. *See* Oberti v. Board of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993).

434. *Id.* at 1216. *But see Daniel R.R.*, 874 F.2d at 1048 ("States need not provide every conceivable supplementary aid or service to assist the child.").

435. *Oberti*, 995 F.2d at 1217.

The Third Circuit addressed this issue in the context of a dispute over the placement of a boy with Down's Syndrome who had "serious behavioral problems" in a developmental kindergarten class.[436] These problems included repeated toilet accidents, temper tantrums, crawling and hiding under furniture, touching and hitting and spitting on other children, and hitting the teacher and teacher's aide on several occasions.[437] The district court determined (and the court of appeals agreed) that these behavioral problems were a result of "an inadequate level of services" provided in the classroom.[438] Suggestions for the aids and services that the school must provide to prevent this one child from disrupting a regular classroom included: "the assistance of an itinerant instructor with special education training, special education training for the regular teacher, modification of... the academic curriculum,... parallel instruction to allow [the child] to learn at his academic level, and the use of a resource room"[439] "or *any other* available aids or services appropriate to the child's particular disabilities."[440]

Even if all these aids and services somehow manage to change the severe behavioral problems exhibited by this one disabled child—in addition to the potential effect all the aids and services may have on the academic achievement of other children in the classroom[441]—one further limit on the obligation to provide the additional aids and services necessary to include a disabled child must be financial resources.[442]

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436. *Id.* at 1207–08.

437. *Id.* at 1208.

438. *Id.* at 1222 (quoting Oberti v. Board of Educ., 801 F. Supp. 1392, 1403 (D.N.J. 1992)).

439. *Id.*; *see also* Mavis v. Sobol, 839 F. Supp. 968, 989 (N.D.N.Y. 1994) (stating that school district did not provide adequate specialized education training to child's regular teacher and aide). In *Mavis*, the court determined that a child should be included in a regular classroom, despite evidence of behavioral problems and acting out, which was described in part as "striking students and jabbing students with sharp pencils." *Id.* at 991. The court stated, "It may well be that with adequate supplemental aids and services Emily would be less frustrated in a regular classroom... and, hence... would 'act out' less." *Id.*

440. *Oberti*, 995 F.2d at 1216 (emphasis added). In *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), the court addressed the placement of a child who required school personnel to suction mucus from her tracheostomy tube and perform other health services. The court disagreed with the Department of Education's claim that the child's disability was so severe that "education in regular classes with the use of supplementary aids and services [could not] be achieved satisfactorily." *Id.* at 815; *see also* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984) (holding that school nurse must be provided for eight-year-old who was unable voluntarily to empty her bladder and needed to be catheterized every three to four hours).

441. *See supra* notes 394–429 and accompanying text.

442. *See* Katharine T. Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, 48 Law & Contemp. Probs., Spring 1985, at 7, 7–8 ("A school district may understand that certain services sought by parents on behalf of a handicapped child would be

Although it is possible that school districts may use inclusion to avoid the cost of separate education classrooms, some researchers have concluded that implementing inclusion requires more resources than special pull-out programs.[443]

The courts have generally refused to consider financial cost if the parties fail to raise the issue.[444] But Congress realized that the availability of resources for special services was a necessary limitation. IDEA specifically provides that local school districts must provide special services to enable disabled children to participate in regular educational programs to the maximum extent *practicable*.[445]

Many of the courts that have considered cost have failed to interpret this language as a meaningful constraint on inclusion. The Sixth Circuit, for example, has looked at cost only from the perspective of the effect excessive cost may have on other *disabled* children because "excessive spending on one handicapped child deprives other handicapped children."[446] The statute does not require such a narrow view, and schools would be forced to abandon their academic mission if this interpretation were followed to its logical conclusion. The public school educational enterprise is for all students, and the "excessive" spending on one group—whether it be the football team or the debate club—has the potential to deprive other *children* of educational opportunity.

The Eleventh Circuit has taken a somewhat broader view: "If the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate."[447] At the upper limit of the cost analysis, the court stated that "a school district cannot be required to provide a handicapped child with his or her own full-time teacher, even if this would permit the child to be satisfactorily educated in a regular classroom."[448] But the court's balancing test does not take into account the full impact on a school system when it must provide the necessary aids and services to include many disabled children throughout an entire district. The court required the school to

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extremely beneficial to the child, but nevertheless be concerned about the resource implications of those services.").

443. *See, e.g.*, Baker & Zigmond, *supra* note 18, at 177.

444. *See, e.g.*, *Oberti*, 995 F.2d at 1218 n.25; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1049 n.9 (5th Cir. 1989).

445. 20 U.S.C. § 1414 (a)(1)(C)(iv) (1994).

446. Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

447. Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991).

448. *Id.*

"balance the needs of each handicapped child against the needs of other children in the district."[449] For example, the court apparently would assess the cost of providing the wide array of aids and services necessary to include a child like Raphael Oberti and consider the effect that cost has on the needs of the other children in the district. The cost for aids and services necessary to include one child may not always have a significant impact on the education of the other children in the district. But the aggregate cost of the aids and services necessary to include all the disabled children in the district with severe behavior problems may have such a impact. The failure to consider the aggregate cost of aids and services thus may allow a disproportionate amount of financial resources to be used to underwrite inclusion.[450]

Thus, many of the important issues on the cost side of the disability fulcrum still await recognition and illumination. The failure to clarify the possible cost of full inclusion to the learning environment on other students and the teacher ignores some of the most important components of the community of learning. The failure to articulate when providing aids and services to place the disabled child in the general education classroom may prove excessive leaves the school with no guidance regarding how it should allocate scarce resources.

VI. CONCLUSION

The courts have wrestled to come to grips with the balance Congress required between "free *appropriate* public education"[451] for disabled children and integration in the general classroom "to the maximum extent *appropriate*."[452] The federal courts of appeals have reached differing conclusions regarding how that balance should best be achieved. To varying degrees, many courts have announced standards for inclusion that have supplanted the academic value of education with the value of integration. With dubious support, these courts have implied that the costs of full inclusion would seldom outweigh its benefits. Of course, there are substantial educational benefits from inclusion for many children. Given the uncertainty of these benefits in many other cases, however, courts must reconsider their uncritical acceptance of the

449. *Id.*

450. *See* Neal & Kirp, *supra* note 73, at 359 (expressing concern that IDEA may distort allocation of limited school district resources and pointing out how legal model therein treats parties to dispute as discreet from system in which they are located).

451. 20 U.S.C. § 1412(1) (1994) (emphasis added).

452. 20 U.S.C. § 1412(5)(B) (emphasis added).

premises underlying the full inclusion movement. Courts can—under the terms of the statute as written—once again elevate academic achievement over academic setting, and they should do so explicitly and without hesitation. The failure to allow the public school to fulfill its mission as a community of learning, a community in which the primary objective is to impart a serious education to all students, disserves the students—both disabled and nondisabled—who have placed their faith and their future in this institution.