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REVISITING THE DISABILITY INTEGRATION PRESUMPTION

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The Individuals with Disabilities Education Act's (IDEA) predecessor established a legal presumption in favor of educating all students with disabilities in an integrated, "least restrictive environment" (LRE) to the "maximum extent appropriate." Yet, the precise meaning of this statutory presumption remains unsettled, which has led to mounting special education disputes in federal court. This Article addresses a less developed area of IDEA litigation: namely, how federal courts should interpret this statutory presumption in light of the disproportionate placement of students with the most significant cognitive disabilities in separate settings.

Whether students with the most significant cognitive disabilities sacrifice their right to an integrated educational opportunity raises novel issues at the intersection of both liberty and equality. Despite the treatment that students with disabilities have received in judicial opinions and legal scholarship to date, neither forum has undertaken an exhaustive analysis of the prevailing circuit split as it applies to students with the most significant cognitive disabilities. This Article aims to fill that gap. As a normative matter, moreover, the Article adds to the literature by demonstrating that students with the most significant cognitive disabilities should possess all of the same protections under the IDEA that are enjoyed by similarly-situated students with high-incidence disabilities. It then concludes by arguing in

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favor of adopting the Ninth Circuit's four-factor balancing test as the most practical national judicial standard for assessing school districts' compliance with the IDEA's integration presumption.

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INTRODUCTION

In the landmark *Brown v. Board of Education* decision, Chief Justice Earl Warren invalidated the long-sanctioned "separate but equal" doctrine by declaring that "[s]eparate educational facilities are inherently unequal."[1] In doing so, the *Brown* Court laid the groundwork for significant social change, including the eventual passage of the Education for All Handicapped Children Act (EHA).[2] The purpose of the EHA centered on ensuring that all students with disabilities received an equal educational opportunity, which had been all but denied to this population of students.[3] Indeed, prior to EHA's passage and enactment in 1975, the education of children with disabilities fell almost entirely within the ambit of state discretion: "[t]hrough most of the history of public schools in America, services to children with disabilities were minimal and were provided at the discretion of local school districts. Until the mid-1970's, laws in most states allowed school districts to refuse to enroll any student they considered 'uneducable,' a term generally defined by local school administrators."[4] To address such rank exclusion, states began passing and enacting legislation to better protect students with disabilities.[5] Although forty-five states enacted such legislation in the lead-up to the EHA's enactment, the newly-enacted state laws often lacked adequate funding and enforcement mechanisms that could elicit broader compliance within and between school districts.[6]

Nearly five decades since its enactment, the EHA—which is now known as the Individuals with Disabilities Education Act (IDEA)[7]—remains the nation's preeminent disability rights statute for students with

1 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

2 Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3(a), § 601(c), 89 Stat. 773, 774–75 (codified as amended at 20 U.S.C. §§ 1400–1482) (introducing "free appropriate public education" into education law).

3 *Id.*

4 Edwin W. Martin, Reed Martin & Donna L. Terman, *The Legislative and Litigation History of Special Education*, 6 THE FUTURE OF CHILD., no. 1, Spring 1996, at 26.

5 *Id.* at 27–28.

6 *Id.* at 28–29 ("Congressional hearings in 1975 revealed that millions of children with disabilities were still being shut out of American schools: 3.5 million children with disabilities in the country were not receiving an education appropriate to their needs, while almost one million more were receiving no education at all. By 1971–72, despite the fact that every school district in the United States had some kind of ongoing special education program, seven states were still educating fewer than 20% of their *known* children with disabilities, and 19 states, fewer than a third. Only 17 states had reached the halfway figure.").

7 Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400–1482).

disabilities.[8] The IDEA protects all students with disabilities living in states that have accepted federal financial aid,[9] conferring both substantive and procedural rights upon more than seven million individuals.[10] Procedurally, the IDEA mandates that public schools provide a Free Appropriate Public Education (FAPE) in the *least* restrictive environment (LRE),[11] as determined by an individualized education plan (IEP),[12] to all eligible children with disabilities.[13] Substantively, the IDEA places an affirmative duty on participating states to identify, assess, and serve students with disabilities, regardless of the severity of their needs.[14] Despite the foregoing progress, however, "special education is a leading sector of litigation in the K-12 public education context," with "[t]he vast majority of this burgeoning litigation" arising under the IDEA.[15]

While most of this litigation has involved disputes as to whether school districts have complied with their affirmative obligation to provide a FAPE to eligible students with disabilities under the IDEA,[16] legal scholars, commentators, and the courts have paid relatively little attention

8 The precursor to the IDEA, the Education for All Handicapped Children Act, was passed 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 [and] to assure that the rights of handicapped children . . . are protected." *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3, § 601(c), 89 Stat. 773, 775. There are two other disability rights laws affecting students with disabilities, but both lack much of the substantive and procedural rights that the IDEA affords to individuals with disabilities in the context of education: Section 504 of the Rehabilitation Act, *see* 29 U.S.C. § 794(a), and the Americans with Disabilities Act of 1990 (ADA), *see* 42 U.S.C §§ 12101 *et seq.*, as modified by the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). Section 504 of the Rehabilitation Act and the ADA, as civil rights statutes, offer broader anti-discrimination protections across various domains, such as employment, public services, public K-12 education, and accommodations, as opposed to the IDEA, which focuses exclusively on protecting the educational rights of students with disabilities.

9 *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 390 (2017) (citing 20 U.S.C. § 1412(a)(1)).

10 NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., CONDITION OF EDUCATION (2023), https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities [https://perma.cc/YJ2R-PMTA].

11 20 U.S.C. § 1412(a)(5)(A).

12 *Id.* § 1414(d).

13 *Id.* § 1401(3).

14 *Id.* § 1412(a)(3).

15 Perry A. Zirkel, *Through a Glass Darkly: Eligibility Under the IDEA—The Blurry Boundary of the Special Education Need Prong*, 49 J.L. & EDUC. 149, 149 (2020); *see generally* Perry A. Zirkel, *National Compilation of Case Law 1998 to the Present under the IDEA and Section 504/ADA*, PERRY A. ZIRKEL, https://perryzirkel.com/2023/02/06/national-compilation-2022 [https://perma.cc/8JWK-V7RZ] (providing a list of IDEA case law from 1998 through 2022).

16 *See* Andriy Krahmal, Perry A. Zirkel & Emily J. Kirk, *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 TEX. J. C.L. & C.R. 201, 219 n.122 (2004) ("FAPE cases . . . continue to be the main source of IDEA litigation . . . .").

to the legal obligations owed to students with disabilities who have been placed in the most restrictive educational settings. This issue is particularly pronounced for students with the most significant cognitive disabilities, a discrete population that constitutes a "non-categorical designation for those students participating in their state alternate assessment based on alternate achievement standards (AA-AAAS)."[17] Indeed, recent empirical research suggests that, "[f]or the nearly 40,000 students participating in the AA-AAAS across a 15-state sample . . . a total of 93% [of students with the most significant cognitive disabilities] were served primarily in self-contained classrooms, separate schools, home[s], hospital[s], or residential settings."[18] Additionally, in spite of a wide body of evidence demonstrating that opportunities to learn and develop are enhanced in more inclusive educational settings,[19] students with the most significant cognitive disabilities continue to be placed outside of general education classrooms "at a substantially greater rate . . . than . . . students in any single IDEA category."[20]

This Article addresses a less developed area of IDEA litigation: namely, how federal courts should interpret the IDEA's LRE requirement in light of the disproportionate placement of students with the most significant cognitive disabilities in separate educational settings. Put another way, to comply with the IDEA's LRE mandate, students with disabilities must receive an opportunity to learn and interact with their non-disabled peers in general education classrooms *to the maximum extent appropriate* for their individual circumstances.[21] In seeking the least restrictive environment for students with disabilities, school officials must consider a host of competing factors when determining the restrictiveness of the educational environment where such students are to be placed.[22] Although the federal appellate courts have agreed that school

17 Harold Kleinert & Jacqui Kearns, *Reconsidering LRE: Students with the Most Significant Cognitive Disabilities and the Persistence of Separate Schools*, TIES CENTER, https://publications.ici.umn.edu/ties/reconsidering-lre/main [https://perma.cc/CXE7-ZZ5B].

18 *Id.*

19 *Id.*; *see also* Jennifer A. Kurth, Mary E. Morningstar & Elizabeth B. Kozleski, *The Persistence of Highly Restrictive Special Education Placements for Students with Low-Incidence Disabilities*, 39 RSCH. & PRAC. PERS. WITH SEVERE DISABILITIES 227, 228 (2014) ("Furthermore, others have found that individuals with low-incidence disabilities demonstrate improved academic achievement by participation in inclusive programs.").

20 Kleinert & Kearns, *supra* note 17.

21 20 U.S.C. § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."); *see* 34 C.F.R. § 300.550(b)(1) (2017); *see also* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

22 34 C.F.R. § 300 (2023); *see also infra* Sections III.A–D.

officials must review these factors when determining the restrictiveness of the educational environment, each circuit has devised a different test for deciding whether the placement of a student with disabilities complies with the LRE requirement's integration presumption.[23] Indeed, courts in the Fourth, Sixth, and Eighth circuits consider whether the segregated placement is comparatively superior to a general education placement when deciding if such placement is appropriate.[24] In other jurisdictions, including the Second, Third, Fifth, Tenth, and Eleventh circuits, courts have instead adopted a multi-factor test to assess compliance with IDEA's LRE mandate.[25] The Ninth Circuit, by contrast, has adopted a slightly modified version of the multi-factor test adopted in the Second, Third, Fifth, Tenth, and Eleventh circuits.[26] Still, in other jurisdictions, including those in the First and Seventh circuits, courts have "declined to adopt" a "multi-factor test" for determining whether a district or state has complied with the LRE mandate,[27] reasoning that "[t]he Act itself provides enough of a framework."[28]

Whether students with the most significant cognitive disabilities sacrifice their right to an integrated educational opportunity raises novel issues at the intersection of both liberty and equality. Despite the treatment that students with disabilities have received in judicial opinions and legal scholarship to date, neither forum has undertaken an exhaustive analysis of the prevailing circuit split as it applies to students with the most significant cognitive disabilities. This Article aims to fill that gap. As a normative matter, moreover, the Article adds to the literature by

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23 The IDEA's LRE requirement and its integration presumption will be used interchangeably throughout this Article to specifically address the initial presumption that each concept adopts which counsels in favor of placing students in inclusive settings. The reader should note, however, that, while both concepts are closely related, they are not necessarily fungible terms, and are often used interchangeably. *See* Oberti *ex rel* Oberti v. Bd. of Educ., 995 F.2d 1204, 1209 n.6 (3d Cir. 1993) (denoting that "[c]ompliance with IDEA's mainstreaming requirement is sometimes referred to as placement in the 'least restrictive environment.'"). Yet, while the integration presumption is a key component of how LRE is implemented, it does not cover the full scope of LRE. Instead, LRE is a broader concept that encompasses the entire spectrum of placement options available to students with disabilities, from full inclusion in general education classrooms to more restrictive settings like special education classrooms or separate schools. The integration presumption, on the other hand, specifically addresses the initial presumption in favor of placing students in inclusive settings, while still allowing for individualized determinations based on each student's needs. *See* Lorna Idol, *Toward Inclusion of Special Education Students in General Education: A Program Evaluation of Eight Schools*, 27 REMEDIAL & SPECIAL EDUC. 77, 78 (2006).

24 *See infra* Section III.A (providing a full discussion of the *Roncker* approach).

25 *See infra* Section III.B (providing a full discussion of the *Daniel R.R.* approach).

26 *See infra* Section III.D (providing a full discussion of the *Rachel H.* approach).

27 Bd. of Educ. v. Ross *ex rel* Ross, 486 F.3d 267, 277 (7th Cir. 2007) (citing Beth B. v. Van Clay, 282 F.3d 493, 499 (7th Cir. 2002)).

28 *Beth B.*, 282 F.3d at 499; *see* C.D. *ex rel* M.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 630 (1st Cir. 2019); *see also infra* Section III.C (providing a full discussion of the approach adopted in the First and Seventh Circuits).

demonstrating that students with the most significant disabilities should possess all of the same protections under the IDEA that are enjoyed by similarly-situated students with high-incidence disabilities.[29] It then argues that the on-going segregation of students with the most significant cognitive disabilities demands a judicial standard that aligns with the prevailing purpose of the IDEA and its LRE mandate. This purpose, as observed by one of the original drafters of the EHA's integration presumption, was to "represent[] a gallant and determined effort to terminate the two-tiered invisibility once and for all with respect to exceptional children in the [n]ation's school systems."[30] To achieve the stated purpose of the IDEA, this Article argues in favor of adopting the Ninth Circuit's four-factor balancing test as the best, most practical national judicial standard for assessing school districts' compliance with the IDEA's integration presumption.

This Article proceeds as follows. Part I provides a brief history of the LRE mandate and traces its presumption that all students with disabilities are to be placed in integrated educational settings. Part II surveys the myriad benefits of receiving one's education in an integrated classroom environment for all students, but especially among students with the most significant cognitive disabilities. It then details the harms engendered by schools and districts that fail to comply with IDEA's integration presumption. Part III describes the prevailing circuit split and offers a critique of each jurisdiction's approach to assessing compliance with the presumption. Part IV argues for the adoption of the Ninth Circuit's four-factor balancing test as the best judicial standard that aligns with the original intent of the EHA and promotes inclusive educational opportunities for students with the most significant cognitive disabilities.

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[29] In scholarly discussions within the field of special education, "high-incidence" disabilities and "low-incidence" disabilities are terms often used to categorize different types of disabilities based on their prevalence in the student population. High-incidence disabilities refer to disabilities that are relatively common and affect a significant portion of the student population. These disabilities often include conditions like specific learning disabilities, speech and language disorders, and mild to moderate intellectual disabilities. Schools typically encounter a higher number of students with high-incidence disabilities, and there are more established and widely-used educational strategies and resources available to support these students. Low-incidence disabilities, on the other hand, refer to disabilities that are relatively rare and affect a smaller percentage of students. Examples of low-incidence disabilities may include severe cognitive impairments, deaf-blindness, or multiple disabilities. Due to their rarity, students with low-incidence disabilities may require more specialized and individualized educational approaches and support, often necessitating collaboration with specialized professionals and resources. This Article utilizes both terms throughout, with students with the most significant cognitive disabilities indicating those children with "low-incidence" disabilities. *See* Kyrie E. Dragoo, CONG. RSCH. SERV., R46566, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: A COMPARISON OF STATE ELIGIBILITY CRITERIA 9, 14 (2020) (defining, among other terms, low- and high-incidence disabilities in the context of IDEA eligibility).

[30] Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72 (1978).

Part V responds to key policy and legal limitations to further support this Article's central thesis. This Article then offers brief concluding remarks.

I. REVISITING THE IDEA'S INTEGRATION PRESUMPTION

The cornerstone of the IDEA is its FAPE requirement.[31] As briefly mentioned in the introduction, this requirement ensures that all children with disabilities are afforded the right to receive an education that is tailored to their unique needs, at no cost to an IDEA-eligible child's parent(s) or guardian(s), and in the least restrictive environment. However, it is the latter element—the IDEA's LRE requirement[32]—that serves as the primary focus of this Article's thesis. Part I proceeds as follows: Section I.A explores the historical context of the IDEA's LRE requirement, its presumption in favor of integrated educational settings, and the relevant case law interpreting its statutory and regulatory metes and bounds. Section I.B discusses the integration presumption as applied to students with high-incidence disabilities and the substantial benefits produced when schools and districts substantively comply with the presumption. Section I.C concludes this section by surveying the short- and long-term harms engendered by schools and districts that choose not to comply with the presumption's terms.

A. *Tracing the History of Educational Exclusion for Students with Disabilities*

Long before the passage of the IDEA, students with disabilities faced a long history of not only educational exclusion, but also social exclusion. Indeed, during the nineteenth century, children with disabilities were largely viewed as a private matter—or "private trouble"[33]—that individual families had to navigate. By the turn of the twentieth century, however, the advent of compulsory school attendance laws upended such social exclusion, compelling a population of children who were considered "uneducable"[34] into public schools for the first time. From the 1950s through the early 1970s, the neglect and ableist vitriol that informed the broader social exclusion of children with

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[31] 20 U.S.C. § 1401(9); *see also* Sytsema *ex rel* Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1312 (10th Cir. 2008) ("The FAPE concept is the central pillar of the IDEA statutory structure.").

[32] *See* 20 U.S.C. § 1412(a)(5)(A).

[33] Marvin Lazerson, *The Origins of Special Education*, *in* SPECIAL EDUCATION POLICIES: THEIR HISTORY, IMPLEMENTATION, AND FINANCE 15, 16 (Jay G. Chambers & William T. Hartman eds., 1983).

[34] *See id.* at 18–19; Martin et al., *supra* note 4, at 26.

disabilities in the preceding century continued apace within the nation's public schools.[35] In fact, the rank segregation of students with disabilities within the nation's public schools ultimately led the White House Committee on Special Classes to condemn the state of special education classrooms as little more than a "dumping grounds" for students with specialized needs.[36]

Despite the abhorrent classroom conditions faced by students with disabilities, parents and community advocates "lobbied aggressively to root out [the] entrenched discrimination" that pervaded the nation's public schools.[37] Yet, by the 1971–72 school year—three years before the passage of the IDEA—"seven states were still educating fewer than 20% of their known children with disabilities, and [in] 19 states, fewer than a third. Only 17 states had reached the halfway figure."[38] With no federal law affording the right to attend public schools, disability rights activists advocated for the substantive inclusion of students with disabilities in mainstream educational settings.[39] Borrowing from the anti-segregation theory proffered in *Brown*, these advocates argued that such segregated educational facilities and separate special education classes resulted in unequal, subpar educational experiences for students with disabilities.[40] Ultimately, the foregoing advocacy helped secure constitutional protections for students with disabilities at the district court level.

In the seminal case of *Mills v. Board of Education*,[41] parents of students with disabilities brought a class-action lawsuit against the District of Columbia's Board of Education, challenging the exclusion of students with disabilities from public education in the District.[42] Once again borrowing from the legal strategy adopted in *Brown*, the plaintiffs

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[35] Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 426–27 (2012).

[36] Lazerson, *supra* note 33, at 35.

[37] Chopp, *supra* note 35, at 426.

[38] Martin et al., *supra* note 4, at 29.

[39] *Id.*; *see also* Jacob W. Wohl, *A Better IDEA: Utilizing the Department of Education's Rulemaking Authority to Reform the Special Education Process*, 74 ADMIN. L. REV. 621, 627 (2022) ("During that period, no federal law provided children with disabilities the right to attend public school.").

[40] *See* Kerrigan O'Malley, *From Mainstreaming to Marginalization?—IDEA's De Facto Segregation Consequences and Prospects for Restoring Equity in Special Education*, 50 U. RICH. L. REV 951, 952–53 (2016) ("The Supreme Court's *Brown* decision resonated with families of disabled children who responded by challenging practices that segregated the disabled student population or deprived such children of educational opportunities altogether."); *see also* Martha Minow, *Surprising Legacies of* Brown v. Board, 16 WASH. U. J.L. & POL'Y 11, 25 (2004) ("Prior to the 1970s, only seven states provided education for more than half of their children with disabilities. Those children with disabilities who did receive educational programming did so largely in classrooms or schools removed from their [non-disabled] peers.").

[41] Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

[42] *Id.* at 868.

in *Mills* argued that the systematic denial of education to children with disabilities violated their constitutional rights under the federal Equal Protection Clause.[43] The *Mills* court agreed and held that the District of Columbia's public schools were required to provide a "free and suitable publicly-supported education[,] regardless of the degree of the child's . . . disability or impairment."[44] Accordingly, the court's ruling in *Mills* marked a significant legal moment in the fight for full inclusion by affirming that students with disabilities have a fundamental right to education.

In *Pennsylvania Association for Retarded Children v. Pennsylvania* (*PARC*), a similar case filed the same year as *Mills*, parents of children with intellectual disabilities challenged the exclusion of these students from the state's public education system.[45] Much like in *Mills*, plaintiff parents relied on the legal strategy adopted in *Brown* to target then-existing state statutes and official school policy that permitted district officials to exclude children that they deemed "uneducable" from school.[46] The court's decision in *PARC* acknowledged that these students had been systematically excluded and, as a result, the court ordered significant reforms so as to provide appropriate educational services for students with disabilities.[47] Taken together, *PARC* and *Mills* helped lay the foundation for the subsequent creation of the EHA, which is now known as the IDEA.[48] But it was the *Mills* decision, in particular, that helped establish the "blueprint for what would later become federal special education law."[49]

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[43] *Id.* at 874–76; Martin et al., *supra note* 4, at 28 ("The U.S. District Court ruled that school districts were constitutionally prohibited from deciding that they had inadequate resources to serve children with disabilities because the equal protection clause of the Fourteenth Amendment would not allow the burden of insufficient funding to fall more heavily on children with disabilities than on other children.").

[44] *Mills*, 348 F. Supp at 878.

[45] Pennsylvania Ass'n for Retarded Child. v. Pennsylvania, 343 F. Supp. 279, 281–82 (E.D. Pa. 1972).

[46] Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform IDEA's Due Process Structure*, 66 CASE W. RES. L. REV. 143, 147 (2015).

[47] Pennsylvania Ass'n for Retarded Child., 343 F. Supp. at 302 ("Approval means that plaintiff retarded children who heretofore had been excluded from a public program of education and training will no longer be so excluded."); Shaver, *supra* note 46, at 147.

[48] Shaver, *supra* note 46, at 149–50.

[49] Chopp, *supra* note 35, at 428; *Mills*, 348 F. Supp. at 878–83 (requiring the identification of students with disabilities, the creation of individually tailored plans, the availability of compensatory services, and the provision of due process rights).

B. *Framing the IDEA's Central Provisions*

Today, the IDEA[50] and its implementing regulations[51] function as the nation's preeminent authorities that protect the rights owed to students with disabilities.[52] The three central features of the IDEA are its (1) FAPE provision; (2) IEP provision; and (3) LRE requirement. Each of these elements plays a distinct yet interconnected role in advancing the central purpose of IDEA, which is to ensure that students with disabilities receive an inclusive and equitable education tailored to their unique needs. The following Sections explore the scope of each provision in turn.

1. Free Appropriate Public Education

The cornerstone of the IDEA lies in its mandate to ensure that all eligible students with disabilities have access to a FAPE.[53] This foundational requirement, enshrined in both the statute and accompanying regulations,[54] is the linchpin of the IDEA's mission to provide equal educational opportunities to students with disabilities. Under the IDEA, the FAPE concept embodies the notion that students with disabilities must receive an education tailored to their unique needs—one that not only opens the doors to academic achievement but also supports their overall development.[55] To operationalize the FAPE requirement, the IDEA establishes a comprehensive framework that encompasses the development of IEPs for each eligible child, including: regular assessments of student progress, parental involvement, and the provision of specialized services and accommodations.[56] It is important to note, however, that the IDEA does not mandate that school districts adopt any specific education programs. Rather, the provision requires that

[50] Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400–1482).

[51] 34 C.F.R. § 300 (2023).

[52] There are two other disability rights laws affecting students with disabilities: Section 504 of the Rehabilitation Act, *see* 29 U.S.C. § 794(a), and the Americans with Disabilities Act of 1990 (ADA), *see* 42 U.S.C §§ 12101 *et seq.*, as modified by the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[53] 20 U.S.C. § 1412(a)(1).

[54] *Id.* § 1412(a)(1); 34 C.F.R. § 300.101.

[55] 20 U.S.C. § 1401(26) (defining "related services" as "transportation, and such development, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.").

[56] *Id.* §§ 1412(a)(4), 1414(d).

school districts provide an educational opportunity that allows a student with disabilities to make progress in light of their circumstances.[57]

2. Individual Education Plans

The IEP is a legally binding document that outlines a student's present level(s) of performance, annual goals, special education and related services, and the extent to which the student will participate in general education programs.[58] As the educational roadmap for students with disabilities, the IEP ensures that each child with a disability is provided with appropriate support that will foster academic success and overall development.[59] The term "appropriate" underscores the requirement that a district's provision of education must be tailored to the individual needs of the student with disabilities.[60] Additionally, schools and districts are required to regularly assess and monitor the progress of students who are receiving special education services.[61] If a student's needs or circumstances change within the intervening assessment periods, the IEP must be updated accordingly to ensure that the education remains appropriate in light of those changes.[62] Finally, the IEP emphasizes the importance of parental involvement in the special education process.[63]

Indeed, parents or guardians have the right to participate in the development of their child's IEP, and to have their concerns and input considered.[64] Specifically, the IDEA affords parents of students with disabilities substantive legal rights, including: the right to accept or deny special education services; the right to request a district-funded special education evaluation by an independent third-party; and the right to meaningfully participate in the decision-making process that often determines the kinds of special education services that their child can

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57 *Compare* Endrew F. *ex rel* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017) (explaining that, to meet the IDEA's FAPE requirement, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."), *with* Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982) ("[I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a free appropriate public education."); *see also* § 1400(d)(1)(A).

58 20 U.S.C. § 1414(d)(1)(A).

59 *Id.* § 1414(d)(4).

60 *Id.*

61 *Id.*

62 *Id.* § 1414(d)(4)(A).

63 *Id.* § 1414(d)(1)(B).

64 *Id.*

expect to receive.[65] Chief among these rights, at least for purposes of this Article's thesis, is a parent's ability to challenge an IEP team's initial identification, evaluation, and the quality of services to—including the educational placement of—their child.[66] Yet, despite this clear mandate, recent research makes clear that IEP teams are failing to comply with these terms.[67] Worse still, evaluations of the current IDEA landscape by practitioners and parents have raised concerns with the IDEA's IEP structure.[68] In fact, one recurring concern exists among parents: that they believe schools do not view them as full partners in the IEP-creation process; instead, parents have reported feeling as if they are viewed by their IEP teams as ancillary, or even hindrances, to the broader IEP process.[69]

3. Least Restrictive Environment

The FAPE requirement under the IDEA is intrinsically connected to its LRE requirement. Indeed, the IDEA envisions that, to the maximum extent appropriate, students with disabilities should be educated alongside their non-disabled peers in general education classrooms.[70] As one of the IDEA's substantive requirements, the drafters of the LRE provision recognized that an inclusive environment benefits students with disabilities by providing them with opportunities for social interaction,

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65 *See* 34 C.F.R. §§ 300.501–300.502 ("The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—(i) [t]he identification, evaluation, and educational placement of the child; and (ii) [t]he provision of FAPE to the child.").

66 *Id.* § 300.507(a)(1) ("A parent . . . may file a due process complaint on any . . . matters (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).").

67 Jennifer A. Kurth et al., *Considerations in Placement Decisions for Students With Extensive Support Needs: An Analysis of LRE Statements*, 44 RSCH. & PRAC. FOR PERS. WITH SEVERE DISABILITIES 3, 9 (2019) ("Contrary to guidelines in IDEA [§ 1412(a)(5)], which compel IEP teams to only remove students from general education 'when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily,' no LRE justification statement in this analysis referred to supplementary aids and services, nor any discussion of how these were considered when making LRE decisions.").

68 *See, e.g.*, Meghan M. Burke & Linda Sandman, *In the Voices of Parents: Suggestions for the Next IDEA Reauthorization*, 40 RSCH. & PRAC. FOR PERS. WITH SEVERE DISABILITIES 71 (2015) (researchers interviewed forty-nine parents requesting their comments on the IDEA and suggestions for reauthorization); *see generally* Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107 (2011).

69 Burke & Sandman, *supra* note 68, at 71.

70 20 U.S.C. § 1412(a)(5)(A).

academic growth, and exposure to grade-level curriculum.[71] However, the LRE requirement is not absolute and must be balanced with the individual needs of the student. Accordingly, the FAPE requirement ensures that the education provided to a student with disabilities—whether in a general education setting or a more restrictive educational environment—must be tailored to meet that student's unique needs and, until recently, result in some educational benefit.[72] It is this latter, outcome-based determination—that is, whether a student with disabilities has received "some educational benefit"[73] through the district's provision of FAPE—that has confounded courts and advocates.[74] Perhaps more importantly, at least for our purposes, the interaction between the provision of FAPE and its provision of "some educational benefit" closely intersects with the IDEA's LRE requirement, as detailed in the following Sections.

Moreover, although the IDEA sets forth the specific content requirements that must accompany an IEP, the IDEA offers little guidance as to what constitutes a FAPE.[75] Instead, the precise meaning of the FAPE standard has remained an open question left for the Court to decide. Two key Supreme Court decisions have endeavored to interpret and establish the standard's meaning—*Board of Education of the Hendrick Hudson Central School District v. Rowley*[76] and *Endrew F.* ex rel *Joseph F. v. Douglas County School District RE-1*.[77] In *Rowley*, the parents of Amy Rowley—a student with a hearing impairment enrolled in the Hendrick Hudson Central School District—contended that their daughter should be receiving a sign language interpreter for all of her

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71 34 C.F.R. § 300.114–120 (describing the types of services and placements school districts must provide); *see also id.* § 300.115(a) (providing that, school districts "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.").

72 Endrew F. *ex rel* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017) (finding that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.").

73 Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982).

74 *Compare* Deal *ex rel* Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 861–63 (6th Cir. 2004) ("IDEA requires an IEP to confer a '*meaningful* educational benefit' gauged in relation to the potential of the child at issue.") (emphasis added), *with* Sytsema *ex rel* Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1313 (10th Cir. 2008) ("This court has interpreted the *Rowley* standard to require an educational benefit that is more than *de minimis*.").

75 20 U.S.C. § 1400(d)(1)(A) (noting that the FAPE standard must be tailored according to a child's individual needs and designed such that they are "prepare[d] . . . for further education, employment, and independent living"); *see also Rowley*, 458 U.S. at 189 ("Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children.").

76 *Rowley*, 458 U.S. 176 (1982).

77 *Endrew F.*, 580 U.S. 386 (2017).

academic courses.[78] Although Amy had been performing "better than the average child in her class and [was] advancing easily from grade to grade,"[79] Amy's parents argued for an "equal educational opportunity" so that their child could reach her full potential.[80] In rejecting their argument, the *Rowley* majority found that the IDEA requires school district officials to only offer students with disabilities a "basic floor of opportunity."[81] As a consequence, the exact parameters of the FAPE provision and its "educational benefit" mandate would go virtually undefined for thirty-five years, until the Supreme Court revisited the issue in *Endrew F*.

In *Endrew F.*, the parents of Endrew, a student with autism enrolled in the Colorado Douglas County (CDC) public schools, argued that the school district had failed to provide a FAPE in an individualized manner, as prescribed in the IDEA.[82] As a CDC student from kindergarten to the fourth grade, Endrew's academic progress began to slow as he moved through each grade.[83] He began exhibiting concerning behavioral challenges, such as yelling during class time and leaving the premises unannounced during the school day.[84] Endrew's parents, having grown weary of the educational environment provided at CDC, enrolled their son at the Firefly Autism House, a private special education school. While there, Endrew's behavior "improved significantly, permitting him to make a degree of academic progress that eluded him in public school."[85] The progress achieved at the Firefly Autism School ultimately informed his parent's legal claim. That is, Endrew's parents claimed that CDC deprived Endrew of a FAPE given their failure to create an IEP with the kinds of substantive supports that he received while a student at the Firefly Autism School.[86] The Court ultimately ruled in favor of the petitioners, finding that school officials were required to create an IEP that would "enable [Endrew] to make progress," while also "set[ting] out a plan for pursuing academic and functional advancement."[87] Although the *Endrew* Court failed to establish a "bright-line rule"[88] in its holding, it did strengthen the FAPE standard from the paltry "more than *de*

[78] *Rowley*, 458 U.S. at 184.

[79] *Id.* at 185.

[80] *Id.* at 198.

[81] *Id.* at 200 (quoting H.R. REP. NO. 94-332, at 14 (1975)); *see also id.* at 197 n.21 ("Whatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education.").

[82] *Endrew F.*, 580 U.S. at 395–96.

[83] *Id.* at 395.

[84] *Id.*

[85] *Id.* at 396.

[86] *Id.* at 395–96.

[87] *Id.*at 399.

[88] *Endrew F.*, 580 U.S. at 404.

minimis"[89] standard that was articulated in *Rowley* nearly thirty-five years earlier. More crucially, the Court's holding in *Endrew F.* raised the bar in terms of the justification that school districts had to provide when placing a child in a particular educational setting.[90] The next Section further unpacks the LRE provision's presumption that all students with disabilities must be placed in an integrated setting to the maximum extent appropriate.

C. *Unpacking the IDEA's Integration Presumption*

At its core, the IDEA's individualized integration presumption was designed to help ensure that the specter of such educational exclusion is neither revived nor reimagined. Yet the presumption is, as the moniker suggests, merely a presumption. The statutory provision that establishes the presumption's scope requires integration only "[t]o the maximum extent *appropriate*," expressly permitting placement in "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment" when "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved *satisfactorily*."[91] By its own terms, then, the presumption mandates that school personnel engage in an individualized assessment of each child's unique needs before determining whether a given placement is "appropriate" in light of those identified needs. Therefore, "[t]he responsibility is not on the student to conform to any particular level of functioning but rather on the school to determine how to address a student's individually determined learning needs, which may differ than those of peers."[92]

The Act's implementing regulations closely track its statutory terms, mandating that "[e]ach public agency must ensure that—(i) [t]o the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are non-disabled."[93] The regulations further

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89 *Id.* at 402–03.

90 Terry Jean Seligmann, *Flags on the Play: The Supreme Court Takes the Field to Enforce the Rights of Students with Disabilities*, 46 J.L. & EDUC. 479, 490 (2017) (describing the *Endrew F.* standard as "markedly more demanding" than the standard applied by the lower court).

91 20 U.S.C. § 1412(a)(5)(A) (emphasis added).

92 Michael F. Giangreco, *"How Can a Student with Severe Disabilities be in a Fifth Grade Class When He Can't Do Fifth-Grade Level Work?" Misapplying the Least Restrictive Environment*, 45 RSCH. & PRAC. FOR PERS. WITH SEVERE DISABILITIES 23, 25 (2020).

93 34 C.F.R. § 300.114(a)(2). The regulations define a public agency as "SEAs [state educational agency], LEAs [local educational agencies], ESAs [educational services agencies], nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities." *Id.* § 300.33.

contemplate that "[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment [is to] occur[] *only if 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."[94] Both the statutory and regulatory provisions form the basis of the LRE mandate. Perhaps more importantly, the creation of the presumption not only represented a material shift in policy at the time of its enactment, but also spurred profound societal change by challenging longstanding discriminatory practices while affirming the right to an equal educational opportunity for all students with disabilities.[95] In sum, the LRE mandate reflects the IDEA's broader presumption that, for virtually all students, the provision of a free appropriate public education implies both placement in mainstream educational environments and appropriate progression through grade levels.[96]

II. THE MISEDUCATION OF STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES

Students with the most significant cognitive disabilities continue to be disproportionately placed in separate, highly restrictive educational settings as compared with students with high-incidence disabilities.[97] Although nearly two-thirds of students with high-incidence disabilities were placed in general education classrooms at least eighty percent of the time as of 2018,[98] a mere three percent of students with the most significant cognitive disabilities were placed in general education

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94 *Id.* § 300.114(a)(2)(ii) (emphasis added).

95 *See* Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 918 (2019) ("Early court decisions laid the conceptual and doctrinal groundwork for the 'least restrictive environment' in special education."); *see also* Heather J. Russell, *Florence County School District Four v. Carter: A Good "IDEA"; Suggestions for Implementing the Carter Decision and Improving the Individuals with Disabilities Education Act*, 45 AM. U. L. REV. 1479, 1482 (1996) ("[E]ncouraging access of handicapped students to public schools[,] [*Mills* and *PARC*] spurred Congress in 1974 to increase federal funding for existing programs and require, for the first time, that states adopt as their goal to 'provide full educational opportunities to all handicapped children.'") (quoting Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 578, 580).

96 *See* Endrew F. *ex rel* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 401 (2017).

97 Kurth et al., *supra* note 19, at 227.

98 National Center for Education Statistics, *Digest of Education Statistics*, *Table 204.6 Children and Youth with Disabilities—Percentage Distribution of Students 6 to 21 Years Old Served Under Individuals with Disabilities Education Act (IDEA), Part B, by Educational Environment and Type of Disability: Selected Years, Fall 1989 Through Fall 2018*, INST. OF EDUC. SCI. (2018), https://nces.ed.gov/programs/digest/d19/tables/dt19_204.60.asp?current=yes [https://perma.cc/Z3AX-HBZE].

classrooms at least eighty percent of the time.[99] In addition, more than ninety percent of students with extensive support needs were placed in segregated settings, such as self-contained classrooms and entirely separate schools.[100]

Such disparate levels of segregation not only contradict the legislative purpose of the IDEA's integration presumption, but also engender significant short- and long-term costs in the lives of students with extensive support needs. The following Sections proceed as follows: Section II.A briefly describes the benefits produced by receiving one's education in an integrated classroom environment, especially among students with the most significant cognitive disabilities. Section II.B will then detail the harms engendered by schools and districts who fail to comply with the integration presumption. Section II.C offers Massachusetts as a case example to underscore the educational harms wrought by excluding students with the most significant cognitive disabilities from the general education classroom and, ultimately, the curriculum.

A. *Charting the Benefits of Educational Inclusion*

The exclusion of students with the most significant cognitive disabilities ignores a wide body of research underscoring the positive effects that such inclusion produces for students with and without significant cognitive disabilities.[101] Indeed, the benefits of appropriately educating students with the most significant cognitive disabilities are legion. Some of these benefits include "higher academic achievement . . . greater self-determination skills . . . and improved communication skills . . . ."[102] For students without disabilities, the benefits are similarly noteworthy. As observed by a recent report by the National Council on Disability (NCD), general education classrooms that were inclusive of students with the most significant cognitive disabilities fostered "reduced fear of human differences, increased comfort and awareness of differences, growth in social cognition, improvements in self-concept, growth of ethical principles, and caring friendships," among

99 Harold Kleinert et al., *Where Students with the Most Significant Cognitive Disabilities Are Taught: Implications for General Curriculum Access*, 81 EXCEPTIONAL CHILD. 312, 314 (2015).

100 *Id.* at 312.

101 MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 84–86 (1990) (denoting the myriad educational benefits that course material offered in sign language and by spoken word has on both students who are deaf and/or hard-of-hearing and students who are not deaf and/or hard-of-hearing).

102 Mary Curran Mansouri et al.,*Comparison of Academic and Social Outcomes of Students with Extensive Support Needs Across Placements*, 47 RSCH. & PRAC. FOR PERS. WITH SEVERE DISABILITIES, no. 2, 2022, at 111, 112.

students without disabilities.[103] Moreover, specially designed instruction and support services, a requirement of the IDEA,[104] can be provided within inclusive settings, thereby allowing students with the most significant cognitive disabilities to make meaningful progress in their academic and social development.[105] Therefore, inclusion in general education settings provides students with significant cognitive disabilities access to, among other things, a richer curriculum and a diverse array of social and emotional benefits.[106]

B. *Charting the Harms of Educational Exclusion*

Segregating students with significant cognitive disabilities from general education settings can also have detrimental effects on both the excluded students and the broader educational community in at least two central ways. First, such educational exclusion exacerbates social isolation and marginalization.[107] When students with significant cognitive disabilities are inappropriately placed in segregated educational settings, they miss out on the opportunity to interact and build relationships with their typically-developing peers.[108] Such isolation can lead to feelings of loneliness and a lack of belonging, which can have long-lasting negative effects on one's self-esteem and mental well-being.[109] Second, such educational exclusion can result in limited access to a challenging and diverse curriculum.[110] When students with the most significant cognitive disabilities are placed in separate, less academically rigorous settings, they often lack access to the same grade-level content standards and the same high academic expectations that their peers receive in inclusive environments.[111]

Such academically diluted settings can impede long-term learning, academic success, and ultimately limit future opportunities. In fact, recent empirical research suggests that "[i]n studies examining the academic outcomes of participants with [significant cognitive disabilities] across settings, the inclusive environment was associated with higher scores and

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103 NATIONAL COUNCIL ON DISABILITY, THE SEGREGATION OF STUDENTS WITH DISABILITIES 39 (2018), www.ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf [https://perma.cc/RA9G-3RHV].

104 34 C.F.R. § 300.39.

105 NATIONAL COUNCIL ON DISABILITY, *supra* note 103, at 18.

106 *Id.* at 39.

107 Matthew E. Brock, John M. Schaefer & Rachel L. Seaman, *Self-Determination and Agency for All: Supporting Students with Severe Disabilities*, 59 THEORY INTO PRACT. 162, 165 (2020).

108 *Id.* at 165–66.

109 *Id.*

110 Kurth, *supra* note 67, at 4.

111 *Id.*

larger effect sizes in literacy . . . and math . . . compared with the segregated environment."[112] Furthermore, "[o]ut of the studies examining students' social outcomes across settings (i.e., inclusive; segregated), the majority (80%) demonstrated that students with [the most significant cognitive disabilities] served in the general education classroom alongside same-age peers had better outcomes than those served in segregated settings."[113] The following Section offers a case example to exemplify the harms wrought by the inappropriate exclusion of students with the most significant cognitive disabilities from general education settings.

C. *The Curious Case of Massachusetts*

Under the federal Every Student Succeeds Act (ESSA), all students, including those with disabilities, are required to participate in state assessments to measure their academic progress.[114] Accommodations are provided to students with disabilities to ensure a fair assessment of their learning.[115] As observed by recent federal guidance, there are two paths that meet the foregoing state assessment requirement under ESSA: (1) the general assessment aligned with their grade-level standards, or (2) the alternate assessment aligned to alternate academic achievement standards (AA-AAAS) designed for students with the most significant cognitive disabilities.[116] Regardless of the chosen assessment path, *all students* are expected to meet state academic content standards, with appropriate modifications for those taking alternate assessments.[117] It is important to note, however, that alternate assessments aligned to alternate achievement standards are only authorized for students with the most significant cognitive disabilities, a term neither defined by the IDEA nor

[112] Mansouri et al., *supra* note 102, at 122.

[113] *Id.* at 124–25.

[114] 20 U.S.C. § 6311(b)(2).

[115] *Id.*

[116] Memorandum from Patrick Rooney, Dir., Sch. Support & Accountability Off. of Elementary & Secondary Educ. & Valerie Williams, Dir., Special Educ. Programs, Off. of Special Educ. & Rehabilitative Servs., to State Assessment Dirs., State Title I Dirs. & State Special Educ. Dirs. 1 (Sept. 20, 2023) [hereinafter Waiver Requirement Memorandum], https://oese.ed.gov/files/2023/09/OnePercentWaiverRequirements20232492023.pdf [https://perma.cc/K4C3-EP9P].

[117] *Id.* at 1 ("One important step in the inclusion of all children with disabilities is State- and district-wide assessments as determined by their respective individualized education programs [], as required under section 612(a)(16) of the Individuals with Disabilities Education Act [] – either in a general grade level assessment with or without accommodations or, for those students with the most significant cognitive disabilities, an alternate assessment aligned with alternate academic achievement standards [].").

ESSA.[118] Instead, the IDEA and ESSA defer to the states to define the term, mandating only that the state include "factors related to cognitive functioning and adaptive behavior . . . ."[119] Finally, for each academic subject, ESSA caps the number of students who may be assessed with the AA-AAAS at one percent of all students tested during a given year.[120] However, states are permitted to exceed this federally-imposed cap by filing a waiver with the United States Department of Education.[121]

In Massachusetts, assessing students based on alternate achievement standards—often as early as third grade—is a high-stakes decision because students must attain a specific competency determination score on the state's alternative exam—also known as the Massachusetts

118 Although the IDEA fails to offer a definition or guidance on determining what constitutes the most significant cognitive disabilities, Section 300.304(3)(c)(1) provides that "[a]ssessments and other evaluation materials used to assess a child under this part–(i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer; (iii) are used for the purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and, (v) are administered in accordance with any instructions provided by the producer of the assessments." *See* 34 C.F.R. § 300.304(3)(c)(1).

119 *See* § 6311(E); 34 C.F.R. § 200.6(d)(1) (2017) (emphasis added) ("If a State adopts alternative academic achievement standards for students with the most significant cognitive disabilities and administers an alternate assessment aligned with those standards, the State must—(1) Establish, consistent with section 612(a)(16)(C) of the IDEA, and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining, on a case-by-case basis, which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards. *Such guidelines must include a State definition of 'students with the most significant cognitive disabilities' that addresses factors related to cognitive functioning and adaptive behavior, such that*— (i) The identification of a student as having a particular disability as defined in the IDEA or as an English learner does not determine whether a student is a student with the most significant cognitive disabilities; (ii) A student with the most significant cognitive disabilities is not identified solely on the basis of the student's previous low academic achievement, or the student's previous need for accommodations to participate in general State or districtwide assessments; and (iii) A student is identified as having the most significant cognitive disabilities because the student requires extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled . . . .").

120 § 6311(b)(2)(D)(i)(I).

121 34 C.F.R. § 200.6(c)(4) (2017); *see also* Waiver Requirement Memorandum, *supra* note 116, at 4 ("For a State to be eligible to receive a 1.0 percent cap waiver for a subject area, it must have assessed at least 95 percent of all students enrolled and 95 percent of children with disabilities in the previous year in the grades assessed in that subject area. As part of its waiver request, a State must submit SY 2022-23 assessment participation rates overall and for students with disabilities for each subject for which it is requesting a waiver. If a State did not meet the 95 percent assessment participation requirement in SY 2022-23, it is not eligible to receive a waiver from the 1.0 percent cap in AA-AAAS participation for SY 2023-24.").

Comprehensive Assessment System Alternate (MCAS-Alt) exam[122]—as a condition of receiving a regular high school diploma.[123] However, this high-stakes decision reveals a prevailing tension between the objectives of the broader Massachusetts special education program and the dictates of the MCAS. On the one hand, the Massachusetts special education program is designed to ensure that school officials identify and appropriately accommodate students with unique learning needs.[124] On the other hand, Massachusetts imposes a uniform MCAS exam score requirement for all students to obtain a high school diploma, irrespective of their special education status.[125] This incongruity between the State's policy of recognizing and accommodating special education students' distinct learning needs and its high school graduation policy requiring MCAS performance at a level that is equivalent to typically-achieving students leads to substantial short- and long-term harms for students with the most significant cognitive disabilities across the Commonwealth.

In terms of short-term harms, students with the most significant cognitive disabilities who are inappropriately placed on the MCAS-Alt track will be learning on substantially modified learning standards.[126] Recall that federal regulations require that students with the most significant cognitive disabilities, much like students without low-

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[122] 603 C.M.R. § 30.03 (2022) (describing the parameters of the Competency Determination requirement); *see also* M.G.L. c. 69, § 1D (same); *see also* MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, MASSACHUSETTS COMPREHENSIVE ASSESSMENT SYSTEM: ALTERNATE ASSESSMENT BASED ON ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH DISABILITIES, 2024 EDUCATOR'S MANUAL FOR MCAS-ALT 66 [hereinafter 2024 EDUCATOR'S MANUAL FOR MCAS-ALT] ("State graduation requirements apply to all students, even those taking the MCAS-Alt. All students without exception are required to meet the competency determination graduation standard on the ELA, mathematics, and one high school science and technology/engineering assessment to be eligible to earn a high school diploma. Local graduation requirements must also be met. Since students who take alternate assessments are those with significant cognitive disabilities, the number earning a competency determination remains low in relation to the number of students who meet the competency determination requirement on the standard MCAS tests. Students remain eligible for special education services until they meet all graduation requirements or turn 22 years of age.").

[123] 2024 EDUCATOR'S MANUAL FOR MCAS-ALT, *supra* note 122, at 66 ("Since students who take alternate assessments are those with significant cognitive disabilities, the number earning a competency determination remains low in relation to the number of students who meet the competency determination requirement on the standard MCAS tests.").

[124] 603 C.M.R. § 28.01 (describing the purpose of the State's special education program).

[125] 603 C.M.R. § 30.03(1) (establishing a minimum passing MCAS score).

[126] *See, e.g.*, *Important Information About the MCAS Alternate Assessment (MCAS-Alt) and the Every Student Succeeds Act (ESSA)*, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, https://www.doe.mass.edu/mcas/alt/essa [https://perma.cc/QTD4-RPV5]; MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, PRINCIPAL'S MANUAL FOR THE 2023–2024 MCAS-ALT 5 (2023) (describing the responsibilities of a school principal, including, among other things, the "monitoring [of] the alternate assessment process and attesting that student work is neither duplicated, altered, nor fabricated in a way that provides false information or portrays the student's performance inaccurately.").

incidence disabilities, must "achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled."[127] Put another way, Congress intentionally established the one percent cap to ensure that students with disabilities who have been identified for, and subsequently placed on, the AA-AAAS track are still effectively taught, provided full and meaningful educational opportunities, and assessed based on the grade-level achievement standards set for all students. Yet, in far too many instances, students in Massachusetts who are placed on the MCAS-Alt track are relegated to segregated classrooms and taught a diluted curriculum that imparts limited academic skills.

In terms of long-term harms, MCAS-Alt placement decisions carry significant implications for future students' academic and non-academic success. Academically, all students—regardless of the assessment that they take—are required to have instruction based on state academic content standards for the grade in which they are enrolled. As mentioned above, the difference for students who take an alternate assessment is that the expectations for achievement are modified with respect to the grade-level content they are taught. This means that all students with disabilities must participate in either the general assessment for the grade in which the student is enrolled (in Massachusetts, the MCAS) or the AA-AAAS (MCAS-Alt).[128] The troublesome academic implication lies in the fact that all students in Massachusetts, even those who have unique learning needs, must also attain a specific competency determination score on the State's general MCAS assessment as a condition of receiving a regular high school diploma.[129]

Yet, as discussed above, students placed on the MCAS-Alt track are learning on substantially modified learning standards. These substantially modified standards are often the result of ineffective instruction, instruction by unqualified teachers, and/or a lack of appropriate special education and supportive services that would allow a student to access the general education curriculum.[130] Absent the opportunity to learn to the same challenging academic standards as students without disabilities, then, students who are placed on the MCAS-Alt track—again, often as early as third grade—are effectively denied the grade-level content

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[127] 34 C.F.R. § 200.6(d)(1)(iii).

[128] 2024 EDUCATOR'S MANUAL FOR MCAS-ALT, *supra* note 122, at 66 ("Standards-based instruction is for all students. All students are capable of learning at a level that engages and challenges them. One important reason to include students with significant cognitive disabilities in standards-based instruction is to explore their capabilities. While 'daily living skills' are critical for these students to function independently, academic skills are also important. Standards in the Massachusetts Curriculum Frameworks are defined as 'valued outcomes for all students.'").

[129] *Id.*

[130] Kurth et al., *supra* note 19, at 236 ("A lack of knowledge or attitudinal barriers among teachers and schools related to inclusive programming may also affect . . . placement decisions.").

knowledge that is needed to pass the general MCAS assessment, which, *ipso facto*, precludes those participating in AA-AAAS from earning a regular high school diploma in Massachusetts.[131] Non-academically, the long-term harms of failing to earn a regular high school diploma in the twenty-first century are well-documented.[132]

Worse still, the Massachusetts Department of Elementary and Secondary Education (DESE) has failed to ensure that students of color, students from low-income families, and English learners with disabilities are not disproportionately placed on the MCAS-Alt. Indeed, data that DESE submitted in its request for a waiver for the 2022–23 school year demonstrates that, during the State's previous five-year waiver period, DESE failed to critically examine and "address any disproportionality in the percentage of students . . . taking an alternate assessment aligned with alternate academic achievement standards."[133] For the 2021–22 academic year, the percentage of African American students, Latinx students, emergent bilingual students, students from low-income backgrounds, and students with disabilities well exceeded the federally-imposed one percent cap on MCAS-Alt placement.[134] Further troubling is that these same populations have been significantly more likely to be assigned to take alternate assessments than their comparison peers.[135] In fact, the largest disparity in such placement is between students from low-income families and their more affluent counterparts, with the former being assessed on alternate assessments aligned to alternate academic achievement standards at a staggering two-and-a-half times the rate of students from non-low-income families.[136]

To be sure, Massachusetts is not an outlier with regard to its segregation of students with the most significant cognitive disabilities. Indeed, "for Fall 2018, placement rates in separate schools, by state, varied from well under 1% of all students with intellectual disabilities to a high of 22%."[137] Perhaps more importantly, at least for purposes of this Article's thesis, the misapplication of the integration presumption may be the result of "local and state-level variations in interpretation of the

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131 2024 EDUCATOR'S MANUAL FOR MCAS-ALT, *supra* note 122, at 66.

132 *See* Cuillo v. Cuillo, 763 A.2d 1105, 1111–12 (Conn. Super. Ct. 2000) ("[A]n individual who lacks a high school diploma in this country today, is both socially stigmatized and vocationally handicapped.").

133 34 C.F.R. § 200.6 (c)(4)(iv)(C); *see also id.* § 200.6(c)(4)(iii)(B); *see also* MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, MASSACHUSETTS "ONE PERCENT" ESSA WAIVER EXTENSION REQUEST FOR SCHOOL YEAR 2022-2023 5–8 [hereinafter Waiver Request].

134 Waiver Request, *supra* note 133, at 2–3.

135 *Id.* at 6.

136 *Id.*

137 Kleinert & Kearns, *supra* note 17.

law."[138] The foregoing evidence highlights the importance of inclusive education for students with significant cognitive disabilities, emphasizing the educational and social benefits of integrating students into general education settings. It also underscores the pervasive and lasting harms associated with such educational exclusion, including social isolation and limited access to a diverse general curriculum.

To address these issues and ensure a more consistent approach to creating inclusive educational settings, advocates must work to establish a national standard for the federal circuit courts on how best to apply the IDEA's integration presumption. Identifying a national standard would be particularly helpful for students with the most significant cognitive disabilities, a population that is disproportionately excluded from participation in general education classrooms. Advocating for such a standard would also help clarify the legal framework and expectations surrounding inclusive education, thereby promoting a more equitable and inclusive educational system that benefits *all* students.

III. SEARCHING FOR A NATIONAL STANDARD: SURVEYING THE LRE CIRCUIT SPLIT

In accordance with the legislative framework articulated in Section 1412(a)(5)(A), Congress has expressed a distinct preference for the integration, or "mainstreaming," of students with disabilities alongside their non-disabled peers. This statutory mandate underscores the principle that children with disabilities should be educated within the regular educational environment to the maximum extent appropriate.[139] The use of special classes, separate schooling, or any form of removal from mainstream settings is only permissible when the nature or severity of a child's disability makes it impractical to achieve educational objectives satisfactorily within regular classes, even with the provision of supplementary aids and services.[140] While the federal circuit courts universally acknowledge this overarching mandate, they have devised conflicting tests to assess whether the placement of students with disabilities complies with the mainstreaming, or the least restrictive environment requirement. The following Part proceeds as follows. Section III.A details the *Roncker* test and offers a critique of its practical application. Section III.B explores the elements of the *Daniel R.R.* test and provides a critique of its cost-based limitations. Section III.C describes the scope of the First and Seventh Circuit tests and critiques its

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138 *Id.*

139 *See* Oberti *ex rel* Oberti v. Bd. of Educ., 995 F.2d 1204, 1213–14 (3d Cir. 1993).

140 20 U.S.C. § 1412(a)(5)(A); *see also* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

lack of a consistent standard to balance competing IDEA requirements. Finally, Section III.D analyzes the Ninth Circuit's *Rachel H.* test and argues that, although potential drawbacks exist, its limitations are of less consequence when compared to LRE tests in other federal circuits.

A. *The* Roncker *Test (Fourth, Sixth, and Eighth Circuits)*

The Fourth, Sixth, and Eighth Circuits employ the *Roncker* test to determine compliance with the LRE mandate by focusing on situations where a segregated facility is considered superior.[141] The *Roncker* test instructs courts to assess whether the services that render the segregated placement superior could reasonably be provided in a non-segregated setting.[142] It also recognizes that some handicapped children may need to be educated in segregated facilities due to the infeasibility of benefiting from mainstreaming or because the benefits derived from specialized services outweigh those gained from inclusion.[143] Further, the *Roncker* test acknowledges cost as a relevant factor to its analysis, provided it does not serve as a defense if the school district fails to allocate funds to provide a proper continuum of alternative placements for students with disabilities.[144] However, the *Roncker* test's potential costs lie in its subjective assessment of whether services could reasonably be provided

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141 Roncker v. Walter, 700 F.2d 1058, 1059–60 (6th Cir. 1983); *see also* Ogden v. Belton Sch. Dist., 40 F.4th 887, 892 (8th Cir. 2022) (adopting the *Roncker* test, the *Ogden* court stated, "Ogden argues that the district court erred in determining that consideration of these factors permits J.P.'s placement at Trails West because the 'District has not shown' that any of these requirements are satisfied. But this misstates the burden of proof in this case—since Ogden challenges the IEP, it was her burden before the AHC to show that the IEP does not meet the District's obligations under the IDEA. We conclude that she did not meet this burden."); Devries v. Fairfax Cnty. Sch. Bd., 882 F.2d 876, 880 (4th Cir. 1989) (affirming the district court's conclusion that "Michael's education could not be accommodated at Annandale High School even with the use of supplementary aids and services," the *Devries* court adopted the *Roncker* test, reasoning that "the record adequately supports the court's final conclusion that Michael would not receive the 'appropriate public education' at Annandale High School and that his placement at the South County Vocational Center represents this 'appropriate public education' for him in the 'least restrictive environment.'").

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

143 *Id.* ("In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is *a disruptive force* in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.").

144 *Id.*

in a non-segregated setting. This subjectivity may lead to inconsistency in legal decisions across cases. Additionally, the consideration of cost, while pragmatic, could inadvertently result in budgetary considerations outweighing the best interests of students, creating a potential legal hurdle in balancing financial constraints with the LRE mandate.

B. *The* Daniel R.R. *Test (Second, Third, Fifth, Tenth, and Eleventh Circuits)*

Adopted by the Second, Third, Fifth, Tenth, and Eleventh Circuits, the *Daniel R.R.* test involves a two-part inquiry.[145] First, the test determines whether education in the regular classroom, supplemented with appropriate aids and services, can be deemed satisfactory for a specific student with disabilities.[146] If not, and the school intends to provide special education or remove the child from regular education, the second part of the inquiry assesses if the child has been mainstreamed to the maximum extent appropriate.[147] The court in *Daniel R.R.* identified a non-exhaustive list of factors to guide the foregoing steps, underscoring that no one factor is conclusive.[148] For the first step, the state's efforts to accommodate the student in the regular classroom are scrutinized.[149]

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145 *Daniel R.R.*, 874 F.2d at 1048 (holding that public schools are required to provide students with disabilities, particularly those with learning disabilities, with appropriate and individualized educational services under the IDEA. The Court clarified that schools must offer services that are tailored to the unique needs of each student, ensuring that they receive an adequate education, even if they do not meet typical grade-level standards. This decision reinforced the importance of individualized education programs for students with disabilities, guaranteeing that their educational needs are met in a manner consistent with the IDEA's objectives.); *see*, *e.g.,* P. *ex rel.* Mr. & Mrs. P. v. Newington Bd. of Educ., 546 F.3d 111, 119–21 (2d Cir. 2008) (adopting the *Daniel R.R.* test, the court reasoned that the IDEA demands "searching" review "to ensure compliance with Congress's directives," including IDEA's LRE requirement); L.B. *ex rel.* K.B. v. Nebo Sch. Dist., 379 F.3d 966, 977 (10th Cir. 2004) (where the school district had violated the LRE requirement by placing a child with autism in a school meant primarily for students with disabilities rather than in an integrated environment with supplementary aid(s), the court adopted the *Daniel R.R.* test); Oberti *ex rel* Oberti v. Bd. of Educ., 995 F.2d 1204, 1213–15 (3d Cir. 1993) (adopting the *Daniel R.R.* test given that the test is "derived from the language of," "closely tracks," and "is faithful to IDEA's [mainstreaming] directive," which established "a strong congressional preference for integrating children with disabilities in regular classrooms." The case involved a student with Down syndrome who was placed in a self-contained special education classroom. The decision emphasized that school districts have an obligation to make substantial efforts to include students with disabilities in regular education classrooms and to provide necessary support services, promoting greater inclusion for students with disabilities); Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991) (adopting the *Daniel R.R.* test given its "adher[ance] . . . to the language of the Act and, therefore, clearly reflects Congressional intent . . . .").

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

147 *Id.*

148 *Id.*

149 *Id.*

While not obligated to provide every conceivable aid or service, states must make some attempt to accommodate the student.[150] This initial inquiry extends beyond academic accommodations, encompassing the child's overall educational experience and their broader impact on the regular classroom environment.[151] Courts are also permitted to consider the cost of supplementary aids and services.[152] For the second step, the IDEA's provision of a continuum of services is paramount, permitting intermediate steps along this continuum as needed.[153] Despite its comprehensiveness, however, the *Daniel R.R.* test introduces complexity with its two-part inquiry, potentially leading to inconsistent application. The consideration of costs may also pose a significant legal hurdle, as schools might prioritize budgetary concerns over students' individualized needs, which would potentially conflict with the IDEA's core requirements.

C. *The First & Seventh Circuit Tests*

In contrast to the foregoing circuits, the First and Seventh Circuits have declined to embrace a multifaceted test for ascertaining compliance with the least restrictive environment mandate,[154] asserting that the statutory framework itself provides adequate guidance.[155] The First Circuit's approach involves a deliberative weighing of the advantages derived from mainstreaming against the educational enhancements achievable in a more restrictive, non-mainstream environment.[156] Put differently, the central inquiry in the First Circuit revolves around striking a balance between the benefits of integration and the potential for

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150 *Id.*

151 *Id.* at 1048–49.

152 The district is required to weigh the individual needs of students with disabilities against the needs of their peers. If the costs associated with providing education to a student with a disability in a general education classroom would substantially hinder the educational experiences of other students in the district, then placement in a general education classroom is not appropriate. Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991).

153 *Id.* at 1050.

154 Bd. of Educ. Of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 277 (7th Cir. 2007) (citing Beth B. v. Van Clay, 282 F.3d 493, 499 (7th Cir. 2002)); *see also* C.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 630 (1st Cir. 2019).

155 *Beth B.*, 282 F.3d at 499 ("The Act itself provides enough of a framework . . . .").

156 C.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 628, 631 (1st Cir. 2019) (ruling that the Individuals with Disabilities Education Act (IDEA) requires public schools to provide disabled students with an individualized education program (IEP) that offers "meaningful educational benefit").

academic improvement in an alternative, less inclusive setting.[157] The Seventh Circuit maintains a more straightforward approach: the court evaluates whether education in a more conventional school was satisfactory and, if not, whether reasonable measures could have made it so.[158] Should integration into a more conventional education prove unsatisfactory and beyond reasonable enhancement, a court in this district should find a school or district in compliance with the statute if its proposed placement maximizes the extent to which students remain integrated with their typically achieving peers.[159]

These distinct approaches in the First and Seventh Circuits underscore the interpretive latitude that various jurisdictions have exercised in crafting their methods for evaluating compliance with the LRE mandate. The potential legal hurdle with these two approaches, however, lies in their potential for subjectivity and inconsistency in assessing the balance between integration and potential academic improvements. The absence of a clear and standardized test may lead to varied interpretations and outcomes, potentially raising concerns about equal application of the LRE mandate for those students with the most significant cognitive disabilities.

D. *The* Rachel H. *Test (Ninth Circuit)*

The Ninth Circuit, in *Sacramento City Unified School District, Board of Education v. Rachel H.*, adopted a modified version of the factors in both *Daniel R.R.* and *Roncker*.[160] The *Rachel H.* test is a four-factor balancing assessment, which considers (1) the educational benefits of full-time placement in a regular class; (2) the non-academic benefits of such placement; (3) the effect on both the teacher and children in the regular class; and (4) the costs associated with mainstreaming the student.[161] This test provides a nuanced approach to determining compliance with the LRE mandate in the context of a student's individual circumstances.[162] As a potential national standard, the *Rachel H.* test

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[157] *Id.* (Noting that "[t]he benefits to be gained from mainstreaming must be weighed against the educational improvements that could be attained in a more restrictive (that is, non-mainstream) environment.").

[158] *Ross*, 486 F.3d at 277 (observing that a court in the Seventh Circuit should "ask whether the education in the conventional school was satisfactory, and, if not, whether reasonable measures would have made it so. . . . if it was not and could not reasonably be made so, the District satisfie[s] the statute if its recommended placement [keeps] [students] with [their] nondisabled peers to the maximum appropriate extent.").

[159] *Id.*

[160] Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1403–04 (9th Cir. 1994).

[161] *Id.* at 1404.

[162] *Id.*

raises both benefits and costs, especially as applied to educating students with the most significant cognitive disabilities.

In terms of costs, the multi-factor nature of the *Rachel H.* test may introduce unnecessary complexity into future legal proceedings, making it potentially challenging for courts to consistently apply the test. But this potential drawback becomes less of a concern when one considers the clear structure of the test and its focus on individualized assessment.[163] Moreover, while cost consideration is a pragmatic aspect of the *Rachel H.* test, there is an underlying concern that districts may prioritize cost-saving measures over adherence to the IDEA's directives, especially for students with the most significant cognitive disabilities.[164] Although a valid concern, the test's focus on both individualized benefits *and* costs balances this concern to a greater degree than the competing judicial tests. The following Part considers these costs and benefits in more detail. It then argues in favor of adopting the *Rachel H.* test as the best, most practical national standard for evaluating and implementing the IDEA's LRE standard for students with *both* high- and low-incidence disabilities.

IV. DISCUSSION: ADOPTING THE RACHEL H. TEST AS THE LRE NATIONAL STANDARD

Students with disabilities, including those with the most significant cognitive disabilities, must receive an education in the least restrictive environment.[165] The *Rachel H.* test presents a distinctive approach to evaluating compliance with this mandate, emphasizing a four-factor balancing assessment that encompasses both academic and non-academic factors.[166] The following Sections delve into the potential ramifications—both positive and negative—of adopting the *Rachel H.* test as a national standard for evaluating LRE compliance, with a central focus on the test's impacts on students with the most significant cognitive disabilities. Section IV.A begins by arguing in favor of adopting the *Rachel H.* test as the best, most practical national standard for circuits to evaluate compliance with the IDEA's LRE requirement, identifying three key benefits that counsel in favor of its uniform adoption. Building upon the

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163 *Id.*

164 A district's claim of excessive costs will be scrutinized very carefully. *Id.* at 1401–02. *See also* RICKI SABIA & MARTHA L. THURLOW, DEBUNKING MYTHS ABOUT INCLUSIVE EDUCATION FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES, TIES CENTER BRIEF #8 5–6 (2022).

165 20 U.S.C. § 1412(a)(5).

166 *Rachel H.*, 14 F.3d at 1404 (The four factors include: "(1) the educational benefits of placement in full-time in a regular class; (2) *the non-academic benefits of such placement*; (3) the effect of [the disabled student] had on the teacher and children in the regular class; and (4) the cost of mainstreaming [the disabled student].").

preceding Section, Section IV.B then contends that the factors enunciated by the Ninth Circuit in *Rachel H.* are better aligned with the IDEA's "Zero Reject" approach than competing circuit tests. Section IV.C concludes by arguing that adopting the *Rachel H.* test best conforms with the FAPE standard as articulated by the Supreme Court in *Endrew F.*

A. Surveying the Benefits of the Rachel H. *Test as the National Standard*

This Section argues in favor of adopting the *Rachel H.* test as the best, most practical judicial test for implementing the IDEA's integration presumption for at least three reasons. First, adopting the *Rachel H.* test promotes greater flexibility and individualization. Indeed, the *Rachel H.* test provides a nuanced evaluation that allows courts to consider a broader spectrum of factors beyond purely academic factors.[167] This flexibility ensures that the unique needs and circumstances of each student can be taken into account, promoting individualized decision-making that aligns with the broader purpose of the IDEA and its integration presumption.[168]

Second, by adopting the *Rachel H.* test as the national standard for evaluating LRE claims, all students with disabilities will be afforded greater access to the general education curriculum. This benefit is especially important for students with the most significant cognitive disabilities, who have, as mentioned previously, been disproportionately placed in segregated educational settings.[169] By assessing both academic and non-academic benefits, the *Rachel H.* test encourages a holistic understanding of the impact of mainstreaming on a student's overall development.[170] It also promotes the notion that inclusion encompasses not only academic progress but also social and emotional growth,[171] thereby fostering a more inclusive educational environment for all learners, including those with the most significant cognitive disabilities.

Third, and finally, adopting the *Rachel H.* test is better able to balance prevailing costs associated with educating students within the

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[167] *Id.*

[168] *Id.* at 1405.

[169] Kurth et al., *supra* note 19.

[170] *Rachel H.*, 14 F.3d at 1404 (describing the four factors used to determine whether the school district's proposed educational placement comported with the LRE requirement).

[171] "[T]he district court found that: (1) Rachel received substantial educational benefits in a regular classroom 'with some modification to the curriculum and with the assistance of a part-time aide'; [and] (2) Rachel developed her social skills and gained self-confidence from placement in a regular classroom . . . ."*See* Sarah Prager, *An "Idea" to Consider: Adopting A Uniform Test to Evaluate Compliance with the Idea's Least Restrictive Environment Mandate*, 59 N.Y.L. SCH. L. REV. 653, 673 (2015) (quoting *Rachel H.*, 14 F.3d at 1401).

least restrictive environment.[172] This is because "[t]he court recognized its origins in *Daniel R.R.* but also followed *Greer* by adding the cost of mainstreaming as a consideration available to courts."[173] When viewed in light of the comparatively substantial near- and long-term costs of miseducating students with the most significant cognitive disabilities in separate educational settings, however, the adoption of the *Rachel H.* test serves as the most comprehensive approach to implementing the LRE requirement for *all* learners.

B. *The* Rachel H. *Test's Alignment with the IDEA's "Zero Reject" Approach*

The "Zero Reject" approach and the LRE requirement are integral components of the IDEA. The Zero Reject approach, much like the LRE requirement, acts as a safeguard against the exclusion of children with disabilities.[174] Under this approach, schools are prohibited from refusing admission to students with disabilities based solely on their disabilities, irrespective of the severity of the child's disability.[175] This principle is aimed at preventing discrimination and ensuring that children with disabilities have equal access to educational opportunities.[176]

Complementing the Zero Reject approach is IDEA's LRE requirement. As mentioned above, this requirement stipulates that, to the maximum extent appropriate, children with disabilities are to be educated alongside their typically-achieving peers in the general education classroom.[177] The LRE principle recognizes the value of inclusion and seeks to minimize the removal of students with disabilities from regular educational environments.[178] Together, both the Zero Reject approach and the LRE requirement embody the core principles of equal access and individualized education for children with disabilities. By preventing exclusion and promoting inclusion, therefore, both the Zero Reject approach and the LRE requirement endeavor to provide children with disabilities the support they need to succeed both academically and socially while upholding their affirmative right to equal educational opportunity under the IDEA.

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[172] *Rachel H.*, 14 F.3d at 1404 (finding that "[t]he District is also not persuasive on the issue of cost.").

[173] Edmund J. Rooney, *Considering the Costs: Adopting A Judicial Test for the Least Restrictive Environment Mandate of the Individuals with Disabilities Education Act*, 45 J. LEGIS. 298, 319 (2018).

[174] 20 U.S.C. § 1412(a)(1)(A).

[175] *Id.*

[176] *Id.*

[177] *Id.* § 1412(a)(5)(A).

[178] *Id.*

At the heart of IDEA's Zero Reject principle is the unwavering commitment to ensure that no child with a disability is excluded from receiving a FAPE.[179] The *Rachel H.* test echoes this principle through its approach to providing a personalized, individualized assessment of each student's educational needs.[180] Importantly, the Zero Reject principle implicitly acknowledges that students with the most significant cognitive disabilities are a diverse group of learners, with each student presenting unique challenges and strengths. This individualized assessment ensures that educational placements are not dictated by a one-size-fits-all approach; instead, the *Rachel H.* test is tailored to meet the specific learning styles possessed by each student. What's more, students with the most significant cognitive disabilities often face challenges that extend far beyond academics. Similarly, the Zero Reject approach recognizes that educational progress encompasses not only cognitive development but also social and emotional well-being. The *Rachel H.* test, in its four-factor assessment, explicitly considers these non-academic benefits. Indeed, the test acknowledges that, for many students, progress in social interaction, communication, and emotional stability are as crucial to one's overall success as academic achievement.[181]

As set forth in the IDEA and subsequent case law, the Zero Reject principle stands for the proposition that public school districts must accept all IDEA-eligible children irrespective of their current capacity to serve them.[182] The *Rachel H.* test strikes a similar balance by factoring in costs while viewing these costs through the lens of individualized benefits.[183] Put another way, the *Rachel H.* factors recognize that educational placements must be both appropriate *and* reasonably feasible. By placing costs in the context of individualized benefits, then, the *Rachel H.* test ensures that financial constraints do not overshadow the fundamental commitment to providing students with disabilities—including those students identified as possessing significant cognitive disabilities—an education that is tailored to their unique needs and potential.

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179 *Id.* § 1412(a)(1)(A) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.").

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

181 *Id.* at 1401.

182 Cedar Rapids Cmty. Sch. Dist. v. Garret F. *ex rel.* Charlene F., 526 U.S. 66, 78–79 (1999) (holding that a student who was quadriplegic, dependent on a ventilator, and required comprehensive nursing assistance was eligible to receive such services according to the Individuals with Disabilities Education Act); Timothy W. v. Rochester, N.H., Sch. Dist., 875 F.2d 954, 972–73 (1st Cir. 1989) (holding that a significantly disabled child has the right to receive special education and related services under the Education for All Handicapped Children Act, irrespective of their capacity to derive benefits from these services.).

183 *Rachel H.*, 14 F.3d at 1400–02.

Taken together, this Part contends that the *Rachel H.* test's individualized assessment, consideration of non-academic benefits, and balanced approach to cost assessment are closely aligned with the central purpose of the IDEA's Zero Reject approach. Thus, the IDEA's Zero Reject approach and its LRE requirement endorse the same precepts animating the *Rachel H.* test's four factors: "educational equality as a human rights claim and fulfill[ing] the demands of children with disabilities for inclusive education as 'individuals, equal in dignity to normal children.'"[184]

C. *LRE's Conformance with* Endrew F.*'s Interpretation of IDEA's FAPE Standard*

Building on the benefits to educational inclusion discussed above, Section IV.C contends that the *Rachel H.* test best aligns with the FAPE standard as interpreted by the Supreme Court in its *Endrew F*. decision. Specifically, it recognizes that, for students with the most significant cognitive disabilities, an appropriate education extends beyond pure academic progress. Instead, "appropriate" in this context encompasses both social and emotional development, two integral components of the FAPE standard. If uniformly adopted as the national judicial standard for interpreting compliance with the IDEA's integration presumption, then, the *Rachel H.* test would better comport with the Supreme Court's interpretation of the FAPE requirement in *Endrew F.* rather than the Court's interpretation of the FAPE requirement in *Rowley*.

As mentioned previously, the Supreme Court's seminal decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley* established the foundation for understanding the FAPE standard.[185] The *Rowley* Court emphasized that FAPE does not require schools to maximize the potential of children with disabilities but instead ensures that students receive an individualized education tailored to their needs that provides only *some* educational benefit.[186] Although the four-factor *Rachel H.* test aligns with the *Rowley* Court's interpretation of the FAPE requirement by fostering an individualized assessment of students with significant cognitive disabilities,[187] thereby adhering to the core

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[184] Sumin Lim, *The Capabilities Approach to Inclusive Education: Re-envisioning the Individuals with Disabilities Education Act's Least Restrictive Environment*, 35 DISABIL. & SOC'Y 570, 571 (2020) (quoting Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, 40 METAPHILOSOPHY 331, 341 (2009)).

[185] Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 187–89 (1982).

[186] *Id.* at 188–90.

[187] *Id.* at 188–89.

principle that FAPE must be tailored to the unique needs of each student, the test's alignment with *Rowley* ultimately falters given the Court's interpretation of FAPE as only requiring a "basic floor of opportunity" which need only be "individually designed to provide educational benefit to the handicapped child."[188] Indeed, the "some educational benefit" language articulated by the Court in *Rowley* established a lower threshold of accountability for districts charged with educating students with disabilities.[189] Therefore, without defining a more precise benefit that is to be provided by school districts, the holding in *Rowley* allows for greater subjectivity, and thus a greater chance for abuse on the part of school districts, as to the level of educational opportunity that it must provide to students with the most significant cognitive disabilities. This concern is especially pronounced as it relates to testing and assessment decisions, as illustrated by the Massachusetts case example.[190]

In *Endrew F.*, however, the Supreme Court expanded upon the FAPE standard set forth in *Rowley* by clarifying that FAPE must offer students with disabilities more than merely *de minimis* educational progress.[191] Instead, the *Endrew F.* Court emphasized that the educational program provided by districts must be "appropriately ambitious"[192] and "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[193] The key interpretative shift here is the emphasis on "appropriately ambitious" and "appropriate progress," rather than merely "some benefit," as articulated in *Rowley*. In terms of the former shift, the *Endrew F.* Court stressed that an educational program must be designed with high expectations tailored to the child's individual potential.[194] It rejected the idea that FAPE could be satisfied by providing a program that merely met minimal standards or offered

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188 *Id.* at 201.

189 *Id.* at 200 (holding that the IDEA required only that "the education to which access is provided by sufficient to confer some educational benefit upon the handicapped child.").

190 By way of example, a 2022 Council of the Great City Schools' report completed a systemic review of the Boston Public School District ("BPS"). This report found that BPS, during the 2021–22 school year, student proficiency rates on the 10th-grade MCAS in ELA increased by 16 percentage points as compared to 8th-grade scores. Similarly, 10th-grade MCAS scores in math increased by 22 percentage points. The Council discovered that "[t]hese significant increases are likely the result of 10th-grade IEP participation rate decreases and alternate assessment rate increases. Accordingly, the significantly higher 10th grade proficient/above outcomes for students with IEPs are probably the product of decision-making resulting in substantially fewer students participating in the test, rather than authentic achievement increases." *See* COUNCIL OF THE GREAT CITY SCHOOLS, BUILDING A UNIFIED SYSTEM OF SERVICE DELIVERY: INCLUSIVE EDUCATION THAT IMPROVES OUTCOMES FOR STUDENTS WITH AND WITHOUT DISABILITIES 37–38 (2022).

191 Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 403–04 (2017).

192 *Id.* at 402.

193 *Id.* at 403.

194 *Id.* at 402–03.

only trivial progress.[195] In terms of the latter shift, the *Endrew F.* Court clarified that a child's progress must be evaluated in the context of the individual child's unique needs and circumstances. In so doing, the Court recognized that children with disabilities have diverse abilities and challenges, and their IEPs should reflect that diversity. The *Rachel H.* test—with its individualized assessment, consideration of non-academic benefits, and a holistic view of students' overall well-being—likewise conforms with the *Endrew F.* Court's heightened interpretation of the FAPE standard. The *Rachel H.* test recognizes that educational progress extends beyond academics and underscores the importance of ambitious, individualized educational goals for students with disabilities, which includes students with the most significant cognitive disabilities.

V. ADDRESSING LEGAL AND POLICY LIMITATIONS

This Part addresses the arguments presented in opposition of adopting the *Rachel H.* test as a national standard for evaluating compliance with the IDEA's integration presumption. It identifies potential legal and policy limitations while providing responses that demonstrate how the *Rachel H.* test can overcome these concerns. The following Part considers each argument in turn.

A. *The* Rachel H. *Test and the "Zero Reject" Principle as a Tenuous Connection*

One of the central claims in favor of the *Rachel H.* test's uniform adoption is its alignment with IDEA's Zero Reject principle. Yet, critics argue that full integration might lead "the education of non-disabled students [to be] compromised by the time-consuming, highly-individualized demands of their special education counterparts."[196] Worse still, according to some critics, the Zero Reject approach, which advances the principle of full inclusion, undermines the primary purpose of K-12 schooling, which is to create "learning communit[ies] for the transfer of knowledge where each student can and will obtain a serious

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[195] In rejecting the "some educational benefit" FAPE standard established in *Rowley*, a unanimous *Endrew* Court declared that a child's IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *See id.* at 399.

[196] *See Mark T. Keaney, Examining Teacher Attitudes Toward Integration: Important Considerations for Legislatures, Courts, and Schools,* 56 ST. LOUIS U. L.J. 827, 830 (2012); *see generally* Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006).

education."[197] Yet the *Rachel H.* test, with its emphasis on individualized assessment, still adheres to the core spirit of the Zero Reject principle. By tailoring educational placements to the unique needs of each student, the test aims to minimize exclusionary practices while recognizing that the Zero Reject principle does not equate to a one-size-fits-all approach.

Another potential limitation of the *Rachel H.* test is its ambiguity in balancing the necessary costs and benefits of educating students with the most significant cognitive disabilities. Critics may argue that this could lead to subjective interpretations and may inadvertently prioritize cost-saving measures over the best interests of students.[198] However, the *Rachel H.* test provides a structured framework for considering costs, ensuring that they are viewed in the context of *individualized* benefits. While some subjectivity may exist, this is an inherent aspect of individualized education planning and is not fatal for the purposes of the thesis offered here. Accordingly, the *Rachel H.* test's emphasis on evaluating costs relative to the unique benefits that full integration affords to each student mitigates any prevailing concern about cost prioritization.

A broader challenge lies in the applicability of the *Rachel H*. test as a national standard. Opponents contend that the lack of guidance by the Supreme Court renders the *Rachel H.* factors difficult to weigh when determining the appropriateness of full inclusion.[199] Yet, the *Rachel H.* test offers a balanced and individualized approach that can be adapted to diverse contexts. Moreover, it provides clear guidance for weighing factors consistently, reducing the potential for inconsistency in its application while aligning with the purpose of the IDEA, more broadly, and its integration presumption, more specifically.

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[197] Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion"*, 72 WASH. L. REV. 775, 821–22 (1997).

[198] *Id.* at 777, 779 ("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.").

[199] Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 831 (2002) ("The Rachel H. opinion itself gives no guidance on the proper weight of each factor or the result in case of a tie." Therefore, the Rachel H. test may have some inherent complexities similar to the "threshold" analyses noted by courts applying *Roncker* and *Daniel R.R.*); *see Proffitt Dupre, supra* note 197, at 795 ("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. Underlying the opinions on inclusion--with the exception of certain opinions from the Second and Seventh Circuits--is the courts' uncritical acceptance of the assertions of these disability full inclusionists--that separation equals stigma and that inclusion equals increased self-esteem.").

Lastly, the arguments in favor of the *Rachel H.* test highlight its alignment with the *Endrew F.* Court's interpretation of the IDEA's FAPE standard. Opponents of this position may question whether a single test can adequately address the nuances of this seminal case law and whether a comprehensive FAPE standard should allow for multiple approaches.[200] However, this Article contends that the *Rachel H.* test's comprehensive framework better aligns with varying FAPE interpretations. Indeed, the test's focus on individualization in the setting of educational goals aligns with *Endrew F.'s* central holding, which strengthened the FAPE standard from the comparatively weaker "more than *de minimis*" standard articulated in *Rowley*.[201] By adopting the *Rachel H.* test as the national judicial standard for interpreting the IDEA's integration presumption, then, a more unified framework is readily established that reflects the guiding principles of the presumption while ensuring more consistent compliance nationwide.

CONCLUSION

The IDEA embodies a comprehensive and critical framework for addressing the unique educational needs of students with the most significant cognitive disabilities. Yet, fewer than half of states meet the requirements and purposes set forth in the IDEA—as measured by both compliance and results data—resulting in less effective protection of parents' and students' rights.[202] This limitation, as described above, includes the IDEA's LRE provision. For students with the most significant cognitive disabilities, moreover, such non-compliance with the IDEA's integration presumption is particularly troubling. Accordingly, to meaningfully address the disproportionate placement of students with the most significant cognitive disabilities in separate classrooms and school, this Article argues in favor of adopting the *Rachel H.* test as a national standard for evaluating compliance with the LRE mandate. As a national standard, the *Rachel H.* test produces myriad benefits, particularly in its nuanced and holistic approach to evaluating LRE compliance within and between school districts. While potential drawbacks exist, these drawbacks are not fatal to the broader project of creating fully integrated educational settings. Further, the *Rachel H.* test's individualized assessment, consideration of non-academic benefits, and

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200 *See* Farley, *supra* note 199, at 831.

201 *Endrew F.*, 580 U.S. at 402–03; Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200–01.

202 Memorandum from U.S. Department of Education, 2023 Determination Letters on Implementation of IDEA (June 26. 2023), https://sites.ed.gov/idea/files/ideafactsheet-determinations-2023.pdf [https://perma.cc/99D4-PHNM].

balanced approach to cost assessment align with the IDEA's Zero Reject approach and the FAPE standard as articulated by the Supreme Court in *Endrew F*. Therefore, by embracing the *Rachel H.* test as the most practical national standard to assessing LRE compliance, all students with disabilities—but especially those with the most significant cognitive disabilities—will be more consistently afforded an inclusive educational setting that is tailored to their unique needs and, ultimately, their potential.