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The Mainstreaming Requirement of the Individuals with Disabilities Education Act in the Context of Autistic Spectrum Disorders

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**THE MAINSTREAMING REQUIREMENT OF
THE INDIVIDUALS WITH DISABILITIES
EDUCATION ACT IN THE CONTEXT OF
AUTISTIC SPECTRUM DISORDERS**

*Conor B. McDonough, Ph.D.**

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INTRODUCTION

Autism is a brain development disorder characterized by impairments in social and communication abilities.¹ Children with autism or one of the related autistic spectrum disorders (“ASD”) are eligible for special education under the Individuals with Disabilities Education Act (“IDEA”), which provides, in part, that disabled students must be educated with non-disabled peers as often as possible, a practice referred to as mainstreaming or inclusion. The federal circuit courts apply different tests to evaluate compliance with this mainstreaming requirement, but as argued in this Note, the circuit tests are effectively equivalent with respect to children diagnosed with ASDs. One significant issue in applying each of these tests is that tensions exist between the mainstreaming requirement of the IDEA and the clinical features of children with ASD diagnosis. As discussed below, children with ASD have deficits in communicative and social behaviors that tend to minimize the importance of mainstreaming for these children.

Part I of this Note provides a brief background on autism and methods of diagnosis and treatment. Part II of this Note reviews the development of the IDEA and outlines the main judicial tests for determining compliance with the mainstreaming requirement. Part III of this Note argues that despite differences in phrasing, the

1. Comm. on Children with Disabilities, Am. Acad. of Pediatrics, *The Pediatrician's Role in the Diagnosis and Management of Autistic Spectrum Disorder in Children*, 107 PEDIATRICS 1221, 1221 (2001) [hereinafter *Diagnosis and Management*].

circuit tests as applied in the context of autistic children involve substantially the same inquiries. Part III discusses the tensions that exist between the needs of children with autism and the mainstreaming requirement of the IDEA, concluding that Congress and the Department of Education should relax the mainstreaming requirement in the context of autistic spectrum disorders.

I. AUTISM, METHODS OF DIAGNOSIS, AND TREATMENT

A. Background on Autistic Spectrum Disorders

Autism is a term used to describe a set of cognitive, social and behavioral impairments that are commonly found to coexist in affected individuals.² The disorder was first reported by Leo Kanner in a seminal publication in 1943,³ in which Kanner reported observations of eleven children who exhibited a set of undocumented behavioral atypicalities. These include a lack of social awareness or indifference to social activities or contact and repetitive, stereotyped or ritualistic behaviors such as rocking, spinning, or drawing.⁴ Affected individuals usually show limited development in language skills paired with enhancement in some cognitive areas, such as strikingly superior memory for specific sets of facts on a single topic.⁵ Kanner highlighted the childrens' apparent indifference to the external world using the phrase "extreme autistic aloneness"⁶ that "whenever possible, disregards, ignores, shuts out anything that comes to the child from the outside."⁷

The contemporary understanding of the symptoms of autism is described in the Diagnostic and Statistical Manual of Mental Disorders — Text Revision (DSM-IV-TR), the handbook for diagnosing mental illness that is published by the American Psychiatric Association.⁸ DSM-IV-TR categorizes autism as one of several

2. *Id.*

3. Leo Kanner, *Autistic Disorders of Affective Contact*, 2 *NERVOUS CHILD* 217 (1943).

4. Christine M. Freitag, *The Genetics of Autistic Disorders and its Clinical Relevance: A Review of the Literature*, 12 *MOLECULAR PSYCHIATRY* 2, 2 (2007) (citation omitted).

5. See Kanner, *supra* note 3, at 217-41.

6. Kanner likely used the term "autistic" because it derives from the Greek "autos" (self), reflecting the disregard for most experiences or events outside of the self. Prior to Kanner's use of the term, Eugen Bleuler included the term "autism" in early diagnoses of schizophrenia as a means of referring to the impaired social interest observed in schizophrenic patients. Freitag, *supra* note 4, at 2.

7. Kanner, *supra* note 3, at 242.

8. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS—TEXT REVISION*, (4th ed. 2000) [hereinafter DSM-IV-TR].

“Pervasive Developmental Disorders” (“PDDs”) including autism, Asperger’s syndrome, and “Pervasive Developmental Disorder-Not Otherwise Specified (“PDD-nos”).”⁹ Asperger’s syndrome and PDD-nos are considered less debilitating disorders than autism.¹⁰ These three disorders are commonly referred to as “autistic spectrum disorders” (“ASDs”) in reference to the continuum of behavioral symptoms that attend these diagnoses. The specific distinctions between these disorders is well beyond the scope of this Note, but these related disorders are mentioned to emphasize the complexity of making the diagnosis of autism. Autism itself is the most common of these PDDs, and recent data from the Centers for Disease Control and Prevention indicates that ASDs affect as many as one in every 150 children in the United States.¹¹ Autism also creates substantial emotional¹² and monetary¹³ costs for educators and the taxpayers who fund school districts. At present, the

9. Additional pervasive developmental disorders include Rett’s syndrome and “Child Integrative Disorder.” See *id.* at 69.

10. *Id.* at 74, 80-84. According to the DSM-IV-TR, unlike autism, Asperger’s syndrome does not usually involve developmental delay in language or cognitive skills, and social interaction is more frequent in individuals with Asperger’s syndrome than in autism. Further, in autism, extreme interests are often ritualistic, repetitive motor behaviors that are often associated with distress whereas in Asperger’s syndrome, an affected individual “can amass a great deal of facts and information.” *Id.* at 80.

11. Press Release, Centers for Disease Control and Prevention CDC Releases New Data on Autism Spectrum Disorders (ASDs) from Multiple Communities in the United States, (Feb. 8, 2007), available at <http://www.cdc.gov/media/pressrel/2007/r070208.htm>. In 1998, the Centers for Disease Control and Prevention began a comprehensive study of the prevalence of ASDs in children. This program was extended in scope as a part of the Children’s Health Act of 2000, Pub. L. No. 106-310, §1 et seq. 114 Stat. 1101 (2000) (codified in scattered sections of 41 U.S.C.), and has tracked autism prevalence in 2000 and 2002. Pursuant to a Congressional mandate encompassed by sections 102-05 of the Children’s Health Act of 2000, the Secretary of Health and Human Services publishes annual reports to Congress on the implementation of this plan.

12. See *Nightline: Autism and Applied Behavioral Analysis: To Find The Words* (ABC News television broadcast July 17, 2001) (noting that parental costs are not just monetary — specialized, private education for children reported to cost over \$30,000 per year—but also emotional). *Id.*

13. See Tom T. Shimabukuro et al., *Medical Expenditures for Children with an Autism Spectrum Disorder in a Privately Insured Population*, 38 J. AUTISM DEV. DISORDERS 546, 548 (2007), available at <http://www.springerlink.com/content/xm6k9420321w1916/fulltext.pdf> (noting that insurance costs for school-age children diagnosed with autistic spectrum disorder can be nearly 6.2 times as high as insurance costs for non-ASD children of the same age group); see also Michael L. Ganz, *The Lifetime Distribution of the Incremental Societal Costs of Autism*, 161 ARCHIVES PEDIATRICS ADOLESCENT MED. 343, 345 (2007) (calculating total per capita lifetime costs of autism among three to seven year olds as \$446,203 in 2003 dollars).

etiology of autism is unknown, although research continues in the search for causes of the disease.

B. Diagnosing Autistic Spectrum Disorders in Children

The DSM-IV-TR describes behavioral features associated with autism, including social deficits, such as impairment in nonverbal communication behaviors (for example, eye-to-eye gaze, facial expression, body postures, and gestures) to regulate social interaction, lack of social or emotional reciprocity, significant impairments in the development of spoken language, stereotyped and repetitive patterns of behavior, interests, and activities, and persistent preoccupation with parts of objects.¹⁴

Clinicians, including psychologists, pediatricians¹⁵ and psychiatrists, parents and educators¹⁶ play a role in diagnosing autism, and several methods exist to make this diagnosis. The first stage entails monitoring children for signs of the disorder.¹⁷ Parents and physicians can observe whether specific behaviors or other indicia of ASD are present in the child. At the next stage, diagnostic screening is performed using questionnaires administered to parents. A common diagnostic tool is the Autism Diagnostic Interview-Revised.¹⁸ Diagnosis is complicated by the fact that, as a spectrum disorder, the degree of impairment will differ substantially between children given the “same” diagnosis of ASD. One possible reason for such heterogeneity in outcomes for individuals diagnosed with autism is that it is not a single disease, but rather a syndrome comprising several underlying biological impairments.¹⁹ In the context of education, a child with an ASD diagnosis is eligible for special

14. See DSM-IV-TR, *supra* note 8, at 75.

15. See *Diagnosis and Management*, *supra* note 1.

16. See Daniel H. Ingram et al., *Assessing Children with Autism, Mental Retardation, and Typical Development Using the Playground Observation Checklist*, 11 AUTISM 311 (2007).

17. See DSM-IV-TR, *supra* note 8, at 73 (noting that the onset of autistic disorder is prior to the age of three, and that parents typically note concerns about their child’s “lack of interest in social interaction”).

18. See Catherine Lord et al., *Autism Diagnostic Interview-Revised: A Revised Version of a Diagnostic Interview for Caregivers of Individuals with Possible Pervasive Developmental Disorders*, 24 J. AUTISM DEV. DISORDERS 659 (1994). The Autism Diagnostic Interview-Revised (“ADI-R”) is a ninety-three item clinical review that evaluates behaviors and traits frequently associated with a diagnosis of autism, such as repetitive gesturing and social withdrawal.

19. See Irving I. Gottesman & Todd D. Gould, *The Endophenotype Concept in Psychiatry: Etymology and Strategic Intentions*, 160 AM. J. PSYCHIATRY 636, 637 (2003) (noting that such collective biological impairments are referred to as “endophenotypes”).

education under the Individuals with Disabilities Education Act (“IDEA”).²⁰

C. Treatments for Children with Autism

1. *Applied Behavioral Analysis*

One widely-used intervention for children with autism is applied behavioral analysis (“ABA”). ABA relies on repeated, one-on-one training involving a therapist and the child.²¹ The child is given a stimulus, such as a request to make eye contact with the therapist or point at some named feature of an object, such as the eye or nose of a doll. If the child produces the requested response to the stimulus, the therapist provides a reward to the child, such as a food the child enjoys, or an object the child appears to view as a treat, such as stickers. Although instances of ABA leading to dramatic improvements are reported,²² children more commonly experience moderate gains.²³

The technique is very time-intensive, typically involving forty hours per week of therapy, and progress is generally measured over multiple years.²⁴ Children often enter ABA therapy at an early age, in many instances younger than three years old, and continue for several years thereafter. The duration of the therapy is accompanied by significant costs.²⁵ Specialized training is required to perform the therapy, which limits the availability of qualified

20. See 20 U.S.C. § 1401(3)(A)(i) (2004) (including autism as one of many enumerated disabilities that are eligible for special education under the IDEA).

21. The technique was developed at the University of California and described in a 1987 paper that found forty-seven percent of the participating autistic children achieved “normal” scores on commonly used behavioral measures. See O. Ivar Lovaas, *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*, 55 J. CONSULTING & CLINICAL PSYCHOL. 3 (1987).

22. See Glen O. Sallows & Tamlynn D. Graupner, *Intensive Behavioral Treatment for Children with Autism: Four-Year Outcome and Predictors*, 110 AM. J. MENTAL RETARDATION 417, 433 (2005) (finding that with intensive behavioral treatments, forty-eight percent of the participating autistic children achieved normal range IQ and language skills).

23. See Saasha Sutera et al., *Predictors of Optimal Outcome in Toddlers Diagnosed with Autism Spectrum Disorders*, 37 J. AUTISM DEV. DISORDERS 98, 99 (2007) (noting that ABA is associated with optimal outcomes, but that the individual child’s characteristics are more likely to be outcome determinative); see also *Nightline*, supra note 12.

24. See, e.g., Lovaas, supra note 21 (conducting study of efficacy of behavioral interventions in autistic children for over six years).

25. See Shimabukuro, supra note 13; see also *Micheletti v. State Health Benefits Comm’n*, 913 A.2d 842 (N.J. Super. Ct. App. Div. 2007), *aff’d*, 934 A.2d 633 (N.J. 2007). *Micheletti* is an example of how difficult it can be for the parent of an autistic child to obtain insurance reimbursement for behavioral therapy.

personnel. ABA can also be a topic of dispute between parents and school districts in the creation of a child's "individualized education plan".²⁶ The nature of ABA demands that the child be isolated from his or her peers for substantial amounts of time.²⁷ As discussed below in Part III, this means that such treatments may be at odds with the Congressional preference for "mainstreaming" indicated in §1412(a)(5)(A) of the IDEA.²⁸

2. *Treatment and Education of Autistic and Related Communication Handicapped Children ("TEACCH") Therapy*

TEACCH uses behavior modification techniques in a manner similar to ABA and also uses one-on-one interaction, usually in a "self-contained" classroom in isolation from other peers, and with contributions from parents as "co-therapists."²⁹ TEACCH is aimed at the use of communication methods specifically tailored to a particular child, using not only words but also pictures or other visual aids that can communicate. The therapy is intended to provide a more flexible method of intervention than ABA, but the two techniques do share many similarities.

3. *Picture Exchange Communication System ("PECS") teaching*

PECS³⁰ uses drawings or images on cards to allow the child to express concepts with visual representations, rather than requiring the child to make verbal responses.³¹ The goal is to assist children with autism to communicate in a manner that can circumvent their impairments in language development.³² PECS uses a gradual ap-

26. See, e.g., *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1034 (8th Cir. 2000) (involving parents who argue that the school district failed to provide appropriate education because it did not provide ABA therapy); see also *Malkentzos v. DeBuono*, 102 F.3d 50, 52 (2d Cir. 1996) (involving a parent seeking compensation from school district for home-based ABA therapy).

27. See *Gill*, 217 F.3d at 1033 (noting that school district was concerned that thirty-five to forty hours per week of home-based ABA therapy would not allow child with autism sufficient interaction with his peers).

28. See *infra* Part III.B.

29. See Sally Ozonoff & Kristina Cathcart, *Effectiveness of a Home Program Intervention for Young Children with Autism*, 28 J. AUTISM DEV. DISORDERS 25, 26 (1998) (noting that TEACCH is a departure from other programs in its focus on the integral role of parents in treatment of autism).

30. Andrew S. Bondy & Lori A. Frost, *The Picture Exchange Communication System*, 9 FOCUS ON AUTISTIC BEHAV. 1 (1994).

31. *Id.* ¶ 7; see also Deborah Carr & Janet Felce, *The Effects of PECS Teaching to Phase III on the Communicative Interactions Between Children with Autism and Their Teachers*, 37 J. AUTISM DEV. DISORDERS 724, 725 (2007).

32. Bondy & Frost, *supra* note 30, ¶ 7.

proach to build up a repertoire of communicative skills from simple identification of things to expression of needs or wants to "conversation-like" experience.³³

II. THE IDEA, "MAINSTREAMING," AND JUDICIAL TESTS OF COMPLIANCE WITH THE "MAINSTREAMING" REQUIREMENT

A. A Brief History of the Development of the IDEA

The history of American special education recounts a progression from isolation and ostracism of disabled students toward a recognition that providing disabled students with a meaningful education is a critical policy goal. As recently as 1965, federal involvement with education of disabled children focused largely on providing funding for states without substantive guidelines as to how those funds should be used.³⁴ To counter this tendency, Congress enacted title VI of the Elementary and Secondary Education Act ("ESEA"),³⁵ establishing the Bureau of Education for the Handicapped³⁶ to administer effective education of the disabled, as well as establishing educational grants to fund such efforts.³⁷ Subsequently, in 1970, Congress repealed the ESEA and enacted the Education of the Handicapped Act ("EHA")³⁸ that contained similar special education grant provisions found in the ESEA.³⁹ The availability of funding through these Federal programs did not, however, lead to effective education of disabled children. Two seminal cases, *Mills v. Board of Education*⁴⁰ and *Pennsylvania Association for Retarded Citizens v. Pennsylvania*,⁴¹ ("PARC") illustrated that disabled students were still denied access to free public education. In *Mills*, the District Court of the District of Columbia noted the exclusion of poor, disabled students from the public education system without meaningful recourse.⁴² In ordering the District of Columbia to comply with its plan to provide public

33. See generally *id.*

34. See S. Rep. No. 94-168, at 5 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1429.

35. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-750, § 161, 80 Stat. 1191, 1204 (1966).

36. See *id.* at 1208.

37. See *id.* at 1204.

38. See Education of the Handicapped Act, Pub. L. No. 91-230, § 601, 84 Stat. 171, 175 (1970).

39. See *id.* at 178.

40. 348 F. Supp. 866 (D.D.C. 1972).

41. 334 F. Supp. 1257 (E.D. Pa. 1971).

42. *Mills*, 348 F. Supp. at 869-70.

education for disabled students, the court in *Mills* noted that the access to a public education had been described by the Supreme Court in *Brown v. Board of Education*⁴³ as “the very foundation of good citizenship.”⁴⁴ It further noted that blocking access to public education cut directly into constitutional guarantees of Due Process and Equal Protection.⁴⁵ *Mills* suggests a preference that disabled students be placed in regular public school environments when possible:

[N]o child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child’s needs⁴⁶

In *PARC*, the district court also ordered a state educational agency school district to provide education to mentally retarded citizens.⁴⁷ In its order, the court noted the “obligation to place each mentally disabled child in a free, public program of education and training appropriate to the child’s capacity”⁴⁸ Similar to the court in *Mills*, the court in *PARC* expressly acknowledged the need for placement of disabled students in regular classrooms, stating that “placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.”⁴⁹

Congress noted these landmark cases during its debates on the renewal of the EHA in 1975.⁵⁰ Congress indicated that *Mills* and *PARC* were but a sample of numerous cases that “guarantee the right to free publicly-supported education for handicapped children”⁵¹ These cases highlighted a clear need for federal involvement in the area of special education.⁵² Congress also recognized a significant failure to provide educational services to

43. 347 U.S. 483 (1954).

44. *Mills*, 348 F. Supp. at 874 (quoting *Brown*, 347 U.S. at 493).

45. *See id.* at 875.

46. *Id.* at 878.

47. *PARC*, 334 F. Supp. 1257, 1258-60 (E.D. Pa. 1971).

48. *Id.* at 1260.

49. *Id.*

50. *See S. Rep. 94-168* at 6, as reprinted in 1975 U.S.C.C.A.N. 1425, 1430.

51. *Id.*

52. *See id.* at 6-8 (noting the significant agreement amongst educators, parents, legislators, and other interested parties that a greater federal role was needed in the area of special education).

disabled children, noting at the time that of the 8 million eligible disabled children, “only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education.”⁵³ To address this issue, Congress enacted the Education for All Handicapped Children Act (“EAHCA”) in 1975.⁵⁴ This legislation created a mechanism for federal assistance in funding special education programs that conditioned receipt of federal funds on compliance with the terms of the EAHCA, specifically that disabled children were to receive a “free appropriate public education” and that parents would have meaningful opportunities to influence their child’s educational path.⁵⁵ The EAHCA was amended in 1990 and renamed the Individuals with Disabilities in Education Act (“IDEA”).⁵⁶

The IDEA, like its predecessors, requires that states submit comprehensive plans to the federal government describing the mechanisms by which that state will educate disabled children.⁵⁷ The Department of Education provides regulatory regimes that supply context to many statutory provisions of the IDEA. For example while the IDEA also provides explicit categories of disabilities that are covered in §1401(a), the Department of Education created regulations incorporating Attention Deficit/Hyperactivity Disorder (“ADHD”) into the generic “other health impairment” category.⁵⁸ Eligible students must fit into one of these disability categories, and the disability must adversely impact the child’s ability to re-

53. *Id.* at 8.

54. Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1401-1406, 1411-1420 (1975)).

55. *Id.* at sec. 3(c), § 601.

56. Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990). The IDEA was subsequently amended in 1991, Pub. L. No. 102-119, 105 Stat. 587 (1991), and again in 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997). The most recent amendments to the IDEA were made in 2004, pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), Pub. L. No. 108-446, 118 Stat. 2647 (2004) to bring the IDEA in line with the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-6304, 6311 (2006)).

57. *See* 20 U.S.C. § 1400(d)(1)(C) (2004).

58. *See id.* § 1401(3)(A) (defining the disabilities covered as autism, deaf-blindness, deafness, hearing impairment, mental retardation, multiple disabilities, orthopedic impairments, other health impairment, emotional disturbance, specific learning disability speech or language impairment, traumatic brain injury, and visual impairment including blindness). ADHD falls within the “other health impairment” category, as clarified by title 34, section 300.8(c)(9) of the Code of Federal Regulations, although the child must experience adverse effects on his or her educational performance to fall within the statutory definition according to section 300.8(c)(9)(ii).

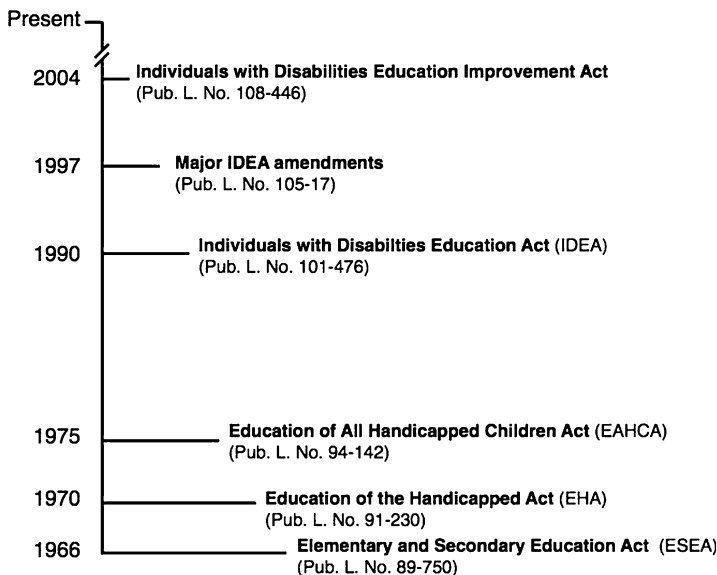


FIGURE 1. TIMELINE ILLUSTRATING THE DEVELOPMENT OF THE CURRENT IDEA, BEGINNING WITH THE ENACTMENT OF THE ESEA IN 1966.

ceive an educational benefit.⁵⁹ The school districts must work with parents to develop and annually evaluate an individualized education program (“IEP”) that is tailored to meet the needs of that child.⁶⁰ The principle features of the IDEA are the requirement that the IEP must provide a “free, appropriate public education”⁶¹ in the “least restrictive environment.”⁶² The Supreme Court ad-

59. See 34 CFR § 300.8(c)(9)(ii) (2007).

60. See 20 U.S.C. § 1414(d)(1)(A) (2004).

61. *Id.* § 1412(a)(1)(A) (providing that a state is obligated to provide a “free appropriate public education [that] 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.”) (emphasis added).

62. *Id.* § 1412(a)(5)(A). It is important to note that the cases cited prior to 1998 discuss the IDEA statute governing the least restrictive environment as “§ 1412(5)(b).” The IDEA amendments of 1997 made changes to the statutory text that rearranged section 1412, resulting in a numbering change from section 1412(5)(b) to section 1412(a)(5)(A). In each of the circuit cases discussed in Part II, the courts were working with section 1412(5)(b), the predecessor to section 1412(a)(5)(A). There are no clear substantive differences in the language of the previous and current versions of section 1412, and the courts do not appear to draw a substantive distinction between the two.

dressed the specific definition of a “free appropriate public education” in *Board of Education v. Rowley*.⁶³

Rowley concerned the IEP of a deaf child, Amy Rowley, whose IEP provided that her school would provide assistive technology such as a wireless hearing aid that amplified her teacher’s and classmates’ voices for Amy.⁶⁴ Amy’s parents wanted a qualified sign-language interpreter present instead of the assistive technologies she had previously used.⁶⁵ The school rejected this request after finding that Amy was achieving academically without the presence of an interpreter.⁶⁶ After this rejection was affirmed by the state educational commissioner, Amy’s parents brought a suit in federal district court, claiming that the failure to provide an interpreter denied Amy a free, appropriate public education.⁶⁷ The Rowleys prevailed at trial, where the judge found that Amy was a bright girl whose academic progress was hampered by her deafness.⁶⁸ Therefore, the judge held that the failure to provide an interpreter denied Amy a free, appropriate public education because she was not being given the same opportunity as her peers to maximize her educational potential.⁶⁹ On appeal, the Second Circuit affirmed the trial court decisions of fact as not “clearly erroneous” and agreed with the court’s conclusions of law.⁷⁰ In dissent, Judge Mansfield argued that there was no indication that Congress intended the IDEA and its predecessors to provide “an opportunity to achieve [the disabled student’s] full potential commensurate with the opportunity provided to other children.”⁷¹ Instead, Mansfield argued, Congress simply intended to assist disabled students to reach self-sufficiency,⁷² and that a standard such as the one applied by the district court required some measure of a child’s full potential, which Mansfield criticized as “an impossible burden.”⁷³ Instead, Mansfield argued that the IDEA really required that the IEP be created so as to decrease the child’s dependency on others,

63. 458 U.S. 176, 188 (1982).

64. *See id.* at 184.

65. *See id.*

66. *See id.* at 184-85.

67. *See id.*

68. *See Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 532 (1980).

69. *See id.* at 534. The trial court judge held that a free, appropriate public education meant “that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.” *Id.*

70. *Rowley v. Bd. of Educ.*, 632 F.2d 945, 947-48 (2d Cir. 1980).

71. *Id.* at 952 (Mansfield, J., dissenting).

72. *Id.*

73. *Id.* at 953.

and to potentially allow the child to reach the same degree of performance as the child's peers.⁷⁴ When it heard the case, the Supreme Court generally agreed with Mansfield. The Court examined the text of the IDEA for some guidance as to the definition of a "free appropriate public education." Justice Rehnquist, writing for the majority, stated that there was no clear indication in the IDEA of "any substantive standard prescribing the level of education to be accorded handicapped children,"⁷⁵ and that special educational services under the IDEA were only intended to provide meaningful access to public education, not a particular outcome.⁷⁶ Therefore, Justice Rehnquist concluded, the IDEA guarantee of a free, appropriate public education consisted of a threshold-level of educational opportunity:

Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.⁷⁷

This standard embodies what Rehnquist referred to as a "basic floor of opportunity."⁷⁸ As long as the procedural requirements of tailoring the IEP to provide an educational benefit to the child are met, the school district satisfies the IDEA.

B. The Least Restrictive Environment: A Congressional Preference for Mainstreaming

Complementary statutes and regulations govern the requirement that school districts place disabled students in the "least restrictive environment."⁷⁹ To receive federal funding through IDEA, states must enact policies and procedures to ensure that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care

74. *See id.*

75. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982).

76. *See id.* at 193.

77. *Id.* at 203.

78. *Id.* at 201.

79. 20 U.S.C. § 1412(a)(5)(A) (2004); *see also* 34 C.F.R. § 300.114(a)(2) (2006) ("Each public agency must ensure that . . . [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and [s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs 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.").

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.⁸⁰

Compliance usually involves placing the disabled students with nondisabled, or “typical” peers to the greatest degree that is reasonably possible, a practice commonly known as “mainstreaming” or “inclusion.” Parents who disagree with the placement decision of a school district may challenge the decision first at a “due process hearing,”⁸¹ where a hearing officer considers the parties’ arguments and can affirm or reject the placement decision and order placement of the student consistent with the outcome of the hearing. Parents can use both the state and federal court system to challenge the adequacy of the placement of their disabled child with typical peers.⁸² The federal circuit courts of appeals, however, apply different tests to evaluate school districts’ compliance with §1412(a)(5)(A). These tests are discussed in the next section.

C. The Circuit Tests for Compliance with Mainstreaming Requirement

1. *Roncker v. Walter*

The mainstreaming requirement was first construed in 1983 by the Sixth Circuit in *Roncker v. Walter*.⁸³ In *Roncker*, the court addressed the issue of whether a student was placed in the least restrictive environment.⁸⁴ Neill Roncker, a nine-year-old with severe mental retardation, was placed in a public school exclusively for the education of mentally retarded children after a previous recom-

80. § 1412(a)(5)(A).

81. *Id.* § 1415(f)(1)(A) (“Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.”).

82. *Id.* § 1415(i)(2)(A) (“Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.”).

83. *See* 700 F.2d 1058 (6th Cir. 1983).

84. *See id.* at 1060-61.

mentation that he be placed in a “mainstream” school environment.⁸⁵ Neill’s parents disagreed with the school district’s decision and challenged Neill’s placement at a due process hearing,⁸⁶ where the hearing officer agreed with Neill’s parents that he “be placed within the appropriate special education class in the regular elementary school setting.”⁸⁷ The school district appealed the decision to the Ohio State Board of Education, which found that Neill would receive an appropriate education at the school for the mentally retarded, but would also need interaction with non-disabled students;⁸⁸ Neill’s placement in the school for the mentally retarded was subject to his receiving contact with non-disabled students. At the school Neill attended, his contact with non-disabled students was limited to “lunch, gym and recess.”⁸⁹ In a subsequent lawsuit filed by Neill’s parents, both they and the school district agreed that Neill could not be placed in a classroom with non-disabled students. Rather, the dispute revolved around providing Neill special education in a setting where he would have greater contact with non-disabled children.⁹⁰

On appeal to the Sixth Circuit, the court noted the potential for tension that the mainstreaming requirement created:

In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act’s mandate.⁹¹

To evaluate compliance with the “mainstreaming” requirement in § 1412(a)(5)(A)⁹² the Sixth Circuit established its test: “[i]n 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 inappro-

85. *See id.* at 1060.

86. *See* 20 U.S.C. § 1415(f)(1)(A) (2004); *see also supra* text accompanying note 81.

87. *Roncker*, 700 F.2d at 1061.

88. *See id.*

89. *Id.*

90. *See id.*

91. *Id.* at 1063.

92. *See supra* note 62 and accompanying text. At the time of the *Roncker* decision the statute was called 20 U.S.C. § 1412(5)(b).

priate under the Act.”⁹³ The court noted that the disruptive effect of the child on the classroom was a factor in this analysis and that the costs of spending on one child to the detriment of the other children weighed against mainstreaming.⁹⁴ The *Roncker* court did not expand on the consideration of costs, likely because costs were not clearly raised as an issue at trial, although later cases have done so.⁹⁵ The *Roncker* test was adopted by the Eighth Circuit in *A.W. v. Northwest R-1 School District*,⁹⁶ and by the Fourth Circuit in *DeVries v. Fairfax County School Board*.⁹⁷

2. Daniel R.R.

In 1989, the Fifth Circuit adopted its own test of compliance with the mainstreaming requirement of section 1412 in the case of *Daniel R.R. v. State Board of Education*.⁹⁸ Daniel was a six-year-old boy with Down’s syndrome whose parents enrolled him in a special education program in the El Paso Independent School District.⁹⁹ Seeking greater interaction for Daniel with nondisabled peers, Daniel’s parents requested part-time placement in a regular education pre-kindergarten classroom, while maintaining Daniel’s part-time enrollment in the special education program.¹⁰⁰ The school district went forward with this placement program, but Daniel’s teachers soon found that he required constant supervision by faculty and that his progress with school work was minimal.¹⁰¹ This led the school district to revise Daniel’s placement, whereby he would return to the special education program but, provided adequate parental supervision, could eat lunch and play with nondisabled peers three days per week.¹⁰² Daniel’s parents challenged this placement in both due process hearings and in district court, both of which upheld the revised placement, relying princi-

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

94. *See id.*

95. *See, e.g., A.W. v. R-1 Northwest Sch. Dist.*, 813 F.2d 158, 161-62 (8th Cir. 1987) (noting that the evidence at trial indicated that school district funds were sufficiently limited that hiring a teacher to benefit a disabled student would impact the ability to educate other students in the district).

96. *Id.* at 163.

97. 882 F.2d 876, 878-79 (4th Cir. 1989).

98. 874 F.2d 1036 (5th Cir. 1989).

99. *Id.* at 1039.

100. *Id.*

101. *Id.*

102. *Id.*

pally on the lack of educational benefit Daniel received in the regular classroom.¹⁰³

On appeal to the Fifth Circuit, the court considered Daniel's educational placement in light of the mainstreaming preference articulated in section 1412.¹⁰⁴ Notably, the court highlighted the tension between the preference for mainstreaming and the need to tailor the educational benefit to the child's specific need: "[t]he nature or severity of some children's handicaps is such that only special education can address their needs. For these children, mainstreaming does not provide an education designed to meet their unique needs and, thus, does not provide a free appropriate public education."¹⁰⁵ The Fifth Circuit, however, stated that despite differing abilities of disabled and nondisabled students, mainstreaming had potential inherent intangible benefits, for example, language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment.¹⁰⁶

The concept of mainstreaming outweighing the placement that is best for academic reasons is similar to the *Roncker* court's analysis as well: "[i]n some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming."¹⁰⁷ In its discussion of *Roncker*, the Fifth Circuit stated that the *Roncker* test created too great a judicial role in policy determinations that, it argued, were best left to local school districts:

Certainly, the *Roncker* test accounts for factors that are important in any mainstreaming case. We believe, however, that the test necessitates too intrusive an inquiry into the educational

103. *See id.* at 1040.

104. *See id.* at 1043-51.

105. *Id.* at 1044.

106. *Id.* at 1048. The Supreme Court in *Brown v. Board of Education* noted that education segregation on the basis of such immutable characteristics as race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). This sentiment seems to be reflected in *Roncker* and *Daniel R.R.* in the movement in special education away from placing disabled students in segregated educational environments because of the perception of potential inherent stigma of separated special education, and also because of the potential benefits to disabled students of inclusion with their nondisabled peers.

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

policy choices that Congress deliberately left to state and local school officials. Whether a particular service feasibly can be provided in a regular or special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make.¹⁰⁸

Instead, the Fifth Circuit found that “language of the [IDEA] itself provides a workable test for determining whether a state has complied with the [IDEA’s] mainstreaming requirement.”¹⁰⁹ Relying on the statutory language, the Fifth Circuit fashioned a two-part test.

First, a court is to examine whether education in a regular classroom can be achieved satisfactorily for a given child with the use of supplementary aids and services.¹¹⁰ Four elements¹¹¹ comprise this first inquiry:

- (1) The steps the school district has taken to accommodate the child in a regular classroom;
- (2) Whether the child will receive an educational benefit from regular education;
- (3) The child’s overall educational experience in regular education;
- (4) The effect the disabled child’s presence has on the regular classroom.

A fifth element was subsequently added by the Eleventh Circuit in *Greer v. Rome*¹¹² in adopting the *Daniel R.R.* test:

- (5) The impact of the cost of educating a handicapped child in a regular classroom upon the education of other children in the district.¹¹³

Second, if the first element cannot be met and the school intends to provide special education or to remove the child from regular education, the court will then ask whether the school has mainstreamed the child to the maximum extent appropriate.¹¹⁴ To satisfy this second prong the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others,

108. *Daniel R.R.*, 874 F.2d at 1046.

109. *Id.*

110. *See id.* at 1048.

111. *See id.* at 1048-49.

112. 950 F.2d 688 (11th Cir. 1991).

113. *Id.* at 697 (“If the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate.”).

114. *See Daniel R.R.*, 874 F.2d at 1050.

mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess.¹¹⁵

This is a subjective standard, as indicated by the language “whether education in [a] regular classroom . . . can be achieved satisfactorily for a *given* child.”¹¹⁶ In addition to the Eleventh Circuit in *Greer*,¹¹⁷ the Third Circuit also adopted the *Daniel R.R.* test in *Oberti v. Board of Education*.¹¹⁸

3. Holland

Rachel Holland was a mentally disabled second grader who had been in a variety of special education programs for four years.¹¹⁹ Her parents had requested that Rachel be provided more time in a mainstream classroom,¹²⁰ and the school district proposed placing Rachel in regular classrooms for nonacademic classes such as art, music, lunch and recess while Rachel would remain in the special education classroom for her academic classes.¹²¹ In response, Rachel’s parents enrolled her in a private school for her second grade year.¹²² At the same time, her parents challenged the school district’s IEP at a due process hearing, where the hearing officer agreed with Rachel’s parents that the district’s proposed placement was inadequate.¹²³ The school district appealed the hearing officer’s decision to the district court.¹²⁴ The trial court relied on both *Roncker* and *Daniel R.R.* in fashioning a four-pronged test¹²⁵ of compliance with section 1412(a)(5)(A):

- (1) The educational benefits of full-time placement in a regular class;
- (2) The non-academic benefits of such placement;
- (3) The effect the student has on the teacher and children in the regular class;
- (4) The costs of mainstreaming the student.

115. *See id.* at 1048-50.

116. *Id.* at 1048; see Ralph E. Julnes, *The New Holland and Other Tests for Resolving LRE Disputes*, 91 EDUC. L. REP. 789, 795-96 (1994).

117. *Greer*, 950 F.2d at 688.

118. 995 F.2d 1204 (3d Cir. 1993).

119. *Sacramento City Unified Sch. Dist. v. Holland*, 14 F.3d 1398, 1400 (9th Cir. 1994).

120. *Id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *Id.* at 1400-01.

This four-pronged test comprises elements from both *Roncker* and *Daniel R.R.* In applying this test, the district court affirmed the decision of the hearing officer and the school district appealed.¹²⁶ On appeal, the Ninth Circuit adopted the district court's test of compliance with section 1412 and affirmed the decision below.¹²⁷

4. Summary of the Circuit Tests

The circuit tests of compliance with the mainstreaming requirement of the IDEA are each based on factors that the circuit court felt were relevant to the analysis, derived from the language of the IDEA, or some of both. The factors are summarized in Table 1.

<i>Roncker</i>	<i>Daniel R.R.</i>	<i>Holland</i>
Factors that make segregated facility considered superior; as applied, these are essentially the same as the benefits of mainstreaming compared to special education	Educational benefit of mainstreaming	Educational benefit of placement
	Overall educational benefits of mainstreaming	Non-academic benefits of placement
Disruptive effect of placement on other students	Impact of the child's presence on classroom	Impact on other students/teacher
Cost of placement	Cost of placement	Cost of placement

TABLE 1. COMPARISON OF THE FACTORS CONSIDERED BY THE FEDERAL CIRCUIT TESTS OF COMPLIANCE WITH SECTION 1412(A)(5)(A).

One factor common to all of these tests is cost.¹²⁸ Placements will be undermined where the cost of placing a disabled student is too great, either because the services the child would require are simply too costly to provide in the mainstream setting, or because using funds to provide the services would adversely impact the services available for a disabled student's peers.¹²⁹ For example, in

126. *Id.* at 1402.

127. *See id.* at 1404.

128. *See supra* text accompanying notes 94, 113, and 125.

129. *See, e.g.,* *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) ("Cost is a proper factor to consider since excessive spending on one handicapped child deprives other children."); *see also* *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 161-62 (8th Cir. 1987) ("The evidence before the Court shows that the funds available are limited so that placing a teacher at House Springs for the benefit of a few students at best, and possibly only A.W., would directly reduce the educational benefits provided to

Holland, the school district argued that it would “lose significant funding if Rachel [Holland] did not spend at least 51% of her time in a special education class.”¹³⁰ *Holland* provides further evidence that this cost analysis can be complex; services that benefit one disabled child may in fact benefit many of his or her disabled peers, and thus it may be inappropriate to assign the entirety of the cost of such services to the child at issue.¹³¹

A second common factor is that of disruptive effects of the disabled child on classroom environments, and recognition that teachers cannot devote the entirety of their time to a single student.¹³² This factor is reflected in the Code of Federal Regulations.¹³³ Although certain behaviors, such as screaming, kicking, biting, or other outbursts can be disruptive, the facts of several cases indicate that schools reconsider the student’s placement where these are repeated patterns of behavior.¹³⁴ The student need not clearly be disruptive per se; if a student’s needs are such that he or she requires an inordinate amount of attention from the teacher or aide, this behavior may fall into the “disruptive” category.¹³⁵

The other factors considered by *Holland* and *Daniel R.R.* involve the educational benefits of the placement in the mainstream classroom and either the “overall” benefits of mainstreaming or the “non-academic” benefits.¹³⁶ *Roncker* compares the factors that make a segregated facility superior to the mainstream facility, and analyzes whether these factors can be feasibly integrated into the

other handicapped students by increasing the number of students taught by a single teacher at [State School No. 2].”).

130. *Holland*, 14 F.3d at 1402. Another example of costs raised in *Holland* was school-wide sensitivity training that cost \$80,000. *Id.* It is important to note that the Ninth Circuit did not directly evaluate many of these cost arguments, because the Circuit indicated that the record did not provide sufficient evidence to support these arguments. *See id.* They are presented here only as examples of the kinds of cost arguments school districts might make against mainstreaming.

131. *See id.*

132. *See supra* text accompanying notes 94, 111, and 125.

133. 34 C.F.R. pt. 104, app. A, ¶ 24 (“[W]here a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs.”).

134. *See Roncker*, 700 F.2d at 1058; *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1229 (8th Cir. 1995) (noting that the risk that an autistic student will cause injury is an important factor in determining whether that student may remain at the educational facility during IDEA disputes).

135. *See, e.g., Beth B. v. Van Clay*, 211 F. Supp. 2d 1020, 1033 (N.D. Ill. 2001) (noting student’s needs demanded attention from classroom staff and periodically removed the teacher from the rest of the class).

136. *See supra* text accompanying notes 111, 125.

mainstream facility.¹³⁷ Several commentators suggest that these “educational experience” factors distinguish favorability of the tests.¹³⁸ Although phrased in different terms between the three circuit tests, Part III of this Note argues that, at least as applied to cases involving autistic children, they comprise essentially the same inquiries.

III. EVALUATION OF THE CIRCUIT TESTS AND OF THE IDEA MAINSTREAMING REQUIREMENT IN THE CONTEXT OF AUTISTIC SPECTRUM DISORDERS

A. The Circuit Tests as Equivalents in the Context of Autistic Students

Scholarly commentary on the split of the federal circuit courts in the test used to evaluate compliance with the mainstreaming requirement of the IDEA has generally expressed a preference for one test over the others, often on the grounds that the higher degree of specificity in the factors considered by—for example *Holland* and not *Roncker*—is of value to the courts.¹³⁹ Other commentary echoes the concern that each of the circuit tests “invite judicial scrutiny of school district [mainstreaming] decisions.”¹⁴⁰ Examination of case law that follows these circuit tests allows for an evaluation of whether—at least in the context of autistic students—there are substantive differences in the circuit tests, as applied.

1. *As Applied, the Tests Account for Substantially Similar Factors*

As indicated in Table 1, the specific factors that the tests considered are substantially similar.¹⁴¹ For example, although *Roncker* did not expressly include consideration of the academic and nonacademic benefits, the broad language of the test, coupled with court’s acknowledgement that nonacademic factors are often significant elements in deciding the appropriate academic placement,

137. See *supra* text accompanying note 93.

138. See Julnes, *supra* note 116, at 806.

139. See, e.g., Kevin D. Stanley, *A Model for Interpretation of Mainstreaming Compliance under the Individuals with Disabilities Education Act*: Board of Education v. Holland, 65 UMKC L. REV. 303, 311-17 (1996).

140. See Julnes, *supra* note 116, at 805.

141. In *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997), the Supreme Court allowed that “linguistic differences” may not really impact the application of judicial tests. *Id.* at 40-41 (“[T]he particular linguistic framework used is less important than whether the test is probative of the essential inquiry . . .”).

imply that such factors should be considered.¹⁴² Both *Daniel R.R.* and *Holland* expressly consider these factors.¹⁴³ Further, all three circuit tests consider the impact of the child on the classroom environment, and each test includes the cost of the child's placement as a factor.¹⁴⁴

As an indication of how similar the *Roncker* and *Daniel R.R.* tests are, in *S. v. Scarborough School Committee*,¹⁴⁵ the district court considered a challenge to a student's bus route as violating the IDEA's least restrictive environment requirement. Although student transportation is not clearly part of student placement or mainstreaming, the court discussed both the *Roncker* and *Daniel R.R.* tests in its decision.¹⁴⁶ The court noted that the *Roncker* and *Daniel R.R.* tests both encompass a comparison of the benefits in the mainstream versus the segregated environment and that both tests account for the effect of mainstreaming disabled students on nondisabled students.¹⁴⁷ As noted above in Table 1, both tests currently account for the cost of mainstreaming a disabled student as well. The court further commented that the outcome of its analysis was the same under the *Roncker* test and the *Daniel R.R.* test, providing evidence that the test that a court applies is not clearly outcome-determinative.¹⁴⁸

Another example of the similarity between these tests is found in *D.F. v. Western School Corporation*,¹⁴⁹ where the court described the circuit tests in a manner that suggests their equivalence. For example, the court noted that as between the *Daniel R.R.* and *Holland* tests:

Whether the test is stated in two pans [sic] or four factors, the standards are very similar. The *Daniel R.R.* test states the standard in terms very close to the statutory terms. The *Holland* factors identify more specific levels of inquiry for applying the

142. The Sixth Circuit in *Roncker* notes that the IDEA mainstreaming requirement includes "non-academic activities such as lunch, gym, recess and transportation to and from school." *Roncker v. Walter*, 700 F.2d 1058, 1063 n.6 (6th Cir. 1983). The court also noted that the evaluation of the appropriateness of a school placement needed to consider whether the school could provide services for Neill that supported his emotional and physical needs, which are not clearly "academic" factors, such as efficacy of the teaching methods at issue in *Rowley*. *Id.* at 1063.

143. See *supra* text accompanying notes 111, 125.

144. See *supra* text accompanying notes 94, 113, and 125.

145. *S. v. Scarborough Co. Sch. Comm.*, 366 F. Supp. 2d 98 (D. Me. 2005).

146. See *id.* at 101-04.

147. See *id.* at 101-04.

148. See *id.* at 104 n.9.

149. *D.F. v. W. Sch. Corp.*, 921 F. Supp. 559 (S.D. Ind. 1997).

more general *Daniel R.R.* standard This court will apply the two part test stated in *Daniel R.R.* and *Oberti*, but will organize its discussion in terms of the four *Holland* factors.¹⁵⁰

This quotation suggests that the court was able to use the *Holland* and *Daniel R.R.* tests interchangeably. From this perspective, despite textual differences between the tests, the factors considered are substantially the same.

2. *The Circuit Tests Are Applied with Equal Deference to Local Educational Officials*

Another potential difference between the circuit tests is their degree of deference to state and local educational authorities. Specifically, the Fifth Circuit in *Daniel R.R.* expressed concern that the *Roncker* test invited too much judicial second-guessing of school district decisions.¹⁵¹ The very nature of cases in which parents and school districts disagree on placement of a child, however, requires judicial consideration, and in some instances second-guessing, of school district decisions. Although the *Daniel R.R.* and *Holland* tests describe specific factors of the placement rather than discussing a comparison of segregated and mainstream facilities, it is not clear that these tests create any less risk of judicial second-guessing. As discussed below, courts that have relied on *Roncker*, *Daniel R.R.* and *Holland* have made some judgment as to the appropriateness of the school district's placement decision.

It is important to note that there are several points at which school and state officials review the appropriate placement of a disabled child. An initial point of review is through annual monitoring of a child's educational progress in his or her current placement. This is usually accomplished by the child's educators in conjunction with school district officials and, in some instances, educational experts.¹⁵² A second point of review can occur if parents challenge the adequacy of proposed placement at a due process hearing. As discussed in Part I, at due process hearings an inde-

150. *Id.* at 567.

151. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1046 (5th Cir. 1989) ("We respectfully decline to follow the Sixth Circuit's analysis. Certainly, the *Roncker* test accounts for factors that are important in any mainstreaming case. We believe, however, that the test necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials.")

152. This annual monitoring is a part of the IDEA's requirement that each disabled child be provided with an Individualized Education Program (IEP) that is developed by the child's educators in coordination with the parents. See 20 U.S.C. § 1414(d) (2004).

pendent hearing officer (“IHO”) reviews the record and makes a determination of (among any other issues in dispute) whether the proposed placement comports with the mainstreaming requirements of the IDEA.¹⁵³ In some cases, a state level review officer (“SLRO”) may review the findings of the hearing officer, providing another point of decision by the state educational officials.¹⁵⁴ Each of these local and state decisions are subject to review by courts, and it is these decisions that fall under the admonition of *Rowley*, that courts must not “substitute their own notions of sound educational policy for those of the school authorities which they review.”¹⁵⁵ The above examination of cases involving children with an ASD diagnosis indicates that courts across the circuits generally abide the *Rowley* admonition. Where they have failed to do so, the cases discussed above indicate that the appeals courts have reversed their decisions.¹⁵⁶

3. *Decisions Applying the Roncker Test Highlight Judicial Deference to the Educational Placement Decisions of State and Local Officials*

As indicated above, courts following the *Roncker* analysis observe deference to state and local decisions regarding educational placement. For example, in *Hartmann v. Loudon County Board of Education*,¹⁵⁷ the Fourth Circuit reversed a district court’s finding that a school placement decision failed the mainstreaming requirement of the IDEA, in large part because the district court failed to defer to the findings of the state educational officials.¹⁵⁸ The case centered on the educational placement of Mark Hartmann, an eleven-year-old student diagnosed with autism¹⁵⁹ who had significant impairments in his learning, communication and social abilities. The school officials observed that Mark’s impairments were such that he was merely an observer in mainstream academic clas-

153. See *supra* note 81 and accompanying text. As discussed above, due process hearings are a means by which parents may challenge the proposed IEP.

154. See 20 U.S.C. § 1415(g)(2) (2004).

155. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

156. See *supra* Part III.A.

157. 118 F.3d 996 (4th Cir. 1997).

158. See *id.* at 1001 (“After careful examination of the record, however, we are forced to conclude that the district court’s decision fails to account for the administrative findings and is not supported by the evidence based on a correct application of the law. In effect, the court simply substituted its own judgment regarding [the plaintiff’s] proper educational program for that of local school officials.”).

159. *Id.* at 999.

ses¹⁶⁰ and that his behaviors were often disruptive.¹⁶¹ The school district proposed placing Mark in a self-contained classroom specifically designed to provide for the needs of autistic students within a mainstream school, thereby facilitating interaction with nondisabled peers.¹⁶² Mark's parents rejected the proposed IEP as violating the mainstreaming requirement of the IDEA.¹⁶³ At a subsequent due process hearing, the local hearing officer found that the IEP in fact complied with the IDEA, and provided the appropriate educational benefit to Mark.¹⁶⁴ After this finding was affirmed by the state hearing officer, the Hartmanns brought suit in district court.¹⁶⁵

The Hartmanns prevailed at trial, where the district court discounted the credibility of the school district's witness testimony regarding the minimal educational benefit that Mark received in a regular classroom.¹⁶⁶ On appeal to the Fourth Circuit, the school district prevailed.¹⁶⁷ Citing its adoption of the *Roncker* test in *DeVries*,¹⁶⁸ the Fourth Circuit stated that the district court erred in the lack of deference it gave to the testimony of Mark's educators that he was not receiving an educational benefit in the regular classroom. In highlighting this lack of deference to state and local educational decisions, the Fourth Circuit reiterated the Supreme Court's statement that district courts should not consider IDEA cases an "invitation . . . to substitute their own notions of sound education policy for those of the school authorities which they review."¹⁶⁹ The Fourth Circuit indicated that the district court violated this principle of deference by virtually disregarding the testimony of Mark's educators.¹⁷⁰

160. *Id.* at 1001-02. The court also noted the similarity between the concerns of the educators in Mark Hartmann's school and those expressed by the educational professionals in *DeVries*. See *id.* (citing *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989)).

161. *Id.* at 999. Mark's behavioral problems included kicking, biting, and screaming.

162. See *id.* at 1000.

163. See *id.*

164. See *id.*

165. See *id.*

166. See *id.*

167. See *id.* at 1005.

168. See *id.* at 1004.

169. *Id.* at 1000 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982)).

170. See *id.* at 1001 ("These principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.").

Hartmann and other cases that have applied the *Roncker* test demonstrate that courts will defer to state and local educational placement decisions where the state has concluded that the IDEA is satisfied.¹⁷¹ Importantly, this judicial deference is not one-sided; deference is also found when state educational officials reject school district placement decisions as violating the IDEA mainstreaming requirement. For example, in *Centerville City School District v. Goldman*,¹⁷² a district court affirmed a finding by the state educational officer that a school district's proposed placement violated the IDEA.¹⁷³ Michael Goldman was a child diagnosed with autism whose parents strongly disagreed with his placement in a special education environment as it failed to provide for mainstreaming.¹⁷⁴ At a due process hearing on Michael's placement, the hearing officer upheld Michael's placement as satisfying the mainstreaming requirement of the IDEA, but this finding was subsequently reversed by a state level review officer ("SLRO").¹⁷⁵ The school board appealed this decision to the district court.¹⁷⁶ The district court applied the *Roncker* test, affirming the SLRO's decision that Michael's placement violated the IDEA's mainstreaming requirement.¹⁷⁷ The court noted that, as required by the

The court also cited its own precedent of deference to school district decisions: "[a]dministrative findings in an IDEA case 'are entitled to be considered *prima facie* correct,' and 'the district court, if it is not going to follow them, is required to explain why it does not.'" *Id.* at 1000-01 (quoting *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991)).

171. See *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989) (deferring to a state educational placement decision for a seventeen-year-old student with autism where the evidence in record supported the school district's assertion that the student could not be provided appropriate services at a mainstream school); see also *Pachl v. Seagren*, 453 F.3d 1064 (8th Cir. 2006) (emphasizing the importance of deference to state and local educational officials in educational placement decisions); *Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 505 (6th Cir. 1998) ("[T]he Education of the Handicapped Act [a forerunner of IDEA] mandates an education that is responsive to the handicapped child's needs, 'but leaves the substance and the details of that education to state and local school officials.'" (quoting *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991))). In *Pachl*, the Eight Circuit also noted other similar precedent acknowledging the idea that judges are to avoid second-guessing of school districts, "'[b]ecause judges are not trained educators, judicial review under the IDEA is limited.'" *Pachl*, 453 F.3d at 1068 (quoting *E.S. v. Indep. Sch. Dist.*, No. 196, 135 F.3d 566, 569 (8th Cir. 1998)).

172. No. C-3-92-442, 1993 WL 1318610 (S.D. Ohio Aug. 24, 1993).

173. See *id.* at *2.

174. See *id.* at *9-10.

175. See *id.* at *15.

176. *Id.* at *16.

177. See *id.* at *22-26.

standard of review set forth in *Roncker*, courts should defer to the SLRO's decision with a "rebuttable presumption of validity."¹⁷⁸

These examples indicate that courts applying the *Roncker* test are cognizant of the risk of judicial second-guessing of state policies, and where such practice occurs, it is corrected on appeal. These examples thus tend to rebut the concern expressed by the Fifth Circuit in *Daniel R.R.* and by commentators that *Roncker* creates too great a risk of judicial "second-guessing" of state and local educational decisions. The following section argues that the degree of deference to state and local educational decisions in the application of the *Daniel R.R.* or *Holland* tests is not clearly different from the cases above that have applied *Roncker*.

4. *The Daniel R.R. and Holland Tests Are not Clearly More Deferential than the Roncker Test to Educational Placement District Decisions*

In 2001, the district court of Illinois heard the case of *Beth B. v. Van Clay*.¹⁷⁹ Beth B. was a thirteen-year-old girl diagnosed with Rett's syndrome, one of the autistic spectrum disorders.¹⁸⁰ Beth's school district proposed placing Beth in a self-contained classroom staffed by teachers who possessed specialized training in educating students with "severe cognitive and communicative disabilities."¹⁸¹ Beth's parents rejected this proposal, and after a due process hearing on the matter concluded in favor of the school district, Beth's parents sought review of the decision in district court.¹⁸² The district court noted that the Seventh Circuit had not yet spoken on which of the existing circuit tests it preferred in determining compliance with the IDEA mainstreaming requirement.¹⁸³ Interestingly, the district court expressly stated its preference for the *Daniel R.R.* test because it agreed with the Fifth Circuit's assessment of the *Roncker* test as "too intrusive" into the decisions of state and local education officials.¹⁸⁴ The court, however, proceeded to apply both the *Daniel R.R.* test and the *Roncker* test because the Seventh Circuit had not spoken definitively on the is-

178. *Id.* at *16 (citing *Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir. 1983)).

179. 211 F. Supp. 2d 1020 (N.D. Ill. 2001).

180. See *supra* note 9 and accompanying text.

181. *Beth B.*, 211 F. Supp. 2d at 1024.

182. See *id.*

183. See *id.* at 1030.

184. *Id.* (quoting *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1046 (5th Cir. 1989)).

sue.¹⁸⁵ In applying the *Daniel R.R.* test, the court examined the school district's efforts to accommodate Beth and the educational benefit Beth would receive in the regular classroom, finding that the school district complied with the IDEA, having designed a specialized curriculum for Beth.¹⁸⁶ In considering the academic benefits of the regular classroom, the court noted the "stark factual dispute" about Beth's progress in class. The court conducted its own review of her progress, concluding that the record showed Beth's greatest gains were associated with the special education environment, and that Beth would merely be an observer in the regular classroom.¹⁸⁷ This point is notable because an independent judicial review of a student's progress appears directly counter to the warnings of *Rowley*, that courts are not to substitute to their own judgment for that of state and local educational officials. After considering the non-academic¹⁸⁸ and disruption¹⁸⁹ factors, the court concluded that under the *Daniel R.R.* test, the school district had mainstreamed Beth to the maximum degree appropriate by placing her in a special education environment and that her placement in a regular classroom would not benefit her.¹⁹⁰

The court then proceeded to analyze the record under the *Roncker* test. The special education environment was found superior to the regular classroom for many of the same reasons that the court dismissed the minimal benefit to Beth of being in the regular classroom.¹⁹¹ *Beth B.* thus rebuts the position that the *Roncker* test is less deferential to state educational officials than the *Daniel R.R.* test. If the *Roncker* test were more intrusive than the *Daniel R.R.* or *Holland* test, a case that involves the application of the *Roncker*

185. The district court noted that the Seventh Circuit had discussed the *Roncker* and *Daniel R.R.* tests previously, but had not endorsed either test. *Id.* at 1030 (citing *Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 905 (7th Cir. 1996)). The court also discussed another recent Seventh Circuit case that yet again declined to endorse one of the existing circuit tests of mainstreaming. *Id.* at 1030 (citing *LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912 (7th Cir. 1999)).

186. *See id.* at 1027 ("We agree with the [hearing officer] that the district acted reasonably in developing Beth's placement.").

187. *See id.* at 1032.

188. *See id.* at 1033 (indicating that Beth's social contacts in the regular classroom might provide some benefit, but that as she grew older, contact she would reasonably expect to gain with regular peers would diminish, especially as the style of teaching shifted to lecturing over in-class cooperation).

189. *See id.* (finding that Beth's needs demanded attention from the teacher and aides in her classroom, which ultimately detracted from attention given to remainder of class).

190. *See id.*

191. *See id.* at 1034.

test and the *Daniel R.R.* test, for example, would be more likely to apply differing levels of scrutiny. In *Beth B.*, the court made essentially the same inquiry under both the *Roncker* and *Daniel R.R.* tests, a fact that tends to refute the suggestion that *Roncker* is less deferential than the *Daniel R.R.* test. Although it is possible that the court's application of the *Roncker* test was deferential merely because the court expressly stated its concern about the intrusiveness of the *Roncker* test, it is not clear from the text of *Beth B.* that the court applied *Roncker* any differently than courts that have expressly adopted *Roncker*.

The *Holland*¹⁹² case itself suggests that the *Roncker* test is at least as deferential a test to state and local educational decisions as either the *Daniel R.R.* or *Holland* test. In *Holland*, the Ninth Circuit affirmed the district court's findings that testimony from expert witnesses for Rachel was more credible than witnesses for the school district. This finding contrasts with the application of the *Roncker* test in *Hartmann*, which concluded that the findings of schools "are entitled to be considered *prima facie* correct."¹⁹³ This language from *Hartmann* indicates that a court applying the *Roncker* test can give great deference to school district decisions. The *Holland* case indicates that courts applying its test may not always do so.

These examples counter the idea that the *Roncker* test creates too intrusive an inquiry into state and local education decisions. In each of the cases discussed that applied *Roncker*, the court expressly recognized the principle that courts should not engage in second-guessing of state and local officials. Further, in each of the cases the school district's proposed placement of a child diagnosed with autism ultimately prevailed. Thus, an examination of the *Roncker* test as applied reveals a standard of review that appears at least as deferential to state and local educational decisions as the standard in the *Daniel R.R.* and *Holland* tests, rather than the judicial second-guessing initially raised by the Fifth Circuit in *Daniel R.R.*

If the circuit tests are equivalent as applied in the context of autistic students, the critical issue is whether these tests effectively evaluate the factors comprising the "least restrictive environment" for a child with autism, and further, whether mainstreaming is fundamentally less important for children with autism. Because au-

192. *Sacramento City Unified Sch. Dist. v. Holland*, 14 F.3d 1398 (9th Cir. 1994).

193. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-01 (8th Cir. 1997) (quoting *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991)).

tism involves, among other things, deficits in social behavior, understanding how autistic children perceive social isolation and inclusion should be considered in evaluating the mainstreaming requirement in the context of autistic students. The following section discusses the tensions between the behavioral deficits observed in children diagnosed with autism and the mainstreaming requirement of the IDEA.

B. Tensions Between the Underlying Principles of the Mainstreaming Requirement and the Clinical Features of Autistic Spectrum Disorders

The underlying principles of the mainstreaming requirement are not stated in the statutory text of section 1412. In a recent article, Professor Ruth Colker suggests that the mainstreaming requirement was a response to a wide-spread practice of institutionalizing disabled students.¹⁹⁴ The mainstreaming requirement “was developed to close disability-only warehouses for children and encourage school districts to develop more humane environments in which children with disabilities could attain an appropriate and adequate education.”¹⁹⁵ This perspective thus contemplates a very different factual scenario than those encountered in the cases leading to the circuit tests above.¹⁹⁶ Even if, as Professor Colker argues, mainstreaming has roots in the movement away from deinstitutionalization, the modern incarnation of the mainstreaming requirement reflects broader concerns that segregated education of disabled students—even in “self-contained” classrooms at

194. Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 789 (2006).

195. *Id.* at 810.

196. For example, the Third Circuit in *Oberti* interprets the mainstreaming requirement as focusing on the difference between placement in a regular classroom and placement outside of a regular classroom, such as a self-contained classroom for special education, not between placing a student in an institution and a regular school:

We construe IDEA’s mainstreaming requirement to prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily. In addition, if placement outside of a regular classroom is necessary for the child to receive educational benefit, the school may still be violating IDEA if it has not made sufficient efforts to include the child in school programs with nondisabled children whenever possible.

Oberti v. Bd. of Educ., 995 F.2d 1204, 1207 (3d Cir. 1993).

regular schools—will risk stigmatization.¹⁹⁷ Further, it reflects the idea that mainstreaming has important non-academic benefits, such as the development of age-appropriate peer networks and social behaviors.¹⁹⁸ For several reasons discussed below, it may be appropriate to relax the mainstreaming requirement in the context of children with ASD because of the inherent tensions between the underlying principles of mainstreaming and the clinical features of autism.

The potential for stigmatization resulting from segregated special education is offered as one factor in support of a mainstreaming requirement. This Note proposes, however, that stigmatization can be described from at least two perspectives, the first is egocentric, from the standpoint of the disabled child, while the second is extrinsic, from the perspective of peers, teacher or possibly parents. Interestingly, Professor Colker cites studies finding that special education students can perceive their placement positively, suggesting that some disabled students do not associate a stigma with their education.¹⁹⁹ In the context of autistic children, the scientific literature suggests that children with ASD do not tend to report accurately social acceptance nor do they appear to express loneliness despite lower social acceptance. For example, one study suggests that many “highly-functioning” children diagnosed with ASD are in fact objectively less socially accepted by their peers, but that the children diagnosed with ASD report low levels of loneliness and social rejection.²⁰⁰ If one goal of mainstreaming is to minimize

197. See, e.g., *id.* at 1217 n.24 (“Teaching nondisabled children to work and communicate with children with disabilities may do much to eliminate the stigma, mistrust and hostility that have traditionally been harbored against persons with disabilities.”).

198. These concerns are evident in the discussion of most case law that has followed the development of the circuit tests of compliance with mainstreaming. In *Daniel R.R.*, the Fifth Circuit clearly conceived of the social benefits of mainstreaming as a part of an academic benefit: “[L]anguage and behavior models available from non-handicapped children may be essential or helpful to the handicapped child’s development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment.” *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989); see also *Sacramento City Unified Sch. Dist. v. Holland*, 14 F.3d 1398, 1401 (9th Cir. 1994) (“evidence indicated that [the disabled student] had developed her social and communications skills as well as her self-confidence from placement in a regular class.”); *Hartmann*, 118 F.3d at 1002 (noting that social development is an important consideration in educational placement decisions, although it should not “outweigh . . . failure to progress academically in the regular classroom”).

199. See Colker, *supra* note 194, at 833-34.

200. See, e.g., Brandt Chamberlain et al., *Involvement or Isolation? The Social Networks of Children with Autism in Regular Classrooms*, 37 J. AUTISM DEV. DISORDERS 230, 240 (2001) (finding that children with autism show a “happy obliviousness” to

any stigmatizing effects the disabled child might perceive, the finding that ASD children do not appear to report loneliness or social rejection would tend to diminish the importance of mainstreaming for these students. Further, peers and teachers of children with ASD report “burn out” experiences from efforts to include these children in classroom activities.²⁰¹ Because each of the circuits considers the effects of mainstreaming on the other students, such “burn out” effects should be another factor that diminishes the importance of mainstreaming children with ASD where there are placements that afford appropriate educational benefits.

This potential for diminished importance of mainstreaming is reinforced by the fact that most of the treatments for autism require extensive time spent in a one-on-one environment with the therapist. For example, the ABA and TEACCH methods of therapy involve substantial one-on-one interactions between the child and the clinician, outside of the mainstream classroom environment.²⁰² Typically, the recommendation indicates forty hours per week of therapy.²⁰³ These therapies may thus run directly counter to the goals of section 1412(a)(5)(A). For example, in *Gill v. Columbia*, the Eighth Circuit agreed with the district court and the school district that an IEP providing for thirty-five to forty hours per week of home-based ABA therapy violated the mainstreaming requirement because it would not allow an autistic child sufficient interaction with non-disabled peers.²⁰⁴ If the child in *Gill* would not truly have benefited from mainstreaming due to the social impairments observed in autism, then the court’s emphasis on mainstreaming as a basis for rejecting an IEP that included behavioral therapy was a disservice to the child.

Another factor that, if true, would minimize the importance of mainstreaming in the context of children with ASD is the efficacy of the current treatment methods at developing social skills. One

their social status). One important caveat in interpreting these studies is that they are limited to highly-functioning ASD children whose parents have provided consent to participation. The sample may not include children whose parents would not consent out of fears that participation might highlight or exacerbate their child’s social isolation. This could thus skew the measurement of how ASD children experience a mainstream classroom environment.

201. See, e.g., Shunit Reiter & Taly Vitan, *Inclusion of Pupils with Autism: The Effect of An Intervention Program on the Regular Pupils’ Burnout, Attitudes and Quality of Mediation*, 11 AUTISM 321, 321 (2007).

202. See *supra* Part I.

203. See Sallows & Graupner, *supra* note 22, at 420-21.

204. See, e.g., *Gill v. Columbia* 93 Sch. Dist., 217 F.3d 1027, 1033, 1038 (8th Cir. 2000).

recent study questions the efficacy of the behavioral therapies used to treat children with ASD.²⁰⁵ Lockett raises the criticism that “successful” behavioral intervention is often measured by an increase in the number of “correct” responses by the child, while ignoring the cognitive underpinnings that motivate the performance of the correct response.²⁰⁶ For example, if a therapist asks a child to make eye contact with her, the “correct” response would be to make such eye contact. If, over time, the child increases the number of “correct” responses, the therapy could be considered successful. Lockett criticizes this interpretation of “success” because the therapy may not increase the child’s intrinsic desire to make eye contact, the child is merely performing a conditioned behavioral response.²⁰⁷ This criticism has important consequences for the mainstreaming requirement of the IDEA in the context of autism. If, as Lockett cautions, behavioral therapies do not improve the intrinsic desire for social interaction and instead merely result in the increased frequency of the “correct” conditioned responses to social cues, then concerns about reducing the impact of social rejection and isolation would become less relevant. In this scenario, the other benefits of behavioral therapies, such as communication skills, would remain valuable, tending to provide the educational benefit that outweighs the potentially minimal or non-existent benefits of mainstreaming.

One caveat is that if being outside of the mainstream classroom has a larger negative effect on the autistic child’s social development than is currently believed, the therapeutic approaches currently used would be more likely to violate the mainstreaming requirement, since they involve removing the child from the social environment of the classroom. There are reports that autistic children do become socially isolated and also report feelings of social rejection and loneliness.²⁰⁸ Additionally, children whose diagnosis is more severe or whose socioeconomic or cultural background is at significant variance from the classroom norm may experience the classroom environment very differently than highly-functioning

205. See Tim Lockett et al., *Do Behavioral Approaches Teach Children with Autism to Play or Are They Just Pretending?*, 11 *AUTISM* 365 (2007).

206. See *id.* at 369.

207. See *id.* It is important to note that the authors do not argue that children with autism are incapable of developing social desires, rather that the specific behavioral techniques are not effective at promoting such development.

208. See Elinor Ochs et al., *Inclusion as Social Practice: Views of Children with Autism*, 10 *SOC. DEV.* 399 (2001).

ASD children, making it difficult to accurately predict the impact of mainstreaming without further study.²⁰⁹

Interestingly, the circuit courts have in several instances approved IEPs that involve such time intensive, one-on-one behavioral therapies,²¹⁰ indicating that courts are approving of placements that provide the greater therapeutic benefit to the students even though such therapy removes the students from the mainstream classroom. The issue is whether the child has been mainstreamed to the “maximum extent appropriate.”²¹¹ In some cases, the “appropriate” degree of mainstreaming may be quite limited. For example, in *Hartmann*, the court appeared to accord less importance to the mainstreaming requirement than to a meaningful educational benefit, stating that the “IDEA encourages mainstreaming, but only to the extent that it does not prevent a child from receiving educational benefit.”²¹² In the context of an ASD diagnosis, mainstreaming is arguably not as critical as an appropriate educational benefit, especially where concerns about stigmatization and delays in development of social behaviors are not clearly warranted.

These issues present a difficult challenge for a court hearing an IDEA case. Although *Rowley* established that the court be deferential to the decisions of the state and local school officials, the court should take notice of credible findings that the efficacy of commonly used behavioral therapies depend on the child’s pre-treatment characteristics.²¹³ This is true because the IEP must be tailored to the specific child’s needs.²¹⁴ For example, if pretreatment characteristics mean that the child will not benefit beyond a

209. See Sandra K. M. Tsang et al., *Application of the TEACCH Program on Chinese Pre-School Children with Autism: Does Culture Make a Difference?*, 37 J. AUTISM DEV. DISORDER 390, 391 (2007).

210. See, e.g., *Pachl v. Seagren*, 453 F.3d 1064, 1069 n.4 (8th Cir. 2006) (approving of IEP that included segregated classroom applying the TEACCH method); see also *Hartmann v. Loudon Co. Bd. of Educ.*, 118 F.3d 996, 1005 (4th Cir. 1997) (approving of segregated educational placement for child with autism, and noting that the “IDEA encourages mainstreaming, but only to the extent that it does not prevent a child from receiving educational benefit”). *Contra* *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1033 (8th Cir. 2000).

211. 20 U.S.C. § 1412(a)(5)(A) (2004).

212. *Hartmann*, 118 F.3d at 1005.

213. See Sallows & Graupner, *supra* note 22. Sallows & Graupner reported that the strongest predictors of treatment outcomes were the pretreatment degrees of imitation, socialization, language and daily living skills. The authors report the ability to predict with ninety-one percent accuracy whether a child would be a “rapid” or “moderate” learner. *Id.* at 434.

214. See *supra* note 60 and accompanying text.

certain amount of therapy, an IEP that extends therapy well beyond the effective amount would potentially not be tailored to the specific child's needs. This does not mean that courts should violate the principle of deference to state and local officials. In contrast, the courts should be deferential to state and local officials where those parties have met the procedural requirements of the IDEA, in large part because these officials are in the best position to evaluate the facts of the case, and also to evaluate any impact of special educational costs on the school district.

Professor Colker argues that the mainstreaming requirement is in many instances inappropriate, and that Congress should alter the statutory language to relax the mainstreaming requirement and also to allow for a subjective, case by case approach.²¹⁵ Given the heterogeneity in clinical outcome of the ASD diagnosis, a subjective approach is warranted, and the examination of case law in Part II suggests that school districts make significant efforts to accommodate the subjective needs of each child.²¹⁶ It is also likely that Professor Colker's argument in favor of amending the statutory language to permit a case-by-case analysis is largely moot, because each of the circuit tests discussed above applies a subjective standard, in large part based on the statutory language itself.²¹⁷ Colker's proposal, however, of shifting the importance of mainstreaming is especially relevant in the context of ASD, where the clinical features of these disorders and the favored therapies tend to make mainstreaming less appropriate. Congress, via statutory amendment, and the Department of Education, through regulatory changes, should relax the mainstreaming requirement in the context of children with autism.²¹⁸ This would allow school districts to develop IEPs for autistic children that are as effective as possible at

215. See Colker, *supra* note 194, at 855-58.

216. See, e.g., *Pachl v. Seagren*, 453 F.3d 1064 (8th Cir. 2006) (approving educational placement in a segregated classroom); see also *Hartmann*, 118 F.3d at 996 (approving of school district's educational plan that involved placement in self-contained classroom for child with autism); *Centerville City Sch. Dist. v. Goldman*, No. C-3-92-442, 1993 WL 1318610 (S.D. Ohio Aug. 24, 1993). *Contra* *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1038 (8th Cir. 2000).

217. See, e.g., *Daniel R.R. v. State Bd. of Educ.*, 574 F.2d 1026, 1046 (5th Cir. 1989) (“[T]he language of the [IDEA] itself provides a workable test for determining whether a state has complied with the [IDEA's] mainstreaming requirement.”).

218. The differential treatment of children with ASD is not likely to raise valid constitutional issues of equal protection. As Prof. Colker points out, “[t]he Supreme Court has not attached strict scrutiny to disability classifications. . . . Because strict scrutiny does not attach to disability, Congress arguably has more flexibility in thinking about remedial options in the disability context than in the race context.” Colker, *supra* note 194, at 807-08.

providing meaningful skill development. Further, the effective equivalence of the circuit tests for compliance with the mainstreaming requirement would increase Congressional certainty that it could proceed without concerns about differential impact on different regions of the country.

CONCLUSION

Autism is a relatively common disorder that is costly to families and society; facilitating treatment for autism is thus critical. Congress has placed a burden on schools of providing special education tailored to the needs of these children. As indicated above, the clinical features of autism and the therapies for autism are in tension with the mainstreaming requirement of the IDEA. By relaxing the mainstreaming requirement of the IDEA, Congress and the Department of Education would effectuate the laudable goal of allowing schools to provide optimal treatment for children with autism, while relying on the effective equivalence of the circuit tests of mainstreaming to obviate concerns about differing regional impacts of such legislative and regulatory change.

