

# **ECONOMICS AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: THE INFLUENCE OF FUNDING FORMULAS ON THE IDENTIFICATION AND PLACEMENT OF DISABLED STUDENTS**

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## **INTRODUCTION**

The Individuals with Disabilities Education Act (IDEA),<sup>1</sup> formerly the Education for all Handicapped Children Act, was enacted in 1975 in response to the increased acknowledgment that disabled children were being unfairly denied the educational opportunities enjoyed by their nondisabled peers.<sup>2</sup> Congress sought to remedy the inequality by providing supplemental federal funds to states which fulfill the requirements of IDEA, foremost among which is the provision to each disabled individual of a free appropriate public<sup>3</sup> education, in the least restrictive environment.<sup>4</sup>

IDEA provides little guidance, however, as to what constitutes an “appropriate” education.<sup>5</sup> Likewise, little definitive guidance is provided regarding how restrictive is too restrictive. Indeed, both of these requirements defy definition, as they must be determined on a case by case basis, depending on the needs of the individual.<sup>6</sup> There is a growing concern, however, that such determinations are being unduly influenced by economic concerns.<sup>7</sup> This Note will examine how special education is funded, focusing in particular on how various funding mechanisms may improperly affect the classification of disabled

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1. 20 U.S.C. §§ 1400-1485 (1994) [hereinafter IDEA].

2. See H.R. REP. NO. 94-332, at 2 (1975).

3. “‘The word ‘public’ is a term of art which refers to ‘public expense,’ whether at public or private schools.’” *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 1997 WL 2523, 2 (5th Cir. 1997) (quoting *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 233 n.10 (9th Cir. 1994)).

4. 20 U.S.C. § 1412 (1994).

5. Mark C. Weber, *The Transformation of The Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 366 (Winter 1990) (“[Early articles discussing ‘appropriateness’] noted . . . that the content of ‘appropriateness’ was so vague that it appeared Congress had left the term completely open to future administrative and judicial interpretation.”). See also *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (Court notes that “Congress was rather sketchy in establishing substantive requirements . . .”).

6. 20 U.S.C. §§ 1400(c), 1401(a)(16) (1994).

7. See, e.g., Fran O’Reilly, Center for Special Educ. Finance, *State Special Education Funding Formulas and the Use of Separate Placements for Students with Disabilities: Exploring Linkages*, (Policy Paper No. 7, 1995); Thomas B. Parrish, Center for Special Educ. Finance, *Fiscal Issues Related to the Inclusion of Students with Disabilities*, (Brief No. 7, 1995); U.S. Dep’t of Educ., 17th Ann. Rep. to Congress on the Implementation of the Individuals with Disabilities Education Act (1995).

children and the educational programs implemented on their behalf. Part I will provide a brief overview of IDEA, its history, purpose, and requirements; Part II will discuss how IDEA's requirement of a free appropriate public education is balanced with that of the least restrictive environment; Part III will examine the issue of cost in providing special education and related services; Part IV will explore the various special education funding formulas used by the federal and state governments; Part V will examine the influence of funding formulas on the placement of special needs children; and Part VI will review several states' efforts at funding reform, then propose legislative reform which would lessen inappropriate fiscal influences on special education placement decisions.

### I. AN OVERVIEW OF IDEA

"The Congress finds that . . . there are more than eight million children with disabilities in the United States today [and that] more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity . . . ."<sup>8</sup> Thus begins the IDEA. These findings reflect the fact that prior to the implementation of IDEA in 1975, disabled children were often excluded from public education, their academic needs largely unfulfilled, ignored, and, in some instances, actively frustrated.<sup>9</sup> In 1966, hearings before a subcommittee of the House of Representatives Education and Labor Committee revealed that only about one third of the nation's disabled children were receiving appropriate special education services. The other two thirds were either totally excluded from public education or "sitting idly in regular classrooms awaiting the time when they were old enough to drop out."<sup>10</sup>

In the early 1970's, however, the civil rights movement, which had already reformed the education of minority group students, began to influence the education of the handicapped as well.<sup>11</sup> Advocates of disabled children were arguing that the right to free public education which was afforded to non-handicapped children belonged to handicapped children, as well.<sup>12</sup>

In two federal court decisions, *Pennsylvania Association for Retarded Children v. Pennsylvania*<sup>13</sup> and *Mills v. Board of Education*,<sup>14</sup> the courts held that equal protection prevents the exclusion of handicapped children from public education. In states across the country, legislation regarding disabled children's rights to public education was being considered.<sup>15</sup> The social concerns

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8. 20 U.S.C. § 1400(b) (1), (3) (1994).

9. Weber, *supra* note 5, at 355-56.

10. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7.

11. Weber, *supra* note 5, at 356.

12. *Id.*

13. 334 F. Supp. 1257 (E.D. Pa. 1971), *aff'd*, 343 F. Supp. 279 (E.D. PA. 1972).

14. 348 F. Supp. 866 (D.D. Cir. 1972).

15. Weber, *supra* note 5, at 357 (describing early efforts to provide education to the disabled).

underlying these decisions and legislative reforms became the impetus for IDEA.

The purpose of IDEA is to “assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.”<sup>16</sup> Such education is to be received by disabled children “to the maximum extent appropriate . . . with children who are not disabled,” in what is commonly referred to as the “least restrictive environment.”<sup>17</sup> Included in IDEA are eligibility requirements and application procedures for states seeking federal special education funds.<sup>18</sup> The eligibility requirements are stated in general terms, primarily insisting that the states develop and implement various detailed policies and procedures which will ensure that disabled individuals will indeed have an opportunity to receive a free appropriate public education.<sup>19</sup> The specifics of those policies and procedures, as well as how they are to be implemented, are left largely to the states.<sup>20</sup> The Act provides that States which fulfill the requirements receive federal funds to supplement their own special education budgets, thus encouraging compliance with federal special education guidelines.<sup>21</sup>

IDEA also provides administrative procedures designed to protect the rights of the disabled child and his parents or guardians.<sup>22</sup> These include an opportunity for parents to be involved in the educational decisions affecting their child and the right to an impartial due process hearing on any complaints the parents may have regarding the identification, evaluation, and placement of their child.<sup>23</sup>

IDEA is an individualized statute: decisions concerning how and where a disabled child should be educated are based on the individual child’s “unique needs.”<sup>24</sup> Because all children are different, with different strengths and weaknesses and thus different needs, it is impossible to formulate specific, universal guidelines for their education, and indeed, IDEA does not purport to do so.<sup>25</sup> It does, however, require in all instances that a disabled child have the opportunity to receive a “free appropriate public education” (FAPE) in the “least restrictive environment” (LRE).<sup>26</sup>

The primary vehicle for ensuring such an education is the student’s

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16. 20 U.S.C. § 1400(c) (1994).

17. *Id.* § 1412(5)(b).

18. *Id.* §§ 1400-1485.

19. *Id.* § 1412.

20. *See supra* note 5 and accompanying text.

21. 20 U.S.C. §§ 1411-1414 (1994).

22. *Id.* § 1415.

23. *Id.*

24. *Id.* § 1400(c).

25. Laura F. Rothstein, *Disabilities and the Law* (1992), cited in Caren Jenkins, Note, *Administrative Exhaustion or Private Rights of Action: Priorities in Educating Students with Disabilities*, 25 GOLDEN GATE U. L. REV. 177, 184 (Spring 1995).

26. 20 U.S.C. § 1412 (1994).

Individualized Education Program, or IEP.<sup>27</sup> The IEP is a written statement which serves as a road map for the disabled child's education.<sup>28</sup> It includes a description of the child's current performance, short term and annual goals, special services to be provided to the child and the extent to which the child will be educated in a regular classroom, the anticipated duration of those services, and a schedule for evaluating the effectiveness of the IEP.<sup>29</sup> The IEP is created during a case conference attended by the child's parents or guardians, the child, when appropriate, his teacher, and a school representative authorized to offer and ensure the provision of necessary special services. The conference can also include any other interested parties, such as additional school personnel, therapists, psychologists, and others working with the disabled child.<sup>30</sup> All members of the IEP team are encouraged to provide input and suggestions regarding the child's educational needs and placement. A member of the IEP team may request a new case conference at any time, with the IDEA requiring that it reconvene a minimum of once a year to evaluate and make necessary revisions to the IEP.<sup>31</sup> In addition, parents who are dissatisfied with the identification and/or placement of their child may present a complaint which will be considered at an impartial due process hearing.<sup>32</sup>

## II. A BALANCING ACT

The goal of the case conference team is to create an IEP which will provide the child with a free appropriate public education (FAPE) in the least restrictive environment (LRE).<sup>33</sup> Ironically, even these two requirements (FAPE and LRE) do not always peacefully coexist.<sup>34</sup> Because IDEA provides little guidance concerning the meaning of these requirements, it has been left to courts to interpret them. The resulting decisions have distinguished between the two requirements.<sup>35</sup> Early decisions concentrated on FAPE, holding that it required only that states make available to each disabled child an education, at public

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27. *Id.* §§ 1401(a)(20). The court in *Oberti v. Board of Education* called the IEP the "centerpiece" of IDEA. 995 F.2d 1204, 1213 n.16 (3d Cir. 1993).

28. 20 U.S.C. § 1401(a)(20) (1994).

29. *Id.*

30. *Id.*

31. *Id.* § 1414(a)(5).

32. *Id.* § 1415(b).

33. *See supra* notes 26-27 and accompanying text.

34. *Oberti*, 995 F.2d at 1214 n.18 (citing Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 181 (Spring 1985)); *see also* Larry D. Bartlett, *Mainstreaming: On the Road to Clarification*, 76 ED. LAW REP. 17 (1992) ("By establishing these two requirements [FAPE and LRE] for the provision of special education to children with disabilities, Congress created an inherent tension in the implementation of the law.").

35. Weber, *supra* note 5.

expense, from which he might obtain some benefit.<sup>36</sup>

In *Board of Education v. Rowley*, Amy Rowley was a deaf elementary student whose parents challenged her IEP because it did not provide for Amy to have the services of a qualified sign language interpreter.<sup>37</sup> The District Court held that although Amy progressed easily from grade to grade with above average performance, her disability prevented her from hearing much of what transpired in the classroom, thus preventing her from achieving as much as she could if she could understand all that was being said.<sup>38</sup> The court then concluded that Amy was not receiving an appropriate education because she was not being given the opportunity to perform as well as if she had no disability.<sup>39</sup> The Supreme Court reversed, holding that the question of “appropriateness” was not whether the school was providing all it could to ensure the child’s success, or whether the disabled child was benefitting from her education to the same degree as her nondisabled peers.<sup>40</sup> The Court asked only whether the disabled child was receiving some benefit from her education.<sup>41</sup> Because Amy was progressing from grade to grade with above average performance, the Court concluded that her IEP was satisfactory.<sup>42</sup>

The *Rowley* Court cautioned that its decision was tailored to the facts of the case.<sup>43</sup> Later lower court decisions used this cautionary language to approach the discussion from a different angle, turning away from questions of appropriateness to examine questions of LRE, which the *Rowley* Court did not address.<sup>44</sup> Under IDEA, states are responsible for assuring that “to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that . . . removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>45</sup>

Courts focusing on this provision emphasized Congress’ intention that disabled children should be educated in the least restrictive environment. Based on this requirement, courts began to equate LRE with “mainstreaming”, or inclusion.<sup>46</sup> Two similar but distinct tests have been developed for determining if the requirement has been satisfied, resulting in a split among the circuits

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36. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

37. *Id.*

38. *Id.* at 185.

39. *Id.* at 185-86.

40. *Id.* at 198.

41. *Id.* at 203.

42. *Id.* at 209-10.

43. *Id.* at 202.

44. See Weber, *supra* note 5, for a thorough discussion of the development of case history regarding the interpretation of IDEA.

45. 20 U.S.C. § 1412(5)(b) (1994).

46. *Oberti v. Board of Educ.*, 995 F.2d 1204, 1207 n.1 (3d Cir. 1993).

regarding which is the appropriate test.<sup>47</sup>

The first test, known as the Roncker Test, was developed by the Sixth Circuit in *Roncker v. Walter*.<sup>48</sup> Under this test, courts consider (1) the benefits the disabled child would receive in a segregated special education environment as compared to the benefits he would receive in a regular education classroom; (2) whether the disabled child would be a disruptive force in the regular education classroom; and (3) the cost of mainstreaming the disabled child.<sup>49</sup> In considering step one, if the services which make a segregated setting superior to an integrated one can be provided in the integrated setting, then the segregated setting is inappropriate.<sup>50</sup>

The Fifth Circuit, in *Daniel R.R. v. State Board of Education*,<sup>51</sup> declined to follow the Roncker Test, finding that it had little basis in the IDEA.<sup>52</sup> Instead, the court fashioned its own test, known as the Daniel R.R. Test.<sup>53</sup> This test considers four issues: (1) the steps which the school district has taken to accommodate the disabled child in a regular education classroom; (2) the academic benefits the disabled child will receive from a regular education placement; (3) the non-academic benefits the child will receive in the regular education classroom; and (4) the effect the disabled child's presence will have on the regular education class.<sup>54</sup>

In *Oberti v. Board of Education*, the Third Circuit engaged in a comprehensive discussion and application of the Daniel R.R. Test.<sup>55</sup> In that case, the parents of a child with Downs Syndrome sued the school board for the Clementon School District, challenging the district's decision to place the Oberti's son in a separate special education program outside the district.<sup>56</sup> Rafael Oberti was an eight year old boy with Downs Syndrome, a disability that

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47. The Ninth Circuit in *Board of Education v. Holland* combined features of both tests. See text Part V, *infra*. The court's decision resulted in a more complete analysis which encompassed the concerns of both disabled and nondisabled students as well as those of the school district involved. 14 F.3d 1398, 1400-01 (9th Cir. 1994).

48. 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983). The Roncker test has been approved by the Fourth, Sixth, and Eighth Circuits. See also *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987).

49. *Roncker*, 700 F.2d at 1063. "Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children." *Id.*

50. *Id.*

51. 874 F.2d 1036, 1046 (5th Cir. 1989).

52. *Id.*

53. *Id.* This test is followed by the Third, Fifth, and Eleventh Circuits. See *Oberti v. Board of Educ.*, 995 F.2d 1204, 1215 (3rd Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991).

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

55. 995 F.2d 1204 (3rd Cir. 1993).

56. *Id.*

impaired his intellectual and communication abilities.<sup>57</sup> Before entering kindergarten, Rafael was evaluated by the school district's Child Study Team,<sup>58</sup> who recommended that Rafael be placed full time in a segregated special education class located in another school district.<sup>59</sup> Rafael's parents visited several of the special classes recommended by the school district but found them unacceptable.<sup>60</sup> Instead, the Obertis and the school district agreed that in the mornings Rafael would attend a regular developmental kindergarten class (for children not quite ready for kindergarten) at his neighborhood school, and in the afternoons he would attend a special education class in another school district.<sup>61</sup> The Clementon school district continued to be responsible for ensuring the appropriateness and effectiveness of Rafael's IEP because he lived in the Clementon district.<sup>62</sup>

Rafael progressed socially and academically in the developmental kindergarten class, but he experienced numerous behavioral difficulties.<sup>63</sup> These included repeated toileting accidents, temper tantrums, hiding during class, hitting and spitting on classmates, and, on several occasions, striking out at his teacher.<sup>64</sup> Although Rafael's teacher consulted with the school psychologist and other members of the Child Study Team to discuss ways of dealing with Rafael's behavioral problems, no significant steps were implemented and no special services were provided to aid Rafael and his teacher until late in the school year.<sup>65</sup> His IEP did not include a plan for addressing his behavioral difficulties, nor did it provide for special education consultation for his teacher or for communication between his teacher and the special education teacher.<sup>66</sup>

At the end of the school year, the school district again proposed placing Rafael in a segregated special education class for children classified as educable mentally retarded.<sup>67</sup> The district based its decision on Rafael's behavioral difficulties as well as their belief that Rafael could not benefit from education in a regular classroom.<sup>68</sup> Because Clementon School District did not offer a class such as they proposed, the separate placement would require Rafael to travel to another district.<sup>69</sup> His parents objected to the placement and requested that

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57. *Id.* at 1207.

58. New Jersey regulations defines the Child Study Team as "an interdisciplinary group of appropriately certified persons" responsible for determining Rafael's eligibility for special education and for developing, monitoring, and evaluating his *IEP*. *Id.* at 1208 n.2.

59. *Id.* at 1207.

60. *Id.*

61. *Id.* at 1207-08.

62. *Id.* at 1208 n.2.

63. *Id.* at 1208.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

Rafael be placed in a regular classroom in his neighborhood school, but the school district refused.<sup>70</sup>

The parties eventually agreed that Rafael would attend a special education class for children classified as “multiply handicapped” in a public elementary school in another district.<sup>71</sup> The placement required Rafael to travel forty-five minutes by bus to reach school.<sup>72</sup> As part of the agreement, the school district “promised to explore mainstreaming possibilities . . . and to consider a future placement for Rafael in a regular classroom in his neighborhood school.”<sup>73</sup>

Rafael progressed in the separate class: his toileting accidents and his disruptive behavior gradually abated.<sup>74</sup> Several months into the school year, however, Rafael’s parents discovered that, contrary to the agreement, the school district was not considering plans to mainstream Rafael.<sup>75</sup> In addition, they learned that Rafael had no meaningful contact with nondisabled students at his school.<sup>76</sup> The Obertis then filed for a due process hearing, requesting once again that Rafael be placed in a regular education classroom in his neighborhood school.<sup>77</sup>

The Administrative Law Judge (ALJ) denied the Oberti’s request and upheld the school district’s decision that the segregated special education class in an outside district was the least restrictive environment for Rafael.<sup>78</sup> The ALJ based his decision primarily on the testimony of the school district’s witnesses, who described Rafael’s behavioral difficulties in the developmental kindergarten class the year before.<sup>79</sup> He discounted the testimony of the Oberti’s expert witnesses, who contended that not only could Rafael be educated appropriately in a regular class with supplementary aids and services, but also that Rafael would benefit from being in a class with nondisabled children because he could learn important skills which he could not learn in the segregated class.<sup>80</sup>

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1209.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* The school district’s witnesses included the teacher of the developmental kindergarten class as well as other school district representatives and employees who had observed Rafael on one or more occasions. *Id.* at 1209 n.7.

80. *Id.* at 1210. The Obertis’ witnesses included a professor of education at Temple University who was also an expert in the education of disabled children. Her testimony was based on her observations of Rafael in the special education class, of his neighborhood school, a review of Rafael’s educational records, and her expertise in the area. Another witness for the Obertis was a teacher who had successfully integrated a Downs Syndrome student into his regular education class. The ALJ rejected the testimony of both witnesses because they did not have day-to-day experience with Rafael. However, the record does not indicate that the school district’s witnesses,



Rafael's parents also testified that, based on their experience with and understanding of their son, they believed that a regular classroom with supplementary aids and services was the best placement for Rafael.<sup>81</sup> Mrs. Oberti testified that she believed that the segregated placement was having a negative emotional impact on Rafael, who would cry regularly before getting on the bus that would take him to his class forty five minutes away.<sup>82</sup> One of the Oberti's neighbors testified that her son and other nondisabled neighborhood children played with Rafael, and that it was her belief that they all learned from each other by working and playing together.<sup>83</sup>

Despite the testimony of the Obertis and their neighbor, the ALJ was convinced by the school district's witnesses that Rafael's behavioral difficulties in kindergarten precluded an inclusive placement.<sup>84</sup>

Pursuant to IDEA, the Obertis sought review of the ALJ's decision in the United States District Court. During trial, the Obertis presented additional expert witnesses who testified that Rafael should be placed in a regular classroom with supplementary aids and services.<sup>85</sup> Although the school district continued to argue for a segregated placement for Rafael, the district court held that the school district had violated IDEA's requirement that disabled students be educated in the least restrictive environment, with the help of supplementary aids and services.<sup>86</sup> The court found that the school district had made only negligible efforts to include Rafael in a regular class, failing to provide him with any supplementary aids and services while he was in the developmental kindergarten class, then making no efforts to reintroduce him into the mainstream after he began attending the segregated class.<sup>87</sup> The court also found that there was reason to believe that the disciplinary problems which Rafael experienced as a kindergartner would not resurface with proper aids and services and in light of

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with the exception of the kindergarten teacher, had such day-to-day contact, either. *Id.* at 1210 n.9.

81. *Id.* at 1210 n.10.

82. *Id.*

83. *Id.*

84. *Id.*

85. By the time the dispute reached the district court, two years had passed since Rafael's attendance in the developmental kindergarten class. Pursuant to IDEA, the court reviewed the record of the administrative hearing as well as new evidence presented. Testifying for the Obertis, in addition to those who had testified at the due process hearing, was a professor of special education from the University of Wisconsin who for over twenty years had acted as a consultant to hundreds of school districts throughout the country regarding the education of disabled children. Also testifying was an expert in communication with children with developmental disabilities who stated that Rafael's speech and language therapy would be most effective if provided in a regular classroom. *Id.* at 1210-11.

86. *Id.* at 1212. The court disagreed with the findings of the ALJ because "they were largely and improperly based upon Rafael's behavior problems in the developmental kindergarten as well as upon his intellectual limitations, without proper consideration of the inadequate level of supplementary aids and services provided by the School District." *Id.*

87. *Id.*

his progress in behavioral skills in the interim.<sup>88</sup>

Applying the Daniel R.R. Test to the district court's findings, the Court of Appeals for the Third Circuit affirmed the district court's order that the school district develop a more inclusive program for Rafael for the following school year.<sup>89</sup> The court concluded that the school district had not taken sufficient steps to accommodate Rafael in the regular classroom, that the benefits to Rafael of an integrated placement would be significant, and that there was reason to believe that any lingering disruptive tendencies would be alleviated with the help of proper supplementary services.<sup>90</sup> The court added that even if a disabled child cannot be satisfactorily educated by full-time inclusion in a regular class, the school district still has an obligation to include the disabled child in school activities with nondisabled children whenever possible.<sup>91</sup> The court found an affirmative duty on the part of public schools to mainstream disabled students to the greatest possible degree, and to bring special education and related services to them in their regular education classrooms.<sup>92</sup>

Although the courts have divided the questions of FAPE and LRE, the statute in fact requires both.<sup>93</sup> As case history demonstrates, however, there is an inherent tension between appropriateness and inclusion.<sup>94</sup> By their very definition, specialized services are those offered to the disabled child to address needs which cannot be served by the regular education program.<sup>95</sup> These services can range from simple modifications in classwork, to intensive individualized instruction in an area of particular difficulty, to training in basic daily living skills, and although some can indeed be brought to the regular education classroom, clearly some of these services have to be provided in a more exclusive environment.<sup>96</sup> While inclusion in the regular education classroom provides significant social and academic benefits to the disabled child, an inappropriate insistence on including all disabled children in the regular classroom all of the time would deprive some children of needed help.<sup>97</sup> It thus becomes a balancing

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88. *Id.*

89. *Id.* at 1223-24.

90. *Id.* at 1221-22.

91. *Id.* at 1218.

92. *Id.* at 1224 n.29.

93. 20 U.S.C. § 1412 (1994).

94. *Oberti v. Board of Educ.*, 995 F.2d 1204, 1214 (3d Cir. 1993). The court quotes from Minow, *supra* note 34, who wrote that IDEA "embodies an express tension between its two substantive commitments to the 'appropriate education' and to the 'least restrictive alternative.' This tension implicates the choice between specialized services and some degree of separate treatment on the one side and minimized labeling and minimized segregation on the other." *Id.* at 1214 n.18.

95. *See supra* note 94.

96. 20 U.S.C § 1401(16), (17), (18), (19) (1994); *see also supra* note 94.

97. "The provision of appropriate educational programming may not always be available in the least restrictive setting, and the least restrictive setting may not always be the appropriate place for providing an education program." Bartlett, *supra* note 34, at 17.

act: to what extent can or should the disabled individual be educated in a regular education classroom with nondisabled peers and still receive the services he needs for an appropriate education.<sup>98</sup>

This is not a question easily resolved, nor is there only one answer. IDEA and its regulations offer guidance in the requirement that a “continuum of placements” be provided for disabled students.<sup>99</sup> Implemented properly, such a provision would allow educators and parents to move along the continuum until the best balance is found. Still, a new balance must be found in each individual case.<sup>100</sup> As the considerations on each end of the scale continue to be weighed today, it is imperative that the focus remain on the rights of disabled children to equality of educational opportunity, and that the balance reflect a genuine effort to protect those rights.

### III. THE COST FACTOR

As courts and commentators have recognized, the balance is further complicated by the issue of cost.<sup>101</sup> Within the disabled student population, the cost of individuals’ special education programs varies, but it is estimated that the average cost of the education of a disabled child is roughly two and a half times greater than that of a nondisabled child.<sup>102</sup> In addition, the number of students receiving special services under IDEA continues to increase. Since the enactment of IDEA in 1975 as the Education for all Handicapped Children Act, the number of disabled school children receiving special education and related services has increased by over forty percent.<sup>103</sup> During the 1993-94 school year, about ten percent of the school age population, or over five million children, received special education services.<sup>104</sup>

The reality of economic concerns was recognized early in the debate regarding the education of disabled students. In *Mills v. Board of Education*,<sup>105</sup> one of the cases which spurred the enactment of IDEA, the court stated that “[i]f sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is excluded from a publicly funded

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98. See David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 187 (1991) (Parents advocating a more integrated placement for their disabled child face the difficult task of stressing the child’s “unique needs” on the one hand and his similarities to nondisabled children on the other.).

99. 34 C.F.R. § 300.551(a) (1996).

100. See *supra* notes 24-25 and accompanying text.

101. See generally Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost be a Factor in Special Education Cases?*, 71 ED. L. REP. 11 (1992).

102. *Id.*

103. O’Reilly, *supra* note 7, at 1.

104. *Id.*

105. 348 F. Supp. 866 (D.D. Cir. 1972).

education consistent with his needs and ability to benefit therefrom.”<sup>106</sup>

Subsequent decisions have similarly acknowledged the reality of financial influences on the development of special education programs.<sup>107</sup> The results of such economic considerations have varied. In one case, the court weighed the cost of a residential placement for a child with Down’s Syndrome against the appropriateness of such placement.<sup>108</sup> The court determined that while cost remained a viable consideration, the expense of the costly placement was outweighed in this instance by its appropriateness, and the school was thus required to provide the residential placement.<sup>109</sup>

In another case, the court held that the cost of necessary nursing services for a severely handicapped child, while appropriate given unlimited resources, would place an undue financial burden on the school, and the school was thus not required to provide such services.<sup>110</sup> However, the court emphasized that its decision was not to be construed as relieving schools from providing any high cost services: “[R]elated services’ [are not] only those services which can be provided at low cost to the district . . . . To the contrary, the states reap the benefit of federal monies [and may be required to provide] special services or [to hire] additional personnel at considerable expense.”<sup>111</sup>

The preceding cases are representative of the cases in which cost considerations are an issue in developing a special education program.<sup>112</sup> In some instances, the courts have found that the expense of providing a particular placement or service is prohibitive, despite its otherwise appropriateness for the child. In other cases, the child’s need for a particular placement or service, and its consequent appropriateness, was so great that it outweighed the high price tag. Most circuits agree, however, that realistically the cost of a proposed special education placement must be considered in determining whether the program should be implemented.<sup>113</sup>

It is, once again, a balancing act which must be achieved in each case, for each disabled child, individually. The expense of providing special education and related services, while encompassing a wide range,<sup>114</sup> can be extensive,<sup>115</sup> and although financial considerations alone cannot determine a child’s special

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106. *Id.* at 876.

107. *See* Collins & Zirkel, *supra* note 101, for a circuit by circuit discussion of how cost is considered in special education cases.

108. *Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982).

109. *Id.*

110. *Bevin H. v. Wright*, 666 F. Supp. 71 (W.D. Pa. 1987); *see also* *Barnett v. Fairfax School Bd.*, 927 F.2d 146, 154 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (“[A]ppropriate’ . . . does not mean the best possible education that the school could provide if given access to unlimited funds.”).

111. *Wright*, 666 F. Supp. at 75-76.

112. *See supra* note 107.

113. *See supra* note 107.

114. Collins & Zirkel, *supra* note 101, at 11.

115. Some placements can cost more than \$100,000 per year. *Id.*

education placement,<sup>116</sup> they must nonetheless be a factor in any realistic determination of what a school can and should provide.<sup>117</sup> As one court stated, “Congress intended the states to balance the competing interests of economic necessity on the one hand, and the special needs of a handicapped child on the other, when making education placement decisions.”<sup>118</sup>

#### IV. PROVIDING FUNDING FOR SPECIAL EDUCATION

##### A. Federal Funding

IDEA is, among other things, a funding statute. It requires states to provide disabled children with special education and related services in return for Federal funding aid.<sup>119</sup> Recent data indicates, however, that the Federal government provides only nine percent of the funding for special education.<sup>120</sup> The maximum amount of funding which the Federal government can provide to a particular state is determined by calculating the number of children in the state who are receiving special education and related services, according to IDEA stipulations, and multiplying that number by forty percent of the average per-pupil expenditure in public elementary and secondary schools across the United States.<sup>121</sup>

##### B. State and Local Funding

The remaining portion of special education funding is left to states and local sources to provide.<sup>122</sup> Unlike the Federal funding formula, which is the same for each state across the nation, state funding mechanisms vary from state to state.<sup>123</sup> The most widely used formula for providing special education funds is based on pupil weights.<sup>124</sup> The “pupil weighting” formula allocates funds based on two or more categories of student-based funding for special education, expressed as a multiple of regular education aid.<sup>125</sup> In other words, the amount allocated for special education is based on a per pupil calculation, with special education

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116. *Barnett v. Fairfax School Bd.*, 927 F.2d 146, 154 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); Collins & Zirkel, *supra* note 101, at 24 (concluding that “it would be inadvisable for any district to base a placement decision solely upon cost”).

117. “Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.” *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983).

118. *Barnett*, 927 F.2d at 154.

119. 20 U.S.C. §§ 1411, 1412 (1994).

120. Collins & Zirkel, *supra* note 101, at 11.

121. 20 U.S.C. § 1411(a) (1994).

122. U.S. Dep’t of Educ., 17th Ann. Rep., *supra* note 7.

123. *Id.*

124. *Id.* This formula is used in Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, South Carolina, Texas, and Utah.

125. *Id.*

students being divided into categories based on placement and/or disability.<sup>126</sup> Those categories are then weighted to determine by what amount the regular education per pupil allocation should be increased for students in each category of special education students. The per pupil allocation in each special education category is then that amount multiplied by the regular education per pupil allocation.

For example, a state using categories based on disability may determine that the education of learning disabled students requires twice the funding required for the education of nondisabled children. The same state may determine that the education of autistic children requires three times the funding required for the education of nondisabled children. Then, the funds allocated for each learning disabled student will be twice the amount allocated for a single regular education student. Likewise, the funds provided for each autistic child will be three times the amount expended on a single regular education child.<sup>127</sup>

Similarly, a state using categories based on placement<sup>128</sup> may determine that educating a disabled child in a separate class within the public school requires twice the funds necessary to educate a child in the regular education classroom. The state may also decide that educating a disabled child in a private school requires three times the funding necessary to educate a child in a regular education classroom. Then, as above, when allocating funds for special education, funds provided for each disabled child placed in a separate class will be twice the amount allocated for a student educated in a regular education classroom. Likewise, the funds provided for each disabled student placed in a private school will be three times the amount allocated for a student educated in a regular education classroom.<sup>129</sup>

Also commonly used among states is a resource-based formula.<sup>130</sup> These states base their funding on the allocation of specific education resources, generally either teachers or classroom units, needed for special education.<sup>131</sup>

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126. *Id.*

127. IDEA lists ten distinct types of disabilities: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities. 20 U.S.C. § 1401(a)(1)(A)(i) (1994). States using pupil weights may assign the same weight to several disabilities.

128. A sampling of placements discussed by O'Reilly, *supra* note 7, at 8, includes regular class, resource room, separate class, public day school, private day school, public residential school, private residential school, and homebound hospital.

129. This explanation is simplified both to make the issue easier to understand and to highlight the connection between funding and placement and/or disability. Some systems are considerably more complex: New Jersey's funding formula, for example, includes 26 weights based on student disability and placement. O'Reilly, *supra* note 7.

130. States using this formula include California, Delaware, Illinois, Kansas, Mississippi, Missouri, Nevada, Ohio, Tennessee, Virginia, and Washington. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7.

131. *Id.*

Classroom units are derived from prescribed staff/student ratios by disability or placement.<sup>132</sup>

A third formula is percentage reimbursement, with funding based on a percentage of either allowable or actual expenditures.<sup>133</sup> Under this formula, the proportion of funds received from the state is the same regardless of the educational environment in which the disabled student is placed.<sup>134</sup>

The final funding mechanism is simply a flat grant, based on either special education enrollment or total enrollment.<sup>135</sup>

#### V. FUNDING FORMULA AS AN INAPPROPRIATE INFLUENCE

As discussed in Parts II and III, courts have recognized that the educational placements of students needing special education and related services requires a balance between appropriateness, the least restrictive environment, and cost considerations. However, although little data exists regarding the issue, there are growing concerns that placement decisions are being improperly influenced by the funding formulas by which special education funds are allocated.<sup>136</sup> Specifically, there is some concern that certain funding formulas provide schools with an incentive to place disabled children in more restrictive educational environments, creating a disincentive to place disabled children in the regular education environment “to the maximum extent appropriate.”<sup>137</sup> This frustrates not only the LRE requirement of IDEA, but also the FAPE requirement, as special education programs are then designed to meet the needs of the school, not the needs of the disabled child.<sup>138</sup>

Evidence that these concerns are well-founded is demonstrated in *Board of Education v. Holland*.<sup>139</sup> Rachel Holland was a moderately mentally handicapped nine year old.<sup>140</sup> She had an I.Q. of 44 (100 is average), and had attended various special education preschool programs in the Sacramento City

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132. *Id.*

133. *Id.*

134. O'Reilly, *supra* note 7, at 14. States using this formula include Colorado, Connecticut, Idaho, Louisiana, Michigan, Minnesota, Nebraska, North Dakota, Rhode Island, South Dakota, Wisconsin, and Wyoming. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7.

135. *Id.* This system is used by Maryland, Massachusetts, Montana, North Carolina, Vermont, and West Virginia.

136. See O'Reilly, *supra* note 7; see also Parrish, *supra* note 7.

137. “[I]t is becoming increasingly clear that special education fiscal policies sometimes affect program provision in unanticipated ways and may sometimes serve as a barrier to the implementation of more integrated and inclusive programming for students with disabilities.” Parrish, *supra* note 7, at 2.

138. “Governmental statements of support for more inclusive placements are not likely to change local practice if the accompanying fiscal provisions actively discourage them.” *Id.* at 2.

139. 14 F.3d 1398 (9th Cir. 1994).

140. *Id.* at 1400.

Unified School District.<sup>141</sup> When she was ready to enter kindergarten, Rachel's parents requested that she be placed in a regular education classroom full time.<sup>142</sup> The school district denied the request and suggested a placement whereby Rachel would be in a special education classroom for academic subjects and a regular education classroom for non-academic subjects, such as art, music, lunch, and recess.<sup>143</sup> Rachel's parents rejected this placement and instead enrolled Rachel in a regular education classroom in a private school.<sup>144</sup> She remained in regular classes in the private school for the several years during which her placement was disputed and finally resolved.<sup>145</sup>

Pursuant to IDEA,<sup>146</sup> Rachel's parents appealed the school district's placement decision to a state hearing officer.<sup>147</sup> The Hollands argued that Rachel most effectively improved both social and academic skills in a regular education classroom and would not benefit from a special education class.<sup>148</sup> The school district's position before the hearing officer was that Rachel's disability was too severe to allow her to benefit from a regular class.<sup>149</sup>

The hearing officer found that Rachel had indeed benefitted from the regular class, that she was not disruptive in the regular class, and that the cost was not so great that it weighed against placing Rachel in a regular class.<sup>150</sup> The school district was ordered to place Rachel in a regular education classroom full time with support services.<sup>151</sup>

The school district appealed to the district court.<sup>152</sup> The court established a four part inquiry, which was approved by the court of appeals, to determine the appropriateness of the school district's proposed placement.<sup>153</sup> First, the court must consider the educational benefits available to the child in a regular education classroom, supplemented with appropriate aids and services, as compared to the educational benefits available in a special education classroom; second, the court must consider the non-academic benefits of interaction with non-disabled children; third, the court must consider the effect of the disabled child's presence on the teacher and other classmates; and fourth, the court must consider the cost of mainstreaming the child.<sup>154</sup>

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. 20 U.S.C. § 1415(b)(2) (1994).

147. *Holland*, 14 F.3d at 1400.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1400-01.

154. *Id.*



The court found for Rachel on each of the first three considerations.<sup>155</sup> It relied on information from Rachel's teacher and parents as well as other experts who testified that Rachel had made "significant strides" in a regular classroom at the private school.<sup>156</sup> In addition, witnesses of both parties testified that Rachel was well-behaved and followed directions, and Rachel's teacher stated that Rachel did not interfere with the teacher's ability to teach the other children.<sup>157</sup> She suggested that Rachel would require only a part time aide to assist her in a regular classroom in the future.<sup>158</sup>

Regarding the issue of cost, the school district argued that it would cost the district \$109,000 to educate Rachel in a regular classroom full time.<sup>159</sup> They based this estimate on the cost of providing a full time aide for Rachel plus \$80,000 for school-wide sensitivity training.<sup>160</sup>

The court found this cost to be significantly overstated.<sup>161</sup> First, Rachel would not require a full time aide, only a part time aide.<sup>162</sup> Based on the school district's figure, this would probably cost less than \$15,000.<sup>163</sup> In addition, the court noted that not only did the district school fail to establish that sensitivity training was necessary, it found that even if such training were necessary, there was evidence from the California Department of Education that the training could be obtained at no cost.<sup>164</sup>

The school district had one final argument, however: *the cost of placing Rachel in a regular education classroom full time was too great because the school district would lose up to \$190,764 in state special education funding if Rachel were not enrolled in a special education classroom for at least 51% of the day.*<sup>165</sup> Despite evidence that Rachel benefitted significantly both academically and non-academically from full time enrollment in a regular education classroom,<sup>166</sup> despite evidence that she was not a disruptive influence and did not

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155. *Id.* at 1401-02.

156. *Id.* at 1401. The Hollands' witnesses testified that Rachel learned by "modeling" her nondisabled classmates, suggesting that the regular classroom placement provided motivation for Rachel. *Id.* at 1401 n.4.

157. *Id.* at 1401.

158. *Id.*

159. *Id.* at 1402.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* The school district indicated that a full time aide would cost less than \$30,000 (\$109,000 total cost minus \$80,000 for sensitivity training).

164. Beyond these considerations, the court found that the school district's calculations should have included a comparison to the cost of their proposed placement for Rachel, which was a separate special education class with a full time special education teacher and two full time aides. *Id.*

165. *Id.* at 1404.

166. *Id.* at 1401.

interfere with the education of her peers,<sup>167</sup> despite evidence that the cost of mainstreaming Rachel would be insignificant,<sup>168</sup> and despite the requirements and purposes of IDEA,<sup>169</sup> the school district argued that Rachel should be placed in the less beneficial, more restrictive educational environment of a special education classroom which happened to enable the school district to obtain more funding from the state.<sup>170</sup>

It cannot be doubted that the promise of greater funding for particular special education placements can provide a powerful incentive for schools to find those placements the most “appropriate” educational settings for disabled children.<sup>171</sup> The same can be argued for funding based on type of disability: where more severe disabilities garner more funding for the school district, schools have an incentive to classify students as having those disabilities. In turn, the severity of the disability identified can lead to the conclusion that the child needs more specialized services, and hence a more restrictive placement.<sup>172</sup>

A recent study sought to examine the relationship between states’ funding formulas and their use of more restrictive placements for disabled children.<sup>173</sup> Although the results were inconclusive,<sup>174</sup> the study revealed that among the five highest users of separate placements, three used a funding formula based on placement or a combination of placement and disability.<sup>175</sup> In contrast, among the thirteen lowest users of separate placements, none used a funding formula based on placement, and only one used a formula based on disability.<sup>176</sup> On the other hand, eight of these thirteen states used a formula based on percentage reimbursement, which does not reward a school district for particular placements.<sup>177</sup>

## VI. THE NEED FOR REFORM

Although a state’s funding formula is not the only indicator of the incidence of more restrictive special education placements by school districts within the state,<sup>178</sup> it is nonetheless a major influence on placement decisions.<sup>179</sup> In a 1994

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167. *Id.*

168. *Id.* at 1402.

169. 20 U.S.C. § 1412 (1994).

170. *Holland*, 14 F.3d at 1402, 1404.

171. *See* O’Reilly, *supra* note 7, at 22; Parrish, *supra* note 7, at 2.

172. Parrish, *supra* note 7, at 2 (states a similar thought in even broader terms: “One way to avoid restrictiveness in the placement of students is to avoid fiscal incentives for identifying students as special education in the first place.”).

173. O’Reilly, *supra* note 7.

174. *Id.* at 14.

175. *Id.* at 15.

176. *Id.*

177. *Id.*

178. *Id.* at 22.

179. *See generally* O’Reilly, *supra* note 7; Parrish, *supra* note 7.

survey of State Educational Agency personnel in all fifty states, respondents acknowledged that the need to eliminate funding incentives that lead to restrictive placements was a primary driving force behind recent efforts to reform special education funding.<sup>180</sup> Several states have already begun the process. For example, Massachusetts, Montana, Pennsylvania, and Vermont have revised their state funding formulas in an attempt to break the link between funding and special education student count.<sup>181</sup> They now provide funds based on a form of census-based funding, whereby the amount of special education funding received by a school district is based on the district's total student enrollment, rather than on the number of students specifically identified for special education services.<sup>182</sup> This removes any financial incentive for labeling children as disabled or for placing them in restrictive special education programs. In Oregon, the state funding formula was recently revised to provide for a single pupil weight, with the per pupil special education allocation being twice that of the per pupil general education allocation.<sup>183</sup> While this does not remove the incentive for identifying children as disabled, it does remove financial incentives for providing restrictive placements for disabled students.<sup>184</sup>

Although these developments are encouraging, they are insufficient alone to ensure that the educational rights of disabled children are protected. It is proposed, therefore, that Congress amend the IDEA to strengthen such protection. This can be done in one of several ways. One alternative would be for Congress to restrict states' choices of special education funding formulas to those which do not encourage restrictive placements. Under such a scheme, any funding formula that is based on placement and/or disability would be prohibited. Grave concerns surround such a proposition, however. Most significantly, it promotes undue federal interference in an area (education) which has traditionally been considered a state concern.<sup>185</sup> This violates the principles of federalism on which our government is founded,<sup>186</sup> "one of the peculiar strengths [of which is] each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.'"<sup>187</sup>

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180. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7. The survey was conducted by the Center for Special Education Finance (CSEF), a research center funded by the Department of Education.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. "[I]t is well established that education is a traditional concern of the states." *United States v. Lopez*, 115 S. Ct. 1624, 1640 (1995) (Kennedy, J., concurring) (citing *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974)); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

186. *Id.*

187. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)); *see also* *United States v. Lopez*, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed [when] the States may perform their role as laboratories for

This is particularly true when, as with special education funding formulas, the best alternative is not easily discerned.<sup>188</sup> In the 1994 survey of State Educational Agencies, the respondents as a group identified more than a dozen issues involved in developing a special education funding formula.<sup>189</sup> While the elimination of incentives for creating restrictive placements was a major concern, other concerns included flexibility, formula simplicity, fiscal accountability, and equity.<sup>190</sup> Allowing the states to act as laboratories for experimentation with various formulas affords the states the opportunity to balance these issues, prioritizing them according to local needs, and to develop and refine a workable formula which promotes those priorities. Evidence that this advantage of federalism is being realized lies in the growing number of states who have recently implemented, or are considering implementing, special education funding reform. Restricting the states' opportunity to experiment eliminates this advantage.

A better solution would be to eliminate from the IDEA the ambiguity regarding appropriateness and least restrictive environment. This could be accomplished by codifying the Ninth Circuit's test for placement discussed in *Board of Education v. Holland*.<sup>191</sup> This test combines features from both the Roncker Test and the Daniel R.R. Test to create a more comprehensive test which provides greater protection to disabled children consistent with the purpose and language of the IDEA.<sup>192</sup> The Holland Test also provides protection to teachers and nondisabled children by considering their need to educate and be educated in an environment free from undue disruption.<sup>193</sup> It also protects school districts by allowing them to consider the expense of alternative placements and the reality of limited funds.<sup>194</sup> It should be emphasized, however, that cost is the last consideration, and any revision of the IDEA must clearly state that the other considerations outlined in the Holland Test take precedence over fiscal concerns. If those considerations are resolved in favor of inclusion, then only in extreme circumstances, developed on a case by case basis, will cost be permitted to influence a disabled child's placement. The burden must be on the school district to show first, that the funds allocated to it for the education of disabled children were in fact expended on those children and their educational programs, and second, that extreme financial concerns exist which preclude an inclusive placement.

The advantage of codifying placement considerations to comply with the

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experimentation to devise various solutions where the best solution is far from clear.").

188. *Lopez*, 115 S. Ct. at 1640.

189. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7.

190. *Id.*

191. 14 F.3d 1398, 1404 (9th Cir. 1994). *See supra* Part V.

192. *Holland*, 14 F.3d at 1404. Steps 1 & 2 require the consideration of both academic and non-academic benefits that inclusion will provide to the disabled student.

193. *Id.* Step 3 requires consideration of the effect the disabled child will have on the teacher and on nondisabled classmates.

194. *Id.* Step 4 allows consideration of the costs of inclusion.

Holland Test, in addition to those already stated regarding the protection of the rights of all interested parties, lies in the resulting clarity of IDEA. Schools and parents would no longer be forced to guess what is required or what the children's rights are, and the extra guidance would likely result in more appropriate, effective placement decisions being made from the beginning. Not only would this benefit the disabled child by providing equality of educational opportunity, but it would also often eliminate the need for costly litigation which can divert resources away from the needs of the students, take crucial years of a child's development to be resolved, and create ill will between parents and the educators with whom their children spend a great portion of their early lives.

In addition, including placement considerations in a federal statute would not create the federalism concerns outlined above. States would still be free to experiment with funding formulas and with alternative placement ideas, as long as their decisions satisfied the IDEA's appropriateness and least restrictive environment requirements, as clarified by the Holland Test.

#### CONCLUSION

The ambiguity of the IDEA's substantive requirements, and the disagreement of the courts regarding how it is to be implemented, has created uncertainty regarding the educational rights of disabled children and the environment in which they should be educated. Further complicating matters is the reality of rising costs and limited funds, coupled with funding formulas which provide incentives to schools to place disabled children in more restrictive environments. While it would be inadvisable for the federal government to attempt to eliminate the use of incentive-laden funding formulas, the effect of such formulas could be counteracted by the inclusion in the IDEA of standards by which special education placement decisions must be guided. Standards consistent with the purpose of the IDEA were developed by the Ninth Circuit in *Board of Education v. Holland*.<sup>195</sup> The codification of the Holland Test would promote the purpose of IDEA and simplify its implementation. It would prevent financial incentives from contributing to the segregation of disabled children, while at the same time addressing the economic difficulties of providing the continuum of alternative placements and options envisioned in IDEA and necessary for the appropriate education of disabled children. In addition, the Holland Test would promote greater financial accountability, as the burden would be on school districts to regularly show that the state funds they receive are being spent on the disabled children and their special education programs for which the funds were requested and designated.

With revisions such as these, the special education programs developed for disabled children will truly be the product of genuine consideration of the children's interests and their right to equality of educational opportunity. Only then can IDEA's purpose be fulfilled—that each disabled child have an opportunity to receive a free appropriate public education in the least restrictive environment.

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195. 14 F.3d 1398, 1404 (9th Cir. 1994).