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SHOULD SPECIAL EDUCATION HAVE A PRICE TAG? A NEW REASONABLENESS STANDARD FOR COST

INTRODUCTION

The increasing cost of educating disabled children is one of the most pressing concerns among educators today.[1] According to the most recent national study, the total spending on special education students was $50.0 billion compared to only $27.3 billion for regular education during academic year 1999–2000.[2] Another study reported the national average of per pupil expenditures for special education as $12,525, which was ninety-one percent more than the general education population per pupil expenditure of $6,556.[3] Between 1995 and 2003, the number of students classified as needing special education services jumped from roughly 4.5 million nationwide to approximately 6.3 million, a thirty-eight percent increase.[4]

A circuit split exists surrounding the best test to employ when determining the most appropriate classroom placement of a special education student under the Individuals with Disabilities Act (IDEA).[5] One of the most controversial issues surrounding the circuit split concerns if and how the cost of a particular placement to a school district should factor into the decision of which learning environment is most appropriate for the child.[6] This article first provides a brief legislative history of IDEA which has strongly influenced the emergence of the three different circuit tests. Second, this piece describes the evolution of the three tests including their strengths and weaknesses as well as the Tenth Circuit's recent adoption of one of the tests in *L.B. ex rel. K.B. v. Nebo School District.*[7] Third, it discusses the court's failure in *Nebo* to articulate practical standards and argues that the Tenth Circuit erred in failing to include cost as one of its factors. Finally, this article proposes a new cost standard for

1. Telephone Interview with Pam Biscelgia, Legal Assistant, Denver Pub. Sch., in Denver, Colo. (Dec. 16, 2005).

2. Thomas Parrish, American Inst. for Research, Accountability in Special Education Finance 4 (Apr. 11, 2003), http://www.eprri.org/Presentations/Session5.ppt; e-mail from Thomas B. Parrish, Dir., Ctr. for Special Educ. Fin., American Inst. for Research (Dec. 19, 2005, 07:13:00 MDT) (on file with author). Prior to this study, another national study had not been conducted for fifteen years. *Id.*

3. Jay G. Chambers, et. al., Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability, Report 5, Special Educ. Expenditure Project 6 (June 2003), http://www.csef-air.org/publications/seep/national/Final_SEEP_Report_5.pdf.

4. Nat'l Ctr. for Educ. Statistics, http://nces.ed.gov/ccd/bat (data taken from statistical table using "Build a Table" tool provided at web site) (on file with author).

5. 20 U.S.C. §§ 1400-1500 (2005).

6. *See* Theresa M. Willard, *Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students*, 31 IND. L. REV. 1167, 1178 (1998).

7. 379 F.3d 966 (10th Cir. 2004).

the courts to consider in placing a disabled child in the most suitable learning environment.

I. THE LEGISLATIVE HISTORY OF IDEA

In 1975, the United States Congress enacted the Individuals with Disabilities Education Act.[8] Replacing the Education for all Handicapped Children Act of 1975,[9] Congress passed IDEA to address its increasing concerns that disabled children did not share the same educational rights as their nondisabled classmates.[10] Congress aimed to remedy this inequity by allocating federal funding to states that complied with the Act's principal goal of ensuring that all disabled students receive a "free and appropriate public education (FAPE) . . . in the least restrictive environment (LRE)."[11] In defining LRE, Congress expressed a strong preference that disabled students obtain instruction in a "regular" education classroom wherever possible: "to the maximum extent possible, children with disabilities . . . [must be] educated with children who are not disabled . . . ."[12] The LRE requirement would in rare circumstances permit placements in segregated or pull-out classrooms for students with more severe disabilities.[13]

The 1997 Amendments to IDEA had two goals: (1) "to strengthen the [LRE] requirement," and (2) to develop and improve the role and rights of the family in determining what that LRE should be.[14] The IDEA mandate established procedural safeguards to both protect the rights of the disabled and establish realistic expectations for the schools.[15] To better accomplish the task of identifying the most suitable LRE for a child, the school district must write and revise what is called

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8. 20 U.S.C. §§ 1400-1500 (2005).

9. Pub. L. No. 94-142, 89 Stat 773 (1975).

10. Willard, *supra* note 6, at 1167.

11. Brian L. Porto, Annotation, *Application of 20 U.S.C.A. § 1412(a)(5), Least Restrictive Environment Provision of Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400 et seq.*, 189 A.L.R. FED. 297 (2004); *accord* Anne E. Johnson, *Evening the Playing Field: Tailoring the Allocation of the Burden of Proof at IDEA Due Process Hearings to Balance Children's Rights and Schools' Needs*, 46 B.C. L. REV. 591, 591 (2005).

12. 20 U.S.C. § 1412(a)(5)(A). This section of IDEA describes the statute's goal to "include" or "mainstream" disabled children into the regular classroom:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate school, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in the regular with the use of supplementary aids and services cannot be achieved satisfactorily.

Id.

13. Roncker v. Walter, 700 F.2d 1058, 1065 (6th Cir. 1983) (holding that placement of a disabled child in a segregated special education class in a public school may satisfy the LRE provision, depending on the child's needs).

14. Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 816–17 (2002) (quoting 20 U.S.C. 1414(d)(1)(B)(ii) (1997) and citing S. REP. NO. 105-17, at 4 (1997), H.R. REP. NO. 105-95, at 3 (1997)).

15. Johnson, *supra* note 11, at 594.

an "individualized education program" (IEP) for every special education student.[16] Then, a team of parents, special educators, regular classroom teachers, an administrator, and other service providers meet to consider the child's present abilities and needs before designing tailored annual learning goals and deciding the most appropriate LRE setting.[17]

What IDEA failed to do, however, was to adequately fund its initiative.[18] Although Congress is authorized under the IDEA to pay for forty percent of special education funding to the states,[19] in the state of Colorado, for example, in 2004, the federal government contributed only seventeen percent.[20] This funding shortfall coupled with rapidly increasing numbers of disabled students being classified has sparked an ongoing debate.[21] A central issue of that debate involves conflicting interpretations of whether cost ought to play a role in a child's LRE placement.[22]

Today, IDEA compliance issues such as this have divided the circuits.[23] Nevertheless, the Supreme Court has not visited the topic of IDEA mandates in over twenty years and has never decided the issue of LRE and placement.[24] In *Board of Education v. Rowley*,[25] the Court developed a two-part test to evaluate whether a school district had met the IDEA standard for providing a "free appropriate public education" (not LRE) when it failed to provide a sign-language interpreter for a hearing impaired child.[26] In the first part of the test, the Court focused on whether the district was in compliance with the procedural requirements of IDEA.[27] Since the Court determined that the district had complied with the procedural requirement, it then had to evaluate the second prong.[28]

In part two of the test, the Court assessed whether the school had designed an IEP that afforded the student the opportunity to receive an

16. Farley, *supra* note 14, at 814.
17. *Id.* at 814–15.
18. *See* Willard, *supra* note 6, at 1179.
19. *Id.*
20. Telephone Interview with Charman Paulmeno, Supervisor, Grants Fiscal Mgmt. Services Unit, Colo. Dep't of Educ., in Denver, Colo. (Dec. 19, 2005).
21. *See* Willard, *supra* note 6, at 1177.
22. Kevin D. Stanley, *A Model for Interpretation of Mainstreaming Compliance Under the Individuals with Disabilities Educ. Act: Bd. of Educ. v. Holland*, 65 U. MO. KAN. CITY L. REV. 303, 310–11 (1996).
23. Farley, *supra* note 14, at 818–19.
24. Stanley, *supra* note 22, at 306–07.
25. 458 U.S. 176.
26. *Rowley*, 458 U.S. at 181, 206-07.
27. *Id.* at 207 n.27. To satisfy this requirement, the school district must prove that "the State has adopted the state plan, policies, and assurances required by the Act . . . [and] . . . created an [individualized education program] for the child in question which conforms with the requirements of § 1401(19)." *Id.*
28. *See id.* at 206–07.

appropriate education.[29] The Court determined that the hearing-impaired child was performing above average and that the district was providing her with personalized instruction and extra services for her needs.[30] In concluding that the district had provided the child an appropriate education, the Court also indicated that a sign language interpreter was not necessary since the child was progressing well without one.[31] Although the *Rowley* test is not directly applicable to the issue of LRE placement,[32] it did lay a foundation for the three tests that would soon emerge among the circuits to determine a special education student's LRE.[33]

II. A THREE-WAY SPLIT

A. Background: LRE Provisions §§ 1212(a) & 1214

IDEA's failure to articulate a clear standard for what a school district must do to provide an "appropriate" education for a disabled child prompted the Supreme Court to respond in kind in the *Rowley* decision.[34] Conversely, IDEA's failure to offer clear standards to aid districts in deciding what sort of placement constitutes a disabled child's LRE has left the circuits to their own devices for three decades since the Act was passed.[35] The circuits have therefore developed three distinct tests to interpret and apply the IDEA in cases that challenge a school district's LRE placement of a disabled child.[36] In various applications, all three tests consider the benefits that the child receives in the regular classroom and the potential disruption the child's presence may cause to the learning of other students in the classroom.[37] The language in two of the tests explicitly considers cost in evaluating placement, while the language in the other test does not.[38]

While the tests share several commonalities, a split exists where the circuits have been unable to come to a consensus on which factors to use and when to apply them.[39] The circuit split translates into inconsistent interpretation of IDEA's LRE, resulting in inconsistent placements across the country.[40] In other words, "[t]his difference could result in

29. *Id.* Some factors the court considered to evaluate part two of the test included how well the handicapped student's education parallels the expectations at the corresponding regular grade level and to see if the student is able to earn passing grades. *Id.* at 207 n.28.

30. *Id.* at 184–85.

31. *Id.*

32. *See* A.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987).

33. *See* Joseph A. Patella, *Missing the "IDEA": New York's Segregated Special Education System*, 4 J.L. & POL'Y 239, 240–42 (1995).

34. *See* Stanley, *supra* note 22, at 305, 07.

35. *See* Willard, *supra* note 6.

36. Stanley, *supra* note 22, at 310.

37. *See generally* Farley, *supra* note 14, at 837–39 (comparing the educational benefits and disruptive impact associated with supplementary aids and services in regular education with those of a more segregated setting).

38. *See* Stanley, *supra* note 22, at 308–10.

39. *See* Farley, *supra* note 14, at 818–19.

40. *Id.* at 809–10.

completely different placements being found 'appropriate' for the same student."[41] For example, a special education student from a military family might find himself in a self-contained classroom segregated from regular education students in one part of the country one year, and in a mainstream education classroom with a classroom assistant and supplemental therapy in another state the next year.[42] Similarly, where cost is a factor at issue, the resulting disparaging placements are magnified.[43] While Massachusetts has placed over sixty percent of the state's mentally retarded population into regular mainstream classrooms, Kentucky, Tennessee, Michigan, and Ohio have only mainstreamed ten percent of their mentally retarded children.[44] The inconsistent interpretations between the three tests thus undermine the IDEA's goal of granting equal protection to special education students across the country.[45]

B. The Roncker *Test*

In 1983, the Sixth Circuit developed the first test in *Roncker v. Walter*.[46] The issue in *Roncker* surrounded whether the district's placement of a nine year old boy with severe mental retardation and seizures was his LRE.[47] The district court upheld the school district's "LRE" placement in a self-contained classroom with exclusively mentally retarded students, even though the placement did not allow the child to interact with non-disabled peers.[48] On appeal, the court held that "[in] a case where a segregated facility is considered superior, the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."[49] Heeding Congress's "strong preference" for mainstreaming, the court reasoned that IDEA mandates that disabled students receive regular classroom instruction unless the benefits of the segregated classroom would far outweigh those in the mainstreamed setting.[50]

In determining whether a school district's placement of a student is the LRE, the court articulated three factors: (1) the benefits to the disabled child of receiving regular education classroom instruction as compared to those received from the special education instruction in a segregated classroom; (2) the potentially disruptive impact of the disabled child on the teacher and students in the regular classroom; and (3) the

41. Stanley, *supra* note 22, at 311.
42. *See* Farley, *supra* note 14, at 818–19.
43. *See* Stanley, *supra* note 22, at 310–11.
44. *Id.* at 311.
45. *See id.*
46. 700 F.2d 1058; Willard, *supra* note 6, at 1172.
47. *See Roncker*, 700 F.2d at 1060.
48. *Id.* at 1061.
49. *Id.* at 1063.
50. *Id.*

cost of mainstreaming.[51] To evaluate the cost factor, the court considered whether the expense of such extensive supplemental aid required for the child to be mainstreamed was so significant that it would mean taking away funding that other district students also needed.[52] The court indicated that it retained some discretion in deciding "whether one program is excessively expensive in comparison to another." [53] However, in its holding, the court did not directly discuss the issue of cost and failed to articulate a clear standard for assessing whether one program is too expensive or not.[54]

Following the Sixth Circuit's lead, the Eighth Circuit adopted the *Roncker* test in *A.W. v. Northwest*,[55] stressing the cost factor in its holding that placing the student in a mainstreamed classroom was not feasible due to the expense.[56] Because the child's handicap was so severe, the court concluded that the child was not benefiting from mere observation of other students in the mainstream classroom.[57] More importantly, providing the child's education in a regular setting would require the costly hiring of a specially trained teacher for this one student in the school.[58] Citing *Roncker's* suggestion that cost is "a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children,"[59] the court upheld the district's placement because the minimal benefit of the child's placement in the mainstream setting was outweighed by the "reduction in unquestioned benefits to other handicapped children which would result from an inequitable expenditure of the finite funds available."[60]

Additionally, the Fourth Circuit approved the *Roncker* test in *Devries v. Fairfax County School Board*[61] in 1989. There, the court upheld a vocational placement over the seventeen-year-old autistic boy's local high school even though it was a segregated placement and thirteen miles away.[62] The court applied *Roncker's* reasoning: "In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."[63]

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51. *See id.*
52. *See id.*
53. *Id.* at 1066.
54. *See id.* at 1059–64.
55. 813 F.2d 158 (8th Cir. 1987).
56. *See A.W.*, 813 F.2d at 163.
57. *A.W.*, 813 F.2d at 161–62.
58. *Id.*
59. *Id.* at 163.
60. *Id.* at 162–63.
61. 882 F.2d 876, 878–80 (4th Cir. 1989).
62. *Devries*, 882 F.2d at 880.
63. *Id.* at 879 (quoting *Roncker*, 700 F.2d at 1063).

C. The Daniel R.R. *Test*

Six years after the *Roncker* decision, the Fifth Circuit developed an alternative test for LRE in *Daniel R.R. v. State Board of Education*.[64] Here, the court pointed to the statutory language of IDEA's LRE definition as the basis for its two-part evaluation of special education services:

> To the maximum extent appropriate, children with disabilities . . . 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.[65]

The first part of the inquiry investigates whether the child could receive an FAPE in the regular classroom setting.[66] If a regular classroom is not possible and the school intends to place the child in a more restrictive classroom, the second part seeks to ensure that the child is still placed in the LRE.[67]

Under the first prong of the test, the court assesses four factors: (1) whether education in the regular classroom can be achieved successfully with the incorporation of "supplementary aids and services;" (2) the benefits to the child in achieving goals on her IEP in the regular classroom; (3) the overall experience and benefits to the child in the mainstream setting as compared to the segregated classroom situation; and (4) the impact that the child's disability would have on the regular classroom including the other students' abilities to learn and the teacher's ability to effectively teach without disruption.[68]

The court in *Daniel R.R.* upheld the school district's decision to remove Daniel, a six-year-old boy with Down's Syndrome to a self-contained classroom, because application of the factors in the first prong of the test indicated that this would be to his benefit and the benefit of other students.[69] The court concluded that the regular kindergarten teacher made "genuine and creative efforts to reach Daniel, devoting a substantial – indeed, a disproportionate – amount of her time and divert[ing] much of her attention away from the rest of the students."[70] Finding that the child's handicap had impeded his development, the court

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64. 874 F.2d 1036 (5th Cir. 1989).

65. 20 U.S.C. § 1412 (2005); *Daniel R.R.*, 874 F.2d at 1048. "The term 'supplementary aids and services' means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate." 20 U.S.C. § 1401 (2005).

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

67. *Id.* at 1050.

68. *Id.* at 1048–49.

69. *Id.* at 1050.

70. *Id.*

concluded that he was unable to benefit academically.[71] Furthermore, the court determined that the benefits of the special education classroom outweighed the only benefit of the regular classroom—which was interaction with nondisabled peers.[72] Finally, the court felt that the child's presence in the classroom was disruptive to the other children, especially given the disproportionate amount of time the teacher had to spend on him.[73]

Having determined that the child could not successfully receive instruction in a mainstreamed classroom under the first prong of the test, the court then moved to the second prong to ensure that the child would still be properly placed in his LRE.[74] The court considered whether the school district, in placing the child in a self-contained setting, had complied with IDEA by taking immediate steps to include the child in mainstreamed activities such as gym, art, or lunch to the maximum extent possible.[75] Under the second prong of the test, the court found that the school district had indeed taken appropriate and timely steps to mainstream the student by including him with regular education students for recess and lunch.[76]

In addition, the Fifth Circuit in *Daniel R.R.* chose not to include cost as an explicit factor in its test.[77] However, the court may have left open the possibility that cost might be relevant on occasion in its suggestion that the *Daniel R.R.* factors were not "an exhaustive list."[78] In its only mention of cost, the court cited *Roncker*, but quickly dismissed it as a non-issue in *Daniel R.R.*, since neither party broached the issue.[79]

The Third Circuit was next to apply the *Daniel R.R.* test in *Oberti v. Board of Education*,[80] noting that the language in the two-pronged test more closely connected to the wording in IDEA.[81] Specifically, the court approved how the test stressed the importance of mainstreaming "to the maximum extent appropriate" and required IEPs to address "each child's specific needs."[82] In 1991, the Eleventh Circuit also adopted the *Daniel R.R.* test in *Greer v. Rome City School District*.[83] Subsequently, as the courts reviewed more and more cases, they began articulating and delineating more specific standards for each of the factors in the test.[84] For

71. *Id.*
72. *Id.* at 1050–51.
73. *Id.* at 1051.
74. *Id.*
75. *Id.*
76. *Id.* at 1051.
77. *Id.* at 1049 n.9.
78. *Id.* at 1048.
79. *Id.* at 1049 n.9.
80. 995 F.2d 1204 (3d Cir. 1993).
81. *Oberti*, 995 F.2d at 1215.
82. *Id.*
83. 950 F.2d 688, 696 (11th Cir. 1991).
84. *See generally* Farley, *supra* note 14, at 825-28.

example, where the school district had not made a good faith effort to actually provide supplemental services or include the student in a mainstream class at all, the district court in *Girty v. School District of Valley Grove*[85] held that the school district failed factor one of prong one.[86] The court found that the school district had not made "reasonable" efforts to accommodate the child in a regular education classroom.[87]

To date, the Second Circuit has not formally adopted one test over the others, although in *Briggs v. Board of Education*,[88] the court overturned a district court decision relying on *Roncker*.[89] However, in *Mavis v. Sobol*,[90] the Second Circuit was one of the first courts to identify that a correlation between the student's level of disruption (factor three) and the level of supplemental aids potentially exists (factor one) in *Daniel R.R.*[91] Because the school district had not shown that the student in the case had been adequately provided with aids known to reduce disruptive tendencies, the court held that the school district failed the third factor of the *Daniel R.R.* test, and therefore, could not "rely on Emily's asserted behavioral difficulties as justification for removing her from a regular classroom."[92]

D. The Rachel H. *Test*

In *Sacramento City Unified School District v. Rachel H.*,[93] the Ninth Circuit combined features of the *Roncker* and the *Daniel R.R.* tests to produce the last major test, commonly referred to today as the *Rachel H.* test.[94] At issue in *Rachel H.* was the appropriate placement of a moderately retarded eleven-year-old.[95] The district's proposal split her time between regular and special education classes, while the parents advocated for a full-time regular education placement.[96] Holding for the parents, the district court did not adopt one of the two earlier tests outright—and did so without any explanation.[97] Instead, it identified the four key factors as being: (1) the "educational benefits" in a regular classroom with additional "aids and services" compared to the benefits in the special education classroom; (2) "the nonacademic benefits" of working with non-disabled students; (3) whether the student's presence creates a negative or disruptive impact on the instruction and learning process of

85. 163 F. Supp. 2d 527 (W.D. Pa. 2001).
86. *Girty*, 163 F. Supp. 2d at 534–36.
87. *Id.* at 534–35.
88. 882 F.2d 688 (2d Cir. 1989).
89. Farley, *supra* note 14, at 827 n.198.
90. 839 F. Supp. 968 (N.D.N.Y. 1993).
91. Farley, *supra* note 14, at 828.
92. *Mavis*, 839 F. Supp. at 991.
93. 14 F.3d 1398 (9th Cir. 1994).
94. Stanley, *supra* note 22, at 312.
95. *Rachel H.*, 14 F.3d at 1400.
96. *Id.*
97. Farley, *supra* note 14, at 829.

the regular education students; and (4) the cost required to provide the supplemental aids and services to include the child.[98]

The school district argued that the four factors indicated that inclusion was the LRE for the moderately retarded girl.[99] The court concluded that (1) with the aid of supplemental services, Rachel could receive a satisfactory education in the regular classroom;[100] (2) the child's self esteem would improve in the mainstream setting; (3) she was not disruptive to the learning environment;[101] and finally, (4) the court found that the district had not met its burden to prove excessive cost of the inclusion.[102]

On appeal, the Ninth Circuit upheld the lower court's decision and officially adopted the four factors as the appropriate test.[103] In its evaluation, the court emphasized that the district had failed to provide any evidence whatsoever that the cost of educating the student in the regular classroom was considerably more expensive than the district's placement.[104] The court further noted that the district's estimate of cost was inflated and inaccurate:

> By inflating the cost estimates and failing to address the true comparison, the District did not meet its burden of proving that regular placement would burden the District's funds or adversely affect services available to other children. Therefore, the court found that the cost factor did not weigh against mainstreaming Rachel.[105]

Since *Rachel H.*, one district court in the Seventh Circuit has applied but not adopted the *Rachel H.* test.[106] Additionally, the Ninth Circuit has further clarified and distinguished the meaning of the first factor from the other circuit tests in *Seattle School District v. B.S.*[107] In *B.S.* the court approved a broad interpretation of the phrase "educational benefit" to mean "academic, social, health, emotional, communicative, physical and vocational needs."[108] Where the child's severe emotional disorder had resulted in several hospitalizations, the court held that the regular classroom was an inappropriate placement despite the student's strong academic performance, because the child did not receive any nonaca-

98. *Bd. Of Educ. v. Holland*, 786 F. Supp. 874, 878 (E.D.Cal. 1992).
99. *Holland*, 786 F. Supp. at 884.
100. *Id.* at 880.
101. *Id.* at 882–83.
102. *Id.* at 883–84.
103. *Rachel H.*, 14 F.3d at 1404 (noting "this analysis directly addresses the issue of the appropriate placement for a child with disabilities").
104. *Id.* at 1402.
105. *Id.*
106. D.F. v. Western Sch. Corp., 921 F. Supp. 559 (S.D. Ind. 1996).
107. 82 F.3d 1493, 1500 (9th Cir. 1996).
108. *B.S.*, 82 F.3d at 1500.

demic benefits.[109] Thus, the court indicated that the scope of "educational benefit" should include more than mere "academic benefit."[110]

III. TENTH CIRCUIT ADOPTS THE *DANIEL R.R.* TEST IN *L.B. EX REL. K.B. V. NEBO SCHOOL DISTRICT*[111]

The circuit feud continues with the Tenth Circuit's recent adoption of the *Daniel R.R.* test.[112] The Third, Fifth and Eleventh Circuits also remain loyal to this test.[113] The Fourth, Sixth, and Eighth Circuits continue to follow *Roncker*, and the Ninth and Seventh Circuits employ the *Rachel H.* test.[114] In *L.B. ex rel. K.B. v. Nebo School District*, the Tenth Circuit upheld the LRE placement of an autistic student in a private preschool supplemented heavily by thirty-five to forty hours of one-on-one home instruction, in spite of the disproportionately high costs.[115] However, on remand, the court seemed to dismantle its own argument that cost was irrelevant when it directed the district court to consider the reasonableness of costs and placements in deciding how to reimburse the parents for their expenses.[116] Perhaps, the court's own contradiction suggests that the *Daniel R.R.* test is fine in theory but not in practice.

In *Nebo*, the plaintiffs-appellants had an autistic preschool-aged child.[117] The school district devised an IEP as required under IDEA and placed the child in a preschool with a population consisting of more than fifty percent handicapped students.[118] Although the district had considered a mainstream placement, it identified the more restrictive preschool as the best option for the autistic child.[119] However, the school district did offer to increase the percentage of non-disabled students in the child's classroom for her benefit.[120] The district justified its placement because the school taught special skill levels, many of which would have met the goals and needs in the child's IEP.[121]

Additionally, the school planned to provide the child with speech and occupational therapy sessions for several hours each week, and as many as fifteen hours of behavioral therapy.[122] However, although both parties recognized the need for behavior therapy, appellants argued that their daughter would only be able to master her IEP goals with thirty-five

109. *Id.*
110. *Id.*
111. 379 F.3d 966 (10th Cir. 2004).
112. *Nebo*, 379 F.3d at 977.
113. Stanley, *supra* note 22, at 310.
114. *Id.*
115. *Nebo*, 379 F.3d at 979, 968–69.
116. *Id.*
117. *Id.* at 968.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* (the specific type of behavioral therapy was called Applied Behavioral Analysis).

to forty hours of it per week.[123] The forty hours also included ten mainstream hours at the preschool.[124] Unhappy with the district's placement, the appellants opted instead to unilaterally enroll their daughter in a private preschool at their own expense for those ten hours, and they proceeded to hire at-home behavioral therapists to complete the remaining thirty hours.[125]

Appellants then requested a due process hearing for reimbursement of the cost of the ABA instruction.[126] The hearing officer determined that the school district's IEP and proposed fifteen hours of supplemental aids and services constituted the appropriate LRE under IDEA.[127] Alleging violations of IDEA, appellants next filed a complaint in the United States District Court in the District of Utah against the district for failing to place their daughter in her LRE.[128] The parties filed cross-summary judgment motions, and the district court held for the school district.[129] On appeal, the appellants again argued that the district court erred in concluding that the school district had correctly identified their daughter's LRE.[130] Overturning the decisions of the hearing officer and the district court, the court concluded that the preschool with disabled students was not the child's LRE.[131]

In *Nebo*, the Tenth Circuit carefully decided to adopt the *Daniel R.R.* test. Reflecting on the *Rachel H.* test, the court noted that this test shared much in common with the *Daniel R.R.* test, but that *Rachel H.* differed because it considered cost in addition.[132] The court summarized this distinction: "These circuits' LRE tests acknowledge the fiscal reality that school districts with limited resources must balance the needs of each disabled child with the needs of other children in the district."[133] In declining to adopt the *Roncker* approach, the court criticized *Roncker* as appositive only "in cases where the more restrictive placement is considered a superior educational choice. This feature makes the *Roncker* test unsuitable in cases where the least restrictive placement is also the superior educational choice."[134] Seeking to adopt a test that the circuit could use in any situation, the court approved the *Daniel R.R.* test.[135] In apply-

123. *Id.*
124. *Id.*
125. *Id.* at 968–69.
126. *Id.* at 969.
127. *Id.*
128. *Id.* at 970.
129. *Id.*
130. *Id.* at 974–75.
131. *Id.* at 975.
132. *Id.* at 976.
133. *Id.* at 977.
134. *Id.*
135. *Id.*

ing the test, the court also emphasized that the list of factors was not exhaustive and concluded that no factor by itself was dispositive.[136]

In its analysis of the first factor of the *Daniel R.R.* test, the court found by a preponderance of the evidence that the benefits the child realized from the private mainstream preschool outweighed those she would have derived from public preschool.[137] The record revealed that the child was actually the most advanced student academically in her mainstream classroom using the supplemental aids and assistance.[138] However, the court reasoned that since the child's needs were almost entirely social, her LRE was more likely the private mainstream setting.[139] The nonacademic benefits significantly outweighed those she could have received at the public school.[140] Finally, while the child struggled with some behavioral problems, the court concluded such outbursts did not disrupt the regular classroom.[141]

Additionally, in discussing its adoption of the *Daniel R.R.* test, the court stated it would not consider cost as a factor in this case since the school district had not raised it as an issue: "[b]ecause costs are not at issue in this case, however, this court adopts and applies . . . only the non-cost factors . . . ."[142] This language suggests that if the court determined that cost was an issue in a case, it would invoke cost as factor in its decision.[143] However, with as much as $63,800 at stake out of the district's maximum preschool budget of $400,000, cost was certainly a relevant issue.[144] In fact, despite an explicit directive that cost was irrelevant in this case, in the final paragraph of the opinion the court remanded the case to the district to decide what expenses should be reimbursed to the family.[145]

IV. ANALYSIS

Each of the three circuit tests brings a unique approach to identifying a child's LRE. However, all three tests share two factors: (1) the benefits to the disabled child and (2) the child's potential disruption to other students in the classroom.[146] Cost has proven to be the most controversial factor both in terms of whether its application is appropriate and what test to use.[147] Many courts have consistently stressed that cost alone is generally not a strong enough reason to determine a disabled

136. *Id.*
137. *Id.* at 978.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 977.
143. *See id.*
144. *Id.* at 972–73.
145. *Id.* at 979.
146. Farley, *supra* note 14, at 820, 823–24, 829–30.
147. *See generally* Stanley, *supra* note 22, at 310–11.

child's LRE.[148] On the other hand, balancing the placement's benefits to the child against the potential disruption to the other children, is also insufficient if the cost places an undue burden on the district and in turn, the other students' education in the district.[149] Accordingly, none of the tests alone are ideal, such that if the Supreme Court decides to hear a case on this issue, it should harness the best elements from each test to design an improved version.

In adopting the *Daniel R.R.* test, like many of the previous circuits, the Tenth Circuit in *K.B. v. Nebo School District*[150] did not articulate practical standards for the two common factors to aid in subsequent applications. The *Nebo* court's failure to adequately consider cost in its initial LRE analysis coupled with its brief mention of reimbursement at the last minute also signified the court's realization that excluding cost from the test is fine in theory, but not in practical application. The benefits and disruption factors when weighed against cost create a new reasonableness standard that the Supreme Court should adopt.

A. An Interpretation of Nebo*'s Application of the Two Common Factors*

1. Factor One: Benefits to the Disabled Child of the Mainstream Classroom

The *Nebo* court, in adopting the *Daniel R.R.* test, chose to consider the academic and nonacademic benefits separately for purposes of analysis.[151] This distinction was noteworthy because it allowed for a more detailed analysis and recognized that academic performance is not the only measure of a child's progress.[152] In evaluating the benefits to the autistic child, the court considered both the impact of the non-disabled students in the mainstream setting and the supplemental aids and services to the child.[153] The court's analysis was lacking in two respects. First, the court did not offer specific criteria to assist later courts in applying the factors. Second, it did not outline a practical method to assess how much of the benefit could be attributable to the mainstream environment versus the supplemental aids and services. The consequence of not having explicitly outlined criteria is that there is no practical way to evaluate how much supplemental support is required to achieve maximum benefit.

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148. Willard, *supra* note 6, at 1178–79.

149. *See generally* Stanley, *supra* note 22, at 317.

150. 379 F.3d 966 (10th Cir. 2004).

151. *Nebo*, 379 F.3d at 977–78.

152. Farley, *supra* note 14, at 838. A child with mental retardation, for example, may achieve few if any academic benefits from the mainstream experience but will likely benefit tremendously from the social interaction and mobility. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989). The *Rachel H.* court added the language, "in a regular classroom, supplemented with appropriate aids and services" as a more specific point of comparison to the academic benefits the child will receive in the special education classroom. Bd. of Educ. v. Holland, 786 F. Supp. 874, 878 (E.D. Cal. 1992).

153. *Nebo*, 379 F.3d at 978.

Accordingly, the Tenth Circuit's reasoning in *Nebo* that the academic benefits to the autistic child were more superior in the private mainstream classroom than they would be in the public classroom is not persuasive.[154] The court emphasized that the child was the most academically advanced student in the mainstream classroom.[155] The court apparently assumed that the larger numbers of lower performing students in the public school would directly correlate with a decline in her academic performance in such a classroom.[156] This reasoning is flawed because advanced learners who would benefit from the opportunity to be challenged are present in every classroom, and yet the school district is not able to move them to another classroom.[157] In fact, tracking students according to ability has been proven to be detrimental to students' self esteem and performance.[158] Rather, students function best in heterogeneous environments.[159]

The court also failed to articulate a standard for attributing the academic benefits of a "mainstream" placement. The public preschool classes contained more than fifty percent special education students in a classroom.[160] Previously, the school district expressly offered to reduce the ratio of disabled students in the autistic child's class.[161] Many "regular" classroom populations are also comprised of as many as thirty or forty percent special education students.[162] Furthermore, those regular education classrooms were taught by a teacher who likely has no background in special education instruction unlike the teachers specially trained to work with handicapped students at the public preschool.[163] Although the evidence demonstrated that the autistic child had been successful in her mainstream classroom, the court failed to discern how much of her progress was attributable to the thirty-five to forty hours of one-on-one instruction she received a week—and how much was influenced by the presence of additional non-disabled students.[164] The court seemed to ignore this reality altogether given the fact that she spent only ten hours a week at the private preschool.[165]

With regard to the nonacademic benefit, the court's rationale was more convincing. It focused on the child's specific disability in the area of social interactions and reasoned that the mainstream classroom, in

154. *Nebo*, 379 F.3d at 978.
155. *Id.*
156. *See id.*
157. Telephone Interview with Kristy Hurt, Special Education Teacher, Skinner Middle School, Denver Pub. Sch., in Denver, Colo. (Nov. 2, 2005).
158. *Id.*
159. *Id.*
160. *Nebo*, 379 F.3d at 968.
161. *Id.*
162. Hurt, *supra* note 157.
163. *Id.*
164. *See Nebo*, 379 F.3d at 968, 978.
165. *Id.* at 968.

surrounding her with non-disabled students with normal mannerisms, provided a more effective social learning environment for her.[166] The court further identified the presence of role models and a more suitable gender ratio to support its conclusion.[167] Interestingly, as almost a caveat to this decision, the court qualified its analysis of the benefits and quoted a case from the Third Circuit:

> This court does not mean to imply that only an exclusively mainstream environment meets the IDEA's LRE mandate for all children. School officials are not required to provide an exclusively mainstream environment in every case, and partial integration may well constitute the provision of an LRE to the 'maximum extent appropriate.'[168]

The court seemed to imply that it would not always decide in favor of a mainstream placement, almost as if realizing the potential ramifications of this decision as precedent.

The Tenth's Circuit's conclusion that the child with autism would benefit from the private mainstream classroom was accurate with regard to her social benefit but less apparent as to her academic benefit. The Court failed to articulate how necessary or beneficial the extra thirty-five to forty hours of supplemental services were to the child.[169] In fact, it did not even mention these additional supports in its application of the *Daniel R.R.* test.[170] The *Nebo* court's decision would have been more effective if it had distinguished the benefit of interacting with non-disabled peers from the benefit of the supplemental behavioral therapy.

2. Factor Two: Potential Disruption in the Regular Classroom

Whereas the aim of the "benefits" factor centers around the potentially positive effects on the child in question, the "disruption" factor focuses more intently on the potentially negative effects on the other regular education students in the classroom and the teacher in the placement decision. The Second Circuit has identified a relationship between the amount of supplemental aids and services provided to a child and how disruptive a child is; with the use of supplemental aids and services there may be less disruption.[171] The *Nebo* court failed to provide specific guidelines to comprehensively account for disruption to the regular stu-

166. *Id.* at 978.
167. *Id.*
168. *Id.* at 978 n.17 (quoting T.R. v. Kingwood Bd. of Educ., 205 F.3d 572, 579 (3d Cir. 2000)); *Daniel R.R.*, 874 F.2d at 1045).
169. *See Nebo*, 379 F.3d at 977–79.
170. *See id.*
171. Mavis v. Sobol, 839 F. Supp. 968, 991 (N.D.N.Y. 1993).

dents as well as the teacher, and guidelines to evaluate appropriate levels of services required to achieve minimal disruption.[172]

The *Nebo* court upheld the parents' request for thirty-five to forty hours of behavioral therapy as a necessary supplemental aid. The court did so because the child demonstrated significant progress—not because it identified forty hours as a limit to how many hours the child needed. It is true that the school district must attempt to implement "positive behavior strategies, interventions, and supports to address the behavior" before placing a student with behavior problems in a more restrictive environment.[173] However, it would have been more helpful to later courts if the Tenth Circuit had established criteria for determining if the child could function with fewer supplemental hours.

The Tenth Circuit also did not articulate a standard for when a "disruption" could infringe on the other students' learning in the class.[174] In general, the courts have not offered guidance in this area, other than to say that the school must demonstrate a reasonable attempt to offer effective supplements calculated to remedy the disruption.[175] The *Nebo* court acknowledged that the autistic child "had some behavioral problems such as tantruming," but was quick to discount them, indicating that this behavior did not seem problematic in the regular classroom.[176] It is difficult to know why the court determined that tantrums were not possibly disruptive.

The *Nebo* court further failed to devise a standard to address the aspect of disruption involving the teacher's ability to instruct the class despite the presence of the disabled child.[177] The Fifth Circuit in *Daniel R.R.* held that "although regular education instructors must devote extra attention to their handicapped students, we will not require them to do so at the expense of their entire class."[178] In contrast, the *Nebo* court did not incorporate this language in its holding on this issue and did not mention at all whether the child's behavior was or was not disruptive to the teacher's ability to instruct the other students.[179]

Overall, the *Nebo* court simply did not offer a clear justification for how or why it decided to dismiss disruption as a non-issue in this case. Had it followed the Second Circuit, the *Nebo* court might have found a correlation between the autistic child's minimal disruptions in the mainstream setting and the significant number of hours of extra therapy both

172. *See Nebo*, 379 F.3d at 978.
173. Farley, *supra* note 14, at 839.
174. *See Nebo*, 379 F.3d at 978.
175. Farley, *supra* note 14, at 839.
176. *Nebo*, 379 F.3d at 978.
177. *See generally* Stanley, *supra* note 22, at 315–16.
178. *Daniel R.R.*, 874 F.2d at 1051.
179. *See Nebo*, 379 F.3d at 978.

in and outside the school day that she received.[180] Unlike the child in the Second Circuit case who had not benefited from extensive or effective supplemental aids and services and was therefore disruptive to the other students and the teacher,[181] the child in *Nebo* was at the opposite end of the spectrum having received so many hours of one-on-one therapy.[182] It is only possible to speculate whether she would have been more disruptive with fewer hours of support. Accordingly, the Tenth Circuit's cursory analysis of the disruption factor, only three sentences in length, failed to identify any useful guidelines for future decisions.[183]

B. Accounting for Cost

Whether and, more importantly, how cost should factor into the equation continues to be a source of significant debate.[184] The *Roncker* court acknowledged the financial burden that mainstreaming a child may impose on a school district.[185] Although subsequent applications of the *Daniel R.R.* test have factored cost, the language of the test itself as delineated by the Fifth Circuit makes no mention of cost.[186] Furthermore, the *Rachel H.* test recently marked a return to a consideration of cost.[187] However, the opinion offers little guidance on whether this factor should be weighed as heavily as the benefits and disruption factors.[188]

The Tenth Circuit mistakenly failed to consider cost in the *Nebo* decision. Generally, other circuits have applied cost as a factor in two different ways.[189] First, some courts have balanced the costs of educating one child against the educational and financial needs of other children in the district.[190] Second, some courts allow school districts to use cost as a defense when balancing the cost of a placement against the appropriateness of that placement.[191]

1. Four Reasons Why Cost Should Be a Factor

First, costs of educating special needs children have increased dramatically in the past three years.[192] Those expenditures are more likely

180. *See Mavis*, 839 F. Supp. at 989–91.
181. *Id.* at 991.
182. Nebo, 379 F.3d at 978.
183. *Id.*
184. *See generally* Willard, *supra* note 6, at 1177–78.
185. *See* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).
186. Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991). *See Daniel R.R.*, 874 F.2d at 1049–50.
187. *Holland*, 786 F. Supp. at 879–80.
188. *See id.*
189. Willard, *supra* note 6, at 1178.
190. *E.g.*, *Greer*, 950 F.2d at 697.
191. *See, e.g.*, *Roncker*, 700 F. 2d at 1064. *See* Willard, *supra* note 6, at 1178.
192. Biscelgia, *supra* note 1. Nationally, the percentage of K-12 special education enrollments continued to rise every year from 1976 until 1997, with a proportional increase of nineteen percent from 1987–1998. Thomas P. Parrish, *Special Education - At What Cost to General Education?*, The CSEF Resource, Winter 1999–2000, Ctr for Special Educ. Finance,

due to increased enrollment of special education students and a decrease in federal funding, rather than a function of an actual increase in per pupil special education expenditures.[193] The Tenth Circuit failed to account for this practical reality in its decision.

Second, the link between special education placement and the ability of the school to qualify for supplemental funding creates a financial incentive for schools to place students in more restrictive environment.[194] A recent study examined the relationship between state formulas that distribute funds based on school district placements and the state's use of restrictive placements for children with disabilities.[195] While states that had the highest number of self-contained placements used funding formulas based on placements, states with the lowest number of segregated placements did not fund according to placement.[196] This study may indicate that school districts have a real incentive to classify more students as "special ed," since doing so means receiving additional state funding.[197] Decisions like *Nebo* produce an even more compelling reason for districts to classify more students as "special ed" since the estimated costs of the autistic child's supplemental aids and service constituted as much as $63,800, approximately one-sixth of the district's total preschool budget.[198]

Third, the courts have interpreted legislative intent to imply that cost should be a relevant consideration in LRE placement. In noting that IDEA directs the states to determine "priorities for providing a free appropriate public education to all handicapped children," the court in *Barnett v. Fairfax County School Board.*[199] indicated that Congress intended for the court to balance the needs of a disabled child against competing economic realities.[200]

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http://www.ldonline.org/ld_indepth/special_education/at_what_cost.html (last visited Jan. 28, 2006). In Vermont, a legislative commission set up in 1998 reported that cost-containment must become a state-wide priority because increased expenditures are not sustainable. *Id.* California's special education population has nearly doubled from 1990 to 1999. *Id.* (quoting Amy Pyle, *Davis Asked to Help End Special Education Funding Dispute*, L.A. TIMES, Nov. 1, 1999, at A3.). An analysis of nine school districts over more than twenty years reveals that general education expenditures had plunged from eighty to fifty-nine percent with special education gains from four to seventeen percent. *Id.*

193. Parrish, *supra* note 2, at 3. Recent studies in New York revealed that ninety percent of increased special education funding correlated with higher enrollments. *Id.* at 2. A study in Wisconsin indicated that virtually all revenue increases for special education had resulted from higher enrollments as well. *Id.*

194. Willard, *supra* note 6, at 1181.

195. Willard, *supra* note 6, at 1184.

196. *Id.*

197. *See generally id.*

198. *Nebo*, 379 F.3d at 973.

199. 927 F.2d 146, 154 (4th Cir. 1991).

200. *Barnett*, 927 F.2d at 154 (quoting 20 U.S.C. § 1412(3) (1991) (current version at 20 U.S.C. § 1412 (2005))).

Fourth, there is a practical limitation to how much a school can afford in order to pursue the maximum benefits for the child.[201] Even before the development of the circuit tests, the Supreme Court in *Rowley* implied a limit to special needs costs: "to require . . . the furnishing of every special service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go."[202]

Accordingly, cost is a practical issue facing school districts that Congress and the Supreme Court have acknowledged to be a relevant concern.

2. Two Standards the Courts Have Articulated Relating to Cost

Although most circuits agree cost cannot be ignored altogether, its role as a factor in placement decisions has been the subject of much debate.[203] No one wants to tell a special needs child she does not deserve a quality education, but the courts have been clear that the most expensive placement is not always the most appropriate for a number of reasons.[204] The courts have tended to analyze cost in two different ways.[205] One approach balances cost for one child against the costs of educating other children.[206] The second approach weighs the cost of a child's placement against the appropriateness of the placement itself.[207]

a. Balancing the Costs of One Child Against the Needs of the Others

The courts adopting this method seem to recognize the realities of IDEA as a largely unfunded mandate.[208] A study conducted in the 1990s concluded that "the cost of educating disabled students . . . is threatening the ability of the educational institution to educate nondisabled students in many districts and, therefore, is placing the entire public education edifice potentially at risk."[209] The state of Colorado paints a bleak picture of this reality. The Colorado Department of Education has reported that the federal government provides only seventeen percent of the requisite special education funding required for such students in Colorado schools, with local dollars responsible for the bulk of expenditures covering seventy percent and only eleven percent coming from the state.[210]

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201. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 199 (1982).
202. *Id.*
203. Willard, *supra* note 6, at 1178; Stanley, *supra* note 22, at 310–11.
204. *See generally* Stanley, *supra* note 22, at 316-17.
205. *Id.* at 310–11.
206. *Id. E.g., Greer*, 950 F.2d at 697.
207. Stanley, *supra* note 22, at 310–11.
208. Biscelgia, *supra* note 1.
209. Parrish, *supra* note 2, at 1 (quoting Bruce Meredith & Julie Underwood, *Irreconcilable Differences? Defining the Rising Conflict Between Regular and Special Education*, 24 J.L. & EDUC. 195, 213 (1995).
210. Paulmeno, *supra* note 20.

Accordingly, some courts have created a balancing test that considers the cost of the disabled student's education against the needs of other students in the district.[211] In *Greer v. Rome City*, the court articulated this standard: "when the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact the education of other children in the district, then education in a regular classroom is not appropriate."[212] The Eighth Circuit, adopting the *Roncker* test in *A.W. v. Northwest*, applied a variation of the test which compares instead the disabled child's expenses against the expenditures for other disabled children, excluding impacts on the general education population.[213] The court agreed with the district court's finding that:

> [T]he severity of the child's handicap was such that the interaction with non-handicapped students would . . . require removal of a teacher from the state facility to provide the student with a properly certified teacher. Due to limited available funding, the teacher would not be replaced at the state school. Thus, the program provided to the other handicapped students would be adversely affected by the increased student/teacher ratio. The court concluded the benefit to the student from mainstreaming was insufficient to justify a reduction in benefits to other handicapped children; the parents' proposed placement in the district would have resulted in a disproportionate expenditure of available funds.[214]

The school district in *Rachel H.* made a similar argument. According to the district, her placement would result in over a $100,000 loss in state funding for special education funding unless she was placed in special education classes for at least fifty-one percent of the day.[215] Ultimately, the *Rachel H.* court was not persuaded by the school district's argument.[216] In holding for the parents, the court reasoned that the cost of mainstreaming her was not significant.[217] It also refused to place her in a more restrictive setting that would not offer her the benefits she could reap in a regular classroom, despite the financial burden potentially imposed on the district, and ultimately other disabled students.[218]

In its LRE placement analysis, the *Nebo* court deliberately ignored cost as a factor on the grounds that the district claimed it was not at issue in its original decision-making process.[219] The court ignored cost even though the expense of educating the autistic child in the regular class-

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211. *Greer*, 950 F.2d at 697.
212. *Id.*
213. *A.W.*, 813 F.2d at 163–64.
214. 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, 22 (1992); *A. W.*, 813 F.2d at 160–63.
215. *Holland*, 14 F.3d at 1402, 1404.
216. *Id.* at 1404.
217. *Id.* at 1402.
218. *Id.* at 1402, 1404.
219. *Nebo*, 379 F.3d at 977.

room with the forty hours of supplemental aids and services equated almost one sixth of the district's entire preschool budget of $400,000, and even though both the district and the parents' expert indicated that only twelve to fifteen hours of additional support for the child would have likely accommodated her.[220] The court did point out that in some circuits, "LRE tests acknowledge the fiscal reality that school districts with limited resources must balance the needs of each disabled child with the needs of other children in the district," but drew the unlikely conclusion that costs are simply not an issue in this case.[221]

In acknowledging the discrepancy in the cost to educate the child in comparison to the remainder of the budget to provide for all other special needs children, the *Nebo* court seemed to follow the *Rachel H.* court.[222] The school in *A.W.* identified a specific need and argued that holding for the one child would specifically deprive the other special needs children.[223] *A.W.* can be distinguished from *Rachel H.* and *Nebo* in that in *A.W.*, the school district specifically identified how placement in the LRE for the handicapped plaintiff would deprive other disabled children from the appropriate student-teacher ratio.[224] Whereas the *Rachel H.* and *Nebo* court considered a nebulous dollar figure, the *A.W.* court confronted concrete inequity. Perhaps that resulted in the different holding.

b. Cost as a Defense: Balancing Cost Against the Appropriate Placement

Like the courts in the previous section suggested, the *Roncker* court concluded that cost is an appropriate factor because excessive spending on one disabled child can withhold needed funds from other handicapped students.[225] However, *Roncker* applied a slightly different standard.[226] The court permitted school districts to use cost as a defense provided that the district could prove that it had allocated its funds to render services to the child along an appropriate continuum of different placements.[227] The court held that the school's individual education program committee must choose from a continuum of ten different possible LREs when evaluating a particular student.[228] At the same time, the court in

220. *Id.* at 973.
221. *Id.* at 977.
222. *Nebo*, 379 F.3d at 979; *Holland*, 14 F.3d at 1402; *see generally* Willard, *supra* note 6, at 1183–84.
223. *A.W.*, 813 F.2d at 161–62; *Nebo*, 379 F.3d at 979; *Holland*, 14 F.3d at 1402, 1404.
224. *Id.*
225. *Roncker*, 700 F.2d at 1063.
226. *Id.* at 1062.
227. *Id.* at 1063.
228. *Id.*; *see also* Harley A. Tomey, III, *IEP: Individualized Education Program The Process, Virginia Department of Education*, http://www.ldonline.org/ld_indepth/iep/iep_process.html (last visited Jan. 28, 2006). The continuum ranges from option 1 that offers direct instruction and/or consultation services within the regular classroom, to option three providing direct instruction within the regular classroom and content instruction in a special education classroom, to option seven

Roncker, refused to consider cost or the merits of an alternative placement when the child had never been placed in a fully mainstreamed setting.[229] Although the *Daniel R.R.* test does not emphasize cost as a factor, its first factor is similar to this approach in requiring that a school demonstrate it took sufficient steps to accommodate the child's needs in the regular classroom before removing her.[230]

This second approach to a cost analysis mirrors the language of that IDEA which mandates states provide a "free and appropriate education" to all handicapped children.[231] As the court in *Rowley* indicated, "appropriate" does not require a school to completely optimize these services, as long as the child is benefiting educationally from the program in place.[232] The courts have often considered cost when weighing two different placement or service options. If a second service or placement option exists that would also provide a free and appropriate education at a lower price, the courts have sometimes opted for such an alternative.[233]

At issue in *Barnett* was whether a center placement for a hearing impaired student was an acceptable alternative to a placement in her neighborhood school that did not offer the appropriate services to meet the child's special needs.[234] Although the neighborhood school was truly the LRE, the Fourth Circuit concluded that the center school could best meet the child's needs.[235] Rather than evaluate cost in terms of other students in the district, the court here considered cost against the appropriate placement in determining that the center placement was "appropriate" even though it was not the best possible education the school district could offer with unlimited funding.[236]

Similarly, in *Detsel v. Board of Education*,[237] the court declined to provide a severely handicapped child with close supervision by a highly trained nurse due to the excessive burden of cost.[238] In *Clovis Unified-School District v. California Office of Administrative Hearings*,[239] the court considered two different placements, a residential home costing $50,000 and a psychiatric facility costing $150,000.[240] In finding for the

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offering separate private day school for students with disabilities, to option ten, a hospital setting. *Id.*

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

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

231. 20 U.S.C. § 1412(a)(1)(A) & (a)(5)(A).

232. Bd. of Educ. v. Rowley, 458 U.S. 176, 198-201 (1982).

233. Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 517 (6th Cir. 1984) (finding that where two placements are proposed, but only one is appropriate, cost is irrelevant and therefore, should not factor into the decision).

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

235. *Id.*

236. *Id.*

237. 820 F.2d 587 (2d Cir. 1987).

238. *Detsel*, 820 F.2d at 588.

239. 903 F.2d 635 (9th Cir. 1990).

240. Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 639 (9th Cir. 1990).

school district's recommendation of the residential home, the court acknowledged a limit that a district must spend to adequately meet a child's special needs.[241]

The Tenth Circuit in *Nebo* had two placement options much like the cases discussed above, both of which were arguably appropriate on the continuum, as required by *Roncker* and IDEA.[242] In fact, homebound placement is actually the ninth most restrictive environment which is where the child spent most of her instructional time with the forty hours of one-on-one instruction in the parent's preferred placement.[243]

In applying this cost analysis to the *Nebo* decision, it is first necessary to determine whether the autistic child had the opportunity to be mainstreamed to the fullest amount possible.[244] At first glance, the court said she did not because the public preschool placement was not the LRE.[245] However, the answer to this question is more complicated and somewhat more difficult given the split-nature of her time, which actually closely parallels the district court's placement in *Roncker* that the appellate court rejected.[246] Unlike the parents in *Roncker* who were unhappy with the placement in a segregated setting at another school coupled with transportation to a mainstream setting midday for lunch and integration, the autistic child's parents in *Nebo* favored the split-time arrangement with the additional time in what was primarily a homebound setting.[247] In fact, although homebound placement is actually the ninth most restrictive placement option, it was where she spent most of her instructional time with the forty hours of one-on-one instruction in the parent's preferred placement.[248] This intensive forty-hour training plus the private school tuition presented a much costlier option.[249]

The child's alternative placement proposed by the school district is actually a LRE in that it offered ten hours of instruction in a setting with approximately half non-disabled students with support from trained therapists for ten to fifteen hours a week, including some on campus and some at home hours.[250] This option is also much more cost efficient than the private school, and had the *Roncker, Detsel, Clovis* or *Barnett* courts decided this case, it might have come out differently.

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241. Collins & Zirkel, *supra* note 214, at 23.
242. *Nebo*, 379 F.3d at 976, 978.
243. Biscelgia, *supra* note 1.
244. *Roncker*, 700 F.2d at 1065 (Kennedy, J., dissenting).
245. *Nebo*. 379 F.3d at 977–78.
246. *Id.* at 972–73; *Roncker*, 700 F.2d at 1063.
247. *Nebo*, 379 F.3d at 968; *Roncker* 700 F.2d at 1059, 1061.
248. *Nebo*, 379 F.3d at 972–73; Tomey, *supra* note 228.
249. *Nebo*, 379 F.3d at 972–73.
250. *Id.* at 968.

In the end, the school district erred in not arguing cost as its defense.[251] On appeal, the school district's special education director claimed that "cost never entered into [its] decision to provide services" and that the district "never said it would not provide a particular service solely because of cost concerns."[252] Although cost is never the only reason to decline services, it is a factor that should not be ignored by the Tenth Circuit or a school district.[253] To pretend cost is irrelevant is to deny other children the services they deserve without an all-out court battle and to pretend that some placements are just as effective without all the bells and whistles.

C. *A New Reasonableness Standard for Cost: The Beetle, Not the Cadillac of Placement*

The courts cannot continue to ignore the practical realities of implementation issues in the classroom coupled with the economic realities of an unfunded mandate. The last time the Supreme Court spoke directly on the issue in *Rowley* was over two decades ago.[254] The court at that time was cognizant that "to require . . . the furnishing of every special [education] service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go."[255] In other words, in terms of practical application, the Court's holding implies that it would be impossible to arm every special needs child with the "Cadillac placement" on the continuum of services.[256] A more appropriate and realistic placement to strive for would be the "Volkswagon beetle placement."[257] The beetle is a metaphor for the quality of placement a school district can be expected to deliver.[258] The idea of IDEA is to ensure that the special education students have the supplemental services—the gas, if you will—they need to drive a beetle.[259]

Ultimately, the beetle represents a "reasonableness" standard which would enable districts to "use cost as a defense against 'unreasonable' demands, provided a continuum of appropriate [placement] options are available to children with disabilities."[260] The courts must of course use tailored judgment for each individual child since what may be a reason-

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251. Biscelgia, *supra* note 1.
252. *Nebo*, 379 F.3d at 972–73.
253. Willard, *supra* note 6, at 1178–79.
254. *See generally Rowley*, 458 U.S. 176.
255. *Id.* at 199.
256. Biscelgia, *supra* note 1.
257. *Id.* All too often, by the time cases like this one get appealed, the child is already experiencing such high achievement that removal seems inappropriate even though the supplementary services are excessive. *Id.* Somewhere the courts need to draw the line between achievement and exceptional achievement. *Id.*
258. Biscelgia, *supra* note 1.
259. *Id.*
260. Janet R. Beales, *Special Education: Expenditures and Obligations*, Policy Study No. 161, Reason Foundation, Los Angeles, Cal. (July 1993) *available at* http://www.rppi.org/education/ps161.html.

able or even an essential demand for one child could be unreasonable for another child.[261] Additionally, a reasonableness standard such as this should sidestep placing a specific limitation on price; rather, in determining appropriate placement, the district and the court should balance the academic and nonacademic benefits to a student against the necessary supplemental services required to prevent disruption in the regular classroom and the costs of providing those services.[262] The price tag will inevitably depend on the costs of the necessary supplements and services that will enable the child in the beetle to function adequately in the LRE.[263]

Indirect support for such a reasonableness standard also comes from the Supreme Court's guidance in *Florence County School District v. Carter*[264] and *Burlington v. Department of Education*[265] on a related cost issue—private school tuition reimbursement to parents who have unilaterally withdrawn their child from a public school placement and enrolled her in a private school.[266] Citing to those decisions, the *Nebo* court indicated that the parents were entitled to receive reimbursement for "the reasonable cost of the services provided to [their daughter] in support of her mainstream preschool education."[267] However, in addressing the issue of reimbursement, the *Nebo* court tried to argue that it was a completely separate issue from cost and its relation to LRE:

> Whereas the issue of the allegedly unreasonable cost of [the autistic child's behavioral therapy] was not presented to the district court in the context of LRE, it was presented in the context of equitable considerations under *Burlington* and *Carter*. As a consequence, in the latter context this issue has not been waived.[268]

Nevertheless, the end result of reimbursement is actually just the same as cases decided under *Rachel H.* or *Roncker*—the district loses the money that could have gone to support other special needs children.[269] The substantive debate surrounding cost and reimbursement is the same even if the school district did not procedurally raise the issue of cost in district court.[270] The Tenth Circuit's decision to disguise cost as reimbursement in the final page of the opinion demonstrates further that the court, in

261. *Id.* at 33.
262. *Id.* at 24; *Mavis*, 839 F. Supp. at 991 (emphasizing that a strong correlation exists between the amount of supplemental aids and services provided and how disruptive a child is).
263. Biscelgia, *supra* note 1.
264. 510 U.S. 7 (1993).
265. 471 U.S. 359 (1985).
266. *See Florence*, 510 U.S. at 11, 15.
267. *Nebo*, 379 F.3d at 978.
268. *Id.* at 979.
269. *See generally* Willard, *supra* note 6.
270. Biscelgia, *supra* note 1.

deciding not to consider cost in the analysis section, later realized that practically speaking, cost was at issue.[271]

Interestingly, in articulating criteria for the lower court to evaluate the reasonableness of the reimbursement cost, the *Nebo* court relied on the Supreme Court's suggestion in *Burlington* and *Carter*.[272] Although reimbursement may be a different issue, there is a significant amount of overlap. Thus, these Supreme Court decisions and *Nebo* can inform the development of a new reasonableness test for cost and LRE placement. The *Nebo* court reiterated two sub-factors, identical to the two addressed by different circuits at length in the preceding two sections.[273] First, the court asked the district court to consider whether the reimbursement for two school years would "impose a disproportionate burden on Nebo's preschool budget."[274] Second, the court directed the lower court to evaluate the cost and the appropriateness of placement on remand:

> [T]he district court should consider equitable factors such as whether [the autistic child] needed forty hours of [behavioral therapy] per week in order to succeed in her mainstream classroom. In considering this equitable factor, the district should give due deference to [the expert's] finding that [the child] needed only twenty to thirty hours of at-home [therapy].[275]

Unintentionally, the *Nebo* court's discussion of reimbursement frames the proposed reasonableness standard.[276] Unlike the theoretical constructs of the court's opinion and its failure to spell out clear standards for the benefits, disruption and cost factors, the Tenth Circuit essentially charged the district court with assessing the benefits and costs of placement.[277]

In application, since the district court's remanded opinion has not been released, it is only possible to speculate as to how the *Nebo* decision and LRE placement might have come out differently had the court applied its own standards for reasonableness. In its initial decision, the *Nebo* court upheld the "Cadillac placement" in placing the child in a private mainstream preschool and providing her with forty hours of one-on-one instruction (the Cadillac of class size).[278] The mainstream school placement and the forty hours of supplemental aids and services did come with a hefty price tag of up to $63,800 annually.[279]

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271. *Nebo*, 379 F.3d at 978–79.
272. *Id.*
273. *Id.* at 979.
274. *Id.*
275. *Id.*
276. *See* id.
277. *Id.*
278. *See generally id.* at 970.
279. *Id.* at 973.

A more reasonable placement would have considered the two sub-factors as suggested by the *Nebo* court.[280] First, based on cost alone, it is likely that the cost of tuition at approximately $60,000 annually plus reimbursement for two previous years at $120,000 would impose a significant hardship on the district's ability to fund services for other disabled children out of a budget of $400,000.[281]

Second, a consideration of cost as it relates to the appropriateness of the placement identifies a possible alternative "beetle placement" in lieu of the parents' "Cadillac placement." A *Nebo* expert testified that the child had shown significant progress with only twenty hours over a four-month period.[282] Since this autistic child was the most academically advanced in a class of regular non-disabled students, such a high level of performance suggests that the supplemental services required to keep her from being disruptive and enable her growth were perhaps over the top.[283]

While the district erred in placing her at the public preschool where she might regress under the potential negative influence of other disabled children's behavior and mannerisms,[284] an alternative, more reasonable placement exists. This alternative ("beetle") placement would continue placement at the private school with only twenty hours of behavioral therapy a week since expert testimony indicated that she had been successful during a four-month period with this amount of support. Accordingly, this placement balances the excessive cost of the personal instruction tutoring against both costs to other children and the cost of her placement against its appropriateness.

CONCLUSION

With the cost of special education continuing to rise, the Tenth Circuit and others will continue to face more and more cases concerning cost as an issue.[285] The *Nebo* court was unable to ignore cost altogether because of its practical realities. Most courts have recognized a need to evaluate LRE placement with cost in mind. The *Nebo* court's discussion of reimbursement alluded to two sub-factors many circuits have already considered in previous decisions. The first sub-factor is important because it forces the courts to consider how choosing the Cadillac place-

280. *Id.* at 979.
281. *Id.* at 973, 978–79.
282. *Nebo*, 379 F.3d at 973.
283. *Id.* at 978.
284. *Id.* at 973.
285. Biscelgia, *supra* note 1; *See* Complaint at 1, 6, Thompson R2-J Sch. Dist. v. Luke P., No. 1:05-cv-02248-WDM (10th Cir. Nov. 04, 2005). The Thompson School District in Berthoud, Colorado, is appealing a hearing officer's approval of the parents' decision to withdraw their autistic child from the district and enroll him in a residential placement private school in Boston. *Id.* at 6. The district and the parents disagree on the appropriate LRE placement, and cost is a major issue since the parents are seeking $137,000 in tuition reimbursement for the private school placement. *Id.*

ment may burden the school district and ultimately reduce services offered to other students in the district. The second sub-factor juxtaposes cost with the benefits and disruption factors. The reasonableness standard does not undermine IDEA's objective to identify a child's LRE. Rather, it reinforces the Supreme Court's interpretation of IDEA in *Rowley* that school districts are not required to provide the Cadillac to every child. What the reasonableness standard has the power to accomplish is bridging the abstract, theoretical approach of the circuit tests with the practical realities that school districts face.

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