# PROVIDING SERVICES IN THE LEAST RESTRICTIVE ENVIRONMENT

**Julie J. Weatherly, Esq.**
**Resolutions in Special Education, Inc.**
**6420 Tokeneak Trail**
**Mobile, Alabama 36695**
**(251) 607-7377 (office)**
**(251) 607-7288 (fax)**
**JJWEsq@aol.com**
**Website: www.specialresolutions.com**

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## I. INTRODUCTION

Making determinations regarding the Least Restrictive Environment (LRE) can be particularly challenging, whether a school district is proposing a more restrictive or less restrictive environment than that requested by the parents. Regardless of the restrictiveness of a placement that is proposed, educators need to know how to make defensible recommendations when faced with this important placement question. This presentation will provide an overview of the LRE versus "inclusion" mandate generally, as well as an overview of the LRE legal standards enunciated by the courts. Emerging trends in recent case law will also be highlighted and practical guidance will be shared to assist educators in ensuring that FAPE is provided in the LRE for every student.

## II. WHAT IS "INCLUSION"?

### A. Terminology That has Been Used

1. Regular Education Initiative (REI)

2. Mainstreaming

3. Inclusion/Full Inclusion

    a. 18 IDELR 594 (OSEP 1992). "Full inclusion" is not consistent with the IDEA's requirements.

4. Integration

5. Least Restrictive Environment (LRE)

## II. THE IDEA'S LRE PROVISIONS

### A. The Statute

The IDEA's LRE provision is one that has not changed since its original enactment in 1975. Specifically, the IDEA provides that each State must establish procedures to assure that—

> 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.

20 U.S.C. § 1412(a)(5)(A).

### B. The IDEA Regulations

#### 1. The continuum of alternative placements

The IDEA regulations generally restate the statutory LRE provision at 34 C.F.R. § 300.114 but also add somewhat to it. For instance, the regulations require school districts to ensure that a "continuum of alternative placements" is available to meet the needs of children with disabilities for special education and related services. The law's stated continuum must include—

> the alternative placements listed in the definition of special education under [the regulations] (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. § 300.115.

#### 2. Placement decisions

When determining the educational placement of a child with a disability, the regulations also require school districts to ensure that placement decisions are made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1). In addition, a child's placement is to be determined at least annually; be based upon the child's IEP; and be as close as possible to the child's home. 34 C.F.R. § 116(b).

The regulations further provide that unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school that he or she would attend if nondisabled and that consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs when selecting the LRE. 34 C.F.R. § 300.116(c)

and (d). Finally, placement teams must also ensure that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. § 300.116.

### 3. Extracurricular and nonacademic services

It should be noted that the U.S. Department of Education views "regular educational environment" as encompassing regular classrooms and other settings in schools, such as lunchrooms and playgrounds in which children without disabilities participate. 71 Fed. Reg. 46585 (2006).

Although not necessarily an issue of "placement" per se, it is important to note that there is also an LRE "nonacademic settings" provision in the IDEA regulations. Specifically, 34 C.F.R. § 300.117 provides that school districts must ensure that each child with a disability participates with nondisabled children in extracurricular services and activities to the maximum extent appropriate to the needs of that child and that the child has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings. Such nonacademic services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, in including both employment by the public agency and assistance in making outside employment available. 34 C.F.R. § 300.107. Issues concerning children with disabilities and their participation in nonacademic and extracurricular activities are quite common.

### 4. Definition of "supplementary aids and services"

The regulations also contain a definition of the terms "supplementary aids and services" as:

> [A]ids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance [with the LRE regulations].

34 C.F.R. § 300.42.

### 5. IEP provisions

Among other things, the IDEA regulations require that IEPs contain:

A statement of the special education and related services and supplementary aids and services, based upon peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved in and make progress in the general education curriculum…and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities….

34 C.F.R. § 300.320(a)(4). IEPs must also include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities" described above. 34 C.F.R. § 300.320(a)(5).

## III. COURT-CREATED LRE STANDARDS GENERALLY

Several Circuit Courts of Appeal have established certain standards and/or factors that IEP Teams are to follow/use generally in making LRE decisions, and the standards are very similar. As an initial matter and depending upon the jurisdiction of the school district, relevant standards should be followed when determining what the LRE is for a student with a disability.

The generally applicable court-created LRE standards enunciated thus far are as follows:

Second Circuit: *P. v. Newington Bd. of Educ.*, 51 IDELR 2, 546 F.3d 111 (2d Cir. 2008). "We conclude today that the two-pronged approach adopted by the Third, Fifth, Ninth, Tenth, and Eleventh Circuits provides appropriate guidance to the district courts without 'too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials.' *Daniel R.R.*, 874 F.2d at 1046. Pursuant to that test, a court should consider, first, 'whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate.'"

Third Circuit**:** *Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist.*, 19 IDELR 908, 995 F.2d 1204 (3d Cir. 1993). Adopts the Fifth Circuit's test in *Daniel R.R.* and notes that in looking at the first prong of the two-part mainstreaming test, the court should consider several factors, including: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class. "If, after considering these factors, the court determines that the school district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider the second prong of the mainstreaming test whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate."

Fourth Circuit: *DeVries v. Fairfax County Sch. Bd.*, 441 IDELR 555, 882 F.2d 876 (4th Cir. 1989). While not actually enunciating an LRE "standard" per se, the court held that mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate

instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting.

Fifth Circuit: *Daniel R.R. v. State Bd. Educ.*, 441 IDELR 433, 874 F.2d 1036 (5th Cir. 1989). First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Sixth Circuit: *Roncker v. Walter*, 554 IDELR 381, 700 F.2d 1058 (6th Cir.), *cert. denied*, *Cincinnati City Sch. Dist. v. Roncker*, 464 U.S. 864 (1983). 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. Removing a child from the mainstream setting is permissible when "the handicapped child would not benefit from mainstreaming," when "any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting," and when "the handicapped child is a disruptive force to the non-segregated setting."

Seventh Circuit: *Beth B. v. Van Clay*, 36 IDELR 121, 282 F.3d 492 (7th Cir. 2002). "We find it unnecessary at this point in time to adopt a formal test for district courts uniformly to apply when deciding LRE cases. The Act itself provides enough of a framework for our discussion: if Beth's education at Lake Bluff Middle School was satisfactory, the school district would be in violation of the Act by removing her. If not, if its recommended placement will mainstream her to the maximum appropriate extent, no violation occurs."

Eighth Circuit: *A.W. v. Northwest R-1 Sch. Dist.*, 558 IDELR 294, 813 F.2d 158 (8th Cir. 1987). Adopts Sixth Circuit's standard in *Roncker* but emphasizes that the statutory language "significantly qualifies the mainstreaming requirement by stating that it should be implemented to the 'maximum extent *appropriate*'… and that it is inapplicable where education in a mainstream environment 'cannot be achieved satisfactorily'…."

Ninth Circuit: *Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Holland*, 20 IDELR 812, 14 F.3d 1398 (9th Cir. 1994). District court's use of four factor balancing test is affirmed, where court considered: (1) the educational benefits of placing the child in a full-time regular education program, (2) the non-academic benefits of such a placement, (3) the effect the child would have on the teacher and the other students in the class, and (4) the costs associated with this placement.

Tenth Circuit: *L.B. v. Nebo Sch. Dist.*, 41 IDELR 206, 379 F.3d 966 (10th Cir. 2004). Because the Sixth Circuit's *Roncke*r test is most apposite in cases where the more restrictive placement is considered a superior educational choice, it is unsuitable in cases where the least restrictive placement is also the superior educational choice. For that reason, the *Roncker* test is not appropriate in all cases. The Fifth Circuit's *Daniel R.R.* test, on the other hand, better tracks the language of the IDEA's least restrictive environment requirement and is applicable in all cases. Because costs are not an issue in this case, however, this court adopts and applies to this case only the non-cost factors of the *Daniel R.R.* test for LRE. It is noted that in determining

whether the first prong of the *Daniel R.R.* test has been met, the following non-exhaustive factors will be considered: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom.

Eleventh Circuit: *Greer v. Rome City Sch. Dist.*, 18 IDELR 412, 950 F.2d 688 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025 (11th Cir. 1992), *reinstated*, 967 F.2d 470 (11th Cir. 1992). Adopts the Fifth Circuit's standard in *Daniel R.R.*

## IV. RECENT DECISIONS/ISSUES IN THE AREA OF LRE

### A. Recent Cases Where School District is Proposing a More Restrictive Environment than Parents Desire

*A.R. v. Santa Monica Malibu Sch. Dist.*, 66 IDELR 269 (9th Cir. 2016) (unpublished). While the district has the obligation to educate a preschooler with autism with nondisabled peers to the maximum extent appropriate, its placement of the student in a collaborative class is the child's LRE. Given that the child required prompting to interact with other children, he would not benefit from a general education placement. In addition, the IEP team discussed a number of placement options and when the parents rejected one preschool collaborative class option due to the age of the other children in that class, the district offered an alternative in a pre-academic preschool class with more age-appropriate models. The district provided several options tailored to the meet the needs of the child, including programs with non-disabled peers. Thus, the district complied with the IDEA's requirements and the parents are not entitled to reimbursement for their unilateral private school placement.

*S.M. v. Gwinnett Co. Sch. Dist.*, 67 IDELR 137 (11th Cir. 2016) (unpublished). The district's documentation of the full range of supplementary aids and services considered for a second-grader with difficulties in reading, writing and math supported its decision to offer pull-out instruction in those academic classes. The district provided supplementary aids and services so that the child could remain in the regular classroom in other academic subjects. For example, co-teaching was provided in the regular classroom for science and social studies. Clearly, the child required direct, explicit, small-group instruction with drill and repetition to make progress in the areas of reading, writing and math, which was very different from that provided in the general education classroom. Thus, the district could not meet the child's needs in a mainstream setting even with supplementary aids and services and the district has mainstreamed the child to the maximum extent appropriate.

*Jason O. v. Manhattan Sch. Dist. No. 114*, 67 IDELR 142 (N.D. Ill. 2016). The district's proposed self-contained classroom is the LRE for a kindergartner with persistent behavioral problems. The program will provide opportunities for the child to interact with nondisabled peers in art, music and gym, as well as in academic classes when appropriate. The district provided social emotional services, resource support and a BIP to support the student in the

general education class, but his frequent aggression and non-compliance continued and his academics were on a "downward trajectory." The child's behavior was not improving and instances of non-compliance have increased. Meeting goals is not possible in the general education setting where the child could not receive immediate, frequent correction to address his anger and insensitivity toward peers. Thus, the self-contained class is the LRE where the student can receive educational benefit.

*L.H. v. Hamilton Co. Dept. of Educ.*, 68 IDELR 274 (E.D. Tenn. 2016). The ALJ erred in relying on the 10 year-old boy with Down syndrome's inability to meet grade-level standards and keep pace with his nondisabled peers when finding that the student required a special education placement to receive educational benefit. Under the test set out in the *Roncker* case, the critical question is whether the services that make the segregated program superior can be provided in a regular education setting. Here, the student's second grade teachers were able to provide the intensive instruction that he needed in a general education environment. In addition, while the student did not meet grade-level standards, the evidence showed that he made academic, behavioral and social progress during his time in the regular second grade class, which undercuts the district's argument that a mainstream placement is not appropriate for the student. However, the parents are not entitled to reimbursement for their unilateral placement of the student in a private Montessori school because its instructional approach does not provide the structure that the student needs to learn.

*H.L. v. Downington Area Sch. Dist.*, 65 IDELR 223 (3d Cir. 2015) (unpublished). The district denied FAPE in the LRE to a 4th-grader with SLD when deciding that she could not receive reading and writing instruction in the general education classroom. The first step in the LRE analysis is determining whether the student can be educated satisfactorily in the general education setting with the use of supplementary aids and services. Here, there is little evidence to support the district's decision that the student required pull-out services in language arts for 90 minutes per day. The IEP and the placement notice only vaguely stated that the district considered a full-time general education placement and rejected that option as being inadequate to meet the student's needs. There was no evidence in the record as to how the district actually approached the LRE issue and only limited evidence in the supplemented record of options that might have been available. There is no documentation that discussion of this issue at all. Thus, the district's proposed placement could not be assessed in the absence of that evidence.

*H.G. v. Upper Dublin Sch. Dist.*, 65 IDELR 123 (E.D. Pa. 2015). Where testimony indicated that sixth-grade student with Fragile X syndrome had difficulty understanding the most basic work in reading and math supports the district's proposal to place him in a special education setting for both subjects. In determining a student's LRE, two factors are considered: 1) whether the district could educate the student in a general education classroom with supplementary aids and services; and 2) if not, whether the district mainstreamed the student to the maximum extent appropriate. With respect to the first factor, the student's teachers attempted various modifications, accommodations, aids and supports, many of which were unsuccessful. The math teacher testified that the student struggled with the most basic concepts and frequently became so frustrated that he had to leave the classroom. According to his language arts teacher, he would hold his books upside down and take scribbled notes to be part of the class. Even the parents' witnesses underscored how the student would benefit in a

segregated setting when recommending a smaller, more supportive classroom environment. The student also engaged in loud and disruptive behaviors such as calling out and flapping his hands. In light of these factors, a general education placement is not appropriate for math or science. The fact that the district offered a general education placement for the rest of the day indicates that the district mainstreamed the student to the maximum extent appropriate.

*C.L. v. Lucia Mar Unif. Sch. Dist.,* 62 IDELR 202 (C.D. Cal. 2014). Proposed separate day class for large and aggressive autistic student is upheld as the student's LRE. The proposed IEP included a detailed description of the student's present levels of performance, including his behavioral difficulties, and set out an array of goals, including especially detailed goals concerning his behavior, his difficulties with compliance, attentiveness, aggression and toleration of frustration. The IEP also provided OT, speech therapy, a one-to-one aide, supervision by an autism behavior specialist and consultation with a nonpublic agency. Based on the thoroughness of the IEP, the testimony of the behavioral specialist and the FBA evaluator's recommendations, the ALJ did not err in finding that the IEP offered the student FAPE. Further, the IEP's requirement that the student spend 45 percent of his day in a special day class and 55 percent in a general education setting complied with the Act's LRE requirement, where the student's behavioral difficulties showed that additional time in a general education setting would not have benefited him and would have extended his disruptive impact on classmates and teachers.

*Bookout v. Bellflower Unif. Sch. Dist.,* 63 IDELR 4 (C.D. Cal. 2014). Where autistic child received significant academic and nonacademic benefits from his general education kindergarten program, the general education classroom was his LRE, not a special day class. While a district may consider a child's effect on teachers and classmates when determining placement, the evidence here shows that the district did not give general education teachers the support they needed to address disability-related behavior problems. Instead, the district intentionally rotated students with disabilities through different classrooms to ensure that no general education teacher had an inclusion class for two years in a row. In addition, general education teachers were not provided with any training in the education of students with disabilities. The child's behavioral and social skills improved significantly with exposure to nondisabled peers; thus, the SDC placement is far too restrictive.

*D.W. v. Milwaukee Pub. Schs.,* 61 IDELR 32 (7th Cir. 2013) (unpublished). District's proposed placement in a special day class for students with intellectual disabilities is the appropriate LRE where this student will receive FAPE. The student earned poor grades in her less restrictive multi-categorical class and often refused to participate. As a result, the student's IEP team developed a BIP that included several hours of daily 1:1 instruction, modification of assignments and daily progress reports. However, the interventions were not successful, and the team modified the student's IEP again to include class work at the student's instructional level, seating near the teacher and positive feedback. Only after those interventions failed did the district propose the more restrictive SDC placement. "The relevant inquiry is whether the student's education in the mainstream environment was 'satisfactory' (or could be made satisfactory through reasonable measures)."

*V.M. v. North Colonie Cent. Sch. Dist.,* 61 IDELR 134, 954 F.Supp.2d 102 (N.D. N.Y. 2013). Where evidence indicated that the 9th grader with Down syndrome spent a good deal of time in

her Regents-level classes crying, sleeping or engaging in off-task behaviors, her parents' request for increased mainstreaming opportunities was not supported. The district offered the student FAPE in the LRE when the IEP team decided that the student needed specialized instruction for reading, math and social studies. While the team did not have any recent assessments of the student's needs (because the parents denied consent for reevaluation since third grade), the team did have available information about the student's performance that reflected that continued placement in mainstream classes was not appropriate. Clearly, the student struggled in her general education math and social studies courses, despite receiving individualized instruction and a significantly modified curriculum. Teachers reported that the instruction provided there was far beyond the student's comprehension level and that she regressed academically and behaviorally as a result. Thus, she would not benefit from mainstream placement for math and social studies and the IEP team was correct in limiting her general education instruction to English and science.

*J.H. v. Fort Bend Indep. Sch. Dist.*, 59 IDELR 122 (5th Cir. 2012) (unpublished). A student with an intellectual disability and speech impairment had an IEP which called for science and social studies objectives to be implemented in a special education class, rather than a general education classroom. Because his parents disagreed with this decision, the student was allowed to begin his sixth grade year in regular education social studies and science classrooms. However, throughout this academic year, his teachers reported that he became increasingly overwhelmed by the difficulty of the general education classes in social studies and science. The school at that point, despite the parents' objection, placed the student in special education classes for these subjects as the IEP Team had determined. The LRE for these classes is in the special education class. All the evidence suggests that the school provided a great deal of accommodation for the student in the general education program, and he was assisted by aides at all times. His teachers provided assignments that were modified up to 100 percent to accommodate his skill level, yet he did not derive any significant nonacademic benefit from placement in mainstream science and social studies classes.

*G.B. v. Tuxedo Union Free Sch. Dist.*, 60 IDELR 2 (2d Cir. 2012) (unpublished). District court's decision that district's proposal to place student in a separate day class was overly restrictive is affirmed and parents are entitled to reimbursement for private preschool costs. As the district court observed, the child learns primarily through watching her nondisabled classmates and modeling their behaviors. In addition, a neuropsychologist testified that the child had reached a critical time developmentally with regard to learning appropriate social interaction and that the district should be maximizing the child's exposure to nondisabled peers rather than segregating her. While the child had difficulty following class activities on her own, she made great progress the previous year with the help of her 1:1 aide.

*L.G. v. Fair Lawn Bd. of Educ.*, 59 IDELR 63 (3d Cir. 2012) (unpublished). The parents of a student with a pervasive developmental disorder rejected the school's IEP that called for placement in a special program for preschoolers with autism, which initially did not provide for interaction with typically developing peers. The public school then began to include a "reverse-inclusion component" to the program which "allowed a child from outside the classroom, either typical or preschool disabled, to come in to play with the group in order to demonstrate appropriate social skills." She was unilaterally placed by her parents in an "inclusive" preschool,

attended both by children with disabilities and those without disabilities. The IEP placement met the LRE requirement and the findings of the ALJ are accepted that the student did not have the prerequisite skills for a less restrictive environment such as a regular classroom, that she "demonstrated inappropriate and stigmatizing behaviors," and needed a highly structured environment. In addition, it was found that the student "would not have benefited from a less restrictive environment ... [because she] wouldn't notice her peers, and, therefore, would not gain from their modeling appropriate behavior."

*Williams v. Milwaukee Pub. Schs.*, 58 IDELR 252 (E.D. Wis. 2012). Because the 9th grade cognitively impaired student made virtually no academic progress in her less restrictive multi-categorical class, the district's proposal to move her to a self-contained class did not violate the IDEA's LRE provision. In the multi-categorical placement, the student shut down, refused to follow directions, participate or complete her work. After a year in which multiple BIPs, supports (including a one-to-one paraprofessional for three hours per day) and other services proved ineffective and based upon IEP team members' view that the student was shutting down because she became frustrated when she could not understand grade-level work, the less restrictive class became "unsatisfactory." In addition, when the proposal to change her placement was made, the team relied not only on the student's failure to progress during the ninth grade, but upon years of evidence showing that she struggled in the multi-categorical classes in elementary school as well. Because the student could not learn there, the decision to move her was not a denial of FAPE.

*A.G. v. Wissahickon Sch. Dist.*, 54 IDELR 113 (3d Cir. 2010) (unpublished). Though the parent wanted the nonverbal 18-year-old to spend the entire school day with nondisabled peers, the district's placement in only one academic class with regular education students is appropriate given the student's cognitive deficits and disruptive behavior. In this case, the student cannot be satisfactorily educated full-time in a regular class, even with accommodations. While the district implemented numerous supplemental aids and services, including modifying the curriculum, the student reaped little academic or social benefit from mainstreaming. However, she made significant progress in her life skills class. Further, the student was prone to loud vocalizations, was not toilet trained, and engaged in other behavior that would negatively affect her classmates.

*C.P. v. Department of Educ.*, 54 IDELR 218 (D. Haw. 2010). Self-contained classroom is the LRE for 9-year-old student where student's aggressive behaviors, which included hitting staff and other students, throwing a stapler, upending furniture and urinating in public had a negative impact upon teachers and classmates. In addition, the student made behavioral progress after three weeks of one-to-one instruction in the self-contained classroom, and the IEP team reconsidered his placement and amended the IEP to provide for gradual re-integration into the general student population based upon that progress.

*Las Virgenes Unif. Sch. Dist. v. S.K.*, 54 IDELR 289 (C.D. Cal. 2010). Autistic student's cognitive and communication deficits are too severe for him to receive educational benefit in a full-time placement in a regular classroom. The IDEA's preference for mainstreaming is not absolute and must be balanced with the requirement to develop a program that addresses the student's individual needs. Because the student's cognitive abilities are so much lower than that of his grade level peers, he could not participate academically in a general education classroom,

even with substantial modifications. Further, given that he would sit isolated from the class with his aide to receive instruction, he would not benefit socially and would distract peers. While the parents wanted the placement to achieve socialization objectives and understood that he could not benefit academically in a general education classroom, the court is unaware of any authority that would require placement in a general education classroom solely for the purpose of increasing his proximity to the general education student body. Thus, the district's proposed placement in a special day class for core academics and mainstreaming for other classes and activities was appropriate.

## B. Cases Where School District is Proposing Less Restrictive Program than Parents Desire

*N.T. v. Garden Grove Unif. Sch. Dist.,* 67 IDELR 229 (C.D. Cal. 2016). District's decision to place student in a special day class rather than in a private at-home ABA program is appropriate and met the student's need for small-group and individual services that would allow him to receive significant individual attention either through the teacher or an IBI aide. In addition, the IEP included four 90-minute intensive behavioral intervention clinics per week, which would provide one-on-one instruction in various skill areas. The district developed this program after having reviewed numerous independent and district-affiliated evaluation reports, and several evaluators testified that the student learns better in a small group as opposed to a one-on-one setting.

*A.K. v. Gwinnett Co. Sch. Dist.,* 62 IDELR 253 (11th Cir. 2014). While home instruction is an available placement on the continuum of alternative placements, it is not the LRE for this 11 year-old autistic student. Her strict diet was not prescribed by a medical doctor, she does not have a life-threatening condition, and she is not under the regular care of a medical doctor. Further, the parents did not show that the district was unable to provide the nutritional supplements to the student during the school day. Thus, the LRE for her is the public school SDC where should would have opportunities to interact with peers and to develop social skills.

*Anthony C. v. Department of Educ.,* 62 IDELR 257 (D. Haw. 2014). The district's proposed public school placement is the autistic high-schooler's LRE where the team discussed the student's possible functional, social, behavioral and academic difficulties if he attended the program in the public high school. While the parents had legitimate concerns that the student's behaviors might interfere with his success at the high school, the district considered the potentially harmful effects of the placement and the IEP team spent a significant portion of the LRE discussion weighing the benefits of a public school placement against the potential harms. In addition, the team discussed ways to mitigate any of the potential difficulties and, while the parents may not be pleased with how the team considered these potential harmful effects, their argument that they were not considered is rejected. Importantly, the IEP team also intended to develop a transition plan to ease the student's move from the private school where he had been for the previous 10 years. In addition, the team discussed a variety of possible placement options before deciding to recommend the public school placement with limited mainstreaming. Thus, predetermination did not occur.

*Ka.D. v. Nest*, 58 IDELR 244 (9th Cir.) (unpublished), *cert. denied*, 133 S. Ct. 650 (2012). Parents are entitled to recover $6,100 for the cost of a private school placement where the evidence showed that the 4-year-old was not ready to handle a part-time general education classroom that had a large number of peers in it, as recommended by the school district. The proposed placement would have required her to interact with about 42 other children, counting the 30 different core group of students in the general education class and the 12 children from her special education class. Despite having evidence that the child had documented difficulties with transitions and large groups, the IEP team recommended a part-time placement in the general education inclusion class, which did not reflect the child's unique needs.

*T.L. v. Department of Educ. of the City of New York*, 58 IDELR 213 (E.D. N.Y. 2012). Parents are not entitled to reimbursement for private school tuition where district offered FAPE in the LRE to high school student with ADHD. The parents' argument that the district's proposed transfer from a special class to a larger collaborative class was inappropriate is rejected. While the parents argued that the proposed class was too big and would not provide the student access to the individualized instruction that he needed, the district countered that the class offered the student placement in the LRE while still being appropriate for his needs and abilities. Where the collaborative class contained 19 general education students and three students with IEPs, was taught both by a general education and special education teacher, all of the students had reading and math functioning levels similar to the student's, a district representative testified that the student would have the opportunity for more individualized instruction there, and his IEP contemplated the provision of classroom modifications and related services to further address his needs, the proposed placement offered FAPE.

*Barron v. South Dakota Bd. of Regents*, 57 IDELR 122, 655 F.3d 787 (8th Cir. 2011). While the parents of deaf and hearing impaired students may prefer that their children attend a state school for the deaf, the Board of Regents is not precluded from cutting back on programs on the school's campus and outsourcing services to local school districts. The parents did not allege that their children were unable to benefit from the programs in which they are currently enrolled. Rather, they alleged that a school for the deaf is the LRE for hearing impaired students. While the parents' arguments in that regard had some "scholarly support," the IDEA requires mainstreaming for students with disabilities to the maximum extent appropriate and the IDEA makes no exception for deaf students. Because the parents have failed to show that the children need services in a separate school to receive FAPE, the board is entitled to make the decision to reduce services provided on campus.

*R.H. v. Plano Indep. Sch. Dist.*, 54 IDELR 211, 607 F.3d 1003 (5th Cir. 2010). Proposed placement for 4-year-old autistic child in district's inclusion program is appropriate. The fact that it included children with disabilities, as well as typically developing children, did not make it inappropriate. Clearly, the IEP team decided against the private general education preschool program requested by the parents because the team did not believe that the private school could implement the child's IEP without the district's direct supervision. The parents' reliance upon *Daniel R.R.* is misplaced, as it did not involve the circumstances in this case, where the public preschool curriculum does not include a purely mainstream class. Thus, while *Daniel R.R.* precludes a child's removal from the general education setting unless he cannot be educated satisfactorily with the use of supplemental aids and services, it does not require a private

placement when the district offers only an inclusion program. In addition, the private school program had no special education services to meet the needs of the child.

*M.H. v. New York City Dept. of Educ.,* 54 IDELR 221 (S.D. N.Y. 2010). Where a psychologist testified that the kindergartner with autism was unable to interact with other students unless prompted by an aide and that he required intensive one-to-one ABA instruction to avoid regression, parents' request for tuition reimbursement for private center for students with autism is upheld. In addition, it was clear that the student was not ready to model typically developing peers and the district's proposed program was not appropriate because it did not offer sufficient ABA trial training.

## C. Home or Neighborhood School Issue

*J.T. v. Newark Bd. of Educ.,* 61 IDELR 27 (D. N.J. 2013) (unpublished). School district has no obligation to offer a resource in-class support program to the SLD student at his neighborhood school. In this case, the student's neighborhood school did not offer the special education services set forth in the student's IEP and a district may offer certain types of programming in a centralized location. In addition, the proposed school was only .8 miles from the student's home.

*H.D. v. Central Bucks Sch. Dist.,* 59 IDELR 275 (E.D. Pa. 2012). Where the aggressive LD student's neighborhood school did not have a program that could adequately address his increasing aggression and deteriorating social skills, the district's proposed move to a school where he would receive increased emotional support did not violate the Act's LRE requirement. At the neighborhood school, the district had provided pull-out instruction, an array of behavioral interventions and supports and pull-out counseling services. The district made numerous revisions to his IEP and behavior plan and incorporated an FBA in an ongoing effort to reduce the student's abusive and physically aggressive behavior, but to no avail. While it is true that the LRE requirement contains a preference for placement at the school the student would attend if not disabled, that preference is limited by the student's educational needs and, despite the district's "extraordinary efforts," the student's behavior continued to escalate and his isolation from his classmates was preventing him from developing social skills. At the proposed new placement, the student would have teachers specially trained in improving social skills and teaching students to deescalate, and the emotional support services there offer the educational benefits that the student most requires while also meeting his learning support needs—something the neighborhood school cannot offer.

*Lebron v. North Penn Sch. Dist.,* 56 IDELR 72, 769 F.Supp.2d 188 (E.D. Pa. 2011). Where the student was already being mainstreamed full time in the district's general education kindergarten class and the district decided to place the autistic student in an autism support class in the afternoon as a supplemental service to his half day kindergarten program, the issue of LRE does not come into play. This is so because there was no proposal to remove him from the regular educational environment and the child is already being mainstreamed as much as possible. In addition, the district is not required to place the student at his neighborhood school, where there is no appropriate autism support class available.

*R.K. v. Board of Educ. of Scott County*, 55 IDELR 247, 755 F.Supp.2d 800 (E.D. Ky. 2010). Where there was no nurse at the diabetic kindergartner's neighborhood school, the district was reasonable when it offered to provide insulin pump monitoring at another of its schools where there was a nurse on staff. The parents' argument that the district could have trained another staff member at the neighborhood school to provide the accommodation is rejected where state law authorizes only medical personnel to monitor insulin pumps. School districts are not required to substantially modify their programs in order to ensure neighborhood placements when the appropriate services are available at another location in the district. Hiring another nurse so that the student could attend the neighborhood school would have been unduly burdensome, given the cost of doing so.

## D. LRE and Transportation

*B.B. v. Catahoula Parish Sch. Dist.*, 62 IDELR 50 (W.D. La. 2013). School district violated IDEA's LRE requirement by prohibiting a 7-year-old with Down Syndrome and behavioral problems to be transported on the regular bus with a "bus buddy" in second grade. Notwithstanding that the student's behaviors included slapping, hitting, spitting, not staying seated, disrobing and throwing his shoes out the window, there was adequate evidence to support the hearing officer's decision that the student would have been able to ride the regular bus at that time with the support of a nondisabled partner. However, while the hearing officer ruled that a denial of FAPE did not occur, that decision is reversed because the LRE violation resulted in a loss of educational opportunity and deprived the student of FAPE. A bus aide who had worked with the student for over a year testified that the child could ride the bus with support, and the parents' expert witness testified that the student could be safely transported on the regular bus with a nondisabled peer to demonstrate appropriate behavior. In addition, the district violated LRE by failing to allow the student to join nondisabled peers for PE, art and music. While the district claimed that the student interacted with nondisabled peers during recess, computer lab and library activities, that did not demonstrate that the student was mainstreamed "to the maximum extent appropriate," as required by IDEA.

## E. LRE and One-to-One Aides

Some situations where a school district assigns a one-to-one aide to a student with autism could actually create the most restrictive environment for the student. IEP teams must be very careful to craft a plan for "weaning" or "fading" the aide from the student to ensure that skills of independence are developed, where appropriate.

*Lainey C. v. Department of Educ.*, 65 IDELR 32 (9th Cir. 2015) (unpublished). District court's decision that a one-to-one aide was not necessary for 5th grader with autism is upheld. The district court's reliance upon the testimony of a behavioral specialist--who opined that an aide would not necessarily assist the student with socialization and that it might lead to the student becoming more socially isolated and less independent—was appropriate. Given the potential drawbacks of providing a one-to-one aide, it was not unreasonable for the IEP team to recommend that the district first try a social skills group and autism consultation services.

*Hupp v. Switzerland of Ohio Local Sch. Dist.,* 60 IDELR 63 (S.D. Ohio 2012). District did not deny FAPE to student with Asperger Syndrome when it offered to provide a 1:1 aide only for unstructured times during the school day, such as lunch, music and P.E., because the student did not need an aide throughout the entire school day. While the child's medical providers recommended the presence of a 1:1 aide at all times, none of those providers had observed the child at school. Educators and autism experts who observed the child in class concluded that the presence of a 1:1 aide during instructional time was unnecessary and would prevent the child from becoming more independent. Recognizing that the child needed help socializing with peers, the district did offer to provide a dedicated aide for the times the student was outside the classroom. Thus, the parents' claim that the lack of a 1:1 aide was a "crucial failure" of his program is rejected, and the hearing officer's decision that the district offered FAPE is upheld.

*A.C. v. Board of Educ. of the Chappaqua Cent. Sch. Dist.,* 51 IDELR 147, 553 F.3d 165 (2d Cir. 2009). District court's decision that school district's program was inappropriate because the provision of a one-to-one aide promoted "learned helplessness" is overturned. Clearly, the State Review Officer's findings should have been affirmed, as the evidence identified ways in which the school district developed M.C.'s independence, for example, by decreasing the level of prompting where it was no longer needed. In addition, the IEP stressed independence in following daily routines and the application of reading and math skills. The student with autism also made progress toward independence in co-taught classes and a progress report indicated that he had mastered the goal of independently following classroom routines. Among other things, the student no longer needed prompting and an escort to use the bathroom.

*Roseville City Elem. Sch. Dist.,* 54 IDELR 37 (SEA Ca. 2009). It is appropriate to move the student to a special day class that would meet the student's need for positive behavioral interventions. Her maladaptive behavior, which included shouting in her regular class and physical aggression, would only be managed, not improved, if her mother continued to serve as her 1:1 aide. There is extensive evidence that that student requires a highly structured class that offers routine and individualized instruction. While the mother's presence in the sixth grade class helped reduce aggression and disruptive behaviors, the student "needs to gain independence, which is not likely to occur if she is constantly accompanied by a 1:1 aide to manage her behavior." Because the special class is designed to address maladaptive behaviors to allow students to change and become independent, it is a good fit for the student.

*Connally Indep. Sch. Dist.,* 34 IDELR 309 (SEA Tex. 2001). School district's determination that 14-year-old autistic student no longer requires 1:1 aide is upheld. Although the school had agreed to provide an aide to the student in all classes for the first six weeks of middle school, the IEP also called for the teacher to evaluate and determine in which classes the student would be able to function independently. Factors considered included the structure of the class, the student's skills in the class, the number of other students in the class and their behavior. The plan also called for the continued reevaluation of these factors, should 1:1 support be discontinued. Where the student displayed increased independence and noticeable improvement in behavior following his transition to middle school, constant 1:1 oversight was no longer required, but ongoing reconsideration of the student's need for an aide is warranted.

*District of Columbia Pub. Schs.*, 8 ECLPR 85 (SEA D.C. 2011). Where the special education coordinator unilaterally decided that the autistic youngster should no longer have a dedicated aide, FAPE was denied. Because the decision was made without an IEP team meeting, this impeded the parent's right to meaningful participation in the decision-making process. Not only did the district exclude parental input, it failed to consider input from the child's teacher, who believed that the student required an aide, the child's service providers, or other members of the IEP team. Although the special education coordinator testified that the aide was removed because the student failed to meet the criteria for an aide, the IEP team never considered those criteria, and there was no discussion as to why the district believed the student did not meet them.

**Alternatives to consider:**

Potentially less restrictive options should always be considered (and generally exhausted) before an IEP Team determines that a 1:1 aide is necessary. These options include, but are not limited to:

- Conducting FBAs and developing BIPs (with or without the assistance of a Behavioral Analyst)
- The use of Assistive Technology or other specialized equipment
- A change in the school facility or location of services
- Specialized training for staff
- Specialized training for parents
- Specialized training for other students
- Assigning an aide to the classroom, rather than to the student
- Assigning peer buddies to assist the student
- Providing social skills training or other pertinent services to the student

## F. LRE and Preschool Programs Generally

*Dear Colleague Letter*, 69 IDELR 106 (OSEP 2017). This DCL supersedes the 2012 OSEP DCL (cited below) and includes additional information on the reporting of educational environment data for preschool children. A preschooler receives special education and related services in a "regular early childhood program" when at least half of the children in the class are nondisabled and services are delivered in the child's class during the course of daily activities in which the whole class participates. States are to annually report on the number of preschoolers with disabilities who attend a regular early childhood program and whether they receive the majority of hours of special education and related services in such program or in another location. A regular early childhood program is one in which at least 50% of the children are nondisabled (i.e., children who do not have IEPs). This might include a kindergarten class, Head Start, a public preschool class, a private preschool or kindergarten program, or group child development centers or child care. However, programs such as informal weekly neighborhood playgroups or home settings do not qualify. For example, a child would not be receiving instruction or services in a "regular program" if services are delivered in a one-to-one therapeutic setting or in a small group comprised solely of children with disabilities in a different location in the building.

*A.S. v. Harrison Tshp. Bd. of Educ.*, 66 IDELR 126 (D. N.J. 2015). District's motion to dismiss is denied where parents claimed that their autistic child was placed in a segregated classroom in preschool. The question here is whether the parents allege enough facts to consider whether education in a regular classroom with supplementary aids and services could have been achieved satisfactorily and whether the district had mainstreamed the child to the maximum extent appropriate. In this case, they alleged enough to consider these issues and the district's argument that preschool students with disabilities may be provided educational services without inclusion with nondisabled preschoolers because districts do not have to create preschools is rejected. Instead, once the district created a preschool program, it was required to admit students with disabilities and should not have segregated students with disabilities in one classroom.

*Letter to Colleague*, 58 IDELR 290 (OSEP 2012). A school district with limited or no preschool programs for nondisabled students is not absolved from its obligation to comply with the IDEA's LRE requirement applicable to disabled preschoolers. The LRE provision applies whether or not the school district operates public preschool programs for nondisabled children and districts "must explore alternative methods to ensure that the LRE requirements are met" for disabled preschoolers. These methods may include: 1) providing opportunities for them to participate in preschool programs operated by other public agencies (such as Head Start or community-based child care); 2) enrolling preschool children with disabilities in private programs for nondisabled preschool children; 3) locating classes for preschool children with disabilities in regular elementary schools; or 4) providing home-based services. In addition, if a school district determines that placement in a private preschool program is necessary for a child to receive FAPE, the district must make that program available at no cost to the parent.

## G. LRE and Extended School Year Services

*T.M. v. Cornwall Cent. Sch. Dist.*, 63 IDELR 31 (2d Cir. 2014). The LRE requirement applies to extended school year programs in the same manner as it applies to school year placements. ESY services are an essential program component for students who require year-round services to prevent substantial regression and the LRE requirement applies with the same force in the summer months as it does during the regular school year. Thus, districts must ensure that they have a range of educational settings available for ESY placements. If a district does not offer a mainstream ESY program, it can still make a continuum of ESY placements available by considering a private summer program or a mainstream ESY program offered by another public entity. Because the autistic child here made progress in his general education kindergarten class, the district erred in failing to make a mainstream ESY placement available. Thus, the district court's holding that the district was not obligated to offer a mainstream ESY placement is vacated and remanded for further proceedings.

## H. Separate Schools and LRE

*Smith v. Los Angeles Unif. Sch.. Dist.*, 67 IDELR 226 (9th Cir. 2016). Group of parents who want their children to stay in separate special education settings may intervene in this case to challenge a settlement agreement entered into by a different group of parents and the school district that would lead to the elimination of special education centers. The settlement agreement, which was renegotiated, resulted in curriculum change for the students in the centers

that had not been imposed on students whose IEPs previously recommended full-time placement in a special education center. Thus, challenging at this time is appropriate, even though the litigation has been going on over 20 years. The parents' delay in intervening into the lawsuit as also justified because they did not appreciate the "full import" of the changes based upon the "rosy language in which the changes were portrayed" by the district. Thus, these factors weigh in favor of the parents' intervention in this case.

*Letter to Deal and Olens*, 115 LRP 31259 (DOJ 2015). The State of Georgia has violated the ADA by the unwarranted segregation of over 5,000 students enrolled in the Georgia Network for Educational and Therapeutic Support (GNETS) program. The state must redirect its resources and capital to ensure that all GNETS students are transferred to "the most integrated setting appropriate." Under the ADA, educational agencies must place a student in an integrated educational setting that provides him "with opportunities to interact with his…[nondisabled] peers to the fullest extent appropriate." Here, the state automatically refers students with behavioral disabilities to the GNETS program even though the vast majority of them could participate with additional services and supports in general education schools. The evidence showed that these students, whether they attended a separate center or a classroom within a local school, spent their entire day, including meals, exclusively with other disabled students. In addition, the GNETS program failed to offer equal opportunities to its students by not providing them with grade-level instruction, extracurricular activities or elective courses. Instead, students only received instruction in core academic subjects and were assigned to inferior facilities that lacked many of the features and amenities of regular schools, such as air conditioning and appropriate lighting. The state is ordered to use its available funds to properly evaluate all GNETS students, transition them back into their local schools and provide them with necessary services.

## V. SOME TIPS TO CONSIDER FOR LRE DETERMINATIONS AND ANALYSIS

1. To start, remember that placement decisions may not be based solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space or administrative convenience. *See, e.g., Letter to Trigg*, 50 IDELR 48 (OSEP 2007). Avoid pre-determinations as to the LRE!

2. Remember to adequately train and involve regular education teachers in the decision-making process and in working with students with disabilities.

3. Remember that the LRE mandate does not trump FAPE. The pertinent overall question for every student is "what is the least restrictive environment where this student can receive some (rather than minimal or de minimis) educational benefit?

    a. Education with nondisabled peers is required to the "maximum extent *appropriate*," not to the "maximum extent *possible*."

4. Specifically identify the individual needs/target skills of the student and prioritize them, taking into consideration the nature/severity of the student's disability and the student's age:

    a. Academic needs/skills (strengths/challenges)

    b. Nonacademic needs and skills (behavioral, social/emotional, communication, motor, modeling language and behavior, skills of independence/personal responsibility, generalization)

5. Determine what level of services/supports is necessary to meet the defined needs and to support meaningful progress on goals/objectives.

    a. Intensive/one-to-one instruction

    b. Supplementary aids and services

        i. resource room
        ii. itinerant instruction
        iii. modification of curriculum
        iv. teacher training
        v. behavior management
        vi. classroom aide
        vii. personal aide
        viii. assistive technology devices/services

6. Determine whether the student's needs can be met *satisfactorily* in the regular education classroom with/without supplementary aids and services, considering the following factors:

    a. Level of disruption in the regular education environment

        i. Acting out/aggressive/disruptive behavior(s)
        ii. Deprivation of benefit to other students in class

    b. Cost

    c. Harmful effects upon the student with a disability

    d. Meaningful educational benefit

7. Identify what efforts the school has made to educate in the regular education classroom and to try less restrictive options.

a. Identify efforts made/supplemental services provided

b. Review and/or update data regarding progress/meaningful benefit and effectiveness of previous efforts made

8. If needs cannot be or have not been *satisfactorily* met in the regular education classroom, slowly move along the continuum of alternative placements beginning with less restrictive options and moving to the most restrictive to determine where meaningful educational benefit can be achieved:

a. regular classroom instruction for the entire school day, with some modifications to the regular instructional program;

b. regular classroom instruction for the entire school day, with individualization of instruction by the classroom teacher for part of the school day;

c. regular classroom instruction for the entire school day, with individualized instruction services by a special education teacher or related service staff member for part of the school day;

d. regular classroom instruction for most of the school day, with individualized instruction or services provided in another setting for part of the school day;

e. regular classroom instruction for most of the school day, with special education instruction in basic skills areas and/or related services provided in a resource room for part of the school day;

f. resource room instruction for half of the school day, with instruction in the regular classroom for the other half of the school day;

g. self-contained classroom instruction, with instruction in the regular classroom for part of the school day;

h. full-time instruction in self-contained classroom with opportunities for participation with non-eligible students in non-academic and extracurricular activities;

i. full-time instruction in a self-contained (separate) classroom;

j. full-time instruction in a self-contained (separate) school;

k. instruction provided in a hospital or residential facility setting on an individual or group basis;

l. homebound instruction.

9. If the parent disputes the school's LRE recommendation, use a "contrast and compare" approach, defining and weighing the academic and nonacademic benefits of the proposed placement versus the parents' desired placement.

10. If removal from the regular classroom is determined to be appropriate, determine what alternative mainstreaming opportunities to the maximum extent appropriate can be or have been made available.

    i. P.E., Art, Music, Electives
    ii. Lunch
    iii. Nonacademic and extracurricular activities
    iv. Reverse mainstreaming opportunities