

MODERN LRE ISSUES

Presented by David M. Richards, Attorney at Law

RICHARDS LINDSAY & MARTÍN, L.L.P.

13091 Pond Springs Road • Suite 300 • Austin, Texas 78729

Telephone (512) 918-0051 • Facsimile (512) 918-3013 • www.504idea.org • dave@rlmedlaw.com

©2014, 2017 RICHARDS LINDSAY & MARTÍN, L.L.P. All Rights Reserved. Wyoming WAVE 2017

A note about these materials: These materials are not intended as a comprehensive review of all new case law, rules and regulations on least restrictive environment (LRE), but as an introduction to some of the more complex current LRE issues and trends confronted by schools as they seek to comply with federal law. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts can make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read “ED.”

I. A Quick Review of LRE Basics

The basic mandate that IDEA-eligible students should be educated, to the maximum extent appropriate, with their nondisabled peers has been a part of the Act since its inception in 1975. This mandate is called LRE, for Least Restrictive Environment. The phrase is curious, since it has nothing to do with “restrictiveness” in the normal sense of the word, but instead is based on the level of a student’s *segregation* from education alongside nondisabled peers. What is the least restrictive environment? It is the educational setting where special education students can receive meaningful educational benefit while being educated with their nondisabled peers to the maximum extent possible. The LRE will differ from student to student, since it is an individualized determination based in the same way that IEP development is an individualized process based on the student’s educational needs.

IDEA has contained statutory provisions on LRE since its inception, and IDEA regulations have contained specific provisions clarifying the requirement. In turn, federal courts since the early 1980’s have established analytical frameworks for determining whether a school district has complied with the LRE mandate in dispute situations.

A Summary of Select LRE Requirements.

1. IDEA-eligible students must be educated with disabled students to the maximum extent appropriate. “IN GENERAL—To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability 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).

IDEA’s Job #1 is educational benefit (Not LRE). There is a natural tension between the IDEA’s purpose of providing educational benefit and its presumption of mainstream placement. When resolving the tension, however, educational benefit wins. “Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular education classroom cannot meet the handicapped child’s unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the student in regular education.” *Daniel R.R., supra*. See also, *Board of Education of Murphysboro v. Ill. Bd. of Educ.*, 21 IDELR 1046, 41 F.3d 1162, 1168 (7th Cir. 1994)(The Least Restrictive Environment Requirement “was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements.”); *Hartmann v. Loudoun County Bd. of Educ.*, 26 IDELR 167, 118 F.3d 996 (4th Cir. 1997)(“The IDEA encourages mainstreaming, but only to the extent that it does not

prevent a child from receiving educational benefit. The evidence in this case demonstrates that Mark Hartmann was not making academic progress in a regular education classroom despite the provision of adequate supplementary aids and services.”).

See also, Mr. & Mrs. P. v. Newington Board of Education, 51 IDELR 2 (2d Cir. 2008). Despite the parents’ desire for 80% mainstreaming, some pull-out was necessary for reading, math and speech therapy, resulting in 74% mainstreaming — two-to-three hours a week less than desired by the parents. The parents’ demand appears based on an agreement by the Connecticut DOE in a class action settlement that 80 percent mainstreaming would be a desired outcome for disabled students. The court, focusing on this child, found the degree of mainstreaming appropriate. “While including students in the regular classroom as much as is practicable is undoubtedly a central goal of the IDEA, schools must attempt to achieve that goal in light of the equally important objective of providing an education appropriately tailored to each student’s particular needs.”

This position is hardly unique to the 2nd Circuit. *See also, Beth B. v. Lake Bluff School District*, 36 IDELR 121, 282 F.3d 493 (7th Cir. 2002)(“The LRE requirement shows Congress’ strong preference in favor of mainstreaming, but does not require, or even suggest, doing so when the regular classroom setting provides an unsatisfactory education”); *Lachman v. Illinois State Bd of Educ.*, 441 IDELR 156, 852 F.2d 290 (7th Cir. 1988)(Appropriate placement overrides the least restrictive environment where the student will require so much modification in the curriculum that the regular program has to be altered beyond recognition, resulting in limited educational value to the student); *City of Chicago School District 299*, 50 IDELR 300 (SEA IL 2008)(“The IDEA requires mainstreaming to the maximum extent appropriate, not the maximum extent possible.”); *B.S. v. Placentia-Yorba Linda USD*, 51 IDELR 237 (9th Cir. 2009)(*unpublished*)(“We noted nearly 25 years ago that mainstreaming ‘is a policy which must be balanced with the primary objective of providing handicapped children with an “appropriate” education.’”); *Wilson v. Marana Unified Sch. District*, 556 IDELR 101, 735 F.2d 1178, 1183 (9th Cir. 1984)(“The findings that the educational and non-academic benefits to be derived from a mainstream program were minimal and the blended program would be better suited to meet B.S.’s unique abilities and needs are sufficient to overcome the preference for mainstreaming. The district court did not err in so determining.”); *Greenwood v. Wissahickon School District*, 50 IDELR 280, 571 F. Supp. 2d 654 (E.D. Pa. 2008)(“Mainstreaming does not require inclusion in a regular classroom if doing so would jeopardize a student’s ability to achieve a meaningful educational benefit.”).

A little commentary: Just as the preference for mainstreaming cannot override the primary goal of educational benefit, neither can curricular LRE. As demonstrated below, for some students, full-time or even too much exposure to the grade-level curriculum can deny educational benefits.

2. A change of placement from a regular class to a more restrictive setting can take place only after properly determining that a FAPE cannot be provided in the regular class, even with legitimate efforts at providing supplementary aids, services, and modifications. 34 C.F.R. §300.114 (a)(2)(ii).

3. School districts must maintain a continuum of placements for IDEA-eligible students.

“(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) 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.

- 4. IEP teams must make the placement decisions for IDEA students, and they must do so at least annually.** 34 C.F.R. §300.116(b)(1).
- 5. IEP team placement decisions must be based on each student’s IEP.** 34 C.F.R. §300.116(b)(2).
- 6. Unless the IEP of an IDEA student requires some other arrangement, the child should be placed in the school where the child would attend if they were not disabled.** 34 C.F.R. §300.116(c).
- 7. The placement must be as close as possible to the student’s home.** 34 C.F.R. §300.116(b)(3).
- 8. In making placement decisions, the IEP team must consider any potential harmful effect on the child or on the quality of required services.** 34 C.F.R. §300.116(d).
- 9. IDEA-eligible students must not be removed from regular classrooms solely because of the need for classroom modifications.** 34 C.F.R. §300.116(e).
- 10. LRE applies to nonacademic settings as well.** “In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Sec. 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability 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.” 34 C.F.R. §300.117

II. LRE, Pre-School Programs & ESY.

A. LRE & Pre-School.

In *E.G. v. Fair Lawn Bd. of Educ.*, 59 IDELR 65 (3rd Cir. 2012), the parents of a preschooler with Autism challenged her placement in an Autism preschool class, which offered one-to-one ABA services and opportunities to interact with typically developing peers. Instead, the parents wanted her placed in an inclusive preschool program. The court determined that the school’s proposal constituted the LRE for the child. It noted that she did not have the prerequisite skills needed to learn in a less restrictive setting, demonstrated “inappropriate and stigmatizing” behaviors, and would wander the classroom aimlessly if not in a highly structured environment. Moreover, any modeling benefit from exposure to nondisabled peers was minimized because she did not notice or interact with them. The court agreed that the student needed significant one-to-one instruction, and that she had made significant and meaningful progress in the Autism program.

A little commentary: The court states that the LRE requirement “applies with equal force to the placement of preschool-aged children,” a point that has been made in Department of Education letters and other federal court cases (see below). In a purely analytical point, the court draws a distinction between the FAPE inquiry and the LRE analysis. “Whether an education is ‘appropriate’ for purposes of determining whether a school district has offered a student a free appropriate public education is, or course, a distinct question from whether the student has been integrated ‘to the maximum extent appropriate.’” Some courts do not necessarily agree, viewing compliance with the LRE mandate as a component of whether the school has provided a FAPE.

In another LRE case involving a preschooler, a New York school claimed that a child with Pervasive Developmental Disorder (PDD) needed a more restrictive placement than her private inclusion preschool class. *N.B. v. Tuxedo Union Free Sch. Dist.*, 60 IDELR 2 (2nd Cir. 2012). Noting that the child had made significant progress by modeling nondisabled peers, and in fact, appeared to learn primarily by watching them, the court found that the school’s proposal to place her in a special

education class was not the LRE. Since the child had made good progress in an inclusion classroom with a one-to-one aide, an integrated preschool program represented the LRE for her. The school was unable to produce evidence showing that, even with accommodations or supports, the child could not receive a FAPE in an integrated program. The court thus upheld an award of \$71,000 of reimbursement for her private inclusion program.

A little commentary: At times, the problem generating these disputes is that public schools may lack mainstream preschool programs, thus forcing decisions that preschool students with disabilities be placed in restrictive settings in order to receive services. Both the U.S. Department of Education and federal courts have taken the position that LRE applies equally to preschool children. Thus, starting with *Letter to Nevelidine*, 24 IDELR 1042 (OSEP 1996), **OSEP has stated that LRE applies to preschool students, even in situations where the school district is providing only “stand-alone” services, such as speech therapy.** If the IEP indicates that the student needs to model from, and interact with, nondisabled students in order to receive FAPE, the school district must address that need, either through coordination with other agencies and programs (e.g., Head Start, private daycare programs) or by providing opportunities for such interaction through other means.

In 2012, OSEP reiterated that LRE requirements apply in preschool contexts, adding that districts with limited or no preschool programs are not absolved of their responsibilities to comply with LRE for its IDEA-eligible preschoolers. *Dear Colleague Letter*, 58 IDELR 290 (OSEP 2012). In cases where districts offer no regular preschool programs, alternative means to satisfy LRE requirements must be explored, including providing opportunities for students to participate in (1) preschool programs operated by other public agencies (e.g., Head Start or other community-based child care programs), (2) paying for enrollment in private preschool programs, (3) contracting with other public schools in the area, or (4) providing home-based services. Note also that 2006 regulation at 34 C.F.R. §300.116 (set forth above) specifically applies the continuum of placements requirement to preschool-age students. Potentially, this means that if an IEP team determines that a preschool child’s IEP can be implemented in a regular preschool setting, that placement must be made available at no cost, presumably even if the program is normally provided at cost to parents or even if the child does not otherwise meet criteria to participate.

In an older circuit court decision on point, since the local school offered no preschool programs, it offered a student with ID a placement in a self-contained preschool program in another school district five miles away. *Bd. of Educ. of Lagrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ.*, 30 IDELR 891 (7th Cir. 1999). The parents placed the student in a regular private preschool and sought reimbursement. The court awarded reimbursement, holding that the student’s disability did not preclude mainstreaming, which the school did not offer. The court noted that the private preschool tuition was only \$75 per month—less than the cost of transporting the student to the proposed out-of-district placement.

The Fifth Circuit also weighed in with a preschool LRE case in the matter of *R.H. v. Plano Ind. Sch. Dist.*, 54 IDELR 211 (5th Cir. 2010). The district there proposed placement in a preschool program for a 4-year-old boy with Autism that included both disabled and nondisabled students. The parents, believing that he was regressing behaviorally due to modeling from students from disabilities, requested placement in a private mainstream preschool program. They argued that the district had a duty to offer a mainstream preschool program, even if it meant paying for a private program. The court refused to find that LRE required the school to pay for a private mainstream preschool program if the district did not offer a mainstream preschool program. “*Daniel R. R.* does not consider or speak to the circumstances at issue here, where the public preschool curriculum does not include a purely mainstream class.” The court did not find a violation of LRE.

A little commentary: In states and schools that offer regular preschool, students with disabilities automatically have the option of mainstream preschool placement, if they can receive a FAPE there. The issue gets more complicated in schools that do not offer regular preschool. At least since 1996, the

Department of Education has taken the position that LRE applies to preschool programs. See *Letter to Neveldine*, 24 IDELR 1042 (OSEP 1996)(reviewed above). The Fifth Circuit was, however, reluctant to order the school to pay for private mainstream preschool, stating that “[c]ourts should therefore be cautious before holding that a school district is required to place a child outside the available range of public options.” Curiously, however, the opinion does not confront the issue of whether a mainstream placement could have provided the student a FAPE, instead focusing on the LRE mandate’s prohibition from unnecessary *removal* from regular classes into which the student is placed. Of course, in turn that begs the question of whether a school can avoid LRE requirements by restricting its placement offerings. Moreover, in discussing the parents’ arguments that the school did not properly consider potential harmful effects of the proposed placement, the court found that the regulation in question no longer existed, when in fact the 2006 version of the regulations simply renumbered the harmful effects provision from former 34 C.F.R. §300.552(d) to the current 34 C.F.R. §300.116(d).

B. LRE in Extended School Year (ESY).

T.M. v. Cornwall Cent. School District, 63 IDELR 31 (2nd Cir. 2014). The school district argued that “the LRE requirement applies only where the state already operates a mainstream classroom in which the student could be placed.” Since the district did not operate a mainstream ESY program, argued the school, it need not consider LRE when placing IDEA students in ESY. The Second Circuit ruled otherwise.

“Under the IDEA, a disabled student's least restrictive environment refers to the least restrictive educational setting consistent with that student’s needs, not the least restrictive setting that the school district chooses to make available.... IDEA’s LRE requirement is not strictly limited by the range of ESY programs that the school district chooses to offer. Instead, the LRE requirement applies in the same way to ESY placements as it does to school-year placements. To meet that requirement, a school district first must consider an appropriate continuum of alternative placements; it then must offer the disabled student the least restrictive placement from that continuum that is appropriate for his or her needs.... Of course, a school district need not itself operate all of the different educational programs on this continuum of alternative placements. The continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools.”

III. The Growing Problem with LRE & Homebound Instruction.

Home instruction for IDEA-eligible students. “Home instruction” is a term of art, used by the IDEA regulations to refer to a special education instructional arrangement or setting. It is not to be confused with the phrase “home-based” services, which typically describes a student, who while confined to his home, is provided access to materials, assignments, etc., but gets no direct instruction. The federal regulations specifically identify home instruction as part of the continuum of placements for the IDEA-eligible student. 34 C.F.R. §300.115. State law and regulation will likely provide parameters for delivering instruction at home under the IDEA. Due to the variety of rules among the states, those rules are not discussed here. Consult your school attorney to discuss the impact of state rules.

The home is the most restrictive placement with respect to LRE. Home instruction comes with serious least restrictive environment (LRE) repercussions. **“Home instruction is, for school-aged children, the most restrictive type of placement because it does not permit education to take place with other children.** For that reason, home instruction should be relied on as the means of providing FAPE to a school-aged child with a disability only in those limited circumstances when they cannot be educated with other children even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery.” *DOE Commentary to Subpart E, §300.551* (1997 IDEA Reauthorization)(emphasis added). Similarly, the 9th Circuit found that “Hospitalized and homebound

care should be considered to be among the least advantageous educational arrangements [and are] to be utilized only when a more normalized process of education is unsuitable for a student who has severe health restrictions.” U.S. Department of Education, *Program Standards and Guidelines for Special Education and Special Services, Programs and Services for the Orthopedically Handicapped and Other Health Impaired*, aqi; and *Department of Educ., State of Hawaii v. Katherine D.*, 555 IDELR 276 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117, 112 LRP 25887 (1985).

Doctor’s notes and home instruction. A common requirement in state law is that a medical doctor certify that the student, because of a medical condition or impairment, is unable to attend school. *See, for example, Bellingham Pub. Schools*, 41 IDELR 74 (SEA MA 2004) (addressing Massachusetts law: “at a minimum, the school district must receive a physician’s signed statement which includes ‘the medical reason(s) for the confinement’ to the home.”); and *Los Angeles Unified Sch. Dist.*, 54 IDELR 269 (SEA CA 2010) (Addressing California law: “In order to receive home instruction, a student must have ‘a medical report from the attending physician and surgeon ... stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. The report shall include a projected calendar date for the pupil’s return to school.’”). Students can be confined to the home for any number of disability-related reasons.

Reported cases and OCR letters of finding identify any number of impairments that may, in the case of a particular student, prevent the student from attending school: leukemia (*Yancey (NC) County Schools*, 51 IDELR 23 (OCR 2008)); severe asthma and allergies (*Great Falls (MT) Public School District*, 48 IDELR 200 (OCR 2006)); sensitivity to colognes, perfumes, and fragrances (*Zandi v. Fort Wayne Community Schools*, 59 IDELR 283 (N.D. Ind. 2012)); aplastic anemia (*Georgetown Independent School District*, 45 IDELR 116 (SEA TX 2005)); variety of serious physical injuries from a motorcycle accident (*Bradley County (TN) Schools*, 43 IDELR 143 (OCR 2004)); medically fragile student easily susceptible to communicable disease (*DeKalb County Central United School District*, 111 LRP 51791 (SEA IN 12/03/10)); and cystic fibrosis (*Oneida (NY) City School District*, 54 IDELR 173 (OCR 2009).

A diagnosis isn’t enough—why is the student confined to home? *Bellingham Public Schools*, 41 IDELR 74 (SEA MA 2004). When asked by the district to explain why a student was confined to the home and in need of homebound services, the doctor responded by listing the student’s impairments. Student “has severe learning disabilities (reading, expressive and written language, and math), and also suffers from ADHD, ODD (Oppositional Defiant Disorder), Asperger’s Syndrome, a mood disorder that has many of the hallmarks of bipolar illness, anxiety disorder, and obsessive-compulsive disorder.” Neither the school district nor the court were satisfied.

“Nothing within Dr. Henry’s original submission of May 16, 2003 or in his more recent letter of January 23, 2004 explains how any of Student’s diagnoses impacts upon his ability to leave the home and receive educational services at a school. Dr. Henry has provided no basis for distinguishing Student (and his diagnoses) from all of the students with these same diagnoses who receive their educational services within a school setting. In other words, the diagnoses, without more, do not explain why Student must remain at home.” (Emphasis added).

Why doctors don’t make the homebound placement decision alone.... Not knowing the educational options and resources available to the school, the doctor may simply think that homebound is the only possible solution. A case from Texas provides insight into the analysis that goes into educational placement decisions, and why these decisions are made by an IEP team.

“Dr. [] is unfamiliar with the criteria for educational placements; educational programs, including special education; or state or federal criteria for determining the need for homebound placement. Dr. [] is unfamiliar with the term ‘IEP’ and does not know the difference between homeschooling and homebound placement. Dr. [] has never visited Student’s home or school, or talked to anyone from Student’s school. Dr. [] was unaware that Student’s parent had refused to provide Student’s school with her consent for the school to speak with Dr. [] about his treatment of Student. Dr. [] has provided no

information to Student's school that could be confused as a medical and/or professional opinion in support of an eligibility determination of OHI, based on allergies or multi-chemical sensitivity.... The standards for homebound placement do not exist in a vacuum, nor is it left up to the generalized opinion of a physician who is unfamiliar with the written State standards." *Plano Indep. Sch. Dist.*, 62 IDELR 159 (SEA TX 2013).

See also Brevard County Sch. Bd., 109 LRP 56512 (SEA FL 08/12/09) (With respect to a doctor's opinion on the issue of returning a medically fragile student with autism from homebound to a small classroom in his neighborhood school, the hearing officer wrote, "Petitioner's physicians are not experts on education generally or ESE in particular. Given the nature of their pediatric practices, their counsel on Petitioner's physical capacity to attend public school should be taken into consideration, but only in light of their very limited understanding of what the public school was offering in this instance."); and *Rockford Sch. Dist. #205*, 108 LRP 42815 (SEA IL 06/26/08) ("**The note thus refers to the student's autism, but that is a disability with which the student had long suffered, and it had not prevented him from attending school.** The note also refers to the student as 'having been more depressed and not comfortable at school,' which are not illnesses requiring absence from school at all, but merely descriptive of the student's moods at school. It also refers to the student's 'current illness,' but what this 'illness' was—and whether it is any different from the student being 'depressed and not comfortable at school' or different from the student's 'autism'—is not identified or described or otherwise documented. **This officer finds, in any event, that the February 14 note from Dr. Danko did not document any illness or condition that required the student to be absent from school for even one day, much less for more than four months.**") (Emphasis added).

A little commentary: The *Rockford* case provides an extreme example of parents who either are unwilling or unable to get the student to school and the impact of school demands that parents provide medical documentation for purposes of compulsory attendance. The possibility of truancy filings in the absence of documentation prompted the parent to claim that the student was enrolled in another school. Wrote the hearing officer: "The mother committed a fraud upon the District, and did a profound disservice to her son educationally, by purporting to withdraw him from the Rockford Public Schools in order to enroll him in Education Choice School, when there was no school by that name, but only a mail box drop at the address shown for the school." *Rockford Sch. Dist. #205*, 108 LRP 42815 (SEA IL 06/26/08).

Who has the duty to evaluate the student's need for homebound? IDEA tasks the school with the duty to provide appropriate evaluation. That duty is not one that the school can delegate to the parents, even when homebound is at issue. Homebound demands can create difficult evaluation dynamics, especially when the school does not have access to observe the child, and the doctor's recommendations do not appear to satisfy the IEP Team's concerns. Consider the federal district court's ruling in *Rodriguez & Lopez v. Independent School District of Boise City, No. 1*, 63 IDELR 36 (D. ID. 2014), where parents of a student with autism kept him home, missing months of instruction, due to concerns about the school environment and allegations of an employee kicking the student on the bus. The IEP Team refused the parent's request for homebound, since the student was not confined to home due to illness or accident. The result was a student not receiving services. Wrote the court: "During his absence, C.L.'s academic advancement was not just minimal or trivial; it was nonexistent. Meanwhile, BISSD had a continuing duty to provide FAPE to C.L." The school's position, wrote the court, was that the student should immediately return to school for services.

The parents provided data that an immediate return was inappropriate. For example, the student's doctor recommended that the student receive homebound due to his fear of returning to school. When asked by the school to identify the benefits of homebound to the student, the doctor wrote

"Nothing, other than I thought that is what the family and the school were desiring until his IEP, behavior intervention plan, and the medication plan were in place such that his disruptive/concerning behaviors could be better helped/controlled. If you don't find there is any issue, he'd be free to continue at Hillside."

Following their evaluation of the student, two other doctors recommended a “gradual return to school supplemented with positive reinforcement, school scenario role playing, and efforts to build C.L.’s social and coping skills.” The student’s treating psychologist likewise recommended a gradual transition back to school. The court determined that C.L. has a long history of anxiety at school, and that the “although C.L. is not a reliable reporter of objective facts, the record nevertheless demonstrates that C.L. *perceived* he was abused in Ms. Badger’s classroom and on the bus... According to his parents, C.L.’s perceptions rendered him too anxious to return to Hillside, a reaction entirely consistent with C.L.’s long history of anxiety towards new environments.”

The problem came down to months of no instruction, and the school’s “**stubborn insistence the C.L. could simply return to Hillside at any time[.]**” The school’s position “**inappropriately shifted the burden of complying with the IDEA to C.L.’s parents. BSD embraced this position without seriously considering alternatives that might have addressed the Parent’s legitimate concern that their son would be harmed by returning to a school environment that he—rightly or wrongly—feared.**” The court found in favor of the parents and ordered briefing on appropriate relief, including compensatory services.

A little commentary: The problem here is that even if the student isn’t at home due to illness or accident, he’s at home and getting no services and the medical data speaks of transition not immediate return. There was no data, said the court, indicating that immediate return to school was possible. Once the student is at home, and transition is necessary to bring him back, the school must provide transition service to effectuate the move, and the duty to provide FAPE has to be addressed. Some homebound instruction seems to be the place to start. Would the court’s position have been different if the school has arranged for the teacher, Ms. Badger, to work with the student and home, allowing the school to gather information about his reaction to her and readiness to return? What if the school had provided counseling or school psychological services that addressed the student’s anxiety and ability to return to school? Had those services occurred early, they might have bolstered the school’s position that homebound was inappropriate, and that the student was able to return to immediately to school. See the discussion below on services, in addition to instruction, that might be necessary to return the student to a less-restrictive environment.

No homebound is appropriate when the student isn’t confined to the home. Allegations of home confinement must be viewed in the context of other activities engaged in by the student both during and outside of school hours. *See, for example, Calallen Indep. Sch. Dist.*, 25 IDELR 1017 (SEA TX 1997) (“Some students need continuous homebound services. John is not among them. One is hard pressed to justify continuous homebound services for a student who drives the family car, goes out on dates, and regularly participates in other activities outside the home.”); *Plano Indep. Sch. Dist.*, 62 IDELR 159 (SEA TX 2013) (“Outside of school Student is not restricted to home. Student goes to the local shopping mall with friends, McDonalds, and other social gatherings. Student enjoys swimming and playing soccer.... Student appears robust and healthy and seems to engage in activities involving mold, pollen, and other people when the activity suits student.”); and *Bellingham Pub. Schs.*, 41 IDELR 74 (SEA MA 2004) (“Student testified that he regularly leaves his home, particularly after the end of the school day. He described various things that he typically enjoys doing outside of his home within the community—for example, ‘hanging out’ with his many friends, watching football games, seeing his girlfriend, driving a car (he has his learner’s permit).” “Parents would not consent to home tutoring being scheduled after school hours, because the tutoring would then interfere with Student’s spending time with his friends. The inescapable conclusion is that Student is not, for any reason, confined to his home.”).

A little commentary: A small but growing dynamic schools are encountering is a doctor’s note that indicates the student is confined to home, but other evidence indicates that the student appears to function without any such restriction. In these situations, while the IEP team can certainly conclude that homebound is inappropriate (believing that the student should attend and planning the IEP accordingly),

the IEP Team is nevertheless faced with the problem of a student who may not want to return to school, a parent unable or unwilling to make him, and a doctor supporting nonattendance.

As the school must provide FAPE somewhere to the eligible student, the school faces some difficult choices. One choice is IEP Team action returning the student to school, but the parents will likely refuse to send the student, relying on the doctor's recommendation for home instruction. To be effective, the school will likely have to file for due process to enable a hearing officer to weigh the doctor's opinion on confinement against the evidence of the student's outside activities. Another avenue may be available under state truancy laws. At some point, the student's refusal to attend and his mounting absences may trigger the school's state law duty to file truancy, giving a truancy judge the opportunity to weigh these same issues. Hearing officers and judges may be less than sympathetic to the school's position in the absence of medical data that the student can actually attend. To prepare for such a situation, the school will need to be able to evidence the lack of actual confinement to the home. *See Calallen, Plano, Bellingham, supra*. This type of data can certainly raise suspicions as to the "medical need" for the student to be taught away from school.

A second approach is to simply provide services in the homebound setting despite the IEP Team's belief that the home is not the LRE. This approach is also complicated and can come back to haunt the district. *See, for example, South Washington County Indep. Sch. Dist. #833, 113 LRP 906 (SEA MN 01/11/12)* ("The Complainant unilaterally removed the Student from school and was unresponsive to the District's attempts to meet with her. Although the District proposed a homebound IEP, it is not clear that the District believed that the Student required homebound instruction. Rather, it is reasonable to infer that the District was trying to accommodate the Complainant's unilateral removal of the Student rather than refer the Student as truant. The change of placement required a consideration of the Student's needs and due process.... The District violated 34 C.F.R. § 300.324 when it failed to develop a short-term IEP based on the unique needs of the Student."). Further, for a student uninterested in school, service providers may find the student unavailable, uncooperative, or unconcerned about instruction. These situations can require a great deal of attention and resources to resolve. Schools should approach these thorny situations with the help of the school attorney.

In this context we view the IDEA-eligible student's request to participate in school activities despite the impairment that keeps him or her from receiving instruction at school. Note that while the IDEA's Section 504 duty prevents discrimination in the school's nonacademic and extracurricular activities, IDEA rules also provide some protection. In the 2004 reauthorization of IDEA, a provision was added to the section setting forth the required contents of an IEP. The language specifically addressed extracurricular activities. The language states that the IEP must include

"a statement of the special education and related services and supplementary aids and services, based on 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 for the child... to participate in extracurricular and other nonacademic activities." 20 U.S.C. §1414(d)(1)(A)(i)(IV)(bb).

The relevant 2006 federal regulation likewise includes the same requirement. *See* 34 C.F.R. §300.320(a)(4)(ii). Thus, IEP teams are required, as part of the IEP development process to consider whether a student needs supplementary aids and services, program modifications, or personnel supports, in order for them to participate in extracurricular and/or nonacademic activities. Another regulation adds that states must ensure that the IEP team addresses participation in nonacademic services:

"Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities." 34 C.F.R. §300.107(a).

Can a student be too impaired to come to school, but *not too impaired* to participate in a school dance? *Logan County (WV) Schools*, 55 IDELR 297 (OCR 2010). The problem at issue was a policy with no room for individualized determinations. “The Policy categorically denies students who are placed on homebound instruction, including students with a disability who are placed on homebound instruction because of their disability, the opportunity to participate in extracurricular activities.” Strangely, the policy prevented attendance at dances and parties, but did not prevent students on homebound from attending basketball and football games “since they are paid events and open to the public.” Due to his homebound placement because of Fabry disease (a hereditary metabolic disorder), the student at issue in this complaint was denied the opportunity to participate in the senior party and dance. OCR found this exclusion from participation in extracurricular activities on the basis of disability a Section 504 and ADA violation. The claims continue in federal District Court, where the court refused to dismiss the student’s Section 1983 claims. *Mowery v. Logan County Bd. of Educ.*, 58 IDELR 192 (S.D. W.Va. 2012). *See also Hernando County (FL) Sch. Dist.*, 56 IDELR 142 (OCR 2010); and *Kanawha County (WV) Pub. Schs.*, 112 LRP 7430 (OCR 2011).

A little commentary: The case raises a common refrain: If the student is too impaired to come to school, is he not too impaired to go to a senior party/dance? Apparently OCR’s take is “not necessarily.” The main concern here was the categorical exclusion without any individualized analysis of the student’s unique situation. **That said, could the school require that, where a medical professional has opined that for medical reasons the student cannot attend school, a medical professional must therefore provide a release indicating that attending the dance is medically appropriate?** And could the school then argue that perhaps some attendance at school is also now appropriate since the student is no longer confined to the home?

On a related issue, the school must have some sort of mechanism to provide notice of extracurricular activities and opportunities to homebound students who will not learn of these events as other students do, i.e., announcements over the intercom or posters in school hallways. *See, for example, Kanawha County and Hernando County, supra.*

IV. Curricular LRE

What is Curricular LRE? A recurring theme in the modern IDEA is the need for all special education students to have greater access to and involvement in the general or regular education curriculum. Beginning in its findings under IDEA ‘97, Congress articulated that desire using the familiar language of the Least Restrictive Environment. **“Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by — having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible[.]”** 20 USC §1401(c)(5)(1997). The language seems appropriately chosen. The IDEA concept of Least Restrictive Environment provides a similar dynamic to the modern expectation for greater participation by students with disabilities in the grade-level curriculum. LRE is often described in shorthand as “maximum exposure to nondisabled peers” with the regular education classroom serving as the default placement. The modern duty to leave no child behind can be described in similar shorthand as “maximum exposure to grade-level curriculum” with the regular grade-level curriculum obviously serving as the default, hence “Curricular LRE.”

Because access to grade-level curriculum tends to closely follow access to grade-level peers, analysis of traditional LRE cases can be very instructional for Curricular LRE purposes. **Just as LRE must yield to the primary goal of educational benefit (or meaningful progress), so too must Curricular LRE (since maximum exposure to grade-level curriculum could result in no benefit to a child who is incapable of grade-level performance but who needs instruction in life skills).** Further, just as traditional LRE is not “all or nothing,” Curricular LRE will also balance and attempt to adjust to provide maximum exposure to grade-level curriculum in an IEP calculated to provide educational benefit based on the student’s abilities. **Consequently, the best articulation of Curricular LRE may be “exposure to**

the grade-level curriculum to the maximum extent appropriate for this student’s educational benefit.” The concept represented by the shorthand term “Curricular LRE” is visible in many places, but the term itself is not widely recognized (although the growing practice of “Standards-based IEPs” encompasses the concept and provides a good response to the duty). The various doctrines and regulations that give rise to Curricular LRE are a combination of familiar provisions in the IDEA governing LRE, required IEP elements, and assessment. These materials attempt to trace the foundation and practical impact of Curricular LRE dynamic on IEP decision-making and the provision of services to students eligible for special education. All references to the special education regulations are to the 2006 regulations unless otherwise indicated.

A. Some IDEA History

1. The EHA & Initial Focus of Special Education

“Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs.” *Daniel R.R. v. State Board of Education*, 441 IDELR 433, 874 F.2d 1036, 1038 (5th Cir. 1989).

What the Congress initially desired was that: 1) students with disabilities receive a public education; and 2) that the education they received would be appropriate (taking into account needs arising from disability). Note that neither the Congress nor the Fifth Circuit criticized the education of students with disabilities in the regular education classroom — the criticism focused on the lack of appropriate services in that classroom to meet the needs of students with disabilities.

2. Rowley and the Educational Benefit Standard

In the early days of the IDEA, access to regular education was important, but the approach in the regulations did not contain the explicit modern emphasis on grade-level curriculum. For example, the Supreme Court in *Rowley* referenced the regulation on IEP content requiring “a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular education programs.” *Board of Education v. Rowley*, 553 IDELR 656 (U.S. 1982). Considering congressional intent, the Court concluded:

“By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose on states any greater substantive educational standard than would be necessary to make such access meaningful. ... Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”

The *Rowley* Court rejected a “maximize potential” standard, as well as an “equal benefits” standard, concluding that “the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* The more complex question, according to the Court, was determining when a student with disability is receiving sufficient educational benefit to satisfy the act.

“The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. **It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.** One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We

do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.” *Id.* (Emphasis added).

Put simply, since the possible benefits students can obtain vary dramatically, educational benefit should be measured one-child-at-a-time. Since the *Rowley* student was “receiving substantial specialized instruction and related services” and was performing well in the regular classroom, educational benefit was not difficult to determine.

“The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. **When that ‘mainstreaming’ preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child.** Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. **Children who graduate from our public school systems are considered by our society to have been ‘educated’ at least to the grade level they have completed, and access to an ‘education’ for handicapped children is precisely what Congress sought to provide in the Act.**

“When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, **must approximate the grade levels used in the State’s regular education,** and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, **if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.**” *Id.* (emphasis added).

A little commentary: Was Curricular LRE part of IDEA even at its birth? As a practical matter, maximum exposure to nondisabled peers has to occur where nondisabled peers are located. As nondisabled peers attend regular education classrooms, maximum exposure to regular education grade-level curriculum is a natural (albeit subtle) result. That exposure, however, may be of no educational benefit to the student with disability, even with supplementary aides and services. Of course, the concepts of educational benefit and LRE are at their simplest in the context of a student being educated in the regular classroom successfully and advancing with peers in the grade-level curriculum.

3. Meaningful benefit depends on individual potential. *See, for example, Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41, 172 F.3d 238 (3rd Cir. 1999). There is an important difference between the notion of maximizing potential (which IDEA does not require) and determining whether progress is meaningful based on an individualized analysis of the child’s potential. The 3rd Circuit provided this analysis:

“We first interpreted the phrase ‘free appropriate public education’ in *Board of Education v. Diamond*, 558 IDELR 218, 808 F.2d 987 (3d Cir. 1986), when we rejected the notion that the provision of any educational benefit satisfies IDEA, holding that IDEA ‘clearly imposes a higher standard.’ Examining the quantum of benefit necessary for an IEP to satisfy IDEA, we held in *Polk v. Central Susquehanna Intermediate Unit 16*, 441 IDELR 130, 853 F.2d 171 (3d Cir. 1988), that IDEA ‘calls for more than a trivial educational benefit’ and requires a satisfactory IEP to provide ‘significant learning,’ and confer ‘meaningful benefit.’ We also rejected the notion that what was ‘appropriate’ could be reduced to a single standard, holding the benefit ‘must be gauged in relation to the child’s potential.’ When students display considerable intellectual potential, IDEA requires ‘a

great deal more than a negligible [benefit].’

....It appears also that the District Court may not have given adequate consideration to M.E.’s intellectual potential in arriving in its conclusion that Ridgewood’s IEP was appropriate. **Although its opinion discussed the IEP in considerable detail, it did not analyze the type and amount of learning of which M.E. is capable.** As we have discussed, *Rowley* and *Polk* reject a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student’s individual abilities.” (Emphasis added and internal citations omitted).”

See also, OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994)(Compliance with IDEA’s LRE mandate **“requires an individualized inquiry into the unique educational needs of each disabled student** in determining the possible range of aids and supports that are needed to facilitate the student’s placement in the regular educational environment **before a more restrictive placement is considered.**”)(Emphasis added); *Richard Paul E. v. Plainfield Community Consolidated School District #202, 52 IDELR 130 (N.D. Ill. 2009)*(“The amount of advancement required for each child will vary. The 7th Circuit has suggested that the necessary amount of progress needed to satisfy this standard will correlate, at least to some degree, with ‘the student’s abilities,’ which reflect the severity of the child’s disability. Measuring a child’s progression may seem difficult, but ‘[o]bjective factors, such as regular advancement from grade to grade, and achievement of passing grades, usually show satisfactory progress.”).

4. Does any benefit satisfy FAPE? No. *Beth B. v. Lake Bluff School District, 36 IDELR 121, 282 F.3d 493 (7th Cir. 2002)*. The 2nd Circuit described why the Supreme Court chose the educational benefit standard: “The standard is intended to give school districts ‘flexibility in educational planning.’ By applying it to the LRE directive and arguing that the school district cannot remove Beth from the regular classroom if she receives any benefit there, Beth’s parents turn the ‘some educational benefit’ language on its head. Instead of granting flexibility to educators and school officials, it places an extreme restriction on their policymaking authority and the deference they are owed; it essentially vitiates school districts’ authority to place any disabled children in separate special education environments. Neither Congress nor the Supreme Court intended such a result.” *See also, OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994)*(“The placement team must select the option on the continuum in which it determines that the student’s IEP can be implemented. Any alternative placement selected for the student outside of the regular educational environment must maximize opportunities for the student to interact with nondisabled peers, to the extent appropriate to the needs of the student.”)

Writing in 1991 on congressional intent behind the EHA (which would later become the IDEA), the 4th Circuit declined to find more lofty goals for educational progress than a benefit standard.

“With the benefit of hindsight, now that the crisis facing America’s handicapped children is no longer as exigent, it is easy to suggest that Congress intended more than the establishment of a federal floor when it enacted the EHA. That argument is, however, directly at odds with the legislative history of the EHA, the reimbursement scheme created by the Act, and the interpretation of the Act’s directives that has been provided by the United States Supreme Court.... A careful analysis of the EHA, its history and judicial precedent concerning its interpretation reveals, instead, that Congress’ objectives were less utopian and more grounded in the practical necessity of providing America’s neglected handicapped children with some form of meaningful education.” *Conklin v. Anne Arundel County Bd. Of Educ., 18 IDELR 197, 946 F.2d 306 (4th Cir. 1991)*(internal citations omitted).

The *Conklin* court recognized three groups of students with disabilities, and briefly reviewed how each group related to the grade-level curriculum. While passing grades and advancing grade-to-grade with peers will help determine whether educational benefit has flowed to some students with disabilities (Group 1, like *Rowley*), other students with disabilities (Group 2) may “require several years to achieve what would be to a nonhandicapped child a year’s worth of progress. In that instance, the EHA cannot

expect the States to do the impossible.” *Id.* Finally, (Group 3) “[d]ue to the severity of their handicaps, some children, even with herculean efforts by the state, will never be able to receive passing marks and reasonably advance from grade to grade, and the state should not be placed in the predicament of being forced to comply with this impossible burden or being found in violation of the EHA.” *Id.* Note the familiar groupings years prior to the NCLB and its 1 percent and 2 percent rule. The differences among these groups, as well as differences among the students in each group, demanded individualized analysis of progress to determine educational benefit.

The 4th Circuit language in *Conklin* recognized that students with disabilities could progress educationally, but the language (and the court’s analysis) seems to distance special education students from their grade-level peers, and accept for them an educational progress unrelated to the grade-level curriculum. What a difference a few years can make. ...

5. Congress raised expectations in the IDEA Amendments of 1997. The modern expectations for special education students are highlighted by both the 1997 Amendments and the 2004 Reauthorization, as well as the passage of NCLB in between. Well before No Child Left Behind required all students to perform at grade level, Congress had proclaimed in its findings in IDEA ‘97 that the act had met its now 20-year-old goals, and needed to raise the bar of performance for special education students:

“Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by —

(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible ... [and]

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate[.]” 20 USC §1401(c)(5)(1997)(emphasis added).

Increased Expectations Evidenced in the 1999 Regulations. Congress’ expectation of “access in the general curriculum to the maximum extent possible” targeted IEPs that had been based on functional limitation rather than higher levels of achievement. (*See discussion on the changing focus of IEP goals later in these materials*). Since Congress wanted higher expectations, the statute, and the regulations issued two years later, provided a variety of changes to the process and philosophy of serving special education students. For example:

“The State must have on file with the Secretary information to demonstrate that the State —

(a) Has established goals for the performance of children with disabilities in the State that —

(1) Will promote the purposes of this part, as stated in Sec. 300.1; and

(2) Are consistent, to the maximum extent appropriate, with other goals and standards for all children established by the State;

(b) Has established performance indicators that the State will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, drop-out rates, and graduation rates[.]” 34 CFR §300.137 (1999)(emphasis added).

Of course, the requirements were not limited to the states. LEAs were also required to make changes in a variety of areas to provide special education students with “access in the general curriculum to the maximum extent possible.”

Specially Designed Instruction. The term “specially designed instruction” was given the purpose of ensuring “**access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.**” 34 CFR §300.26(b)(3)(1999)(emphasis added).

Changes to the IEP Team. To ensure a voice on the IEP Team that could help bridge the child to the

regular classroom and curriculum, IDEA '97 required that “At least **one regular education teacher of the child** (if the child is, or may be, participating in the regular education environment)” **attend IEP Team meetings.** §300.344(a)(2)(1999)(emphasis added). “The child’s regular education teacher’s membership on the IEP team is particularly important to meeting the statutory requirement in §614(d)(1)(A)(ii)(I) of the Act that the IEP explain how the child’s needs will be met so that the child can be involved in and progress in the general curriculum.” Appendix A to Part 300, Commentary on §300.344 (1999). Finally, the representative of the public agency was now required to have “**knowledge about the general curriculum**” as well as knowledge of available resources. §300.344(a)(4)(1999)(emphasis added). Commentary from ED on §300.347 explains the reference to the general curriculum in the context of performance expectations. “Even as school systems offer more choices to students, there still is a common core of subjects and curriculum areas that is adopted by each LEA or schools within the LEA, or, where applicable, the SEA, that applies to all children within each general age grouping from preschool through secondary school. **Appropriate access to the general curriculum must be provided. The development and implementation of IEPs for each child with a disability must be based on having high, not low, expectations for the child.**” Appendix A to Part 300, Commentary on §300.347 (1999)(emphasis added).

Present Levels of Performance. During IEP Team meetings, more emphasis should be placed on the student’s access and progress in the regular curriculum. For example, the IEP was now required to include a “**statement of the child’s present levels of educational performance, including [h]ow the child’s disability affects the child’s involvement and progress in the general curriculum** (i.e., the same curriculum as for nondisabled children).” §300.347(a)(1)(1999)(emphasis added). To the extent that IEP Teams had not looked to the regular curriculum as an expectation or source of goals for the student, this provision sought to change the thinking by asking “why can’t this student, because of disability, be involved and participate?” Added the ED, “**The requirement is important because it provides the basis for determining what accommodations the child needs in order to participate in the general curriculum to the maximum extent possible.**” Appendix A to Part 300, Commentary on §300.347(a)(1)(i)(1999)(emphasis added).

IEP Goals & Objectives. Having identified the impact of disability on the child’s involvement and progress in the regular curriculum, the IEP must then provide a statement about what the IEP would do through “measurable annual goals, including benchmarks or short-term objectives” to **meet the “child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum** (i.e., the same curriculum as for nondisabled children)[.]” §300.347(a)(2)(1999)(emphasis added). Note that by adding the phrase on involvement and progress in the general curriculum, the regulation requires goals that are based on the student’s needs and are related to the grade-level curriculum. Periodically, and not less than annually, the IEP Team should meet and determine whether the annual goals are being achieved and revise “the IEP as appropriate to address ... Any lack of expected progress toward the annual goals described in Sec. 300.347(a), and in the general curriculum, if appropriate[.]” §300.343(c)(2)(1999)(emphasis added).

IEP Services. Even IEP Team discussions of the special education and related services the student would require included a focus on access and progress in the general curriculum. The IEP must include:

- (3) **A statement of the special education and related services and supplementary aids and services 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 for the child —
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) **To be involved and progress in the general curriculum** in accordance with paragraph (a)(1) of this section 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 described in this section;
- (4) **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 in paragraph (a)(3) of this section;**”

§300.347(a)(3)-(4)(1999)(emphasis added).

These two powerful provisions brought together both the concept of LRE (by requiring an explanation why the student could not participate with nondisabled children in the regular class) and the concept of Curricular LRE (by requiring an explanation why the student could not participate with nondisabled children in the regular class *in the general curriculum*). The ED commentary reinforces the point. “A basic assumption made in both the statute and these final regulations is that **the programming and services for each ‘individual’ child would be tailored to address the child’s unique needs that impede the child’s ability to make meaningful progress in the general curriculum.**” Appendix A to Part 300, Commentary on §300.347 (1999).

Consequently, barriers preventing the student’s attendance in the regular education classroom, and the student’s involvement and progress in the general curriculum must be addressed through supplementary aids and services before some alternative (be it changes to the curriculum or more restrictive setting) can be considered appropriate. Of course, where the student cannot make meaningful progress either in the setting, or in the general curriculum (despite appropriate supplementary aids and services), the IEP Team has discretion to move away from the default (whether that is the regular classroom or the grade-level curriculum, or both). The ED provided this response in the commentary:

“In order to ensure full access to the general curriculum, it is not necessary to amend Sec. 300.347(a)(3)(ii) to clarify that a child’s involvement and progress in the general curriculum must be ‘to the maximum extent appropriate to needs of the child.’ The individualization of the IEP process, together with the new requirements related to the general curriculum, should ensure that such involvement and progress is ‘to the maximum extent appropriate to the needs of the child.’” Appendix A to Part 300, Commentary on §300.347(a)(3) (1999)(emphasis added).

Participation with Nondisabled Children. Having addressed access and progress in the curriculum, this provision addresses traditional LRE concerns. The IEP must 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 in paragraph (a)(3) of this section.” That the regulations recognize both maximum exposure to curriculum and maximum exposure to nondisabled peers is no accident. Note that both presumptions, or defaults, are subject to the needs of the child for educational benefit.

State Assessments. While the state assessment would play a much more prominent roll with the passage of NCLB two years later, the 1999 IDEA regulations made modifications to the assessment a required IEP element.

- (i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and
- (ii) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of —
 - (A) Why that assessment is not appropriate for the child; and
 - (B) How the child will be assessed[.] §300.347(a)(5)(1999)(emphasis added).

ED Commentary clearly states that all special education students are to be assessed. “The IDEA Amendments of 1997 require that all children with disabilities be included in general State and district-wide assessment programs, with appropriate accommodations, where necessary. (§300.138). In some cases, alternate assessments may be necessary, depending on the needs of the child, and not the category or severity of the child’s disability.” Appendix A to Part 300, Commentary on §300.347(a)(5) (1999). *See also, Working Together, p. 3* (“Too often in the past, students with disabilities were excluded from assessments and accountability systems, and the consequence was that they did not receive the academic attention and resources they deserved.”).

Incorporating State Content Standards into IEP Goals. Throughout the Commentary to the 2007 regulations on assessment, ED praised efforts to incorporate state content standards into IEP goals.

“One way to help ensure that students have access to grade-level content before they are assessed based on modified academic achievement standards, and receive instruction in grade-level content after they are assessed based on modified academic achievement standards, is to require IEP Teams to include goals that are based on grade-level content standards in the IEPs of these students. Such an approach focuses the IEP Team and the student on grade-level content and the student’s achievement level relative to those content standards.” *2007 Assessment, p. 17758.*

ED included in the eligibility requirements for 2 percent assessment a requirement that if the student’s IEP contains goals for a subject assessed, the goals must be based on the academic content standards for the grade in which the student is enrolled. 34 CFR §200.1(e)(2)(iii).

“Incorporating State content standards in IEP goals is not a new idea. Because the reauthorization of IDEA in 1997 required States to provide students with disabilities access to the general curriculum, the field has been working toward incorporating State standards in IEP goals. Some States already require IEP Teams to select the grade-level content standards that the student has not yet mastered and to develop goals on the basis of the skills and knowledge that the student needs to acquire in order to meet those standards. In addition, some States have developed extensive training materials and professional development opportunities for staff to learn how to write IEP goals that are tied to State standards.” *2007 Assessment, p. 17758.*

Isn’t the IEP’s lack of connection to the curriculum one of the reasons NCLB focuses (focused?) on the state assessment to determine student progress for AYP? Yes. “In general, IEP goals are individualized for each student and may cover a range of needs beyond reading/language arts and mathematics, such as behavior and social skills. They are not necessarily aligned with state standards, and they are not designed to ensure consistent judgments about schools — a fundamental requirement for AYP determinations.” *Working Together, p. 4.* The incorporation of state content standards in IEPs (sometimes called Standards-Based IEPs) will be discussed later in these materials.

6. The 2004 IDEA Reauthorization.

Prior to the 2004 Reauthorization, the President’s Commission on Excellence in Special Education put together a report that analyzed the state of special education and summarized changes that the commission felt were necessary to improve IDEA. Many of the committee’s suggestions made their way into both the statute and regulations. A key point made by the commission reaffirms Congress’ efforts in both IDEA ‘97 and NCLB to look at students in special education differently than had become the custom. The President’s Commission Report on Excellence in Special Education, titled *A New Era: Revitalizing Special Education for Children and Their Families*, [hereinafter “President’s Commission Report”], July 1, 2002, summarized the appropriate regular education and special education relationship quite nicely.

“Children placed in special education are general education children first. Despite this basic fact, educators and policymakers think about the two systems as separate and tally the cost of special education as a separate program, not as additional services with resultant add-on expense. In such a system, children with disabilities are often treated not as children who are general education students and whose instructional needs can be met with scientifically based approaches; they are considered separately with unique costs — **creating incentives for misidentification and academic isolation** — preventing the pooling of available resources and learning. General education and special education share responsibilities for children with disabilities. They are not separable at any level — cost, instruction or identification.” *President’s Commission Report at 7* (emphasis added).

Put simply, “Being in special education does not mean that a student cannot learn and reach grade level standards. In fact, the majority of students with disabilities should be able to meet those standards.” *Working Together for Students with Disabilities: IDEA & NCLB, ED FAQ, December 1, 2005, p. 5* (hereinafter, “*Working Together*”). In IDEA 2004, Congress firmly cemented the presumption of participation by IDEA eligible students in the regular education curriculum in the mainstream classroom, and in nonacademic and extracurricular activities. The default position is that the student with a disability participates fully in these mainstream pursuits, and any restriction or deviation from the default must be justified.

“**Specially Designed Instruction.**” The 1999 version of the definition remained unchanged in 2004 (§300.39(b)(3)), prompting a commenter to the proposed regulations to ask that ED “strengthen the requirements ensuring children access to the general curriculum, because many children with disabilities still do not have the tools they need or the teachers with expertise to access the general curriculum.” In response ED provided this commentary: “We believe the regulations place great emphasis on ensuring that children with disabilities have access to the general education curriculum. ... [E]nsuring that children with disabilities have access to the general curriculum is a major focus of the requirements for developing a child’s IEP. ... We do not believe additional language is necessary.” *Federal Register*, p. 46577. Specifically cited by ED were the requirements of §300.320, outlined below. The regulation on required IEP content was fine-tuned in 2006 to provide some interesting re-emphasis on grade-level curriculum.

Present levels of performance — academic and functional. While the previous regulation required a statement on “present levels of educational performance,” the 2006 regulation split the phrase into two parts. In the new regulation, the IEP must include a statement of the “child’s present levels of academic and functional performance.” 34 CFR §300.320(a)(1). The commentary provides some helpful insight on the change requiring the statement on “academic achievement.” First, ED declined to further define the term “academic achievement.” “‘Academic achievement’ generally refers to a child’s performance in academic areas (e.g., reading or language arts, math, science and history). We believe the definition could vary depending on a child’s circumstance or situation, and therefore, we do not believe a definition of ‘academic achievement’ should be included in these regulations.” *71 Fed. Reg. 46,662 (2006)* [hereinafter “*2006 Commentary*”]. Second, in response to a commenter’s request that the regulations require that present levels of performance be aligned with the state’s core curriculum content and standards, ED appears to take the position that the concern has already been sufficiently addressed in the regulation.

“The IEP Team’s determination of how the child’s disability affects the child’s involvement and progress in the general education curriculum is a primary consideration in the development of the child’s annual IEP goals. Section 300.320(a)(1)(i), consistent with section 614(d)(1)(A)(i)(I)(aa) of the Act, requires the statement of a child’s present levels of performance in the IEP to include how the child’s disability affects the child’s involvement and progress in the general education curriculum. This directly corresponds with the provision in §300.320(a)(2)(i)(A) and section 614(d)(1)(A)(i)(II)(aa) of the Act, which requires the IEP to include measurable annual goals designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum. We do not believe further clarification is needed regarding the alignment of a child’s present levels of performance with the child’s annual goals.” *2006 Commentary, p. 46662.*

IEP Goals and Objectives. The most interesting changes here involved the removal of the requirement to provide benchmarks or short-term goals for some special education students. The IEP must include a statement of measurable annual goals, including academic and functional goals designed to —

- “(A) Meet the child’s needs that result from the child’s disability **to enable the child to be involved in and make progress in the general education curriculum;** and
- (B) Meet each of the child’s other educational needs that result from the child’s disability;

(ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives[.]” §300.320(a)(2)(emphasis added).

Benchmarks and short-term objectives were removed from the statute for most students, but remain for those taking the state’s alternative assessment (1 percent test). Presumably, no short-term goals or benchmarks are necessary for other special education students as the grade-level curriculum meets the need. Finally, in response to a commenter’s request that the goals and objectives (for those students taking the alternative assessment) be aligned with the state’s alternative assessment, ED declined to provide a change. Citing language in the statute on assessment, ED writes, “The Act requires alternate assessments to be aligned with the State’s challenging academic content standards and academic achievement standards, and if the State has adopted alternate academic achievement standards permitted under 34 CFR §200.1(d), to measure the achievement of children with disabilities against those standards.” *2006 Commentary, p. 46663*. There is no alignment to the test or assessment, but to the curriculum (here, the alternate academic achievement standards) upon which the alternate assessment is based. Finally, ED reminds us that “for some children, goals may be needed for activities that are not closely related to a State’s academic content and academic achievement standards.” *Id.*

In commentary to the 2007 IDEA Assessment Regulations, the ED praised the practice of incorporating state grade-level content into IEPs as an effective way to keep IEP Teams focused on a student’s progress to grade-level performance.

“We believe that requiring IEP Teams to incorporate grade-level content standards in the IEP of a student who is assessed based on modified academic achievement standards and to monitor the student’s progress in achieving the standards-based goals will focus IEP Teams on identifying the educational supports and services that the student needs to reach those standards. This will align the student’s instruction with the general education curriculum and the assessment that the IEP Team determines is most appropriate for the student.” *2007 Assessment, p. 17759*.

Additional ED guidance, provided in *No Child Left Behind Modified Academic Achievement Standards, Nonregulatory Guidance, ED July 20, 2007 [hereinafter “July 2007 Guidance”]*, explains the benefits of this approach to all students with disabilities, regardless of how they participate in state and district assessments.

“IEP goals based on grade-level content standards are appropriate for a wide range of students with disabilities, including students with the most significant cognitive disabilities. **It is not our intent to limit the implementation of IEP goals based on grade-level content standards to students participating in an alternate assessment based on modified academic achievement standards or those achieving close to grade level.** The regulations require a student’s IEP to include goals based on grade-level content standards only for the subjects to be assessed based on modified academic achievement standards. For example, if a student will be assessed based on a modified academic achievement standard in reading and math, IEP goals for reading and math must be based on grade-level content standards. **However, we encourage all IEP goals that are related to academic achievement to be based on grade level content, especially since the vast majority of students with disabilities will be assessed based on those standards.**” *July 2007 Guidance, E-5, p. 31 (emphasis added)*.

IEP Services. The main change here was the addition of references to peer-reviewed research to appropriately reference the statute, but another subtle change was made by ED. The IEP must include a statement of:

“the special education and related services and supplementary aids and services, *based on 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 in accordance with paragraph (a)(1) of this section, 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 described in this section.” (§300.320(a)(4)(2006)(changes from 1999 in italics).

The significant changes made by the regulation, for our discussion, was the addition of the word “enable” in the regulations. The ED Commentary provided the following context for the “peer review” requirement. As the statute requires, there are limits.

“[T]here is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child’s IEP Team based on the child’s individual needs. . . . If no such research exists, the service may still be provided, if the IEP Team determines that such services are appropriate. A child with a disability is entitled to the services that are in his or her IEP whether or not they are based on peer-reviewed research. The IEP Team, which includes the child’s parent, determines the special education and related services, and supplementary aids and services that are needed by the child to receive FAPE.” *2006 Commentary, p. 46665.*

Participation with nondisabled children. The LRE statement remains unchanged from 1999. The IEP must 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 in paragraph (a)(4) of this section” §300.320(a)(5)(2006).

State Assessments. Since this was the first reauthorization of IDEA following NCLB, changes to the IEP provision on the state assessment were no surprise. For the states, regulations adopted in 2007 to implement the 2 percent rule provide that, “**A State must ensure that all children with disabilities are included in all general State and district-wide assessment programs**, including assessments described under section 1111 of the ESEA, 20 U.S.C. 6311, with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs.” (§300.160.)(2007)(emphasis added). For LEAs, the IEP content requirement is as follows:

- “(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
- (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why —
 - (A) The child cannot participate in the regular assessment; and
 - (B) The particular alternate assessment selected is appropriate for the child[.]” §300.320(a)(6).

Note that the ED commentary on this section provides additional support for Curricular LRE.

“One commenter recommended that §300.320(a)(6) clarify that a child with the most significant cognitive disabilities, who has been determined by the IEP Team to be unable to make progress toward the regular achievement standards even with the best instruction, will be taught and assessed based on alternate achievement standards. Discussion: It would be inappropriate to require a child with the most significant cognitive disabilities to be taught and assessed based on alternate achievement standards.” *2006 Commentary, p. 46666.*

While no rationale is provided for the answer, it seems clear that an automatic assignment of anything other than grade-level curriculum to a special education student violates the requirement that the student be involved and progress in the general education curriculum (or Curricular LRE).

B. Some Lessons from the LRE Case Law

While Curricular LRE can be traced back to IDEA '97, it is often elusive in the case law. The issue usually arises in the context of disputes over the least restrictive environment. Interestingly, the analytical framework established by a seminal LRE case, *Daniel R. R. v. State Board of Education*, 441 IDELR 433, 874 F.2d 1036 (5th Cir. 1989), provides a framework of questions or inquiries to assist a school in meeting its Curricular LRE duty. The *Daniel R.R.* test is as follows:

“First, we ask whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for a given child. *See* §1412(5)(B). 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.” *Id.*

Case law developed since *Daniel R. R.* has not altered the basic legal framework of the LRE inquiry. Presently, the *Daniel R.R.* two-prong approach appears to be the accepted test in the 2d, 3d, 5th, 9th, 10th and 11th Circuits. *Mr. & Mrs. P. v. Newington Board of Education*, 51 IDELR 2 (2d Cir. 2008). The Sixth and Eighth Circuits appear to follow the *Roncker Test*. *Roncker v. Walter, supra*, (“In a case where the segregated facility is considered superior [academically], 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.”) *A.W. v. Northwest R-1 School District*, 558 IDELR 294, 813 F.2d 158 (8th Cir. 1987).

The Curricular LRE Application. Note that the first part of the test asks IEP Teams to determine what can be done to provide the child with educational benefit in the regular classroom. The second part of the test keeps the student as close to the regular class as possible should educational benefit not be possible there. A similar construct for Curricular LRE logically follows. If appropriate school efforts (supplementary aides and services, and the continuum of educational placements) cannot provide the child with educational benefit at grade level, then the IEP Team must determine how close the student’s curriculum can get to grade level while simultaneously providing educational benefit to the child.

1. LRE and Curricular LRE Are Statements of a Preference or a Default. *Walczak v. Florida Union Free School District*, 27 IDELR 1135, 142 F.3d 119 (2d Cir. 1998). A kindergarten student diagnosed with multiple disabilities (including ADHD, developmental language disorder, obsessive compulsive disorder, and Tourette syndrome) was removed from the public school and placed by her parent in a private school for children with learning disabilities. When her progress was reviewed three years later, “the results were very disappointing. The 9-year-old child’s reading skills were at the first-grade level. Her math scores were even poorer.” She was also experiencing a “panoply of behavioral and social problems” including volatility, insensitivity to others’ feelings, ignorance of basic social rules and conventions, and a lack of empathy with other people. The parents agreed to a placement at BOCES (special education cooperative) in a 12-student intermediate level class and provided additional group counseling, occupational therapy and speech therapy. An evaluator hired by the parent who had conducted an evaluation of the child in kindergarten noted “startling” improvement in behavior, reading scores at the high second-grade to third-grade level, and math scores at the second-grade level. Despite making consistent progress in the public school in other areas, “all parties recognized that one social problem persisted: B.W.’s refusal to interact with other children.”

The school proposed placement “in the higher functioning of two developmentally disabled classes” that were age and skill appropriate. With respect to social skills, “B.W. ranked at the bottom of the proposed grouping” but at the top “in terms of behavior.” Dr. Liss, the private evaluator recommended residential placement where “she would have around-the-clock reinforcement of appropriate behavior and constant interaction with peers.” In a letter to the school, the parents rejected the school’s proposal, explaining they wanted “to obtain the maximum interventions in [B.W.’s] self-development so that she could reach her true potential.” The litigation was filed by the parent seeking reimbursement for the

private residential placement.

Both a hearing officer and state review officer upheld the school's proposed placement. Significantly, the review officer looked to the reports of:

“B.W.’s two classroom teachers indicating that the child had advanced academically at BOCES to the point where she could work at the second- to third-grade level. **To the extent that B.W.’s progress was sometimes slow and inconsistent, the review officer held that this was more reflective of the nature and extent of the child’s disabilities than of any inherent inadequacy in the BOCES program.** ... To the extent Dr. Liss had also testified that B.W. could not make further social progress in a day program, the officer rejected this opinion, noting that Dr. Liss had not explained why the skills she deemed important — learning to live with others, take turns, say how she feels, smile at the appropriate time — could not be developed in a nonresidential program.” (Emphasis added).

The Court of Appeals focused on the parents’ desire for benefit, and apparent misunderstanding of LRE.

“**The Walczaks argue that the statutory preference is primarily concerned with educating disabled children together with their nondisabled peers. They submit that in cases such as this one, where everyone recognizes that no mainstreaming is possible for B.W., the preference has no applicability. This court disagrees.** The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families. A ‘residential placement is, by its nature, considerably more restrictive than local extended day programming. ... Thus, ‘even in close cases in which mainstreaming is not a feasible alternative,’ the statutory preference for a least restrictive environment applies. ... While the parents’ wishes are understandable, IDEA does not require states to maximize the potential of handicapped children. ... Indeed, it would violate IDEA’s preference for the least restrictive educational setting to move a student from a day program where she is making progress to a residential facility simply because the latter is thought to offer superior opportunities.” (internal citations omitted.)

The Curricular LRE Application: The regular grade-level curriculum is a preference. LRE recognizes a preference for the mainstream, and should that not be possible, the preference for education is the least restrictive environment where the student can receive the required services necessary for FAPE. Is not the same dynamic true with respect to the preference of grade-level performance? If the student cannot achieve at grade level, is the preference (analogizing to the rejected *Walczak* argument) simply dead and the IEP Team has full discretion to set goals without reference to grade-level curriculum, or does Curricular LRE likewise require that the IEP Team creates goals as close to the grade-level curriculum as possible while still providing educational benefit based on the student’s abilities? The “all or nothing” approach contradicts Congress’ desire for special education students to have access in the general curriculum “to the maximum extent possible.”

2. Has the school taken steps to accommodate the student in the regular curriculum? *Fresno Unified School District*, 52 IDELR 150 (SEA CA 2009). A 17-year-old student with mild mental retardation was served in the magnet high school in general education classes with one-to-one aide support, and a curriculum modified by a resource specialist teacher. Her IEP Team had determined that she was on a “non-diploma track,” meaning that she did not need to accumulate credits to graduate with a diploma, and would not need to take the state exit level exam. She would be eligible for a letter of recommendation upon completion of four years of high school. The student had gained enrollment at the magnet school through its lottery system. At the time of enrollment in the magnet school, the student’s reading skills were at the second-grade level, with math skills at about the same level.

After a year and a half in this placement, an assessment revealed that the student’s present levels of performance in math and language arts had not substantially changed, and her goals remained

“substantially the same.” There appears to be no discussion of progress reports “and the team did not discuss with or mention to mother that student had not progressed in her program at her functional level and abilities.” The district proposed moving the student to a comprehensive (apparently non-magnet) high school, with placement in a self-contained mild/moderate life skills class. When the parent refused, the district filed for due process.

The school district argued that “there is no level of supplemental aids or supports that reasonably can permit student to receive academic or nonacademic benefit from inclusion in general education classes, leading to a conclusion that a self-contained mild/moderate SDC is a more appropriate placement.” Put simply, the school’s position was that since the student does not perform at grade level in her core academic classes, she receives no academic benefit from the regular classroom. The parent’s argument was that progress in both academic and nonacademic areas was occurring, but not at grade level. Instead, the progress should be viewed based on the student’s abilities. Parent points to student’s success in the modified curriculum in Floral Design, Intro to Agricultural Science, Art, and Adaptive P.E. Further, the student made “some progress” toward her IEP goals (at her functional level) in her core math and English courses, although she did not perform at grade level.

The ALJ noted the student’s academic progress on her IEP goals, and that the student was not a behavior problem, had improved her social interaction with others, had friends at school, and was extensively involved in extracurricular activities as well. The school’s analysis was flawed, however, as the school equated grade level performance with educational benefit. The ALJ wrote:

Testimony that student did not gain academic benefit because she did not make progress at grade level does not support the district’s position. ... Student was not on diploma track because of her disability. She was not expected to earn credits toward graduation and her progress in general education classes could not be measured by her inability to perform at grade level. The *Rowley* court made clear there is no one test for measuring adequacy of educational benefits conferred under an IEP and a student may derive educational benefit if he makes no progress toward some of the IEP goals, as long as he makes progress toward other goals at his functional levels.

In short, the school loses. The ALJ determined that “a student’s failure to perform at grade level is not necessarily indicative of a denial of FAPE, as long as the student is making progress commensurate with his abilities.” The student’s unique needs can be met at the magnet high school.

A little commentary: **Did it make a difference that the school failed to force a more restrictive placement and the core regular ed teachers appeared “disengaged”?** Probably. An interesting undercurrent in the decision is a description of the efforts by regular education core content teachers in algebra and English. Note the following comments by the hearing officer. “Student was provided assistance by her one-to-one *aide with occasional assistance* from the general education teacher.” The efforts of the algebra teacher, specifically, are described this way:

[Teacher] does not believe student belongs in her class because she is not able to do grade level work. [Teacher] does not track student’s progress. ... [Teacher] does not believe student has received non-academic benefits because student does not interact with the students who are doing grade-level work. [Teacher] has not encouraged social interaction in the classroom. She has not considered making changes in the classroom to foster social interaction or enhance academic benefit to student. [Teacher] attended several of student’s IEP team meetings and did not tell the IEP team that student was not making progress or that she was a problem student.

The efforts of the English teacher, specifically, are described this way:

[Teacher] does not consider student to be ‘her student’ because student was not on her attendance roll, student sits in the back of her classroom with her ‘tutor,’ she does not provide student’s work assignments, and did not grade her work. ... [Teacher] did not get involved in the development of her

curriculum or her work assignments. She never discussed Student's progress or lack thereof in her class with mother. She attended the most recent IEP team meeting last semester as a formality. She reported to the IEP team that student was in her classroom, had a nice personality, and was not a problem. She never complained about student or told district that student should not be in her classroom. [Teacher] did not know whether student had friends or socialized with the students in her class.

The Curricular LRE Application: It would be difficult for a school to argue that grade-level performance, or any other level of performance is beyond the student when the school has not made the required effort to provide an appropriate IEP or implement an appropriate IEP. Where the focus of the analysis is on the child's performance in the regular classroom, the regular classroom teacher's efforts on the student's behalf are essential. The *Oberti* case, below, highlights another variation on the point.

3. Were efforts at accommodating the child sufficient efforts (not merely token attempts)? *Oberti v. Board of Educ. of the Borough of Clementon School District*, 19 IDELR 908, 995 F.2d 1204 (3d Cir. 1993). In *Oberti*, a student with Down syndrome was placed in a half-day developmental kindergarten class in the morning and a half-day special education class in another school district in the afternoon. While he made academic progress in the developmental class over the course of the year, his behavior was problematic there, including repeated toileting accidents, temper tantrums, crawling and hiding under furniture, touching, hitting, and spitting on other children, and several instances of striking the teacher and aide. His IEP had no goals for the developmental class other than "observe, model and socialize with nondisabled children." Further, there was no behavior intervention plan to address these behaviors (which behaviors were not reported in the afternoon special education class), and there was no consultation between the morning developmental class teacher and the special education teacher from the other district who taught the student in the afternoon. A few months prior to the end of the school year, an aide was added to the developmental class, but that change "did little to resolve the behavioral problems."

In anticipation of the next school year, the school proposed a full-day special education class for children classified as "educable mentally retarded" in a nearby district. The parent requested a regular education kindergarten class in the home district. The impasse was broken by an agreement that the school would place the student in a special education class for students labeled "multiply handicapped" in a public elementary school in a nearby district (the Winslow Class), would explore mainstreaming possibilities there, and consider a future placement for the student in what appears to be his home school. While the student made academic progress in the Winslow Class, became toilet trained, and improved behaviorally, the parents filed for due process upon learning that the district was making no plans to mainstream the student, and the student had no meaningful contact with nondisabled peers.

Both the District Court and 3d Circuit rejected the ALJ's findings, and based on testimony by two experts who were not part of the administrative record, concluded that the school had violated IDEA's mainstreaming requirement. The 3d Circuit was particularly interested in testimony by the parents' experts on the "commonly applied strategies" available to make the regular classroom appropriate for the student:

"In particular, the court was persuaded by the *Obertis'* experts that many of the special education techniques used in the Winslow class could be implemented in a regular classroom. **The court also found that the School District did not make reasonable efforts to include Rafael in a regular classroom with supplementary aids and services (e.g., an itinerant teacher trained in aiding students with mental retardation, a behavior management program, modification of the regular curriculum to accommodate Rafael, and special education training and consultation for the regular teacher);** that Rafael's behavior problems during the 1989-90 school year in the developmental kindergarten class were largely the result of the School District's failure to provide adequate supplementary aids and services; and that the record did not support the School District's contention that Rafael would present similar behavior problems at that time (more than two years

after the kindergarten class) if included in a regular classroom setting with adequate aids and services. **The court declined to defer to the findings of the ALJ because it found that ‘they were largely and improperly based upon Rafael’s behavior problems in the developmental kindergarten as well as upon his intellectual limitations, without proper consideration of the inadequate level of supplementary aids and services provided by the School District.’** (Internal citations removed and emphasis added).

In short, the student’s inability to be educated in the regular classroom was not due to disability, but the school’s refusal to explore and implement appropriate supports — one of the two basic problems IDEA was created to address.

See also, Daniel R.R., supra (“The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.”) *Greenwood v. Wissahickon School District*, 50 IDELR 280, 571 F.Supp. 2d 654 (E.D. Pa. 2008)(“A school district must give serious consideration to the student’s inclusion in a regular classroom with supplementary aids and services. Mere token gestures for the sake of inclusion will not suffice.”)

Of course, it’s possible for the school to have provided appropriate supplementary aids and services so as to satisfy this element. *See, for example, J.S. v. North Colonie Central School District*, 51 IDELR 150, 586 F.Supp. 2d 274 (N.D.N.Y. 2008). Parents objected to an IEP removing the student from a regular education global history and English class based on student’s difficulty with language-based subjects and expert testimony on the need for small group instruction in these classes. According to undisputed evidence at the hearing, student’s significant deficiencies in language, reading, writing and social skills made education in these two general education classes ineffective, despite significant supplementary aids and services. The hearing officer found credible testimony that “plaintiff isolated himself in the general classroom setting when faced with difficulties understanding materials presented to him and requires constant attention from his personal aide to take notes or participate in class.”

Unlike *Oberti*, the District Court found overwhelming evidence of efforts to make the general curriculum appropriate. “[D]efendants have provided a myriad of services and accommodations in an effort to allow plaintiff to succeed in the mainstream environment, including a full-time one-on-one aide, note-taking performed by the aide, notes sent home to plaintiff’s parents, extended time for assignments, instructional feedback to plaintiff’s parents, teacher, and service provider consultations, visual aids, previewing of tests at home, alternative test locations, use of a calculator and computer, and the modification of test content.” The proposed IEP was appropriate.

A little commentary: One very interesting fact in the case is that during the pendency of the administrative hearing while stay-put kept the student in the regular global history class, he achieved a passing average of 73 (having achieved quarterly grades of 75, 71, and 65 in the same class the previous year). On its face, the passing grades are certainly some evidence that the student was capable of learning the material. The District Court, however, was not impressed, as it viewed the grades in the context of missing educational opportunities that were more valuable. Citing the school psychologist’s testimony, the court found that rather than repeatedly taking the global history course (since he failed exit level exams in the course numerous times), he should have been focusing on other skills as he could not possibly achieve a diploma before he aged out of services.

“[I]t’s so off point in thinking that his time is worth spending in trying to earn Regents credits when his functional impairments are so grave and significant and has so utterly affected the rest of his life. So the downside is the functional cost, the time we have to use this mode of instruction that could actually increase his level of independence as he emerges into adulthood. So there’s an enormous downside. It’s not just time away. It’s time for him to withdraw into his internal world, which, again, in my opinion, makes him more disabled.”

4. Will most of the teacher’s time be devoted to the student with disability or to modifying the curriculum? *Greenwood v. Wissahickon School District*, 50 IDELR 280, 571 F. Supp. 2d 654 (E.D. Pa. 2008). “Angela’s regular education social studies teacher “testified that he engaged the student one-on-one at least twice a day, discussing her flashcards, explaining the class material, or clarifying how her cards related to the general curriculum. Despite having a class of 28 students, he sometimes spent ninety percent of the class time solely with Angela.” The District Court found that Angela’s needs demanded attention that resulted in the teacher ignoring other students in the class — one of the factors used to determine whether the classroom placement is the LRE. (*See additional discussion of Greenwood infra.*)

See also, Brillon v. Klein Independent School District, 41 IDELR 121 (5th Cir. 2004)(unpublished). “[T]o implement the goals and objectives that the parties agreed were appropriate for Ethan in the second grade, the 2001 ARD committee reported that the ‘curriculum would have to be modified beyond recognition.’ Ethan’s second-grade general education teacher likewise testified at the due process hearing that in order to implement Ethan’s proposed IEP goals and objectives, ‘the level would be so low that it would change the curriculum beyond recognition,’ and that she would be forced to operate ‘a classroom within a class.’ Unlike Ethan’s first-grade IEP, which provided that Ethan would learn two regular education concepts per unit in science and social studies, his second-grade IEP focused on having Ethan achieve developmentally appropriate goals and objectives not specifically drawn from the second-grade curriculum. Therefore, while we agree with the district court that the school district adequately accommodated Ethan in regular education during the first grade, we also conclude that the modifications required to implement Ethan’s second-grade IEP goals in the regular education classroom would have been unduly burdensome.”

Likewise, mainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student.

The Curricular LRE Application: Some students simply are not ready for grade-level curriculum. While traditionally, many of those children would have IEPs developed based on their level of functioning, with academics playing only a minor role, IDEA requires that all students with disabilities have academic and functional goals “to enable the child to be involved in and make progress in the general education curriculum.” §300.320(a)(2)(A)(See discussion of Standards-Based IEPs below.)

5. Can the student with a disability receive educational benefit from regular education? *Brillon v. Klein Independent School District*, 41 IDELR 121 (5th Cir. 2004)(Unpublished).

“The hearing officer specifically found, with regard to the second grade, that Ethan was ‘not making academic progress in the general education setting.’ Ethan’s speech teacher, who had known him for six years, testified that she saw ‘a breakdown of his overall demeanor’ at the end of his first-grade year, which she thought was because ‘he was over his head.’ Moreover, Ethan’s second-grade general education teacher testified that he was unable to master any of the second-grade TEKS (state mandated Texas Essential Knowledge and Skills) that she was teaching, and that he was not benefitting academically in her classroom. Thus, we are not persuaded that mainstreaming beyond that contemplated in the school district’s proposed second-grade IEP would have provided Ethan an educational benefit, and defer to the school officials in this regard.”

6. What has been the child’s overall educational experience in the regular classroom? *City of Chicago School District 299*, 50 IDELR 300 (SEA IL 2008).

“The Student’s disabilities affect his ability to process sounds and thus affects his speech and his reading. He has a severe deficit which requires intensive remediation. He does not recognize short

vowels. He does not have any phonological skills. His reading is inaccurate. He is not able to read, write or spell independently. The evidence also supports that from a very early stage the District was aware of the Student's deficits, yet failed to provide him with the intensive instruction which he needed." The school argues that educational benefit was conferred based on Student's receipt of passing grades (mainly A's and B's) and success on modified tests. **"However, after listening to testimony it is quite clear that the Student has been given extreme modifications and accommodations which have masked the Student's struggling and that the benchmarks set for him are too low. He has not been given an appropriate program in the necessary intensity to address his learning deficits."** ... (Emphasis added).

"In this case the Student has average to above average intelligence, and as stated by his teachers has benefited from his educational program. However, the evidence supports that he is not at all independent in his school work, requiring significant modifications and accommodations. He cannot read, write or spell and is still having significant issues with his speech. The District has failed to provide him with a program which addresses his deficits with the necessary intensity. The court in *J.L. and M.L. v. Mercer Island School District*, 46 IDELR 273 (W.D. Wash. 2006) found that **'employing accommodations and other compensatory strategies without increasing a student's skill level does not represent compliance with the IDEA. It is not sufficient to simply 'escort' an educationally challenged student through the school system.** The District has failed to provide for his disability.'" (Emphasis added).

It is true that a District does not have to maximize educational benefit, however it still needs to provide a program that is appropriate and meets the student's identified needs. The evidence supports that the Student needs a program which meets a certain scope and sequence. The District's own specialist stated that the District has a Wilson reading program which is very intensive, structured and requires a multi-year commitment from the students. She also stated that she never tested the Student nor was the Student referred to her prior to the hearing request. ..."

Critical of the school's setting low goals, providing services in such a way as to create dependence rather than independence, and delayed provision of the services necessary for appropriate progress (an intensive, structured reading program with scope and sequence), the hearing officer found de minimus benefit — a denial of FAPE. "From the evidence and testimony, it is clear that the Student's disability is severe and requires significant remediation. The District has failed to provide the Student with appropriate services to service his needs as required by law. They have not provided him the intensive remediation he needs to become an independent reader and writer. Therefore, the Parents' request for placement at Hyde Park Day School is granted."

A little commentary: While the *Mercer* case cited in *Chicago Public Schools* was later vacated in part by the 9th Circuit (52 IDELR 241), the District Court's language provides an appropriate warning in very memorable language.

C. One Approach to Curricular LRE: Standards-Based IEPs

While there are many ways to approach the school's Curricular LRE duty, the Standards-Based IEP approach has gathered momentum, and an approving nod from ED in commentary to the 2 percent rule. *2007 Assessment*, p. 17758 fn 2. Project Forum at the National Association of State Directors of Special Education is a cooperative agreement funded by the U.S. Department of Education's Office of Special Education Programs. Project Forum has focused on the area of Standards-Based IEPs, and by analyzing current practices, conducting interviews with state special education departments, reviewing state practices and IEP forms, and providing technical assistance to the field, has promoted the incorporation of grade-level curriculum standards into IEPs. One such publication, *Standards-Based IEPs: Implementation in Selected States*, Eileen Ahearn, *NASDE (May 2006)* (hereinafter "*Ahearn 2006*"), provides interesting insight into the evolution of the IEP with respect to academics achievement, and thoughts on implementation.

In the initial implementation of the special education law, IEPs stressed a **developmental approach** that focused on attaining skills related to readiness and little attention was paid to chronological age in designing educational programs, especially for children with more severe disabilities. As described in the article by *Browder et al.* (2003, pp. 166-68), the developmental model arose to fill the curriculum void for this population, adapting the early childhood curriculum based on the mental age assessed for the child. This model was rejected in the 1980s with the adoption of the concept of normalization. At this point, interest shifted to a more **functional approach** with a focus on the ultimate goal of preparing students for life in the community with only minimal attention to academics. This was a significant change because the emphasis shifted at least in part to teaching chronologically age-appropriate skills. However, special education was widely considered to be ‘a place’ where students with disabilities attended school and their IEPs prescribed a curriculum that was different from the general education for students at the same grade level. ...

At a steadily increasing pace through the 1990s, IEPs began to provide for students with disabilities to spend more time in general education settings during the school day. Part of the ‘social inclusion philosophy’ (*Browder et al.* (2003, p. 167), this movement, first called **mainstreaming and then inclusion**, started out with emphasis on having students spend time in regular classes such as art or music or nonacademic activities such as lunch or physical education. The trend expanded and strengthened in the 1990s and moved toward integrating students with disabilities into the academic component of the regular education classroom. **It culminated in the emphasis on providing access to the regular education curriculum for students with disabilities that first appeared in the 1997 amendments to IDEA and was reinforced in NCLB and the subsequent reauthorization of IDEA in 2004.** A survey completed by Project Forum in 1999 and reported in the document, *Linkage of the IEP to the General Education Curriculum*⁴ confirmed that many states were taking initial steps toward what was beginning to be called standards-based IEPs to provide alignment between the goals for students with disabilities and the standards that had become the basis of each state’s general education curriculum. *Ahearn, p. 3-4 (emphasis added).*

Since each state has developed or is developing its own response to the Curricular LRE duty, the specific actions to be taken, questions to be answered, etc., are uniquely state issues. For specific directions, see your state education agency’s Web site for forms and technical assistance. Additional information including a seven-step process to creating Standards-based IEPs in *Standards Based Individualized Education Program Examples*, is available at the NASDE Web site, www.projectforum.org. Other web resources include:

The National Center on Educational Outcomes, www.cehd.umn.edu/NCEO.

The National Alternate Assessment Center, www.naacpartners.org.

1. Present Levels of Performance become very important. “Under a standards-based approach, discussion of present performance levels starts from a discussion of the state standards the student has achieved and concentrates on identifying the skills and knowledge the student has already acquired that will allow him/her to work toward standards for the current grade level.” *Ahearn, p. 5.*

See for example, Bend-Lapine School District v. K.H., 43 IDELR 191 (D.C. Or. 2005), *affirmed*, 48 IDELR 33 (9th Cir. 2007). 9th Circuit affirms lower court ruling that the Student was denied FAPE where the IEP failed to establish a baseline of student’s behaviors and set measurable goals. Wrote the District Court:

Without that baseline of current performance and/or behavior, it is difficult to draft measurable and relevant annual goals. The District provided the following information regarding K.H.’s ‘behaviors,’ presumably based on K.H.’s disability: her behaviors ‘resulted in short term suspensions,’ K.H. had been physically and verbally aggressive, and K.H. ‘had been involved in some sexual harassment incidents.’ It was further noted that K.H. had difficulty maintaining friendships, verified by the

behavioral inventory, and that people ‘don’t always enjoy [K.H.’s] company.’ Finally, K.H.’s ‘inappropriate behaviors interfere with her success in the classroom both socially and academically.’

The ALJ correctly found that the statement quoted above was insufficient to determine an accurate baseline of K.H.’s behaviors affected by her disability. The information explaining K.H.’s current level of performance failed to provide any measurable level of problematic behaviors, including how many times K.H. had been suspended as a result of the behaviors associated with her disability, or how many instances and in what settings had K.H. been verbally aggressive.

See also, Laura P. v. Haverford School District, 51 IDELR 183 (E.D. Pa. 2008)(“The Hearing Officer found beginning in November 2004, **Vivian’s IEPs were ‘repetitive without indication of either progress or a change in instruction’ and ‘lacked the systematic present levels of educational performance, measurable annual goals, and appropriate progress monitoring ... necessary to constitute FAPE.’** These findings are supported by the record. Vivian’s June 2003 and February 2004 IEPs, though not flawless, carefully address whether previously established goals were reached, by documenting current performance levels reflecting advancement from prior IEPs, and establish new goals based upon this assessment. Subsequent IEPs, however, omit baseline skill levels, inexplicably report identical achievement levels from one IEP to the next while declaring ‘great’ progress in ‘all’ areas of the IEP, fail to respond to Vivian’s apparent stagnation in development, do not provide a measure for progress reported, and goals set in each IEP do not correspond to Vivian’s actual performance in attaining goals established in prior IEPs. ... In light of the repetitiveness and lack of meaningful progress reporting in her IEPs, **I must conclude Vivian was denied FAPE for that period. The IEPs failed to report accurately Vivian’s abilities and outline the goals of her education, resulting in erroneous specifications for the services recommended for Vivian.**”)(Emphasis added).

See also, Farmington ISD #192, 109 LRP 32944 (SEA MN 2007)(“At a minimum, the IEP must include PLEP statements that clearly describes how the Student’s disability affects his involvement and progress in the general curriculum. This may be accomplished by stating where the Student is performing in relation to the current competencies all eighth-graders are expected to have developed by the start of the eighth grade. Appropriate goals to aid in closing the achievement gap for the Student must then be determined, and then the services necessary to help the Student reach those goals.”)

2. Align IEP goals with the state’s grade-level curriculum. *See, for example, Ysleta ISD*, 103 LRP 29836 (SEA TX 2003) “YISD declined to write specific goals in math for Eva because of its view that she could perform in a regular education math class working on the regular state curriculum.” The school did include a goal with respect to mastering independent study skills. Eva passed the regular education algebra class in ninth grade (although she did not pass the state’s end-of-course-exam), failed the first semester of regular education geometry, but was passing the class in the spring of her 10th-grade year at the time of the hearing. Wrote the hearing officer, “Although there might be merit to the Petitioner’s allegations that appropriate goals addressing Eva’s learning disabilities were not included in the IEP, she nonetheless is receiving educational benefit in the schooling arrangement provided by YISD. No denial of FAPE was found. *See, also Ahearn, supra, p. 5* (“One of the problems plaguing IEPs in the past is that despite IEP Team discussion of academic areas, “the emphasis would most often be on the child’s acquisition of basic developmental and/or functional skills unrelated to a specific academic area.”)

3. Where the student is not expected to perform at grade level, the IEP Team’s efforts to determine the student’s abilities and appropriate goals becomes critical.

“[T]he input from evaluations and other sources are used to identify the skills and knowledge the individual student needs to achieve the academic standards for the current or subsequent grade level. As stated in the California training materials, the IEP goals are “the plan for bridging the gap between where the student is and where the student needs to be in relation to the state or district content

standards.” The training materials go on to say: ‘By incorporating standards into our Individualized Education Programs, the IEP can now tie individual student needs to state standards and access and progress in the general education curriculum. This promotes Individualized Education Programs that allow general educators and special educators to speak the same language.’” *Ahearn, p. 5, internal citations omitted.*

See, for example, Rosemount-Apple Valley ISD #196, 107 LRP 36767 (SEA MN 2007). An IDEA violation was found where the student’s IEP lacked baseline data upon which progress could be measured. Required PLEP (Present Levels of Educational Progress) statements were missing, and (consequently) goals were vague making any progress immeasurable. Wrote the hearing officer:

“[A]n IEP that focuses on ensuring that a child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.” *Fed. Reg. Vol. 71, No. 156, Monday, August 14, 2006, p. 46662.* ‘Academic content standards are statements of the knowledge and skills that schools are expected to teach and students are expected to learn.’ ED Non-regulatory Guidance on Modified Academic Achievement Standards, April, 2007, A-4, pp. 12-13. ‘IEP goals based on grade-level academic content standards are goals that address the skills specified in the content standards for the grade in which a student is enrolled.’ *Id.* at E-1, p. 27.

Farmington ISD #192, 109 LRP 32944 (SEA MN 2007)(“Adequate educational progress would be shown by a general increase in the number of competencies or skills reached in each grade completed, not a greater number of competencies or skills failing to be reached. The Student’s limited progress in the general curriculum (the same curriculum as for non-disabled children), the lack of progress on his individual goals and his continued inability to independently solve basic math problems, indicates his program has not been adequate.”)

“Some states with standards-based IEPs allow the IEP team to consider goals related to standards below the current grade level for the student, usually because that student has not had access to academic standards in the past. Such students are expected to make more than one year of progress through standards-based instruction because the needed skills are targeted by the teacher. Teachers scaffold instruction (i.e., provide supports as necessary) and prerequisite skills are used to work toward the grade-level standards. For example, a student who cannot read 6th grade materials may work toward a grade-level standard that calls for analyzing written materials. The cognitive processes associated with that higher level reading skill can still be taught while the student accesses the grade-level materials in a different way. Such a student may also have some lower level reading skills included as goals.” *Ahearn, p. 8.*

4. Are the special education and related aids and services in the IEP necessary to provide educational benefit, or do they reduce opportunities for student achievement?

While not explicit in the IDEA, quite implicit is the educational principle that special education should not do for a student what she can do for herself. Put differently, special education is not meant to replace student effort, but to ensure that student effort is encouraged and has meaning. A variety of cases on the point follow.

Can an inappropriate accommodation negatively impact educational progress? Yep. *North Lawrence (IN) Community Schools, 38 IDELR 194 (OCR 2002).* A common problem encountered by schools is a disability related need, and a parent’s strong preference for a particular accommodation to address the need. In this case, the student was diabetic, and the parent was concerned that his needs for water were being disregarded during the school day as he had been denied access to the water fountain on a variety of occasions. The district was apparently concerned that too frequent water breaks were interrupting the educational process and interfering with the student’s ability to stay on task. To provide proper hydration while maintaining the student’s presence in the classroom, the district suggested allowing the student to keep a water bottle at his desk. After an initial objection for unspecified

“hygiene” reasons and logistical concerns about refilling it, the parent agreed to the accommodation, and OCR determined the matter closed.

Assistive Technology: You can use a calculator, just not THAT calculator. *Sherman v. Mamaroneck Union Free School District*, 39 IDELR 181, 340 F.3d 87 (2d Cir. 2003). A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator, but provided that the student’s teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student’s parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student’s teachers were convinced that he could learn to factor, and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. “It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor.” **The TI-92 is inappropriate because “it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts.”** The court concluded that the student’s failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student’s lack of effort. “The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aids requested, to succeed but nonetheless fails. **If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires.**” The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts. (Emphasis added).

Cases involving 1-1 Aides demonstrate how services can (when inappropriately provided or implemented) reduce student benefit.

Even if appropriate, unless the aide is well-trained and effective, progress can suffer. *A.C. v. Board of Education of the Chappaqua Central Sch. Dist.*, 47 IDELR 294 (S.D.N.Y. 2007). The use of an aide or paraprofessional can assist a student in accessing the regular curriculum. However, when provided inappropriately, the service can reduce independence and skill acquisition. The concern is often referenced as “learned helplessness.” A case from New York involving special education services for a student with pervasive developmental disorder provides a helpful introduction to the concerns arising from inappropriate assistance.

“The Court holds that the IEP was not reasonably calculated to afford M.C. a FAPE. It is true that the District provided M.C. with extensive ‘support,’ most notably in the form of a 1:1 aide throughout the day. But as the IHO noted, **‘the constant presence of a 1:1 aide may be viewed as a crutch or palliative measure, especially where, as here, lack of independence is one of the student’s most significant deficits. The 1:1 aide may have been very inhibiting in the proposed middle school placement, where he or she would have followed M from class to class.’**”

“Defendant’s failure to address the need to increase M’s independence conforms to the pattern of ‘learned helplessness’ that was being fostered by the District’s IEP. **This approach is epitomized by the District’s designation of a separate bathroom facility for M.C, and the fact that the District admitted that there was no ‘instruction goal aimed to have M.C. use a community bathroom.’** By failing to address M.C.’s need to increase his independence, and indeed by fostering ‘learned helplessness’ through the indefinite use of a 1:1 aide, the Court concludes that the IEP was substantively inadequate and not reasonably calculated to provide M.C. with a FAPE.” (Emphasis added).

Learned helplessness is increasingly common language in IDEA decisions. The language focuses on

the desired goal of independence, together with the recognition that excessive services or inappropriate services may negatively impact on a student's acquisition of skills. When the school does for the child what he should do for him or herself, educational opportunity can be lost.

When help is provided matters. "Recognizing []'s need for independence, the paraprofessional in Mrs. Ringler's room does not sit next to [] but instead circles the room and helps [] only when needed. This focus on independence comes not only from the parents, but also from outside experts and consultants. The 1998 Cappers Evaluation recognized that too much assistance could lead to a learned helplessness and a lack of confidence." *USD #253, 102 LRP 2897 (SEA KS 2000)*(internal citations omitted).

How the student is helped matters. "While at lunch, Dr. Cooper observed [that] an adult aide obtained food and other items for this Student. The aide also verbally directed this Student while she ate and the aide repeatedly wiped her mouth. In Dr. Cooper's opinion, the utilization of the aide in this manner was 'terrible.' Dr. Cooper opined that it is highly likely that this Student has the skills to perform lunchroom activities; and, if she did not have such skills, the District should focus on teaching her how to perform mealtime activities, rather than perform the activities for her. Dr. Cooper saw no evidence that the District had paid any attention to her current and/or future needs in this area, and she testified that the District's failure in this regard contributes to her 'learned helplessness.'" *Jefferson County Board of Education, 103 LRP 7409 (SEA AL 2003)*.

The importance of timely support and fading assistance in the provision of services by an aide. "Examination of the IEPs, progress reports, work samples, and testimony of School staff show that the School District was able to achieve this balance. The IEPs that the School District proposed gave Seb an opportunity to do many skills (i.e. banking, laundry, accessing transportation) with support and fading assistance. The progress reports and communication logs show that Seb was able to do tasks with gradual fading and less cueing and in some cases independently. BICO did not put Seb on public transportation alone but provided him with repeated training in the classroom and in the community. **The School District began by having staff ride with Seb on the van that had limited passengers, some of whom Seb knew, with a limited amount of drivers who Seb knew. This assistance was faded when Seb was ready with staff shadowing the van to having Seb get on the bus with only a staff member or a work employee at either end.** Similarly, when Seb first began his vocational placements, Ms. Lapointe had more frequent contact with the employers and then began to fade her daily on-site supervision only when the employers and Seb were comfortable. While Ms. Lapointe did not make visits on-site frequently, she did maintain frequent phone contact, made accommodations when necessary and the employers were able to adequately supervise Seb because Ms. Lapointe was available and the employers called her when they needed her." *King Philip Public Schools, 52 IDELR 29 (SEA MA 2009)*.

Can a more restrictive placement be required for appropriate access to grade-level curriculum? Absolutely. *S.K. v. Parsippany-Troy Hills Board of Education, 51 IDELR 106 (D.N.J. 2008)(unpublished)*. S.K. involves addressing the appropriateness of an IEP for a student with multiple disabilities including autism, specific learning disabilities, attention deficit hyperactivity disorder and speech and language impairments. Having been mainstreamed for three years (K-2) with significant supports (one-to-one aide, parent training, a behavior intervention plan, "modifications in the classroom to tailor lessons to his needs" and a home ABA program), the student was not making progress in basic academic skills.

An independent evaluation secured by the parent supported the move from the mainstream class finding "poor pragmatic language usage, deficits in comprehension, difficulty in reading and persistent difficulties in academic subjects involving problem solving and complex concept formation." The current mainstream placement was resulting in "severe academic underachievement in basic reading skills, reading comprehension and oral expression." **The independent evaluator concluded: "It is clear, however, that he requires special education to develop basic reading**

skills commensurate with his ability and to develop basic skills in math and written expression so that he has the necessary competencies before transitioning to higher grades.” While the initial report (based on an in-office evaluation and questionnaires completed by others) indicated that “some of the student’s instruction would need to be provided outside the inclusion classroom,” an amended report (produced after the evaluation and after conducting a classroom and home observation) concluded that “it will be necessary to provide academic instruction in a one-to-one or very small group instructional setting using intensive specially-designed instruction.” Based on his lack of academic progress, the school proposed placement in a self-contained autism class.

The parent objected to the proposed move to self-contained, arguing that the student “had made great progress in social skills and oral expression by spending three years in the mainstream classroom.” The parent also rejected the conclusions of the independent evaluation secured by the parent, which placed “undue importance on N.K.’s achievement of academic improvement. Plaintiff argues that this contravenes the LRE mandate of the IDEA, which favors mainstreaming over providing the child with the best academic instruction.”

The ALJ and District Court both agreed with the independent evaluator. At hearing, the independent evaluator testified consistently with the evaluation, and added that the student required instruction “in a self-contained classroom now so that he could develop the skills needed for later mainstreaming at the higher grades.” Plaintiff’s expert urged one more year of mainstreaming but “conceded that she would no longer recommend that placement if N.K. did not fare well.” The court looked to IDEA’s obligation to provide meaningful, not trivial benefit, and the requirement that benefit be gauged in relation to the child’s potential. **Not only does the evidence indicate that the student has not progressed, the court finds, as did the independent evaluator, that the student “will only fall further behind if he continues in a group classroom environment where he receives lessons with nondisabled children.”** (emphasis added). Addressing the parent’s concerns directly, the court writes:

“The Court finds Dr. Kay’s opinions particularly persuasive, given her thorough examination of N.K., her lack of connection to the School District, and her selection by S.K. herself to perform the independent re-evaluation of N.K. **Her opinion is not, as Plaintiff characterizes it, that N.K. would achieve superior academic benefits in a self-contained classroom, but rather that a self-contained placement is necessary for N.K. to develop the fundamental skills he has failed to develop in the several years he has spent in the classroom. ...** N.K.’s failure to achieve more than negligible benefit during his three year’s worth of regular education instruction persuades this court that the challenged IEP’s proposed placement of N.K. in a self-contained classroom was ‘reasonably calculated to enable the child to receive educational benefits.’” (emphasis added).

A little commentary: An important factor in the decision was the parent argument that the student’s lack of progress was attributable to the district’s failure to appropriately implement the IEP, including the inconsistency in home instruction and a one-to-one aide who was poorly trained and did not work well with the student. While the arguments were rejected by the court, schools need to ensure that IEPs are not only appropriate but also are appropriately implemented to prevail in a move to a more restrictive placement. *See also, Pacht v. School Board of Anoka-Hennepin ISD #11*, 46 IDELR 1, 453 F.3d 1064 (8th Cir. 2006) (“Although the disputed IEP provides for Sarah to spend approximately 70 percent of the time in the mainstream environment, the Pachts argue that 100 percent of her day should be spent in the regular classroom. The district court rejected the argument, finding that ‘with full inclusion, Sarah would be among her peers, but not learning with them... **Sarah’s service providers also believed that the functional skills that Sarah would need to develop personal independence could not be fully addressed in the mainstream environment, ‘since many of the functional skills that Sarah should learn cannot be performed in the natural setting of the mainstream with enough frequency to provide her the needed practice.’**”) (emphasis added).

See also, Greenwood v. Wissahickon School District, 50 IDELR 280, 571 F.Supp. 2d 654 (E.D. Pa.

2008). The case arises from a parent's desire for a full-time regular classroom program for her 17-year-old daughter. The student has severe mental retardation and static nonprogressive encephalopathy, together with a sensory disorder affecting her ability to sustain focused attention, postural control and motor planning. The student had previously been taught in life skills classes.

"The record establishes that Angela received little, if any, educational benefit from her inclusion in regular class. The reliable testimony from her teachers demonstrates that her ability to receive educational benefit from regular education is extremely low. Her seventh-grade social studies teacher testified that Angela did not make meaningful educational progress in a regular education class. She did not come away with an understanding of any of the material from the seventh-grade social studies curriculum, even as substantially modified. Angela's eighth-grade teacher similarly concluded that Angela made no progress on any academic goals in her regular education class."

While criticized by the parents, the court had no problem with the level of supplementary aids and services provided by the district to support the student in regular classes. Angela receives a one-to-one aide throughout the day, an IEP facilitator, and a great deal of communication with the parent. A key point of contention was an alleged lack of training of staff to meet Angela's needs, with the parent emphasizing that Angela is the first student with significant disabilities to have mainstreaming opportunities in the district. Nevertheless, the court was not convinced.

"Greater inclusion in academic courses compromises any achievement in acquiring essential life skills needed to improve her functional ability." Further, the regular education class is an inappropriate setting in which to provide necessary training in life skills goals such as dressing and toileting. Finally, "to accommodate Angela's cognitive limitations and abilities, the School District must modify her regular education program to such an extent that it effectively constitutes a totally different curriculum, thus defeating the purpose of Angela's inclusion in regular class."

Ultimately, it was the question of meaningful benefit for this student that required a more restrictive placement. **"Mainstreaming does not require inclusion in a regular classroom if doing so would jeopardize a student's ability to achieve a meaningful educational benefit. Thus, inclusion is not appropriate when the nature or severity of a student's disability precludes an educational benefit from inclusion with non-disabled students by means of supplementary aids and services."** The IEP was upheld.

V. IDEA students attempting to apply Section 504 LRE analysis

IDEA rights and Section 504/ADA rights for the IDEA-eligible student. By its own language, the IDEA provides that special education eligibility does not foreclose other rights the student may have under Section 504 or ADA.

"Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. §1415(l).

Note, however, that ADA and non-FAPE Section 504 requests for accommodations are limited to those that do not result in fundamental alteration. The overlap of rights has begun to create some interesting issues. By way of example of the complexity of the concerns that can arise, consider this case on LRE.

Do Section 504 and the ADA impact IDEA LRE? *S.S. v. City of Springfield, Massachusetts*, Civil Action No. 14-30116 (D.C. Mass. 2014). An interesting facet in the modern intersection of ADA/504 and

the IDEA is found in a class action complaint filed in federal district court in Massachusetts entirely on ADA claims arising from the placement of disabled students with mental impairments in segregated Public Day Schools. A Statement of Interest in the case filed by the U.S. Department of Justice highlights DOJ's position that plaintiffs with both IDEA and ADA claims can, but are not required, to file both. "[A] plaintiff's decision, as here, to seek relief under the ADA but not the IDEA in a Federal court is plainly his or her choice." *DOJ Statement of Interest*, p. 8. The plaintiffs here are not pursuing a denial of FAPE claim. "Rather, the theory of the case is that the Defendants have violated the equal opportunity principles fundamental to the ADA," including the claim that they were denied "the opportunity to receive educational programs and services in the most integrated setting appropriate to their needs." Opines the DOJ, "The Defendants' IDEA FAPE obligations, even if satisfied, do not foreclose the ADA claims in this case." *Id.*, p. 9.

A little commentary: While the ADA claims may not be foreclosed, are they not flavored by the lack of an IDEA FAPE claim? It appears that the plaintiffs in *S.S.* argued an IDEA denial of FAPE as part of an IDEA due process hearing, but lost on the claim and did not pursue it on appeal. *DOJ Statement of Interest*, p. 4, *fn* 3. That said, what prevents the defendants from arguing that FAPE was in fact provided under IDEA, and that part of that FAPE is the balancing of educational benefit and LRE? To the extent that LRE is different under the IDEA and ADA (and the author is neither advancing such an idea nor accepting it as fact), which law wins? To the extent that ADA includes language on yielding in the event of fundamental alteration (and IDEA does not), IDEA would seem to prevail in such a conflict. What matters now is that the issue is now being pursued in litigation here, and will likely be attempted in other cases as well.