

**The Least Restrictive Environment: From PreSchool to High School**  
**Selene Almazan, Esq.**  
**Selene Almazan Law, LLC**

**The Act’s 1997 amendments and continued in the 2004 reauthorization, Congress made involvement and progress in the “general education” curriculum an overall priority and goal for students with disabilities.**

The 2004 Reauthorization of the Act incorporated the following findings, thus renewing and strengthening the obligations attendant to the least restrictive environment (LRE) requirements:

Almost 30 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 to the general education curriculum in the regular classroom, to the maximum extent possible;

...

(C) coordinating this title with other local, educational service agency State, Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

...

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate.

20 U.S.C. §1400(c)(5).

In 2004, therefore, Congress expressly reaffirmed that a student has the right of access to the general curriculum and classroom and opportunities to be educated alongside appropriate peers to the maximum extent possible. Congress recognized that “special education can become a service for such children rather than a place where such children are sent.”*Id.*<sup>1</sup>

---

<sup>1</sup> This notion that special education is not a place but services is important to understanding how a student with disabilities can be successfully included in general education classes and receive special education services in that same setting. *See*, 20 U.S.C. §1400 (5)(c).

Since the Act's 1997 amendments and continued in 2004 Reauthorization, Congress made involvement and progress in the "general curriculum" an overall priority and goal for students with disabilities. *Id.* Congress has adopted a number of measures that further the goal of educating students with disabilities in general education classes to the maximum extent appropriate. For example, the IEP must include supplementary aids and services in order to facilitate in the general education classroom. In addition, a student cannot be removed from general education classes based solely on a need for curriculum modification. 34 C.F.R. §300.116(e). A student's general education teacher is a member of the student's IEP team and participates in developing the IEP. 34 C.F.R. §300.324(b)(ii)(E)(3). If a student will not be participating in general education classes, an explanation for that exclusion must be provided in the IEP. All these measures serve to not only reinforce the strong presumption of placement in general education classes, but also to highlight Congressional intent that educating students with disabilities school districts maintain high expectations for the educational achievements of those students.

### **Thirty Years of Educational Research Supports the Inclusion of Students with Disabilities in General Education Classes.**

The Congressional commitment to placement of students with disabilities in general education classrooms reflected in these measures is a direct outgrowth of the "30 years research and experience" relied upon by the Congress in 2004. Abundant quantitative and qualitative research demonstrates that students with disabilities can achieve considerable educational benefit from placement in general education classes with supplementary aids and services. Time spent with non-disabled peers enhances academic achievement for students with disabilities, that is, inclusion and achievement are positively correlated. A 2002 study compared results on measures of child development and social competence, for children in inclusive programs versus children in

segregated or “self-contained” programs over a 2-year study period. The children enrolled in inclusive programs achieved statistically significant better results than the children in the segregated programs. Fisher & Meyer, *Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs*,” 27 *Research & Practice for Persons with Severe Disabilities* 165, 166, 169-73 (2002). The authors concluded:

The results of this study point to greater gains on psychometrically valid measures for students who were included in general education settings in comparison to matched peers who were segregated. Moving instruction into inclusive environments, rather than providing instruction in isolation from normalized learning opportunities... seems to be beneficial for individual child learning outcomes. . . .

*Id.* at 172-73.

Research also shows that students with disabilities who are educated in general education classes do better academically and socially than comparable students in noninclusive settings, regardless of the type of disability or grade level. R. Turnbull, A. Turnbull, M. Shank & S. Smith, *Exceptional Lives: Special Education in Today's Schools* 238. (2004).

In 50 research studies since the 1980's comparing the academic performance of mainstreamed and segregated students with mild disabilities, the mean academic growth of the integrated group was in the 80<sup>th</sup> percentile, while the segregated students was in the 50<sup>th</sup> percentile. R. Weiner, *Impact on Schools* (1985).

It is important to remember that all children – not only those with disabilities but also typical students – learn differently. Including students with disabilities in regular education classrooms, as the law requires, makes it possible for educators to develop new methods of instruction that lead to improved outcomes for all students. *See, e.g.,* Gilberts, *et al., The Effects of Peer Delivered Self-Monitoring Strategies on the Participation of Students With Severe*

*Disabilities in General Education Classrooms*, 26 Journal of the Association for Persons with Severe Handicaps 25 (2001) (study of using peer tutors and self-monitoring by students with disabilities)

Identifying the conditions that enable peers to have a positive influence on the learning of children with developmental needs and disabilities presents a significant challenge for researchers. See Odom, McConnell, McEvoy, Peterson, Ostrosky, Chandler, Spicuzza, Skellenger, Creighton, & Favazza, *Relative effects of interventions supporting the social competence of young children with disabilities*, 19 Topics in Early Childhood Special Education, 75-91 (1999) and Wolery, *Inclusion in early childhood special education: seeing through a glass darkly, knowing in part*. 58 Exceptional Children, 127-135 (1991). See, Vaughn, Moody, & Schumm, *Broken promises: Instruction in the resource room*, 64 Exceptional Children 211-255 (1998) (resource rooms provide primarily whole group reading instruction with little differentiated materials); Algozzine, Morsink & Algozzine, *What's happening in Special Education Classrooms?*, 55 Exceptional Children 259-65 (1988)(few differences in instructional methods across self-contained classes for students with various disabilities); McDonnell, Thorson, McQuivey & Kiefer-O'Donnell *Academic Engaged Time of Students With Low-Incidence Disabilities in General Education Classes*, 35(1) Mental Retardation 18-26 (1997). (results showed no significant differences in academic responding and task management behaviors of students with and without disabilities enrolled in general education classes)

Research on preschool inclusive opportunities for students with severe disabilities has found that children with severe disabilities who participate in inclusive settings appear to score higher on standardized measures of development than comparable children enrolled in traditional special education settings. Odom, S. *Preschool Inclusion: What We Know and Where We Go From*

*Here*, 20(1) Topics in Early Childhood Special Education, 20-27 (2000). Another study examined the impact of peer-mediated intervention on pre-school children's participation within routine childcare activities. Results indicated that a peer-mediated intervention consisting of songs and finger plays, attention to photographs of children displaying desired behaviors, and peer verbal cues was effective in increasing each of these skills. Alper, Green, Koler, Robertson, Schloss, *Using a Peer-Mediated Intervention to Facilitate Children's Participation In Inclusive Childcare Activities*, 26(2) Education and Treatment of Children 182-197 (2003). Another study by Kohler and Strain describes four types of effective peer-mediated interventions recognized in the early childhood literature. Peers:

1. provide suggestions, encouragement, and related forms of support for one another's behaviors
2. model appropriate responses for a child with special needs to imitate
3. act as tutors and provide instructions and feedback to teach specific academic or developmental skills
4. participate in cooperative activities and group-oriented reinforcement contingencies with other children

Kohler & Strain, *Promoting positive and supportive interactions between preschoolers: An analysis of group-oriented contingencies*, 14(4) Journal of Early Intervention 327-341 (1990).

Research after the reauthorization of IDEA in 2004 continues to confirm the marked academic and social improvement in children with disabilities who are educated alongside their typical peers in the general education classroom. *E.g.*, Wayne S. Sailor & Amy B. McCart, Stars in Alignment, 39 Res. & Prac. for Persons with Severe Disabilities 55, 57-58 (2014) (Appx. 2) (collecting studies and noting benefit to *all* students of educational practices that support inclusion); Hehir, Thomas et al., Review of Special Education in the Commonwealth of Massachusetts: A Synthesis Report (2014), available at <http://www.doe.mass.edu/sped/hehir/2014-09synthesis.pdf>; see also Lewis B. Jackson et al., *The Dynamic Relationship Between Context, Curriculum and Student Learning: A*

*Case for Inclusive Education as a Research Based Practice*, 34 Res. & Prac. for Persons with Severe Disabilities 175-95 (2008), available at [http://www.academia.edu/2567145/The\\_dynamic\\_relationship\\_between\\_context\\_curriculum\\_and\\_student\\_learning\\_A\\_case\\_for\\_inclusive\\_education\\_as\\_a\\_research-based\\_practice](http://www.academia.edu/2567145/The_dynamic_relationship_between_context_curriculum_and_student_learning_A_case_for_inclusive_education_as_a_research-based_practice); Peggy Coyne et al., *Literacy by Design: A Universal Design for Learning Approach for Students with Significant Intellectual Disabilities*, 33 Remedial & Special Educ., 162- 72 (2012), available at [https://ccids.umaine.edu/wp-content/uploads/sites/26/2013/08/Remedial-and\\_Special-Education-2012-Coyne-162-72\\_web.pdf](https://ccids.umaine.edu/wp-content/uploads/sites/26/2013/08/Remedial-and_Special-Education-2012-Coyne-162-72_web.pdf) (students with significant disabilities can learn academic content, build social competence and develop friendships with peers).

In an analysis of self-contained classes, experts observed special education classes that were spacious, well-staffed by educators and paraprofessionals, and supplied with adequate resources. Despite these supports and resources, they found a remarkable lack of time that students spent in instruction, and the instruction that did occur was provided primarily by paraprofessionals. Further, they found there were few opportunities for students to respond to instructional cues, a high level of distractions in the classroom, a lack of communication supports for students, and a lack of individualization of instruction. Kurth, Jennifer A., Kiara Born, and Hailey Love. “*Ecobehavioral Characteristics of Self-Contained High School Classrooms for Students with Severe Cognitive Disability.*” *Research & Prac. for Persons with Severe Disabilities* 41, 227–43 (2016).

Moreover, and particularly important here, is that research demonstrates the benefits of inclusion in the general education classroom especially for children who, like R.M., have Down syndrome. Sue Buckley et al., *A Comparison of Mainstream and Special School Education for Teenagers with Down Syndrome: Effects on Social and Academic Development*, 9 Down

Syndrome Res. & Prac. (2006), available at <https://www.down-syndrome.org/reports/295/reports-295.pdf>. This study compared two groups of children with Down syndrome, one group educated with their non-disabled peers in general education classrooms and another group educated in special education classrooms containing only peers with disabilities. *Id.* The study found that by their teenage years, the children with Down syndrome included in general education with non-disabled peers were reading and writing more than 3.4 years ahead of children with Down syndrome educated in special education classrooms with only disabled peers. *Id.* at p. 57. Similarly, the expressive language of the included children was 2.6 years ahead of that of the non-included children. *Id.* at 56-57. And, by being educated alongside typically developing children, 78% of the included children had language intelligible to strangers, as compared to 56% of those educated in separate classrooms. *Id.*; see also *A Summary of the Research Evidence on Inclusive Education* (PDF Download Available), available at <https://www.researchgate.net/publication/312084483> [A Summary of the Research Evidence on Inclusive Education](https://www.researchgate.net/publication/312084483) (summarizing extensive benefits, including academic, social and emotion, of including students with disabilities, particularly those with Down syndrome, in the general education classroom with non-disabled peers).

IDEA's mandates are not simply empty aspirations; in fact, research demonstrates that children with disabilities can achieve considerably more educational benefit from placement in general education classes with access to the general education curriculum through supplementary aids and services than from placement in special education classrooms or schools with limited access, or no access to their age-appropriate non-disabled peers or general education curriculum. Further, the research also supports the finding that when students with and without disabilities spend time together, all students benefit; thus, there is a positive correlation between academic

achievement and inclusion. Additionally, the Supreme Court has recently made clear that the IEPs of children with disabilities must be “appropriately ambitious” to enable them to make progress in the *general education curriculum* in light of their unique abilities. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). The Court explained that children with disabilities are to be challenged to reach their potential progress just as their non-disabled peers are. For most students, this progress happens most effectively when children with disabilities are given access to the general education curriculum and included in the general education classrooms with their peers without disabilities. IEPs that are just deemed to be “more appropriate” without regard to the children’s least restrictive environment do not provide children with the ability to meet their true potential, nor do they satisfy the Congressional mandate under IDEA.

A detailed set of procedures govern the drafting of the IEP, the “centerpiece of the statute’s educational delivery system for disabled children.” *Endrew F.*, 137 S. Ct. at 994 (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988)). “In determining what it means to ‘meet the unique needs’ of a child with a disability, the provisions governing the IEP development process are a natural source of guidance.” *Id.* at 1000.

IDEA’s procedures provide explicit direction when it comes to segregation of students with disabilities. Wary of separate classes and segregation of individuals with disabilities, Congress included within IDEA the following “least restrictive environment” (LRE) provision:

To the maximum extent appropriate, children with disabilities, including children in public and 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.

Congress recognized that “**special education can become a *service* for such children rather than a *place* where such children are sent.**” 20 U.S.C. §1400(c)(5)(C) (emphasis added).

Accordingly, Congress has made involvement and progress in the “general curriculum” an overall priority and goal for students with disabilities. 20 U.S.C. §1400(c)(5)(D).

Several regulations ensure compliance with this LRE mandate. “The IEP must include supplementary aids and services in order to facilitate the provision of services to the student in the general education classroom.” 34 C.F.R. §300.320(a)(4). Further, a student cannot be removed from general education classes based solely on a need for curriculum modification. 34 C.F.R. §300.116(e). And if a student will not be participating in general education classes, justification for that exclusion must be provided in the IEP. 34 C.F.R. §300.320(a)(5). Additionally, unless the IEP of a child with a disability requires some other arrangement,” the child must be educated in the school that he or she would attend if nondisabled. 34 C.F.R. §300.116(c).

In *Andrew F.* the Supreme Court rejected the argument that such provisions governing the IEPs required components “impose only procedural requirements – a checklist of items the IEP must address – not a substantive standard enforceable in court.” *Andrew F.*, 137 S. Ct. at 1000. As the Supreme Court explained, the “procedures are there for a reason.” They provide insight into what it means to meet the unique needs of a child with a disability. *Id.* And as the regulations set forth, the unique needs of a child with a disability must be met in the child’s LRE.

In short, inclusive education is not only effective, but its effectiveness is growing with greater experience.<sup>2</sup> This makes it even more important that courts enforce the law’s mandate – education in the least restrictive environment – and do so without hesitation or compromise.

---

<sup>2</sup> Waldron, N., Cole, C., & Majd, M., *The academic progress of students across inclusive and traditional settings: A two year study Indiana inclusion study* (2001). This study investigated the effects of inclusive programs for students without disabilities and students identified with mild disabilities in Indiana schools. Students’ academic progress in reading and mathematics were compared using a curriculum-based measure, the Basic Academic Skills Sample (BASS). The BASS is a group administered instrument designed to assess student achievement in the

A. The Least Restrictive Environment Requirements of the IDEA (34 C.F.R. §300.114) –

“to the maximum extent appropriate, children with disabilities, including children in public and private institutions or other care facilities, are educated with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

1. Substantive due process right
2. Procedural due process right
3. The 1997 Amendments to the IDEA

B. Individualized determination (34 C.F.R. §300.116)

1. Made by a team that includes the student’s parents
2. Based on IEP NOT on
  - Category or significance of disability
  - Availability of services
  - Configuration of service delivery system
  - Availability of space
  - Administrative convenience
3. In conformity to LRE provisions
4. Is as close as possible to the student’s home.
5. Unless the IEP of a child with a disability requires some other arrangement, the student is educated in the school he or she would attend if nondisabled.

C. Sequential determination

1. Continuum of alternative placements (34 C.F.R. §300.115)
  - a. “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions” and
  - b. continuum must make provision for “supplementary aids and services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.”
2. Begin with assumed placement in regular education classes in the school the student would attend if not disabled.
3. If IEP cannot be implemented in the least restrictive placement, then *before* moving on to a more restrictive setting, consider the *full range* of supplementary aids and services in the LRE.
4. For each setting, consider
  - a. characteristics of setting
  - b. supports natural to the setting

---

academic skill areas of mathematics and reading. It was concluded that students with and without disabilities showed gains on BASS measured areas when placed in inclusive classrooms.

- c. previous supports provided and their effectiveness
- d. additional supports

5. Placement questions

- a. Can the student learn the same curriculum as the other same aged students with only occasional in-class or consultative services? If yes, place in age-appropriate regular classes.
- b. Can the student participate in the same learning activities as the other students with accommodations or modifications? If yes, list accommodations or modifications and place in regular classes with accommodations or modifications.
- c. Does the student need supplementary aids and services in order to benefit in the regular classroom? If yes, list supplementary aids and services on the IEP and note the persons responsible for providing the services.

d. Does the student need any services that cannot be provided in the regular classroom setting at this time? If yes, the IEP should identify those services and provide for the student's removal from the classroom *only* for those activities.

6. Students with disabilities to participate with peers without disabilities in nonacademic and extracurricular services and activities, including meals, recess periods, athletics, recreational activities, special interest groups or clubs sponsored by the school to the maximum extent appropriate. (34 C.F.R. §§300.107 and 300.117)

7. If student will not participate with peers without disabilities, the IEP must include an *explanation* of the reasons.

B. Review of Court Decisions Related to LRE

- 1. *P.A.R.C.*
- 2. *Mills v. Board of Education*
- 3. *Roncker v. Walter*
- 4. *Daniel R.R.*
- 5. *Oberti v. Board of Education*
- 6. *Sacramento City Unified School District v. Rachel H.*
- 7. *Barnett v. Fairfax County School Board*
- 8. *Hartmann v. Loudon County Board of Education*

**LEAST RESTRICTIVE ENVIRONMENT  
IDEA Requirements**

1. Supplementary aids and services are necessary to implement IEP goals and objectives.
2. IEP team must consider the range of supplementary aids and services.
3. Supplementary aids and services shall be added to the IEP.
4. IEP shall contain a statement of the special education and related services and supplementary aids and services provided to the child, on behalf of the child.
5. IEP shall contain a statement of the program modifications or supports for school personnel that will be provided for the child.
  6. Supplementary aids and services are designed to help the student accomplish three purposes.
    - a. to advance appropriately toward attaining the annual goals
    - b. to be involved and progress in the general curriculum and participate in extracurricular and/or non-academic activities and
    - c. to be educated and participate with other children with disabilities and non-disabled children.
7. The amendments outlawed funding formulas that lock special education to separate settings.
8. The amendments have added the requirement of the participation of the regular education teacher in the IEP meetings.
9. The Least Restrictive Environment provisions of the federal regulations have the requirement for technical assistance as well as the requirement that the state department of education shall ensure that schools are able to implement the LRE provision of the IDEA.

## **SUPPLEMENTARY AIDS AND SERVICES**

Aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate...

The supports that allow students with disabilities to succeed in regular education classrooms. SAS are designed to help the student with a disability obtain three benefits from his or her education:

1. To advance appropriately in attaining IEP goals;
2. To be involved in and to progress in the general curriculum and to participate in extracurricular and non-academic activities;
3. To be educated and participate with other students with disabilities and those without disabilities.

Four categories:

- ✓ environmental/physical
- ✓ instructional
- ✓ social/behavioral
- ✓ staff/collaborative

#### **Environmental/physical accommodations/modifications:**

- Providing preferential seating
- Altering physical arrangement of classroom
- Reducing distractions
  - Providing quiet corner/room
  - Modifying equipment
  - Adapting writing utensils
  - Allowing use of study carrel
  - Providing assistance in maintaining uncluttered space
  - Providing space for movement or breaks

#### **Instructional Modifications:**

- Teaching to learning style
- Modifying materials
- Providing resource room instruction
- Providing one to one instruction
- Varying method of instruction

- Varying content of lesson
- Providing alternative assignments
- Providing extra visual and verbal cues and prompts
- Providing study sheets
- Conducting an assistive technology evaluation
- Providing augmentative communication devices
- Allowing use of computer and calculator
- Allowing use of tape recorder
- Providing books on tape
- Providing textbooks for at home use
- Providing notetaker or teacher outlines, study guides
- Modifying workload or length of assignments/tests
- Modifying time demands
- Allowing additional time for assignments and tests
- Allowing test answers to be dictated
- Providing word bank
- Providing hands-on activities
- Providing highlighted materials
- Allowing use of manipulatives
- Giving no penalty for spelling errors, sloppy handwriting
- Providing adapted physical education
- Following routine or schedule
- Alternate quiet and active time
- Teach management skills
  - Assign specific tasks within specific time period

### **Social/behavioral interventions/supports:**

- Providing immediate feedback
- Allowing rest breaks
- Conducting functional behavioral analysis
- Implementing behavioral intervention strategies
- Implementing behavior modification plan
- Developing crisis intervention plan
- Using varied reinforcement system
- Providing circle of friends
- Provide peer buddies
- Providing counseling
- Providing verbal and visual cues regarding transition or directions or staying on task
- Providing study skills instruction
- Providing management skills instruction
- Providing agenda book
- Providing visual daily schedule
- Adjusting assignment timelines
- Providing checklists

- Giving notice, warning before change in activities
- Allowing daily check-in with case manager or special education teacher

**Staff supports/collaboration:**

- Enhancing staffing
- Providing one on one aide
- Instituting Co-teaching arrangement
- Designating adult staff member to listen and provide support
- Providing small group instruction
- Using cooperative learning groups
- Providing staff development

**Testing accommodations:**

- Allowing answers to be dictated
- Allowing frequent rest breaks
- Allowing additional time
- Allowing oral testing
- Giving no timed tests
- Giving choice of test (multiple-choice, essay, true-false)
- Accepting short answers
- Allowing open book or open notes tests
- Shortening test
- Reading test to student
- Providing study guide prior to test
- Highlighting key directions
- Giving test in alternative site
- Allowing calculator, word processor

**§300.324 Development, review, and revision of the IEP**

- *Requirement with respect to regular education teachers*

The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in the determination of –

- Appropriate positive behavioral interventions and strategies
- Supplementary aids and services, program modifications and supports for school personnel

### §300.107 Nonacademic services

- Each school system shall take steps 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.
- Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency (school system) and assistance in making outside

### 1980s: Court Decisions Related to LRE

*Roncker v. Walter*, 700 F.2d 1058 (6<sup>th</sup> Cir. 1983) (*cert. denied*, 464 U.S. 864).

This is the first case in which a federal court interpreted the LRE provisions of the Act. This case involved a parents' request for a continued placement in the neighborhood school for their son with a disability. The school district argued that the student had not succeeded at the neighborhood school and he needed the special services available at the segregated county school. The Court of Appeals found that the question that must be addressed was whether the student "could have been provided with additional services, such as those provided at the county schools, which would have improved his performance" at the neighborhood school. [*Id.* at 1063.]

The question fashioned by the Court was whether the services needed and provided in the segregated environment could be feasibly provided in a non-segregated setting. "If they can, the placement in the segregated school would be inappropriate under the Act." [*Id.*] This "portability" doctrine is the concrete expression of the separation of special education services and the setting in which they are delivered.

*Daniel R.R. v. State Bd. of Educ.*, 874 F2d 1036 (5<sup>th</sup> Cir. 1989).

This case was brought on behalf of a kindergarten student with mental retardation. The parents appealed the school district's recommendation that the student be removed from his half-day kindergarten class and receive all of his instruction in a segregated classroom. Although the Court ultimately found for the school district, it enunciated a test for determining whether a recommended educational placement met the LRE requirements of the Act.

The Court posed the question (as it is stated in the Act) "whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education or to remove the

child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.” In order to apply the test, the Court used three factors to analyze the educational placement:

1. Whether the school system has made attempts to accommodate the student in regular education and if it has, whether its efforts were sufficient;
2. Whether the student can receive some academic or non-academic benefit from placement in the regular education environment;
3. Whether there are negative or adverse effects to either the student with a disability or to typical classmates.

### **Early 1990s: Court Decisions Related to LRE**

*Barnett v. Fairfax County School Bd.*, 721 F. Supp.757 (E.D. Va. 1989), aff’d 927 F.2d 847 (4<sup>th</sup> Cir. 1991).

A Fairfax County case brought on behalf of a student who was hearing impaired and required the services of a cued speech interpreter. This case was one in which the high school student wanted to access his neighborhood school and requested that the services of a cued speech interpreter be added to the high school. There was another high school in the area where there was a cued speech program.

The Fourth Circuit determined that the Act did not require a school district to replicate each specialized service at neighborhood schools, particularly those services or programs that serve students with low-incidence disabilities.

*Oberti v. Bd. Of Ed. Of Borough of Clementon School District*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993).

This case involved an eight-year-old student with Down Syndrome whose parents wanted him fully included in a regular education classroom. The school district recommended a segregated classroom.

The Third Circuit found that the school district failed to prove that the student was incapable of being included in a regular education environment. The school district had failed to consider the whole range of supplementary aids and services that might have facilitated placement in a regular education classroom.

The Court applied the *Daniel R.R.* test and ordered the school district to provide the student with a “supplementary teacher’s aide to a regular classroom...if necessary, to accommodate the special needs of included students with disabilities.” [*Id.*]

*Sacramento City Unified School Dist. V. Rachel H.*, 14 F.3d 1398 (9<sup>th</sup> Cir. 1994).

This case involved a student with developmental disabilities whose parents wanted her included in a third grade classroom. The school district refused based upon its argument that if allowed to segregate this student, the State Education Agency would give the district more money. In essence the school district would lose money if it allowed Rachel to be included in regular education.

The Court of Appeals found the school system's argument unpersuasive and affirmed the lower court's finding that the school system had exaggerated the cost to educate Rachel.

### **Late 1990s: Court Decisions Related to LRE**

*Hartmann v. Loudon County Bd. Of Ed.*, 118 F.3d 996 (4<sup>th</sup> Cir.), *cert. denied*, 552 U.S. 1046 (1998).

This is a case involving a student with autism. The parents wanted him fully included in a regular classroom with supports. He had been included, with success, prior to the family moving to Virginia. The Fourth Circuit held that the school district had attempted to include him to the maximum extent appropriate, but that his behaviors interfered with his ability to receive educational benefit from the inclusive placement.

Further, the Court dismissed the parents argument that the student's failure in the inclusive setting was directly related to the school district's failure to bring in a qualified autism expert to design his program in the regular education classroom. The Fourth Circuit found that the IDEA requires no such expertise.

### **Other Court Decisions**

*Beth B. v. Van Clay*, 282 F. 3d 493 (7<sup>th</sup> Cir. 2002)

A 13 year-old- student with severe disabilities (Rett Syndrome) was educated throughout elementary school in a regular education classroom. At the onset of middle school, the school district recommended placement in an educational life skills (ELS) classroom in middle school. Parents sought a hearing, lost, appealed to the federal court and lost again. The parents appealed to the 7<sup>th</sup> Circuit and the 7<sup>th</sup> Circuit held that the recommendation for placement in the ELS program satisfied the IDEA's FAPE requirement. He appeals court determined that the LRE provisions of the IDEA do not require placement in a regular education classroom when doing so provides an unsatisfactory education. The Court determined that "some" educational benefit was insufficient.

The Court declined to set forth a test for determining placement based upon LRE rather the court decided that each case should be decided on a case-by-case basis.

*Girty v. Sch. District*, (3d Cir. 2002)

A 14-year-old-student with mental retardation received special education services in a regular education classroom. At the onset of 6<sup>th</sup> grade, the school district recommended placement in a life skills classroom/program. The parents argued that the school district had not implemented modification to Spike's curriculum. There was no planning for Spike's day and Spike's instructional assistant was primarily responsible for the delivery of his education. The 3d circuit upheld the federal court's decision, applying the standards set forth in *Oberti*, that placement in the life skills classroom violated the LRE requirement of the IDEA. The school district was ordered to draft an IEP that complied with the IDEA's mainstreaming requirement.

*Doe v. Arlington County Sch. Bd.*, (4<sup>th</sup> Cir. 2000)

An elementary school student was placed in self-contained classroom for academic subjects for third and fourth grades. The parents alleged a violation of the IDEA's mainstreaming requirement. The parents alleged bad faith on the part of the school officials (essentially an attempt to place students in categorical placements) The 4<sup>th</sup> Circuit upheld the federal court's decision and rejected the parent's appeal.

*Warton v. New Fairfield Board of Education*, 217 F. Supp. 2d 261 (2002)

The school district recommended placement in a self-contained classroom for a student with a disability. The parents appealed and alleged that the school district had failed to make reasonable efforts to accommodate the student in a regular education classroom. Furthermore, the parents alleged that the student had similar behavioral difficulties in the regular and special education classrooms.

The federal court held that the hearing officers decision to place the student in a self-contained classroom violated the IDEA's mainstreaming requirement.

*R.E.B. v. Hawai'i Dep't of Educ.*, 876 F.3d 1025 (9th Cir. September 13, 2017). **WITHDRAWN ON APRIL 3, 2018; PENDING.**

The parents rejected the IEP for a student moving from a private preschool to a public kindergarten. The district court held that transition services were not required for the student, and the Court of Appeals reversed, holding that transition services must be included in a student's IEP as supplementary aids and services when the student needs those services to be educated satisfactorily in a new educational environment. The Court held that that the Department of Education violated the IDEA and the parents' right to participate in the IEP process by failing to specify the least restrictive environment for the child during the regular school year and in extended school year. The Court of Appeals also held that the school district violated IDEA by failing to specify Applied Behavioral Analysis as a teaching methodology in the IEP because the method was integral to the student's education.

*R.A. v. Contra Costa Unified Sch. Dist.*, 696 Fed. Appx. 171 (9th Cir. June 30, 2017).

The Court of Appeals affirmed the ALJ and district court in holding that the school district had not denied the student FAPE by failing to complete behavioral and psychoeducational evaluations due to an impasse with the parents concerning the conditions of the testing environment. The parent asked to be able to see and hear the student during testing, a condition for which no legal requirement exists.

The Court of Appeals also held that the school district had not predetermined the student's placement, since it had been discussed, along with alternatives, at two meetings. The Court upheld the placement against an LRE challenge, suggesting that the parents' proposal to provide one-on-one instruction in a public-school building was more restrictive than placement in a non-public school.

*H.L. v. Downingtown Area Sch. Dist.*, No. 14-3678, No. 14-3727, 2015 U.S. App. LEXIS 9742 (3d Cir. June 11, 2015).

*Failure to consider supplementary aids and services in regular class.* The school district argued that it offered a FAPE in the LRE, even if it "insufficiently documented" the more inclusive options it considered. However, the Court noted that the IEP did not address why inclusion on the same scale as the private school was inadvisable or why the specially designed instruction the district proposed could not be implemented in a regular classroom. The NOREP contained a single line rejecting full inclusion as not appropriate. The Court held that this showed that it was more likely than not that the district failed to consider the "whole range" of possible placements. Nor was the LRE violation based only on "what the IEP said or did not say for its own sake"; the record as a whole lacked evidence that this critical part of implementing the LRE mandate had been carried out. In the district court, where the school district had the burden of proof on the LRE issue, the school district provided no evidence of the steps it took toward full inclusion. Addressing the school district's contention that the district court had "conflated" the FAPE and LRE requirements, the Court held that "on this record there is no indication of compliance with the LRE mandate, and so the IEP was inappropriate, regardless of how the relationship between the FAPE and LRE requirements is characterized."

*Ka.D v. Nest*, 475 Fed. Appx. 658 (9th Cir. 2012).

The Court affirmed the district court. The Court noted that the District's independent consultant had recommended special education, but opined that the student should be able to transition relatively soon to a more inclusive program. The problem was that the District's general education classes contained too many students for the student to handle easily. However, the evidence was uncontested that the student's needs could be met at Hanna Fenichel, a small school with 6 to 8 students in each class, and a one on one aide.

*E.G. v. Fair Lawn Bd. of Educ.*, No. 11-3014, 2012 U.S. App. LEXIS 13227 (3d Cir. June 28, 2012).

On the Parents' appeal, the Court held that the district court applied the proper standard of review, even though its opinion contained a phrase suggesting that it applied a "clearly erroneous" standard in its review of the ALJ's findings and appeared to place the burden of proof on the parents, in violation of New Jersey law. The Court held that the ALJ's findings of fact were sufficient to determine that the District "reasonably concluded" that the completely segregated environment provided for in the student's IEP was the least restrictive environment in which she could obtain meaningful educational benefit. The Court also held that the District had not predetermined the student's placement and that the district court's exclusion of additional evidence of the student's progress in the inclusive program was not an abuse of discretion.

*J.H. v. Fort Bend Indep. Sch. Dist.*, 482 Fed. Appx. 915 (5th Cir. 2012).

On the Parents' appeal, the Court held, concerning the standard of review, that in an IDEA matter "[t]he school district's plan is presumed to be appropriate." Because the Parent failed to object to the magistrate judge's report and recommendations, review is for "plain error." On the merits, the Court applied the test set forth in *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989) and held that the District had provided an aide and a modified curriculum, that the student exhibited signs of "frustration" with the difficulty of the curriculum, that he was not disruptive but that he received no benefit from being in general education classes for these subjects. The student was taught primarily by teaching assistants and tutors and taught a different curriculum, and thus he received little social benefit from inclusion.

*T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145 (2<sup>nd</sup> Cir. 2014)

The Court of Appeals held that the LRE requirement of the IDEA applies to ESY placements as it does to regular school-year placements. The Court of Appeals asked whether education in the regular classroom, with the use of supplemental aids and services, could have been achieved satisfactorily, and whether the school district mainstreamed the child to the maximum extent appropriate. The Court of Appeals found that it was clear that the student could receive an education in the regular classroom, as he had been in mainstreamed settings during the academic year. The Court of Appeals also found that it was clear that the school district was not providing FAPE when it considered only self-contained classrooms. The Court of Appeals found that once it was determined that the student needed ESY services, the school district was obliged to provide a continuum of alternative placements and to offer the least restrictive of those placements.

*S.M. v. Gwinnett Cnty. Sch. Dist.*, 646 Fed. Appx. 763 (11th Cir. March 24, 2016).

The Court of Appeals affirmed. The Court held that under the Eleventh Circuit standard for interpreting the right to be educated with students who do not have disabilities to the maximum extent appropriate, as set forth in *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991), the school district properly considered the supplementary aids and services that could enable the student to be educated satisfactorily in general education classes. The student was educated in general education classes except for reading, writing and math. The district court's opinion referenced a "wide range" of supplementary aids and services that were considered for feasibility. The district offered some of those services in the general education classes such as science and social studies in which the student was included.