Advanced Least Restrictive Environment (LRE) Contexts: ESY, Preschool, Deaf Ed, Transition, Private School Cases

Presented by

Jose Martín, Attorney

Richards Lindsay & Martín, L.L.P.—Austin, Texas

jose@rlmedlaw.com

What is the Least Restrictive Environment?

- **20 U.S.C. §1412(a)(5)(A)**
- The educational setting within which the child can receive FAPE and have maximum exposure to nondisabled peers
- Also, the educational setting within which the child's IEP can be implemented that allows for maximum exposure to nondisabled peers
- Removal from regular classes not to take place unless FAPE there not possible with sp ed services

What is the Least Restrictive Environment?

- **20 U.S.C. §1412(a)(5)(A)**
- Note IDEA's balancing of LRE mandate vs. ideal/maximizing placement:

  Placement in ideal segregated program violates IDEA if there is a less restrictive option capable of appropriate progress (*Endrew* FAPE)

Operationalizing the LRE Mandate—The Requirements of the IDEA Regulations

- Sp. ed. students must be educated with non-disabled students to the maximum extent appropriate (34 C.F.R. §300.114)
- A **change of placement from 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)

Foundation—The LRE Requirements of the IDEA Regulations

- School districts must maintain a **continuum of placements** for IDEA-eligible students (34 CFR 300.115)

  A variety of instructional settings

  And, itinerant sp ed instruction provided in conjunction with regular class placement (i.e., inclusion services)

Foundation—The LRE Requirements of the IDEA Regulations

- IEP teams must make **placement decisions** for IDEA students, and must do so at least annually (34 CFR 300.116(b)(1))

  In most states, this happens through the annual IEP team meeting process

- IEP team placement decisions must be **based on each student's IEP** (34 CFR 300.116(b)(2))

  Thus, the IEP team decision sequence—First IEP (present levels of performance, goals, progress measures, services), then placement

  From the IEP, the IEP team asks: where is the LRE within which the IEP can be properly implemented?

- Unless the IEP requires some other arrangement, **children should be placed in the school where they would attend if they were not disabled** (34 CFR 300.116(c))

  Congress' preference for "default" placement—The child's regular home campus

  Unless the IEP cannot be implemented in the settings offered in the home campus (after meaningful attempts at sp ed supports, supplementary aids and services)

- Otherwise, the **placement must be as close as possible to the student's home** (34 CFR 300.116(b)(3))

  If home campus cannot implement student's IEP, then the IEP team must go to the next closest campus to the home that is capable of implementing the IEP

  Meaning, the campus with the settings needed to implement the IEP

    Note—Courts more stringently scrutinize placement changes that move the student outside the community.

- In making placement decisions, the IEP team must consider any potential **harmful effects** on the child or on the quality of required services (34 CFR 300.116(d))

  This requirement is embedded in the IEP forms, and requires that the IEP team consider the potential harmful effects of the placement decision

  Requirement applies whether IEP team is considering a more restrictive setting or a less restrictive setting

- In making placement decisions, the IEP team must consider any potential **harmful effects** on the child or on the quality of required services (34 CFR 300.116(d))

  At times, identified potential harmful effects, such as stigma of needing sp ed setting, can be addressed through other services, such as counseling

  At times, the consideration requires weighing the benefits of a placement versus its potential harmful effects

- IDEA students must not be removed from regular classrooms solely because of the **need for classroom modifications** (34 CFR 300.116(e))

  A more recent addition to the regulations, included to reiterate that IEP team should not place a child in a sp ed setting just because they may need classroom accommodations or modifications

  (Requirement already a part of Fifth Circuit's LRE analysis of ***Daniel R.R.***)

The LRE Analyses of the Circuit Courts

- ***Roncker* formulation** (6th Circuit—KY, MI, OH, TN)

  Can student benefit from mainstreaming?

  Would benefits of mainstreaming be outweighed by benefits gained in more restrictive setting?

  Could services be feasibly make FAPE possible in a mainstream setting? (Cost is a valid consideration).

  Is student a disruptive factor in regular class?

- ***Daniel R.R.* Analysis** (5th Circuit—LA, MS, TX, adopted by 3rd (DE, NJ, PA) and 11th (AL, FL, GA))

1. **Can student be educated satisfactorily in regular classes with supplementary aids and services?** Six sub-factors help answer the question

   Has school attempted placement in regular classes?

   Were those efforts sufficient, and not mere token attempts?

- ***Daniel R.R.* Analysis**

  Will most of the teacher's time be devoted to the student or to modifying the curriculum?

  Can student receive educational benefit in the regular classroom?

  What has been the child's overall experience in regular classes?

  What is the child's effect on the classroom and other students' education?

- ***Daniel R.R.* Analysis**

2. **If the child cannot be educated in regular class, has the child been mainstreamed to the maximum extent appropriate?**

   Analysis envisions a gradual movement up the "ladder" of restrictiveness, if the child cannot be educated full-time in regular classes (likely also applicable to other LRE analyses).

- ***Rachel H.* Formulation (9th Circuit**— AK, AZ, CA, HI, ID, MT, NV, OR, WA)

  What are the educational benefits available to the student in regular class, with aids and services, as compared with a special ed class?

  What are the non-academic benefits of interaction with children who are not disabled?

  What is the effect of the student's presence on the teacher and other students in the regular classroom?

- ***Rachel H.* Formulation (9th Circuit**— AK, AZ, CA, HI, ID, MT, NV, OR, WA)

  What is the cost of mainstreaming the student into a regular classroom?

  Note—Notice all LRE analyses share a factor looking at the student's impact on the less restrictive setting, with an additional cost-based factor in both the *Roncker* and *Rachel* formulations.

- **Recent General LRE Cases of Note in Ninth Circuit**

  ***D.R. v. Redondo Beach Unified Sch. Dist.*, 82 IDELR 77 (9th Cir. 2022)**(In analyzing academic benefits, proper standard is whether child is progressing on IEP goals, not whether child is meeting regular grade-level standards).

  ***Solorio v. Clovis Unified Sch. Dist.*, 74 IDELR 2 (9th Cir. 2019)**(Teen with Down Syndrome who earned F's in regular classes and withdrew from social interaction due to embarrassment needed partial day placement in sp ed classrooms as the LRE).

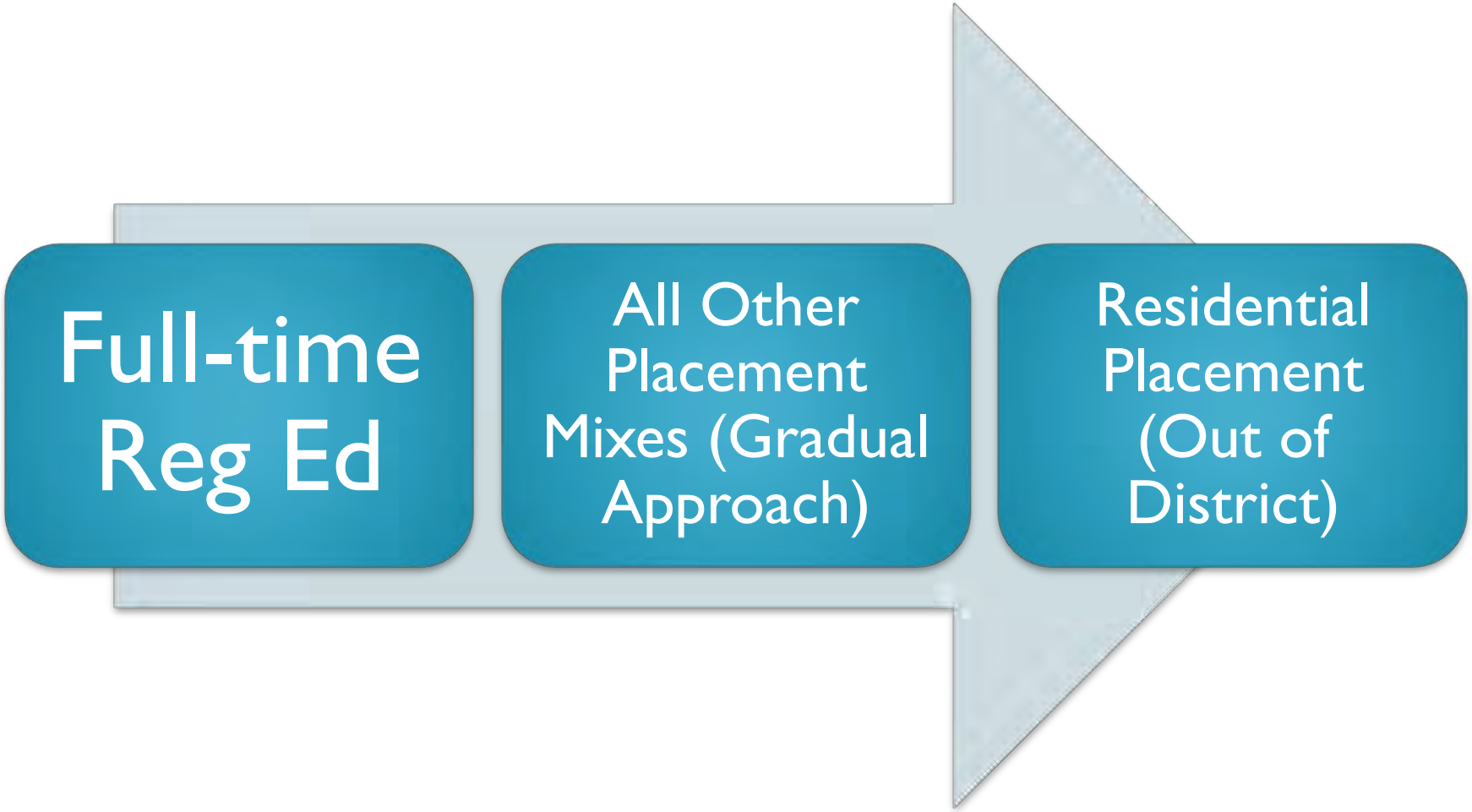
  ***B.E.L. v. State of Hawaii Dept. of Educ.*, 71 IDELR 162 (9th Cir. 2018)**(2nd-grader with dyslexia needed some time in sp ed classes, as accommodations and interventions, even those suggested by the parent, had been attempted and were unsuccessful).

The LRE Ladder

Most Restrictive

Least Restrictive

The Extremes of the LRE Continuum



- **Moves to More Restrictive Settings**

  These require careful IEP team consideration, as they can trigger litigation (and stay-put protection—placement is frozen at last agreed placement during the pendency of the lawsuit)

  Documentation of serious efforts to provide FAPE in less restrictive setting, with various sp ed support services, is crucial.

  Must be able to show that change of placement is warranted, based on application of your jurisdiction's analysis factors.

- **Moves to More Restrictive Settings**

  Engage in careful planning and seeking of guidance before considering a change in placement to a more restrictive setting, particularly if off-campus.

- **The issue of IDEA students' impact on classroom**

  J.W. v. Fresno USD, 55 IDELR 153 (9th Cir. 2010)(regular class was LRE for student with positive impact on peers and classroom)

  J.P. v. New York City DOE, 58 IDELR 96 (E.D.N.Y. 2012)(ED student's inflexibility, blurting, and arguing impacted class, thus requiring special ed class)

  C.L. v. Lucia Mar USD, 62 IDELR 202 (C.D.Cal. 2014)(Aggressive AU student who needed aide could not be in more regular classes, as he was already mainstreamed more than half of day)

- **The issue of IDEA students' impact on classroom**

  J.H. v. Fort Bend ISD, 59 IDELR 122 (5th Cir. 2012)(6th-grader with ID who could not keep up with regular ed science and social studies even with aide and often refused work needed sp ed classes, even though he had no negative impact on class).

  In sum, a student's negative impact on other students and the teacher, despite interventions to address it, is a significant factor tending to indicate the student needs a more restrictive setting.

- **Neighborhood school placement disputes**

  While LRE prefers placements in neighborhood schools, if the IEP requires placements that do not exist in the neighborhood school, then the student must be placed in the nearest school to the home that has the right placement

  But, those decisions can lead to LRE disputes…

  ***J.T. v. Newark BOE*, 61 IDELR 27 (D.N.J. 2013)**(SLD child required inclusion services that were not provided in his home school, and schools are allowed to "centralize" services in certain schools)

- **Neighborhood school placement disputes**

  ***H.D. v. Central Bucks SD*, 59 IDELR 275 (E.D.Pa. 2012)**(Student with SLDs, ADHD, and aggressive behavior needed emotional support program on another campus, after various attempts had failed on home campus)

  At times, centralization of services in rural areas requires some students to travel to other towns for services, as in ***M.M. v. Unified Sch. Dist. No. 368,* 51 IDELR 188 (D.Kan. 2008)**, where an ID child had to ride for up to 90 minutes to a co-op class out of town

- **The Benefits of Inclusion**

  A variety of education experts have advocated the benefits of serving even students with severe disabilities in regular campuses and classes. See, e.g., BROWN, ET AL., *The Home School: Why Students with Severe Intellectual Disabilities Must Attend the Schools of Their Brothers, Sisters, Friends, and Neighbors*, EDUCATIONAL PROGRAMS FOR STUDENTS WITH SEVERE INTELLECTUAL DISABILITIES, Vol. XVII (1987).

  Lou Brown's social/community contact development argument…

Challenging LRE Contexts

- **Shouldn't LRE apply equally in all areas?**

  In theory, yes, and most courts definitely say so, but in practice, LRE is not always treated in the same way, depending on the context

  In some contexts, the LRE requirement is applied strictly, but at others, it appears as a relaxed mandate.

  In some areas, traditional LRE is simply a poor fit for new and innovative placement options (i.e., virtual programs).

Preschool Programs

- The LRE dilemma in the preschool context is that an LEA may not have a regular pre-K program to provide for mainstreaming for 3-4-year IDEA-eligible students
- In such schools, there will be tendency toward offering services in PPCD settings, which may be appropriate for some, but not all students in that age range
- Is there any flexibility in the LRE requirement for preschool programs?

Preschool Programs

34 CFR 300.116 expressly applies LRE to preschool settings (see commentary at 71 Fed. Reg. 46589 (2006))

Letter to Neveldine, 24 IDELR 1042 (OSEP 1996)—LRE applies equally in preschool settings, even to preschool students eligible only for speech services

Dear Colleague Letter, 58 IDELR 290 (OSEP 2012)—LRE applies even if the district has no pre-K; schools can explore Head Start, paying for private preschool, other public schools, or home-based services (?...)

Preschool Programs

Even older cases follow this line—*Bd. of Educ. of Lagrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ.*, 30 IDELR 891 (7th Cir. 1999)(ordering reimbursement for $75/mo private preschool, since student could be mainstreamed but LEA offered no regular pre-K)

Preschool Programs

Letter to Anonymous, 53 IDELR 127 (OSEP 2009)—LRE and continuum of placements requirement applies equally to charter schools

How about the courts?...

They support the notion that LRE applies to preschool placements.

- ***E.G. v. Fair Lawn Bd. of Educ.*, 59 IDELR 65 (3rd Cir. 2012)**

  Preschooler with AU challenged placement in an AU pre-K classroom with 1:1 ABA and "reverse inclusion"

  Parents wanted inclusive pre-K classroom

  Court found student lacked the skills needed to benefit from regular class, would wander around class, and exhibited inappropriate behaviors

- ***E.G. v. Fair Lawn Bd. of Educ.* (3rd Cir. 2012)**

  Modeling benefit was minimized because she neither noticed nor interacted with peers (notice this is a relevant factor…)

  Student needed lots of 1:1 instruction, had made progress in AU classroom, and had opportunities for interaction with typical peers

  Court held LRE applies with equal force in pre-school contexts (common finding that LRE does not have different interpretations based on context)

- ***N.B. v. Tuxedo Union FSD*, 60 IDELR 2 (2nd Cir. 2012)**

  Parent challenged proposal to place PPD preschooler in a special ed class

  Student made good progress by modeling typical peers, and with 1:1 aide, in regular pre-K

  School had no evidence that FAPE was not feasible in regular pre-K

  Court held proposal was not LRE, awarded tuition reimbursement

- ***N.B. v. Tuxedo Union FSD* (2nd Cir. 2012)**

  LRE/continuum of placements applies even to preschool students eligible only for speech

  LRE applies even if the district has no pre-K (see *Lagrange*, 30 IDELR 891 (7th Cir. 1999))

  Schools may need to explore Head Start agencies or contracts with other schools

- ***N.B. v. Tuxedo Union FSD* (2nd Cir. 2012)**

  See *Letter to Neveldine* (OSEP 1996), *Letter to Anonymous* (OSEP 2012) and 34 CFR 300.116 about LRE and preschool (p. 12)

  LRE/continuum of placements applies even to preschool students eligible only for speech services

  LRE applies even if the district has no pre-K

  Schools may need to explore Head Start agencies or contracts with other schools

- ***R.H. v. Plano Ind. SD*, 54 IDELR 211 (5th Cir. 2010)**

  School proposed an inclusive pre-K program for 4-year-old with ASD and speech impairments

  Parents wanted payment for private regular pre-K (teacher had no degree, was not certified)

  School not sure IEP could be implemented in private pre-K without its "direct supervision"

  School had no regular pre-K

- ***R.H. v. Plano Ind. SD*, 54 IDELR 211 (5th Cir. 2010)**

  Court stated that "IDEA…makes removal to a private school placement the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system…."

  Court held its LRE analysis "does not consider or speak to the circumstances at issue here, where the public preschool curriculum does not include a purely mainstream class."

- ***R.H. v. Plano Ind. SD*, 54 IDELR 211 (5th Cir. 2010)**

  Thus, 5th Circuit does not read LRE mandate to require paying for regular private school when LEA has no pre-K

  It sees private placement as an exceptional and limited circumstance, given IDEA's purpose to serve students in *public* schools

  A definite conflict among circuits, owing to the realities of scarcity in regular pre-K programs—Does LRE require creation of regular placements or access to private options to satisfy IDEA?

- **Practical Realities**

  Districts without Pre-K programs risk LRE claims from parents of preschool IDEA students capable of receiving services in regular classrooms, although inclusion options may be limited or not really good options

  But, districts are unlikely to self-fund Pre-K programs in States that do not support them with funding

  Thus, the existing application of LRE to preschool programs exposes these schools to a continuous legal risk of LRE claims and limited options to avoid it

- **Practical Ideas**

  Schools should *plan* to address the need for mainstreaming for certain preschool IDEA-eligible students, rather than hoping parents won't object to overly restrictive placements.

  Explore any and all alternatives available locally for mainstreaming (e.g., Head Start programs, other public schools, private options (if feasible)).

  Best option may be push-in or reverse inclusion programs, where nondisabled peers are brought into sp ed settings for guided interaction with nondisabled peers.

- **Practical Ideas**

  Reverse inclusion could use selected K students (could be made into a program akin to Partners in PE)

  For 4-year-olds, mainstreaming with K class can be considered more plausibly

  DHH kids and preschool? Even more challenges…

Extended School Year Services Programs

- The LRE difficulty in the ESY context is that an LEA may have only sp ed settings to provide ESY services
- And, it is more likely that more severely impaired students will need ESY, and the specialized services of a sp ed setting, to prevent regression
- Thus, it makes sense for schools to focus funding on special ESY programs
- Is there any flexibility in the LRE requirement for ESY programs?

- ***T.M. v. Cornwall Cent. SD*, 63 IDELR 31 (2nd Cir. 2014)**

  AU child is normally mainstreamed with supports, but was offered sp ed class for ESY

  Court held LRE applies equally to ESY terms, even if the district does not have offer regular summer programs

  Court stated that districts do not have to create regular summer programs for this purpose; they can contract with other public or private schools

  Does a school have to offer the continuum of placements it normally offers during year?...

- ***T.M. v. Cornwall CSD*, 63 IDELR 31 (2nd Cir. 2014)**

  "For ESY programs as for academic year programs, a child's LRE is primarily defined by the nature of the child's disabilities rather than by the placements that the school district chooses to offer."

  Question—Does a school have to offer the continuum of placements it normally offers during year?...Would that be cost-effective? Is that question irrelevant?

- ***T.M. v. Cornwall CSD*, 63 IDELR 31 (2nd Cir. 2014)**

  "If practical issues make it objectively impossible or impracticable to provide a disabled student an ESY program in the LRE, the equitable calculus may weigh against reimbursement."

  Note—Court seems to acknowledge the practical implications of its own holding… There are likely many situations where summer mainstreaming alternatives are "impracticable." Does this not undermine the Court's ESY LRE holding?

- ***T.M. v. Cornwall Cent. SD* (2nd Cir. 2014)**

  Case has problematic implications—Is contracting with a neighboring public school for regular Summer school mainstreaming really a feasible option?

  Are private summer school options available in rural areas?

  Schools that have regular summer school will have to consider integrating IDEA students for ESY whose IEPs call for mainstreaming during school year

- ***T.M. v. Cornwall Cent. SD* (2nd Cir. 2014)**

  Case has problematic implications

  Fifth Circuit probably disagrees—See *R.H. v. Plano ISD*, 54 IDELR 211 (5th Cir. 2010)(no duty to contract with private preschool just because district has no regular preschool program)

  Schools that have regular summer school may have to think about integrating IDEA students who need mainstreaming during ESY

Programs for Transition-Age Students

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (W.D.Pa. 2018)**

  High-functioning 21-year-old with Down's Syndrome was placed in a life skills transition-oriented placement (60% mainstreaming)

  Parents wanted a postsecondary transition program on a university campus

  District argued LRE did not require mainstreaming during transition ages

Programs for Transition-Age Students

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (SEA PA 2018)**

  "Given the emphasis on transition services, as opposed to traditional academics, this Court finds no error in the HO's determination that this level of inclusion satisfies the LRE requirement."

  Question—Why is a restrictive environment needed for transition-oriented learning to a greater degree than for academic learning? This is what the school argued…

Programs for Transition-Age Students

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (W.D.Pa. 2018)**

  Question—Since the student will have to interact primarily with nondisabled persons in post-school environments, does it make sense to educate her with other disabled students?

  But, a valid countervailing consideration would be the need for the student to work on transition skills not part of regular curriculum…

  And, the student was mainstreamed a good portion of the school day as well…

Programs for Transition-Age Students

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (W.D.Pa. 2018)**

  Practical Point—The issue is likely one of properly balancing need for instruction on transition skills with need for interaction with nondisabled peers (although with some difference in ages)

  In this age range, schools should still look to maximizing time spent with nondisabled peers in the school portion of the program (e.g., electives, PE)

Programs for Students Aged 18-21

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (W.D.Pa. 2018)**

  Prospective View—With the advent of postsecondary programs for students with disabilities, we are likely to see more of this type of case

LRE in *Burlington* Reimbursement Cases

- In its 1985 *Burlington* opinion, Supreme Court held that parents could place their child unilaterally in a private school setting and get reimbursement from their public school if they showed that:

1. Public school program was inappropriate, and
2. Private school is appropriate

See *Burlington Sch. Committee v. Massachusetts DOE*, 556 IDELR 389 (1985)

LRE in *Burlington* Reimbursement Cases

- In its follow-up *Florence* opinion, Supreme Court held that the parents' chosen private placement need not be approved by SEA or meet all normally-applied FAPE requirements in order for reimbursement to be possible

See *Florence Cty. Sch. Dist. 4 v. Carter*, 20 IDELR 532 (1993)

LRE in *Burlington* Reimbursement Cases

- And, circuit courts have interpreted Florence as not requiring full LRE compliance in private placement reimbursement cases, holding LRE is only a "factor" in determining appropriateness of the private program

  See, e.g., *M.S. v. BOE of the City Sch. Dist. of Yonkers,* 33 IDELR 183 (2nd Cir. 2000); *Warren G. v. Cumberland Cnty. Sch. Dist.*, 31 IDELR 27 (3rd Cir. 1999); *Cleveland-Heights-University Heights CSD v. Boss*, 28 IDELR 32 (6th Cir. 1998)

LRE in *Burlington* Reimbursement Cases

- Indeed, some courts plainly state that LRE is a prohibitionary mandate intended to prevent public schools from improperly segregating students, but not that is equally applicable to parental private placement situations.

  See, e.g., *Carter v. Florence Cnty. Sch. Dist.*, 18 IDELR 350 (4th Cir. 1991)("the Act's preference for mainstreaming was aimed at preventing *schools* from segregating handicapped students from the general student body" and not to restrict parental options in unilateral placement situations).

LRE in *Burlington* Reimbursement Cases

- ***C.L. v. Scarsdale Union Free SD*, 63 IDELR 1 (2nd Cir. 2014)**

  Parents unilaterally placed a 4th grader with ADHD and SLDs in a private special school for students with disabilities and sought reimbursement from the District

  Since parents' options may be limited to special schools, "inflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in *Burlington*."

LRE in *Burlington* Reimbursement Cases

- ***C.L. v. Scarsdale Union Free SD*, 63 IDELR 1 (2nd Cir. 2014)**

  Thus, the high restrictiveness of a private school is not dispositive of whether the placement is appropriate for *Burlington* reimbursement, but it is a "factor" to consider

  Note—But, the Court overrules the lower court's finding that the private program was way too restrictive for the student's needs, without further consideration of the LRE issue, and despite the student's prior progress in regular classes.

LRE in *Burlington* Reimbursement Cases

- ***C.L. v. Scarsdale Union Free SD*, 63 IDELR 1 (2nd Cir. 2014)**

  Questions—To what degree does LRE remain a factor in examining the appropriateness of the private school? Are the student's needs irrelevant to the inquiry?

  Would prospective funding of the private school be appropriate, or, rather, would LRE require courts to order the appropriate services be provided to the student in the public school setting that would make LRE possible there?

LRE in *Burlington* Reimbursement Cases

- ***C.L. v. Scarsdale Union Free SD*, 63 IDELR 1 (2nd Cir. 2014)**

  Note—Definitely a context where the importance of the LRE mandate is diluted and does not apply with "equal force"… More like a "waivable" right to LRE.

  Is LRE really only a prohibition on schools? Some courts view LRE as a student right; a right to socially interact and associate with nondisabled children in school.

  See, e.g., *A.K. v. Gwinnett Cnty. SD*, 62 IDELR 253 (11th Cir. 2014); *Teague Ind. SD v. Todd L.*, 20 IDELR 259 (5th Cir. 1993).

More Restrictive Environment (MRE) Cases

- Despite the LRE mandate, at times, parents take legal action to seek highly restrictive placements
- E.g., ABA cases, private placement cases, therapeutic placements
- Or, to seek optimal progress (e.g., *Moradnejad v. District of Columbia*, 67 IDELR 261 (D.D.C. 2016))
- *Foundation Question*—Is LRE a matter of parent preference or a child's independent right under IDEA?

More Restrictive Environment (MRE) Cases

- ***T.M. v. Quackertown CSD*, 69 IDELR 276 (E.D.Pa. 2017)**

  Parents seek 1:1 ABA services for 11-year-old with ASD/ID

  They assert that he cannot benefit from interaction with nondisabled student

  Court disagrees, notes that student's social skills have improved with mainstreaming

More Restrictive Environment (MRE) Cases

- ***T.M. v. Quackertown CSD*, 69 IDELR 276 (E.D.Pa. 2017)**

  Again, court does not focus on LRE analysis, noting only in passing, that "one goal of mainstreaming is to provide the child with opportunities to develop social and communication skills."

  Question—Court could have just applied traditional LRE analysis and simply held that the parents' request violates the LRE mandate.

More Restrictive Environment (MRE) Cases

- ***T.M. v. Quackertown CSD*, 69 IDELR 276 (E.D.Pa. 2017)**

  Note—See also, ***J.G. v. State of Hawaii DOE*, 72 IDELR 219 (D.Hawaii 2018)** for a case where parent argued that being exposed to neurotypical peers was actually harmful to their child, as they claimed he needed a program with only AU Spectrum peers.

- ***B.M. v. Encinitas USD*, 60 IDELR 188 (S.D.Cal. 2013)**

  Parents of a child with AU sought home-based 1:1 ABA program, rejecting the special preschool class proposed by the district

  Court noted that although child was highly distractible and had problems with attention, he had strong non-verbal skills and a desire to interact with peers and adults

  IEP also called for ABA services and 1:1 aide—Court found proposed placement was LRE

- ***B.M. v. Encinitas USD*, 60 IDELR 188 (S.D.Cal. 2013)**

  Again, an example of an "MRE" case, where parents actually seek highly restrictive settings

  This usually happens in ABA cases involving AU students, as well as in parent requests for private placements in special schools for students with disabilities

  See *S.A. v. Weast* (D.Md. 2012)(Parents of LD student sought placement in special private school, claiming transition to public school would cause anxiety and that he could be bullied)

- ***A.R. v. Santa Monica Malibu SD*, 66 IDELR 269 (9th Cir. 2016)**

  School proposed preschool collaborative placement for 4-year-old with ASD.

  When parents complained of the focus on play-based learning, school proposed another pre-K class focusing on pre-academics and more typical peer models.

  Parents sued for private specialized program for students with disabilities, while asserting that the public school program violated LRE

- ***A.R. v. Santa Monica Malibu SD*, 66 IDELR 269 (9th Cir. 2016)**

  Court denied relief on LRE grounds (without noting the contradictory nature of the parents' claim)

  Note—Not a one-off case, see ***M.M. v. Seattle SD*, 68 IDELR 165 (W.D. Wa. 2016)**(parents sued for full-time regular placement for child with ASD on LRE grounds, but sought placement in a private program for ASD children only).

- ***K.K.R. v. Missoula Cty. Pub. Schs.*, 68 IDELR 68 (D.Mt. 2016), aff'd 71 IDELR 181 (9th Cir. 2017)**

  Parents of a 9th grader with Asperger and ED sought continuation of private therapeutic placement

  Parents declined all options other than private placement

  "Nothing in the IDEA or corresponding regulations require a school to start the process with the most restrictive placement if it can adequately serve the student in a less restrictive placement…."

  Note—The "adequately" modifier is meaningful here…

- ***K.K.R. v. Missoula Cty. Pub. Schs.*, 68 IDELR 68 (D.Mt. 2016), aff'd 71 IDELR 181 (9th Cir. 2017)**

  Note—An analysis more observant of the LRE mandate

  (See, similarly, *B.M. v. Encinitas USD*, 60 IDELR 188 (S.D.Cal. 2013)(using *Rachel H.* analysis to hold that parents' preferred 1:1 ABA home program was not the LRE for the student, and denying reimbursement)

- ***Nathan M.. v. Harrison SD No. 2*, 73 IDELR 148 (D.Co. 2018)**

  School proposed transitioning student with AU from a private ABA program to public school

  Challenge to school program failed because "the prime difference between Alpine and Otero. There are no nondisabled children among the 27 or so children at Alpine."

  Thus, "there is no opportunity for him to interact with children making normal progress."

- ***Nathan M.. v. Harrison SD No. 2*, 73 IDELR 148 (D.Co. 2018)**

  Moreover, private school focused only on behavior, but it had no certified teachers, and student made little academic progress

  Note—Why no discussion of lack of access to regular curriculum in the private school? Is there not a "curricular LRE" component to IDEA that emphasizes participation in regular curriculum standards?

- **More MRE case examples**

  T.B. v. Haverstraw-Stony Point CSD, 60 IDELR 279 (2013)(parent sought private school for student with SLD and ADHD, but IEP appropriately addressed needs with intensive services in the LRE).

  Anthony C. v. Hawaii DOE, 62 IDELR 257 (D.Hawaii 2014)(teen with AU could transition from private school to public high school, and school staff observed student at private school in developing his IEP).

- **More MRE case examples**

  K.B. v. New York City DOE, 57 IDELR 219 (S.D.N.Y. 2011)(9th grader with SLD and ADHD did not need a special ed class, as she was only slightly below grade level and behaved well in collaborative team-teaching class).

LRE in Deaf Ed and VI Cases

- A portion of the deaf community's idea of LRE is not entirely aligned with how the LRE mandate of IDEA operates with respect to placement decisions.
- To some parents, appropriate placement means interaction with similar-language peers in a deaf community, not with nondisabled students peers—but that usually means highly restrictive residential placements.
- Is there a different treatment of LRE for them, or is it one concept for all IDEA students?...

- ***Barron v. South Dakota BOR*, 57 IDELR 122 (8th Cir. 2011)**

  State reduced funds to state school for deaf, so vast majority of deaf ed services were moved to local districts

  Parents sued, wanted kids to stay in state school with sign language peers, arguing an implicit exception to regular LRE for DHH students.

  Court disagreed, finding no exception to LRE for deaf population in IDEA, and noted that parents did not argue that kids could not receive FAPE in local schools with appropriate itinerant or in-district DHH services.

- ***Barron v. South Dakota BOR*, 57 IDELR 122 (8th Cir. 2011)**

  Parents argued that the LRE for DHH students is a "school of their own."

  Court disagreed, noting that "the IDEA's integrated classroom preference makes no exception for deaf students."

  "Although it is arguable that a standalone school for the deaf might provide the best education for their children, the state is not required to make available the 'best possible option.'"

- ***Barron v. South Dakota BOR*, 57 IDELR 122 (8th Cir. 2011)**

  Note—The court noted that "the parents' views regarding deaf-education policy is not without support" (citing law review articles), but IDEA does not recognize, at this time, the notion of differing LREs for different populations.

  The Court finds no legal support in IDEA the proposition that LRE analysis also involves consideration of same-language peers.

  Again, a reiteration of federal courts reading of the LRE provisions as not allowing for varied applicability in different contexts… (i.e., preschool, ESY).

Note—With the 2006 regulations, DOE stated:

> **The process for determining the educational placement for children with low-incidence disabilities (including children who are deaf, hard of hearing, or deaf -blind) is the same process used for determining the educational placement for all children with disabilities**. That is, each child's educational placement must be determined on an individual case-by-case basis depending on each child's unique educational needs and circumstances, rather than by the child's category of disability, and must be based on the child's IEP. We believe the LRE provisions are sufficient to ensure that public agencies provide low-incidence children with disabilities access to appropriate educational programming and services in the educational setting appropriate to meet the needs of the child in the LRE. 71 Fed. Reg. 46586 (August 14, 2006).

- ***McComish v. Underwood Pub. Schs.*, 49 IDELR 215 (D.N.D. 2008)**

  Parent challenged out-of-state residential placement for blind student

  Court allowed placement, noting that District had not been able to hire a certified VI teacher

  Question—Here, a blind student has to go to residential placement although his needs don't demand it—Are personnel issues valid exceptions to the LRE mandate? What about the present post-COVID staff shortages? Would that be a valid consideration? Unlikely.

- ***Johnson v. Boston Pub. Schs.*, 73 IDELR 31 (1st Cir. 2018)**

  Boy with significant deafness was fitted with a cochlear implant, but nonetheless remained with substantially impaired hearing and language.

  Initially, he was served in an in-district program with instruction in ASL and spoken English.

  He was making progress, including spontaneously signing some words, naming classmates in sign, imitating words in sign, and attempting to approximate speech.

- ***Johnson v. Boston Pub. Schs.*, 73 IDELR 31 (1st Cir. 2018)**

  Parent informed school she wanted to limit his instruction to her preferred methods—sign-supported spoken English and no ASL instruction.

  In addition, she wanted him in a class without peers that used ASL or who had disabilities other than DHH.

  Numerous educators with experience with the student reported that his progress was negatively impacted by the parent's "intransigent opposition to the use of ASL," and later, opposition even to sign-supported spoken English.

- ***Johnson v. Boston Pub. Schs.*, 73 IDELR 31 (1st Cir. 2018)**

  Moreover, the parent was inconsistent in the use of the cochlear processor and failed to follow up on recommendations of hearing and speech specialists.

  Assessments showed ability to understand words using sign-supported English was similar to that of same-aged hearing peers, as opposed to abilities in spoken English, leading to a recommendation for both spoken and sign-supported instruction.

  Parent now demanded placement in an out-of-District program focused solely on spoken English.

- ***Johnson v. Boston Pub. Schs.*, 73 IDELR 31 (1st Cir. 2018)**

  At parent request, an independent evaluation was conducted that found that delays in linguistic skills were due to inconsistent use of cochlear implant, inconsistent expectations on mode of communication, and limited spoken or sign language skills.

  Court noted that with sign language instruction and support, the student made progress in language.

  It also found that the "consistent recommendation" of experts was that student receive education that included sign language support.

- ***Johnson v. Boston Pub. Schs.*, 73 IDELR 81 (1st Cir. 2018)**

  On appeal, the parent argued that the student's progress was characterized as "slow," and thus a denial of FAPE.

  The Court disagreed, finding that "slow progress does not, by itself, mean a student is not receiving meaningful benefit."

  It noted that the child's circumstances included where he began upon arriving at school and the parent's resistance to ASL/spoken language approach.

- ***Johnson v. Boston Pub. Schs.*, 73 IDELR 31 (1st Cir. 2018)**

  Court rejected the notion that LRE required that student be placed with only DHH peers, and upheld the District's placement, denying out-of-district placement.

  Note—While a number of states have laws requiring consideration of, or respect to, parents' preferred communication methods (also an IDEA regulation), the preference is rebuttable and must, ultimately, yield to the FAPE mandate.

  Parents' preferences are a factor for IEP team consideration, but not the only factor…

- ***Johnson v. Boston Pub. Schs.*, 73 IDELR 31 (1st Cir. 2018)**

  Note—The Court applies the parent's intransigence to use of sign as one of the "child's circumstances" that compromise more progress, based on the Supreme Court's FAPE analysis in *Endrew* (appropriate progress in light of child's circumstances).

  In evaluations, it can be important to note all factors present in the child's circumstances that could limit expectations for progress.

- ***Johnson v. Boston Pub. Schs.*, 73 IDELR 31 (1st Cir. 2018)**

  Note—See also, ***Beeville Ind. Sch. Dist.*, 109 LRP 72816 (SEA Texas 2009)**, where a parent challenged a proposed placement in a regional DHH program 70 miles from the home campus, as the student had made some progress, and the law did not require maximizing the student's benefit in a more specialized, but more restrictive, setting.

- ***J.G. v. Baldwin Park Unified Sch. Dist.*, 65 IDELR 177 (C.D.Cal. 2015)**

  After 10 years of services in the District (ASL, interpreter), a deaf middle-schooler had such severe language deficits that he struggled to distinguish left from right and could only identify 3 body parts that were finger-spelled to him.

  Although he had a cochlear implant, he still had not developed sufficient ASL to transition to learning spoken English.

  Parent had asked at various times about the State school, but was mostly rebuffed.

- ***J.G. v. Baldwin Park Unified Sch. Dist.*, 65 IDELR 177 (C.D.Cal. 2015)**

  Court found that the school failed to share information about the State school with the parent, including after they toured the program.

  Moreover, it found that the student had not made appropriate progress in the District and ordered that he be referred to the state school for consideration of placement.

- ***J.G. v. Baldwin Park Unified Sch. Dist.*, 65 IDELR 177 (C.D.Cal. 2015)**

  Note—While LRE is a fundamental "pillar" of IDEA, FAPE comes first. The law requires FAPE in the LRE, not LRE at the expense of FAPE.

  In some of these cases, the courts might require reevaluation of the student to ascertain whether increased intensity of services in-district could provide the student a FAPE in their home community.

- ***J.G. v. Baldwin Park Unified Sch. Dist.*, 65 IDELR 177 (C.D.Cal. 2015)**

  Note—Similarly, see ***Poolaw v. Arizona Supt. Of Pub. Instruction*, 23 IDELR 406 (9th Cir. 1995)**, for an older case where a profoundly deaf student had been unsuccessfully mainstreamed, had "primitive" communication skills, and was held to need residential placement at a state school as his LRE.

- ***J.G. v. Baldwin Park Unified Sch. Dist.*, 65 IDELR 177 (C.D.Cal. 2015)**

  Note—An aspect of LRE is not only a preference for placement in the home campus, but also a strong preference that the student be educated in their home community. In **Sherri A.D. v. Kirby, 19 IDELR 339 (5th Cir. 1992)**, the Court believed that the local district had placed the student at the state school for the blind with an expectation she would be there the rest of her school career, in violation of LRE even though the services might be ideal. Thus, the Court ordered a home community placement.

- ***J.G. v. Baldwin Park Unified Sch. Dist.*, 65 IDELR 177 (C.D.Cal. 2015)**

  Note—On that point, see ***Northside Ind. Sch. Dist.*, 60 IDELR 27 (SEA Texas 2012)**(parent's chosen private school offered an outstanding program for a DHH student, but the local district proposed program was appropriate (teacher and two assistants trained in DHH needs, acoustic modifications to classroom).

- ***Los Angeles Unified Sch. Dist. v. A.O.*, 80 IDELR 98 (C.D.Cal. 2022)**

  5-year-old with deafness was fitted with a cochlear implant, but still experienced "severely delayed" language.

  After a time, her language showed growth, and the District offered a special day program at an elementary school with DHH services, speech therapy, and audiology support, but only DHH peers.

  Court agreed with ALJ that the District program was too restrictive, and did not provide sufficient exposure to non-disabled peers.

- ***Los Angeles Unified Sch. Dist. v. A.O.*, 80 IDELR 98 (C.D.Cal. 2022)**

  Experts had testified to the need for interaction with non-disabled hearing peers.

  Court thus ordered reimbursement for the parents' private placement.

  Note—Here, both the LRE mandate, as well as the student's language modeling needs pointed to the need for significant mainstreaming with nondisabled peers.

USDOE Guidance on DHH

- Over time, USDOE has commented on the issues of FAPE, LRE, and DHH students, emphasizing the primary responsibility for FAPE, together with compliance with the LRE mandate.

USDOE Guidance and Regulation

- **USDOE Notice of Policy Guidance, at 57 Fed. Reg. 49274 (October 30, 1992).**

  Summarizing the findings of the Commission on Education of the Deaf (COED), DOE noted that the "major barriers to learning associated with deafness related to language and communication."

  "The communication nature of the disability is inherently isolating."

  Thus, some particular factors must be considered in developing the IEP:

USDOE Guidance and Regulation

- **USDOE Notice of Policy Guidance, at 57 Fed. Reg. 49274 (October 30, 1992).**

    1. Communication needs and family's preferred mode of communication,
    2. Linguistic needs,
    3. Severity of hearing loss and potential for using residual hearing,'
    4. Academic level, and
    5. Social, emotional, and cultural needs, including opportunities for peer interactions

USDOE Guidance and Regulation

- **USDOE Notice of Policy Guidance, at 57 Fed. Reg. 49274 (October 30, 1992).**

  The concern is that the LRE provision of the law not be interpreted to require placement in programs that may not meet their educational needs.

  "Meeting the unique communication and related needs of a student who is deaf is a fundamental part of providing a FAPE to the child."

  "The Secretary recognizes that the regular classroom is an appropriate placement for some children who are deaf, but for others it is not."

USDOE Guidance and Regulation

- **USDOE Notice of Policy Guidance, at 57 Fed. Reg. 49274 (October 30, 1992).**

  Note—It should be emphasized that the guidance sets out *factors* to be considered in developing the IEP, and presumably determining placement, not mandatory requirements.

  Of course, the Guidance is walking the line between ensuring the provision of FAPE, but that it takes place in the LRE, as both are crucial requirements.

USDOE Guidance and Regulation

- **34 C.F.R. §300.342(a)(2)(iv)**

  In developing the IEP, the IEP team must:

  consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

USDOE Guidance and Regulation

- **34 C.F.R. §300.342(a)(2)(iv)**

  Note that the current regulation essentially codifies into regulation the factors cited in DOE's 1992 Notice of Policy Guidance. *See also*, 71 Fed. Reg. 46684 (August 14, 2006).

USDOE Guidance

- ***OSEP Memorandum 94-15*, 20 IDELR 1181 (OSEP 1994).**

  Just 2 years after the Notice of Policy Guidance, OSEP issued a Memo reminding states and LEAs that then-recent pro-LRE court decisions in *Oberti* and *Holland* reaffirmed the important principle of implementing Part B's FAPE requirement within the context of the LRE requirement.

  Again, DOE wants to ensure its previous guidance did not result in overly restrictive placements for DHH students…

USDOE Guidance

- ***Letter to Bosso*, 56 IDELR 236 (OSERS 2010).**

  Letter cites to the current DHH IEP factors, and states that "any setting that does not meet the communication needs of a child who is deaf does not allow for the provision of a FAPE and cannot be considered the LRE for that child."

  Note—Of course, a setting that does not meet primary educational needs related to the disability does not provide a FAPE, and is thus not an appropriate placement.

USDOE Guidance

- ***Letter to Stern*, 58 IDELR 169 (OSEP 2011).**

  Letter states there is no "quota" of students who must be mainstreamed.

  "Just as the IDEA requires placement in the regular educational setting when it is appropriate for the unique needs of a child who is deaf, it also requires placement outside of the regular educational setting when the child's needs cannot be met in that setting."

USDOE Guidance

- ***Letter to Stern*, 58 IDELR 169 (OSEP 2011).**

  Note—It bears mentioning that the continuum of placements provision requires consideration of alternative placement options within a district before consideration of out-of-district options, which would be the most restrictive possible. See, e.g, *Letter to Kohl*, 20 IDELR 1465 (OSEP 1994).

  Overall, the DOE guidance focuses on the fact that full-time placement in a *regular class* may not meet some DHH student's needs.

USDOE Guidance

- ***Letter to Stern*, 58 IDELR 169 (OSEP 2011).**

  Note—What if the parent *wants* their DHH student to be placed in a highly restrictive state residential program? Can a parent "waive" the LRE requirements. Apparently not. DOE has stated that a process that results in placement decisions made only on the basis of parent preference is inconsistent with IDEA and the IEP team's role in decision-making. ***Letter to Burton*, 17 IDELR 1182 (OSERS 1991).**

LRE Thoughts on DHH Students

- Removing students from regular classes to part-time sp ed settings in their campuses is one thing, another is full-time sp ed placement in home campuses, and yet another is placing them in fully segregated settings outside of their community.

  Legally, high level of restrictiveness of state school placement requires commensurately high evidence that efforts at facilitating placement in local district, with sp ed and related services supports, have been fully attempted and exhausted (see prong 1 of. *Daniel R.R* analysis, *Roncker* analysis factor).

LRE Thoughts on DHH Students

- As a foundation LRE point, it is certainly appropriate for a State Dept of Education to promote importing services into local school districts to ensure placement in less restrictive settings and minimize need for State school placements.
- It is understood, however, that the unique needs of some students may be so involved that State school placement is the only option that can provide a FAPE.

2023 WAVE Session Evaluation:

Understanding LRE in Various Contexts: Fundamentals, ESY, Preschool, Deaf Ed, Transition - Jose Martin

8/2 2:15 p.m. - 3:30 p.m.