LEAST RESTRICTIVE ENVIRONMENT (LRE)

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I. THE STATUTE AND REGULATIONS

A. The IDEA 2004 LRE Mandate

The IDEA requires that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412(a)(5)(A).

B. Full Continuum of Services

1. "Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. §300.115(a).

2. "The continuum … must … include the alternative placements listed in the definition of special education under Sec. 300.38

(instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions)." 34 C.F.R. §300.115(b)(1).

3. "The continuum … must … make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. 34 C.F.R. §300.115(b)(2).

C. Making the Determination

1. "In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that … the placement decision is based on the child's IEP." 34 C.F.R. §300.116(b)(2).

2. "In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that … in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. §300.116(d).

3. "In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that … a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum." 34 C.F.R. §300.116(e).

4. "As used in this part, the term individualized education program or IEP means a written statement for each child with a disability … that must include ... a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—
   (i) To advance appropriately toward attaining the annual goals;
   (ii) To be involved in and make progress in the general curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section." 34 C.F.R. §300.320(a)(4).

D. Ensuring the Right Decision and Justifying the Determination

1. "As used in this part, the term individualized education program or IEP means a written statement for each child with a disability … that must include ... an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section. 34 C.F.R. §300.320(a)(5).

2. "Each public agency must ensure that … to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled." 34 C.F.R. §300.114(a)(2)(i).

3. "Each public agency must ensure that … special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. §300.114(a)(2)(ii).

4. "In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Sec. 300.306, each public agency shall ensure that each child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of that child." 34 C.F.R. §300.553.

5. "Each public agency 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." 34 C.F.R. §300.306(a).

II. THE LEADING CASES ON LEAST RESTRICTIVE ENVIRONMENT

A. Sixth Circuit[1]: *Roncker v. Walter,* 700 F.2d 1058 (6th Cir. 1983); *cert. denied*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983).

Facts: Neill Roncker is a nine year old severely mentally retarded student. He also suffers from seizures. Due to his level of cognitive functioning, he requires constant supervision to ensure his safety. Neill is not considered dangerous. Following a period of attendance on a campus that allowed for contact with nondisabled students, the school district proposed a placement in an entirely segregated county school. The school district staff believed that this environment would be academically superior for Neill. During the pendency of the dispute, Neill began attending a class for severely retarded students on a regular elementary school campus where he had limited opportunities during lunch, gym, and recess to interact with nondisabled peers. At trial, the parties agreed that Neill should not be instructed in a regular classroom setting. Instead, the dispute was narrowly tailored to the issue of opportunity to have contact with nondisabled peers.

Standard: "In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."

Factors:

1. Did the student make progress in the integrated setting? If the student did not make progress, were there additional services which would have improved his performance?

2. Compare the benefits of regular and special education. A segregated placement is appropriate if any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.

3. Is the student disruptive in the non-segregated setting?

4. Cost is a proper factor to consider since excessive spending on one disabled child deprives other disabled children. Cost is no defense if the school district failed to use its funds to provide a proper continuum of alternative placements for disabled children.

[1] The Sixth Circuit Court of Appeals includes the states of Kentucky, Michigan, Ohio, and Tennessee.

Result: Remanded to the district court to apply the above standard.

B. Eighth Circuit[2]: *A.W. v. Northwest R-1 School District,* 813 F.2d 158 (8th Cir. 1987); *cert. denied,* 484 U.S. 847, 108 S.Ct. 144, 98 L.Ed.2d 100 (1987).

Standard: The Eighth Circuit adopted the Sixth Circuit standard in *Roncker*.

C. Fourth Circuit[3]: *DeVries v. Fairfax County School Bd.*, 882 F.2d 876 (4th Cir. 1989).

Facts: Michael is a seventeen year old autistic student. Prior to this dispute, Michael had been attending a private day school for disabled students. His mother sought placement for Michael at his home high school campus. After first recommending continued placement at the private day school, the district recommended a segregated vocational center, thirteen miles from home, and located in a regular high school campus. His mother challenges the recommendation of the school district to place Michael in the vocational center. Both the due process hearing officer and review officer affirmed the school district's recommended placement. The district court affirmed.

Standard: Fourth Circuit adopts Sixth Circuit standard in *Roncker*.

Results: Fourth Circuit upholds placement at Vocational Center, affirms district court's comparison of the two placement options. There was no appropriate peer group academically, socially or vocationally for Michael at his home high school ("Annandale"). Even with an aide to assist him in comprehending and in communicating with teachers and students, the court found that "Michael would simply be monitoring classes" with nonhandicapped students at Annandale." Michael's disability would make it difficult for him to bridge the "disparity in cognitive levels" between him and the other students, he would glean little from the lectures, and his individualized work would be at a much lower level than his classmates. In contrast, the South County Vocational Center, located within a public high school, would provide a structured program with the one-to-one instruction that Michael requires, including appropriate instruction in academic subjects, vocational and social skills, community-based work experiences, and access to all the programs and facilities of the public high school.

[2] The Eighth Circuit Court of Appeals includes the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.
[3] The Fourth Circuit Court of Appeals includes the states of Maryland, North Carolina, Virginia, Washington D.C., West Virginia, and South Carolina.

D. Fifth Circuit[4]: *Daniel R.R. v. SBOE*, 874 F.2d 1036 (5th Cir. 1989).

Facts: Daniel R. was a child with mental retardation and a speech impairment. In 1985, his parents enrolled him in the district's half-day special education Early Childhood Program. Before the next year began, his mother requested placement for him in a half-day regular education pre-kindergarten class so he could interact with children without disabilities. The district agreed to enroll Daniel in the half-day pre-kindergarten class as well as the half-day Early Childhood class. However, Daniel required "constant, individual attention" from the regular education teacher and aide in order to participate in the pre-kindergarten class, and he was unable to master any of the skills taught as part of the regular curriculum. In November, the ARD committee proposed a revised IEP under which Daniel would attend only the special education class while interacting with nonhandicapped children at recess and at lunch. Daniel's parents challenged this decision in a due process hearing, but the school district prevailed there and in federal court. The Fifth Circuit affirmed, and in doing so it established a standard along with five factors to consider when determining LRE.

Standard (Two-Part Test):

1. Ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily.

2. If the answer is "no," and the school intends to provide special education or to remove the child from regular education, ask whether the school has mainstreamed the child to the maximum extent appropriate

Factors to consider:

1. Has the district taken steps to accommodate the child with disabilities in regular education?

   "The Act requires states to provide supplementary aids and services and to modify the regular education program when they mainstream handicapped children."

   "If the state has made no effort to take such accommodating steps, our inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education."

[4] The Fifth Circuit Court of Appeals includes the states of Louisiana, Mississippi, and Texas.

2. Were these efforts sufficient or token?

   "The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad."

   "Although broad, the requirement is not limitless. States need not provide every conceivable supplementary aid or service to assist the child."

   "[T]he Act does not require regular education instructors to devote all or most of their time to one handicapped child or to modify the regular education program beyond recognition."

3. Will the child receive an educational benefit from regular education?

   "This inquiry necessarily will focus on the student's ability to grasp the essential elements of the regular education curriculum."

   "We reiterate, however, that academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself. Thus, our inquiry must extend beyond the educational benefits that the child may receive in regular education."

4. What will be the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education?

   "[T]he benefit that the child receives from mainstreaming may tip the balance in favor of mainstreaming, even if the child cannot flourish academically."

   "On the other hand, placing a child in regular education may be detrimental to the child."

5. What effect does the disabled child's presence have on the regular classroom environment?

   "Where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs."

"[T]he child may require so much of the instructor's attention that the instructor will have to ignore the other student's needs in order to tend to the handicapped child."

"The Act and its regulations mandate that the school provide supplementary aids and services in the regular education classroom. A teaching assistant or an aide may minimize the burden on the teacher. If, however, the handicapped child requires so much of the teacher or the aide's time that the rest of the class suffers, then the balance will tip in favor of placing the child in special education."

E. Eleventh Circuit[5]: *Greer v. Rose City School District*, 950 F.2d 688 (11th Cir. 1991); *withdrawn on other grounds,* 956 F.2d 1025; *reinstated* p*er curiam* 967 F.2d 470, (11th Cir. 1992).

Facts: Christy is a child with Down's syndrome. Her parents first tried to enroll her in her regular elementary school when she was five years old, but refused to consent to having her evaluated. After the school district insisted that she be evaluated, her parents declined to enroll her. Two years later they again attempted to enroll her without agreeing to an evaluation. The school district requested a due process hearing, and obtained an order granting an evaluation. During the pendency of the due process hearing and evaluation, Christy was enrolled in a regular Kindergarten class on her home campus of the school district. Her evaluation revealed that she functioned in the moderately mentally handicapped range with significant deficits in language and articulation.

Following the evaluation, the IEP team met to design a program for Christy. The district proposed placement in a self-contained classroom with speech therapy at an elementary school other than her home campus. Christy's parents requested that she remain in the regular kindergarten classroom of her home campus with the supplementation of speech therapy. The parents presented an IEE in support of regular classroom placement. After considering the IEE, the school district did not alter its proposal. The Court found it "significant that neither the transcripts and minutes of the placement committee meetings nor the proposed IEP indicate that school officials considered any options other than the two extremes presented by the parties, that is, the school district's proposal for instruction in a self-contained class and the parents' proposal for instruction in a regular class supplemented only by speech therapy." Due to the stay-put provision, Christy remained in regular education during the pendency of the proceedings. Additional evidence before the district court revealed that Christy was making progress in regular education even without supplementary aids and services.

[5] The Eleventh Circuit Court of Appeals includes the states of Alabama, Florida, and Georgia.

Standard: The Eleventh Circuit adopts the Fifth Circuit standard in *Daniel R.R.*

Result: School district loses. During the IEP development, the full range of supplemental aids and services in the regular class was not discussed or considered. The full range of supplemental aids and services does not include the provision of a full-time teacher for a disabled child even if this would permit the child to be satisfactorily educated in a regular class. The consideration of supplemental aids and services should be shared with the child's parents at the IEP meeting. The court will not consider after-the-fact justifications for a predetermined placement.

F. Third Circuit[6]: *Oberti v. Board of Educ of Borough of Clementon Sch Dist*, 995 F.2d 1204 (3rd Cir. 1993).

Facts: Rafael is an eight year old child with Down's syndrome. After a one year placement half-day in a regular pre-kindergarten class and half-day in a special education class on another campus, the school district recommended that Rafael be placed in a segregated self-contained classroom located in a different school district. Although Rafael made social and academic gains in his pre-kindergarten classroom, he "experienced a number of serious behavioral problems there, including repeated toileting accidents, temper tantrums, crawling and hiding under furniture, and touching, hitting and spitting on other children. On several occasions Rafael struck at and hit the teacher and the teacher's aide." The parents disagreed with the school district's proposal. Instead, they requested a regular kindergarten placement on Rafael's home campus.

Through mediation, the parties agreed to full-time placement in a special education classroom on a different campus, with the promise that the school district would consider mainstreaming opportunities and transition to a regular classroom placement on Rafael's home campus sometime in the future. Rafael continued in the agreed upon special education classroom. A half a year passed, and the school district still had not initiated any mainstreaming or meaningful contacts with nondisabled students. "Rafael's class went to the lunchroom and assemblies with nondisabled children, but he and his classmates had no opportunity to socialize with the other children. Rafael did not participate in any classes, such as art, music, or physical education, with nondisabled children." The parents again requested a due process hearing. The hearing officer upheld the school district's self-contained placement, finding that Rafael was not ready for mainstreaming. The district court reversed.

[6] The Third Circuit Court of Appeals includes the states of Delaware, New Jersey, and Pennsylvania.

Standard: Third Circuit adopts the Fifth Circuit's LRE standard, applying the following three factors:

1. Whether the school district has made reasonable efforts to accommodate the child in a regular classroom with supplementary aids and services;

2. A comparison of the educational benefits available in a regular class and the benefits provided in a special education class; and

3. The possible negative effects of inclusion on the other students in the class.

Results: The Court upheld the district court's determination that the school district violated the mainstreaming requirement of IDEA:

1. The school district's IEP was inadequate: student goal "to observe, model and socialize with nondisabled children;" and teacher goal "to facilitate Rafael's adjustment to the kindergarten classroom." There were "no provisions for supplementary aids and services in the kindergarten class aside from stating that there will be 'modification of regular class expectations' to reflect Rafael's disability."

2. The school district made only negligible efforts to include Rafael in a regular education classroom. Its failure to have a curriculum plan, a behavior management plan, and supports for school personnel resulted in his unsuccessful placement.

G. Ninth Circuit[7]: *Sacramento City Unified School District v. Holland*, 14 F.3d 1398 (9th Cir. 1994).

Facts: The parents of a moderately mentally retarded child (I.Q. of 44) sought full inclusion of their nine-year-old daughter in a regular 2nd grade class. At the time of the request, she attended special education classes only, and the parents sought full-time regular education placement for her. The District rejected this request, but proposed that the student's schedule include regular education time for the non-academic subjects (art, music, lunch, and recess) and special education time for the academic subjects (reading, math, etc.). The parents requested a due process hearing, maintaining that placement in the regular education classroom constituted the least restrictive environment. During the pendency of the proceedings, the parents enrolled their child in a private school, where she was placed in a regular education classroom on a full-time basis where she was

[7] The Ninth Circuit Court of Appeals includes the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam.

successfully educated. The hearing officer ruled for the parents, and the district court affirmed.

Standard: The Ninth Circuit upheld the district court's own four-factor test, which employed elements from both the *Daniel R.R.* and *Roncker*, as follows:

1. The educational benefits available in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom;

2. The non-academic benefits of interaction with children who were not disabled.

3. The effect of the child's presence on the teacher and other children in the classroom, including whether:

    a. There was a detriment because the child was disruptive, distracting, or unruly; and

    b. The child would take up so much of the teacher's time that the other students would suffer from lack of attention.

4. The cost of mainstreaming Rachel in a regular classroom.

Results: The Ninth Circuit affirmed the district court's finding that the appropriate placement for Rachel was full-time placement in a regular classroom with some supplementary services. The district court put the most weight upon the testimony of Rachel's current teacher. The court concluded that testimony as to each factor weighed in favor of placing Rachel in a regular 2nd grade classroom with a part-time teacher's aide.

The evidence as they related to each of the factors:

1. The IEP that mostly consisted of communication goals could be implemented in a regular classroom with some curriculum modification, or through supplementary aids and services.

2. Non-academic benefits in the regular classroom included development of social and communication skills as well as improved self-confidence.

3. Rachel's presence in the regular classroom was not disruptive nor did her presence interfere with the teacher's ability to teach the rest of the class. Rachel followed directions, was well-behaved and not a distraction in class. A part-time aide for Rachel was sufficient to

ensure that Rachael did not interfere with the teacher's ability to teach the other children.

4. While cost is a factor, the district failed to prove that educating Rachel in the regular classroom with appropriate services would be significantly more expensive than educating her in the district's proposed setting.

H. Seventh Circuit[8]: *Beth B. v. Van Clay*, 282 F.3d. 493 (7th Cir. 2002).

Facts: Beth is described as a thirteen-year old, severely mentally and physically challenged student with Rett Syndrome. "Beth is nonverbal; she uses an instrument called an eye gaze, a board with various pictures and symbols that she singles out with eye contact to communicate her wants and needs, as well as other communication devices that allow her to choose among symbols or to hear messages recorded by others. She relies on a wheelchair for mobility. She, like nearly all Rett sufferers, has an extreme lack of control over body movement." Her cognitive ability is difficult to estimate.

The district served Beth in a regular classroom from ages seven to thirteen. "Since the first grade, Beth has worked with a one-on-one aide at all times and has used an individualized curriculum tied in subject matter, as much as possible, to that of the other students in the class. Beth's curriculum is geared toward someone at a preschool level." At age thirteen, the district recommended placement in an Educational Life Skills (ELS) program. The parents did not agree to the recommended placement.

"The ELS program recommended by the district would be located in a public school building [other than Beth's home campus] and would serve students between the ages of six and twenty one with mild, moderate, or severe handicaps. Generally, six to eight students comprise one ELS classroom, and the student-teacher ratio is one-to-one. ELS students in the program are mainstreamed into regular education classrooms during music, library, art, computer, and certain social studies and science classes, and join other students at the school during lunch, recess, assemblies, and field trips. Additionally, reverse mainstreaming is employed; that is regular education students come into the ELS classroom to allow for interaction between ELS and non-ELS students."

Standard: "Each student's educational situation is unique. We find it unnecessary at this point in time to adopt a formal test for district courts uniformly to apply when deciding LRE cases. The Act itself provides enough of a framework for our discussions."

[8] The Seventh Circuit Court of Appeals includes the states of Illinois, Indiana, and Wisconsin.

Result: District's proposed placement upheld.

Key Quotes:

"So long as the regular classroom confers 'some educational benefit' to Beth, [the parents] argue, the school district cannot remove her from that setting. This language is misplaced."

"We agree with the school district's decision that a modicum of developmental achievement does not constitute a satisfactory education."

"Although we respect the input Beth's parents have given regarding her placement and their continued participation in IEP decision making, educators 'have the power to provide handicapped children with an education they consider more appropriate than that proposed by the parents.' *Lachman v. Illinois SBOE*, 852 F.2d 290 (7th Cir. 1988)."

Bd. of Educ. of Township High Sch. No. 211 v. Ross, 486 F.3d 267 (7th Cir. 2007).

In this case the Seventh Circuit upheld the decision of the hearing officer and district court in favor of the school district.

Key Quote: "We declined to adopt any sort of multi-factor test for assessing whether a child may remain in a regular school. See *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7th Cir.2002). We did hold, however, that it is not enough to show that a student is obtaining some benefit, no matter how minimal, at the mainstream school in order to prove that the District's removal of Lindsey violated the "least restrictive environment" requirement. Instead, giving due deference to the administrative findings and the conclusions of the district court, we ask whether the education in the conventional school was satisfactory and, if not, whether reasonable measures would have made it so. If the mainstream environment was satisfactory, the District violated the statute by removing Lindsey. *Id*. at 499. If it was not and could not reasonably be made so, the District satisfied the statute if its recommended placement kept Lindsey with her nondisabled peers to the maximum appropriate extent. *Id*."

I. The Tenth Circuit[9] and Least Restrictive Environment: *L.B. and J.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004).

Summary of Facts: The parents of K.B., a child with autism, enrolled her in a private mainstream preschool and requested that the district pay for a "supplementary" aide and 35-40 hours per week of primarily home-based ABA services. The district refused, instead offering to provide K.B. with a program in its "hybrid" special education/regular education preschool (Park View), as well as SLP, OT and 8-15 hours per week of ABA programming.

The parents filed a request for due process seeking reimbursement for the cost of K.B.'s intensive ABA program as a "supplementary service" and the cost of her "supplementary" aide. K.B.'s ABA program costs included:

> (1) forty hours per week of ABA services; (2) seven and one-half hours per week of preparation time for ABA therapists to plan for individual sessions; (3) two and one-half hours per week for a team meeting with K.B.'s five ABA therapists; (4) one day per month for an ABA consultant to train the five therapists; (5) materials for ABA program; (6) one hour of speech therapy per week; and (7) occupational therapy as needed.

The hearing officer and the district court found for the school district, concluding that it had offered K.B. a FAPE.

Holding of the Court: The Tenth Circuit reversed the lower court's decision, holding that the district had violated the IDEA by denying K.B. an education in the LRE.

In addressing the LRE issue, the Tenth Circuit adopted the two-part test set forth by the Fifth Circuit in *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989), which asks: (1) whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, whether the school district has mainstreamed the child to the maximum extent appropriate.

The Tenth Circuit also adopted the Fifth Circuit's "non-exhaustive" list of factors to consider when answering the first prong of this test, which includes: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational

[9] The Tenth Circuit Court of Appeals includes the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom.

The case turned on the first prong of the *Daniel R.R.* test. In treating this case as a placement rather than a methodology dispute, the Tenth Circuit avoided addressing whether or not the district's proposal offered K.B. a FAPE, and instead focused its analysis on a comparison of the two methodologies to determine which one was superior from an LRE standpoint.

Key Quotes:

"... Park View was not K.B.'s least restrictive environment. Because this conclusion establishes a violation of the IDEA's substantive LRE provision, this court need not address whether Nebo provided K.B. with a FAPE....[T]he LRE requirement is a specific statutory mandate. It is not, as the district court in this case mistakenly believed, a question about educational methodology."

"A preponderance of the evidence shows that the academic benefits which K.B. derived from the mainstream classroom are greater than those she would have received in Park View's classroom. Despite the hearing officer's contrary conclusion, the evidence shows that K.B. was succeeding in the mainstream classroom with the assistance of her aide and intensive ABA program....On the other hand…Park View's students functioned at a considerably lower level than K.B. Thus, K.B. benefitted academically much more from her regular classroom than she would have from Park View's hybrid classroom. This factor strongly favors a conclusion that Park View was not the [LRE] for K.B."

"Likewise, the non-academic benefits of K.B.'s mainstream classroom outweigh the non-academic benefits she could have received at Park View. K.B.'s primary needs involved improving her social skills….[T]he mainstream classroom provided K.B. with appropriate role models, had a more balanced gender ratio, and was generally better suited to meet K.B.'s behavioral and social needs than was Park View's hybrid classroom."

III. SUPPLEMENTARY AIDS AND SERVICES

A. 34 C.F.R. § 300.42. Supplementary aids and services

"*Supplementary aids and services* means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116."

U.S. Department of Education discussion of 34 C.F.R. § 300.42: "As noted in the Analysis of Comments and Changes section for subpart B, we have clarified in § 300.107(a) that States must ensure that public agencies take steps to provide nonacademic and extracurricular services and activities, including providing supplementary aids and services determined appropriate and necessary by the child's IEP Team to afford children with disabilities an equal opportunity for participation in those services and activities. We have, therefore, revised the definition of supplementary aids and services in new § 300.42 (proposed § 300.41) to be consistent with this change. *Changes*: We have added language in new § 300.42 (proposed § 300.41) to clarify that supplementary aids and services can be provided in extracurricular and nonacademic settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate." 71 Fed. Reg. 46578 (August 14, 2006).

B. 34 C.F.R. § 300.105 Assistive technology

"(a) Each public agency must ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5 and 300.6, respectively, are made available to a child with a disability if required as a part of the child's—
(1) Special education under § 300.36;
(2) Related services under § 300.34; or
(3) Supplementary aids and services under §§ 300.38 and 300.114(a)(2)(ii)."

"(b) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE."

C. 34 C.F.R. § 300.107 Nonacademic services

"The State must ensure the following:

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

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

D. 34 C.F.R. § 300.117 Nonacademic settings

"In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings."

IV. LOCATION

A. Regulations governing location

1. "In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that … the child's placement … is as close as possible to the child's home." 34 C.F.R. § 300.116(b)(3).

2. "In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that … unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." 34 C.F.R. § 300.116(c).

3. "As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, and that must include ... [t]he projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications." 34 C.F.R. § 300.320(a)(7).

B. The Tenth Circuit and Neighborhood School: *Murray v. Montrose County*, 51 F.3d 921 (10th Cir. 1995).

Summary of Facts: Tyler is a twelve year old student with cerebral palsy. He suffers from multiple disabilities including cognitive, physical, and speech impairments. He lives approximately five blocks from his neighborhood school. His neighborhood school has a special education program for mildly to moderately disabled students. An elementary school campus 10 miles away has a special education program for severely and profoundly disabled students. During kindergarten and first grade, Tyler was educated on his home campus through a combination of regular education and resource room services with speech therapy, occupational and physical therapy. During this time period, his level of special education services progressively increased, and school personnel began to express concern regarding their ability to meet Tyler's needs at his neighborhood school. Ultimately, it was recommended that Tyler would be placed at the elementary school campus with services for severely and profoundly disabled students. The parents challenged this decision.

Holding: The Tenth Circuit upheld the district's recommendation that Tyler be placed at a school other than his neighborhood school. The Court refused to apply an LRE analysis. Instead, the Court concluded that the regulations contain a mere preference rather than presumption in favor of neighborhood school.

Key Quotes:

"The Supreme Court has not addressed how courts evaluate whether the LRE requirement of section 1412(5)(B) has been met. Three standards have emerged from the circuit courts. *See generally* Dixie Snow Huefner, *The Mainstreaming Cases: Tensions and Trends for School Administrators,* 30 Educ.Admin.Q. 27 (1994); Ralph E. Julnes, *The New Holland and Other Tests for Resolving LRE Disputes,* 91 Educ.L.Rep. 789 (1994). While the Murrays urge us to adopt one of these standards, as we discuss further *infra,* we need not do so to resolve this case."

"The Murrays argue that the LRE mandate includes a presumption that the LRE is in the neighborhood school, with supplementary aids and services. They rely upon the 'plain meaning' of the statute; the 1973-1975 legislative history of the IDEA; the wording of two regulations implementing the IDEA; and the 1982-1983 legislative history of the IDEA. We reject these arguments."

"The statute clearly addresses the removal of disabled children from classes or schools with nondisabled children. It simply says nothing, expressly or by implication, about removal of disabled children from neighborhood schools. In other words, while it clearly commands schools to include or mainstream disabled children as much as possible, it says nothing about where, within a school district, that inclusion shall take place."

"A natural and logical reading of these two regulations [34 C.F.R. 300.552(a)(3) and 34 C.F.R. 300l.552(c)] is that a disabled child should be educated in the school he or she would attend if not disabled (i.e., the neighborhood school), *unless* the child's IEP requires placement elsewhere. If the IEP requires placement elsewhere, then, in deciding where the appropriate placement is, geographical proximity to home is relevant, and the child should be placed as close to home as possible… There is at most a preference for education in the neighborhood school. To the extent the Third Circuit has expressly held in *Oberti* that the IDEA encompasses a presumption of neighborhood schooling, we disagree. *See Oberti*, 995 F.2d at 1224 n. 31."

"With respect to legislative statements surrounding the enactment of the IDEA, they all present the same problem for the Murrays as the statute: they simply do not clearly indicate that Congress, in discussing mainstreaming or inclusion and the concept of the LRE for each disabled child, meant anything more than avoiding as much as possible the segregation of disabled children from nondisabled children. They in no way express a presumption that the LRE is always or even usually in the neighborhood school."

C. The Fifth Circuit and Neighborhood School: *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003)

Summary of Facts: Dylan was a hearing impaired second grader, about to move up to third grade. He had been attending a school which was about five miles further away than his neighborhood school. This is because the school district had decided to centralize services for hearing impaired students. Dylan had the services of a "transliterator" but he was the only elementary aged student who needed this person. Thus, it would have been just as easy for the school to send Dylan and his transliterator to his neighborhood school as it was to send them to

the centralized location. Everyone agreed that Dylan was doing well in school. The parents' request for the move to the neighborhood school was primarily based on their desire for him to have the social benefit of going to school with the kids in the neighborhood. Lengthy IEP meetings were held on this issue, but consensus was not achieved, and the parents ultimately requested a due process hearing.

The school district had prevailed at the due process level and at the due process appeal. (Louisiana is a two-tier state.) The parents took the matter to federal court, and at the district court level, the parents won. The school district appealed to the Fifth Circuit.

Holding: Fifth Circuit upheld decisions below in favor of the school district.

Key Quotes:

"These statutory provisions do not, however, explicitly require parental participation in site selection. 'Educational placement,' as used in the IDEA, means educational program–not the particular institution where that program is implemented."

"Thus, contrary to the Whites' position, that parents must be involved in determining 'educational placement' does not necessarily mean they must be involved in site selection. Moreover, that the parents are part of the IEP team and that the IEP must include location is not dispositive. The provision that requires the IEP to specify the location is primarily administrative; it requires the IEP to include such technical details as the projected date for the beginning of services, their anticipated frequency, and their duration."

"The Whites note that 'placement' in [the regulations] appears to have a broader meaning than just educational program...and to relate in some way to location....Ascension responds that 'placement' does not mean a particular school, but means a setting (such as regular classes, special education classes, special schools, home-instruction, or hospital or institution-based instruction). It cites 34 CFR [300.115], which describes "placement" options as such. This is the better view."

"34 CFR [300.116(b)] only requires that the student be educated as close *as possible* to the child's home. 34 CFR [300.116(c)] specifies that the child is educated in the school he would attend if not disabled *unless the IEP requires some other arrangement.* Here, it was not possible for Dylan to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement."

"Of course, as the Whites point out, neighborhood placement is not possible and the IEP requires another arrangement only because Ascension has elected to

provide services at a centralized location. This is a permissible policy choice under the IDEA. Schools have significant authority to determine the school site for providing IDEA services."

The court then quotes its earlier decision from Flour Bluff: "State agencies are afforded much discretion in determining which school a student is to attend....The regulations, not the statute, provide only that the child be educated "as close as possible to the child's home." However, this is merely *one of many factors* for the district to take into account in determining the student's proper placement. *It must be emphasized that the proximity preference or factor is not a presumption that a disabled child attend his or her neighborhood school. Flour Bluff ISD v. Katherine M.,* 91 F.3d 689 (5th Cir. 1996)."

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