

## **Autism and LRE: What the Courts are Saying**

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### **I. INTRODUCTION**

For students with autism, the issue of providing special education services in the Least Restrictive Environment (LRE) can be particularly challenging, whether the school district is proposing a more restrictive or less restrictive environment than that requested by the parents. While most of the Circuit Courts of Appeal have established a legal standard for making a determination of what is the LRE for students with disabilities generally, recent key decisions seem to reflect an emerging trend of upholding more restrictive settings for autistic children, particularly when it is the *school district* proposing the more restrictive setting. Regardless of the restrictiveness of the environment for placement that is being proposed, educators need to know how to make defensible recommendations when faced with placement questions for students with autism.

This presentation is designed to provide an overview of the LRE mandate generally, as well as an overview of the current LRE legal standards enunciated by the courts. Specifically, this presentation will also detail emerging trends in recent case law concerning inclusion for students with autism, including those which have upheld more restrictive settings for them. In addition, practical guidance will be provided for educators to take back to their IEP Teams to ensure that LRE determinations made for autistic students are defensible.

### **II. THE IDEA'S LRE PROVISIONS**

#### **A. The Statute**

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

to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5).

#### **B. The IDEA Regulations**

The IDEA regulations generally restate the statutory LRE provision at 34 C.F.R. § 114 but also add somewhat to it. For instance, the regulations require school districts to ensure that a “continuum of alternative placements” is available to meet the needs of children with disabilities for special education and related services. The continuum must include—

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

34 C.F.R. § 300.115.

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

The regulations further provide that unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school that he or she would attend if nondisabled and that consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs when selecting the LRE. 34 C.F.R. § 300.116(c) and (d). Finally, placement teams must also ensure that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. § 300.116.<sup>1</sup>

### **III. COURT-CREATED LRE STANDARDS GENERALLY**

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

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

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

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<sup>1</sup> Although beyond the scope of these materials, it is important to note that there is also an LRE “nonacademic settings” provision in the IDEA regulations. Specifically, 34 C.F.R. § 300.117 provides that school districts must ensure that each child with a disability participates with nondisabled children in extracurricular services and activities to the maximum extent appropriate to the needs of that child and that the child has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings. Issues concerning children with ASD and their participation in nonacademic and extracurricular activities are extremely common.

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

Fourth Circuit: *DeVries v. Fairfax County Sch. Bd.*, 441 IDELR 555, 882 F.2d 876 (4<sup>th</sup> Cir. 1989). While not actually enunciating an LRE "standard" per se, the court held that mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting.

Fifth Circuit: *Daniel R.R. v. State Bd. Educ.*, 411 IDELR 433, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989). First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Sixth Circuit: *Roncker v. Walter*, 554 IDELR 381, 700 F.2d 1058 (6<sup>th</sup> Cir.), *cert. denied*, *Cincinnati City Sch. Dist. v. Roncker*, 464 U.S. 864 (1983). In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Removing a child from the mainstream setting is permissible when "the handicapped child would not benefit from mainstreaming," when "any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting," and when "the handicapped child is a disruptive force to the non-segregated setting."

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

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

Ninth Circuit: *Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Holland*, 20 IDELR 812, 14 F.3d 1398 (9<sup>th</sup> Cir. 1994). District court's use of four factor balancing test is affirmed, where court considered (1) the educational benefits of placing the child in a full-time regular education program, (2) the non-

academic benefits of such a placement, (3) the effect the child would have on the teacher and the other students in the class, and (4) the costs associated with this placement.

Tenth Circuit: *L.B. v. Nebo Sch. Dist.*, 41 IDELR 206, 379 F.3d 966 (10<sup>th</sup> Cir. 2004). Because the Sixth Circuit's *Roncker* test is most apposite in cases where the more restrictive placement is considered a superior educational choice, it is unsuitable in cases where the least restrictive placement is also the superior educational choice. For that reason, the *Roncker* test is not appropriate in all cases. The Fifth Circuit's *Daniel R.R.* test, on the other hand, better tracks the language of the IDEA's least restrictive environment requirement and is applicable in all cases.

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

#### **IV. RECENT CASE TRENDS IN LRE CASES INVOLVING STUDENTS WITH AUTISM**

##### **A. Overall Case Trends**

In looking at recent court trends, the review of cases was restricted to those decided from 2006 to the present. Overall, a couple of interesting trends are noted in cases where the issue is LRE for an autistic student:

1. Courts and hearing officers clearly utilize the LRE standards enunciated by the courts when determining the LRE for autistic students, just as they do in cases involving students with other disabilities;
2. Schools generally prevail when seeking to change an autistic student's placement from a less restrictive to a more restrictive setting within the public school environment;
3. Parents seldom prevail in LRE cases generally but, when they do, they are seeking a more restrictive placement in the form of private schooling.

##### **B. Cases Where School District is Proposing a Move to a More Restrictive Environment**

As noted above, a current trend in the case law involving the LRE for autistic students appears to be that schools have prevailed when seeking to change an autistic student's placement from a less restrictive public school placement to a more restrictive public school setting. In many of the cases, the focus is upon the student's complex needs, including that for intensive, one-to-one direct instruction.

*Las Virgenes Unif. Sch. Dist. v. S.K.*, 54 IDELR 289 (C.D. Cal. 2010). Based upon the autistic student's significant cognitive and communication deficits, he would not reap any benefit from the parents' desired full-time mainstream placement. Because the parent's desired placement would confer no academic or social benefit to the student, the district did not violate the IDEA's LRE mandate when it offered a blended placement instead.

*B.S. v. Placentia-Yorba Linda Unified Sch. Dist.*, 51 IDELR 237 (9<sup>th</sup> Cir. 2009) (unpublished). School district's recommended placement of 4<sup>th</sup> grader with autism in the more restrictive SDC placement for language arts instruction, rather than in general education language arts class, is appropriate as necessary to meet student's unique abilities and needs. School district had no obligation to offer mainstream placement, since educational and non-academic benefits to be derived from mainstream program were minimal.

*E.G. and M.G. v. City School District of New Rochelle*, 52 IDELR 228, 606 F. Supp.2d 384 (S.D.N.Y. 2009): Parents' claim for reimbursement is denied on grounds that they failed to show kindergarten student with autism was denied FAPE in least restrictive environment. School district's proposed program, which includes only five half days of regular classroom time is appropriate in light of student's educational needs requiring highly structured environment to develop social and language skills. Parents' desire for additional time in regular classroom with 1:1 aide is not appropriate.

*Laura P. v. Haverford Sch. Dist.*, 51 IDELR 183 (E.D. Pa. 2008). The parents' demand for a full-time general education placement rather than a part-time learning support placement offered by the district is rejected. Where the student tests at the beginning kindergarten level in math and reading, she requires intensive instruction in those subjects and can not receive that level of instruction in the general education classroom, even with the use of supplemental aids and services. "[This student] has significant language, attention and sensory needs, requiring intensive, systematic and direct instruction with multiple opportunities for guided practice and repetition in a [small], structured learning environment." Where the district proposes that the student will attend general education classes for homeroom, lunch, recess, special subjects, science and social studies, the district has mainstreamed the student to the maximum extent appropriate.

*J.S. v. North Colonie Cent. Sch. Dist.*, 51 IDELR 150 (N.D. N.Y. 2008). While it is true that the high schooler with autism made progress in a Regents-level Global History course, the district's decision to transfer the student to a self-contained special education class is upheld. Clearly, information obtained at the time of the IEP's development, including the results of an independent evaluation, indicates that a mainstream placement is not appropriate where the student had significant deficiencies in language, reading, writing and social skills. The student continued to struggle in the general education courses, despite the "myriad of services and accommodations" provided by the district. "It is undisputed that [the school district] has provided a long list of services, aids and accommodations in an effort to help [the student] succeed in the mainstream environment before seeking to remove him to a self-contained special education classroom." The fact that the student received passing grades in the general education history class while the parents' appeal was pending did not negate his earlier struggles, and the district's psychologist testified that the student needed to spend more time on developing functional skills.

*S.K. v. Parsippany-Troy Hills Bd. of Educ.*, 51 IDELR 106 (D. N.J. 2008). District's decision to place a student in a self-contained class for students with autism is appropriate, where the ABA-based class offered intensive instruction and mainstreaming opportunities and was the student's LRE. Although the student received numerous supports and accommodations in the general education classroom, including a one-to-one aide, the student was unable to acquire basic skills in math, language and reading comprehension. In addition, the parent's expert testified that the student would fall further behind if he continued to receive instruction in a large group. The parent's attempt to characterize this testimony as an opinion only that the student would get "superior" academic benefits in the self-contained classroom is misplaced. The opinion was that the student needed the self-contained placement to develop fundamental skills that he has failed to develop in the several years he has spent in a regular classroom.

*M.W. v. Clarke County Sch. Dist.*, 51 IDELR 63 (M.D. Ga. 2008). Self-contained program for 3-year-old boy with autism is the LRE because the private general education preschool program desired by the parents did not offer one-to-one instruction. "School professionals believed that [the child's] ABA training 'would be almost impossible in a regular setting' and that [the child] would require 'a truckload of pull-out' from a regular education classroom to obtain all of the services he needed...." Because the self-contained program offered a low student-to-teacher ratio and was staffed by personnel certified in ABA methodology and the child would have regular opportunities to interact with typically developing peer, the self-contained placement is the child's LRE.

*Yates v. Washoe County Sch. Dist.*, 51 IDELR 7 (D. Nev. 2008), *reconsideration denied*, 52 IDELR 219 (D. Nev. 2009). The school district's proposal for a high schooler with autism to receive math instruction in a resource room, rather than a general education classroom, is appropriate. As the autism specialist testified, the student needs a setting where he can receive direct instruction from a classroom teacher. Because the student requires one-to-one verbal instruction to receive an educational benefit, the proposed resource room placement for math instruction is appropriate.

*L.E. and E.S. v. Ramsey Bd. of Educ.*, 44 IDELR 269 (3d Cir. 2006). School district's program providing for a half-day in a self-contained classroom is appropriate placement in the LRE for 7-year old with autism. School district reasonably believed that student required segregated placement to receive educational benefit, and student can not receive satisfactory educational opportunity in the less restrictive setting advocated by the parent.

*G.W. v. New Haven Unified Sch. Dist.*, 46 IDELR 103 (N.D. Cal. 2006). School district's proposal to place 8-year-old student with form of autism in special day class at private facility is appropriate, rather than in public elementary school program advocated by parent. School district's proposed placement was LRE in which student could be placed, as prior efforts to place him in public school program had been unsuccessful because of his behavior problems. In special day class at private facility, student's behavior and educational development were "slowly but surely improving."

*Pachl v. School Bd. of Anoka-Hennepin Indep. Sch. Dist. No. 11*, 46 IDELR 1, 453 F.3d 1064 (8<sup>th</sup> Cir. 2006). School district provided FAPE in the LRE to a sixth-grade student with developmental and physical disabilities, including autism, when it developed an IEP that provided that she spend two hours per day in a segregated classroom. Placing student in small structured classroom for 30 percent of the school day and in selected general education programs for 70 percent of the day provided appropriate balance from which she would receive meaningful educational benefit along with social interaction with her typically-developing peers. In addition, student will receive greater benefit from small structure of segregated class rather than large, lecture-driven general education classroom for which the parents advocate.

*Schoenbach v. District of Columbia*, 46 IDELR 67 (D. D.C. 2006). School district's proposed placement of high school student with Asperger's Syndrome in public school's newly developed special education program for students with Asperger's Syndrome, which had no more than 6 students per class, along with special education teacher and 2 teacher assistants is appropriate. The proposed program is reasonably calculated to provide educational benefit to student, even though high school itself is large with 400 students. Parents' claim for reimbursement for placement at a small private school is rejected because it does not offer special education services, even though it is a smaller school setting and his parents believe that he can be educated in a mainstream setting. The parents are not "entitled to reimbursement for private school just because the private placement is less restrictive than the public school placement; placement must also provide educational benefit...." Parents' requested placement did not offer student services he required in accordance with IEP and therefore, was not appropriate.

**C. Cases Where School District is Proposing Less Restrictive Program than Placement Parents Desire**

Particularly in cases where the school district can show that its program offers FAPE (and that no fatal procedural violations occurred), parents are seldom prevailing in current cases where they are seeking a more restrictive placement for their autistic child. Where parents have prevail recently, it is typically in cases where the parent is seeking placement in a private school setting and have been able to show that the school district's placement denied FAPE.

*M.H. v. New York City Dept. of Educ.*, 54 IDELR 221 (S.D. N.Y. 2010). Based upon the testimony of a psychologist that the autistic student required one-to-one instruction and that the presence of typically developing peers would have distracted him, school district must reimburse parents for private school tuition. The student would have obtained no benefit from a less restrictive environment or exposure to peers.

*M.S. v. Fairfax County Sch. Bd.*, 51 IDELR 148, 553 F.3d 315 (4<sup>th</sup> Cir. 2009). District court's denial of reimbursement and conclusion that parents' placement of teenager with mild to moderate autism at private Lindamood-Bell facility was highly restrictive is affirmed. Issue of least restrictive environment was proper for consideration in determining appropriateness of parental placement for purposes of reimbursement award. "Although we have never held that parental placements must meet the least restrictive environment requirement, the district court's consideration of Lindamood-Bell's restrictive nature was proper because it considered the restrictive nature only as a factor in determining whether the placement was appropriate under the IDEA, not as a dispositive requirement."

*E.H. and K.H. v. Board of Educ. of Shenendehowa Central Sch. Dist.*, 53 IDELR 141 (2d Cir. 2009) (unpublished). School district's proposed placement of grade-school student with autism in 12:1 student-to-teacher ratio class is appropriate. Based upon testimony of independent psychologist and on data regarding other students in the classroom, the six-person classroom requested by the parents (based on a state regulation that capped class size at six for students with "highly intensive" needs "requiring a high degree of individualized attention and intervention") would not have been the LRE required by the IDEA.

*Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, 53 IDELR 153 (S.D. Ohio 2009). School district satisfied its obligation to provide FAPE in the least restrictive environment to 6-year-old autistic student, where IEP proposed that student would receive special education in public school program by teacher and aides outside of regular education classroom for more than 60% of school day. While some students with autism may require extensive ABA services, neither IDEA nor judicial decisions require a set amount of ABA (such as 30 to 40 hours per week of ABA).

*Richard Paul E. v. Plainfield Community Consol. Sch. Dist. 202*, 52 IDELR 130 (N.D. Ill. 2009). Student's academic and social progress demonstrate that public school placement, not therapeutic private placement sought by guardian, is the LRE for 12-year-old student with multiple disabilities, including Asperger's Syndrome. Two incidents at school with other students, while "unfortunate," do not establish that school district failed to provide FAPE in LRE. "Incidents at school, whether they are physical encounters or emotional embarrassments, are an inevitable byproduct of peer interaction."

*G.B. and D.B. v. Bridgewater-Raritan Regional Bd. of Educ.*, 52 IDELR 39 (D. N.J. 2009). Parents' claim for reimbursement for private school placement is rejected where school district's proposed program for preschool autistic student is appropriate. School district's proposed program calls for student to start with 1:1 student-to-teacher ratio in school district's preschool program and, after initial period, for IEP team to discuss his program further to determine whether 1:1 ratio remains necessary.

*M.P. v. South Brunswick Bd. of Educ.*, 51 IDELR 219 (D. N.J. 2008) (unpublished). District offered 6<sup>th</sup> grade student with autism and other disabilities FAPE in the least restrictive environment and, accordingly, court need not reach issue of whether parents' unilateral private placement was proper. Nevertheless, "given the IDEA's requirement that children falling under its provisions be educated in the least restrictive environment and the IDEA's preference for mainstreaming, the [c]ourt would be hard pressed to determine that placement of [the student], a high functioning autistic/multiply disabled child, who successfully completed fifth-grade in the top one-third to one-fourth of his mainstream class, and who successfully passed both major content areas of [a state standardized test], at [a] private [school] ... attended solely by students with disabilities, was proper."

*R.V. v. Simi Valley Sch. Dist.*, 109 LRP 44928 (C.D. Cal. 2008). School district's decision is upheld that adolescent autistic student does not require self-contained, specialized program for students with autism, such as non-public school type program where social and emotional skills are incorporated into school curriculum, in order to receive FAPE. Proposed placement in general education setting provided student with the opportunity to be in classes with typically developing peers, whereas in non-public school's self-contained program sought by parents, almost all of the student's classmates would have an autism diagnosis and, because non-public program lacked female students, student would have little opportunity to establish friendships with other females.

*D.B. v. Houston Indep. Sch. Dist.*, 48 IDELR 246 (S.D. Tex. 2007). School district's proposed placement of 6<sup>th</sup> grader diagnosed by private evaluators as autistic in behavioral support class for children with emotional disturbances provides FAPE in the LRE. Special education and related services provided by the school district specifically targeted behavioral difficulties, and behavioral support classroom allowed student to attend public school while accommodating his need for behavioral interventions and increased supervision. The fact that the student's evaluators did not reach consensus on his diagnosis, such that private evaluators indicated student had autism, while school district's psychologists concluded student had emotional disturbance, was not determinative of whether IEP provided FAPE in LRE. "The IDEA does not require that children be classified by their disability so long as each eligible child is regarded as a child with a disability under the Act." Failure to identify (or agree with) the identification of the particular disorder is not a per se denial of FAPE as long as individualized services are provided.

*T.F. v. Special Sch. Dist. of St. Louis County*, 45 IDELR 237, 449 F.3d 816 (8<sup>th</sup> Cir. 2006). School district's proposed placement of 9<sup>th</sup> grade student with disabling psychological conditions and learning disabilities, including "educational autism," is upheld in program at neighborhood high school that offered "unique services tailored to [student's] needs," including small classes, 1:1 instruction and therapeutic elements. Parents claim that student required residential program is rejected, as they provided no evidence to support their argument that student required residential placement and, moreover, the school district's program focused on the student's individual needs and provided an opportunity to be included with typically-developing peers. "That may not have satisfied [student's parents], but it satisfied the requirements of IDEA." Although "[t]here was no guarantee that the programs proposed by [school district] would have accommodated [student] ... the school district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement."

*Marc V. v. North East Indep. Sch. Dist.*, 48 IDELR 41, 445 F. Supp.2d 577 (W.D. Tex. 2006), *aff'd*, 109 LRP 582 (5<sup>th</sup> Cir. 2007). District's IEP for preschool student with autism was reasonably calculated to provide student with FAPE in the LRE and parents were not denied FAPE by school district's refusal to honor request for homebound instruction. Student's dual placement in special education preschool class and general education pre-kindergarten program balanced the need for structure with the need to work on social skills. Moreover, the court noted that "[m]any of [the child's] IEP goals would be practically impossible to implement in a homebound setting."

*W.S. v. Rye City Sch. Dist.*, 46 IDELR 285, 454 F. Supp.2d 134 (S.D.N.Y. 2006). Parents' claim for reimbursement is denied because school district proposed appropriate placement for first grade student with autism. Student was making academic progress in public school, spending half-day in special education program and half-day mainstreamed with an aide. Moreover, the evidence showed that student had made friends in kindergarten, was starting to imitate behavior of non-disabled peers and could read--something many "regular" kindergartners could not do. Student "is exactly the sort of student for whom IDEA mandates education in the public setting--and for whom extensive or premature consideration of schooling in an exclusively disabled student environment ... would be inappropriate as a matter of law."

*Corpus Christi Indep. Sch. Dist. v. Christopher N.*, 45 IDELR 221 (S.D. Tx. 2006). District’s proposal to address multiply-disabled high schooler’s increasing academic difficulties by revising his IEP to provide for a more restrictive class setting, a one-to-one aide and counseling was appropriate. The district’s proposals were “untested” and were the LRE for the student. Therefore, residential placement is not appropriate.

**D. What About One-to-One Aides and LRE?**

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

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

**V. TIPS FOR MAKING DEFENSIBLE LRE DETERMINATIONS FOR STUDENTS WITH AUTISM**

1. Remember that the LRE mandate does not trump FAPE. The pertinent overall question for every student is “what is the least restrictive environment where this student can receive *meaningful* (rather than minimal or de minimis) educational benefit?
  - a. Education with nondisabled peers is required to the “maximum extent *appropriate*,” not to the “maximum extent *possible*.”
2. Specifically identify the individual needs/target skills of the student and prioritize them, taking into consideration the nature/severity of the student’s disability and the student’s age<sup>2</sup>:

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<sup>2</sup> Although no court has included age of the student as a factor, the nonacademic benefits of placement in less restrictive environments tend to be greater for younger students. Indeed, The National Autism Center’s “National Standards Report” issued in September 2009 reminds us that “treatment providers” should continue to follow the recommendations for intensity of services provided by the National Research Council regarding children less than 8 years of age. Specifically:

The committee recommends that educational services begin as soon as a child is suspected of having an autistic spectrum disorder. Those services should include a minimum of 25 hours a week, 12 months a year, in which the child is engaged in systematically planned, and developmentally appropriate educational activity toward identified objectives. What constitutes those hours, however, will vary according to a child’s chronological age, developmental level, specific strengths and weaknesses, and family needs. Each child must receive sufficient individualized attention on a daily basis so that adequate implementation of objectives can be carried out effectively. The priorities of focus include functional spontaneous communication, social instruction delivered throughout the day in various settings, cognitive development and play

- a. Academic needs/skills (strengths/challenges)
  - b. Nonacademic needs/skills (behavioral, socialization/interpersonal, communication, motor, modeling language/behavior, skills of independence/personal responsibility, generalization)
3. Determine what level of services/supports is necessary to meet the defined needs and to support progress on goals/objectives.
- a. Intensive/one-to-one instruction
  - b. Supplementary aids and services
    - i. resource room
    - ii. itinerant instruction
    - iii. modification of curriculum
    - iv. teacher training
    - v. behavior management
    - vi. classroom aide
    - vii. personal aide
    - viii. assistive technology devices/services
4. Determine whether the student's needs can be met *satisfactorily* in the regular education classroom with/without supplementary aids and services.
- a. Level of disruption in the regular education environment
    - i. Acting out behavior(s)
    - ii. Deprivation of benefit to other students in class
  - b. Cost
  - c. Harmful effects upon autistic student
  - d. Meaningful educational benefit
5. Identify what efforts the school has made to educate in the regular education classroom/try less restrictive options.
- a. Identify efforts made/supplemental services provided
  - b. Review data regarding progress/meaningful benefit

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skills, and proactive approaches to behavior problems. To the extent that it leads to the acquisition of children's educational goals, young children with autistic spectrum disorder should receive specialized instruction in a setting in which ongoing interactions occur with typically developing children.

"National Standards Report," p. 81.

6. If needs can not be/have not been *satisfactorily* met in the regular education classroom, slowly move along the continuum of alternative placements beginning with less restrictive options and moving to the most restrictive to determine where meaningful benefit can be received:
  - a. regular classroom instruction for the entire school day, with some modifications to the regular instructional program;
  - b. regular classroom instruction for the entire school day, with individualization of instruction by the classroom teacher for part of the school day;
  - c. regular classroom instruction for the entire school day, with individualized instruction services by a special education teacher or related service staff member for part of the school day;
  - d. regular classroom instruction for most of the school day, with individualized instruction or services provided in another setting for part of the school day;
  - e. regular classroom instruction for most of the school day, with special education instruction in basic skills areas and/or related services provided in a resource room for part of the school day;
  - f. resource room instruction for part of the school day, with instruction in the regular classroom for part of the school day;
  - g. self-contained classroom instruction, with instruction in the regular classroom for part of the school day;
  - h. full-time instruction in self-contained classroom with opportunities for participation with non-eligible students in non-academic and extracurricular activities;
  - i. full-time instruction in a self-contained (separate) school;
  - j. instruction provided in a hospital or residential facility settings on an individual or group basis;
  - k. homebound instruction.
  
7. If the parent disputes the school's LRE recommendation, using a contrast/compare approach, define and weigh the academic and nonacademic benefits of the proposed placement versus the parents' desired placement.
  
8. If removal from the regular classroom is determined to be appropriate, determine what alternative mainstreaming opportunities to the maximum extent appropriate can be or have been made available.
  - i. P.E., Art, Music, Electives
  - ii. Lunch
  - iii. Nonacademic and extracurricular activities
  - iv. Reverse mainstreaming