ISSUES DETERMINING THE LEAST RESTRICTIVE ENVIRONMENT FOR SPECIAL EDUCATION STUDENTS

Protecting the educational rights of students with disabilities has been accomplished primarily through federal legislative mandates. The Education for All Handicapped Children Act was initially passed in 1975 and has been reauthorized numerous times since. It is now titled the Individuals with Disabilities in Education Act (IDEA), and it has had a significant impact on school districts and children with disabilities. Despite improvements, the debate still continues over the quality of the education provided to students with disabilities. In particular, controversy remains over whether the best placement for a child with a disability is in the general classroom or in a separate educational setting. IDEA could use clarification on how to determine the least restrictive environment (LRE) for educating special needs children. There are many issues when determining the LRE for a special education student, and this paper discusses a few of them including a lack of uniformity from the courts, whether cost should be a factor, and

1 Susan C. Bon CONFRONTING THE SPECIAL EDUCATION INCLUSION DEBATE; A PROPOSAL TO ADOPT NEW STATE-WIDE LRE GUIDELINES, 249 Ed. Law Rep. 1 (2009).
2 Id.
3 Id.
4 2006 BYU Educ. & L. J. 189
5 Id.
the unique problems of placement for special education preschoolers. If the
Supreme Court would rule on these issues, it would help achieve uniformity for all
students across the United States.

It is important to understand the meaning of LRE within IDEA 2004 before
discussing problems with it. In the 1970's and prior to congressional legislation,
there were more than eight million children with disabilities, most of who were
excluded from any educational opportunities. Among the children with disabilities
that were educated, almost seventy percent were taught in separate classrooms or
buildings apart from non-disabled students. Education for students with
disabilities has improved dramatically since the days when children with disabilities
were excluded from many educational opportunities. Currently, IDEA provides
that each child has the right to a free and appropriate public education, which
provides special education and related services without charge and at public
expense to all children with disabilities; be involved as parents and child in the
education al decision making process; to be educated in the least restrictive
environment so as to maximize the child’s opportunity to interact with non-disabled
peers; have in place an individualized education program that is individually
tailored to meet the child’s unique needs; and procedural safeguards or due process
in order to resolve disputes over special education services. In the United States,
public school systems are obligated, as a condition of receiving federal funding, to

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7 Robert L. Hughes & Michael A. Rebell, Special Educational Inclusion and the Courts: A Proposal for a
Child: A Research-Based Report on Eliminating Tracking on New York City Public Schools 42 (1992)).
8 2006 BYU Educ. & L. J. 189
comply with IDEA and protect the rights of students with disabilities while also ensuring that these students receive comprehensive educational programs and services.\textsuperscript{10}

Looking at LRE in more detail, IDEA and the Code of Federal Regulations provide that 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; and 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.\textsuperscript{11} This means that the regular education classroom is the first choice the child’s IEP team must consider, and the team must ask what can be provided so that the child can stay in the regular education classroom or activity. It also means that the IEP team must consider what supplementary aids and services will allow the child to be placed in a general education environment. There are many social benefits of integrating special education students in the general education classroom. Senator Robert Stafford illustrated some of these benefits when he said that he and the rest of Congress were “concerned that children with handicapping conditions be educated in the most normal possible and least restrictive setting, for how else will they adapt to the world beyond the educational environment, and how else will the nonhandicapped

\textsuperscript{10} Id.

\textsuperscript{11} 34 CRF §300.114(a)(2)
adapt to them?"12

To ensure that all students are educated in the least restrictive environment that is most appropriate for their individual needs, IDEA requires that school districts have a range or continuum of alternative placement options that meet the students’ needs.13 The purpose of the continuum is to allow the school options when determining the LRE that is most appropriate for the student. Additionally, anytime a student with a disability is excluded from education or an activity with general education students the school must explain in the IEP why the child will not participate.14 It is important to remember that LRE is an individualized determination so what is least restrictive for each student must be based on the child’s individual needs.15

Determining a child’s placement is a frequently litigated issue.16 This may be due to a lack of specific guidelines or tests for schools to use with respect to decisions about LRE and educational placement.17 Since the Supreme Court has not ruled on any specific guidelines for determining LRE, the circuit courts have offered their own interpretations.18 The result of having several interpretations of how to determine LRE is a split among the circuit courts over which factors should be

13 34 CRF §300.115
14 34 CRF §300.320
16 249 Ed. Law Rep. 1 CONFRONTING THE SPECIAL EDUCATION INCLUSION DEBATE; A PROPOSAL TO ADOPT NEW STATE-WIDE LRE GUIDELINES (2009)
used. The broad range of rulings in the area of LRE determination further complicates the debate over inclusion and the LRE provisions of IDEA by adopting a variety of tests to determine the appropriate placement and education for students with disabilities.

There is a two-pronged test to determine if placement is proper from the Fifth Circuit. First it must be asked whether an appropriate education in the general education classroom with the use of supplementary aids and services can be achieved satisfactorily, and second if a student is placed in a more restrictive setting, is the student "integrated" to the "maximum extent appropriate"? The Sixth Circuit established its own three-factor test to guide school districts when determining the appropriate placement for children with disabilities. The court held that in order to justify placement in a separate facility for a child, a school district must “determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.” Then a school district may also consider the following three factors: comparison of the benefits received by a child with a disability in the segregated special education environment to the benefits received in the non-segregated setting, consideration of whether the child will be a disruptive force in the non-segregated setting, and consideration of the cost of mainstreaming. Finally, the Ninth Circuit established a four-factor test. In order to properly determine placement, the school should balance the educational

19 Susan C. Bon CONFRONTING THE SPECIAL EDUCATION INCLUSION DEBATE; A PROPOSAL TO ADOPT NEW STATE-WIDE LRE GUIDELINES, 249 Ed. Law Rep. 1 at 4 (2009).
20 2006 BYU Educ. & L. J. 190
22 Roncker v. Walter, 700 F.2d 1058 (6th Cir. Ohio 1983)
23 Id. at 1063
24 Id.
benefits of placement full-time in a regular class, the non-academic benefits of such
placement, the effect the child has on the teacher and children in the regular class
and the cost of mainstreaming the child. This test derives its factors from both the
Fifth and Sixth Courts’ decisions. However it fails to address the use of
supplemental aids and services.

There is much overlap between the three tests. All consider the benefits that
the child receives in the general education classroom and the potential disruption
the child’s presence may cause to the learning of other students as factors to
consider when deciding LRE. However, there are also some major differences as
only two mention cost as a factor and not all properly address the use of
supplemental aids and services. There is much litigation in the area of LRE
determination, which shows how school districts are struggling to determine what
is required of them. It has been suggested that state educational agencies should
construct statewide guidelines for determining LRE in compliance with IDEA. This
may reduce the school district’s confusion and provide children with more
appropriate LRE’s without litigation.

Because the circuit courts are split about which factors to use and when to
apply them when determining LRE, this can result in completely different
placements being deemed appropriate for the same student. This lack of consensus
is especially problematic for families of special needs children who move a lot, such

25 Sacramento City Unified Sch. Dist. V. Rachel H., 14 F.3d 1398 (9th Cir. 1994).
26 Susan C. Bon CONFRONTING THE SPECIAL EDUCATION INCLUSION DEBATE; A PROPOSAL TO
27 Id. at 10
28 Id.
as members of a military family. A special education student from a military family
might find himself in a self-contained classroom segregated from regular education
students in one part of the country one year, and in a mainstream education
classroom with a classroom assistant and supplementary therapy in another state
the next year.29 Where cost is a factor at issue, the resulting disparaging placements
are magnified.30

Cost has proven to be the most controversial factor when determining LRE
both in terms of whether its application is appropriate and what test to use.31 Many
courts have emphasized that cost alone is generally not a strong enough factor to
determine a disabled child’s LRE.32 The Sixth Circuit, in Rockner, acknowledged the
financial burden that mainstreaming a child may impose on a school district.33 The
Fifth Circuit does not explicitly mention cost yet subsequent applications of the Fifth
Circuit test have factored in cost.34 Finally, the Ninth Circuit considers cost in Rachel
H.35 Some people feel that cost should be a factor when considering LRE for special
education children.36 The cost of educating special education students have
increased dramatically in recent years most likely due to the increased enrollment

29 Sarah E. Farley, Least Restrictive Environments: Assessing Classroom Placement of Students with
30 Kevin D. Stanley, A Model for Interpretation of Mainstreaming Compliance Under the Individuals
31 Farley, supra note 19, at 820, 823-824, 829-830.
32 Theresa M. Willard, Economics and the Individuals with Disabilities Education Act: The Influence
of Funding Formulas on the Identification and Placement of Disabled Students, 31 IND. L. REV. 1167,
33 Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. Ohio 1983).
35 Sacramento City Unified Sch. Dist. V. Rachel H., 14 F.3d 1398 (9th Cir. 1994).
36 Oliver, supra note 8, at 10.
of special education students and a decrease in federal funding. This link between special education placement and the ability of the school to qualify for supplemental funding creates a financial incentive for schools to place students in more restrictive environments, which is in direct conflict with IDEA 2004. Additionally, courts have interpreted legislative intent to imply that cost should be an appropriate factor in LRE placement. Finally, some people feel that cost should be taken into consideration when determining LRE because there is a practical limitation to how much a school can afford in order to pursue the maximum benefits for the child.

Although no one wants to tell a special needs child she does not deserve to maximize her educational potential, the Rowley Court has made it clear that there is no responsibility to provide beyond the required free and appropriate public education. The diverging views on whether cost should be a factor when determining a child’s LRE is just one example of difficulties schools encounter when working with special needs children.

Another issue with LRE’s is the appropriate placement for preschoolers. IDEA entitles children with disabilities, including preschoolers, to individualized

37 Thomas P. Parrish, Special Education - At What Cost to General Education?, The CSEF Resource, Winter 1999-2000, Ctr for Special Educ. Finance, http://www.ldonline.org/ldindepth/specialeducation/atwhatcost.html. In Vermont, a legislative commission set up in 1998 reported that cost-containment must become a state-wide priority because increased expenditures are not sustainable. Id. California’s special education population has nearly doubled from 1990 to 1999. Id. (quoting Amy Pyle, Davis Asked to Help End Special Education Funding Dispute, L.A. TIMES, Nov. 1, 1999, at A3.). An analysis of nine school districts over more than twenty years reveals that general education expenditures had plunged from eighty to fifty-nine percent with special education gains from four to seventeen percent. Id.
38 Willard, supra note 22, at 1181.
39 927 F.2d 146, 154 (4th Cir. 1991).
41 Id.
educations the least restrictive environment appropriate to their needs.\textsuperscript{42} However preschoolers are an additional challenge because public schools rarely provide preschool for children without disabilities.\textsuperscript{43} Therefore getting special education preschoolers to be educated alongside general education classmates is difficult. Early intervention for disabled students is critical so it makes clarification of the issue of LRE for preschoolers important.\textsuperscript{44} Courts diverge on what constitutes the presumptive least restrictive environment for preschoolers.\textsuperscript{45} Researchers and scholars have posited that barriers to placing preschool children in the less restrictive settings include lack of resources at the district level, stakeholder attitudes, and difficulty coordinating services.\textsuperscript{46} Some schools have tried to create access to nondisabled peers by paying for tuition at private preschools or daycares.\textsuperscript{47} Others create “mixed” special education center-based programs, which invite participation from nondisabled children so that children with special needs have exposure to nondisabled peers.\textsuperscript{48} A uniform approach to deciding preschool least restrictive environment is needed.\textsuperscript{49} It has been suggested that courts should

\begin{footnotesize}
\begin{enumerate}
\item 20 U.S.C. § 1412
\item 85 Wash. L. Rev. 157
\item \textit{Id.} at 159
\item \textit{Id.}
\item 85 Wash. L. Rev. 157, 182
\end{enumerate}
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embrace a community-specific standard where the presumptive least restrictive environment is the setting in which a preschool child’s same-aged nondisabled peers are being educated.\footnote{Id. at 191} This will reduce segregation of disabled and nondisabled preschoolers while remaining true the child’s educational needs.\footnote{Id.}

Congressional legislation has helped to dramatically improve education for students with disabilities.\footnote{2006 BYU Educ. & L. J. 189} However, none of the legislation defines how to determine the least restrictive setting or the appropriate level of inclusion in a general education classroom.\footnote{Id.} Because of this lack of authority, there are many issues when determining the LRE for a special education student including a lack of uniformity from the courts, whether cost should be a factor, and the unique problems of placement for special education preschoolers. There would be more clarity on all these issues if the Supreme Court ruled on them. With more clarity on the issue of LRE, schools can focus on providing children with the most appropriate education to fit students’ needs.