PROGRAMMING IN THE LRE FOR STUDENTS ON THE AUTISM SPECTRUM

I. INTRODUCTION

a. When it comes to students with autism, school districts are often faced with the challenge of providing services and supports that meet the IDEA’s least restrictive environment (LRE) mandate while also meeting the unique behavioral, social and academic needs of each student.

b. This presentation analyzes trends in recent case law regarding the LRE mandate as applied to placement and programming for students with autism and the benefits of participation in the general education setting versus the benefits of highly specialized curriculum and strategies.

II. THE IDEA’S LRE PROVISIONS

a. The Statute

i. The IDEA’s LRE provision is one that has not changed since its original enactment in 1975.

ii. Requires 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

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

   A. The continuum must include the alternative placements listed in the definition of special education under the regulations and make provision for supplementary services to be provided in conjunction with regular class placement. 34 C.F.R. § 300.115.

ii. When determining the educational placement of a child with a disability, the regulations also require 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).

iii. In addition, the regulations require that 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).

iv. 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).

v. 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. § 300.116.1

III. RECENT FEDERAL CIRCUIT COURT CASES REGARDING LRE AND PLACEMENT FOR STUDENTS WITH AUTISM

a. Mainstreaming May be Appropriate for High Functioning Students with Autism and Social/Behavioral Issues.

*M.W. ex rel. S.W. v. New York City Dept. of Educ., 725 F.3d 131 (2nd Cir. 2013)*

1. M.W. is a student diagnosed with Pervasive Developmental Disorder, Attention Deficit Hyperactivity Disorder, certain speech and language disorders, and fine and gross motor deficits. Despite these setbacks, M.W. has an average IQ and is bright. His autism and developmental disorders, however, present behavioral and social-emotional problems that have resulted in academic under-performance and have required speech, occupational, and physical therapies. M.W. also requires direct, hands-on supervision during the school day from a paraprofessional, who helps him stay focused when his attention strays and calm in the event of a behavioral crisis.

2. M.W. was enrolled in a private school, but parents sought to transition him to public school. They met with the district for an IEP meeting. The IEP team recommended placement in a general education environment with integrated co-teaching (“ICT”) services with a 12:1 staffing ratio, five days per week, for a ten-month school year. The IEP
also provided M.W. with a fulltime behavioral management paraprofessional to give him one-on-one help self-regulating in times of behavioral crisis, and these other related services. Finally, the IEP concluded that M.W.’s “behavior seriously interfere[d] with instruction and require[d] additional adult support.” and therefore added a BIP to the IEP.

3. The BIP identified “emotional meltdowns,” “poor self-regulation,” and “poor attention” as the behavioral difficulties that impaired M.W.’s academic progress and recommended a reward system, praise and encouragement, and positive modeling as strategies to modify those behaviors. The goal was to teach M.W. to become more attentive and focused and to better control himself when frustrated. Id. To implement those strategies, M.W.’s teacher, paraprofessional, and the parents were to collaborate. The BIP did not quantify data relating to the frequency of M.W.’s “meltdowns” because the private school did not provide a functional behavior assessment (“FBA”), and the DOE did not request or develop one.

4. The student was placed in an ICT classroom with related services recommend in the IEP, but the parent, upon visiting the recommended placement, decided to keep the student at the private school and filed for due process seeking reimbursement for placement in private school. The hearing officer ruled for parents, granting parents full funding for special education in religious school. The district appealed to State Review Officer (SRO), who overruled. Parents then appealed to federal district court, who granted summary judgment for school district. Parents appealed to Second Circuit.

5. On appeal, the court considered a number of issues, including whether public school placement was the child’s LRE. The Court of Appeals held that placement of student in general education environment with regular curriculum alongside typically developing peers, but supplemented with special education teacher was not overly restrictive for that student, and thus IEP that provided such integrated ICT services and did not deny FAPE to the student.

6. In making its ruling, court noted that the IDEA expresses a strong preference for educating disabled students alongside their non-disabled peers; that is, in their LRE. While mainstreaming is an important objective under the IDEA, the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students; the tension between the IDEA’s goal of providing an education suited to a student’s particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow dictates a
case-by-case analysis in reviewing whether both of those goals have been optimally accommodated under particular circumstances.

7. The Court also ruled as follows with regard to remaining claims:

i. FBA was not required for valid BIP and thus lack of FBA did not deprive the student of his right to FAPE

ii. lack of parent counseling and training in an IEP did not deprive autistic student of his right to FAPE

iii. BIP did not impermissibly rely on retrospective testimony

iv. provision of 10-month services, rather than 12-month services, did not deny FAPE to student

**M.M. v. District 0001 Lancaster County School, 702 F.3d 479 (8th Cir. 2012)**

1. Parents of fourth grader with autism brought action against school district, alleging that district failed to provide student FAPE in the LRE.

i. Student was diagnosed with autism at a young age and began attending first grade in the district at his neighborhood school pursuant to an IEP. He did well during first grade, but by second grade, he had displayed increased physical aggression. The district used calming strategies with him, which included taking him to a room away from other students, but he continued to engage in physically aggressive behaviors. The student was promoted to third grade because his progress was found sufficient and exceeded district standards in several areas.

ii. Student returned to public school for third grade with a new IEP. When he continued to engage in aggressive behaviors, including physically hurting staff members, district personnel increased his time away from peers and gave him less demanding academic work. His grades were lower in third grade than in previous years, but his test results and writing samples indicated that he was making academic progress.

iii. Before he completed his third grade year, his parents took him to the Kennedy Krieger Institute (KKI), a short term rehabilitation facility. KKI personnel developed a three level behavior plan for L.M. which eliminated use of the calming room. Student was scheduled to return to his public school in the fall of 2009 as a fourth grader, and his mother presented the KKI behavior plan to
the District. The District did not agree with all aspects of the KKI plan and wrote its own behavioral intervention plan (“BIP”) and attached it to his fourth grade IEP.

2. Parents disagreed with the IEP and the BIP because the District had not adopted KKI’s plan in full. The district plan allowed personnel to move the student to a calming room when he engaged in problem behaviors, which was contrary to the institute’s recommendations. Dissatisfied with the District’s plans, his parents placed him in a private school serving mostly general education students for his fourth grade year and requested that the District pay its costs. After an administrative hearing officer concluded that the District had provided a FAPE for the student’s fourth grade year, his parents brought this action in federal district court. The court held a bench trial and found that the District had provided a FAPE and allowed his parents meaningful participation in the development of his BIP and IEP.

3. Parents appealed and Court of appeals affirmed:
   a. The record supported the district court’s conclusion that public elementary school was the LRE for student; the school was the student’s neighborhood public school attended by both disabled and non disabled students, and although the behavior intervention plan in the IEP the school district created for the student allowed him to be removed from class if he was disruptive or aggressive, and although the student might have been mainstreamed for a larger percentage of his day at a private school, the record showed that the school district would have attempted to mainstream the student whenever possible at the public school.
   b. Record supported district court’s determination that fourth grade IEP school district created was reasonably calculated to provide student some educational benefit.
   c. School district provided parents a meaningful opportunity to participate in the creation of the student’s fourth grade IEP.

b. LRE Mandate Applies to Extended School Year Services and Placement

_T.M. v. Cornwall Cent. School Dist., 752 F.3d 145 (2nd. Cir. 2014)_

1. Student T.M., while diagnosed with autism, was succeeding with support in a mainstream preschool setting. In the development of the student’s 2010-2011 school year IEP, the school district offered T.M. opportunities to continue being educated with non-disabled peers for the “regular” part of the school year; that is, September-June. However, for the summer of 2010, the district offered T.M. placement
only in its self-contained, special education classroom and offered T.M. his related services only as part of that self-contained classroom experience.

2. T.M.’s parents rejected the district’s IEP recommendation on the basis that its offered program was too restrictive. After an 8 day trial, the hearing officer ruled for T.M. and his parents. The hearing officer held that IEP was substantively defective because it was unduly restrictive.

3. The state review officer (“SRO”) reversed, finding that the district’s recommended program was not too restrictive for T.M. The federal district court then affirmed the SRO on this point. Parents then appealed to the Second Circuit Court of Appeals.

4. The Second Circuit held that “…the least restrictive environment (LRE) requirement of [IDEA] applies to extended school year (ESY) placements as it does to regular school year placements. We therefore conclude that the district court erred in determining that Cornwall met the LRE requirement when it offered T.M. only an ESY placement in a self-contained, special education class.”

5. The Court went on to further explain its ruling:

   i. Once the District determined that T.M. needed a twelve month educational program, including an ESY placement, in order to prevent substantial regression, it was required to consider a continuum of alternative ESY placements and to offer T.M. the least restrictive placement from that continuum appropriate for his needs.

   ii. Both of the ESY placements that the district offered were self-contained, special education classrooms with no nondisabled students

   iii. The District’s IEP violated the LRE requirement because it placed T.M. in a more restrictive educational setting for his ESY program than his disability required

   iv. The LRE requirement applies in the same way to ESY placements as it does to school year placements. The LRE requirement is not necessarily limited by what programs the school district already offers

   v. In order to comply with the LRE requirement, a school district must consider an appropriate continuum of alternative placements.
c. Homeschooling May Violate LRE Mandate When Less Restrictive Alternatives Are Available

*A.K. v. Gwinnett County School District (11th Cir. 2014)*

1. Pursuant to a settlement agreement, student (A.K.) with autism was placed in a moderate autism spectrum disorder classroom. Subsequently, A.K.’s parents and district met to discuss A.K.’s IEP. Parents informed the district that A.K. was taking nutritional supplements every forty-five minutes and requested that A.K. be provided home-based services so that she could be provided the diet in a low-stress environment. Although the district offered to provide the diet to A.K. in school, it agreed to parent’s request to provide in-home services until the end of the school year.

2. When the parties met next, the district suggested ESY services in the home and a switch to in-school placement for following school year. A.K.’s parents requested that in-home schooling be continued and rejected a modified plan that would place A.K. in school for two hours per day and in her home for three. After another meeting, A.K.’s parents once again rejected the modified placement. The parents then filed a second due process complaint asserting that A.K. needed in-home schooling so that she could maintain her strict diet.

3. A hearing officer dismissed the complaint for parent’s failure to meet the burden of proof. The case was appealed to state court, then moved to federal court. The federal district court reviewed the administrative record concluding that the district offered the student FAPE. Parent appealed.

4. The Eleventh Circuit Court of Appeals held that the student’s IEP providing that student be placed in an autism classroom, rather than in-home schooling, was reasonably calculated to enable student to receive educational benefit in the LRE, as required to provide student with FAPE.

   i. The Court opined that “it seems clear, then, that the [IDEA’s LRE mandate] favors reintegrating children into the school setting, where they can socially interact with other children.”

   ii. Court noted that the student was on strict diet that was not prescribed by a medical doctor, the student did not have life-threatening condition and she was not under regular care of medical doctor to justify home schooling.

   iii. Most importantly, though, the court noted, is that the parent provided no evidence that the district will be unable to adequately supply A.K. with her special diet. In fact, the court found that evidence actually shows that A.K. would be best served by
reintegrating her into the school setting where she can practice social interaction with her peers.

IV. RECENT FEDERAL DISTRICT COURT CASES REGARDING LRE AND PLACEMENT FOR STUDENTS WITH AUTISM

Application of 9th Circuit’s Four Factor LRE Test Applied to Autism Placements


1. Student has autism and was six years old at the time of the due process hearing. For about two years prior, student attended a small private school for students with autism and other special needs paid for by the Department of Education.

2. Student’s IEP to transition to kindergarten provided Student with special education, occupational therapy, speech and language therapy, transportation, and a variety of other supplementary aids and services, program modifications and supports in the student’s home public school, and ESY.

3. IEP established that student will split his time in special education class and general education class as deemed appropriate in certain subjects with a modified curriculum and supports in a public school campus. The district explained its rational in a notice to parents – that student’s LRE is a combination of general education and special education classes with specially designed instruction to acquire targeted skills in certain subjects while the access to the general education environment will allow for development of socialization skills and the ability to tolerate increased stimuli.

4. Parents filed for due process and hearing officer ruled for district on a variety of issues, including that the placement was the student’s LRE. On appeal, district court affirmed the hearing officer’s decision.

5. With regard to LRE, parents contend that the decision should be reversed both because the IEP team did not fully discuss student’s LRE and because the IEP delegated too much decision-making authority to the student’s general education and special education teachers for certain subjects.

6. The court opined that this contention has no merit. The court noted in determining the least restrictive environment, the following four factors are considered: “(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect...
[Student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [Student].” Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir.1994).

7. However, here, the parent never challenged any of these factors while the record indicates that the district addressed them all. Instead, all that the parent did is to generally contend that the district did not have an appropriate placement discussion.

8. The district, on the other hand, at the IEP meeting discussed the academic and non-academic benefits, impacts, and costs of placing the student in the full continuum of possible placements. The IEP team also discussed the effect the student would have on the general education class and the cost of mainstreaming the student. The district outlined all of this in detail in its answering brief, while the parent did nothing to rebut this evidence.

9. Parent also contends that the placement decision violates LRE because the IEP places too much discretion at the hands of the special ed and general teachers by stating that student will have access to mainstreaming “as deemed appropriate. The Court was not swayed by the argument either.

   i. The Court held that the “as deemed appropriate” language actually enables the special education and general education teachers to provide the student with services in the least restrictive environment. It effectively provides access for the student to the general education curriculum for science and social studies, when it is appropriate, and to the maximum extent possible, based on the student’s needs and abilities.

   ii. In fact, it affords the teachers with necessary flexibility in that particular lessons, and their propriety for the student’s inclusion, may not be determined far in advance, and the potential need to convene an IEP team each time such an opportunity arose would, in practical terms, mean that the student would lose out on an educational opportunity.

10. Finally, the Court notes that the student’s placement was not immutable. the student was coming from PAC, where he had no exposure to nondisabled peers and thus no inclusion opportunities. Although the IEP team concluded that some exposure to the general education population was appropriate, the team also recognized that depending on performance and results, the student’s IEP could be adapted accordingly.

1. Student was an 8 year old child receiving special education services under the primary eligibility category of autism. Pursuant to a previous agreement, the student was placed in general education kindergarten. The student was the first fully included student with autism to ever be placed in one of the general education teacher’s (“Teacher”) classrooms in her 17 years with the District. The teacher also had never received any autism specific training.

2. The student struggled in kindergarten. He frequently had verbal outbursts, threw materials and himself onto the floor, jumped out of his seat and ran around the classroom, kicked his legs, and on more than one occasion threw his head back violently while on the floor, slamming it into the floor of the classroom and on the asphalt outside of the classroom. The student’s outbursts occurred daily and were disruptive to the classroom, leading aides to often remove student from the classroom so he could calm down. The student also struggled to socialize with other students and did not respond well to instruction in the general education setting. He repeated kindergarten as a result; although he was academically advanced in some areas.

3. At an IEP meeting, the district recommended, despite student making some progress in the areas of reading and math, that the student be immediately placed into a “Special Day Class” (“SDC”) for students with mild to moderate autism. The district however did not offer a specific SDC placement immediately, instead proposing the continuation of a 40 per week “home/school” ABA program and 20 hours per month of “consultation supervision” provided by a private agency through the District. District proposed mainstreaming the student for 18% of the day with a specific provision that “student will not participate in the general education environment for academics.”

4. The district filed for due process seeking an order that the IEP offered the student FAPE in the LRE. The student counter-filed alleging that the IEP did not offer Student FAPE in the LRE and procedural violations of the IDEA. The student argued primarily that (1) District procedurally denied the student FAPE by failing to list a specific SDC location; and (2) substantively denied the student FAPE by proposing an SDC, partly because Student’s teacher had no autism training and despite the student’s academic and non-academic progress.

5. The hearing officer held, among other things, that the District failed to offer the student FAPE in the LRE and procedurally denied the student
FAPE. District appealed the hearing officer decision, challenging whether the subject IEP offered student FAPE in the LRE.

6. The District Court held that a school district’s failure to provide general education teachers with autism training did not justify the district’s proposal to place a student with autism in a special day class for his first grade year. The court held that the child received significant academic and non-academic benefits from his general education kindergarten program, therefore the general education classroom was the student’s least restrictive environment.

iii. To determine whether the IEP was reasonably calculated to provide the student with meaningful educational benefit in the LRE, the court applied a four-part balancing test which analyzed (1) whether Student is receiving educational benefit from inclusion; (2) whether Student received non-academic benefit from the general education placement; (3) Student’s effect on the general education classroom; and (4) the cost of full inclusion. Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1403 (9th Cir. 1994).

A. The student was receiving educational benefit as evidenced by his academic strengths, which were the result of academic instruction in a general education classroom through general education teaching techniques. Although the student needed frequent prompts and removal from the classroom, his report cards showed that he was absorbing and mastering grade-level material. The court rejected District’s attribution of the student’s academic progress to the fact that the student had repeated kindergarten because, in reality, the student only attended a special education kindergarten class for one semester and was not exposed to general education curriculum at that time.

B. The student made significant progress on his behavioral goals including “being more compliant, following instructions, and reducing vocalizations, tantrums, and self-injury.” Moreover, the student’s ABA therapist testified that a placement with typically developing peers was appropriate for the student because he had academic strengths and “the social skills he needed to learn required peers who could model behavior and had the language for reciprocal conversations.”

C. With regard to impact on general education classroom, the court found that, even with the student’s interruptions and
disruptions, the teacher was able to conduct her classes. Furthermore, the ABA therapist testified that the student’s disruptive behaviors decreased during the school year. The ABA therapist further testified that the student’s kindergarten classmates initiated social contact with the student, although the student only responded when prompted, and she saw no evidence of the student’s classmates being afraid of him.

a. Related to this factor, the court noted that the district was not supportive of its general education teachers in addressing the student’s behaviors in the classroom. To the contrary, the school principal intentionally rotated full inclusion students through different classrooms so no one teacher would have an inclusion student two years in a row. This effectively guaranteed that the teachers would have little experience with inclusion students. This is in addition to the student’s teachers not having received any training in the education of disabled students.

b. The court held that “District cannot place Student in a more restrictive setting (SDC) to compensate for the lack of sufficient supports for the teacher in the general education classroom. The IDEA mandates inclusion of disabled children to the maximum extent appropriate, and District cannot disregard that obligation because it is difficult, inconvenient, or unpopular.”

c. The court did not address the fourth factor, as it was not an issue here.

V. DISCUSSION OF PRACTICAL TIPS FOR MEETING LRE REQUIREMENTS