

LEGAL ISSUES INVOLVING STUDENTS WHO ARE DEAF OR HARD OF HEARING

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Throughout the history of the IDEA, services to students who are Deaf or Hard of Hearing have been litigated. Experienced school attorney, Elena Gallegos will review the issues of concern to this population and discuss the cases that have litigated these issues including methodology (such as oral-aural versus total communication), related services, centralizing services, determining placement in the least restrictive environment and selecting the campus. Ms. Gallegos will further discuss the influence of technology and its role in the IEP and the provision of FAPE.

FAPE

1. What is the standard for FAPE?

In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 533 IDELR 656, 458 U.S. 176 (1982), which involved a dispute over the delivery of interpreter services for a child who was profoundly deaf, the United States Supreme Court set forth the defining standard for determining FAPE as a two-part test:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. (*Id.* at 206-207 (footnote omitted).)

The Court also stated:

Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. (*Id.* at 203)

The *Rowley* Court declined to establish a fixed rule for determining the amount of educational benefit that must be conferred, but did conclude that, “while an IEP need not maximize the potential of a disabled student, it must provide ‘meaningful’ access to education, and confer ‘some educational benefit’ upon the child for whom it is designed.” (*Ridgewood Bd. of Educ. v. N.E. for M.E.*, 30 IDELR 41, 172 F.3d 238, 247 (3rd Cir. 1999), quoting *Rowley*, 533 IDELR 656, 458 U.S. 176 (internal citations omitted).)

SELECTING METHODOLOGIES BASED ON THE STANDARD FOR FAPE

2. Has the U.S. Supreme Court addressed the issue of who decides methodology?

The U.S. Supreme Court prefers that courts stay out of the business of selecting methodology. In *Board of Education v. Rowley*, 553 IDELR 656, 102 S.Ct. 3034 (1982), the U.S. Supreme Court stated the following with respect to questions of methodology:

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, *was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child*....Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States. (Emphasis added.)

3. What if the parents and school cannot agree?

Historically, the courts have interpreted the *Rowley* language to mean that in cases of disagreement, the courts must defer to the school district’s choice of methodology. The case of *Lachman v. Illinois St. Bd. of Educ.*, 441 IDELR 156, 852 F.2d 290 (7th Cir. 1988), involving a deaf child, is probably the most widely cited case.

Summary of Facts: Mr. and Mrs. Lachman sought assistance from the Regional Hearing Impaired Program (RHIP) when they discovered that Benjamin was profoundly deaf at 10 months of age. The program used the total communication methodology to teach communication through sign language, finger spelling, and simultaneous talking. Before age two, Benjamin began speech and language services using total communication. His parents, however, grew frustrated by the differences between Benjamin’s language skills and those of hearing children. They were also frustrated by the method because Mr. Lachman experienced difficulty with learning sign language and adapting to its use.

The Lachmans began searching for alternatives to help Benjamin. An independent evaluation confirmed their concerns about his significantly delayed skills. They learned about cued speech from a RHIP teacher and attended a workshop. They learned that it was more easily implemented than sign language, using only eight hand shapes formed in four positions near the mouth. The hand shapes were used to clarify phonic ambiguities and enhance lip reading. The Lachmans began using cued speech with Benjamin, became proficient in the method, and discontinued using sign language.

A second independent evaluation showed that Benjamin improved in language comprehension after using the method for eight months. Just five months later, when Benjamin was three, a third independent evaluation showed that he had approached or exceeded language comprehension levels of children with normal hearing.

At age three, Benjamin became eligible for school-based services. The school-based program used total communication to integrate language instruction with every subject throughout the school day. The program was also investigating the cued speech method through a pilot program.

Benjamin's special education needs were evaluated at age three and again at age four. Following each evaluation, the district recommended that Benjamin be educated using total communication. The Lachmans rejected the plan both times because it did not employ their preferred method, cued speech. Instead, they enrolled him in a private school and employed a cued speech translator to accompany Benjamin at the private school. His teacher reported that he performed the regular class curriculum as well as most of his peers.

As Benjamin approached age five, his parents requested that he attend a regular kindergarten classroom in his neighborhood school accompanied by an experienced cued speech interpreter. The district proposed an IEP that would provide a cued speech interpreter for half of the school day and the total communication program for the other half. The Lachmans claimed that sign language was an inappropriate goal, rejected the plan, and requested a due process hearing.

The Litigation at the hearing and district court levels: Both the Level I and the Level II due process hearing officers upheld the IEP. The parents appealed the case to the federal court.

The school district and the Lachmans continued their efforts to resolve the dispute while awaiting appearance in district court. Within months, they agreed that Benjamin should be reevaluated in a regular kindergarten classroom in his neighborhood school with the support of a cued speech interpreter. District education professionals used information gathered during the four week evaluation period to choose methods that would provide Benjamin with a FAPE. Teacher observations, a speech and language evaluation, and a psychological evaluation were completed during the reevaluation. Another IEP was developed and the district again recommended total communication as the method that would meet his educational needs. The IEP also included the use of cued speech for a brief time to assist him with the transition to sign language. The Lachmans remained

convinced that sign language was an inappropriate goal for Benjamin. Unsatisfied with the proposed use of total communication in the IEP, they maintained their appeal before the district court.

Before the district court, the Lachmans used expert witnesses to try to prove that cued speech should be used to teach Benjamin. However, the court disagreed, concluding that the district had carefully considered his educational needs and had offered him a FAPE. Convinced that Benjamin should only be taught through cued speech, the Lachmans appealed the decision to the Seventh Circuit Court of Appeals.

Holding of the Court: The Seventh Circuit also held in favor of the school district.

Key Quotes:

“[P]arents, no matter how well-motivated, do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.”

The court ruled that the district had properly developed an IEP “based upon an accepted, proven methodology for facilitating the early primary education of profoundly hearing-impaired children.”

4. *What does the IEP have to specify in the way of services?*

The IEP 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 to enable the child —

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education 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).

5. ***What does “based on peer reviewed research to the extent practicable” mean?***

The U.S. Department of Education explains:

States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. 71 Fed. Reg. 46665 (August 14, 2006).

6. ***Must we specify methodology in the IEP?***

No. “There is nothing in the Act that requires an IEP to include specific instructional methodologies....The Department’s longstanding position on including instructional methodologies in a child’s IEP is that it is an IEP Team’s decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.” 71 Fed. Reg. 46665 (August 14, 2006).

7. ***Does this create a higher standard?***

Ridley School District v. M.R. and J.R., 56 IDELR 74 (E.D.Pa. 2011). The court rejected the argument that IEPs must be based on “peer-reviewed research.” The court noted earlier cases, such as *Joshua A. v. Unified School District* and the congressional language about peer-reviewed research “to the extent practicable.”

Joshua A. v. Rocklin Unified School District, 52 IDELR 64 (9th Cir. 2009). “Plaintiff contends that this Court should consider the *Rowley* standard in light of more recent Congressional language inferring that ‘peer review research’ services are required. The Court declines to do so. It does not appear that congress intended that the service with the greatest body of research be used in order to provide FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE.”

8. ***Are there other methodology cases involving children with hearing impairments?***

A long line of cases involving disputes over instructional methodologies for children with hearing impairments reinforce the *Lachman* court’s reasoning as the lodestar for guiding courts on this issue. These cases illustrate how, when methodology stands alone as a discrete issue, school districts are likely to win methodology disputes.

Petersen v. Hastings Public Schools, 21 IDELR 377, 31 F.3d 705 (8th Cir. 1994). A group of parents requested that the district adhere to strict implementation of the Signing Exact English (SEE-II) method. They were unhappy that the district had modified the method by adding “several simplifications of the strict system, which the school district used to allow young students just beginning to sign to learn the language more easily.”

However, the parents were unable to convince a state hearing officer, a district court, or the Eighth Circuit Court of Appeals to order the district the change its chosen methodology. The Eighth Circuit wrote:

Despite the good intentions of the parents, the Act's requirements do not entitle them to compel the school district to provide their hearing-impaired children with a specific system of signing. The Act "does not require states to provide each handicapped child with the best possible education at public expense." (*Id.* at 708 (citations omitted).)

Logue v. Unified Sch. Dist. No. 512, 28 IDELR 609, 153 F.3d 727 (10th Cir. 1998). When the Logues discovered the Central Institute for the Deaf (CID), they decided that their son, Noah, would benefit from the oral communication method this private school offered. Despite the fact that Noah had made progress in a district program using the total communication method, they asked the district to place him at the CID at public expense. The Logues requested a due process hearing after two IEP meetings failed to result in an agreement. They appealed the resulting decisions against them to the Tenth Circuit Court of Appeals. That court cited *Lachman* in concluding "that the IEP was calculated to provide educational benefit to Noah."

M.M. ex rel. C.M. v. School Bd. of Miami-Dade County, Fla., 45 IDELR 1, 437 F.3d 1085, 1102 (11th Cir. 2006). C.M. began receiving auditory-verbal therapy (AVT) when she was nine months old. Her parents carefully researched the method before choosing to use it. The Miami-Dade County Early Intervention program paid for one weekly hour of AVT until C.M. turned three. The district completed its evaluation of C.M. a few days after her third birthday and drafted an IEP recommending that she be placed in a special education class using the verbotonal (VT) approach. Her parents repeatedly asked that the district provide AVT during multiple IEP and mediation meetings. They filed suit because the district refused to provide AVT. After a lengthy legal battle, the case was decided by the Eleventh Circuit Court of Appeals. The court determined that the district had appropriately chosen a "recognized and well-established" method. Citing *Lachman*, the court concluded that "[t]he dispute in this case boils down to the parents' belief that AVT is the program best suited to provide C.M. with a quality education. However, under the IDEA there is no entitlement to the 'best' program."

Poway USD v. Cheng, 57 IDELR 189 (S.D. Cal. 2011). The court held that the ALJ applied the wrong legal standard when he concluded that the school was required to provide "word-for-word" transcription services for the hearing impaired student. The school proposed to provide "meaning-for-meaning" services. Relying on *Rowley*, the court held that the issue was not which method was better, but rather, whether or not the district's proposed method would enable the student to receive educational benefit.

9. How should methodologies be selected?

We think it is important that school districts keep up with the research, and know what methodologies are supported by peer-reviewed research. Methodologies should be chosen from the body of peer-reviewed research.

However, ultimately, the methodologies used with a given child will be judged according to the standard for FAPE. “If no such [peer-reviewed] research exists, the service may still be provided, if the IEP Team determines that such services are appropriate.” 71 Fed. Reg. 46665 (2006).

RELATED SERVICES

10. *What is the federal definition of related services?*

“Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.” 34 C.F.R. § 300.34(a) (emphasis added).

11. *Are there other related services that are not contained in the federal list?*

The list of related services in the IDEA is not exhaustive and may include other developmental, corrective, or supportive services if they are required to assist a child with a disability to benefit from special education. See USDE discussion of 34 C.F.R. §300.34(a), 71 Fed. Reg. 46569 (August 14, 2006).

12. *Is the mapping of a cochlear implant a related service?*

“Related services do not include a medical device that is surgically implanted, the optimization of that device’s functioning (e.g. mapping), maintenance of that device, or the replacement of that device.” 34 C.F.R. § 300.34(b)(1).

The comments to the regulations state:

Specifically, “mapping” and “optimization” refer to adjusting the electrical stimulation levels provided by the cochlear implant that is necessary for long-term post-surgical follow-up of a cochlear implant. Although the cochlear implant must be properly mapped in order for the child to hear well in school, the mapping does not have to be done in school or during the school day in order for it to be effective... mapping a cochlear implant, or even the costs associated with mapping, such as transportation costs and insurance co-payments [were not intended by Congress to be] the responsibility of a school district. These services and costs are incidental to a particular course of treatment chosen by the child’s parents to maximize the child’s functioning, and are not necessary to ensure that the child is provided access to education, regardless of the child’s disability, including maintaining health and safety while in school. 71 Fed. Reg. 46569-46570 (August 14, 2006).

However, nothing in paragraph (b)(1) limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services (such as speech and language therapy, assistive listening devices, appropriate classroom acoustics, auditory training, educational interpreters, cued speech transliterators, and specialized instruction) that are determined by the IEP Team to be necessary for the child to receive FAPE.

Nothing in (b)(1) limits the responsibility of the district to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school.

Nothing in (b)(1) prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly. See 34 C.F.R. § 300.34(b)(2)(iii). Each district must ensure that hearing aids worn in school are functioning properly. See 34 C.F.R. § 300.113(a). Each district must ensure that the external components of surgically implanted medical devices are functioning properly. See 34 C.F.R. § 300.113(b)(1). The district is not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device). See 34 C.F.R. § 300.113(b)(2).

13. *Are there any recent related services case involving hearing impaired student?*

D.H. v. Poway USD, 56 IDELR 92 (S.D.Cal. 2011)

The hearing impaired student requested CART services (Computer Assisted Real Time captioning) to assist her in the classroom. However, the student was doing very well with grades of As and Bs in a mainstream classroom. The court held that CART was properly considered by the IEP Team but was not necessary for the provision of FAPE.

Comment: This case is noteworthy because it is the 21st Century version of the Rowley case. Again, we have a request for services from a high achieving deaf student, and again it is rejected as not necessary. In the 20th Century it was sign language interpreting at issue; now it is CART. New technology—same legal analysis.

LEAST RESTRICTIVE ENVIRONMENT

14. What does the law say with respect to least restrictive environment?

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).

15. The Tenth Circuit¹ 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 supplementary 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 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.

¹ The Tenth Circuit Court of Appeals includes the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

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."

16. Can you give us an LRE case involving a hearing impaired student?

J.S. v. DOE, State of Hawaii, 55 IDELR 43 (D.C. Ha. 2010). This case involved a hearing impaired child and the IDEA provision that requires the team to "consider the child's language and communication needs" and the child's "language and communication mode." The parents argued that the child's communication mode was verbal and objected to a placement in a school that emphasized total communication and sign language. However, the court ruled in favor of the school's proposed placement, largely due to LRE considerations.

17. *What about when the parent wants a more restrictive placement?*

Barron v. South Dakota Board of Regents, 57 IDELR 122 (8th Cir. 2011)

Parents of deaf and hearing impaired students argued that the LRE for deaf students was “a school of their own.” The court noted there was some support for this position, citing *The Individuals with Disabilities Education Act and Its Impact on the Deaf Community* at 6 Stanford Journal of Civil Rights and Civil Liberties 355 (2010). However, the court rejected the argument, noting that “The IDEA’s integrated classroom preference makes no exception for deaf students.”

Comment: The state decided to shutter its statewide school for the deaf, which had been in existence since 1880. There were only 389 children with hearing impairments in the state. Only 32 of those students (8%) were served at the School for the Deaf, but they received 91% of the budgeted funds. So the state decided to shut down SDSD and disperse its 32 students to local districts, using the money for outreach activities and services.

18. *How strong is the defense that we did it because the parent wanted it?*

J.W. v. Fresno USD, 52 IDELR 194; 611 F.Supp.2d 1097 (E.D.Cal. 2009)

The court affirmed a hearing officer’s decision in favor of the school district involving a hearing impaired student. Among many other claims, the parents argued that the mainstream placement for 4th, 5th and 6th grades was inappropriate. The district countered with the argument that the parents had asked for this. Thus the district argued that the parents could not later claim a denial of FAPE over the placement they had asked for. The court rejected the theory that the parents had somehow waived the right to complain of this; but on the other hand, the court implied that the parent’s insistence on a mainstream placement bolstered the decision in favor of the school district. Key Quote:

Accordingly, while the claim is not waived, Student’s parents insistence on mainstreaming at the time the IEP was made supports the ALJ’s conclusion that the District provided Student a FAPE, as discussed more fully below.

This opinion was summarily affirmed by the 9th Circuit at 55 IDELR 153 (9th Cir. 2010).

DETERMINING LOCATION OF SERVICES

19. *Do we have to specify location in the IEP?*

The IEP must specify:

The projected date for the beginning of the services and modifications described in paragraph (a)(4) [special education, related services, supplementary aids and services] of this section, and the anticipated frequency, location, and duration of those services and modifications. 34 C.F.R. § 300.320(a)(7).

20. *How is location determined?*

“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).

“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).

21. *Can we centralize our services?*

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. 300.552(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.”

22. *The Fifth Circuit² 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.

² The Fifth Circuit Court of Appeals includes the states of Louisiana, Mississippi, and Texas.

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.”

MISCELLANEOUS CASE

23. *Quatroche v. East Lyme Board of Education, 52 IDELR 96 (D. Conn. 2009)*

A district court held that the school district did not violate a deaf student’s First Amendment rights by failing to provide closed-captioning on the high school’s closed-circuit news program. The student argued that the schools’ Morning Show is a forum provided for student discourse and was one of the primary ways in which students received information regarding the school. The issue in this case was the scope of the student’s right to receive this information. The court found the school’s Morning Show is a nonpublic forum; therefore, the restrictions on speech need only be reasonable and viewpoint neutral.

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