

LRE: IT'S NOT JUST ATTENDING CLASS WITH NONDISABLED PEERS

Presented by David M. Richards, Attorney at Law

RICHARDS LINDSAY & MARTIN, L.L.P.

13091 Pond Springs Road • Suite 300 • Austin, Texas 78729

Telephone (512) 918-0051 • Facsimile (512) 918-3013 • www.504idea.org

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A note about these materials: These materials are not intended as a comprehensive review of all case law and rules on the topic, but as a summary of the landscape and issues arising from IDEA's increasing focus on access to grade-level curriculum. Many of the cases cited are extremely complex, with numerous fact-findings and conclusions of law. The summaries provided do not attempt to address every argument made, nor every argument that could have been made. The cases are selected to illustrate a particular point or dynamic. These materials are not intended as legal advice, and should not be so construed. State law, local policy and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation.

What is Curricular LRE? A recurring theme in the modern IDEA, especially post-NCLB, is the need for all special education students to have greater access to and involvement in the general or regular education curriculum. Beginning in its findings under IDEA '97, Congress articulated that desire using the familiar language of the Least Restrictive Environment. "Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by — having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible[.]" 20 USC §1401(c)(5)(1997). The language seems appropriately chosen. The IDEA concept of Least Restrictive Environment provides a similar dynamic to the modern expectation for greater participation by students with disabilities in the grade-level curriculum. LRE is often described in shorthand as "maximum exposure to nondisabled peers" with the regular education classroom serving as the default placement. The modern duty to leave no child behind can be described in similar shorthand as "maximum exposure to grade-level curriculum" with the regular grade-level curriculum obviously serving as the default, hence "Curricular LRE."

Because access to grade-level curriculum tends to closely follow access to grade-level peers, analysis of traditional LRE cases can be very instructional for Curricular LRE purposes. Just as LRE must yield to the primary goal of educational benefit (or meaningful progress), so too must Curricular LRE (since maximum exposure to grade-level curriculum could result in no benefit to a child who is incapable of grade-level performance but who needs instruction in life skills). Further, just as traditional LRE is not "all or nothing," Curricular LRE will also balance and attempt to adjust to provide maximum exposure to grade-level curriculum in an IEP calculated to provide educational benefit based on the student's abilities. Consequently, the best articulation of Curricular LRE may be "exposure to the grade-level curriculum to the maximum extent appropriate for this student's educational benefit." The concept represented by the shorthand term "Curricular LRE" is visible in many places, but the term itself is not widely recognized (although the growing practice of "Standards-based IEPs" encompasses the concept and provides a good response to the duty). The various doctrines and regulations that give rise to Curricular LRE are a combination of familiar provisions in the IDEA governing LRE, required IEP elements, and assessment. These materials attempt to trace the foundation and practical impact of Curricular LRE dynamic on IEP decision-making and the provision of services to students eligible for special education. All references to the special education regulations are to the 2006 regulations unless otherwise indicated. The author prefers usage of "IDEA" as opposed to IDEIA. The acronym "USDE" will be used to reference the U.S. Department of Education.

I. Some IDEA History

A. The EHA & Initial Focus of Special Education

“Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs.” *Daniel R.R. v. State Board of Education*, 441 IDELR 433, 874 F.2d 1036, 1038 (5th Cir. 1989).

What the Congress initially desired was that: 1) students with disabilities receive a public education; and 2) that the education they received would be appropriate (taking into account needs arising from disability). Note that neither the Congress nor the Fifth Circuit criticized the education of students with disabilities in the regular education classroom — the criticism focused on the lack of appropriate services in that classroom to meet the needs of students with disabilities.

B. *Rowley* and the Educational Benefit Standard

In the early days of the IDEA, access to regular education was important, but the approach in the regulations did not contain the explicit modern emphasis on grade-level curriculum. For example, the Supreme Court in *Rowley* referenced the regulation on IEP content requiring “a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular education programs.” *Board of Education v. Rowley*, 553 IDELR 656 (U.S. 1982). Considering congressional intent, the Court concluded:

“By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose on states any greater substantive educational standard than would be necessary to make such access meaningful. ... Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”

The *Rowley* Court rejected a “maximize potential” standard, as well as an “equal benefits” standard, concluding that “the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* The more complex question, according to the Court, was determining when a student with disability is receiving sufficient educational benefit to satisfy the act.

“The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. **It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.** One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.” *Id.* (Emphasis added).

Put simply, since the possible benefits students can obtain vary dramatically, educational benefit should be measured one-child-at-a-time. Since the *Rowley* student was “receiving substantial specialized instruction and related services” and was performing well in the regular classroom, educational benefit was not difficult to determine.

“The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. **When that ‘mainstreaming’ preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child.** Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. **Children who graduate from our public school systems are considered by our society to have been ‘educated’ at least to the grade level they have completed, and access to an ‘education’ for handicapped children is precisely what Congress sought to provide in the Act.**

“When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. 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. Such instruction and services must be provided at public expense, must meet the State’s educational standards, **must approximate the grade levels used in the State’s regular education,** and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, **if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”** *Id.* (emphasis added).

A little commentary: Was Curricular LRE part of IDEA even at its birth? As a practical matter, maximum exposure to nondisabled peers has to occur where nondisabled peers are located. As nondisabled peers attend regular education classrooms, maximum exposure to regular education grade-level curriculum is a natural (albeit subtle) result. That exposure, however, may be of no educational benefit to the student with disability, even with supplementary aides and services. Of course, the concepts of educational benefit and LRE are at their simplest in the context of a student being educated in the regular classroom successfully and advancing with peers in the grade-level curriculum.

Meaningful benefit depends on individual potential. *See, for example, Ridgewood Bd. of Educ. v. N.E.,* 30 IDELR 41, 172 F.3d 238 (3d Cir. 1999). There is an important difference between the notion of maximizing potential (which IDEA does not require) and determining whether progress is meaningful based on an individualized analysis of the child’s potential. The 3d Circuit provided this analysis:

We first interpreted the phrase ‘free appropriate public education’ in *Board of Education v. Diamond*, 558 IDELR 218, 808 F.2d 987 (3d Cir. 1986), when we rejected the notion that the provision of any educational benefit satisfies IDEA, holding that IDEA ‘clearly imposes a higher standard.’ Examining the quantum of benefit necessary for an IEP to satisfy IDEA, we held in *Polk v. Central Susquehanna Intermediate Unit 16*, 441 IDELR 130, 853 F.2d 171 (3d Cir. 1988), that IDEA ‘calls for more than a trivial educational benefit’ and requires a satisfactory IEP to provide ‘significant learning,’ and confer ‘meaningful benefit.’ We also rejected the notion that what was ‘appropriate’ could be reduced to a single standard, holding the benefit ‘must be gauged in relation to the child’s potential.’ When students display considerable intellectual potential, IDEA requires ‘a great deal more than a negligible [benefit].’

...It appears also that the District Court may not have given adequate consideration to M.E.’s intellectual potential in arriving in its conclusion that Ridgewood’s IEP was appropriate. **Although its opinion discussed the IEP in considerable detail, it did not analyze the type and amount of learning of which M.E. is capable.** As we have discussed, *Rowley* and *Polk* reject a bright-line rule

on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's individual abilities.” (Emphasis added and internal citations omitted).

See also, OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994)(Compliance with IDEA's LRE mandate “**requires an individualized inquiry into the unique educational needs of each disabled student** in determining the possible range of aids and supports that are needed to facilitate the student's placement in the regular educational environment **before a more restrictive placement is considered.**”)(Emphasis added); *Richard Paul E. v. Plainfield Community Consolidated School District #202*, 52 IDELR 130 (N.D. Ill. 2009)(“The amount of advancement required for each child will vary. The 7th Circuit has suggested that the necessary amount of progress needed to satisfy this standard will correlate, at least to some degree, with ‘the student's abilities,’ which reflect the severity of the child's disability. Measuring a child's progression may seem difficult, but ‘[o]bjective factors, such as regular advancement from grade to grade, and achievement of passing grades, usually show satisfactory progress.”).

If the student receives any benefit, there is no continuum of placements? No. *See for example, Beth B. v. Lake Bluff School District*, 36 IDELR 121, 282 F.3d 493 (7th Cir. 2002). The 2d Circuit described why the Supreme Court chose the educational benefit standard: “The standard is intended to give school districts ‘flexibility in educational planning.’ By applying it to the LRE directive and arguing that the school district cannot remove Beth from the regular classroom if she receives any benefit there, Beth's parents turn the ‘some educational benefit’ language on its head. Instead of granting flexibility to educators and school officials, it places an extreme restriction on their policymaking authority and the deference they are owed; it essentially vitiates school districts' authority to place any disabled children in separate special education environments. Neither Congress nor the Supreme Court intended such a result.” *See also, OSEP Memorandum 95-9*, 21 IDELR 1152 (OSEP 1994)(“The placement team must select the option on the continuum in which it determines that the student's IEP can be implemented. Any alternative placement selected for the student outside of the regular educational environment must maximize opportunities for the student to interact with nondisabled peers, to the extent appropriate to the needs of the student.”)

Writing in 1991 on congressional intent behind the EHA (which would later become the IDEA), the 4th Circuit declined to find more lofty goals for educational progress than a benefit standard.

“With the benefit of hindsight, now that the crisis facing America's handicapped children is no longer as exigent, it is easy to suggest that Congress intended more than the establishment of a federal floor when it enacted the EHA. That argument is, however, directly at odds with the legislative history of the EHA, the reimbursement scheme created by the Act, and the interpretation of the Act's directives that has been provided by the United States Supreme Court. ... A careful analysis of the EHA, its history and judicial precedent concerning its interpretation reveals, instead, that Congress' objectives were less utopian and more grounded in the practical necessity of providing America's neglected handicapped children with some form of meaningful education.” *Conklin v. Anne Arundel County Bd. Of Educ.*, 18 IDELR 197, 946 F.2d 306 (4th Cir. 1991)(internal citations omitted).

The *Conklin* court recognized three groups of students with disabilities, and briefly reviewed how each group related to the grade-level curriculum. While passing grades and advancing grade-to-grade with peers will help determine whether educational benefit has flowed to some students with disabilities (Group 1, like *Rowley*), other students with disabilities (Group 2) may “require several years to achieve what would be to a nonhandicapped child a year's worth of progress. In that instance, the EHA cannot expect the States to do the impossible.” *Id.* Finally, (Group 3) “[d]ue to the severity of their handicaps, some children, even with herculean efforts by the state, will never be able to receive passing marks and reasonably advance from grade to grade, and the state should not be placed in the predicament of being

forced to comply with this impossible burden or being found in violation of the EHA.” *Id.* Note the familiar groupings years prior to the NCLB and its 1 percent and 2 percent rule. The differences among these groups, as well as differences among the students in each group, demanded individualized analysis of progress to determine educational benefit.

The 4th Circuit language in *Conklin* recognized that students with disabilities could progress educationally, but the language (and the court’s analysis) seems to distance special education students from their grade-level peers, and accept for them an educational progress unrelated to the grade-level curriculum. What a difference a few years can make. ...

C. Congress raised expectations in the IDEA Amendments of 1997

The modern expectations for special education students are highlighted by both the 1997 Amendments and the 2004 Reauthorization, as well as the passage of NCLB in between. Well before No Child Left Behind required all students to perform at grade level, Congress had proclaimed in its findings in IDEA ‘97 that the act had met its now 20-year-old goals, and needed to raise the bar of performance for special education students:

Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by —

(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible ... [and]

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate[.] 20 USC §1401(c)(5)(1997).

Increased Expectations Evidenced in the 1999 Regulations. Congress’ expectation of “access in the general curriculum to the maximum extent possible” targeted IEPs that had been based on functional limitation rather than higher levels of achievement. (*See discussion on the changing focus of IEP goals later in these materials*). Since Congress wanted higher expectations, the statute, and the regulations issued two years later, provided a variety of changes to the process and philosophy of serving special education students. For example:

“The State must have on file with the Secretary information to demonstrate that the State —

(a) Has established goals for the performance of children with disabilities in the State that —

(1) **Will promote the purposes of this part, as stated in Sec. 300.1; and**

(2) **Are consistent, to the maximum extent appropriate, with other goals and standards for all children established by the State;**

(b) Has established performance indicators that the State will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, drop-out rates, and graduation rates[.]” 34 CFR §300.137 (1999)(emphasis added).

Of course, the requirements were not limited to the states. LEAs were also required to make changes in a variety of areas to provide special education students with “access in the general curriculum to the maximum extent possible.”

Specially Designed Instruction. The term “specially designed instruction” was given the purpose of ensuring “**access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.**” 34 CFR §300.26(b)(3)(1999)(emphasis added).

Changes to the IEP Team. To ensure a voice on the IEP Team that could help bridge the child to the regular classroom and curriculum, IDEA '97 required that “At least **one regular education teacher of the child** (if the child is, or may be, participating in the regular education environment)” **attend IEP Team meetings.** §300.344(a)(2)(1999)(emphasis added). “The child’s regular education teacher’s membership on the IEP team is particularly important to meeting the statutory requirement in §614(d)(1)(A)(ii)(I) of the Act that the IEP explain how the child’s needs will be met so that the child can be involved in and progress in the general curriculum.” Appendix A to Part 300, Commentary on §300.344 (1999). Finally, the representative of the public agency was now required to have “**knowledge about the general curriculum**” as well as knowledge of available resources. §300.344(a)(4)(1999)(emphasis added). Commentary from USDE on §300.347 explains the reference to the general curriculum in the context of performance expectations. “Even as school systems offer more choices to students, there still is a common core of subjects and curriculum areas that is adopted by each LEA or schools within the LEA, or, where applicable, the SEA, that applies to all children within each general age grouping from preschool through secondary school. **Appropriate access to the general curriculum must be provided. The development and implementation of IEPs for each child with a disability must be based on having high, not low, expectations for the child.**” Appendix A to Part 300, Commentary on §300.347 (1999)(emphasis added).

Present Levels of Performance. During IEP Team meetings, more emphasis should be placed on the student’s access and progress in the regular curriculum. For example, the IEP was now required to include a “**statement of the child’s present levels of educational performance, including [h]ow the child’s disability affects the child’s involvement and progress in the general curriculum** (i.e., the same curriculum as for nondisabled children).” §300.347(a)(1)(1999)(emphasis added). To the extent that IEP Teams had not looked to the regular curriculum as an expectation or source of goals for the student, this provision sought to change the thinking by asking “why can’t this student, because of disability, be involved and participate?” Added the USDE, “**The requirement is important because it provides the basis for determining what accommodations the child needs in order to participate in the general curriculum to the maximum extent possible.**” Appendix A to Part 300, Commentary on §300.347(a)(1)(i)(1999)(emphasis added).

IEP Goals & Objectives. Having identified the impact of disability on the child’s involvement and progress in the regular curriculum, the IEP must then provide a statement about what the IEP would do through “measurable annual goals, including benchmarks or short-term objectives” to **meet the “child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum** (i.e., the same curriculum as for nondisabled children)[.]” §300.347(a)(2)(1999)(emphasis added). Note that by adding the phrase on involvement and progress in the general curriculum, the regulation requires goals that are based on the student’s needs and are related to the grade-level curriculum. Periodically, and not less than annually, the IEP Team should meet and determine whether the annual goals are being achieved and revise “the IEP as appropriate to address ... Any lack of expected progress toward the annual goals described in Sec. 300.347(a), and in the general curriculum, if appropriate[.]” §300.343(c)(2)(1999)(emphasis added).

IEP Services. Even IEP Team discussions of the special education and related services the student would require included a focus on access and progress in the general curriculum. The IEP must include:

- (3) **A statement of the special education and related services and supplementary aids and services to be provided to the child**, or on behalf of the child, and a statement of the **program modifications or supports for school** personnel that will be provided for the child —
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) **To be involved and progress in the general curriculum** in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and
 - (iii) To be **educated and participate with other children with disabilities and nondisabled**

children in the activities described in this section;

(4) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(3) of this section;” §300.347(a)(3)-(4)(1999)(emphasis added).

These two powerful provisions brought together both the concept of LRE (by requiring an explanation why the student could not participate with nondisabled children in the regular class) and the concept of Curricular LRE (by requiring an explanation why the student could not participate with nondisabled children in the regular class *in the general curriculum*). The USDE commentary reinforces the point. “A basic assumption made in both the statute and these final regulations is that **the programming and services for each ‘individual’ child would be tailored to address the child’s unique needs that impede the child’s ability to make meaningful progress in the general curriculum.**” Appendix A to Part 300, Commentary on §300.347 (1999).

Consequently, barriers preventing the student’s attendance in the regular education classroom, and the student’s involvement and progress in the general curriculum must be addressed through supplementary aids and services before some alternative (be it changes to the curriculum or more restrictive setting) can be considered appropriate. Of course, where the student cannot make meaningful progress either in the setting, or in the general curriculum (despite appropriate supplementary aids and services), the IEP Team has discretion to move away from the default (whether that is the regular classroom or the grade-level curriculum, or both). The USDE provided this response in the commentary:

“In order to ensure full access to the general curriculum, it is not necessary to amend Sec. 300.347(a)(3)(ii) to clarify that a child’s involvement and progress in the general curriculum must be ‘to the maximum extent appropriate to needs of the child.’ The individualization of the IEP process, together with the new requirements related to the general curriculum, should ensure that such involvement and progress is ‘to the maximum extent appropriate to the needs of the child.’” Appendix A to Part 300, Commentary on §300.347(a)(3) (1999)(emphasis added).

Participation with Nondisabled Children. Having addressed access and progress in the curriculum, this provision addresses traditional LRE concerns. The IEP must include an “explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(3) of this section.” That the regulations recognize both maximum exposure to curriculum and maximum exposure to nondisabled peers is no accident. Note that both presumptions, or defaults, are subject to the needs of the child for educational benefit.

State Assessments. While the state assessment would play a much more prominent roll with the passage of NCLB two years later, the 1999 IDEA regulations made modifications to the assessment a required IEP element.

- (i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and
- (ii) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of —
 - (A) Why that assessment is not appropriate for the child; and
 - (B) How the child will be assessed[.] §300.347(a)(5)(1999)(emphasis added).

USDE Commentary clearly states that all special education students are to be assessed. “The IDEA Amendments of 1997 require that all children with disabilities be included in general State and district-wide assessment programs, with appropriate accommodations, where necessary. (§300.138). In some cases, alternate assessments may be necessary, depending on the needs of the child, and not the

category or severity of the child's disability." Appendix A to Part 300, Commentary on §300.347(a)(5) (1999). *See also, Working Together, p. 3* ("Too often in the past, students with disabilities were excluded from assessments and accountability systems, and the consequence was that they did not receive the academic attention and resources they deserved.").

D. High expectations fueled by NCLB and IDEA 2004

No Child Left Behind. By 2001, Congress had concluded in No Child Left Behind that higher expectations were appropriate for all students, including students with disabilities. While NCLB is a massive piece of complex legislation, it has a fairly simple stated purpose, as provided by Congress in the opening paragraphs of the law. 20 USC §6301. A few pertinent pieces of the language are reproduced below:

"The purpose of this title is to ensure that **all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.** This purpose can be accomplished by

(1) ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;

(2) **meeting the educational needs of low-achieving children** in our Nation's highest-poverty schools, limited English proficient children, migratory children, **children with disabilities**, Indian children, neglected or delinquent children, and young children in need of reading assistance;

(3) closing the achievement gap between high- and low performing children, especially the achievement gaps between minority and non-minority students, and between disadvantaged children and their more advantaged peers;

(8) providing children an enriched and accelerated educational program, including the use of schoolwide programs or additional services that increase the amount and quality of instructional time[.]" (Emphasis added).

NCLB through Adequate Yearly Progress reinforces the strong presumption of grade-level performance for the IDEA-eligible student. Indeed, under the current regulations, the expectation is that a large majority of IDEA students (as many as 73 percent) are to be taught and tested on grade-level state-mandated curricula. For AYP measurement purposes, only 3 percent of the total student population tested can be tested with something other than the grade-level statewide assessment, and only 1 percent of the total student population tested (representing students with the most significant cognitive impairments) can be tested with a below-grade-level, alternate assessment based on alternate achievement standards. 34 CFR §200.13(c)(2)(i). The 2 percent group ("a small group of students whose disability has precluded them from achieving grade-level proficiency and whose progress is such that they will not reach grade-level achievement standards in the same time frame as other students") can be tested with a less-rigorous alternate assessment based on modified academic achievement standards, but it must remain an on-level test. 34 CFR §200.13(c)(2)(ii). *Commentary to the 2007 Assessment Regulations; 72 Fed. Reg. 17,748 (2007) [hereinafter "2007 Assessment"]*. Note that the caps are not meant to control how many students are given a particular assessment, but to cap the number that may be included in the measurement of AYP. *Working Together, p. 7* ("The cap is a limit on the number of proficient scores that may be included in AYP decisions at the district and state

levels.” It is not a limit on the number of students who may take such an alternative or modified assessment).

How do we know who gets which assessment? Any bright-line guidance? No. A commenter to the regulations asked for USDE to identify a bright line to distinguish between students on the 1 percent and 2 percent assessments. USDE declined to provide such a rule, noting that the regulations, while providing some basic criteria, leave such definitions to the states. 34 CFR §200.1(d); *2007 Assessment*, p. 17760. As noted below, states are required to provide guidance to LEAs on making the assessment determination.

A Little More Detail on the 1 percent Eligibility for the 1 percent test, or the alternate assessment based on alternate academic achievement standards is limited to “students with the most significant cognitive disabilities.” 34 CFR §200.1(d). USDE did not provide a definition in the final regulation, giving the “States and LEAs more latitude in identifying the population that should appropriately be evaluated” under this assessment. *Commentary to Part 200, 68 Fed. Reg. 68,704 (2003) [hereinafter “2003 Assessment”]*.

For students assessed on an alternate assessment based on alternate academic achievement standards, states are required to ensure that (1) **the alternate standards are “aligned with the state’s academic content standards,” “promote access to the general curriculum”** (34 C.F.R. §200.1(d)(1)&(2)(emphasis added); and (2) the state must document that **“Students with the most significant cognitive disabilities are, to the extent possible, included in the general curriculum and in assessments aligned with that curriculum.”** 34 CFR §200.6(a)(2)(C)(emphasis added). The regulations also require efforts to improve access by students with significant cognitive disabilities to assessments other than the alternate assessment. The state must:

“(D) Develop, disseminate information on, and **promote use of appropriate accommodations to increase the number of students with the most significant cognitive disabilities who are tested against grade-level academic achievement standards;** and

(E) Ensure that regular and special education teachers and other appropriate staff know how to administer assessments, including making appropriate use of accommodations, for students with the most significant cognitive disabilities.” 34 CFR §200.6(a)(2)(D)&(E)(emphasis added).

These provisions reflect the reality that, for some students, an alternate assessment based on alternate academic achievement standards will be necessary, but such an assessment is not always appropriate for a student with a significant cognitive disability. IEP Teams, pursuant to state guidance, should be setting appropriate expectations. A commenter to the 2006 regulations asked for a change to the regulation requiring students with the most significant cognitive disabilities to be assessed on alternate achievement standards. USDE declined to make the change.

“It would be inappropriate to require a child with the most significant cognitive disabilities to be taught and assessed based on alternate achievement standards. Consistent with section 614(d)(1)(A)(i)(VI)(bb) of the Act, the child’s IEP Team is responsible for determining the particular assessment that is appropriate for a child. Under § 200.1(d) of the ESEA title I regulations, a State is permitted, but not required, to adopt alternate achievement standards and develop an alternate assessment based on those standards for children with the most significant cognitive disabilities. There is no requirement under the Act or the ESEA that a State develop an alternate assessment based on alternate achievement standards.” 71 *Fed. Reg.* 46,666 (2006).

In summary, NCLB raises expectations for students with the most significant cognitive disabilities. While an assessment based on alternate achievement standards is possible (the 1 percent test), a state need not create such an assessment. Should a state create an alternate assessment, it must be aligned

with the state's academic content standards and promote access to the general curriculum. Students with the most significant cognitive disabilities are, to the extent possible, included in the general curriculum and in assessments aligned with that curriculum, including the grade-level assessment and the assessment based on modified academic achievement standards (the 2 percent test).

A Little More Detail on the 2 percent Students to be assessed based on modified academic achievement standards must meet state criteria that include at least the following:

- (i) The student's disability has precluded the student from achieving grade-level proficiency, as demonstrated by such objective evidence as the student's performance on —
 - (A) The State's assessments described in §200.2; or
 - (B) Other assessments that can validly document academic achievement.
- (ii)(A) The student's progress to date in response to appropriate instruction, including special education and related services designed to address the student's individual needs, is such that, even if significant growth occurs, the IEP team is reasonably certain that the student will not achieve grade-level proficiency within the year covered by the student's IEP.
 - (B) The determination of the student's progress must be based on multiple measurements, over a period of time, that are valid for the subjects being assessed.
- (iii) If the student's IEP includes goals for a subject assessed under §200.2, those goals must be based on the academic content standards for the grade in which the student is enrolled, consistent with paragraph (f)(2) of this section. 34 CFR §200.1(e)(2).

Why are both the grade-level assessment and the 1 percent out-of-level alternate assessment inappropriate for 2 percent students?

“Neither of these options provides an accurate assessment of what these students know and can do. A grade-level assessment is too difficult and, therefore, does not provide data about a student's abilities or information that would be helpful to guide instruction. An alternate assessment based on alternate academic achievement standards is too easy and is not intended to assess a student's achievement across the full range of grade-level content. Such an assessment, therefore, would not provide teachers and parents with information to help these students progress toward grade-level achievement.” *2007 Assessment, p. 17748.*

USDE is concerned about accuracy in measuring the student's achievement, as well as generating data to assist IEP Teams as they build IEPs aimed at student progress to grade-level achievement. Consequently, the 2 percent test envisioned by USDE (but created by interested states) is aligned with the State's academic content standards for the grade in which the student is enrolled, is challenging (but may be less difficult than the grade level academic achievement standards), and includes at least three achievement levels. 34 CFR §200.1(e)(1). “The final regulations make clear that modified academic achievement standards are challenging for eligible students, but are a less rigorous expectation of mastery of grade-level academic content standards.” *2007 Assessment, p. 17748.*

Does the student have to be close to grade level to be eligible for an assessment based on modified academic achievement standards? In the proposed regulations, USDE required the student to be receiving direct instruction in the grade-level curriculum in order to be eligible for the modified assessment. Misunderstanding ensued, as commenters apparently thought that the grade level instruction requirement meant that only students performing close to grade level were eligible. USDE clarified:

That was not our intent. We included this requirement because we believe that all students with disabilities, including students assessed based on modified academic achievement standards, should have access to grade-level content. **This is consistent with the provisions in the IDEA that focus**

on ensuring that all students with disabilities have access to the general curriculum (See, e.g., section 614(d)(1)(A)(i)(II)(aa) and (IV)(bb).)

“However, in order to clarify the policy and limit further misunderstanding, we have removed the requirement that a student receive direct instruction in grade-level content in order to be eligible for an alternate assessment based on modified academic achievement standards from the final regulations and **replaced it with a requirement that if the IEPs of these students include goals for a subject assessed under §200.2, those goals must be based on grade-level content standards.** We believe this will help ensure that students have access to grade-level content before they are assessed based on modified academic achievement standards and that they receive instruction in grade-level content after they are assessed based on modified academic achievement standards. **Such an approach focuses the IEP Team and the student on grade-level content standards and on the student’s current achievement relative to those standards.** We believe that instruction in grade-level content is critical to ensure that students who participate in alternate assessments based on modified academic achievement standards are prepared to demonstrate their mastery of grade-level content and can move closer to grade-level achievement.” *2007 Assessment, p. 17749 (emphasis added).*

The concern is that while these students will not move quickly toward grade level, they will get to grade level as long as expectations and services are appropriate. This position has generated some controversy, as several commenters to the regulations thought that modified academic achievement standards should focus on the individual needs of a student with disabilities and be aligned with standards that are appropriate for the student’s *instructional level*, not grade level. Said USDE,

“Modified academic achievement standards are intended for a small group of students who, by virtue of their disability, are not likely to meet grade-level academic achievement standards in the year covered by their IEPs even with appropriate instruction. These students need the benefit of access to instruction in grade-level content so that they can move closer to grade-level achievement. **We believe that allowing modified academic achievement standards to focus on something other than grade-level content standards (e.g., allowing them to be based on a student’s instructional level) would lower expectations and limit opportunities for these students to access grade-level content and meet grade-level achievement standards.**” *2007 Assessment, p. 17755 (emphasis added).*

“We did not want students to be assessed based on modified academic achievement standards merely because they did not have access to grade-level content or solely because their achievement was one or two grades below their enrolled grade.” *2007 Assessment, p. 17758.*

Incorporating State Content Standards into IEP Goals. Throughout the Commentary to the 2007 regulations on assessment, USDE praised efforts to incorporate state content standards into IEP goals.

“One way to help ensure that students have access to grade-level content before they are assessed based on modified academic achievement standards, and receive instruction in grade-level content after they are assessed based on modified academic achievement standards, is to require IEP Teams to include goals that are based on grade-level content standards in the IEPs of these students. Such an approach focuses the IEP Team and the student on grade-level content and the student’s achievement level relative to those content standards.” *2007 Assessment, p. 17758.*

USDE included in the eligibility requirements for 2 percent assessment a requirement that if the student’s IEP contains goals for a subject assessed, the goals must be based on the academic content standards for the grade in which the student is enrolled. 34 CFR §200.1(e)(2)(iii).

“Incorporating State content standards in IEP goals is not a new idea. Because the reauthorization of IDEA in 1997 required States to provide students with disabilities access to the general curriculum, the field has been working toward incorporating State standards in IEP goals. Some States already require IEP Teams to select the grade-level content standards that the student has not yet mastered and to develop goals on the basis of the skills and knowledge that the student needs to acquire in order to meet those standards. In addition, some States have developed extensive training materials and professional development opportunities for staff to learn how to write IEP goals that are tied to State standards.” *2007 Assessment*, p. 17758.

Isn't the IEP's lack of connection to the curriculum one of the reasons NCLB focuses on the state assessment to determine student progress for AYP? Yes. “In general, IEP goals are individualized for each student and may cover a range of needs beyond reading/language arts and mathematics, such as behavior and social skills. They are not necessarily aligned with state standards, and they are not designed to ensure consistent judgments about schools — a fundamental requirement for AYP determinations.” *Working Together*, p. 4. The incorporation of state content standards in IEPs (sometimes called Standards-Based IEPs) will be discussed later in these materials.

The 2004 IDEA Reauthorization.

Prior to the 2004 Reauthorization, the President's Commission on Excellence in Special Education put together a report that analyzed the state of special education and summarized changes that the commission felt were necessary to improve IDEA. Many of the committee's suggestions made their way into both the statute and regulations. A key point made by the commission reaffirms Congress' efforts in both IDEA '97 and NCLB to look at students in special education differently than had become the custom. The President's Commission Report on Excellence in Special Education, titled *A New Era: Revitalizing Special Education for Children and Their Families*, [hereinafter “President's Commission Report”], July 1, 2002, summarized the appropriate regular education and special education relationship quite nicely.

“Children placed in special education are general education children first. Despite this basic fact, educators and policymakers think about the two systems as separate and tally the cost of special education as a separate program, not as additional services with resultant add-on expense. In such a system, children with disabilities are often treated not as children who are general education students and whose instructional needs can be met with scientifically based approaches; they are considered separately with unique costs — **creating incentives for misidentification and academic isolation** — preventing the pooling of available resources and learning. General education and special education share responsibilities for children with disabilities. They are not separable at any level — cost, instruction or identification.” *President's Commission Report at 7* (emphasis added).

Put simply, “Being in special education does not mean that a student cannot learn and reach grade level standards. In fact, the majority of students with disabilities should be able to meet those standards.” *Working Together for Students with Disabilities: IDEA & NCLB, USDE FAQ, December 1, 2005, p. 5* (hereinafter, “*Working Together*”). In IDEA 2004, Congress firmly cemented the presumption of participation by IDEA eligible students in the regular education curriculum in the mainstream classroom, and in nonacademic and extracurricular activities. The default position is that the student with a disability participates fully in these mainstream pursuits, and any restriction or deviation from the default must be justified.

“Specially Designed Instruction.” The 1999 version of the definition remained unchanged in 2004 (§300.39(b)(3)), prompting a commenter to the proposed regulations to ask that USDE “strengthen the requirements ensuring children access to the general curriculum, because many children with

disabilities still do not have the tools they need or the teachers with expertise to access the general curriculum.” In response USDE provided this commentary: “We believe the regulations place great emphasis on ensuring that children with disabilities have access to the general education curriculum. ... [E]nsuring that children with disabilities have access to the general curriculum is a major focus of the requirements for developing a child’s IEP. ... We do not believe additional language is necessary.” *Federal Register*, p. 46577. Specifically cited by USDE were the requirements of §300.320, outlined below. The regulation on required IEP content was fine-tuned in 2006 to provide some interesting re-emphasis on grade-level curriculum.

Present levels of performance — academic and functional. While the previous regulation required a statement on “present levels of educational performance,” the 2006 regulation split the phrase into two parts. In the new regulation, the IEP must include a statement of the “child’s present levels of academic and functional performance.” 34 CFR §300.320(a)(1). The commentary provides some helpful insight on the change requiring the statement on “academic achievement.” First, USDE declined to further define the term “academic achievement.” “‘Academic achievement’ generally refers to a child’s performance in academic areas (e.g., reading or language arts, math, science and history). We believe the definition could vary depending on a child’s circumstance or situation, and therefore, we do not believe a definition of ‘academic achievement’ should be included in these regulations.” *71 Fed. Reg. 46,662 (2006) [hereinafter “2006 Commentary”]*. Second, in response to a commenter’s request that the regulations require that present levels of performance be aligned with the state’s core curriculum content and standards, USDE appears to take the position that the concern has already been sufficiently addressed in the regulation.

“The IEP Team’s determination of how the child’s disability affects the child’s involvement and progress in the general education curriculum is a primary consideration in the development of the child’s annual IEP goals. Section 300.320(a)(1)(i), consistent with section 614(d)(1)(A)(i)(I)(aa) of the Act, requires the statement of a child’s present levels of performance in the IEP to include how the child’s disability affects the child’s involvement and progress in the general education curriculum. This directly corresponds with the provision in §300.320(a)(2)(i)(A) and section 614(d)(1)(A)(i)(II)(aa) of the Act, which requires the IEP to include measurable annual goals designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum. We do not believe further clarification is needed regarding the alignment of a child’s present levels of performance with the child’s annual goals.” *2006 Commentary, p. 46662*.

IEP Goals and Objectives. The most interesting changes here involved the removal of the requirement to provide benchmarks or short-term goals for some special education students. The IEP must include a statement of measurable annual goals, including academic and functional goals designed to —

- “(A) Meet the child’s needs that result from the child’s disability **to enable the child to be involved in and make progress in the general education curriculum;** and
- (B) Meet each of the child’s other educational needs that result from the child’s disability;
- (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives[.]” §300.320(a)(2)(emphasis added).

Benchmarks and short-term objectives were removed from the statute for most students, but remain for those taking the state’s alternative assessment (1 percent test). Presumably, no short-term goals or benchmarks are necessary for other special education students as the grade-level curriculum meets the need. Finally, in response to a commenter’s request that the goals and objectives (for those students taking the alternative assessment) be aligned with the state’s alternative assessment, USDE declined to provide a change. Citing language in the statute on assessment, USDE writes, “The Act requires alternate assessments to be aligned with the State’s challenging academic content standards and

academic achievement standards, and if the State has adopted alternate academic achievement standards permitted under 34 CFR §200.1(d), to measure the achievement of children with disabilities against those standards.” *2006 Commentary*, p. 46663. There is no alignment to the test or assessment, but to the curriculum (here, the alternate academic achievement standards) upon which the alternate assessment is based. Finally, USDE reminds us that “for some children, goals may be needed for activities that are not closely related to a State’s academic content and academic achievement standards.” *Id.*

In commentary to the 2007 IDEA Assessment Regulations, the USDE praised the practice of incorporating state grade-level content into IEPs as an effective way to keep IEP Teams focused on a student’s progress to grade-level performance.

“We believe that requiring IEP Teams to incorporate grade-level content standards in the IEP of a student who is assessed based on modified academic achievement standards and to monitor the student’s progress in achieving the standards-based goals will focus IEP Teams on identifying the educational supports and services that the student needs to reach those standards. This will align the student’s instruction with the general education curriculum and the assessment that the IEP Team determines is most appropriate for the student.” *2007 Assessment*, p. 17759.

Additional USDE guidance, provided in *No Child Left Behind Modified Academic Achievement Standards, Nonregulatory Guidance, USDE July 20, 2007 [hereinafter “July 2007 Guidance”]*, explains the benefits of this approach to all students with disabilities, regardless of how they participate in state and district assessments.

“IEP goals based on grade-level content standards are appropriate for a wide range of students with disabilities, including students with the most significant cognitive disabilities. **It is not our intent to limit the implementation of IEP goals based on grade-level content standards to students participating in an alternate assessment based on modified academic achievement standards or those achieving close to grade level.** The regulations require a student’s IEP to include goals based on grade-level content standards only for the subjects to be assessed based on modified academic achievement standards. For example, if a student will be assessed based on a modified academic achievement standard in reading and math, IEP goals for reading and math must be based on grade-level content standards. **However, we encourage all IEP goals that are related to academic achievement to be based on grade level content, especially since the vast majority of students with disabilities will be assessed based on those standards.**” *July 2007 Guidance, E-5, p. 31 (emphasis added)*.

IEP Services. The main change here was the addition of references to peer-reviewed research to appropriately reference the statute, but another subtle change was made by USDE. 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.” (§300.320(a)(4)(2006)(changes from 1999 in italics).

The significant changes made by the regulation, for our discussion, was the addition of the word “enable” in the regulations. The USDE Commentary provided the following context for the “peer review” requirement. As the statute requires, there are limits.

“[T]here 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. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child’s IEP Team based on the child’s individual needs. ... If no such research exists, the service may still be provided, if the IEP Team determines that such services are appropriate. A child with a disability is entitled to the services that are in his or her IEP whether or not they are based on peer-reviewed research. The IEP Team, which includes the child’s parent, determines the special education and related services, and supplementary aids and services that are needed by the child to receive FAPE.” *2006 Commentary, p. 46665.*

Participation with nondisabled children. The LRE statement remains unchanged from 1999. The IEP must include an explanation of “the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section” §300.320(a)(5)(2006).

State Assessments. Since this was the first reauthorization of IDEA following NCLB, changes to the IEP provision on the state assessment were no surprise. For the states, regulations adopted in 2007 to implement the 2 percent rule provide that, “**A State must ensure that all children with disabilities are included in all general State and district-wide assessment programs**, including assessments described under section 1111 of the ESEA, 20 U.S.C. 6311, with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs.” (§300.160.)(2007)(emphasis added). For LEAs, the IEP content requirement is as follows:

- “(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
- (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why —
 - (A) The child cannot participate in the regular assessment; and
 - (B) The particular alternate assessment selected is appropriate for the child[.]” §300.320(a)(6).

Note that the USDE commentary on this section provides additional support for Curricular LRE.

“One commenter recommended that §300.320(a)(6) clarify that a child with the most significant cognitive disabilities, who has been determined by the IEP Team to be unable to make progress toward the regular achievement standards even with the best instruction, will be taught and assessed based on alternate achievement standards. Discussion: It would be inappropriate to require a child with the most significant cognitive disabilities to be taught and assessed based on alternate achievement standards.” *2006 Commentary, p. 46666.*

While no rationale is provided for the answer, it seems clear that an automatic assignment of anything other than grade-level curriculum to a special education student violates the requirement that the student be involved and progress in the general education curriculum (or Curricular LRE).

If a student requires an accommodation to allow the student to participate in an assessment, and the use of that accommodation would invalidate the assessment, does the IEP Team have to include it in the IEP ? No.

“The commenter recommended revising the statement to require the IEP to include a statement of any individual appropriate accommodations that are necessary to allow the child to ‘participate’ in assessments. Discussion: To change the regulation in the manner suggested by the commenter would be inconsistent with the Act. Section 300.320(a)(6)(i) reflects the language in Section 614(d)(1)(A)(i)(VI)(aa) of the Act and requires accommodations that are necessary to measure a child’s performance. Accommodations that allow a child to ‘participate’ in assessments could include accommodations that invalidate the child’s test score, thereby resulting in an assessment that does not ‘measure’ a child’s performance.” *2006 Commentary*, p. 46667.

E. Don’t the ‘Individualized Goals’ of IDEA conflict with the ‘All Students at Grade Level’ in NCLB?

The U.S. Department of Education answered this question in a 2005 Q&A document. The answer is as diplomatic as it is interesting:

“No. Both laws have the same goal of improving academic achievement through high expectations and high-quality education programs. *NCLB* works to achieve that goal by focusing on school accountability, teacher quality, parental involvement through access to information and choices about their children’s education, and the use of evidence-based instruction. *IDEA* complements those efforts by focusing specifically on how best to help students with disabilities meet academic goals.

“*NCLB* aims to improve the achievement of all students and recognizes that schools must ensure that all groups receive the support they need to achieve to high standards. That is why *NCLB* requires that schools look at the performance of specific subgroups of students, including students with disabilities, and holds schools accountable for their achievement. **By including students with disabilities in the overall accountability system, the law makes their achievement everybody’s business, not just the business of special education teachers.** Shining the light on the needs of students with disabilities draws attention to the responsibility of states, districts, and schools to target resources to improve the achievement of students with disabilities and to monitor closely the quality of services provided under *IDEA*.” *Working Together*, p. 1 (*bold emphasis added*).

A little commentary: Without doubt, both laws demand higher expectations for all students. The problem is that NCLB rather clearly states that all children can reach the same goal. Special education was created with the understanding that, because of disability, not all students can perform at grade-level. Note how the answer incorporates the concerns over regular education and special education sharing responsibility for special education students, articulated by the President’s Commission as “[c]hildren placed in special education are general education children first.” The tension between the grade-level goal and the student’s abilities has to be respected and somehow addressed in IEP decision-making.

LRE Rules and Resolution of the NCLB vs. IDEA tension. IDEA has addressed this type of tension before — the desire for students to be taught with their regular education peers and the need for some students to have at least some of their instruction in segregated settings. The LRE rules provide the perfect framework for addressing the tension between these laws. Legally, the focus of the modern IDEA regulations is that IEP goals and objectives be aimed toward acquiring the **skills and competencies that will facilitate the greatest possible involvement in the regular curriculum and placement while making meaningful educational progress.** IDEA has always recognized that the level of involvement in the regular curriculum and placement is an individualized determination, involving the interplay of educational benefit and LRE. Traditional LRE analysis (as discussed below) has always recognized that when in conflict, educational benefit trumps LRE.

IDEA’s Job #1 is educational benefit (Not LRE). There is a natural tension between the IDEA’s

purpose of providing educational benefit and its presumption of mainstream placement. When resolving the tension, however, educational benefit wins. “Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular education classroom cannot meet the handicapped child’s unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the student in regular education.” *Daniel R.R., supra*. See also, *Board of Education of Murphysboro v. Ill. Bd. of Educ.*, 21 IDELR 1046, 41 F.3d 1162, 1168 (7th Cir. 1994)(The Least Restrictive Environment Requirement “was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements.”); *Hartmann v. Loudoun County Bd. of Educ.*, 26 IDELR 167, 118 F.3d 996 (4th Cir. 1997)(“The IDEA encourages mainstreaming, but only to the extent that it does not prevent a child from receiving educational benefit. The evidence in this case demonstrates that Mark Hartmann was not making academic progress in a regular education classroom despite the provision of adequate supplementary aids and services.”).

See also, *Mr. & Mrs. P. v. Newington Board of Education*, 51 IDELR 2 (2d Cir. 2008). Despite the parents’ desire for 80% mainstreaming, some pull-out was necessary for reading, math and speech therapy, resulting in 74% mainstreaming — two-to-three hours a week less than desired by the parents. The parents’ demand appears based on an agreement by the Connecticut DOE in a class action settlement that 80 percent mainstreaming would be a desired outcome for disabled students. The court, focusing on this child, found the degree of mainstreaming appropriate. “While including students in the regular classroom as much as is practicable is undoubtedly a central goal of the IDEA, schools must attempt to achieve that goal in light of the equally important objective of providing an education appropriately tailored to each student’s particular needs.”

This position is hardly unique to the 2d Circuit.

- *Beth B. v. Lake Bluff School District*, 36 IDELR 121, 282 F.3d 493 (7th Cir. 2002). “The LRE requirement shows Congress’ strong preference in favor of mainstreaming, but does not require, or even suggest, doing so when the regular classroom setting provides an unsatisfactory education.”
- *Lachman v. Illinois State Bd of Educ.*, 441 IDELR 156, 852 F.2d 290 (7th Cir. 1988). Appropriate placement overrides the least restrictive environment where the student will require so much modification in the curriculum that the regular program has to be altered beyond recognition, resulting in limited educational value to the student.
- *City of Chicago School District 299*, 50 IDELR 300 (SEA IL 2008). “The IDEA requires mainstreaming to the maximum extent appropriate, not the maximum extent possible.”
- *B.S. v. Placentia-Yorba Linda USD*, 51 IDELR 237 (9th Cir. 2009)(unpublished). “We noted nearly 25 years ago that mainstreaming ‘is a policy which must be balanced with the primary objective of providing handicapped children with an “appropriate” education.’”
- *Wilson v. Marana Unified Sch. District*, 556 IDELR 101, 735 F.2d 1178, 1183 (9th Cir. 1984). “The findings that the educational and non-academic benefits to be derived from a mainstream program were minimal and the blended program would be better suited to meet B.S.’s unique abilities and needs are sufficient to overcome the preference for mainstreaming. The district court did not err in so determining.”
- *Greenwood v. Wissahickon School District*, 50 IDELR 280, 571 F. Supp. 2d 654 (E.D. Pa. 2008)(“Mainstreaming does not require inclusion in a regular classroom if doing so would jeopardize a student’s ability to achieve a meaningful educational benefit.”).

A little commentary: Just as the preference for mainstreaming cannot override the primary goal of educational benefit, neither can curricular LRE. As demonstrated below, for some students, full-time or even too much exposure to the grade-level curriculum can deny educational benefits.

What about the nonacademic benefits of mainstreaming? Even in situations where the student with disability is unable to gain any educational benefit from a regular education classroom, are there not inherent nonacademic benefits to be gained from mainstreaming? Absolutely.

“[E]ducational benefits are not mainstreaming’s only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child’s development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment.”
Daniel R.R., supra.

The problem is that while some sacrifice of educational benefit for exposure to nondisabled students is appropriate, a placement that offers only nonacademic benefits and no educational benefit cannot provide FAPE. *See also, Hartmann v. Loudoun County Bd. of Educ.*, 26 IDELR 167, 118 F.3d 996 (4th Cir. 1997)(“[T]he district court pointed to perceived improvement in Mark’s social skills due to interaction with his nondisabled peers. **Any such benefits, however, cannot outweigh his failure to progress academically in the regular classroom.** The mainstreaming provision represents recognition of the value of having disabled children interact with non-handicapped students. The fact that the provision only creates a presumption, however, reflects a congressional judgment that **receipt of such social benefits is ultimately a goal subordinate to the requirement that disabled children receive educational benefit.**”)(emphasis added).

It’s not semantics: “Inclusion” and “Mainstreaming” are different. A New York hearing officer provided this interesting distinction. “Although not defined by statute or regulation, the term ‘inclusion’ is generally recognized by educators to mean the placement of a child with a disability in a regular education class with the child’s age-appropriate peers. The child with a disability receives appropriate special education services to support his or her placement in the regular education class, while working towards the achievement of his or her IEP annual goals (*Application of a Child with a Disability*, Appeal No. 94-17). **Inclusion should not be confused with mainstreaming, which is the placement of a child with a disability in a regular education class with the expectation that he or she will meet the curriculum requirements for the class, with supplementary aids and services.**” *Board of Educ. of the City Sch. Dist. of Rochester*, 26 IDELR 823, fn. 1 (SEA NY 1997)(emphasis added). This distinction, and the language articulating it, have been adopted in subsequent decisions in other jurisdictions. *See, for example, West St. Paul-Mendota Heights-Eagan ISD #197*, 106 LRP 13928, fn. 30 (SEA Minn. 2004); *Los Angeles Unified School District*, 106 LRP 63892 (SEA CA 2006); *New Haven Board of Education*, 110 LRP 4313, fn. 62 (SEA CT 2009)(“[T]he Student was not performing grade level academic work in any meaningful manner without substantial assistance from an adult (whether his 1:1 Paraprofessional or Ms. Lewin); and ... the Student’s program was not mainstreaming, but rather was an inclusive program in which he was largely receiving ‘parallel instruction’ in the mainstream academic classes he attended.”). *See also, OSEP Memorandum 95-9*, 21 IDELR 1152 (OSEP 1994)(“IDEA does not use the term ‘inclusion’; consequently, the Department of Education has not defined this term.”) *See also, Beth B. v. Lake Bluff School District*, 36 IDELR 121, 282 F.3d 493 (7th Cir. 2002)(“This preference for mainstreaming demands a hard look and a careful analysis of the education Beth was receiving at Lake Bluff Middle School. Beth’s parents rely on misplaced language from *Rowley* to argue that so long as she was receiving any benefit — improvement in eye contact, or progress in responding to a request to ‘look’ or ‘touch’ — her removal would violate the LRE requirement. We cannot agree with this definition of satisfactory education.”)

While the NCLB expectation is a presumption of grade-level performance for each child, the IDEA fine-tunes that expectation so that the student receives maximum exposure to grade-level curriculum subject to the educational benefit requirement. Ultimately, appropriate progress in IDEA is measured by the student's ability — not that of nondisabled grade-level peers. **While the IEP goals are tied to the grade-level curriculum, the focus of the student's program will be on individualized progress.** LRE declares that when the student, with appropriate supplementary aids and services cannot be educated in the regular classroom, a more restrictive setting is possible. Similarly, Curricular LRE declares that when the student, with appropriate supplementary aids and services cannot achieve educational benefit from grade-level curriculum, a change in curriculum is possible.

II. Some Lessons from the LRE Case Law

While Curricular LRE can be traced back to IDEA '97, it is often elusive in the case law. The issue usually arises in the context of disputes over the least restrictive environment. Interestingly, the analytical framework established by a seminal LRE case, *Daniel R. R. v. State Board of Education*, 441 IDELR 433, 874 F.2d 1036 (5th Cir. 1989), provides a framework of questions or inquiries to assist a school in meeting its Curricular LRE duty. The *Daniel R.R.* test is as follows:

“First, we ask whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for a given child. See §1412(5)(B). 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.” *Id.*

Case law developed since *Daniel R. R.* has not altered the basic legal framework of the LRE inquiry. Presently, the *Daniel R.R.* two-prong approach appears to be the accepted test in the 2d, 3d, 5th, 9th, 10th and 11th Circuits. *Mr. & Mrs. P. v. Newington Board of Education*, 51 IDELR 2 (2d Cir. 2008). The Sixth and Eighth Circuits appear to follow the *Roncker Test*. *Roncker v. Walter, supra*, (“In a case where the segregated facility is considered superior [academically], 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.”) *A.W. v. Northwest R-1 School District*, 558 IDELR 294, 813 F.2d 158 (8th Cir. 1987).

The Curricular LRE Application. Note that the first part of the test asks IEP Teams to determine what can be done to provide the child with educational benefit in the regular classroom. The second part of the test keeps the student as close to the regular class as possible should educational benefit not be possible there. A similar construct for Curricular LRE logically follows. If appropriate school efforts (supplementary aides and services, and the continuum of educational placements) cannot provide the child with educational benefit at grade level, then the IEP Team must determine how close the student's curriculum can get to grade level while simultaneously providing educational benefit to the child.

A. LRE and Curricular LRE Are Statements of a Preference or a Default

Walczak v. Florida Union Free School District, 27 IDELR 1135, 142 F.3d 119 (2d Cir. 1998).

A kindergarten student diagnosed with multiple disabilities (including ADHD, developmental language disorder, obsessive compulsive disorder, and Tourette syndrome) was removed from the public school and placed by her parent in a private school for children with learning disabilities. When her progress was reviewed three years later, “the results were very disappointing. The 9-year-old child's reading skills were at the first-grade level. Her math scores were even poorer.” She was also experiencing a “panoply of behavioral and social problems” including volatility, insensitivity to others' feelings,

ignorance of basic social rules and conventions, and a lack of empathy with other people. The parents agreed to a placement at BOCES (special education cooperative) in a 12-student intermediate level class and provided additional group counseling, occupational therapy and speech therapy. An evaluator hired by the parent who had conducted an evaluation of the child in kindergarten noted “startling” improvement in behavior, reading scores at the high second-grade to third-grade level, and math scores at the second-grade level. Despite making consistent progress in the public school in other areas, “all parties recognized that one social problem persisted: B.W.’s refusal to interact with other children.”

The school proposed placement “in the higher functioning of two developmentally disabled classes” that were age and skill appropriate. With respect to social skills, “B.W. ranked at the bottom of the proposed grouping” but at the top “in terms of behavior.” Dr. Liss, the private evaluator recommended residential placement where “she would have around-the-clock reinforcement of appropriate behavior and constant interaction with peers.” In a letter to the school, the parents rejected the school’s proposal, explaining they wanted “to obtain the maximum interventions in [B.W.’s] self-development so that she could reach her true potential.” The litigation was filed by the parent seeking reimbursement for the private residential placement.

Both a hearing officer and state review officer upheld the school’s proposed placement. Significantly, the review officer looked to the reports of:

“B.W.’s two classroom teachers indicating that the child had advanced academically at BOCES to the point where she could work at the second- to third-grade level. **To the extent that B.W.’s progress was sometimes slow and inconsistent, the review officer held that this was more reflective of the nature and extent of the child’s disabilities than of any inherent inadequacy in the BOCES program.** ... To the extent Dr. Liss had also testified that B.W. could not make further social progress in a day program, the officer rejected this opinion, noting that Dr. Liss had not explained why the skills she deemed important — learning to live with others, take turns, say how she feels, smile at the appropriate time — could not be developed in a nonresidential program.” (Emphasis added).

The Court of Appeals focused on the parents’ desire for benefit, and apparent misunderstanding of LRE.

“The Walczaks argue that the statutory preference is primarily concerned with educating disabled children together with their nondisabled peers. They submit that in cases such as this one, where everyone recognizes that no mainstreaming is possible for B.W., the preference has no applicability. This court disagrees. The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families. A ‘residential placement is, by its nature, considerably more restrictive than local extended day programming. ... Thus, ‘even in close cases in which mainstreaming is not a feasible alternative,’ the statutory preference for a least restrictive environment applies. ... While the parents’ wishes are understandable, IDEA does not require states to maximize the potential of handicapped children. ... Indeed, it would violate IDEA’s preference for the least restrictive educational setting to move a student from a day program where she is making progress to a residential facility simply because the latter is thought to offer superior opportunities.” (internal citations omitted.)

The Curricular LRE Application: The regular grade-level curriculum is a preference. LRE recognizes a preference for the mainstream, and should that not be possible, the preference for education is the least restrictive environment where the student can receive the required services necessary for FAPE. Is not the same dynamic true with respect to the preference of grade-level performance? If the student cannot achieve at grade level, is the preference (analogizing to the rejected *Walczak* argument) simply dead and the IEP Team has full discretion to set goals without reference to grade-level curriculum, or does

Curricular LRE likewise require that the IEP Team creates goals as close to the grade-level curriculum as possible while still providing educational benefit based on the student's abilities? The "all or nothing" approach contradicts Congress' desire for special education students to have access in the general curriculum "to the maximum extent possible."

B. Has the school taken steps to accommodate the student in the regular curriculum?

Fresno Unified School District, 52 IDELR 150 (SEA CA 2009).

A 17-year-old student with mild mental retardation was served in the magnet high school in general education classes with one-to-one aide support, and a curriculum modified by a resource specialist teacher. Her IEP Team had determined that she was on a "non-diploma track," meaning that she did not need to accumulate credits to graduate with a diploma, and would not need to take the state exit level exam. She would be eligible for a letter of recommendation upon completion of four years of high school. The student had gained enrollment at the magnet school through its lottery system. At the time of enrollment in the magnet school, the student's reading skills were at the second-grade level, with math skills at about the same level.

After a year and a half in this placement, an assessment revealed that the student's present levels of performance in math and language arts had not substantially changed, and her goals remained "substantially the same." There appears to be no discussion of progress reports "and the team did not discuss with or mention to mother that student had not progressed in her program at her functional level and abilities." The district proposed moving the student to a comprehensive (apparently non-magnet) high school, with placement in a self-contained mild/moderate life skills class. When the parent refused, the district filed for due process.

The school district argued that "there is no level of supplemental aids or supports that reasonably can permit student to receive academic or nonacademic benefit from inclusion in general education classes, leading to a conclusion that a self-contained mild/moderate SDC is a more appropriate placement." Put simply, the school's position was that since the student does not perform at grade level in her core academic classes, she receives no academic benefit from the regular classroom. The parent's argument was that progress in both academic and nonacademic areas was occurring, but not at grade level. Instead, the progress should be viewed based on the student's abilities. Parent points to student's success in the modified curriculum in Floral Design, Intro to Agricultural Science, Art, and Adaptive P.E. Further, the student made "some progress" toward her IEP goals (at her functional level) in her core math and English courses, although she did not perform at grade level.

The ALJ noted the student's academic progress on her IEP goals, and that the student was not a behavior problem, had improved her social interaction with others, had friends at school, and was extensively involved in extracurricular activities as well. The school's analysis was flawed, however, as the school equated grade level performance with educational benefit. The ALJ wrote:

Testimony that student did not gain academic benefit because she did not make progress at grade level does not support the district's position. ... Student was not on diploma track because of her disability. She was not expected to earn credits toward graduation and her progress in general education classes could not be measured by her inability to perform at grade level. The *Rowley* court made clear there is no one test for measuring adequacy of educational benefits conferred under an IEP and a student may derive educational benefit if he makes no progress toward some of the IEP goals, as long as he makes progress toward other goals at his functional levels.

In short, the school loses. The ALJ determined that "a student's failure to perform at grade level is not necessarily indicative of a denial of FAPE, as long as the student is making progress commensurate with his abilities." The student's unique needs can be met at the magnet high school.

A little commentary: **Did it make a difference that the school failed to force a more restrictive placement and the core regular ed teachers appeared “disengaged”?** Probably. An interesting undercurrent in the decision is a description of the efforts by regular education core content teachers in algebra and English. Note the following comments by the hearing officer. “Student was provided assistance by her one-to-one *aide with occasional assistance* from the general education teacher.” The efforts of the algebra teacher, specifically, are described this way:

[Teacher] does not believe student belongs in her class because she is not able to do grade level work. [Teacher] does not track student’s progress. ... [Teacher] does not believe student has received non-academic benefits because student does not interact with the students who are doing grade-level work. [Teacher] has not encouraged social interaction in the classroom. She has not considered making changes in the classroom to foster social interaction or enhance academic benefit to student. [Teacher] attended several of student’s IEP team meetings and did not tell the IEP team that student was not making progress or that she was a problem student.

The efforts of the English teacher, specifically, are described this way:

[Teacher] does not consider student to be ‘her student’ because student was not on her attendance roll, student sits in the back of her classroom with her ‘tutor,’ she does not provide student’s work assignments, and did not grade her work. ... [Teacher] did not get involved in the development of her curriculum or her work assignments. She never discussed Student’s progress or lack thereof in her class with mother. She attended the most recent IEP team meeting last semester as a formality. She reported to the IEP team that student was in her classroom, had a nice personality, and was not a problem. She never complained about student or told district that student should not be in her classroom. [Teacher] did not know whether student had friends or socialized with the students in her class.

The Curricular LRE Application: It would be difficult for a school to argue that grade-level performance, or any other level of performance is beyond the student when the school has not made the required effort to provide an appropriate IEP or implement an appropriate IEP. Where the focus of the analysis is on the child’s performance in the regular classroom, the regular classroom teacher’s efforts on the student’s behalf are essential. The *Oberti* case, below, highlights another variation on the point.

C. Were efforts at accommodating the child sufficient efforts (not merely token attempts)?

Oberti v. Board of Educ. of the Borough of Clementon School District, 19 IDELR 908, 995 F.2d 1204 (3d Cir. 1993).

In *Oberti*, a student with Down syndrome was placed in a half-day developmental kindergarten class in the morning and a half-day special education class in another school district in the afternoon. While he made academic progress in the developmental class over the course of the year, his behavior was problematic there, including repeated toileting accidents, temper tantrums, crawling and hiding under furniture, touching, hitting, and spitting on other children, and several instances of striking the teacher and aide. His IEP had no goals for the developmental class other than “observe, model and socialize with nondisabled children.” Further, there was no behavior intervention plan to address these behaviors (which behaviors were not reported in the afternoon special education class), and there was no consultation between the morning developmental class teacher and the special education teacher from the other district who taught the student in the afternoon. A few months prior to the end of the school year, an aide was added to the developmental class, but that change “did little to resolve the behavioral problems.”

In anticipation of the next school year, the school proposed a full-day special education class for children classified as “educable mentally retarded” in a nearby district. The parent requested a regular education kindergarten class in the home district. The impasse was broken by an agreement that the school would place the student in a special education class for students labeled “multiply handicapped” in a public elementary school in a nearby district (the Winslow Class), would explore mainstreaming possibilities there, and consider a future placement for the student in what appears to be his home school. While the student made academic progress in the Winslow Class, became toilet trained, and improved behaviorally, the parents filed for due process upon learning that the district was making no plans to mainstream the student, and the student had no meaningful contact with nondisabled peers.

Both the District Court and 3d Circuit rejected the ALJ’s findings, and based on testimony by two experts who were not part of the administrative record, concluded that the school had violated IDEA’s mainstreaming requirement. The 3d Circuit was particularly interested in testimony by the parents’ experts on the “commonly applied strategies” available to make the regular classroom appropriate for the student:

“In particular, the court was persuaded by the *Obertis*’ experts that many of the special education techniques used in the Winslow class could be implemented in a regular classroom. **The court also found that the School District did not make reasonable efforts to include Rafael in a regular classroom with supplementary aids and services (e.g., an itinerant teacher trained in aiding students with mental retardation, a behavior management program, modification of the regular curriculum to accommodate Rafael, and special education training and consultation for the regular teacher);** that Rafael’s behavior problems during the 1989-90 school year in the developmental kindergarten class were largely the result of the School District’s failure to provide adequate supplementary aids and services; and that the record did not support the School District’s contention that Rafael would present similar behavior problems at that time (more than two years after the kindergarten class) if included in a regular classroom setting with adequate aids and services. **The court declined to defer to the findings of the ALJ because it found that ‘they were largely and improperly based upon Rafael’s behavior problems in the developmental kindergarten as well as upon his intellectual limitations, without proper consideration of the inadequate level of supplementary aids and services provided by the School District.’** (Internal citations removed and emphasis added).

In short, the student’s inability to be educated in the regular classroom was not due to disability, but the school’s refusal to explore and implement appropriate supports — one of the two basic problems IDEA was created to address.

See also, Daniel R.R., supra (“The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.”) *Greenwood v. Wissahickon School District*, 50 IDELR 280, 571 F.Supp. 2d 654 (E.D. Pa. 2008)(“A school district must give serious consideration to the student’s inclusion in a regular classroom with supplementary aids and services. Mere token gestures for the sake of inclusion will not suffice.”)

Of course, it’s possible for the school to have provided appropriate supplementary aids and services so as to satisfy this element. *See, for example, J.S. v. North Colonie Central School District*, 51 IDELR 150, 586 F.Supp. 2d 274 (N.D.N.Y. 2008). Parents objected to an IEP removing the student from a regular education global history and English class based on student’s difficulty with language-based subjects and expert testimony on the need for small group instruction in these classes. According to undisputed evidence at the hearing, student’s significant deficiencies in language, reading, writing and social skills made education in these two general education classes ineffective, despite significant supplementary aids and services. The hearing officer found credible testimony that “plaintiff isolated

himself in the general classroom setting when faced with difficulties understanding materials presented to him and requires constant attention from his personal aide to take notes or participate in class.”

Unlike *Oberti*, the District Court found overwhelming evidence of efforts to make the general curriculum appropriate. “[D]efendants have provided a myriad of services and accommodations in an effort to allow plaintiff to succeed in the mainstream environment, including a full-time one-on-one aide, note-taking performed by the aide, notes sent home to plaintiff’s parents, extended time for assignments, instructional feedback to plaintiff’s parents, teacher, and service provider consultations, visual aids, previewing of tests at home, alternative test locations, use of a calculator and computer, and the modification of test content.” The proposed IEP was appropriate.

A little commentary: One very interesting fact in the case is that during the pendency of the administrative hearing while stay-put kept the student in the regular global history class, he achieved a passing average of 73 (having achieved quarterly grades of 75, 71, and 65 in the same class the previous year). On its face, the passing grades are certainly some evidence that the student was capable of learning the material. The District Court, however, was not impressed, as it viewed the grades in the context of missing educational opportunities that were more valuable. Citing the school psychologist’s testimony, the court found that rather than repeatedly taking the global history course (since he failed exit level exams in the course numerous times), he should have been focusing on other skills as he could not possibly achieve a diploma before he aged out of services.

“[I]t’s so off point in thinking that his time is worth spending in trying to earn Regents credits when his functional impairments are so grave and significant and has so utterly affected the rest of his life. So the downside is the functional cost, the time we have to use this mode of instruction that could actually increase his level of independence as he emerges into adulthood. So there’s an enormous downside. It’s not just time away. It’s time for him to withdraw into his internal world, which, again, in my opinion, makes him more disabled.”

D. Will most of the teacher’s time be devoted to the student with disability or to modifying the curriculum?

Greenwood v. Wissahickon School District, 50 IDELR 280, 571 F. Supp. 2d 654 (E.D. Pa. 2008).

“Angela’s regular education social studies teacher “testified that he engaged the student one-on-one at least twice a day, discussing her flashcards, explaining the class material, or clarifying how her cards related to the general curriculum. Despite having a class of 28 students, he sometimes spent ninety percent of the class time solely with Angela.” The District Court found that Angela’s needs demanded attention that resulted in the teacher ignoring other students in the class — one of the factors used to determine whether the classroom placement is the LRE. (*See additional discussion of Greenwood infra.*)

See also, Brillon v. Klein Independent School District, 41 IDELR 121 (5th Cir. 2004)(*unpublished*). “[T]o implement the goals and objectives that the parties agreed were appropriate for Ethan in the second grade, the 2001 ARD committee reported that the ‘curriculum would have to be modified beyond recognition.’ Ethan’s second-grade general education teacher likewise testified at the due process hearing that in order to implement Ethan’s proposed IEP goals and objectives, ‘the level would be so low that it would change the curriculum beyond recognition,’ and that she would be forced to operate ‘a classroom within a class.’ Unlike Ethan’s first-grade IEP, which provided that Ethan would learn two regular education concepts per unit in science and social studies, his second-grade IEP focused on having Ethan achieve developmentally appropriate goals and objectives not specifically drawn from the second-grade curriculum. Therefore, while we agree with the district court that the school district adequately accommodated Ethan in regular education during the first grade, we also conclude that the modifications required to implement Ethan’s second-grade IEP goals

in the regular education classroom would have been unduly burdensome.”

Likewise, mainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student.

The Curricular LRE Application: Some students simply are not ready for grade-level curriculum. While traditionally, many of those children would have IEPs developed based on their level of functioning, with academics playing only a minor role, IDEA requires that all students with disabilities have academic and functional goals “to enable the child to be involved in and make progress in the general education curriculum.” §300.320(a)(2)(A)(See discussion of Standards-Based IEPs below.)

E. Can the disabled student receive educational benefit from regular education?

Brillon v. Klein Independent School District, 41 IDELR 121 (5th Cir. 2004)(Unpublished).

“The hearing officer specifically found, with regard to the second grade, that Ethan was ‘not making academic progress in the general education setting.’ Ethan’s speech teacher, who had known him for six years, testified that she saw ‘a breakdown of his overall demeanor’ at the end of his first-grade year, which she thought was because ‘he was over his head.’ Moreover, Ethan’s second-grade general education teacher testified that he was unable to master any of the second-grade TEKS (state mandated Texas Essential Knowledge and Skills) that she was teaching, and that he was not benefitting academically in her classroom. Thus, we are not persuaded that mainstreaming beyond that contemplated in the school district’s proposed second-grade IEP would have provided Ethan an educational benefit, and defer to the school officials in this regard.”

F. What has been the child’s overall educational experience in the regular classroom?

City of Chicago School District 299, 50 IDELR 300 (SEA IL 2008).

“The Student’s disabilities affect his ability to process sounds and thus affects his speech and his reading. He has a severe deficit which requires intensive remediation. He does not recognize short vowels. He does not have any phonological skills. His reading is inaccurate. He is not able to read, write or spell independently. The evidence also supports that from a very early stage the District was aware of the Student’s deficits, yet failed to provide him with the intensive instruction which he needed.” The school argues that educational benefit was conferred based on Student’s receipt of passing grades (mainly A’s and B’s) and success on modified tests. **“However, after listening to testimony it is quite clear that the Student has been given extreme modifications and accommodations which have masked the Student’s struggling and that the benchmarks set for him are too low. He has not been given an appropriate program in the necessary intensity to address his learning deficits.”** ... (Emphasis added).

“In this case the Student has average to above average intelligence, and as stated by his teachers has benefited from his educational program. However, the evidence supports that he is not at all independent in his school work, requiring significant modifications and accommodations. He cannot read, write or spell and is still having significant issues with his speech. The District has failed to provide him with a program which addresses his deficits with the necessary intensity. The court in *J.L. and M.L. v. Mercer Island School District*, 46 IDELR 273 (W.D. Wash. 2006) found that **‘employing accommodations and other compensatory strategies without increasing a student’s skill level does not represent compliance with the IDEA. It is not sufficient to simply ‘escort’ an educationally challenged student through the school system.** The District has failed to provide for his disability.” (Emphasis added).

It is true that a District does not have to maximize educational benefit, however it still needs to provide a program that is appropriate and meets the student's identified needs. The evidence supports that the Student needs a program which meets a certain scope and sequence. The District's own specialist stated that the District has a Wilson reading program which is very intensive, structured and requires a multi-year commitment from the students. She also stated that she never tested the Student nor was the Student referred to her prior to the hearing request. ..."

Critical of the school's setting low goals, providing services in such a way as to create dependence rather than independence, and delayed provision of the services necessary for appropriate progress (an intensive, structured reading program with scope and sequence), the hearing officer found de minimus benefit — a denial of FAPE. "From the evidence and testimony, it is clear that the Student's disability is severe and requires significant remediation. The District has failed to provide the Student with appropriate services to service his needs as required by law. They have not provided him the intensive remediation he needs to become an independent reader and writer. Therefore, the Parents' request for placement at Hyde Park Day School is granted."

A little commentary: While the *Mercer* case cited in *Chicago Public Schools* was later vacated in part by the 9th Circuit (52 IDELR 241), the District Court's language provides an appropriate warning in very memorable language.

III. One Approach to Curricular LRE: Standards-Based IEPs

While there are many ways to approach the school's Curricular LRE duty, the Standards-Based IEP approach has gathered momentum, and an approving nod from USDE in commentary to the 2 percent rule. *2007 Assessment*, p. 17758 *fn* 2. Project Forum at the National Association of State Directors of Special Education is a cooperative agreement funded by the U.S. Department of Education's Office of Special Education Programs. Project Forum has focused on the area of Standards-Based IEPs, and by analyzing current practices, conducting interviews with state special education departments, reviewing state practices and IEP forms, and providing technical assistance to the field, has promoted the incorporation of grade-level curriculum standards into IEPs. One such publication, *Standards-Based IEPs: Implementation in Selected States*, Eileen Ahearn, NASDE (May 2006)(hereinafter "Ahearn 2006"), provides interesting insight into the evolution of the IEP with respect to academics achievement, and thoughts on implementation.

In the initial implementation of the special education law, IEPs stressed a **developmental approach** that focused on attaining skills related to readiness and little attention was paid to chronological age in designing educational programs, especially for children with more severe disabilities. As described in the article by *Browder et al.* (2003, pp. 166-68), the developmental model arose to fill the curriculum void for this population, adapting the early childhood curriculum based on the mental age assessed for the child. This model was rejected in the 1980s with the adoption of the concept of normalization. At this point, interest shifted to a more **functional approach** with a focus on the ultimate goal of preparing students for life in the community with only minimal attention to academics. This was a significant change because the emphasis shifted at least in part to teaching chronologically age-appropriate skills. However, special education was widely considered to be 'a place' where students with disabilities attended school and their IEPs prescribed a curriculum that was different from the general education for students at the same grade level. ...

At a steadily increasing pace through the 1990s, IEPs began to provide for students with disabilities to spend more time in general education settings during the school day. Part of the 'social inclusion philosophy' (*Browder et al.* (2003, p. 167), this movement, first called **mainstreaming and then inclusion**, started out with emphasis on having students spend time in regular classes such as art or

music or nonacademic activities such as lunch or physical education. The trend expanded and strengthened in the 1990s and moved toward integrating students with disabilities into the academic component of the regular education classroom. **It culminated in the emphasis on providing access to the regular education curriculum for students with disabilities that first appeared in the 1997 amendments to IDEA and was reinforced in NCLB and the subsequent reauthorization of IDEA in 2004.** A survey completed by Project Forum in 1999 and reported in the document, *Linkage of the IEP to the General Education Curriculum*⁴ confirmed that many states were taking initial steps toward what was beginning to be called standards-based IEPs to provide alignment between the goals for students with disabilities and the standards that had become the basis of each state's general education curriculum. *Ahearn, p. 3-4 (emphasis added).*

Since each state has developed or is developing its own response to the Curricular LRE duty, the specific actions to be taken, questions to be answered, etc., are uniquely state issues. For specific directions, see your state education agency's Web site for forms and technical assistance. Additional information including a seven-step process to creating Standards-based IEPs in *Standards Based Individualized Education Program Examples*, is available at the NASDE Web site, www.projectforum.org. Other web resources include:

The National Center on Educational Outcomes, www.cehd.umn.edu/NCEO.

The National Alternate Assessment Center, www.naacpartners.org.

A. Present Levels of Performance become very important. "Under a standards-based approach, discussion of present performance levels starts from a discussion of the state standards the student has achieved and concentrates on identifying the skills and knowledge the student has already acquired that will allow him/her to work toward standards for the current grade level." *Ahearn, p. 5.*

See for example, Bend-Lapine School District v. K.H., 43 IDELR 191 (D.C. Or. 2005), *affirmed*, 48 IDELR 33 (9th Cir. 2007). 9th Circuit affirms lower court ruling that the Student was denied FAPE where the IEP failed to establish a baseline of student's behaviors and set measurable goals. Wrote the District Court:

Without that baseline of current performance and/or behavior, it is difficult to draft measurable and relevant annual goals. The District provided the following information regarding K.H.'s 'behaviors,' presumably based on K.H.'s disability: her behaviors 'resulted in short term suspensions,' K.H. had been physically and verbally aggressive, and K.H. 'had been involved in some sexual harassment incidents.' It was further noted that K.H. had difficulty maintaining friendships, verified by the behavioral inventory, and that people 'don't always enjoy [K.H.'s] company.' Finally, K.H.'s 'inappropriate behaviors interfere with her success in the classroom both socially and academically.'

The ALJ correctly found that the statement quoted above was insufficient to determine an accurate baseline of K.H.'s behaviors affected by her disability. The information explaining K.H.'s current level of performance failed to provide any measurable level of problematic behaviors, including how many times K.H. had been suspended as a result of the behaviors associated with her disability, or how many instances and in what settings had K.H. been verbally aggressive.

See also, Laura P. v. Haverford School District, 51 IDELR 183 (E.D. Pa. 2008) ("The Hearing Officer found beginning in November 2004, **Vivian's IEPs were 'repetitive without indication of either progress or a change in instruction' and 'lacked the systematic present levels of educational performance, measurable annual goals, and appropriate progress monitoring ... necessary to constitute FAPE.'** These findings are supported by the record. Vivian's June 2003 and February 2004 IEPs, though not flawless, carefully address whether previously established goals were reached, by documenting current performance levels reflecting advancement from prior IEPs, and establish new

goals based upon this assessment. Subsequent IEPs, however, omit baseline skill levels, inexplicably report identical achievement levels from one IEP to the next while declaring ‘great’ progress in ‘all’ areas of the IEP, fail to respond to Vivian’s apparent stagnation in development, do not provide a measure for progress reported, and goals set in each IEP do not correspond to Vivian’s actual performance in attaining goals established in prior IEPs. ... In light of the repetitiveness and lack of meaningful progress reporting in her IEPs, **I must conclude Vivian was denied FAPE for that period. The IEPs failed to report accurately Vivian’s abilities and outline the goals of her education, resulting in erroneous specifications for the services recommended for Vivian.**”(Emphasis added).

See also, Farmington ISD #192, 109 LRP 32944 (SEA MN 2007) (“At a minimum, the IEP must include PLEP statements that clearly describes how the Student’s disability affects his involvement and progress in the general curriculum. This may be accomplished by stating where the Student is performing in relation to the current competencies all eighth-graders are expected to have developed by the start of the eighth grade. Appropriate goals to aid in closing the achievement gap for the Student must then be determined, and then the services necessary to help the Student reach those goals.”)

B. Align IEP goals with the state’s grade-level curriculum. *See, for example, Ysleta ISD, 103 LRP 29836 (SEA TX 2003)* “YISD declined to write specific goals in math for Eva because of its view that she could perform in a regular education math class working on the regular state curriculum.” The school did include a goal with respect to mastering independent study skills. Eva passed the regular education algebra class in ninth grade (although she did not pass the state’s end-of-course-exam), failed the first semester of regular education geometry, but was passing the class in the spring of her 10th-grade year at the time of the hearing. Wrote the hearing officer, “Although there might be merit to the Petitioner’s allegations that appropriate goals addressing Eva’s learning disabilities were not included in the IEP, she nonetheless is receiving educational benefit in the schooling arrangement provided by YISD. No denial of FAPE was found. *See, also Ahearn, supra, p. 5* (“One of the problems plaguing IEPs in the past is that despite IEP Team discussion of academic areas, “the emphasis would most often be on the child’s acquisition of basic developmental and/or functional skills unrelated to a specific academic area.”)

Where the student is not expected to perform at grade level, the IEP Team’s efforts to determine the student’s abilities and appropriate goals becomes critical.

[T]he input from evaluations and other sources are used to identify the skills and knowledge the individual student needs to achieve the academic standards for the current or subsequent grade level. As stated in the California training materials, the IEP goals are “the plan for bridging the gap between where the student is and where the student needs to be in relation to the state or district content standards.” The training materials go on to say: ‘By incorporating standards into our Individualized Education Programs, the IEP can now tie individual student needs to state standards and access and progress in the general education curriculum. This promotes Individualized Education Programs that allow general educators and special educators to speak the same language.’” *Ahearn, p. 5, internal citations omitted.*

See, for example, Rosemount-Apple Valley ISD #196, 107 LRP 36767 (SEA MN 2007). An IDEA violation was found where the student’s IEP lacked baseline data upon which progress could be measured. Required PLEP (Present Levels of Educational Performance) statements were missing, and (consequently) goals were vague making any progress immeasurable. Wrote the hearing officer:

“[A]n IEP that focuses on ensuring that a child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.” *Fed. Reg. Vol. 71, No. 156, Monday, August 14, 2006, p. 46662.* ‘Academic content standards are statements of the knowledge and skills that schools are expected to teach and students are expected to learn.’ USDOE Non-regulatory

Guidance on Modified Academic Achievement Standards, April, 2007, A-4, pp. 12-13. ‘IEP goals based on grade-level academic content standards are goals that address the skills specified in the content standards for the grade in which a student is enrolled.’ *Id.* at E-1, p. 27.

Farmington ISD #192, 109 LRP 32944 (SEA MN 2007)(“Adequate educational progress would be shown by a general increase in the number of competencies or skills reached in each grade completed, not a greater number of competencies or skills failing to be reached. The Student’s limited progress in the general curriculum (the same curriculum as for non-disabled children), the lack of progress on his individual goals and his continued inability to independently solve basic math problems, indicates his program has not been adequate.”)

“Some states with standards-based IEPs allow the IEP team to consider goals related to standards below the current grade level for the student, usually because that student has not had access to academic standards in the past. Such students are expected to make more than one year of progress through standards-based instruction because the needed skills are targeted by the teacher. Teachers scaffold instruction (i.e., provide supports as necessary) and prerequisite skills are used to work toward the grade-level standards. For example, a student who cannot read 6th grade materials may work toward a grade-level standard that calls for analyzing written materials. The cognitive processes associated with that higher level reading skill can still be taught while the student accesses the grade-level materials in a different way. Such a student may also have some lower level reading skills included as goals.” *Ahearn*, p. 8.

C. Are the special education and related aids and services in the IEP necessary to provide educational benefit, or do they reduce opportunities for student achievement?

While not explicit in the IDEA, quite implicit is the educational principle that special education should not do for a student what she can do for herself. Put differently, special education is not meant to replace student effort, but to ensure that student effort is encouraged and has meaning. A variety of cases on the point follow.

Can an inappropriate accommodation negatively impact educational progress? Yep.

North Lawrence (IN) Community Schools, 38 IDELR 194 (OCR 2002).

A common problem encountered by schools is a disability related need, and a parent’s strong preference for a particular accommodation to address the need. In this case, the student was diabetic, and the parent was concerned that his needs for water were being disregarded during the school day as he had been denied access to the water fountain on a variety of occasions. The district was apparently concerned that too frequent water breaks were interrupting the educational process and interfering with the student’s ability to stay on task. To provide proper hydration while maintaining the student’s presence in the classroom, the district suggested allowing the student to keep a water bottle at his desk. After an initial objection for unspecified “hygiene” reasons and logistical concerns about refilling it, the parent agreed to the accommodation, and OCR determined the matter closed.

Assistive Technology: You can use a calculator, just not THAT calculator.

Sherman v. Mamaroneck Union Free School District, 39 IDELR 181, 340 F.3d 87 (2d Cir. 2003).

A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator, but provided that the student’s teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student’s parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student’s teachers were

convinced that he could learn to factor, and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. “It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor.” **The TI-92 is inappropriate because “it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts.”** The court concluded that the student’s failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student’s lack of effort. “The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aids requested, to succeed but nonetheless fails. **If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires.**” The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts. (Emphasis added).

Cases involving 1-1 Aides demonstrate how services can (when inappropriately provided or implemented) reduce student benefit.

Won’t a 1-1 aide make the regular classroom appropriate for all students? No.

Department of Education, State of Hawaii, 109 LRP 19681 (SEA HI 2008).

While the assistance of an aide can make a regular classroom accessible and beneficial for some students, for others a more restrictive setting will be required. Consider these facts from a Hawaii case involving the impact of an aide on the appropriateness of a regular kindergarten class.

“The evidence showed that during August and September 2007, the SSC, Board Certified Behavior Analyst, and Psychologist #2 observed Student in Student’s kindergarten classroom setting. According to the observations, Student required a lot of cueing or prompting by Student’s skills trainer in order to attend and/or participate in the class. Student could not understand the teacher’s verbal instructions unless prompted by Student’s skills trainer. Student, a passive, solitary child, was not sufficiently engaged during the class to gain meaningful educational benefits. Student’s responses and actions in class were solely based on the prompting done by Student’s skills trainer and held no independent meaning for Student. Student was also engaged in self-stimulatory behaviors, which interfered with Student’s focus and attention to the teacher and the lesson. Student was not at the same skill level as Student’s peers and could not keep up with the class.

“According to testimony from Psychologist #2 and the Board Certified Behavior Analyst, the kindergarten setting was inappropriate for Student because Student was not able to participate in class in a meaningful way. Many of the tasks in the kindergarten classroom required interactive, language-based responses or both. Student did not currently possess this level of skill. **Even with the constant prompting or cueing by Student’s skills trainer, Student lacked the necessary understanding, language, and communication skills to benefit from a kindergarten program. Student was not benefiting from Student’s kindergarten placement.** Student’s language and communication skill levels were not sufficient to allow for meaningful class participation. Student required a program in a pre-school setting.” (emphasis added).

Even if appropriate, unless the aide is well-trained and effective, progress can suffer.

A.C. v. Board of Education of the Chappaqua Central Sch. Dist., 47 IDELR 294 (S.D.N.Y. 2007).

The use of an aide or paraprofessional can assist a student in accessing the regular curriculum. However, when provided inappropriately, the service can reduce independence and skill acquisition. The concern is often referenced as “learned helplessness.” A case from New York

involving special education services for a student with pervasive developmental disorder provides a helpful introduction to the concerns arising from inappropriate assistance.

“The Court holds that the IEP was not reasonably calculated to afford M.C. a FAPE. It is true that the District provided M.C. with extensive ‘support,’ most notably in the form of a 1:1 aide throughout the day. But as the IHO noted, **‘the constant presence of a 1:1 aide may be viewed as a crutch or palliative measure, especially where, as here, lack of independence is one of the student’s most significant deficits. The 1:1 aide may have been very inhibiting in the proposed middle school placement, where he or she would have followed M from class to class.’**”

“Defendant’s failure to address the need to increase M’s independence conforms to the pattern of ‘learned helplessness’ that was being fostered by the District’s IEP. **This approach is epitomized by the District’s designation of a separate bathroom facility for M.C, and the fact that the District admitted that there was no ‘instruction goal aimed to have M.C. use a community bathroom.’** By failing to address M.C.’s need to increase his independence, and indeed by fostering ‘learned helplessness’ through the indefinite use of a 1:1 aide, the Court concludes that the IEP was substantively inadequate and not reasonably calculated to provide M.C. with a FAPE.” (Emphasis added).

Learned helplessness is increasingly common language in IDEA decisions. The language focuses on the desired goal of independence, together with the recognition that excessive services or inappropriate services may negatively impact on a student’s acquisition of skills. When the school does for the child what he should do for him or herself, educational opportunity can be lost.

When help is provided matters. “Recognizing []’s need for independence, the paraprofessional in Mrs. Ringler’s room does not sit next to [] but instead circles the room and helps [] only when needed. This focus on independence comes not only from the parents, but also from outside experts and consultants. The 1998 Cappers Evaluation recognized that too much assistance could lead to a learned helplessness and a lack of confidence.” *USD #253, 102 LRP 2897 (SEA KS 2000)*(internal citations omitted).

How the student is helped matters. “While at lunch, Dr. Cooper observed [that] an adult aide obtained food and other items for this Student. The aide also verbally directed this Student while she ate and the aide repeatedly wiped her mouth. In Dr. Cooper’s opinion, the utilization of the aide in this manner was ‘terrible.’ Dr. Cooper opined that it is highly likely that this Student has the skills to perform lunchroom activities; and, if she did not have such skills, the District should focus on teaching her how to perform mealtime activities, rather than perform the activities for her. Dr. Cooper saw no evidence that the District had paid any attention to her current and/or future needs in this area, and she testified that the District’s failure in this regard contributes to her ‘learned helplessness.’” *Jefferson County Board of Education, 103 LRP 7409 (SEA AL 2003)*.

The importance of timely support and fading assistance in the provision of services by an aide. “Examination of the IEPs, progress reports, work samples, and testimony of School staff show that the School District was able to achieve this balance. The IEPs that the School District proposed gave Seb an opportunity to do many skills (i.e. banking, laundry, accessing transportation) with support and fading assistance. The progress reports and communication logs show that Seb was able to do tasks with gradual fading and less cueing and in some cases independently. BICO did not put Seb on public transportation alone but provided him with repeated training in the classroom and in the community. **The School District began by having staff ride with Seb on the van that had limited passengers, some of whom Seb knew, with a limited amount of drivers who Seb knew. This assistance was faded when Seb was ready with staff shadowing the van to**

having Seb get on the bus with only a staff member or a work employee at either end. Similarly, when Seb first began his vocational placements, Ms. Lapointe had more frequent contact with the employers and then began to fade her daily on-site supervision only when the employers and Seb were comfortable. While Ms. Lapointe did not make visits on-site frequently, she did maintain frequent phone contact, made accommodations when necessary and the employers were able to adequately supervise Seb because Ms. Lapointe was available and the employers called her when they needed her.” *King Philip Public Schools*, 52 IDELR 29 (SEA MA 2009).

IV. Some Miscellaneous Points

A. Staff training is critical.

Changing the way that IEPs are developed and providing special education students more access and progress in the regular curriculum requires training. A few thoughts...

“There was strong agreement among those interviewed that professional development related to the involvement of state standards in IEPs is a critical and ongoing need. For the most part, special education staff need detailed groundwork in the state standards and then targeted professional development on applying standards to the IEP process. Many of those interviewed stressed the importance of making clear the message that standards-based goals are not just the standard reworded into a goal. The involvement of general education staff was described by one interviewee as crucial because they are the experts in the general education curriculum, an area where special education staff may lack expertise. Not only does professional development have to be delivered often, but its content must extend into many areas. One respondent emphasized the importance of providing clear information about how to assess a student’s current performance in the context of state standards in order to support the development of standards-based goals.” *Ahearn*, at 9.

The Office of Special Education and Rehabilitative Services provided the following observation on the training of regular education personnel to share responsibility for special education students.

“Despite this history of policies promoting the inclusion of students with disabilities in the general education environment, according to the National Center for Education Statistics (NCES, 2000), **67 percent of public school teachers reported that they did not feel very well prepared to address the needs of students with disabilities in their classrooms.** For example, during the 2004–2005 academic year, according to the Study of State and Local Implementation of the Individuals with Disabilities Education Act (SLIIDEA), school principals reported that general education teachers were generally much less prepared than special educators to use accommodations in instruction and assessment to improve the academic performance of students with individualized education programs (IEPs). The promise of NCLB and IDEA to ensure that students with disabilities have IEPs to promote their access to and participation and progress in the general education curriculum in the least restrictive environment can only be realized if schools are staffed with highly qualified personnel. These personnel should be able to provide content-rich, standards-based curriculum and make any needed accommodations, modifications, and adaptations for curriculum, instruction, and assessment.” 71 *Fed. Reg.* 35,261 (2006)(emphasis added).

B. Can a more restrictive placement be required for appropriate access to grade-level curriculum? Absolutely.

S.K. v. Parsippany-Troy Hills Board of Education, 51 IDELR 106 (D.N.J. 2008)(unpublished).

S.K. involves addressing the appropriateness of an IEP for a student with multiple disabilities including autism, specific learning disabilities, attention deficit hyperactivity disorder and speech and language

impairments. Having been mainstreamed for three years (K-2) with significant supports (one-to-one aide, parent training, a behavior intervention plan, “modifications in the classroom to tailor lessons to his needs” and a home ABA program), the student was not making progress in basic academic skills.

An independent evaluation secured by the parent supported the move from the mainstream class finding “poor pragmatic language usage, deficits in comprehension, difficulty in reading and persistent difficulties in academic subjects involving problem solving and complex concept formation.” The current mainstream placement was resulting in “severe academic underachievement in basic reading skills, reading comprehension and oral expression.” **The independent evaluator concluded: “It is clear, however, that he requires special education to develop basic reading skills commensurate with his ability and to develop basic skills in math and written expression so that he has the necessary competencies before transitioning to higher grades.”** While the initial report (based on an in-office evaluation and questionnaires completed by others) indicated that “some of the student’s instruction would need to be provided outside the inclusion classroom,” an amended report (produced after the evaluation and after conducting a classroom and home observation) concluded that “it will be necessary to provide academic instruction in a one-to-one or very small group instructional setting using intensive specially-designed instruction.” Based on his lack of academic progress, the school proposed placement in a self-contained autism class.

The parent objected to the proposed move to self-contained, arguing that the student “had made great progress in social skills and oral expression by spending three years in the mainstream classroom.” The parent also rejected the conclusions of the independent evaluation secured by the parent, which placed “undue importance on N.K.’s achievement of academic improvement. Plaintiff argues that this contravenes the LRE mandate of the IDEA, which favors mainstreaming over providing the child with the best academic instruction.”

The ALJ and District Court both agreed with the independent evaluator. At hearing, the independent evaluator testified consistently with the evaluation, and added that the student required instruction “in a self-contained classroom now so that he could develop the skills needed for later mainstreaming at the higher grades.” Plaintiff’s expert urged one more year of mainstreaming but “conceded that she would no longer recommend that placement if N.K. did not fare well.” The court looked to IDEA’s obligation to provide meaningful, not trivial benefit, and the requirement that benefit be gauged in relation to the child’s potential. **Not only does the evidence indicate that the student has not progressed, the court finds, as did the independent evaluator, that the student “will only fall further behind if he continues in a group classroom environment where he receives lessons with nondisabled children.”** (emphasis added). Addressing the parent’s concerns directly, the court writes:

“The Court finds Dr. Kay’s opinions particularly persuasive, given her thorough examination of N.K., her lack of connection to the School District, and her selection by S.K. herself to perform the independent re-evaluation of N.K. **Her opinion is not, as Plaintiff characterizes it, that N.K. would achieve superior academic benefits in a self-contained classroom, but rather that a self-contained placement is necessary for N.K. to develop the fundamental skills he has failed to develop in the several years he has spent in the classroom. ...** N.K.’s failure to achieve more than negligible benefit during his three year’s worth of regular education instruction persuades this court that the challenged IEP’s proposed placement of N.K. in a self-contained classroom was ‘reasonably calculated to enable the child to receive educational benefits.’” (emphasis added).

A little commentary: An important factor in the decision was the parent argument that the student’s lack of progress was attributable to the district’s failure to appropriately implement the IEP, including the inconsistency in home instruction and a one-to-one aide who was poorly trained and did not work well with the student. While the arguments were rejected by the court, schools need to ensure that IEPs are not only appropriate but also are appropriately implemented to prevail in a move to a more

restrictive placement. *See also, Pacht v. School Board of Anoka-Hennepin ISD #11*, 46 IDELR 1, 453 F.3d 1064 (8th Cir. 2006) (“Although the disputed IEP provides for Sarah to spend approximately 70 percent of the time in the mainstream environment, the Pachts argue that 100 percent of her day should be spent in the regular classroom. The district court rejected the argument, finding that ‘with full inclusion, Sarah would be among her peers, but not learning with them... **Sarah’s service providers also believed that the functional skills that Sarah would need to develop personal independence could not be fully addressed in the mainstream environment, ‘since many of the functional skills that Sarah should learn cannot be performed in the natural setting of the mainstream with enough frequency to provide her the needed practice.’**”) (emphasis added).

See also, Greenwood v. Wissahickon School District, 50 IDELR 280, 571 F.Supp. 2d 654 (E.D. Pa. 2008). The case arises from a parent’s desire for a full-time regular classroom program for her 17-year-old daughter. The student has severe mental retardation and static nonprogressive encephalopathy, together with a sensory disorder affecting her ability to sustain focused attention, postural control and motor planning. The student had previously been taught in life skills classes.

“The record establishes that Angela received little, if any, educational benefit from her inclusion in regular class. The reliable testimony from her teachers demonstrates that her ability to receive educational benefit from regular education is extremely low. Her seventh-grade social studies teacher testified that Angela did not make meaningful educational progress in a regular education class. She did not come away with an understanding of any of the material from the seventh-grade social studies curriculum, even as substantially modified. Angela’s eighth-grade teacher similarly concluded that Angela made no progress on any academic goals in her regular education class.”

While criticized by the parents, the court had no problem with the level of supplementary aids and services provided by the district to support the student in regular classes. Angela receives a one-to-one aide throughout the day, an IEP facilitator, and a great deal of communication with the parent. A key point of contention was an alleged lack of training of staff to meet Angela’s needs, with the parent emphasizing that Angela is the first student with significant disabilities to have mainstreaming opportunities in the district. Nevertheless, the court was not convinced.

“Greater inclusion in academic courses compromises any achievement in acquiring essential life skills needed to improve her functional ability.” Further, the regular education class is an inappropriate setting in which to provide necessary training in life skills goals such as dressing and toileting. Finally, “to accommodate Angela’s cognitive limitations and abilities, the School District must modify her regular education program to such an extent that it effectively constitutes a totally different curriculum, thus defeating the purpose of Angela’s inclusion in regular class.”

Ultimately, it was the question of meaningful benefit for this student that required a more restrictive placement. **“Mainstreaming does not require inclusion in a regular classroom if doing so would jeopardize a student’s ability to achieve a meaningful educational benefit. Thus, inclusion is not appropriate when the nature or severity of a student’s disability precludes an educational benefit from inclusion with non-disabled students by means of supplementary aids and services.”** The IEP was upheld.

C. What if the student could progress faster to grade level in a more restrictive setting?

Gavriety v. New Lebanon Central School District, 53 IDELR 152 (N.D.N.Y. 2009).

As early as third grade, the parents were concerned that the services the student received “did not seem to be the ones needed for him to proceed.” The student was receiving reading training, language therapy and speech therapy. Data reflects that the student was falling further behind his grade level peers in reading skills each year until he was a full grade level behind at the end of third grade. The parents,

concerned about his rate of progress, sent the student to Camp Dunnabeck (at the Kildonan School) at their own expense for six weeks of intensive reading instruction. Test scores from the camp indicate that the student showed dramatic improvement.

“The documents containing M.G.’s test scores state that they ‘were obtained under optimum conditions’ and warn that ‘[c]aution should be exercised in interpreting test results. It must, for instance, be remembered that the final testing was done under optimum conditions at the end of a period of intensive study. While at Dunnabeck, M.G.’s scores in reading skills on the WRAT-3 improved from a school grade equivalent of 3.2 to 4.3. M.G.’s scores in reading rate and accuracy on the GORT-4 showed improvement from a grade equivalent of less than 1.0 in both areas to 1.2 in rate and 1.7 in accuracy. M.G.’s scores on the GORT-4 in reading fluency stayed at less than 1.0. M.G.’s scores on the Gates MacGinitie test improved from 1.6 to 2.7 in reading vocabulary, and from 2.1 to 3.3 in reading comprehension. M.G.’s scores in spelling skills on the WRAT-3 improved from 2.2 to 2.9.” (Internal citations omitted.)

To encourage continued success, the camp made a number of recommendations including the student’s continuing need “to receive remedial instruction by a trained Orton-Gillingham tutor.” Immediately thereafter, M.G. underwent a psycho-educational evaluation that documented “significant difficulties with phonemic awareness and manipulation, short-term and working memory, cognitive speed/fluency, on demand associative recall and rapid naming.” The evaluation recommended that the student’s reading program should be multisensory in design — based upon principles of Orton-Gillingham[.]” The district purchased one of the reading programs listed by the evaluations, and used its curriculum with M.G. from that point forward. By the end of the fourth-grade year, progress slowed “in the areas of phonetic fluency and non-phonetic fluency, but his reading skills were ‘emerging and he was ‘progressing satisfactorily’ in his ‘ability to use appropriate expression and voice inflection in his reading of connected text’ as well as his ‘independent use of strategies to decode unknown words, syllabication, word families, phonemic knowledge, prefixes and suffixes and context clues.’”

Displeased with his progress and grade-levels achieved in reading (“They had been working with him for five years and he has limited progress throughout.”), the parents requested a placement at the Kildonan School at district expense. The district declined to fund the private placement (it was not approved by the State Department of Education) and offered an IEP very similar to what the student had previously received, but with goals broken down into quarters of the year to better track progress. The student attended fifth grade at Kildonan.

The District Court rejected the reimbursement claim finding that the school’s IEP offered a FAPE. While the student’s progress at the public school had not been as rapid as the parents desired, the testimony from both school witnesses and the academic dean at Kildonan recognized that the student was not likely to have immediate or speedy success.

“Kildonan Academic Dean Robert Lane testified that M.G. ‘not only has a core phonological deficit’ and ‘difficulty with the phonology of language,’ but he ‘also has difficulty with short-term memory and processing of information’. Given M.G.’s specific disability, Lane explained, ‘it is going to take a lot longer ... to help train his brain to understand those very basic concepts, that different individual[] letters have individual sounds ... Those kinds of pieces are constantly going to interfere with his initial learning. And for a student like [M.G.] ... it would not be uncommon for him to take a good two years to be able to see more success or I don’t want to say grade level, but more success with applying those basic skills.’ Thus, the SRO had an adequate basis on which to conclude that M.G.’s progress under the Language! program was meaningful in light of his disability and therefore that the IEP’s recommendation of continued use of the Language! program was calculated to enable M.G. to progress.”

That testimony was supported by school witnesses who noted that although the student's progress was slow, it was meaningful in light of his disability. The student had been offered a FAPE. Reimbursement was denied.

D. Some courts don't want to figure out placement, so curricular LRE could be even less popular.

Consequently, if the IEP Team's determination of an expectation seems fair or reasonable, some courts would let the IEP Team live (and die) by its decision. An older case from the 4th Circuit makes the point. Despite the fact that the parents had provided, at their own expense, a "high level of attention through intensive private tutoring — especially during the summer months" — and thus his progress cannot be entirely attributed to the school program, the "board of education has seen fit to take advantage of his advancement during the relevant period to demonstrate its compliance with the act, and we find that annual grade promotion, with the additional instruction noted, seems easily within Thomas' grasp. Annual grade promotion may, as a result, be a reasonable barometer for measuring the progress that this handicapped child can achieve in coming years. Although we do not mean to specify in any detail what Thomas' individualized educational program should be in the future, the barometer chosen by the appellee appears to us to be a fair standard to which the board of education could be reasonably held in the coming years. Cf. Matthew 26:52 (King James)("[A]ll they that take the sword shall perish with the sword.") *Conklin v. Anne Arundel County Bd. of Educ.*, 18 IDELR 197, 946 F.2d 306, fn. 6 (4th Cir. 1991).

Does that mean that courts will defer to the IEP in close cases? Sometimes.

"Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment. ... Loudoun County properly proposed to place Mark in a partially mainstreamed program which would have addressed the academic deficiencies of his full inclusion program while permitting him to interact with nonhandicapped students to the greatest extent possible. This professional judgment by local educators was deserving of respect. The approval of this educational approach by the local and state administrative officers likewise deserved deference from the district court which it failed to receive. In rejecting reasonable pedagogical choices and disregarding well-supported administrative findings, the district court assumed an educational mantle which the IDEA did not confer." *Hartmann v. Loudoun County Bd. of Educ.*, 26 IDELR 167, 118 F.3d 996 (4th Cir. 1997).

See also, Richard Paul E. v. Plainfield Community Consolidated Sch. Dist. 202, 52 IDELR 130 (N.D. Ill. 2009)(Faced with question over appropriate class-size for a student with autism, the District Court wrote: "A court is particularly incapable of making such judgments, which is why we must defer to trained educators.... A long black robe and a gavel give the judge authority to rule on legal issues, not to make educational policy judgments — and a court should not 'substitute its own notions of sound educational policy for those of the school authorities [that] they review.'")(internal citations omitted); *Beth B. v. Lake Bluff School District*, 36 IDELR 121, 282 F.3d 493 (7th Cir. 2002)("The school officials' decision about how to best educate Beth is based on expertise that we cannot match. They relied on years of evidence that Beth was not receiving a satisfactory education in the regular classroom. The placement shows a concern both for her development and for keeping her mainstreamed, to an appropriate extent, with her nondisabled peers. We cannot hold that the Lake Bluff School District has failed to provide her with the free, appropriate public education where she is mainstreamed to the maximum extent appropriate, to which she is entitled under the IDEA.")