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Special Education—

The Least Restrictive Environment and The 1997 IDEA Amendments and Federal Regulations

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Abstract

The final regulations to the Individuals with Disabilities Education Act (IDEA) Amendments for 1997 address the right of children with disabilities to receive a free appropriate public education (FAPE). The regulations also pose responsibilities for school systems to build their capacity to respond to student diversity. The intent of the present analysis is to explore the concept of the Least Restrictive Environment (LRE) in the 1997 IDEA Amendments and to examine how its recently released federal regulations direct the statute's implementation. The goal is to clarify the direction of the new regulations, and to examine their prospects for supporting the provision of FAPE to each eligible student with a disability. The method includes an historical analysis of the origins of the LRE concept in federal special education law, and a comparative analysis of the statutory and regulatory language related to LRE in past and present reauthorizations of the IDEA. The question that guides this discussion is this: Has the purpose of the LRE component changed in the

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most recent reauthorization of the IDEA? Does LRE still stand in the service of FAPE? This analysis first examines LRE as a rebuttable presumption, and then explores the evolution of the concept in federal statutory and regulatory language. Final consideration is given to the foundational components of responsible placement decisions, including the elements essential to rebutting the presumption of inclusive placements when necessary: (a) appropriate programming; (b) appropriate access; and (c) appropriate accountability for student progress.

The long awaited final regulations to the Individuals with Disabilities Education Act (IDEA) Amendments for 1997 [2] were published in the Federal Register on March 12, 1999, to take effect on May 11, 1999. While underscoring the IDEA's commitment to individual child-centered decision-making, the regulations address lowering the costs of special education, increasing the influence of regular educators and administrators, and strengthening the capacity of American schools to effectively educate children with disabilities. Does this focus on the systemic habilitation of the educational system come without risk to the specialized instructional needs of vulnerable children?

"The IDEA is a fascinating law and a difficult federal mandate that touches on a contemporary American problem—the successful integration of historically excluded and disparate groups." [3] Submitting such a problem to legal analysis and resolving it through the lens of legal rights limits the questions we ask and the solutions we consider. Halpern suggests that "framing a social problem as a legal issue produces a transformation of the issue itself—a reconceptualization of the problem, yielding unique questions and concerns that first become the focus of the legal debate and subsequently tend to dominate public discussion." [4] Within the field of special education, for example, the social issue of integration addressed in the least restrictive environment (LRE) provisions of the IDEA has come to dominate the public discussion of educating students with disabilities. In fact, the hottest topic in special education over the past decade has been where, not how, students with disabilities should be taught. This emphasis on inclusion over instruction has threatened at times to overshadow the central mandate of the Act: the provision of a free and individually appropriate public education (FAPE).

2. 20 U.S.C. Sec 1400, *et seq* (1994), *as amended* by the Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, III Stat. 37 (June 4, 1997) hereafter "1997 IDEA."

3. LAWRENCE M SIEGEL. LEAST RESTRICTIVE ENVIRONMENT: THE PARADOX OF INCLUSION, 134 (1994).

4. STEPHEN. C. HALPERN. ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT, ix (1995).

The IDEA, originally authorized as the Education for All Handicapped Children Act (EAHCA) in 1975, [5] began as a remedy for excluding millions of children from public instruction based solely upon their disabilities. The IDEA went beyond the limits of traditional civil rights legislation, however, in affirming FAPE through an individualized special education for each eligible student with a disability. To the maximum extent appropriate to the special student's learning needs, this education was to be offered in regular settings along side non-disabled students unless he or she could not make satisfactory progress there. [6]

The intent of the present analysis is to explore the concept of LRE in the IDEA Amendments of 1997 and to examine how its recently released federal regulations direct the statute's implementation. The goal is to clarify the direction of the new regulations, and to examine their prospects for supporting the provision of FAPE to each eligible student with a disability. The method includes an historical analysis of the origins of the LRE concept in federal special education law, and a comparative analysis of the statutory and regulatory language related to LRE in past and present reauthorizations of the IDEA. The question that guides this discussion is this: Has the purpose of the LRE component changed in the most recent reauthorization of the IDEA? Does LRE still stand in the service of FAPE?

The following analysis first examines LRE as a rebuttable presumption, and then explores the evolution of the concept in federal statutory and regulatory language. Final consideration is given to the foundational elements essential to responsible placement decisions, including the elements essential to rebutting the presumption of inclusive placements when necessary: (a) appropriate programming; (b) appropriate access; and (c) appropriate accountability for student progress.

LRE as a Rebuttable Presumption

In trying to reconcile the relationship of LRE to FAPE, a fundamental question is generated: "Does appropriateness drive placement, or is placement the starting point for any consideration of an appropriate education?" [7] Early legal literature, as well as the first draft of the federal regulations, refers to the term Least Restrictive Alternative (LRA)—a less situational term than least restrictive environment. Application of this concept to the education of children

5. Congress passed the Education for All Handicapped Children Act in 1975. Pub. Law No. 94-142, 89 Stat. 773 (1975. Now called the IDEA, the EAHCA "remains the foundation for IDEA." Heldman v. Soled, 962 F. 2d 148, 150 n.1 (2d Cir. 1992).

6. 20 U.S.C. Sec. 1412(a)(5)(A) (1997) has remained unchanged since the 1975 adoption of the EAHCA.

7. SIEGEL, *supra* note 3 at 134.

has followed an interesting route through both legislation and litigation. Turnbull describes the LRE concept as a means by which to balance the values surrounding the provision of an "appropriate education (the student's right to and need for an appropriate education) with the values of individual rights of association. It is supported by, and implemented through, the constitutional principles of procedural due process, substantive due process, and equal protection." [8] In Turnbull's analysis, LRE is a rebuttable presumption, or, "a rule of conduct that must be followed in every case unless, in a particular case, it can be demonstrated that the general rule will have unacceptable consequences for the affected individual." [9] LRE, then, is not an immutable rule, but a rebuttable presumption favoring integration, but allowing separation: "Presumptively... segregating placement is more harmful than regular school placement. Only when it is shown that such a placement is necessary for appropriate education purposes in order to satisfy the individual's interests or valid state purposes is the presumption overcome." [10] Ambiguity, however, is embedded in the complexity of determining what constitutes a suitable rebuttal. In this instance, LRE "is inextricably tied to the notion of appropriateness, which makes it all the more complex because appropriate education itself is difficult to define." [11] While the constitutional basis of LRE requires the government, when it has a legitimate interest, to take actions which least drastically restrict a citizen's liberty, "it is another thing altogether to answer the question: What is an unwarranted or unnecessary restriction of a handicapped child when the state is required to educate him or her appropriately?" [12]

The term LRE is derived from the concept of the least restrictive alternative, which has its legal basis in the US Constitution and serves to accommodate individual and state interests to one another. "As long ago as 1819, Chief Justice Marshall of the United States Supreme Court, in the early landmark case of *McCullock v. Maryland*, indicated that regulation affecting citizens of a state should be both 'appropriate' and 'plainly adapted' to the end sought to be achieved." [13] This principle has been phrased in various judicial forms, including "less drastic means for achieving the same basic purpose," [14] "least

8. H. RUTHERFORD TURNBULL, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES, 148 (1990).

9. *Id.* at 163

10. *Id* at 163. Turnbull views rebuttable presumptions as a positive policy tool, one that offers affected parties greater "freedom of choice" (italics in original), and protection from having no alternative to what is perceived as harmful.

11. *Id.* at 161.

12. *Id.* at 162.

13. ROBERT L BURGDORF, JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT, 278 (1980).

14. *Shelton v. Tucker,* 364 U.S. 479, 483 (1960)

restrictive means," [15] and "the least burdensome method." [16] Burgdorf sums it up like this:

> These majestic-sounding phrases have a fairly straightforward meaning. In very simple terms, the principle of least restrictive alternative means that state laws and state officials (and here would be included public education officials and public school teachers) should be no nastier than they absolutely have to be. [17]

Pitasky notes that "like most laws, the IDEA's LRE provision is deliberately brief and vague, and left wide open to interpretation." [18] Bateman and Chard describe LRE as "a complex concept that includes both absolute mandates and qualified requirements . . . Far from being a place or a placement, the LRE is the decision that results from following a set of procedural requirements in the IDEA." [19] According to Fred Weintraub, who directed governmental policy for the Council for Exceptional Children (CEC) at the time of the development of the EAHCA, this statute was "largely CEC's ball game" [20] and that of Ed Martin, Director of the Bureau of Education for the Handicapped, and his staff at the US Office of Education. This legislation, authorized in 1975, was developed, not by lawyers, but by representatives of an alliance of educational organizations and had its roots in earlier legislation enacted over the previous 10 years. The following examination of the evolution of LRE within the IDEA statute is illustrated with comments regarding the development of federal special education law contributed by Edwin W. Martin, Frederick J. Weintraub, and Thomas K. Gilhool, who served as lead counsel in the landmark right-to-education case of *Pennsylvania Association for Retarded Children (PARC) v. The Commonwealth of Pennsylvania.* [21] Their remarks are excerpted from Crockett's and Kauffman's comprehensive analysis of the LRE concept in special education. [22]

15. *Smith v. Sampson,* 349 F. Supp. 268, 271 D.N.H. (1972)

16. *Ramirez V. Brown,* 9G. 3d 199, 104 Ca. R. 137, 507 P.2d 1345, 1353, (1973).

17. BURGDORF, *supra* note 13 at 279.

18. VICKI M PITASKY, THE CURRENT LEGAL STATUS OF INCLUSION, 1 (1996).

19. Barbara D. Bateman & David J. Chard, Legal Demands and Constraints on Placement Decisions, in ISSUES IN EDUCATIONAL PLACEMENT: STUDENTS WITH EMOTIONAL AND BEHAVIORAL DISORDERS 294, 291 (James M. Kauffman et al. eds, 1995).

20. JEAN B. CROCKETT, & JAMES M. KAUFFMAN, THE LEAST RESTRICTIVE ENVIRONMENT: ITS ORIGINS AND INTERPRETATIONS IN SPECIAL EDUCATION, 74 (1999).

21. *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania,* 334 F.Supp. 1257 (E.D. Pa., 1971) hereafter "PARC".

22. Crockett & Kauffman, *supra* note 20.

An Historical Retrospective of Federal Legislation

Fred Weintraub remembers applying the LRE concept to special education after reading an account of a 60-year-old woman picked up nightly by police and brought to St. Elizabeth's psychiatric hospital in Washington, DC. In this case, [23] the court decided that her need for safety and support could be met less restrictively in a supervised community residence. The continuum of choices for her support ranged from outpatient care to foster care, half-way houses, day hospitals, then nursing homes, and hospital confinement. Legally, the degree of restriction depended upon the severity of the problem and the skillful use of professional techniques available for her supervision. To Weintraub, the parallels with educational practices for exceptional learners were clear, suggesting that some students might require instruction separate from the regular classroom; others might not. What was needed was a procedural mechanism to ensure the protection of a student's liberty while at the same time assuring an education that provided him or her with a meaningful educational opportunity. Tom Gilhool, however, calls LRE a "nefarious concept." [24] He finds it problematic that the phrase arose not from the right-to-education cases, which were based on the constitutional principle of equal protection, but rather from the very different cases that emphasized the right-to-treatment *within* mental health institutions. Because "schools are not a closed institution like the institutions to which people are involuntarily committed," [25] he views LRE as misapplied to education. To Tom Gilhool: "Equality and Integration are the imperatives of the Act." [26] Providing contrast to Gilhool's perspective, Ed Martin referred to the text of the IDEA statute to indicate that Congress never intended the full inclusion of all students with disabilities into regular settings as essential to the provision of FAPE.

Federal Statutory Language: 1975-1997

Edwin W. Martin served as Chief of the federal Bureau of Education for the Handicapped, and then Deputy Commissioner of Education from 1969 to 1980. He was deeply involved in the development of the legislation, the writing of the law, and the creation of the regulations that would govern its implementation. Martin notes that the phrase LRE is not in the original statute, but that the reference to a continuum of placements was built into the law from the start:

> LRE was an important element of the law, but it was down the list of elements. The most important element was a 'free appropriate public

23. *Lake v. Cameron,* 124 U. S. App. D. C. 364 F. 2d (1966)
24. Crockett & Kauffman, *supra* note 20, at 85.
25. *Id.* at 85.
26. *Id.* at 85.

> education.' The assumption was not that all children would be educated in the regular classroom with non-handicapped children, although a statement including the word "appropriate" does appear. There is an underlying philosophy that supports that inclusion, or mainstreaming, but the intent was not "all"—just where "appropriate." Appropriate placement is based not on the philosophy of the school but on the individual IEP under the law. [27]

Martin indicated that where items appeared in the original statute signified their importance, and following closely upon the definitions of special education, related services, and the provision of a free, appropriate public education came the means to document that a student was actually receiving them. The term individualized education program (IEP) was defined as a written statement developed by a representative of the local school district or an intermediate educational unit who "shall be qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child." [28]

> We defined that rather carefully—what it should mean; how it would be not too precise; it would not be a federal control of education, yet at the same time, it would guarantee the simple statements. . . . Basically, it was a statement of present levels, a statement of annual goals, a statement of specific educational services to be provided to such a child, and the extent to which each child would be able to participate in regular education programs. (There is the first, I would say, philosophical underpinning of LRE.) The effective date of initiation and the appropriate objective criteria and evaluation procedures. That's it. [29]

Placed at the front of the statute, this Definitions section recognized that special education and related services might be received in a variety of settings, but required that the educational program for the exceptional child was to be free and appropriate as considered by both the objective standards of the SEA and the subjective criteria stipulated in the child's IEP. Weintraub remarked that "our concern about having something on LRE [in the original statute] was not to eliminate any part of the continuum but to assure that there would be a continuum. That's why, in the definition of special education, the continuum was there." [30] In 1975, the EAHCA made a shift away from the substantive policy approach used in the states, which was based on the notion that

27. *Id.* at 75.
28. 20 U.S.C. Sec. 1401(20) (1975).
29. Crockett & Kauffman, *supra* note 20 at 76.
30. Crockett & Kauffman, supra note 20 at 76.

placement was dependent on category of disability. Most of the legislative developers shared a belief that the general category of the learner's disability did not define the delivery of service, and so, Weintraub explained, the decision was made to adopt an individualized approach in the EAHCA dependent upon a set of procedures rather than a specific outcome:

> In other words, by taking an individualized approach, then you had to presume that each student was an individual, and required a unique set of decisions based on their unique needs. We focused on a *process* of determining what was appropriate for the student. What we didn't want was something that simply said that there is only one choice. We wanted to break that tradition. If one were to say what is the revolutionary part of PL 94-142, it was the shift from substantive to procedural policy, so that supposedly we were making the decision individually, not by classes or groups of individuals. The IEP is the vehicle for holding procedural law together. . . We could not have had this law without an IEP because you cannot have compliance unless you have a document. [31]

With this emphasis, the EAHCA went beyond a simple, equal access civil rights statute and addressed directly the issue of a meaningful educational opportunity for each child with a disability.

Section 1412 (5)(B) of the original legislation is the statement upon which most placement decisions have hinged. Martin notes that it is here in the original statute, "that you do find essentially the philosophical underpinnings to LRE." [32] This section of the statute continues to require each state to establish procedures to assure that:

> to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [33]

In recalling the development of the statute, Martin refers to the controversy surrounding the insertion of what would become this pivotal section. He points out that the qualifier referring to the removal of children with disabilities from regular classrooms, only when their progress there "cannot be achieved satis-

31. *Id.* at 77.

32. *Id.* at 77.

33. As a result of the renumbered amendments to the 1997 IDEA, this item is now found at 20 U.S.C. Section 1412 (a)(5)(A) (1997).

factorily," was added later at the insistence of legal advocates who had worked on the contemporary right-to-education cases. Martin explains that, at the time of the EAHCA's development from 1971 to 1975, the issue of institutions was a key variable in civil rights litigation, stemming from cases like *PARC* which were brought on behalf of retarded citizens and children who were excluded from public schools. He explains that this emphasis on social advocacy was precisely why the drafters of this educational law inserted the caveat, "to the maximum extent appropriate" into the beginning of Section 1412(5)(B):

> LRE really grew out of the interests in institutionalization and de-institutionalization. Civil rights attorneys, particularly Tom Gilhool, I would think, were very committed to that principle and extended it and wanted to extend it to the everyday life of the school. At the same time, parents, and teachers who were working in the special education system, never really conceived that there would only be a mainstreamed environment for children with disabilities. That is why, right through the law, there are so many references to other settings. So these two [sections of 1412 (5)(B)] clash a bit in their philosophy and have—although even this phrase says, (and this was important, and I can remember the discussion that put this phrase in) "to the maximum extent appropriate." I was arguing, based on my work with deaf children and emotionally disturbed children, that it would not be appropriate for every child to be in the regular class, and it had to be clear that these options existed for children for whom it would not be appropriate. At the same time, we also knew that many children were unnecessarily segregated and, therefore, we wanted to put as much emphasis as possible on having children go into the programs which were maximally appropriate for them. In many cases, for mildly handicapped children, there was no reason they could not be in regular classes full-time or part-time. So, I would say, the larger context of this law was, in its early development and even in its current state, a law that emphasized service to children, free appropriate public education, finding the children, educating them in the environments that were appropriate to them, and, within that context, encouraging their participation in regular education. [34]

The 1997 IDEA Amendments retain the wording in the definitions of special education and free appropriate education, but the items were renumbered within Section 1401. Mobility training and Braille use have been added to the list of related services available to assist a child to benefit from special education. The 1997 IDEA defines the IEP as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance

34. Crockett & Kauffman, *supra* note 20 at 92.

with Sec. 1414 (d)." [35] The amended text also expands the Definitions in Sec. 1401 and re-orders the topics alphabetically rather than in a conceptual sequence. Supplementary aids and services are defined for the first time in the statute; specific reference is made to their use in enabling children with disabilities to be educated in "regular education classes or other education-related settings" with their non-disabled peers. [36] There is no definition given in this section for the term LRE, but a cross-reference is made to Sec. 1412 (a)(5)(A) where the term now appears, for the first time, within the text of the law. With the 1997 Amendments to the Act, the words "least restrictive environment" have officially been transferred from the federal regulations into the statute. Under this heading, the reauthorized law additionally requires that states employ a placement-neutral funding formula that does not violate the LRE requirements.

In Sec. 1412, the 1997 IDEA continues to ask states for evidence of policies and procedures ensuring FAPE, a full educational opportunity, and IEP provision. Child-find efforts must be continued and extended to students currently in private schools and in need of special education and related services. [37] The 1997 Amendments to Sec. 1412 do not require classification by disability, as long as the child meets the federal definition for eligibility. This section of the amended law also addresses the issue of cessation of services and clarifies that for most students there will be a continued right to FAPE during disciplinary periods. Efforts to determine performance goals and indicators for students with disabilities are now tied to general school reform initiatives under Sec. 1412. Waivers may be sought to co-mingle or supplant funds to accommodate state or local school-improvement efforts, but states may not reduce fiscal efforts in other disability programs related to the IDEA. To facilitate coordination with instruction in regular settings, a provision allowing general education students to benefit incidentally from special education services has been added at Sec. 1413 (a)(4).

The Comprehensive System of Professional Development (CSPD) provision, embodying personnel standards, has been moved from Sec. 1413 in the EAHCA, to Sec. 1412 of the 1997 IDEA. This places the CSPD within the

35. 20 U.S.C. Sec. 1401 (11) (1997). Reference is made to Sec. 1414 of the 1997 IDEA which requires changes in the IEP that address student progress. According to MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION, 87 (1998), "Congress believed that the IDEA had been extremely successful in improving students' access to public schools, and the critical issue in 1997 was to improve the performance and educational achievement of students with disabilities in both the special education and general education curricula."

36. 20 U.S.C. Section 1401 (29) (1997).

37. The element of the original legislation extending the benefits of special education and related services to children in private schools and facilities has been retained in the 1997 IDEA and moved to Sec. 1412, clarifying the rights of private school students and limiting the exposure of public agencies to pay for their private placements.

section of the law that addresses the establishment of state goals for the performance of children with disabilities and their participation in state-wide assessments. [38] According to Gilhool, the CSPD is "the state of the art imperative" and a provision that has for too long been ignored by the states. Attorney Gilhool remarks that "Justice Rehnquist in the *Rowley* decision calls this section of the statute a clear statutory directive and places it at the heart of the Act. It's time for us to turn toward enforcing this 'state of the art' imperative of the Act directly." [39]

The 1997 Amendments to the IDEA re-title Sec. 1414 as *Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements*. Changes to the text assume that exceptional learners have gained educational access; consequently, the amendments target a relationship with the regular education environment and curriculum. In addition to defining supplementary aids and services to support exceptional learners in settings with non-disabled students, the 1997 IDEA amends the contents of the IEP to "weave in an emphasis upon student involvement in the general curriculum." [40] Some IEP components have been rephrased to underscore the presumptive nature of regular programming for students receiving special education. [41] Sec. 1414 of the 1997 IDEA finishes with an explicit requirement for involving parents on any team that makes decisions about the educational placement of their child.

Congress, in developing the original EAHCA in 1975, viewed the regular classroom as the optimal setting but acknowledged that instruction would need to be offered in multiple environments if individual needs were to be appropriately met. [42] In 1997, when amending the statute, Congress similarly recognized that decisions for students with disabilities are to be based on individual need but called for justification in the IEP when decisions require an alternative placement to regular classes. [43] Ed Martin finds neither a change in the philosophy nor the goals of including persons with disabilities necessary. The key, he believes, is in demonstrating what is meant by "appropriate."

38. In the original statute, Section 1413 was significant because it set a priority for the preparation of personnel to educate students with disabilities in order to satisfy the terms of the law.

39. Crockett & Kauffman, *supra* note 20, at 80.

40. U. S. DEPARTMENT OF EDUCATION, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS CURRICULUM., 8-7 (1997).

41. For example, IEP content has changed from explaining how much the child will participate in regular education to a provision that reads "an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class and in the activities described in clause (iii)" [extracurricular and nonacademic activities] 20 U. S. C. Sec. 1414(d)(1)(A)(iv)) (1997).

42. U. S. Congress. House of Representatives, Committee on Education and Labor. (1975, June 26). *Education for All Handicapped Children Act* of 1975. 94th Congress, 1st Session. H. R. Rep. No. 94-332, at 132-133. In U. S. Senate, Committee on Labor and Public Welfare, Subcommittee on the Handicapped (1976). Education of the Handicapped Act as amended through December 31, 1975. (S. Rep. No. 72-611).

43. U. S. Senate, Committee on Labor and Human Resources (1997). Report (to accompany S. 717).

"Where we've gone wrong in special education is that we haven't followed how kids have done. We have not interpreted 'appropriate' as empirically derived by student outcomes. We have used argument instead of data in making placement decisions" (E.W. Martin, personal communication to J.B. Crockett, April, 1996). By proceeding without data, the field has been susceptible to what Martin calls "the myth of mildness," that these students are not so tough to teach or so different in their educational needs. "Without data," he says, "all we have are assumptions."

Federal Regulatory Language: 1975-1999

Debates concerning instructional settings for exceptional learners are most often argued with reference to the guidelines that fall under the chapter heading of Least Restrictive Environment in the federal regulations to the IDEA statute. [44] Since the release of the initial federal regulations to the EAHCA in 1978, there has been deep confusion over what is meant by the term "least restrictive environment." For those who hold a sociological perspective, the word restrictive is synonymous with segregated so that the least restrictive environment becomes the least segregated environment, or the environment in which children with disabilities are least separated from their non-disabled peers. [45] For others, who emphasize an educational focus on student performance, the term implies an eco-behavioral interaction among an individual student, a prescribed educational plan, and an instructional setting calculated to provide him or her with academic and social benefit that includes non-disabled peers to the maximum extent appropriate for that student. [46]

The provisions of the 1997 IDEA and its regulations are directive in addressing this confusion. While the previous text of the LRE regulations from Sec. 300.550-556 remains, for the most part, intact, and an additional reference is made to the requirement for a continuum of alternative placements in Sec. 300.130, remedy for what might be described as functional exclusion from general education is prescribed in Sec 300.347: Content of the IEP. This section calls for the child's individual programming and progress to be made and monitored with continual reference to the content of the general education curriculum, rather than the setting in which this curriculum is employed. The attached comments to the regulations underscore the US Department of Edu-

44. LRE provisions to the 1997 IDEA can be found at 34 C.F.R. Sec. 300.550-556.

45. See RICHARD A. VILLA, & JACQUELINE S. THOUSAND, CREATING AN INCLUSIVE SCHOOL (1995).

46. See Jay Gottlieb, Mark Alter, & Barbara W. Gottlieb, *Mainstreaming Academically Handicapped Children In Urban Schools, in* THE REGULAR EDUCATION INITIATIVE: ALTERNATIVE PERSPECTIVES ON CONCEPTS, ISSUES, AND MODELS (John W. Lloyd et al. eds., 1991). Also, see C. V. Morsink, & L. L. Lenk, *The delivery of special education programs and services,* 13 REMEDIAL AND SPECIAL EDUCATION 33-43 (1992).

cation's view of the "general curriculum" as playing a crucial role in meeting the requirement of the Act:

> The IDEA amendments of 1997 place significant emphasis on the participation of children with disabilities in the general curriculum as a key factor in ensuring better results for these children. . . . As the term is used throughout the Act and congressional report language, the clear implication is that, in each State or school district, there is a "general curriculum" that is applicable to all children. A major focus of the Act—especially with respect to the new IEP provisions—is ensuring that children with disabilities are able to be involved in and progress in the "general curriculum." [47]

Although the comments to the regulations suggest that an emphasis has been placed on the content of the general curriculum rather than the location of service delivery, the text of the regulations speak otherwise:

> While the Act and regulations recognize that IEP teams must make individualized decisions about the special education and related services, and supplementary aids and services, provided to each child with a disability, they are driven by IDEA's strong preference that, to the maximum extent appropriate, children with disabilities be educated in regular classes with their nondisabled peers with appropriate supplementary aids and services. [48]

The final regulations to the 1997 IDEA are codified at 34 CFR, Part 300 and 303. Material referred to in "notes" in the previous version of the regulations has been removed and most of the substantive content has been incorporated within the regulatory text. Any notes considered to provide guidance or clarification to practice have been incorporated, but uncodified, into Attachment 1. The packet of rules and regulations is divided into three sections: (1) the text of the regulations from Sec. 300.1-300.756, including Appendix A to Part 300—Notice of Interpretation; (2) Appendix B to Part 300—Index for IDEA Part B Regulations; and (3) Attachment 1—Analysis of Comments and Changes. Appendix B and Attachment 1 are intended to be instructive; they do not carry the force of law.

LRE additions and deletions: 1999

References to the LRE provisions can be found explicitly in several sections of the reauthorized federal code. The primary references remain at Sec. 300.550-556, and are markedly similar to those sections in the earlier regulations. Sec. 300.550 starts with a new statement that these provisions apply to

47. 34 C.F.R. Part 300, Attachment 1
48. 34 C.F.R. Part 300, Appendix A (I).

all children who are the recipients of FAPE but do not apply to juveniles with disabilities incarcerated in adult prisons. [49] The requirements for the continuum of alternative placements and for supplementary services to be provided in conjunction with the regular classroom remain intact at Sec. 300.551. A reference that these LRE provisions apply to preschool children with disabilities now appears in Sec. 300.552. New items have been added here instructing that placement decisions are to be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. These placements are to be made in conformity with the traditional LRE provisions. A new provision instructs that "A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general curriculum." [50] Deleted from this section, however, is a note to the previous regulations clearly establishing an overriding rule that placement decisions must be made on an individual basis. This note has been expanded and codified into text:

> In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs, and not solely on factors such as category of disability, significance of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. Rather, each student's IEP forms the basis for the placement decision. [51]

Sec. 300.553, which addresses participation in nonacademic settings, remains intact, as does Sec. 300.554, which guides the placement of children in public or private institutions. A reminder has been added to this section indicating that state education agencies are not responsible for ensuring that Part B requirements to the 1997 IDEA are met with respect to juveniles with disabilities who are convicted as adults under state law and incarcerated in adult prisons. The note following this section in the previous regulations has been transported to text at Sec. 300.300 under the heading of FAPE. The intent of this addition is to emphasize that services and placement decisions must be based on a child's individual needs and not category of disability. Sections

49. The text of 300.550 is identical to the former except for two items: (1) specific reference is made to accountability ("a State shall demonstrate *to the satisfaction of the Secretary* that the State has in effect policies and procedures to ensure that it meets the requirements of Sec. 300.550-300.556" (Sec. 300.550 (a), emphasis added); and (2) the hypothetical word *if* has been substituted for the more deterministic *when* in the phrase "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily" at Sec. 300.550 (b)(2).

50. 34 C.F.R. Sec. 300.552 (b) (3)(e)

51. 34 C.F.R. Part 300, Appendix A (I)).

300.555 and 300.556, respectively addressing technical assistance and training activities, and monitoring activities remain unchanged.

FAPE, LRE, and the IEP

Bateman and Chard refer to six regulatory provisions that have traditionally guided placement decisions. They consider three of these LRE guidelines as "mandatory, absolute, binding, and without an 'escape clause:'" [52] (1) a continuum of alternative placements must be made available by a school district; (2) consideration must be given to any potential harmful effect on the child or his or her quality of service by a district in making placement decisions; (3) placement must be based on the IEP and determined at least annually. Three more LRE requirements are considered "qualified", that is, "they are preferences to be implemented to an extent indicated:" [53] (4) students with disabilities must be educated with their nondisabled peers to the maximum extent appropriate; (5) their removal from the regular education environment can only occur when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (6) unless the IEP requires otherwise, the student should attend a neighborhood school, or if a non-neighborhood placement is indicated, this should be as close to home as possible.

Bateman and Chard argue that, ironically, these "qualified" provisions are the focus of much of the philosophical and ideological debate surrounding LRE. "The central issue in the controversy has to do with when, if ever, education cannot be 'achieved satisfactorily' in the regular classroom. When it cannot, removal from that classroom is legally appropriate." [54] In their analysis, LRE is not a location, but a procedural process in which a greater weight is given to the standard of FAPE than to the requirements of the LRE guidelines. "LRE is also a policy preference of the law that must take a secondary role to the primary purpose of the law, that is, to provide a free appropriate public education to every child who has a disability." [55]

Although minor changes have been made to the LRE provisions of the Act, more explicit ingredients are now prescribed under the heading of FAPE. The contents of the IEP, described in Sec. 300.347, must now address how a child's disability affects his or her involvement and progress in the general curriculum (defined as the same curriculum as for nondisabled children) and how the disability affects a preschooler's participation in appropriate activities. Measurable annual goals including benchmarks or short term objectives must be

52. BATEMAN & CHARD, *supra* note 19 at 291.
53. *Id.* at 291.
54. *Id.* at 292.
55. *Id.* at 294.

included that are related to meeting the child's needs that result from the disability to enable the child to be involved in and progress in the general education curriculum, or, in the case of a preschooler, in appropriate activities. Following this statement, as if to suggest it comes next in importance, is the stipulation that these goals also address meeting each of the child's other educational needs that result from the child's disability. Included in the IEP must be a statement of the special education and related services and supplementary aids and services to be provided to or on behalf of the child. A statement of the program modifications or supports expected of school personnel are also to be documented so that the child can have access to the following elements related to the provision of FAPE in the LRE: (a) to advance appropriately toward his or her goals; (b) to be involved and progress in the general curriculum in accordance with his or her unique needs and to participate in extracurricular and other nonacademic activities; and (c) to be educated and participate with other children with disabilities and nondisabled children in various activities. Another element related to the LRE provisions is incorporated into Sec. 300.347 requiring an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and nonacademic activities.

Bateman and Linden describe the IEP process as the heart and soul of the IDEA, essential to the formulation of appropriate programming and the determination of the least restrictive environment for the child. [56] Consequently, creating meaningful IEPs, with truly individualized goals and objectives, and using them to guide instructional decisions, is integral to service delivery. As the law suggests, only when such a program is designed, with collaborative and knowledgeable input, can appropriate instruction follow. No doubt this is what prompted Champagne to remark, "you can fight over placement all you want, but if you want to win, you need to control the content of the IEP." [57] The Supreme Court refers to the IEP as a written record of reasonable expectations. [58] Dupre makes the important distinction, however, that the Rowley court's definition applies to an *appropriate education*, not to *appropriate integration*. [59] With regard to the provision of FAPE in the LRE, Underwood and Mead suggest that "it might be best to say that a child has the right to the least restrictive appropriate placement." [60] Underwood and Mead make an

56. BARBARA D. BATEMAN, & MARY ANNE LINDEN, BETTER IEPS (1998).

57. Jeffrey Champagne, LRE: Decisions in Sequence, Symposium at the Annual conference of the National Association of Private Schools for Exceptional Children, 14 (1992).

58. See *Hendrick Hudson Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982).

59. See Anne P. Dupre, *Disability And The Public Schools: The Case Against Inclusion*, 72 WASH. L. REV. 775-858 (1997).

60. JULIE UNDERWOOD & JULIE F. MEAD, LEGAL ASPECTS OF SPECIAL EDUCATION AND PUPIL SERVICES, 98 (1995).

interesting distinction: "The IEP team cannot select an option that is inappropriate just because it occurs in the presence of nondisabled peers. Equally true, they cannot select an option that is more segregated because it offers a more than appropriate education." [61] The extent to which each child will participate in academic or non-academic activities is to be specifically prescribed for the child in his or her written individualized educational program so that he or she can benefit from instruction in the least restrictive appropriate placement. The 1997 Amendments to the IDEA and its regulations make federal policy on appropriate education very clear: Placement decisions are to be child-centered, not system-centered.

Rebutting the Presumption

Zirkel reports that comprehensive canvassing of LRE judicial decisions by legal scholars reveals an equivocating answer to the question of whether placement of a child with a disability in a regular classroom is, in fact, the least restrictive environment. The answer is ambiguous and relies on the facts in each case. Says Zirkel, "Courts have not used a per se, or automatic, 'yes' answer any more than they have used a per se 'no' answer." [62] Decisions reflect a common core of criteria including comparison of educational benefits with an overall preference for placement in the regular classroom.

As early as 1980, Burgdorf remarked that, "ideally, the law ought to set up a framework and some broad guidelines, within which public educators can exercise their professional discretion in selecting an educational program and placement designed to meet the needs of each individual handicapped student." [63] Several significant cases have surfaced that have devised tests, or analytic frameworks, by which to evaluate whether a student is achieving satisfactorily in the regular classroom. [64] Turnbull and Turnbull note that elements of these frameworks as well as directives from the Office of Special Education Programs (OSEP) have been incorporated into the IDEA of 1997. [65] Currently, however, there is no national framework employed in placement decisions, and the Supreme Court has denied hearing any LRE cases to date.

61. *Id.* at 101-2.

62. Perry Zirkel, *Inclusion: Return of the pendulum?* 12 (9) THE SPECIAL EDUCATOR, 5 (1996).

63. BURGDORF, *supra* note 13 at 273.

64. The major frameworks include the *Roncker* standard (*Roncker v. Walter*, 700 F. 2d. 1058 (6th Cir. 1983)), the two-pronged test from *Daniel R. R.* (*Daniel R. R. v. State Board of Education*, 874 F 2d. 1036 (5th Cir. 1989)), and the four-pronged Holland test (*Sacramento City Unified School District v. Rachel H.*, 14 F. 3d 1398 (9th Cir. 1994)) (see CROCKETT & KAUFFMAN at *supra* note 20; YELL at *supra* note 35, for discussion).

65. see H. RUTHERFORD TURNBULL, & ANN P. TURNBULL, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES (1998).

In an effort to synthesize the various frameworks as an aid to placement decision-makers, Yell suggested guiding elements to making legally and educationally sound LRE decisions. [66] Each of these elements can be supported by the 1999 federal regulations, making it clear that the essence of the LRE provisions has been maintained in the current requirements: (1) Determination of the LRE is based on the individual needs of the student; [67] (2) good-faith efforts are required to maintain students in integrated settings, but districts are not required to actually place a student in a regular classroom, or set him or her up for failure there, before recommending a separate placement. [68] (Some courts, when faced with imprecise data, have required proof by placement to rebut the presumption that an exceptional learner should be educated in a regular instructional setting. Consequently, schools are advised to keep impeccable records concerning their educational decision-making process, as well as data-based decision models to monitor the progress of students); (3) each school district must make available a complete continuum of alternative placements to meet the needs of each of its special education students; [69] (4) when students are placed in separate programs, they are to be integrated in regular settings to the maximum extent appropriate to their needs; [70] and (5) the needs of non-disabled peers may be considered in determining placement in the LRE. All of the tests consider the potential disruptive effect of the student with disabilities upon the instructional environment. Courts, as well as the new regulations, consider whether accommodations to ameliorate a child's disruption to the general education environment have been considered. [71]

In addition to these five enduring elements, the 1997 IDEA and its regulations instruct that a full range of supplementary supports and services that, if provided, would facilitate a child's adaptation to the regular setting, must be considered. [72] The 1997 IDEA and its regulations, however, do not require that an all or nothing determination be made. Sometimes placement decisions require that IEP/placement teams rebut the presumption of regular class placement and specifically address the impact of the child's disability upon his or her involvement. In these instances, LRE is a flexible mechanism that stands in the service of FAPE. The following recommendations are offered to guide placements in the least restrictive appropriate placements for students with disabilities: (1) ensure appropriate programming; (2) ensure appropriate access to the

66. Mitchell L. Yell, *Least Restrictive Environment, Inclusion, And Students With Disabilities: A Legal Analysis.*. 28 THE JOURNAL OF SPECIAL EDUCATION 389-404 (1995).

67. 34 C.F.R. 300.552(b)(2); 34 C.F.R. Part 300, Appendix A (I)

68. 34 C.F.R. Part 300, Appendix A (I).

69. 34 C.F.R. 300.551.

70. 34 C.F.R. 300.554.

71. 34 C.F.R. Part 300, Appendix A, (IV) (39).

72. 34 CFR 300.552 (e); 34 CFR Part 300, Appendix A (I).

general curriculum and district resources; and (3) ensure valid accountability for student progress.

Ensure Appropriate Programming

An examination of the legal foundations underpinning LRE, and the decisions of case law and federal directives over time reinforce Turnbull's conceptualization of LRE as both an educational strategy and a legal principle in which "needs sometimes do prevail over the presumptive right to regular education placement and programming." [73] Courts have preserved, and the 1997 IDEA reinforces, the intent of LRE to provide separate classes or schools on the basis of student need, not administrative convenience. Consequently, decisions of placement in the LRE continue to be made on a case-by-case determination, but with greater awareness of the regular class as the starting point for consideration. From a legal perspective, LRE remains a component of FAPE, requiring *school systems* to provide resources that make the inclusion of students *possible*, while ensuring that *IEP teams* make programming and placement decisions that are *individually appropriate*. The equitable provision of an appropriate education in the LRE depends on both constitutional protections and appropriate instruction.

Ensure Appropriate Access

The purpose of the IDEA legislation is to provide exceptional learners with a full educational opportunity. The Act requires that an individually appropriate education—one that is reasonably calculated to provide educational benefit—be provided through the provision of specialized instruction and related services, and supplementary aids and services, to eligible students. The 1997 IDEA and its regulations use the general education curriculum as a reference point for the education of students with disabilities. This strategy requires a closer look to prevent children whose exceptional learning needs require what Kauffman calls "an extraordinary response" [74] from falling through the cracks.

The formal curriculum of a school denotes the plans made to guide learning, including the structures and practices to implement what is to be taught and learned. [75] Instructional practices flow from curricular imperatives dictating policies of class grouping, grade levels, grading practices, grade retention, and

73. TURNBULL, *supra* note 8 at 161. For an expanded analysis of LRE case law and federal directives, see CROCKETT & KAUFFMAN, *supra* note 21.

74. James M. Kauffman, *Caricature, Science, and Exceptionality*, 18 REMEDIAL AND SPECIAL EDUCATION, 130 (1997).

75. For a full discussion, see Jean B. Crockett & James M. Kauffman, *Classrooms for Students with Learning Disabilities: Realities, Dilemmas, and Recommendations for Service Delivery, in* LEARNING ABOUT LEARNING DISABILITIES (Bernice Wong, ed., 1998).

academic content. As Schumm and her colleagues suggest, "many students do not have the ability to keep pace with the curriculum the way it is structured within the general education classroom and thus may experience a different kind of segregation—the exclusion from the basic right to learn." [76] The assumption that the general education curriculum is appropriate for students with disabilities begs critical questions: Can the curriculum be modified to meet the needs of all students? Can professional training positively affect teaching practice? Is it probable that all teachers will provide specialized instruction for individual students with disabilities as they attempt to offer an improved, personalized, and accommodating educational experience for all students? Such questions have practical merit to school systems. If an accommodating general education provides academic and social benefit to a student so that he or she makes progress from grade to grade, then conceivably more students could be disenfranchised from mandated services, and more districts released from costly obligations. [77]

However, when the right to access and the right to an individually meaningful education collide, nagging questions arise that demand knowledgeable special educators and the child-centered consideration of IEP/placement teams: How is an environment restrictive for a particular child and what does it restrict? Will the lack of restrictive intervention now create the need for greater restriction later? How can the present restriction be balanced against the probability of later restriction for this child? To suggest that a systems-change focus and increased access to the general education curriculum can resolve such thorny educational dilemmas is to glorify the possibility of inclusive services over the probability that inclusive services might not, in some cases, be individually appropriate.

Ensuring Accountability

The IDEA mandates that educators be prepared to utilize promising practices, materials, and technology. [78] Promising practices in terms of what reliable and extensive field tests have shown produces the best learning outcomes have not always been popular or promoted in general education. What rates as "best practice" has often been based on educational theory or philosophy that has not been tested against learning outcomes for a wide range of students. The guiding philosophy of full inclusion, similarly disregards learning outcomes as

76. Jean S. Schumm et al., *General Education Teacher Planning: What Can Students With Learning Disabilities Expect?* 61 EXCEPTIONAL CHILDREN, 335 (1995).

77. See Naomi Zigmond, *An Exploration Of The Meaning And Practice Of Special Education In The Context Of Full Inclusion Of Students With Learning Disabilities,* 29 THE JOURNAL OF SPECIAL EDUCATION, 109-115 (1995).

78. 20 U. S. C. Sec. 1412 (a)(14)).

the measure of best practices and substitutes proximity as the ultimate test of best practice. The 1997 IDEA and its regulations emphasize that "Part B's LRE principle is intended to ensure that a child with a disability is served in a setting where the child can be educated satisfactorily." [79] Increased accountability for incorporating "educational experiences that prepare students with disabilities for later educational challenges and employment" [80] make it clear that a child's educational progress trumps proximity.

For decision-makers confronting LRE, problems occur when there is confusion about what a learning environment is restricting in the first place—educational opportunity or social integration. While there is hope for the alignment of these values in schools and classrooms, there is persistent tension between them in practice as there is in the law itself. The 1997 IDEA and its regulations address this tension not directly through the LRE provisions but indirectly through a renewed emphasis on basing IEPs on the unique educational needs of each student. IEPs are to stipulate special education and any needed changes in regular education programming that allow students to access and progress appropriately in the general education curriculum with due regard to the impact of their disability on their learning. A critical distinction exists between providing services which allow a student *access* to the content of the general education curriculum—such as various services, supports, and accommodations—versus actually incorporating that general curriculum into an IEP. [81]

In attempting to address the educational benefit of students with disabilities through the medium of the general education curriculum, the 1997 IDEA sets a perilous course. Although the LRE provisions in Sections 300.550-300.556 remain markedly intact, and the continuum of alternative placements is explicitly reinforced, significant demands to consider the full range of supplementary supports and services are embedded in the IEP requirements. These demands threaten to encourage placements that are systems-centered, not child-centered. The potential exists for some interpreters of the final regulations to do an end-run around the LRE provisions by intimidating IEP/placement teams into thinking that their job is to make inclusive placements *possible*, or to provide instruction in the general education curriculum for every student with a disability. This is not their job. IEP/placement teams are accountable for making programming and placement decisions that are *individually appropriate* for a particular student, to commit district resources to support appropriate programming, and to determine the goals, objectives, and accomplishments that will demonstrate that their plan for this child has been successfully

79. 34 C. F. R. Part 300, Appendix A (I).

80. 34 C. F. R. Part 300, Appendix A (II).

81. For a full discussion of legally correct and educationally meaningful IEPs, see BATEMAN & LINDEN, *supra* note 56.

achieved. Only in this sequence can the needs of vulnerable children be met, their right to FAPE in the LRE protected, and the responsibilities of the educational establishment addressed.

Postscript: This manuscript is dedicated to the memory of Jim Vaught who died on April 27, 1999, at the age of 55. Jim, who retired in December, 1998, as Superintendent of Schools in Wythe County, VA, finished every talk to parents and educators with this simple but profound prescription: "Take care of the kids, and take care of each other."