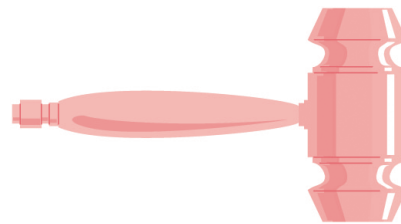


Legal Corner



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Placement of Students in the Least Restrictive Environment: An Overview of the Law and Pitfalls to Avoid



Students who are receiving special education services must be educated in the least restrictive environment possible. This is not an ideal or a goal; it's a requirement of law. This article provides an overview of the law applicable to the concept of **Least Restrictive Environment (LRE)**, and it will discuss some of the issues school principals need to address and pitfalls school principals should try to

avoid in the area of LRE.

The Statutory and Regulatory Framework

The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled "to the maximum extent appropriate . . ." 20 U.S.C. § 1412(a)(5)(A). Federal regulations have, therefore, created presumptions that:

1. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
2. Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (34 C.F.R. § 300.114(a)).

The law intends the degree of inclusion for an individual student with special education needs be determined at least annually; be based upon the Individualized Education Program (IEP) of the child; and be as close as possible to the child's home, with students being educated in their "regular" or neighborhood school unless the IEP requires some other arrangement. 34 C.F.R. § 300.116. In addition, placement determinations must be made "by a group of persons [that includes] the parents," and in that determination there must be a consideration of the potential harm to the child or to the quality of educational services. 34 C.F.R. § 300.116(a)(1) and (d).

Students' IEPs must include a statement of "present levels of academic and functional performance," explaining how the child's disability affects the child's involvement and progress in the general education curriculum. 34 C.F.R. § 300.320.

(a)(1)(i). Thus, students with disabilities should not merely be in the same room as the regular education students, but they should be following the same curriculum and be accommodated appropriately. This, of course, does not mean that every child with a disability must be included in the general classroom at all times; the presumption of the law is that a *continuum* of placement be available for every student. Thus, when an IEP is being developed, the team must consider a general education classroom setting as the starting point.

Under both the federal and state regulations, schools must provide a *continuum* of alternative placement options that are available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115(a), 22 Pa. Code § 14.145(5). Under the federal rules, that continuum of services must:

1. Include the alternative placements listed in the definition of special education under 34 C.F.R. § 300.38 (instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions); and
2. Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. (34 C.F.R. § 300.115(b)).

In order to carry out the intent of the Individuals with Disabilities Education Act (IDEA), IEP teams should seek to do two things at once: educate students with disabilities in a setting that resembles the general education program as closely as possible and meet the unique needs of each student with disabilities. *See generally* A Principal's Guide to Special Education, Bateman and Bateman, Third Ed., pp. 90-91 (2014).

The Judicial Framework – Oberti

The United States Court of Appeals for the Third Circuit (the federal appellate court for the federal district courts in Pennsylvania, New Jersey, Delaware and the Virgin Islands) has interpreted the above-quoted language from the IDEA as setting forth a "strong preference" for integrating children with

disabilities in regular classrooms. *Oberti v. Board of Ed. of Bor. of Clementon Sch. Dist.*, 995 F.2d 1204 (3d Cir. 1993). The court called the language a “presumption” in favor of educating children with disabilities in the general education environment for at least a “significant portion” of the school day. *Id.* at 1215 n. 21.

In *Oberti*, the court conducted a two-part analysis for determining whether a local educational agency has complied with the LRE requirement. First, a determination should be made of whether the child can be educated satisfactorily in the regular education setting with supplementary aids and services. And second, it should be determined whether the Local Education Agency (LEA) has provided education in the general education setting to the extent feasible, such as inclusion in part of the general education classes and extracurricular and other school activities. This analysis, created by the *Oberti* court 26 years ago, is still used by hearing officers and courts today; it is important for principals to be familiar with it.

The *Oberti* court laid out three considerations for determining the first prong of the analysis (i.e., whether the student can be educated in the regular classroom): **(1)** Has the school given “serious consideration” to using the full continuum of placements and supplementary aids and services?; **(2)** What are the comparative educational benefits that the child can receive in the regular education and segregated settings, particularly considering the benefits of learning social and communication skills in the general education context?; and **(3)** Is the child’s behavior in the regular education setting so disruptive that the child is not benefiting and is the behavior interfering with the education of the other children in the general education setting? *Oberti*, at 1217. The court found that if the supplementary aids and services would prevent these negative consequences, then the determination of a negative effect on peers would not warrant removal from the regular education environment. *Id.*

As for the second prong, if it is found that removal from a regular, integrated classroom is justified, a court (or hearing officer) must consider whether the school has “included the child in school programs with nondisabled children to the maximum extent appropriate.” *Oberti*, at 1218. This analysis reinforces the idea that the education of children with disabilities is not an all or nothing system. In connection with this analysis, the court cited favorably an opinion from the Fifth Circuit, which stated:

[T]he school must take intermediate steps wherever appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops.

If principals are familiar with the analysis set out by *Oberti* – the analysis that hearing officers and federal courts have



long applied in determining whether a student has been placed in the LRE – they should be in a strong position when they determine whether and how students receiving special education should be placed in the LRE. To simplify the summary even further, readers should note that the *Oberti* court emphasized that the central consideration for determining whether a district has provided Free Appropriate Public Education (FAPE) in the LRE is the “proper use of supplementary aids and services,” when the entire “continuum of alternative placements” have been made available and supplementary services are offered in conjunction with regular class placement. *Oberti*, at 1214, 1216; 34 C.F.R. § 300.115(b)(2).

Knowing the analysis to apply is one thing; giving it short shrift is another. A hearing officer recently held that a district did not give “serious” consideration to using the full continuum of placements and supplementary aids and services in order to keep a student in a regular education environment. Because of that failure, the hearing officer entered an order awarding significant relief to the student. If a school has not given serious consideration (or *any* consideration) to including a student with disabilities in a general education classroom with supplementary aids and services, or to modifying the grade-level curriculum, then it has most likely violated IDEA’s mainstreaming directive. As the *Oberti* court put it, “the [IDEA] does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.” *Oberti*, at 1216 (cleaned up).

What other steps can principals take to avoid problems caused by not making proper placements in the LRE? Principals can take the lead in the effort to place students in LREs by educating staff; ensuring the availability of supplementary aids and services; providing time for planning, meetings, in-service training and conferences; and demonstrating commitment to the issue. *Principal’s Guide*, at 94.

First, as for education, staff should be educated on a regular basis about the presumptions imposed by law regarding LRE.

Second, with respect to effective support of teachers through the availability of supplementary aids and services, principals could take steps to ensure that students with disabilities are “spread out” among different classrooms. In connection with this, principals might consider the proportion of students with disabilities in a classroom as reflecting the proportion in the total population. *Id.* at 96.

Third, there are numerous steps principals can take to provide time for planning, meetings, in-service training and conferences, including: (1) Building into the schedule regular meeting times for teachers to work, plan and reflect on different students’ needs in different settings; (2) Arranging special meetings when something is not working for a student or a staff member; (3) Involving educational staff in planning how to support individual students and how to collaborate to support students with disabilities in the school; and (4) Identifying teachers’ professional development needs and

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creating in-service training to meet those needs or identifying conferences and workshops they can attend.

And finally, principals can demonstrate their own commitment to the issue by, among other ways: (1) Attending and participating in IEP meetings; (2) Asking questions about how students are doing; (3) Reinforcing positives when students with disabilities are working effectively; and (4) Reinforcing positives when special education teachers and other staff are working together to meet the needs of students with disabilities. *Id.*

Likely, the most important aspect of working with students with disabilities is a commitment to work to provide for their education. Principals are responsible for the education of all students

in their schools. Ensuring the inclusion of students with disabilities in appropriate academic environments and school activities is a significant part of that responsibility. *Id.* at 97.

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