

# ND PROTECTION & ADVOCACY PROJECT

## SPECIAL EDUCATION LEAST RESTRICTIVE ENVIRONMENT

### ***Least Restrictive Environment (LRE) is the legal mandate of IDEA***

Least restrictive environment (LRE) is the core legal mandate of the Individuals with Disabilities Education Act (IDEA). It requires that students with disabilities receive their education in the regular classroom environment to the maximum extent appropriate or, to the extent such placement is not appropriate, in an environment with the least possible amount of segregation from the student's nondisabled peers and community.

The mandate is set forth in the IDEA regulations at 34 CFR 300.114 through 34 CFR 300.120. The "LRE mandate" at 34 CFR 300.114(a) requires each public agency to ensure 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 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."

The term "regular educational environment" is defined as encompassing "regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate." 70 1FED. REG. 46,585 (2006).

The United States Supreme Court in the landmark education case *Honig v. Doe*, 484 U.S. 305, 309 (1988), interpreted the Education of the Handicapped Act (EHA)—the predecessor statute to the IDEA—to include this legal mandate:

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“(State) plans must assure that, ‘to the maximum extent appropriate,’ states will ‘mainstream’ disabled children, i.e., that they will educate them with children who are not disabled and they will segregate or otherwise remove such children from the regular classroom setting ‘only when the nature or severity of the handicap is such that education in regular classes ... cannot be achieved satisfactorily.’” (Citing 20 U.S.C. § 1412(5)).

The IDEA strengthens the LRE mandate by barring states from using a funding mechanism by which they distribute funds “on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child as described in the child’s Individual Education Plan (IEP).” 34 CFR 300.114(b).

### ***North Dakota—a 25-year philosophy of inclusion***

To be clear, *full* inclusion of students with disabilities in *all* instances is not mandated by the IDEA. In other words, there may be instances where a student cannot receive an appropriate education in a regular classroom environment even with supplemental aids and services. However, districts must always consider inclusion during the IEP development process. The LRE requirement at 34 CFR 300.116 expresses a *strong presumption*, not a mandate, for educating children with disabilities in the general education setting alongside their peers without disabilities. The IDEA does provide for continuum of alternative placements at 34 CFR 300.115. Under this provision, the continuum must:

- (1) include the alternative placements listed in the definition of special education under §300.39, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and
- (2) make provisions for supplementary services such as resource room or itinerant instruction to be provided in conjunction with regular class placement.

For the last quarter century, North Dakota, as a state, has adhered to the core IDEA philosophy of inclusion and integration in educating students with disabilities with their nondisabled peers to the maximum extent possible, avoiding the establishment of separate schools altogether. There is not a good reason to change that philosophy now. The decision not to select an inclusive setting for a student with a disability must be made on an

individual basis. Categorical decisions regarding placement clearly violate the IDEA's requirement for individualized educational planning.

Even if a student with a significant disability has limited potential for academic achievement in the regular classroom, he or she may benefit in nonacademic areas, such as social development and self-care. Thus, the courts have held that districts must consider an inclusive setting for all students to determine if an appropriate general education program with supplementary aids and services can be designed for the student. If so, the district should try that placement first before considering more restrictive placements. See, for example, *Statum v. Birmingham Public School Board*, 20 IDELR 435 (N. D. Ala. 1993) (Finding that the school board failed to prove that the student would benefit to a more substantial degree, either academically or non-academically, in a restricted setting, and holding that the district erred when it failed to consider a regular education placement for the student.) In short, the district should always consider inclusion during the IEP development process. (See *Daniel R. R. v. State Board of Education*, 441 IDELR 433 (5<sup>th</sup> Cir. 1989) ("We...must examine the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child."))

The IEP format currently used in North Dakota requires the team to select one of eight categories of educational environments to affirm that they have considered the continuum of services and that the selected setting is believed to be the most appropriate environment for the student. These categories of settings, which are identified pursuant to the federal child count code, must be reported by the district to the federal government at regular intervals. The government keeps track of and publishes the number of students who are educated in each of the settings in each state. These categories are known as the "level system" in North Dakota. Research did not disclose a state law or regulation listing these eight categories of educational environments.

***Department of Justice has investigated the state of Pennsylvania's practice of referring students with disabilities to alternative education programs for disruptive youth***

The United States Department of Justice (DOJ) recently entered into a settlement agreement resolving complaints alleging that the Pennsylvania Department of Education's policies and practices regarding placement of students with disabilities in alternative education programs led to violations of federal law. The settlement agreement provides that, pursuant to Title II of the ADA, students with disabilities should not be placed in alternative

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education programs for behavior that is a manifestation of their disability. Rather, they are entitled to an individual determination as to whether any behavior subjecting them to possible placement in a separate school or program is because of a disability. If so, students with disabilities are entitled to reasonable modifications of policies and procedures under Title II of the ADA to prevent discrimination. In negotiations leading up to the settlement agreement, the Pennsylvania Department of Education had made the argument that under its interpretation of Pennsylvania law, school districts are afforded a great deal of local control and are directly responsible for making decisions related to the education of their students. Pennsylvania took the position that the state's only authority over alternative education programs was limited to approval and general oversight. The settlement agreement, however, makes clear that the United States disagreed with Pennsylvania's interpretation; it states that the Department of Education is responsible for the education of public-school students in Pennsylvania, including those students placed in separate school programs.

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