

**DETERMINING THE LRE WITHOUT ENGAGING IN
PREDETERMINATION OF PLACEMENT**

By

**Kathleen S. Mehfoud
Reed Smith LLP
Riverfront Plaza, West Tower
901 East Byrd Street, Suite 1700
Richmond, VA 23219
(804) 344-3421
kmehfoud@reedsmith.com**

- I. Public Placement as the Least Restrictive Environment
- A. “The IDEA creates a preference for mainstream education, and a disabled student should be separated from her peers only if the services that make segregated placement superior cannot ‘be feasibly provided in a non-segregated setting.’” (*Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006), quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) in *Waukee Comty. Sch. Dist., et al. v. Douglas and Eva L., individually and on behalf of Isabel L.*, 51 IDELR 15 (S.D. Iowa 2008) quoting *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006).
- B. L.M. has autism and his parents sought reimbursement for his placement in a private school. Following an evaluation at Kennedy Krieger Institute, the parents rejected the use of a calming room for his significant behaviors in the proposed public school setting. The court concluded the offered public school IEP offered a program designed to provide some educational benefit. The use of the calming room was found to be necessary for the safety of staff and students, although other aspects of the KKI program were adopted by the public school. The public school program was a neighborhood program attended by students with and without disabilities, provided the opportunity for some mainstreaming and was the LRE. See *M.M., individually and on behalf of L.M. v. District 0001 Lancaster Cnty. Sch., AKA Lincoln Pub. Schs.*, 702 F.3d 479 (8th Cir. 2012).
- C. Six year old boy with autism engaged in a number of maladaptive behaviors. The school district employed a number of behavioral interventions. He was offered FAPE in the LRE because “The IDEA does not require a school district to eliminate interfering behaviors. It requires only that the school district ‘consider the use’ of positive behavioral interventions and supports to address the behavior.” See *J.W., by his natural guardians and next friends, Ward and Ward v. Unified Sch. Dist. Johnson Cnty., State of Kansas*, 58 IDELR 124 (D. Kan. 2012).
- D. “Mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which

could feasibly be obtained only in a separate instructional setting; or, (3) the disabled child is a disruptive force in a regular setting.” See *Hartmann v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997).

II. Private Placement as the Least Restrictive Environment

A. IDEA provision:

1. “(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency. (i) In general. Subject to subparagraph (A), this part [20 USCS § § 1411 et seq.] does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

a. Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.”

20 U.S.C. § 1412(c).

B. U. S. Supreme Court Case Decisions:

1. *School Comm. of Town of Burlington v. Dep’t. of Educ.*, 471 U.S. 359 (1985). Two part test: Did school district offer FAPE and, if not, was private placement appropriate.
2. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). Private placement does not have to meet state standards but equitable factors can be considered by the courts in determining whether to award tuition reimbursement.
3. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009). Equitable factors and the parents’ motivation in making the placement can be considered.

C. Private placements must be available as part of the continuum of placements. School divisions make the decision to place a student in a private program if that placement is the LRE for the provision of FAPE. A private placement may be the LRE where the public school district did not make FAPE available. “Aside from the concern that Groves educates primarily children with disabilities, there is no doubt that it was a proper placement for C.B.” *C.B., by and through his parents*,

B.B. and C.B., v. Special Sch. Dist. No. 1, 636 F.3d 981, 991 (8th Cir. 2011). (Of note, this case also decides that the *Burlington* two part reimbursement test is also still applicable.)

D. Private Residential Placement Cases

1. *Burke Cnty. Bd. of Educ. v. Denton, by and through Denton*, 895 F.2d 973 (4th Cir. 1990). Chris, a 19 year old boy with autism and moderate intellectual impairments, had been educated in a residential placement. His parents brought him home and provided some educational services in the home through an aide in addition to attending the public school. The in-home aides did not implement the behavioral program consistently but the student still made progress. The aides spent a lot of time providing basic care for Chris such as bathing, dressing and eating. His aggression decreased and he made progress at school and was able to spend more time on task. There was no link between the supportive services in the home and the educational placement and therefore no requirement to pay for the in-home services.
2. *Mary Courtney T., et al. v. Sch. Dist. of Philadelphia*, 575 F.3d 235 (3d Cir. 2009). Mary Courtney has learning disabilities, speech and language impairments, ADHD and mental health issues. She was placed at a residential facility by her parents at Rancho Valmora in New Mexico. Parents may recover reimbursement if the placement confers “meaningful benefit.” Later the student was placed in Supervised LifeStyles (SLS). The private school does not have to meet IEP or state educational standards. (Citing *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981)). The placement at SLS was found not to be a special education program but was rather a mental health placement to manage Mary Courtney’s medical condition. The program was licensed by the Office of Mental Health and had no state education accreditation or on-site educators. Also, Mary Courtney’s medical and educational needs were segregable.
3. *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E., by and through her parents, Roxanne B. and David E.*, 702 F.3d 1227 (10th Cir. 2012). Parents sought a residential placement for Elizabeth, a student with significant behavioral and emotional issues. The program that they chose was a residential treatment center in Idaho known as Innercept. The court did not adopt the *Kruelle* test or the *Richardson* test. Tuition was granted because the proposed IEP was not appropriate and the private residential program provided educational services in an accredited facility. (On appeal to U.S. Supreme Court). See also *Tice v. Botetourt County School Board*, 908 F.2d 1200 (4th Cir. 1990).
4. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 299, 580 F.3d 286, 299 (5th Cir. 2009). “In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for

the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education.”

E. Private Day Placement Cases

1. *Park Hill Sch. Dist. v. Dass and Dass, individually and as parents of D.D. and K.D.*, 655 F.3d 762 (8th Cir. 2011). Twin brothers K.D. and D.D. had significant cognitive, adaptive, communication, social/emotional and physical disorders. The parents placed the students in a private school because of a dispute over the lack of one-to-one errorless teaching and positive reinforcements in the public school. The court denied tuition reimbursements because the school district offered appropriate educational services and had provided planning for transition and a behavioral plan. The district staff had observed the students for many hours.
2. *Klein Indep. Sch. Dist. v. Per Hovem, et al.*, 690 F.3d 390 (5th Cir. 2012). This older student with a very high IQ and written expression disabilities sought a private placement. The parents were concerned that he would not be able to perform college level work. According to the parents, he could not write down phone messages at home. The school district argued the student had better than average grades in general education classes and was progressing toward graduation. The court concluded that educational benefit did not include making progress in the area of weakness caused by the learning disability. “Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting the child’s disability.”
3. *Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). James is a sixteen year old student of above average intelligence and has a learning disability. According to his parents, at age eleven he was functionally illiterate. His parents placed him in a private day school, Vance Academy. Later James was placed in a residential facility at Oakland School where he made considerable progress. The school division failed to give the parents notification of procedural safeguards and his promotions were due to social promotions. Tuition was awarded.

III. Defenses to Requests for Private Placements

- A. Offer an appropriate and extensive public school IEP and make sure it is completed prior to the private placement.
- B. Review and respond to the ten day notice of removal, possibly through the IEP process. 20 U.S.C. § 1412(a)(10).
- C. Consider the need for transition services to move the student from a private school to the public school.
- D. Make a written settlement offer to protect against attorneys’ fees. 20 U.S.C. § 1415(i)(1)(D).

- E. Proof of progress and data collection is essential to a defense. Improvement in grades, mastery of Dolch words, performance on the Brigance, and increase in basic reading and independence demonstrated that there was progress in the public school program. *Torda, by and through his guardians, Capuano Torda and Torda, et al. v. Fairfax Cnty. Sch. Bd.*, 112 LRP 32614 (E.D. Va. 2012).
- F. “Thus, although positive educational outcomes can signal that an IEP is appropriate under the IDEA, the appropriateness of S.H.’s IEP ultimately turns on whether it was reasonably calculated to provide educational benefit and does not hinge on the showing of an actual positive outcome.” *See S.H., by next friend A.H. and E. H. v. Plano Indep. Sch. Dist.*, 487 F. App’x 851 (5th Cir. 2012).
- G. Reimbursement was denied where the private school and the parents hindered the development of the IEP through their actions in being uncooperative. *M.N. ex rel. A.B. v. State of Hawaii, Dep’t of Educ.*, 60 IDELR 181 (9th Cir. 2013).
- H. *M.L. and S.L. ex rel. E.L. v. East Ramapo Cent. Sch. Dist.*, 113 LRP 14037 (S.D.N.Y. 2013). Parents could not recover reimbursement for a private school placement when they helped to found the school.
- I. *Hessler v. State Board of Education of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983). “First, we do not think that because a given school is allegedly more appropriate than another school, the less appropriate school becomes inappropriate. Second, the unexpressed premise of the allegations is that there is a constitutional and statutory obligation to provide the infant plaintiff the best education, public or nonpublic, that money can buy. Such a premise is in conflict with the recent decision in [*Rowley*].”
- J. Consider whether the parents ever visited the public school program or whether their experts visited the program.
- K. Cost is a factor in choosing between two appropriate programs and the effect on a budget is a relevant consideration. *See Florence*, 510 U.S. 7; *Jefferson Cnty. Sch. Dist.*, 702 F.3d 1227.

IV. Decision-making Process

- A. Be familiar with the student.
- B. Be knowledgeable about the private school program.
- C. Be knowledgeable about the public school program.
- D. Prepare a comparison chart of the two programs.
- E. Sell your IEP program to the parents.

V. Practical Considerations

- A. IEP development

1. Have a private school representative present if the student is attending the private school program.
 2. *S.H., by next friend A.H. and E. H. v. Plano Indep. Sch. Dist.*, 487 F. App'x 851 (5th Cir. 2012). Student S.H. has severe autism and attended a private school, Wayman Learning Center (WLC), where he received ABA services. Subsequently, his parents placed him in a dual enrollment program at the public school and at WLC. The court found that the failure to include the private school teacher in the IEP development denied FAPE.
- B. Application process—obtain parent permission for release of documents.
- C. Selection of school—this decision is the school division's prerogative but obtain input from the parents. In the event of a dispute, be prepared to prove that the selected school can provide FAPE. *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4th Cir. 2007).
- D. Shared cost placements—list the terms in the IEP or in an agreement.
- E. Decide whether the private school will be the stay-put placement and state the decision in the IEP or agreement.

VI. Predetermination Issues

- A. **Avoid predetermination of IEP terms or placement but do not give up the valuable opportunity for the creation of a draft IEP or for the holding of a planning IEP meeting.** Nothing in the IDEA prohibits the preparation of a draft IEP or the holding of a planning meeting with staff. Utilize these valuable tools but be sure staff understands that all determinations are actually made in the IEP meeting and only after consideration of the parents' input.
- B. **Be careful to avoid statements that could be made by staff and which could prove that there was predetermination.** Do not make statements such as "We have met and decided that your child should receive these services" or "The proposed related service goals cannot be changed as they were determined by the provider who is not here at the meeting to discuss any revisions."
- C. **Emphasize to the parents that placement decisions are made based on the individual needs of the student and not based on the availability of programs or services.** Parents are sometimes told that "This is how the program operates." Such a statement suggests erroneously that the student must fit into the program rather than tailoring the program to the student's individual needs.
- D. **Demonstrate that the parents' information and concerns were considered and incorporated into the IEP, as appropriate.** If it can be shown that the parents' private evaluations and concerns were considered and incorporated in the IEP in part, then there will be a finding of no predetermination. *See Fort Osage R-1 Sch. Dist. v. Sims, on behalf of his daughter, B.B., et al.*, 641 F.3d 996 (8th

Cir. 2011); *K.E. by and through her parents, K.E. and T.E. v. Independent Sch. Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011).

- E. **Make the placement decision at the end of the IEP meeting.** Avoid discussion of the location of the services as the IEP is being developed in order to prevent accusations that the placement was determined in advance of the meeting and that the IEP was then developed to be consistent with a predetermined placement.

VII. Determine Appropriate Services and Settings for the Student

- A. **The IEP team needs to be able to recite specific facts that support the appropriateness of the selected placement.** Describe the placement in factual and persuasive terms. It is a good practice to set forth a cogent, convincing argument in the LRE section and in the prior written notice. General statements about the placement being the LRE to provide FAPE are not compelling.
- B. **Students with disabilities cannot be removed from the general education setting unless it is established that the student's needs cannot be adequately addressed in the general education setting.** It is helpful to have data which supports the need to remove the student to a more restrictive placement. Staff should be able to articulate why the setting that was selected is the LRE and why the student could not remain in the general education setting. The discussion should not be conclusory.
- C. **It is not necessary to provide a completely separate curriculum through the support of a one-to-one aide in order to maintain a student in a general education setting.** In order to participate in a general education setting, the student must be able to benefit from the instruction in the class. If the student requires separate instruction and a different curriculum with the support of a one-to-one aide in order to remain in the class, the general education setting may not be the appropriate setting for the student. The provision of a one-to-one aide to accompany the student in a general education setting is not necessarily the LRE for the student.
- D. **The behavior of the student can be a consideration in determining LRE.** The IEP team can consider the effect of the student's behaviors on the education of the other students in the class as one factor in determining the LRE. If the student is unable to learn in the class because of behavioral issues or the other students are unable to learn due to the presence of the student, a more restrictive placement is likely indicated.
- E. **It may not be prudent to place the student in a highly restrictive placement in the initial IEP.** Students should typically be placed in a less restrictive setting before moving the student to a more restrictive placement. It is not required, however, to wait for the student to fail in each setting along the continuum before moving the student to a more restrictive placement. The IEP team should place the student along the continuum at the point where he or she will receive appropriate services.

- F. **Placement selection should be based on good data that has been thoroughly analyzed.** Documentation of problems experienced in a less restrictive placement will assist in establishing that a more restrictive placement is needed. The absence of good data on which to make an informed decision may result in uninformed decision-making.

VIII. Bonus

- A. **The IEP team should have knowledge of the attributes of a private school if a private school placement is going to be selected as the LRE.** If the IEP team is considering whether a private placement is needed, at least one member of the IEP team should be familiar with the private school and its characteristics before making a decision about whether a private placement is required for FAPE. This knowledge should include location of the program, types of students served, staff credentials, and the approaches and strategies used in educating enrolled students.