Tenth Circuit Adopts Least Restrictive Environment Standard

By Randy Chapman

On August 11th the 10th Circuit Court of Appeals (the U. S. Court of Appeals Circuit that includes Colorado) issued a major decision adopting a test for determining whether a school district has met the IDEA's least restrictive environment (LRE) requirement. In *L.B. v. Nebo School District (Nebo)* www.kscourts.org/ca10/cases/2004/08/02-4169.htm, the Court adopted the standard previously stated in *Daniel R.R. v. Bd. Of Education*, 874 F.2d 1036 (5th Cir. 1989) http://www.kidstogether.org/ct-danl.htm. In *Nebo* the parents of a young child with autism spectrum disorder were seeking payment from the school district for placement in an integrated private preschool because the integrated preschool was both less restrictive and educationally superior to placement in a public preschool that primarily served students with disabilities. In approaching the LRE issue, the court in *Nebo* notes that: "Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements.[1] Thus, the LRE requirement is a **specific statutory, mandate. It is not…a question about educational methodology."** [2] Looking for an appropriate LRE test to adopt, the court specifically rejects the *Roncker* LRE test that is applied in the Fourth, Sixth, and Eight Circuits because: " The *Roncker* test is most apposite in cases where the more restrictive placement is considered a superior educational choice. This makes the *Roncker* test unsuitable in cases where the least restrictive environment is also the superior educational choice."[3]

In *Nebo* the parents are arguing that the less restrictive setting is also educationally superior, therefore, the 10th Circuit looks to the *Daniel RR* test because it "better tracks the language of the IDEA's least restrictive environment requirement and is applicable in all cases." The court then states that the test that it is adopting for determining least restrictive environment is a two-part test "in which the court

(1) determines: whether education in a regular classroom, with the use of supplementary aids and services can be achieved satisfactorily; and
(2) if not, the court determines if the school district has mainstreamed the child to the maximum extent appropriate."

The Tenth Circuit outlines four non-exhaustive factors to be considered in determining the first part of the test, that is, whether education in the regular classroom

[1] Citing *Murray v. Montrose County Sch. District*, 51 F.3d 921 at 926 (10th Cir. 1995).
[2] Emphasis supplied.
[3] In *Roncker v. Walter*, 700 F.2d 1058 at 1063 (6th Cir. 1983) the Sixth Circuit's LRE test stated "[i]n a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting."

can be achieved satisfactorily with the use of supplementary aides and services. The four factors to be considered are:

(1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services;
(2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom;
(3) the child's overall educational experience in regular education, including non-academic benefits; and
(4) the effect on the regular classroom of the disabled child's presence in that classroom.

In *Nebo* the parents had placed their daughter, at their own expense, in a private preschool so that she could attend school with children without disabilities. The school district did not have a mainstreamed preschool and had offered a placement in a school that primarily served students with disabilities, although some students without disabilities also attended the school. Only students without disabilities attended the private school chosen by the parents. Thus, in the parents' view, the private program was a less restrictive or more mainstreamed setting. In addition, the parents provided, also at their own expense, significant supplementary aids and services to support their daughter's mainstreamed placement. They paid for a paraprofessional to support their daughter in the private mainstream preschool and the parents provided an intensive at-home Applied Behavioral Analysis (ABA) program. The school district eventually agreed to pay for some of the ABA program but not the private preschool so the parents requested a due process hearing. At the hearing the evidence showed that the student was making very good progress at her private mainstream preschool with the support of her paraprofessional and the in-home ABA program.

Applying the above four factors to the facts of the case at hand, the Tenth Circuit ruled for the parents. Looking at the first factor, the court credited the school district as having considered accommodating the student at the private preschool. The court noted that the district had sent an autism specialist to evaluate the private program and continued to evaluate the student.

But, second, when comparing the benefits of the private mainstream placement to the public special education placement the court found that the evidence was clear that the benefits the student was receiving from the mainstream placement were greater than those she would have received from the special education placement.

Moreover, looking at the third factor, the court determined that the non-academic benefits of the mainstream placement outweighed the non-academic benefits of the special education placement offered by the district. Specifically, the mainstream placement provided more appropriate role models, had a more balanced gender ratio, and was generally better suited to meet her behavioral and needs.

Finally, when assessing the fourth factor, the court found that although the student had some behavioral problems (tantruming), she was not disruptive in the regular mainstream classroom. Three out of the four factors weighed in favor of the private mainstream preschool placement.

This is a significant case for Colorado and other states in the 10th Circuit.[4] Impartial hearing officers, federal complaints officers, and judges within the 10th Circuit will be obligated to follow this LRE test. Important points in this decision include that the least restrictive environment requirement is a specific statutory mandate. It is not a question of educational methodology. The court also clearly emphasizes the importance of considering the use of supplementary aids and services in determining whether education in the regular classroom can be achieved satisfactorily. In fact, in *Nebo* the court ordered that the family be reimbursed for fairly substantial supplementary aids and services, a paraprofessional and ABA therapy that were needed to support the less restrictive placement. It is also noteworthy the extent to which *Nebo* takes into account the non- academic benefits of the integrated settings, such as, role modeling and gender ratios. The court also downplayed the impact of the child's tantrums on the regular classroom. Of course, each special education case is unique, individualized, and depends on the evidence. In *Nebo* it was very helpful that the parents managed to pay for the private mainstream placement, including the supplementary aids and services. Their daughter's real success in that less restrictive setting, was probably much more persuasive, than if she had been placed in the more segregated setting without the supplementary aids and services, and the parents had to argue the hypothetical benefits of mainstreaming.

[4] The 10th Circuit includes Colorado, Oklahoma, Kansas, New Mexico,Wyoming, and Utah.