TASC Training & Advocacy Support Center

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FACT SHEET
Advocating for Less Restrictive Environments Without Due Process: How to Achieve Inclusion by Working with School Districts

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Introduction

Although the Individuals with Disabilities Education Act is more than 30 years old, obtaining placement of children in the least restrictive environment in which their needs can be met continues to be a struggle for many families. School districts may lack knowledge of how to include students in general education, or they may not provide the supports and services necessary to make such inclusion successful. Other systemic barriers such as the structure of the IEP process or lack of training of hearing officers regarding the law or educational best practices may also operate to keep students in overly-restrictive placements. Many parents may rely on the IDEA's due process procedures to try to obtain inclusive educational programs for their children. However, with planning and focused advocacy efforts, it is also possible to obtain inclusive education for students without due process; it is preferable to do so when possible, because the school district will be more likely to feel a sense of ownership of the placement and more of a stake in making the placement work if it has not been imposed by a hearing officer.

This fact sheet will discuss how to advocate for inclusion of students with disabilities without resorting to due process. The fact sheet will begin with a brief overview of the major least restrictive environment cases, and will then continue with a case scenario and how the case might be approached by working with the school system as a partner, rather than an adversary. The fact sheet will end with some general advocacy strategies.

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Overview of Significant Caselaw

Roncker v. Walter, 700 F. 2d 1058 (6th Cir. 1983), *cert. denied* 464 U.S. 864 (1983); 1983-84 EHLR 554:381:

The Sixth Circuit addressed least restrictive environment for the first time and set forth the following standard: If a segregated facility is considered superior for a student, a determination should be made if the services that make the placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated setting would be inappropriate under the IDEA. The court went on to say that some students must be educated in segregated facilities because they would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the child with disabilities is a disruptive force in the non-segregated setting. The court further stated that cost is a proper factor to consider.

Note: The Sixth Circuit Court of Appeals reiterated its *Roncker* standard in *Kari H. v. Franklin Special School District*, 125 F. 3d 855 (6th Cir. 1997); 26 IDELR 569, in a case upholding partial inclusion for a student with cri du chat syndrome.

A.W. v. Northwest R-1 School Dist., 813 F. 2d 158 (8th Cir. 1987), *cert. denied* 484 U.S. 847 (1987); 1987-88 EHLR 558:294:

Adopted the *Roncker* standard and discussed cost issues at length in denying regular education placement to student with severe mental retardation.

Daniel R.R. v. El Paso Independent School District, 874 F.2d 1036 (5th Cir. 1989); 1988-89 EHLR 441:433:

The Fifth Circuit set out a two part test to determine compliance with the least restrictive environment requirements of the IDEA. First, can education in the regular classroom, with the use of supplemental aids and services be achieved satisfactorily? In answering this question, it is necessary to look at whether supplementary aids and services have been provided, whether the program has been modified, and whether the efforts of the district have been sufficient. It is also necessary to ask if the student will receive an educational benefit from regular education, recognizing, however, that academic achievement alone is not the only purpose of placing a child with disabilities into a regular education environment.

The court also stated that it is necessary to look at the child's overall educational experience, balancing the benefits of special and regular education for the child, and to look at the effect of the child's presence on the regular classroom environment and on the education the other students are receiving. Second, if the student cannot be educated in the regular classroom satisfactorily, has the student been mainstreamed to the maximum extent appropriate? The court specifically notes that the IDEA does not

take an all-or-nothing approach to special education, and that students can be placed in both regular and special education to varying degrees.

Note: The Fifth Circuit Court of Appeals reiterated its *Daniel R.R.* standard in *Brillon v. Klein Independent School District*, 100 Fed. Appx. 309 (5th Cir. 2004); 41 IDELR 121, in which the court upheld a student's placement in a special education class for science and social studies for second grade, despite his full inclusion in regular education in first grade.

DeVries v. Fairfax County Board of Education, 882 F.2d 876 (4th Cir. 1989); 1988-89 EHLR 441:555:

The Fourth Circuit essentially adopted the holding of *Roncker v. Walter* to deny a neighborhood school placement to a student with severe disabilities.

Note: The Fourth Circuit Court of Appeals reiterated its *DeVries* holding in *Hartmann v. Loudoun County Board of Education,* 118 F.3d 996 (4th Cir. 1997); 26 IDELR 167, which overturned the district court's order of an inclusive placement for an elementary school student with autism. The Fourth Circuit stated clearly that mainstreaming is not required when the child with a disability would not receive an educational benefit from mainstreaming into a regular class, when any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting, or the child with a disability is a disruptive force in a regular classroom setting.

Barnett v. Fairfax County Public Schools, 927 F.2d 146 (4th Cir. 1991); 17 EHLR 350:

The court denied home school placement to a student who used cued speech interpreting, finding that whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination; it was acceptable for the school district to centralize its cued speech interpreting program at a different school, and it was acceptable to consider cost as a factor.

Greer v. Rome City School District, 950 F. 2d 688 (11th Cir. 1991); 19 IDELR 100; 18 IDELR 412:

The Eleventh Circuit adopted the two-part *Daniel R.R.* test. Focusing on the first part to conclude that the district had failed to accommodate the student appropriately in the regular classroom, the court stated that before a school district may determine that a student with disabilities can be educated outside the regular classroom, the district must consider whether supplemental aids and services would permit satisfactory education in the regular classroom; the district must consider the full range of supplementary aids and services. The court outlined a non-exhaustive list of factors to be considered, including the comparative benefits of the regular versus the special education classrooms, the effect of the child with disabilities on the rest of the children in the regular classroom, and the cost of the supplementary aids and services that would be

necessary for the child with disabilities to obtain a satisfactory education in the regular classroom.

Oberti v. Board of Education of Borough of Clementon, 995 F.2d 1204 (3d Cir. 1993); 19 IDELR 908:

In holding that a school district failed to make adequate efforts to include a child with Down Syndrome in regular education, the Third Circuit adopted the *Daniel R.R.* test, holding that the court should first ask whether a student can be educated satisfactorily in a regular class with supplemental aids and services, and then if not, whether the school has included the child with nondisabled children to the maximum extent appropriate. In asking the first question, the court should consider a) whether the school district has made reasonable efforts to accommodate the child in a regular classroom, b) the educational benefits available to the child in a regular class with appropriate supplementary aids and services, compared with the benefits available in a special education class, and c) the possible negative effects of the child's inclusion on the education of the other students in the class. When addressing the second question, the court noted, the school district should take intermediate steps when appropriate, such as including the child in nonacademic classes or other activities.

Sacramento City Unified School District v. Holland, 14 F. 3d 1398 (9th Cir. 1994); 20 IDELR 812:

In affirming an inclusive educational placement for a student with mental retardation, the Ninth Circuit Court of Appeals adopted a four-factor test blending elements of the *Daniel R.R.* and *Roncker* standards. The court held that the following must be considered in determining placement: a) the educational benefits of placement full-time in a regular class; b) the nonacademic benefits of placement full-time in a regular class; c) the effect the child with disabilities has on the teacher and children in the regular class; and d) the costs of including the child.

Beth B. v. Van Clay, 282 F.3d 493 (7th Cir. 2002); 36 IDELR 121:

The Seventh Circuit Court of Appeals declined to adopt a test for deciding least restrictive environment cases. The court found the IDEA's framework sufficient, stating that if the student's placement was satisfactory, the district would be in violation of the statute by removing her, and if not, the district's recommended placement would not violate the statute if the placement mainstreamed her to the maximum extent appropriate.

Girty v. School District of Valley Grove, 60 Fed. Appx 889 (3d Cir. 2002): 38 IDELR 13:

The court affirmed the district court's decision (163 F.Supp.2d 527, 35 IDELR 181). The district court applied *Oberti* to order the inclusion of a student transitioning from elementary to middle school.

L.B. v. Nebo School District, 379 F.3d 966 (10th Cir. 2004); 41 IDELR 206:

In finding that the district violated the student's right to placement in the least restrictive environment, the court adopted the *Daniel R.R.* test but specifically did not apply the cost factors to the case at hand.

Discussion of Advocacy Approach to Inclusion

Case Scenario: Sara is a six year old child with cerebral palsy, significant vision impairment, and some developmental delay. She uses a walker for mobility purposes, but for long distances she is transported in a stroller, in part for speed, and in part because of the immense amount of energy she expends to use the walker. Her fine motor skills are significantly delayed because of her cerebral palsy, but she is able to scribble, and can write her name in very large letters with a great deal of effort. She knows her colors and numbers and is able to recognize a few words, but is not reading yet. She has a gastrostomy tube for supplemental feedings, which are generally provided at home. She makes good use of her limited vision, but her vision fluctuates depending on how tired she is. She is extremely verbal and has a highly developed sense of humor. She is also acutely aware of her limitations and has some behavioral issues, primarily at home. She desperately wants to have friends.

Sara attended preschool at her neighborhood school, where she had a successful year, according to her parents, but the school system convinced her parents that she would be "better off" attending kindergarten at the state's school for the blind, as she would be able to receive more intensive services there. Sara's parents trusted the IEP team and agreed to placement at the school for the blind, and she is spending her kindergarten year in a classroom with six other students, most of whom are nonverbal. The program is based on acquisition of functional skills, and Sara has little opportunity to work on academic skills or to access the general curriculum. She has no contact with students without disabilities. She receives physical and occupational therapies, speech therapy, social work services, vision services, and special education.

Sara's parents would like Sara to attend her neighborhood school. The school is a few blocks from their home, and it is the school their other children attend. Sara has been asking why she cannot go to that school like her sisters. However, the staff members at Sara's neighborhood school do not want her to return; they believe she is "too disabled" to attend their school and that she needs too many services. Although they have not been hostile to Sara's parents when the question has come up, they have been politely dismissive. During the late fall of Sara's kindergarten year, however, Sara's parents become convinced that Sara will never have the opportunity to make academic progress if she remains at the school for the blind, and they seek legal assistance from you.

Preliminary Considerations:

1) Are Sara's parents willing to take time to plan for Sara's return to her neighborhood school? Under the best of circumstances, moving a student from a separate school program to an inclusive program takes a significant amount of time and planning, and in a case such as this, in which the school team is not receptive to Sara's return, the planning process will take longer. For Sara, it may take the remainder of her kindergarten year as well as the summer to plan for her return to her neighborhood school. Particularly if transition is difficult for a student, moving in the middle of a school year may not be appropriate. For Sara, it may make sense to plan for inclusion into first grade, rather than inclusion during her kindergarten year.

2) Are Sara's parents prepared for a long and difficult IEP and placement process? Sara's parents need to know at the outset that this is not going to be easy, and they need to make a commitment to the process of working with you and trying to work with the school district in good faith to go through this process cooperatively. They also need to understand that even with an investment of a great deal of time and energy, it is possible that mediation or a due process hearing will be necessary, but that it is to Sara's benefit to try to work this out in as non-adversarial a manner as possible.

3) If Sara's parents seem unwilling to take time to plan for her inclusion, it will be important to discuss with them why moving her without adequate planning time is not going to work, particularly if her neighborhood school is not receptive to her return. At the very least, Sara's parents would be likely to have to go to a due process hearing to achieve inclusion that way, and would be unlikely to win unless they had experts who could evaluate and observe Sara in her current placement, observe her proposed placement, and make recommendations for how she could be successfully included. In light of the reauthorized Individuals with Disabilities Education Improvement Act, failing to give the IEP process a fair, good faith effort, and proceeding to due process without adequate preparation would be extremely unwise, and Sara's parents should be advised accordingly.

Suggested Advocacy Approach:

1) Convene an initial IEP meeting at the school for the blind to discuss planning for placement in a less restrictive setting, and ensure that a representative of the school system is present. Make clear that Sara's parents are not asking for an immediate change in placement, but that they are hoping to work with the IEP team to plan for a smooth transition. If the team is resistant, try to break down their concerns and address them one by one. Point out that time has passed since Sara has been in preschool, point out that they are relying on an old image of Sara, invite them to visit Sara in her current school for the blind placement, and provide the legal framework in a non-threatening manner.

2) At the meeting, discuss Sara's current levels of academic performance and decide if updated assessments are needed. If so, do school for the blind staff have the content knowledge to test Sara appropriately? If not, do school staff have the vision disability expertise to test her appropriately? If not, consider obtaining semi-independent assessments, i.e., assessments from other school district personnel who do not know Sara but who have the expertise to test her, or if none do, consider asking the school system to contract with independent assessors.

3) Obtain a copy of the school district's curriculum or a parent-friendly summary, and use it as a guide to begin drafting suggested goals and objectives (if IEP will have objectives) for an IEP.

4) Try to get the district representative to make a commitment to have school staff come to the school for the blind to observe Sara and spend some time with her.

5) Set another meeting date to review any assessments that are being completed and to discuss the district staff visit.

6) In between IEP meetings it is helpful, if possible, to share drafts of the IEP. The IEP should be based on the curriculum. What do her parents feel it is most important for Sara to learn? Perhaps she does not need to learn all twenty elements of the curriculum regarding weights and measures, but learning the concepts of heavy and light and full and empty are important for her, as is learning to estimate by feeling rather than looking at something, since she may not be able to see it well. Any aspects of the curriculum for which Sara will need special instruction, accommodations, or modifications need to be included on her IEP.

7) At the next IEP meeting, review any assessments that have been completed, discuss the visit by school staff, address any concerns, and begin to develop the IEP, based on the school district curriculum. If IEP drafts have been exchanged, this process will be much faster and easier, though it will likely take more than one meeting.

8) Take as many meetings as necessary to develop a strong IEP that includes all of the services Sara needs. Include all academic goals and all of the related services. Use 34 C.F.R. 300.347, the programmatic supports and services requirement of the IDEA to ensure that consultation and planning time for service providers is included. Additionally, any training that school staff will need regarding Sara should be included on the IEP. If related service providers want to be able to co-treat, this should be included on the IEP as well. As always, the guiding questions are: Does Sara need the service in order to make meaningful educational progress? Will these supports and services enable Sara to be included satisfactorily in her neighborhood school?

9) Make sure the IEP addresses issues such as Sara's need for support staff during the school day. If she is in a general education classroom, will she need one-to-one assistance? Is it possible that she might need g-tube feedings during the school day or does her food intake need to be monitored? If so, depending on nurse practice act requirements in Sara's state, she may need nursing services on her IEP. Will Sara need adapted physical education or will she be able to participate in a regular physical education class with accommodations or modifications? Does Sara use or will she need additional assistive technology? To what extent will Sara's related services be provided in the classroom and to what extent will she be pulled out for services? The IEP should address all of these questions, although it is likely that many of these questions will be revisited periodically over the course of the school year.

10) One of the benefits of multiple meetings is that they force the participants to develop a working relationship with each other. If you and Sara's parents are meeting on a regular basis with school staff and developing an appropriate IEP that is designed to enable her to be educated in her neighborhood school, you are developing relationships over the course of the hours you spend together that cannot but stand all of you in good stead when difficult issues arise.

11) When the IEP is complete, discuss placement and advocate for return to neighborhood school. If the IEP has been drafted carefully, it should be clear that the IEP can be implemented in the neighborhood school, and that the neighborhood school is the least restrictive environment.

<u>Advocacy Strategy for Transition from Separate to Inclusive Placement</u>

1) Once the IEP team has made the decision to transfer Sara, the decision must be made when the actual transfer will occur, depending on when during the school year the placement meeting occurs. It is likely that a transition process will be necessary; the length and type of transition must be considered when thinking about the actual start date for the child.

2) As the transition issues begin to be discussed, consider shifting the location of the IEP meetings to the neighborhood school, even if Sara is not placed there yet. It will help the school staff begin to take ownership of her and of the issues. A school for the blind representative should be present at least until Sara makes the transition.

3) As part of the transition process, it may be helpful for Sara to spend some time at her neighborhood school. If the plan is for her to begin attending first grade, she should sit in on a first grade class; if she is going to transition during the kindergarten year, she should go to a kindergarten class. Depending on how comfortable she is, and on how comfortable school staff are, Sara might make several visits.

4) Before Sara begins at her neighborhood school, administrators and the occupational and physical therapists should do an accessibility walk-through to determine how to ensure her safe exit from the building during fire drills and emergencies. Additionally, the walk-through should look at issues such as school entrance and exit, positioning for desk work, restroom use, classroom location and walker use to get to the cafeteria and other parts of the school, access to and use of the playground, and any other issues that Sara's parents or the school staff or therapists think of. Will she continue to use the stroller or is there a more age-appropriate means of getting her around or out of the building quickly?

5) Consider a Magill Action Planning System (MAPS)[2] meeting prior to Sara's actual return to her neighborhood school. The MAPS process, while structured, is less formal than the IEP process and can be very helpful in fostering relationships between parents and school staff. During the process, parents and staff discuss their hopes and dreams for the student, their fears, the needs of the student, and how to meet those needs. Ultimately, the process can result in a list of items that can be incorporated into the student's IEP. It may make more sense to wait until Sara has been at school for a few months and school staff have gotten to know her a little bit. The decision is a strategic one.

6) Consider requesting Circle of Friends[3] or another program that will foster friendships between Sara and other students. While elementary school-age students without disabilities tend to be affectionate and solicitous of their classmates with disabilities, it may take a more formal program to ensure that true friendships form. Particularly because this is something Sara is quite vocal about, the district should be proactive about trying to set up friendship opportunities for Sara and her classmates. If everyone determines that such a program is appropriate, it should be incorporated into Sara's IEP.

7) If Sara will be beginning the new school year at her neighborhood school, ensure that the IEP team discusses extended school year services and considers the provision of services to enable her to make a smoother transition.

General Advocacy Strategies to Avoid Due Process

1) Consider tabling issues when they become controversial. If you are involved in a long-term case such as Sara's, in which you will be attending meetings on a frequent basis, not every issue has to be battled to the absolute end. Sometimes, if a conflict arises about the provision of a related service, for instance, the issue can be set aside for a future meeting and the parent can

[2] *See, e.g.* http://www.circleofinclusion.org/english/guidelines/modulesix/a.html

[3] *See, e.g.* http://www.cde.state.co.us/cdesped/download/pdf/dbCircleFriends.pdf
http://www.lin.ca/resource/html/Vol26/V26N3A2.htm

consult with the child's private therapist or go home and think about the team's position. Or, if there is a dispute about how Sara should exit the building in the event of a fire, with the team wanting to use the stroller and the parent wanting Sara to use her walker, consider tabling the issue while the physical therapist conducts several timed trials to see how long it takes Sara to exit the building with her walker. In the meantime, Sara's parents, school staff, and any private providers who may be involved can explore other mobility options that might be available in lieu of the stroller or the walker. At the next meeting, any new information can be put on the table, and the issue can be discussed again and possibly resolved.

2) Identify one team member who can be a point of contact for you and particularly for the parents. It is extremely important that lines of communication remain open at all times. In order for this to happen, parents must have a school staff member with whom they feel comfortable and whom they trust to address issues when they arise. If the case manager is not such a person, then make the team identify another team member who can fill this role.

3) To the extent possible, allow the parents to address their concerns with school staff directly. Be available to intervene when necessary. Attend IEP meetings and ensure that small issues do not escalate and become big issues, but to the extent possible on a day-to-day basis, stay in the wings and provide technical assistance to the parents, rather than intervening directly in all issues.

4) Be a team player, but keep the law in your back pocket. The team members know you are a lawyer; you do not have to hit them over the head with it. It is much more productive to problem solve in a cooperative way and try to figure out how to ensure that Sara is successfully included than it is to threaten to go after the school if inclusion does not work.

5) Generally, inclusion is going to fail for one or a combination of several reasons:

   a) Lack of knowledge/training on the part of school staff;
   b) Lack of resources on the part of the school district;
   c) Inadequate provision of supplementary aids and supports;
   d) Refusal on the part of the school district to provide the training, resource, or supports necessary to ensure the successful inclusion of the student.

   The first three reasons can be addressed through the IEP process in a cooperative way, especially if the parent and district have forged a good working relationship. Sometimes, parents even are willing to pay for school staff to attend an inclusion conference if funding is unavailable through the school system. Outright refusal to work with a family is a more difficult problem, but if broken into its component parts, as Sara's situation was (preschool was a while ago, she has changed, law requires consideration of least restrictive environment…), there may be some room for negotiation.

6) Try not to personalize problems when they arise. When inclusion is not going well, rather than focusing on the faults of particular people involved, it is more productive to focus on bigger issues such as training of staff, acquisition of additional resources, changing the student's schedule, making additional accommodations or modifications, or problem-solving in other ways. Sometimes personnel changes may be necessary, but it is important to always keep the focus on the student's educational needs and how to enable the student to continue to make educational progress.

Conclusion

Why is it so important to avoid due process? There are several reasons, some more evident than others. First, from a pragmatic standpoint, under the reauthorized IDEIA, there are simply more barriers to get to a due process hearing; it is clear that the intent of the statute is to promote alternative means of dispute resolution. Second, due process hearings are time and resource-intensive, they can be emotionally difficult for families to endure, and the outcome is never assured, even if the case is a strong one. Third, due process hearings strain relationships with school staff, even when those relationships are already troubled; when parents and school staff have to work together for years, a due process hearing can make difficult relationships even more acrimonious. Perhaps most important, however, is that if a school district is absolutely opposed to inclusion of a student, the chances are higher that the district will find a way to sabotage inclusion if it is imposed on the district by a hearing officer than if the district is involved in planning the student's inclusion. When an IEP team and parents are able to work together to plan a student's program, everyone feels invested in making the program work; everyone is likelier to work together to resolve problems and to focus on promoting the student's successful inclusion into general education.