

Striking a Blow to LRE and School District Discretion in Choice of Methodology

Two longstanding stalwarts of special education law, a district's broad discretion in deciding what educational methodologies to include in a child's IEP and the federal mandate to educate children in the least restrictive environment (LRE), have been called into question in two cases that scrutinize school district programming decisions for children with autism.

In finding for the parents in both matters, the Sixth Circuit Court of Appeals in *Deal ex rel. Deal v. Hamilton County Bd. of Educ.* and more recently by the United States District Court for the Eastern District of Virginia in *School Board of Henrico County v. R.T.* both weighed heavily expert testimony of proponents of Applied Behavior Analysis (ABA), a form of intensive and lengthy one-to-one programming for a student with autism by an ABA-trained instructor, as well as the copious data that results from these intensive therapies. Both courts affirmed the parent-chosen ABA method as the preferred methodology in programming for students with autism, especially during early school-age programming.

However, most notable, in determining the parent-chosen methodology to be more appropriate for the students in question, both *R.T.* and *Deal* directly challenged and questioned the broad discretion given to districts in developing the methodology for student educational programs. Additionally, the *R.T.* court, in the same vein as *Deal*, not only challenged the methodology chosen by the district, it also ignored the longstanding obligation of school districts to program for students in inclusive settings by ultimately determining an isolated one-to-one setting separate from typical peers for several hours a day was the most appropriate placement for a school-age student.

Initially, as it relates to programming for students in the least restrictive environment, the LRE requirement is one of the central concepts of placement under the Individuals with Disabilities Education Act (IDEA). Compliance with IDEA's LRE provision essentially 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.

For example, in *Oberti v. Board of Education of the Borough of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the court made clear that a determination of whether a school district has met the IDEA's mainstreaming requirement must be based on whether the school properly attempted to accommodate the student in the regular education setting using supplementary aids and services.

The Court in *R.T.* challenges the longstanding notion that disabled students, especially at a young age, require significant opportunities for inclusion. The court noted, in making programming decisions for *R.T.*, the district mistakenly relied on the LRE mandate instead of programming for the student in the more appropriate setting. The court concluded that because the student did not have the requisite attending skills needed to pay attention to his surroundings,

did not know how to make eye contact, and did not know how to imitate others, the student did not have the needed social skills to benefit from the least restrictive environment.

The court went on to note that the district's LRE argument was not substantive, but was instead a talismanic justification for not considering the benefits of the ABA program versus the district's autism program. Ironically, this decision highlights the mixed messages sent to school districts as it relates to programming for students in a lesser restrictive environment. It is ironic that, the very same reasons used by the Court to justify a more restrictive environment for the student are the same arguments that avid proponents of inclusionary practices have argued as the reasons why disabled students must be provided significant exposure with typical peers in the regular education environment.

Next, as it relates to a district's choice of methodology in educational programming for students, a majority of the federal circuits around the country still give districts great leeway in selecting the appropriate educational methodology for a student with a disability, so long as the methodology provides FAPE. Courts and administrative officers have decided that the choice of educational methodology falls within the sole discretion of the district. See, *M.M. and B.M. ex rel. C.M. v. School Bd. of Miami-Dade County, Fla.* (11th Cir. 2006). However, both *R.T.* and *Deal* have thrown caution to this generally held position by the circuits. The *R.T.* court noted the early successes the student experienced with his home-based ABA program before entering school-age programming, combined with the program's propensity for individualizing the programming to the specific student, clearly made it more appropriate than the district-wide autism program. In fact, the court noted that the very design of the district's methodology would not have resulted in progress for the student.

Equally troubling, in *Deal*, the court noted that school systems are not required to provide autistic children with an intensive (and expensive) educational program like ABA, yet at some point the difference in outcomes between the district's methodology, and parent-chosen methodology like ABA, can be so great that provision of the district's program could amount to denial of a FAPE. The substantive issue of whether FAPE was denied due to the methodology employed by the district was returned to the district court following the Sixth Circuit's decision in *Deal*.

While the district court ultimately found the district's methodology appropriate, the history of this case, and the overall debate on programming for children with autism, will continue.

Both cases underscore the unique programmatic challenges that confront school districts when developing IEPs for students on the autism spectrum. Unfortunately, federal courts have created more complication than clarity regarding programming for students who are beginning school-age programming.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.