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CHANGING STUDENTS' PLACEMENTS TO A MORE RESTRICTIVE SETTING IN A POST GASKINS ENVIRONMENT; IS IT REALLY ANY DIFFERENT?

The restrictiveness of a particular special education student's placement has been a common issue in special education due process hearings for many years now. The focus on such placement issues, however, will no doubt become heightened in light of the recent agreement reached between the plaintiffs and the Pennsylvania Department of Education in *Gaskins v. Commonwealth of Pennsylvania*, et al. Despite its success in shining the spot light on the "least restrictive environment," the Gaskins agreement changes very little by way of the legal standard applied to disputes involving the restrictiveness of a particular placement.

Gaskins, a class action law suit filed in the United States District Court for the Eastern District of Pennsylvania, alleged that students with disabilities across the Commonwealth systematically have been denied placement in regular education classrooms with individualized supportive services, or have been placed in regular education classrooms without the support, services and accommodations they need to succeed in that environment. In settling the law suit, the Pennsylvania Department of Education agreed to, among other things, the establishment of, in our opinion, a less than effective system to monitor school district compliance with the Individuals with Disabilities Education Act's (IDEA) mandate to educate children with disabilities in the "least restrictive environment." Most importantly, the Gaskins agreement does not change the IDEA's legal mandate.

In fact, the "least restrictive environment" language of the IDEA has remained stable for more than three decades, during which Congress has revised and tinkered with much of the rest of this massive federal civil rights law. The language is simply stated, although loaded with ambiguity. Each State must ensure that, "[t]o the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and 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 of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

The least restrictive mandate, as described above and as it has existed in the IDEA from the beginning, addresses only one aspect of "restrictiveness." It is focused entirely on the physical aspect of the problem, requiring that public schools educate children with disabilities in "the regular educational environment" or "regular classes" with "children who are not disabled." It does not address what children with disabilities are expected to learn or how they are expected to perform in those environments or classes. In 1997, however, Congress revised the IDEA to include language requiring that children with disabilities receive "special education and related services and supplementary aids and services" that, among other things, enable the child "to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities." This newer variant of the existing "least restrictive environment" formula requires not only that children with disabilities occupy the same physical space as their non-disabled peers, but also that as much as possible they learn the same skills and content and participate in the same extracurricular and nonacademic activities, as those peers. The need to ensure access to the general curriculum and to extracurricular experiences must, therefore, be weighed together with the need to provide that access among non-disabled peers in the regular educational environment.

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The IDEA's "least restrictive environment" language unfortunately raises more questions than it answers: what is "appropriate" and when have we reached the "maximum extent" of it? Whose "satisfaction" is relevant in determining whether the child can be educated "satisfactorily" in the regular classroom? The most problematic question, the answer to which appears to hold the key to answering the remainder, concerns the phrase "supplementary aids and services." What are these "supplementary aids and services" that public schools must use in "regular classes" in an effort to establish whether the child with a disability can be educated there "satisfactorily"? While there are no bright line answers to these questions, guidance can be found in the extensive line of federal and state case law that attempts to clarify when a school district can change a student's placement to a more restrictive setting.

In the landmark case of *Oberti v. Clementon School District*, the United States Court of Appeals for the Third Circuit established a two part test to determine whether a school district's placement meets the least restrictive environment mandate. The first part of the test asks whether the student in question can be educated satisfactorily in the regular classroom. In examining this prong of the test, the court looked at three factors: (1) the extent to which reasonable efforts were made to accommodate the student in the regular classroom setting with the use of supplemental supports; (2) the outcome of comparing the benefits of the regular education setting versus the more restrictive setting; and (3) the possible negative effects of inclusion on other students. If, after reviewing these three factors, it is determined that a student cannot be satisfactorily educated in the regular education setting, then the court must examine the second prong of the test, which is whether the more restrictive setting still allows for some amount of inclusion with typical or non-disabled peers to the maximum extent appropriate.

In applying this test to the facts of the *Oberti* case, the court found that the school district did not meet the first part of the test which asks whether the student can be educated satisfactorily in the regular education setting. When analyzing the sub-parts of the first prong of the test as listed above, the court cited in its decision that reasonable efforts were not made to educate the student in the regular education setting. Facts supporting this conclusion were that the student's IEP had no provision of specially designed instruction or related services and the IEP's goals were vague. In comparing benefits of inclusion in the regular education classroom versus the more restrictive setting, the court found that all of the special education and related services that were provided in the more restrictive setting could have been provided in the less restrictive setting. In looking at the impact of including the student on the learning of others in the class, the court held that although the student exhibited behavioral concerns, his behavior toward the other students would not be a factor if the appropriate supports were in place. Because the court found that the student could have been placed in the less restrictive setting, the court found the more restrictive placement proposed by the school district to be inappropriate.

In *Girty v. School District of Valley Grove*, the United States District Court, similar to the court in *Oberti*, concluded that a school district failed to demonstrate that a student was unable to be satisfactorily educated in the regular education setting with the appropriate supports. The court came to this conclusion by again examining the two part test established in *Oberti*. In deciding that the school district did not make reasonable efforts to include the student in the regular education environment, the court found that, among other things, the district assigned the entire responsibility of implementing the IEP to an aide and the regular education teacher never received consultation, support or training regarding the student.

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Equally as important, when comparing the benefits of the two placements, the court found that the student made progress commensurate to his ability in the regular education setting. As such, the court concluded that the school district's more restrictive placement was inappropriate.

Reaching a very different conclusion than the two cases cited above, the United States District Court in *M.A. v. Voorhees School District* once again applied the test set forth in *Oberti* to determine whether the school district could place a student in a more restrictive setting. In its analysis of the first prong of the test, the court concluded that the student could not be satisfactorily educated in the regular education classroom. In so concluding, the court cited facts satisfying all of the factors of the first prong of the *Oberti* test. More specifically, the court found that multiple meetings every month by the student's team to revise the IEP and review progress were a reasonable effort to attempt to educate the child in the regular education setting. The court also found that even though the student interacted with non-disabled peers, the interaction was not meaningful, therefore, the regular education setting lacked benefit compared to a more restrictive placement. The court further held that the other students in the classroom had apprehension and some were actually injured by the student in question. Because the school district met the first prong of the *Oberti* test, the court then analyzed the second prong of the test. In its analysis of this prong, the court found that the out-of-district placement did allow for some level of inclusion, and concluded that the school district's more restrictive placement was in fact appropriate.

Although the cases above are those most often cited regarding least restrictive environment issues, there are many other judicial and administrative opinions that provide interpretations of the *Oberti* restrictiveness analysis. In the end, however, what can be gleaned from these and other similar cases is, as was always the case, that a more restrictive placement will be deemed appropriate only where a school district has first attempted to provide the student with a variety of accommodations, modifications, supports, related services, and training to staff in an effort to include a special education student within the regular education environment. The key to demonstrating such an effort on the part of school district lies in the collection and maintenance of thorough and comprehensive data of the support and services provided to a student in an effort to include him or her in the regular education setting, and the success, or lack thereof, of those supports and services.

In light of the complex nature of this topic, the above synopsis was developed to be used as a general guideline. As such, we recommend that schools consult with their solicitor or special counsel prior to making any placement decisions if they are unclear about what to do when they are faced with a restrictiveness issue.

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.