



# Spotlight on Practice:

## Considering the Continuum

# What We'll Consider . . .



- Least Restrictive Environment (“LRE”) and the Continuum:  
Legal Requirements
  - LRE
  - Obligation to Consider Continuum of Alternative Placements
- Examples and Overview of Specific Placements Along Continuum
  - Residential Placement
  - Home or Hospital Instruction
  - Independent Study



# Legal Requirements

# The LRE Mandate



- “To the maximum extent appropriate, students with disabilities should be educated with nondisabled students; and
- . . . special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”

(34 C.F.R. § 300.114(a); Ed. Code, § 56031)

# Supplementary Aids and Services



“Aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate” [Emphasis added]

(34 C.F.R. § 300.42; Ed. Code, § 56033.5)

# Continuum of Alternative Placements



A “continuum of alternative placements” is the range of potential placements in which a district can implement student’s IEP

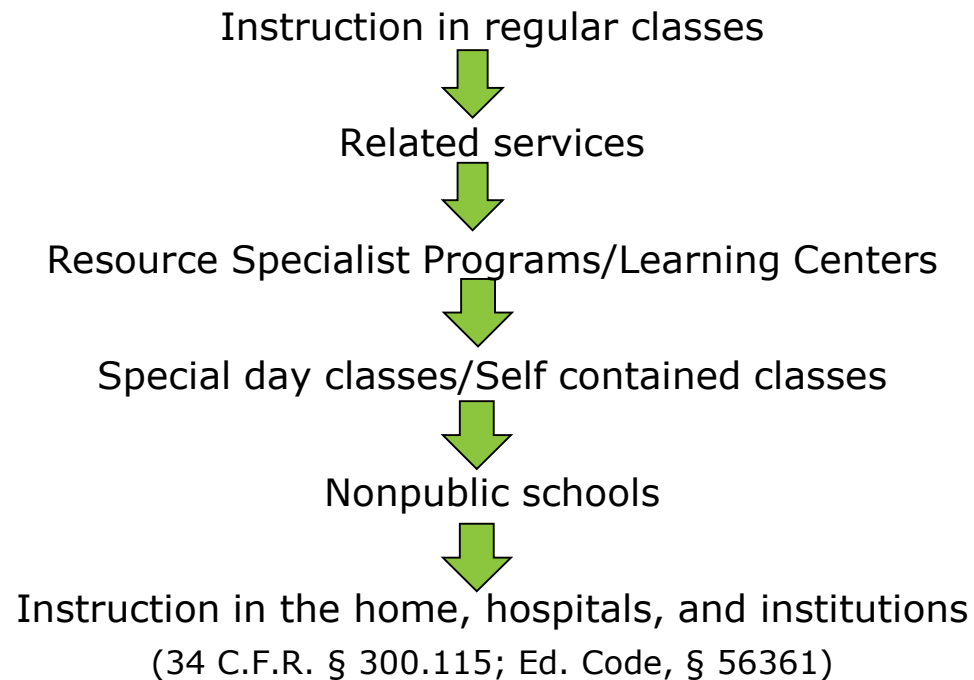
# Continuum of Alternative Placements



- Each public agency must ensure continuum of alternative placements is available to meet needs of students with disabilities for special education and related services
  - In California, obligation is on SELPAs
- Continuum must make provision for supplementary aids and services to be provided in conjunction with general education class placement

(34 C.F.R. § 300.115; Ed. Code, § 56360)

# The Continuum





# Modifications to Curriculum



Districts also must ensure children with disabilities are not removed from education in age-appropriate general education classrooms solely because of needed modifications in general curriculum

(34 C.F.R. § 300.116(e); Letter to Wohle (OSEP 2008) 50 IDELR 138)

# Placement in Neighborhood School

- Unless IEP requires otherwise, students with disabilities should be educated in their neighborhood school
  - Courts have consistently held that IDEA creates presumption in favor of neighborhood school, but does not guarantee it
- If IEP services are not available at home school, student may be placed in another school that can offer services

(34 C.F.R. § 300.116(b)(3),(c); Ed. Code, § 56342, subd. (b); 71 Fed. Reg. 46588 (Aug. 14, 2006))

# IEP Team Obligations



- IEP team must start by considering least restrictive placement that may be appropriate for student
- There is no IDEA requirement that student be placed and fail in less-restrictive setting before moving to more restrictive one
- IEP team can place student in particular classroom or school based on availability of special education services; however, it cannot allow such concerns to dictate student's placement on LRE continuum

(34 C.F.R. § 300.116(b)(3),(c); Ed. Code, § 56342, subd. (b); 71 Fed. Reg. 46588 (Aug. 14, 2006))

# IEP Team Obligations (cont'd)

- While IEP team must consider range of placements, nothing in IDEA requires team to consider every possible placement along continuum
- Case Example: William S. Hart Union HSD (OAH 2016)
  - Parents claimed IEP team failed to ensure continuum of placement options was available for 15-year-old Student with ED and ADHD because team did not consider placement in NPS
  - ALJ: District had appropriate therapeutic program designed to meet Student's known needs; as such, District was not required to include NPS as part of discussion of placement options

(Student v. William S. Hart Union High School Dist. (OAH 2016) Case No. 2016020807)

# Continuum and Charter Schools

OSEP has stated that the IDEA regulation requiring districts to ensure availability of continuum of alternative placements applies in equal force to public charter schools

(34 C.F.R. § 300.115; Letter to Anonymous (OSEP 2009) 53 IDELR 127)

# Continuum and Transportation

- LRE requirement applies to all special education services and in “nonacademic settings,” which includes transportation
- IEP team should start with presumption that student will ride regular transportation with nondisabled peers as long as such transportation is appropriate to meet his or her educational needs

(34 C.F.R. § 300.117; 71 Fed. Reg. 46576 (Aug. 14, 2006))

# Continuum and ESY



- While there is no exception to LRE requirement during ESY, OSEP has not interpreted IDEA to require districts to make full continuum of placements available for purpose of providing ESY
- California: “If during the regular academic year an individual’s [IEP] specifies integration in the regular classroom, a public education agency is not required to meet that component of the [IEP] if no regular summer school programs are being offered by that agency”

(Letter to Myers (OSEP 1989) 213 IDELR 255; Cal. Code Regs., tit. 5, § 3043(g))

# Continuum and Preschoolers



- OSEP: “The public agency responsible for providing [FAPE] to a preschool child with a disability must make available the full continuum of alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, to meet the needs of all preschool children with disabilities for special education and related services”

(Dear Colleague Letter: Preschool Least Restrictive Environment (OSEP 2017) 69 IDELR 106)



# Continuum and Section 504



- Unlike IDEA, Section 504 does not contain express provision regarding continuum of alternative placements requirement
- Nonetheless, OCR has applied same IDEA concepts (LRE and continuum) to its investigations under Section 504

(Boston (MA) Renaissance Charter School (OCR 1997) 26 IDELR 889; Memphis City (TN) School Dist. (OCR 1998) 29 IDELR 490)



# Specific Placements Along Continuum

# Overview



- Disputes over whether student can be educated appropriately in general education setting comprise most of the litigation surrounding LRE and continuum of alternative placements
- In these instances, courts and ALJs apply balancing test adopted by 9th Circuit in Sacramento City Unified School District v. Rachel H.
  - Educational benefits of general education placement
  - Nonacademic benefits of general education placement
  - Effect on teacher and other students
  - Cost (rarely used)

(Sacramento City Unified School Dist. v. Rachel H. (9th Cir. 1994) 14 F.3d 1398)

# Overview (cont'd)



- But significant number of disagreements between districts and parents involve placements (proposed or disputed) in very restrictive settings
- We will examine in greater detail some of most restrictive placement options along LRE continuum, specifically residential placements, home or hospital instruction, and independent study . . .

# Residential Placement



Continuum of alternative placements also may include “placement in a public or private residential program,” in event such a program “is necessary to provide special education and related services to a child with a disability”

(34 C.F.R. § 300.115; Ed. Code, § 56031)

# Residential Placement



- If placement in public or private residential program is necessary to provide special education and related services to student, then such placement, including non-medical care and room and board, must be at no cost to parents
- Districts are not responsible for providing medical care associated with residential placements
  - Visits to doctor for treatment of medical conditions are not IDEA-covered services

(34 C.F.R. § 300.104; 71 Fed. Reg. 46581 (Aug. 14, 2006))

# Residential Placement



- Given highly restrictive nature of residential placement on continuum, removal of student to residential setting complies with LRE mandate in very limited situations for students who are unable to receive FAPE in less restrictive environment
- Generally, the further a residential placement is located from student's home and community, the more restrictive it is

(Carlisle Area School Dist. v. Scott P. (3rd Cir. 1995) 62 F.3d 520; Todd D. v. Andrews (11th Cir. 1991) 933 F.2d 1576)

# Residential Placement



- Several cases from 9th Circuit have delineated when district has duty to provide/fund residential placement to address student's unique needs and provide FAPE
- Although each decision approached issue slightly differently, essentially court's analysis for determining whether residential placement is appropriate hinged on whether placement was necessary for educational purposes

(Clovis Unified School Dist. v. California Office of Administrative Hearings (9th Cir. 1990) 903 F.2d 635; Seattle School Dist. No. 1 v. B.S. (9th Cir. 1996) 82 F.3d 1493; County of San Diego v. California Special Education Hearing Office (9th Cir. 1996) 93 F.3d 1458; Ashland School District v. E.H. (9th Cir. 2009) 587 F.3d 1175; Ashland School District v. R.J. (9th Cir. 2009) 588 F.3d 1004)



# Residential Placement



## Clovis USD v. California OAH (1990)

- Three possible tests for determining when district is responsible for cost of residential placement
  - When placement is “supportive” of student’s education
  - When medical, social or emotional problems are intertwined with educational problems
  - When placement primarily aids student to benefit from special education

# Case Example #1



J.B. v. Tuolumne County Sup't of Schools (E.D. Cal. 2021)

- Student with ED exhibited severe behaviors in District's placement throughout 2017-2018, ultimately resulting in twice-daily pocket and sock check to ensure Student was not carrying any contraband he could turn into weapon
- Court: Student required residential placement to receive FAPE
- "Intrusive" behavior management adopted by District was sufficient notice of Student's increasing volatility
- Adjustments made by IEP team were insufficient to meet needs

(J.B. v. Tuolumne County Sup't of Schools (E.D. Cal. 2021) 78 IDELR 188)

# Case Example #2



G.R. v. Del Mar Union School Dist. (S.D. Cal. 2020)

- Parents sought residential placement after behavior problems of Student with autism and anxiety escalated during fourth grade, resulting in 45 incidents of physical restraint
- Court rejected Parents' argument that restraint incidents demonstrated educational need for residential placement
- Student made progress toward IEP goals and made academic and social progress in therapeutic public school
- Staff members were always able to de-escalate Student

(G.R. v. Del Mar Union School Dist. (S.D. Cal. 2020) 76 IDELR 152)

# Practical Essentials



- Stress importance of LRE and inform parents that residential placement is one of most restrictive environments possible
- Be prepared to discuss all placement possibilities along continuum, especially when parents want their child to go directly from general education classroom to residential setting
- If IEP team determines that residential placement is necessary for provision of FAPE, look for appropriate placement as close to student's home as possible
- Remember to base all placement decisions on student's needs, not parents' desires

# Home or Hospital Instruction

## ■ Eligibility

- Decision must be made by IEP team if it believes such placement is necessary and it is LRE in which student can receive services
- No minimum amount of time that student must be out of school before starting home or hospital instruction (“HHI”)

## ■ Requirement for Medical Report

- IEP team must have medical report from student’s physician (or treating psychologist) stating diagnosed condition and certifying that such condition prevents student from attending less restrictive placement
- Report also must include projected calendar date for student’s return to school

(Ed. Code, § 48206.3; Ed. Code, § 56361; Cal. Code Regs., tit.5, § 3051.4(a))

# Home or Hospital Instruction

- Review of Other Available Information
  - HHI is not automatic on receipt of doctor's note
  - IEP team must review all available information prior to placement decision
  - Rule applies even if condition requiring HHI is temporary or short-term
- Nature and Delivery of Services
  - Number of instructional hours is based on student's unique needs
  - Services may be provided by general education teacher, special education teacher, RSP teacher or related services provider, as appropriate
  - Services may be delivered individually, in small groups or "by teleclass"

(Cal. Code Regs., tit.5, § 3051.4(a), (c), (d), (e))

# Case Example #1

Antioch Unified School Dist. (OAH 2015)



- Middle-school Student with SLD and SLI had experienced difficulties with peer interaction, resulting in anxiety
- IEP team provided home instruction for remainder of 2013-2014 (two weeks), but refused Parent's request to continue HHI for 2014-2015, instead offering counseling-enriched classroom
- ALJ: Counseling-enriched classroom for 2014-2015 would meet Student's needs in LRE
- Home placement would not allow Student to interact with peers

(Student v. Antioch Unified School Dist. (OAH 2015) Case No. 2014120518)

# Case Example #2

Panama-Buena Vista Union School Dist. (OAH 2014)



- Student with ID and SLI was involved in undescribed “incident” with classroom aide
- Parent asked that Student be placed on home instruction because Student allegedly had PTSD as result of incident
- ALJ: Home placement was not LRE
- Parent did not assert that Student required different goals or services
- Student’s anxiety regarding interactions with one aide did not support change to restrictive individualized in-home instruction

(Student v. Panama-Buena Vista Union School Dist. (OAH 2014) Case No. 2014040519)



# Practical Essentials



- Make sure IEP team members are sufficiently trained to field questions
- Be sure to document all offers made to assist parents in gathering requisite information to submit HHI request
- Because HHI is one of most restrictive environments in which student can be placed, team should approach decision with caution
  - Consider whether student can continue education at school with addition of classroom accommodations, IEP services or NPS placement
  - Consider whether student can receive some services at school and some in home setting; such combined approach can provide less restrictive setting and allow more participation with nondisabled peers

# Independent Study (“IS”)



- Individualized alternative education to teach core curriculum, in which students generally work independently at home with supervision from certificated teacher
- Must maintain written agreement for each student that includes:
  - Arrangement for submitting assignments and reporting progress
  - Objectives and methods of study
  - Resources that will be made available to student
- Student with IEP may not participate in IS program unless team includes such program as component of IEP

(Ed. Code, §§ 51745; 51747, 51747.5)

# Independent Study (“IS”)



## Assembly Bill 130 (“AB 130”)

- Signed by Governor Newsom in July 2021
- Requires districts, for 2021-22 school year, to offer IS option to be made available to students whose health would be put at risk by in-person instruction, as determined by parent or guardian
- Adds new requirements for written agreements and program components to collect ADA
- Does not change current rule that student with IEP may not participate unless team includes IS as component of IEP

# Case Example #1

Manteca Unified School Dist. (OAH 2013)



- District proposed placing Student in small, structured program at NPS
- Parent claimed District denied FAPE by failing to provide independent study program
- District witnesses credibly established that Student could not benefit from program where he was required to be self-directed and would not be able to work on intense behavior needs
- NPS could offer multiple daily instructional strategies and help Student work on impulsivity and inability to focus

(Student v. Manteca Unified School Dist. and Manteca Unified School Dist. v. Student (OAH 2013) Case Nos. 2013080296 and 2013050805)

# Case Example #2

River Springs Charter School (OAH 2019)



- Parents and Charter School placed Student in independent study program (“Homeschool”), with on-campus SL and counseling
- Although Student’s behaviors improved, Parent had difficulty making him available for on-campus services
- ALJ rejected Charter School’s proposal to continue “Homeschool” placement for following school year
  - Staying at home prevented Student from gaining skills and confidence interacting with peers
  - Charter School had duty to consider other options along continuum

(Student v. Panama-Buena Vista Union School Dist. (OAH 2014) Case No. 2014040519)

# Practical Essentials



- When parents ask that their child's IEP include independent study placement, consider these pointers:
  - Determine reason for request to ensure team understands student's needs. Is student medical fragile? Are there ongoing COVID-19 concerns?
  - Make certain parent understands what independent study entails. Discuss how it is different from distance learning and carefully define level of teacher contact and services to which student would be entitled
  - Emphasize LRE requirement and how it applies to student. Ensure parents understand restrictiveness of independent study along LRE continuum
  - Ensure IEP offers FAPE, which may or may not include independent study

# Conclusion and Summary



- LRE determinations are fact-intensive, are often difficult and contentious, and are subject to close scrutiny by ALJs and courts
- When there is uncertainty about offering appropriate placement, district must make documented, diligent and good-faith effort to educate student in LRE before considering more restrictive options along continuum
- We hope this session has provided additional insights into continuum of alternative placements and LRE decision-making process in order to assist you in serving your students

*Information in this presentation, included but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.*



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