

# **EDUCATING PRESCHOOL STUDENTS IN THE LEAST RESTRICTIVE ENVIRONMENT**

**Presented by: Paula Maddox Roalson, Attorney at Law**

WALSH, ANDERSON,  
GALLEGOS, GREEN  
and TREVIÑO, P.C.

ATTORNEYS AT LAW

[www.WalshAnderson.com](http://www.WalshAnderson.com)

*The information in this handout was created by Walsh, Anderson, Gallegos, Green & Treviño, P.C.  
It is intended to be used for general information only and is not to be considered specific legal advice.  
If specific legal advice is sought, consult an attorney.*

505 E. Huntland Dr.  
Suite 600  
Austin, Texas 78752  
(512) 454-6864

100 N.E. Loop 410  
Suite 900  
San Antonio, Texas 78216  
(210) 979-6633

909 Hidden Ridge  
Suite 410  
Irving, Texas 75038  
(214) 574-8800

6521 N. 10<sup>th</sup> Street  
Suite C  
McAllen, TX 78504  
(956) 971-9317

500 Marquette, N.W.  
Suite 1360  
Albuquerque, NM 87102  
(505) 243-6864

10375 Richmond Ave.  
Suite 750  
Houston, Texas 77042  
(713) 789-6864

---

## **INTRODUCTION: LEAST RESTRICTIVE ENVIRONMENT REQUIREMENTS**

### **34 C.F.R. § 300.114 Least restrictive environment.**

#### **(a) General.**

(1) Except as provided in § 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120.

(2) Each public agency must ensure that—

- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (ii) 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. § 300.115 Continuum of alternative placements.**

- (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
- (b) The continuum required in paragraph (a) of this section must—
  - (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
  - (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

### **34 C.F.R. § 300.116 Placements.**

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—

- (a) The placement decision—
  - (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
  - (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;
- (b) The child's placement—
  - (1) Is determined at least annually;
  - (2) Is based on the child's IEP; and
  - (3) Is as close as possible to the child's home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- (e) A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.

### **34 C.F.R. § 300.117 Nonacademic settings.**

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

### **34 C.F.R. § 300.118 Children in public or private institutions.**

Except as provided in § 300.149(d) (regarding agency responsibility for general supervision for some individuals in adult prisons), an SEA must ensure that § 300.114 is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

### **GUIDING AUTHORITY ON LRE IN PLACEMENT DECISIONS FOR STUDENTS WITH DISABILITIES**

Daniel R.R. v. SBOE, 874 F.2d 1036 (5th Cir. 1989).

The Fifth Circuit's five factors for determining least restrictive environment (LRE):

1. Has the district taken steps to accommodate the disabled child in regular education?
2. Are the efforts sufficient or token?
3. Will the child receive an educational benefit from regular education?
4. What will be the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education?
5. What effect does the disabled child's presence have on the regular classroom environment?

Oberti v. Board of Educ., 19 IDELR 908 (3d Cir. 1993). In determining whether a public school district has met the LRE requirements, courts and hearing officers will take into consideration of the following factors:

1. Whether the district has made reasonable efforts to accommodate the child in a regular classroom.
2. The educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special class. Educational benefits are considered to be both academic in nature, as well as encompassing socialization opportunities, which can include the development of social and communication skills, increased sense of self-esteem, and language and role modeling.
3. The possible negative effects, including those the child would have on other students in the class.

## **LEAST RESTRICTIVE ENVIRONMENT CONSIDERATIONS FOR PRESCHOOLERS**

### **1. *Do the LRE Requirements apply to preschoolers?***

Yes. In a recent letter from the Office for Special Education Programs (OSEP), the Department of Education confirms the application of LRE requirements in placement determinations for preschool children.

The purpose of this letter is to reiterate that the least restrictive environment (LRE) requirements in section 612(a)(5) of the Individuals with Disabilities Education Act (IDEA) apply to the placement of preschool children with disabilities. Dear Colleague Letter, 58 IDELR 290 (OSEP 2012).

### **2. *What special considerations must be reviewed by the IEP Team?***

Here is what the Department of Education said:

Before a child with a disability can be placed outside the regular educational environment, the group of persons making the placement decision must consider whether supplementary aids and services could be provided that would enable the education of the child, including a preschool child with a disability, in the regular educational setting to be achieved satisfactorily...If a determination is made that a particular child with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that child then could be placed in a setting other than the regular educational setting. The public agency responsible for providing a free appropriate public education (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, 58 IDELR 290 (OSEP 2012).

### **3. *Must preschoolers have an opportunity to be educated with non-disabled peers in “regular classes”?***

There is a strong preference for the education of students with disabilities with non-disabled children.

The LRE requirements under Part B of the IDEA state a strong preference for educating children with disabilities in regular classes alongside their peers without disabilities. The term regular class includes a preschool setting with typically developing peers. In determining the educational placement of a child with a disability, including a preschool child with a disability, the public agency must ensure that each child's placement decision is made in conformity with the LRE provisions...The child's placement must be based on the child's individualized

education program (IEP). In addition, the IEP must include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. Dear Colleague Letter, 58 IDELR 290 (OSEP 2012).

#### **4. *What if our school district doesn't offer "regular education" classes for preschoolers?***

The public agency responsible for providing FAPE to a preschool child with a disability must ensure that FAPE is provided in the LRE where the child's unique needs (as described in the child's IEP) can be met, regardless of whether the local educational agency (LEA) operates public preschool programs for children without disabilities. An LEA may provide special education and related services to a preschool child with a disability in a variety of settings, including a regular kindergarten class, public or private preschool program, community-based child care facility, or in the child's home.

LEAs that do not have a public preschool program that can provide all the appropriate services and supports for a particular child with a disability must explore alternative methods to ensure that the LRE requirements are met for that child. Dear Colleague Letter, 58 IDELR 290 (OSEP 2012).

This is confirmation of earlier guidance from the Department. In the preamble to the 2006 IDEA Part B regulations, the Department of Education advised that:

Public agencies that do not have an inclusive public preschool that can provide all the appropriate services and supports must explore alternative methods to ensure that the LRE requirements are met. Examples of such alternative methods might include placement options in private preschool programs or other community-based settings. Paying for the placement of qualified preschool children with disabilities in a private preschool with children without disabilities is one, but not the only, option available to public agencies to meet the LRE requirements. We believe the regulations should allow public agencies to choose an appropriate option to meet the LRE requirements. However, if a public agency determines that placement in a private preschool program is necessary as a means of providing special education and related services to a child with a disability, the program must be at no cost to the parent of the child. 71 Fed. Reg. 46589 (2006).

#### **5. *What "alternative methods" should be explored?***

The Department said the methods "may" include:

- (1) providing opportunities for the participation of preschool children with disabilities in preschool programs operated by public agencies other than LEAs (such as Head Start or community based child care);
- (2) enrolling preschool children with disabilities in private preschool programs for nondisabled preschool children;
- (3) locating classes for preschool children with disabilities in regular elementary schools; or
- (4) providing home-based services. Dear Colleague Letter, 58 IDELR 290 (OSEP 2012).

**6. Does that make the private preschool classroom the “default” LRE placement for preschool children with disabilities?**

No. The appropriateness of the placement will be determined based upon the individual needs of each child. This was confirmed by the 5<sup>th</sup> Circuit Court of Appeals in the case of R.H. v. Plano ISD, 54 IDELR 211 (5<sup>th</sup> Cir. 2010).

The court upheld the denial of the parents’ request for reimbursement for tuition at a private preschool. The parents argued that the private preschool was a “general education” setting, and therefore, less restrictive than the preschool special education program offered by the school district. The court directly addressed a common point of contention in placement disputes involving preschoolers: if a public school does not or cannot offer a fully mainstreamed placement, then is the public school required to first try the private preschool program? Here is how the court dealt with this issue:

R.H. asserts that “PISD offers no mainstream public classes for preschool children.” In such a case, he argues, PISD was required to begin with the presumption that it would place him in “[t]he only mainstream placement available,” a “‘private’ placement at a preschool for typically developing children,” and remove him from the private setting only if it could not provide a satisfactory education there.

The IDEA, however, makes removal to a private school placement the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education. Courts should therefore be cautious before holding that a school district is required to place a child outside the available range of public options.

**7. If the IEP Team determines that a private preschool classroom is required for FAPE, can the school district rely on the parent to furnish that program?**

No. The Department made clear:

If a public agency determines that placement in a private preschool program is necessary for a child to receive FAPE, the public agency must make that program available at no cost to the parent. Dear Colleague Letter, 58 IDELR 290 (OSEP 2012).

**RECENT CASES INVOLVING LRE**

A.G. v. Wissahickon School District, 54 IDELR 113 (3<sup>rd</sup> Cir. 2010)

The District placed the student, a nonverbal 18-year-old, in a life-skills class with mainstreaming for assemblies, lunch, homeroom, gym, and recess. The parent wanted the student to spend the entire day with nondisabled peers. The District implemented numerous supplemental aids and services, including modifying the curriculum, yet the student received little academic or social

benefit from mainstreaming. She made significant progress in her life skills class. Furthermore, she was prone to loud vocalizations, was not toilet trained, and engaged in other behavior that would negatively affect her classmates. The Court found that the student could not be satisfactorily educated full-time in a regular class, even with accommodations.

Madison Metropolitan School District v. P.R., 51 IDELR 269 (W.D.Wis. 2009)

The court affirmed a hearing officer's decision that required the school district to reimburse the parents for part of the tuition at a private preschool. The IEP called for special education services to be provided to the child at the preschool, and also noted the student's need for interaction with non-disabled peers. The district argued that the parents privately placed the child at the preschool due to their own work schedules. The court described that as "irrelevant."  
Key Quotes:

.....the District fails to cite any persuasive support why it should not have to pay for the necessary non-disabled peer interaction component of P.R.'s program just because P.R.'s parents enrolled him in what the program team agreed was an appropriate least restrictive environment.

.....permitting a school district to obtain a financial windfall by not paying for portions of private preschool programs or daycare settings that provide disabled students necessary non-disabled peer interaction would be a disincentive for school districts to create inclusive public preschools that could provide all the appropriate services and supports necessary to insure that disabled preschool aged students receive a free appropriate public education in the least restrictive environment.

*Comment: The parents did not ask the school to pay the tuition at the time of the IEP meeting. Everyone assumed that the student would be attending the preschool program because the parents needed the daycare and there were no other alternatives. Months later the parents asked the school to pay for it. The fact that the IEP Team acknowledged the student's educational need for interaction with non-disabled peers was crucial to the outcome. Decisions like this will encourage schools to find more inclusive settings for preschoolers within the public school environment.*

L. v. North Haven Board of Education, 52 IDELR 254; 624 F.Supp.2d 163 (D.C.Conn. 2009)

The court affirmed the district's placement of the student in a more restrictive environment, rejecting the argument that the school was obligated to operate with a presumption that the student should be placed in a general education environment for 80% of the day. In part, the court relied on the fact that the parents had rejected parts of the proposed behavior plan. Behavioral problems were the main reason the student was moved to a more restrictive environment, and the IEP Team developed a behavior plan, parts of which the parents rejected.  
Key Quote:

I agree with the Hearing Officer's determination that the Board offered an appropriate behavior plan for 2006-07 and any deficiency in its implementation cannot be attributed to the Board because the parents refused to accept a central concept of that plan—the time out room.

*Comment: As is usually the case, the parties had very different perceptions of what the time out room was going to be like, but the hearing officer and court agreed with the school's perception, that it was a reasonable method.*

C.P. v. State of Hawaii, DOE, 54 IDELR 218 (D.C.Ha. 2010)

The court affirmed a hearing officer's decision in favor of the school district. The 8-year old student was placed in a highly restrictive self-contained placement due to significant behavioral issues, including knocking over furniture, tipping over the wheelchair of a student, throwing a stapler, urinating in public and smearing feces. Key Quote:

Student was an actual danger to his fellow students and to himself. It is undisputed that Student had physically attacked other students and staff on several occasions. The fact that Student was isolated from his peers is not, in itself, indicative that he was not provided with the LRE.

On another issue, the court held that it was not necessary for the IEP to specify how much of the speech therapy would be "individual" and how much "group." The court quoted IDEA to the effect that it should not be construed to require "that additional information be included in a child's IEP beyond what is explicitly required in this section." The IEP in question called for 810 minutes per quarter consisting "primarily of individual direct therapy sessions, with group therapy sessions introduced as behavior improves."

Las Virgenes USD v. S.K., 54 IDELR 289 (C.D.Cal. 2010)

In a lengthy and detailed opinion, the court overturned the hearing officer and concluded that the school offered placement in the LRE. The proposed placement was more restrictive than the parent wanted, but the court found it to be appropriate, given the student's substantial cognitive and communication deficits. The student's experience in the mainstream classroom showed that he was not receiving an academic benefit and was working independently from the rest of the class. The gap between S.K. and the rest of the class grew as the years went by, and the student, at the time of the hearing, was working almost exclusively with his aide in the classroom. The court also overturned the hearing officer on the issue of "predetermination," finding that the parents were active participants in the decision making at IEP Team meetings. Key Quotes:

Most importantly, the IEP transcript supports the conclusion that the parents actively participated in the IEP process. First, both parents attended the meeting and both remained active contributors throughout the meeting. Based on the transcript, it is clear that S.K.'s mother had a full opportunity to participate in any discussions throughout the IEP meeting. S.K.'s mother asked questions when she felt she did not understand, and expressed disagreement when goals were not

constructed to her satisfaction. Moreover, a large portion of the meeting was devoted to additional goals and objectives that she articulated and the IEP team's consideration of those goals.

*Comment: The same parties were involved in litigation that went to the 9<sup>th</sup> Circuit: Kutasi v. Las Virgenes USD, 494 F.3d 1162 (9<sup>th</sup> Cir. 2007). In that case the parents alleged a pattern and practice of retaliatory and discriminatory actions against the student and the parents. The 9<sup>th</sup> Circuit dismissed the case due to failure to exhaust administrative remedies.*

J.S. v. DOE, State of Hawaii, 55 IDELR 43 (D.C. Ha. 2010)

This case involved a hearing impaired child and the IDEA provision that requires the team to “consider the child’s language and communication needs” and the child’s “language and communication mode.” The parents argued that the child’s communication mode was verbal and objected to a placement in a school that emphasized total communication and sign language. However, the court ruled in favor of the school’s proposed placement, largely due to LRE considerations.

Toledo City School District v. Horen, 55 IDELR 102 (N.D. Ohio 2010)

The court held that the district improperly changed the student’s placement to a less restrictive environment. The student was medically fragile and, among other conditions, had a seizure disorder which might require immediate nursing services. The IEP called for placement at a regular school which had a nurse available only two days a week. The court held that this was inadequate and the student should have remained in the more restrictive placement where nurses were available at all times.

Marc M. v. DOE, State of Hawaii, 56 IDELR 9 (D.C.Ha. 2011)

The court overturned a hearing officer’s decision and held that the school denied the student FAPE by failing to consider certain information provided by the parent at the end of an IEP Team meeting. The court cited 9<sup>th</sup> Circuit authority for the general proposition that schools cannot abdicate their affirmative duties “irrespective of parental conduct.” The documents here were reports from the private school the student had been attending. The court viewed these reports as an “evaluation” that had to be considered by the Team before the development of the IEP. The school argued that the IEP had already been developed and the meeting was about to conclude when the parents provided this information. The court found this irrelevant, noting that the IEP was still weeks away from being implemented.

*Comment: The court noted in a footnote that “this is not the first case where parents, either on their own or with the advice of an advocate, have seemingly waited until an opportune moment to ‘slip’ the Defendant an evaluation and then later complained that it was not considered in the IEP. This type of fundamental unfairness should not be tolerated. This Court would therefore suggest that prior to or during the IEP meeting, IEP team members affirmatively request whether the parents or their representatives have any additional materials or information that they would like the other IEP team members to consider.”*

R.P. v. Prescott USD, 56 IDELR 31 (9<sup>th</sup> Cir. 2011)

Circuit Court affirmed a decision that the IEP Team does not need to include an “expert” on autism. The regulation requiring the team to include someone “with knowledge in the area of suspected disability” has not been in effect since 1999.

Lebron v. North Penn School District, 56 IDELR 72 (E.D.Pa. 2011)

The autistic student was placed in a regular half-day kindergarten program, which is what the district provided for non-disabled students. The student’s IEP also called for him to attend an autistic support class for the other half of the day. Since that support class was not available for his grade level on his home campus, the district placed him in another school. The court upheld the district’s actions and observed that LRE analysis was irrelevant under these facts. Key Quote:

The record quickly reveals that a least restrictive environment analysis is irrelevant to this case. Both parties agreed that [the student] would attend the full instructional program of regular education kindergarten....The statutory and regulatory language reflects congressional concern with “removal” from classes with nondisabled peers. [The student] has not been removed from any part of class with nondisabled peers—he was to attend the full fifteen hours.

C.B. v. Special School District No. 1, Minneapolis, Minnesota, 56 IDELR 187; 636 F.3d 981 (8<sup>th</sup> Cir. 2011)

The court held that the district was responsible for private placement for the student. The student with a learning disability had made very slow progress over several years in public school when the parents withdrew him and placed him in a special school that served students with learning disabilities. The school argued that the private school was inappropriate because it was more restrictive. The court rejected that. Key Quote:

A less restrictive environment is the ideal, but C.B.’s move to [the private school] after years of frustration in the public schools is a far cry from “the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes” that concerned Congress. We thus join the Third and Sixth Circuits in holding that a private placement need not satisfy a least-restrictive environment requirement to be “proper” under the Act.

*Comment: This case marks a significant turn in the evolution of the LRE standard. The court here takes an historical approach, noting that when the LRE component was placed in the law, there was a “widespread practice” of “relegating” or “warehousing” children with disabilities. Here, in contrast, the court was considering a good school specially designed to focus on a particular type of disability. Moreover, it was chosen by the parents, after “years of frustration” in the public schools. Cases like this one indicate that LRE is a preference rather than an absolute mandate. FAPE is mandated, and sometimes requires a more restrictive placement.*

Sumter County School District 17 v. Heffernan, 56 IDELR 186 (4<sup>th</sup> Cir. 2011)

The Court affirmed fact findings of the district court that the district failed to provide FAPE, largely due to a failure to provide all of the ABA therapy called for by the IEP. Testimony showed that no more than 10 hours per week, even though the IEP called for 15 hours of ABA therapy. This was accompanied by significant behavioral problems in the classroom. Moreover, the court held that the home placement provided by the parents was appropriate, even though it was more restrictive than the school placement. Key Quote:

As the district court noted, however, this circuit has “never held that parental placements must meet the least restrictive environment requirement.” *M.S. ex. rel. Simchick v. Fairfax County School Board*, 553 F.3d 315 (4<sup>th</sup> Cir. 2009).

*Comment: The court also quoted from its own decision in the Carter v. Florence case that was later affirmed by the U.S. Supreme Court, noting that “mainstreaming is a policy to be pursued so long as it is consistent with the Act’s primary goal of providing disabled students with an appropriate education. Where necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program.”*

Barron v. South Dakota Board of Regents, 57 IDELR 122 (8<sup>th</sup> Cir. 2011)

Parents of deaf and hearing impaired students argued that the LRE for deaf students was “a school of their own.” The court noted there was some support for this position, citing *The Individuals with Disabilities Education Act and Its Impact on the Deaf Community* at 6 Stanford Journal of Civil Rights and Civil Liberties 355 (2010). However, the court rejected the argument, noting that “The IDEA’s integrated classroom preference makes no exception for deaf students.”

*Comment: The state decided to shutter its statewide school for the deaf, which had been in existence since 1880. There were only 389 children with hearing impairments in the state. Only 32 of those students (8%) were served at the School for the Deaf, but they received 91% of the budgeted funds. So the state decided to shut down SDDS and disperse its 32 students to local districts, using the money for outreach activities and services.*

Hailey M. v. Matayoshi, 57 IDELR 124 (D.C.Ha. 2011)

The court affirmed the district’s move of the student from a general inclusion classroom to a self-contained unit. The court noted that “Testimony clearly indicated that Student did not thrive in the general inclusion classroom, and could not keep up with the pace of the class, even with accommodations.”

Letter to Autin, 56 IDELR 51 (OSERS 2011)

OSERS was asked about the proliferation of “segregated schools for students with autism” in every county in New Jersey, along with a “segregated charter school” for such students. The

response simply summarizes the regulatory requirements about placement decisions being made on an individualized basis, without regard to classification.

J.P. v. New York City DOE, 58 IDELR 96 (E.D.N.Y. 2012)

The court upheld the district's decision to place the student in a more restrictive environment based primarily on the student's disruptive behavior. "The reports from J.P.'s instructors at West End indicate that he was an inflexible child that became easily frustrated and argumentative when he did not get his way."

Clark v. Special School District of St. Louis, 58 IDELR 126 (E.D. Mo. 2012)

The court affirmed the school district's decision to transfer the student to a more restrictive setting, a separate public day school which used SORs (secure observation rooms). The court noted that "All the educators involved in the change of placement decision supported the decision, including the use of support rooms and/or SORs when necessary to address JJ's aggressive and dangerous behavior."