

EDUCATING PRESCHOOL STUDENTS IN THE LEAST RESTRICTIVE ENVIRONMENT

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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.

K.B.v. Nebo Sch. Dist., 41 IDELR 206 (10th Cir. 2004)

The 10th Circuit Court of Appeals determined that the school district's proposed placement for a preschool child with autism violated the child's right to be educated in the least restrictive environment. The district had proposed placing the child in a preschool classroom for children with disabilities; the child's parents requested a preschool placement with typically developing peers. In determining that the district failed to meet the least restrictive environment requirements under the IDEA, the 10th Circuit adopted the *Daniel R.R.* analysis (in which the court: (1) determines whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate). Key quote:

As stated above, this court is persuaded by the Daniel R.R. test and by the reasoning of the other circuits which have adopted it. Because costs are not at issue in this case, however, this court adopts and applies to this case only the non-cost factors of the Daniel R.R. test for a least restrictive environment.

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 FR 46540-01.

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 5th Circuit Court of Appeals in the case of R.H. v. Plano ISD, 54 IDELR 211 (5th 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).

SELECT CASES INVOLVING LRE FOR PRESCHOOL STUDENTS

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.

This case was distinguished on other grounds in Jessica K. v. Bd. of Educ. of the City of Chicago, 56 IDELR 197 (N.D. Ill. 2011)(noting that the 7th Circuit has not determined whether an IDEA provision requiring an IEP to identify the "location" of a child's services refers to the specific classroom placement).

Santa Monica Malibu Unified Sch. Dist., 59 IDELR 20 (SEA Cal. 2012)

The parents of a four year old boy with autism challenged the public school district's special education program, contesting, in part, that the school district failed to afford the student with an educational placement in the least restrictive environment. As relief, the parents requested reimbursement for their unilateral private placement of the student. The Administrative Law Judge ruled in favor of the school district, finding that the student required a more restrictive placement in a special education program for preschool children. Key quote:

Given the extent of Student's severe symptoms of Autism, attention, communication and social skills deficits, the class was designed to meet his needs and reasonably calculated to provide some educational benefit by providing him with a small, language based class with a highly trained special education teacher and several aides, and accommodations such a picture schedules, and collaboration with his direct service providers. This small class has a higher teacher ratio than could have been provided elsewhere. The SDC provided Student with more opportunities for individualized attention to work on his goals. In his SDC class, Student was exposed to two typical peers for the entire day during reverse mainstreaming, and other typical peers for 30 to 90 minutes per day during outdoor play, library, circle time and snack. The evidence showed that Student was mainstreamed to the maximum extent that was appropriate in light of the continuum of program options and that the placement offered was reasonably calculated to meet his unique needs.

Bibb Co. Bd. of Educ., 5 ECLPR 96 (SEA Ala. 2007)

The public school district proposed the placement of the three year old student with autism in an inclusive classroom provided by Head Start. The parent objected to the district's proposed placement, arguing that such was inappropriate to meet the student's unique needs. As a result of concerns the parent had related to the Head Start classroom, the parent agreed to place the child in a special education classroom for preschool students with disabilities. When the parent later challenged the district, alleging a denial of a free appropriate public education in the least restrictive environment, the Administrative Law Judge ruled in favor of the district regarding the placement issue. Key quote:

Petitioner first argues that the Board failed to provide FAPE because this Child's educational program was not in the least restrictive environment. More particularly, Petitioner argues that the Board did not meet its obligation because this Child's class was housed in the middle school where he had no opportunity to participate with non-disabled peers in social or academic activities. Prior to the initial IEP meeting, the Mother met with Board representatives and discussed programs that were available to this Child. The Board offered her a pre-school program for this Child with the Head Start program that included both disabled and non-disabled peers. After viewing the Head Start program, the Mother adamantly refused to consider allowing this Child to participate in the program. In

fact, the Mother went so far as to make a complaint to the local health department about what she saw to be deficiencies in the Head Start program.

At the initial IEP meeting, the Mother again refused to consider the Head Start program for this Child. The Mother viewed the program being offered at the middle school and agreed to the middle school pre-school program for this Child. In addition, she agreed to the services that the IEP team proposed to provide to this Child. While it is true that the middle school pre-school program did not have non-disabled children as participants, it was the Mother's decision not to allow this Child to participate in a program that included interaction with non-disabled children. As a result, this Child's participation in the pre-school program to the exclusion of the Head Start program cannot be said to be a denial of FAPE.

Etiwanda Sch. Dist., 5 ECLPR 88 (SEA Cal. 2007)

The public school district afforded FAPE to the five year old child with autism when the District proposed the child's placement in an inclusive program for preschool children with disabilities. The Administrative Law Judge noted that the student's needs in the area of socialization and peer interaction required the student's placement in an environment with non-disabled peers. Key quote:

Student was not able to show that the CLOUDS classroom setting was inappropriate. CLOUDS classroom was half regular education students and nearly half special education students. Student's academic achievements meant he would be high up in the class as far as education was concerned. His primary areas of need were socialization and play skills. In this mixed class he had the opportunity to play with non-disabled peers. He would have a "confederate" aide to support him if he experienced difficulty with social contacts.

Bd. of Educ. of Paxton-Buckley-Loda Unit Sch. Dist. No. 10 et al v. Jeff and Debbie S., 36 IDELR 93 (C.D. Ill. 2002)

The parents of a child with a profound bilateral hearing loss challenged the proposed placement of their child in a special education class for preschool children. As the child was the recipient of a cochlear implant, the parents argued that the student needed to be placed in an environment consisting of nondisabled, typically developing peers. The parent rejected the district's placement because she did not believe it would provide appropriate language models necessary as part of the student's audio verbal therapy. Following notification to the school district, the parent challenged the district, seeking reimbursement for the costs of a private preschool program. The Court ruled in favor of the parents. Key quotes:

Public agencies that do not operate programs for nondisabled children are not required to initiate such programs to satisfy the requirements regarding placement in the LRE embodied in Sections 300.550-556. For these public agencies, some alternative methods for meeting the requirements include (1) Providing opportunities for participation (even part time) of preschool children with

disabilities in other preschool programs operated by public agencies (such as Head Start); (2) Placing children with disabilities in private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children; and (3) Locating classes for preschool children with disabilities in regular elementary schools. In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met, based on the child's IEP (internal citations omitted).

Alec's IFSP indicated that he should "participate in a center based program that includes normally developing children." The IEP developed at the August meeting stated that Alec "would really benefit from interaction with his hearing peers." Despite these facts, the District offered only a placement in the Early Childhood Special Education class, a self-contained special education classroom, in August 1998. At the September 1999 MDC, the District offered the PREP program. The PREP program is a District program for non-special education students who may be behind in normal developmental areas that would cause them to not have an equal chance when they arrive in kindergarten. The District argues that this is a regular education preschool. However, Eric Brackmann, the program coordinator for the Ford-Iroquois County Special Education Association, testified that he was not aware of any regular preschool classrooms. Brackmann described the students in the PREP program as being "behind in normal developmental areas that would cause them not to have an equal footing when they came into kindergarten." Chris Locher, the regional coordinator of hearing services for the Central Affiliation for Special Education, stated that she felt the PREP program would be appropriate for Alec because "he would get an opportunity to be with similar age peers who are working on talking and listening just like he is." This court agrees with the hearing officer that the PREP program cannot be considered the LRE because "the evidence shows that [Alec] can be educated in a regular preschool classroom with nondisabled children and with few modifications to the curriculum." Therefore, this court agrees with the hearing officer that the PREP program and the Early Childhood Special Education class were not a FAPE for Alec within the meaning of the IDEA because the programs did not provide the LRE to meet his educational needs.