

## He has a Right to Be in General Education Classes Even If He Bit Three Kids!

The Least Restrictive Environment and the  
Behaviorally Challenged Student

**Denise Hays**  
**Attorney at Law / Shareholder**  
AUSTIN OFFICE



WALSH GALLEGOS  
TREVINO KYLE & ROBINSON P.C.



### The IDEA 2004 LRE Mandate

- The IDEA requires that “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 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 the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A).



## Making the LRE Determination

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

- the placement decision is based on the child’s IEP.
- consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.
- a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.” 34 C.F.R. §300.116

WG

## Ensuring the Right Decision and Justifying the Determination

- an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section. 34 C.F.R. §300.320
- extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled.
- ensure that ... 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

WG

### Daniel R.R. LRE Standard (Two-Part Test):

- Ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily.
- If the answer is “no,” and the school intends to provide special education or to remove the child from regular education, ask whether the school has mainstreamed the child to the maximum extent appropriate. *Daniel R.R. v. SBOE*, 874 F.2d 1036 (5th Cir. 1989).

WG

### Daniel R.R. Factors to Consider

- Has the district taken steps to accommodate the child with disabilities in regular education?
- Were these efforts sufficient or token?
- Will the child receive an educational benefit from regular education?
- What will be the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education?
- What effect does the disabled child's presence have on the regular classroom environment? *Daniel R.R. v. SBOE*, 874 F.2d 1036 (5th Cir. 1989).

WG

## What About Placement?

- In determining the educational placement of a 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. §300.116

WG

## Full Continuum of Services

- Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

34 C.F.R. §300.115(a)

WG

## Full Continuum of Services (continued)

- 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. 300.115(b)

WG

## What Does State Law Require?

- Each local school district shall be able to provide services with special education personnel to students with disabilities in order to meet the special needs of those students in accordance with the federal mandate regarding continuum of placements.

19 T.A.C. §89.63

WG

## Does the law provide examples of instructional arrangements?

- Yes. However, instructional arrangements /settings shall be based on the individual needs and individualized education programs (IEPs) of eligible students receiving special education services.

WG

## What is Mainstream?

- This instructional arrangement/setting is for providing special education and related services to a student in the regular classroom in accordance with the student's IEP. Qualified special education personnel must be involved in the implementation of the student's IEP through the provision of direct, indirect and/or support services to the student, and/or the student's regular classroom teacher(s) necessary to enrich the regular classroom and enable student success. The student's IEP must specify the services that will be provided by qualified special education personnel to enable the student to appropriately progress in the general education curriculum and/or appropriately advance in achieving the goals set out in the student's IEP. Examples of services provided in this instructional arrangement include, but are not limited to, direct instruction, helping teacher, team teaching, co-teaching, interpreter, education aides, curricular or instructional modifications/accommodations, special materials/equipment, consultation with the student and his/her regular classroom teacher(s) regarding the student's progress in regular education classes, staff development, and reduction of ratio of students to instructional staff. 19 T.A.C. §89.63

WG

**Self-contained is very restrictive. Is this listed on the Continuum?**

- Yes. Self-contained (mild, moderate, or severe) is placement on the regular campus. This instructional arrangement/setting is for providing special education and related services to a student who is in a self-contained program for 50% or more of the regular school day on a regular school campus.

19 T.A.C. §89.63

WG

**Does a District have the option to set up programs located off-campus?**

- Yes. Off home campus is an instructional arrangement/setting for providing special education and related services to:
  - a student who is one of a group of students from more than one school district served in a single location when a free appropriate public education is not available in the respective sending district;
  - a student whose instruction is provided by school district personnel in a facility (other than a nonpublic day school) not operated by a school district; or
  - a student in a self-contained program at a separate campus operated by the school district that provides only special education and related services.

19 T.A.C. §89.63

WG

## What is Nonpublic Day School?

- This instructional arrangement/setting is for providing special education and related services to students through a contractual agreement with a nonpublic school for special education.

19 T.A.C. §89.63

WG

## Is residential care still listed on the Continuum?

Residential care and treatment facility (not school district resident). This instructional arrangement/setting is for providing special education instruction and related services to students who reside in care and treatment facilities and whose parents do not reside within the boundaries of the school district providing educational services to the students. In order to be considered in this arrangement, the services must be provided on a school district campus. If the instruction is provided at the facility, rather than on a school district campus, the instructional arrangement is considered to be the hospital class arrangement/setting rather than this instructional arrangement. Students with disabilities who reside in these facilities may be included in the average daily attendance of the district in the same way as all other students receiving special education.

19 T.A.C. §89.63

WG

## Are there other program options listed in the Continuum?

- Other program options which may be considered for the delivery of special education and related services to a student may include contracts with other school districts; and other program options as approved by the TEA.

19 T.A.C. §89.63

WG

## Should an Incremental Approach be used before moving to more restrictive settings?

- “Although the district accommodated the student by providing aides and modifying the curriculum, the student often refused to work due to frustration with his inability to grasp increasingly difficult concepts. Furthermore, because the student received instruction separately from tutors and teaching assistants, his ability to interact with non-disabled peers was seriously limited.”
  - accommodations noted included assistance by aides at all times and assignments modified up to 100 percent to adapt to his level.
  - while he did not present as a disruptive student, such was less important than the fact that he was receiving no educational benefit.
  - The Court observed that the District, in keeping with the statute, embarked upon an “incremental approach” when recommending more restrictive settings. As difficulties in general education classes increased, the school recommended incrementally greater time be spent in special education classrooms.

*J.H. v. Fort Bend Indep. Sch. Dist.*, 482 Fed. App’x 915 (5th Cir. 2012)

WG

## Does OSEP Require Inclusion for All Students?

- No. In a redacted letter dated March 30, 2009, OSEP responded to the following question: "Would full inclusion for all and/or most students within a public school district, regardless of their needs, etc., be a violation of this regulation (34 C.F.R. §300.115)?" OSEP responded that placement decisions must be made in conformity with the LRE provision.
- In an OSEP memorandum dated November 23, 1994, OSEP indicated the IDEA does not define the term inclusion.

WG

## What if the ARDC failed to consider a continuum of placements?

- An administrative law judge found that a district's IEP team failed to consider a continuum of placements as well as the child's actual needs.
- The team focused on putting a student with autism into a regular kindergarten class with pull-out special education and support services, while the parent asked them to consider a private day school.
- The team failed to consider the private day school, despite the parent's repeated requests, and therefore failed to consider a continuum of placements for the child.

*Deer Valley Unified Sch. Dist., 54 IDELR 206, March 2010*

WG

## What do you do if a Student needs a change in Placement?



## What do you do if a Student needs a change in Placement?

- There are two ways to approach when a behaviorally challenged student needs a change in placement.
  - 1) Educational Change of Placement With Agreement
  - 2) Educational Change of Placement Without Agreement



## What is the difference between a “disciplinary” change of placement and an “educational” one?

- The difference lies in the manifestation determination.
- If the student violates the Code of Conduct in a way that justifies a change in placement and is not a manifestation of disability, the school can impose a “disciplinary change of placement,” just as it would do to a non-disabled student.
- But if the behavior is a manifestation of disability, disciplinary action is not permitted. However, a change for educational reasons may be appropriate.

WG

## Educational Change of Placement With Agreement

- This is for changes in placement longer than 10 days.
- It’s “educational” as opposed to “disciplinary.” So it’s based on behavior that IS a manifestation of disability.
- IDEA gives us two “don’ts” when the behavior of the student is a manifestation of disability.
- Don’t punish it.
- Don’t ignore it.
- The law spells that out in more detail.

WG

## If the Behavior is a Manifestation

- The ARDC must conduct an FBA unless one is already done. And develop a BIP, or review and revise an existing one.
- The school must return the child to the placement from which the child was removed...“unless the parent and the LEA agree to a change of placement as part of the modification of the BIP.”
- If the behavior is a manifestation, the student must be returned to the placement from which the student was removed.
  - Except for special circumstances or if the parent agrees to a disciplinary change in placement.

WG

## Why isn't this change in placement considered a disciplinary removal?

- Q. “When the parent(s) of a child and the school personnel are in agreement about the child’s change of placement after the child has violated a code of student conduct, is it considered to be a removal under the discipline provisions?”
- A. “No, if the parent(s) of a child and the school district agree to a specific change in the current educational placement of the child.”
- OSERS Q and A: 52 IDELR 231 (2009).

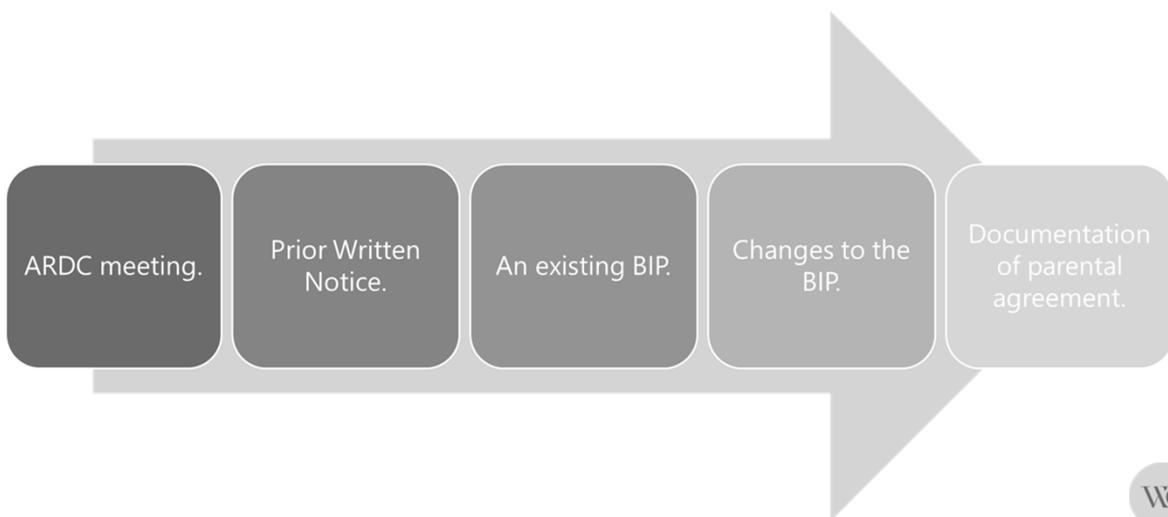
WG

## Parental Agreement

- Parental agreement to a change of placement after a disciplinary incident should be voluntary, informed, genuine, and if to a DAEP, borderline enthusiastic.
- Make sure parents understand that they do not have to agree to what the school is proposing.

WG

## What do you need for an agreed upon change in placement?



WG

## Educational Change of Placement Without Agreement

- This should be used if the parent does not consent to a change in placement to a more restrictive placement.
- This should be used when the behavior is a manifestation of disability, and so the change in placement is educational rather than disciplinary.
- Since the parent does not agree DAEP is not an option. However, a more restrictive placement to focus on behavior is an option.
- Schools always have the option of proposing a change of placement to a more restrictive environment (MRE).
- This should ONLY be done if the disability causes the misbehavior.
- Like any change of placement, this requires parental agreement, or a willingness to defend the decision in hearing.

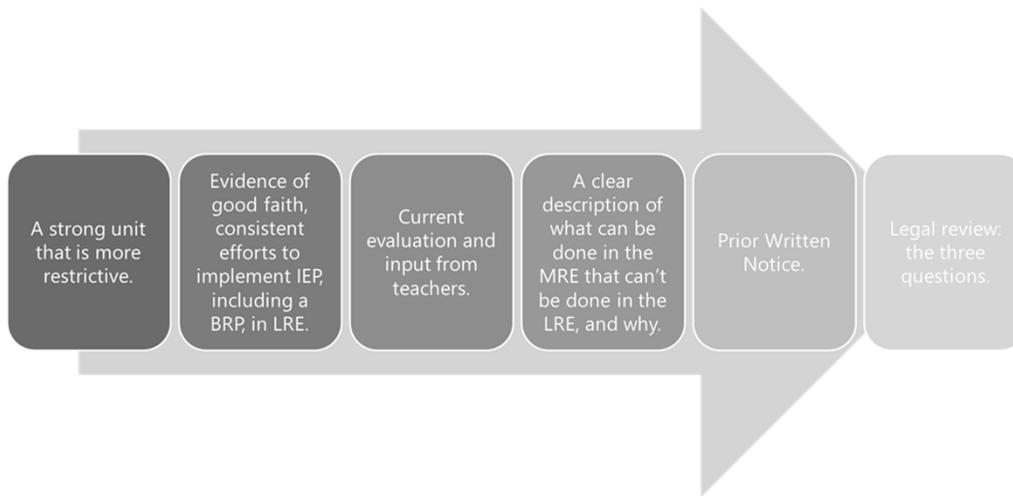
WG

## How do we think about moving a student into a more restrictive placement?

- Moving a student to a MRE is an admission of failure, since the goal is to serve the student in the LRE.
- To justify this, school must be able to show that:
  - 1) the current placement is not working;
  - 2) we have made good faith, consistent efforts to enable the student to succeed in LRE, and
  - 3) the MRE offers services likely to improve student performance.

WG

## What do you need for a change in placement without parental consent?



WG

## Three things to ask before having a change in placement without parental consent

- 1) Is it worth fighting over?
- 2) Are we legally defensible?
- 3) Is the staff united on this?
- Best practice: Ask them in reverse order.

WG

## What do the Courts have to say about changes in placement?

WG

### Doe v. Todd County School District, 55 IDELR 185 (8<sup>th</sup> Cir. 2010)

- Here, the parent agreed to the change of placement at the IEP Team meeting, but quickly changed her mind. Since the placement was based on an agreement, the parent should have asked for another IEP Team meeting to formally revoke her agreement. Instead, the Parent took the matter to court, alleging a denial of due process because she was not allowed to take the matter to the school board. The court held the parent to the agreement, even though it seemed clear that the parent did not fully understand the agreement, or the fact that she did not have to agree to it. The parent was not denied due process because she was not entitled to a hearing before the school board.

WG

**Doe v. Todd County School District, 55 IDELR 185 (8<sup>th</sup> Cir. 2010)**

- “Once the IEP team changed Doe’s placement with Dorothy Doe’s consent, the IEP team, not the school board, became the decision-maker authorized to change his placement again. Given the IDEA’s stay-put mandate...the board could not have ordered Doe’s reinstatement at [the regular high school].”

WG

**Global Impact Stem Academy, 118 LRP 12987 (SEA OH 03/22/18)**

- Notice must be given prior to a change in education placement to give parents the opportunity to make an informed decision. Although an Ohio mother agreed with her child’s placement change decision, she was not given proper notice and had been unaware that a placement decision would be made at that meeting. So, even though the student’s mother agreed with the district about the student’s educational placement decision, the district violated the IDEA when it changed the student’s placement without providing the student’s mother with proper notice.

WG

Frisco ISD, 119 LRP 42539 (Tx. SEA 2019, Docket No. 180-SE-0219)

- A Texas hearing officer has concluded that Frisco ISD served a student appropriately, even when the district proposed moving the student to a more restrictive environment.
- The school proposed moving this student to a self-contained unit where behavior and emotional control would be the primary focus. The student had been in the general education setting, so this was definitely a move to a more restrictive setting. The parents objected and, in fact, pulled the student out of public school and sought reimbursement for the private school tuition they were paying.

WG

Frisco ISD, 119 LRP 42539 (Tx. SEA 2019, Docket No. 180-SE-0219)

- They didn't get it. The hearing officer held that the district had offered FAPE and that the proposed move to the self-contained unit was timely:
  - "While this setting is more restrictive than the general education setting, it was necessary for Student due to Student's behaviors. It is not appropriate to educate a student in the general education setting when the student engages in disruptive behavior that significantly impairs the education of other students in the general education setting."

WG

Frisco ISD, 119 LRP 42539 (Tx. SEA 2019, Docket No. 180-SE-0219)

- And note this: the move was not intended to be permanent. The district's goal was to get this student back to his general education setting:
  - "The School District's goal... was to help Student learn how to handle Student's emotions when Student was frustrated and teach coping skills in a more controlled environment with the goal of returning to the general education setting."

WG

Frisco ISD, 119 LRP 42539 (Tx. SEA 2019, Docket No. 180-SE-0219)

- The hearing officer held that Frisco passed all four parts of the FAPE test that Texas courts use:
  - 1) The IEP was individualized, based on multiple assessments and input from both teachers and parents.
  - 2) It was implemented in the least restrictive environment. Even the move to the self-contained unit satisfied this test because it was the LRE for this student at this time.
  - 3) There was ample evidence of good communication and collaboration between school and parents.
  - 4) The only close call was on the fourth factor- did the student make progress? Academically he did. He made A's in all classes and was achieving above grade level. But by all accounts the student's behavior deteriorated toward the end of his time in the district. In response, the school called for revisions to the BIP and a move to the self-contained unit. The parents argued that this was, in effect, an admission of a denial of FAPE.

WG

Frisco ISD, 119 LRP 42539 (Tx. SEA 2019, Docket No. 180-SE-0219)

- ...The parents argued that this was, in effect, an admission of a denial of FAPE. However, the court ruled otherwise.
  - "A school district is allowed to change a Student's program without it being a denial of FAPE. Otherwise, the result would be any suggested change in a Student's program would be an automatic admission of denying FAPE to a student."

WG

Jason O. v. Manhattan School District No. 114,  
67 IDELR 142 (N.D. Ill. 2014)

- When districts propose moving a student to a more restrictive environment over parental objections, the district has to convince the hearing officer of three things:
  - 1) the current placement is not working;
  - 2) we have really tried; and
  - 3) the student will do better in the more restrictive setting.
- In this case the district passed all 3 tests.

WG

Jason O. v. Manhattan School District No. 114,  
67 IDELR 142 (N.D. Ill. 2014)

- 1) It's Not Working
  - Jacob's kindergarten teacher testified that he had regressed in reading. The school social worker noted that Jacob's physical aggression and non-compliant behaviors were not decreasing as they should.
- 2) We Have Really Tried
  - Jacob had an aide, a behavior plan, social work support, and the mainstream placement had been in place for a full year.

WG

Jason O. v. Manhattan School District No. 114,  
67 IDELR 142 (N.D. Ill. 2014)

- 3) He Will do Better in the More Restrictive Settings
  - The court relied heavily on the testimony of an independent educational expert who observed Jacob in the classroom setting over a period of almost three months and written an 11-page report. She made the case that Jacob needed the kind of services that could only be provided in a more restrictive setting, such as the SELF program (Social Emotional Learning Foundations). Her report noted that the boy should be served "in an environment that can support appropriate relationships, learn to display empathy for others, learn to alter his own behavior to conform to the standards in place, accept responsibility...value another's point of view, and accept authority." In her testimony at the hearing she stated that "he needed more support systems." "He needed trained staff to be able to address the teachable moments that were occurring throughout his day that could not be done in a GenEd setting." The expert said that the SELF program was good for kids with "similar characteristics, the disrespect, the unpredictable behavior, the impulsivity, the lack of remorse, the trouble with social skills."

WG

Jason O. v. Manhattan School District No. 114,  
67 IDELR 142 (N.D. Ill. 2014)

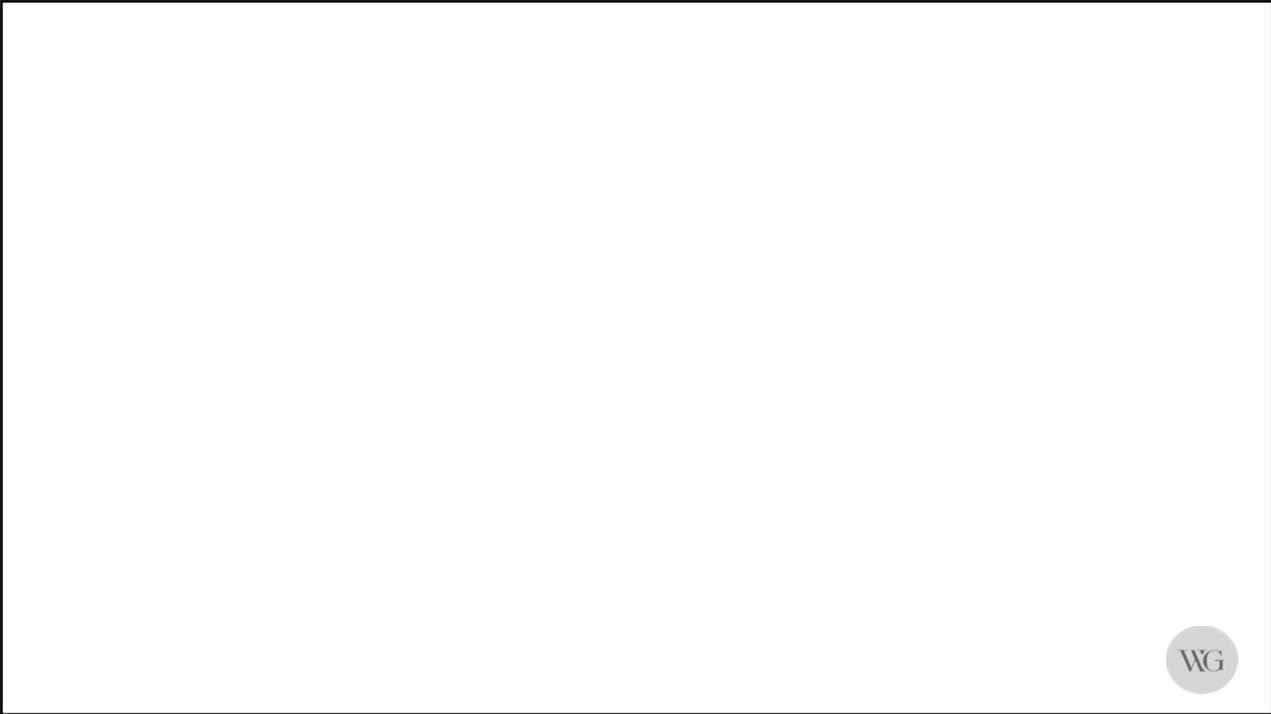
- The court ruled in favor of the school district on the placement issue. The case illustrates that it is alright for the school to fail with a student, as long as the school seeks to fix the problem in a timely fashion. Proposing to move a student out of the mainstream is, in effect, an admission of failure by the school. The law does not expect that every placement will succeed. However, it does expect school officials to be on top of the situation and to step in with a good Plan B if Plan A is not working.

WG

Jason O. v. Manhattan School District No. 114,  
67 IDELR 142 (N.D. Ill. 2014)

- That's what is particularly noteworthy about this case. The independent expert retained by the school did an excellent job of describing exactly what the student needed; why he could not get what he needed in the mainstream setting; and why the school's proposed placement would be beneficial to the student. Thus the school made the case that the proposed change of placement was not about the other kids... it was about Jacob.

WG



Denise Hays



Centennial Towers  
505 E. Huntland Dr.  
Suite 600  
Austin, TX 78752

© Walsh Gallegos 2021

The information in this presentation was prepared by Walsh Gallegos Treviño Kyle & Robinson P.C. It is intended to be used as general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.

© 2021