

Wyoming Department of Education
Special Programs Division

Reference Guide:
Residential Placements

Under Part B of the Individuals with Disabilities Education Act (IDEA), each State must ensure that a free appropriate public education (FAPE) is made available to all children with disabilities. FAPE includes the provision of special education and related services that meet Wyoming education standards and Part B requirements. On occasion, a student may be placed in a private residential facility. These placements may be the result of parent choice, school placement, or court placement. The obligation of the public agency will depend on the reasons for the student's placement in a residential facility, as well as other factors, including the educational needs of the student and the licensure status of the facility. The Wyoming Department of Education (WDE) has developed this document to serve as a reference tool for public agencies with residential placement questions.

Summary of Relevant Definitions

TERM	CITATION	DEFINITION
Free Appropriate Public Education (FAPE)	34 C.F.R. §300.17	<p><i>FAPE</i> means special education and related services that</p> <ul style="list-style-type: none"> • Are provided at public expense, under public supervision and direction, and without charge; • Meet the standards of WDE, including the requirements of the IDEA; • Include an appropriate elementary school or secondary school education; AND • Are provided in conformity with an Individualized Education Program (IEP) that meets the requirements of IDEA.
FAPE	<i>Board of Education of the Hendrick Hudson Central Sch. District v. Rowley</i> , 553 IDELR 656 (1982)	An IEP developed through IDEA's procedures that is reasonably calculated to enable the child to receive educational benefit.
Least Restrictive Environment (LRE)	34 C.F.R. §§300.114 through 300.118	<p>Each public agency must ensure that –</p> <ul style="list-style-type: none"> • To the maximum extent appropriate, children with disabilities, including children in public and private institutions or other care facilities, are educated with children who are nondisabled, AND • Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
Special Education	34 C.F.R. §300.39	<p><i>Special education</i> means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.</p> <p><i>Specially designed instruction</i> means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the disability AND to ensure access to the general curriculum.</p>

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Related Service	34 C.F.R. §300.34	<i>Related services</i> means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.
Public Agency Local Educational Agency (LEA)	34 C.F.R. §300.2 34 C.F.R. §300.28	<i>Public agencies</i> include <i>Local Educational Agencies (LEA)</i> . <i>LEA</i> means a public board of education or other public authority. The IDEA and courts typically utilize the terms <i>Public Agency</i> and <i>LEA</i> interchangeably to refer to school districts.
Elementary School Secondary School	34 C.F.R. §300.13 34 C.F.R. §300.36	<i>Elementary</i> or <i>Secondary school</i> means a nonprofit institutional day or residential school, including a public charter school, that provides elementary or secondary education, as determined under state law. Secondary school does not include any education beyond grade 12.
Private School	WDE Chapter 18, Sec. 5(d), Rules on Private School Licensing	<i>Private school</i> means any nonpublic elementary or secondary school providing a basic academic educational program for children in grades K-12.
License	WDE Chapter 18, Sec. 5(c), Rules on Private School Licensing (currently in effect)	<i>License</i> is defined as a non-transferrable certificate issued by the State Department of Education to a private school located within this state which permits the school to solicit, offer, and maintain courses of instruction or study in compliance with the provisions of the private school licensing act and the rules and regulations of the State Board.

Tenth Circuit Authority

For some students, their disabilities cause a degree of impairment that requires a residential placement in order for the student to receive FAPE. In those situations, supports in behavioral, functional, or independent living skills may also be necessary in order to provide FAPE. It is critical to understand the limitations and obligations of making residential placements in light of two decisions in the Tenth Circuit Court of Appeals. The first is the private school tuition reimbursement case of *Thompson R2-J Sch. Dist. v. Luke P.*, 50 IDELR 212 (10th Cir. 2008), in which the Court ruled that generalization of skills learned in school to the home and other environments is not guaranteed by the IDEA. In so ruling, the Court stated:

Congress did not provide in IDEA a guarantee of self-sufficiency for all disabled persons, and the most authoritative arbiter of congressional intent has already reached this conclusion. In *Rowley*, the Supreme Court expressly considered and rejected the notion that "self-sufficiency" is "the substantive standard which Congress imposed on the States." 458 U.S. at 201 n.23. The Court explained that "[n]oticeably absent from the language of [IDEA] is *any* substantive standard prescribing the level of education to be accorded handicapped children." *Id.* at 189 (emphasis added). Rather, while the promotion of self-sufficiency was surely among Congress's purposes in enacting IDEA, the Court explained that Congress proceeded to select a rather particular means for advancing that purpose -- a statutory scheme focused on and limited to enhancing disabled students' access to public education. See *id.* at 192; *id.* at 201 n.23.

The second case is *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 60 IDELR 91 (10th Cir. 2012). In this very important private school tuition reimbursement case, the Tenth Circuit developed a four-part test for determining whether a private residential placement can be funded under the IDEA:

1. Determine whether the school district provided or made FAPE available to the disabled child in a timely manner; if it did, the unilateral parental placement is not reimbursable.
2. Determine whether the private placement is a state-accredited elementary or secondary school; if not, the placement is not reimbursable.
3. Determine whether the private placement provides special education, i.e. “specially designed instruction . . . to meet the unique needs of a child with a disability”; if the placement provides no such instruction, it is not reimbursable.
4. If the private placement provides additional services beyond specially designed instruction to meet the child’s unique needs, determine whether such additional services can be characterized as “related services” under the IDEA. If the additional services cannot be characterized as related services, they are not reimbursable.

Decisions from the Tenth Circuit are relevant in Wyoming and must be considered when determining the necessity for and appropriateness of any private residential placement.

Residential Placements by a Public Agency

Pursuant to the Federal Regulations implementing the IDEA, 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. The continuum must include placements such as the regular classroom, special classes, home instruction, and instruction in hospitals and institutions. *34 C.F.R. §300.115*. A student who is placed in or referred to a private school or facility by a public agency must be provided special education and related services in conformance with an IEP at no cost to the parents. Further, the education provided in a private school or facility must meet the Wyoming standards applicable to schools. *34 C.F.R. §300.146*. The IDEA makes clear that if a placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including the non-medical care and room and board, must be at no cost to the parents. *34 C.F.R. §300.104*. The public agency making the placement is also responsible for funding the placement and ensuring that FAPE is provided.

When determining whether to propose a residential placement for a student, school districts must consider:

1. **The educational needs of the student.** As a general rule, school districts are obligated to consider lesser restrictive placements before offering a residential placement. *T.F. v. Special School Dist. of St. Louis County*, 45 IDELR 237 (8th Cir. 2006). If a student cannot obtain educational benefit in a lesser restrictive setting, then a residential placement should be considered. *L.H. v. Monroe-Woodbury Central Sch. Dist.*, 51 IDELR 91 (2nd Cir. 2008).
2. **The accreditation/licensure status of the residential facility.** The provision of FAPE includes special education and related services that meet the standards of Wyoming. *34 C.F.R. §300.17*. The IDEA requires that residential placements meet the standards for a school in Wyoming. *34 C.F.R. §300.146(b)*. Wyoming law requires private schools to be licensed by the state. *W.S. §21-2-401(a)*. Determine the licensure and accreditation status of the private facility before proposing placement. If the residential placement does not meet the definition of a school, it cannot be utilized to provide specially designed instruction, but in some circumstances, may be used to provide habilitation and other supportive services as related services *if* the student is receiving specially designed instruction from an appropriately accredited, licensed school.
3. **The development of an IEP that can provide special education and related services in the residential placement.** The IDEA mandates the provision of FAPE, which includes special education and related services. A student who is placed in a residential facility continues to have the right to receive FAPE through the provision of special education and related services. The IEP implemented in the residential placement must provide FAPE. In

some instances, it is possible for a residential facility that is *not* licensed as a school to be the appropriate placement *if* the student is provided specially designed instruction from a licensed, accredited school *and* the habilitation or other supportive services provided in the residential facility meet the definition of related services, i.e. necessary in order for the student to benefit from his/her specially designed instruction. If no specially designed instruction is provided to the student in the residential facility, the habilitation or residential portion of the program shall not be considered a related service. Without making separate, external arrangements for the provision of specially designed instruction, the private residential placement would not be considered an educational placement, and therefore, would not be an allowable use of IDEA funds by the placing district.

Residential Placements by Parents: As a Parent Choice Option

Parents have the right to enroll their child in a private school, including religious schools or facilities, as a parental choice or option. 34 C.F.R. §300.130. When a parent exercises this choice, the right of the student to receive FAPE at public expense is waived. “No parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in public school.” 34 C.F.R. §300.137. See also *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993).

Although considerably less onerous than the provision of FAPE, school districts continue to have two primary responsibilities for parentally placed private school children: child find and the provision of equitable services. In addressing child find, the Federal Regulations make clear that a school district “must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district...” 34 C.F.R. §300.131(a). Also made clear by the Federal Regulations, reevaluation is part of the school district’s child find responsibility for parentally placed private school children. 71 *Federal Register* 46593.

Through a process of planning and consultation, the school district must, to the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary and secondary schools located in the school district, provide for the participation of those children through development of a services plan. 34 C.F.R. §300.132. “Each parentally placed private school child with a disability who has been designated to receive services under §300.132 must have a services plan that describes the specific special education and related services that the [school district] will provide to the child in light of the services that the [school district] has determined, through the process described in §§300.134 through 300.137, it will make available to parentally placed private school children with disabilities.” 34 C.F.R. §300.137. The development of service plans must be based on a proportionate share of Federal funds. 34 C.F.R. §300.134(b).

The right of a parent to unilaterally place his/her child in a private school as a matter of choice is sometimes confused with a parent’s decision (in consultation with medical providers) to temporarily remove the child from school for the purpose of hospitalization. A recent Tenth Circuit decision distinguished between the temporary removal of a child from a public school when admitted to a hospital for evaluation and “disenrollment from the public school system with the intent to place the child in a private school.” Only disenrollment with the intent to place the child in a private school would meet the definition of a unilateral private school placement by the parent. *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 60 IDELR 91 (10th Cir. 2012).¹

¹ The Wyoming statute addressing Instruction for Hospitalized or Homebound Pupils does not apply to special education students. W.S. §21-4-402.

Residential Placements by Parents: When the Provision of FAPE is in Dispute

If a parent places his/her child in a private school without the consent or referral of the school district, a court or hearing officer may require the school district to reimburse the parents for the cost of that enrollment. This occurs when the court or hearing officer finds that the school district had not made FAPE available to the child in a timely manner prior to that enrollment *and* the private placement is appropriate. *34 C.F.R. §300.148. See also Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993). In making the tuition reimbursement decision, courts should also take into account any equitable considerations. *See Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 556 IDELR 389 (U.S. 1985). In 2009, the United States Supreme Court ruled that the IDEA does not limit the availability of the tuition reimbursement remedy to students who have previously received special education services through the public school system. *Forest Grove School District v. T.A.*, 52 IDELR 151 (U.S. 2009).

If a parent decides to place his/her child in a private school when FAPE is in dispute, the parent assumes the risk of proceeding to due process in order to obtain a favorable ruling and an award of tuition reimbursement.

Court Ordered Residential Placements

The educational requirements for court ordered placements of children are governed by Wyoming Statute §21-13-315. In order to be eligible for WDE funding, the placement facility must be licensed or accredited as a private residential treatment facility by appropriate state authority. *WDE Rules for Education Program Approval of Public and Private Institutions Receiving State Funds for the Education Costs of Students Placed by Court Order, Chapter 14, Section 5.* As another prerequisite to payment for education costs of school-aged students court placed in care, the placement must ensure that every school-aged student attends either an external (provided by the local public school district in which the facility is located) or an on-grounds education program evaluated and accredited by the Wyoming State Board of Education. *WDE Rules for Education Program Approval of Public and Private Institutions Receiving State Funds for the Education Costs of Students Placed by Court Order, Chapter 14, Section 6.*

In the related matter of students in juvenile detention by order of the Juvenile Court, the Wyoming Office of the Attorney General issued a guidance letter in 2004 regarding a district's obligation to students in detention facilities. The Attorney General opined that the responsibility for providing educational services to children in a juvenile detention facility rests with the school district in which the facility is located. Although the district in which the student is court placed has responsibility for the provision of educational services to the student, the district of residence has the overarching responsibility to monitor the student's educational progress in order to ensure the provision of FAPE and to ensure a successful transition back into the resident district when appropriate.

Additional Considerations

WDE issued a series of Superintendent's Memos regarding the educational services for students placed outside of a conventional school setting. The most recent memo is dated March 12, 2010, superseding and rescinding Memorandum No. 2009-177. The March 2010 Memorandum No. 2010-055 instructs school districts to assign a case manager to monitor the student's educational progress while he/she is placed outside of the resident school district. In addition, the Memorandum reminds school districts that education of students in private residential facilities and institutions may require additional endorsements from the Professional Teaching Standards Board.

WDE's Chapter 8 Rules on the School Foundation Program address special education reimbursement, and require that school districts offering special education programs and

services through a case-management arrangement in out-of-district settings must develop personal service contracts describing those services. *WDE School Foundation Program, Chapter 8, Section 15(f)*. These Rules further limit reimbursement to contracted service providers who are appropriately certified, licensed, or registered providers.

In Summary

Private school placements—and residential placements in particular—are complex areas of special education law. The many variables described above increase the complexity of these issues. One certainty can be gleaned from all aspects of residential placement requirements: unless the parent has enrolled his/her child in a private placement as a parent choice, the student has the right to receive FAPE, and the student’s resident district has the overarching responsibility to ensure the provision of special education and related services in the least restrictive environment, meeting the IDEA’s requirement for the provision of FAPE.

Crosswalk of Relevant Provisions

WY Statutes	WY Rules	WY Guidance	Federal Reference
W.S. §§21-2-401 through 407: Private School Licensing Act	WDE Chapter 1: Private School Licensing for Post Secondary Proprietary Schools WDE Chapter 18: Private School Licensing for Students in Non-Religious Elementary & Secondary Schools	Superintendent’s Memo No. 2008-131 with attached Letter to Blankenship, Attorney General Opinion (September 8, 2004) Superintendent’s Memo No. 2009-177 (RESCINDED) Superintendent’s Memo No. 2010-055 Superintendent’s Memo No. 2010-173	34 C.F.R. §300.13: Elementary School 34 C.F.R. §300.17: FAPE 34 C.F.R. §300.36: Secondary School 34 C.F.R. §300.104: Residential Placement
W.S. §21-4-402: Instruction for Hospitalized or Homebound Pupils		The Memos can be located at: http://edu.wyoming.gov/Communications/archives/Superintendents_Memos_2010.aspx	34 C.F.R. §§300.114 - 300.117: Least Restrictive Environment
W.S. §21-13-315: Court Ordered Placement of Children	WDE Chapter 14: Education Program Approval of Public and Private Institutions Receiving State Funds for the Education Costs of Students Placed by Court Order DFS Chapter 1: Authority and Reasons for Rules		34 C.F.R. §300.18: Children in Public or Private Institutions 34 C.F.R. §§300.130 - 300.144: Children with Disabilities Enrolled by Their Parents in Private Schools 34 C.F.R. §§300.145 & 300.146: Children with Disabilities in Private Schools Placed or Referred by Public Agencies
W.S. §21-13-321: State Financial Support	WDE Chapter 8, Section 15: Special Education Reimbursement		
	PTSB Chapter 4, Section 6: Endorsement Areas Specific to Teachers of At-Risk Students		34 C.F.R. §§300.148 - 300.150: Children with Disabilities Enrolled by Their Parents in Private Schools When FAPE Is at Issue