

Residential Placements in Wyoming

March 2013

The Conversation

- Parent placement when FAPE is in dispute: Parents accept the risk of placing their child in a private school because they believe the school district has not offered FAPE to their child.
- Parents have the right to seek tuition reimbursement from the school district pursuant to 34 C.F.R. §300.148.
- Disagreements between a parent and a school district regarding the availability of FAPE and the question of financial reimbursement are subject to due process procedures.

The Conversation

- Parent choice option: Parents choose to enroll their child in a private school for personal, religious, or other reasons. This type of choice has no FAPE implications and few responsibilities for a district.
- Two IDEA obligations:
 - Child find pursuant to 34 C.F.R. §300.131.
 - This obligation includes the initial child find activities, initial evaluations, and reevaluations. *71 Federal Register 46593.*
 - Child find is the responsibility of the LEA in which the private school is located. *34 C.F.R. §300.131(a), 71 Federal Register 46592 and 46593.*
 - Equitable services according to 34 C.F.R. §§300.137 and 300.138.

The Conversation

- A student is placed in a private school by a public agency: as a means of providing FAPE based on the needs of the student, a school district may place a child in a private school.
- The school district must ensure that the student receives special education and related services in conformance with an IEP at no cost to the parents pursuant to 34 C.F.R. §§300.145 and 300.146.
- The private placement must meet the standards that apply to education in the state.
- This student retains all rights under the IDEA.



The Conversation

- Court placed students: In Wyoming, students placed in a residential facility for care or treatment present unique obligations for a school district.
- If the student is confined to juvenile detention, the school district in which the facility is located has responsibility for the provision of FAPE. *See Attorney General Opinion to Blankenship, 2004.*
- However, the resident school district has the ongoing responsibility to ensure the provision of FAPE through case management and plan for the student's transition back into the resident district, when appropriate. *See Superintendent's Memo 2010-173, et al.*

Context

- Residential placements must be viewed in light of student needs, the IDEA requirements, Federal Regulations, state laws, and two Tenth Circuit Court of Appeals cases.
- The Tenth Circuit is controlling in Wyoming, and all states and school districts within the Tenth Circuit must be in compliance with its rulings.

- The court ruled that generalization of skills learned in school to the home or other environments is not guaranteed by the IDEA.
- “Congress did not provide in IDEA a guarantee of self-sufficiency for all disabled persons. . . .”
- So long as the student is making some progress in the classroom, the court explained, the district does not need to ensure that the student is able to apply his newly learned skills outside of school.

Thompson v. R2-J Sch. Dist. v. Luke P.

50 IDELR 212 (10th Cir. 2008)

- "This is not the usual IDEA dispute whether the student and parents allege that their concerns have gone unheeded or unaddressed in the IEP process."
- "Indeed, both the IHO and the ALJ found the December 2003 IEP to represent a 'monumental and genuine effort on the part of the district to improve [the student's] performance in a number of areas affected by his autism.'"

Thompson v. R2-J Sch. Dist. v. Luke P.

50 IDELR 212 (10th Cir. 2008)

- Although the IEP did not offer as many benefits as the student's residential program, the court concluded that the district satisfied its obligation to provide a "basic floor of opportunity."
- The 10th Circuit reversed the District Court's reimbursement order and remanded the case for further proceedings.

Thompson v. R2-J Sch. Dist. v. Luke P.

50 IDELR 212 (10th Cir. 2008)

- 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 student 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.

**Jefferson County
Sch. Dist. R-1 v.
Elizabeth E.**

60 IDELR 91 (10th Cir. 2012)

- 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 are not related services, they are not reimbursable.

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Jefferson County Critical Points

- The district did not provide or propose FAPE for the student. It unilaterally terminated the student's placement based on what the court considered to be an erroneous assumption that the student's hospitalization was tantamount to a unilateral private placement.
- The court makes a critical distinction between a temporary removal or absence, i.e. hospitalization, and " disenrollment in the public school system with the intent to enroll the child in a private school."
- The district continued to have FAPE obligations for the student who was temporarily absent or hospitalized.

Jefferson County Critical Points

- The placement must include instruction in or by an accredited, state approved elementary or secondary school.
- Specially designed instruction must be provided by licensed teachers.

Jefferson County Critical Points

- Related services are only available if a student receives specially designed instruction, or special education.
- It would not be consistent with the IDEA or the Jefferson County case to provide only a related service.

Jefferson County Critical Points

- If a district is proposing to evaluate the student in order to identify and address current needs, it is NOT sufficient to verbally propose an evaluation, or state in such general terms that the district wants to evaluate the student upon his/her return to the district.
- A proposal to evaluate must meet all of the requirements of Prior Written Notice consistent with 34 C.F.R. §300.503.

Zero Reject Principle

- The law explicitly recognizes that education for the severely handicapped is to be broadly defined, to include not only traditional academic skills, but also basic functional life skills, and that educational methodologies in these areas are not static, but are constantly evolving and improving.
- It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs.



Zero Reject Principle

- The only question for the school district to determine, in conjunction with the child's parents, is what constitutes an appropriate individualized education program (IEP) for the handicapped child.
- We emphasize that the phrase "appropriate individualized education program" cannot be interpreted, as the school district has done, to mean "no educational program."
- *Timothy W. v. Rochester Sch. Dist.*, 441 IDELR 393 (1st Cir. 1989).

Real Life

- The *Timothy W.* case reminds us that some students may have significant cognitive and functional skill deficits that require an IEP focused on functional and self-care skill development.
- This focus may be appropriate for some students, but does not obviate the need for specially designed instruction.
- It is NOT possible to have an IEP without the provision of specially designed instruction. If functional skills are the primary need, then provide specially designed instruction by a qualified teacher or provider to address those needs.

The Major Points

- Students with disabilities have the right to FAPE. There are very few exceptions to this rule.
- IEP teams identify student needs and propose an IEP reasonably calculated to provide FAPE.
- Public schools bear the cost of FAPE.
- Typically, but not always, this responsibility falls on the district of residence, i.e. the district in which the IDEA parent resides.
- The FAPE concept is the central pillar of the IDEA statutory structure. *Sytsema v. Acad. Sch. Dist. No. 20*, 50 IDELR 213 (10th Cir. 2008).

Residential Placement Scenarios



General principles to apply.
DON'T seek or expect one right answer.



Residential Placements by a Public Agency

- What is the “public agency?”
 - In most instances, this is the school district in which the IDEA parent of a child resides.
 - This can be confounded by open enrollment and public school choice options. If a student is enrolled through open enrollment or choice options rather than residency, this arrangement shall not operate to deny any of the substantive rights and procedural safeguards guaranteed by the IDEA.
 - OSEP offered the following guidance: “We emphasize that only the school district that is responsible for ensuring that FAPE is provided to a child with [a disability] participating in a choice program is the school district entitled to count that child in its child count for IDEA funding.” *Letter to Lutjeharms*, 16 IDELR 554 (OSEP 1990).
 - The message? If a district enrolls a student through open enrollment, that district is responsible for the provision of FAPE, even if a residential placement is required to meet the student’s needs.

Residential Placements by a Public Agency

- Who is responsible for ENSURING the provision of FAPE?
 - In most instances, the school district in which the IDEA parent of a student resides.
 - The responsibility may shift to the enrolling district in a school choice enrollment situation.

Residential Placements by a Public Agency

- Where can a child be placed residentially?
 - Students with disabilities must receive specially designed instruction from a licensed, highly qualified teacher or provider.
 - A residential placement must afford the student the opportunity to receive specially designed instruction.
 - In most instances, the residential placement must be an accredited elementary or secondary school.
 - In less common situations, it may be possible to utilize a residential placement to provide related services that are necessary in order for the student to benefit from specially designed instruction that is provided through an alternate arrangement, i.e. from contractual or other service agreements with a local school district or adequately licensed providers.

Residential Placements by a Public Agency

- Ensuring the provision of FAPE vs. providing FAPE.
 - Residential placements by a public agency are an example of one district maintaining responsibility for ensuring FAPE that is provided by another district or entity.
- Remember the *Jefferson County* test, steps 2 through 4:
 - Licensed, accredited elementary or secondary school.
 - Specially designed instruction.
 - Related services only if needed to support the specially designed instruction.

Residential Placement as a Parent Choice Option

- What is the “public agency?”
 - There are two public agencies with responsibility for the parentally placed private school student.
 - The school district in which the IDEA parent of a child resides maintains responsibility for child find pursuant to 34 C.F.R. §300.111, including reevaluations.
 - The school district in which the private residential placement is located is responsible for child find pursuant to 34 C.F.R. §300.131, including reevaluation AND equitable services pursuant to 34 C.F.R. §§300.132 through 300.134.

Residential Placement as a Parent Choice Option

- Who is responsible for ENSURING the provision of FAPE?
 - No one. The child has no individual right to receive FAPE when parentally placed in private school.

Residential Placement as a Parent Choice Option

- Where can a child be placed residentially?
 - Anywhere the parent chooses.

Residential Placements by Parents When FAPE Is In Dispute

- What is the “public agency?”
 - In most instances, this is the school district in which the IDEA parent of a child resides.
 - This can be confounded by open enrollment and public school choice options. If a student is enrolled through open enrollment or choice options rather than residency, this arrangement shall not operate to deny any of the substantive rights and procedural safeguards guaranteed by the IDEA.
 - OSEP offered the following guidance: “We emphasize that only the school district that is responsible for ensuring that FAPE is provided to a child with [a disability] participating in a choice program is the school district entitled to count that child in its child count for IDEA funding.” *Letter to Lutjeharms*, 16 IDELR 554 (OSEP 1990).
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Residential Placements by Parents When FAPE Is In Dispute

- Who is responsible for ENSURING the provision of FAPE?
 - This depends. A parent who places their child in a private school when FAPE is in dispute may make a claim for tuition reimbursement. This claim is made at the parent's peril. If they don't prevail, no tuition reimbursement. The student is treated as a parentally placed private school student through the parent choice option.
 - If the parent prevails, the resident district is typically responsible for tuition reimbursement. This may shift to another district if the student was attending school in another district through open enrollment.
 - If the parent prevails, the responsible district will be ordered to pay tuition reimbursement, not provide FAPE.
 - The responsible district may limit future liability for private school tuition through proposing an IEP reasonably calculated to provide benefit, or FAPE.

Residential Placements by Parents When FAPE Is In Dispute

- Where can a child be placed residentially?
 - Students with disabilities must receive specially designed instruction from a licensed, highly qualified teacher or provider.
 - A residential placement must afford the student the opportunity to receive specially designed instruction.
 - In most instances, the residential placement must be an accredited elementary or secondary school.
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Residential Placements by Court Order

- What do these placements look like?
 - Detention facilities
 - Treatment facilities
 - Others?

Residential Placements by Court Order

- Who is responsible for ensuring the provision of FAPE?
 - The resident district or public agency.
- Who is responsible for providing FAPE?
 - The district in which the facility is located, or
 - The accredited facility in which the child is placed
- Services must be coordinated.
 - The district of residence has the overarching responsibility to **ensure** the provision of FAPE.
 - Case management services are typically provided by the district of residence.

Funding Disputes

- If disputes arise regarding which public agency or district is responsible for ensuring and funding the provision of FAPE, DO NOT let that dispute interrupt services to the child.
- States must ensure that there is no delay in implementing a child's IEP, **including any case in which the payment source for providing or paying for special education and related services to the child is being determined.** (Emphasis added.) 34 C.F.R. §300.103(c).

In Summary

- This is a complex area of the IDEA, made even more complex by the myriad of state laws, rules, and guidance relating to the topic of residential placements.
- Use *Jefferson County* as your guide.
- General rules can be applied in most instances, but not all. These are individual determinations.
- The Reference Guide is just that: a tool to which you can refer for guidance. It is NOT an answer guide.