

PARENTAL REQUESTS FOR PRIVATE DAY PLACEMENTS AND RESIDENTIAL FACILITIES: WHAT IS A SCHOOL DISTRICT'S RESPONSIBILITY?

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WHAT IS A SCHOOL'S RESPONSIBILITY WHEN CONSIDERING PLACEMENT?

34 C.F.R. 300.114(a)(2) provides the following:

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 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 the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

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WHAT IS THE LEAST RESTRICTIVE ENVIRONMENT (LRE)?

IDEA provides that children who receive special education should be educated in the least restrictive environment. This means they should spend as much time as possible with peers who do not receive special education and related services to the maximum extent appropriate. It is important to acknowledge that the “maximum extent appropriate” is an individualized decision. The IEP team must consider the unique needs and challenges of the student. LRE for one student may be all general education classes while another student may need a fully self-contained setting.

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IS THE DISTRICT REQUIRED TO PLACE A STUDENT ON THE CAMPUS THE STUDENT WOULD ATTEND IF NOT DISABLED?

Unless the IEP requires some other arrangement, the child is educated at the school that the child would attend if nondisabled. 34 C.F.R. 300.320(a)(5)

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WHAT DOES THE CONTINUUM OF PLACEMENTS MEAN?

In accordance with 34 C.F.R. 300.115(a), each school 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 instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and
- Make provision for supplementary services such as resource room or itinerant instruction, to be provided in conjunction with regular placement.

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WHO MAKES THE DETERMINATION AS TO PLACEMENT?

In determining the educational placement of a child with a disability, including a preschool child with a disability, each district must ensure that the placement decision is made by the IEP(ARD) committee, including the parents. 34 C.F.R. 300.116

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IF A STUDENT IS CURRENTLY IN THE RESOURCE CLASSROOM, CAN THE STUDENT BE PLACED IN ALL GENERAL EDUCATION INCLUSION CLASSES IF THE PRINCIPAL HAS DETERMINED THAT THEIR CAMPUS WILL BE FULLY MAINSTREAMED AND NOT HAVE RESOURCE?

No. Placement decisions cannot be made without an IEP (ARD) meeting. The district is required to provide a continuum of placements. Some students may need resource rather than be fully mainstreamed.

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IF A STUDENT HAS NOT ATTENDED SCHOOL IN THE DISTRICT AND THE PARENT IS SEEKING PRIVATE PLACEMENT, WHAT SHOULD THE SCHOOL DO?

If the student has not been evaluated by the district, the district needs to request to conduct an evaluation and provide procedural safeguards, written consent for evaluation and prior written notice. The district should also request to visit the private school.

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IF THE PARENT DOES NOT SIGN CONSENT FOR EVALUATION, WHAT SHOULD THE SCHOOL DO?

If the parent of the child who is enrolled in or seeking to be enrolled in public school does not provide consent for an initial evaluation or fails to respond to a request to provide consent, the district may, but is not required to, pursue the initial evaluation by utilizing the procedural safeguards, including the due process hearing procedures, if appropriate. 34 C.F.R. 300.300(a)(3)(i)

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WHEN WOULD A SCHOOL BE RESPONSIBLE FOR THE COST OF A PRIVATE PLACEMENT OR RESIDENTIAL PLACEMENT MADE BY THE PARENT?

IDEA does not require a school to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the school made FAPE available to the child and the parents elected to place the child in a private school or facility. 34 C.F.R. § 300.148

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WHAT IS THE PARENT'S RESPONSIBILITY TO THE SCHOOL WHEN MAKING A REQUEST FOR PRIVATE PLACEMENT?

Under 34 C.F.R. § 300.148, the cost of reimbursement for a private placement may be reduced or denied if:

- At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the school to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the school of their rejection of the school placement proposed by the school including stating their concerns and their intent to enroll their child in a private school at public expense; or

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WHAT IS THE PARENT'S RESPONSIBILITY TO THE SCHOOL WHEN MAKING A REQUEST FOR PRIVATE PLACEMENT? (CONT'D)

- If, prior to the parents' removal of the child from the public school, the school informed the parents of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or
- Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

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ARE THERE ANY EXCEPTIONS TO THE PARENT NOT HAVING TO PROVIDE THE NOTICE OF PRIVATE PLACEMENT?

Yes. Reimbursement shall not be reduced or denied for failure to provide the notice if:

- The school prevented the parents from providing the notice;
- The parents had not received notice, pursuant to §300.504, of the notice requirement; or
- Providing notice through the IEP meeting or thereafter would likely result in physical harm to the child.

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ARE THERE ANY EXCEPTIONS TO THE PARENT NOT HAVING TO PROVIDE THE NOTICE OF PRIVATE PLACEMENT? (CONT'D)

Reimbursement may, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if:

- The parents are not literate or cannot write in English; or
- Giving notice would likely result in serious emotional harm to the child

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WHEN THE PARENT HAS REQUESTED PRIVATE PLACEMENT, DOES THE DISTRICT NEEDS TO HOLD AN IEP (ARD) MEETING?

Yes. When the child with a disability who has been placed directly by the parent in a private school is referred to the school, the school must convene an admission, review, and dismissal (ARD) committee meeting to determine whether the school can offer the child a free appropriate public education (FAPE).

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WHAT SHOULD THE SCHOOL DO IF THE PARENT WANTS RESIDENTIAL PLACEMENT BECAUSE OF WHAT IS HAPPENING IN THE HOME?

A school is not financially responsible for a residential placement where education is not the primary focus. However, it is important to offer services such as in-home or parent training to help the student generalize the goals and objectives in another setting such as the home.

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IF THE PARENT PRESENTS A PHYSICIAN'S STATEMENT THAT RECOMMENDS RESIDENTIAL PLACEMENT, WHAT SHOULD THE SCHOOL DO?

The school should ask for a release to consult with the physician to ascertain why the physician is making such a recommendation. It is important to remember that the school is not responsible for placements that are medically based.

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IF THE PRIVATE PLACEMENT DOES NOT HAVE CERTIFIED SPECIAL EDUCATION TEACHERS, DOES THAT MAKE THE PLACEMENT INAPPROPRIATE?

A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the school districts.

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WHO HAS THE BURDEN OF PROOF WHEN THE PARENTS REQUEST A DUE PROCESS HEARING FOR A PRIVATE PLACEMENT OR RESIDENTIAL PLACEMENT?

The IDEA creates a presumption in favor of the education plan proposed by the District and places the burden of proof on the student challenging the plan.

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WHAT IS THE LEGAL STANDARD FOR DETERMINING WHETHER A SCHOOL WOULD BE OBLIGATED TO PROVIDE A RESIDENTIAL PLACEMENT?

IDEA requires states to provide all children with a “free appropriate public education” (FAPE) in order to receive federal funding. 20 U.S.C. Section 1412 (a)(1)(A). In order to ensure that all children receive a meaningful opportunity to benefit from public education, the individual education plan (IEP) must be tailored to the unique needs of the disabled child. 20 U.S.C. Section 1414(d). IDEA mandates that disabled children be educated among non-disabled children, to the fullest extent possible, in the least restrictive environment. However, IDEA does not entitle a disabled child to a program that maximizes the child’s potential, but rather must offer an IEP that is reasonably calculated to enable the child to make appropriate progress in light of the child’s circumstances.

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WHAT IS THE LEGAL STANDARD FOR DETERMINING WHETHER A SCHOOL WOULD BE OBLIGATED TO PROVIDE A RESIDENTIAL PLACEMENT? (CONT'D)

IDEA does not require a school to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the school made FAPE available to the child and the parents elected to place the child in a private school or facility.

Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures.

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WHAT IS THE LEGAL STANDARD FOR DETERMINING WHETHER A SCHOOL WOULD BE OBLIGATED TO PROVIDE A RESIDENTIAL PLACEMENT? (CONT'D)

If the parents of a child with a disability, who previously received special education and related services under the authority of a public school, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the school, a court or a hearing officer may require the school to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the school had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

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HOW IS FAPE DETERMINED?

Cypress-Fairbanks ISD v. Michael F, 118 F. 3D 245 (5th Cir. 1997), the Fifth Circuit established four factors for determining FAPE. These four factors must be assessed in order to determine whether the IEP in issue, was reasonably calculated to provide students with necessary educational benefit under the IDEA. The factors are:

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment;
- Whether the services are provided in a coordinated and collaborative manner by key stakeholders; and
- Whether positive academic and nonacademic benefits are demonstrated as a result.

There is no requirement that these four factors be considered in any particular order or any particular weight given each.

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IF THE SCHOOL'S PROGRAM IS DETERMINED INAPPROPRIATE, WHAT IS THE STANDARD USED TO DETERMINE THAT THE RESIDENTIAL PLACEMENT IS APPROPRIATE?

For a residential placement to be appropriate under IDEA, it must be (1) essential in order for the disabled child to receive a meaningful education benefit, and (2) primarily oriented toward enabling the child to obtain an education. See Richardson ISD v. Michael Z., 580 F. 3D 286, 299 (5th Cir. 2009). Two factors are crucial: Whether the child was placed at the facility for education reasons and whether the child's progress at the facility is primarily judged by educational achievement. *Id.* At 301; See also Fort Bend ISD v. Douglas A., 601 Fed Appx. 250 (2015)

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IF THE SCHOOL'S PROGRAM IS DETERMINED INAPPROPRIATE, WHAT IS THE STANDARD USED TO DETERMINE THAT THE RESIDENTIAL PLACEMENT IS APPROPRIATE? (CONT'D)

The first factor identified in Michael Z., "whether the child was placed at the facility for education reasons", concerns the motivation of the person making the placement. It reflects the careful balance struck by the IDEA, which aims to ensure that children receive an education, but does not "shift the costs of treating a child's disability to the public school district." Michael Z., at 300. Under this question, a court must determine whether the student was placed in the residential program for education reasons; that the student actually will realize educational benefits is irrelevant under the factor if those benefits are incidental to the reasons for placing the student. See Fort Bend ISD at 252.

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IF THE SCHOOL'S PROGRAM IS DETERMINED INAPPROPRIATE, WHAT IS THE STANDARD USED TO DETERMINE THAT THE RESIDENTIAL PLACEMENT IS APPROPRIATE? (CONT'D)

The second factor identified in Michael Z., "whether the child's progress at the facility is primarily judged by education achievement," ensures that the residential program defines its own mission as primarily education. Measuring progress by educational achievement instead of disability treatment is strong evidence of the placements' purpose and goals, ensuring that the school district is being made to reimburse a program designed to remedy the district's failure to provide FAPE. See Fort Bend ISD at 252.

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WHAT IF THE PARENT INSISTED ON A SPECIFIC PROGRAM OR PLACEMENT AND THE DISTRICT CONCEDED EVEN THOUGH IT WAS NOT APPROPRIATE, BUT THE PARENT LATER STATES THAT THE SCHOOL HAD AN INAPPROPRIATE PROGRAM AND IS SEEKING PRIVATE PLACEMENT?

While parental input is important, the ultimate obligation of the IEP committee members is develop an IEP that they believe in their professional judgment is appropriate for the child. If the school agrees to an inappropriate program, even if it was at parental request, the school will be found to have provided an inappropriate program and could be vulnerable to a private school placement request.

QUESTIONS AND ANSWERS!



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