

Private Placements: Who Is Responsible?

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Talking Point:

Students with disabilities attending
private schools.

3 Types of Private School Placements in the IDEA

- ✦ Parentally-placed private school children with disabilities pursuant to 34 C.F.R. §§300.130 through 300.144.
- ✦ Children placed by public agencies pursuant to 34 C.F.R. §§300.145 through 300.147.
- ✦ Children enrolled by their parents in private schools when FAPE is at issue pursuant to 34 C.F.R. §300.148.

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Parent Placements

Think "Choice"

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Parentally-Placed Private School Students

- ✦ Who are we talking about?
 - ✦ **Parentally-placed** private school children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary or secondary school.
 - ✦ We are not talking about students placed by the school district in a private school as a method of providing FAPE.

✦ 34 C.F.R. §300.130.

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What Service Must Be Provided?

- ✦ 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 served by the LEA, provision is made for the participation of those children in the program under part B and the IDEA by providing them with special education and related services.
- ✦ A services plan must be developed and implemented.

✦ 34 C.F.R. §300.132.

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How Do You Decide What Services to Provide?

- ✦ To ensure timely and meaningful consultation, an LEA must consult with private school representatives and parents of parentally-placed private school children with disabilities during the design and development of special education and related services for the children regarding:
 - ✦ Child find, including how parentally-placed private school children suspected of having a disability can participate equitably, and how parents will be informed.
 - ✦ A determination of the proportionate share of funds available to serve parentally-placed private school children with disabilities.

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✦ 34 C.F.R. §300.134(a).

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Consultation

- ✦ The determination of a proportionate share of Federal funds, and how those funds would be calculated.
- ✦ What the consultation process includes.
- ✦ How, where, and by whom special education and related services will be provided for parentally-placed private school children, including
 - ✦ The types of services and the service mechanism, and
 - ✦ How services will be apportioned, if necessary, and
 - ✦ How and when those decisions will be made.

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✦ 34 C.F.R. §300.134(b) through (e).

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What Are Equitable Services?

- ✦ There is **no individual right to special education and related services** for a parentally-placed private school student.
- ✦ No parentally-placed private school child has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.
- ✦ The LEA must make the final decisions about the services that will be provided to parentally-placed private school children.

✦ 34 C.F.R. §300.137.

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Who Pays for Equitable Services?

- ✦ The IDEA is sufficiently clear that the LEA where the private elementary or secondary schools are located is responsible for paying for the equitable services provided to a parentally-placed private school child. *71 Federal Register 46593.*

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How Are Services Provided?

- ✦ Services are provided through a services plan. The LEA must:
 - ✦ Initiate and conduct meetings to develop, review, and revise a services plan for the child.
 - ✦ Ensure that representatives of the school attend the meeting.
- ✦ The plan must describe the specific special education and related services the LEA will provide to the child.

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How Are Disputes Handled?

- ✦ Since the child does not have an individual right to FAPE, due process hearings are not applicable (unless the sole issue in dispute is child find).
- ✦ The state complaint system may be used for complaints regarding the requirements of §§300.132 through 300.135 and 300.137 through 300.144.
 - ✦ 34 C.F.R. §300.140.

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OSEP Guidance

Q & A (2011)

- ✦ Question: Are there any particular kinds of services or specified amounts of services that must be provided to parentally placed private school children with disabilities under Part B of the IDEA?
- ✦ Answer: No. Decisions about which services and the amounts of services children with disabilities enrolled by their parents in private schools will receive are made during the consultation process and are based on the needs of the children designated to receive services. **These children have no individual entitlement to receive some or all of the special education and related services they would receive if enrolled in a public school.** See 34 CFR §300.137(a).

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OSEP Guidance

Q & A (2011)

- ✦ Question: If an LEA sends a special education teacher (employed by the LEA) to a private school to provide special education and related services to a child, must that teacher meet the HQT requirements in IDEA?
- ✦ Answer: Yes. Any public elementary or secondary school teacher must meet the HQT requirements.

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OSEP Guidance

Q & A (2011)

- ✦ Question: Are children enrolled in a for-profit private school counted for the purpose of determining the proportionate share and eligible to receive equitable services?
- ✦ Answer: No. The regulations in 34 CFR §300.130 define parentally placed private school children with disabilities as children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in 34 CFR §300.13 or secondary school in 34 CFR §300.36. The definitions of elementary school in 34 CFR §300.13 and secondary school in 34 CFR §300.36 **specify that the school must be nonprofit**. Therefore, children attending for-profit private schools would not be included in the proportionate share calculation or be eligible for equitable services.

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The Cost of Private School

- ✦ Parents who choose to enroll their children in nonprofit private schools bear the financial burden of the private school tuition.
- ✦ An LEA must expend a proportional share of IDEA funds on children attending private schools within its borders.
- ✦ However, a parentally-placed private school child has **NO** individual right to FAPE. The LEA cannot be made to pay for the private school.

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Private School Placements by Public Schools

Think “FAPE”

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Placements to Provide FAPE

- ✦ Each SEA must ensure that a child with a disability who is placed in a private school by an LEA -
 - ✦ Is provided special education and related services in conformance with an IEP that meets the IDEA’s requirements and at no cost to the parents.
 - ✦ Is provided an education that meets the standards that apply to education provided by the SEA and LEAs.
 - ✦ Has all of the rights of a child with a disability served in public school.

✦ 34 C.F.R. §300.146.

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Developing IEPs

- ✦ Before a public agency places a student in a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child.
- ✦ The agency must ensure that a representative of the private school attends the meeting. If the representative cannot attend, the agency must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.
- ✦ After a student enters a private school, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

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Developing IEPs

- ✦ If the private school initiates and conducts the IEP meeting, the public agency must ensure that the parents and an agency representative are involved in any decision about the child's IEP, and agree to any proposed changes in the IEP before those changes are implemented.
- ✦ Even if a private school implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

✦ *34 C.F.R. §300.325.*

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FAPE Entitlement

- ✦ Children with disabilities enrolled in public schools or who are publicly placed in private schools are entitled to FAPE and must receive the full range of services under the IDEA that are determined necessary to meet the child's individual needs and provide FAPE. *71 Federal Register 46596.*

Ensuring FAPE

- ✦ The public agency, not the private school, is responsible for ensuring that FAPE is provided to a child who is placed by the public agency in a private school. *71 Federal Register 46599.*

IEPs Are Required

- ✦ IEPs are required for students with disabilities who have been publicly placed in private schools or facilities. *34 C.F.R. §300.146(a)*.
- ✦ This group of students retains all of their rights under the IDEA. *34 C.F.R. §300.146(c)*. *P.N. v. Greco*, 40 IDELR 9 (D.N.J. 2003) (the district had a "**non-delegable obligation to ensure**" that the publicly placed child's IDEA rights were not infringed).

The Cost of FAPE

- ✦ The cost of providing FAPE is the responsibility of the LEA making the private school placement.
- ✦ If placement in a residential program is necessary to provide special education and related services to a child with a disability (FAPE), the program, **including non-medical care and room and board**, must be at no cost to the parents. *34 C.F.R. §300.104*.



Parental Placements When
FAPE Is In Dispute

Think “Reimbursement”

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FAPE Disputes

- ✦ The IDEA **does not require** an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school **if that agency made FAPE available** to the child and the parents elected to place the child in the private school.
- ✦ Disagreements about the availability of FAPE are subject to the due process procedures.

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Reimbursement

- ✦ A court or hearing officer may order a public agency to reimburse parents for the cost of enrollment in a private school if it the hearing officer or court finds –
 - ✦ The public agency has 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(c).

Limitations on Reimbursement

- ✦ The cost of reimbursement can be reduced or denied if –
 - ✦ At the most recent IEP team meeting, the parents did not inform the team that they were rejecting the placement proposed by the public agency, including their concerns, and their intent to enroll their child in a private school at public expense; or
 - ✦ At least 10 business days prior to the removal of the child from the public school, the parents did not give written notice to the public agency;
 - ✦ If, prior to the removal, the public agency informed the parents of its intent to evaluate the child, 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.
 - ✦ 34 C.F.R. §300.148(d).



Caution

This is one of the most highly litigated areas under the IDEA.

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Avoiding Reimbursement

✦ Tuition reimbursement is only available if a Federal court concludes –

- ✦ The public placement violated IDEA, and
- ✦ The private school placement was proper under the IDEA.

See School Comm. Of the Town of Burlington v. Mass. Dep't. of Educ., 556 IDELR 389 (1985) and *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (1993).

✦ LEAs can avoid reimbursement awards by offering and providing FAPE consistent with the IDEA either in public schools or in private schools. *71 Federal Register*

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46590.

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The Forest Grove Case

- ✦ The United States Supreme Court held that the prior receipt of special education services from the school district is NOT a prerequisite for reimbursement under the IDEA.
- ✦ The Court held that conditioning reimbursement on the student's prior receipt of special education services would immunize districts for their failure to comply with child find duties.
 - ✦ *See Forest Grove Sch.. Dist. v. T.A.*, 52 IDELR 151 (2009).

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“Appropriate” Private Placement

- ✦ When a placement is not appropriate to meet the student's educational needs, courts will typically deny reimbursement requests. *See R.S. v. Lakeland Cent. Sch. Dist.*, 59 IDELR 32 (2nd Cir. 2012); *N.T. v. District of Columbia*, 58 IDELR 69 (D.D.C. 2012); *G.R. v. Dallas Sch. Dist. No. 2*, 57 IDELR 223 (D. Or. 2011); and *J.G. v. Kiryas Joel Union Free Sch. Dist.*, 56 IDELR 200 (S.D.N.Y. 2011).

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Oddities

- ✦ Sharing the costs with other entities: When is a district responsible only for the educational costs of a student's private placement? Educational needs v. medical needs?
 - ✦ There are many federal court cases dealing with the issue of tuition reimbursement and the complexities of educational needs v. medical needs. The United States Supreme Court's holding and subsequent lower court rulings on remand are a great example. See *Forest Grove Sch. Dist. v. T.A.*, 56 IDELR 185 (9th Cir. 2011) and the complete line of *Forest Grove* cases.
- ✦ The SEA as a service provider: It is possible under 34 C.F.R. §300.227 for the state to be responsible for the provision of direct services under certain conditions. However, this typically requires a finding that the LEA is unable to provide FAPE.

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Utah's Hybrid



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Curiosities

- ✦ Juvenile Justice placements and education: Who is responsible for FAPE and who pays?
- ✦ Other court ordered placements: Who is responsible for FAPE and its costs when a child is in foster care?
 - ✦ Utah law defines, in relevant part, the school district of residence as the school district in which the child resides
 - ✦ While in the custody or supervision of a Utah state agency, under the supervision of a private or public agency in compliance with U.C. §62A-4a-606, while living with a responsible adult resident of the district. *See U.C. §53A-2-201(a).*

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Curiosities

Other residency considerations pursuant to *U.C. §53A-2-201(2)*:

- ✦ A minor child whose custodial parent or legal guardian does not reside in the state is considered to be a resident of the district in which the child lives, unless that designation violates any other law or rule, if: (in relevant part)
 - ✦ The child lives with a resident of the district who is a responsible adult and whom the district agrees to designate as the child's legal guardian; or

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Curiosities

- ✦ If permissible under policies adopted by the local board, it is established to the satisfaction of the local school board that the child lives with a responsible adult who is –
 - ✦ A relative (grandparent, brother, sister, uncle, or aunt);
 - ✦ The child's presence in the district is not for the primary purpose of attending school;
 - ✦ The child's physical, mental, moral, or emotional health would best be served by considering a child to be a resident for school purposes; and
 - ✦ The child is prepared to abide by the rules and policies of the school district in which attendance is sought.

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Curiosities

- ✦ “Responsible adult” means a person 21 years of age or older who is a resident of this state and is willing and able to provide reasonably adequate food, clothing, shelter, and supervision for a minor child.
- ✦ A local school board must adopt a policy permitting it to designate a responsible adult residing within the district to act as legal guardian.

✦ *See U.C. §53A-2-202.*

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Curiosities

- ✦ U.C. §53A-2-205. Permitting attendance by nonresident of the state – Tuition. (In relevant part.)
- ✦ A local school board may permit a child residing outside the state to attend school within the district.
- ✦ The board shall charge the nonresident child tuition at least equal to the per capita cost of the school program in which the child enrolls unless the board, in open meeting, determines to waive the charge for that child in whole or in part.

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Curiosities

- ✦ Open enrollment is a possibility for student who reside in a district in the state and desire to attend school in another district.
- ✦ There are specific requirements for consideration of applications. More importantly, there are prohibitions against consideration of the following when accepting or rejecting applications:
 - ✦ Previous academic achievement;
 - ✦ Athletic or other extracurricular ability;
 - ✦ The fact that the student requires special education services for which space is available;
 - ✦ Proficiency in the English language; OR
 - ✦ Previous disciplinary proceedings, except some noted proceedings.

✦ U.C. §§53A-2-207 and 208.

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Re-Cap

- ✦ Students may attend school in another school district in the state through –
 - ✦ A court ordered placement such as foster care or juvenile justice facilities;
 - ✦ Establishing residency by residing with a “responsible adult” as defined by statute;
 - ✦ Open enrollment provisions.

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Caution

- ✦ Any determinations regarding residency through a responsible adult or the rejection of a student’s open enrollment application must be made **WITHOUT REGARD FOR THE STUDENT’S IDENTIFICATION AS A LEARNER WITH A DISABILITY OR THE STUDENT’S SPECIAL EDUCATION NEEDS.**
- ✦ Once a student is enrolled in your district, the child is entitled to FAPE and all of the procedural safeguards guaranteed by the IDEA.

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THANK
YOU!

Questions?

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