Spotlight On Practice

Meeting District Obligations to Parentally Placed Private School Students

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What We’ll Focus On. . . .

- Child Find and Assessment Obligations
- Responsibility for the Provision of FAPE
- Private School Tuition Reimbursement Claims
  - Case Examples
- Obligations When FAPE Is Not at Issue
  - Consultation
  - Equitable Participation
  - Individualized Services Plans (“ISPs”)
But First . . . Some Terms

- Private School vs. Nonpublic School ("NPS")
  - Private school = private business or nonprofit entity that functions outside jurisdiction CDE and most state education regulations
  - Nonpublic school = specialized private school that provide services to public school students with disabilities, who are placed in the NPS by a district in order to provide FAPE

(Private Schools Frequently Asked Questions, CDE, April 2015)
But First . . . Some Terms

- District of Residence ("DOR") vs. District of Location ("DOL")
  - DOR = District in which Student maintains permanent residence
  - DOL = District in which private school is located

- Important distinction for purposes of child find, assessment, FAPE and equitable services responsibilities
Child Find and Assessment Obligations
Responsibility for Child Find Activities

- Child find rules apply equally for public school students and for students placed by their parents in private (nonprofit elementary or secondary) school
  - General child find activities must be similar and completed in comparable time period
  - Child find generally includes, but is not limited to, activities such as:
    - Widely distributing informational brochures
    - Providing regular public service announcements
    - Staffing exhibits at health fairs and other community events
    - Creating direct liaisons with private schools

Responsibility for Child Find Activities

- **OAH Case Example**: District provided evidence of effective child find program by contacting every private school within its boundaries (twice) at beginning of each school year, providing contact information for referral, and listing of classes and seminars to which private school staff were invited. *(Student v. Pasadena Unified School Dist. (OAH 2015))*

- **OAH Case Example**: District successfully defended claim of child find violation made by parents of private school student by pointing to numerous referrals and inquiries about special ed services it received as result of newspaper ads and brochures. *(Student v. Glendale Unified School Dist. and Los Angeles Unified School Dist. (OAH 2012))*
Responsibility for Child Find Activities

- All districts have general IDEA responsibility to “identify, locate and evaluate” children with disabilities in their jurisdictions.

- Purpose of child find for private school students is to ensure accurate count in order to determine IDEA equitable services obligation.
  - Therefore, specific IDEA responsibility for child find for this group of students lies with district where private school is located (“DOL”).

(Letter to Eig (OSEP 2009) 52 IDELR 136; 34 C.F.R. § 300.131; Ed. Code, § 56171)
Responsibility for Assessment

- Once student is identified, DOL also is responsible for assessment to determine eligibility.

- Parents theoretically can request assessments from both DOL (for purposes of the provision of equitable services) and from DOR (for the purpose of having a program of FAPE made available).
  - If that occurs, both districts are legally responsible for conducting assessments.
  - DOL and DOR should exchange information if parents consent.
  - MOUs may exist between DOL and DOR to designate assessment responsibilities.

(71 Fed. Reg. 46,593 (Aug. 14, 2006); Letter to Eig (OSEP 2009) 52 IDELR 136)
Practice Pointer: Assessments

- Remember to instruct all relevant personnel that in cases where the student resides within district boundaries, they cannot refuse a parental request for assessment on the grounds that the student is currently attending a private school in another district.

- Also remember that parental consent is required for the DOR and the DOL to communicate assessment information.
Responsibility for Provision of FAPE
Responsibility for Providing FAPE

- DOR is responsible for offering and providing FAPE
- If student is found eligible by DOL, DOL must provide parents with notice of procedural safeguards advising them of student’s right to FAPE from DOR if he or she enrolls in public school
- DOL may send results of its evaluation and eligibility determination to student’s DOR after receiving parental consent

Responsibility for Providing FAPE

- DOR is not required to make offer of FAPE to privately placed student if parent “makes clear his or her intention to keep the student enrolled in private school”
  - No explanation of what parents must do to “make clear” their intention
  - District may request parents to clarify their intention as to whether they will keep their child enrolled in private school

Determining Intent: Case Example #1

- **Student v. Sequoia Union HSD (OAH 2015)**
  - Parents completed enrollment form for Student in 2011, but then delivered “We Will Not Be Attending” letter stating Student would be enrolling in private school
  - District did not follow up or send PWN to Parents
  - Student re-enrolled in District in 2013
  - ALJ: District violated IDEA for its inaction between 2011 and 2013
    - Because District had no contact with Parents, they did not have opportunity to “make clear” their intention to keep Student in private school
    - District had obligation to let Parents know FAPE was available

(\textit{Student v. Sequoia Union High School Dist. (OAH 2015) Case No. 2015020856})
Determining Intent: Case Example #2

- **Student v. Los Angeles USD (OAH 2006)**
  - Fourth-grade Student had been attending private school since kindergarten
  - When Student was initially found eligible, Parent signed form acknowledging that FAPE was offered but that Parent elected to enroll Student in private school
  - ALJ dismissed Parent’s two due process complaints filed in successive years
    - Noted that Student had never enrolled or attended private school in District
    - Evidence indicated Parent enrolled Student in private school based on belief that it was most appropriate setting

Determining Intent

- **But note!**
  - 2009 U.S. Supreme Court decision *(Forest Grove School Dist. v. TA)*
  - Fact that student has never before enrolled in public school is not, in and of itself, determinative of parental intent to keep student enrolled in private school or of absolving a district of its duty to offer FAPE
    - “A child should not be denied the protection of the IDEA simply because the child has not previously received services under the statute”

*(Forest Grove School Dist. v. T.A. (U.S. 2009) 52 IDELR 151)*
Practice Pointer: Offer of FAPE

- Absent an unequivocal statement from parents that they are not interested in a public placement, the DOR should make FAPE available to a parentally placed private school student.
Revocation of Consent

- Parents of student placed in private school with existing IEP, or found eligible for special education while in private school, may choose to revoke consent for provision of special education
  - If parents do this – and if student’s DOR gives PWN that it will not provide services – DOR will not be considered to be in violation of requirement to make FAPE available to student

(34 C.F.R. § 300.300 (b)(4); Ed. Code, § 56346, subd. (d))
Continuing Obligation

- Even where parents have made clear their intention to keep their child enrolled in private school (or have revoked their consent to special education), DOR must be prepared to provide services should parents decide to reenroll student in public school
  - If parents request assessment before deciding whether to return student to public school, district cannot condition assessment on reenrollment

Continuing Obligation

But DORs are not required to continue developing IEPs or holding IEP meetings for student who is no longer attending district schools and whose parents do not respond to IEP meeting requests

- Unless prior year’s IEP is under administrative or judicial review at time it normally would be due

(Student v. Cabrillo Unified School Dist. (OAH 2009) Case No. 2008120207)
Private School Tuition Reimbursement Claims
Legal Standard for Reimbursement

- Court or ALJ may require DOR to reimburse parents for cost of private school enrollment if:
  - District had not made FAPE available to the student in timely manner prior to enrollment; and
  - Private placement is appropriate

- If both criteria are satisfied, court or ALJ must weigh “equitable considerations” to determine how much reimbursement is appropriate
  - Reimbursement still may be appropriate even if private school does not meet all state’s educational standards or furnish every service that student needs

(34 C.F.R. § 300.148(c); Ed. Code, § 56175)
Legal Standard for Reimbursement

- Reimbursement claim can be reduced or denied:
  - If, at most recent IEP meeting prior to removal, parents did not inform team that they were rejecting district’s proposed placement (or at least 10 business days prior to removal, parents did not give notice of rejection);
  - If parents did not make their child available for proposed assessment by district; or
  - Upon a finding of unreasonableness with respect to actions taken by parents

(34 C.F.R. § 300.148(d))
Legal Standard for Reimbursement

- Even if parents failed to give notice, court or ALJ cannot deny/reduce reimbursement if:
  - District prevented parents from providing notice;
  - Parents were not informed of the notice requirement; or
  - Compliance with the notice requirement would likely result in physical harm to the child

- Even if parents failed to give notice, court or ALJ may use discretion to deny/reduce reimbursement if:
  - Parents are not literate or cannot write in English; or
  - Compliance with notice requirement would likely result in serious emotional harm to student

(34 C.F.R. § 300.148(e))
Reimbursement Case Example #1

- **Student v. Corona-Norco USD** (OAH 2010)

- **Facts:**
  - Parents of 12-year-old Student with autism accepted portion of District’s proposed IEP that offered services by private providers, but rejected proposed public school placement component
    - Also conditioned acceptance by restricting District’s ability to choose different private providers at later time
  - Sought reimbursement for cost of private school where Student had been attending prior to District’s proposed IEP
Reimbursement Case Example #1

Student v. Corona-Norco USD (OAH 2010)

Decision:

ALJ: Case involved Parents’ statutory right to accept some IEP services but not others vs. no entitlement to FAPE when Parents choose private school placement when there is appropriate public school placement

ALJ denied reimbursement claim

“Ability of a parent to agree only to portions of an IEP was never intended to circumvent the separation between public and private schools in special education law”

Offer of related services was tied to public school placement; Parents could not accept the services at a different location

(Student v. Corona-Norco Unified School Dist. (OAH 2010) Case No. 2010020194)
Reimbursement Case Example #2

- **S.L. v. Upland Unified School Dist. (9th Cir. 2014)**

- **Facts:**
  - Parents placed Student in private school and reached settlement agreement with District over FAPE claim
  - Subsequently, OAH found District denied FAPE by breaching settlement agreement
  - But ALJ refused reimbursement based on finding that Student did not receive educational benefit at NPS
    - Any benefit Student obtained was due to his private aides
  - Appeal ultimately reached 9th Circuit
Reimbursement Case Example #2

- **S.L. v. Upland Unified School Dist. (9th Cir. 2014)**
  - **Decision:**
    - 9th Circuit reversed denial of reimbursement
    - Although private aides provided essential assistance, private school curriculum allowed Student to make progress
      - School followed state-approved curriculum and private aides indicated that they followed that curriculum as presented by classroom teacher when working with Student
    - Private school also provided Student with structure, support and socialization

(S.L. v. Upland Unified School Dist. (9th Cir. 2014) 747 F.3d 1155, 63 IDELR 32)
Reimbursement Case Example #3

Covington v. Yuba City USD (E.D. Cal. 2011)

Facts:

- Parents unilaterally enrolled Student with ED in sectarian private residential school in Tennessee after District declined to revise IEP to address Student’s increased anxiety
- ALJ determined that District denied FAPE but denied Parents’ reimbursement claim
  - Found that private school was not appropriate for Student
- ALJ’s decision appealed to U.S. District Court
Reimbursement Case Example #3

**Covington v. Yuba City USD (E.D. Cal. 2011)**

- **Decision:**
  - District Court affirmed ALJ’s decision
  - Private school had no credentialed special ed teachers
  - Staff not trained to provide behavioral interventions
  - Religious-based curriculum did not address Student’s special needs
  - Even if private school was appropriate, court would not have provided full reimbursement
    - Parents failed to provide timely notice of removal
    - Never gave District time to explore other placement options

(Covington v. Yuba City Unified School Dist. (E.D. Cal. 2011) 56 IDELR 37)
District Obligations to Parentally Placed Private School Students When FAPE Is Not at Issue
Legal Overview

- When provision of FAPE is not at issue, parentally placed private school students do not have individual right to receive some or all of the special education and related services that they otherwise would receive if enrolled in a public school.

- Nonetheless, DOL has specific IDEA obligations to this group of students, including consultation with private school representatives and provision of “equitable services” through development and implementation of ISPs for selected students.

(34 C.F.R. § 300.137; Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2011) 111 LRP 32532; Ed. Code, § 56174.5)
Consultation

- Mandatory process that involves “timely and meaningful” discussions between DOL, private school representatives and representatives of parents on key issues relating to equitable participation of private school students in special education and related services
  - Parties discuss how, where and by whom special education and related services will be provided

(34 C.F.R. § 300.134; Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2011) 111 LRP 32532)
Consultation

- Private schools have right under IDEA to file state (CDE) compliance complaint alleging:
  - That DOL did not engage in consultation that was meaningful and timely; and/or
  - That DOL did not give due consideration to views of private school officials

(34 C.F.R. § 300.136)
Practice Pointer: Consultation

- Through the consultation process, parents should be reminded that parentally placed private school students have no individual right to receive some or all of the special education and related services that they would receive if enrolled in a public school.
- Parents should be made aware of moneys available to fund programs under the proportionate share requirements so they have a realistic idea of what services to expect.
“Equitable Participation”

- Term used by USDOE to refer to provision of services by DOL to parentally placed private school students with disabilities

- Although IDEA requires consultation, DOL makes final decision as to:
  - Amount of IDEA funds to be allocated toward its parentally placed private school students (based on proportionate share formula)
  - How, when, where and by whom special education will be provided to some or all students, including types of services and service delivery mechanisms

(34 C.F.R. § 300.137)
Equitable Participation

- DOLs can decide how to distribute their proportionate share of federal IDEA funding by developing ISP policy after meeting their consulting obligation
  - If student is eligible for services under ISP policy, DOL provides equitable services to student through ISP, rather than IEP
  - DOLs need to develop ISPs only for those parentally placed private school students whom they choose to serve pursuant to their policies

(34 C.F.R. §§ 300.132, 300.134, 300.138; Letter to Mendelson (OSEP 2007) 49 IDELR 198)
Individualized Services Plans ("ISPs")

- Each parentally placed private school student with a disability who is designated to receive services is entitled to ISP detailing specific services that district will provide
  
  - Private school students with disabilities who are not designated to receive services under DOL’s policy would not receive ISP

(34 C.F.R. § 300.138 (b); 34 C.F.R. § 300.132 (b); Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools (OSERS 2001), 111 LRP 32532; Letter to Chapman (OSEP 2007) 49 IDELR 163)
Development of ISPs

- Districts must “initiate and conduct meetings to develop, review, and revise” ISP if student has been designated to receive services
  - Must occur in manner consistent with IEP meeting requirements of the IDEA
  - Same membership requirements as IEP teams but districts also must ensure that representative of private school attends and, “if the representative cannot attend, use other methods to ensure participation”
  - ISP must be reviewed periodically—and not less frequently than annually

(34 C.F.R. § 300.137; 34 C.F.R. § 300.138)
Practice Pointer:
ISP Meeting vs. IEP Meeting

- Although many of the procedural requirements are the same, remember that it is the DOL that will hold the ISP meeting to design equitable services; IEP meetings are held by the DOR when making an offer of FAPE.
Content of ISPs

- Although DOLs must develop ISPs in same manner that they develop IEPs, content of ISPs likely will differ from content of IEPs
  - IEPs generally will be more comprehensive than ISPs “because parentally placed children do not have an individual entitlement to any or all of the services that the children would receive if enrolled in a public school”
  - IDEA does not explicitly prohibit districts from using IEPs in lieu of ISPs, although the USDOE has stated that such practice may not be appropriate

ISP Challenges

- Parents cannot use due process to allege DOL did not follow IDEA’s ISP procedures, including charges of not providing services in manner stipulated by ISP
  - Exception: Parents may file for due process for allegations that DOL failed to meet its child find requirements

- But parents may file state compliance complaint for alleged failures to properly implement an ISP

(34 C.F.R. § 300.140 (a))
Provision of Transportation

- If student requires transportation in order to take part in equitable services under ISP, DOL must provide transportation:
  - From private school or home to service site other than private school; and
  - From service site to private school, or to home, depending on the timing of the services

- No requirement to provide transportation from home to private school

- Cost included in proportionate share calculation

   (34 C.F.R. § 300.139)
Services for Preschool Children

- DOL’s obligation to serve children aged 3 through 5 under equitable services provisions depends on whether child is enrolled in private school that meets the IDEA’s definition of “elementary school” (nonprofit school that provides elementary education)
  - If yes, equitable participation provisions apply

- DOR still has obligation to make FAPE available to this group of children

(34 C.F.R. § 300.13; 34 C.F.R. § 300.101)
Summary of Responsibilities

- Child find and assessment: DOL (DOR has general child find responsibilities)
- Provision of FAPE: DOR
- Consultation: DOL
- ISP: DOL
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