



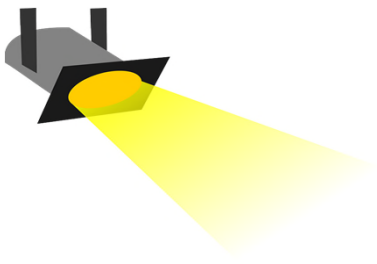
Fagen Friedman & Fulfroft LLP

Spotlight On Practice



Residential Placements

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What We'll Focus On

- ❑ Restrictiveness: When Is a Residential Placement the Least Restrictive Environment ("LRE")?
- ❑ Responsibility: What Are the Parameters for Determining Whether a District Is Responsible for a Residential Placement?
- ❑ Reimbursement: What Is the Analysis When Parents Are Seeking Reimbursement for a Residential Placement?
- ❑ Other Issues Involving Residential Placements



Restrictiveness:

When Is a Residential Placement the LRE?



LRE: Legal Overview

- Removal from general education environment can occur only when nature or severity of student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily

(34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56031)



LRE: Legal Overview

- IDEA also requires, to the maximum extent appropriate, that student with a disability must be educated with children who are not disabled

(34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56342)



LRE: Legal Overview

- To determine whether student can be placed outside general education setting, use Rachel H. balancing test
 - Educational benefits of general ed placement
 - Non-educational benefits of general ed placement
 - Effect on teacher and other children
 - Costs of mainstreaming

(Sacramento City Unified School Dist. v. Rachel H. (9th Cir. 1994) 14 F.3d 1398)



LRE: Legal Overview

- “Continuum of alternative placements” must be available
- Continuum may include “placement in a public or private residential program” if necessary to provide special education and related services
 - Residential placement is one of most restrictive settings on continuum

(34 C.F.R. § 300.104; 34 C.F.R. § 300.105; Ed. Code, § 56360)



LRE: Legal Overview

- Districts must attempt to make placement decision that “is as close as possible to the child's home” and in “the school he or she would attend if nondisabled”
 - Generally, the further that residential placement is located from student’s home and community, the more restrictive it is considered to be
 - California law imposes reporting requirements on districts that make out-of-state nonpublic placements

(34 C.F.R. § 300.116; Ed. Code, § 56342; Ed. Code, § 56365)



OAH Case Example #1

Burbank Unified School Dist. (2014)

- After DCFS discontinued RTC funding for 14-year-old with mood disorder, Parents made unilateral residential placement
- ALJ denied reimbursement and upheld District's proposed placement at nearby nonpublic day school
- Student's in-class behavior/emotional issues could be addressed in less restrictive day school setting

(Student v. Burbank Unified School Dist. (OAH 2014) Case No. 2014020031, 114 LRP 36110)



OAH Case Example #2

Barstow Unified School Dist. (2017)

- 16-year-old with ED and OHI exhibited highly disruptive and dangerous behaviors
- Had some success in juvenile hall (controlled environment where he felt safe)
- ALJ upheld District's proposed RTC placement with secured setting and 24-hour supervision
- Lack of appropriate placements in California necessitated out-of-state RTC as LRE

(Barstow Unified School Dist. v. Student (OAH 2017) Case No. 2017040083, 117 LRP 44522)



Residential Placements and LRE: Practical Essentials

- Stress importance of LRE and inform parents that residential placement is one of most restrictive environments possible for student
- Be prepared to discuss all placement possibilities, especially when parents want their child to go directly from general education classroom to residential setting



Residential Placements and LRE: Practical Essentials

- If IEP team determines that residential placement is necessary for provision of FAPE, look for appropriate placement as close to student's home as possible
- Remember to base all placement decisions on student's needs, not parents' desires
 - District, not parents, will be held responsible for not placing student in his or her LRE



Responsibility:

**What Are the Parameters for
Determining Whether Districts Are
Responsible for Residential
Placements?**



Responsibility: Legal Overview

- If placement in public or private residential program is necessary to provide special education and related services to student, then such placement, including non-medical care and room and board, must be at no cost to parents

(34 C.F.R. § 300.104)



Responsibility: Legal Overview

- Districts are not responsible for providing medical care associated with residential placements
 - Visits to doctor for treatment of medical conditions are not IDEA-covered services

(71 Fed. Reg. 46581 (Aug. 14, 2006))



9th Circuit Standards

Clovis USD v. California OAH (1990)

- Three possible tests for determining when district is responsible for the cost of residential placement
 - When placement is “supportive” of student’s education;
 - When medical, social or emotional problems are intertwined with educational problems; and
 - When placement primarily aids student to benefit from special education

(Clovis Unified School Dist. v. Calif. Office of Admin. Hearings (9th Cir. 1990) 903 F.2d 635)



9th Circuit Standards (cont'd)

Seattle School Dist. No. 1 v. B.S. (1990)

- Student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical and vocational needs

County of San Diego v. Calif. SEHO (1996)

- Applied all three tests from Clovis to find RTC was necessary and appropriate for teenager with intermittent explosive disorder because she had not achieved mental health treatment goals in her IEP

(Seattle School Dist. No. 1 v. B.S. (9th Cir. 1996) 82 F.3d 1493; County of San Diego v. Calif. Special Education Hearing Office (9th Cir. 1996) 93 F.3d 1458)



9th Circuit Standards (cont'd)

Ashland School Dist. v. E.H. (2009)

- Student's educational and medical issues were not intertwined and parents had placed student at RTC primarily for medical reasons (emotional problems and migraine headaches that led to suicide attempts and hospitalizations)

Ashland School Dist. v. R.J. (2009)

- Student did not require RTC to address educational needs because all issues occurred outside of the school setting and were independent of educational process

(Ashland School Dist. v. E.H. (9th Cir. 2009) 587 F.3d 1175; Ashland School Dist. v. R.J. (9th Cir. 2009) 588 F.3d 1004)



OAH Case Example #1

San Mateo Union High School Dist. (2015)

- 16-year-old with OHI and autism exhibited severe behavior issues at three different placements
- Parents rejected day school placement offer and placed Student in out-of-state residential facility
- ALJ awarded reimbursement
- Social/emotional problems were “intertwined” with educational problems, as outbursts kept Student out of classroom on most days

(Student v. San Mateo Union High School Dist. (OAH 2015) Case No. 2015010181, 115 LRP 52886)



OAH Case Example #2

Mountain View-Los Altos Union HSD (2016)

- Parents unilaterally placed Student in Utah RTC
- District offered placement in therapeutic program
- Parents failed to prove that Student's need for residential placement was educationally related
- Student's school difficulty was attributable to private school's failure to implement his accommodations
- Residential placement stemmed from safety concerns about Student's aggression at home

(Student v. Mountain View-Los Altos Union High School Dist. (OAH 2016) Case No. 2016050172, 116 LRP 47859)



Residential Placements and District Responsibility: Practical Essentials

- Discuss with parents their primary reason(s) for requesting residential placement
- Understand that, in some cases, student may have medical, emotional and behavioral needs that are so inextricably intertwined that they cannot be separated from his or her educational needs



Residential Placements and District Responsibility: Practical Essentials

- Consider reassessing and possibly conducting an FBA to determine social, emotional and behavior needs and whether they are affecting student's education
 - If district is subsequently involved in due process over denial of residential placement request, it is essential to be able to demonstrate that IEP team arrived at informed decision



Residential Placements and District Responsibility: Practical Essentials

- If parents have already placed student in residential setting and are requesting continuation of placement, seek consent to access residential facility's evaluation
- Interview residential facility staff to determine if placement's mission fits student's educational needs



Reimbursement:

What Is the Analysis When Parents are Seeking Reimbursement for a Residential Placement?



Reimbursement: Legal Overview

- Court or ALJ may require district to reimburse parents for cost of private residential placement if:
 - District had not made FAPE available to 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)



Reimbursement: Legal Overview

- 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 finding of unreasonableness with respect to actions taken by parents

(34 C.F.R. § 300.148(d))



Reimbursement: Legal Overview

- 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))



OAH Case Example #1

Garden Grove Unified School Dist. (2014)

- ALJ rejected District's argument that Student's extreme behavior difficulties were home-based
- District ordered to reimburse Parent for unilateral placement and to pay for prospective placement
- ALJ excused failure to provide 10-day notice due to "crisis situation"
- Slow progress did not make RTC inappropriate, it only showed severity of Student's needs

(Student v. Garden Grove Unified School Dist. (OAH 2014) Case No. 2014010895, 114 LRP 29090)



OAH Case Example #2

Los Angeles Unified School Dist. (2009)

- Parents took 5-day trip to Colorado to visit Student at RTC (and to ski)
- Father attended family therapy session; Mother did not
- No indication that Student's IEP reflected need for parental visits to obtain educational benefit
- Mother denied reimbursement, but Father reimbursed for attending therapy session

(Student v. Los Angeles Unified School Dist. (OAH 2009) Case No. 2008090252, 52 IDELR 144)



Residential Placements and Reimbursement: Practical Essentials

- Schedule IEP meeting immediately after receiving parents' 10-day notice
 - Parents might refuse to attend, so be sure to document all efforts made to secure attendance
- Reiterate willingness to work with parents to consider changes to student's IEP



Residential Placements and Reimbursement: Practical Essentials

- Understand that district offers FAPE when its IEP is reasonably calculated to enable student to make progress appropriate in light of his or her circumstances
 - Fact that student would make greater progress in parents' placement does not, in itself, make district's program inadequate or justify reimbursement



Residential Placements and Reimbursement: Practical Essentials

- If parents have provided notice of specific unilateral residential placement, ask how, why and when they chose that placement
 - Review student's educational goals to see if he or she can pursue them at placement parents have selected
 - Remember that parents must show that their placement is appropriate



Other Issues Involving Residential Placements: Assessments and Observations



Assessments: Legal Overview

- Numerous IDEA and state requirements for comprehensive eligibility assessments
- Must assess all areas of suspected disability
- No single measure or assessment can be sole criterion for determining eligibility
- Review existing data, including information from parent and classroom observations

(34 C.F.R. § 300.304(b)(1); Ed. Code, § 56320)



Assessments: Legal Overview

- Observations are essential!
 - Who should observe?
 - Variety of settings
 - Consider testing environment
 - Any special circumstances?



OAH Case Example

Capistrano Unified School Dist. (2013)

- 18-year-old Student with history of aggression was unilaterally placed at out-of-state RTC
- Triennial assessment conducted by District during spring break; no classroom observation
- Assessment was inadequate because classroom was where Student encountered frustration
- District could not determine classroom behavior without observing Student in that setting

(Capistrano Unified School Dist. v. Student and Student v. Capistrano Unified School Dist. (OAH 2013) Case Nos. 2012120545 and 2012120173, 113 LRP 33573)



Residential Placements and Assessments: Practical Essentials

- In addition to observation in various settings, any assessment or reassessment for a student who might require a residential placement should include
 - Record review
 - Psychosocial interviews
 - Psychological evaluation
 - Psychiatric evaluation (when necessary for educational purposes)



Residential Placements and Assessments: Practical Essentials

- Speak with outside providers
 - Especially important after districts have assumed responsibility for mental health assessments
- Amend assessment report if presented with new information
 - Amend report to show district has considered such new information, even if it results in no substantive change



Other Issues Involving Residential Placements:

Predetermination and Obligation to Consider Placement Options



Parent Participation: Legal Overview

- Law requires participation at meetings as well as “meaningful discussion”
- Predetermination can occur if team presents limited options for services and/or placement and is unwilling to consider—or present—other alternatives along continuum
- District policy that precludes/limits certain placements can also be predetermination

(34 C.F.R. § 300.327, 34 C.F.R. § 300.501)



OAH Case Example

East Side Union High School Dist. (2016)

- District denied FAPE by failing to inform Parent of possible availability of residential placement
- “Purpose [of continuum] is not served when parents—essential members of the IEP team—do not know of the available choices”
- Reflected District’s policy to exhaust both public placements and local non-public placements before it considered residential placement

(Student v. East Side Union High School Dist. and Santa Clara County Office of Educ. (OAH 2016) Case No. 2016061098, 116 LRP 53312)



Residential Placements and Parent Participation: Practical Essentials

- Give parents sufficient information about placements along continuum (location, class size, services and supports, etc.) so that they can effectively participate in discussion
- Avoid policies that categorically rule out certain placements or services, such as residential placements, and keep placement decisions individualized



Residential Placements and Parent Participation: Practical Essentials

- If parents ask for residential placement outside of IEP meeting, convene meeting promptly
- Emphasize that all options are open for discussion and that team did not make any decisions prior to meeting
- Ensure enough time for parents to ask questions and present input



Take Aways . . .



- Practical tips to assist with IEP compliance
 - Listen and respond to parent concerns
 - Consider need for assessment with mental health focus
 - Revise goals as appropriate
 - Consider need for additional services vs. more restrictive placement
 - Upon receipt of notice of unilateral placement, provide prior written notice
 - Do not forget to hold annual IEP meetings even when student is residentially placed



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