

Lenore Knudtson
WDE Leadership Symposium
Law Conference June 2014

Residential Placements in the 10th Circuit

THE 4-PART TEST

Session Goals

- ❖ This session is designed to synthesize Wyoming statute, federal case law, and IDEA into concise, consumable information about residential placements.
- ❖ It will provide and apply the *Jefferson County* 4-part test for determining the appropriateness of a residential placement.
- ❖ The session will also venture into areas of more creative application of the residential placement standard in reimbursement requests.

The Central Premise

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).

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3

Scenario #1

- ❖ **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.
- ❖ Parents assume the risk of the costs for the private placement, while seeking an order from a hearing officer granting reimbursement.

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4

Scenario #2

- ❖ **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.**
- 1. Two IDEA school district obligations:
 - ❖ Child find pursuant to 34 C.F.R. §300.131.

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5

Scenario #2

- ❖ 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.*
- 2. Equitable services according to 34 C.F.R. §§300.137 and 300.138.

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6

Scenario #3

- ❖ Public school placement in a private school: As a means of providing FAPE based on the identified needs of a 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.

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7

Scenario #3

- ❖ The private placement must meet the standards that apply to education in the state.
- ❖ This student retains all rights under the IDEA.

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8

The Other Scenario

- ❖ 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.*

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9

The Other Scenario

- ❖ 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.*

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10

Our Focus



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11

TUITION REIMBURSEMENT

IN THE 10TH CIRCUIT COURT OF APPEALS

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12

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.

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13

Thompson R2-J Sch. Dist. v. Luke P., 50 IDELR 212 (10th Cir. 2008)

- ❖ 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.

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14

Thompson 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.'"

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15

Thompson 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.

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16

Fast Forward to 2013

Jefferson County Sch. Dist. v. Elizabeth E.,
60 IDELR 91 (10th Cir. 2012).



01

Major Judicial Update:

- ❖ This is a residential placement case with many other important considerations.
- ❖ The 10th Circuit deviated from the tests created by all other circuit courts.
- ❖ Know the 4 part test!

Jefferson County Sch. Dist. v. Elizabeth E.

- ❖ The 10th 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.**

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19

Jefferson County Sch. Dist. v. Elizabeth E.

- 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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20

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.

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21

Jefferson County Critical Points

- ❖ The placement must include instruction in or by an accredited, state approved elementary or secondary school.
 - ❖ Elementary school is defined as a *nonprofit* institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined by state law. 34 C.F.R. §300.13.
 - ❖ Secondary school is defined as a *nonprofit* institutional day or residential school, including a public secondary charter school that provides secondary education, as determined by state law, except that it does not include any education beyond grade 12. 34 C.F.R. §300.36.

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Jefferson County Critical Points

- ❖ Specially designed instruction must be provided by licensed teachers and providers.
- ❖ Schools must offer instruction in the state's minimum core curriculum.
- ❖ Facilities or institutions licensed for habilitation purposes without accreditation as a school are not reimbursable as a private placement under IDEA.

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23

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.
- ❖ 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.

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24

Jefferson County Critical Points

- ❖ 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.

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25

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.

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26

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.

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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.

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28

Time to take a step
back. . .

Remember Timothy.



01

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).

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31

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.

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32

The Major Points

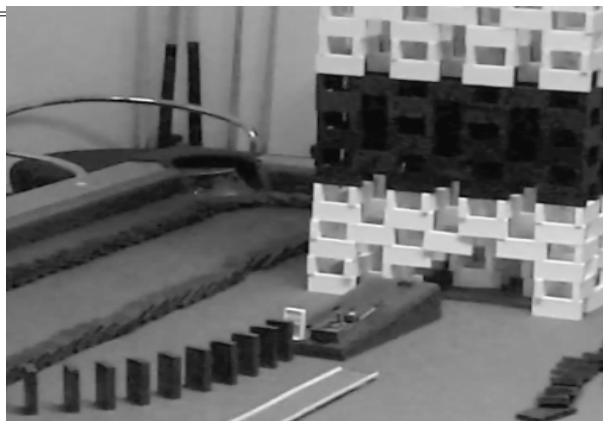
- ❖ Students with disabilities have the right to FAPE. There are very few exceptions to this rule.
- ❖ IEP teams identify student needs and propose an IEP reasonably calculated to provide FAPE.
- ❖ Public schools bear the cost of FAPE.
- ❖ Typically, but not always, this responsibility falls on the district of residence, i.e. the district in which the IDEA parent resides.

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Think Dominoes



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WYOMING REFERENCE GUIDE

ON PRIVATE SCHOOL PLACEMENTS

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Guidance in Wyoming

- ❖ When determining whether to propose a residential placement for a student, school districts must consider:
 - ❖ **The educational needs of the student.** As a general rule, school districts are obligated to consider lesser restrictive placements before offering a residential placement. *T.F. v. Special School Dist. of St. Louis County*, 45 IDELR 237 (8th Cir. 2006). **If a student cannot obtain educational benefit in a lesser restrictive setting, then a residential placement should be considered.** *L.H. v. Monroe-Woodbury Central Sch. Dist.*, 51 IDELR 91 (2nd Cir. 2008).

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Guidance in Wyoming

- ❖ **The accreditation/licensure status of the residential facility.** The provision of FAPE includes special education and related services that meet the standards of Wyoming. 34 C.F.R. §300.17. The IDEA requires that residential placements meet the standards for a school in Wyoming. 34 C.F.R. §300.146(b). **Wyoming law requires private schools to be licensed by the state.** W.S. §21-2-401(a). Determine the licensure and accreditation status of the private facility before proposing placement. **If the residential placement does not meet the definition of a school, it cannot be utilized to provide specially designed instruction,** but in some circumstances, may be used to provide habilitation and other supportive services as related services *if* the student is receiving specially designed instruction from an appropriately accredited, licensed school.

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Guidance in Wyoming

- ❖ **The development of an IEP that can provide special education and related services in the residential placement.** The IDEA mandates the provision of FAPE, which includes special education and related services. A student who is placed in a residential facility continues to have the right to receive FAPE through the provision of special education and related services. **The IEP implemented in the residential placement must provide FAPE.** In some instances, it is possible for a residential facility that is *not* licensed as a school to be the appropriate placement *if* the student is provided specially designed instruction from a licensed, accredited school *and* the habilitation or other supportive services provided in the residential facility meet the definition of related services, i.e. necessary in order for the student to benefit from their specially designed instruction.

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38

Guidance in Wyoming

- ❖ If no specially designed instruction is provided to the student in the residential facility, the habilitation or residential portion of the program shall not be considered a related service. **Without making separate, external arrangements for the provision of specially designed instruction, the private residential placement would not be considered an educational placement, and therefore, would not be an allowable use of IDEA funds by the placing district.**

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39

SPECIALLY DESIGNED INSTRUCTION

IN A PRIVATE RESIDENTIAL PLACEMENT

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Specially Designed Instruction

- ❖ Parents seeking reimbursement for a private placement bear the burden of demonstrating that the private placement is appropriate, even if the proposal in the IEP is inappropriate. *M.S.*, 231 F.3d at 104. Nevertheless, parents are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a free appropriate public education. *See 20 U.S.C.A. §1401(9)*.

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41

Specially Designed Instruction

- ❖ An appropriate private placement need not meet state education standards or requirements. For example, a private placement need not provide certified special education teachers or an IEP for the disabled student. *Id.* In addition, parents "may not be subject to the same mainstreaming requirements as a school board."
- ❖ *M.S.*, 231 F.3d at 105 (citing *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3rd Cir.1999) (holding that "the test for the parents' private placement is that it is appropriate, and not that it is perfect")).
- ❖ *Frank G. v. Bd. of Educ. of Hyde Park*, 46 IDELR 33 (2nd Cir. 2006) *cert denied* 109 LRP 29770.

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Specially Designed Instruction

- ❖ The 2d Circuit affirmed a decision that a New York district was not responsible for the cost of the student's residential program.
- ❖ To demonstrate a right to reimbursement under the IDEA, the court explained, the parent must show that the private school offered **instruction specifically designed** to meet the student's unique disability-related needs.

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43

Specially Designed Instruction

- ❖ The parent here failed to meet that burden. Although the student had an SLD in math, the school did not implement any strategies to help the student make progress. Rather, the school placed the student in a lower-level consumer math class. The student's ongoing struggles in that lower-level math class were particularly noteworthy in light of her performance in a more challenging math class the previous year, when she received specialized instruction in math.
- ❖ As for the student's behavioral difficulties, the court pointed out that the student's lack of emotional regulation impeded her learning as well as her interactions with others.
- ❖ *Ward v. Bd. of Educ. of the Enlarged City Sch. Dist. of Middletown, NY*, 114 LRP 24218 (2nd Cir. 2014).

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UNIQUE CIRCUMSTANCES

AND THE RIGHT TO A RESIDENTIAL PLACEMENT

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45

Behavior

- ❖ Behavior problems do not become a basis for residential placement unless they become so severe that they interfere with the student's ability to obtain an educational benefit in a typical school setting. Typically, such behavior threatens the welfare of the student or other individuals and cannot be effectively controlled anywhere other than a 24-hour environment with specially trained staff.

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46

Behavior

- ❖ Generally, behavior problems that are limited to the home environment or manifest themselves almost exclusively in that setting do not warrant residential placement. A parent's inability to manage a student at home will not in itself demonstrate a need for a residential placement.
- ❖ *Ashland Sch. Dist. v. Parents of Student R.J.*, 53 IDELR 176 (9th Cir. 2009); *L.G. v. School Bd. of Palm Beach County*, 48 IDELR 271 (11th Cir. 2007, unpublished); *Swift v. Rapides Parish Pub. Sch. Sys.*, 19 IDELR 771 (W.D. La. 1993), *aff'd*, 12 F.3d 209, 109 LRP 52742 (5th Cir. 1993).

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47

Mental Health Needs

- ❖ The court denied the parents' request for compensatory education on the grounds that the placement was inappropriate. Citing her earlier decision in *I.T. v. Department of Education, State of Hawaii*, 62 IDELR 178 (D. Hawaii 2013), Compensatory education may include reimbursement for services a student has already received as well as prospective relief. **In determining whether reimbursement is appropriate in such circumstances, however, the court must consider whether the student's private school attendance was designed to compensate for flaws in the IEP.** The court determined that the student here did not require the intensive mental health services that the private program offered. *J.T. v. Dep't. of Educ. State of Hawaii*, 63 IDELR 3 (D. Haw. 2014).

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48

Mental Health Needs

- ❖ Despite a student's severe emotional impairments and history of suicide attempts, she did not require a residential placement to receive FAPE, the 4th Circuit Court of Appeals held. The student's safety, mental health, and medical issues were distinct from her educational needs, and thus did not obligate the district to fund a residential placement. *Shaw v. Weast*, 53 IDELR 313 (4th Cir. 2010).

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49

Home School as a Residential Placement

- ❖ In Wyoming, home school is considered a private school. W.S. §21-4-101. A parent choosing to serve his/her own child in a private school, even when the parent disputes the availability of FAPE, is not sufficient to trigger the right to tuition reimbursement. The parent must prove that the district failed to make FAPE available and that the private placement was appropriate.

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50

Home School as a Residential Placement

- ❖ Based on federal court interpretation, OSEP has recently opined, “If a parent unilaterally places his or her child in a private school or facility because he or she believes that the public agency failed to make FAPE available to his or her child, such parental action alone is not sufficient to require reimbursement.” *See Forest Grove v. T.A.*, 52 IDELR 151 (2009) and *Letter to Chamberlain*, 60 IDELR 77 (OSEP 2012).

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51

Home School as a Residential Placement

Apply the Jefferson County test:

- | | |
|--|--|
| <p>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.</p> | <ul style="list-style-type: none"> ❖ The provision of FAPE must be in dispute. ❖ If home school is a parent choice, then no reimbursement. |
|--|--|

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52

Home School as a Residential Placement

Apply the Jefferson County test:

- ② Determine whether the private placement is a state-accredited elementary or secondary school. **If not, the placement is not reimbursable.**
 - ❖ Home school, by definition in Wyoming statute, is not a state-accredited elementary or secondary school.

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Home School as a Residential Placement

Apply the Jefferson County test:

- 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.**
 - ❖ Home school is very unlikely to provide specially designed instruction.

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Home School as a Residential Placement

Apply the *Jefferson County* test:

- 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.
- ❖ This question is not relevant unless specially designed instruction is provided.

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Home School as a Residential Placement

- ❖ A parent's claim for lost wages constitutes a claim for damages rather than for compensatory educational services and, as such, is not recoverable through the administrative process under IDEA.
- ❖ *W.B. v. Matula*, 23 IDELR 411 (3rd Cir. 1995); *Angela L. v. Pasadena ISD*, 17 IDELR 341(5th Cir. 1990); *Hall v. Knott County Board of Education*, 18 IDELR 192 (6th Cir. 1991).

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56

Home School as a Residential Placement

- ❖ Other cases interpreting remedies available under the IDEA are clear that a parent can receive reimbursement for obtaining alternate educational services or evaluations through the administrative process; **however, such recovery does not extend to reimbursement for time spent, i.e. lost wages, incurring those necessary educational services.**

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57

Home School as a Residential Placement

- ❖ In *Craven County Board of Education*, 27 IDELR 255 (SEA N.C. 1997), the Hearing Officer considered this exact issue in the context of lost wages incurred by the parents in obtaining a free appropriate public education for their child. The Hearing Officer found no authority under IDEA to reimburse lost wages despite a finding that the child had, in fact, been denied a free appropriate public education.
- ❖ See also, *Schroeder v. San Mateo County Office of Education*, 44 IDELR 244 (U.S.D.C. CA 1988); *In Re G*, 27 IDELR 451 (Department of Defense, Defense Legal Services Agency 1997); *Meiner v. Missouri*, 800 F.2nd 749 (8th Cir. 1986).

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Drug Addiction

- ❖ Noting that a public school program offered small class sizes, extensive therapeutic supports, and drug and alcohol interventions, the District Court held the program was an appropriate placement for a teenager with ADHD and substance abuse issues.
- ❖ The parent could not recover the cost of the student's residential treatment from a Pennsylvania district.

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59

Drug Addiction

- ❖ The proposed IEP included organizational and behavioral goals, and called for the student to receive regularly scheduled counseling, additional counseling services as needed, and social skills instruction.
- ❖ The program's staff included a social worker, a psychologist, a job trainer, a nurse, and a private therapist, all of whom were trained to be aware of and intervene in any drug or alcohol issues.

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Drug Addiction

- ❖ Although the parent argued that the district's program did not offer the substance abuse treatment her daughter required, the court explained that the district had no obligation to provide such services.
- ❖ "A school district cannot be held responsible for treating a student's longstanding drug addiction, familial problems, or delinquent behavior."

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61

Drug Addiction

- ❖ Concluding that the district offered the student an appropriate program and placement, the court held it had no obligation to fund the residential drug and alcohol treatment program.
- ❖ *EK v. Warwick Sch. Dist.*, 62 IDELR 289 (E.D. Pa. 2014).

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62

In Closing

- ❖ The 4-part test is critical to an understanding of school district obligations for a residential placement.
- ❖ The district **MUST** propose FAPE. Anything less than FAPE makes your district vulnerable to a tuition reimbursement claim.
- ❖ Tuition reimbursement is **ONLY** awarded when the district has not proposed or provided FAPE.

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63

QUESTIONS?

THANK YOU

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64