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# RESIDENTIAL PLACEMENTS: A Review of Tenth Circuit Decisions, Defenses and Strategies

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# Tenth Circuit Decisions

- Cain, et al. v. Yukon Public Schools, 775 F.2d 15, 557 IDELR 174 (10<sup>th</sup> Cir. 1985)
  - Mark Cain was intellectually and emotionally disabled.
  - Difficult for the teacher to work with him and she told the parents that she could not handle him.
  - Devoted a disproportionate amount of her time to dealing with Mark.

- Mark had an outburst that disrupted over half of the student body.
- School district proposed a home-based program.
- Parents, however, did not wait for the school district to develop another IEP.
- They unilaterally placed Mark at the Brown School in Texas.

- Teacher supplied a letter to the Brown School describing the student's needs. (Any issues here?)
- The parents reenrolled the student in the school district in the Fall. This was a reenrollment in name only.
- In the interim, the school district received state approval to create a new program to serve students with multiple disabilities.
- Proposed teacher for the new program had no credentials in dealing with ED students, but was qualified in ID.

- Hearing decisions were in favor of the school district.
- Tenth Circuit noted the importance of complying with procedures and recited that the parents were actively involved in decision-making and in attending meetings.
- No written IEP was in place but the court found this was not a fatal error under the circumstances.
- The failure to offer a program was attributable to the parents' action in removing the student from the Yukon schools, placing him at Brown and continuing that placement.

- Joshua W., et al. v. USD 259 Board of Educ., 211 F.3d 1278, 32 IDELR 137 (10<sup>th</sup> Cir. 2000)
  - Student with a disability got into criminal difficulty in Kansas.
  - Threatened his mother with a knife while she was driving him to a military academy.
  - Court ordered the student to serve two years probation and to complete a program at a private residential facility in Tennessee.

- Mother asked the Wichita USD to pay for the residential placement, but omitted any mention of the criminal charges and the sentence.
- The Court referred to the “enrollment” in Wichita as a “pretended attempt to enroll” and found that he was never a resident.
- “Mother’s “action in unilaterally placing Joshua W. in Three Springs was manipulative, was not undertaken for education purposes, and essentially obstructed the IDEA process.”

Thompson R2-J Sch. Dist. v. Luke P., 48 IDELR 63 (D.Colo. 2007), rev'd, 50 IDELR 212 (10th Cir. 2008).

- Luke has autism and is in the 9<sup>th</sup> grade.
- He has trouble generalizing skills from school to home and other environments.
- Luke made progress in public schools but was not successful at home where he experienced severe behavioral problems.
- The parents expressed concerns about the public school program to the staff and they revised the IEP to address the parents' concerns.

- The parents withdrew Luke from the public schools and placed him in a private residential school (Boston Higashi School).
- This school specializes in educating children with autism.
- The parents prevailed at the due process hearing.
- The Tenth Circuit recited its precedent for review of a private placement as:
  - Failure to offer FAPE or
  - Failure to satisfy LRE.

- The IEP will be reviewed for appropriateness but not for “maximization.”
- The IEP will be evaluated as of the time it is developed.
- The benefit to be derived from the IEP must be more than “de minimis.”
- Primary issue in the case was the generalization from school to home.
- The Tenth Circuit held that there is:
  - No guarantee of self-sufficiency.

- Compliance with procedures will typically guarantee a substantively appropriate IEP.
- His IEP was generated in a process that showed genuine effort to continue his progress.
- If the inability to generalize is so severe that it prevents educational benefit, then it might be a FAPE issue.
- Here, however, Luke was making educational progress in school.
- He was meeting many of his goals.
- A comparison of IEPs showed that progress had been made.

Sytsema, et al., v. Academy Sch. Dist. No. 20, 538 F.3d 1306, 50 IDELR 213 (10<sup>th</sup> Cir. 2008)

- Nicholas is a three-year-old preschool student with autism.
- He has poor eye contact, is unresponsive to his name and avoids group activities.
- He received a program of instruction for 16.5 hours weekly of one-to-one instruction in his home.

- School district proposed an initial IEP of 9.5 hours of integrated instruction in a preschool program and 1.25 hours weekly of related services.
- At a meeting, but not an IEP meeting, the district offered to increase services to 20 hours per week, but never incorporated this offer in an IEP.
- The parents continued the placement in their home.

- The IEP for this first school year was not finalized.
- The second school year the school district offered 25 hours of integrated classroom services and five hours per week of discrete trial training.
- That second IEP was finalized in an IEP meeting.
- The parents sought reimbursement for both years of services provided in their home.

## Sytsema, continued.

- Failure to complete the one IEP was a procedural issue that could give rise to a claim for reimbursement if there were a denial of FAPE.
- Because the parents did not meaningfully participate in the development of the IEP, the parents did not cooperate in the IEP process.
- The parents did not adequately consider the public placement because it was in a group setting and they wanted only one-to-one services.

## Court ruling:

- Remand and determine if the incomplete IEP offered FAPE.
- Cannot consider the offer of additional services.
- Must only consider the substance of the written document and not of any verbal offers.
- There were no procedural problems with the second year's IEP, that it was fully proposed and it provided FAPE.

## Jefferson Co. Sch. Dist. R-1 v. Elizabeth E., et al., 702 F.3d 1227 (10<sup>th</sup> Cir. 2012).

- Student was entitled to reimbursement for unilateral private residential placement under the following test:
  - 1. Was FAPE provided or made available in a timely manner?
  - 2. Is the private placement a state accredited school?
  - 3. Does the private school provide special education (specially designed instruction for a student with disabilities)?
  - 4. Are any additional services qualified as related services?

- The court granted reimbursement because the school district did not offer FAPE.
- The Parents' failure to give ten day notice was excused on the basis that the school district refused to develop an IEP because the student was out of state in a program.
- Even though parents offered to start “anew” with IEP development, the school district refused because the student was out of state.
- The adamant refusal of the school district to assume any responsibility for the student's education or IEP, excused the parents' failure to make the student available for an evaluation.

# Tuition Reimbursement: Statutory and Regulatory Provisions

- 20 U.S.C. Section 1412(a)(10)(C)
  - An LEA is not required to pay private tuition if “...that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.”
  - If the student was previously eligible under the IDEA, or should have been eligible, the court may award reimbursement if “...the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.”

# Ten business day notice of removal:

- The reimbursement to the parents may be reduced or denied if:
  - “... at the most recent IEP meeting that the parents attended prior to removal ..., the parents did not inform the IEP team ...” of their concerns with the IEP, their rejection of the IEP and their intent to place the child in a private program at public expense; or
  - The parents did not given written notice of removal, of their concerns with the IEP and their intent to place the student in a private school at public expense at least 10 business days in advance of the removal; or

- Formal notice of an evaluation was given to the parents prior to the removal from public school and 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.”

# Exceptions to denial of reimbursement:

- The parents were prevented by the school district from giving the required notice of removal; or
- The parents were not advised of their obligation to give notice through the provision of procedural safeguards; or
- The parents could not give the notice because giving the notice would “...likely result in physical harm to the child.”

- Other reasons to excuse the failure to give notice include:
  - The parent is illiterate or cannot write in English; or
  - Compliance would likely result in serious emotional harm to the child.

# Strategies for Responding to Requests for Private Placements

- Train staff to notify the central office if parents mention the possibility of a private placement.
- The 10-day period is the final opportunity to make the IEP challenge-proof.
- Do the research regarding the private placement, its program and approaches.

- Be sure that school staff have direct familiarity with the student.
- Consider proposing an immediate, expedited evaluation.
- Discuss the request for private placement at an IEP meeting.

- Pay particular attention to the drafting of the prior written notice in this situation.
- Make sure that the school district has documentation of progress.
- Use well-qualified and articulate school district staff to work on the case.

- Consider the use of outside experts when necessary.
- Offer an appropriate and extensive public school IEP.
- Review and respond to the 10-day notice of removal.

- Consider the need for transition services to move the student from a private school to the public school.
- Make a written settlement offer to protect against attorneys' fees.
- Proof of progress and data collection is essential to a defense.

## Cases denying reimbursement:

- “[t]he appropriateness of S.H.’s IEP ultimately turns on whether it was reasonably calculated to provide educational benefit....” S.H., by next friend A.H. and E. H. v. Plano Indep. School District, 487 F. App’x 851, 859 (5<sup>th</sup> Cir. 2012).
- The private school and the parents hindered the development of the IEP. M.N. v. State of Hawaii, Department of Education, 509 F. App’x 640, 60 IDELR 181 (9<sup>th</sup> Cir. 2013).

## Consider the appropriateness of the private placement.

- Hessler v. State Board of Education of Maryland, 700 F.2d 134, 139 (4<sup>th</sup> Cir. 1983). “First, we do not think that because a given school is allegedly more appropriate than another school, the less appropriate school becomes inappropriate.”
- Consider whether the parents ever visited the public school program.

- Cost is a factor in choosing between two appropriate programs. See Florence County School District Four v. Carter, 510 U.S. 7 (1993).
- Continue to develop IEPs annually when involved in litigation or when notice of removal has been given.

# Decision-making Process in Tuition Reimbursement Situations

- Be familiar with the student.
- Be knowledgeable about the private school program.
- Be knowledgeable about the public school program.

- Prepare a comparison chart of the two school programs.
- Sell your IEP program to the parents.
- Be detailed in describing the public school program.

## Practical Considerations

- Have a private school representative present at IEP meetings and obtain a description of the program from them.
- Examine the timelines for the application process. Did the parents already commit prior to the IEP meeting?
- Obtain parent permission for release of documents with the private school.

- Shared cost placements: list the terms in the IEP or in an agreement. Not likely in Wyoming.
- Decide whether the private school will be the stay-put placement and state the decision in the IEP or agreement.

- THE END