

C.A.S.E. LEGAL UPDATE

Students with Disabilities in Private Schools

Introduction

The law and practices regarding the provision of special education services to students with disabilities placed by their parents in private schools have developed over the past several years as a result of court cases and administrative policy interpretive guidance. Until the most recent reauthorization in 1997, neither the federal statute, the Individuals With Disabilities Education Act (IDEA), nor the federal regulations directly addressed this issue. The law has now been clarified as a result of the 1997 IDEA Amendments, the 1999 IDEA regulations and judicial decisions.

This article will address what the rights and responsibilities under the IDEA are in identifying and providing special education services to parentally placed private school students with disabilities. This topic should be distinguished from other situations where a student with a disability is receiving services from a private school. If the public agency places a student with disability in a private school as a means of fulfilling the school's obligations to provide a free appropriate public education, the student maintains an individual legal entitlement to services and the parents have full access to all the procedural safeguards provided by the IDEA. In addition, when the parents have made a unilateral placement of the student in a private school when the provision of a free appropriate public education is an issue, the parents may seek full reimbursement for all costs associated with that placement from a hearing officer or a court.

The reader of this article should also be aware that many states have state laws that provide for greater rights and legal entitlements than the IDEA. For example, some states have dual enrollment state statutes allowing students, including students with disabilities, who attend private schools to also enroll in the public schools and receive desired services which may include special education. Therefore, state law and local school district policy should also be reviewed.

The 1997 Amendments to the IDEA

The IDEA for the first time directly addressed the fiscal scope and services for parentally placed private school students with disabilities when the Congress reauthorized the IDEA. The statutory provision states:

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parent in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements.....

Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of federal funds made available under this part.

Such services may be provided to children with disabilities on the premises of private, including parochial schools, to the extent consistent with law.

The requirementsrelating to child find shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

(20 U.S.C. Section 1412 (a)(10))

The IDEA Regulations

Although the basic issues were addressed through the statute and judicial decisions, many implementation issues remained unresolved until the United States Department of Education promulgated the final IDEA regulations in March 1999 implementing the new statute.

Reference in the following summary is made to both specific IDEA regulatory sections (Part 300 of Title 34 of the Code of Federal Regulations) and to the Analysis and Comments to the IDEA Regulations contained in the Federal Register of March 12,1999. The Analysis and Comments summarize the United States Department of Education's intent in promulgating the regulations.

It should also be emphasized that the IDEA sets a minimum legal standard of practice. The IDEA regulations make clear that nothing in the IDEA prevents a local education agency (LEA) from providing more services than are legally required. Again, it is important to also be aware of any applicable state law or local district policy that may require the LEA to provide more services than are required under the IDEA.

Recent OSEP Policy Guidance

The Office of Special Education Programs has issued a technical assistance document (OSEP Memorandum 00-14, May 4,2000) in a question and answer format to assist families of students with disabilities, state and local education officials and private school representatives to better understand the IDEA requirements. Excerpts from this Memorandum are included in the following discussion.

Summary of Current IDEA Requirements

Child Find:

The regulations underscore that local educational agencies (LEA) maintain the responsibility to engage in child find activities in locating, identifying, and evaluating children, who are legal

residents of the LEA as provided for under state law, who may have a disability and be in need of special education services regardless of whether they are enrolled in a public school. (34 C.F.R. Sections 125 (a)(1)(i) and 451(a)). In doing so, the LEA must consult with representatives of private school students with disabilities on how to carry out child find activities for private school students.

The child find activities that the LEA engages in for private school children must be comparable to the activities that it uses to evaluate students in the public school. Therefore, parents are entitled to the procedural safeguards that apply including the right to participate in evaluation and eligibility meetings, be provided with a copy of the Evaluation Report and eligibility determination, be provided with prior written notice of proposed or refused actions, and be asked to provide informed written consent for the initial evaluation. In addition, parents have the right to request a due process hearing to challenge decisions pertaining to the identification and evaluation of their child.

The determination that a private school student has a disability and is in need of special education services, however, does not result in an entitlement to IEP services unless the student then enrolls in the public schools.. Under the IDEA statute and regulations, a student with a disability who is placed by his/her parents in a private school has no individual legal entitlement to receive some or all of the special education and related services they would receive if enrolled in a public school. Parents must be informed by the LEA that should they enroll their child in the public school, the school will provide a free appropriate public education. (see 34 CFR 300.454)

If a determination is made that a student in a private school is eligible for special education services, the general rule is that the LEA must convene an IEP Team to develop an IEP for the student. This provides the parents with specific information regarding what a free appropriate public education would be for their child so that they can decide whether to maintain the private school placement or to enroll their child in the public school to receive IEP services. The exception to this requirement would occur if the parents clearly indicate their intent to enroll or to maintain their child in the private school and are not interested in considering a public program or placement. In such a case an IEP would not need to be developed. (See Question 8, OSEP Memorandum 00-14).

Service Determination:

The LEA is required to consult with representatives of private school students with disabilities, in a timely and meaningful way, regarding the number of private school students with disabilities, their needs and location in order to decide: which students will receive services, what services will be provided, how and where the services will be provided and how the services will be evaluated. (See 34 CFR 300.454(b)) The law leaves discretion for the LEA to determine who would be appropriate representatives of such students. Appropriate representatives may include teachers, building or central office administrators or parents. (See Question 25, OSEP Memorandum 00-14)

The Analysis and Comments to the regulations clarify that the LEAs and States determine the appropriate period between consultations based on circumstances in each jurisdiction. An annual consultation is not automatically required.

Based on the information received, the LEA determines what services and which students will receive special education and related services using a proportionate amount of their IDEA Part B grant.

The proration is based on the number of private school children with disabilities (ages 3-21) residing in the LEA compared to the total number of children with disabilities (ages 3-21) residing in the LEA. The number of private school children with disabilities used to calculate the proportionate share is based on the total number of private school children identified through child find as being eligible for special education services, not just the number of such students who are receiving special education or related services in accordance with a service plan. (See Question 15, OSEP Memorandum 00-14).

For example, if the LEA has 1,000 children with disabilities and of those children, 50 have been placed by their parents in private schools, the LEA would be required to provide special education and related services in an amount that at least equals 5% of its Part B grant. The LEA needs to determine such proportionate share based on both:

- the LEA's General Part B subgrant for students with disabilities ages 3 through 21

and

- the LEA's Preschool (Section 619) subgrant for students with disabilities ages 3 through 5.

In determining whether the LEA has met this minimum expenditure requirement, the LEA can use local, state and/or federal funds to provide the services. (See 34 CFR 300.453) Note that any costs incurred as a result of child find activities are not included in the above analysis.

Based on the information received from the consultation with representatives of private school students with disabilities previously discussed, the LEA will decide the type and location of services that will be provided to students with disabilities in private schools expending at least this proportionate amount.

In so doing, the LEA may consider providing direct services, consultative services or both. The location of the student is also a possible factor in determining what, if any, service to offer. It may be reasonable, as a result of the consultation process, for a LEA to elect not to provide services to students who attend a private school outside of the district. (See Question 37, OSEP Memorandum 00-14)

Service Plans:

For those students who will receive some special education and related services as determined by the LEA, the LEA will develop a service plan instead of an Individualized Education Program (IEP). The service plan must specify what services will be provided (which may be less than the student would receive if enrolled in a public school) and be developed, reviewed and revised by the same participants who develop IEPs. A representative of the private school shall be invited to attend and if unable to do so, the LEA shall use other methods, such as conference calls, to ensure their participation. (See 34 CFR 300.455(b))

The services which the private schools students receive must be provided by personnel meeting the same standards as personnel providing services to students in public schools.

Location of Services:

The LEA, after considering the information received from consultation with representatives of private school children, determines the location of services. The services may be provided on site, at the public school or a neutral location. (See 34 CFR 300.456)

Should transportation be required for the private school student with disabilities to participate in the services provided under their service plan, such transportation must be provided. Such transportation may include transportation from the private school or home to the service site or from the service site to the private school or home (depending on the timing of the service). LEAs are not required to provide transportation from the home to the child's private school. Any transportation costs incurred may be included in calculating the pro-rated amount required to be spent on services. (See 34 CFR 300.456)

Reevaluations:

The reevaluation requirements applicable to public school students with disabilities also apply to private school students with disabilities. Reevaluations must be conducted at least every three years or more often if conditions warrant or the parent or teacher requests. The scope of the reevaluation is a decision for the IEP Team and informed written parental consent must be sought if the reevaluation will involve more than a review of existing information. (See 34 CFR 300.536)

Due Process Rights:

Parents have the right to go to a due process hearing only on the issue of child find activities. Parents do not have the right to contest in a due process hearing decisions regarding the services their child will/will not receive. In such a case, parents may file an administrative complaint with the state education agency. (See 34 CFR 300.457)

Home Schooled Students:

The analysis and comments to the regulations clarify that the IDEA's provision addressing private school students would also apply to students with disabilities who are being home schooled if state law so provides. If a state considers home schools to be private schools, the

above analysis applies. If not, the school district would still have child find responsibilities under the IDEA and if found eligible, would have a responsibility to offer to provide a FAPE should the parents decide to enroll their child in the public school.

Services on Site of a Parochial School:

As the 1997 Amendments state, a school district may provide the services it offers students with disabilities who are placed in private schools with services on site of the private school to the extent consistent with law.

The United States Supreme Court, expanding its holding from the Zobrest decision, held that supplementary instructional services under Title I of the Elementary and Secondary Act may be provided in a religiously affiliated private school without violating the Establishment Clause of the Constitution. Agostini v. Felton (1997). In guidance issued by the United States Department of Education, the Department stated, A.....the implication of the Court's ruling is that there is not a constitutional bar to public school employees providing educational services in private schools under other Federal programs under similar circumstances. Question 25 from Guidance on the Supreme Court's Decision in Agostini v. Felton, (United States Department of Education, July 18,1997)

The Agostini holding was specifically applied to the provision of special education and related services by the United States Court of Appeals, Sixth Circuit, which held that furnishing occupational therapy and physical therapy on the premises of a parochial school did not violate the Establishment Clause of the Constitution. Peck v. Lansing School District, 28 IDELR 472 (1998).

As was noted earlier in the document, some states have laws which may impose limitations on the discretion provided under federal law or exceed the minimum legal standard set by the IDEA. A recent decision from the United States Court of Appeals, Ninth Circuit is illustrative.

The Court in KDM by WJM v. Reedsport School District, 31 IDELR 107 (1999) held that an Oregon regulation mandating that special education and related services must be provided in a religiously neutral setting did not violate the First Amendment. Neither the IDEA nor the Constitution requires that the services be provided on site of the parochial school. As the Supreme Court noted in Agostini, a school is permitted to but not required to provide the services on site unless there are further restrictions imposed by state law.

Conclusion

In summary, public school officials need to ensure that the district has policies and procedures which provide for:

-ongoing child find and evaluation services for students who are suspected of having a disability and being in need of special education who are being home schooled or placed by their parents in a private school

-timely and meaningful consultation with representatives of private school students in order to obtain information for considering:

-which students will receive services

-what services will be provided

-how and where the services will be provided, and

-how the services will be evaluated

-determining the proportionate share of federal special education funds to be used for services

-developing, implementing and reviewing service plans for students with disabilities in private schools who will be receiving special education or related services from the district

-affording selected due process procedures to parents

As this article illustrates, the law addressing the provision of special education and related services to students with disabilities placed in private schools by their parents has been evolving over the years due to statutory and regulatory changes and judicial decisions. Further clarification of the law is anticipated.