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LEGAL OBLIGATIONS TO STUDENTS WITH DISABILITIES IN PRIVATE SCHOOLS [a1]

The issue of which organization has the legal obligation to evaluate and/or provide services/accommodations to private school students with disabilities under the IDEA and Section 504/ADA is subject to frequent confusion and, at least occasionally, fatal miscalculation. The confusion is largely attributable to the failure to apprehend differences not only among these statutory frameworks [1] but also, at least for the IDEA, between two groups of students. [2]

The two groups of private school students do not have well-established labels under the IDEA. In contrast with a third group, which is not subject to confusion and clearly designated as "children with disabilities in private schools placed or referred by public agencies," [3] the IDEA regulations refer to these two groups as (1) "parentally-placed private school children with disabilities" [4] and (2) "children with disabilities where FAPE is at issue." [5] Because the first heading is too generic and the second one is imprecise about the obligations at issue, the references herein are to the simpler and clearer respective designations of (1) "voluntarily placed" and (2) "unilaterally ***689** placed," with the understanding that the distinguishing difference is that the parents seek reimbursement for the second group, not the first.

The next sections of this brief overview synthesize the obligations of school districts to students in each of these two groups, first under the IDEA and second under Section 504 and the ADA. As the synthesis reveals, the significance of the distinction is legally limited to the initial obligations of school districts under the IDEA, but practically extends to confusion as to the entity--school district of residence, school district of location, or the private school--under the IDEA, Section 504, and the ADA. Finally, the scope of the synthesis does not extend to any additional obligations under state laws. [6]

I. The IDEA

The IDEA's differentiation of the two groups of private school students addresses the *immediate* issues of what is the extent of the evaluation/service obligation and which is the affected school district--the one where the student resides or, if different, the one where the private school is located? [7] However, the confusion lies in the *residual* question of whether the district of residence has any concurrent obligation to these students. For the answer, the courts have conflated the two groups. [8]

Voluntarily Placed

In the wake of a substantial case law interpreting the ambiguity in the IDEA,[9] the 2004 amendments and the 2006 regulations set for a relatively clear, albeit rather complicated, process that basically obligates the district of location to provide (1) child find, and, after a prescribed consultation process based on overall proportionate amount, (2) equitable participation.[10]

The residual question is: what obligation, if any, does the district of residence have to these children under the IDEA? Increasing legal authority provides an answer surprising or at least not known by many affected parties-- that the district of residence must offer FAPE[11] via a proposed IEP for the ***690** child when the parents have requested or at least expressed a willingness to participate in this process. This authority started with a lengthening line of case law in one jurisdiction[12] and the commentary accompanying the IDEA regulations,[13] but it has extended on a conflated basis with the corresponding case law in the context of unilaterally placed students.[14]

Unilaterally Placed

Somewhat similarly, the IDEA legislation and regulations seem to address relatively clearly the legal obligations to this group of students. The pertinent provisions,[15] along with the Supreme Court decisions,[16] provide a contingent obligation for the school district of residence to reimburse the parent according to a multi-step test.[17]

However, the corresponding residual question is: what ongoing obligation, if any, does the district of residence have for the child during the extended period of the unilateral placement?[18] According to both case law ***691** and agency interpretation that generally conflate the two groups in the overall private school placement category, the answer appears to be that the district of residence must offer FAPE annually if there appears to be requisite parental interest.[19] Moreover, this obligation applies to the child find step for students not already identified as eligible under the IDEA regardless of whether the child ultimately meets the eligibility criteria.[20]

II. Section 504 and the ADA

Although subject to various other differences,[21] a few are key within the scope of this brief article. First, Section 504 and the ADA have a broader definition of disability than does the IDEA.[22] Second, Section 504 only applies to public or private schools that receive federal financial assistance, while the ADA, in relevant part (Title II), extends to other private schools except those that are religiously controlled.[23] Finally, the scope of FAPE is ***692** wider under Section 504 than under the IDEA,[24] but private schools' obligation is conditioned on doing so only to the extent of "minor adjustments,"[25] whereas the ADA provides an overlapping obligation to provide "reasonable modifications."[26]

Absent a contrary state law,[27] neither the school district of residence nor the school district of location has any obligation under Section 504 and the ADA to children with disabilities in the aforementioned[28] private school categories.[29] Instead, the private school is the responsible institution to the extent of coverage[30] and within what is referred to here with the broad rubric of "qualified FAPE."[31]

Visual Summary

The following table serves as a visual organizer to summarize the applicable institution and obligations under the IDEA and Section 504/ADA for parentally-, rather than district-, placed private school students. The labels "initial"

and "ongoing" refer to the immediate and residual obligation issues.[32] The entries of "X" and "(X)" simply refer as approximate abbreviations for a FAPE offer, including any requisite evaluation, and a more limited obligation of qualified FAPE, respectively.

	DISTRICT OF RESIDENCE	DISTRICT OF LOCATION	PRIVATE SCHOOL
IDEA			
- voluntarily placed			
• initial		(X)	
• ongoing	X		
- unilaterally placed			
• initial	(X)		
• ongoing	X		
Sec. 504/ADA			(X)

***693** The entries for the "ongoing" obligation of the district of residence under the IDEA and the absence of any entries for school districts under Section 504/ADA merit particular practical attention.

Recommendations

Subject to applicable state law and consultation with local counsel, the following proactive suggestions are a practical starting point for the district of residence based on current legal authority:[33]

• Limit your efforts for "504-only"[34] students in private schools to optional cooperative activities (unless state law provides otherwise).

• Keep track of children with disabilities or suspected of having disabilities that parents who are residents of your district have placed voluntarily or unilaterally in private schools.

• In addition to fulfilling your obligations to voluntarily placed students in private schools within the boundaries of your district,[35] each year initiate the process to propose an IEP, including any necessary evaluation, for any IDEA-eligible child who is a resident of your district and in a private school, regardless of whether voluntarily or unilaterally placed.[36] Document the invitation and the response or lack thereof, and continue the process for parents who do not expressly decline the invitation.[37]

Footnotes

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1 *E.g.*, Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 Ed. Law Rep. 886 (2017) (systematically identifying the differences among the IDEA, Section 504, and the ADA for K-12 students).

2 Inevitably, confusion also arises for the limited cases of unusual situations that the IDEA legislation and regulations did not anticipate. *See, e.g.*, *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 345 Ed.Law Rep. 666 (5th Cir. 2017) (customizing an answer to a district's specific, sequential obligations to a student with a disability whose residence changed from a district in state A to a district in state B while in a private school placement in state B and with belated notice to the new district of residence).

3 34 C.F.R. §§ 300.145-300.147 (2015) (heading). This third group is not the focus of this brief analysis. For the Section 504 case law for this excluded group, see, e.g., *Smith v. Tobinworld*, 68 IDELR ¶ 47 (N.D. Cal. 2016); *C.D. v. N.Y.C. Dep't of Educ.*, 52 IDELR ¶ 8 (S.D.N.Y. 2009).

4 34 C.F.R. § 300.130.

5 *Id.* § 300.148 (heading). These 2006 regulations rather obviously tried to clarify the differences between what the 2004 amendments referred to as "children enrolled in private schools by their parents." and "children enrolled in private schools without consent of or referral by public agencies." 20 U.S.C. §§ 1412(a)(10)(A) and 1412(a)(10)(C) (2014).

6 *E.g., Special Sch. Dist. No. 1 v. R.M.M.,* 861 F.3d 769, 344 Ed.Law Rep. 766 (8th Cir. 2017) (ruling that voluntarily placed student had right to FAPE under Minnesota state law); *Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K.*, 926 N.E.2d 250, 256 Ed.Law Rep. 328 (N.Y. 2010) (ruling that voluntarily placed student had right to special education services on an equitable basis under New York's dual enrollment law).

7 "Immediate," and its contrasting term, "residual," here merely designate the distinction between the relatively obvious initial stage and the remaining obligation that is ongoing and often confused under the IDEA.

8 The reason appears to be that regardless of the route for the placement, the obligations overlap once the child is at the private school.

9 *E.g., Jasa v. Millard Pub. Sch.,* 206 F.3d 813, 142 Ed.Law Rep. 750 (8th Cir. 2000); *Cyrex v. Ascension Parish Sch. Bd.*, 189 F3d 467 (5th Cir. 1999); *Russman v. Bd. of Educ.*, 150 F.3d 219, 128 Ed.Law Rep. 576 (2d Cir. 1998).

10 20 U.S.C. § 1412(a)(10)(A) (2014); 34 C.F.R. §§ 300.130-300.147 (2015). For the limited applicable case law, see, e.g., *Bd. of Educ. of Appoquinimink Sch. Dist. v. Johnson*, 543 F.Supp.2d 351, 231 Ed.Law Rep. 794 (D. Del. 2008) (ruling that district's equitable services obligation did not extend to provision of a 1:1 interpreter, which would have been more than ten times the district's proportionate share for all parentally placed private school children).

11 This obligation is for the proposal, not the provision, of FAPE. *See, e.g., I.H. v. Cumberland Valley Sch. Dist.,* 842 F.Supp.2d 762, 771, 281 Ed.Law Rep. 1057 (M.D. Pa. 2012) ("it is necessary to distinguish between the provision of a FAPE and the provision of an IEP, which is, in essence, an offer of FAPE").Ê It also includes the foundational obligation of evaluation or reevaluation where part of this proposal process. *See infra* note 12.

12 *E.g.*, *Lague v. District of Columbia*, 130 F.Supp.3d 305, 328 Ed.Law Rep. 207 (D.D.C. 2015) (where parents expressed willingness to participate); *District of Columbia v. Oliver*, 62 IDELR ¶ 293 (D.D.C. 2014); *District of Columbia v. Wolfire,Ê*10

F.Supp.3d 89, 309 Ed.Law Rep 684 (D.D.C. 2014); *District of Columbia v. Vinyard*, 971 F.Supp.2d 103, 302 Ed.Law Rep. 1064 (D.D.C. 2013) (where parents requested evaluation and IEP).

13 71 Fed. Reg. 46,593 (Aug. 14, 2006) ("[B]ecause most States generally allocate the responsibility for making FAPE available to the LEA in which the child's parents reside, and that could be a different LEA from the LEA in which the child's private school is located, parents could ask two different LEAs toÊevaluate their child for different purposes at the same time .... If a determination is made by the LEA where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child."). For consistent, more recent iterations of this agency interpretation, see *Letter to Eig*, 52 IDELR § 136 (OSEP 2009); *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, 47 IDELR ¶ 197 (OSERS 2007).

14 *See infra* note 19.

15 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148.

16 *Forest Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) (ruling that the child's lack of previous enrollment in special education did not preclude application of the reimbursement test); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 86 Ed.Law Rep. 41 (1993) (ruling that parents are not held to the same standards as districts, thus making the second step of the test relatively relaxed); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 23 Ed.Law Rep. 1189 (1985) (setting forth the three-part test for tuition reimbursement--appropriateness of district's proposed placement, appropriateness of the parent's unilateral placement, and application of the equities).

17 For a detailed flowchart outline with illustrative case law applications, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed. Law Rep. 785 (2012).

18 The extension of this period into multiple years starts with period from when the parents "knew or should have known" of the alleged violation to their filing for a due process hearing (20 U.S.C. §§ 1415(b)(6)(b) and 1415(f)(3)(C)-(D) and continues during the "stay-put" period after the filing date (*id.* § 1415(j)), which may well last more than a year, especially if either or both parties appeal the hearing officer's decision). For questionable authority that this FAPE-offer obligation only applies during stay-put, see *M.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 536,169 Ed.Law Rep. 59 (4th Cir. 2002).

19 The applicable authority varies as to whether the trigger is parental request or, in effect, parental waiver. *E.g., Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 319 Ed.Law Rep. 641 (2d Cir. 2015), *cert. denied*, 136 S.Ct. 2022 (2016) (not conditioned on parental action, selectively relying on the agency interpretation for voluntarily placed private school students); *M.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 169 Ed.Law Rep. 59 (4th Cir. 2002) (continuing obligation, without addressing any requisite trigger, but only during stay-put period); *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F.Supp.2d 1057, 276 Ed.Law Rep. 196 (D.N.J. 2011) (where parents asked the district to reevaluate and propose an IEP--analyzing a unilaterally placed child under the voluntarily placed statutory and case law); *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635, 279 Ed.Law Rep. 229 (S.D.N.Y. 2011) (where parents requested an evaluation); *District of Columbia v. Abramson*, 493 F.Supp.2d 80, 222 Ed.Law Rep. 207 (D.D.C. 2007) (where district refused to continue the evaluation and IEP process--analyzing a unilaterally placed child under the voluntarily placed statutory and case law). *But cf. D.C. v. Klein Indep. Sch. Dist.*, 711 F.Supp.2d 739, 260 Ed.Law Rep. 176 (S.D. Tex. 2010) (ruling that the obligation does not extend to students in a unilateral placement that is out-of-state). For a nuanced discussion as to the requisite trigger, see *Shane T. v. Carbondale Area School District*, 70 IDELR ¶ 259 (M.D. Pa. 2017) (interpreting the benefit of doubt in favor of the parent upon ambiguous intent after re-enrollment). An altogether alternate approach is to consider the parents' reasonably understood intent only as part of the final, equities step of tuition reimbursement analysis. *E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist.*, 60 IDELR ¶ 31 (S.D.N.Y. 2012) (concluding that the parents' expression of intent was not the dispositive, threshold factor).

20 *E.g.*, *M.A. v. Torrington Bd. of Educ.*, 980 F.Supp.2d 245, 304 Ed.Law Rep. 384 (D. Conn. 2013) (rejecting district refusal to continue evaluation process upon unilateral placement). *But cf. S.B. v. San Mateo Foster City Sch. Dist.*, 2017 WL 4856868 (N.D. Cal. Apr. 11, 2017) (harmless procedural violation if student is not eligible).

21 *See supra note* 1.

22 *Compare* 29 U.S.C. § 705(20) (2015) (Section 504); 42 U.S.C. § 12102(1) (2015) (ADA), *with* 34 C.F.R. § 300.8 (IDEA). *See, e.g.*, *Franchi v. New Hampton Sch.*, 656 F.Supp.2d 352, 252 Ed.Law Rep. 139 (D.N.H. 2011) (ruling that private school student with severe eating disorder qualified under ADA definition of disability).

23 20 U.S.C. § 794 (Section 504); 42 U.S.C. §§ 12181(7)(J) and 1287 (ADA Title II). *See, e.g., Doe v. Abington Friends Sch.*, 480 F.3d 252, 217 Ed.Law Rep. 89 (3d Cir. 2007) (ruling that the parents were entitled to discovery in ADA suit as to whether the school qualified for the exemption for religiously controlled organization); *Russo v. Diocese of Greensburg*, 55 IDELR ¶ 98 (W.D. Pa. 2010) (ruling that Section 504 applied to parochial school based on its participation in federal E-rate program); *Spann v. Word of Faith Christian Ctr. Church*, 589 F.Supp.2d 759, 240 Ed.Law Rep. 626 (S.D. Miss. 2008) (ruling that Section 504 applied to parochial school based on student enrollees with federal vouchers and that further proceedings were needed to determine whether the school qualified for exemption under the ADA).

24 *Compare* 34 C.F.R. § 104.33(b) (general or special education and related services), *with id.* § 300.17(special education and related services). However, the child find and other procedural obligations does not appear to extend to private schools, instead being limited to students in public schools. *Id.* § 104.35.

25 *Id.* § 104.39(a). *See, e.g.*, *Hunt v. St. Peter Sch.*, 963 F.Supp. 843, 118 Ed.Law Rep. 663 (W.D. Mo. 1997) (ruling that parochial school's maintenance of voluntary scent-free environment satisfied applicable 'minor adjustment' standard for child with severe scent-based asthmatic allergy).

26 42 U.S.C. § 12182(b)(2)(A)(ii) (when necessary unless fundamental alteration). *See, e.g., U.S. v. Nobel Learning Cmties, Inc.*, 676 F.Supp.2d 379, 254 Ed.Law Rep. 180 (E.D. Pa. 2009) (dismissing reasonable modification claim as applied to private organization's elementary and secondary, but not preschool, programs). The ADA clarifies that its obligations generally do not provide lesser standards than those of Section 504. 42 U.S.C. § 12201(b). However, it is unclear whether this particular ADA Title II obligation provides a higher and superseding standard than Section 504's qualified FAPE obligation for private schools.

27 *E.g., Lower Merion Sch. Dist. v. Doe*, 931 A.2d 640, 224 Ed.Law Rep. 312 (Pa. 2007) (ruling that child meeting § 504 definition of disability was entitled to related services from district of residence under state dual enrollment law).

28 For the applicable and not clearly settled triggering standard, *see supra* text accompanying notes 4-5.

29 *D.L. v. Baltimore City Bd. of Sch. Comm'rs*, 706 F.3d 256, 289 Ed.Law Rep. 493 (4th Cir. 2013).

30 *See supra* notes 22-23 and accompanying text.

31 *See supra* notes 24-25 and accompanying text. The rubric of qualified FAPE is merely an approximate abbreviation that covers the pertinent variations that are less than a full offer or provision of FAPE.

32 *See supra* note 7.

33 The case law is not clearly settled for all jurisdictions, but these recommendations are offered only on a qualified, proactive basis.

34 The term "504-only" refers to students who meet the broad definition of disability under Section 504/ADA but do not also meet the narrower definition of disability under the IDEA. *See, e.g.*, Perry A. Zirkel & John M. Weathers, *K-12 Students Eligible Solely under Section 504: Updated National Incidence Data*, 27 J. DISABILITY POL'Y STUD. 67 (2016) (finding that "504-only" students amounted to approximately 1.5% of the school population nationally based on the 2011-2012 Civil Rights Collection Data).

35 *See supra* note 10 and accompanying text.

36 The case law is not settled with regard to whether this obligation is limited to private schools within the same state as the district of residence. *Compare District of Columbia v. Abramson*, 493 F.Supp.2d 80, 222 Ed.Law Rep. 207 (D.D.C. 2007) (applying the obligation to student unilaterally placed out of state), *with D.C. v. Klein Indep. Sch. Dist.*, 711 F.Supp.2d 739, 260 Ed.Law Rep. 176 (S.D. Tex. 2010) (ruling that the obligation does not extend to students in a unilateral placement that is out-of-state).

37 *See supra* notes 13 and 19.

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