



The Individuals with Disabilities Education Act (IDEA): Private Schools

(name redacted)

Legislative Attorney

March 10, 2011

Congressional Research Service

7-....

www.crs.gov

R41678

Summary

The Individuals with Disabilities Education Act (IDEA) is a grants and civil rights statute which provides federal funding to the states to help provide education for children with disabilities. If a state receives funds under IDEA, it must make available a free, appropriate public education (FAPE) for all children with disabilities in the state. Education for children with disabilities in private schools is included in IDEA, but the requirements of the statute for children in private schools are not always the same as the requirements for children with disabilities in public schools.

Under current law, there are several ways a child with a disability may be placed in a private school, and the LEA's responsibilities under IDEA vary depending on the type of placement. A child with a disability may be placed in a private school by the local education agency (LEA) or state educational agency (SEA) as a means of fulfilling the FAPE requirement for the child. In this situation, the full cost is paid for by the LEA or the SEA. A child with a disability may also be unilaterally placed in a private school by his or her parents. In this situation, the cost of the private school placement is not paid by the LEA unless a hearing officer or a court makes certain findings. However, IDEA does require some services for children in private schools, even if they are unilaterally placed there by their parents, and there is no finding that FAPE was not made available to the child. In this situation, IDEA requires that a proportionate amount of the federal funds shall be made available.

Contents

Introduction	1
Background	1
Current Law on Private School Placement	2
Types of Private School Placement	2
Children Enrolled by Their Parents in Private Schools	3
Private School Placement Where FAPE Is at Issue	3
Parental Private School Placement Where FAPE Is Not at Issue	5

Contacts

Author Contact Information	7
----------------------------------	---

Introduction

The Individuals with Disabilities Education Act (IDEA) is a grants and civil rights statute which provides federal funding to the states to help provide education for children with disabilities.¹ If a state receives funds under IDEA, it must make available a free, appropriate public education (FAPE) for all children with disabilities in the state.² Another key requirement of IDEA is “child find” which requires that all children with disabilities be located, identified, and evaluated.³ Education for children with disabilities in private schools is included in IDEA, but the requirements of the statute for children in private schools are not always the same as the requirements for children with disabilities in public schools. For example, there are specific requirements delineated regarding private schools.⁴ Issues concerning what services are required for children with disabilities placed in private schools, and who is to pay for these services, have been a continuing source of controversy under IDEA.⁵

Background

Under the law prior to the enactment of P.L. 105-17 in 1997, states were required to set forth policies and procedures to ensure that provision was made for the participation of children with disabilities who are enrolled in private schools by their parents consistent with the number and location of these children. These requirements were further detailed in regulations which required that local education agencies (LEAs) provide private school students an opportunity for equitable participation in program benefits and that these benefits had to be “comparable in quality, scope, and opportunity for participation to the program benefits” provided to students in the public schools.⁶ The vagueness of the statute and the “equitable participation” standard led to differences among the states and localities and to differences among the courts. Prior to P.L. 105-17, the courts of appeals that had considered these issues had sharply divergent views. Some courts gave local authorities broad discretion to decide whether to provide services for children with disabilities in private schools, which generally resulted in fewer services to such children,⁷ while others attempted to equalize the costs for public and private school children.⁸ The Supreme Court

¹ 20 U.S.C. §1400 *et seq.* For a general discussion of the statute see CRS Report R40690, *The Individuals with Disabilities Education Act (IDEA): Statutory Provisions and Recent Legal Issues*, by (name redacted).

² 20 U.S.C. §1412(a)(1)(A). In addition to the requirements of IDEA, schools must also comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq.*, where applicable. For a discussion of the interrelationship of these statutes see CRS Report R40123, *Education of Individuals with Disabilities: The Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (ADA)*, by (name redacted).

³ 20 U.S.C. §1412(a)(3).

⁴ 20 U.S.C. §1412(a)(10)(A)(ii).

⁵ One of the issues which has received more attention recently is the cost of private school placement. See e.g., “Across the Nation,” 44 EDUCATION DAILY 2 (March 2, 2011), where it was noted that the New York City School Chancellor was looking at the costs of private school reimbursement.

⁶ 34 C.F.R. §§ 76.651-76.662 (1996).

⁷ See e.g., *Goodall v. Stafford County Public School Board*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, 502 U.S. 864 (1991); *K.R. v. Anderson*, 81 F.3d 673 (7th Cir. 1996), *vac.* 521 U.S. 1114 (1997), 125 F.3d 1017 (7th Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998).

⁸ See e.g., *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996), *vac.* 521 U.S. 1114 (1997), on remand, 150 F.3d 219 (2d Cir. (continued...))

had granted *certiorari* in several of these cases, but when Congress rewrote the law in 1997, the Court vacated and remanded these cases.

The IDEA Amendments of 1997 rejected the “equitable participation” standard and provided that to the extent consistent with the number and location of children with disabilities in the state who were enrolled in private schools by their parents, provision was made for the participation of these children in programs assisted by Part B by providing them with special education and related services.⁹ The amounts expended for these services by an LEA were to be equal to a proportionate amount of federal funds made available to the local educational agency under Part B of IDEA. These services could be provided to children with disabilities on the premises of private schools, including parochial, elementary, and secondary schools.¹⁰ There was also a requirement that the statutory provisions relating to “child find,” identifying children with disabilities, are applicable to children enrolled in private schools, including parochial schools.¹¹

Much of the 1997 language regarding private schools was kept in the 2004 reauthorization, but changes to these provisions were made, and these are discussed in more detail in the subsequent discussion of current law. Generally, the Senate report observed that “the intent of these changes is to clarify the responsibilities of LEAs to ensure that services to these children are provided in a fair and equitable manner.”¹² In addition, the Senate report stated that “many of the changes reflect current policy enumerated either in existing IDEA regulations or the No Child Left Behind Act.”¹³ The House report noted that “the bill makes a number of changes to clarify the responsibilities of local educational agencies to children with disabilities who are placed by their parents in private schools. The Committee feels that these are important changes that will resolve a number of issues that have been the subject of an increasing amount of contention in the last few years.”¹⁴

Current Law on Private School Placement

Types of Private School Placement

Under current law, there are several ways a child with a disability may be placed in a private school, and the LEA’s responsibilities under IDEA vary depending on the type of placement. A child with a disability may be placed in a private school by the LEA or state educational agency (SEA) as a means of fulfilling the FAPE requirement for the child. In this situation, the full cost is paid for by the LEA or the SEA. A child with a disability may also be unilaterally placed in a private school by his or her parents. In this situation, the cost of the private school placement is

(...continued)

1998).

⁹ P.L. 105-17, §612(a)(10)(A). Part B contains the state formula grant program, the requirement for a free appropriate public education, and due process protections for children with disabilities.

¹⁰ *Id.*

¹¹ P.L. 105-17, §612(a)(10)(A)(ii).

¹² S.Rept. 108-185, 108th Cong. 1st Sess. 15 (2003).

¹³ *Id.*

¹⁴ H.Rept. 108-77, 108th Cong., 1st Sess. 94 (2003).

not paid by the LEA unless a hearing officer or a court makes certain findings. IDEA states in part,

(ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT.—If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of the enrollment 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.¹⁵

However, IDEA does require some services for children in private schools, even if they are unilaterally placed there by their parents, and there is no finding that FAPE was not made available to the child. In this situation, IDEA requires that a proportionate amount of the federal funds shall be made available.¹⁶

Children Enrolled by Their Parents in Private Schools

Private School Placement Where FAPE Is at Issue

As noted previously, sometimes parents place their child in a private school when they disagree with the LEA concerning whether the LEA can provide FAPE. In *School Committee of the Town of Burlington v. Department of Education of Massachusetts*, the Supreme Court held that the statutory provision granting courts the right to grant such relief as the court deems appropriate includes the power to order school authorities to reimburse parents for private school expenditures.¹⁷ However, this reimbursement is permitted only if a court ultimately determines that the private school placement, rather than a proposed individualized education program (IEP),¹⁸ is proper under the act.

The reimbursement may be reduced or denied if the child's parents did not give certain notice,¹⁹ if the parents did not make the child available for an evaluation by the LEA,²⁰ or if a court finds the parents' actions unreasonable.²¹ The cost of reimbursement is not to be reduced or denied for the failure to provide notice if

- the school prevented the parent from providing such notice,

¹⁵ 20 U.S.C. § 1412(a)(10)(C)(ii).

¹⁶ 20 U.S.C. §1412(a)(10). For a detailed discussion of these requirements see U.S. Department of Education, "Provisions Related to Children with Disabilities Enrolled by Their Parents in Private Schools," (Feb. 2008) <http://www.rfnetwork.org/images/stories/FRC/IDEA/idea.pdf>.

¹⁷ 471 U.S. 359 (1985).

¹⁸ An IEP is the way FAPE is implemented. It is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 614(d)." 20 U.S.C. §1401(14). Section 614(d), 20 U.S.C. §1414(d), provides in part that the IEP must include a statement of the child's present levels of academic achievement, and a statement of measurable annual goals. For a more detailed discussion of IEPs see CRS Report R40690, *The Individuals with Disabilities Education Act (IDEA): Statutory Provisions and Recent Legal Issues*, by (name redacted).

¹⁹ 20 U.S.C. §1412(a)(10)(C)(iii)(I).

²⁰ 20 U.S.C. §1412(a)(10)(C)(iii)(II).

²¹ 20 U.S.C. §1412(a)(10)(C)(iii)(III).

- the parents had not received notice of the notice requirement, or
- compliance would likely result in physical harm to the child.²²

In addition, at the discretion of a court or hearing officer, the reimbursement may not be reduced or denied if

- the parent is illiterate or cannot write in English or
- compliance with the notice requirement would likely result in serious emotional harm to the child (§612(a)(10)(C)(iv)).²³

The issue of whether FAPE has been or will be provided is a complex one that has been at the crux of many judicial decisions, including those concerning reimbursement for parental private school placement. The first IDEA case to reach the Supreme Court, *Board of Education of the Hendrick Hudson Central School District v. Rowley*,²⁴ remains a seminal decision on the requirements of FAPE. The Court held in *Rowley* that the requirement of FAPE is met when a child is provided with personalized instruction with sufficient support services to benefit educationally from that instruction. This instruction must be provided at public expense, meet the state's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP. *Rowley's* application to particular fact patterns remains a much-litigated issue.²⁵

The Supreme Court has also addressed the issue of whether parents can receive reimbursement from an LEA for unilaterally placing their child in a private school even if the child has never received IDEA services. In the Supreme Court's most recent IDEA decision, *Forest Grove School District v. T.A.*,²⁶ the Court held that IDEA authorized reimbursement for private special education services when a public school fails to provide FAPE and the private school placement is appropriate, regardless of whether the child previously received special education services through the public school. The Court emphasized that "[i]t would be particularly strange for the Act to provide a remedy ... when a school district offers a child inadequate ... [special education] services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether."²⁷

Recent lower court decisions have held that if the child is making some educational progress and the public school has provided an IEP calculated to provide for continued progress, the requirements of FAPE are met and the child is not entitled to a private school placement.²⁸ For example, in *M.H. and J.H. v. Monroe-Woodbury Central School District*,²⁹ the court found that

²² 20 U.S.C. §1412(a)(10)(C)(iv)(I).

²³ 20 U.S.C. §1412(a)(10)(C)(iv)(II). Previous law had included a provision requiring that reimbursement not be reduced or denied if a parent is illiterate and had included "serious emotional harm." P.L. 105-17, §612(a)(10).

²⁴ 458 U.S. 176 (1982).

²⁵ For a discussion of court of appeals cases discussing *Rowley* since the last IDEA reauthorization in 2004 see CRS Report R40521, *The Individuals with Disabilities Education Act (IDEA): Selected Judicial Developments Following the 2004 Reauthorization*, by (name redacted).

²⁶ 557 U.S. ___, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009).

²⁷ *Id.* at 2495, 182.

²⁸ *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008), cert. den. 557 U.S. ___, 129 S.Ct. 1356, 176 L.Ed. 590 (2009); *K.J. v Fairfax County School Board*, 39 Fed. Appx. 921 (4th Cir. 2010).

²⁹ 250 Fed. Appx. 428 (2d Cir. 2007).

the child's IEP was adequate and, therefore, the parents were not entitled to tuition reimbursement for a private school placement. These same standards have been applied when parents seek to place their child in a private school different from the private school where the school district has placed the child.³⁰ In addition, if a private school does not adequately address the child's educational needs, the court may not require private school tuition reimbursement.³¹

Courts have held that reimbursement for private school tuition is barred if parents arrange for private school educational services without notifying the LEA of their problems with their child's IDEA services.³² Reimbursement is also barred if the parents act unreasonably in their relations with the school³³ or if the allegation concerns procedural violations that do not rise to a level of substantive harm.³⁴

Parental Private School Placement Where FAPE Is Not at Issue

Provision of Education

Children with disabilities may be unilaterally placed in a private school by their parents in situations where the parents do not argue for tuition reimbursement. Generally, children with disabilities enrolled by their parents in private schools are to be provided special education and related services to the extent consistent with the number and location of such children in the school district served by a LEA pursuant to several requirements.³⁵ This general provision was changed in 2004 from previous law by the addition of the requirement that the children be located in the school district served by the LEA. In other words, the LEA responsible for implementing IDEA is the LEA in the area where the private school is located. The Senate report described this change as protecting "LEAs from having to work with private schools located in multiple jurisdictions when students attend private schools across district lines."³⁶ Although the intent was to protect LEAs from working with private schools in multiple jurisdictions, this provision has generated considerable controversy. A detailed discussion of this issue is beyond the scope of this report; however, several of the issues raised include the disproportional effect on LEAs with large concentrations of private schools, the lack of change in the funding formula to reflect the change, and potential conflicts with state laws.³⁷

³⁰ M.H. and J.H. v. Monroe-Woodbury Central School District, 296 Fed. Appx. 126 (2d Cir. 2008), cert. den. 557 U.S. ___, 129 S.Ct. 1584, 173 L.Ed. 2d 676 (2009).

³¹ Lauren P. v. Wissahickon School District, 310 Fed. Appx. 552 (3d Cir. Feb. 12, 2009). Similarly, if the private placement is determined to be for medical, not educational, reasons, reimbursement is not required. Courtney v. School District of Philadelphia, 575 F.3d 235 (3d Cir. 2009).

³² See Frank G. v. Board of Education, 459 F.3d 356 (2d Cir. 2006), cert. den. 552 U.S. 985 (2007); Carmel Central School District v. V.P., 192 Fed. Appx. 62 (2d Cir. 2006); K.J. v Fairfax County School Board, 39 Fed. Appx. 921 (4th Cir. 2010).

³³ 20 U.S.C. §1412(a)(10)(C)(iii)(III). See C.G. and B.S. v. Five Town Community School District, 513 F.3d 279 (1st Cir. 2008), where the court held that the parents' "single-minded refusal to consider any placement other than a residential one" was unreasonable; C.H. v. Cape Henlopen School District, 606 F.3d 59 (3d Cir. 2010), where the court held that the parents' disregard of their obligation to cooperate and assist in the formation of an IEP was unreasonable.

³⁴ C.H. v. Cape Henlopen School District, 606 F.3d 59 (3d Cir. 2010); Anello v. Indian River School District, 355 Fed. Appx. 594 (3d Cir. 2009).

³⁵ 20 U.S.C. §1412(a)(10)(A)(i).

³⁶ S.Rept. 108-185, 108th Cong., 1st Sess. 15-16 (2003).

³⁷ For a more detailed discussion of this issue, see CRS Report RL33368, *The Individuals with Disabilities Education* (continued...)

Specific Requirements Regarding Parentally Placed Children

In addition to the general LEA responsibility discussed above, there are also five specific requirements regarding parentally placed children:

- Funds expended by the LEA, including direct services to parentally placed private school children, shall be equal to a proportionate amount of federal funds made available under part B of IDEA.
- The LEA, after timely and meaningful consultation with representatives of private schools, shall conduct a thorough and complete child find process to determine the number of children with disabilities who are parentally placed in private schools.
- Services may be provided to children on the premises of private, including religious, schools, to the extent consistent with law.
- State and local funds may supplement, but not supplant, the proportionate amount of federal funds required to be expended.
- Each LEA must maintain records and provide to the SEA the number of children evaluated, the number of children determined to have disabilities, and the number of children served under the private school provisions.³⁸

However, although IDEA does require services to parentally placed children, it should be emphasized that no parentally placed child has an individual right to receive the services that child would receive if enrolled in the public school.³⁹

Consultation

IDEA contains requirements concerning LEA consultation with private school officials and representatives of the parents of parentally placed private school children with disabilities. This consultation is to include

- the child find process and how parentally placed private school children with disabilities can participate equitably;
- the determination of the proportionate amount of federal funds available to serve parentally placed private school children with disabilities, including how that amount was calculated;

(...continued)

Act (IDEA): Parentally Placed Children in Private Schools, by (name redacted) and (name redacted). See also "Questions and Answers on Serving Children with Disabilities Placed by their Parents at Private Schools," Department of Education (March 2006), reprinted at <http://www.ed.gov/policy/spced/guid/idea/faq-parent-placed.pdf>.

³⁸ 20 U.S.C. §1412(a)(10)(i). IDEA contains specific provisions relating to child find. See 20 U.S.C. §1412(a)(10)(ii).

³⁹ 20 U.S.C. §1412(a)(1)(A)(i); 34 C.F.R. §300.137 (2010). However, children with disabilities who have been designated by the LEA to receive services must have a service plan developed. This plan describes the specific special education and related services that the LEA will provide to the child. 34 C.F.R. §§300.132, 300.137, 300.138, and 300.139 (2010).

- the consultation process among the LEA, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how the process will operate;
- how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of the types of services (including direct services and alternate service delivery mechanisms), how the services will be apportioned if there are insufficient funds to serve all children, and how and when these decisions will be made; and
- how the LEA shall provide a written explanation to private school officials of the reasons why the LEA chose not to provide services if the LEA and private school officials disagree.⁴⁰

A written affirmation of the consultation signed by the representatives of the participating private schools is required by the law. If the private school representatives do not sign within a reasonable period of time, the LEA shall forward the documentation to the SEA.⁴¹

A private school official has the right to submit a complaint to the SEA alleging that the LEA did not engage in meaningful and timely consultation or did not give due consideration to the views of the private school official. If a private school official submits a complaint, he or she must provide the basis of the noncompliance to the SEA, and the LEA must forward the appropriate documentation. If the private school official is dissatisfied with the SEA's determination, he or she may submit a complaint to the Secretary of Education, and the SEA shall forward the appropriate documentation to the Secretary.⁴² The general IDEA due process procedures are not applicable for children parentally placed in private schools where FAPE is not an issue except where the complaint concerns child find.⁴³

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

Acknowledgments

This report was initially authored by (name redacted)

⁴⁰ 20 U.S.C. §1412a(10)(A)(iii).

⁴¹ 20 U.S.C. §1412a(10)(A)(iv).

⁴² 20 U.S.C. §1412a(10)(A)(v).

⁴³ 34 C.F.R. §300.140(a)(2010).

EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.