A Moving Experience: The Law Pertaining to Interstate and Intrastate Transfers

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a deeper understanding of the requirements pertaining to the education of transfer students with disabilities under the IDEA. This material does not include every aspect of the law and you are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this material is to provide special educators with information about the requirements pertaining to educating children with disabilities who transfer during the school year. This material does not cover all aspects of the Individuals with Disabilities Education Act ("IDEA").

II. The IDEA Requirements

A. Intra-State Transfers

When "a child with a disability (who had an IEP that was in effect in a previous [school district] in the same State) transfers to a new [school district] in the same State, and enrolls in a new school within the same school year, the new [district] (in consultation with the parents) must provide a [free, appropriate public education (FAPE)] to the child (including services comparable to those described in the child's IEP from the previous school district), until the new [district] either:

- Adopts the child's IEP from the previous district; or
- Develops, adopts, and implements a new IEP that meets the IDEA requirements."

20 USC 1414(d)(2)(C)(i)(2); 34 CFR 300.323(e); Ed 1109.03 (requiring compliance with 34 CFR 300.323).

The Office of Special Education and Rehabilitative Services, U.S. Department of Education ("OSERS") interprets the word "comparable" to have the "plain meaning of the word, which is 'similar,' or 'equivalent.' Therefore, when used with respect to a child who transfers to a new public agency from a previous public agency in the same State (or from another State) 'comparable' services means services that are 'similar' or 'equivalent' to those that were described in the child's IEP from the previous public agency, as determined by the child's newly-designated IEP Team in the new public agency." Fed. Reg. Vol. 71, No. 156 at 46681 (Aug. 14, 2006).

The Office of Special Education Programs ("OSEP") has also opined that the requirement to provide "comparable services" includes a duty to provide "temporary goals aligned with the annual goals in the student's prior IEP." Letter to Finch, 56 IDELR 174 (OSEP Aug. 5, 2010).

B. Inter-State Transfers

When "a child with a disability (who had an IEP that was in effect in a previous [school district] in another State) transfers to a [school district] in a new State, and enrolls in a new school within the same school year, the new [district] (in consultation

with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous [school district]), until the new [district]:

- Conducts an evaluation . . . (if determined to be necessary by the new [district]); and

- Develops, adopts, and implements a new IEP, if appropriate, that meets the [IDEA] requirements."

20 USC 1414(d)(2)(C)(i)(2); 34 CFR 300.323(f); Ed 1109.03 (requiring compliance with 34 CFR 300.323).

OSERS has opined that if the new public agency proposes to conduct an evaluation, it "would be to determine if the child is a child with a disability and to determine the educational needs of the child. Therefore, the evaluation would not be a reevaluation, but would be an initial evaluation by the new public agency, which would require parental consent." Fed. Reg. Vol. 71, No. 156 at 46682 (Aug. 14, 2006).

OSERS has also opined that "[b]ecause the child's evaluation in this situation is considered an initial evaluation, and not a reevaluation, the stay-put provision . . . does not apply. The new public agency would treat the student as a general education student and would not be required to provide the child with comparable services if a due process complaint is initiated to resolve the dispute over whether the evaluation should be conducted. . . . Similarly, if the parent does not provide consent for the new evaluation and the new public agency does not seek to override the parental refusal to consent to the new evaluation, the new public agency would treat the student as a general education student." Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 111 LRP 63322 (OSERS Sept. 1, 2011).

C. Miscellaneous Requirements

1. Transmittal of Records

When a student transfers to a new school district, the new district of residence and the old district of residence have obligations pertaining to student records.

The new district must "take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child" from the prior district where the student was enrolled.

The prior district must "take reasonable steps to promptly respond to the request from the new agency."

20 USC 1414(d)(2)(C)(ii); 34 CFR 300.323(g); Ed 1109.03 (requiring compliance with 34 CFR 300.323).

When a student moves from another state, OSERS has opined that if the new district of residence has taken "reasonable steps" to obtain a copy of the student's IEP (and other records), but has not been able to obtain the IEP from the prior district or the parent, then the new district of residence "is not required to provide special education and related services to the child." Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 111 LRP 63322 (OSERS Sept. 1, 2011) (emphasis added). However, "[e]ven if the parent is unable to provide the child's IEP from the previous public agency, if the new public agency decides that an evaluation is necessary because it has reason to suspect that the child has a disability, nothing in the IDEA or its implementing regulations would prevent the new public agency from providing special education services to the child while the evaluation is pending, subject to an agreement between the parent and the new public agency." Id.; see also Questions and Answers on Special Education and Homelessness, 110 LRP 212 (OSERS Feb. 1, 2008).

In Pikes Peak Bd. of Coop. Educational Svcs., 8 ECLPR 86 (Colo. State Educational Agency (SEA) Feb. 10, 2011), the parents filed a complaint against their new district of residence, alleging (in part) that the district failed to obtain records from the prior district in a timely fashion. Student was a preschool student who was eligible for special education services due to Autism. He transferred into the District in July 2010. Prior to that time, the parents informed the District of their upcoming move, and that the student had an IEP which they wanted the District to implement. Parents provided the new district with a copy of the IEP and offered to provide the new district with copies of the student's recent evaluations and other records. The new district informed parents that it would implement the transfer IEP (rather than develop its own). The district declined the parents offer to provide copies of additional records, opting instead to request the records from the prior district.

Student's new IEP Team met on several occasions over the summer and in early September. During that time, the district did not implement the transfer IEP, nor did it request records from the prior district until September 2010; it received the records shortly after making the request. The State found that this delay in requesting records was unreasonable given the "Parents' diligence in attempting to work with the [district] to effect a smooth transition and the fact that Student's age and disability render Student particularly vulnerable to gaps in service."

2. Evaluations

The new district of residence must ensure that assessments of children with disabilities who transfer in the same school year are coordinated with those children's

prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations. 34 CFR 300.304(c)(5); Ed 1107.01(a).

When a student enrolls in a school in a new school district after the 45 day evaluation time period has begun, and prior to the determination by the previous school district as to whether the child is a child with a disability, and if the new district of residence is "making sufficient progress to ensure a prompt completion of [an] evaluation, and the parent and [new district of residence] agree to a specific time when the evaluation will be completed," then the 45 day evaluation time period will not apply. 34 CFR 300.301(d)(2), (e); Ed 1107.01(a).

Districts may not use RTI to expand the time period for completing an evaluation for a transfer student. See Letter to State Director of Special Education, 61 IDELR 202 (OSEP July 19, 2013).

III. Case Law

A. Failure to provide services

Regional School Unit No. 51 v. John Doe, 2012 U.S. Dist. LEXIS 185359 (D. Me. Nov. 29, 2012), magistrate's order approved by 920 F.Supp.2d 168 (D. Me Jan. 29, 2013).

Facts: Student was referred for special education in January 2006, and was identified in May 2006 due to an "other health impairment," resulting from ADHD and executive functioning deficits. Student's Team developed an IEP that covered the period of May 2006-May 2007.

In the fall of 2006, when the student was in 5th grade, his parents unilaterally placed him in a private school. He also had a private tutor that would attend school with him for roughly 10-20 hours per week. Student did very well academically his 5th grade year.

Prior to the start of the 2007-08 school year, the student's parents moved to another school district in the same state, and enrolled the student in public school. Upon enrollment, parents informed the district that the student did not have a current IEP, and had not received special education services at the private school. The district informed the parent that they could refer him for special education if they wished. However, parents were concerned about the negative effects that testing would have on student, including possible lost class time, invasive testing, and self-esteem issues. As a result, the district convened a meeting to discuss the possibility of providing services under Section 504 without the need for further testing. Throughout this process, the Parent's believed he would not be eligible for special education without additional testing.

Student had some difficulties during the 2007-08 school year, and during the summer of 2008, the parents hired a tutor to work with the student, however, the student continued to show difficulties during his 7th grade year (2008-2009). In October 2008, the student's team met to review the Section 504 plan. The plan was left essentially the same.

During the 2009-10 school year, the student had difficulty following directions and completing his homework on time. He began to show defiance and was unable to engage even when redirected by a teacher. His Section 504 Plan was amended in the fall of 2009 to include two evenings of extra tutoring with one of the teachers. However, this stopped during ski season when the family would travel. In November, after the student had failed 3 courses, parents referred student for special education. In March 2010, student was identified as eligible for special education due to multiple disabilities (autism, OHI due to ADHD, and a specific learning disability in math). An IEP was developed in the spring of 2010.

Parents eventually decided to send the student to a private school in Massachusetts because they believed the proposed IEP was inappropriate. In the fall of 2011, after a successful 9th grade year, the student transferred to a residential school in New Hampshire.

Parents filed a request for due process, seeking reimbursement for the costs associated with their unilateral placements. Parents argued that the IEPs developed by the District for the 2010-11 and 2011-12 school years were inappropriate, and also that the student was entitled to compensatory educational services due to the District's failure to identify him from 2007 until 2010.

The hearing officer awarded parents reimbursement for the costs associated with their placement for the 2010-11 school year as compensatory education for the district's failure to identify the Student as eligible for special education from September 2007 to March 2010. The District appealed this decision. The hearing officer found in favor of the District as to the 2011-12 IEP, and the parents appealed that decision.

Held: The decision of the hearing officer was affirmed. The court first addressed the District's argument that portions of the parents' claims were barred by the IDEA's 2 year statute of limitations. The court rejected that argument, noting that the IDEA's 2 year limitations period does not apply if the parent was prevented from requesting due process because the district withheld information (such as procedural safeguards) from the parents.

The court found that the District had failed to provide the parents with their procedural safeguards in the fall of 2007. The court also found that the District should have done such, because the student was eligible for services under the IDEA in the fall of 2007, despite not having an existing IEP at the time he transferred to the District. The court noted that the District was not required to implement the IEP because it

expired in May 2007 and student transferred into the District over the summer of 2007, but that it should have developed an IEP for the 2007-08 school year, or conducted evaluations to determine whether the student was no longer eligible for services under the IDEA.

The court found that the District violated its "child find" obligations in the fall of 2007 by failing to recognize that, upon his transfer, he remained IDEA-eligible. Alternatively, even if he was not then IDEA-eligible, the district violated the IDEA by failing to refer him immediately for special education services. This violation continued until student ultimately was referred for special education services in 8th grade and identified in 2010.

The court affirmed the decision to reimburse the parents for the costs associated with the 2010-11 tuition. Finally, the court found that the District's 2011-12 IEP was appropriate and student would have received a FAPE if he had returned to the District. Therefore, parents were not entitled to reimbursement for the costs associated with the 2011-12 tuition.

Similarly, in Pillager Area Charter Sch. #4080, 110 LRP 65969 (Minn. SEA Sept. 1, 2010), the district was required to provide compensatory education (at least 50 hours in both math and social skills) and to provide staff with training regarding their obligations to transfer students, because it failed to provide a transfer student with services upon his enrollment in the district. The student was identified as having a specific learning disability, and received services for social skills and mathematics. The student enrolled in the District during the second half of the school year, but the District did not adopt the student's prior (existing) IEP or develop a new IEP. The student did not receive services in math or social skills, and although he had some initial success, he ultimately failed all of his classes except for English.

1. Private School Students

In Hancock County Schs., 111 LRP 2436 (W.Va. SEA Jan. 3, 2011), the parent filed a request for due process against the district, alleging that it failed to provide services to a transfer student who was home-schooled immediately prior to the transfer, and prior to that had previously received speech services through a service plan at a private school. The Hearing Officer found in favor of the district, noting that the student did not have an "existing" IEP at the time of the transfer. "[T]he LEA did not deny student FAPE by failing to implement an IEP which is more than one year old where the student is transferring to the public school from home school."

B. Extended School Year Services

OSEP has opined that "comparable services" includes extended school year services, when those services are required by a student's IEP. See Letter to State Director of Special Education, 61 IDELR 202 (OSEP July 19, 2013). As the following

case illustrates, it may be necessary to provide such services even if the student does not have an IEP.

Mountain Lakes Bd. of Educ., 48 IDELR 23 (NJ. SEA, Dec. 7, 2006).

Facts: Student and his parents moved to the Mountain Lakes School District on July 9, 2004. At that time, student, who was 6 years old, had been diagnosed with autism and was participating in an in-home extended school year program "arranged for by his parents." The program ran from July 9 to September 2, 2004 (the start of the 2004-05 school year). He did not have an IEP during the 2003-04 school year, however, when the parents moved to Mountain Lakes, they were involved in a dispute with their prior district pertaining to the student's placement for the 2003-04 school year.

Prior to their move, the parents contacted the Mountain Lakes School District on 2 separate occasions, to inform them of the upcoming move and to discuss arrangements for the student. Parents were informed that services would not be provided until the student was residing within the District. Student's three siblings, none of whom were identified under the IDEA, were permitted to enroll in the District prior to July 9, 2004.

On July 9, parents contacted the district and informed them that the student was a resident of the district. A meeting was scheduled for August 4, and subsequently rescheduled to August 11. The meeting occurred in the student's home, and student was observed in that setting for approximately 1 hour by the Director of Student Services. The Director also spoke with the parents about the upcoming school year. Student and his parents were on vacation from August 14 to August 28. A Team meeting was scheduled for early September.

In March 2005, parents filed a request for due process, seeking reimbursement for the costs associated with the ESY program. The District argued that the parents did not provide them with notice of their intent to seek reimbursement for the costs, nor did they make any request for payment of the program. During the hearing, district staff testified that the student would require a summer program to avoid an increase in negative behaviors and to reduce the likelihood of regression.

Held: For the parents. The Hearing Officer found that "[t]he moment that [student] became a resident of Mountain Lakes, he became entitled to a free, appropriate public education." Prior to his enrollment, the District was made aware that he would be enrolling, that he had a disability, and that he did not have an IEP. The Hearing Officer noted that the Director was "of the opinion that regardless of what program may have been offered for the balance of the summer ESY, it would have been unlikely that [student's] parents would have been receptive to it," but went on to state "[t]hough that perception may be accurate, there was no program offered to [student]."

C. Comparable Services

Alvord Unified Sch. Dist., 50 IDELR 209 (Ca. SEA March 19, 2008).

Facts: In May 2004, student sustained a traumatic brain injury. A developmental assessment conducted in August 2004 found that he was significantly delayed in his overall cognitive processing abilities, exhibited communication and gross and fine motor impairment and behavioral problems. In October 2004, he was diagnosed with Cerebral Palsy. He was evaluated in November 2004 and determined eligible for special education services (due to multiple disabilities) shortly thereafter. An IEP was developed and placement was offered in a "preschool Orthopedic Handicap SDC (moderate to severe) at [the public elementary school in his school district]."

Subsequently, in March 2006, his IEP Team developed an IEP and proposed to continue his placement in the "kindergarten to first grade SDC for moderate to severe OH students," at his public school, for "175 minutes per day, five times per week," with speech-language services, adapted physical education, and special education services for 98% of the day. The Team also agreed to provide the student with a 1:1 aide, and to conduct OT and vision assessments. Ultimately, the IEP was amended to include OT and vision services.

In October 2006, Student's parents contacted the Special Education Coordinator for the Alvord Unified School District and informed him that they were preparing to move into the District. Parents provided the District with a copy of the March 2006 IEP and inquired about placement options. The District reviewed the IEP and "believed that the most appropriate placement for Student was in the Physically Handicapped/Orthopedic Handicapped program operated by [another school district] because there were no comparable classes within the District."

Parents observed the other program in November 2006. The program had 10 students, ranging in ages from 3-12. "The students had severe orthopedic disabilities with average to low cognitive ability. The students were not ambulatory and required the use of a wheelchair[r] for access to the classroom. Parents observed several of the students lying or sitting on the classroom floor. Parents further observed that several of the students appeared incapable of communicating even with the use of supports in the form of assistive technology or alternative communication devices. The Parents also observed that the students had no outdoor recess activities or apparent access to adaptive playground equipment. The students were segregated from their typically developing peers during the school day." Parents believed that this program was not comparable to the program he attended in his prior district, and in early December, requested that the District locate a more appropriate placement or allow the student to remain in the public school program in his prior district of residence.

In January 2007, the District agreed to allow the student to remain in the program in his prior district of residence, so long as the program was funded by the prior district of

residence. The prior district declined to fund the placement without an "Inter-SELPA Agreement for Providing Placement and Services to Students with Severe Disabilities," and a few weeks later, the District formally offered an interim placement at the program observed by the parents in November 2006. The offer included all of the services set forth in the student's IEP. Parents declined this offer. During this time, the student continued to attend the program at his prior district with the two districts negotiated the terms of the inter-SELPA agreement.

In March 2007, Student's Team met to develop an IEP. The Team agreed that the services set forth in his prior IEP were appropriate and noted that the student was attending school in the prior district of residence. In June 2007, the District and the prior district of residence signed the inter-SELPA agreement. Under the terms of the agreement, the District agreed to fund the student's placement from January 2007 through June 2007. At the end of the school year, parents were informed that student could not continue with the program because the agreement had expired.

In June, the District offered an extended school year program at the program observed by the parents in November 2006. Parents rejected the proposal and the student did not receive ESY services.

In August 2007, student and his mother moved in with a relative who resided in the Student's prior district of residence. Student began attending his prior program. In November 2007, student was informed that he could no longer attend the program because he was not a resident of the district. Student and his mother returned to their home in the District. In November 2007, the District again offered to place the student in the same program the parents had observed in November 2006. The District believed that the program was comparable because "it was substantially the same as the program and service provided to the student in the March 21, 2007 IEP." The placement provided for the "same services" that the student received in the prior district, although there were no opportunities for mainstreaming and the students in the proposed placement were not able to interact with the general education students. The District acknowledged that the proposed placement did not currently have all of the communication devices called for in the Student's IEP, but noted that the equipment could be ordered and the parents could provide equipment in the interim. Parents rejected the placement and did not enroll student in the District. Student did not receive any educational services. Parents requested due process.

Held: For the parents. The November 2007 placement offer was not comparable to the student's prior placement. The Hearing Officer noted that the placement proposed by the District consisted of students in grades K-6, ranging in age from 4 ½ to 12 years, and that "students had minimal to no opportunities to mainstream with typically developing peers." In addition, student did not have access to necessary communication devices. In contrast, the prior program was comprised of students in grades 1-3, ranging in age from 6-7, and students had "access to typically developing peers and a variety of opportunities to interact with the general education students."

The Hearing Officer also found that the District failed to convene a meeting to adopt or amend the student's IEP when he returned to the District in November 2007. Because the student was not attending school, this procedural violation resulted in a substantive denial of FAPE.

However, the Hearing Officer noted that although the District committed a procedural violation when it failed to formally offer the student an interim placement until January 2007, over 2 months after the student had moved into the District, it did not result in a denial of a FAPE because the student continued to attend and receive services from his prior school district. The Hearing Officer also noted that the District should have convened an earlier meeting to formally adopt the prior IEP or to develop a new IEP, but that its failure to do such did not result in a denial of FAPE because the student continued to receive services and there was no dispute that the prior IEP was appropriate.

The District was required to provide compensatory education services. The Hearing Officer faulted parents for "removing Student from any possible educational placement," noting that their decision not to enroll Student "contributed to Student's loss of educational opportunity and must be considered in fashioning a fair and equitable remedy," and the compensatory education order was reduced from 14 weeks to 10.

Similarly, in Prince George's County Pub. Schs. 7 ECLPR 62 (Md. SEA June 29, 2009), the State found that the District violated the student's IEP by providing less speech-language services than were required by a transfer student's existing IEP. The Student transferred into the District in December 2008. From the time of the transfer until May 2009, student received "some speech/language therapy services," but "did not receive the amount required by the IEP" that was in place at the time of the transfer. The District was required to provide the student with compensatory services.

In Sterling A. v. Washoe County Sch. Dist., 51 IDELR 152 (D. Nev., Nov. 10, 2008), the court held that the new district of residence was not required to continue an in-home program as a "comparable service."

Facts: Preschool student resided in District A until November 2006. Student was diagnosed with "profound bilateral hearing loss" shortly after he was born and his IEP provided for in-home services, including 1:1 "Deaf and Hard of Hearing services and speech and language services."

In November 2006, student moved to District B, located in another state, with his family. Shortly after their move, parents met with the District and the District adopted an interim IEP, which lasted for 30 days. The interim IEP stated that the student's services would be provided at his neighborhood public school. Parents agreed with the provision of the speech services in the public school setting, but disagreed that the Deaf and Hard of Hearing Services should be provided in the school setting.

District B contacted District A and was informed that the services were provided in-home because student "was enrolled at a parochial preschool, for convenience, and because the home offered 'no real distractions.'" District A indicated that services would have been provided in the school "if it was requested or if the home environment was not working out."

District B declined the request to provide the services in the home because it believed that the student would benefit from access to typically developing peers, and because it had a policy to provide home services only to medically ill children. Parents brought student to the school for speech, but refused to do such for the Deaf and Hard of Hearing therapy. Instead, they contracted privately with an individual to provide the services in their home. Parents requested due process after the District denied their request to reimburse them for the costs associated with those services.

The Hearing Officer found that the District had offered comparable services, and parents appealed.

Held: For the District. Parents argued that to provide "services 'comparable' to those in the [prior] IEP, [District B] must provide . . . services in the home. In contrast, [District B] maintain[ed] that 'comparable' services means similar services, and that nothing requires it to provide in-home . . . therapy where it can provide substantially the same therapy at [Student's] local school." The court agreed, noting that the District was not required to adopt the prior IEP in its exact form. "All that the IDEA requires is that the interim IEP be similar or equivalent to the [prior] IEP. A comparison of the interim IEP and the [prior] IEP indicates that the only difference between the two IEPs is the location of the . . . services. . . . The evidence indicates that while the exact location of the services was different, the substance and goals of the . . . services was the same. In light of this substantial similarity in the substance of the . . . services, the additional benefits provided by [the] services at the elementary school, and the deference due to local and state officials' educational policy determinations, the court finds that the interim IEP provided services comparable to those provided in the [prior] IEP."

Similarly, in Metro Nashville Pub. Schs., 51 IDELR 116 (Tenn. SEA March 3, 2008), the hearing officer found that a "Learning Strategies" class offered in the student's new district of residence was comparable to the "Resource Reading" class the student was previously enrolled in at his prior district. The Hearing Officer noted that both classes provided the student with 5 hours per week of special education services in reading, which was what was required by the student's IEP. Parent argued that the new district should be required to utilize a computer-based program to provide the student with specialized reading instruction. The Hearing Officer disagreed, noting that the student was receiving the required 5 hours of reading instruction in the Learning Strategies class, and that it was not necessary to provide those hours of instruction using the computer-based program.

In Charles County Pub. Schs., 52 IDELR 302 (Md. SEA Jan. 22, 2009), the parent requested due process after the district proposed to discontinue providing transportation as a related service. The parent argued that the district violated the IDEA by eliminating that service from the IEP that was developed after the student moved into the district. The Hearing Officer found that the District complied with the IDEA by providing transportation (which was included as a related service in the IEP that was in place when the student transferred into the District), and that the District properly proposed to remove transportation as a related service because it was not necessary for the student to receive a FAPE.

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