

Defending Denial of FAPE Claims After COVID-19

**IAASE Fall Conference
October 2021**

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Defending Denial of FAPE Claims After Covid-19

Presented by Caroline A. Roselli & Michelle L. Weber
IAASE Fall Conference, October 2021

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1

Agenda

- 1) Addressing Breaks in Special Education Service Due to Staffing Shortages
- 2) Responding to Unilateral Placement Notices Due to Dissatisfaction with District's Program
- 3) Practical Tips

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2

Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

Addressing a Break in Special Education Service

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3

Post-Covid Trend

- *This school year, school districts across the state are seeing massive staffing shortages. As students return to full time, in-person learning, school districts are experiencing significant difficulties complying with IEPs due to these staffing shortages.*



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4

Illinois School Code Notice Requirement



If the IEP team determines that a service is required for the provision of FAPE, and that service is not implemented within 10 school days after the service was to be initiated as set forth by the student's IEP, then the LEA shall provide the student's parent/guardian with written notice that the service has not yet been implemented.



The notification must be provided to the student's parent or guardian within 3 school days of the LEA's non-compliance with the student's IEP and must inform the parent/guardian about the school district's procedures for requesting compensatory services.



"School days" does not include days where the student is absent from school for reasons unrelated to IEP services or when the service is available, but the student is unavailable.

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5

Compensatory Services

- Compensatory education (or compensatory services) is not a remedy which is expressly identified or defined in the IDEA.
- Courts and administrative hearing officers have the authority to order such services by exercising their authority to "grant such relief as the court determines appropriate." 34 CFR 300.516(c)(3).
- Compensatory education is meant to remedy a denial of a free appropriate public education (FAPE).



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6

Compensatory Services: Purpose

- Compensatory services are not meant to punish the district for denying the student FAPE.
- The purpose is to place the student in the position that the student would be in had the district provided the appropriate services in the first place.
- Typically, compensatory services are thought to be services above and beyond what is normally due to the student.

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7

Compensatory Services: Purpose

- Compensatory education can be in the form of reimbursement for out-of-pocket educational expenses, additional services or supports, and/or an extended placement or more restrictive educational setting than what the student would be entitled to.
- Designed to be an EQUITABLE remedy, and as such, there is NO obligation to provide for day-for-day or minute-for-minute compensation of missed education.
- Determined on a qualitative basis by looking at the totality of the circumstances for each student and determining the amount of service needed to remedy the educational deficits resulting from a failure to provide FAPE.

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8

U.S. Dept. of
Ed./OSERS
*Return to
School
Roadmap*
(Sept. 2021)

- Determinations about compensatory services are IEP team decisions.
- Among other factors, teams should consider the following:
 1. Present levels, comparing student's present levels to progress that was anticipated absent the service interruption;
 2. Whether the student's previous rate of progress has decreased; and
 3. Comparison of services required by the IEP and the services actually provided during school closure and remote learning.

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9

U.S. Dept. of
Ed./OSERS
*Return to
School
Roadmap*
(Sept. 2021)

- Examples of Circumstances That May Warrant Compensatory Services:
 1. Delay initial evaluation, eligibility determination, and identification, development and implementation of the IEP for an eligible student;
 2. If the special education and related services provided during the pandemic were not appropriate to meet the student's needs;
 3. If some or all of the child's IEP could not be implemented using the methods of service delivery available during the pandemic; and
 4. If meaningful post-secondary transition services were not provided due to the pandemic.

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10

Compensatory Services: Determining the Amount of Compensatory Services Owed

- *Petrina W. v. City of Chicago Public Sch. Dist. 299* (N.D. Ill. 2009)
 - Parents requested placement in therapeutic day school past student's 22nd birthday as compensatory services for failure to provide student FAPE.
 - Court declined to adopt a rote, day-by-day formula for determining compensatory services award.
 - Court noted that an individualized approach is necessary to determine compensatory services. Some students may require a "short, intensive compensatory program targeted at specific problems" while others may need "extended programs... exceeding the hour-for-hour replacement of time spent without FAPE."



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11

Compensatory Services: Recoupment of Skills After Break in Service

- *Smith v. Cheyenne Mountain School Dist.* (D. Colo. 2018)
 - Student with Autism was denied FAPE when his charter school prevented him from re-enrolling, resulting in two months of missed instruction.
 - Upon student's return to school, student quickly regained skills, and ended school year with increased performance on test scores, excellent grades and teacher reports, and was performing at or above grade level.
 - Parent requested compensatory services for period of missed instruction.

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12

Compensatory Services: Recoupment of Skills After Break in Service

- *Smith v. Cheyenne Mountain School Dist.*
 - Court held that, although student experienced a two-month break in service, not entitled to compensatory services.
 - Based on a review of the student's assessment scores, academic data and teacher reports, the student quickly regained skills upon his return to school and therefore, was not entitled to compensatory services.
 - Court relied heavily on the student's performance on both standardized assessments, as well as classroom performance, in making its determination.

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13

Compensatory Services: Timing of Determination

- *Lake Stevens School Dist.* (Wash. SEA August, 2020)
 - Student with Autism was placed in a residential program. Due to issues between the parent and the residential placement, the residential program issued a 30-day dismissal notice, effective February 2020.
 - The District sought alternative residential programs, but was unable to identify an available program that would admit the student due to Covid-related school closures.
 - Parents filed a due process hearing request seeking compensatory services for months of missed services.

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14

Compensatory Services: Timing of Determination



- ALJ determined that it could not award compensatory services, due to the timing of parent's due process hearing request.
- Due to the uncertainty surrounding the pandemic and that it would be unknown how much regression the student would experience, it was impossible to determine an appropriate award.
- The ALJ instructed the District to convene the IEP team once the student entered a residential program.

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15

Addressing Unilateral Placement Notices

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Post-Covid Trend #2 Unilateral Placement Notices

- *As a result of the disruption to student learning during the 2020-2021 school year and the mental health impact of the Covid-19 pandemic, schools are experiencing a significant uptick in private parental placements, in particular, residential programs.*
- *This uptick is compounded by issues related to staffing shortages and limited seats in ISBE-approved therapeutic day and residential programs.*



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17

Unilateral Placements: Definition under the IDEA

- A Unilateral Placement Occurs When:
 - A child is placed by a parent in a private educational program, and
 - Seeks district reimbursement by claiming that the public school district did not provide the student with a free appropriate public education ("FAPE").

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18

Unilateral Placements: When Do They Apply?

- Students Determined Ineligible for an IEP:
 - Courts have found that “when a child requires special education services, a school district’s failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.”
- Students Receiving Supports/Services Pursuant to an IEP



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19

Unilateral Placements: Reimbursement Responsibility

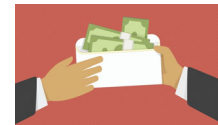
- Reimbursement for Educational Costs of Unilateral Placements
 - District may be responsible if:
 - The placement in a private school or facility was necessary to effectuate FAPE
 - District is not responsible if:
 - The district has made FAPE available to the student
 - The unilateral placement proposed by the parent is not appropriate to meet the needs of the student

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20

When FAPE Is At Issue

- School districts may be required to reimburse the parent for the cost of private school placement if:
 - The district has not made a FAPE available to the student in a timely manner prior to the enrollment in a private placement, **and**
 - The private placement is appropriate for the child.
- 34 C.F.R. 300.148(c)



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An Offer of FAPE Must be Made

- A hypothetical IEP/placement that the district *could* have offered is not sufficient
- The determination about whether or not the student receives a FAPE is based on the educational program/placement the district did offer
 - Note: Implementation is not required

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22

Appropriateness of the Private School Placement

- A hearing officer or court may find the private placement to be appropriate even if it does not meet the State standards that apply to LEAs.
- But note:
 - A school district has no obligation to provide for a placement whose sole function is to provide services to address non-educational needs.
 - Courts draw a distinction between those services that are primarily for treating a child's medical, mental health, behavioral or personal problems and those services that are primarily for enabling educational progress.

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Parental Requirements Prior to Reimbursement

- The reimbursement of educational costs for a private school placement may be reduced or denied if the parent doesn't:
 - Inform the IEP Team that they are rejecting the placement proposed by the public agency;
 - Provide notice of their dissatisfaction with the IEP and intent to unilaterally place the student; and
 - Indicate their intent to enroll their child in a private school at public expense (i.e. notice of unilateral placement "at public expense"); or



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24

Parental Requirements Prior to Reimbursement (cont'd)

- The reimbursement of educational costs for a private school placement may be reduced or denied if:
 - At least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described; or
 - Prior to removal, the district provided prior written notice to the parent of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parent did not make the child available for the evaluation; or
 - Upon a judicial finding that the parent's actions were unreasonable.

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25

Notice Requirement: Purpose

- The purpose of the notice requirement is to:
 - Provide timely notice of the rejection of the proposed IEP; and
 - Give districts the opportunity to provide a FAPE before a child leaves public school and enrolls in private school.
- Courts have found it proper to deny reimbursement when the student's parents agreed to the IEP proposed by the school and only informed the district of their concerns after parents arranged for the student's enrollment in private school.

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26

Exceptions to the Notice Requirements

- The cost of reimbursement for unilateral placement shall not be reduced or denied for failure to provide the required notice if:
 - the district prevented the parent from providing such notice;
 - the parent had not received notice of his/her responsibility to provide the notice described above; or
 - compliance with the requirements would likely result in physical harm to the child.

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27

Factors to Consider in Placing a Student in Therapeutic or Residential Programs

- Student's progress (or lack thereof) in less restrictive settings.
- Interventions attempted and the student's response – what interventions have been implemented and what has been the result of those interventions?
- Exhaustion of available supports and services - has the school district exhausted supports and services available in less restrictive settings?
- Emotional and physical condition of the student – is the student's physical and mental condition interfering with their learning in their current setting?
- Purpose of the placement (for residential) – is the residential placement needed primarily for educational purposes?



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28

Unilateral Placement

- *J.F. v. Bryam Township Board of Ed.* (3d Cir. 2020)
 - Student with dyslexia, previously attending a private therapeutic day school, transferred to a NJ school district.
 - NJ district adopted the prior IEP, but proposed to provide services through an in-district program.
 - Parents refused and enrolled the student at the private school, but did not notify the district of their decision or their intent to seek reimbursement.
 - Parents filed due process seeking reimbursement and placement at private therapeutic day school.

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29

Unilateral Placement

- *J.F. v. Bryam Township Board of Ed.*
 - Court denied parents' request for reimbursement and determined that parents "behaved unreasonably."
 - Parents did not provide notice, and had already enrolled the student in the private school before they had met with the NJ district.
 - Parents failed to participate in collaborative process with the District. Parents declined to visit the in-district program and never shared their concerns regarding the in-district program with the staff or administration.



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Residential Placements under IDEA

- The IDEA regulations require that a school district must provide a residential placement to a student with a disability if such a placement is necessary for the student to receive a free appropriate public education (FAPE).

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31

Residential Placements under IDEA

- Appropriate when student is unable to receive a FAPE in a less restrictive setting (and make progress in light of the student's circumstances).
- Where a district can show that the student is able to make progress in a less restrictive setting (such as a therapeutic day program or special education classroom in a public-school setting), the district is not in violation of IDEA for denying a parent's request for residential placement.

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32

Residential Placement

- *Board of Educ. Of City of Chicago v. W.E.* (N.D. Ill. 2013)
- W.E. had a history of excellent grades and was admitted into a selective enrollment high school.
- During the first two years of high school, his grades plummeted, he was suspended from school and began using marijuana.
- Parents obtained a neuropsychological evaluation, which identified weaknesses in processing speed, which the evaluator determined to be the result of several factors, including depression, marijuana use, and ADHD.
- Report also diagnosed the student with chronic depression, ADHD, and Cannabis Abuse.

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33

Residential Placement



- *Board of Educ. Of City of Chicago v. W.E.*
- Although the school held several problem-solving meetings, never initiated a formal evaluation until after parents filed due process.
- Parents removed the student from school and sent him to a month-long wilderness program.
- Following the filing of their due process complaint, parents enrolled the student in a residential alternative educational program, where he was asked to leave because of his oppositional behavior.

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34

Residential Placement



- *Board of Educ. Of City of Chicago v. W.E.*
- District conducted a formal evaluation of the student, determined him eligible and developed an IEP for the student, to remain in general education classes with social work services and consultative services from a special education teacher.
- Parents enrolled student in another therapeutic boarding school in Utah.

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35

Residential Placement

- *Board of Educ. Of City of Chicago v. W.E.*
- District argued that parents should be denied reimbursement because they never gave formal notice of unilateral placement.
- District also argued that reimbursement for the residential programs is improper because these were drug treatment services, not educational services as contemplated under the IDEA.

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36

Residential Placement

- *Board of Educ. Of City of Chicago v. W.E*
 - Court denied District's procedural argument and found that Parents had notified the District of their intent to enroll the student in residential programs and were never provided with procedural safeguards. Therefore, parents were unaware of their obligation to give formal notice of unilateral placement.
 - Court also adopted the "primarily oriented" standard. Court held that, the fact that the private school provides counseling or other services (such as drug treatment) does not render such an inappropriate placement.



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37

Practical Tips

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38

Practical Tips

- Keep records of any and all efforts to fill staffing shortages.
- Maintain comprehensive progress monitoring data for students impacted by any breaks in service.
- Document discussions regarding compensatory services in IEP meeting notes, including any offers made or agreements reached.

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39

Practical Tips

- When faced with staffing shortages, consider other ways to meet student needs (e.g. consultative services, group therapy instead of individual, virtual services).
- Make sure to report progress towards IEP goals and benchmarks. Continued progress towards IEP goals and benchmarks is indicative that the student is receiving FAPE.

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40

Practical Tips



- If parents issue a unilateral placement notice, document receipt of the notice and offer to hold an IEP meeting as soon as possible
- Consider which school/district staff or other representatives should be present at the IEP meeting
- At the IEP table, discuss the primary purpose for the parents' request for residential and whether such is primarily for educational purposes

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41

Practical Tips

- Prepare the school team to consider any outside information, parent input, and outside evaluation information
- Remember that a medical provider cannot "prescribe" educational placements. A physician's recommendation for a residential placement should be considered by the IEP team like any other outside provider's recommendation
- Organize all records and materials gathered in the event of a due process hearing

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42

Questions?



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Caroline has presented at annual conferences for both the Illinois Association for School Boards and for the Illinois Alliance of Administrators of Special Education. She is a co-author of the "Special Education" chapter of the Illinois Institute of Continuing Legal Education's School Law treatise. Caroline also regularly conducts workshops and in-service programs on a variety of special education related topics, including IEP compliance, response to intervention and child find, evaluation procedures, eligibility determinations, autism litigation and discipline of special education students.

AWARDS

Illinois Emerging Lawyer, School Law (2017-2018)

Illinois "Rising Star," Super Lawyers Magazine, Schools and Education Law (2012-2017)

RECENT PUBLICATIONS

"Students Should Know the Consequences of Sexting," *Chicago Daily Law Bulletin* (2015)

"What Does State Law Say about Measles Prevention and Control in Schools?" *Chicago Daily Law Bulletin* (2015)

Contributing author, "Special Education," *Illinois School Law*, IICLE (2010, 2012 and 2015)

RECENT PRESENTATIONS

Due Process: To Go or Not to Go? Special Education Update, Illinois Council of School Attorneys, 33rd Annual Seminar on School Law (November 2019)



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Education Law
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J.D., *cum laude*, Loyola
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Supreme Court of the
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ORGANIZATIONS

Chicago Bar Association

Illinois Bar Association

Illinois Council of School
Attorneys

National Council of School
Attorneys

Seclusion, Restraint, and Time Out 2020, Illinois Alliance of Administrators of Special Education Region 1 Roundtable (November 2019)

Risk Assessment, Threat Assessments and the Impact on Students with Disabilities, Illinois Alliance of Administrators of Special Education Fall Conference (October 2019)

Legal Issues Related to School Safety and Security: Addressing the Complex Challenges Facing Schools, Large Unit District Association, (May 2019)

Responding to Requests for Homebound Instruction, Illinois Alliance of Administrators of Special Education Webinar (April 2019)

Tips for Preparing Legally Defensible Eligibility Determinations for Specific Learning Disability, Illinois Alliance of Administrators of Special Education Roundtable Presentation (March 2019)

Absenteeism, School Refusal, and Truancy in Special Education: Legal Issues when Students Don't or Can't Come to School, Illinois Alliance of Administrators of Special Education Roundtable Presentation (March 2019)

Escalating Student Behavior and Safety Concerns: Legal Options and Considerations, Illinois Alliance of Administrators of Special Education Winter Conference (February 2019)

The Ins & Outs of Residential Placements: Rules, Regulations, & Recommendations, Illinois Alliance of Administrators of Special Education Fall Conference (October 2018)

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Prior to joining Robbins Schwartz, Michelle worked as an attorney for Waukegan Public Schools and Chicago Public Schools, focusing in special education. She has experience counseling IEP teams and school administrators, representing districts in complex due process hearings and developing policies and procedures for school districts. Prior to starting law school, Michelle was a Middle School Language Arts Teacher in Los Angeles, CA.

RECENT PUBLICATIONS

"DeVos Rollbacks Could Hit Schools Hard," *Chicago Daily Law Bulletin* (2017)

RECENT PRESENTATIONS

Risk Assessments, Threat Assessments and the Impact on Students with Disabilities, Illinois Alliance of Administrators of Special Education Fall Conference (October 2019)

Escalating Student Behavior and Safety Concerns: Legal Options and Considerations, Illinois Alliance of Administrators of Special Education Winter Conference (February 2019)

Student Bullying Legal Framework & Recommended Practices, In-Service (August 2018)

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