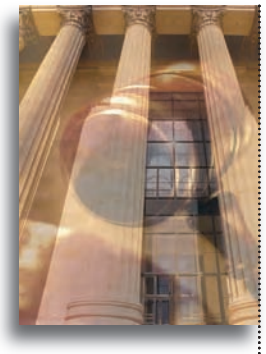

The Duty of School Boards to Pay for Private School Placements

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An important issue with significant financial ramifications for school business officials is the point at which their boards must begin paying for private placements based on orders from hearing officers or courts.

According to the Individuals with Disabilities Education Act (IDEA), once students with disabilities receive educational placements, school officials cannot unilaterally change their settings. When officials wish to change the placements of students with disabilities for any reason, they must not only notify their parents of their intent to do so in writing, they must also afford them opportunities either to participate in making decisions involving their children or to object to those with which they disagree (20 U.S.C. § 1415[b][3]).

Under what is known as the status quo or stay-put provision, the IDEA mandates that while administrative hearings or judicial proceedings that parents filed to challenge proposed changes by school officials are pending, students must remain in their "then-current placements" unless the parties agree otherwise (20 U.S.C. § 1415[j]). The purpose of the status quo provision is to provide educational stability and consistency (*Gabel ex rel. L.G. v. Board of Education of the Hyde Park Central School District* 2005).

Parents who are dissatisfied with their children's placements often remove them from public schools and unilaterally enroll them in private schools. After doing so, parents may initiate administrative due process hearings seeking to have their school boards pay for their chosen placements. These costly placement disputes may take years to resolve because parents frequently seek judicial review.

Without addressing the merits of the issue, the Supreme Court appeared to agree with the First Circuit in noting that an order of a state-level hearing in favor of a parentally chosen placement seemed to constitute agreement by state officials to a change in placement (*Burlington School Committee v. Department of Education of the Commonwealth of Massachusetts* 1985). The upshot of these cases is that it is unclear whether school boards must pay for unilateral parental placements as judicial appeals proceed.

An important issue with significant financial ramifications for school business officials is the point at which their boards must begin paying for private placements based on orders from hearing officers or courts. Some courts have insisted that boards had to begin paying once final administrative orders declared private placements to be appropriate even if they were appealed to the courts. For example, the Ninth Circuit held that once a state education agency decided that a parentally chosen placement was correct, it became the status quo under the IDEA, requiring a local board to pay for the placement (*Clovis Unified School District v. California Office of Administrative Hearings* 1990). Similarly, the federal trial court in Massachusetts found that where a state-level agency and parents agreed on a placement, local officials did not have to approve in order for it to become the child's pendant placement (*Grace B. v. Lexington School Committee* 1991).

In light of the lack of judicial clarity about when school boards must incur the typically unbudgeted cost of unilateral parental placements of students in private schools, we will examine the key provision from the IDEA's regulations regarding who should pay for unilateral placements along with case law on point, then reflect on what this means for school business officials, other education leaders, and school boards.

The IDEA and Unilateral Placements

IDEA regulations include a clause clarifying the point at which boards are responsible for paying the costs of parental private school

placements that were made unilaterally. The 2006 regulations stipulate:

> If the hearing officer in a due process hearing conducted by the [state education agency] or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents. . . . (34 C.F.R. § 300.518[d])

Section (a) of this same regulation emphasizes that students must remain in their then-current educational placements (pendent placements) during the pendency of dispute resolution proceedings unless the parents and state or local educational officials agree otherwise.

As straightforward as the relevant IDEA regulation appears to be, litigation has arisen—especially in states with two-tiered administrative due process schemes. In jurisdictions with single-tiered systems where due process hearings are conducted at the state level, there is no question that administrative adjudications favorable to parents require school boards to begin paying for placements. For example, the Third Circuit affirmed that since the placement ordered by a due process appeals panel became a student's pendent placement immediately, a board in Pennsylvania had to pay for the cost even though it sought judicial review (*Susquenita School District v. Raelee S.* 1996).

In jurisdictions with two-tiered due process systems, initial hearings generally occur at the local level and appeals are resolved at the state level. Again, there is no question that state-level decisions favorable to parents obligate boards to begin paying for placements. At issue, then, is whether the IDEA regulation requires boards to begin paying for placements if parents are successful in initial hearings in two-tier systems pending appeals.

Unfortunately, since the courts disagree as to who should pay as appeals proceed, a body of conflicting litigation is developing. From the judicial perspective, as reflected in the next two sections, a great deal depends on whether initial hearings are viewed as local functions or whether they are essentially state-level actions since they are conducted by personnel of state education agencies.

To Pay or Not To Pay

Federal courts in New York, Minnesota, and Ohio—states with two-tiered due process systems—have agreed that decisions made at the first tier do not constitute agreements with parents for purposes of the IDEA's stay-put provision.

In the case from New York, the federal trial court emphasized that an order by a state hearing officer in a one-tier system or a state reviewing officer in a two-tier system constitutes an agreement by the state under the stay-put provision of the IDEA, but that an adjudication by a first-tier local hearing officer does not equate to state action (*Murphy v. Arlington Central School District Board of Education* 2000, 2002).

On appeal, the Second Circuit affirmed that the school board had to begin paying for a unilateral parental private school placement from the date of the state reviewing officer's decision but not from the initial hearing officer's decision, even though it also favored the parents. Similarly, the Eighth Circuit affirmed that under Minnesota law, first-tier hearings were conducted by local boards and that the second-tier reviews were state actions (*CJN v. Minneapolis Public Schools* 2003).

As straightforward as the relevant IDEA regulation appears to be, litigation has arisen.

As an initial matter, the court determined that since the first tier in Ohio's due process system is a local hearing, boards must provide parents with opportunities for hearings and fund the hearings (*Winkelman v. Ohio Department of Education* 2008). In its analysis, the court acknowledged that since initial requests for hearings were submitted to local superintendents of schools, whereas appeals for second-tier reviews were submitted to state officials, the former could not be considered to be state-level actions. However, the court rejected the notion that since state officials prepared hearing officers and all hearings, regardless of their level, were conducted pursuant to state regulations, the first-tier hearings were state actions. As such, the court concluded that because the outcome of initial hearings did not implicate the IDEA's stay-put provision, the board did not have to pay for the placement at that point.

Conversely, a federal trial court in Indiana maintained that first-tier hearings could be treated as state-level actions since they were conducted by state officials rather than by local school boards (*L.B. ex rel. Benjamin v. Greater Clark County Schools* 2006). Even though the local board paid for the first-tier hearing, the court's opinion was that it was a state proceeding because the state set the rules and procedures for the hearing, selected the hearing officers, and made sure they were qualified and competent.

The court observed that the IDEA's stay-put provisions applied to hearings at this level and a decision in favor of the parents constituted an agreement by the state to change the student's placement even though a reviewing officer reversed the initial adjudication.

Reflections

Regardless of whether jurisdictions operate under single- or double-tiered systems for due process appeals, boards clearly must pay for unilaterally made private school placements once state-level hearing officers render orders in favor of parents. The difference is that in jurisdictions with single-tiered due process systems, any hearing decisions treating unilateral parental private placements as appropriate settings for children, boards must pay for them even if officials seek judicial review.

In contrast, under most two-tiered due process mechanisms, since initial adjudications are likely be considered local hearings, boards are not required to pay for unilateral parental placements since they are not typically treated as agreements with the state for the purposes of the IDEA.

Yet, as reflected by the case in Indiana, whether first-tier hearings are considered to be state-level actions depends on the fine points of state law and state regulations governing hearing processes. Even so, it is difficult to predict how courts are apt to interpret the interplay between the IDEA and state law.

In light of the relatively unsettled nature of the law in this area, school business officials and other education leaders, regardless of whether they work in states with one or two levels of due process review, should consider the following four points.

1. School business officials should consult with their attorneys in order to keep abreast of the seemingly ever-changing federal and state laws, as well as judicial interpretations thereof, regarding the complex topic of due process hearings in special education.

   This is important because, as discussed, procedures vary from one state to the next, particularly when it comes to due process hearings and the levels of review for disputes.

   The more involved that state-level officials are in conducting hearings, the more likely they are to be deemed state-level hearings that obligate local boards to pay for unilaterally made parental private school placements.
2. Insofar as hearing orders requiring boards to begin to pay for unilateral parental private school placements may come at any time, school business officials need to be prepared for these unexpected and often unbudgeted expenditures. To this end, school business officials would be wise to allocate some resources in their contingency funds in the event that they must pay for unanticipated costs of unilateral parental placements of their children in private schools.
3. School business officials should notify parents of and explain to them all their rights to challenge any aspect of the education of their children. Providing parents with this information may help avoid conflicts by keeping them informed and demonstrating the willingness to work together.
4. School business officials should consult with other members of their administrative leadership teams in their districts to encourage parents to remain within the IDEA's due process provisions starting with mediation and resolution sessions rather than making unilateral placements.

   By working with parents to reach compromises and avoiding the cost of due process hearings that can easily exceed $10,000 in most states, educators not only can build bonds of trust with parents but can also conserve needed funds to provide services to all students.

References

Burlington School Committee v. Department of Education of the Commonwealth of Massachusetts, 471 U.S. 359 (1985).

CJN v. Minneapolis Public Schools, 323 F.3d 630 (8th Cir. 2003).

Clovis Unified School District v. California Office of Administrative Hearings, 903 F.2d 635 (9th Cir. 1990).

Gabel ex rel. L.G. v. Board of Education of the Hyde Park Central School District, 368 F. Supp.2d 313 (S.D.N.Y. 2005).

Grace B. v. Lexington School Committee, 762 F. Supp. 416 (D. Mass. 1991).

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. (2005).

L.B. ex rel. Benjamin v. Greater Clark County Schools, 458 F. Supp.2d 845 (S.D. Ind. 2006).

Murphy v. Arlington Central School District Board of Education, 86 F. Supp.2d 354 (S.D.N.Y. 2000), affirmed, 297 F.3d 195 (2d Cir. 2002).

Susquenita School District v. Raelee S., 96 F.3d 78 (3d Cir. 1996).

Winkelman v. Ohio Department of Education, 616 F. Supp.2d 714 (N.D. Ohio 2008).

Winkelman v. Parma City School District, 127 S. Ct. 1994 (2007).

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