

Placement of Students with Disabilities in the Least Restrictive Environment

A Fact Sheet from the Minnesota Disability Law Center

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Introduction

Once a student has been evaluated and determined eligible for special education services, important next steps include creating an Individualized Education Plan (IEP) and agreeing on where the student will be placed to receive the services outlined in the IEP. These steps go hand in hand: it is difficult to determine what services the student will receive if the placement is not known and placing the student without having a full picture of the student's service needs will likely lead to programmatic problems.

Highlights

This factsheet discusses legal steps and considerations in determining a student's placement in the Least Restrictive Environment (LRE). The report includes a review of the necessary steps to complete the initial placement and important factors to consider in ensuring ongoing placement appropriateness, including significant changes of placement.

The factsheet also analyzes Minnesota complaint and hearing decisions, along with relevant state and federal laws, to show where districts have avoided legal violations, where districts have most often run into difficulties, and what the more common consequences for violating the law look like.

- a step-by-step guide about how to comply with state and federal laws (including examples of how and when districts have been found in violation);
- a summary of what can constitute a "change of placement";
- recurring pitfalls and consequences for schools; and
- strategies and tips on how to avoid LRE and placement problems.

Summary

A review of the LRE and Placement laws, Department policy letters, complaint decisions and hearing decisions reveals the following main lessons:

- ★ Complaints and hearings were evenly distributed throughout the grades from 11 involving kids in PreK-6, seven in grades 6-8, and nine in grades 9-12. The three most common disability categories were Developmental Cognitive Disorders, Emotional Behavioral Disorder and Other Health Impaired. Other common categories were Early Childhood Special Education and Autism Spectrum Disorders.
- ★ Most often problems with placement do not occur at the initial placement. Disputes are more likely to occur when changes in placement are proposed, made without notice and consent, or are necessary due to student issues.
- ★ “Unilateral” decisions and changes by administrators and teachers to alter a student’s schedule, withhold “mainstreaming” opportunities, or otherwise not include parents result in violations, especially where a student’s time with non-disabled peers or amount of services is changed.
- ★ Imposing disciplinary consequence such as suspensions of more than 10 days, cumulatively or consecutively, and removals from scheduled “mainstreaming” opportunities can also result in a “change of placement” that requires notice and consent procedures.
- ★ Districts that were found not to be in violation have carefully documented parental participation in meetings, placement decisions and considerations, and parental consent.
- ★ Districts found in violation face substantial and costly corrective action orders in the form of compensatory education for students, training of staff, additional meetings and planning, preparing memos to staff, and reimbursement of parental expenses, in addition to others.

PLACEMENT IN THE LRE

What is the LRE?

The LRE concept is basically the idea that students with disabilities are entitled to be educated with their non-disabled peers, unless a different educational placement is warranted and beneficial. This relatively simple concept has resulted in a multitude of legal requirements and complexities. The next section sorts out the practical application of placement in the LRE and reviews where districts have gone wrong, and right.

Overview: LRE is Presumed to be in the Regular Education Setting

Minnesota and Federal law creates a presumption that the LRE is in the regular education setting by requiring a different placement “only when the nature or severity of the disability is such that education in a regular educational program with the use of supplementary aids and services cannot be accomplished satisfactorily. Furthermore, there must be an indication that the pupil will be better served outside of the regular

program.”¹ Consideration is also given to “any potential harmful effect on the child or on the quality of services” for the student.

INITIAL PLACEMENT: FIVE MAIN CONSIDERATIONS

Notification: Let Parents Know!

The district must hold a meeting to develop an IEP and to determine placement “within 30-days” of the initial determination of eligibility.² The District informs the parent of this meeting and its intent to provide special education services with a formal notice to the parents. This notice, in addition to containing meeting details, must include information about the parent’s rights and procedural safeguards.³ Further, the Student’s IEP must be implemented “as soon as possible” following this IEP meeting.⁴

A warning: Note that parent consent for the initial evaluation is not the same as parent consent for placement or initial provision of services. Separate parent written consent for placement and initial provision of services must be obtained prior to the district placing the student.⁵

Look to the Evaluation and IEP to Determine Placement

Most importantly, the placement should be based on the student’s unique needs as reflected in the evaluation and in the IEP. If the placement is not based on the IEP or on the current documented needs of the student as shown in the evaluation, a district may be found in violation.⁶ Moreover, if IEP services and placement are based on a particular disability category or district policy, the IEP is not sufficiently individualized.⁷ If the district is determined to have done an incomplete evaluation of the student’s needs, it will have a difficult time establishing the appropriateness of placement.⁸ “Any potential harmful effect” of the setting on the student and the quality of services are other required bases for the determination.⁹

In a policy letter dated November 24, 1994, the federal Office for Special Education Services has also indicated that districts may not consider the following factors: category or severity of the student’s disability, configuration of delivery system, availability of services or space, or administrative convenience.

Offer a Continuum of Services, Start with the Closest School

In considering the student’s placement, the district must ensure that a continuum of options is discussed before arriving at a specific placement. A good starting point is to consider the school the student usually would attend and schools closest to the student. Requiring a medically frail student to be transported for 60-70 minutes to go less than 10 miles and having a commute of two hours per day (when a closer placement was possible) were both found to be violations.¹⁰ Federal law requires the placement to be as close as possible to the student’s home, and is at the school the student would have been educated if the student was not disabled.¹¹

Minnesota law specifies that the continuum includes “instruction in regular classes, special classes, special schools, home instruction, and instruction in schools and

hospitals.”¹² Consideration of the student’s ability to access nonacademic and extracurricular offerings (including recess, meals, athletics, health services, counseling, and recreational activities) in the LRE must also occur.¹³ If none of these instruction and activities options can provide FAPE to the student, a placement in a private school or facility can be considered.¹⁴ Presenting limited options to parents, or having little or no explanation of available options, will likely result in violations.¹⁵

Importantly, supplementary services and aids for a student to succeed in a regular education setting must be considered.¹⁶ Indeed, a placement outside of the regular education setting cannot be made solely because of the lacked of needed modifications or personnel in that setting.¹⁷

Make it a Group Decision

Using the results and information included in the evaluation, a group of individuals, including the parents, makes the placement decision.¹⁸ This group may be but is not necessarily the same people that are on the student’s IEP team; the parents must be part of either group. Districts have been found in violation of this requirement by having a policy that sends all students with a disability to a particular school (regardless of individual needs),¹⁹ or having a practice or policy that conditions increased time with non-disabled peers on behavior.²⁰

Obtain Consent, and, As Usual, Document

Documentation of parent involvement and consent to a placement from IEP meeting minutes and due process forms will allow a district to escape findings of violations even if the parents claim that they signed even though they did not like it or felt they had no other options.²¹

The form of parental consent is important. Verbal consent is insufficient.²² Similarly, “written” consent on an application from or other non-due process document will not establish a parent actually consented to a placement or a change through the IEP team process.²³ Documentation of written consent on IEP forms will insulate the district from findings of violations.²⁴

An exception to the group requirement is if a county social service agency or a court places or revokes placement of a student, especially in residential facilities. Where a county places a student, for example, in a district’s residential program, and subsequently removes the student, the district has no obligation to inform the parents of the change or to follow due process procedures stemming from the change. The district, does, however, have to meet and discuss placement options for that student after the county removes the student.²⁵

Once the group makes the placement decision and on the services needed by the student, an IEP is drafted and sent to the parents for their formal consent. The placement decision must be documented in the IEP must include an explanation of the extent to which the student is not participating with his or her non-disabled peers.²⁶ Failure to include this

statement or failure to provide a reasonable explanation has led to findings of violations.²⁷

ONGOING DETERMINATIONS AND SIGNIFICANT CHANGES

Ongoing Determinations

Following the initial determination, the student's placement must be revisited at least annually.²⁸ Failing to ensure the student's placement is appropriate on an annual basis will result in a violation.²⁹ While IEP team members might all agree informally or tacitly that the placement is appropriate, such an agreement must be documented on the IEP.

Placement determinations and legal requirements also apply to extended school year (ESY) services.³⁰

Significant Changes: Site, Setting, Goal Completion, New Conditional Procedures

If the initial placement does not work out for the student, or if the student's needs change during the year, a change in placement may be required. What constitutes a "change in placement" is important because such a change requires notice to parents and parental consent prior to the change. Generally, minor modifications in a student's educational programming may be made without going through the IEP process or gaining the parents' consent. Similarly, if a student can receive the same services and has the same access to non-disabled peers in two different sites, there is no change in placement. Day to day

However, a modification that alters the provision or amount of services,³¹ time with non-disabled peers,³² the *type* of site or setting,³³ or the student's IEP goals are completed or need to be changed, is a significant change in placement.³⁴ Additionally, a significant change in placement occurs if the student's IEP team determines that a conditional procedure is needed for the student.³⁵ A significant change in placement is important because it triggers notice and consent requirements BEFORE the change actually happens.³⁶ The notice identifying the proposed change must include a copy of the IEP, must state that the district will not proceed with the change until written consent from the parents is received for initial placement and service provision or unless the parents provide written objection within 14 calendar days of the notice.³⁷ If districts are not aware of when a change in placement occurs, they risk making "unilateral" changes in placement, which are violations of law.³⁸

Also, the withholding of a "mainstreaming" or regular education opportunity for disciplinary purposes by a teacher, principal or district staff can constitute a change in placement, if this action is not included in the IEP or recognized in a behavioral intervention plan as a planned, appropriate way of dealing with student behaviors.³⁹

Note: The term "significant change in placement" is found in Minnesota, not federal law, and it seeks to provide guidance on when the notice and consent requirements are triggered.

Changes in Placement: Discipline

Another type of change that can constitute a change of placement is when a student is suspended for 10 or more consecutive school days or when a student is suspended for more than 10 cumulative days in any school year that constitutes a “pattern” of removal.⁴⁰ A “pattern” exists depending on the length of each removal, the amount of time of removal, and the proximity between removals.⁴¹ If there is this type of disciplinary change of placement, the district must: conduct a functional behavioral assessment and implement a behavioral intervention plan or if an FBA and BIP existed, the district must hold an IEP meeting to review the plan and revise it as needed to address the behavior.⁴² An important question is what constitutes a removal. The guidelines to the federal regulations suggest that any time a student is removed from the educational setting, from his or her non-disabled peers.

While keeping a difficult special education student out of school following a suspension and providing him or her with services might seem like a great idea to minimize confrontation, prevent the recurrence of behavior, and to have an extended cooling off period, there are numerous legal problems. Districts have been found in violation for not allowing the student to return to his previous placement from a homebound placement resulting from a disciplinary incident.⁴³ Homebound services are not likely to have any components for “mainstreaming” and thus violate the presumption of educating the student in the LRE. Often, the root of the issue stems from an incomplete IEP and an inappropriate placement. A meeting to review and revise the student’s IEP, BIP, and placement is probably a good alternative to relying on the extended and continued provision of services through a homebound placement.⁴⁴

One exception to the consent requirements is if a student has a weapon at school or at a school function, if the student “knowingly” has or uses illegal drugs or sells or solicits controlled substances at school or at a school function, or commits a serious bodily injury.⁴⁵ In this case, the district may unilaterally remove the student to an alternative interim placement for up to 45 days.⁴⁶ Another rarely used exception is if the district can prove to an independent hearing officer that the student’s current placement constitutes a substantial risk of injury to the student or to others, the district made reasonable efforts to minimize the risk, and that the alternative educational setting is appropriate.⁴⁷

Summary of Changes in Placement

- ★ a modification that alters the provision or amount of services,
- ★ changes in time with non-disabled peers,
- ★ changes in the type of site or setting,
- ★ completed or out of date IEP goals,
- ★ IEP team determination that a conditional procedure is needed for the student
- ★ graduation with a regular education diploma
- ★ suspension or removal of a student for more than 10 consecutive days
- ★ suspension or removal of a student for more than 10 cumulative days if there is a pattern

REVIEW OF LRE AND PLACEMENT COMPLAINTS

To determine where schools have encountered problems and successes in their child find duties, 25 special education complaints investigated by the Minnesota Department of Education were reviewed between July 2001 and August 2004.

Students in these 25 complaints were fairly well distributed across the grade spectrum. Ten complaints involved students in grades PreK-5, six in grades 6-8, and nine in grades 9-12. This suggests that LRE and placement difficulties are prominent throughout a student's education.

For the students involved in these 25 complaints, the three most common disability categories were Developmental Cognitive Disorders, Emotional Behavioral Disorder and Other Health Impaired. Other common categories were Early Childhood Special Education and Autism Spectrum Disorders.

Overall, there were findings of violations in 19 of the 25 complaints. In the six complaints where no violations were found, the district properly documented parent consent,⁴⁸ parent participation,⁴⁹ and the placement decision in the IEP.⁵⁰

Violations and Corrective Action

The MDE found 19 LRE and Placement violations in the 25 cases, or 76%. The MDE ordered corrective action in most of the cases where violations were found.

The most common violations concerned failing to provide required notice (8 complaints), unilateral changes by the district (7 complaints), significant change problems (4 complaints); and failing to include documentation of LRE in the IEP (3 complaints). Other violations included: failing to offer a continuum of placements, placing the student in the closest possible alternative resulting in lengthy bus rides, withholding mainstreaming opportunities, relying on improper forms of consent, and improperly continuing a homebound placement following a suspension. It should be noted that a violation of certain laws, for example, making a unilateral change in placement also form the basis for other violations, such as notice.

The most common corrective action ordered by the MDE included requiring the district to hold IEP meetings (6 of 19 complaints), training (6 of 19 complaints), and additional planning or review of programming (6 of 19 complaints). Compensatory education (e.g. make up services) was ordered in 5 complaints. The compensatory education awards are designed to remedy the violation for the student. The compensatory education plans were typically minimal and usually due to missed services caused by a change of placement.

Another frequently corrective action order included preparing a memo for distribution to staff (5 of 19 complaints). Other corrective action orders included: reimbursement to parents for transportation, conducting an evaluation, and informing other parents of problems that may have affected their children.

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- ¹ Minn. R. 3525.0400
² 34 CFR §300.323 (c)(1)
³ 34 CFR §300.503, Minn. R. 3525.3600
⁴ 34 CFR §300.323 (c)(2)
⁵ Minn. R. 3525.2710, subpt. 1
⁶ MDE Complaint Decision 2012
⁷ MDE Complaint Decision 1760, 1973
⁸ MDE Complaint Decision 2013
⁹ 34 CFR §300.116
¹⁰ MDE Complaint Decision 2005, 1745
¹¹ 34 CFR §300.116
¹² Minn. R. 3525.3010, subpt. 1
¹³ Id.
¹⁴ 34 CFR §300.114-.116, 34 CFR §300.148
¹⁵ MDE Complaint Decision 1476, 1930, 2013
¹⁶ Id.
¹⁷ 34 CFR §300.116 (e)
¹⁸ 34 CFR §300.116(a), Minn. R. 3525.3010
¹⁹ MDE Complaint Decision 1745
²⁰ MDE Complaint Decision 1760
²¹ MDE Complaint Decision 1816, 1662, 1402
²² MDE Complaint Decision 1536
²³ MDE Complaint Decision 1507, 1558, 1921
²⁴ MDE Complaint Decision 1526, 1466, 1816
²⁵ MDE Complaint Decision 1424
²⁶ 34 CFR §300.320
²⁷ 1930, 1745, 2039
²⁸ 34 CFR §300.116
²⁹ MDE Complaint Decision 2039
³⁰ MDE Complaint Decision 1930
³¹ MDE Complaint Decision 1921, 2039
³² MDE Complaint Decision 1558, 1640, 2039
³³ MDE Complaint Decision 1536
³⁴ Minn. R. 3525.0200, Subpt. 19b
³⁵ Id.
³⁶ Minn. R. 3525.3600, see also 34 CFR §300.503
³⁷ Id.
³⁸ MDE Complaint Decision 2012, 1921, 1640
³⁹ MDE Complaint Decision 1593, 1507
⁴⁰ 34 CFR §300.530, Complaint Decision 1452
⁴¹ Id.

⁴² 34 CFR §300.530

⁴³ MDE Complaint Decision 1513, 1567

⁴⁴ See MDE Complaint Decision 1513, 1567

⁴⁵ 34 CFR §300.530

⁴⁶ Id.

⁴⁷ 34 CFR §300.532

⁴⁸ MDE Complaint Decision 1662, 1402, 1628

⁴⁹ MDE Complaint Decision 1816

⁵⁰ MDE Complaint Decision 1526, 1466, 1816