

# 2024 ISBE Legal Updates

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# Legal Hot Topics 2024

# Nonpublic Placements



# Nonpublic Placements

- When is a nonpublic placement appropriate?
- Issues that commonly arise when making the placement
  - Finding an appropriate program
  - Disputes / Stay-Put
  - Interim services
- Allowable costs
- Ongoing responsibility for FAPE
- Non-ISBE approved programs

# Nonpublic Placements Generally

- Nonpublic Special Education Programs
  - Therapeutic Day Schools (Separate Day School)
  - Residential Programs
- 23 Illinois Administrative Code Part 401: Special Education Facilities Under Section 14-7.02 of the School Code
- Non-ISBE Approved Programs (105 ILCS 5/14-7.02(e))
- These are the most restrictive types of placement

# When Is a Nonpublic Placement Appropriate?

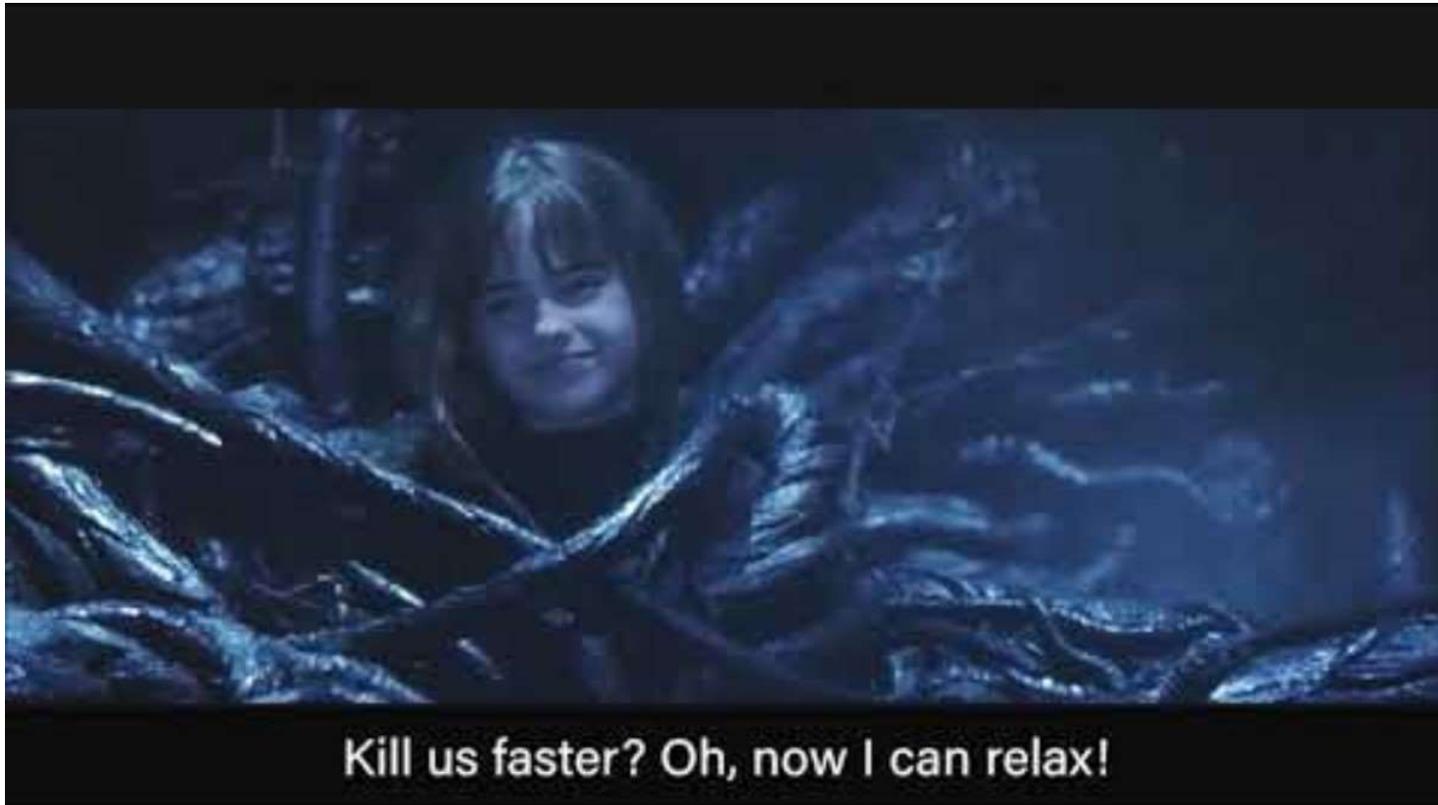
- Under the IDEA, students with disabilities are entitled to FAPE in the Least Restrictive Environment (LRE)
- 34 CFR § 300.114 - LRE Requirements
  - (a)(2)(i) To the **maximum extent appropriate**, children with disabilities must be educated with children who are nondisabled; and,
  - (a)(2)(ii) Special classes, separate school, or other **removal of children with disabilities** from the regular educational environment **occurs only if** the nature or severity of the disability is such that **education in regular classes** with the use of supplementary aids and services **cannot be achieved satisfactorily**.

# When Is a Nonpublic Placement Appropriate?

- Need to be able to show the student cannot get FAPE in a less restrictive environment
  - Requires a specific type of instructional program, a high level of therapeutic support for mental health / social-emotional needs, a safe / secure setting due to behavioral concerns, or 24-hour support in order to access education (residential placements)
- Need for private placement must be tied to educational need for the school district to provide it.
  - 34 CFR § 300.104 - Residential Placement
    - If placement in a residential program is necessary to provide special education and related services, the program, including non-medical care and room and board, must be at no cost to the parents.

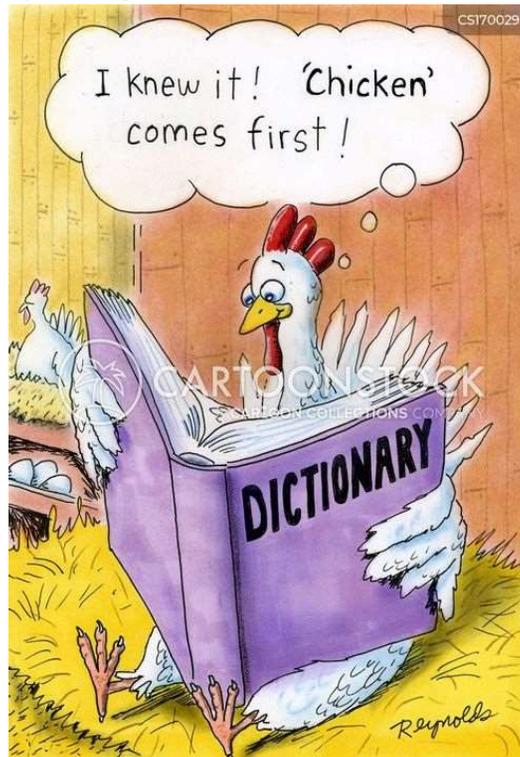
# Common Issues When Making the Placement

# Common Issues When Making the Placement



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- Finding an appropriate program



# Common Issues When Making the Placement

- Finding an appropriate program
  - The IEP Team making a change in placement is the first step. Must find a program that is appropriate and willing / able to accept the student
    - Remember – these are nonpublic programs!
- Parental input
  - Parents have the right to participate in decisions about the type of program the student will attend, but they cannot select a specific school
  - A district complies with the IDEA so long as it selects a school that can implement the IEP.
  - *J.T. V District of Columbia*, 80 IDELR 62 (D.C. Cir. 2022)

# Common Issues When Making the Placement

- Disputes / Stay-Put
- 105 ILCS 5/14-8.02a(j)
  - During the pendency of any administrative or judicial proceeding conducted pursuant to this Section...unless the school district and the parents or student...otherwise agree, the student shall remain in his or her present educational placement and continue in his or her present eligibility status and special education and related services, if any.
- Stay-put is all about maintaining status quo, so what if the student hasn't been placed in a new program yet?

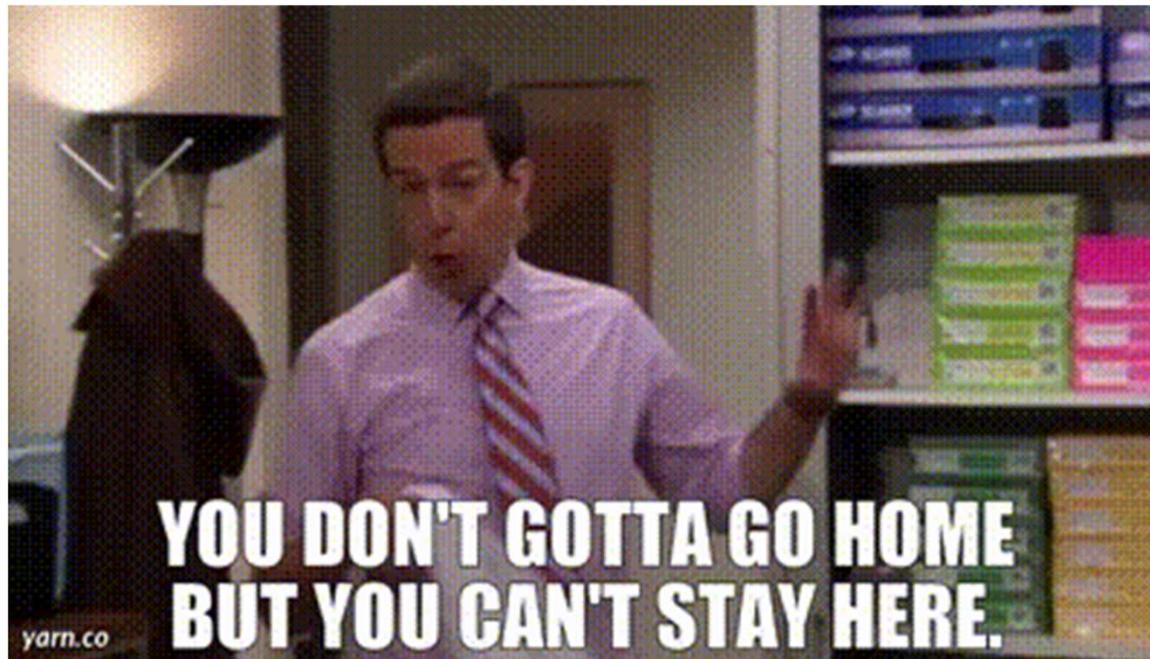
# Common Issues When Making the Placement

- What about when there is no readily-available program?



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# Common Issues When Making the Placement

- What about when there is no readily-available program?
- District is still responsible for providing FAPE.
  - May want to convene an IEP meeting to consider what services can/should be provided in the interim.
  - Ultimately, district may be responsible for compensatory education services for the period where the student was not placed in an appropriate program.
  - Lack of available program does not absolve district of its responsibility.

# Allowable Costs

- So the district has found a placement and is paying tuition



# Allowable Costs

- 23 Ill. Adm. Code 401.110 - Use by Public School Districts
  - No public school district shall place any student in a special education program that is subject to the requirements of this Part...unless:
    - (b) The [IPCRB] has established the allowable costs for the program...
- 23 Ill. Adm. Code 401.280 - Fiscal Provisions
  - (a) Tuition charged to a public school district by a provider...shall not exceed the allowable costs approved pursuant to 89 Ill. Adm. Code 900 (Illinois Purchased Care Review Board).
- If a fee is not included in the established rate, it must be optional

# Ongoing Responsibility for FAPE



# Ongoing Responsibility for FAPE

- 34 CFR § 300.325 - Private school placements by public agencies.
  - (b) Reviewing and revising IEPs.
    - (1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility *at the discretion of the public agency*.
    - (2) If the private school or facility initiates and conducts these meetings, the public agency must ensure that the parents and an agency representative -
      - (i) Are involved in any decision about the child's IEP; and,
      - (ii) Agree to any proposed changes in the IEP before those changes are implemented.
  - (c) Responsibility. Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

# Non-ISBE Approved Programs

[This is where I ran out of ideas for fun pop-culture transitions]

# Non-ISBE Approved Programs

- 105 ILCS 5/14-7.02(e)
  - A school district may residentially place a student in a public special education facility providing educational services, but not approved by [ISBE] pursuant to 23 Ill. Adm. Code 401...provided that [ISBE] provides an emergency and student-specific approval for residential placement.
  - [ISBE] shall promptly, within 10 days after the request, approve a request for emergency and student-specific approval for residential placement if the following have been demonstrated...

# Non-ISBE Approved Programs

- ISBE Form 34-43

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**SECTION XIII: ASSURANCES**

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The district hereby assures that:

- (i) The district made good faith efforts to locate placement in a facility approved pursuant to 23 Ill Admin Code 401 and no approved facility accepted the student or no immediate placement was available.
- (ii) The nonpublic facility demonstrates satisfactory proof of the following:
  - The nonpublic facility offers an age-appropriate curriculum and services are delivered in an age-appropriate setting.
  - The nonpublic facility has appropriate licensed teachers and related service personnel for the student.
  - The academic assessments administered by the nonpublic facility to the student are the same as those administered to other individuals served in the program who are of approximately the same age.
  - The nonpublic facility has the ability to implement the student's IEP.
  - The nonpublic facility will submit attendance records to the district. The district will provide ISBE a copy of the attendance records upon request.
- (iii) The district provided ISBE a copy of the nonpublic facility's school calendar for the academic year of placement. (See Section XI on page 10 of this document.)
- (iv) The district agrees to enter the student information into the I-Star data system.
- (v) The district is aware of the room and board and tuition costs to be charged by the nonpublic facility and understands that reimbursement is dependent on a per diem rate first being established by the Illinois Purchased Care Review Board. Further, the district understands the Illinois Purchased Care Review Board reserves the right to place limits on costs above and beyond what is reasonable for the placement.
- (vi) The district has made the parent/guardian of the affected student aware that the facility above is not approved pursuant to 23 Ill. Adm. Code 401; therefore, the facility is not required to follow Illinois Law or Administrative Rules, and the State Board of Education has no oversight or authority to investigate complaints made against the facility.  
Date parent was informed: \_\_\_\_\_
- (vii) The district understands that ISBE does not monitor safety and health concerns that arise in the facility of a non-approved residential program and will not be responsible if the student's safety and health are compromised. The district accepts responsibility for the student while placed in the nonapproved facility and does not hold the State Board of Education responsible for any liability associated with any safety and health concerns that arise due to the student's placement in this nonapproved facility.
- (viii) The district has submitted this form and corresponding documents. The district understands that failure to submit all documents will exclude the district from receiving reimbursement. The district understands that reimbursement for allowable room and board and tuition costs will be subject to the same proration methodology as is applied to reimbursement for rates determined under 5/14-7.02.
- (ix) The district has verified that the residential facility can demonstrate that the facility itself is providing special education and can meet the requirements of 23 IAC 226.330(g)(1)-(5) that states "A school district may place a student in a nonpublic special education facility ("facility") providing educational services..."

# Non-Regulatory Guidance – Residential Placement

## Scenario #1

David is a high school student with an IEP eligible under the category of Emotional Disability. Currently, he attends his public high school where he is included in general education for 85% of the day and receives social work services weekly. David's parents, Moira and John, report David exhibits aggressive behavior toward them in the home and has threatened suicide on more than one occasion resulting in hospitalization. Thus far, the hospitalizations have not impacted his academic progress and the aggressive behaviors are not observed during the school day. Moira and John have applied for an FSP grant and David will be placed at an out of state residential facility to get additional support and psychiatric stabilization. Moira and John requested a meeting with their IEP team because the facility will not accept David unless the placement recommendation is changed to 100% special education. Does David's IEP team have to make this change?

### Question G3:

State agencies, the IEP team of the resident district, and the residential facility should make every effort to reach an agreement regarding the appropriate educational placement of the student. However, if there is a disagreement regarding educational placement for the student, *then the IEP team of the resident district is considered the decision maker regarding LRE determination.* The resident district retains control of the IEP process and is responsible for ensuring that the student is receiving educational services in the LRE.

## Scenario #2

Rachel is a special education student who has been placed at a residential facility in Bloomington, Illinois, while her parents continue to live in Downers Grove, Illinois. Upon turning 18, Rachel did not delegate her educational rights and is now her own legal guardian. Under Article 14 of the School Code, is Rachel's district of residence in Bloomington or Downers Grove?

### **Citation C3:**

Section 14-1.11a states that *the resident district is the school district where the student resides* in instances where (1) the parent has legal guardianship but the location of the parent is unknown; or (2) an individual guardian has been appointed but the location of the guardian is unknown; or (3) *the student is 18 years of age or older and no legal guardian has been appointed*; or (4) the student is legally an emancipated minor; or (5) an Illinois public agency has legal guardianship of a student and that agency or any Illinois court has placed the student residentially outside of the school district where the parent lives.

## Scenario #3

Scranton CHSD 314, an Illinois public school district, placed their student Dwight in Happy Farm Ranch a non-ISBE approved residential facility. The placing school district created a contract with the residential facility outlining their expectations for notification of restraint incidents and referenced Rule 1.285. Scranton CHSD 314 then learned that Dwight was in a restraint two weeks ago and Happy Farms did not provide notification of this restraint to them or to Dwight's parents. Can Dwight's parents make a complaint to ISBE about the lack of notification?

### Question H16:

...The contract should avoid references to 23 Ill. Adm. Code Part 401 and Part 1.285 as ISBE does not have investigatory authority over non-ISBE approved residential facilities with regard to the aforementioned rules. Placing school districts must accept responsibility for the student while placed in the non-ISBE approved residential facility and assume liability for any safety and health concerns that arise due to the student's placement in such a facility.

## Scenario #4

Max is a DCFS Youth in Care with an IEP who is placed in a residential facility. Max is enrolled as a student in a public school district. Max runs away from the facility and his whereabouts are unknown. DCFS marks the youth as AWOL. At the end of the month, Max's school district receives a bill for the full month of tuition. Should the school district pay all of the costs and then submit claims for reimbursement to ISBE?

**Question E5:**

The district is under no obligation to pay for special education services that were not provided to the youth during the time their whereabouts were unknown.

## Scenario #5

Chaz is a student whose IEP is marked for residential placement. Chaz's parents Sonny and Cher have found a residential facility not approved by ISBE where they wish to send their child. The placing school district explains to Sonny and Cher that the team must first attempt to place Chaz in an approved residential facility. Sonny and Cher refuse to consent to releasing Chaz's school records to facility but the non-approved facility. Does this meet the "good faith effort" requirement of 23 IAC 226.330(g)(5)?

## Question H6

...The school district demonstrates that it made good faith efforts to place the student in an approved facility, but no approved facility has accepted the student or has availability for immediate placement of the student. *A parent or guardian refusing to sign a release does meet this requirement.*

## Scenario #6

Chaz is a student whose IEP is marked for residential placement. Chaz's parents Sonny and Cher have found a residential facility not approved by ISBE where they wish to send their child. The placing school district explains to Sonny and Cher that the team must first attempt to place Chaz in an approved residential facility and after making a few referrals, Chaz is accepted into an approved facility. Sonny and Cher decline to place Chaz in the approved facility and request placement in the non-approved placement. Can the placing school district move forward with placement in the non-approved facility?

### Question H7:

...The school district demonstrates that it made good faith efforts to place the student in an approved facility, but no approved facility has accepted the student or has availability for immediate placement of the student. *A parent or guardian not agreeing to place the student in an ISBE-approved facility does not meet this requirement.* The parent or guardian and resident district may utilize special education dispute resolution options to help resolves any disagreements regarding the student's special education services.

## Scenario #7

Piper is a student who does not have an IEP is placed in a residential facility by DCFS after being ordered into treatment. DCFS believes Piper to be a student with a disability and is surprised to learn she does not have an IEP. Who has a responsibility to fund the educational services? Who has the responsibility of conducting the evaluation if requested by DCFS?

### **Citation A1:**

Section 10-20.12a(b) requires that, unless otherwise agreed to by the parties involved and where the educational services are not otherwise provided for, educational services provided to all Illinois students under the age of 21 in residential facilities, who are not eligible for services pursuant to Article 14 of the School Code, be provided by the district in which the facility is located. Costs are to be paid for by the district of the student's residence.

### **Question B8:**

The school district of residence is responsible for conducting the requested evaluation. Each school district is responsible for identifying all students within the district who may be eligible for special education and related services and determining if an evaluation is necessary. The residence of the person who has legal custody of the student is considered to be the residence of the student. See 105 ILCS 5/10-20.12b. If an evaluation is not conducted, the school district of residence could be in violation of the Individuals with Disabilities Education Act (IDEA).

## Scenario #8

Buster is placed by his resident school district Bluth CUSD 815 in a residential facility approved under Section 14-7.02 located in Illinois within the boundaries of Funke CSD 785. Buster's parents Lucille and George move to another city in Illinois outside of the boundaries of both Bluth and Funke school districts. The facility learns of this change and is unsure who to bill for the placement. Can they request a residency determination from the state superintendent of schools under Section 14-7.02?

## Residency Determinations

A party may request a residency determination from the state superintendent under the following:

105 ILCS 5/10-20.12a

105 ILCS 5/14-7.03

105 ILCS 5/14-7.05

Note: ISBE Form 19-83 (Nonpublic Facility Placement Contract) requires the facility to provide notification of any change in residence or guardian of the student to the placing district.

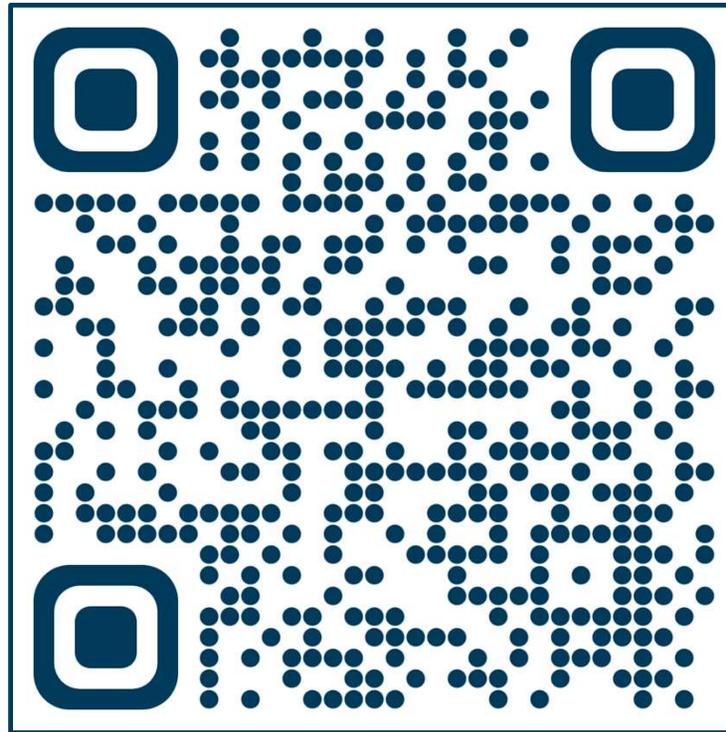
## Scenario #9

Elle is a special education student who is treated by a private psychiatrist for her eating disorder. The private psychiatrist believes Elle would benefit from intensive inpatient residential treatment and recommends a facility located out of the state and Elle's parents immediately move her into the facility. Elle's parents have private insurance which will pay for a portion of the treatment, but they've requested the school district pay for the rest of the placement. The IEP team has not made a recommendation of residential placement for Elle because she has been making reasonable progress with special education supports in a general education setting. Does Elle's school district have to pay for the placement?

### Question D5:

If a parent unilaterally places their student in a residential facility, special education services provided to the student by the residential educational facility are the financial responsibility of the parent, in addition to the residential costs. *In such an instance, if a student's resident district made FAPE available to the student, the school district of residence of the student is not required to accept financial responsibility for educational or residential service costs of the unilateral placement.* However, if FAPE was not made available to the student, a school district may be held financially responsible for the unilateral placement by the parent. See 34 CFR 300.148.

# Residential Guidance is now available on ISBE.net!





# Questions?

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Thank you