

## Residential and Other Unilateral Placements

### VIRTUAL SCHOOL ADMINISTRATORS' CONFERENCE

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**Laura M. Sinars**

[lsinars@robbins-schwartz.com](mailto:lsinars@robbins-schwartz.com)

**Michelle L. Weber**

[mweber@robbins-schwartz.com](mailto:mweber@robbins-schwartz.com)

**Chicago**

55 West Monroe Street, Suite 800  
Chicago, IL 60603  
p 312.332.7760  
f 312.332.7768

**Champaign-Urbana**

301 North Neil Street, Suite 400  
Champaign, IL 61820  
p 217.363.3040  
f 217.356.3548

**Collinsville**

510 Regency Centre  
Collinsville, IL 62234  
p 618.343.3540  
f 618.343.3546

**Lisle**

550 Warrenville Road  
Suite 460  
Lisle, IL 60532-4311  
ph: 630.929.3639  
fax: 630.783.3231

**Rockford**

2990 North Perryville Road, Suite 4144B  
Rockford, IL 61107  
p 815.390.7090

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# Residential and Other Unilateral Placements

Presented by Laura M. Sinars and Michelle L. Weber  
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## Parental Private School and Residential Placements

- *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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## Agenda

- 1) Unilateral Placements – Procedural Issues and Responding to Parental Notices
- 2) Residential Placements and Factors to Consider in Making LRE Determinations
- 3) Case Analysis
- 4) Practical Tips

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## Unilateral Placements: Procedural Requirements



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## 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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## 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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## 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 child
    - The unilateral placement proposed by the parent is not appropriate to meet the needs of the student

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## 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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## 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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## Parental Requirements Prior to Reimbursement (cont'd)

- 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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## 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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## 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 prove the notice described above; or
  - compliance with the requirements would likely result in physical harm to the child; and

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## Exceptions to the Notice Requirements

- May not, in the discretion of the court or hearing officer, be reduced or denied for failure to provide the required notice if:
  - The parent is illiterate or cannot write English; or
  - Compliance with the requirements would likely result in serious emotional harm to the child.



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## Residential Placements



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## Residential Placement 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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## 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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## Factors to Consider

- 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 – is the residential placement needed primarily for educational purposes?

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## Special Circumstances

Family or personal problems

Behaviors in the home environment or outside of school

Truancy

Criminal behavior

Suicidal behavior or self harm

Medical needs and medication management

Substance abuse

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## Case Analysis



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## Truancy/ Criminal Behavior

*Dale M. v. Board of Educ. of Bradley-Bourbonnais High School Dist.* (7 Cir. 2001)

- Student with significant behavioral and emotional problems was involved in multiple disciplinary incidents in school, including truancy and disruptive behaviors.
- Outside of school, abused drugs and alcohol and was hospitalized for depression. Student also committed burglary and stole a car.

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## Truancy/ Criminal Behavior

- After student was released from detention center, district proposed to return the student to therapeutic day school, where he was previously attending.
- Parent removed the student from the district and enrolled him in a residential boarding school for "difficult children" and sought reimbursement from the district.
- Issue: Whether the residential placement, by virtue of "confining" the student and thus, preventing his truancy and criminal behavior, was necessary for the provision of FAPE.



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## Truancy/ Criminal Behavior

Findings: In favor of District.

- 7<sup>th</sup> Circuit adopted the "primarily oriented" test, to determine whether the residential placement was warranted.
- A district is obligated to fund a student's residential placement if the services provided at the residential facility are "primarily oriented" toward enabling the student to obtain an education.
- In contrast, if the services needed are geared more toward assisting the student to engage in noneducational activities, the district is not required to fund the residential placement.
- Court found in favor of the District and determined that the purpose of the residential placement was not "primarily oriented" for educational purposes, rather for purposes of "confining" the student and thus preventing him from engaging in criminal behavior.

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## Behaviors Outside of School Setting

*Braydon K. v. Douglas County Sch. Dist.  
RE-1 (D. Colo.2020)*

- Student experienced significant trauma in his early life, as a result of homelessness and neglect. He was adopted by his parents.
- He was diagnosed with ADHD, PTSD and dyspraxia at a young age.
- He was enrolled in a religious school for one year but was not allowed to return due to his disruptive behaviors.



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## Behaviors Outside of School Setting

- He underwent a 30-day evaluation at an assessment facility. He was diagnosed with social engagement disorder, ADHD, and anxiety disorder.
- The evaluation indicated that the student needs firm, consistent and concrete guidelines with immediate positive and negative consequences.
- The evaluation recommended "milieu therapy," a structured therapy with integrated therapeutic interventions and in the moment training opportunities.
- No education-specific findings or recommendations were made, but a nurse practitioner noted in the report that the student requires a therapeutic residential program for ongoing mental health care.

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## Behaviors Outside of School Setting



- Student was enrolled in a residential program, where he immediately began experiencing behavioral difficulties.
- The residential program took several steps to address his behaviors, including removing transitions, increasing adult supervision, and providing a small student-teacher ratio in the classroom.
- Student made significant progress while in the therapeutic day school.
- Based on data from the residential program, student continued to have behavioral incidents, but a majority were not occurring during regular school hours.

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## Behaviors Outside of School Setting

- Parents began working with the school district to develop an IEP. The district initiated an evaluation.
- At the IEP meeting, the District recommended placement in a therapeutic day program, which offered a variety of supports and services, mirroring “milieu therapy.”
- Parents raised no concerns with the IEP (i.e. accommodations, goals, etc.), only the recommendation for therapeutic day instead of residential.
- Parents filed due process seeking residential placement.

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## Behaviors Outside of School Setting

- Findings: In favor of the District.
- Court followed the “primarily oriented” standard in determining whether the residential program was necessary for the provision of FAPE.
- Court distinguished between services that are “supportive” of a student’s education vs. those services that are necessary for the student to make educational progress.
- Parents’ main concern was their ability to reinforce behavior strategies applied in the classroom.
- Court noted that the residential placement was primarily intended to help the student with medication management and mental health issues. Court also noted that the student’s out-of-school behaviors had no impact on his classroom performance, based on data from the residential program.



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## Substance Abuse

*Board of Educ. Of City of Chicago v. W.E.* (N.D. Ill. 2013)

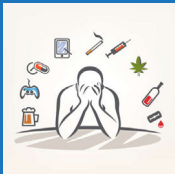
- W.E. has a history of excellent grades and was admitted into a selective enrollment high school.
- During the first two years of high school, his grades plummeted. The school team initiated the problem solving process.
- Parents obtained a neuropsychological evaluation, which identified weaknesses in processing speed, which the evaluator determined to be the result of several factors, including depression, marijuana use, and ADHD.

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## Substance Abuse



- Report diagnosed W.E. with chronic depression, ADHD, and Cannabis Abuse.
- The school team scheduled a problem-solving meeting to review the psychological evaluation.
- Student was suspended for 5 days due to a tagging incident and then 10 days for possession of marijuana and a pipe.

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## Substance Abuse

- Parents removed the student from school and sent him to a month-long wilderness program.
- Parents filed a due process complaint.
- Following the due process complaint, parents enrolled students in a residential alternative educational program, where he was asked to leave because of his oppositional behavior.

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## Substance Abuse



- 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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## Substance Abuse

- 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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## Substance Abuse



Findings: In favor of parents.

- 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 Dale M. "primarily oriented" standard. Court held that, the fact that the private school provides counseling or other services (such as drug treatment) does not render it improper as long as it is primarily oriented towards enabling the student to obtain an education.
- Here, the drug treatment provided at the residential facilities were "incidental to" and enabled the student to benefit from their academic programs.

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## Mental Health and Non-Educational Considerations

*Edmonds School Dist. v. A.T.* (9thCir. 2019)

- Student was adopted at age 4.
- Started in the District in preschool and always had an IEP. Student has a history of issues with behavior, decision-making and interpersonal problems. Primary diagnosis was ADHD.
- In 9<sup>th</sup> and 10<sup>th</sup> grade, the student's behaviors escalated. He received more than 20 disciplinary offenses and two expulsions which were later turned into long-term suspensions.

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## Mental Health and Non-Educational Considerations

- In 10<sup>th</sup> grade, student engaged in criminal behavior and experienced a significant deterioration of his mental health.
- Through a court-ordered evaluation was also diagnosed with schizophrenia.
- Evaluating psychologist suggested student be enrolled in a residential treatment facility.
- District held an IEP Meeting and recommended the student attend the alternative high school in the STEP program.
- Student attended alternative school for one day and never returned. He was home for 6 months, where he had run ins with the law, began using drugs and was in a psychiatric hospital.



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## Mental Health and Non-Educational Considerations

- Psychiatric hospital recommended residential program.
- Parents placed student in residential program and gave notice of unilateral placement.
- District rejected the unilateral placement and argued that, because the student is intelligent and capable of performing adequately at school when medical conditions are under control, placement in the residential program was strictly a “medical service” and not educationally necessary.

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## Mental Health and Non- Educational Considerations

Findings: In favor of parents.

- Court held that, even though the student experienced an “acute” deterioration of his mental health, such does not render the need for residential placement due to medical reasons only.
- The fact that a student is experiencing an “acute health crisis” at the time of their placement does not render the placement to be a medical and not educational placement.

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## Practical Tips



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## Practical Tips

- When a student is withdrawn from a public school and placed by a parent in a private school, be sure to gather information regarding the student's progress in the public school program (academic, social and behavioral)
- Critically study the evidence of progress and the documentation to determine whether there are issues or concerns with either the evidence of progress or the paperwork
- Consider meeting with the parents to discuss their concerns and/or whether to convene a formal IEP meeting

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## Practical Tips

- If parents mention possible private or residential placement to remedy any concerns, consider proposing a reevaluation of the student to address the program concerns being raised
- Consider additional supports and services that may be available within the District

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## 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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## 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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Twitter:

@RSchwartzLaw

Laura M. Sinars | @Lsinars\_RS

Michelle L. Weber | @Mweber\_RS



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## **LAURA M. SINARS**

**PARTNER, CHICAGO**

312.332.7760

lsinars@robbins-schwartz.com

Laura Sinars focuses on special education and students' rights law. She counsels and represents public school districts at IEP meetings, due process hearings and mediation. She also represents districts at student expulsion and residency hearings. Laura has defended district decisions regarding evaluations, services and placement of special education students in due process hearings. She has successfully prevailed in hearings to defend against parents' unilateral private placements. In the area of student rights, Laura has assisted clients with routine student issues related to records, discipline, health and 504 questions. She has also assisted clients with building strong residency and discipline cases which proceed to hearing and has successfully defended districts' decisions in state and federal courts. Laura has represented districts before federal and state agencies including the Illinois State Board of Education, the Illinois Guardianship and Advocacy Commission and the Office for Civil Rights.

## **AWARDS**

Illinois Super Lawyers, 2005-2018

## **RECENT PUBLICATIONS**

Contributing author, "Special Education," *Illinois School Law*, IICLE (2005, 2010, 2012 and 2015)



## **PRACTICE AREAS**

Education Law  
Special Education  
Student Discipline

## **EDUCATION**

J.D., University of Notre  
Dame Law School

B.A., University of Notre  
Dame

## **ADMITTED TO PRACTICE**

U.S. Court of Appeals for  
the Seventh Circuit

U.S. District Court for the  
Central District of Illinois

U.S. District Court for the  
Northern District of Illinois

Supreme Court of Illinois

# Robbins Schwartz

**MICHELLE L. WEBER**

**SENIOR COUNSEL, CHICAGO**

312.332.7760

[mweber@robbins-schwartz.com](mailto:mweber@robbins-schwartz.com)

Michelle practices in the area of education law with a focus on special education and student matters. She counsels school districts and community colleges regarding the IEP process, due process, Section 504, student discipline, board policy and student records.

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)

**PRACTICE AREAS**

Education Law  
Special Education  
Student Discipline

**EDUCATION**

J.D., Loyola University  
College of Law

M.A., Loyola Marymount  
University

B.A., Trinity College

**ADMITTED TO PRACTICE**

Supreme Court of Illinois

**ORGANIZATIONS**

Chicago Bar Association

Illinois Council of School  
Attorneys