Services to Nonpublic Students with Disabilities

Thomas A. Mayes
Iowa Department of Education
Sources of the Law

Federal: 34 C.F.R. §§ 300.130 through 300.144

- Requirement of IDEA for “equitable services” to nonpublic school students with disabilities
- “Services Plan”
- No right to a FAPE

State: Iowa Code § 256.12(2)

- Services in the “same manner and to the same extent” as to public school students with disabilities.
- “Service activities shall be similar to those undertaken for public school students.”
- IEP
- Right to a FAPE
Iowa Code section 256.12(2)

- Provides both a floor and a ceiling
- Parent choice, but with limits
- Certain things (course scheduling, length of courses) are exclusively the province of the school district.
- Location of services requires dialogue between public school and nonpublic school authorities.
What is a FAPE? Why is that important?

“Free appropriate public education” or “FAPE” means special education and related services that are provided at public expense, under public supervision and direction, and without charge; that meet the standards of the SEA, including the requirements of this chapter; that include an appropriate preschool, elementary school, or secondary school education; and that are provided in conformity with an individualized education program (IEP) that meets the requirements of rules 281—41.320(256B,34CFR300) to 281—41.324(256B,34CFR300).

Iowa Admin. Code r. 281-41.17; accord 34 C.F.R. § 300.17

Note the highlighted language.
Hypothetical A: FAPE

The IEP team of a child with a disability has identified a need for occupational therapy and a need for specially designed instruction (SDI) in mathematics. The child’s parents enroll the child in an accredited nonpublic school. The child’s parents and the nonpublic school’s staff assert that the AEA will provide the OT and the nonpublic school’s staff will provide the SDI in mathematics.

Unless the mathematics SDI is “under public supervision and direction,” it is not part of the child’s FAPE and will not fulfill the obligation of the public agencies to provide IEP services under section 256.12.
Iowa Law Imposes A Higher Standard

The higher standard imposed by Iowa law (section 256.12(2)) is what applies, not the lower standard in federal law. See, e.g., Special Sch. Dist. No. 1 v. R.M.M., 861 F.3d 769, 773 (8th Cir. 2017).

Iowa law provides for a FAPE. There is no individual entitlement under federal law. 34 C.F.R. §§ 300.132(b), 300.137(a), 300.138(b)-(c).

Because there is no individual entitlement to a services plan, a parent of a nonpublic school student may not reject an IEP and demand a services plan instead.
A Floor and A Ceiling

Under Iowa Code section 256.12(2), parents of nonpublic school students with disabilities have the same rights to public school special education services as parents of public school students.

- No more
- No less

If a public school parent cannot make a certain demand, then neither can a nonpublic school parent.
Floor and Ceiling: Refusing Particular Services

Parents may unilaterally revoke consent for special education. The IEP Team has nothing to say about this.

Parents may not unilaterally revoke consent for particular services. This is a team decision. 73 Fed. Reg. 73,006, at 73,011 (Dec. 1, 2008).

- Not necessary for a FAPE? Remove the service from the IEP.
- Necessary for a FAPE? Keep the service and provide a prior written notice.
  
  The parent has procedural safeguards.
  
  ○ Note: While procedural safeguards are pending on the disputed service, the LEA and AEA must provide the undisputed services. 34 C.F.R. § 300.300(d)(3).
Hypothetical B: Refusing Particular Services

A nonpublic student has an IEP that calls for SDI in mathematics and behavior. The parents want the behavior goal deleted. The child’s IEP Team determines that the child would continue to receive a FAPE after the behavior goal is removed.

The public agencies should remove the behavior goal and SDI.
Hypothetical C: Refusing Particular Services

A nonpublic student has an IEP that calls for SDI in mathematics and behavior. The parents want the behavior goal deleted. The child’s IEP Team determines that the child would not receive a FAPE after the behavior goal is removed.

The public agencies must continue to provide the behavior goal and SDI, subject to the parents’ procedural safeguards.
Section 256.12 provides for parent choice; however, parent choice in special education always is subject to limits. Under parent choice, the parent may elect from appropriate placements. The parent is not entitled to unilaterally make a placement under public school choice and is not entitled to select an inappropriate placement. See, e.g., Letter to Siegel, 16 IDELR 797 (OSEP 1990); see also Letter to Farmer, 103 LRP 49606 (OSEP 2003).

If public school parents may not elect an inappropriate special education placement, see Iowa Code § 282.18(8) (open enrollment), then neither may nonpublic school parents.
Hypothetical D: School Choice

A parent of a student with significant intellectual disability and significant challenging behaviors demands IEP services at an accredited nonpublic elementary school. The IEP Team determines that the IEP services required are incompatible with the services and capacity of the nonpublic school, even with LEA and AEA services.

Section 256.12 would not require these services to be provided at the nonpublic elementary school; however, the parents are able to challenge this determination through procedural safeguards.
The public agencies are entitled to determine how IEP goals and services are to be provided. The parents may request that a particular method be used; however, they may not demand a particular method or instructional approach (unless they show that the particular approach is necessary for a FAPE). Likewise, the nonpublic school may not demand a particular method.

Questions of methodology are reserved to the public agencies. See, e.g., Board of Educ. v. Rowley, 458 U.S. 176, 207-08 (1982).
Hypothetical E: Instructional Method

A nonpublic student has an IEP that calls for speech services. The AEA determines that the child’s speech needs would be met by telepractice. The parents and the nonpublic school demand face-to-face speech services.

The AEA decision on method is controlling until the parents or the nonpublic school prove that face-to-face services are necessary for a FAPE.
Hypothetical F: Instructional Method

A nonpublic student has an IEP that calls for speech services. The IEP Team determines that would only be met by face-to-face services. The AEA proposes to provide speech by telepractice instead.

Since the IEP team concluded that face-to-face services are required, the AEA may not provide telepractice.
Location of Services: Four Listed Services

The following services must be provided on the nonpublic school’s campus, with the nonpublic school’s permission:

● “Health services”
● “Special education support, and related services provided by area education agencies for the purpose of identifying children with disabilities”
● “Assistance with physical and communications needs of students with physical disabilities”
● “Services of an educational interpreter”
Location of Services: Four Listed Services

Simply because a service is listed as a service that must be provided on the nonpublic school’s campus does not mean that the service is exempt from all other considerations required by special education law. The service must be determined to be necessary in accordance with special education procedures.

If a demanded service would not be appropriate, or would not be sufficient, or would not be necessary under the IDEA, the service falls outside the statute’s scope of providing special education “in the same manner and to the same extent” as provided to public school students with disabilities.
A nonpublic school student has an IEP that calls for a paraeducator for health and communication needs, as well as SDI in reading and AEA speech services. The family wants to reject reading SDI and AEA services, while demanding that the paraeducator services continued, relying on section 256.12(2)’s “location” language.

If the child will receive less than a FAPE without SDI and speech, the public agencies need not (must not?) provide the paraeducator.
Location of Services: Other Services

All other services “may be provided on the nonpublic school’s campus at the discretion of the school district or area education agency provider of the service and with the permission of the lawful custodian of the property.” Iowa Code § 256.12(2)(b) (emphasis added).

This discretion must not be abused. John T. v Marion Indep. Sch. Dist., 173 F.3d 684 (8th Cir. 1999). This discretion, however, does exist. Not every refusal to provide services on a nonpublic school site is an “abuse of discretion.”

Whether the public agency properly uses its discretion depends on the facts of each case.
Hypothetical H: Location

A nonpublic school student’s IEP calls for a full-time paraeducator to assist with academics, among other services. The public school proposes providing paraeducator services at a public school building. Based on that proposal, the child’s attendance at the nonpublic school would be impossible.

This is an abuse of discretion. John T., 173 F.3d at 689.
Hypothetical I: Location

A nonpublic school student’s IEP calls for SDI in mathematics. The public agencies propose providing SDI in math at the local public school building, either at the beginning or end of the school day. The family objects.

Since the child is able to attend some of the school day at the nonpublic school, the public agency’s proposal does not frustrate the intent of section 256.12 and is a permissible exercise of its discretion.
A nonpublic school student’s IEP calls for SDI in mathematics and speech services. The public agencies propose providing SDI in math at the local public school building, either at the beginning or end of the school day, and speech on the nonpublic campus. The family objects to SDI and demands speech services only. Under the child’s IEP, both services are necessary for a FAPE. The family and nonpublic school assert that section 256.12’s purpose is frustrated by not providing speech services only and that the public agencies are abusing their discretion.

So? What are the public agencies’ obligations?
Hypothetical J, Continued

The location dialogue presumes a compliant IEP.

The public agency’s discretion on where to provide services is limited by its duty and obligation to provide services to nonpublic school students “in the same manner and the same extent” as nonpublic school students. If the child would not receive a FAPE with a “speech only” IEP, the public agencies have no discretion to provide speech only. Since such an IEP would not provide a FAPE, the location of where that noncompliant IEP would be provided is legally irrelevant.
Other Matters

The services provided to nonpublic school students must meet all other requirements of special education law, including requirements that funds not benefit nonpublic schools and remain under the control of the public agencies, and that any services provided be “secular, neutral, and nonideological.” See, e.g., Iowa Admin. Code r. 281-41.413(1).

Finance of these services are governed by the IDEA and Iowa Code section 256.12(2)(b)-(c).
Questions? Comments? Insults?

Enjoy the rest of the 2018 Summer Symposium!

Thomas A. Mayes
thomas.mayes@iowa.gov
515-242-5614