



Modern Trends in Special Education Placements: Vouchers and Virtual Programs

Presented by

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Structure of Presentation

- Commentary on private school voucher programs for students with disabilities
- Growth of virtual programs and potential benefits to students with disabilities
- Discussion of the various challenges to special education in virtual programs
- Sample policy language for admission criteria and procedures for students with disabilities in virtual programs
- Sample operational guidelines/procedures under §504



Commentary on Voucher Programs

- **Current status**

President Trump and Secretary of Education Betsy DeVos are strong advocates of voucher-based school choice programs

Bills are circulating in Congress that would allow sp ed students to take their IDEA-B federal funds as part of a voucher program (along with state funds)



Commentary on Voucher Programs

- **Current status**

As of 2015, 40 States considered private school choice legislation (either traditional vouchers, education savings accounts, or scholarship tax credits)

See School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice, Almazan & Stile Marshall (June 2016)



- **Current status**

As of 2015, the following states have some form of private school choice program:
Nevada, Arizona, Oklahoma, Utah,
Colorado, Arkansas, Louisiana, Mississippi,
Tennessee, North Carolina, Georgia,
Florida, Wisconsin, Indiana, Ohio, Maine,
DC, and Vermont

See School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice, Almazan & Stile Marshall (June 2016)



- **Current status**

Median amount of state voucher programs is \$5,000-7,000 (from \$2,000 in Mississippi to up to \$27,000 in Ohio for students with severe autism spectrum disorder)

Programs vary in eligibility criteria, limitations, reapplication requirements, disabilities covered, or geographic regions covered

See School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice, Almazan & Stile Marshall (June 2016)



- **Inescapable facts of voucher programs for students with disabilities**

Enrollment in a private school with a voucher likely means termination of IDEA framework and safeguards

*(Exceptions—*In Louisiana, current IEP must be followed, and in Ohio, all IDEA rights remain, except due process right)

Practically, states cannot force private schools to take voucher students and extend the IDEA rights to them



- **Inescapable facts of voucher programs for students with disabilities**

Enrollment in a private school with a voucher likely means termination of IDEA framework and safeguards

What about §504 rights? Are the private schools “recipients” of federal funds or are the parents? Probably the parents are the recipients, and thus, the private schools are not subject to §504



- **Inescapable facts of voucher programs for students with disabilities**

Enrollment in a private school with a voucher likely means termination of IDEA framework and safeguards

Is it feasible for private schools to create the IDEA framework of rights, procedures, and safeguards for a limited number of voucher sp ed students?...

Will they be willing to risk complex sp ed legal claims?...



- **Inescapable facts of voucher programs for students with disabilities**

Enrollment in a private school with a voucher likely means termination of IDEA framework and safeguards

DeVos has stated that “any institution receiving federal funding is required to follow federal law.”

But that is not consistent with guidance from Dept of Educ...



- **Inescapable facts of voucher programs for students with disabilities**

Addressing sp ed voucher students, OCR and OSEP stated that “Under IDEA, such parentally placed private school students with disabilities have no individual entitlement to a free appropriate public education including special education and related services in connection with those placements.”

Letter to Bowen, at
www.ed.gov/policy/speced/guid/idea/letters/2001-1/bowen3302001fape.doc



- **Inescapable facts of voucher programs for students with disabilities**

Should public schools notify parents seeking vouchers of the IDEA rights and safeguards they will lose upon private school enrollment?

Such a step makes sense, since parents may not realize that the private school may not develop annual IEPs or make decisions by an IEP team that includes the parent, and the parents will not have right to IDEA mediation, due process, IEEs, etc...



- **Inescapable facts of voucher programs for students with disabilities**

Little if no data exists on the performance of sp ed students in private voucher-based programs

Likely due to the fact that private school curricula may not be based on State content or standards, there are no testing requirements, and graduation rates may not be measured uniformly



- **Inescapable facts of voucher programs for students with disabilities**

Voucher funds will almost never cover the entire costs of private school

Especially quality programs specializing in students with disabilities...

Even if IDEA-B per capita funding is added to a State program, it will likely represent only a portion of tuition (and other fees and costs)



- **Inescapable facts of voucher programs for students with disabilities**

Private schools are free to deny special students enrollment or dismiss them after enrollment

Such actions would violate no law

This is more likely to happen to students with severe disabilities or behavioral issues

IDEA discipline protections would not apply



- **Inescapable facts of voucher programs for students with disabilities**

Private schools for students with disabilities tend to be located in urban and suburban areas

Meaning, the right to school choice under a voucher program may be of little use to sp ed students in rural areas or in states with few special private schools



- **Inescapable facts of voucher programs for students with disabilities**

Under the longstanding Florida McKay Program, voucher students return to public schools, on average, within 3.6 years of taking the voucher (although 93% stated they were satisfied with the private school services)

Goldstein, *Special Ed School Vouchers May Come with Hidden Costs* (NY Times—4-11-2017), citing Florida DOE data



Growth and Benefits of Virtual Programs

- The data that exists, is indicative of significant increase in enrollment in virtual programs.
- Data on level of participation of students with disabilities remains unclear
- **Potential benefits:**
 - Self-pacing
 - Greater student control of learning
 - Lack of peer distractions/conflicts
 - Option for students with health issues
 - Allows for instruction in remote rural areas



Growth and Benefits of Virtual Programs

- **Potential benefits:**

- Highly differentiated instruction

- On-going feedback on progress

- Flexible scheduling of work

- Multimodal presentation of content

- Possible cost savings (?)



Challenges to Special Education in Virtual Programs

- A number of challenges, some more complex than others
- *Major problem*—the present IDEA legal framework is based on group instruction in brick-and-mortar public schools
- Another is that the inherent nature of virtual programs is such that they will not be able to meet the needs of some students with disabilities



Equity and Access Issues

- Non-discrimination mandate under §504 means that virtual programs cannot *categorically or arbitrarily* deny or exclude students with disabilities.
- A key issue will be virtual programs' admission or screening policies, which must be designed to avoid arbitrary discrimination.




- **Quillayute Valley (WA) SD, I 08 LRP 17959 (OCR 2007)**

Contract virtual program that is part of a Washington district

Written criteria precluded modified curriculum, counseling, aide support, more than 40 mins/wk of sped services, some tech devices

Unwritten criteria did not allow admission if reading/writing ability below 6th grade or if student lacked ability to work independently



- **Quillayute Valley (WA) SD, I 08 LRP I 7959 (OCR 2007)**

OCR found admission criteria discriminatory and not “reasonably necessary to achieve the mission and goals of the education program.”

Criteria that are applied only to students with disabilities are likely to be seen as discriminatory

Note—But, there are ways of incorporating some of the programs’ valid concerns in ways that do not violate §504 (more later...)



Open Enrollment Virtual Programs

- **Model exacerbates problem of lack of fit of VP for certain students**

States must decide which LEA has the FAPE responsibility (*Dear Colleague Letter* (OSERS/OSEP 2016))—Likely, the open enrollment VP, if it is its own LEA

Dilemma—Open enrollment VPs may get students impossible to serve virtually, and expose VP to liability



Open Enrollment Virtual Programs

- ***Commonwealth Connections Academy Charter Sch. (SEA Pennsylvania 2016)***

8th-grader with ADHD (OHI) transferred from regular district to the VP charter

Prior school's IEP had direct sp ed instruction in social skills, organizational skills, and math

VP provided software programs, live lectures, recordings of lectures



- ***Commonwealth Connections Academy Charter Sch. (SEA Pennsylvania 2016)***

VP also provided “virtual support” from a “learning support teacher”

Student did not take advantage of help, and started falling behind and failing

VP put him in “supplemental support program” but without IEP meeting

Then, parent rejected additional 1:1 support in the home



- ***Commonwealth Connections Academy Charter Sch. (SEA Pennsylvania 2016)***

HO found school failed to provide services comparable to prior IEP

HO—“Soon after enrolling it became apparent, the Student's attention and organizational deficits would interfere with online learning.”

Also, procedural violations

HO awarded 1000 hrs of comp ed



- ***Cincinnati Learning Sch. (SEA OH 2016)***

Teenager enrolled in online charter that offered resource room to supplement VP

IEP did not state an amount of resource time, and student often did not attend

Lots of missing work, logging in inconsistently

SEA found violation, as IEP did not state specific amount of services or face-to-face classes, leaving it up to the student



- ***Cincinnati Learning Sch. (SEA OH 2016)***

Despite escalating problems, school did not hold an IEP meeting

Note—If the VP places a high degree of responsibility on the student as a matter of policy, is that contrary to the IDEA?

But, in open enrollment situations, there are no criteria for admission

And, services must be stated on IEP (could be “minimum of...”)



- ***In re: Student with a Disability (SEA Pennsylvania 2016)***

Student with SLDs and ED enrolled in VP

But, student had a history of school avoidance, so he started not participating, and failed many classes

HO found denial of FAPE—VP did not reevaluate situation or amend IEP

“Charter continued to apply its online model to Student, a model which relies upon the child to access instruction.”



- **Open Enrollment VP Problems:**

Truant students enrolled by parents as an alternative to attendance

Students with off-task tendencies, low capacity for independent work, low motivation, school resistant

Parents not willing/able to function as learning coaches

Students that need significant hands-on instruction



Compliance with Legal Norms in Virtual Context

- Virtual programs must assume all IDEA and §504 requirements apply to them (e.g., IEP progress reports under IDEA)
- But, those laws envision group instruction in brick-and-mortar schools.
- Some emerging cases show how the legal requirements might apply:



- ***Dear Colleague Letter (OSERS/OSEP 2016)***

“The educational rights and protections afforded to children with disabilities and their parents under IDEA must not be diminished or compromised when children with disabilities attend virtual schools that are constituted as LEAs or are public schools of an LEA.”

Child-find applies in VPs, although it presents “unique challenges” in VP context



- ***Virtual Community Sch. of Ohio, 62 IDELR 124 (OCR 2013)***

Fully virtual program not affiliated with a public school district

§504 plans developed informally by a §504 Coordinator after discussion with parent, sometimes after talking with prior school, but without §504 evaluation/meeting

Parents at times were asked to go to doctors to substantiate their children's disabilities



- ***Virtual Community Sch. of Ohio, 62 IDELR 124 (OCR 2013)***

No child-find process, no reevaluations, spotty notice of parent rights

§504 plans not examined “even though many plans would not have previously provided for placement of the student in an on-line educational environment.”

Note—OCR understands that IEPs and §504 plans will have to be adapted to “fit” into an online education setting



- ***Virtual Community Sch. of Ohio, 62 IDELR 124 (OCR 2013)***

Discussion—School website stated it was an “ideal scenario” for students with disabilities, including “students removed from school due to disciplinary reasons”

Might this be oversell? Can VPs be appropriate for any student?...

Any VP must have §504 policies/procedures



- ***Eley v District of Columbia*, 63 IDELR 165 (D.D.C. 2014)**

Application of stay-put—School argued move to regular school from a VP was not a change in placement, as IEP not changed

Court—“Clearly, shifting from what is essentially a completely individualized instructional setting separate from other students to a more traditional school setting does constitute a change in the plaintiff’s ‘then-current educational placement.’”



- ***Tacoma Sch. Dist. (SEA WA 2016)***

District expelled high-schooler with ADHD and ODD, due to risk of violence

After emergency expulsion term, school moved student to its VP (no IEP meeting)

But, student produced little work and was mostly off-task

HO—VP inappropriate for student's unique needs, and provided no social interaction

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- ***Wayne-Westland Comm. Schs.*, 64 IDELR 176 (E.D.Mich. 2014)**

Court grants injunction removing large, aggressive student from school, and placing him in a VP

Note—Court does not comment on how the VP would be appropriate for a highly non-compliant student...



Least Restrictive Environment (LRE)

- LRE speaks to students' being educated alongside nondisabled peers—clearly based on group instruction in brick-and-mortar schools and physical exposure to peers
- LRE regulations require placement in campuses where the student would attend were they nondisabled, unless IEP requires another arrangement (in which case, they require placement in the school next closest to the home)—34 CFR 300.116



Least Restrictive Environment (LRE)

- So how does LRE work in virtual settings? Some cases have applied the mandate traditionally:

- ***S.P. v. Fairview Sch. Dist.*, 64 IDELR 99 (W.D.Pa. 2014)**

Student with severe migraines alleged VP was inappropriate, denied him FAPE

School had made numerous attempts to accommodate his condition, absences, tardies



- ***S.P. v. Fairview Sch. Dist.*, 64 IDELR 99 (W.D.Pa. 2014)**

He had previously been provided a hybrid VP with some school attendance, but he neither attended school, nor worked well on the VP

School finally fashioned a fully VP, fashioned on the VP parents preferred, but parents lost faith in the program after student did not perform

Expert for parents raised LRE, arguing VP was a highly restrictive placement

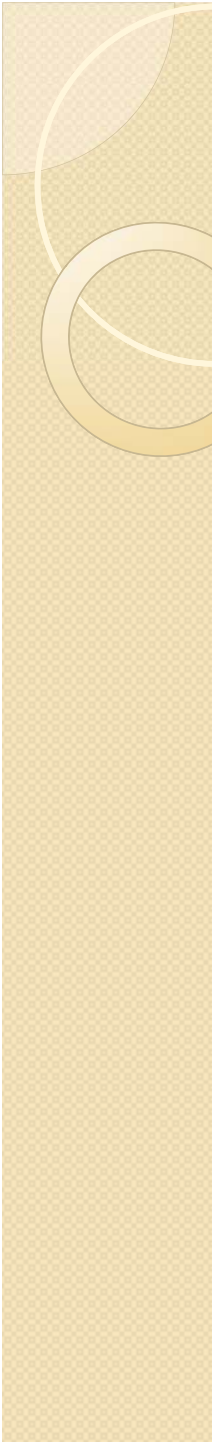


- ***S.P. v. Fairview Sch. Dist.*, 64 IDELR 99 (W.D.Pa. 2014)**

Expert argued VP did not allow learning of behavior and social interaction with peers

Court—Student’s condition made him incapable of attending program other than VP

It applied traditional LRE analysis, finding that school had made “extraordinary” efforts to accommodate student prior to determining “the most restrictive option” was needed

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- ***Does traditional LRE analysis really apply in the virtual context?***

Does it matter that most programs are choice-based programs? Does the parent waive LRE if they choose the private school?...

Or, must IEP teams limit admissions to VPs only to students who require the most restrictive environment in light of their needs?...This “traditional” application would minimize the VP option for students with disabilities

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- ***Does traditional LRE analysis really apply in the virtual context?***

Or, does the virtual environment allow for *virtual* interaction with peers? Virtual LRE?


A continuum of virtual placements exists, where some VPs allow for interaction with peers, others have some, others have none

Is the law saying that virtual interaction is not as valuable as physical interaction? It really has not addressed the issue...

Appropriateness Disputes Involving VPs

- As VPs enter the arena of placements, they will also enter the world of FAPE litigation, which may focus on some of the unique aspects of VPs
- ***Benson Unified Sch. Dist.*, 56 IDELR 244 (SEA Arizona 2011)**


Parents of a student with multiple chemical sensitivities disputed the District's proposal to change her from homebound services to VP



- ***Benson Unified Sch. Dist.*, 56 IDELR 244 (SEA Arizona 2011)**

Parents of a student with multiple chemical sensitivities disputed the District's proposal to change her from homebound services to VP

School argued the VP offered a superior curriculum; parent argued the VP offered too little one-to-one instruction, that neither parent was able to serve as "learning coach," and that student would be exposed to print chemicals



- ***Benson Unified Sch. Dist., 56 IDELR 244 (SEA Arizona 2011)***

Student's treating psychologist testified she lacked the ability to "self-motivate"

HO found for school—HB teacher indicated student was responsible and requiring more independent work would be beneficial

And, program would be print-free and a paraprofessional could serve the function of "learning coach" (implications?...)




- ***School Dist. of Pittsburgh v. C.M.C. (W.D.Pa. 2016)***

Teen with Asperger's and anxiety had fear of school after an altercation

District proposed a mostly VP

Court found student was not a good candidate for a VP, as she was obsessed with computers and the internet

And, the VP offered no social interaction



- ***Virtual Community Sch. of Ohio, 43 IDELR 239 (SEA Ohio 2005)***

Parents of a low-functioning child with Down's alleged that a VP failed to provide an appropriate IEP or confer a FAPE, and sought reimbursement for private placement

Parents had sought out VP after disputes with a regular school

VP required parents to play significant role



- ***Virtual Community Sch. of Ohio, 43 IDELR 239 (SEA Ohio 2005)***

After a time, VP team felt that student required more intensive instruction and hands-on assistance, and sought a change in placement to another regular school

Then, parents argued lack of staff training, inappropriate IEP, failure to provide and maintain technology

Parent stopped participating, student stopped completing any of the VP work

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- ***Virtual Community Sch. of Ohio, 43 IDELR 239 (SEA Ohio 2005)***

HO found for VP—“When parents elect to enroll their children in a virtual school they assume the responsibility of their new role as education facilitator and eyes and ears for the teacher.”

HO found all tech issues were promptly addressed, and denied reimbursement (equitable grounds?...)



- ***DOE State of Hawaii, 112 LRP 31884 (SEA Hawaii 2012)***

Student with cognitive, hearing, health impairments, and behavior problems was placed in a District-operated charter school that offered a hybrid VP and bricks-and-mortar program (main portion of instruction took place online)

Parents serve as “learning coaches,” but get training and assistance in that function

Quickly, problems developed in both parts of program



- ***DOE State of Hawaii, 112 LRP 31884 (SEA Hawaii 2012)***

Student did almost no VP work, and was frequently absent or tardy to school portion

Program made various attempts to provide additional assistance and services to both parent and student, with little results

Team concluded student needed the structure and face-to-face services of a regular campus program and proposed a change in placement

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- ***DOE State of Hawaii, 112 LRP 31884 (SEA Hawaii 2012)***

HO found for school—Student needed highly structured and consistent program, and his behaviors “posed too great of a challenge for the parent as a ‘learning coach.’”

HO held student required a structured placement on a regular campus

Note—A potentially typical VP dispute scenario, after a difficult student is initially accepted, but then problems develop...

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- ***DOE State of Hawaii, 112 LRP 31884 (SEA Hawaii 2012)***

Discussion Question—Disputes over proposed placements in a VP or proposed changes in placement *out* of a VP—which will be more common?...



Degree of Individualization

- VPs must be prepared to offer a high degree of individualization to students, based on their IEPs and evaluation data
- Changes to the IEPs must be made to reflect the accommodations, services, aids, and supports that the student will need to work in the VP
- Lack of proper individualization may lead to FAPE disputes, **and** equity-based challenges



The Fit of the Current Legal Framework

- The current legal framework envisions brick-and-mortar schools and group learning
- Legislation tends to lag behind innovation, and plays catch-up, after period of confusion
- Next IDEA reauthorization must address VPs (LRE application, LRE in parent choice placements in VPs, higher expectations on parents, factors relevant in making determinations of appropriateness for VPs, among others)



Cyberbullying

- VPs that allow for student-to-student interaction must be vigilant to cyberbullying and have a policy in place (as part of anti-harassment policy)
- Policy must address disability-based harassment with particularity



Related Services in VPs

- Services necessary for student to benefit from their special education (34 CFR 300.34)
- Some services will “come with the territory” of VPs—parent training, technology training, tech setup, tech monitoring, consultation with parents
- Some may be provided virtually or by videoconferencing—Speech therapy, counseling
- Others may have to be face-to-face—OT, PT—and may have to be contracted from afar



Related Services

- Could admission criteria include requirement that student not need any hands-on related services? Unlikely



Behavior, Social, or Motivational Issues

- VPs give students greater flexibility and control over their learning experience, but also place greater responsibility on students
- Thus, VPs may not be appropriate for younger students or other students who are dependent learners and have difficulties assuming the responsibilities of VPs.
- This factor plays into admission decisions (and later disputes)



Behavior, Social, or Motivational Issues

- VPs may have to include tech safeguards to address off-task behavior, work completion
- VPs must plan for interventions that make sense in a virtual context, such as increased monitoring of students, increased contacts with parents, training of parents on tech and supervisory role
- **Social skills issues**—Most challenging to address in VPs, may signal need for non-VP



Factors Relevant to Appropriateness of Virtual Program

- Attendance problems or school avoidance
- Ability to remain on task with minimum prompts
- Social skills deficits requiring live interaction with other students
- Need for significant hands-on instruction
- Need for life-skills instruction
- Ability to work independently
- Previous performance in virtual programs



Factors Relevant to Appropriateness of Virtual Program

- Ability and willingness of parents to play expected role
- Need for alternate schedule
- Compliance problems
- Emotional problems
- Academic ability
- Ability to work with technology (with training and support)



Addressing the Increased Role of Parents

- Parents in many VPs assume new roles as monitors and facilitators of their child's educational programs when they agree to participate in the online program (*Virtual Comm. Sch. of Ohio* (OCR 2005)).
- Ability and willingness of parents to play this role, with assistance, is a factor in whether the VP will be appropriate for the student



Addressing the Increased Role of Parents

- Role must be clear in **written policies**
- **Needs Assessments** can help identify whether parents, with training, can master the tech and monitoring roles
- If parents are failing in their roles, IEP team should meet, and propose more supports
- If even with more support, parents cannot perform minimum role, VP may not be proper



VP Written Policy Ideas (See Materials)

- **Mission and Goals** provision (see OCR decisions)
- **Equity and Access Statement**
- Provision on **IEPs and 504 Plans**, and need to determine whether VP is appropriate for student, reevaluations of appropriateness
- **Factors relevant to appropriateness**
- **Related services**
- **Parent Roles and Needs Assessments**
- **Accessibility**
- **Equipment**