

# Modern Issues in Cases of Reimbursement for Unilateral Private Placements Under the IDEA

by

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## The Remedy of Reimbursement for Unilateral Private Placement of IDEA Students

Every parent has the right to obtain private services or place their child in a private school if they so desire. This right, of course, extends to students with disabilities. Some parents, however, place their disabled children in private schools because they assert that their public school's program is not appropriate to meet the child's educational needs. Prior to 1985, however, the law was not clear on the question of whether a legal mechanism existed to allow a parent to recover the costs of a unilateral private placement for their disabled student, and if so, under what conditions. Since that time, and following Supreme Court caselaw, the federal courts and the Congress have established a legal framework for the reimbursement remedy. Since 1997, the IDEA has included specific provisions providing a statutory structure to that remedy. This article addresses the development of the reimbursement remedy, reviews the Supreme Court's most recent opinion on the topic, alerts schools to the potential implications of that opinion, and surveys the modern federal court caselaw on the various legal issues raised in unilateral placement cases.

### The *Burlington* Decision

The Supreme Court answered the question of whether reimbursement was possible for a parent-initiated unilateral placement in its opinion in *School Committee of Burlington v. Dept. of Education of Massachusetts*, 471 U.S. 359 (1985). The *Burlington* opinion held that a school would have to reimburse the costs of a parent's unilateral private placement for their disabled child if the following findings were made:

1. the school's IEP is found inappropriate (i.e. not reasonably calculated to confer meaningful educational benefit to the child), *and*,
2. the private program is found to be appropriate under the IDEA.

Thus, parents can unilaterally pull their children from a public school program, and be reimbursed for the costs of a private placement, if the public program is inappropriate to meet the child's educational needs, and the private program is educationally appropriate. The reimbursement remedy therefore

requires *two* findings: (1) the public program must be found inappropriate, and (2) the private program must be found appropriate to meet the child's educational needs.

The Supreme Court made clear, however, that parents run the risk that hearing officers or courts will find the public school program appropriate or the private program inappropriate. In those cases, the parents will not obtain reimbursement. Therefore, unilateral private placement involves an element of gamble on the part of parents.

### **The *Carter* Decision—The Issue of State Approval of Private Placements**

After 1985, a question arose as to whether reimbursement was possible in situations where the private placement was not on the state's list of "approved" private schools. Could a program meet the standards of the state education agency if it was not approved by the state? In 1993, the Supreme Court issued its opinion in *Florence County School District Four v. Carter*, 114 S.Ct. 361, 20 IDELR 532 (1993). The lower court had split from other courts to hold that reimbursement could be awarded for a unilateral placement in a non-approved facility. The Supreme Court granted *certiorari* (review) to resolve the conflict among the courts of appeals. The Supreme Court's opinion in *Carter* agreed with the lower court and held that a parent could obtain reimbursement for a non-approved unilateral private placement if the public IEP was inappropriate and the private placement provided an appropriate program. This was so even if the private placement did not develop IEPs or meet other technical requirements applicable to educational placements effected by school districts.

The doctrine of the *Carter* opinion is now incorporated in the applicable IDEA regulation, which states that "[a] parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs." 34 C.F.R. §300.148(c); see e.g., *C.B. v. Garden Grove Unified Sch. Dist.*, 53 IDELR 260 (C.D.Cal. 2009).

### **The Post-*Carter* Standard for Appropriateness of Unapproved Private Placements**

If failure to comply with the regular requirements of the IDEA, such as state educational agency approval, does not mean that a parent-initiated placement is inappropriate under the Act, what is the standard then, for determining the appropriateness of a unilateral private placement after *Carter*? The consensus among the commentators is that a private placement will be found inappropriate only if it fails to confer an educational benefit to the child. The lack of IEPs, of certified staffpersons, or of specific objectives, is not fatal to reimbursement—so long as a private program meets the IDEA's minimum standard of substantive appropriateness under *Rowley*—a program reasonably calculated to provide educational benefit (i.e. more than trivial educational progress) to the child.

## The Statutory Provision of the 1997 IDEA Reauthorization

Congress reauthorized and amended IDEA in 1997, and included a provision codifying the remedy of reimbursement for unilateral private placements. The provision, which was also made part of the 2004 amendments, states as follows:

Payment for education of children enrolled in private schools without consent of or referral by the public agency—

- (i) In general—Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
- (ii) Reimbursement for private school placement—If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.
- (iii) Limitation on reimbursement—The cost of reimbursement described in clause (ii) may be reduced or denied—
  - (I) if—
    - (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
    - (bb) 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 in item (aa);
  - (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 615(b)(3), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
  - (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.
- (iv) Exception—Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—
  - (I) shall not be reduced or denied for failure to provide such notice if—
    - (aa) the school prevented the parent from providing such notice;
    - (bb) the parents had not received notice, pursuant to section 615, of the notice requirement in clause (iii)(I); or

- (cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and
- (II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—
  - (aa) the parent is illiterate or cannot write in English; or
  - (bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child. 20 U.S.C. §1412(a)(10)(C).

Thus, the IDEA provision first sets forth the *Burlington* remedy, including a reminder that schools do not have to fund private placements if they have made a FAPE available to a child with a disability. In other words, the provision acknowledges the right of parents to voluntarily forego public education and place their children in private schools at their expense, in situations where there is not a dispute over the provision of a FAPE. Next, the provision codifies a variety of case holdings that limited or denied reimbursement if parents did not provide prior notice of their intent to unilaterally place their child in a private setting and seek reimbursement from the public school. See, e.g. *Garland Ind. Sch. Dist. v. Wilks*, 558 IDELR 308 (N.D.Tex. 1987). The underlying policy is to provide schools with an opportunity to address parental concerns and revise the IEP accordingly. The provision also adds clauses that would allow a hearing officer or court to reduce or deny reimbursement if a parent refused to submit to a reevaluation of the child, or if the parent acted unreasonably in considering and undertaking a unilateral private placement. Finally, the provision includes exception provisions addressing situations where lack of notice on the part of the parent may be justified.

### ***Forest Grove*—The Issue of Prior Receipt of Special Education Services**

The latest clarification of the reimbursement remedy for unilateral private placements occurred recently, with the Supreme Court opinion in the case of *Forest Grove Sch. Dist. v. T. A.*, 52 IDELR 151 (2009). In that case, the Court addressed the issue of whether the IDEA provisions on reimbursement for unilateral private placements prohibit reimbursement for private school costs if a child had not previously received special education services from the local educational agency. The IDEA provision states that “[i]f the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.” 20 U.S.C. §1412(a)(10)(C)(ii) (emphasis supplied). Some courts read the provision literally, and held that parents were barred from seeking reimbursement for unilateral placements unless the child had previously received special education services from the public school in question. See, e.g. *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (1<sup>st</sup> Cir. 2004).

*Factual background*—In *Forest Grove*, a high school student began having problems with attention and schoolwork, and was seen by a school psychologist, who interviewed him, examined school records, and administered cognitive ability

tests. The psychologist concluded that the student needed no further testing for either learning disabilities or other health impairments. The problems, however, worsened during the student's junior year, and he was formally diagnosed, privately, with ADHD and a number of disabilities related to learning and memory. After a private specialist recommended a structured residential learning environment, the parents placed the student in a private academy focusing on educating students with special needs. Four days after enrolling him in the private school, the parents hired a lawyer to advise them and provide notice to the school district of the private placement. After the parents filed a request for due process hearing, the school multidisciplinary team met and determined that the student was not IDEA-eligible because his ADHD did not have a sufficiently significant adverse impact on his educational performance. The student remained enrolled in the private school for his senior year.

*The Supreme Court's opinion and rationale*—Justice Stevens, writing for the majority, held that the IDEA provision was not a categorical bar to reimbursement in situations where the child had not previously received services from the public school in question. First, he reasoned that the policies underlying the reimbursement remedy applied equally in situations where the school had not provided special education services because it failed to properly identify the child. In fact, the opinion posits that a failure-to-identify is actually a more egregious violation than failing to provide an adequate IEP to an identified child. Secondly, he interpreted the text of the IDEA provision as not imposing a bar to reimbursement in these situations, writing that “clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special education services and the child's parents believe those services are inadequate.” Finally, he stated that “[i]t would be particularly strange for the Act to provide a remedy, as all agree it does, when a school district offers a child inadequate special education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether.”

*Limits of the Court's opinion*—It is important to note what the *Forest Grove* opinion does not say. It does not stand for the proposition that a parent's refusal to allow a public school to attempt a potentially appropriate school IEP would not be a proper factor for consideration as part of a court's equitable findings relevant to the reimbursement claim. The Court, rather, holds that the fact that a public school has not provided special education services to a child is not an outright bar to the reimbursement claim. The Court opinion, moreover, does not touch on the fact that the IDEA reimbursement provision allows hearing officers or courts to reduce or deny reimbursement “upon a judicial finding of unreasonableness with respect to actions taken by the parents.” 20 U.S.C. §1412(a)(10)(C)(iii)(III). It also does not affect its holding in *Carter*, which emphasized that “[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors...” *Carter*, 20 IDELR 532 at 5.

*On remand*—The lower court on remand, per the Court's guidance, addressed the equitable factors present in the case and denied reimbursement, finding that the purpose of the private placement was not

educational, but rather in response to the student's drug use and problem behaviors. Moreover, the parents did not provide notice of the unilateral placement until well after the student was enrolled. The placement was the first option presented by the family's physician, and the parents investigated no other placement. *Forest Grove Sch. Dist. v. T. A.*, 53 IDELR 213 (D.Ore. 2009). The District Court opinion was upheld on appeal.

## **The Reimbursement Remedy in Action—A Survey of Selected Recent Caselaw**

### **Recent Circuit Court Pronouncements**

In cases where the claim is for reimbursement of the costs of private residential facilities, the costs of such placements tend to be high, due to the 24-hour nature of the services, the therapeutic interventions, the psychiatric care, and the overall mental health care that goes along with the educational services that may be provided as part of the residential program. A recent case that promises to shake up this area of caselaw is the matter of *Richardson Independent Sch. Dist. v. Leah Z.*, 109 LRP 52635 (5<sup>th</sup> Cir. 2009). There the parents of a girl with diagnoses including ADHD, oppositional defiant disorder, bipolar disorder, autism, separation anxiety disorder placed her in a residential psychiatric facility after Leah was found to have engaged in sexual activities during her frequent self-removals from the classroom. Apparently, Leah often left class and wandered around the halls, sometimes also engaging in violent and profane episodes when confronted. A long-term substitute who taught her class was given little assistance, did not have Leah's IEP, and did not know of her tendency to flee the classroom setting. At the psychiatric facility, Leah groped staff members and patients, attempted to remove other patients' clothing, refused to follow directions or attend class, and engaged in self-mutilation. After a change in medication, however, Leah improved and was discharged with a recommendation for a special education class with one-on-one supervision.

The district court found that Leah's IEPs were not appropriate and were substantially similar to previous IEPs that contained measures that proved ineffective in curbing Leah's problem with staying in class. Thus, it awarded reimbursement for the residential psychiatric facility costs. Noting that the residential program addressed significant psychiatric issues, however, the Fifth Circuit found that caselaw holding that when psychiatric and educational problems are "intertwined," reimbursement may be warranted for the full costs of the residential program, "expands school district liability beyond that required by IDEA." In light of that finding, the court wrote that "we adopt the following test: In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education." The court explained that "IDEA, though broad in scope, does not require school districts to bear the costs of private residential services that are primarily aimed at treating a child's medical difficulties or enabling the child to participate in non-educational activities. IDEA ensures that all disabled children receive a meaningful education, but it was not intended to shift the costs of treating a child's disability to the school district." Thus, the court instructed, if a court finds that a residential placement was primarily oriented toward enabling the child to

receive an education, “the court must then examine each constituent part of the placement to weed out inappropriate treatments from the appropriate (and therefore reimbursable) ones.” The court therefore remanded the case back to the district court so it could make these determinations.

*Note*—Practically, however, the main costs of residential placements are not the educational costs. The expensive services are the psychiatric care, mental health services, and therapeutic interventions. The costs of educational services and services directly designed to assist the child in progressing educationally are likely to be a minor part of the total costs of the placement. Thus, this opinion significantly reduces the potential reimbursement parents can recover in most residential placement situations involving students with psychiatric needs. This decision, which is arguably in conflict with various older circuit courts’ decision, may therefore lead to Supreme Court review.

*Note*—The Fifth Circuit thus posits that the proper inquiry is whether a particular residential program is “primarily oriented” toward enabling the child to receive an education. This analysis is an alternative to the “inextricably intertwined” formulation of various circuit courts, under which if a child’s educational and non-educational/medical needs are intertwined to the point that they cannot be meaningfully segregated, and in conjunction require residential placement, then such a placement is proper under the IDEA. The Fifth Circuit’s analysis appears to shift the focus to the nature of the residential program, its immediate and long-term objectives, its component parts, and the degree to which it focuses on education. The “inextricably intertwined” formulation instead focuses on the student’s deficits and needs. The Fifth Circuit’s concern with that analysis is that a child’s problems may be primarily non-educational, and to a lesser degree educational, but nevertheless intertwined to the point that public funding for the residential placement is still afforded under the IDEA. It remains to be seen, however, whether the *Leah Z.* test affects other circuit courts and represents a more workable legal framework for these cases.

Indeed, one of the Circuit Courts of Appeal mentioned in the *Richardson ISD* decision above issued recently an opinion of its own touching on the question of a medically-oriented residential placement. In *Mary Courtney T. v. School Dist. of Philadelphia*, 52 IDELR 211 (3<sup>rd</sup> Cir. 2009), the parents of a girl with multiple psychiatric conditions, and who had been dismissed from several facilities, placed her in a psychiatric residential facility in New York and sought public reimbursement for the placement. The placement came as a result of a crisis situation where the student was increasingly self-abusive and aggressive. The court noted that the facility had no educational accreditation, no on-site school, no on-site educators, no appreciable educational component. Focusing on the goals sought to be achieved by the facility, the court found that they were related to helping the student be aware of her condition and how to respond to it. “Courtney received services that are not unlike programs that teach diabetic students how to manage their blood sugar levels and diets—both sorts of programs teach children to manage their conditions so that they can improve their own health and well-being.” It also noted that Courtney’s placement was necessitated by a need to address her acute medical condition. The medical interventions, psychiatric treatment, and drug interventions to address her conditions are “far beyond the

capacity and responsibility of the School District.” The court also found that the costs of such a facility “may undoubtedly be classified as ‘unduly expensive.’” Thus, the court denied reimbursement.

*Note*—In the above case, the court dealt with a fairly clear example of a placement that was not primarily oriented at enabling the child to receive an education. Thus, one could argue that the Third and Fifth Circuit are not that far off in their respective analyses, although they certainly use different wording and structure their “tests” in different ways. But, most likely the two courts would part ways when it came to a placement that was educationally oriented, but where significant costs are associated with non-educational interventions and treatment. At that point, the Fifth Circuit would proceed to segregate the costs associated with education from those associated with treatment, and would not reimburse the latter.

The case of *A. S. v. Five Town Community Sch. Dist.*, 49 IDELR 93 (1<sup>st</sup> Cir. 2008) highlights the importance of collaborative action on the part of parents in the educational decision-making process. A. S. is a teenage girl with an emotional disability. When she was first enrolled in the District, her parents requested that the District pay for private residential placement. Before the school could consider this request, the student went into crisis and her parents unilaterally placed her in an out-of-state residential facility, and then brought her back to Maine to a private boarding school, unbeknownst to the District. After an independent evaluator found that A. S. could receive an appropriate education in a public school setting, the school prepared a preliminary IEP that called for public school placement and left various areas open for later development. At the meeting to discuss the IEP, discussion became contentious, as the parents insisted on residential placement. The court held that the parents had frustrated the collaborative process that was intended to complete the IEP. “Once the parents realized that the school district was focused on a non-residential placement, the essentially lost interest in the IEP process.” The district court and the circuit court concluded that, had the parents allowed the IEP process to run its course, the school would have developed a complete and appropriate IEP. Noting that the Congress deliberately fashioned an interactive IEP process, “it expressly declared that if parents act unreasonably in the course of the process, they may be barred from reimbursement under the IDEA.” Citing Section 1412(a)(10)(C)(iii)(III), the court held that the parents’ fixed idea of residential placement disrupted the IEP process and was unreasonable, and denied any reimbursement. “The parents made a unilateral choice to abandon the collaborative IEP process without allowing that process to run its course.”

*Note*—Any evidence that the parents are entrenched in an *idée fixe* that the student must be educated in a private setting, tends to have a powerful influence in the equitable calculation that is a key aspect of the unilateral placement remedy. At times, the evidence of such an attitude is the parents’ statements at IEP team meetings, while in other situations, failure to participate in the IEP process demonstrates a parent’s unwillingness to consider public program options. In other situations, parental actions, such as signing an enrollment contract with a private school, or putting down a sizeable unrefundable deposit show that the parent is not seriously considering placement in the public school.

Related services played a key role in *Souderton Area Sch. Dist. v. J. H.*, 109 LRP 71219 (3<sup>rd</sup> Cir. 2009), where parents of a teen with LDs sought reimbursement for a private school placement. The parents argued that the student's IEP did not properly address his needs in the area of writing and occupational therapy (OT). The court disagreed, finding that the IEP used a writing method approved for use throughout the state. On the issue of OT, the parents did not provide their private OT evaluation until the school year had begun and the IEP was already formulated. The school responded by indicating it would address the OT issue within 30 days after the student returned to school, but the parents requested a hearing instead. The court held that the parents' "contention that the IEP should have provided for OT services assumes a recognition of OT needs that did not exist when the IEP was created." It did not find that the private OT evaluation was sufficient to demonstrate that the public IEP was inappropriate. Finally, the fact that the private school provided speech therapy did not mean that the public IEP needed to include speech therapy, particularly in light of the fact that the private school provided speech services to all its students.

*Note*—The parent argued that the writing program used for the student was not "research-based," although it was widely used across the state as a "best practice" methodology. IDEA currently requires that IEPs include a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child..." 20 U.S.C. §1414(d)(1)(a)(1)(IV) (emphasis supplied). The USDOE commentary accompanying the 2006 IDEA regulations states, however, that "there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP team based on the child's individual needs." 71 Fed. Reg. 46,665 (August 14, 2006). Thus, even if the parent had proven that the writing program was not research-based in a strict sense, that would not have meant that the program was inappropriate or denied a FAPE.

At times, the reimbursement claim is derailed not by the actions of parents, but by the nature of the private placement. In the New York case of *Gagliardo v. Arlington Central Sch. Dist.*, 48 IDELR 1 (2<sup>nd</sup> Cir. 2007), the school and the parents agreed that a student with emotional disturbance needed a private school setting, but disagreed on the choice of private program. The student had refused to attend school after being bullied and teased, and was provided homebound instruction for a time. The public school began considering several special private programs, but the parents sought independent advice and focused on a Quaker school that was not approved by the State, without letting the school district know. When the District proposed another private program, the parents objected, although they had no alternate suggestion. They also refused additional testing. The court denied reimbursement, finding that the Quaker program lacked staff with the training and therapeutic background needed to meet the student's needs, as identified by evaluators. Moreover, although the student received some benefit at the Quaker school, "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not."

*Note*—The court in *Gagliardo* comments on the appropriateness standard for a private program not approved by a state educational agency. Although a private program need not meet every technical requirement imposed on public schools by the state, it must be “proper” under the Act. “Subject to certain limited exceptions, ‘the same considerations and criteria that apply in determining whether the school district’s placement is appropriate should be considered in determining the appropriateness of the parents’ placement.’” The placement, although not meeting all technical requirements, must be reasonably calculated to enable the child to receive educational benefits. Here, it neither provided the type of staff required, nor the specific special education services the student needed. The benefits of the program were simply those associated with small private schools in general. See also, *N. C. v. Board of Educ. of the Hyde Park Cent. Sch. Dist.*, 50 IDELR 225 (S.D.N.Y. 2008)(private program benefits were general, rather than specifically tailored to the student’s needs).

In *B. G. v. School Bd. of Palm Beach County*, 48 IDELR 271 (11<sup>th</sup> Cir. 2007), the parents of an 8-year-old with emotional disturbance failed in their bid to win reimbursement for his unilateral placement in a residential behavioral health facility. The student, who had received various diagnoses, including mood disorder, impulse control disorder, ADHD, bipolar disorder, and schizoaffective disorder, was hospitalized after a violent episode at home (he threw things and tried to smash a mirror over his mother’s head). Subsequently, his parents placed him in a residential facility, where his behavior remained uncontrollable. The parents argued that although the student’s performance was acceptable in the public school setting, he was not transferring those gains into the home. The court stated that “the standard for an appropriate education is whether the student is making ‘reasonable and adequate gains in the classroom,’ not whether the child’s progress in a school setting carried over to the home setting.” Indeed, the parents’ expert, who recommended residential placement, testified to the need for such a setting based on the difficulties that the student was having with his parents at home. The court denied reimbursement, finding that the student was making adequate progress in the public school classroom, and that “the IDEA does not require that the student be able to generalize behaviors from the classroom to the home setting.”

*Note*—But, are educational gains made solely in the classroom, and exhibited only in the classroom, really the “educational benefit” envisioned in *Rowley*? If a child’s primary area of educational need is in the emotional/behavioral domain, and the child does not demonstrate improvement in that area at home and society, has there really been improvement? Does such a situation not indicate the potential need for in-home services, parent training, or parent counseling? The court here may be taking an “old-school” approach to education—i.e., if the student is making progress on the three R’s, then the student is receiving educational benefit—without fully recognizing that education is a broader concept than academic proficiency, particularly for students with emotional disturbance or autism spectrum disorder.

Similarly, in *Thompson R2-J Sch. Dist. v. Luke P.*, 50 IDELR 212 (10<sup>th</sup> Cir. 2008), the circuit court reversed a district court in holding that the Act does not

guarantee generalization of skills needed to reach self-sufficiency. Despite progress in many areas of goals and objectives, the student manifested serious behavior problems in the home and community, including violent outbursts, sleep problems, and intentionally spreading bowel movements around his bedroom at night. After a consultant observed the student in the public school setting and made recommendations regarding his IEP goals and objectives, the school agreed to revise the IEP, but refused to pay for residential placement. The court disagreed with the lower court's view of the generalization issue. "Though one can well argue that generalization is a critical skill for self-sufficiency and independence, we cannot agree with appellees that IDEA always attaches essential importance to it." Finding that the Congress did not provide in IDEA a guarantee of self-sufficiency, together with the fact-finders' conclusions that the student made progress at school, the court felt compelled to reverse the lower court. It thus held that schools do not need to show progress on generalization of skills, in all cases, to ensure an appropriate educational program under the IDEA. At most, the court added, there could be a case where the child's problems generalizing skills across settings were so severe that they prevented the child from receiving any educational benefit.

*Note*—The stage seems set for a future Supreme Court battle on the issue of generalization of skills from school to home and community. The First, Tenth, and Eleventh Circuits are clearly skeptical of tying generalization of skills to the concept of FAPE and educational benefit in a general way. See *Gonzalez v. Puerto Rico Dep't of Educ.*, 34 IDELR 291 (1<sup>st</sup> Cir. 2001); *Thompson R2-J* (10<sup>th</sup> Cir. 2008); *B. G.* (11<sup>th</sup> Cir. 2007). Other circuits, when faced with appropriate dispute scenarios, are likely to disagree. Regarding the Tenth Circuit's analysis, do we have to agree that self-sufficiency is guaranteed under the IDEA in order to also say that an IEP must address generalization of skills to be appropriate, particularly with students exhibiting problems in this area? A circuit court may, in a future case, decide that while self-sufficiency is not guaranteed under the IDEA, an IEP must address generalization of skills in order to be appropriate under the Act, in cases where generalization of skills is an identified area of educational need.

## Recent Selected Lower Court Caselaw

### *A New Legal Question for Debate*

Can a parent unilaterally place their child in a private school they cannot afford, and then take legal action seeking for the public school to directly pay the private school? Although not the traditional reimbursement scheme, a New York federal court answered the question in the affirmative. *D. A. v. New York City Dept. of Educ.*, 56 IDELR 42 (S.D.N.Y. 2011). After agreeing with the hearing officer that the public school denied a FAPE by failing to make a concrete offer of placement to the parents, the court found that the policies and purposes underlying the reimbursement remedy would be thwarted if parents of limited means were required to "front" the costs of a private placement before being able to access the *Burlington* remedy. "It simply cannot be the case that an act designed to grant 'all' disabled children access to needed services would undermine that very goal by making such access dependent upon a family's financial situation." The court was, moreover, unperturbed that the parents were not bearing the financial risk normally inherent in the reimbursement remedy. "The only difference in this case

is that the [private] school absorbed some of that risk, by agreeing with a needy family to a permissive payment schedule.”

*Note*—The private school agreed to enroll the child as long as the parents agreed to a payment plan of \$100 per month toward the \$85,000 per year tuition (the plan would take nearly 75 years). The school testified that it would take legal action against the parent if they failed to comply with the payment plan. But, why would a private school expend significant attorneys’ fees only to recover \$100 per month? The more likely situation is that the private school simply agreed to bear the risk that the parents might not prevail in obtaining reimbursement. Does this dynamic change the relative incentive on the part of the private school, as it now has a direct financial interest in the outcome of the case? Is the parents’ financial risk a fundamental component of the *Burlington* scheme? An appeal from the court’s ruling is highly likely.

### *Equitable Factors in Reimbursement Cases*

Federal courts have long held that equitable factors may work to reduce or obviate reimbursement for a unilateral private placement under the IDEA. See, e.g., *Alamo Heights ISD v. State Bd. of Education*, 790 F.2d 1153 (5th Cir. 1986)(equitable considerations may work to reduce reimbursement, even in situations where the school district has failed to provide an appropriate IEP). In 1997, the Congress included a provision in the IDEA codifying the doctrine allowing consideration of equitable considerations in deciding reimbursement cases. The provision harkens to the ancient “clean hands” doctrine of equity—he who comes to the court seeking relief based on fairness considerations must come to the court with “clean hands,” in terms of the fairness of his own actions in the dispute. Numerous district court decisions in this area turn on the actions of parents leading up to, and during, the legal action for reimbursement. Indeed, some courts view parental collaboration with the public school almost like a prerequisite to reimbursement. Clearly, courts take seriously the collaborative structure envisioned by the Congress with respect to educational decision-making for students with disabilities, as well as the IDEA provision’s guidance on reduction or denial of reimbursement based on unreasonable parental conduct or lack of notice of private placement to the public school. The focus on the parties’ conduct is in line with the equitable nature of the reimbursement determination, which is, ultimately, a basic fairness decision. The following cases show some fact scenarios stressing this area of analysis.

After a teenage girl who had not been identified as IDEA-eligible began making suicidal statements, the parent requested an evaluation from the District. *Lazerson v. Capistrano Unified Sch. Dist.*, 56 IDELR 213 (C.D.Cal. 2011). Two days later, the school contacted the parents asking them to bring the girl in for evaluation. Instead, the parents placed her in a residential facility with one-day notice to the school, and did not communicate further with the school for nine months. The school continued attempting to evaluate the child while she was in her facility to no avail. The parents filed suit requesting reimbursement. Although the court found technical violations in failing to provide notice of procedural safeguards and initiating the evaluation in a timely evaluation, it found that the parents thwarted the evaluation process, in addition to providing “incredibly short notice,” and failing to research alternative options with the District. Although the

parents may have believed immediate placement was necessary to prevent imminent harm, “Districts, however, are not responsible for providing emergency mental health services.”

Similarly, in a DC case, a parent who thwarted the school’s attempts to develop an IEP could not later claim that the school failed to offer her a program when she brought her son to the high school after providing 10-day notice of her intent to unilaterally place her in a private school. *G. M. v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010). Mid-summer, the parent demanded that the public school develop an IEP for her son, who would be transferring from out of state. When the school had not completed the task after three weeks, she provided notice that she was placing him unilaterally in a private school. When school started, however, she showed up to enroll him at the high school, and later sought reimbursement, claiming the school failed to offer her son a FAPE. The court denied reimbursement on the basis of the parent’s unreasonable behavior, also finding that as a transfer student, the school did not have to offer a finalized IEP immediately upon transfer.

For some courts, parental cooperation with the public school in attempting to develop a public IEP is almost an equitable prerequisite to seeking reimbursement for a private placement. In *C. G. v. Sheehan*, 56 IDELR 17 (D.R.I. 2010), a parent placed her daughter unilaterally in a private facility after she was sexually abused by a school referee, who was banned from the campus after the abuse was discovered. The court found that the parent cancelled scheduled IEP meetings and manipulated the process because she had “predetermined” to place her daughter in a private school, and thus impeded the IEP development. The magistrate held that reimbursement is contingent upon a showing that the parent diligently pursued the provision of appropriate services from the district, yet the district failed to provide them. In addition, the court found that the public program offered by the public school would have met the student’s needs, if the parent had allowed it to be implemented.

But, it is not enough that it appears that the parent would prefer a private placement. The public school’s IEP must be appropriate. In *Sudbury Public Schs. v. Massachusetts Dept. of Elementary and Secondary Educ.*, 55 IDELR 284 (D.Mass. 2010), although the parents enrolled their teenager with autism in the private school before even contacting the public school, the public school’s offer of an IEP was not appropriate. Moreover, the parent cooperated with the IEP process and testified she would have accepted an appropriate public school program. The court found no evidence of obstruction or loss of interest in the IEP process, despite acknowledging that there was evidence that the parents preferred a private placement and intended for their child to be placed in private school. The public school staff, moreover, did not appear to understand the nature of the student’s multiple needs and did not provide sufficient support or safeguards for his participation in regular science and social studies classes.

In *J. B. v. Bridgewater-Raritan Reg. Bd. of Educ.*, 52 IDELR 39 (D.N.J. 2009), the issue involved educational programming for a preschool child with Autism. The proposed IEP for the student included 29 hours of ABA programming per week, speech therapy, weekly in-service staff debriefing and training, communication with parents, and a one-to-one staff-to-student ratio. The parents

rejected the IEP and placed their child in a private ABA program without attempting the public IEP services. While allowing the reimbursement action, the court noted that “Plaintiffs enrolled J. B. at Somerset Hills before this proposed IEP for J.B. was considered as an option or tested out for that matter.” The court found that the proposed IEP was appropriate, and indicated that the evidence showed that the District’s program was “extremely flexible” and “could have been further molded to fit his specific needs had he been enrolled...” Thus, the court denied reimbursement, based on the appropriateness of the IEP, as well as the parent’s conduct in refusing implementation of an IEP that appeared to have the components that would meet the student’s broad educational need areas.

But not all failures to cooperate with school officials cost a parent the case. If the school has also acted obstructively, it may nullify the impact of parental non-cooperation. In *Hogan v. Fairfax County Sch. Bd.*, 53 IDELR 14 (E.D.Va. 2009), a parent suffered only a one-sixth reduction in reimbursement, despite the fact that they refused some evaluations, failed to return phone calls, and failed to pick up a certified mail packet. The tone of their e-mails led the court to find that they were intended “with an eye toward creating a record.” A school staffperson close to retirement, however, did not respond to some parent e-mails and took no action for several weeks prior to leaving her post. The court held that the parent “did not singlehandedly derail [the IEP process],” and only reduced reimbursement by one-sixth rather than the one-third reduction ordered by the hearing officer.

*Note*—Although not of much help to the public school in this instance, the court wrote that “several discrete actions, none of which could be called so unreasonable that it would justify reducing reimbursement on its own, can lead, in the aggregate to a finding of unreasonableness.” Small instances of parental non-cooperation can thus accumulate to support a judicial finding of unreasonableness. Although this point is implied in a number of cases, this court explicitly makes it.

### ***Parental Notice of Unilateral Private Placement***

Even before the 1997 IDEA included a provision on parental notice to the public school in unilateral placement situations, caselaw addressed the need for parents to notify school districts prior to seeking reimbursement for a unilateral private placement. See e.g., *Evans v. Dist. No. 17 of Douglas County*, 841 F.2d 824 (8th Cir. 1988); *Garland Independent School District v. Wilks*, 657 F.Supp. 1163 (N.D. Tex. 1987). The policy underlying the doctrine and IDEA provision is straightforward—parental notice affords public schools an opportunity to address potential deficiencies in the student’s IEP before the parent resorts to a private placement. See *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (1<sup>st</sup> Cir. 2004). Armed with notice that the parents intend to unilaterally place the student at public expense, the school may choose to conduct re-evaluations, add services, revise the IEP, or otherwise address potential deficiencies in the public educational program for he student. While courts will always examine notice irregularities, they vary in terms of deciding the consequences of a parental failure to provide notice to the public school. Some courts will view a notice failure as a bar to reimbursement. In fact, the IDEA provision states that reimbursement “may” be reduced or denied if there is no notice, expressly indicating the discretionary nature of the provision. See *Ashland Sch. Dist. v. Parents of Student E. H.*, 583 F.Supp.2d 1220 (D.Ore. 2008).

Others will deny reimbursement of private placement costs incurred prior to the date notice was provided to the public school. Others will simply “eyeball” a reduction in the total reimbursement costs in no-notice situations. Yet others will excuse non-compliance with the notice provision in certain circumstances. Since there can be such a variety of factual situations surrounding unilateral placements, it makes sense to afford fact-finders significant discretion in applying the notice provision. The cases below are modern examples of the notice provision in action.

A court awarded partial reimbursement to parents of a child with dyslexia despite the fact that they waited two months before notifying the public school of their dissatisfaction with the IEP the school offered. *J. W. v. Kingston City Sch. Dist.*, 55 IDELR 132 (N.D.N.Y. 2010). The court found that the parents wrote a letter to the school five days before the start of school and two months after the offer of FAPE clearly expressing their disagreement with the proposed program. The letter, held the court, sufficiently put the school on notice of the parents’ concerns. Moreover, although the parents requested a due process hearing instead of meeting with the school to discuss the issue, the conduct did not rise to the level of uncooperativeness that would justify rejecting reimbursement. The court thus reduced the reimbursement by 10%.

Similarly, in *Erin K. v. Naperville Sch. Dist. No. 203*, 109 LRP 63178 (N.D.Ill. 2009), Illinois parents of a girl with mental and emotional disorders were able to revive their reimbursement action despite not providing prior written notice of their unilateral out-of-state residential placement. After a hospitalization, Erin’s parents placed her in a Utah residential facility. Three days later, they wrote the school district regarding their placement and intent to seek reimbursement. After a due process hearing request was filed nine months later, the parents and the school district agreed in a resolution session that the district would assume financial responsibility for the residential placement, but the parents also requested retroactive reimbursement. The hearing officer dismissed the hearing request, finding that since the parents had failed to provide prior written notice, they were precluded from seeking retroactive reimbursement for the residential placement. The court disagreed, finding that the parents had spoken with the district’s special education director about their intent to place Erin in a residential facility about a month prior to the placement. In addition, the court noted that failure to provide notice is not a firm bar to reimbursement, but rather allows a fact-finder to reduce or deny reimbursement. “That Congress left some discretion to the decision maker is understandable, given the remedial purpose of the IDEA and myriad of factual circumstances that arise under the IDEA.” The court thus ordered the parents to re-submit their hearing request so the hearing officer could determine whether circumstances dictate that reimbursement should be reduced or denied entirely due to the parents’ failure to provide written notice.

*Note*—If the notice provision is intended to provide public schools with an opportunity to review its IEP and address parental concerns, is a failure to provide prior *written* notice of significance if the parents otherwise alert the school of their intent to seek reimbursement for a private placement due to concerns over the IEP? Certainly, the notice provision would allow a hearing officer to find that such technical failure to comply with the precise terms of the law should not result in a reduction of reimbursement, if other requirements are met.

A case disallowing reimbursement fully due to a parent's failure to notify is *A. H. v. New York City Dept. of Educ.*, 53 IDELR 44 (E.D.N.Y. 2009). There, the parents of a nine-year-old with speech and language impairments and problems in the area of socialization sought reimbursement for his placement in a private school for children with special needs. The court found that the public school IEP did not address the student's needs in the area of socialization outside of his homeroom class. The student needed assistance navigating the campus social situation, particularly during unstructured times, such as recess and lunch. Also, the student would shovel food in his mouth with two utensils during lunch, disturbing other students. But, the court also found that the parent failed to provide the school with notice of her intent to unilaterally place the child at public expense. Indeed, although the parent may have "mentioned" that she was considering private placement, she did not inform the district that she had made a non-refundable \$5,000 deposit. By the time the IEP team finalized the IEP, the parent was already committed to paying for a year of private placement. The lack of notice deprived the public school of the ability to address the parents' concerns about the IEP. The court found that the parent "demonstrated that she did not seriously intend to enroll J. H. in public school." It thus denied reimbursement fully, and only provided a declaratory judgment to the effect that the IEP in question was deficient.

### *Inappropriate Public School IEPs*

The ultimate reason why districts are forced to reimburse parents for their unilateral private placements is their failure to develop and implement appropriate IEPs. In fact, Justice O'Connor reminded schools in the *Carter* opinion that they had no fear of liability for private placements if they acted in accordance with the IDEA and formulated appropriate IEPs for students with disability. For an IEP to be appropriate under IDEA, it must be reasonably calculated to confer educational benefit upon the student. *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 102 S.Ct. 3034 (1982). Substantively, an IEP may be found inappropriate by attacking it with contrary evaluation data, indicating a child's lack of progress, showing the IEP is missing essential components, proving lack of needed related services, or showing failure to implement key IEP components, for example. The following cases are examples of this area of analysis in practice.

The issue in *Sarah D. v. Board of Educ. of Aptakasic-Tripp Comm. Cons. Sch. Dist. No. 102*, 109 LRP 45050 (N.D.III. 2009) was the appropriateness of the public school's reading program for a 10-year-old with severe dyslexia and low-average cognitive ability. Dissatisfied with her progress in public school, her parents placed her in a state-approved private program. The court rejected the parents' argument that the IEP goals were not measurable, finding that the goals were supported by measurable short-term objectives. Likewise, the court did not fault the District for rejecting a private evaluation that advocated only one method for the student's reading program, finding that the school considered the evaluation, as required by the applicable regulation. Finally, although Sarah had not mastered all her reading goals, the court found that her reading level increased, though slowly, over time. Although she showed drops in percentile scores on norm-referenced testing, this merely meant she was not progressing at the same rate as nondisabled students her age. Moreover, District assessments showed

progress in reading, and her teachers observed improvement. Thus, the court found that the public IEP was appropriate and denied reimbursement.

### *Appropriateness of the Private Program*

After *Carter*, although lack of state agency approval does not render a private program non-reimbursable, a private placement can nevertheless fail to be reasonably calculated to confer educational benefit to a child, and thus not be appropriate for reimbursement purposes. Arguments going to the appropriateness of the private placement, however, must focus on general substantive educational deficiencies, rather than on failure to comply with IDEA's more technical or procedural requirements. As the following cases show, however, *Carter* did not make private schools immune from a finding of inappropriateness. To support a reimbursement claim, private schools must provide specially designed educational services, meet the broad areas of educational need, and provide the services necessary to meet the identified areas of need. See, e.g. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1<sup>st</sup> Cir. 2007)(while private school need not meet every area of need, there must be a nexus between those needs and the special education services provided by the private school). In addition, the private program must do more than offer the benefits and advantages normally associated with private schools in general. Some of the cases also deal with the thorny issue of how the LRE requirement should be applied in unilateral private placement situations, where the most common scenario involves a placement in a private school for students with disabilities.

In *Covington v. Yuba City Unified Sch. Dist.*, 56 IDELR 37 (E.D.Cal. 2011), the parents of a 13-year-old with emotional disturbance sought reimbursement for a residential program run by a church. Although the hearing officer and court found that the District had denied the student a FAPE by properly revising the student's IEP and services, they also found that the private program was not appropriate under the *Carter* standard. The program had no credentialed special education teachers, and did not address either the student's problems in math and reading, or provide any behavioral supports. Staff had no training in individualized behavioral interventions. The religious-based curriculum, found the court, "which apparently included significant Bible study and application, had nothing to do with [the student's] special needs." Unsurprisingly, the court found that the student exhibited the same behaviors he exhibited prior to his removal from public school.

*Note*—Parents tend to lose reimbursement cases where the private school program suffers the very deficiencies upon which they premise their claim that the public school has failed to confer a FAPE. Here, the parents alleged that the public IEP failed to address the student's growing behavioral and emotional needs, but placed the student in a program that offered no services to address those very needs. The *Burlington* remedy is not intended to replace an inappropriate public program with an inappropriate private program.

The failure of the private school to provide a necessary related service derailed a reimbursement action in the case of *Hunt v. Bureau of Special Educ. Appeals*, 53 IDELR 83 (D.Mass. 2009). There, an 11-year-old boy was provided a

§504 Accommodation Plan after he was determined to have a learning disability. The school and the parents had differences of opinion on occupational therapy (OT) services and the school's handling of bullying allegations. The dispute was settled in mediation, with the school agreeing to an IEP and an outside OT evaluation. The parents, however, placed the student in a private school and rejected the IEP. A hearing officer found that the §504 plan for the fifth grade did not sufficiently address the student's needs, but also found that the private program failed to provide the very services that the parents argued were needed in the public school program. The court agreed, finding that the private program failed to provide OT services, which were a primary bone of contention with respect to the public program. The services provided at the private school did not meet the recommendations of the student's own evaluators, did not provide special education services, and was not certified to teach special needs students. Although the parent testified the student was happy at his private school, it appeared that the primary benefits of the program were the kind of advantages inherent in small private schools in general.

*Note*—A reimbursement action is in danger when the private school program fails to provide the services that the parent demands of the public school program. See, e.g., *Mr. I. v. Maine Sch. Admin. Dist., No. 55*, 480 F.3d 1 (1<sup>st</sup> Cir. 2007)(private placement inappropriate where it did not provide special education services student's own health professionals recommended). The *Burlington* remedy was designed to protect a student's right to FAPE, not to punish a public school for providing an inappropriate program, or to substitute an inappropriate private program of the parents' choice for an inappropriate public school program. The likely trigger for the private placement in this case was the bullying issue, although it played only a small role in the case, rather than the OT services issue that was actually litigated.

A court denied reimbursement in *M. S. v. Fairfax County Sch. Bd.*, 47 IDELR 289 (E.D.Va. 2007) to the parents of a high schooler with multiple disabilities (autism, language disabilities, delays in motor skills, and moderate mental retardation) although it also found that the public IEP was inappropriate. The public program did not specify a degree of individualized instruction and failed to meet the student's need for one-to-one instruction. The Lindamood-Bell Center chosen by the parents, however, focused exclusively on communication skills, but offered no academic curriculum, social interaction opportunities, life skills instruction, or vocational instruction. Moreover, the program lacked qualified teachers, and testing indicated the student made virtually no academic progress while placed there. "[A] program that focuses almost entirely on communication skills without any of the other suggested areas is not reasonably calculated to confer educational benefit."

*Note on Fourth Circuit appeal*—On appeal from the above decision, the parents succeeded in convincing the Circuit Court that the lower court was required to assess the appropriateness of the private program school year by school year, instead of as one aggregate program. Thus, the lower court on remand must make distinct appropriateness findings on *each* of the two years of the private program. *M. S. v. Fairfax County Sch. Bd.*, 51 IDELR 148 (4<sup>th</sup> Cir. 2009). If the private program was relatively similar over the two

years in question, the lower court remand may turn out to be a mere formality.

*Note on LRE Issue*—The court here agreed that the private program was too restrictive, in that it only provided for one-to-one instruction, and no opportunities for social interaction with peers. Although there is some debate as to the degree to which the LRE requirement applies to private schools post-*Carter*, the court wrote that “[w]hile it is clear that the least restrictive environment requirement should not be applied in the strictest sense, it remains a consideration that bears upon the parents’ choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate.” See also, *P. H. v. New York City Dept. of Educ.*, 54 IDELR 221 (S.D.N.Y. 2010) citing *M.S. v. Board of Educ. of the City Sch. Dist. of the City of Yonkers*, 33 IDELR 183 (2d Cir. 2000)(LRE may be considered in determining whether a parent’s unilateral placement choice is appropriate); *Steven P. v. Harrison Central Sch. Dist.*, 47 IDELR 133 (S.D.N.Y. 2007)(LRE is a factor to consider in assessing appropriateness of private program); *S. S. v. East Ramapo Cent. Sch. Dist.*, 54 IDELR 161 (S.D.N.Y. 2010)(As part of determining appropriateness of private program, court found private program inappropriate due to insufficient level of mainstreaming for student with SLD).

But, parents may not necessarily have to prove that the student made actual progress in the private school before obtaining reimbursement. In *G. R. v. New York City Dept. of Educ.*, 53 IDELR 9 (S.D.N.Y. 2009), a student with LDs and speech impairments attended public school from Kindergarten to the fifth grade. Although his fifth-grade IEP called for placement in special education classes, the parents were informed that upon entering sixth grade, he would be enrolled in a general education class. The parent instead placed him in a private school, where she reported that he was happy, completing homework, and understanding material better. Although the public school conceded that it had not offered an appropriate program, a hearing officer denied reimbursement because of insufficient proof of progress at the private school and it failed to provide speech-language therapy. On appeal, the court granted reimbursement, finding that a parent is not required to show that the child progressed significantly at the private school in order to obtain reimbursement. The court wrote that “[r]ather, when the WPS program and R. R.’s deficiencies are examined in their totalities, it is clear that the program was well designed to serve R. R.’s needs.” The court was also not bothered by the lack of speech services, finding that speech and language “was only one area in which R. R. demonstrated deficiencies.”

*Note*—Most cases, however, stand for the proposition that the private program must be specially designed to meet the student’s needs, and include the services necessary to meet the student’s broad areas of educational need. See, e.g., *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356 (2<sup>nd</sup> Cir. 2006). If speech/language skills are a basic area of deficiency, can a program be appropriate if it does not address the area altogether? Generally, hearing officers and courts would find a public IEP inappropriate if it lacked speech therapy and speech/language was an identified area of educational need. See also, *C. R. v. Wappingers Cent. Sch. Dist.*, 111 LRP 24529 (S.D.N.Y. 2010)(student made no progress in a private program that was not

tailored to meet the needs of student with dyslexia and attention problems, despite the claims of its promotional brochures).

### *Child-Find Lapses*

The opinion in *Forest Grove* emphasizes that schools may be susceptible to reimbursement claims if they fail to properly and timely meet their obligation to identify students that may need special education services. Indeed, a primary rationale for allowing reimbursement actions in situations where the student has not received services from the public school was the fact that if reimbursement was barred in those situations, a school might not be held accountable for a failure to identify a student with disabilities. In light of advances in research-based regular education interventions, this area promises to be a source of new and complex litigation addressing the proper balance between making effective use of modern RtI-oriented interventions in regular education and timely compliance with the IDEA's child-find obligations.

In *Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. & Mrs. M.*, 53 IDELR 8 (D.Conn. 2009), a Connecticut school district lost a reimbursement battle in a case with shades of *Forest Grove*, since the student in question never enrolled in the public school. The parents of a teenaged girl who had been in private schools started communicating with the local public school about enrolling her for the 11<sup>th</sup> grade, and proceeded to register her. Prior to the start of the school year, the girl took sleeping pills and was admitted to a psychiatric hospital and a psychiatrist diagnosed her with severe depression. The parents provided a health form to the district that indicated the girl had bulimia and depression, had been hospitalized, and was being medicated. They also let the school know that due to her hospitalization, she would not be starting school at that time. The girl was then placed in a program for suicidal adolescents. A school social worker spoke with the mother and discussed special education, but no referral was initiated. Incongruously, the school sent a progress report to the parents indicating that the student was making good progress in Algebra and was a pleasure to have in class. Thereafter, the student was placed in a therapeutic boarding school in Massachusetts and then a wilderness camp in Utah. When an attorney for the parents contacted the school to discuss special education, the school asserted that it wanted to conduct its own evaluations when the girl returned to Connecticut, and refused to determine eligibility based on the private evaluations. The parents offered to pay for district staff to travel to Utah to conduct the evaluation, but the offer was rejected. The parents then provided notice that they would place the student privately and seek reimbursement. On appeal, the court agreed that the district knew that the student had been hospitalized, had psychiatric diagnoses, and was on medication, long before the parents' attorney asked about special education. It found that the school failed to identify the student and provide the parents with notice of their procedural safeguards. "M. M.'s inability to commence classes due to admission to a psychiatric hospital constitutes a 'clear sign' of a disability." The court also noted that the district could have evaluated the student while she was at the Massachusetts boarding school (only 74 miles from the public school) if it had identified the student in a timely fashion.

*Note*—It certainly did not help the district's position that while the student had never enrolled, the parents were receiving progress reports indicating

that she was doing well at school. In the court's mind, those reports may have added to the perception that school staffpersons were not communicating effectively with each other.

### *Appropriate Public School IEP*

Under the *Burlington* scheme, if a parent fails to prove that the public school program was inappropriate, reimbursement is not awarded. This is part of the *Burlington* gamble. This issue sometimes turns on the terms of the IEP itself, particularly if it was not actually put into practice before the unilateral placement. At other times, the appropriateness issue is analyzed based on the student's progress or lack thereof. Although hearing officers and courts will not demand optimal progress, or even progress in all areas, the public school program must provide positive or meaningful educational benefit in proportion to the severity of the student's disabilities. Procedurally, the program must be developed collaboratively with the parent, in compliance with the parent's right to meaningfully participate in the IEP development process. The disputes may focus on differences of opinion on degree of progress, type of services necessary, intensity of services, methodology, appropriateness of IEP goals and objectives, related services needs, and handling of behavioral issues, among others. The cases also make clear that it is not enough to show that the private program is superior to the public school IEP—the issue is, rather, whether the public IEP is reasonably calculated to confer educational benefit.

The fact that the parent believed that the Wilson reading method was needed for her child, but the school ultimately did not train staff in that method, was insufficient to support a reimbursement claim in *D. G. v. Cooperstown Cent. Sch. Dist.*, 55 IDELR 155 (N.D.N.Y. 2010). The court found that the public school offered a multisensory reading program, just not the one preferred by the parent. Nor did it matter that the parent believed that the Wilson program was superior and would promote maximum progress, as long as the public school offers a program reasonably calculated to confer educational benefit. In addition, the IEP was properly developed, with appropriate present levels of performance, and proposed an appropriate placement in an integrated classroom with additional small-group instruction.

Similarly, the fact that a Washington public school focused on providing accommodations to a child with SLDs, rather than remediating the student's deficiencies, did not mean the IEP was inappropriate. *K. L. v. Mercer Island Sch. Dist.*, 55 IDELR 164 (W.D.Wash. 2010). The parents placed the child in a school that worked on remediating the disabilities, arguing that the public school had a duty to bring the student up to the reading level of her peers. The court disagreed, finding that the fact that the public school offered accommodations such as note-takers and readers, as opposed to focusing purely on remediation of the reading disability did not render the IEP inappropriate. The student received passing grades, met many of her IEP goals, and received positive comments from her teachers. The court thus denied reimbursement, finding that although she read at a slower pace than her peers, she received a FAPE.

Disputes over the role of music in a student's transition plans resulted in a Texas reimbursement claim in *K. C. v. Mansfield Ind. Sch. Dist.*, 52 IDELR 103

**(N.D.Tex. 2009).** The case involved a young lady with Williams Syndrome, which typically causes cognitive impairments and learning disabilities. Students with the condition often express an interest in music, as K.C. did, although her vocational assessment scores showed very low skills in that area. The IEP included various transition provisions, and placed K.C. in a work setting at a clothing store, as well as assisting an elementary teacher with music instruction for a kindergarten class. She was also provided one-on-one music instruction, with the option for choir competition (to accommodate her difficulties with sight reading of music). A music therapy evaluation concluded K.C. did not need therapy in order to receive a FAPE. And, achievement scores were indicative of academic progress, despite sub-average intelligence scores. A hearing officer and a district court agreed that the public program was appropriate, and denied reimbursement for the costs of a private music academy for disabled students.

*Note*—The court commented that the parents devoted a large part of their briefing to arguing that the 1997 and 2004 IDEA provisions acted to elevate the IDEA’s FAPE standard, particularly with respect to transition programming, to the point that the *Rowley* standard no longer applied. Noting the lack of explicit statutory language to support the position, as well as the majority caselaw, the court disposed of the argument and found that the actual challenges to the IEP were generalized and unsupported, and that some claims were raised for the first time in the reply brief.

Differences over the structure of an ABA program for a child with autism spectrum disorder led to the case of *Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, 109 LRP 64472 (S.D.Ohio 2009). There, the student attended a private school for children with autism, but the public school prepared to propose an IEP for the student by contracting with ABA consultants and providing training for instructional staff. In a mediation agreement reached by the parties, the parents agreed, in good faith, to work with the district to return the child to the public school. The district proposed an IEP using ABA methodology with an individualized approach using the number of hours of one-on-one sessions that may be needed, depending on the child’s performance and needs. The parents wanted to know exactly how many hours of one-on-one sessions would be provided, but the school would not commit to a specific number of hours until the plan was finalized. The parents then cancelled a subsequent IEP meeting to finalize the plan and address the parents’ concerns, and instead signed an enrollment contract with the private school. The school continued to insist further meetings were necessary, and that the parents’ issues on the ABA details could be worked out, but the parents’ attorney indicated that they would not participate in the IEP process and would be initiating litigation to seek reimbursement. The court found for the district, holding that (1) the fact that the public IEP allowed for social interaction with nondisabled peers would not deny the student a FAPE, (2) the use of Picture Exchange Communication System (PECS) would not negate the school’s ability to implement an ABA program, (3) the fact that the student would make greater progress in the private facility did not mean FAPE was denied, (4) the school was willing to negotiate the precise number of ABA hours per day in further discussions in which the parent refused to participate, and (5) the parents “disengaged” from the IEP process and failed to cooperate with the school. The court therefore denied reimbursement.

## Key Practical Lessons of the Caselaw for Public Schools

- Schools ignore, or fail to adequately respond to, students' escalating problems and parents' increasing concerns at their peril. The cases allowing reimbursement frequently involve situations where schools failed to respond proportionately to the challenges presented by the student's needs.
- When parents mention possible private placement or give formal notice of unilateral placement, schools should propose reevaluation of the student to address the program concerns the parents are raising. Parents that refuse consent to such evaluations may see their reimbursement claim undercut.
- If parents indicate they are considering private placement, schools may want to undertake a close self-evaluation of the current IEP, its services, and documentation of progress. Schools may also want to have an objective consultant provide a fresh perspective on the school program, as the analysis must be self-critical and honest.
- Schools should document any instances of lack of cooperation on the part of parents in the IEP development and revision process. Schools must invariably strive for the collaborative, interactive approach envisioned by the IDEA in the IEP team process.
- When faced with unilateral private placements, it is imperative for schools to learn as much as possible about the private program, both prior to, and as part of, litigation.
- If a private program is found to have relative strengths, schools should examine whether they can replicate those program strengths and incorporate similar services or interventions into the student's IEP.
- Schools that "fall asleep" when a child is privately placed may regret their inaction if the matter leads to legal action. Instead, schools should maintain communication with parents, offer to hold IEP meetings, hold IEP meetings, request information and records from the child's progress in the private program, and otherwise remain engaged in the student's education.