Reimbursement to Parents of Tuition and Other Costs Under the Individuals with Disabilities Education Improvement Act of 2004

Lewis M. Wasserman

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred
REIMBURSEMENT TO PARENTS OF TUITION AND OTHER COSTS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004

LEWIS M. WASSERMAN*

INTRODUCTION

A substantial number of judicial decisions involve parents of disabled children who are dissatisfied with the programs and/or services offered to their child by public agencies. These parents opt to enroll their child in programs and/or services they deem appropriate to meet their child’s special needs and then seek reimbursement for the associated expenses under the Individuals with Disabilities Education Improvement Act of 2004 (hereinafter “IDEA/2004”). These programs and services typically include private school programs, tutoring, supplementary services and independent medical or other professional evaluations of their child for the purpose of ascertaining their special needs. At times, although satisfied with the Individualized Education Program (hereinafter “IEP”) their school district created for their child, parents purchase special education or related services and then seek reimbursement for such expenses, contending that the school district did not implement the IEP as required. However, parents are not always successful in obtaining reimbursement.

* Founding Partner, Wasserman Steen, LLP, Patchogue, New York. Mr. Wasserman holds a Juris Doctor from St. John’s University School of Law and a Ph.D. in School Psychology from Hofstra University, and currently practices in the fields of education and employment discrimination law.

1 See Shaffer v. Weast, 126 S.Ct. 528, 533 (2005) (concerning the educational services that were due to a child suffering from learning disabilities and speech-language impairments); see also Deptford Township Sch. Dist. v. H.B., No. 01-0784(JBS), 2005 U.S. Dist. LEXIS 11602, at * 2-4 (D.N.J. June 15, 2005) (discussing the case of an autistic child whose parents, dissatisfied with their public education plan, sought recourse under IDEA/2004).
This article examines the elements for reimbursement under IDEA/2004, namely denial of a free appropriate public education for the child and the appropriateness of the programs/services purchased by the parents, through judicial decisions rendered under IDEA/2004's predecessor statutes to reimbursement claims under IDEA/2004. The article will also examine complete and partial defenses to reimbursement claims under IDEA/2004 based on, among other things, parental conduct, program/services cost, and statutes of limitation. Finally, the article will synthesize the current statutory scheme with case law to render practical advice regarding the prosecution of complaints seeking reimbursement under IDEA/2004 and make suggestions for further amendment to IDEA which may be helpful in attaining the Congressional goal that all children with disabilities receive a free appropriate education which meets their special needs.

I. OVERVIEW OF IDEA/2004

IDEA/2004 provides federal money to assist state ("SEAs") and local education agencies ("LEAs") in educating children with disabilities and conditions such funding upon the state's compliance with extensive goals and procedures. The Act requires states to provide disabled children with a "free

---


4 IDEA/2004 is interpreted under standards established for legislation passed under Congress's spending power. See Schaffer, 126 S.Ct. at 531. Because the power to legislate under the spending Clause rests on whether the State voluntarily and knowingly accepts the terms of the contract, those conditions Congress intends to impose on the funding recipient must be expressed unambiguously. See Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County, et al. v. Rowley, 458 U.S. 176, 204 (1982).
appropriate public education" ("FAPE")\(^5\) that includes "special education\(^6\) and related services."\(^7\) IDEA/2004 recognizes thirteen categories of disability\(^8\) plus at the discretion of the states, one additional category of disability.\(^9\)

To be eligible for special education and related services under IDEA/2004 a student must be between the ages of three and

---

\(^5\) See 20 U.S.C. § 1401(9) (2006) defining FAPE as:

special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d).

\(^6\) See 20 U.S.C. § 1401(29) (2006) (defining "[s]pecial education" as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including - -(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education"); see also 34 C.F.R. § 300.26(2) (1999) (indicating that special education includes: "(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards; (ii) Travel training; and (iii) Vocational education"); 34 C.F.R. § 300.26(3) (1999) (explaining how "[s]pecially designed instruction means adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction - - (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children").

\(^7\) Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training. 34 C.F.R. § 300.24(a) (1999).

\(^8\) See 20 U.S.C. § 1401 (2006) (enumerating the disabilities recognized under IDEA/2004 including "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities"); see also 34 C.F.R. § 300.7 (1999) (recognizing the same disabilities as IDEA/2004 and describing the term "multiple disabilities").

\(^9\) See 34 C.F.R. § 300.7(b) (1999) (providing that the term "child with a disability" for 3 through 9 year olds may, at the discretion of the state and local educational agency, include a child "[w]ho is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and . . . [w]ho, by reason thereof, needs special education and related services") (emphasis added); see also 20 U.S.C. § 1401(3)(B)(i) (2006) (conferring discretion to the state to include within the term 'child with disability' a child "experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments" if such delays are in the areas of "physical development, cognitive development, communication development, social development, emotional development or adaptive development." See generally 34 C.F.R. § 300.313(a) (1999) (explaining that a state which adopts the term "developmental delay" under section 300.7(b) may determine whether it applies to children aged 3 through 9, or to a subset of that age range, for example, ages 3-5 and maintaining that although a state may not compel a local educational agency to adopt and use the term developmental delay for children within its jurisdiction those LEAs choosing to do so must employ the state's definition).
twenty-one years\textsuperscript{10} and meet both parts of a two-part test. First, the student must satisfy the definition of one of the thirteen disabilities listed at § 34 C.F.R. 300.7(c)(1)-(c)(13)\textsuperscript{11} or the state criteria for "developmental delay." Second, the child must be in need of special education and related services as a result of his or her disability or disabilities.\textsuperscript{12}

Students who are eligible for special education and related services under IDEA/2004 must receive an IEP.\textsuperscript{13} IEPs are written documents\textsuperscript{14} formulated by an IEP team at an IEP meeting.\textsuperscript{15} IEP placements must be provided in the "least restrictive environment".\textsuperscript{16}

\textsuperscript{10} See 34 C.F.R. § 300.121 (2006) (mandating that every state have a policy in effect that ensures that all children with disabilities between the ages of 3 and 21, residing in the state, have the right to FAPE).

\textsuperscript{11} See 34 C.F.R. § 300.7(c)(1)-(c)(13) (1999).

\textsuperscript{12} See 20 U.S.C. § 1401(3)(A)(ii) (2006) (highlighting that under IDEA/2004 a child must not only suffer from one of the thirteen enumerated disabilities, but he must also be in need of special education or related services as a result of his disability in order to satisfy the two-part test).

\textsuperscript{13} See generally 34 C.F.R. § 300.122(a)(1) (1999) (explaining that a state need not provide IDEA Part B services to children with disabilities aged 3, 4 or 5 if "inconsistent with state law or practice, or the order of any court, respecting the provision of public education to children in one or more of those age groups" and clarifying that if a state does not provide public education to nondisabled children under age 6, then it is not required to provide services under IDEA Part B until such children attain age 6).

\textsuperscript{14} See 20 U.S.C § 1414(d)(i)(A)(i) (2006) (defining IEP (individualized education program) under IDEA/2004 as "a written statement for each child with a disability that is developed, reviewed and revised in accordance with" the requirements of IDEA/2004 and listing the specifics of these requirements).

\textsuperscript{15} See 20 U.S.C § 1414 (2006) (identifying both mandatory and permitted members of the IEP team); see also Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857 (6th Cir. 2004) (annulling IEP since parents’ IEP participation was a matter of form and after the fact and determining that the IEP team must engage in a genuine deliberative process about the disabled child’s individual needs for programs and services and provide the parents with a meaningful opportunity to participate in the development of their child’s IEP to avoid annulment); see generally Spielberg v. Henrico County Pub. Sch., 853 F.2d 256, 258-59 (4th Cir. 1988) (holding that parental involvement is essential in IEP development and maintaining that after the fact involvement is not enough); Cf. W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1484-85 (9th Cir. 1992) (finding that procedural inadequacies that result in the loss of educational opportunities or seriously infringe the parents’ opportunity to participate in the IEP formulation process, result in a denial of FAPE).

\textsuperscript{16} See 34 C.F.R. § 300.550(b) (1999) providing that:

Each public agency shall ensure - (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are non-disabled; and (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

\textit{Id.} IDEA/2004 contains the same provision and defines "supplementary aids and services" as "aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate". See 20 U.S.C § 1412(a)(5)(A) (2006); The term "on behalf of the child" includes services that are provided to the parents or teachers of a child with a disability to help them work more effectively with the child". 64 FR 12406, 12593 (Mar. 12, 1999) (to be codified at 34 C.F.R. pt. 300 and pt. 303); IDEA/2004 bars the states from using "a funding mechanism by which [they] distribute
IDEA/2004, in § 614(d)(1)(A)(i) lists eight components that must be included in every child's IEP. For disabled children who have limited English proficiency, the IEP must state whether the special education and related services the child needs will be provided in a language other than English. Section 614(d)(1)(A)(ii) further provides that "[n]othing in this
section shall be construed to require - - (I) that additional information be included in a child’s IEP beyond what is explicitly required in this section; and (II) the IEP Team to include information under 1 component of a child’s IEP that is already contained under another component of such IEP.”

IEPs must be reviewed at least annually by the IEP team. At these annual reviews, the efficacy of the child’s IEP is examined and appropriate changes are made in the IEP to meet the child’s then current needs. Once the IEP team determines that a child is IDEA/2004 eligible, there must be an IEP in place for that child at the beginning of that school year. IEP teams must formulate the IEP before they make a placement decision.

IDEA/2004 requires particularized written notice “whenever the local educational agency - - (A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.”

---

20 See 20 U.S.C §1414(d)(4)(A)(i) (2006) (explaining that the IEP must be reviewed periodically, but not less then annually); see also 34 C.F.R. § 300.343(c) (1999) (reiterating that the IEP must be reviewed at least annually to determine whether the annual goals for the child are being achieved).
21 See 20 U.S.C. § 1414(d)(4)(A)(ii) (2006) (listing five factors IEP teams should consider in recommending IEP changes); see also 34 C.F.R. § 300.343(c)(2) (1999) (providing that revisions of an IEP are appropriate to address any lack of expected progress toward the annual goals and the results of any reevaluation, information about the child provided to, or by, the parents during the evaluation process, and the child’s anticipated needs as factors to be considered).
22 See 20 U.S.C. § 1414(d)(2)(A) (2006) (requiring that the IEP must be in effect for each child with a disability at the beginning of the school year); 34 C.F.R. § 300.342(a) (1999) (stating that “at the beginning of each school year, each public agency shall have an IEP in effect for each child with a disability within its jurisdiction”).
23 See 34 C.F.R. § 300.552(a)(2) (explaining that in essence, placement means where the child’s IEP will be implemented and that this is controlled by what is the least restrictive environment for the child); see generally 34 C.F.R. § 300.552(b)(2) (1999) (maintaining that placement is dependent on the IEP); 34 C.F.R. § 300.552(c) (1999) (positing that generally, unless the IEP requires otherwise, the child should be educated at the school he would otherwise attend if he were not disabled).
24 20 U.S.C. § 1415(b)(3) (2006). Individuals with Disabilities Education Improvement Act of 2004 § 615 (c)(1) provides that:

The notice required by subsection (b)(3) shall include - - (A) a description of the action proposed or refused by the agency; (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of the description of the procedural safeguards can be obtained; (D) sources for parents to contact to obtain assistance in understanding the provisions of this part; (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency’s proposal or refusal.

Id.
A. Students with Disabilities who Attend Private Schools

The rights of students with disabilities who enroll in private schools vary under IDEA/2004 depending on whether they were placed in the private school by their parents or referred by the school district. The reasons for the placement also impact on the student's rights. Where, for example, a student with a disability is placed at a private school selected by the district, the student will retain all his or her procedural and substantive rights to a FAPE, notwithstanding the fact that the placement is private. However, under IDEA a private school student whose parents do not dispute the appropriateness of the IEP has no individual right to receive special education and related services. More nebulous is the situation where the parent(s) unilaterally place their child in private school because they consider the IEP offered to their child inadequate. Under these circumstances there is an obligation to reimburse the parents for the cost of private placement, but only if the parents prevail in an administrative proceeding and establish that their child was denied a FAPE under the Act and the private programs and/or services met the student's special needs. This situation is the central focus of this article.

B. Child Find

IDEA/2004 imposes an affirmative obligation on states and local educational agencies to ensure that:

[all children with disabilities residing in the State, including children with disabilities who are homeless or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and

25 See 20 U.S.C. §1412(a)(10)(B)(ii) (2006) (stating that in all such cases "... the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies."); see also 34 C.F.R. § 300.400-300.402 (1999) (dealing with children with disabilities placed in or referred to private schools by public agencies).

26 See 34 C.F.R. §§ 300.450-300.462 (1999) (outlining rights of private school children with disabilities and responsibilities of local educational agencies); see also 34 C.F.R. § 300.454(b)(4) (1999) (providing "[t]he LEA shall make the final decisions with respect to the services to be provided to eligible private school children").

27 See 20 U.S.C. § 1412(a)(10)(C)(2) (2006) (allowing a court or hearing officer to require the agency to reimburse the parents for private school placement of a child if that officer finds that a free appropriate public education was not made available in a timely manner).

who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.  

School districts' child find duties extend to all children with disabilities starting at birth, irrespective of the age at which children in that state are entitled to receive educational services. Since child find duties are "affirmative," a parent is not required to request that a school district identify and evaluate the child. The "child find" obligation is sweeping and extends to "children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools." Child find activities must be "designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children." Moreover, LEAs or SEAs, where applicable, must undertake their child find activities in a manner similar to those it employs for the agency's public school children.  

29 See 20 U.S.C. § 1431(a)(1) (2006) (recognizing a need "to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first 3 years of life").  

30 See 20 U.S.C. § 1431(a) (2006) (stating "an urgent and substantial need" to aid in the development of disabled children during the first few years of their lives).  

31 See Robertson County Sch. Sys. v. King, No. 95-5526, 1996 U.S. App. LEXIS 27257, at *10 (6th Cir. Oct. 15, 1996) (interpreting the 1990 version of the act as "impos[ing] an affirmative duty on the state to assure that 'all children residing in the State who are disabled . . . and who are in need of special education and related services are identified, located, and evaluated'.")  


activities for children enrolled in private schools must be completed in a time period comparable to that for children attending public schools in the LEA.\textsuperscript{36}

\textit{C. Complaint Procedures}

Parents of children with disabilities may file a complaint concerning the identification, evaluation, placement or provision of FAPE to their child.\textsuperscript{37} This initiates the "due process" hearing process to resolve the dispute. States have the option to establish either one-tier or two-tier dispute resolution systems. In a one-tier system the state educational agency conducts the due process hearing.\textsuperscript{38} In a two-tier system a hearing is conducted by the local school district or other local or state agency responsible for providing FAPE to that child, after which either party may obtain review of the Tier I decision by the state educational agency.\textsuperscript{39} Following the state level agency decision in a Tier I or Tier II system a party aggrieved by a finding and decision may "bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."\textsuperscript{40} Absent a sufficient excuse, the parent must exhaust the state


\textsuperscript{37} See 20 U.S.C. § 1415(b)(6) (2006) (permitting any party to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child").

\textsuperscript{38} See 20 U.S.C. § 1415(f)(1)(A) (2006) (stating that parties to a complaint have the opportunity of impartial review by the local educational agency or State educational agency as determined by State law); see also 20 U.S.C. § 1415(i)(2)(A) (2006) (providing that an aggrieved party under the one-tier system "shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy").

\textsuperscript{39} See 20 U.S.C. § 1415(g) (2006) (stating that State educational agency will conduct an impartial review and reach an independent decision where the hearing required by subsection (h) was conducted by a local educational agency); see also 20 U.S.C. § 1415(f)(1)(B) (2006) (requiring resolution sessions prior to commencement of a due process hearing which may be waived on the parties' consent).

\textsuperscript{40} 20 U.S.C. § 1415(i)(2)(A) (2006). IDEA/2004 provides that the court, in its review of the state administrative proceedings, "(i) shall receive the record of the [state] administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C) (2006). Since a civil action provides a mechanism for the review of the State educational agency's decision at hearing, it provides a first level of review to parties in one-tier states and an additional level of review to aggrieved parties in two-tier states. \textit{Id.}
administrative procedures before seeking relief in court that was available under IDEA/2004’s administrative procedures.\textsuperscript{41}

\section*{II. SUPREME COURT JURISPRUDENCE}

A. Board of Education of the Hendrick Hudson School District v. Rowley

\textit{Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley,\textsuperscript{42}} was the first United States Supreme Court case to interpret the meaning of the Education for All Handicapped Children Act.\textsuperscript{43} In \textit{Rowley} the parents brought a civil action to review the New York State Education Commissioner’s determination that the local school district had offered Amy Rowley an appropriate IEP for first grade.\textsuperscript{44} Amy was a deaf child with only minimal residual hearing. Among the IEP components, were Amy’s use of an FM hearing aid, which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities, one hour per day of a tutor for the deaf, and three hours each week of speech therapist services. Although the parents agreed with parts of the IEP, they insisted that Amy be provided with a qualified sign language interpreter in all of her academic classes in lieu of the assistance proposed in other parts of her IEP.\textsuperscript{45} In their civil action the parents claimed, among other things, that the district had denied Amy a “free appropriate public education”.\textsuperscript{46} The United States District Court for the

\textsuperscript{41} See 20 U.S.C. § 1415(f) (2006) (stating “[n]othing in this [chapter] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before filing a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this part” (citations omitted)).

\textsuperscript{42} 458 U.S. 176 (1982).

\textsuperscript{43} \textit{Id.} at 187 (stating that this is the first case in which the Supreme Court has been called upon to interpret any provision of the Education for All Handicapped Children Act); see generally Ed Halsell, \textit{Disabled School Children: Where Are There Advocates?}, 23 J. Juv. L. 65, 72 (2003) (stating “Rowley is still the standard for the minimum level of accommodation a school district must provide to a disabled child”).

\textsuperscript{44} See \textit{Rowley}, 458 U.S. at 184–85.

\textsuperscript{45} See \textit{id.} Amy had been provided with an interpreter for a two-week experimental period. Following this period the interpreter reported that Amy did not need his services at that time. \textit{Id.}

\textsuperscript{46} \textit{Rowley}, 458 U.S. at 185.
Southern District of New York and the United States Court of Appeals for the Second Circuit agreed with the parents. In its grant of certiorari, the Supreme Court agreed to consider the meaning of the Act’s requirement for a free appropriate public education and the role of the state and federal courts in exercising the review granted by section 1415(e)(2).

In analyzing the role of the state and federal courts in exercising their review granted by EHA’s § 1415, the Court first referred to the text of the statute which states that a court “... shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate.”

The Rowley Court determined that “… a court’s inquiry in suits brought under §1415(e)(2) is twofold.” First, the court must determine “if the State complied with the procedures set forth in the Act?” Next, the court must determine whether “the individualized program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” The Rowley Court made clear that the statute should not be interpreted as inviting a court “to substitute their own notions of sound educational policy for those of the school authorities which they review.” Moreover, the Court interpreted the Act as severely limiting the role of courts in “imposing their view of preferable educational methods upon the states,” since that responsibility was assigned to “state and

47 Id. at 185–86 (noting that the District Court found that the disparity between Amy’s achievement and her potential led to the conclusion that she was not getting a free appropriate education, a decision which a divided United States Court of Appeals for the Second Circuit affirmed).
48 Rowley, 458 U.S. at 186.
50 See Rowley, at 458 U.S. at 205 (quoting the Education of the Handicapped Act § 1415(e)(2)).
51 See id. at 206. The first inquiry includes determining whether the State has created an IEP for the child in question which conforms with the requirements of § 1401(19), now § 1414(d)(1)(A)(i)(I)-(VIII), of the Act. See id. at 207.
52 See id. at 206. The Rowley Court gave great weight to compliance with the procedures contained in the Act, noting that “[w]e think that the Congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” Id.
53 Id.
54 Rowley, 458 U.S. at 207 (explaining the Court’s rational in deferring to local authorities).
local educational agencies in cooperation with the parents or
guardian of the child." Therefore, in the view of Rowley, "it
seems highly unlikely that Congress intended courts to overturn
a State's choice of appropriate educational theories in a
proceeding conducted pursuant to §1415(e)(2)." This
assessment of the Act's meaning leads invariably to the
conclusion that "once a court determines that the requirements of
the Act have been met, questions of methodology are for
resolution by the States."

The Rowley Court unequivocally rejected the notion that under
the Act an "appropriate" education was one which "maximize[d]
the potential of each handicapped child commensurate with the
opportunity provided nonhandicapped children." Indeed, it
determined that the Act did not impose any particular
substantive educational standard upon the States. Instead,
FAPE "consists of access to specialized instruction and related
services which are individually designed to provide educational
benefit to the handicapped child." The Court recognized the
difficulty in determining whether "children are receiving
sufficient educational benefits to satisfy the requirements of the
Act" in light of the fact that "benefits obtainable by children at
one end of the spectrum will differ dramatically from those
obtainable at the other end, with infinite variations in

55 See id. (reiterating its reluctance to reevaluate the act).
56 See id. at 207–08
57 See id. at 208. Federal circuit courts have not been reluctant to overturn district court decisions
where the district court substituted its judgment for that of the state educational agency as to the
substantive adequacy of the IEP. See, e.g., Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186 (2d Cir.
2005). The circuit court reversed and remanded an award by the district court of summary judgment in
favor of the parents, where the impartial hearing officer and, on appeal, the state review officer, both
found in favor of the school district. Id. at 197. In terms of the district's compliance with procedural
requirements, the circuit court concluded that transcripts of multiple [IEP team] meetings showed the
parent participated in IEP development, that the draft documents presented to the parent at meetings
were adequate, that the parent was given a copy of the IEP before the school year began, and offered an
additional meeting upon learning of the parent's intent to unilaterally place her child in a private
residential school. Id. at 193. In terms of the district's compliance with substantive IDEA requirements,
the circuit court disagreed with the district court's findings that (1) the IEP failed to furnish enough one-
to-one instruction; (2) the student's passing grades did not convincingly evidence mastery of the
material she was taught; and (3) the IEP should have included counseling services. Id. at 196. The
Cerra Court stated: that "[i]n order to avoid impermissibly meddling in state educational methodology,
a district court must examine the record for any objective evidence indicating whether the child is likely
to make progress or regress under the proposed plan." Id. at 195.
58 Rowley, 458 U.S. at 200.
59 See id. (finding that Congress' desire to provide specialized educational services, even in
furtherance of "equality," cannot be read as imposing any particular substantive educational standard
upon the States).
60 Rowley, 458 U.S. at 201.
between." The Court expressly refused "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act," but instead confined its analysis to situations like Amy's, that is, where the child "is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system . . . ." The Court highlighted that under such circumstances the program "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." In applying these principles to Amy's case the Supreme Court concluded that, in light of Amy's better than average performance compared to the average child in her class and her easy advancement from grade to grade, the District Court and Court of Appeals should not have concluded that the Act required the school district to provide Amy with a sign language interpreter. Accordingly, the decision of the Court of Appeals was reversed.

B. Burlington

In School Committee of the Town of Burlington, Massachusetts v. Department of Education of the Commonwealth of Massachusetts, the Supreme Court examined, for the first time, the parents' right to reimbursement for their unilateral placement of their handicapped child in a state-approved private school under the Education for All Handicapped Children Act. In its grant of certiorari the Court agreed to decide two issues: "whether the potential relief available under the Act includes reimbursement to the parents for private school tuition and related expenses" and, secondly, whether reimbursement is

---

61 ld. at 202.
62 ld.
63 ld.
64 ld. at 204.
65 ld. at 203, n.25 (stating "[w]e do not hold today that every handicapped child who is advancing from grade to grade . . . is automatically receiving a [FAPE]. In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration accorded by the . . . school administrators, to be dispositive.").
67 ld. at 367.
barred "to parents who reject a proposed IEP and place a child in a private school without the consent of local authorities."\(^{68}\)

In deciding the first question, the Court examined the "grant of authority" contained in the Act and determined that it was sufficient to "order school authorities to reimburse parents for their expenditures on private special education for a child if the Court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."\(^{69}\) According to the Court, the phrase "grant such relief as [it] determines appropriate" contained in the Act "confers broad [judicial] discretion."\(^{70}\) Moreover, the Court concluded that since the statute did not amplify on what "appropriate" meant, the term must be interpreted "in light of the purposes of the Act."\(^{71}\) That purpose is principally to provide handicapped children with a free appropriate public education.\(^{72}\)

The \textit{Burlington} Court discussed two broad factual scenarios that might occur in a reimbursement case. The first scenario, perhaps more theoretical, involved disputes that are resolved quickly during the same academic year. The second and more likely scenario addresses situations where it takes years to come to a conclusion. As to the first scenario the court stated that,

\[ \text{[i]n a case where a court determines that the private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.}^{73} \]

The Court, however, noted that, realistically, by the time these cases reach the courts the school year will have expired, leaving the parents with the grim choice of either accepting the IEP offered by the public agency, notwithstanding its perceived

\(^{68}\) \textit{Id.}
\(^{69}\) \textit{Id.} at 369.
\(^{70}\) \textit{Id.}
\(^{71}\) \textit{Id.}
\(^{72}\) \textit{See Burlington,} 471 U.S. at 369.
\(^{73}\) \textit{Id.} at 370.
deficiencies, or front the cost of what they believe to be an appropriate placement. As stated by the Court:

If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by school officials. If that were the case, the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.74

Significantly, the Supreme Court rejected the repeated argument made by the Town of Burlington that tuition reimbursement was a form of damages, concluding that "reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."75 In reaching this conclusion, the Court relied in part on the legislative history that supported "a post hoc determination of financial responsibility" as well as on regulations issued by the Department of Education.76

Section 1415(e)(3) of the act states that "during the pendency of any proceedings conducted pursuant to [§1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of the child."77 The Town of Burlington argued that the parents' violation of this provision operated as a waiver of any right they might otherwise have to reimbursement, at least during any interim period in which their child's placement violated this provision. The Supreme Court rejected

74 Id.
75 Id. at 370-71.
76 Id. at 371.
77 Burlington, 471 U.S. at 371.
this argument on two principal grounds. First, the language in §1415(e)(3) “says nothing about financial responsibility, waiver, or parental right to reimbursement at the conclusion of judicial proceedings.” 78 Second, the Town’s interpretation of this section would in many instances defeat the purpose(s) of the Act “to give handicapped children both an appropriate education and a free one.” 79 The Burlington Court ultimately decided that a parent’s failure to maintain a child in her current educational environment during the pendency of the case does not constitute a bar to reimbursement.

Finally, the Burlington Court made clear that the phrase “such relief as the court determines is appropriate” contained in §1415(e)(2) meant that “equitable considerations are relevant in fashioning relief.” 80

C. Carter

In Florence County School District Four v. Carter, 81 the Supreme Court answered the question “whether [a handicapped child’s] parents are barred from reimbursement because the private school in which [the child was enrolled] did not meet [IDEA’s definition] of a ‘free appropriate public education.’” 82 In a unanimous decision, the Court said they are not because FAPE “requirements cannot be read as applying to parental placements.” 83 According to the Court, the FAPE requirement that special education and related services be “provided at public expense, under public supervision and direction” and pursuant to

78 Id. at 372.
79 Id. Additionally, the Court noted that § 1415(e)(3) was housed in a section of the statute which detailed “procedural safeguards which are largely for the benefit of the parents and the child.” Id. at 373. However, the Court stated:
   [w]hile we doubt that this provision would authorize a court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child’s placement during the pendency of review proceedings, without the consent of the state or local school officials, do so at their own financial risk.
80 Id. at 373–74.
82 Id. at 13. In 1990 EHA was renamed IDEA without significant changes in the substance of the statute. See 20 U.S.C. § 1400 (2006). This change was effected mainly to employ the term “disability” rather than “handicapped.” Id.
83 Carter, 510 U.S. at 13. This case came to the Supreme Court with two issues settled: “the school district’s proposed IEP was inappropriate under IDEA, and (2) although [the private school] did not meet the . . . requirements [for FAPE], it provided an otherwise proper education under IDEA.” Id. at 12-13.
§1414(a)(5), established, revised and reviewed by the public agency, did not make sense in the context of a unilateral parental placement. Therefore, to read §1401(18)'s FAPE definition "as applying to [unilateral] parental placement would effectively eliminate the right of unilateral withdrawal recognized in Burlington" and "defeat this statutory purpose."

In the same vein, the Supreme Court rejected the argument that, in a reimbursement context, the private school must satisfy the FAPE requirement that such school meet state standards. Indeed, the Court made clear that "[p]arents' failure to select a program known to be approved by the State in favor of an unapproved option" and the presence on the faculty of teachers not certified by the state is not a bar to reimbursement. In short, as long as the student was denied FAPE and the private placement was otherwise appropriate under the Act, the remedy of reimbursement may be available to the parents.

Finally, the Carter Court rejected the school district's argument that allowing reimbursement to parents placed an unreasonable burden on financially strapped school districts. As to the risk of suffering exorbitant judgments for tuition, the Court pointed out that the Court's authority to "grant such relief as the court determines appropriate" under §1415(e)(2) confers "broad discretion" in applying "equitable considerations," including adjusting any award which might be made "if the cost of the private education was unreasonable."

84 Id. at 13.
85 IDEA defines free appropriate public education as meaning: special education and related services that— (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d) [20 U.S.C. § 1414(d)].
86 Carter, 510 U.S. at 13-14.
87 Id. at 14.
88 Id. The court noted the irony of the school district arguing the private school did not meet state standards when the district itself had failed to meet this student's needs and the private school program was appropriate in this regard. Id.
89 Id. at 15. In response the Supreme Court said that all the district had to do to avoid reimbursement claims was to do what the Act required: give the child FAPE in a public setting or "place the child in an appropriate private setting of the State's choice." Id.
90 Id. at 15-16.
91 Carter, 510 U.S. at 16.
III. TUITION REIMBURSEMENT

A. No Reimbursement When FAPE Is Offered

IDEA/2004 expressly provides that a local educational agency is not required to pay for the cost of education, including special education and related services, when the agency made a FAPE available but the parents, nonetheless, elected to place their disabled child in a private school or facility.

B. Reimbursement When FAPE Is Denied

IDEA/2004, however, provides for the reimbursement remedy where the agency denies the child a FAPE, stating 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.

92 In IDEA '97, Congress included, for the first time, express language that addressed the remedy of tuition reimbursement. See Individuals with Disabilities Education Act Amendments of 1997 § 612(a)(10)(C)(2). Reimbursement claims are different from compensatory education claims. See id. Reimbursement claims seek payment for costs the family incurred in the past during periods that the school district failed to offer a FAPE. See Ms. M. v. Portland Sch. Comm., 360 F.3d 267 (1st Cir. 2004) where the court noted that “when [it] has used the term ‘compensatory education,’ it has usually assumed that the remedies available involve prospective injunctive relief, which would not encompass tuition reimbursement. Id. at 273. Compensatory education is a type of “prospective injunctive relief” directing the school district to furnish services of a certain nature and quantity in the future to make up programming failures in the past. See G v. Fort Bragg Dependent Schs., 343 F.3d 295, 309 (4th Cir. 2003).

93 The language in this provision remains unchanged from that contained in IDEA '97. See Individuals with Disabilities Education Act Amendments of 1997 § 612(a)(10)(C)(1). Where the tribunal determines that a FAPE was offered the parents' case is effectively over and analysis of the merits of the unilateral placement and the equities will not ordinarily be required; however, where the tribunal skips to an equities analysis and does not determine whether a FAPE was provided, a court will remand to the lower tribunal for further findings. See, e.g., Goldstrom v. Dist. of Columbia, 319 F. Supp. 2d 5, 6 (D.D.C. 2004).

Thus, IDEA/2004 makes express the reimbursement remedy inferred by the Supreme Court in Burlington.\textsuperscript{95} Notably, neither IDEA/2004, its implementing regulations or their predecessors, establish specific criteria for determining whether the private placement selected by the parents warrants reimbursement.

i. Scope of the Reimbursement Remedy

When \textit{Carter},\textsuperscript{96} came before the Supreme Court, the only issue was whether the parents were barred from a tuition reimbursement award because Trident, the private school in which the parents had unilaterally placed their child, did not meet IDEA’s FAPE criteria.\textsuperscript{97} The Court determined that the parents’ unilateral placement did not bar them from reimbursement.\textsuperscript{98} The District Court had determined that placement at Trident was proper for reimbursement purposes based on the District Court’s finding that Trident allowed the petitioner’s child to attain passing marks and progress from grade to grade.\textsuperscript{99} Consequently, the Fourth Circuit concluded that Trident provided an “appropriate education . . . reasonably calculated to enable the child to receive educational benefits.”\textsuperscript{100} Accordingly, the Fourth Circuit awarded the parents tuition and other costs.

Perhaps the most common type of tuition reimbursement cases in which parents prevail involves private day
school placements.\textsuperscript{101} However, reimbursement awards for private residential placements where such placements are proper under the Act are not unusual.\textsuperscript{102}

Moreover, reimbursement awards are not restricted to private school settings. Thus, parents may be reimbursed for private tutoring when the school district has denied a FAPE and tutoring is otherwise proper under the Act.\textsuperscript{103} Reimbursement may also be required where the school district denies a FAPE but concedes, by stipulation, or otherwise, that the private placement is appropriate.\textsuperscript{104}

Additionally, the Establishment Clause of the First Amendment does not bar reimbursement when the child attends a sectarian school.\textsuperscript{105} Furthermore, IDEA itself does not contain language which would prevent reimbursement based on the

\textsuperscript{101} See, e.g., Zayas v. Commonwealth of Puerto Rico, No. 05-2376, 2005 U.S. App. LEXIS 28323, at *4 (1st Cir. Dec. 21, 2005) (affirming district court’s reimbursement for temporary placement in a private day school when public school was unable to provide child with FAPE); Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072, 1079–80 (9th Cir. 2003) (allowing reimbursement for private day school); Union Sch. Dist. v. Smith, 15 F.3d 1519, 1527–28 (9th Cir. 1997) (affirming district court’s determination that parents should be reimbursed for unilaterally placing child in private day school); Drew P. v. Clarke County Sch. Dist., 877 F.2d 927 (11th Cir. 1989); Jefferson County Bd. of Ed. v. Breen, 853 F.2d 853 (11th Cir. 1988); Alamo Heights Indep. Sch. Dist. v. State Bd. of Ed., 790 F.2d 1153 (5th Cir. 1986); Hall v. Vance County Bd. of Ed., 774 F.2d 629 (4th Cir. 1985).


\textsuperscript{103} See, e.g., Gerstmyer, 850 F. Supp. at 366 (awarding private school tuition and tutoring fees to parents when district failed to make timely evaluation and placement of child due to budgetary and systemic constraints); Union Sch. Dist. v. Smith, 15 F.3d 1519, 1528 (9th Cir. 1994) (granting relief to a family after public school’s failure to provide FAPE); W.G. v. Bd. of Trs., 960 F.2d 1479, 1487 (9th Cir. 1992) (reimbursing parents for tutoring).

\textsuperscript{104} See Kantor v. Dist. of Columbia, No. 90-828 (CRR), 1991 U.S. Dist. LEXIS 1158, at *10 (D.D.C. Jan. 31, 1991) (ordering reimbursement when parties agreed that chosen private placement was appropriate).

religious character of the school. Rather, the 2004 amendments suggest such reimbursement is permissible.106

Courts have awarded reimbursement for related and other services which were proper in meeting children's special needs, including a wide variety of therapies107 and transportation expenses.108 Moreover, parents have been successful in obtaining reimbursement for the costs they incurred in making special living arrangements for the child in order to obtain needed special services.109 Additionally, where home-based programs are proper, school districts have been ordered to pay for them.110 Some courts have even compensated parents for the services they provided their own child due to a denial of a FAPE and the unavailability or impracticality of obtaining such services elsewhere.111


109 See, e.g., Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1478 (9th Cir. 1993) (ordering payment of board costs for child with grandparents who lived near appropriate placement); Jenkins v. Fla., 931 F.2d 1469, 1471 (11th Cir. 1991) (affirming district court decision for reimbursement of maintenance fees for children in residential placements, including payments from insurance and other third party sources).


111 In Bucks County Dep't of Mental Health/Mental Retardation v. Commonwealth of Pa., Dep't of Pub. Welfare, 379 F.3d 61 (3d Cir. 2004), for example, the court ordered the district to pay parent for her time in furnishing Lovaaus therapy to her two-year old disabled child where county denied a FAPE. See id. at 75. The court determined that paying the parent was a form of reimbursement, not damages as the district contended. Id. Further, it refused to limit the definition of reimbursement to out-of-pocket expenses. See id. at 68. The court also rejected the district's contention that twenty-two dollars per hour was excessive since it was in the range of what providers in the county were being paid for such services. See id. at 69. The district further argued that Congress did not anticipate parents being reimbursed for services to their own child since such assistance was in essence was what an involved parent was expected to do. See id. at 71. The court stated that the parent went above and beyond what a typical parent was expected to do and in effect “stepped into the shoes of the therapist”. See id. at 73. Finally, the court rejected the suggestion that awarding reimbursement here would have far reaching effects. See id. at 75. The courts have even reimbursed parents for lost earnings resulting from their providing services to their child. See Bd. of Ed. v. Dienelt, 843 F.2d 813, 815 (4th Cir. 1988). However,
ii. Determinations as to Denial of FAPE

1. Procedural Inadequacies.

In Shapiro v. Paradise Valley Unified School District No. 69, the school district failed to include the child's teacher from the private school where the child received special education services in the IEP meeting. This violation, according to the court, denied the child a FAPE. Due to the school district's procedural violation, resulting in a loss of educational opportunity for the child, the court found it unnecessary to address the second prong of the Burlington FAPE analysis, that is, whether the proposed IEP was substantively adequate. As a result of the district's denial of a FAPE to the child, the court deemed the unilateral placement selected by the parents proper under the Act and granted their request for tuition reimbursement.

Since adequate evaluative information is necessary to determine the child's needs and develop appropriate IEP goals for the child, incomplete evaluations or the complete absence there must be at least some evidence of training and ability on the part of the parents in providing the necessary therapy. In Dombrowski v. Wissahickon Sch. Dist., No. 01-5094, 2003 U.S. Dist. LEXIS 19481, at *26 (E.D.Pa. Sept. 30, 2003), for example, the court denied reimbursement to parent where there was no evidence parent received training or implemented or secured appropriate program. See 20 U.S.C. § 1414(f)(3)(e)-(f) (2006). 317 F.3d 1072 (9th Cir. 2003).

Id. at 1074 (finding that the school district effectively denied a deaf student a FAPE as a result of its failure to include a teacher from the child's private educational placement and her parents in an IEP meeting).

Looking to § 1401(a)(20) of IDEA, and its implementing regulation at 34 C.F.R. § 300.344 the court concluded that when the child receives special education services at her current private school, the statute mandates that not just any teacher, but the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, participate in the meeting. See id. at 1077. The reason for this finding was based on the fact that "IDEA requires the persons most knowledgeable about the child to attend the IEP meeting." Id. at 1076. A New York court came to a similar conclusion where a district, in violation of 34 C.F.R § 300.349(a)(2) and the parallel state regulation, failed to have a representative from the child's therapeutic placement at an IEP meeting. See Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 657–59 (S.D.N.Y. 2005). Due to this transgression, the child's parents were denied an opportunity to ask questions or raise concerns about the proposed placement with knowledgeable individuals. Id.

Shapiro, 317 F.3d at 1078–79 (observing that because the IEP failed to include a statement of child's present educational level and how such determinations were made, it was unnecessary to proceed to test's second prong).

Id. at 1080 (reimbursing parents for costs of educating their child for 1994–1995 school year).

See Roca v. D.C., No. 02-01646(HHK), 2005 U.S. Dist. LEXIS 5130, at *5 (D.C. Mar. 14, 2005) (contending that evaluations were inadequate and failed to identify the need for a broad range of services, including speech/ language therapy).
of an evaluation\textsuperscript{119} will result in a denial of FAPE. However, relatively minor procedural violations occurring after development of a substantively adequate IEP, where the district otherwise complied with the procedures mandated by the Act, will not result in a denial of FAPE.\textsuperscript{120}

Yet, since parental participation in the formulation of the IEP goes to the heart of the Act, a school district's failure to include parents in IEP development will almost certainly result in a denial of FAPE.\textsuperscript{121} However, when the parents have knowingly executed a written waiver of their attendance at the IEP meeting at which the IEP is developed, their absence will not be considered a deficiency resulting in a denial of FAPE.\textsuperscript{122} Where, however, procedural errors by the district in developing the student's IEP are harmless and non-prejudicial to the parents, courts will not construe such errors as resulting in a denial of FAPE.\textsuperscript{123}

Finally, the courts have found that procedural inadequacies may deprive a child of educational benefits. One example of this type of FAPE violation occurs when a district fails to timely convene an IEP meeting and, as a result of this failure, a student is denied educational benefits he should have received at an earlier time.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{120} See, e.g., Parents Denied Reimbursement for at-Home Autism Services, 16 EARLY CHILDHOOD REP. 10 (2005) (describing holding which found that a child was not denied FAPE despite the district's error in failing to provide parents written notification that their request for at-home autism service was being denied).
\item \textsuperscript{121} See, e.g., Shapiro, 317 F.3d at 1078 (stating, "those individuals, like [the child's] parents, who have first-hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process."); N. Kitsap Sch. Dist. v. K.W., 123 P.3d 469, 478 (Wash. Ct. App. 2005) (denying grandparents meaningful opportunity to participate in developing student's IEP constituted serious procedural error); Bd. of Educ. of County of Cabell v. Dienelt, 843 F.2d 813, 815 (4th Cir. 1988) (holding failure to consult with child's parents when developing IEP constitutes procedural default rendering IEP fatally flawed).
\item \textsuperscript{122} See Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. Mills, 03 Civ. 0050(RCC), 2005 U.S. Dist. LEXIS 13741, at *13-15 (S.D.N.Y. July 8, 2005) (explaining school's record of waiver aided court's determination that parent validly waived right to attend CSE meeting).
\item \textsuperscript{124} See Shapiro, 317 F.3d at 1079 (requiring loss of educational opportunity where there have been procedural errors); but see Tice v. Botetourt County Pub. Sch., 908 F.2d 1200, 1206 (4th Cir. 1990) (explaining tardy completion of evaluations alone constitutes FAPE violation).
\end{itemize}
2. Substantive Denial of FAPE.

Since neither IDEA nor its implementing regulations provide a substantive standard for a FAPE, courts have been forced to supply its meaning on a case-by-case basis, in light of the child's unique needs. It is clear from Rowley that, under IDEA, school districts are not obligated to provide the best possible educational services unless the state where the child resides sets a higher standard. In such cases the state standard controls and its criteria are incorporated into the federal FAPE requirement.

Next, as explained above, Rowley requires that the IEP provide "some educational benefit." Unfortunately, Rowley did not elaborate on what this means. The Rowley court did state the benefit it mandates varies with the individual characteristics of the child. Polk v. Central Susquehanna Intermediate Unit 16, the leading post-Rowley case on substantive FAPE, said that IDEA required an IEP to provide "more than a trivial educational benefit" and "significant learning." Moreover, Polk explained that what was appropriate could not be reduced to a single standard and "must be gauged in relation to the child's potential." Thus, Polk followed Rowley's guidance concerning a sliding scale of expectation depending on the individual characteristics of the child. Where the child has participated unsuccessfully in substantially similar programs in the recent

125 See County of San Diego v. Cal. Special Educ. Hearing Office, 93 F.3d 1458, 1467 (9th Cir. 1996) (stating that "educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior and socialization").

126 See 34 C.F.R. § 300.13 (1999) (noting that the term free appropriate public education or FAPE "means special education and related services that . . . meet the standards of the SEA"); see also Amann v. Stow Sch. Sys., 982 F.2d 644, 649 (1st Cir. 1992) (explaining that where states create standards more stringent than federal rule, the district must also satisfy state requirements).

127 Bd. of Educ. v. Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 200 (1982) (concluding that "[i]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child").

128 See id. at 202–203 (explaining how different students may respond very differently to same instruction).

129 853 F.2d 171 (3d Cir. 1988).

130 Id. at 180.

131 Id. at 182.

132 Id. at 185.

133 See id. at 177 (urging individualized programs).
past, to those now proposed, such programs will be deemed to fail a substantive FAPE test.\textsuperscript{134}

Assessing the merits of an IEP sometimes involves weighing academic progress against the benefits of contacts with non-disabled peers, the so-called academic gain/socialization fulcrum.\textsuperscript{135} Rather than emphasizing how much should be learned, the onus of an assessment usually focuses on what should be learned or emphasized. This fulcrum of benefits problem arises most often with children with severe impairments and it is exceedingly difficult to resolve. Sometimes a child is so impaired that no meaningful academic instruction can occur and the substantive FAPE turns to which basic functional skills should be taught to the child.\textsuperscript{136} Children falling at this end of the continuum may only be able to benefit from instruction in activities of daily living, self-care and travel training, for example. IDEA's implementing regulations contemplate programs and services for meeting the unique needs of children with such limitations.

Another aspect of the substantive FAPE question is whether the benefits conferred in the IEP must generalize across settings to be adequate. In \textit{J.S.K. v. Hendry County School Board},\textsuperscript{137} the court held that there was no requirement of such broad generalization. \textit{J.S.K.} involved a 15-year-old student with autism and mental retardation who displayed aggressive, maladaptive and self-injurious behaviors both at home and school. Under the IEP in effect prior to trial, this student made material gains at school.\textsuperscript{138} However, the student's gains had not manifested in other settings, namely the home, leading the parents to claim that the proposed IEP was inadequate. The parents sought,


\textsuperscript{135} See Roland M. and Miriam M. v. Concord Sch. Comm., 910 F.2d 983, 993 (1st Cir. 1990) (holding that “an appropriate educational plan . . . requires a balancing of the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive fulcrum”).

\textsuperscript{136} See, e.g., Timothy W. v. Rochester, N.H. Sch. Dist., 875 F.2d 954, 973 (1st Cir. 1989), \textit{cert. denied}, 493 U.S. 983 (1989) (concluding that all handicapped children, regardless of the severity of their handicap, are entitled to a FAPE, but that “education for the severely handicapped is to be broadly defined, to include not only traditional academic skills, but also basic functional life skills, and that educational methodologies in these areas are not static, but are constantly evolving and improving”).

\textsuperscript{137} 941 F.2d 1563 (11th Cir. 1991).

\textsuperscript{138} See \textit{id.} at 1573.
through the IEP team, a residential placement. In rejecting the parents' assertion, the court "define[d] 'appropriate education' as making measurable and adequate gains in the classroom."\(^{139}\) The court further highlighted that "[i]f meaningful gains across settings means more than making measurable and adequate gains in the classroom, they are not required by [IDEA]."\(^{140}\) The Eleventh Circuit's \textit{J.S.K} decision regarding the "generalization of gains" has generally been followed.\(^{141}\)

In \textit{M.C. ex rel J.C. v. Central Regional School District},\(^{142}\) however, the court gave a broader meaning to FAPE than the Eleventh Circuit. It expressly held that FAPE includes the obligation to teach skills in a manner that will foster generalization of the target skills to other aspects of daily life.\(^{143}\) This decision is more in line with the language and spirit of IDEA than the Eleventh Circuit's decision. It recognizes, consistent with \textit{Rowley}, that school districts must address children's unique needs after conducting individualized evaluations. Moreover, unlike \textit{J.S.K} and its progeny, it recognizes that an appropriate education includes much more than formal academic subjects.\(^{144}\)

Next, courts may sometimes find an IEP substantively deficient based on the IEP's very structure. For example, an IEP may be found deficient where it lacks statements of the child's present level of educational performance, goals relevant to the student's needs as identified in their evaluation(s), a sufficiently specific description of the specialized instruction the child will receive or objective evaluation criteria with which to measure progress.\(^{145}\)

\(^{139}\) \textit{Id.}\(^{140}\) \textit{Id.}\(^{141}\) In Weiss by \\& Through Weiss v. Sch. Bd. of Hillsborough County, 141 F.3d 990 (11th Cir. 1998) the court held that an IEP for an autistic child was sufficient, as the child improved academically and behaviorally at school. \textit{See id.} at 997. The court, in interpreting whether adequate educational benefits had been conferred, held that "adequate educational benefits refer to a basic floor of opportunity which might not have existed without the IDEA." \textit{See id.}\(^{142}\) 81 F.3d 389 (3d Cir. 1996).\(^{143}\) \textit{See id.} at 394 (describing deficiencies in child's education were result of inappropriate IEP that failed to give child opportunity to learn skills applicable to everyday life).\(^{144}\) \textit{See, e.g.}, \textit{Calloway v. Dist. of Columbia}, 216 F.3d 1, 3 (D.C. Cir. 2000) (noting that IDEA requires a FAPE "emphasiz[ing] special education and related services designed to meet their unique needs and prepare them for employment and independent living").\(^{145}\) \textit{See Briere v. Fair Haven Grade Sch. Dist.}, 948 F. Supp. 1242, 1250 (D. Vt. 1996) (describing specific statutory components of IEPs); \textit{see also} Evans v. Bd. of Educ., 930 F. Supp. 83, 95 (S.D.N.Y. 1996) (highlighting that an IEP must contain "appropriate objective criteria and evaluation procedures
A proposed public placement is evaluated prospectively, that is as of the time it was developed, rather than retrospectively with the benefit of 20/20 hindsight. In the same vein, the IEP's merits are not measured by comparing it to the current private school program. Notwithstanding the difficulty in defining a substantive FAPE, there are certain types of violations which will almost always result in the substantive denial of a FAPE and will provide the opportunity for reimbursement for programs and services purchased by the parents.

Additionally, school districts must ensure that a child's IEP is in effect by the beginning of the school year and that the parents are provided a copy. Mailing the IEP to the parents less than one week prior to the start of the school year does not violate IDEA's procedural requirements. Where, however, the district fails to propose an IEP until three weeks after the school year

and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In Adams v. Or., 195 F.3d 1141 (9th Cir. 1999), the Ninth Circuit refused to judge the efficacy of an IFSP in hindsight. See id. at 1149. The Third Circuit also refused to judge the appropriateness of an IEP in retrospect, noting that the "appropriateness [of an IEP] is judged prospectively so that any lack of progress under a particular IEP . . . does not render that IEP inappropriate." Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 (3d Cir. 1995). The First Circuit has framed the question as not whether the IEP achieved perfect academic results, "but whether it was 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law." See Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990). In D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595 (2d Cir. 2005), both the state review officer and the district court assessed the substantive validity of the IEP based on a retrospective analysis of the IEP's efficacy. See id. at 598. Since neither party had briefed that issue or raised it in the court below, the Second Circuit remanded to the district court directing the district court to determine whether it was error to consider retrospective evidence in assessing the substantive quality of the IEP. Id. at 599. The D.F. court pointed out that there might be value in distinguishing between claims which challenge the validity of a proposed IEP and those which question an existing IEP on the ground that it should have been modified based on changed circumstances, new information or proof of failure. Id. at 599 n.3. It is posited that the latter view is very significant. A child should not go an entire school year, receiving programs and services that do not meet the child's needs, especially during developmentally critical periods.

See Andrew M. v. Del. County Office of Mental Health and Mental Retardation, No. 03-6134, 2005 U.S. Dist. LEXIS 5819, *57 (E.D. Pa. Apr. 7, 2005) (explaining that "the issue . . . is not what hindsight shows, but whether [the program proposed] was appropriate at [the time it was offered]").

See 34 C.F.R. § 300.342(a) (1999) (mandating that "[a]t the beginning of each school year, each public agency shall have an IEP in effect for each child with a disability within its jurisdiction"); 34 C.F.R. § 300.345(f) (1999) (providing that "[t]he public agency shall give the parent a copy of the child's IEP at no cost to the parent").

The Second Circuit has found that a school district fulfilled its legal obligations by providing the IEP before the first day of school. See Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 194 (2d Cir. 2005). Arguably this holding conflicts with parents' due process rights under IDEA. Receipt of an IEP a few days before commencement of the school year hardly provides sufficient time for a parent to evaluate the merits of the IEP, comply with the required notice provisions respecting the child's removal, evaluate alternative placements for the child, make formal application to the private school(s), arrange, if necessary, for financing for the alternative placement and contract, if necessary, for transportation to implement the alternative placement.
begins, the delay will be deemed to deprive the student of FAPE, which, in a proper case, may warrant reimbursement.150

Although an IEP is not a guarantee that the child will achieve the goals set out therein, it amounts to a promise by the school district to implement the IEP's provisions.151 For example, in Roca v. District of Columbia,152 the IEP did not include therapy and counseling that an independent evaluation showed the student required for FAPE. Substantive violations have also been found where an IEP is not implemented or where the IEP fails to provide for appropriate related services.

Finally, courts have held school districts liable for child find violations in individual cases where the districts were on notice of the child's academic difficulties but failed to initiate appropriate identification and evaluation activities.153

In the leading tuition reimbursement case, Doe v. Metropolitan Nashville Public Schools,154 the Sixth Circuit reversed the district court's dismissal of the parents' claim alleging child find violations and remanded the case for trial.155 Doe involved a "learning disabled" and "emotionally disturbed" child156 who had

150 See Kitchelt v. Weast, 341 F. Supp. 2d 553, 556-57 (D. Md. 2004) (stating receipt of IEP plan three weeks after school began warranted reimbursement); see also Evans v. Bd. of Educ. of the Rhinebeck Cent. Sch. Dist., 930 F. Supp. 83, 95-96 (S.D.N.Y. 1996) (holding that there was a denial of a FAPE where proper IEP was not ready to implement at the start of school year).

151 See Ms. M. v. Portland Sch. Comm., No. 02-169-P-H, 2003 U.S. Dist. LEXIS 8552, at *45-6 (D. Me. May 20, 2003) (affirming a hearing officer's determination that, because the district failed to fully implement the reading segment of a fifth-grade student's program, the district was required to reimburse the family for the costs incurred in hiring a private reading tutor).


153 It has been held that "in order to establish that the school violated the identification requirements of IDEA, plaintiff must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." Clay T. v. Walton County Sch. Dist., 952 F. Supp. 817, 823 (M.D. Ga. 1997). In the absence of such notice, however, courts have been reluctant to provide reimbursement or other remedies for such failures notwithstanding the affirmative nature of the child find obligation. See Alex K. v. Wissahickon Sch. Dist., No. 03-854, 2004 U.S. Dist. LEXIS 1994, at *28-29 (E.D. Pa. Feb. 12, 2004). The District Court, for the Eastern District of Pennsylvania, for example, found that a district did not violate its child find obligations when the district was not on notice that the student was receiving speech and language services, and no evaluations of the student were shared with the district. Id. Similarly, the District Court for the Eastern District of Wisconsin found a local district did not violate the child find requirements by failing to initiate an evaluation of a child who slept in class and whose grades were slipping. See Hoffman v. East Troy Cmty. Sch. Dist., 38 F. Supp. 2d 750, 764-65 (E.D. Wis. 1999). After all, "[i]n either due process nor federal law imposes an obligation upon school districts to test every child whose grades are gradually slipping..." Russo v. Chippewa Valley Sch. Dist., No. 95-CV-73484, 1996 U.S. Dist. LEXIS 8639, at *10 (E.D. Mich. May 21, 1996).


155 Id. at 388 (explaining reimbursement may be granted, despite lack of communication between child’s parents and the school, where the school district does not follow proper "child find" procedures).

156 Id. at 385.
never attended the public schools. Rather he attended private special education at the parents’ expense prior to, and after, the dispute arose.\footnote{See id. (explaining parents paid for private school, but wanted reimbursement for tuition before seeking IEP from public school district).} The district court held that, because Doe had been unilaterally placed by his parents and the school district had not been given the opportunity to evaluate Doe or create an IEP for him, it was not obligated to reimburse the Does.\footnote{Id.} The Sixth Circuit reversed and remanded, holding that where, as here, the parents claimed “the lack of dialogue stems from the school district’s failure to conduct sufficient ‘child find,’ reimbursement may be appropriate.”\footnote{Id. at 387} The district argued that the parents’ general knowledge of the availability of services should bar the claim.\footnote{Id. at 387 (noting that the school district “argues that even if the district court had used the proper standard, it was still entitled to summary judgment because of the Does’ admitted knowledge of the general availability of services”).} However, the circuit court viewed child find failures as procedural violations which could, if sufficiently serious, justify reimbursement,\footnote{Id. at 388 (holding that “[e]ven though the Does had some general knowledge of the availability of services, the failure by Metro to apprise the Does of their specific procedural and substantive rights could make reimbursement a proper remedy”).} further holding that the parents’ general knowledge of the availability of services did not bar recovery as a matter of law.\footnote{Id. (holding parents’ awareness of availability of services did not operate as bar to recovery).} Finding sufficient factual questions, the \textit{Doe} court directed that, on remand, the district court balance “the extent of the Does’ knowledge” of their substantive and procedural rights against the “the degree of [the school district’s] laxity.”\footnote{Id. at 386.} The court further directed that, in applying this balancing test, it should give “due weight . . . to the [administrative law judge’s] determinations”.\footnote{Id. at 386.}

psychiatric help.\textsuperscript{166} In \textit{Lakin}, the district failed to develop an appropriate IEP until seven months after the child's removal to the private residential placement. The court limited its reimbursement award to the period between the child's removal and the date on which the district offered an appropriate IEP.\textsuperscript{167} This left the parents responsible for approximately eight months tuition, corresponding to the time during which the student remained in the private school after an adequate IEP was offered.\textsuperscript{168}

A number of other judicial decisions have resulted in tuition awards based on child find violations.\textsuperscript{169} In other decisions involving child find claims, courts have found parents presented colorable claims for reimbursement or other relief sufficient to deny school districts' motions to dismiss.\textsuperscript{170}

\textbf{iii. Determining Whether the Unilateral Placement Selected by the Parents Was Proper under the Act.}

Determining a parent's right to reimbursement for private placement requires a determination as to whether the placement was appropriate, not perfect.\textsuperscript{171} An "appropriate" private

\textsuperscript{166} See \textit{id.} at *1-3. At the time the parents removed the student to the private school, the district had failed to advise the parents of their procedural and substantive rights under IDEA. \textit{id.} at 2. In reliance on \textit{Metropolitan Nashville}, the \textit{Lakin} court further held that the district's failure to comply with the Act's child find provisions may suffice as grounds for reimbursement of an injured party's private placement costs. \textit{id.} at *2-3.

\textsuperscript{167} \textit{id.} at *3-4 (affirming district court's grant of partial reimbursement).

\textsuperscript{168} See \textit{id.} at *4. Assuming the court of appeals was correct as to the adequacy of the IEP, the timing of the offer is significant. Here, the IEP was offered in May, that is, prior to the end of the school year. It would seem educationally unsound to disrupt the child's program mid-semester merely because an appropriate IEP was finally offered. Moreover, the effects on the child of removing him from a placement necessitated by the school district's failure to offer a FAPE should be an equitable consideration in determining the time period for which a reimbursement award will be given.


\textsuperscript{170} See, e.g., \textit{W.B. v. Matula}, 67 F.3d 484, 500-02 (3d Cir. 1995) (upholding an action for damages based on, among other things, defendant's failure to identify and evaluate a child with disabilities in violation of regulations); \textit{Hicks v. Purchase Line Sch. Dist.}, 251 F. Supp. 2d 1250, 1254-55 (W.D. Pa. 2003) (finding sufficient evidence was presented from which a jury could believe defendants failed to fulfill child find obligations, given child's academic and behavioral decline); \textit{Wiesenberg v. Bd. of Educ.}, 181 F. Supp. 2d 1307, 1312 (D. Utah 2002) (finding issues of fact whether district was sufficiently on notice).

\textsuperscript{171} See \textit{M.S. v. Bd. of Educ.}, 231 F.3d 96, 101 (2d Cir. 2000) (highlighting that "an appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement [and] [t]hus, the test for the parents' private placement is that it is appropriate, and not that it is perfect").
placement must be an educational program that meets the child's special needs. To qualify as appropriate, the parent-selected unilateral placement need not employ certified special education teachers or prepare an IEP. Least restrictive environment ("LRE") considerations may apply when assessing whether the unilaterally selected placement is proper, but parents are not held to the same strict standard as school districts in this regard. Courts have determined, in essence, that LRE is one among many factors considered in determining whether the private placement is proper under the Act. When parents are unable to place the child in the least restrictive environment they are not necessarily barred from receiving a tuition reimbursement award.

C. Limitations on Reimbursement Based on Parental Conduct

IDEA/2004 confers on hearing officers and the courts discretion to reduce or deny a reimbursement award when the parent fails to give adequate notice to the LEA prior to the child's removal, fails to make the child available for evaluation, or when the parents' actions are unreasonable. Each of these is discussed in turn.

i. Failure to Give Adequate Notice to the LEA Prior to the Child's Removal

A parent's right to reimbursement may be reduced or denied if:

\[172\] See M.S., 231 F.3d at 104 (positing that "[o]nce it is established that a school district's IEP is inappropriate, [the court] must consider whether the 'private education services obtained by the parents were appropriate to the child's needs'").


\[174\] See M.S., 231 F.3d at 105 (recognizing that "parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board" but that the mainstreaming requirement "remains a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate"; see also Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 248 (3d Cir. 1999) (holding that that parent was not obligated to show that student was unable to be educated in a public setting in order to receive reimbursement for a more restrictive private placement); see generally Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999) (admonishing that the test for reimbursement is appropriateness, not perfection).

\[175\] See M.S., 231 F.3d at 105 (agreeing with the District Court's finding that parents will not be denied reimbursement simply because their unilateral placement did not result in the least restrictive environment but overruling District Court's holding because the level of restrictiveness remains a consideration that must bear on the parents' decision).
(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).\textsuperscript{176}

IDEA/2004, however, provides that notwithstanding these notice requirements:

\begin{verbatim}
...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.\textsuperscript{177}
\end{verbatim}

In \textit{Ms. M. ex rel. K.M. v. Portland School Committee},\textsuperscript{178} the court affirmed the district court’s denial of reimbursement to the parent for her child’s placement at a private school.\textsuperscript{179} It was undisputed that the parent failed to provide the requisite notice at the most recent IEP meeting and 10 days prior to the child’s removal to the private school. The parent claimed, however, that she fell into exceptions to this requirement based on her illiteracy

\textsuperscript{178} 360 F.3d 267 (1st Cir. 2004).
\textsuperscript{179} \textit{See} id. at 274.
and the district's failure to provide the section 1415 notice of her rights.\textsuperscript{180} The circuit court rejected the parent's assertion of illiteracy and that she had not received the required notice of her rights, finding the trial court's determinations on these issues were not clearly erroneous.\textsuperscript{181} The court did not find an abuse of discretion in the trial court's decision to deny reimbursement.\textsuperscript{182}

Aside from the illiteracy and fair notice exceptions, a parent's failure to give the required notice of removal will not necessarily bar a claim for tuition reimbursement based on the so-called dangerousness exception.\textsuperscript{183}

\textbf{ii. Failure to Make Child Available for Evaluation}

Another ground for the denial or reduction of reimbursement exists 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 [do] not make the child available for such evaluation[.]

Consequently, parents who do not make their child available for evaluation upon receipt of a proper request from the district and later seek reimbursement for a unilateral placement do so at great financial risk.\textsuperscript{185} However, the parents' failures to produce

\begin{itemize}
\item \textsuperscript{180} See id. at 268.
\item \textsuperscript{181} See id. at 272-73. In reaching its determination, the First Circuit pointed out that the parent was a high school graduate, the child's teachers had no indication the parent could not read, that the parent had completed the written application to the private school and that she indicated on a kindergarten questionnaire that she read stories to her child. \textit{Id}. Respecting the notice of rights issue, the court found the parent had received notice of her duty to inform the district of her intent to remove the child from the public school. \textit{See id.} at 272.
\item \textsuperscript{182} See Ms. M., 360 F.3d at 373.
\item \textsuperscript{183} See J.M. by A.S. v. Kingsway Reg'l Sch. Dist., No. 04-4046(RBK), 2005 U.S. Dist. LEXIS 18110, at *13 (D. N.J. Aug. 18, 2005) (noting that, notwithstanding the provisions under the IDEA which will reduce or deny reimbursement for a unilateral placement where parents fail to give school authorities proper notice of the placement, reimbursement may not be reduced or denied "where compliance with the notice requirement 'would likely result in physical or serious emotional harm to the child'")
\item \textsuperscript{185} See, e.g., P.S. v. Brookfield Bd. of Educ., 353 F. Supp. 2d 306, 315 (D. Conn. 2005) (stating parents forfeited right to reimbursement by not consenting to psychological evaluation since they were unable to demonstrate that evaluation would cause the student harm); D.P. by Pierce v. Sch. Dist. of Poynette, No. 03-C-310-C, 2004 U.S. Dist. LEXIS 4903, at *23 (W.D. Wis. Mar. 16, 2004) (denying reimbursement where parents refused to allow the district to evaluate their son); Caitlin v. Rose Tree
the child may be excused where the notice furnished by the district was insufficient.

iii. Parental Actions Are Unreasonable

Finally, "... upon a judicial finding of unreasonableness with respect to actions taken by the parents" the reimbursement award may be denied or reduced. In *Loren F. v. Atlanta Independent School System,* for example, the court remanded the case to the trial judge who had dismissed the parents' claim for reimbursement based on the parent's "unreasonable" conduct without first making a FAPE determination.

The student in *Loren F.* had attended a private school for seventh and eighth grades. Thereafter, the student's mother completed an application for the private school that indicated she would seek reimbursement from the district, before she contacted the district about enrolling the student in the public school for ninth grade. Before completing an evaluation, the district's IEP team developed an interim IEP. The parents refused to give written approval to the interim program believing the district lacked the resources to teach their son. They withdrew Loren from the public school after five days, placed him in the private school, and then sought reimbursement. The Eleventh Circuit held that the trial court's conclusion that the parents acted unreasonably as a matter of law was error, since factual issues surrounded the parents' conduct. On remand the court was directed to conduct:

"...a bench trial on the entire IDEA case and to make findings of fact and conclusions of law on each of the issues in this case including, but not limited to: (1) whether Loren was provided a FAPE; (2) whether [the school district] complied with IDEA's procedures; (3) whether the IEP developed through those procedures was reasonably calculated to enable Loren to receive educational benefits; (4) if Loren was not provided an

Media Sch. Dist., No. 03-CV-6051, 2005 U.S. Dist. LEXIS 13102, at *3 (E.D. Pa. June 30, 2005) (denying reimbursement where parent did not argue that the child's IEP was inappropriate or that their placement in private school was appropriate).

187 349 F.3d 1309 (11th Cir. 2003).
188 See id. at 1318 (explaining why the parents' acts were not unreasonable as a matter of law).
189 See id. at 1314-17 (discussing plaintiff's prior actions and the district court's ruling).
appropriate FAPE or IEP, whether Loren's parents contributed to, and to what extent, the failure to provide Loren with an appropriate FAPE or IEP by either being unavailable themselves or in not making Loren more available to [the school district]; (5) did Loren's parents act unreasonably under 20 U.S.C. § 1412(a)(10)(C)(iii)(III); (6) when was Loren "removed" for purposes of 20 U.S.C. § 1412(a)(10)(C)(iii)(I), from public school under IDEA - - that is was Loren removed from [the public school] when he stopped attending [the public school] on 8/18/00, when his mother sent a formal rejection of the IEP on 8/21/00, when Loren actually enrolled in private school, or on some other date; (7) whether the parents complied with the notice requirement in 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa)-(bb); and (8) whether the safe harbor provision in § 1412(a)(10)(C)(iv)(II) is applicable to this case.\(^\text{190}\)

Needless to say, parental conduct which disrupts the evaluation process or IEP meetings, especially where it interferes with the development of a FAPE for a child, will be extremely prejudicial to the parents in a reimbursement case. Moreover, where parents are verbally abusive to school officials or withhold information vital to a child's program development, their chance for obtaining tuition reimbursement is markedly diminished. Similarly, where parents refuse to attend IEP meetings in the absence of a reasonable excuse, such conduct will diminish their chance of success on a tuition reimbursement claim.

\[D. \text{ Other Limitations}\]

For the first time, IDEA/2004 contains an express statute of limitations. A party must request a hearing within two years of the date the party knew or should have known about the alleged action that forms the basis of the complaint.\(^\text{191}\) However, IDEA defers to state law if the state has set a different time limitation for requesting such a hearing.\(^\text{192}\) Under IDEA/2004, the new limitations period does not apply to a parent if the parent was prevented from requesting a hearing due to a specific

\(^{190}\) Id. at 1319.
\(^{192}\) Id.
misrepresentation by the district that it had resolved the problems forming the basis of the complaint, or when the district withheld information from the parent that the IDEA required it to provide.\(^{193}\) IDEA/97 and its predecessors did not have such a limitations period, leaving it to state law and judicial interpretation to resolve the issue.\(^{194}\)

Although *Carter* specifically mentioned that the reasonableness of the cost of a private school is a factor which may limit a parent's recovery, very few school districts have chosen to litigate that issue. In one case, however, the court reduced the $480 daily rate for rehabilitation services, but upheld the $275-per-day rate at another facility, basing its analysis on the customary rates in the region and the degree of expertise available at the facility.\(^{195}\)

### E. Prior Receipt of Special Education as a Condition of Tuition Reimbursement

Recent cases applying IDEA/97 have limited a parent's right to tuition reimbursement to situations where the child has "... previously received special education and related services under the authority of a public agency...".\(^{196}\) There is no reason to believe these courts would have decided the cases differently under IDEA/2004 since the applicable language is identical.\(^{197}\)

In light of these decisions, appellate courts will have to determine the circumstances that their broad authority, under section 615(h)(2)(C)(iii), to grant "appropriate relief" is limited by section 612(a)(10)(C)(ii)'s authorization to award reimbursement...

---


196 See Bd. of Educ. of the City Sch. Dist. of N.Y. v. Tom F. ex rel. Gilbert F., No. 01 Civ. 6845(GBD), 2005 U.S. Dist. LEXIS 49, at *7 (S.D.N.Y. Jan. 3, 2005); see also Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 411 (S.D.N.Y. 2005) (highlighting that "tuition reimbursement is available only to parents of a child with a disability who enroll their child in private school without the district's consent after the child previously received special education and related services under the authority of a public agency"); but see E.W. and E.W. ex rel. J.W. v. Sch. Bd. of Miami Dade County Fla., 307 F. Supp. 2d 1363, 1369 (S.D. Fla. 2004) (finding that "parents of a disabled student [are] not barred from seeking reimbursement... even though their child has never been enrolled in public school.")

to parents of students whose children "... previously received special education and related services under the authority of a public agency . . . ." Moreover, courts will have to reconcile the case law granting parents reimbursement for unilateral placements for child find failures against an absolute rule denying reimbursement to parents based on a narrow application of §612(a)(10)(C)(ii).

F. Reimbursement Resulting from Pendency Rights

Generally, courts have interpreted a child's "current educational placement" as the current education, related services and placement provided in accordance with the most recently approved IEP. This means the IEP that was actually implemented when the dispute arose. By merely initiating IDEA's complaint procedures, the parent can force the school district to maintain the child in the last agreed-to program.

Questions are often raised as to what point, if at all, pendency may change when parents initiate a complaint after they object to their child's pendency placement or program proposed by the district and unilaterally remove a child upon objecting. The answer is found at 34 C.F.R. § 300.514(c)(1999), which states that:

If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of [the pendency provisions] of this section.

Thus, where a state level administrative order grants reimbursement for a private school unilaterally selected by the

198 Id.
199 See Drinker v. Colonial Sch. Dist., 78 F.3d 859, 867 (3d Cir. 1996) (defining the standard for "current educational placement"); see also Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 626 (6th Cir. 1990) (explaining that the location where the child receives instruction at the time of the dispute is commonly "current educational placement").
200 Thomas, 918 F.2d at 625-26 (finding that the current educational placement centers around where the dispute arose).
201 34 C.F.R. § 300.514(c) (1999).
parents, that order changes the pendency placement from the public to the private school, and obligates the district to continue to fund the child’s education at the private school until resolution of the parents’ claim. This is because the school district’s loss at the state administrative level “constitutes a placement within the meaning of the pendent placement provision of the IDEA”.

How, if at all, are parents’ reimbursement claims effected by a favorable, but untimely decision by state level review officers? This question was resolved in Mackey ex rel. Thomas M. v. Board of Education for the Arlington Central School District. In Mackey, the Second Circuit held that the district is responsible for payment of tuition as a result of pendency established at a Tier II decision, retroactive to the date when the review officer was required to make the decision, not months later when the decision actually issued. The court held that a different outcome would be “unfair to the parents.”

Courts have consistently required school districts which lost reimbursement cases at the state agency level to continue to fund placements until IDEA’s procedures are exhausted respecting the then current or subsequent controversy. Courts have further held that, even when school district ultimately prevails, the school district’s obligation to fund the private placement during

---

202 See Bd. of Ed. of the Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 485 (2d Cir. 2002), cert. denied, 537 U.S. 1227 (2003) (holding that “a final administrative decision by a state review board, agreeing with a parent’s decision about their child’s placement, constitutes a “placement” within the meaning of the pendent placement provision of the IDEA”).

203 See id.

204 386 F.3d 158 (2d Cir. 2004).

205 See id. at 165 (deciding that tuition reimbursement would be granted to parents as of date Standard Review Officer’s (“SRO”) decision should have been made).

206 Id. at 164. The problem of untimely decisions by the State Review Officer (“SRO”) of the New York State Education Department was effectively resolved in Schmelzer v. N.Y., 363 F. Supp. 2d 453 (E.D.N.Y. 2003), where the court decided that the office is subject to a permanent injunction compelling the SRO to timely decide Tier II appeals within the 30 day time frame required by federal regulation. Id. at 460.

207 See Gabel ex rel. L.G. v. Bd. of Educ., 368 F. Supp. 2d 313, 326 (S.D.N.Y. 2005) (obligating district to pay child’s tuition at private school because it was her pendency placement under settlement agreement reached with district); see also Bd. of Educ. v. O’Shea, 353 F. Supp. 2d 449, 454 (S.D.N.Y. 2005) (finding that reviewing officer’s decision, though issued more than one year after end of school year in dispute, was retroactive to time preceding that decision for purposes of determining district’s obligation to pay tuition as pendency matter); see generally Spilsbury v. Dist. of Columbia, 307 F. Supp. 2d 22, 27-28 (D.C. Cir. 2004) (directing district to reimburse parents’ out-of-pocket costs for educating their children with learning disabilities at private school).
the pendency of a final judicial remedy is absolute and that parents are not required to reimburse the school district.\textsuperscript{208}

Since the applicable regulations treat the state level decision as an agreement between the school district and the parents respecting the private placement, it would seem doctrinally unsound to require the parents to reimburse the school district after an "agreement" was reached. Moreover, the threat of an unjust enrichment claim may discourage parents from making efforts to have their disabled children receive an appropriate education.

Absent statutory changes, it appears unlikely that school districts that ultimately prevail in reimbursement decisions will be reimbursed the money they paid to the parents as a result of their pendency obligation.

\textit{G. Reimbursement for Independent Educational Evaluations}

IDEA/2004 § 615(b)(1) carries over from IDEA/97 the parents' right to obtain an independent educational evaluation at public expense,\textsuperscript{209} when the parent disagrees with the district's evaluation.\textsuperscript{210} Under the procedural safeguards notice, school districts are required to provide parents with a statement of this right.\textsuperscript{211} When parents request an independent educational evaluation, a school district must "without unnecessary delay" file a due process complaint to establish that its evaluation is appropriate or ensure that the independent evaluation is provided at public expense unless the evaluation did not meet

\textsuperscript{208} See Lauren W. v. DeFlaminis, Civ No. 03-CV-1526, 2005 U.S. Dist. LEXIS 18559, at *9-10 (E.D. Pa. July 20, 2005) (holding that district must pay tuition until close of litigation, and was barred by stay-put provisions from seeking reimbursement for private school tuition during administrative and judicial proceedings, even if district ultimately prevailed); see also Aaron M. v. Yomtoob, No. 00-C-7732, 2003 U.S. Dist. LEXIS 21252, at *20-22 (N.D. Ill. Nov. 25, 2003) (explaining that parents who received reimbursement as matter of pendency for twelve trips to visit their child with autism at out-of-state residential facility were not required to reimburse the school district for trips in excess of six, because to hold otherwise would cause parent who lacked sufficient financial resources to hesitate to use stay-put protections).

\textsuperscript{209} See 34 C.F.R. § 300.502(a)(3) (2006) (providing that, "[i]ndependent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question," and clarifying that public expense requirement means that, "the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent . . .").

\textsuperscript{210} See 34 C.F.R. § 300.502(b)(1) (2006) (highlighting parent's right to independent evaluation at public expense if parent disagrees with public agency's evaluation).

\textsuperscript{211} See 34 C.F.R. § 300.503(b)(6) (2006) (requiring agency to alert parents of their procedural right to obtain independent educational evaluation).
agency criteria.\textsuperscript{212} The criteria established by the agency for independent evaluations, "including the location of the evaluation and the qualifications of the examiners must be the same criteria as the agency employs when it initiates an evaluation, to the extent that they are consistent with the parent's right to an independent evaluation."\textsuperscript{213} Moreover, a parent is not required to explain the reasons for requesting an independent evaluation as a condition of obtaining such evaluation.\textsuperscript{214} However, the school district is not forbidden from inquiring as to the reasons.\textsuperscript{215} Regardless of whether the district pays for the independent evaluation, its IEP team is required to consider the evaluation in its decisions concerning provision of FAPE to the child, if it meets district criteria for such evaluations.\textsuperscript{216} Any party is permitted to introduce the independently obtained evaluation as evidence at a hearing on a due process complaint regarding the child.\textsuperscript{217}

If there is any one rule limiting a parent's right to an independent evaluation, it is that such evaluations should not be cumulative.\textsuperscript{218} On a practical level, this means that absent extraordinary circumstances, the parent cannot obtain at school district expense multiple evaluations involving the same area of

\textsuperscript{212} See 34 C.F.R. § 300.502(b)(2) (2006) (specifying that when parents file request for independent educational evaluation, agency must either show why its own evaluation was appropriate, or ensure that independent educational evaluation is provided at public expense, unless parent request fails to meet agency criteria).

\textsuperscript{213} 34 C.F.R. § 300.502(e) (2006).

\textsuperscript{214} See 34 C.F.R. § 300.502(b)(4) (2006) (explaining that parent is not required to give explanation for request for independent educational evaluation); see also Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 87 (3d Cir. 1999) (finding parents not obligated to express disagreement with district's evaluation before requesting independent evaluation).

\textsuperscript{215} See 34 C.F.R. § 300.502(b)(4) (2006) (clarifying that "agency may ask for the parent's reason why he or she objects to the public evaluation").

\textsuperscript{216} See 34 C.F.R. § 300.502(c)(1) (2006) (explaining that when parent obtains independent educational evaluation at private expense results must be considered if evaluation meets agency criteria).

\textsuperscript{217} See 34 C.F.R. § 300.502(c)(2) (2006) (stating that privately obtained independent educational evaluations "may be presented as evidence at a hearing . . . regarding that child").

\textsuperscript{218} See, e.g., Bd. of Educ. v. Ill. Bd. of Educ., 41 F.3d 1162, 1169 (7th Cir. 1994) (upholding reimbursement for one independent evaluation, but remanding to determine basis for order of reimbursement for more than one independent evaluation); Bd. of Educ. v. Ill. Bd. of Educ., 21 F. Supp. 2d 862, 880 (N.D. Ill. 1998), rev'd on other grounds, 207 F.3d 931 (7th Cir. 1999), cert. denied, 531 U.S. 824 (2000) (limiting reimbursement to one evaluation, based on necessity, failure to cross-appeal administrative decision); Hiller v. Bd. of Educ., 687 F. Supp. 735, 743 (N.D.N.Y. 1998) (limiting reimbursement to one evaluation).
functioning for which an independent evaluation has already been obtained.\textsuperscript{219}

\section*{IV. PRACTICE CONSIDERATIONS AND COMMENTARY}

\subsection*{A. When IEP Deficiencies Matter}

\textit{i. Procedural Violations}

Since parental participation is central to the purpose of the Act, school districts which offer parents a "take it or leave it" date for the IEP meeting, notwithstanding the fact that the parents have expressed their unavailability on that date, or deny the parents' reasonable request for an adjournment of the meeting, are running a serious risk of loss on the procedural aspect of FAPE if litigation ensues.\textsuperscript{220}

IEP meetings are, at times, adjourned at the school district's request. Other times, the meeting commences and the school district discontinues the meeting when the parties fail to reach a consensus regarding the child's program. In any event, the school district will often promise to reconvene the meeting. However, it is not uncommon for the school to fail to reconvene the meeting. Instead, parents are mailed an IEP containing programs, services and/or goals which were never discussed at any duly called and conducted IEP meeting. Obviously, such a

\textsuperscript{219} In the author's experience, school districts will generally agree to provide an independent evaluation at district's expense, rather than initiating a due process hearing to establish the appropriateness of its own evaluation(s). This makes sense when the cost of the two items is compared. Moreover, it is not unusual that the results of the independent evaluation(s) are similar to those obtained by the school district, especially on relatively stable measures like IQ and achievement tests. Unfortunately, some school districts neither agree to furnish the independent evaluation nor commence a due process hearing to establish the appropriateness of their own evaluations. Rather they stand pat, assuming that if enough time goes by the parent will, so to speak, go away. This usually occurs when the parents are relatively unsophisticated and unsure of their rights, or when there is a history of a contentious relationship with the parents. In the author's experience once the parent serves a demand for a due process hearing over this issue the district will comply will its obligations where it has not done so before.

\textsuperscript{220} Parents of course should document in writing their requests for adjournment of IEP and other meetings in the event a factual dispute later arises. However, parents and/or their representatives, should not, of course, try to "game" the system by not showing up at IEP meetings, with the plan to later allege they were not afforded an opportunity to participate in the process. Alternatively, school districts will be well served by employees who develop paper trails evidencing multiple invitations to IEP meetings to the parents, and send follow-up letters expressing concern about the parents' failure to appear at the meeting.
procedure thwarts the parents' participation in IEP development and will be a per se violation.

Another significant procedural violation occurs when the district fails to include appropriate educators at the IEP meeting. When, for example, the child's current or future teacher(s), either public or private, do not participate in the IEP meeting, valuable information is lost from the planning process. Moreover, the absence of such teaching professionals deprives the parent of an opportunity to learn how the child is progressing in areas relevant to the child's needs. Further, it may deny the child opportunities that would result from parent-teacher interaction. The failure to include the child's educators may prove fatal to the district's ability to defend a procedural FAPE claim.

Another procedural violation resulting in a denial of FAPE stems from structural defects in the IEP. These include the absence of, or incomplete evaluations of, the child, thereby preventing an accurate assessment of the child's present levels of

---

221 Besides the parents, who are considered members of the IEP development team, section 614(d)(1)(B) of the Individuals with Disabilities Education Improvement Act of 2004 mandates that IEP teams include not less than one regular education teacher if the child is or may be participating in the regular classroom environment and not less than one special education teacher. See 20 U.S.C. § 1414(d)(1)(B) (2006). Although the district enjoys discretion in the selection of which special education teacher attends the meeting, the special education teacher should, to the extent possible, be the person who is (or will be) responsible for implementing the child's IEP. Further, the IEP team must include a district or other agency representative who is qualified to provide or supervise special education and is knowledgeable about both the general curriculum and school district resources. See 20 U.S.C. § 1414(d)(1)(B)(iv) (2006). In addition to the foregoing persons, the IEP team must include an individual who can interpret the instructional implications of the evaluation results. See 20 U.S.C. § 1414(d)(1)(B)(v) (2006). Further, besides these people, the school district and the parents are permitted to bring to the meeting other individuals who have knowledge or special expertise regarding the child and even, where appropriate, the student who is the subject of the meeting. See 20 U.S.C. § 1414(d)(1)(B)(vi) (2006).

222 It should be obvious that if a school district is recommending an out-of-district placement for the child, a representative of that placement should participate in the meeting. After all, the representative would be the most knowledgeable as to whether the child's needs may be met at such placement. Similarly, the teacher or teachers who worked with the child all year long and can offer recommendations, based on objective and thoughtful analysis of the student's performance, are perhaps in the best position to make program and service recommendations for the student. Unfortunately, institutional inertia, resulting from budgetary constraints, fixed programming and self-imposed scheduling limitations, among other things, may affect teachers' good faith recommendations from being implemented.

223 IDEA/2004 loosens IEP meeting attendance requirements. Team members are not required to attend in whole or in part, if the parent and district agree that the member's attendance is unnecessary because his or her area of the curriculum or related services is not being modified or discussed in the meeting. See 20 U.S.C. § 1414(d)(1)(C)(i) (2006). Moreover, any IEP team member may be excused from all or part of the IEP team meeting if the member submits to both the parent and the team written input into the IEP's development prior to the meeting and the parent and district agree in writing to the excusal. See 20 U.S.C. § 1414(d)(1)(C)(ii) (2006).
performance in relevant areas. Since present levels of performance are critical to developing goals for the ensuing school year, school personnel should use reliable, valid and relevant measures to ascertain present performance levels. This will enable educators to assess the progress the child has made on last year’s goals and perhaps adjust the IEP for the ensuing school year based upon the child’s current needs. A related problem is the absence of measurable annual goals which correspond to the student’s needs. For example, it is common for goals employed for one school year to simply be transferred to another year without serious consideration of the child’s progress on those goals. It is astounding how often a school district will repeat goals that the district claims the child has either attained or did not make any progress, without examining the goals in relation to the child’s present performance. The child’s attainment of the goals would ordinarily require establishing new goals which “raise the bar” in light of the child’s accomplishments. The absence of meaningful progress should dictate re-examination and amendment of the child’s goals and perhaps the programs and services recommended.

A related problem arises where the district recognizes that there are significant academic or social needs adversely affecting the student’s progress, but fails to provide an IEP that establishes goals which address those needs. The IEP may only provide for related services, say speech and language or occupational therapy services, but fail to include goals for the therapist to work toward. Such inadequacies may result in a denial of FAPE. In sum, the IEP teams should objectively review the child’s current needs, establish goals toward which the child is expected to progress, provide programs and services sufficient to attain those goals and, at appropriate intervals, objectively measure the child’s progress toward those goals.

IDEA/2004 requires that IEPs state how the child’s progress toward meeting academic and functional goals will be measured and the district must report that progress to parents. Such reports must usually issue concurrent with regular report

---

The most significant deficiency in this aspect of IEP development is the lack of objective measurement. Unfortunately, it is very common for IEP teams to "measure" progress based substantially on teachers' feelings about progress, for example, teacher-made assessments. Although teacher-made assessments can be helpful, they must be based on objective criteria. Therefore, it would be far better practice if, for example, such teachers were required to report starting points and ending points in student's workbooks or textbooks between the start date of school and the date of the report and include percentages of success in each subdivision of the work the child produced. Moreover, such reports should relate to the skills children are expected to acquire in the general education curriculum and the grade level with which those skills are associated. This will assist the IEP team in its planning, including the establishment of meaningful goals for the next ensuing school year based on objective measures. Additionally, it will give the parents a realistic picture of their child's strengths and weaknesses. This will enable parents to advocate more effectively at IEP meetings for needed special education and related services.

A new requirement in IDEA/2004 requires school districts to provide special education and related services based on "peer-reviewed research to the extent practicable." This will presumably obligate IEP teams to keep current on methods and techniques as reported in professional journals and other sources. Their failure to use such research may become a deficiency in IEP services resulting in a denial of FAPE.

It is not uncommon for IEPs to mention specific special education and related services, but fail to include the frequency, location or duration of those services. Further, the intensity of the services or group size, for example, are not always specified in the IEP document, thereby raising ambiguities as to the exact nature of the services the district is offering. These deficiencies may also result in a FAPE denial.

---


226 See 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2006). The full text of the subsection requires as part of the progress report: "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, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child." Id.
Another serious procedural deficiency worth mentioning is the district's failure to deliver the IEP prior to the start of the school year. In such cases it is not a matter of looking for deficiencies in the IEP document, since there is no IEP in which to look. Absent some special circumstance, this is a *per se* violation of FAPE. This can fairly be characterized as either substantive or procedural. If the IEP is eventually delivered it may provide a substantive FAPE.

Sometimes the IEP contains statements as to what occurred at the meeting, including specific recommendations for programs and services that were made thereat and the parties disagree over the accuracy of those statements. Unfortunately those statements are sometimes inaccurate. For instance, the document may refer to a parental refusal to permit evaluation of the child when, in fact, the parent has executed consent for an evaluation which is on file with the district's special education office. Sometimes the IEP contains a comment that the parents agree with the recommendation of the IEP team for programs and services when, in fact, the parents expressly stated that they disagreed with the recommendation or perhaps reserved judgment for the purpose of consulting with experts to obtain advice about the efficacy of the proposed program and services. Therefore, the earlier the IEP document is delivered to the parents the sooner the discrepancies can be resolved and the IEP amended, if mutually agreeable. When the IEP arrives a few days before school opens, it leaves the parents with little time to negotiate with school officials, confer with their advisors and perhaps resolve the dispute. Sometimes, based on their dissatisfaction over what occurred at the most recent IEP meeting, the parents will make a down payment to secure a place for their child in a private school, still hoping to obtain an adequate public placement for the child. The parents are in essence hedging their bets. In situations where private school programs fill up early and they do not have an IEP in hand, parents are forced to make a decision about the public verses private placement earlier than they would prefer. The late-arriving IEP forces the parents' hand in the direction of a private placement, simply because they had no choice. In short, the better practice for school districts is to get the IEP to the parents as soon as possible after the IEP meeting, perhaps at latest by
the end of June. If not solving all problems, at least it will resolve some of them.

ii. Substantive Violations

Substantive analyses require an examination of facts available to the IEP team at the time the IEP was developed and a determination as to whether the program offered was calculated to provide the level of progress required under state law, so long as the state standards do not fall below minimum federal standards. Because determinations of substantive FAPE violations are fact intensive and highly individual, it is sometimes difficult to tell what violations, standing alone or in the aggregate, will result in a FAPE violation upon judicial review. Having said this, there are a few practical observations that can be gleaned from the cases on substantive FAPE.

Certainly any analysis on substantive FAPE should include a careful examination of the child's progress in any programs in which he or she was recently enrolled. A one or two-year retrospective is ordinarily sufficient. This would include report cards, IEP progress reports, achievement and other testing by general or special educators or related services providers, as well as progress on behavior intervention plans, if applicable. Independent educational evaluations obtained pursuant to statutory entitlement and other testing performed by professionals not employed by the school district should of course be reviewed as well. The child's progress should be analyzed in special education and related services programs the child has received.227

When IEPs merely continue program and service configurations which have consistently failed, the parents' case that substantive FAPE has been denied will be strengthened. On the other hand, where the child has made progress consistent with the child's abilities under the existing programs and the district intends to continue the child in an identical or very similar program, it will be difficult to challenge the program on substantive grounds. In such cases the parents should closely

227 When progress is measured by pre- and post-testing on standardized tests it is important that the tests measure the same skills. For example, if the baseline measures are comprised of reading scores on the Wechsler Individual Achievement Test (WIAT), the post-test progress measure should ordinarily be the same or a parallel version of the WIAT. This is the so-called "apples to apples" comparison.
examine the measurements the district employed in concluding the child progressed adequately. However, even if on such scrutiny the district produces meager objective evidence of progress, the tribunal may credit teachers' mantra of "slow and steady progress" and find that the program is adequate.

Sometimes a substantive FAPE violation can be established if the teacher(s) or related services providers recommend, in writing or otherwise, that the student receive services in addition to or different from those included in the IEP. For example, it is not uncommon for teachers to urge parents to hire a tutor for two or three after-school sessions per week of private reading or other academic supports to enable the student to keep up with his or her current program. In such cases, a strong argument can be made that the student needs those services as part of the IEP since they enable the student to participate and advance in the general education curriculum.

In a similar vein, psychological or speech and language reports, for example, may contain express recommendations based on needs assessments the evaluators performed, yet such services do not appear on the IEP. Here, too, a strong argument may be available that a substantive FAPE denial occurred. Although such recommendations are not conclusive on the IEP team, they may be persuasive before the relevant tribunal because such service providers usually possess special expertise not possessed by other IEP team members.

Problems of generalization of benefits across settings usually involve children with more severe disabilities. It is quite natural for parents whose children are burdened with extreme needs to be conflicted about how much time should be devoted to socialization versus academic goals. And even if there is agreement on the appropriate proportion, there may be disagreement on where progress should be shown. It is submitted that in most cases it is irrational to limit social skills development to a classroom only. Not only is such limitation inconsistent with the structure of the statute, but with the definition of what social skills are and, more broadly, what constitutes an educational setting. Such statutory constructs as vocational rehabilitation, vocational education, travel training, and self-care skills, strongly implicate behaviors occurring outside of the formal academic setting. Indeed, they are the sine
qua non for any child to become a wholly or partially independent adult and a functioning member of society. In short, the settings for specific progression in these areas should be addressed in the IEP and generalization should be planned for and expected.

Perhaps the best advice that can be given on substantive FAPE is to examine the most recent decisions by the highest state administrative tribunal and develop a grid on cases which address the needs of children whose characteristics come closest to the child you represent. Courts will give deference to state administrative tribunals’ view on the adequacy of educational programming. Therefore, ascertaining what the standard of review in your state is and how it is actually applied is critical in analyzing the merits of your case. The reality is that in some circuits, deference to state agency substantive FAPE determinations can virtually preclude judicial review.

Perhaps the single most important questions will be how the disability affects the child’s capacity to participate and progress meaningfully in the general education curriculum, that is, the curriculum non-disabled children receive at their grade level and what special education and related services are appropriate to make that happen. If there is a material gap between the program and services offered and the child’s needs, there will a substantive FAPE denial. In conducting this analysis, relevant inquiries will include factors such as the frequency, duration and intensity of the special education and related services the IEP contains, the proposed class size(s) and the developmental levels of the children with whom the child will be grouped. Disabled students must be placed with children whose needs are similar intellectually, socially, emotionally, physically and in terms of management needs. Moreover, since programming must be offered in the “least restrictive environment,” that is, to the extent appropriate with non-disabled children, it is imperative that the child's advocate determine whether the IEP satisfies this requirement. If the case hinges upon substantive FAPE and least restrictive environment issues, there will be a strong preference for mainstreaming unless there is a very good reason to separate the child from his or her non-disabled peers. In this, as well as other substantive areas, the importance of expert testimony cannot be overstated. For example, if the child’s IEP assigns the child to a mainstream setting of the kind where he or
she has progressed very little over the past two years and your expert special educator testifies that the child requires a more restrictive small class setting in order to progress, this combination of educational history and expert opinion may be difficult for the school district to overcome, notwithstanding LRE principles. Of course, the benefits to the child of the more restrictive setting should be particularized in terms of the child's individual needs.

In sum, it is probably easier to establish a FAPE denial on procedural rather than substantive grounds. However, the advocate must become familiar with the child's substantive needs and be prepared to show how they are not being met in the IEP. Moreover, understanding the child's substantive needs is necessary to demonstrate the adequacy of the private school and/or other services unilaterally selected by the parents.

B. Selection of Proper Private Schools and Service Providers: A Needs Driven Determination

It is clear under Carter that the private school selected by the parents need not be approved by the state for educating special needs children or employ state certified teachers, in order to be proper for reimbursement purposes. Moreover, parents may obtain reimbursement even where the private school does not provide an IEP for the child. It is submitted, nevertheless, that it is easier for the parents to meet their burden of establishing the propriety of the private school and other services if they present evidence which shows that the service providers possess state credentials in the disciplines in which they work, whether it be special or general education, related services or subject matter areas. Such credentials enhance the credibility of these witnesses and the institution they serve.

Similarly, although the private school is not bound by state or local curricula, the parents’ case will be strengthened where such curricula or other sequential teaching in each subject area is offered at the private school and demonstrated to the tribunal. State and local curricula have inherent credibility and their use shows recognition that the child may someday return to the

228 See Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 (1993) (holding that a parent's failure to choose a state approved school is not itself a bar to reimbursement).
public school. In that event the child will be able to transition to the public program seamlessly since the child’s curriculum corresponds to that offered by the public school.

Similar principles apply to social, emotional, life skills and vocational education areas. In every case, a thoughtful sequential and developmental approach should obtain. Again, this is not only sound pedagogically, but it goes to the credibility of the institution and how it operates its programs.

A showing of how the unilaterally selected program and services meets the child’s needs is paramount to the parents’ case. It is imperative that the parents demonstrate how the placement they selected overcomes IEP deficiencies, especially where the parent has attacked the IEP on substantive FAPE grounds. For example, if the parents contend that the child cannot function in a class of more than six children and attack the IEP based on the fact that the child was mainstreamed within a class of twenty-five students with a resource room program, the parents should put in evidence of the child’s class size at the private school and call witnesses who can explain why the child needs such small classes, or at least why such a setting is appropriate. If the private school exclusively educates children with disabilities, the school district will unquestionably raise the failure to educate the child in the least restrictive environment as a fact that should defeat the parents’ reimbursement claim. These efforts by school districts usually fail. As stated, unilaterally selected private schools are not required to provide a FAPE like public schools. LRE is just one of many factors in determining whether the private placement is proper. However, the extent that the private school exposes its students to a non-disabled student population should be brought out in the hearing, notably where the private school involves the children in community or recreation programs.

What if the parents have criticized the IEP for its absence of language development goals and the private school does not employ speech and language therapists, the related service providers who usually work with children on such needs? How then, can they demonstrate their unilateral placement addresses those needs? There is no reason why language skills could not be taught by a special or general educator at the private school, so long as that service meets the child’s needs. Additionally, there
is no reason why the parent cannot supplement the private school program with speech and language therapy and arrange for the speech and language therapist to communicate with the private school staff at appropriate intervals to insure integrated efforts on behalf of the child. As another example, if the parents contend the IEP lacks an adequate behavior management plan, they should show how the management plan at the private school meets needs which were overlooked in the IEP. The private school need not be perfect, but it must address the child's dominant needs.

As with the public program, the private school should keep adequate records of the child's progress in text and workbooks as well as in areas such as life skills, socialization, vocational interests and needs and other relevant areas. Fact finding by the tribunal is made easier by objective evidence. It helps avoid credibility issues.

This all leads to the conclusion that parents who intend to unilaterally place their disabled child in a private school and seek tuition and other reimbursement through IDEA's complaint procedures, should look before they leap. Advocates who advise such parents would be well advised to analyze the child's current needs across dimensions of intellectual, academic, social, emotional, physical and management needs and compare them to what the private school offers before they select a private school. This will improve their chances of winning their case and increase the likelihood that the child will progress in relevant areas of need at the school they select. In this regard, the parents should secure from the private school a commitment as to what programs and services the school will provide the child. The last thing the parents and child need are battles being fought on two fronts.

C. Parental Conduct: The Golden Rule Still Matters

Parents should always be polite and cooperative and should always listen carefully, even where parents perceive public school officials as being insensitive or indifferent to their child's needs. I have always advised parents that the more off base they consider the school official, the more polite they should be. School officials are often under enormous stress for a variety of
reasons. Moreover, there are incompetent school officials. Whatever the source of the difficulty, courtesy is contagious and sometimes it helps parents get what they want. Even when it does not, it will be difficult to later accuse the parent of behaving badly in a manner that interfered with IEP development. Consequently, parents should not provide a defense to the adversary in a reimbursement case that is otherwise sound.

Listening can never hurt. There may be another viewpoint and the parent may actually learn that the school district’s proposal has merit. Moreover, by listening and taking notes, many of the erroneous statements school officials have made can be either corrected and used to resolve the problem or if litigation ensues, submitted as evidence at the hearing against the district. Listening is truly a win-win.

Similarly, parents should cooperate in any way that will assist school officials in developing an appropriate program for the child. Parents who refuse to allow the child to be tested or interviewed by school staff will almost always lose their case. How can IEP teams be criticized for an inadequate IEP when they were denied the opportunity to gather information with which to do the job? It doesn’t matter whether the parents like or don’t like the particular school official or whether they think the person is professionally inadequate. The school is entitled to pick its own evaluators. Sometimes, school districts will agree, upon request, to select another evaluator employed by the district when there is a particularly bad relationship between the child or the parents and the evaluator and the parents explain this fact.

Parents should also cooperate by visiting classrooms and/or out-of-district schools recommended by the IEP team. Even where the parents are highly skeptical about the merits of the recommended program, they should visit it anyway. As with listening, they may learn something and be pleasantly surprised. Moreover, if they don’t like what they see they can take advantage of this opportunity by taking detailed notes on the program and later using them as evidence at the hearing, showing why a substantive FAPE denial occurred. School and

229 See 20 U.S.C. § 1414(a)(1)(A) (2006) (stating that an initial evaluation of each student must be completed before special education services are provided).
classroom visits show parental cooperation and open-mindedness. They enhance the parents' credibility and undermine attacks against the parents on equitable grounds.

At the risk of belaboring the obvious, parents should show up to IEP meetings. Should they become unavailable, they should request an adjournment in writing and maintain a copy of that request. When they are uncomfortable with the proposed program, they should tell school officials about their concerns at the IEP meeting. Since they are usually not educators, their objections need not be wrapped in educational jargon but should be clear enough so that the essence of their concern is readily apparent. Even if other deficiencies become obvious later, they will not be precluded from alleging them by reason of their failure to raise them at the meeting. They should, however, assert those deficiencies in their due process complaint.

If the parents know at the IEP meeting they intend to look for private programming they should indicate as much to the district, even if the parent is not sure what the program will be. Again the parents' message should be reiterated in a writing as soon as may be practicable after the meeting to establish that the communication was made. Additionally, the parent must inform the district in writing at least 10 days prior to the formal removal from the district if and when the parents intend to seek reimbursement for the placement.\textsuperscript{230}

Because it is so easy to confuse and/or forget the sequence of events and their details, parents and their advocates should maintain an events log with the date, time, location, persons participating in the transactions and make that record as events unfold or very soon thereafter. The log will include written and oral communications, including the substance of telephone conversations, from school district officials and as well as notices or requests made by the parents. Not only will this help prepare witnesses for testimony but the logs themselves may be admissible at the hearing since formal rules of evidence do not apply.

What should parents do after they have behaved badly? My answer is to "put the genie back in the bottle." For example,

when they have refused to sign consent for an evaluation of their child they should write to school officials and provide that consent as soon as possible. If they failed to show up at a scheduled IEP meeting, they should write to school officials, apologize if appropriate, ask them to reschedule the meeting and then show up. If they were rude to school personnel they should again say they are sorry, explain why they were upset and put the IEP process back on course. When parents have not complied with notice of removal requirements, they should cure the deficiency to the extent that circumstances will allow. If possible, parents should cure all these problems before they litigate. Generally, the tribunal will understand that the parents were confused or upset since the problem involves their child or that they were merely ignorant of the required procedures. The tribunal will be less understanding about inexcusable belligerent behavior and unjustifiable and persistent refusals to allow access to the child or by transparent efforts to play the system. Exercise of a little humility goes a long way. Parental failures may result in a denial or a reduction in the reimbursement award. In short, parents should fix their conduct which may be construed against them, as soon as possible.

D. Issue Selection/Drafting Complaint: Paring Down the Pile to Make Your Point.

IDEA/2004 made some important amendments to the content of the due process complaint and to procedures which ensue thereafter. It mandates that the party filing the “complaint notice” provide a copy to the other party and a copy forwarded to the State Educational Agency. At a minimum it must contain the name of the child, the address of the child’s residence and the name of the school the child is attending. In the case of homeless children or youth the complainant must provide available contact information for the child or youth and the name of the school the child is attending. The complaint must

231 See 20 U.S.C. § 1415(b)(7)(A)(i) (2006) (affirming the duty of the parents to copy both the school and appropriate state educational agency with the complaint notice).
232 See 20 U.S.C. § 1415(b)(7)(A)(ii)(I) (2006) (noting that the complaint must include the name of the child, address of primary residence, and the name of the school the child is attending).
describe the nature of the problem relating to the proposed initiation or change, including facts relating to such problem as well as a proposed resolution of the problem to the extent known and available to the party at the time of the complaint.\textsuperscript{234} The due process complaint notice is deemed sufficient unless the party receiving it notifies the hearing officer and the other party, in writing, that the receiving party believes the notice has not met the requirements listed above.\textsuperscript{235} The party making such assertion must do so within fifteen days following its receiving the complaint.\textsuperscript{236} Within five days thereafter, the hearing officer must decide whether the complaint notice meets these requirements based on the face of the complaint and must immediately notify the parties in writing of such determination.\textsuperscript{237}

IDEA/2004 permits a party to amend its complaint notice in two circumstances. First, if the other party consents to such amendment in writing\textsuperscript{238} and, second, where the hearing officer grants permission.\textsuperscript{239} Such permission may be granted no later than five days before a due process hearing occurs.\textsuperscript{240} A response "specifically" addressing the issues raised in the complaint must be sent to the complainant within ten days of its receipt.\textsuperscript{241} A party requesting the due process hearing is not permitted to raise issues at the due process hearing that were not raised in the due process complaint notice, unless the other party agrees.\textsuperscript{242} Significantly, there is nothing in IDEA/2004 that "preclude[s] a parent from filing a separate due process

\textsuperscript{235} See 20 U.S.C § 1415(c)(2)(A) (2006) (stating that a complaint is assumed sufficient unless there is a challenge).
\textsuperscript{237} See 20 U.S.C. § 1415(c)(2)(D) (2006) (specifying that a determination of sufficiency is made by the hearings officer).
complaint on an issue separate from a due process complaint already filed."\textsuperscript{243} Finally, before a due process hearing may begin, the district is required to convene a so-called “resolution session” with the parents and relevant IEP team members who have specific knowledge of the facts contained in the due process complaint.\textsuperscript{244} The purpose of the resolution session is to obviate the need for a hearing. The resolution session is not required where both the parents and the district agree in writing to waive it or agree to use mediation in lieu thereof.\textsuperscript{245} Before parents participate in resolution sessions, they should insist on a written agreement stating that communications during the sessions may not be used as evidence at the due process hearing or in any judicial proceedings. Of course, if the resolution session results in a settlement agreement and there are ambiguities in the writing, oral statements made during the negotiation process may be relevant to discerning the meaning of the agreement. If the district refuses to enter into a confidentiality agreement, the parents or their representative should be circumspect so that their good faith efforts to settle the case are not later used against them. In any event, where the resolution session results in an agreement, that agreement should be in writing.

The due process procedures are new and therefore, absent case law, their precise interpretation is not always readily apparent. Clearly, when drafting the complaint, it will not be necessary to include every offense, small and large, committed by the district. The complaint notice should, however, explain in simple language the factual underpinnings for procedural and substantive FAPE violations. Put yourself in the position of the person on the other side reading the complaint and make sure that the violations alleged in the complaint are apparent. It's

\textsuperscript{243} See 20 U.S.C. § 1415(o) (2006) (stating specifically “nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed”).

\textsuperscript{244} See 20 U.S.C. § 1415(f)(1)(B) (2006). The resolution session must take place within 15 days of the district’s receiving notice of the parents’ complaint; must include a representative from the district who has decision making authority; may not include the district’s attorney, unless the parents are accompanied by an attorney; and the parents must be provided with an opportunity to discuss their complaint and the facts that form its basis, and the district must be afforded the opportunity to resolve it. \textit{Id.}

\textsuperscript{245} See 20 U.S.C. § 1415(f)(1)(B)(i)(IV) (2006) (discussing options available to both parents and the school district prior to a due process hearing, specifically a resolution session or mediation).
okay to be slightly over broad, just don't overdo it. After all, only meaningful violations may result in a win.

In terms of the private program and services for which reimbursement is sought, the name of the private school program should be mentioned as well as the related services the child is receiving and what related services are being sought by the parents. Further, the parents should explain why the private school is proper in terms of meeting the child's needs, at least in general terms. The same concept will apply to the purchase of tutoring and other services.

Certainly, the complaint notice should explain what it is the parents are demanding, that is, reimbursement of tuition, related services expenses, transportation and other things. Be specific. For example, if the parents want interest on the reimbursement award, they should ask for it. Since the new rules appear to prevent parents from recovering for things they didn't request, perhaps it will be safer to be overinclusive in this respect.

Parents should take advantage of the opportunity to amend the complaint if they overlooked an item. Although the amendment must be made at least five days prior to the hearing, there is nothing improper with requesting an adjournment for this purpose. Moreover, most attorneys will consent to the amendment if it does not prejudice their client or they believe the request will in any case be granted. Even if that fails, the rules expressly permit parents to file another complaint which contains items not included in the initial complaint.\textsuperscript{246} If the parents file a second complaint, there is nothing to prevent them from asking the hearing officer assigned to the first complaint to consolidate the second proceeding with the first and try the cases together. Recognizing that the proposed solution may not be known to the parent, it is both sensible and fair to provide the parents with the opportunity to amend the complaint or file another one. It is posited that the amendments will be liberally granted as they should be. As long as the school district receives adequate notice it will not be prejudiced by the amendment.\textsuperscript{247}

\textsuperscript{246} See 20 U.S.C. §1415(o) (2006) (granting parents the opportunity to file additional complaints to introduce issues not previously addressed in prior complaints).

\textsuperscript{247} I think the better practice will be to include in the initial complaint a specific request for permission to amend the complaint in the event the hearing officer should for any reason find the complaint insufficient. Moreover, as soon as the parents receive a copy of the school district's notice of
E. Burden of Proof/Persuasion and Burden of Going Forward at Due Process: Does It Matter?

Schaffer v. Weast, 248 decided under IDEA/97, held that the general default rule that the party seeking relief in an administrative proceeding, must carry the burden of proof and persuasion applied to the case before it in the absence of any guidance on the issue from IDEA/97. In Weast, that burden belonged to the parents since they sought relief from the school district. 249 The Supreme Court expressly left open the question as to whether state law could assign the burden of proof or persuasion in IDEA proceedings. 250 Moreover, the court specifically exempted from its holding the question of who carried the burden of going forward, that is, who puts in evidence in what sequence. 251 Since IDEA leaves the development of IDEA procedure to the state, it is posited that the better view is that, unless IDEA/2004 is amended, the burden of proof and persuasion in IDEA administrative hearings should be established by state lawmakers. Certainly, by leaving such a large void, it may inferred that Congress did not intend to do otherwise. Although this will result in lack of uniformity from state to state in determining who carries the burden of proof or persuasion on specific issues, it has the advantage of enabling parties to refer to state statutory and regulatory law, as well as longstanding state administrative practices, in predicting trial sequence and assignment of burdens. State legislatures are well advised to fill this void until Congress provides guidance on these issues.

Finally, as the Supreme Court in Weast recognized there are few, if any, cases where the evidence is so perfectly balanced that the assignment of burdens or proof and persuasion will determine the outcome of the case. 252 The real issue is trial insufficiency they should write to the hearing officer requesting the opportunity to cure any deficiencies in their notice.

---

249 Schaffer, 126 S. Ct. at 537 (holding that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief [and] [i]n this case, that party is Brian, as represented by his parents”).
250 Id. (declining to address the issue of the role of state law because no pertinent Maryland state law existed).
251 Id. at 534 (noting that the burden of production was not in question).
252 Id. at 535 (referring to the perfect balance of evidence as “equipoise” and stating that very few cases demonstrate this).
sequence, the burden of production. Parents required to put on their direct case first will have greater difficulty, especially parents appearing pro se. From an efficiency perspective, it makes far more sense for the school district to present its case first. This will enable the district to explain why it contends it offered a FAPE. Not only are school districts usually represented by lawyers experienced in framing questions, but they have staffs of special educators, psychologists, speech and language therapists, and administrators, as well as psychiatrists and other specialists on call who can testify as expert or fact witnesses on behalf of the district and frame the case. Under IDEA/2004 districts will have the benefit of the parents' complaint notice and, to the extent they deem appropriate, gear their presentations to respond to the parents' allegations therein. In reality, parents not only lack staffs of their own to call upon, but often cannot afford to hire expert witnesses. When parents cannot afford to hire experts they may have to use experts employed at the private school, if available. Private school employees may be willing to testify about the substantive deficiencies in the IEP and why the program in which they work meets the child's needs.

Even where parents cannot produce experts to attack the substantive program offered by the public school district, all may not be lost. In a proper case the hearing officer can selectively subpoena, to testify, members of the public school staff. Sometimes those subpoenaed are staff professionals who are not afraid to testify against their employer. These are usually, but not always, tenured staff members of long standing, who have strong beliefs about the inadequacy of the program being offered to the child. Though reluctant as witnesses, staff professionals often have written reports that assist the parents in establishing that the child's needs will not be met under the proposed IEP. Through witnesses, subpoenas, cross-examination and the submission of appropriate documents, parents may effectively establish the inadequacy of the substantive program. In certain instances, parents have even brought tape recordings that effectively end the case for the district. In most states, tape

253 See Sherry v. N.Y. State Educ. Dep't, 479 F. Supp. 1328, 1337 (W.D.N.Y. 1979) (highlighting that the hearing officer is authorized to issue subpoenas).
recordings are admissible so long as the person who recorded the conversation was a party to the conversation. In any case, rules of evidence do not apply in these proceedings. Use of such devices, nevertheless, warrants careful consideration, since no one from the district may ever trust the parents again and may implicate difficult moral issues. However, in the rare instance where the school official is habitually deceptive, extraordinary efforts may be required. Obviously none of this precludes the parents from using tape recordings made conspicuously at IEP meetings with the knowledge of school officials.

Finally, where the hearing officer directs a trial sequence different than that required by state law, it may not result in a reversal of the final determination. Provided each party was afforded an opportunity to present its case, including calling its witnesses, cross-examining the other party’s witnesses, and other indicia of a fair hearing are present, it is unlikely than a reversal on trial sequence will occur.

### F. Pendency as a Litigation Tool

Once a child attains pendency in the parentally preferred placement, assertion of pendency rights at the next due process hearing over the next ensuing IEP will in effect operate as an automatic injunction, compelling the district to continue paying for the programs and services the child is receiving under pendency. Therefore, when parents win their reimbursement case for the current school year, they may, as a practical matter, receive tuition and other expenses paid for at least two years.

---


257 See, e.g., Honig v. Doe, 484 U.S. 305, 328 n.10 (1988) (suggesting that maintenance of placement provisions create a presumption of irreparable harm if placement is changed unilaterally by the school district); Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ., 103 F.3d 545, 549-50 (7th Cir. 1996) (affirming grant of preliminary injunction by district court compelling district to maintain student in residential setting and asserting that traditional test for preliminary injunction need not always be met); Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (holding that movants are entitled to injunctive relief without satisfying the usual prerequisites).
Assume, for example, that the parents prevail before the Tier II hearing officer for school year 2004-2005 and the district does not seek judicial review of the Tier II order. Further assume that the district offers an IEP for 2005-2006 in May 2005 and that the parents reject the new IEP and then commence a due process hearing, claiming a denial of FAPE and requesting tuition reimbursement as a remedy. Under this scenario the district will be forced to pay for the pendency placement by virtue of the parents filing the complaint with the district, and insisting that the district maintain the child’s placement. This is not a matter of merely flexing parental muscle. Frequently, the district will offer a program the second time around that is no better that the one it offered in the first instance. This is often the result of limited program options in the district. At times, it is the result of the fact that the out-of-district program offered is as objectionable to the parents as the initial program. Moreover, where the child is successful in the unilaterally selected placement, often the child’s first true success, the parent will naturally be reluctant to substitute a successful experience for one whose outcome is far less certain.

Experienced school district attorneys understand the effects of pendency. Therefore, when they know they have a weak case, they may offer, on behalf of their client, to pay for the current placement on condition that the parents will not treat it as a pendency placement. A parent’s decision to reject such an offer depends on many factors, including the benefits of the private placement to the child, the strength of the parents’ reimbursement case and the financial means of the parents. While private schools will sometimes permit parents to go on a payment plan for tuition and other expenses, there comes a point where the parents will be required to advance substantial sums. Consequently, the parents’ staying power will often drive these decisions.

The payment of attorneys’ fees is equally important in the negotiation process. If the parents obtain a reimbursement order, they will become the “prevailing” party and the district will become obligated to pay the parents’ attorneys’ fees
reasonably incurred. When the district has a weak or even marginal case, this factor creates enormous pressure on the school district to settle quickly. Indeed, in cases where the amount of tuition involved is relatively modest, it is very easy for the attorneys' fees incurred by the parents to exceed the amount of the tuition claim. If they lose the case it may be very difficult for attorneys representing school districts to explain to their clients how in, say a $20,000 tuition case, the district incurred in excess of $20,000 in fees from their own attorneys. Moreover, assuming in our example the parents incurred fees similar to those incurred by the district, this would mean that the district could end up paying $40,000 in fees plus the $20,000 in tuition. For most school boards, it is extremely difficult to justify spending $60,000 for a $20,000 tuition case except in the most unusual of circumstances. This amount, of course, does not include claims for interest and other costs.

Often, it is possible to negotiate multi-year agreements for the private school placement, especially with very impaired children whom the school district has difficulty placing. Multi-year agreements have the advantage of offering the child a stable and

258 IDEA/2004, as did its predecessor, provides that in any action or proceeding brought pursuant to 20 U.S.C. § 1415, the court in its discretion may award reasonable attorneys' fees as part of the costs to the prevailing party. See 20 U.S.C. § 1415(i)(3)(B) (2006). IDEA/2004 provides for the first time that the court in its discretion may grant an award of attorneys' fees to an SEA or LEA who is a prevailing party "against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable or without foundation." 20 U.S.C. § 1415(i)(3)(B)(i)(II) (2006). In addition, IDEA/2004 permits courts to grant fees to prevailing SEAs and LEAs against parents or their attorneys if the parents' "complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. § 1415(i)(3)(B)(i)(III) (2006). Under IDEA/97 only parents could recover attorneys' fees, even when the LEA or SEA claimed the parents acted in bad faith. See Bd. of Educ. of Northfield Twp. High Sch. Dist. 225 v. Roy H., No. 93-C-3252, 1995 U.S. Dist. LEXIS 191, at *8-9 (N.D. Ill. Jan. 12, 1995). Parents and their attorneys should not be intimidated by school district attorneys' threats to use these provisions. Even when parents have marginally colorable claims, I think it extremely unlikely that LEAs or SEAs will be successful in court in recovering fees against the parents or their attorneys.

259 There is a split in the circuits as to whether prevailing parties may recover expert consulting and witness fees as part of their costs in IDEA proceedings. The Seventh Circuit has concluded that expert witness fees may not be recovered in IDEA proceedings. See T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 482 (7th Cir. 2003). The Eighth Circuit reached a similar holding. See Neosho R-V Sch. Dist. v. Clark ex rel. Clark, 315 F.3d 1022, 1031 (8th Cir. 2003). The Third Circuit however has reached a contrary determination. See Arons v. N.J. State Bd. of Educ., 842 F.2d 58, 62 (3d Cir. 1988). Recently, the Second Circuit joined the Third and held that parents who prevail may recover expert consulting fees as part of their costs. See Murphy v. Arlington Cent. Sch. Dist., 402 F.3d 332, 336 (2d Cir. 2005). On January 6, 2006 the Supreme Court granted certiorari on the question of the availability of an award for expert fees under § 1415(i)(3)(B), the fee-shifting provisions of IDEA. See Petition for Writ of Certiorari, Murphy, 126 S. Ct. 978 (No. 05-18).
hopefully adequate education for a period of years. It is posited that such arrangements are preferable. When agreements are reached, it is recommended that an opt out provision be included in the agreement. Since children change, the program which was successful may become inappropriate, either because things got better or worse, or for some other reason. The agreement should provide for such a contingency. The contingency plan should come in the form of an option for the parents to return to the IEP team for an IEP recommendation based on the child's then current condition or for the parent to make an alternative private placement so long as the new placement does not exceed the cost of the original deal. The alternatives that will be acceptable will, of course, depend of the child and the parents' means and negotiating power.260

G. Further Legislative Reform

i. Burdens of Proof and Production

In light of Schaffer v. Weast, Congress would be well advised to direct its attention to questions of burden of proof on distinct issues, namely FAPE. For reasons discussed above, it makes sense to place that burden on the school district or other agency. Moreover, Congress should establish the order in which testimony must be presented. Certainly school districts or other agencies should shoulder the responsibility of presenting their case first. They possess the child's records and employ all, or virtually all, of the professionals who recommended the particular programs and services contained in the IEP. Furthermore, Congress should assign burdens on the various defenses to reimbursement claims listed in IDEA/2004. Since the character of the defenses is essentially "affirmative," it appears that Congress intended for the school district bear the burden of proof on those items. However, the burden of proof should be made explicit. Until all of this happens, state legislatures should fill in the void. It seems clear that, absent Congressional direction, it is within states' powers to make such decisions. Since IDEA permits states to legislate over such matters, state

260 The art of negotiating a settlement agreement in reimbursement and IDEA cases generally deserves an article in itself.
enactments will in essence become federal law in the state of enactment.

ii. Use of State Aid

Once parents prevail at the state level in an IDEA administrative proceeding over their unilaterally selected placement it should be required that the placement be state aidable retroactive to the date of placement, due to the fact that the state has, in essence, given its approval to the placement. Since the aid would reduce the district's net cost for reimbursement liability it would in a sense "reward" the district for its mistakes. However, it would also make it easier to settle cases once pendency has been established and very often would be in the best interests of the child. After all, the purpose of the Act is to help the child, not punish the school district. In any event, state aid could be made available to districts in these circumstances and they could, at their option, use it or elect to litigate, if they found the private placement unacceptable. Ideally, this would enable parents and districts to come to a resolution sooner, putting their relationship back on the right course. Additionally, subsequent litigation could be avoided. Such legislation could be incorporated in a further amended IDEA by mandating that states which accept federal IDEA monies be required to fund private pendency placements in the same proportion as it would a state approved placement of that kind under state law, if made as a public placement. In the meantime, state legislatures could pass laws having the same effect.

iii. The Impecunious Parent

When FAPE has been denied to a parent that does not have the means to pay for a private placement, tutoring and other services during IDEA litigation, compensatory education may provide a solution, though not a very satisfactory one. With compensatory education, the child may receive an award of

261 See 34 C.F.R. § 300.514(c) (1999) (stating that “[i]f the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child’s parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of [the child’s pendency placement during IDEA proceedings]”).
services to compensate for what the child should have received in the past. While seemingly sensible, the remedy may be unsatisfactory because the child may be denied services at developmentally critical periods.

It is posited that the better solution is an amendment to IDEA that creates an administrative procedure similar to those used in court for obtaining preliminary injunctive relief. The parent would file a notice of complaint containing those items already required by IDEA/2004. Accompanying the complaint, there would be an addendum requesting relief in the form of public funding of the private placement as well as copies of documents they intend to introduce at the hearing and a demand for production of documents. Additionally, the parents would submit a list of the witnesses then known to the parent whom the parent might call to testify. The school district would be required to supply the documents requested, subject to legitimate objections, and any additional documents it intended to introduce as well as a list of its witnesses within five days of receipt of the parents’ complaint. The hearing would commence not more than five days thereafter. Since the right to this accelerated procedure would be based on the parents’ inability to fund a private placement, the parents would have to demonstrate why their financial circumstances prohibit their unilateral placement at the school they selected. Upon the parent satisfying this requirement, the hearing could go forward. Hearings would have to be held on consecutive days until they are concluded. If the parents obtained an order requiring the district to make the payments, the district would be required to do so forthwith. Although the district could appeal the payment order, the required payments could not be stayed pending the outcome of a final appeal, administrative or judicial. Of course the parent would not be required to post a bond to obtain this relief.

This or a similar procedure would enable parents to obtain for their disabled children an adequate education when it would not otherwise be available to them. Although hearing officers currently have broad authority to provide equitable relief, it is uncertain whether their powers include ordering prospective payments for unapproved private placements or services. IDEA/2004, after all, only addresses the reimbursement remedy
for private placements [not prospective payment obligations, unless pendency rights are involved].

iv. IEPs: 60 Days in Advance of Their Implementation Date

Because of the problems associated with IEPs delivered just prior to the commencement of a school year, it is suggested that IDEA be amended to require IEPs to be delivered 60 days prior to the period when implementation commences. Thus, if the IEP team contemplates implementing the student's programs and services on or about September 1, the IEP would have to be delivered to the parents on or about July 1. This would give the parties sufficient time to work out their differences, if possible. If not, it would provide parents with sufficient lead time to locate a private school and arrange for tutorials and other supports for the child prior to the commencement of the school year. Since the welfare of the child is the ultimate concern, the open window would enable parents and private service providers and the public schools to arrange for a mutually supportive and coordinated effort that is sound pedagogically and efficient, regardless of whether litigation ensued. Moreover, by requiring IEP teams to deliver IEPs well in advance of the start of the school year, school districts would be less likely to run into the problem of not having an IEP in place when school begins. This would reduce the school district's chances of failing the FAPE test for want of a timely IEP.

v. Curriculum-based IEPs

Although IDEA/2004, like IDEA/97, frequently refers to "general education curriculum," IEP goals, in reality, are not

---

262 The Third Circuit has recognized that denial of meaningful access to appropriate programs and services based on the parents means is inherently unfair and inconsistent with the IDEA's purpose, that is, to serve all eligible children. See Susquenita Schol. Dist. v. Raelee S., 96 F.3d 78, 86-87 (3d Cir. 1996); see also Komminos v. Upper Saddle River Bd. of Educ. 13 F.3d 775, 780 (3d Cir. 1994). For an interesting application of this principle where the district conceded it failed to offer a FAPE, and the appropriateness of the unapproved private school selected by the parents, see Connors v. Mills, 34 F. Supp. 2d 795, 802-06 (N.D.N.Y. 1998). In Schl. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359 (1985), a reimbursement case, the Supreme Court stated that, in a proper case, "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school." See id. at 370. This implicates clearly a remedy beyond reimbursement, at least in a case where, as there, administrative remedies were exhausted. It does at least suggest, however, that a prospective injunction might be appropriate relief where parents are without the means to make a private placement and they make a sufficient preliminary showing that the child has been denied a FAPE.
anchored to specific parts of the curriculum, assuming the curriculum exists at all. When the word “curriculum” is used in this article, it refers to a specific and detailed description of the skills children are required to acquire at each grade level, in every subject, organized sequentially and developmentally. More often than not, it is very difficult for parents, and even educators, who read IEP progress reports and report cards to determine what they mean. This problem derives from the generality of the statements which are made. If, however, each academic goal in the IEP were tied to a specified segment of the curriculum and those items were contained in a commonly accessible curriculum manual given to or made available to the parents, then the child’s success or lack thereof could more readily be understood. Moreover, if a dispute arises, for example, a disagreement as to whether the child accomplished his goals by year’s end, the proof would be easily accessible, leading to an expedient determination as to whether the child attained the particular goal. This would enable participants in the IEP process to ascertain present levels of performance and plan intelligently for the next year’s goals. Similar hierarchies can be made for vocational and pre-vocational skills, speech and language and all other programs and services the child receives. It should be emphasized that curriculum-based goals are not the same as using standardized tests and comparing pre and post-test results to determine progress. While normative tests have their place, they typically compare the child’s performance in selected areas compared to other children in the same age and peer-group. While normative tests may point to areas of difficulty, they are usually not anchored to a particular curriculum and do not, in a specific curriculum-based way, tell us what to teach. Consequently, this approach will lead to a common understanding about what progress actually means and provide for greater accountability.

Congress should require this as part of the IEP process. While it will not be necessary for Congress to usurp states in establishing what the components of the SEA or LEA curriculum are, Congress should require, at the very least, that each LEA or SEA has curriculum manuals or similar documents to which IEP goals can be anchored for every grade level in each area for which

special needs programming occurs, and to the general education curriculum. This is something that SEAs and LEAS should already be doing. Unfortunately, such curricula often do not exist. Of all the recommendations made in this article, it is the most important.

CONCLUSION

I once had a psychology professor who taught a class in the philosophy of science who gave the class an assignment, with the following quote: “In order to know what you’re talking about you have to know whether you’re talking about anything at all. Questions as to whether it’s worth saying come later.” Our job was to figure out what it meant and write a paper about it. By the end of the semester the common consensus was that it meant that in gaining what purports to be knowledge, reliability of measurement is paramount. Without being able to derive stable measures of what we see and develop tools to address the problem based on those measures, we will fail, or at least not know whether we succeeded. This principle applies with equal force to learning what children know. Without ascertaining that information in a reliable way, through mutually understood observations, then what we write may not mean anything at all, and that would be shameful.