June 2011

Direct Tuition Payments Under the Individuals With Disabilities Education Act: Equal Remedies for Equal Harm

Katie Harrison

Follow this and additional works at: http://scholarship.law.stjohns.edu/jcred

Recommended Citation
DIRECT TUITION PAYMENTS UNDER THE
INDIVIDUALS WITH DISABILITIES EDUCATION
ACT:

EQUAL REMEDIES FOR EQUAL HARM

KATIE HARRISON*

INTRODUCTION

Anna and Billy are eight year-old third graders attending public school in New York City. At the beginning of their third grade years in 2008, Anna’s and Billy’s teachers suspected that each child was suffering from learning disabilities. Pursuant to the Individuals with Disabilities Improvement Education Act (IDEA), which aims “to ensure that all children with disabilities have available to them a free appropriate public education [(FAPE)],” each student was evaluated by a special education teacher, and each was identified as having learning disabilities. Each school then drafted an Individualized Education Program (IEP) for the students for the 2008-2009 school year, which provided for three hours of weekly individual tutoring for each child.

At the conclusion of the students’ third grade years, each school evaluated the students again and proposed new IEPs for the 2009-2010

* J.D., St. John’s University School of Law (2011); B.A., Middlebury College (2006). This article would not have been possible without the assistance and support of Joseph Kohn, the guidance of Professor Rosemary Salomone, and the fantastic editing of the Journal of Civil Rights and Economic Development staff. Thank you all!

1 Anna and Billy are hypothesized characters that reflect the situations of many disabled children and their families in the public education system. These characters are not modeled off of any specific case.


4 See 20 U.S.C. § 1414(d)(2011) (describing the required elements of an IEP and the manner in which it is developed).
school year. The new IEPs provided the same services as the prior year. Neither Anna’s nor Billy’s parents were satisfied with these proposed IEPs, because neither believed their child was benefiting from the services. Both parents met with the special education teacher and school administrators during the summer of 2009 to alter the 2009-2010 IEP, but since neither school thought that changes were necessary, no changes were made.

Pursuant to the IDEA, if the parents of a disabled child believe the public school has failed to provide their child with a FAPE, as both Anna’s and Billy’s parents believed, the parents have two possible remedies. First, the parents can leave the child in his current placement and bring a due process complaint against the school district seeking changes to the student’s IEP and compensatory services. Alternatively, the parents can withdraw their child from the public school, place him in private school, and then file a due process complaint seeking reimbursement for the payment of the private school tuition (“unilateral placement”). Anna’s and Billy’s parents are convinced that their child will not receive an appropriate education during the 2009-2010 school year, so they each opt for the latter remedy and place their child in a private school that provides special education services.

Anna’s parents place her at Academy A. They sign an enrollment contract and pay the school’s $50,000 tuition in advance of the school year. They then file a due process complaint seeking reimbursement of the private school tuition. Billy’s parents want to place him at Academy B, which also has a tuition of $50,000, but Billy’s parents cannot afford to pay any of the school’s tuition. Academy B reviews Billy’s school records and his 2009-2010 IEP, and concludes that he has been denied an appropriate

---

5 Public schools are required to evaluate and revisit IEPs annually. See id.
7 See 20 U.S.C. § 1415(b)(6)(A) (2011) (providing “[a]n opportunity for any party to present a complaint with respect to any matter relating to... the provision of a [FAPE]”).
8 See, e.g., Bd. of Educ. v. L.M., 478 F.3d 307, 316 (6th Cir. 2007) (holding that “[a]n award of compensatory education is an equitable remedy that a court can grant pursuant to the appropriate relief provision codified as 20 U.S.C. § 1415(h)(2)(C)(iii)); see Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025, 1033 (9th Cir. 2006) (noting that “[c]ompensatory education services can be awarded as appropriate equitable relief” when a disabled child has been denied a FAPE).
9 20 U.S.C § 1412(a)(10)(C)(2011). There are certain notice requirements parents must follow as well. See 20 U.S.C § 1415(c)(1). These procedural requirements are important when a court determines whether the parents’ unilateral placement was proper. If the court finds that a parent has not fully complied with the IDEA or cooperated with the school district in developing an appropriate IEP, the court will deny relief to the parents. Equitable considerations are also relevant in fashioning relief. See Sch. Comm. of Burlington v. Dept. of Educ., 471 U.S. 359, 374 (1985).
education by the public school and that Academy B can provide Billy with an appropriate education. Thus, Academy B agrees to enroll Billy for the 2009-2010 school year. Academy B requires Billy's parents to sign a contract that obliges them to seek tuition reimbursement from the public school and holds them responsible for the school's $50,000 tuition regardless of the result of the administrative hearing process. Billy's parents file a timely due process complaint seeking payment of the private school tuition.

Anna's and Billy's cases proceed slowly through the administrative hearing process. The independent hearing officers (IHO) in each case do not render decisions until March 2010.11 Both IHOs find that the public schools failed to provide an appropriate education to Anna and Billy, that the children were properly placed in private school, and that their parents complied with all aspects of the IDEA.12 Consequently, the IHOs find that each public school is responsible for reimbursing the parents for the private school tuition under the IDEA's reimbursement provision.13 The IHO directs the public school to reimburse Anna's parents for the costs they have expended. The IHO in Billy's case also directs the public school to reimburse Billy's parents for the costs they have expended or debts they have incurred. However, because Billy's parents could not afford to make any payments, they have not expended any money. The IHO finds that the contract between Billy's parents and Academy B did not create a financial

11 The IDEA provides timing requirements for the administrative review process. See 20 U.S.C. § 1415(c). After filing a complaint regarding an IEP, the school district has 10 days to provide the parent with an explanation of the IEP. See § 1415(c)(2)(B)(i). Then, the parent has 15 days after receiving that explanation to notify the LEA that she is requesting an independent hearing. See § 1415(c)(2)(C).

12 The IDEA provides timing requirements for the administrative review process. See 20 U.S.C. § 1415(c). After filing a complaint regarding an IEP, the school district has 10 days to provide the parent with an explanation of the IEP. See § 1415(c)(2)(B)(i). Then, the parent has 15 days after receiving that explanation to notify the LEA that she is requesting an independent hearing. See § 1415(c)(2)(C). Subsequent to filing the complaint with the IHO, within 5 days, the IHO must determine whether the complaint meets the requirements of § 1415. See § 1415(c)(2)(D). The parties then must attend a pretrial meeting within 15 days of the IHO's certification of the matter. See § 1415(f)(1)(B)(i). The hearing must occur within 30 days of that conference, and a final decision by the IHO must be rendered within 45 days of that hearing. See § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.515(a)-(b). The IDEA provides for an expedited hearing process to appeal a decision to change a child's placement during the school year. See § 1415(k)(4). An expedited hearing must occur within 20 days after a hearing is requested, and a final decision by an IHO must be rendered within 10 days of that hearing. See § 1415(k)(4)(B). However, the process does not always proceed or conclude in the timely manner envisioned by the Act. For instance, Forest Grove School District v. T.A., 129 S.Ct. 2484, 2495 (2009) "vividly demonstrates the problem of delay, as respondent's parents first sought a due process hearing in April 2003, and the District Court issued its decision in May 2005." Likewise, in Wilkins v. D.C., 571 F. Supp. 2d 163, 171-72 (D.D.C. 2008), a final determination was not issued until 5 months after an expedited hearing.

13 See Burlington, 471 U.S. at 370. These requirements are referred to as "Burlington's three prongs."
obligation because neither the school nor Billy’s parents intended to be bound by the contract. The IHO therefore finds that the public school does not have to make any payments to Billy’s parents or to Academy B. Thus, Academy B does not receive any compensation for educating Billy for the 2009-2010 school year.

In the summer of 2010, the public school again tries to formulate a proper IEP for Billy. Nevertheless, Billy’s parents believe that the IEP for the 2010-2011 school year is still inappropriate. Consequently, Billy’s parents would like to re-enroll him at Academy B. However, Academy B refuses to consider him for admission because the Academy does not think that Billy’s parents will receive payment of tuition if they succeed on the merits of Billy’s case. As a result, Billy must return to public school for the 2010-2011 school year, where he will receive an inappropriate education for some, if not all, of the school year. Additionally, Betsy, another disabled child from a low-income family, applies to Academy B during the summer of 2010 because her parents believe she has been denied a FAPE in her public school. Academy B agrees that Betsy has been denied a FAPE, but denies her application for admission because her parents cannot afford to pay its tuition. Academy B now knows, based on its experience with Billy, that it is not likely to receive tuition from the public school even if Betsy’s parents prevail at the administrative hearing. Hence, like Billy, Betsy will be denied a FAPE for all or most of her 2010-2011 school year.

This Note analyzes whether payment of private school tuition under the IDEA is available to parents that unilaterally place their children in private school but do not pay the private school tuition because of a financial inability to do so. To receive relief for a unilateral placement under the IDEA’s reimbursement provision, a parent must prove that such relief is warranted. The IDEA does not define reimbursement, and the Supreme Court has never clarified its use of the term. As recently demonstrated in several decisions by New York’s State Review Office (SRO), the scope of the reimbursement provision is unsettled. Upon Academy B’s denial of admission, Billy’s parents can seek a revision of his IEP through the administrative process. See 20 U.S.C. § 1415(b)(6)(A). If the judge or IHO finds that the IEP is inappropriate, she will instruct the public school to provide appropriate services. However, because of the delay in the administrative process, a decision declaring the IEP inappropriate may not be rendered until many months into the school year. As a result, Billy will be forced to forgo an appropriate education for those intervening months. Billy’s parents can also seek compensatory services for the school’s failure to provide a FAPE during that time. However, these services will likely not provide Billy with an appropriate education for the majority of the 2010-2011 school year.

14 Upon Academy B’s denial of admission, Billy’s parents can seek a revision of his IEP through the administrative process. See 20 U.S.C. § 1415(b)(6)(A). If the judge or IHO finds that the IEP is inappropriate, she will instruct the public school to provide appropriate services. However, because of the delay in the administrative process, a decision declaring the IEP inappropriate may not be rendered until many months into the school year. As a result, Billy will be forced to forgo an appropriate education for those intervening months. Billy’s parents can also seek compensatory services for the school’s failure to provide a FAPE during that time. However, these services will likely not provide Billy with an appropriate education for the majority of the 2010-2011 school year.

(LEAs) advocate for a narrow reading of the provision, limited only to the plain meaning of “repayment,” to pay back, or “to make restoration.” Parents urge that both Congress and the Supreme Court intended “reimbursement” to have a broader meaning, encompassing prospective relief in the form of direct tuition payments. As discussed below, Supreme Court precedent, the IDEA’s purposes, and principles of justice support the latter view that Congress did not intend to foreclose the remedy of unilateral placement to low-income disabled children. Consequently this Note proposes two solutions to this controversy. First, Congress should amend the reimbursement provision to capture the remedy of unilateral placement as Congress intended. Second, courts and IHOs should award tuition payments to parents that have not incurred a financial obligation to a private school under the appropriate relief provision.

Part I of this Note discusses the legislative and judicial development of unilateral placement and the remedies available under the IDEA for that placement. Part II evaluates the arguments for awarding tuition payments to low-income parents under the reimbursement and appropriate relief

stating, “[t]he evidence contained in the hearing record establishes that the parent has neither paid any tuition nor incurred any out-of-pocket expenses in connection with the student’s 2008-2009 school year. . . . There is no evidence . . . indicating that the [private school] has ever sought payment of the student’s tuition for the 2008-09 school year from the parent or the student’s grandmother, or that is has any intention of doing so. Consequently, . . . I disagree with the impartial hearing officer’s conclusion that the parent has standing to seek tuition reimbursement.”); Application of a Student with a Disability, No. 09-079, at 11 (N.Y. State Review Office, September 14, 2009), available at http://www.sro.nysed.gov/decisionindex/2009/09-079.pdf (stating, “[b]ecause the hearing record demonstrates that the parent has not paid any tuition or incurred out-of-pocket expenses, under the circumstances of the instant appeal, I concur with the impartial hearing officer’s conclusion that the parent does not have standing to seek tuition reimbursement or retrospective relief on behalf of the private placement.”); Application of a Student with a Disability, No. 08-50, at 9 (N.Y. State Review Office, July 23, 2008), available at http://www.sro.nysed.gov/decisionindex/2008/08-050.pdf (stating, “[r]eimbursement under the IDEA allows parents to recover only actual, not anticipated expenses, for private school tuition and related expenses.”); Application of the N.Y. City Dep’t of Educ., No. 07-032, at 5-6 (N.Y. State Review Office, July 5, 2007), available at http://www.sro.nysed.gov/decisionindex/2007/07-032.pdf (finding “no support for [the parent’s] assertion . . . that she incurred financial responsibility for the student tuition” although the parent and school had signed a contract for the full tuition).

16 Reimbursement, BLACK’S LAW DICTIONARY (9th ed. 2009).


18 See, e.g., Mr. A. v. New York City Dep’t of Educ., No. 09 Civ. 5097 (PGG), 2011 WL 321137 (S.D.N.Y., Feb. 1, 2011) (holding that a narrow reading of reimbursement is “entirely antithetical to Congress’s clearly expressed legislative intent and purpose in enacting the IDEA”); Connors v. Mills, 34 F. Supp. 2d 795, 803 (N.D.N.Y. 1998) (agreeing with a parent’s argument that pre-payment of tuition is not required and that prospective payments are available under the IDEA where the parent “has shown the Burlington prerequisites [because her] right to payment for placing [her child] in the [private] school has attached”); Lewis M. Wasserman, Reimbursement to Parents of Tuition and Other Costs Under the Individuals with Disabilities Education Improvement Act of 2004, 21 ST. JOHN’S J.L. COMM. 171, 235-36 (2006) (“IDEA/2004, after all, only addresses the reimbursement remedy for private placements not prospective payment obligations, unless pendency rights are involved.”) (internal formatting omitted).
provisions. Part III argues that amending the reimbursement provision to enable low-income parents to receive private school tuition payments when they have properly placed their child in private school reflects Congressional intent and fulfills the purpose of the IDEA. Part IV proposes that courts and IHOs currently addressing remedies available to low-income parents after a proper unilateral placement should award tuition payments to those parents under the IDEA’s appropriate relief provision.

I. UNILATERAL PLACEMENT UNDER THE IDEA

The struggle of disabled individuals to receive educational services and support from states and localities has been advanced by Congress and the United States Supreme Court over the past forty years. Prior to 1975, disabled children were almost “totally excluded from [public] schools.”\(^{19}\) The landmark cases of Pennsylvania Association for Retarded Citizens v. Pennsylvania\(^ {20} \) and Mills v. Board of Education of the District of Columbia\(^ {21} \) influenced Congress to mandate rules for educating disabled students in public school.\(^ {22} \) In 1975, Congress enacted the Education for All Handicapped Children Act (EAHCA),\(^ {23} \) which required that public schools provide a free appropriate public education (FAPE) to all disabled students.\(^ {24} \) Although the EAHCA has been amended three times since its

---

20. 334 F. Supp. 1257, 1259 (E.D. Pa. 1971) (approving a consent decree which declared that “all mentally retarded persons are capable of benefiting from a program of education and training” and, “[h]aving undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training”).
21. 348 F. Supp. 866, 874 (D.D.C. 1972) (holding that the Fifth Amendment’s due process clause requires that “the [District of Columbia] Board of Education . . . provide whatever specialized instruction [I will benefit the [city’s disabled] child[ren]]”).
22. See Samuel R. Bagenstos, The Judiciary’s Now-Limited Role in Special Education, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 121, 121 (Joshua M. Dunn & Martin R. West eds., Brookings Institution Press 2009) (explaining that Congress enacted federal legislation to address the issues raised in PARC and Mills as well as constitutional litigation in twenty-eight states); see also MARK G. YUDOF ET AL., EDUCATION POLICY AND THE LAW 693 (4th ed., Wadsworth Cengage Learning 2002) (discussing PARC and Mills and stating that the EAHCA “codifie[d] [those cases] in several respects”).
24. See Pub. L. 94-142 Sec. 3(c) (declaring that “[i]t is the purpose of this Act to assure that all handicapped children have available to them . . . a free appropriate public education”); Sec. 4(a)(18) (defining FAPE as “special education and related services which (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, or secondary school education in
enactment, this foundational FAPE requirement remains unchanged in the current version, now called the Individuals with Disabilities Education Improvement Act (IDEA). To provide a disabled child with a FAPE, a school district must offer special education and related services that meet four requirements: the education and services must (i) be provided at public expense; (ii) meet state educational standards; (iii) be appropriate; and (iv) conform to an individualized education program (IEP).

As discussed above, when a child has been denied a FAPE, the IDEA provides parents with procedural and substantive remedies for that denial. When the IDEA was enacted in 1975 (as the EAHCA), a court could award "such relief as [it] determines appropriate" if a child was denied a FAPE ("appropriate relief provision"). The Supreme Court, in School Committee of Burlington v. Department of Education of Massachusetts, interpreted this provision as allowing courts to award reimbursement of private school tuition to the parent when the parent unilaterally placed her child in private school, as long as that placement was proper. Unilateral placement occurs when a parent of a disabled child removes the child from the public school, without agreement or approval from the public school, the State involved, and (D) are provided in conformity with the individualized education program").

The IDEA was amended in 1997, see Pub. L. 105-17, and again in 2004, see Pub. L. 108-446. See also TWENTY-FIVE YEARS IN PROGRESS, supra note 23, at 3.

These requirements come from 20 U.S.C. § 1401(9) (2006), which outlines the requirements for "[f]ree appropriate public education." The Supreme Court has held that "appropriate public education" means only "specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982). The Court did not require schools to "maximize the potential of handicapped children commensurate with the opportunity provided to other children." Id. at 189-90 (internal quotations omitted).

To take advantage of these remedies, parents must initiate an administrative appeals process. See, e.g., Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 361-64 (1985). The Court in that case stated that "[i]n several places, the [IDEA] emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness." Id. at 368. According to Valerie Leiter and Marty Wyngaarden Krauss, who discuss the role parents can play in securing services for their disabled child, although the IDEA generally gives parents considerable power to secure services for their disabled child, those parents must also be aware of the power they have in order to take advantage of all that the IDEA affords them. Claims, Barriers, and Satisfaction: Parents' Requests for Additional Special Education Services, 15 J. DISABILITIES POL. STUD. 135, 136 (2004). Often, low- and middle-income parents do not take advantage of the IDEA because they are unaware of the power the IDEA gives them. See id. at 136-37. This can result from a lack of time or education, or an inability to understand the IDEA's complex legal structure. See id.

The section of IDEA which gives the court this power is § 20 U.S.C. 1415(i)(2)(C)(iii).

See Burlington, 471 U.S. at 370 (observing that when a court found a private placement was proper, the court could issue an injunction compelling officials to establish and pay for an IEP, involving placement of the child in private school); see also James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 834 (N.D. Ill. 2009) (stating that "a school district must reimburse parents for a child's unilateral placement in a private program if the court determines (1) that the private placement desired by Plaintiffs was proper and (2) that the school district's proposed IEP was inappropriate").
and then places the child in a private school where he receives special education services. In order to receive payment of tuition for the unilateral placement, a parent must prove at the administrative hearing that (i) the child was not receiving a FAPE in public school because her IEP was inappropriate; (ii) the child's private school placement was appropriate; and (iii) any equitable considerations support granting relief to the parent.

In 1997, Congress amended the IDEA and added reimbursement as a separate remedy for a parent to seek when she has unilaterally placed her child in private school. Section 1412(a)(10)(C)(i) of the IDEA provides that a local education agency (LEA) is not required "to pay for the cost of education ... of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." Subsection (ii) provides that:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public...
agency, enroll the child in a private elementary school or secondary
school without the consent of or referral by the public agency, a court
or a hearing officer may require the agency to reimburse the parents
for the cost of that enrollment if the court or hearing officer finds that
the agency had not made a free appropriate public education available
to the child in a timely manner prior to that enrollment.36

Since the enactment of the reimbursement provision in 1997, parents
have almost exclusively sought payment of private school tuition under that
provision, even though the appropriate relief provision remains in the
IDEA.37

II. REIMBURSEMENT: THE CURRENT REMEDY FOR UNILATERAL
PLACEMENT AND WHY IT DOESN’T WORK FOR LOW-INCOME FAMILIES

As set forth in Part I, the IDEA recognizes a parent’s right to unilaterally
place her disabled child in a private school when the local education
agency (LEA) fails to provide a free appropriate public education (FAPE)
to the child. Before the enactment of the reimbursement provision in 1997,
the only remedy for that failure was appropriate relief, which the Supreme
Court held included the payment of private school tuition after success on
the merits of the case.38 Appropriate relief remains a remedy for unilateral
placement.39 However, since 1997, parents that have unilaterally placed
their child in private school have sought to remedy the LEA’s failure to
provide a FAPE largely through the reimbursement provision.40

36 § 1412(a)(10)(C)(ii).
37 See, e.g., ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW: A
GUIDE FOR PRACTITIONERS 173 (2d ed. Corwin Press 2006) (discussing remedies for an LEA’s failure
to provide a FAPE and indicating that reimbursement alone is available after a unilateral placement).
But see Forest Grove Sch. Dist. v. T.A., 129 S.Ct. 2484, 2496 (2009) (holding that reimbursement is
available under the appropriate relief provision if the reimbursement provision does not apply to the
circumstances of the case).
38 See, e.g., Burlington, 471 U.S. at 370; see also Timothy M. Huskey, Teaching the Children
“Appropriately.” Publicly Financed Private Education Under the Individuals with Disabilities
Education Act, 60 Mo. L. REV. 167, 176 (1995) (discussing the Supreme Court holding that retroactive
reimbursement was appropriate relief in the proper case).
39 See, e.g., Forest Grove, 129 S.Ct. at 2484, 2486, 2493; see also Natalie Pyong Kocher, Lost in
Forest Grove: Interpreting IDEA’s Inherent Paradox, 21 HASTINGS WOMEN’S L.J. 333, 336 (2010)
(stating that the IDEA empowers courts with broad discretion to grant appropriate relief).
40 See OSBORNE & RUSSO, supra note 37; see also Michael J. Tentindo, Private School Tuition at
the Public’s Expense: A Disabled Student’s Right To a Free Appropriate Public Education, 17 AM. U.J.
GENDER SOC. POL’Y & L. 81, 85 (2009) (discussing the 1997 Amendment and a parent’s right to obtain
a tuition reimbursement).
A. Establishing Standing Under the IDEA

Parents seeking relief under the IDEA must first establish that they have standing to seek relief under the IDEA. To have standing under the IDEA, a parent must demonstrate that (i) she or her child has suffered an injury; (ii) the LEA caused that injury; and (iii) a favorable decision by the judge or IHO will redress that injury.41 Some courts have held that a parent does not have standing to sue under the IDEA where she has not paid out-of-pocket expenses to a private school or incurred a financial obligation to pay that tuition, and therefore has not suffered an injury.42 Alternatively, a parent can establish standing by demonstrating an injury to her child. Denial of a FAPE by the public school constitutes an injury in fact under the IDEA.43 Payment of the private school’s tuition redresses the injury to the child, as it satisfies the school’s obligation to provide the student with an appropriate education “at public expense,” a basic requirement of a FAPE.44

B. The Scope of the Reimbursement Provision

Once a parent establishes standing to sue under the IDEA, she can seek to redress her injuries through the remedies provided by the IDEA. The IDEA currently provides for “relief that a court determines is appropriate”45 or for “reimburse[ment] to parents for the cost of [private

41 See, e.g., S.W. v. N.Y. City Dep’t of Educ., 646 F. Supp. 2d 346, 356 (S.D.N.Y. 2009) (listing the requirements for standing under the IDEA); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (stating the standing requirements under Article 3, Section 1 of the U.S. Constitution).

42 See, e.g., Emery v. Roanoke City Sch. Dist., 432 F.3d 294, 299 (4th Cir. 2005) (finding that disabled child’s parent lacked standing because he had not suffered an injury in fact since his insurance company had paid the tuition and the parent had not paid any out of pocket expenses for his son’s tuition at private school); Piedmont Behavior Health Center, LLC v. Stewart, 413 F. Supp. 2d 746, 754-55 (S.D.W. Va. 2006) (holding that a disabled child’s parent did not have standing under the IDEA because she had not suffered an injury since she was only suing for the school district’s failure to pay for the child’s private school education); see Application of a Student with a Disability, No. 09-104, supra note 15 and accompanying text.

43 In Winkelman v. Parma City School District, the Supreme Court held that parents can prosecute IDEA claims where their child has been denied rights under the IDEA because the IDEA gives parents enforceable rights which encompass the entitlement to a FAPE for the parent’s child. 550 U.S. 516, 526 (2007). Although the issue in Winkelman was not presented in the context of standing, the outcome demonstrates that the parents are entitled to bring cases solely where their child has been denied a FAPE. In S.W., the court found that the parent of a disabled child did not have standing based on an indebtedness to the private school, but that the parent did have standing to sue on behalf of her child because “[t]he denial of a FAPE or of a procedural right created by the IDEA [] constitutes an injury sufficient to satisfy the standing requirement.” 646 F. Supp. 2d 346, 358-59 (S.D.N.Y. 2009).

44 20 U.S.C. § 1401(9)(A) (2011); S.W., 646 F. Supp. 2d at 358-59 (holding that “[t]he idea requires school districts to provide disabled children with a FAPE, which is defined by the statute, in relevant part, as ‘special education and related services that . . . have been provided at public expense . . . ’”)

45 § 1415(i)(2).
school] enrollment."\(^{46}\) Since the Supreme Court first addressed unilateral placement, this remedy has been labeled as "reimbursement."\(^{47}\) The Court defined the relief as reimbursement in situations where parents had paid private school tuition in advance and were seeking repayment of the costs they expended.\(^{48}\) However, the Court's award of appropriate relief did not depend on the parent's advance payment of tuition. Instead, that relief was based on the authority of the appropriate relief provision, the purpose of the IDEA, and the injustice that would result if tuition payments were not awarded.\(^{49}\) As discussed below, this rationale requires that the remedy of direct tuition payments be available to all parents under the IDEA.

The reimbursement provision codified an important legal remedy for parents and disabled children under the IDEA. Reimbursement redresses a parent's injury—whether payment of out-of-pocket expenses or assumption of a financial obligation—by requiring repayment of those expenses or satisfaction of the debt by the local educational agency (LEA).\(^{50}\) Reimbursement also redresses the injury to the child—denial of a FAPE—because it satisfies the LEA's obligation to provide a student with an appropriate education "at public expense."\(^{51}\)

Prior to 1997, reimbursement was awarded as appropriate relief. However, with the addition of the reimbursement provision, Congress provided a specific remedy for unilateral placements.\(^{52}\) In 2009, however, the Supreme Court clarified that the reimbursement provision was not the sole provision under which courts and IHOs could award private school tuition payments.

---

\(^{46}\) § 1412(a)(10)(C).

\(^{47}\) See Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 374 (1985) (framing one of the issues facing the Court as "whether the potential relief available under [the appropriate relief provision] includes reimbursement to parents for private school tuition and related expenses") (emphasis added); see also Rouse v. Wilson, 675 F. Supp. 1012, 1014-18 (W.D. Va. 1987) (examining the Burlington decision, and concluding "§ 1415(f)(3) does not pertain to financial responsibilities").

\(^{48}\) Burlington, 471 U.S. at 362 (describing the situation to be addressed as one in which the parent "enrolled [his son] in the Carroll School in mid-August at his own expense") (emphasis added); Rouse, 675 F. Supp. at 1019 (explaining that a parent "would be barred from obtaining reimbursement" for tuition expenses [if a school] offered a free and appropriate education which the parent unilaterally rejected").

\(^{49}\) Burlington, 471 U.S. at 369 (finding that the "broad discretion" conferred on courts by the appropriate relief provision enables courts to fashion relief "in light of the purpose of the Act," which is to "provide handicapped children with a [FAPE]"); Forest Grove Sch. Dist. v. T.A., 129 S.Ct. 2484, 2490-91 (2009) (stating that public funds would even be used if necessary).

\(^{50}\) § 1412(a)(10)(C); Schaffer v. Weast, 546 U.S. 49, 60-61 (2005) (discussing how all parents have the right to an independent educational evaluation).

\(^{51}\) § 1401(9)(A); Gadsby v. Grasmick, 109 F.3d 940, 949-50 (4th Cir. 1997) (explaining an LEA's obligation of providing a free education).

tuition.\textsuperscript{53} In Forest Grove v. T.A., the Court held that since the reimbursement provision requires that a disabled child "previously receive[] special education and related services under the authority of a public agency" before reimbursement can be awarded, in a situation where the disabled child never received special education services in public school before he was unilaterally placed in private school, the reimbursement provision did not apply.\textsuperscript{54} Since T.A. had never received such services, the Court held that the child was not eligible for reimbursement under the reimbursement provision.\textsuperscript{55} Instead, the Court held that upon a showing of Burlington's three prongs,\textsuperscript{56} tuition reimbursement was still appropriate relief.\textsuperscript{57}

The Forest Grove rationale can justify an award of tuition payments in a situation like Billy's because it similarly falls outside the parameters of the reimbursement provision. Billy's parents are not able to seek reimbursement as envisioned by that provision because of their financial status. Instead, Billy's parents are seeking direct payment of tuition, a remedy that a court or IHO has the discretion to award under the appropriate relief provision.\textsuperscript{58}

This argument, however, ignores the fact that Congress intended the reimbursement provision to provide a remedy for unilateral placement, as long as the child received special education and related services in public school before his enrollment in private school.\textsuperscript{59} Billy fits in that intended class, as he previously received special education and related services in

\textsuperscript{53} Forest Grove, 129 S.Ct. at 2493 (awarding private school tuition payments to the parents under the appropriate relief provision instead of the reimbursement provision); see generally Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006) (discussing the possibility of receiving a free education under the appropriate relief provisions).

\textsuperscript{54} See Forest Grove, 129 S.Ct. at 2493 (holding that the reimbursement provision "does not foreclose reimbursement awards in other circumstances").

\textsuperscript{55} Id. (finding that the reimbursement provision is "best read as elucidative rather than exhaustive" and granting relief under the appropriate relief provision because T.A. did not fall within the "elucidative" list of § 1412(a)(10)(C)).

\textsuperscript{56} Id. at 2496. The Court found that T.A.'s parents successfully proved the first two prongs, but that the district court failed to "consider the equities" as required by Burlington's third prong. Id. The Court remanded the case for that determination. Id.

\textsuperscript{57} Id. at 2494, n.10 (noting that denying reimbursement in to T.A.'s parents would be an "injustice").

\textsuperscript{58} See infra discussion in Part IV; see also, Mr. A. v. New York City Dep't of Educ., No. 09 Civ. 5097 (PGG), 2011 WL 321137 (S.D.N.Y., Feb. 1, 2011) (holding that the appropriate relief provision is "sufficiently broad to encompass the retroactive direct tuition payment"); Connors v. Mills, 34 F. Supp. 2d 795, 802 (N.D.N.Y. 1998) (ruling that the holdings of Burlington and Carter "establish the validity" of prospective relief for placement in private school under the IDEA's appropriate relief provision).

\textsuperscript{59} See Rothstein & Johnson, supra note 25, at 200 (explaining the circumstances in which the remedy of reimbursement is available); see also Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985) (describing that the third grade student was in an IEP, which called for individualized tutoring by a reading specialist, before the parents unilaterally place him in a private school).
public school, his parents enrolled him in a private school without the consent of the LEA, and the LEA failed to provide Billy with a FAPE prior to that enrollment. Consequently, the reimbursement provision should apply to Billy’s situation. Furthermore, since the reimbursement provision’s enactment, courts and IHOs have applied that provision in situations like Billy’s. In such cases, parents generally needed only to successfully demonstrate Burlington’s three prongs to secure payment of their child’s private school tuition.

Recently, however, New York independent hearing officers (IHOs) and the New York State Review Office (SRO) have denied claims for tuition payments, even after parents have succeeded on the merits of their case, because the parent has not paid out-of-pocket expenses or incurred a financial obligation. In these cases, the parents did not pay tuition because they could not afford to. These decisions reason that these parents could not have intended to pay the tuition, and therefore, did not enter into a valid contract to pay that tuition. According to this rationale, these parents have not incurred a debt and are not entitled to reimbursement. These decisions limit the scope of the reimbursement


61 But see infra Part IV (proposing that in light of the extreme inequities produced by the current reimbursement provision, direct tuition payments are available under the appropriate relief provision until an amendment is passed incorporating direct tuition payments into the reimbursement provision).


63 See, e.g., Application of a Student with a Disability, No. 08-50, at 9-10 (N.Y. State Review Office, July 23, 2008), available at http://www.sro.nysed.gov/decisionindex/2008/08-050.pdf (finding that neither the parent nor the private school had standing to sue for reimbursement of past tuition because the parent never paid out-of-pocket expenses and the IDEA only allows parents, and not private schools, to seek reimbursement from the public school district); see also Muller v. Comm. on Special Educ. of East Islip, 145 F.3d 95, 106 (2d Cir. 1998) (holding that compensation for a parent’s out-of-pocket expenses is appropriate).

64 The SRO decisions denying tuition payments do not explicitly state that the parents failed to pay tuition because of a financial inability. However, in each decision in which the SRO employs this rationale, the parents are represented by a non-profit organization such as Advocates for Children or Partnership for Children’s Rights, groups which only represent low-income or no-income parents. Coupled with the fact that these parents made no payments to the private school before the administrative decision was rendered, concluding that these parents are low-income is a fair assumption.

65 See, e.g., Application of the N.Y. City Dep’t of Educ., No. 07-032 at 5-6 (N.Y. State Review Office, July 5, 2007), available at http://www.sro.nysed.gov/decisionindex/2007/07-032.pdf (reviewing an enrollment contract where the parties contracted for the full tuition and finding that the parent’s failure to pay any part of that tuition indicated that the contract was not valid); see also Daz-Fonseca v. Commonwealth of P. R., 451 F.3d 13, 32 (1st Cir. 2006) (noting that tuition reimbursements are not for anticipated expenses).
provision and circumvent Congress's intention in enacting that provision.

C. Demonstrating a Need for Reimbursement

Under the current statutory scheme, low-income parents that cannot afford to pay out-of-pocket expenses for private school tuition must enter into an enrollment contract with the private school. Parents generally sign one of three types of enrollment contracts. One type requires that the parent only seek reimbursement under the IDEA and cooperate with the private school's attorneys during that process ("Agreement to Cooperate").66 A second type of contract obligates the parent to pay the school's full tuition ("Agreement to Pay").67 The third type combines the first two, and the parent agrees to seek reimbursement under the IDEA and cooperate with the school's attorneys, and, in the event that tuition payments are denied, to pay the tuition in full ("Agreement to Cooperate and Pay").68

Under the reimbursement provision, if the enrollment contract is deemed valid by the court or IHO, payment of tuition is awarded. Courts and IHOs evaluate enrollment contracts pursuant to the governing state's contract law.69 Although some variation exists among the states, most state contract

---

66 See e.g., Application of a Student with a Disability, No. 08-50, at 10 (N.Y. State Review Office, July 23, 2008), available at http://www.sro.nysed.gov/decisionindex/2008/08-050.pdf (finding that the agreement between the parent and the private school required the parent to seek tuition reimbursement under the IDEA).


68 In Application of a Student with a Disability v. N.Y. State Review Office, at issue was an Agreement to Cooperate and Pay. The enrollment contract obliged the parent and grandparent "to seek funding from the district and to cooperate fully with . . . their counsel and the [private school] . . . [and if they] are denied payment by a final unappealed decision resolving their claim for prospective payment of tuition, they will remain responsible for tuition costs per the Enrollment Agreement and will complete a new payment schedule." Appeal No. 09-104, at 9-10 (N.Y. State Review Office, November 24, 2009), available at http://www.sro.nysed.gov/decisionindex/2009/09-104.pdf.

69 See, e.g., 5-24 CORBIN ON CONTRACTS § 24.6. Some states view contracts purely objectively, interpreting a contract from the view of a reasonable third person. See, e.g., Hotchkiss v. Nat’l City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) (holding that “[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.”), aff’d sub nom; Ernst v. Mechanics’ & Metals Nat. Bank of N.Y., 201 F. 664 (2d Cir. 1912), aff’d sub nom; Nat. City Bank of N.Y. v. Hotchkiss, 231 U.S. 50 (1913). Other states use a combined objective-subjective approach similar to the Restatement (Second) of Contracts. This approach attempts to ascertain each party’s intent in entering into the contract by viewing each party as a reasonable person who is subject to circumstances existing at the time of contracting. A final tool of contract interpretation is a fully subjective approach. Many courts have discounted this theory of interpretation because of the difficulty of “delving into the parties’ minds to ascertain their original intent.” Mellon Bank, N.A. v. Aetna Bus. Credit, 619 F.2d 1001, 1009 (3d Cir. 1980).
law requires that contracts be evaluated objectively. Under the objective theory of contracts, "the object in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used, and to give effect to that intent so long as it does not conflict with any rule of law, good morals, or public policy." Where the language used is "plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and from that language alone, regardless of what the actual or secret intentions of the parties may have been." In that instance, the judge or IHO will enforce the plain meaning of the contractual language without "inquir[ing] into the actual mental processes of the parties in entering into the particular contract.

Courts and IHOs applying the objective approach to contract interpretation should find that each type of agreement (Agreement to Cooperate, Agreement to Pay, and Agreement to Cooperate and Pay), if unambiguous, is a valid contract regardless of the parents' ability to pay the private school tuition. However, an Agreement to Cooperate, though valid, does not financially obligate a parent to pay tuition; rather, it merely requires them to seek tuition payments.

An alternative to the objective approach is the subjective approach, in which a court or IHO seeks to ascertain the intent of the parties regardless of the contractual language. However, this approach is rarely used because of the difficulty of "delv[ing] into the parties' minds to ascertain their original intent." In Mellon Bank, 619 F.2d at 1009. In Mellon Bank, the court rejected the subjective approach stating that "courts neither claim nor possess psychic power. Therefore, in order to interpret contracts with some consistency, and in order to provide contracting parties with a legal framework which provides a measure of predictability, the courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestations of their intent." Id. See also Hotchkiss, 231 U.S. at 50.

If the contractual language is not "plain, complete, and unambiguous," a judge "may also look to . . . the circumstances surrounding the transaction, and enforce the contract pursuant to "the common meaning of the parties, not a meaning imposed on them by the law." RESTATEMENT (SECOND) OF CONTRACTS: WHOSE MEANING PREVAILS at § 201 cmt. c (2009). In the case of a contract between a school and a low-income parent, the common meaning of the parties will likely be to create a financial obligation to pay tuition. Review of subjective intent should only be used when analysis of a contract's plain language is inconclusive. See 1 WILLISTON ON CONTRACTS § 32:1.

In S.W. v. New York City Department of Education, 646 F. Supp. 2d 346, 357 (S.D.N.Y. 2009), the court evaluated an Agreement to Cooperate between a low-income parent and the private school. After finding the contract unambiguous, the court held that the contract "plainly relieved S.W. of the responsibility for the cost of her son's tuition [because it] include[d] an acknowledgment by S.W. that she 'is dependent upon receiving prospective payment from the [New York City Department of Education (DOE)] in order to make the payment of tuition.' Id. The court, therefore, found that S.W. had not incurred a financial obligation to pay the private school tuition and that reimbursement was not
On the other hand, Agreements to Pay and Agreements to Cooperate and Pay do purport to create a financial obligation. If these agreements are validly entered into and are unambiguous, courts applying the objective approach to contract interpretation should look only to the contractual language to determine the meaning of the contract. Since the plain meaning of these contracts creates a financial obligation to pay tuition, a court or IHO should enforce that meaning and award reimbursement to the parent where she has succeeded on the merits of her case. In New York, however, recent decisions by the State Review Office (SRO), the body that hears appeals of IHO decisions, have held that Agreements to Pay and Agreements to Cooperate and Pay are invalid contracts and do not create a financial obligation when they are entered into by low-income parents. These decisions are based upon the view that when a parent fails to pay any tuition before or throughout the school year because she cannot afford to, the parties have indicated an intention that they are not to be bound by their contract, and therefore, no contract has been formed.

Additionally, LEAs argue that “all of the parties’ words, phrases, expressions and acts should be viewed in light of the circumstances that existed at [the] time [the contract was made], including the situation of the parties, both individually and relative to one another, and the objectives warranted. Id. The S.W. court did find that S.W. had standing based upon the injury to her son, the LEA’s failure to provide him with a FAPE. Id. at 358.

See supra notes 67-68 and accompanying text.

See Lunch, supra note 62, at 182; see also Zirkel, supra note 62, at 402.


A brief Internet search for private school tuition payment schedules reveals that most schools offer installment payment plans. However, payment both before and throughout the year is usually required. See, e.g., Portersville Christian School, Tuition and Fee Schedule 2009-2010, available at http://portersvillechristianschool.org/prospective/tuitionschedule09-10.pdf (providing four payment plans, each requiring payment by August of the enrollment year); Morristown-Beard School, Tuition/School Affordability, available at http://www.mobeard.org/mbs/affordability.php (offering three payment plans, each of which requires some payment by July of the enrollment year).

See RESTATEMENT (SECOND) OF CONTRACTS: INTENTION TO BE LEGALLY BOUND § 21, Illustration 1 (explaining that where A pays B $300 for a $15 watch, both understanding that the transaction is “frolic and banter,” the contract is unenforceable despite the parties belief or intention that they would be legally bound by their exchange); see also RESTATEMENT (SECOND) OF CONTRACTS: REVOCATION BY COMMUNICATION FROM OFFEROR RECEIVED BY OFFEREE § 42 (stating that “an offeree’s power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract”).

they sought to attain."\textsuperscript{80} LEAs contend that consideration of "the situations of the parties" includes consideration of the financial situation of the parents, and that it necessarily follows from these circumstances that neither party intended to be bound by their agreement, since fulfillment of the contract by the parent would be impossible.\textsuperscript{81} LEAs also assert that the objective that these parties sought to attain was not to create a true financial obligation on the part of the low-income parent, but instead to deceive a third party (namely, the IHO) into believing that such an obligation existed.\textsuperscript{82} Because that objective does not reflect an intention to be bound by the contract, LEAs argue (and New York's SRO has agreed) that these contracts are invalid and that these parents are not entitled to relief under the IDEA.\textsuperscript{83}

Parents and their advocates counter that this line of reasoning is contrary to established law. Under New York contract law, "[i]f a contract is unambiguous, a court is required to give effect to the contract as written and may not consider extrinsic evidence to alter or interpret its meaning."\textsuperscript{84} Parents submit that a financial inability to pay tuition, and a failure to pay any tuition prior to an administrative decision, is irrelevant to interpreting an unambiguous contract, because the court should look to the parties' intentions.

\textsuperscript{80} Williston on Contracts (4th ed.) § 3:5 (footnotes omitted).

\textsuperscript{81} Application of a Student with a Disability, No. 09-104, at 9-10 (N.Y. State Review Office, November 24, 2009), available at http://www.sro.nysed.gov/decisionindex/2009/09-104.pdf (outlining the school district's argument that the applicants never intended to pay the school's tuition because the parent never paid any amount of tuition while the child was enrolled).

\textsuperscript{82} See Marcus A. Winters & Jay P. Greene, Debunking a Special Education Myth: Don't Blame Private Options for Rising Costs, \textit{7 Educ. Next} 67, 67 (2007) (describing allegations made by critics of private school tuition reimbursement that parents are "clever" and "greedy needy").

\textsuperscript{83} In Application of a Student with a Disability, N.Y. State Review Office, the New York State Review Office (SRO) denied a parent and grandparent's application for private school funding because of their failure to incur a financial obligation. The enrollment contract obliged the parent and grandparent "to seek funding from the district and to cooperate fully with . . . their counsel and the [private school] . . . [and if they] are denied payment by a final unappealable decision resolving their claim for prospective payment of tuition, they will remain responsible for tuition costs per the Enrollment Agreement and will complete a new payment schedule." Appeal No. 09-104 (N.Y. State Review Office, November 24, 2009), available at http://www.sro.nysed.gov/decisionindex/2009/09-104.pdf. The SRO held that "there is no evidence contained in the hearing record indicating that the [private school] has ever sought payment of the student's tuition for the 2008-2009 school year from the parent or the students' grandmother, or that it has any intention of doing so." Id. at 10 (citations omitted). Consequently, the SRO concluded that reimbursement was not warranted. Id. Cf., S.W. v. N.Y. City Dep't of Educ., 646 F. Supp. 2d 346 (S.D.N.Y. 2009), where the SRO held that the "language in the enrollment contract [wa]s unambiguous, and it plainly relieved S.W. of responsibility for the cost of her son's tuition. Item 4 provide[d] explicitly that Bay Ridge 'has assumed the risk that the parent may not receive prospective payment from the DOE or that said payment will be delayed beyond the term of the 2005-2006 school year.'" Id.

\textsuperscript{84} S.W., 646 F. Supp. 2d at 357 (quotations omitted) (interpreting an Agreement to Cooperate and finding it was unambiguous). See, e.g., South Road Assocs., LLC v. Intern'l Bus. Machines Corp., 826 N.E.2d 806, 838 (N.Y. 2005) (determining a contract between a landlord and tenant was unambiguous).
manifested intention at the time the contract was made.\textsuperscript{85} The parties' manifested intention should be ascertained objectively, and a court should only "consider[] what a reasonable person in the parties' position would conclude given the surrounding circumstances."\textsuperscript{86} Parents maintain that a reasonable person would understand that parents and schools were intending to enter into a binding contract. From this rationale, parents conclude that a finding that these contracts are unenforceable is flawed, since "the law accords to individuals an intention that corresponds with the reasonable meaning of their words and conduct, and if their words and conduct manifest an intention to enter into a contract, their real but unexpressed intention is irrelevant."\textsuperscript{87}

This discussion reveals that under the current statutory scheme, parents that are financially able to pay out-of-pocket expenses or incur a true financial obligation can take full advantage of the reimbursement remedy provided by the reimbursement provision, while low-income parents are precluded from doing so merely because of their financial status.\textsuperscript{88} Denial of tuition payments not only fails to provide a child with an appropriate education at public expense, as required by FAPE,\textsuperscript{89} but it also discourages private schools from accepting disabled children that cannot afford to pay tuition in advance. As a result, low-income disabled children are precluded from receiving appropriate educations when an LEA fails to provide the child with an appropriate education in public school. Given that the reimbursement provision was intended to ensure that all children receive an appropriate education, it should be amended to ensure that low-income parents are not precluded from such relief.

\textsuperscript{85} See 1 WILLISTON ON CONTRACTS § 3-5 (stating that when a court determines whether parties intended to be bound by the contract, "a court must consider the totality of the circumstances surrounding the parties at the time they manifest an intention to contract") (emphasis added) (footnotes omitted); see also Matthew D. Walden, Could Fair Use Equal Breach of Contract?: An Analysis of Informational Web Site User Agreements and Their Restrictive Copyright Provisions, 58 WASH & LEE L. REV. 1625, 1630-31 (2001) (stating "[m]utual assent is a prerequisite to an enforceable contract... each party must manifest its assent to the terms of a contract before such contract is valid").

\textsuperscript{86} Id. (footnotes omitted).

\textsuperscript{87} See, e.g., ROTHSTEIN & JOHNSON, supra note 25, at 200 (indicating that in order to seek reimbursement, parents are required to "pay for the [private] placement and all related expenses up front"); OSBORNE & RUSSO, supra note 37, at 173, 183 (asserting that compensatory services under the appropriate relief provision, and not tuition payment under the reimbursement provision, are available to "parents who cannot financially obtain private services up front").

\textsuperscript{88} § 1401(9).
III. ACHIEVING EQUALITY UNDER THE IDEA: AMENDING THE REIMBURSEMENT PROVISION TO FULFILL THE IDEA'S PURPOSE

The IDEA was created to ensure that all disabled children receive a free appropriate public education (FAPE). To fulfill this purpose, Congress provided appropriate relief and reimbursement to remedy a local educational agency's (LEA) failure to provide a child with a FAPE. Although most parents seek tuition payments under the reimbursement provision after they unilaterally place their child in public school, financial realities can prevent a parent from incurring a valid debt to a private school, therefore foreclosing the remedy of reimbursement as the statute is currently written. However, because the IDEA intended to provide a "full educational opportunity to all children with disabilities," low-income children should not be denied the remedy of unilateral placement merely because their parents cannot afford costly private school tuition. Congress should amend the reimbursement provision to reflect that intention.

A. The IDEA's Purpose Supports Direct Tuition Payments

Awarding tuition payments to low-income parents is necessary for fulfilling the IDEA's purpose. When Congress enacted the IDEA, it was largely concerned with a disabled child's ability to access a free appropriate education. During the late 1960s and early 1970s, disabled children in over 28 states sought access to public education. Judges in most of these states found that the denial of that access to disabled children violated the Fifth and Fourteenth Amendments. Largely in response to this litigation, Congress enacted comprehensive legislation to ensure that "all children with disabilities have available to them a free appropriate public education" that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment,

90 See § 1400(d)(1)(A); 150 Cong. Rec. S11543-01 (daily ed. Nov. 19, 2004) (statement of Sen. Kennedy that the IDEA requires that "all children in America — including those with disabilities have — the right to a free and appropriate education").
91 § 1412(a)(2) (emphasis added).
92 See § 1400(d)(1)(A) (the IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education") (emphasis added); see also Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982) (noting "[c]ongress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education."); Mills v. Bd. of Educ., 348 F. Supp. 866, 874, 876 (D.D.C. 1972).
93 See Bagenstos, supra note 22, at 121.
and independent living.” When a child has been denied that opportunity, unilateral placement is available to remedy that denial. In Burlington, the Supreme Court held that if payment for unilateral placement was not contained in the IDEA,

the child’s right to a free appropriate public education, the parents’ right to participate fully in developing the proper IEP, and all of the procedural safeguards would not be 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.

The Court restated this position in Carter, where it expanded the appropriate relief provision to apply when the parent’s unilateral placement does not comply with the IDEA’s FAPE requirements as described in § 1401(a)(18). The Court stated that “the IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of § 1401(a)(18) to bar reimbursement in the circumstances of this case would defeat this statutory purpose.”

In its most recent decision addressing reimbursement under the IDEA, the Supreme Court held that if the IDEA did not permit parents that properly placed their child in private school to receive payment for that placement, then school districts would be virtually immunized from discovering whether a child needed special-education services in the first place. If tuition payments are not available to such students, and the LEA is aware of the child’s inability to pay private school tuition, then the LEA will likewise have little or no incentive to provide that child with an appropriate education. Consequently, low-income parents are effectively precluded from the remedy of unilateral placement. Although the parent can seek an

95 § 1400(d). See Salomone, supra note 94, at 145 (discussing the development of “right to education” cases and their eventual production of the EAHCA).
96 Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 374 (1985) (noting that the provisions of the IDEA “would not always produce a consensus between the school officials and the parents” so Congress provided for various “‘procedural safeguards’ to insure the full participation of the parents and proper resolution of substantive disagreements”).
97 Id. at 370.
99 Id. at 13-14.
101 Id.
alteration of the child’s IEP and compensatory services, those remedies do not immediately provide the child with an appropriate education.102

Private schools that currently accept disabled children without requiring advance payment do so because the parents’ likelihood of success on the merits of their child’s case is very high, and therefore, these schools are confident that the parents will succeed during the administrative review process.103 If the prospect of receiving tuition payments in such cases is no longer available, it is likely that private schools will not enroll disabled children from low-income households because the schools will be unable and unwilling to educate the children for free.104 Alternatively, a private school that still wishes to admit low-income, disabled children, but that is not willing to risk nonpayment by LEAs, will likely increase its regular tuition, thereby charging wealthier students more than necessary in order to educate the low-income disabled children. Since the IDEA intended for appropriate education to be provided by LEAs, and not by private schools or wealthy parents of private school students, the LEAs should be required to pay for private school tuitions where a parent has succeeded in proving Burlington’s three prongs.

If low-income families are denied the remedy of unilateral placements, they will also lose considerable bargaining power during the development of their child’s IEP. The IDEA gives parents “more control over the education of their children than almost every other parent in the nation’s public schools, through an elaborate planning and review process.”105 However, where parents cannot use unilateral placement as leverage to secure appropriate services, LEAs likely are less motivated to create the best IEP for the child. Although “parents are assigned a substantial role in decision making, aptly characterized as ‘significant bargaining power,’ through the IEP,”106 that bargaining power is drastically reduced when

102 Since the appeals process is lengthy, a decision finding that an IEP is inappropriate and requiring changes to the IEP or compensatory services would likely come after a child has received months of an inappropriate education in public school. Indeed, there are several notification and timing requirements under the IDEA for the administrative process. See supra note 11.
103 This is evidenced by a private school’s willingness to sign an Agreement to Cooperate with a parent. See supra notes 66 and 74 and accompanying text; see also Application of a Student with a Disability, Appeal No. 09-104, at 9-10 (N.Y. State Review Office, November 25, 2009), available at http://www.sro.nysed.gov/decisionindex/2009/09-104.
106 Id at 165.
LEAs do not face the potential payment of private school tuition. Because the IDEA intended to provide parents with significant influence in the education of their children, the remedial provisions of the IDEA should not be interpreted as reducing that role.

Finally, eliminating tuition payment to low-income parents would require those parents to seek either compensatory services or alteration of the child's inappropriate IEP. However, these remedies are grossly inadequate when compared to the remedy of unilateral placement. Compensatory services merely make up for past inappropriate services, and they do not provide an appropriate education to the child at the time it is needed. A child is similarly denied an immediate appropriate education when a parent must seek an alteration of an IEP through the administrative process. Where a child is faced with either receiving an inappropriate education in public school or an appropriate one in private school, the IDEA and the Supreme Court have recognized a parent's right to place the child in private school so that he may receive an appropriate education. While a parent may decide to seek compensatory services instead of unilateral placement, compensatory services should not be the only remedy available to low-income parents.

107 See Rothstein & Johnson, supra note 25, at 120 (discussing a parent's role in the IEP development process); see also 20 U.S.C. § 1414(d)(1)(B)(i) (2011) (including parents on the team that creates their child's IEP).

108 See Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985) (finding unilateral placement available because without that remedy "the parents' right to participate fully in developing the IEP, and all of the procedural safeguards would be less than complete").

109 See Bd. of Educ. v. Munoz, 16 A.D.3d 1142, 1144 (N.Y. 2005); see also 8 NYCRR § 201.10 (2011) (enabling the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in that IEP).

110 § 1412(c) provides procedural safeguards to remedy inappropriate IEPs, but it also allows up to 120 days, or 4 months, before requiring an IHO decision to be rendered on that IEP’s appropriateness.

111 See § 1412(a)(10)(C) (authorizing reimbursement to the parents of a disabled child, who previously received special education and related services under the authority of a public agency); see also Frank G. v. Bd. of Educ., 459 F.3d 356, 367 (2d Cir. N.Y. 2006) (explaining that this authority comes from the plain language of § 1412(a)(10)(C)).

112 In discussing the 2004 amendments to the IDEA, Senator Harkin explicitly said that "compensatory education must . . . belatedly provide all education and related services previously denied and needed to make the child whole. Children whose parents can't afford to pay for special education and related services when school districts fail to provide FAPE should be treated the same as children whose parents can. Children whose parents have the funds can be fully reimbursed under the Supreme Courts decisions in Burlington and [Carter], subject to certain equitable considerations, and children whose parents lack the funds should not be treated differently." 150 Cong. Rec. S1547 (daily ed. November 19, 2004) (statement of Sen. Harkin). Although this language could be interpreted as providing only the remedy of compensatory services to low-income parents, in light of the statutory purpose of the IDEA, Senator Harkin's remarks are more accurately read to require equal remedies for both low-income and high-income families in light of the Supreme Court's continuous holding that a free and appropriate education for all children is mandated by the IDEA. See, e.g., Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13 (1993), a case in which the Supreme Court said that the intention behind IDEA is to ensure that children with disabilities get a free and appropriate education.
benefit all disabled children, the remedial provisions of the Act should not be interpreted as applying to a wealthy disabled child, but not to a poor disabled child.

B. Precluding Low-Income Parents From the Unilateral Placement Remedy Violates the Constitution’s Guarantee of Equal Protection

A complete denial of tuition payments to low-income parents under the IDEA arguably violates the Equal Protection Clause of the United States Constitution because it prevents access to an appropriate education to one class of individuals while providing that access to another class. The Equal Protection Clause prohibits the federal and state governments from unreasonably classifying individuals and treating them differently based upon that classification. When the reimbursement provision is interpreted as denying tuition payments to parents based on their inability to incur a financial obligation to pay tuition, disabled children from low-income families are treated differently than disabled children from wealthy families. The Supreme Court has established that neither denial of education nor disparate treatment based on wealth triggers strict or heightened scrutiny. However, unequal application of the reimbursement provision violates a poor disabled child’s equal protection rights, because there is no necessary or rational relation between this unequal application and a compelling or legitimate government interest.

The Supreme Court has recognized in one narrow instance that education is deserving of heightened scrutiny under the Equal Protection Clause. In Plyler v. Doe, the Court held that a Texas statute that deprived children of

---

113 See U.S. Const. amend. XIV, §1; see also SALOMONE, supra note 94, at 139 (explaining that the courts in PARC (Pa. Ass’n for Retarded Children v. Pa., 343 F. Supp. 279 (E.D. Pa. 1972)) and Mills (Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972)) used a rational basis test to evaluate the plaintiff’s claims, finding that “[t]he denial of educational services was not reasonably related to any legitimate governmental interest, not even the avoidance of undue financial burdens”).

114 ROTHSTEIN & JOHNSON, supra note 25, at 11 (noting that “[i]n its evaluation of what is meant by equal terms, the Supreme Court has traditionally applied different degrees of scrutiny to the practices of governmental entities”); EDWARD SIDLOW & BETH HENSCHEN, AMERICA AT ODDS: ALTERNATE ADDITION 99 (Wadsworth, Cengage Learning, 6th ed. 2009) (stating that “[t]he equal protection clause has been interpreted by the courts, and especially the Supreme Court, to mean that states must treat all persons in an equal manner and may not discriminate unreasonably against a particular group or class of individuals unless there is a sufficient reason to do so”).

115 See Plyler v. Doe, 457 U.S. 202, 238 (1982) (Powell, J., concurring) (asserting that students who are being excluded from public schools because of their parents illegal immigration status are innocent victims and therefore such classifications deserve to be reviewed with heightened scrutiny under the equal protection clause); see also Anja Matwijkiw & Willie Mack, Making Sense of the Right to Truth in Educational Ethics: Toward a Theory and Practice that Protect the Fundamental Interests of Adolescent Students, 2 INTERCULTURAL HUMAN RIGHTS L. REV. 329, 339 (2007) (discussing that the court in Plyler applied intermediate scrutiny, a stricter standard than usual, and stressed the importance of education for children).
illegal immigrants from attending public school violated the Equal Protection Clause because “[t]he inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status based denial of basic education with the framework of equality embodied in the Equal Protection Clause.”

The Court did not hold that education was a fundamental right, but it did find that the “denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”

Since the Plyler decision, the Court has not “extended [the Plyler] holding beyond the unique circumstances that provoked its unique confluence of theories and rationales.” Since the situation created by an unequal application of the reimbursement provision is not analogous to the one in Plyler, where Texas was attempting to “control the conduct of adults by acting against their children,” heightened scrutiny is not warranted under the Plyler rationale.

The Court has also held that strict scrutiny is appropriate in limited circumstances where the government classifies on the basis of wealth. Even in such instances, strict scrutiny is only appropriate where “the class discriminated against ... share[s] two distinguishing characteristics: because of their impecunity they were unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.” In San Antonio Independent School District v. Rodriguez, the Supreme Court held that strict scrutiny was not the appropriate test for evaluating whether unequal

---

116 Plyler, 457 U.S. at 222.
117 Id. at 221-22.
119 Plyler, 457 U.S. at 220. In his concurring opinion, Justice Powell describes this aspect of the case as one of the "unique circumstances" in which "the Court may properly require that the State's interests be substantial and the means bear a "fair and substantial relation" to these interests." Id. at 239 (Powell, J., concurring).
120 See Kadrmas, 487 U.S. at 461-62 (holding that since the circumstances were not similar to those presented by Plyler, heightened scrutiny was not warranted).
121 See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20-21 (1973) (discussing the Court's past equal protection decisions regarding individuals inability "to pay for some desired benefit"); Lewis v. Casey, 518 U.S. 343 (1996) (stating that unless a group claiming discrimination on the basis of poverty can show that it is "completely unable to pay for some desired benefit," strict scrutiny of a classification based on wealth would not apply).
122 Rodriguez, 411 U.S. at 20.
funding for schools violated the Equal Protection Clause, because such disparate funding did “not occasion[] an absolute deprivation of the desired benefit,”123 namely, education. The Court also held, as in *Plyler*, that education was not a fundamental right requiring heightened scrutiny.124 Thus, the Court applied a rational basis test and concluded that Texas’s taxation scheme was rationally related to a legitimate state interest.125

Here, unlike in *Rodriguez*, precluding low-income parents from unilaterally placing their child in private school does create “an absolute deprivation of the desired benefit,”126 because the disabled child will not receive any educational benefit when he has been denied a FAPE in public school and cannot be unilaterally placed in private school.127 The Supreme Court has defined “appropriate education” under the IDEA to mean special education and related services that provide the disabled child with “some educational benefit.”128 That “educational benefit” does not have to “maximize the potential of the handicapped child[],”129 but must merely ensure that the disabled child is “benefiting educationally.”130 Thus, if a child is denied an appropriate education and cannot receive immediate redress of that denial, he will receive no educational benefit at all during that time and consequently suffer “an absolute deprivation of the desired benefit.”131 It follows, then, that strict scrutiny is appropriate; to pass constitutional muster, a school district that refuses to pay a child’s private school tuition, only because her parents are too poor to incur a financial obligation to pay such tuition, must demonstrate that this disparate treatment is necessary to achieve a compelling state interest. The state interest allegedly being protected is the cost of special education. This interest is not a compelling one in light of the important role that education plays in our society. In *Brown v. Board of Education*, the Court stated that “education is perhaps the most important function of state and local governments” because “it is doubtful that any child may reasonably be

123 Id. at 23.
124 Id. at 35 (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”).
125 Id. at 54-55 (“[W]here wealth is involved, the Equal Protection Clause does not require absolute equality or precise equal advantage.”).
126 Id. at 23.
128 Id. at 188-89.
129 Id. at 189-90.
130 Id. at 203.
131 *Rodriguez*, 411 U.S. at 23. Although the IDEA provides compensatory services and revision of an inappropriate IEP as additional remedies for the denial of a FAPE, those remedies fail to provide a low-income student with an immediate, appropriate education.
expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

Although Brown addressed racial discrimination in public schools, the Supreme Court has repeatedly stressed the importance of education in other decisions. For example, in Plyler, the Court dismissed the idea that education was “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.” While the Court stopped short of recognizing education as a fundamental right, it emphasized “the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child.” Because of this importance, “the interest in educating the [disabled] children clearly must outweigh [the government’s] interest in preserving its financial resources.” In this situation, mere “avoidance of undue financial burdens” is not a compelling governmental interest.

Not only does the unequal application of the reimbursement provision not satisfy strict scrutiny, but it also does not satisfy the lesser rational basis standard. Under rational basis review, the provision must only be rationally related to a legitimate government interest. The legitimate government interest arguably being addressed by the unequal application of

---

133 See Plyler v. Doe, 457 U.S. 202, 221 (1982) (indicating the importance of education); see also Rodriguez, 411 U.S. at 30 (recognizing “that the grave significance of education both to the individual and to our society cannot be doubted”) (quotations and footnotes omitted).
134 Plyler, 457 U.S. at 221.
135 Id.
137 SALOMONE, supra note 94, at 139.
138 See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973) (stating “Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or suspect classifications.”) (footnotes omitted).
139 The Supreme Court’s precedents treating poverty as a suspect classification warranting strict scrutiny have been narrowly focused on denials of access to fair criminal proceedings. See James A. Kushner, Government Discrimination: Equal Protection Law and Litigation, WL GOV. DISCRIM. § 1:5 (2010). Additionally, it is difficult to demonstrate that low-income parents negatively affected by a narrow application of the reimbursement provision are completely unable to pay for private school education, and that the denial of that remedy results in the absolute derivation of the benefit, as required by the Court’s jurisprudence. Thus, courts may be more likely to apply a rational basis test unless and until the Supreme Court holds this situation warrants application of strict scrutiny.
140 See, e.g., United States Dep’t of Agriculture v. Moreno, 413 U.S. 528, 533 (1973) (holding “[u]nder traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.”); United States v. Carolene Prods., Co., 304 U.S. 144, 152 (1938) (stating “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”).
the unilateral placement remedy is the substantial cost of special education and of unilateral placement in particular.\textsuperscript{141} LEAs argue that limiting the unilateral placement remedy to those that can afford to pay tuition in advance is a rationally related means of controlling this cost. However, the government’s interest in reducing the cost of special education can only be a legitimate government interest when that interest does not preclude disabled children from receiving an appropriate education.\textsuperscript{142} As discussed above, low-income disabled children are precluded from receiving such education under the current reimbursement provision.\textsuperscript{143} While the reduction of educational costs may be a concern of state legislatures, it cannot be deemed legitimate when it comes at the expense of precluding disabled children from receiving an appropriate education.

Additionally, limiting the unilateral placement remedy to parents that can afford to pay tuition is not rationally related to reducing the cost of special education. The Supreme Court, in both \textit{Carter} and \textit{Forest Grove}, dismissed concerns that their holdings would increase the cost of special education.\textsuperscript{144} In \textit{Carter}, the Court recognized that “Congress has imposed a significant financial burden on States and school districts that participate in the IDEA,”\textsuperscript{145} but that “[parents] are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act.”\textsuperscript{146} In \textit{Forest Grove}, the Court concluded that concerns of “a substantial financial burden on public school districts”\textsuperscript{147} were “unfounded,”\textsuperscript{148} even though permitting

\textsuperscript{141} Educating a disabled child in public school costs an average of $12,639 per year. \textit{See} U.S. Dep’t of Educ., 1999-2000 President’s Commission on Excellence in Special Education Report, available at \url{http://www2.ed.gov/ints/commissionsboards/whsperellespecialeducation/reports/three.html}. When a disabled child is unilaterally placed in private school and the LEA is ordered to pay for that placement, the cost can be more than twice as much as a private school tuition of $26,350. \textit{See}, e.g., S.W. v. N.Y. City Dep’t of Educ., 646 F. Supp. 2d 346, 353 (S.D.N.Y. 2009); \textit{see also} Chambers, \textit{supra} note 104, at 18. Indeed, the tuition can sometimes be more than twice as much (Winston Prep lists its tuition at the New York City location as $46,800); \textit{see} Winston Prep Application, \textit{supra} note 10.

\textsuperscript{142} \textit{See}, e.g., \textit{Rodriguez}, 411 U.S. at 40 (stating that it is not the Court’s role to “condemn the State’s judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests,” which the Court determined was “an area in which it has traditionally deferred to state legislatures”); Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 508-09 (1937) (noting that a state has the inherent power to tax and grant exemptions).

\textsuperscript{143} \textit{See supra} notes 126-31 and accompanying text.

\textsuperscript{144} \textit{See} Forest Grove School District v. T.A., 129 S.Ct. 2484, 2496 (2009) Forest Grove Sch. Dist., 129 (holding that the Act will not impose a substantial financial burden on school districts); \textit{see also} Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993) (stating that claims of an unreasonable financial burden are irrational).

\textsuperscript{145} \textit{Carter}, 510 U.S. at 15.

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Forest Grove}, 129 S.Ct. at 2496.

\textsuperscript{148} \textit{Id.}
tuition payments under the appropriate relief provision when a child had 
not been offered special education services prior to his private school 
placement created a remedy for a class of individuals not captured by the 
reimbursement provision. Both the Forest Grove and Carter Courts 
reasoned that the burden placed on parents to demonstrate that their 
placement was appropriate, while the LEA’s was not, is a significant 
limitation on unilateral placement, and that further curtailment of this 
remedy is unnecessary and does not serve to reduce costs.149 

Any fears that LEAs have regarding an increase in special education cost 
resulting from allowing low-income parents to receive direct tuition 
payments under the IDEA are likewise unfounded. First, these low-income 
parents must succeed on the merits of their case, as did the parents in 
Carter and Forest Grove. This burden is no less difficult, and may indeed 
prove even more difficult, in the case of a low-income parent. In Schaffer 
v. Weast, the Supreme Court held that the plaintiff in an administrative 
hearing under the IDEA has the burden of proving her case.150 Generally, 
the plaintiff in such a hearing is the parent. Additionally, in Arlington 
Central School District Board of Education v. Murphy, the Court held that 
parents could not recover non-attorney expert witness fees even if they 
succeeded on the merits of their case.151 Therefore, not only must parents 
sustain the burden of proof at an administrative hearing, but they must also 
rely on their own funds if they require an expert witness to help them 
sustain that burden. As the Court has recognized, these substantial hurdles 
ensure that only the truly deserving will be awarded tuition payments. 
Furthermore, “the facts show that there is very little litigation under the 
IDEA,”152 and that “the incidence of private school placement at public 
expense is quite small.”153 Although at least one study has shown that “the 
number of court decisions concerning special education has increased,”154 
that study also recognized that “the percentage of rulings in favor of the 

149 Id. (noting that “the incidence of private-school placement at public expense is quite small”). 
150 Schaffer v. Weast, 546 U.S. 49, 56 (2005) (holding that “the ordinary default rule is that 
plaintiffs bear the risk of failing to prove their claims”). 
prevailing litigants in an IDEA action are not entitled to recovery of fees for experts’ services). 
153 Forest Grove, 129 S.Ct. at 2496. See Allan G. Osborne & Charles J. Russo, Commentary: 
. . is likely something of a wash in terms of its financial impact.”); see also Thomas A. Mayes & Perry 
Zirkel, Special Education Tuition Reimbursement Claims: An Empirical Analysis, 22 REMEDIAL 
& SPEC. EDUC. 350, 351 (2001) (stating “[a]pproximately 2% of IDEA-eligible children receive their 
education in private settings.”). 
154 Perry A. Zirkel, Tuition Reimbursement for Special Education Students, 7 THE FUTURE OF 
CHILDREN 122, 123 (Winter 1997).
parents has not changed significantly since the 1975 inception of [the IDEA].” In a follow-up study, researchers found that:

a statistically significant change in the outcome distribution of published tuition reimbursement decisions has not followed in the wake of successive announcements of new pertinent legal doctrine by the U.S. Supreme Court and... Congress. This finding, which is in line with [the previous study's] results, should douse the rhetorical fires of those who assert that changes in the law concerning tuition reimbursement constitute either unjustified windfalls to parents of children with disabilities or broad attacks on the right to a FAPE that the IDEA provides.

Despite the fact that this follow-up study did recognize that “increased frequency of tuition reimbursement claims” can cause financial strain on an LEA, allowing low-income parents to seek direct tuition payments will not cause droves of parents to unilaterally place their children in private schools and file direct tuition payment claims. Given the high burden of proof as discussed above, as well as private schools’ own admission policies. private schools are not in the business of educating children for free. Those that admit disabled students without requiring payment in advance will do so only where they are confident that the parent will succeed on the merits of the case. Thus, while some parents may wish to unilaterally place their children in private school and seek direct tuition payments, the children must first be accepted for admission.

Moreover, while LEAs argue that denying tuition payments under the IDEA is a rational method of reducing education costs, this method is not rational when compared to the truly cost-saving measure of providing disabled children with an appropriate education in public school. If an LEA implements the latter measure, it will not have to pay for the child’s private school education. The Court in Carter explained that the IDEA’s mandate requires that “public education authorities who want to avoid reimbursing parents for private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State’s choice... [and the] school officials who conform to it need not worry

---

155 Id. This study also found that “the Burlington and Carter cases have not made courts more inclined to rule in favor of parents.” Id. at 124.
156 Maynes & Zirkel, supra note 153, at 357.
157 Id.
158 See supra note 141 (listing the difference between public and private educations as roughly $34,000).
about reimbursement claims.”159 Thus, reduction in the cost of unilateral placement is directly related to the LEA’s provision of a FAPE to its disabled students, and not to denying tuition payments to meritorious parents.160 Finally, allowing direct tuition payments would not increase the cost of special education, because courts and IHOs have the discretion to determine “the appropriate and reasonable level of reimbursement that should be [awarded].”161 Although unilateral placement imposes a financial burden on LEAs, limiting that relief to wealthy individuals does not reduce that burden, and therefore is not rationally related to decreasing special education costs.

C. Proposed Amendment

In order to remedy the inequality created by the current statute and bring the reimbursement provision in line with the IDEA’s purpose, the term “reimbursement” in the provision162 should be replaced as follows, with the new language in italics:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment or pay to the parents the cost of the enrollment as stated in an enrollment agreement 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.

This amendment communicates that every parent is entitled to unilaterally place their child in private school and receive payment for that placement if a court or IHO finds that the placement was proper. Although this amendment would broaden the language of the statute, it would not expand the relief that Congress intended to provide through the reimbursement provision – specifically, that all children receive a FAPE. Unilateral placements present one of the most significant costs that LEAs must absorb under the IDEA. Amending the reimbursement provision to

161 Florence, 510 U.S. at 15.
allow for payment of tuition in all circumstances where a FAPE has been denied, and the parents have properly placed their child in private school, will likely not significantly increase the frequency of placements or their cost.\textsuperscript{163} Parents that unilaterally place their child in private school must still prove that the LEA’s placement was inappropriate, the private school placement was appropriate, and the equities favor payment of tuition.\textsuperscript{164} This is a high burden, and therefore, relatively few parents will succeed.\textsuperscript{165} Moreover, the child in question still needs to be accepted into the private school, and a school that does not believe a child has a meritorious case will likely not enroll that child for fear of not receiving tuition payments.

Additionally, this amendment will allow and encourage parents and schools to enter into accurate contracts, a result that parties, courts, and Congress should desire. Under the current reimbursement provision, low-income parents demonstrate a financial obligation by entering into an enrollment contract that requires them to pay the school’s tuition. Although these contracts are arguably valid, since low-income parents are incapable of fulfilling their part of the contract without payment from the LEA, and since private schools are aware of the parents’ financial inability to pay when the parties form the contract, assertions that these contracts accurately reflect the parties’ agreement are disingenuous.\textsuperscript{166} Also, allowing these contracts to act as evidence of a financial obligation warranting reimbursement undermines the legitimacy of the judicial system, because it puts parents and schools in the unenviable position of having to mislead or lie to a judge or hearing officer about their intentions in entering the contract.\textsuperscript{167} If a party to an Agreement to Pay or Agreement to Cooperate and Pay admits that neither party to their contract intended it to be enforceable if payment was denied by the IHO, the parent would

\textsuperscript{163} See supra notes 150-61.

\textsuperscript{164} See Burlington, 471 U.S. at 370 (holding that in a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, the 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 also Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860, 869 (D.N.H. 1992) (stating the same rule followed by the court).

\textsuperscript{165} See Forest Grove School District v. T.A., 129 S.Ct. 2484, 2496 (2009) (noting that parents are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act); see also Florence, 510 U.S. at 15.

\textsuperscript{166} See discussion supra notes 63-65.

\textsuperscript{167} When these contracts are litigated, parties are asked about the accuracy of the contract and whether the parent truly had an intention to pay the tuition as required by the contract. Thus, a party must either lie and tell the court she intends to pay, or admit the invalidity of the contract. See, e.g., Application of a Child with a Disability, No. 09-079 at 11 (N.Y. State Review Office, September 14, 2009). This shows a parent’s testimony regarding her view of her obligations under the enrollment contract. Id.
likely be denied tuition payment under the reimbursement provision since the court would find that the parent did not incur a financial obligation. In such a situation, parties and private school representatives are tempted to lie under oath because doing so increases the likelihood that payment will be awarded.  

The direct payment provision will allow parties and private schools to enter into enrollment contracts that accurately reflect their agreement. Private schools are not generally in the business of educating children for free, so these schools will likely continue to require financially capable parents to pay tuition in advance, or enter into binding enrollment contracts for tuition, in order to reduce the risk of a parent refusing to pay tuition if she loses on the merits of her case at the administrative hearing. Even though this amendment may fall short of statutory perfection, it at least ensures that the unilateral placement remedy is available to all disabled students, thereby allowing them to receive a FAPE.

IV. AN IMMEDIATE SOLUTION: COURTS AND IHOS HAVE THE AUTHORITY UNDER THE APPROPRIATE RELIEF PROVISION TO AWARD DIRECT TUITION PAYMENTS

Due to the extreme inequities that result from an application of the current reimbursement provision, the IDEA should be amended. However, amendments to federal statutes do not happen overnight, and in the meantime, many low-income disabled students will be denied a FAPE. Because the IDEA provides courts and IHOS with “broad discretion” to “grant such relief as [they] determine[] is appropriate” “in light of the purpose of the Act,” those decision-makers should award direct tuition payments to parents under the IDEA’s appropriate relief provision. This relief is warranted because of “the breadth of the authority conferred by [the appropriate relief provision], the interest in providing relief consistent with the [IDEA’s] purpose, and the injustice that a contrary reading would produce.”

168 See, e.g., Application of a Child with a Disability, No. 08-050, at 10 (N.Y. State Review Office, July 23, 2008), available at http://www.sro.nysed.gov/decisionindex/2008/08-050.pdf (finding that the parties did not intend to be obligated by the contract despite the principal of private school’s testimony that the school assumed that the mother would pay the tuition if the school district did not).
169 Burlington, 471 U.S. at 369.
170 § 1415(i)(2)(C).
171 Burlington, 471 U.S. at 369.
The Supreme Court’s jurisprudence interpreting the appropriate relief provision demonstrates that a court or IHO has the authority under the appropriate relief provision to award payment of a private school’s tuition. In Burlington, the Court declared that “the ordinary meaning of ["appropriate relief"] confers broad discretion on the court. The type of relief is not further specified, except that it must be ‘appropriate.’ Absent other reference, the only possible interpretation is that the relief is to be ‘appropriate’ in light of the purpose of the Act.” The Court relied on this breadth of authority to authorize tuition payments, even where other provisions of the IDEA seemed to foreclose a remedy. In Carter, the Court found that tuition payments were appropriate relief even though the private school did not “meet the standards of the State educational agency” as required to establish a FAPE under the IDEA. The Court held that to read the FAPE “requirements as applying to parental placements would effectively eliminate the right of unilateral withdrawal recognized in Burlington.” Similarly, in Forest Grove, the Court held that the appropriate relief provision provided a remedy to a parent that unilaterally placed her child in private school, even though the child did not “previously receive special education and related services under the authority of a public agency” prior to enrollment in private school, as required by the IDEA. The Court held that the reimbursement provision “does not foreclose reimbursement awards in other circumstances” not specifically addressed by that provision. The “other circumstance” facing the disabled child in Forest Grove was that he never received special education services in public school before he was unilaterally placed in private school. Consequently, although the reimbursement provision did not apply to the circumstances, the appropriate relief provision’s “broad discretion” enabled the Court to award tuition payments because the relief sought by T.A.’s parents was “appropriate... in light of the Act’s

174 Burlington, 471 U.S. at 369.
175 Id. See Florence, 510 U.S. at 14.
177 Florence, 510 U.S. at 7, 13.
178 § 1412(a)(10)(C)(ii).
180 Id. at 2448 (holding that 1997 Amendments do not "categorically prohibit reimbursement for private-education costs if a child has not 'previously received special education and related services under the authority of a public agency'" (quoting § 1412(a)(10)(C)(ii))).
181 Id. at 2490 (quoting Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 369 (1985)).
broad purpose of providing children with disabilities a FAPE.”

In Billy’s situation, the “other circumstance” is his inability to incur a financial obligation warranting reimbursement. Similar to T.A., Billy falls outside the reimbursement provision, because the provision only captures a situation in which a parent is capable of paying a private school’s tuition. And since the reimbursement provision “bars reimbursement only when a school district makes a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child’s needs,” where an LEA fails to do so, and the reimbursement provision does not encompass the situation presented, a court or IHO has the discretion to award appropriate relief consistent with the IDEA’s purpose.

Direct tuition payments are appropriate because they require LEAs to “belatedly pay expenses that [they] should have paid all along and would have borne in the first instance had [they] developed a proper IEP.” The Court in Burlington stated that “it seems clear 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.” This “prospective injunction” is all that Billy’s parents are seeking. However, because “the review process is ponderous,” they have had to wait many months into the school year to receive their prospective relief. Given the passage of time, an injunction would not remedy Billy’s injury; whereas payment of the private school tuition would.

Although the Supreme Court has stressed that parents who unilaterally place their child in private school do so “at their own financial risk,” Billy’s parents’ failure to incur such a risk does not make direct tuition payments inappropriate. For some parents, incurring such a risk is impossible, but would still foreclose the unilateral placement remedy. This

182 Id. at 2490-91.
183 Id. at 2493 (emphasis added).
184 Id. at 2496 (explaining that “IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide FAPE”). See Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 370 (1985) (holding that the Court has broad discretion in determining relief for IDEA violations).
185 Burlington, 471 U.S. at 370-71.
186 Id. at 370.
187 Id.
188 When tuition payments are provide by the LEA, the unilaterally placed child receives an appropriate education at public expense. It is not until the LEA assumes payment of the private school tuition that the child receives a FAPE and the LEA has fulfilled its obligation under the IDEA. The payment by the LEA completes the requirement that the education be a public one.
189 Burlington, 471 U.S. at 374.
result is inapposite to the Court’s consistent iteration that the IDEA “was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.” Precluding low-income parents from receiving direct tuition payments would defeat the IDEA’s hallmark objective. Direct tuition payments that provide a free appropriate public education are “‘appropriate’ in light of the purpose of the Act,” and should be awarded where a parent has not incurred a financial obligation to pay tuition.

CONCLUSION

Under either solution proposed above, Billy would be able to receive an appropriate education for his fourth grade year, as Academy B would accept Billy, confident that his parents would be awarded tuition payments if they succeeded on the merits of Billy’s case. Anna’s parents would also be able to receive an appropriate remedy from the LEA (as she had in her third grade year), since, under the revised amendment, she would still be entitled to payment of the private school tuition. This resolution reflects the IDEA’s purpose and produces an equitable result. Thus, Congress should amend the reimbursement provision to ensure that all disabled students, regardless of their financial status, can receive a free appropriate public education. Until Congress enacts such an amendment, however, courts and IHOs should award direct tuition payments to parents that have not paid out-of-pocket expenses or incurred a financial obligation.

190 Id. at 372. See Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13-14 (1993) (stating “IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of [the Act] to bar reimbursement in the circumstances of this case would defeat this statutory purpose.”) (citing Burlington, 471 U.S. at 373) (citation omitted).
191 See 20 U.S.C. § 1400(d) (2011); see also SALOMONE, supra note 94, at 146 (finding “[t]he centerpiece of the [IDEA] is a grants-in-aid program authorized under Part B. It requires states to provide all handicapped children between the ages of three and twenty-one with a ‘free, appropriate education.’”).
192 Burlington, 471 U.S. at 369.