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# A historical analysis on the status of unilateral private placements in special education

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ABSTRACT

A HISTORICAL ANALYSIS ON THE STATUS OF UNILATERAL PRIVATE PLACEMENTS IN SPECIAL EDUCATION

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With the passage of the Education for All Handicapped Children Act (EAHCA) in 1975, parents were provided the right to a hearing if they did not agree with the special educational services being provided to their child. However, it was not until the IDEA 1997 amendments that tuition reimbursement was specifically offered when a school district failed to provide a free and appropriate public education (FAPE) to a child with a disability. In current times, when parents disagree about the services provided to their child, they often do not wait for the due process procedure to resolve the issue. Instead, they withdraw their child from the public school and place them in a specialized private school. After unilaterally placing their child in the private school, parents are then able to seek tuition reimbursement and compensatory educational services from the public school system.

As school districts attempt to provide special education students with a free and appropriate public education, they are forced to accomplish this within budgetary realities. Considering that individual cases of tuition reimbursement have cost districts over one million dollars, it is essential that school administrators are familiar with each aspect of unilateral private

placements. In order to provide school administrators with a relevant legal history of unilateral private placements, a legal research methodology was employed for this study. The resulting review and analysis will provide public school educators with information on current trends, as well as potential new provisions during the next reauthorization of IDEA.

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# A HISTORICAL ANALYSIS ON THE STATUS OF UNILATERAL PRIVATE PLACEMENTS IN SPECIAL EDUCATION

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DEDICATION

For Sara, Jillian, Kieran, and Ruby

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CHAPTER ONE

# INTRODUCTION TO THE STUDY

## Problem Statement

The Individuals with Disabilities Education Act (IDEA) requires that school districts identify students with disabilities and provide them with a free and appropriate public education (FAPE).[1] However, there are times when school districts and parents have a difficult time coming to consensus about whether the special education services are sufficient and appropriate. Due process hearings are the principal mechanism for resolving disagreements between school districts and parents of children with disabilities. The Individuals with Disabilities Education Act regulations provide that a parent or a public agency may file a due process complaint in regards to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE.[2] If the school district proposes a public school placement for a disabled child, but the parents of the child think private school is necessary, the parents can request a due process hearing and ultimately appeal to the courts to determine the appropriate placement for their child.[3] Since this process can sometimes take several months or years, parents sometimes decide to unilaterally place their child in a private school during the pendency of the administrative hearings or judicial review.

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[1] Individuals with Disabilities Education Act of 2004, 20 U.S.C. § 1412(a) (2004).
[2] *Id.* at § 1415(b)(3) (2004).
[3] *Id.* at § 1415(f) (2004).

[2] *Id.* at § 1415(b)(3) (2004).
[3] *Id.* at § 1415(f) (2004).

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), also referred to as Public Law 94-142, which was designed to eliminate discrimination on the basis of a handicapping condition.[4] In 1990, P.L. 94-142 was renamed the Individuals with Disabilities Education Act (IDEA).[5] Congress went on to reauthorize IDEA again in both 1997 and 2004, each time increasing services for students with disabilities.[6] The Individuals with Disabilities Education Act ensures that eligible students receive a free and appropriate public education by requiring school districts to meet with a student's parents to determine educational needs, annual goals, and other needed services.[7] A written Individualized Education Plan documents the resulting accommodations, which the public school must implement in either a public or private school.[8] Pursuant to the "least restrictive environment" requirement, the child should remain in the public school system if the school has the ability to implement the services on the IEP.[9] IDEA also requires that disabled and non-disabled students should be educated together unless the regular public school placement deprives the disabled student of an appropriate education.[10]

Two of the most important concepts that are often involved in IEP decisions, as well as placement disputes, are free and appropriate public education (FAPE) and least restrictive environment (LRE). The concept of FAPE is considered to be special education and related services that have been provided at public expense and meet the standards of the state

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[4] Education for All Handicapped Children Act of 1975, Pub.L. No. 94-142, 89 Stat. 773 (1975).
[5] Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990).
[6] Candace Cortiella, *IDEA 2004 Close Up: The Individualized Education Program,* GREAT SCHOOLS, http://www.greatschools.org/special-education/legal- rights/916-the-individualized-educat ion-program-iep.gs (last visited Jan. 28, 2014).
[7] *Frank G. v. Bd. Of Educ.*, 459 F.3d 356, 363 (2d Cir. 2006).
[8] Sandra J. Altshuler & Sandra Kopels, *Advocating in Schools for Children with Disabilities: What's New with IDEA?*, 48 SOC. WORK, 320, 320-21 (2003).
[9] *Id.*
[10] 20 U.S.C. § 1412(a)(5)(A)(2006).

educational agency.[11] The services must include an appropriate preschool, elementary, or secondary school education and be provided in conformity with the IEP requirements under the Individuals with Disabilities Education Act.[12] One area of contention results from the fact that even with the *Board of Education v. Rowley*[13] decision, there exists no concrete definition of appropriate services that can uniformly be applied to all other cases. Furthermore, IDEA does not provide a clear definition of an appropriate education. Instead, one must turn to case law to determine how the various courts have interpreted this legislation and the concept of FAPE.

The other important concept, least restrictive environment, requires that a student with a disability should have access to the general education curriculum. IDEA requires that "to the maximum extent appropriate, children with disabilities should be educated with children that are not disabled."[14] Furthermore, IDEA states that "separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[15] A placement in the general education environment "should be the setting of choice and a segregated setting should be contemplated only if an inclusionary placement has failed despite the best efforts of educators or if there is overwhelming evidence that it is not reasonable."[16]

When the family of a special education student feels that they are not receiving the services required for FAPE, they have the option to utilize their due process rights and pursue an

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[11] *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).
[12] *Id.*
[13] *Id. at* 182 (1982). The *Rowley* Court acknowledged that IDEA's definition of FAPE was "cryptic," as it did not provide any substantive standards providing the level of education that should be provided to handicapped children.
[14] 20 U.S.C. § 1412(a)(5)(A) (2004).
[15] *Id.*
[16] ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW, 27 (2003).

administrative hearing. Due process, also referred to as an "impartial due process hearing," was a procedural safeguard first provided to parents in 1975 by the Education for All Handicapped Children Act.[17] The Individuals with Disabilities Education Act gives states the choice of having a one-tiered system, consisting solely of an impartial due process hearing, or a two-tiered system, which includes an additional officer-level review.[18] After exhausting their administrative remedies, the aggrieved party has the right to judicial review in state or federal court.[19]

The Individuals with Disabilities Education Act accords the authority to award attorney's fees in specified circumstances and requires them to grant "such relief as the court determines is appropriate."[20] While the court, in its discretion, may award reasonable attorney's fees as part of the costs to the prevailing party, this provision does not make a district responsible for reimbursing prevailing parents for services rendered by experts.[21] In the expansive litigation that has arisen under IDEA, courts have exercised various traditional forms of relief, primarily in the specialized equitable remedies of tuition reimbursement and compensatory education.[22] The courts are divided as to whether IDEA allows for the legal remedy of money damages.[23]

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[17] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.
[18] Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N L. JUD. 1, 3, (2011).
[19] *Id.*
[20] 20 U.S.C. § 1415(i)(2)(C)(iii) (2005).
[21] *Arlington*, 548 U.S. 291, 297 (2006). The Court went on to state that § 1415(i)(3)(B) was not meant to be an open-ended provision that makes participating states liable for all expenses incurred by prevailing parents in connection with an IDEA case (for example, travel and lodging expenses or lost wages due to time taken off from work).
[22] Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N L. JUD. 1, 4, (2011).
[23] *Id.* at 3. See *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007) (reversing the Third Circuit's position, which had previously permitted compensatory damages under the IDEA via § 1983), *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13 (1st Cir. 2006) (interpreting the IDEA as not providing money damages), *Polera v. Bd. of Educ.*, 288 F.3d 478 (2d Cir. 2002) (discussing the situation in which awarding money damages is the only way to compensate for the grievance from the situation in which the injured party failed to timely pursue effective

Between the years of 1990 and 1997, there was a huge growth in the number of due process hearings that took place.[24] However, since 1997, there has been only a slight growth in the number of due process hearings.[25] The concerning thing for school districts is that the process has become more time-consuming, as there has been an overall increase in the average number of sessions, issues decided, legal citations, legal sources cited, and length of written opinions.[26] Educating children with disabilities is a significant financial responsibility for public school systems and one of the reasons is the relatively high percentage of students who receive special education services.[27] During the 2010-11 school year, the number of children receiving services under the Individuals with Disabilities Education Act was 13% of the total U.S. public school enrollment.[28] This is a substantial increase of students being served under Public Law 94-142 from the 8.3% who were being initially being served when the Education for All Handicapped Children Act[29] was first passed in 1975.[30] Additionally, between the years of 1993

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remedies), *Thompson v. Bd. of Special Sch. Dist. No. 1*, 144 F.3d 574 (8th Cir. 1998) (denying compensatory damages because neither general nor punitive damages are available under the IDEA).

[24] Perry A. Zirkel, and Karen L. Gischlar, *Due Process Hearings Under the IDEA: A Longitudinal Frequency Analysis,* 21 JOURNAL OF SPECIAL EDUCATION LEADERSHIP, 25, March 2008.

[25] *Id.*

[26] Perry A. Zirkel, Zorka Karanxha, & Anastasia D'Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study,* 27 J. NAT'L ASS'N L. JUD. 27, 38-44 (2008).

[27] Susan Aud et al., *The Condition of Education*, U.S. DEP'T OF EDUC. & NAT'L CTR. FOR EDUC. STATISTICS, 167 (2011).

[28] NAT'L CTR. FOR EDUC. STATISTICS, NUMBER AND PERCENTAGE OF CHILDREN SERVED UNDER IDEA, PART B, BY AGE GROUP AND STATE OR JURISDICTION, http://nces.ed.gov/programs/digest/d12/tables/dt12_048.asp (last visited Jan. 19, 2014).

[29] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

[30] NAT'L CTR. FOR EDUC. STATISTICS, NUMBER AND PERCENTAGE OF CHILDREN SERVED UNDER IDEA, PART B, BY AGE GROUP AND STATE OR JURISDICTION, http://nces.ed.gov/programs/digest/d12/tables/dt12_048.asp (last visited Jan. 19, 2014). See 1976-77 school year.

and 2004 alone, over 1.2 million additional students began receiving services under IDEA, an increase of a full percent of the general population.[31]

Studies have shown that on average, a due process hearing occurs once for approximately every 1,633 students who are eligible for special education.[32] Approximately 47% of all hearings that result in a decision involve tuition and related reimbursements.[33] While these situations may not occur daily in every district, the litigation costs can be so exceptional that even an occasional occurrence can have a profound impact upon a district. This is due to the fact that for each open due process case that goes to litigation, it costs districts an average of $94,000 annually for the legal costs alone.[34]

A series of legal decisions in the recent years have had a significant impact on the process of unilateral private placements, reinforcing parents' rights to unilaterally place their child in a

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[31] U.S. DEP'T OF EDUC., 28TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 39 (2006), available at http://www2.ed.gov/about/reports/annual/osep/2006/parts-b-c/28th-vol-1.pdf.

[32] Samuel R. Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 121, 127 (Joshua M. Dunn & Martin R. West eds., 2009) (citing U.S. General Accounting Office, GAO-03-897, *Special Education: Numbers of formal disputes are generally low and states are using mediation and other strategies to resolve conflicts* (2003)). The National Association of State Directors of Special Education study from 1996 to 2000 estimated that state agencies across the country held approximately five due process hearings for every 10,000 special education students. Id. The Consortium for Appropriate Dispute Resolution in Special Education found there are 7.9 due process hearings for every 10,000 students. The average of these two studies was used to determine the ratio of 1:1,633.

[33] Zirkel, P.A., *Adjudicative Remedies for Denials of FAPE under the IDEA*. 33 J. NAT'L ASS'N L. JUD. 214, 228 (2013).

[34] Samuel R. Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 121, at 129 (Joshua M. Dunn & Martin R. West eds., 2009) (citing Jay G. Chambers et al., Center for Special Education Finance, Report 4, What are we spending on procedural safeguards in special education, 1999-2000?, at 5, 8 (2003)).

private placement at public expense.[35] However, before discussing these cases, some additional background is necessary. In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), which mandated that children with disabilities receive a "free appropriate public education."[36] At that time, only approximately 20% of students with disabilities were receiving an education in the public school systems.[37] The EAHCA included most of the important foundational protections that are now found in the Individuals with Disabilities Education Act (IDEA). These included the rights to an Individualized Educational Plan (IEP), a free and appropriate public education (FAPE), education in the least restrictive environment (LRE), and due process rights.[38]

In 1990, EAHCA was reauthorized and renamed IDEA, which recognized 13 types of disabilities as "handicaps" and required states to address the educational needs of children with disabilities from ages 3 to 21.[39] IDEA was subsequently amended in 1997 and 2004, each time strengthening the rights of students and emphasizing the importance of children with disabilities to be educated with their non-disabled peers. In its present form, IDEA requires that the IEP clarify what services are to be provided, how often they are provided, and the student's present levels of performance.[40] Additionally, the IEP should state how the student's disability affects his/her academic performance (adverse affect) and accommodations and modifications that are to

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[35] Stacey L. Sheon, Comment: *Opening the Doors to a Quality Public Education for Children with Disabilities or Slamming Them Shut: A Critique of the Supreme Court's Treatment of Private-Tuition Reimbursements Under the IDEA,* 49 Washburn L.J. 599, 218 (2010).
[36] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180-81 (1982) (quoting 20 U.S.C. § 1412 (1976)).
[37] Alexia M. Baiman, *Educating Special Education Students Who have only Attended Private Schools: After Tom F., Who Is Left with the Bill?,* 71 U. PITT. L. REV.121, 142 (2009).
[38] Education for All Handicapped Children Act of 1975, Pub.L. No. 94-142, 89 Stat. 773 (1975).
[39] Individuals with Disabilities Education Act, Pub. L. No. 104-476, 104 Stat. 1103, 1141-42 (1990) (codified as amended at 20 U.S.C. §§1400-1482).
[40] Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, 118 Stat. 2647.

be provided for the student.[41] IDEA also provides for related services, such as transportation, developmental services, and other supportive services that are needed for a child with a disability to make appropriate progress.[42]

A number of important legal decisions have paved the way for unilateral private placements, starting in 1982 with *Hendrick Hudson District Board of Education v. Rowley.*[43] The *Rowley* decision was the first to significantly address the level of special education services required to provide a student with FAPE. The Supreme Court has heard four cases[44] that specifically address unilateral private placements, starting in 1985 with *School Committee of Burlington v. Department of Education*. In *Burlington,* the Court decided that the stay-put provision does not require parents to wait until a hearing decision has been made before placing their child in a private placement.[45] The second case, *Florence County School District Four v. Carter* (1993), established that the unilateral placement does not have to be at a public school, as long as there are appropriate services provided.[46] In the final two cases, *Board of Education of the City of New York v. Tom F*. (2007) and *Forest Grove School District v. T.A.* (2009), the Court found that students do not first need to receive special education in the public schools for a parent to be eligible for tuition reimbursement.[47]

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[41] Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. §§ 1400-1482) (amending the IDEA).
[42] *Id.*
[43] *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).
[44] See *Burlington* (1985), *Carter* (1993), *Tom F.* (2007), and *Forest Grove* (2009). Although the circumstances in *Schafer v. Weast* involved a unilateral private placement, this was not the primary issue argued in court.
[45] *Burlington* v. *Dep't of Educ. of Mass.,* 471 U.S. 359 (1985).
[46] *Florence Co. Sch. Dist. Four v. Shannon Carter*, 510 U.S. 7 (1993).
[47] *Bd. of Educ. of City of New York v. Tom F*, 128 S. Ct. 1 (2007); *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009).

The average cost for a student enrolled in a private special education program is nearly five times as much as the cost per student in a public school; therefore, tuition reimbursement can result in enormous awards for the parents.[48] Often, the costs for these placements can reach as high as $100,000 per year, before legal costs are included.[49] One reason that the potential tuition reimbursement can be so high is that the award often includes the cost of a private residential facility, which may include 24-hour services and psychiatric care.[50] With this much at stake, it has become increasingly important for districts to thoroughly understand the process and issues related to unilateral private placements.

## Research Questions

This study investigated the following research questions:

1. What is the legal history of special education rights and how do these rights relate to unilateral private placements in the United States?

2. What do school administrators need to know about the federal special education jurisprudence and how it is related to unilateral private placements?

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[48] Stacey Lynn Sheon, *Opening the Doors to a Quality Public Education for Children with Disabilities or Slamming Them Shut: A Critique of the Supreme Court's Treatment of Private-Tuition Reimbursement Under the IDEA*, 49 WASHBURN L.J. 599, at 624 (2010); Brief for Council of the Great City Schools As Amicus Curiae in Support of Petitioner at 22-23, *Forest Grove Sch. Dist. v. T.A*, 129 S.Ct. 2484 (2009) (No. 08-305). The average cost for a public special education program is $ 5,709 as compared to a private special education at $ 26,440. A Boston public school tuition survey shows that a public special education program costs approximately $ 13,000 per student, while private special education costs are an average of $59,553 per pupil.

[49] Melanie Asmar, *Special Education Costs Soar; Unpredictable Bill Can Strain Local Districts*, CONCORD MONITOR, Feb. 17, 2008, available at http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20080217/FRONTPAGE/802170375.

[50] See *Jefferson County Sch. Dist. v. Elizabeth E.*, 702 F.3d 1227, 1244 (10th Cir. 2012). The tuition costs for the placement at Innercept were $9,800 per month.

3. What is the history and current provisions of IDEA as it relates to unilateral private placements?

## Procedures

A legal research methodology was employed for this study. Research included an extensive search for sources of law, including federal legislation, regulations, case law, related law review articles, other scholarly publications, and relevant documents. These sources were reviewed, analyzed, and synthesized to construct a historical timeline, perspective on the current legal status of these provisions, and a hypothesis of its future direction. The literature review of cases is arranged in chronological order to provide a historical perspective of the IDEA provisions as well as the relevant case law.

## Significance of the Study

The frequency of litigation involving special education services has continued to rise dramatically since the late 1970s.[51] One of the biggest areas of contention in present-day special education law is private placements, with approximately 47% of all decisions involving tuition and related reimbursements.[52] One of the reasons why hearings involving tuition reimbursement occur so frequently is that there are approximately 90,000 U.S. students in private education placements.[53] The potential risk of having to reimburse a parent for one of these private

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[51] Perry A. Zirkel & Brent L. Johnson, *The "Explosion in Education Litigation: An Updated Analysis, 265* EDUC. L. REP. 1 (2011) (finding pronounced increase in special education court decisions in Westlaw database during the most recent three decades).

[52] Zirkel, P.A., *Adjudicative Remedies for Denials of FAPE under the IDEA.* 33 J. NAT'L ASS'N L. JUD. 214, 228 (2013).

[53] Tamar Lewin, *Court Affirms Reimbursement for Special Education*, N.Y. TIMES, June 23, 2009, A16, available at http://www.nytimes.com (search using "Tamar Lewin Forest Grove v.

placements further complicates the already-strained financial situation of public school systems.[54] The resulting due process hearings can result in enormous tuition reimbursement awards for the parents, as well as reimbursed legal fees and other compensatory awards. In the current economic climate, it has become increasingly important for districts to fully understand all aspects of unilateral private placements, including the history of litigation and the current provisions of IDEA. With the recent U.S Supreme Court decisions giving parents additional liberties in this process, it is expected that private placements will continue to be an increasingly significant threat to the financial health of public school districts. Therefore, it is imperative that this legal process is studied and updated regularly so that administrators can be provided with the most updated information about this important legal process.

## Delimitations

This study was designed to analyze the impact of various legislative acts and court cases on the parental placement of students in private schools. A delimitation of this study is that only federal, appellate-level case law was considered. The cases in this study came from either the United States Supreme Court or the United States Circuit Court of Appeals. Cases that resulted in a summative judgment were not included.[55]

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T.A."; then follow "Court Affirms Reimbursement for Special Education" hyperlink). Out of the $36 billion spent for school aged-children, $5.3 billion was spent on private programs not under the authority of a public agency.

[54] See Brief for Council of the Great City Schools As Amicus Curiae in Support of Petitioner at 24-25, *Forest Grove Sch. Dist. v. T.A*, 129 S.Ct. 2484 (2009) (No. 08-305). A school superintendent stated, "You really can have just a few very high-cost students come into your district and have a huge impact on your cost per pupil." Id. (quoting Meaghan M. McDermott, Special Ed., Rochester Democrat and Chronicle, Dec. 2, 2007, 1A).

[55] Nine summative judgment cases were identified; see Appendix.

## Limitations

While U.S. Supreme Court cases are certainly controlling in many of the applicable areas of law, not every issue that is relevant to this study has been litigated at that level. Since there is still limited applicability on a national basis, it is often more important to assess how each specific federal circuit court of appeals has historically ruled. Also, the way that each federal circuit court of appeals jurisdiction rules differently on cases is also important to examine since this impacts decisions made at the hearing officer level of review in those areas. Since not all court decisions are published, it is possible that there is additional case law on this subject.

CHAPTER TWO

LITERATURE REVIEW

## Introduction

A quality education provides the necessary skills for children to become self-sufficient, contributing members of society.[56] However, in our nation's public schools, the parents of a child challenged by disabilities sometimes feel that their child is not receiving the intensive services needed to allow them to be a productive member of society.[57] One of the reasons why public schools have a difficult time meeting the diverse needs of disabled learners and the expectations of parents is the limited resources and budgetary funds. School officials are expected to provide quality educational services to all of the students residing within their school district. While special education students make up approximately 13% of the overall school population, special education services consume an average of 20% of a school district's operating budget.[58] School officials must develop an Individualized Educational Plan (IEP) for each child with disabilities in order to meet the requirements of a free and appropriate public

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[56] See President Barack Obama, Prepared Remarks of President Barack Obama: Back to School Event (Sept. 8, 2009), available at http://www.whitehouse.gov/mediaresources/PreparedSchoolRemarks.

[57] See N. Jane Dubovy, Expert Perspective: *Thoughts on Forest Grove School District v. T.A.*, Examiner.com, June 27, 2009, http://www.examiner.com (search using "Expert Perspective on Forest Grove"; then follow "*Expert Perspective: Thoughts on Forest Grove School District v. T.A.*" hyperlink).

[58] See Brief for Council of the Great City Schools as Amicus Curiae in Support of Petitioner at 22-23, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305); Tamar Lewin, *Court Affirms Reimbursement for Special Education*, N.Y. TIMES, June 23, 2009, A16, available

education (FAPE).[59] When school officials are unable to provide a FAPE for a child with disabilities they may refer the student to a private school at no cost to the parents.[60] If the parents of a child with a disability unilaterally enroll their child in a private school without the consent of the district, a court or hearing officer may require the district to reimburse the parents for the cost of the private placement if school officials had not provided the child with a FAPE.[61]

Under the Individuals with Disabilities Education Act[62] (IDEA), courts have the authority to provide appropriate relief, including tuition reimbursement, to the parents of a child with a disability. If a parent removes their child from an inappropriate public school placement and unilaterally places them in a private school, the IDEA recognizes their eligibility for tuition reimbursement if certain criteria are met. First, school officials must have failed to offer an appropriate Individualized Educational Plan (IEP) and the child's private school placement must be appropriate under the IDEA.[63] In addition, equitable considerations (related to the reasonableness of the parent's action) must also support granting relief to the parent.[64] The following timeline highlights both the legislative acts and litigation that has provided parents with the right to unilaterally place their child in a private placement and then seek tuition reimbursement.

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[59] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985).
[60] 20 U.S.C. § 1412(a)(10)(B)(i) (2004).
[61] *Id.* at § 1412(a)(10)(C)(ii) (2004).
[62] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.
[63] 20 U.S.C. § 1412(a)(10)(C)(ii) (2004).
[64] *Id.*

**Early History**

Throughout history, the treatment of individuals challenged by disabilities has varied with the social and culture climate of that period of time.[65] However, one perception that has consistently been an obstacle for individuals with disabilities is the perception they are "incapable of being productive members of society."[66] Because of this persistent attitude, meeting the educational needs of children with disabilities was not prioritized as a top concern for our public schools until more recently in our nation's history.[67] Scientific thought first began to challenge the moral overtones associated with the treatment of individuals with disabilities during the 17th century.[68] By the end of the Age of Enlightenment, society began providing remedial training for individuals who had visual or hearing impairments.[69] After the American Civil War, many communities began adopting compulsory attendance laws.[70] During this time, while children who suffered from less severe disabilities gained access to formal education, they

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[65] See HENRI-JACQUES STRIKER, A HISTORY OF DISABILITY, 14 (William Sayers trans., Univ. of Mich. Press 1999). "There is no disability, no disabled, outside precise social and cultural constructions."

[66] Barbara P. Ianacone, *History Overview: From Charity to Rights*, CHANGING PATTERNS OF LAW: THE COURTS AND THE HANDICAPPED 953 (William R.F. Phillips & Janet Rosenberg eds., 1980). This notion is traceable to the English Poor Law System, which emerged in the colonies as maintenance for those who were dependent on society, 953-54.

[67] ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW 129-130, 1 (2003). The government provided institutions to care for individuals with disabilities but did not take steps to bring them into the mainstream of society.

[68] HENRI-JACQUES STIKER, A HISTORY OF DISABILITY 14, 90-92 (William Sayers trans., Univ. of Mich. Press 1999). Thinkers of the time explored causes of disability, such as imaginings of a child's mother, signaling a transition from demonic or moral causation to a more natural sequence of events.

[69] *Id.* at 102, 206. Specialized institutions emerged for individuals who were blind or deaf.

[70] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND THE AMERICAN LAW, 29 (1990).

were often separated into different classrooms or schools.[71] These students were labeled as "deaf," "feebleminded," or "crippled."[72]

World War I was also an important period of time for individuals with disabilities because society largely felt the soldiers who had sustained lifelong injuries deserved rehabilitation.[73] Although important reform began taking place after World War I, much of society felt individuals with disabilities still only had a "limited right to live in the world."[74] No state provided students with disabilities meaningful access to schools until 1911, when New Jersey became the first state to provide special education classes.[75] Educational classrooms for the disabled came into existence in the 1920s, especially in progressive cities like Boston and Chicago.[76] However, students who did not show progress in the classrooms were deemed "uneducable" and excluded from public schooling.[77]

### ***Buck v. Bell (1927)***[78]

In 1927, one of the first cases to challenge the rights of people with disabilities was the case of *Buck v. Bell*. In this case, a Virginia state institution sought an order compelling the

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[71] Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 871 (1975).
[72] *Id.*
[73] HENRI-JACQUES STIKER, A HISTORY OF DISABILITY 14, 124 (William Sayers trans., Univ. of Mich. Press 1999).
[74] Barbara P. Ianacone, *Historical Overview: From Charity to Rights*, CHANGING PATTERNS OF LAW: THE COURTS AND THE HANDICAPPED 953, 956 (William R.F. Phillips & Janet Rosenberg eds., 1980).
[75] Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 873 (1975).
[76] *Id.*
[77] *Id.*
[78] *Buck v. Bell*, 274 U.S. 200 (1927).

sterilization of a "feeble-minded" woman named Carrie Buck.[79] Carrie's attorney challenged the attempt by arguing forced sterilization encroached upon her right of bodily integrity and therefore violated the due process clause of the Fourteenth Amendment.[80] In *Buck v. Bell*, the superintendent of the state institution where Carrie resided sought an order for sterilization by salpingectomy and the state trial court found in favor of the sterilization.[81] The family appealed to the Circuit Court of Amherst County, the Virginia Supreme Court, and then finally to the United States Supreme Court. Each court found the sterilization law complied with both the state and federal constitutions.[82] The Supreme Court determined forced sterilization was allowable under the Fourteenth Amendment "for the protection of the individual and of society."[83] When delivering the opinion of the Court, Justice Holmes stated that "three generations of imbeciles is enough."[84] At one time or another, at least 30 states permitted the involuntary sterilization of people with disabilities.[85] That the majority of states allowed this type of procedure to be forced upon individuals with disabilities shows how disparate their treatment was compared to the rest of the population.

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[79] *Id.* at 205.
[80] *Id.* at 201.
[81] *Id.*
[82] *Id.* at 207. The *Buck* Court employed rational basis review, rather than strict scrutiny. As a result of *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), procreation is now considered a fundamental right, so the statute at issue in *Buck* would now fail strict scrutiny.
[83] *Id.*
[84] *Id.*
[85] AMERICAN EUGENICS MOVEMENT, http://histclo.com/essay/misc/eug/cou/eug-us.html (last visited on Mar. 24, 2014).

### *Brown v. Board of Education (1954)*[86]

For children with mental and physical disabilities, early help surprisingly came from the civil rights movement. In the 1954 landmark civil rights case, *Brown v. Board of Education,* the United States Supreme Court finally addressed whether all children should be afforded an equal educational opportunity.[87] Although this case actually focused on racial segregation, it also influenced the rights of children with disabilities. The *Brown* case was decided on the principle of the Fourteenth Amendment, which provides that the states may not deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."[88] Although the United States Constitution does not provide a right to education, if a state makes the decision to provide an education to its citizens, a property interest in education is thereby created.[89] Once a property interest is established, the Fourteenth Amendment requires that education is provided to equally situated individuals and that this state-granted right is not denied without due process of law.[90]

The case of *Brown v. Board of Education* combined five lower court cases in which African-American children were denied admission to their neighborhood public schools.[91] In each instance, the students were denied admission to schools attended by Caucasian children under laws requiring or permitting segregation according to race.[92] In three out of the four cases, the lower court denied relief to the plaintiffs under the "separate but equal" doctorine announced

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[86] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
[87] *Id.* at 486.
[88] U.S. Const. amend. XIV § 1.
[89] *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).
[90] *Id.*
[91] *Id.* at 486. The five cases were *Brown*, *Briggs v. Elliott* (filed in South Carolina), *Davis v. County School Board of Prince Edward County* (filed in Virginia), *Gebhart v. Belton* (filed in Delaware), and *Bolling v. Sharpe* (filed in Washington D.C.).
[92] *Id.* at 487.

under *Plessy v. Ferguson* in 1896.[93] The families alleged operation of segregated schools deprived their children of the equal protection of the laws under the Fourteenth Amendment.[94]

In its landmark decision, the Supreme Court unanimously declared even if segregated Black and White schools were of equal quality in terms of both facilities and teachers, segregation was harmful to Black students and, therefore, unconstitutional.[95] The unanimous Court concluded the impact of segregated schools was greater when sanctioned by the law because it communicated "the inferiority of the negro group."[96] The Court further explained this sense of inferiority would then affect the motivation of the segregated Black child to learn and would deprive them of the benefits they would receive in an integrated school system.[97] The Justices concluded the doctrine of "separate but equal" had no place in public schools as it would deprive Black children of the equal protection of the laws guaranteed by the Fourteenth Amendment.[98]

The *Brown* decision served as an impetus for the special education movement because the concept of equal opportunity derived from the Fourteenth Amendment could be applied not only to minorities but also to children with disabilities.[99] *Brown* led to a growing understanding that all people, regardless of race, gender, or disability, had an equal right to educational opportunities. Chief Justice Warren writing the unanimous decision stated education was "the

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[93] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[94] *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954).
[95] *Id.* at 494-95.
[96] *Id.* at 494.
[97] *Id.* at 494-95.
[98] *Id.* at 495.
[99] MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION 54, 59 (1st ed. 1998). Mitchell Yell said, "In our country, public education is viewed as a birthright that leads to an educated electorate without which there would be no viable democracy."

most important function of state and local governments."[100] Establishing a high priority for public education provided the background for the idea that all students with disabilities are entitled to a free and appropriate education.[101] *Brown*'s underlying principles encouraged parents to form advocacy groups and push for these rights to be extended to their children.[102] In the late 1960s and early 1970s, parents and activists brought cases seeking educational equality for poor and minority children, gathering more momentum for students with disabilities to be included in the public schools.[103]

### ***Pennsylvania Association for Retarded Children v. Pennsylvania (1972)*[104]**

When the *Brown* Court held the segregation of Black students was unconstitutional, the decision encouraged parents of disabled children to join together to fight for basic educational rights.[105] The next significant victory for children with disabilities was the case of *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*. The *PARC* case was a class action lawsuit brought on behalf of mentally retarded children in Pennsylvania who had been statutorily

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[100] *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).
[101] Gabriela Brizuela, Note, *Making an "IDEA" a reality: Providing a free and appropriate public education for children with disabilities under the Individuals with Disabilities Education Act*, 45 VAL. U.L. REV. 595, 598-99 (2011).
[102] MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION 54, 56-59 (1st ed. 1998). A number of national advocacy groups formed, such as the National Association for Retarded Children and the Council for Exceptional Children.
[103] CHARLES J. RUSSO & ALLAN G. OSBORNE, JR., ESSENTIAL CONCEPTS & SCHOOL-BASED CASES IN SPECIAL EDUCATION LAW 4 (2008), 6-7 (quoting *Watson v. City of Cambridge*, 32 N.E. 864 (D. Mass. 1893)); see also *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (finding that a public school's failure to provide English language instruction to students of Chinese ancestry who did not speak English violated the Civil Rights Act of 1964 because it denied them the meaningful opportunity to participate in public education).
[104] *PARC*, 343 F. Supp. 279 (1972).
[105] *Brown v. Bd. of Educ.*, 347 U.S. 483.

excluded from public schools.[106] At the time of the PARC case, across the country it was estimated state statutes denied 70,000 – 80,000 children access to public education services in schools, community facilities, and state residential institutions.[107]

Four[108] Pennsylvania State statutes excluded children who were deemed mentally unfit to attend the public schools.[109] At that time, Pennsylvania disabled children could be excluded from the public schools if a public school psychologist or an approved mental clinic determined that a child was uneducable and untrainable.[110] Another statute allowed school districts to refuse enrollment to any child who had not attained a mental age of five years of age.[111] Since the established compulsory education age began at eight years old, this mental age was being used to argue these children's attendance in the public schools was noncompulsory.[112] The plaintiffs in this case alleged that Purd. Stat. Sec. 13-1375[113] (uneducable and untrainable) and Purd. Stat. Sec. 13-1304[114] (mental age of five years) were unconstitutional for a multitude of reasons.

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[106] *PARC*, 343 F. Supp. 279, 281 (1972).
[107] *Id.* at 296.
[108] *Id. at* 281. See Statutes: (1) 24 Purd. Stat. Sec. 13-1375 relieves obligation to educate a child who is uneducable or untrainable; (2) 24 Purd. Stat. Sec 13-1304 allows indefinite postponement of admission to school and student who has not attained a mental age of five years; (3) 24 Purd. Stat. Sec. 13-1330 excuses children from compulsory attendance if a psychologist finds them unable to profit from school; (4) 24 Purd. Stat. Sec. 13-1326 defines compulsory school age as 8 to 17 years but was used to postpone the admission of disabled kids until age 8 or to eliminate them from public schools at age 17.
[109] *Id.*
[110] *Id.* at 282.
[111] *Id.*
[112] *Id.*
[113] *Id.* Relieved the State Board of Education from any obligation to educate a child whom a public school psychologist certified as uneducable and untrainable.
[114] *Id.* Allowed an indefinite postponement of admission to public school of any child who has not attained a mental age of five years.

These statutes existed even though experts had already identified that educational programs would allow the majority of retarded people to become self-sufficient.[115]

The plaintiffs filed their claim in the United States District Court for the Eastern District of Pennsylvania, arguing the denial of a public education to children with mental retardation violated the Equal Protection Clause of the Fourteenth Amendment.[116] They also contended the state statutes lacked any provision for notice and a hearing before a retarded person was excluded from the right to receive a public education.[117] Second, it was alleged Sections 1375 and 1304 of the state statute violated federal equal protection because it was assumed, without any supporting basis in fact, certain retarded children were uneducable and untrainable.[118] Finally, the plaintiffs alleged because the laws of Pennsylvania guarantee an education to all children, Sections 1375 and 1304 violated due process in that they arbitrarily and capriciously denied that right to retarded children.[119]

Through the use of expert testimony, the plaintiffs were able to show all mentally retarded persons are capable of benefitting from a program of education and training. Proving that mentally retarded children were able to benefit from an education repudiated the notion they were uneducable.[120] The U.S. District Court for the Eastern District of Pennsylvania's decision set forth a foundation for what would eventually become the Education for All Handicapped Children Act (EAHCA) in 1975. The case was resolved with a consent decree recognizing that mentally retarded children in Pennsylvania had a right to a "free" and "appropriate" public

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[115] *Id.* at 296.
[116] *Id. at* 283.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 307.

education.[121] The decree set forth every retarded person between the ages of 6 and 21 years of age would be provided access to a free public program of education and training appropriate to his capacities as soon as possible.[122]

The *PARC* decision also provided an extensive range of due process procedures for children with disabilities. These procedural requirements included written notice of the proposed action (before changing a student's services), an opportunity for a hearing before an independent hearing officer, the right to legal counsel at the hearing, and the right to present evidence at the hearing.[123] Additionally, the consent decree also provided parents with access to all educational records and information held by the school.[124] The decree recognized the rights of students with disabilities to an appropriate education and set the stage for other federal requirements, including a student's right to FAPE. While *Brown* introduced the concept that all children should receive educational services, *PARC* was the first time that the term "FAPE" was used. However, at the time of the *PARC* decision, this conceptual term was vaguely defined thereby setting the stage for future litigation.

### ***Mills v. Board of Education (1972)*[125]**

In *Mills v. Board of Education*, the District Court for the District of Columbia also considered the due process rights of students with disabilities. In 1972, seven African-American students with disabilities were the named plaintiffs in a class-action lawsuit against the Board of Education in the District of Columbia. The students alleged school officials had excluded them

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[121] *Id.* at 302.
[122] *Id.* at 307.
[123] *Id. at* 304.
[124] *Id. at* 305.
[125] *Mills v. Bd. of Educ.* of D.C., 348 F. Supp. 866 (1972).

from the public schools without providing an alternative placement (e.g., private school) at public expense.[126] It was further claimed these "exceptional" children were excluded from school without having been afforded the due process of law.[127] The lawsuit argued the exclusion, expulsion, or transfer of students without the due process of law allegedly violated the student's Fourteenth Amendment rights. Furthermore, it was alleged that these students were excluded without a determination of whether they would benefit from specialized instruction adapted to their needs.[128]

The Board of Education acknowledged their obligation to educate these students with disabilities and admitted to neither fulfilling this responsibility nor providing the families with due process.[129] However, the Board of Education also defended their actions by claiming the school district did not have sufficient funding to provide educational services for disabled children.[130] School officials stated unless Congress appropriated millions of dollars towards special education, or school district funds already appropriated for other services were diverted, it was not possible to provide these special education services to the students.[131] The U.S. District Court for the District of Columbia found in favor of the students and ordered school officials to provide publicly supported education and training to students with disabilities.[132] Furthermore, the District Court expressly clarified that school officials could not be excused from providing these services by claiming they lacked sufficient funds to do so.[133] The court

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[126] *Id.* at 868.
[127] *Id.*
[128] *Id.* at 870.
[129] *Id.* at 871.
[130] *Id.* at 872.
[131] *Id.* at 875.
[132] *Id.* at 876.
[133] *Id.*

held excluding children with disabilities from the public school system denied them equal protection.[134]

The *Mills* court defined extensive procedural requirements similar to those delineated in *PARC*. Included were an expectation that school officials would establish procedures to allow all children to benefit from an education, as well as provide a comprehensive health and psychological appraisal of children.[135] The court's findings also included the requirement that the school officials provide a report within 45 days to show how well they had identified, located, evaluated, and provided notice to disabled students and their families.[136] The *Mills* court also prohibited the school officials from excluding, suspending, expelling, reassigning, or transferring a handicapped student without first affording them due process.[137] Ultimately, the court found the students were entitled to relief[138] and ordered school officials to formulate general plans for compensatory educational services to be provided to each of the students excluded in order to overcome the effects of the education deprivations.[139] The compensatory education directive was an early example of the judicial system holding a school system financially responsible for failing to provide a student with FAPE. Additionally, the *Mills* decision furthered support for the development of the many due process rights currently in place during administrative hearings. These rights included the written notice of a proposed action, the right to legal counsel, and an opportunity for a hearing.[140]

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[134] *Id.* at 875.
[135] *Id.* at 872.
[136] *Id.*
[137] *Id.* at 880.
[138] *Id.* at 873.
[139] *Id.* at 879.
[140] *Id.* at 880-81.

### *Early Special Education Legislation*

Prior to 1975, students with disabilities were often excluded from the public schools.[141] After *PARC* and *Mills* recognized the rights of students with disabilities to a free and appropriate public education, Congress passed the Education for All Handicapped Children Act (EAHCA).[142] Until this point, the federal government had minimally addressed the education of disabled students or the effectiveness of special education programs. Most states had already enacted legislation about the provision of services to students with disabilities as a result of numerous decisions in state and federal courts.[143] However, many children were still not receiving an equal educational opportunity since many states did not have sufficient financial resources to carry out these plans. The Education for All Handicapped Children Act was enacted to provide supplemental federal funding to the states to assist with the heavy costs involved with educating handicapped children.[144]

Prior to the passage of EAHCA, the Elementary and Secondary Education Act (ESEA) Amendments of 1965[145] were the first to specifically target children and youth with disabilities. As part of Lyndon Johnson's Great Society policies, this Act was designed to compel school districts to provide equal treatment to "disadvantaged students."[146] The ESEA identified categories of children with greater educational needs, including low-achieving children in high-

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[141] Charles J. Russo & Allan G. Osborne, Jr., ESSENTIAL CONCEPTS & SCHOOL-BASED CASES IN SPECIAL EDUCATION LAW 4, 4-5 (2008) (quoting *Watson v. City of Cambridge*, 32 N.E. 864 (D. Mass. 1893)).
[142] Pub. L. No. 94-142, 89 Stat. 773 (1975).
[143] 121 CONG. REC. 37,023, 37,025 (1975) (remarks of Rep. Brademas).
[144] 20 U.S.C. § 1412 (1) (1975).
[145] Pub. L. No. 89-313, 79 Stat. 1158 (1965).
[146] Harvey Kantor, *Education, Social Reform, and the State: ESEA and Federal Education Policy in the 1960s*, 100 AM. J. EDUC. 47, 49 (1991).

poverty schools, children with limited English proficiency, and children with disabilities.[147] The 1965 ESEA amendments authorized the first federal grants to state institutions and state-operated schools devoted to the education of children with disabilities. In 1966, further ESEA amendments[148] established the Bureau of Education of the Handicapped (BEH) and the National Advisory Council, the predecessor of the National Council on Disability.[149]

Congress amended ESEA again in 1970 and replaced the Title VI amendment with the Education of the Handicapped Act (EHA).[150] Likes its predecessor, EHA did not specify how the funds had to be spent. Rather, it consolidated programs and established funds designed to help states begin special education programs or expand and improve upon existing ones.[151] The EHA also established several competitive grant programs such as personnel preparation, research and demonstration. This was the first federal grant program for the education of children and youth with disabilities at the local school level, rather than at state-operated schools or institutions. This new authority, the precursor of the current IDEA, was the first federal statute written expressly for children and youth with disabilities. EHA was amended again in 1974 and for the first time included a mandate for all public schools to provide an appropriate education to all children with disabilities.[152] This amendment increased awareness of the educational needs of the disabled and drew attention to the necessity to increase the fiscal responsibilities of the federal government.

In 1973, Congress passed Section 504 of the Rehabilitation Act, prohibiting discrimination against "otherwise qualified" people with disabilities from participation in

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[147] Pub. L. No. 89-313, 79 Stat. 1158 § 101(b)(3) (1965).
[148] Pub. L. No. 89-750, 80 Stat. 1191 (1966).
[149] *Id.*
[150] Pub. L. No. 91-230, 84 Stat. 601 (1970).
[151] *Bd. of Educ. v. Rowley*, 548 U.S. 176, 180 (1982).
[152] Pub. L. No. 93-280 (1974).

federally funded activities and programs.[153] Section 504 was designed to provide opportunities and reasonable accommodations for children and adults with disabilities in education, employment and other settings. However, Section 504 was primarily ignored by states for the first twenty years after its passage, since it did not include any funding or system of monitoring.[154]

### *Education for All Handicapped Children Act*[155]

The Education for All Handicapped Children Act (EAHCA) was introduced in the 93rd Congress on January 1, 1974, and reintroduced again in the 94th Congress on January 15, 1975.[156] The intent of EAHCA was to ensure special education services would be made available to children who needed them while establishing a procedure that allowed parents to participate in the decision-making process.[157] The Committee on Labor and Public Welfare heard testimony from over 100 stakeholders on Senate Bill 6, which was unanimously approved on May 20, 1975.[158] The Education for All Handicapped Children Act, also known as Public Law 94-142, created a federal grant program to help public school districts educate disabled children. Federal funding was conditioned on each participating state's compliance with the Act's extensive procedural requirements.[159] Congressional hearings revealed of the approximately 8 million children with disabilities, over half were still not receiving an education

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[153] 29 U.S.C. § 794(a) (2006).
[154] Edward W. Martin et al., *The Legislative and Litigation History of Special Education*, 6 FUTURE OF CHILD, 29 (1996).
[155] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. §§ 1400-1461 (2006)).
[156] S. Rep. No. 94-168, 6 (1975).
[157] *Id.*
[158] *Id.* at 7.
[159] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, (1975).

appropriate to their needs.[160] Additionally, 1.75 million disabled students attending public schools were not receiving educational services that would allow them to have "full equality of opportunity."[161] The Bureau of Education for the Handicapped also found that many disabled students were not receiving any special education services because their disabilities had not yet been detected.[162]

Congress recognized adherence to EAHCA could be expensive for states; therefore, it relied upon its spending power to gain compliance.[163] Financial support was provided only to states in compliance with EAHCA, which resulted in nearly uniform implementation of the requirements.[164] One purpose of the EAHCA was to develop staff training in diagnostic and instructional procedures in special education and related services.[165] The EAHCA established the requirement that states receiving federal funds for special education and the public school districts within the state provide eligible children a free and appropriate public education.[166]

To comply with 94-142, states had to comply with a number of major requirements. For example, school officials had to identify students in need of special education services.[167] To accomplish this, school officials had to perform evaluations to assess the impact a student's

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[160] U.S. Congress, Committee on Education and Labor, Select Subcommittee on Education. Hearings. 93rd Cong., lst sess., 1973; Pub. L. No. 94-142 § 3(b)(1) (1975).
[161] S. Rep. No. 94-168, at 8 (1975).
[162] Pub. L. No. 94-142 § 3 (1975).
[163] S. Rep. No. 168, 94th Cong., 1st Sess. 8, 15 (1975).
[164] 102 S. Ct. 3034, 3039 (1982). All but one state (New Mexico) was receiving federal funds under the EAHCA at that time.
[165] Pub. L. No. 94-142 § 3 (amending Title VI § 601(3)(b)(7)) (1975).
[166] Trent D Nelson, Comment and Note, *Congressional Attention Needed for the "Stay-Put" Provision of the Individuals with Disabilities Education Act*, 1997 BYI EDUC. & L.J. 49, 49 (1997).
[167] Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, 6 FUTURE OF CHILD, 25, 30 (1996).

disability had on his/her education.[168] Once a child was identified as disabled and in need of special education services, school officials were required to develop and maintain an Individualized Education Plan (IEP).[169] Regardless of ability, all children ages 6-17 (and ages 3-5 and 18-21 if the state also educated nondisabled children in those age groups) had to be provided with a free and appropriate public education (FAPE).[170] The services required for a FAPE were defined as the provision of regular and special education services, as well as related aids and services.[171] These services had to include instruction meeting the state educational standards and comply with the student's IEP.[172] These IEP services were to be provided without cost to the handicapped student or to his/her parents or guardian.[173]

The EAHCA legislation called for safeguards against discriminatory evaluations. In order to address inequitable practices in the identification of students with disabilities, assessments were to be comprised of more than one procedure and administered in a child's primary language whenever possible.[174] In addition, the EAHCA mandated that each school district create, review, and revise an IEP for each student with a disability.[175] Each child's IEP was to be uniquely designed to meet the individual needs of a particular student and developed by qualified school personnel, parents, and the student.[176] The team of individuals known as the

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[168] *Id.*
[169] 34 C.F.R. 104.33 (b).
[170] Pub. L. No. 94-142 § 5 (amending Title VI § 612 (2)(B)) (1975).
[171] 34 C.F.R. 104.33 (b).
[172] Pub. L. No. 94-142 § 5 (amending Title VI § 602 (18)(A-D)) (1975).
[173] 20 U.S.C. § 1413(a)(B)(i) (1975).
[174] *Id.* at § 1412(5)(C) (1975).
[175] *Id.* at § 1414(1)(B)(5) (1975).
[176] *Id.* at § 1401(19) (1975).

IEP team should meet annually to develop or update the IEP for all students receiving special education or related services.[177]

The EAHCA legislation required that individualized educational plans include present levels of educational performance as well as annual goals and short-term objectives. In order to help determine whether instructional objectives are being met, the law required that the IEP goals should utilize objective criteria and evaluation procedures.[178] The EAHCA also required that the IEP contain the specific special education services to be provided to the child, the extent of the student's participation in the general education setting, and dates for the initiation and duration of services in the IEP.[179] This legislation also defined related services as transportation, developmental, corrective and other supportive services as may be required to assist a handicapped child to benefit from special education.[180]

Of the various educational services and procedures described in EAHCA, there are a number of important concepts that have had a significant impact upon unilateral private placements. These big concepts are Child Find, free and appropriate public education (FAPE), procedural safeguards, least restrictive environment, and language describing the responsibility to private schools. As previously noted, EAHCA imposed upon school officials the responsibility to locate and evaluate children who are handicapped who are in need of special education and related services.[181] This responsibility is known as "Child Find." Not only are school officials required to provide the services described under P.L.94-142, they are also required to locate and evaluate every child who may potentially be eligible for special education.

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[177] *Id.* at § 1401(19)(E) (1975).
[178] *Id*
[179] Pub. L. No. 94-142 § 4 (amending Title VI § 602 (19)(A-D) (1975).
[180] 20 U.S.C. § 1401(17) (1975).
[181] *Id.* at § 1412(2)(C) (1975).

There have been many incidences wherein parents have placed their child in a private placement because school officials had allegedly failed their Child Find responsibility.[182]

The second important EAHCA concept was the guarantee of procedural safeguards, which included a parent's right to request a due process hearing if they were not in agreement with the IEP services or their child's educational placement.[183] The EAHCA legislation provided parents with an opportunity to "present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child or of the provision of a free and appropriate public education to such child."[184] If a parent disagreed with the services proposed by the IEP team, the state educational agency was responsible for ensuring that the requirements of the law were followed by the school district.[185] The EAHCA provided parents with the right to be represented by an attorney during a due process hearing.[186] The Act's due process provisions also gave courts the authority to review evidence and determine what, if any, relief should be granted to the family.[187] The EHCA was the first federal legislation to specifically provide parents with the right to seek compensation from a school district based upon whether the IEP offered appropriate services.

Included within the procedural safeguard provisions was the requirement that school officials provide parents with ten-day prior notice before making a change in educational placement.[188] These rights also provided parents with the opportunity to examine all relevant

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[182] See *Forest Grove Sch. Dist. v. T.A.,* 129 S. Ct. 2484*, Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. & Mrs. M.,* 53 IDELR 8 (D.Conn. 2009)*, K. L. v. Mercer Island Sch. Dist.,* 55 IDELR 164 (W.D.Wash. 2010).
[183] 20 U.S.C. § 1415(b)(1)(E) (1975).
[184] *Id.* at § 1415(b)(1)(E) (1975).
[185] *Id.* at § 1415(b)(2) (1975).
[186] *Id.* at § 1415(d)(1) (1975).
[187] *Id.* at § 1415(b)(1)(A) (1975).
[188] *Id.* at § 1415(b)(1)(C)(ii) (1975).

IEP student records as well as to obtain an independent evaluation of their child.[189] Finally, the safeguard provision in EAHCA also directly impacted unilateral private placements through the establishment of the "stay-put" provision. This provision stated that a child should remain in the educational placement in effect at the time of a parent's request for a due process hearing until a resolution had been reached during either an administrative or judicial proceeding.[190]

The third important concept introduced by EAHCA was a free and appropriate education (FAPE). The EAHCA described a FAPE as special education and related services provided at public expense, under public supervision and direction, and without charge in conformity with the IEP program requirements.[191] Approximately half of all due process complaints have to do with substantive issues, where the parent does not feel that the IEP proposed by school officials provides their child with a FAPE. The EAHCA legislation supplied very little clarification about the level of services needed in order to provide a disabled child with FAPE.

The fourth important concept introduced in the EAHCA legislation was least restrictive environment (LRE). Although, the actual term "least restrictive environment" did not appear in the EAHCA, the statute did mention the child's participation in the general education setting. It stated that to the maximum extent possible, children with disabilities, including children in public or private institution or other care facilities, were to be educated with children who are not disabled.[192] Furthermore, EAHCA stated that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only

[189] *Id.* at § 1415(b)(1)(A) (1975).
[190] *Id.* at § 1415(e)(3) (1975).
[191] *Id.* at § 1401(18) (1975).
[192] *Id.* at § 1412(5)(B) (1975).

when the nature or severity of the disability is such that education in the regular classes cannot be achieved satisfactorily.[193]

There was also EAHCA language that specifically addressed private school placements. The EAHCA stated that handicapped children in private schools and facilities should be provided special education and related services at no cost to their parents if they are placed there by the school officials.[194] The Act also imposed upon the state education agency the responsibility for determining whether such schools and facilities met state standards.[195] This was the first mention of school districts taking on the financial responsibility for private placements when they are required as part of a student's IEP.

The EAHCA legislation systematically laid the foundation for many of our current-day special education rights and procedures. Because it addressed Child Find, FAPE, LRE, due process, and private placements, the EAHCA had a significant impact upon a parents' right to unilaterally place their child in a private placement and seek tuition reimbursement. However, since many of these rights and procedures were vague, the courts were left to interpret how school districts should apply them to children with disabilities.

## Free and Appropriate Public Education (FAPE)

### *School District v. Rowley (1982)*[196]

Possibly the most significant decision impacting special education occurred in 1982, seven years after Congress first enacted the Education for All Handicapped Children Act (EAHCA). In Board of Education of the Hendrick Hudson Central School District v. Rowley,

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[193] *Id.*
[194] *Id.* at § 1413(a)(4)(B)(i) (1975).
[195] *Id.* at § 1413(a)(4)(B)(ii) (1975).
[196] *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

the U.S. Supreme Court was asked to clarify the level of services required to fulfill the Act's expectation for school officials to provide every qualified child a free and appropriate public education (FAPE).[197] The five-Justice majority relied upon their belief that compliance with the procedures described in EAHCA would typically result in appropriate services being set forth in the Individualized Educational Plan (IEP)."[198] The Court also stated the Congressional intent underlying the EAHCA was to open the schoolhouse doors and require school officials to listen to parents' input.[199] Since the concept of a FAPE is at the forefront of most unilateral private placement disputes, *Rowley*'s impact has been profound.

The case centered on the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, N.Y. Amy was initially placed for a trial period in a regular kindergarten class with no specialized support services.[200] Subsequently she was provided with a hearing aid and assigned a sign language interpreter for a two-week trial period.[201] At the end of the trial period, the school officials determined Amy did not require an interpreter since she could read lips and was progressing through her coursework without any significant difficulties.[202] At this time, consistent with the EAHCA's procedural requirements, school officials conducted a special education evaluation of Amy Rowley. The results of the evaluation showed Amy was eligible for special education. Therefore, an IEP was created for the following year of school.[203] Although school officials agreed to provide considerable specialized services, they determined an interpreter would not be required to

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[197] *Id. at* 203.
[198] *Id. at* 206.
[199] *Id.*
[200] *Bd. of Educ. v. Rowley*, 483 F. Supp. 528, 530 (1980).
[201] *Id.*
[202] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 185 (1982).
[203] *Id.* at 184.

provide Amy with a FAPE.[204] Amy's parents disagreed and, after exhausting their administrative remedies, sought review in federal court.

The United States District Court for the Southern District of New York determined an interpreter should be provided so Amy would have "an opportunity to achieve (her) full potential commensurate with the opportunity provided to other children."[205] The United States Court of Appeals for the Second Circuit affirmed this decision and the school board appealed to the Supreme Court.[206] The Supreme Court rejected the Second Circuit's position, relying on the "legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."[207] The *Rowley* Court held the language of the EAHCA was clearly grounded in providing disabled children with the "the basic floor of opportunity" for free access to individualized education instruction and supports within the least restrictive setting.[208] In examining the educational needs of a hearing-impaired student who had been provided with specialized instructional supports and was performing above grade level, the *Rowley* Court held that the appropriateness requirement of the Act was met.[209]

Writing for the majority, Justice Rehnquist criticized the lower courts for overlooking the statutory definition of "free and appropriate public education," which he felt was readily discernible from the EAHCA's language.[210] The Court majority concluded instruction designed to address the unique needs of the child met the requirements of EAHCA if the IEP was

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[204] *Bd. of Educ. v. Rowley*, 483 F. Supp. 528, 530-31 (1980).
[205] *Id. at* 534.
[206] *Bd. of Educ. v. Rowley*, 632 F.2d 945 (2d Cir. 1980).
[207] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).
[208] *Id.* at 201.
[209] *Id.* at 209-10.
[210] *Id.* at 186.

"reasonably calculated" to "permit the child to benefit educationally."[211] The Court noted that it could neither find a standard in EAHCA clarifying the minimum level of education for handicapped children nor locate any language to support the district court's requirement that the child's potential be maximized.[212] The *Rowley* Court also stated "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[213]

The *Rowley* Court rejected the suggestion that EAHCA required strict equality in either opportunity or services, as this would be too difficult to measure.[214] The Court stated: "The educational opportunities provided by our public school system undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom."[215] The majority suggested that equality of services would result in less than the EAHCA requires in some situations while requiring too much in others.[216] The Court also dismissed the self-sufficiency standard on a similar basis, stating the desire to provide handicapped children with an attainable degree of personal independence in most cases is a lot more modest than the potential-maximizing goal adopted by the lower courts.[217] They reiterated this point by pointing out that in some situations self-sufficiency would be too easily achieved, while in others it would be an unrealistic goal.[218] The Court concluded while Congress sought to provide assistance to the states in carrying out their

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[211] *Id.* at 203-04.
[212] *Id.* at 189-90.
[213] Rubinstein, M.H. (2008) *Parents as Quasi-Therapists under the Individuals with Disabilities Education Act*. 76 U. CIN. L. REV. 899, 938.
[214] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198-99 (1982).
[215] *Id.* at 198.
[216] *Id.* at 199.
[217] *Id.* at 201.
[218] *Id.*

constitutional responsibilities to provide equal protection of the laws, it did not intend to achieve strict equality of opportunity for handicapped and non-handicapped children. Instead, Congress was primarily interested in identifying and evaluating handicapped children and providing them with access to public education.[219]

The Court also recognized the central role that *Mills* and *PARC* played in the congressional design of EAHCA, explaining how each case focused on the procedures necessary for creating an individualized education program, rather than the program's substance.[220] The Court also concluded that establishing a test to determine if a child's needs were being met would be too difficult and therefore focused its analysis on the unique characteristics in the *Rowley* case.[221] Chief Justice Rehnquist reasoned if a child is being educated in a general education classroom, "the system itself monitors the educational progress of the child."[222] Therefore, he implied a child's education and supports must be appropriate if the child was achieving passing grades and was advancing from grade to grade.[223] The Court acknowledged, like many statutory definitions, the Act's definition of a FAPE gravitated "toward the cryptic, rather than the comprehensive, but that [was] scarcely a reason for abandoning the quest for legislative intent."[224]

*Rowley* set forth a two-part inquiry for determining whether the Act's FAPE requirement had been satisfied.[225] First, school officials must have complied with the Act's procedural

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[219] *Id.* at 200.
[220] *Id.* at 193-94.
[221] *Id.* at 202.
[222] *Id.* at 203.
[223] Steven N. Robinson, *Rowley: The Court's First Interpretation of the Education for All Handicapped Children Act of 1975*, 32 CATH. U.L. REV. 941, 958 (1983).
[224] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188 (1982).
[225] *Id.* at 206-207.

stipulations, which included meaningful parental participation in IEP meetings.[226] Additionally parents must be given notice of any proposals to change the educational placement of a child, and they were entitled to an independent educational evaluation.[227] These procedures also empowered parents of a disabled child to examine school records as well as present complaints.[228]

The second part *of Rowley*'s two-part inquiry required that an IEP must be reasonably calculated to enable the child to receive educational benefits.[229] The Court majority reasoned this meant the IEP must be designed to enable the child to achieve passing marks and advance from grade to grade.[230] When interpreting the word "appropriate," the Court rejected an approach that would require school districts to "maximize a student's potential."[231] The Court decided "appropriate" meant an education that followed IDEA's procedures and was "sufficient to confer some educational benefit."[232]

The Court also concluded Congress meant for reviewing courts to have a fair amount of reviewing power but an amount that fell short of ignoring lower court findings and retrying the case (de novo).[233] Given the highly detailed provisions of § 1415 outlining the administrative hearing process, compared to the EAHCA's vague "substantive admonitions," the Court determined Congress intended for the procedural guidelines to ensure substantive compliance with EAHCA.[234] The Court indicated these highly detailed procedural requirements were

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[226] *Id.* at 206.
[227] *Id.* at 183.
[228] *Id.*
[229] *Id.* at 207.
[230] *Id.* at 202.
[231] *Id.* at 198.
[232] *Id.* at 200.
[233] *Id.* at 205. (quoting S. REP. NO. 94-455, at 50 (1975)).
[234] *Id.* at 205-206.

designed to ensure that parents and school personnel were equally involved in the formulation of educational goals for the student with a disability.[235]

While *Rowley* was primarily concerned with the requirement of FAPE, it also provided guidance as to what constituted the appropriate least restrictive environment for a student. The *Rowley* Court observed Congress did not intend there to be a rigid presumption for mainstreaming. It first characterized the Act's language as creating a "preference for mainstreaming" and then noted the statutory language provided for some students to be educated in an entirely segregated setting.[236] Subsequently, one lower court observed *Rowley*'s impact upon LRE was "demarcating an outer limit to the IDEA's LRE preference."[237]

After clarifying the proper scope of review, the *Rowley* Court cautioned lower courts against imposing their views on educational methods upon the states and emphasized the limited role of courts in state educational decisions.[238] The Court cited *San Antonio v. Rodriguez*[239] and *Epperson v. Arkansas*[240] as support for the notion that education is primarily a state concern. The Court also sought to dispel the fear that limiting the scope of review would leave the rights of handicapped children unprotected. Indeed, the Court pointed out that when necessary, the parents of handicapped children could assert the educational rights of their children through administrative hearings and the courts.[241]

Another important aspect of *Rowley* was the Court majority's rejection of the dissent's standard of "maximizing of potential." Justice Rehnquist characterized the dissent's proposed

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[235] *Id.* at 206.
[236] *Id.* at 181 (quoting 20 U.S.C. § 1412(a)(5)(A) (2006)).
[237] *A.S. ex rel. S. v. Norwalk Bd. of Educ.*, 183 F.Supp. 2d. 534, 541 (D. Conn. 2002).
[238] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).
[239] *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).
[240] *Epperson v. Arkansas*, 393 U.S. 97 (1968).
[241] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

standard as "limitless."[242] The *Rowley* standard is satisfied by providing personalized instruction with sufficient support services that permit the child to benefit educationally from the instruction.[243] This is commonly referred to as the "educational benefit" standard.

In the years following *Rowley*, lower federal courts struggled to clearly define an appropriate standard for judging the education plans of disabled students. A split between the circuit courts emerged as the judiciary attempted to quantify the level of benefits necessary to satisfy *Rowley*'s opaque educational benefit standard requiring only "some" benefit.[244] The Third Circuit's definition of FAPE is a LRE enabling the child to receive "significant learning" and a "meaningful benefit."[245] The Second, Fourth, Fifth, Sixth, and Ninth Circuit Courts have also enacted higher FAPE standards, while the First, Eighth, Tenth, and Eleventh Circuit Courts have maintained the less rigorous "some educational benefit standard."[246] The Seventh Circuit Court has applied a mixture of these two standards.[247] The courts also had a difficult time

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[242] *Id.* at 190.
[243] Terry Jean Seligmann, *Sliding Doors: The Rowley Decision, Interpretation of Special Education Law, and What Might Have Been*, 41 J.L. & EDUC. 71, 77 (2012). Citing *Bd. of Educ. v. Rowley*, 458 U.S. 183, 203 (1982).
[244] Scott Goldschmidt, *A New Idea for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 CATH. U.L. REV. 749, 757 (2011). See Nancy Lee Jones & Carol J. Toland, *The Individuals with Disabilities Education Act (IDEA): Supreme Court Decisions*, CONGRESSIONAL RESEARCH SERVICE 3 (2010). (Explains that lower courts have attempted to adhere to *Rowley*, but the resulting interpretations have differed vastly. Several circuits have interpreted *Rowley* narrowly, holding that minimal educational progress is sufficient if the FAPE procedural requirements are satisfied, while other circuits have interpreted the decision expansively, requiring school districts to provide meaningful educational benefits.)
[245] *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (1999).
[246] Scott Goldschmidt, *A New Idea for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 CATH. U.L. REV. 749, 758, (2011).
[247] *Id.*

recognizing the difference between procedure and substance under *Rowley*.[248] Even when the courts recognized the existence of procedural errors, they reached varying conclusions as to the implications of those procedural errors.[249]

An example of this post-*Rowley* chaos was *Polk v. Central Susquehanna Intermediate Unit 16* (1988).[250] In this case the federal district court granted summary judgment in favor of the school district concluding under both the EAHCA and *Rowley* the child had derived "some educational benefit" from his educational program.[251] However, the Third Circuit Court of Appeals overturned this finding, in part based upon a conclusion the child's education program offered no more than trivial progress, which did not amount to a FAPE.[252]

**Least Restrictive Environment (LRE)**

While tuition reimbursement cases frequently involve whether a student is receiving a FAPE,[253] considering what placement constitutes the LRE is also an important part of the substantive analysis.[254] Therefore, compliance with the Act's least restrictive environment mandate is also an important consideration when deciding unilateral private placement disagreements. Both before and after the Supreme Court's *Burlington* decision, two important

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[248] John Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 430 (2011).
[249] *Id.*
[250] *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (1988).
[251] *Id.* at 172.
[252] *Id.*
[253] Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT'L ASS'N L. JUD. 214, 234 (2013). Tuition reimbursement is the most frequent remedy for FAPE violations (47% of cases).
[254] Perry A. Zirkel, *"Appropriate Decisions Under the Individuals with Disabilities Education Act,"* 33 J. NAT'L ASS'N L. JUD. 242, 252 (2013).

cases interpreting the Act's least restrictive environment (LRE) provisions were decided by the Sixth and Fifth Circuits.[255]

### *Roncker v. Walter (1983)*[256]

The first of these LRE disputes was *Roncker v. Walter* (1983), where the issue of "bringing educational services to the child" versus "bringing the child to the services" was pivotal. This case was based upon the education of Neill Roncker, a nine-year-old child with Down Syndrome.[257] Neil was classified as Trainably Mentally Retarded and had a mental age of two to three years.[258] Because of his need for almost constant supervision, the Cincinnati City School District decided Neill's appropriate placement was in a special school.[259] Since that county school exclusively served children with mental retardation, Neill would not have had contact with non-handicapped children. Therefore, Neill's parents disagreed, believing their son would benefit from contact with non-disabled peers.[260]

The U.S. District Court for Southern District of Ohio ruled in favor of school officials, concluding the county school was an appropriate placement. However, the Sixth Circuit Court of Appeals overturned this decision.[261] The *Roncker* court found placement decisions must be made on an individual basis, thus forbidding school officials from automatically placing students in a predetermined type of school based solely upon the child's diagnosed disability (e.g.,

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[255] *Oberti*, 995 F.2d 1204 (1993); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).
[256] *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).
[257] *Id.* at 1060.
[258] *Id.*
[259] *Id.*
[260] *Id.* at 1061.
[261] *Id.* at 1061-62.

mentally retardation).[262] The court of appeals affirmed that integration must be implemented to the maximum extent possible. The Sixth Circuit's Roncker Portability test emerged from this decision.[263] Under this test, when a segregated facility is considered superior, school officials must consider whether the services making the segregated placement superior could feasibly be provided in an integrated setting.[264]

### ***Daniel R.R. v. State Bd. of Educ. (1989)*[265]**

While several circuits embraced the Roncker Portability test, the majority of circuit courts adopted a slightly different approach, which was originally fashioned by the Fifth Circuit in *Daniel R.R. v. State Board of Education*.[266] The student in this case, Daniel R., was a six-year-old boy with Down Syndrome who was enrolled in the El Paso Independent School District (EPISD) in Texas.[267] Daniel was intellectually disabled, had a speech impairment, and his developmental age was between two and three years old.[268] In 1985, Daniel's parents enrolled him in EPISD's Early Childhood Program, which was a special education program.[269] Before the following year of school began, Mrs. R. requested that Daniel be placed in the district's pre-kindergarten general education classroom.[270] Daniel's placement team agreed and he was dually placed in a half-day of general education preschool and a half-day of special education

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[262] *Id.* at 1064.
[263] *Id.* at 1063.
[264] *Id.*
[265] *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989).
[266] Mark T. Keaney, *Examining Teacher Attitudes Toward Integration: Important Considerations for Legislatures, Courts, and Schools*, 56 ST. LOUIS L.J. 827, 836-37 (2012).
[267] *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989).
[268] *Id.*
[269] *Id.*
[270] *Id.*

preschool.[271] However, in November, Daniel's placement team met again and concluded the general education preschool was inappropriate.[272] This decision was based upon Daniel's inability to participate without constant individualized attention and his failure to master the skills taught in class.[273]

Under the new recommended placement, Daniel would attend the special education preschool class and would only have contact with general education students during recess.[274] Additionally, Daniel would be able to eat lunch in the school cafeteria with nondisabled children three days a week, but only when his mother was present to supervise him.[275] Mr. and Mrs. R. appealed to a hearing officer who upheld the placement team's decision.[276] The hearing officer concluded Daniel could not participate in the preschool class without constant attention from the instructor because the curriculum was beyond his abilities.[277] In addition, the hearing officer found Daniel was receiving little educational benefit from general education preschool program and was diverting too much of the teacher's attention away from the rest of the class.[278]

Dissatisfied with the hearing officer's decision, Mr. and Mrs. R. appealed to the United States District Court for the Western District of Texas.[279] Relying primarily on Daniel's inability to receive educational benefit in the regular education setting, the district court

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[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.* at 1041.

affirmed the hearing officer's decision.[280] The district court stated, "Some children, even aided by supplemental aids and services in a regular education classroom, will never receive an educational benefit that approximates the level of skill and comprehension acquisition of nonhandicapped children."[281] The district court concluded in cases like Daniel's, regular education did not provide the child with an appropriate education thereby overriding the Act's presumption in favor of mainstreaming.[282]

Mr. and Mrs. R. then proceeded to appeal to the Fifth Circuit Court of Appeals. After considering the history of the EAHCA and the dual FAPE and LRE mandates, the Fifth Circuit declined to follow the *Roncker* analysis.[283] Instead, relying upon the EAHCA's LRE provision, the Fifth Circuit created a two-part test: (1) Can education in the regular classroom, with supplemental aids and services, be achieved satisfactorily? (2) If the answer is "no," and the school intends to provide special education or to remove the child from regular education, ask whether the school has mainstreamed the child to the maximum extent appropriate.[284] The *Daniel R.R.* court derived this test directly from the language of the LRE provision.[285]

The Fifth Circuit determined courts should first consider whether the school has taken sufficient steps to accommodate the student in a regular classroom by means of supplementary aids and services.[286] The *Daniel R.R.* court cautioned this requirement is not limitless and courts may consider the impact on the regular education teacher's workload and the extent of the

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[280] *Id.* at 1046.
[281] *Id.*
[282] *Id.*
[283] *Id.* The court found that *Roncker*'s feasibility test required "too intrusive an inquiry" into educational policy choices that Congress intended to leave to local school officials.
[284] *Id.* at 1050.
[285] 20 U.S.C. 1412(a)(5) (1997). Supplementary aids and services are "aids, services, and other supports that are provided in regular education classes ... to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate."
[286] *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

required modifications.[287] The court also clarified that a school must take more than token steps to accommodate a student's needs.[288] In this case, the Fifth Circuit found the school officials had made a genuine effort to accommodate Daniel in the regular classroom.[289]

Second, the Fifth Circuit examined whether Daniel was receiving "educational benefit" from the general education curriculum and concluded that he was receiving little educational benefit in the pre-kindergarten class.[290] The Fifth Circuit also found Daniel received only marginal non-academic benefits.[291] Next, the Fifth Circuit considered the impact of Daniel's presence on the classroom environment.[292] The court noted a child's presence in the regular education setting might either be so disruptive or require so much individual attention that the quality of education for the rest of the class suffers.[293] In this case, the court acknowledged Daniel required a large percentage of the teacher's attention. Finally, although the cost of supplementary aids and services was not an issue in this particular case, the court did note cost could also be considered.[294] Applying these factors under the first prong of the test, the Fifth Circuit upheld Daniel's removal to a segregated special education class because all the factors weighed against placement in the general education classroom.[295] As to the second prong, the

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[287] *Id.*
[288] *Id.* at 1049.
[289] *Id.* at 1050 (finding the regular education teacher made "creative efforts" to reach Daniel, devoted substantial time attending to him, and modified the curriculum).
[290] *Id.* (A student who might "be able to absorb only a minimal amount of the [regular academic curriculum], but may benefit enormously from the language models that his nonhandicapped peers provide for him" could still be placed in the regular classroom.)
[291] *Id.* at 1051.
[292] *Id.* at 1049-51.
[293] *Id.* at 1049.
[294] *Id.* at 1049.
[295] *Id.* at 1052.

court found Daniel had been mainstreamed as much as appropriate because he remained integrated for lunch and recess.[296]

### *Oberti v. Bd. of Educ. (1993)*[297]

A third significant case involving LRE considerations, *Oberti v. Bd. of Educ.*, was decided in 1993.[298] Rafael Oberti, an eight-year-old child with Down Syndrome, was evaluated for special education by the Clementon School District (New Jersey) in 1989.[299] Based on this evaluation, the IEP team recommended that Rafael be placed in a segregated special education class located in another school district for the 1989-90 school year.[300] After visiting a number of special education classes and finding them unacceptable, the Obertis and school officials came to an agreement that Rafael would attend a "developmental" kindergarten class in Rafael's neighborhood school in the mornings and attend a special education class in another school district in the afternoons.[301]

During the following year, Rafael exhibited inappropriate behavior in the developmental kindergarten class. These inappropriate behaviors included throwing tantrums, hitting other children and hiding under tables.[302] Although Rafael had problems in the developmental kindergarten class, he did not exhibit similar disruptive behavior in the afternoon special education class.[303] Based on Rafael's experience in the developmental kindergarten class, school

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[296] *Id.* at 1051.
[297] *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3rd Cir. 1993).
[298] *Id.* at 1207.
[299] *Id.*
[300] *Id.*
[301] *Id.* at 1207-08.
[302] *Id.* at 1208.
[303] *Id.*

officials proposed Rafael be placed in an out-of-district, segregated, special education class for the 1990-91 school year.[304] Rafael's parents objected to this plan and requested that Rafael be placed in a regular kindergarten class in his home district of Clementon.[305] When this request was denied, the Obertis and the school district went to mediation.[306] As a result of mediation, the Obertis and school officials agreed Rafael would attend a special education class in the Winslow Township School District.[307] However, after being disappointed with school officials' efforts to mainstream Rafael, the Obertis filed a due process complaint.[308] The administrative law judge affirmed the school district's decision to place Rafael in the segregated placement.[309]

The Obertis appealed to the United States District Court for the District of New Jersey. The district court determined school officials had failed to prove their proposed placement was consistent with the IDEA's mainstreaming requirement.[310] School officials appealed.[311] The Third Circuit adopted and applied the two-part *Daniel R.R.* test.[312] In applying the first prong of the *Daniel R.R.* test, the Third Circuit considered the steps school officials made to accommodate Rafael in a regular classroom, e.g., a comparison of the educational benefits available in both classrooms and the possible negative effects of Rafael's inclusion on the other children in the

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[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.* at 1209.
[309] *Id.*
[310] *Id.* at 1212.
[311] *Id.*
[312] *Id.* See *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). *Daniel R.R.* two-part test: Can education in the regular classroom, with the use of supplemental aids and services, be achieved satisfactorily? If not, and the school intends to remove the child from regular education environment, has the school mainstreamed the child to the maximum extent appropriate?

class.[313] However, the Third Circuit Court found school officials failed to consider less restrictive placements for Rafael and violated the IDEA by not providing adequate supplementary aids and services during Rafael's year in the kindergarten class.[314] On the second prong of the *Daniel R.R.* test, the Third Circuit deferred to the district court's finding that Rafael would benefit academically and socially from integration in a regular classroom setting.[315] On the third prong, the Third Circuit considered the possible disruptive effect of Rafael's inclusion on the other students in the class.[316] Presented with contradictory evidence, the Third Circuit once again deferred to the district court that nothing found in the record suggested he would have similar problems if provided with appropriate services.[317]

After applying the first prong of the *Daniel R.R.* test, the Third Circuit held school officials had violated the mainstreaming requirement of the IDEA and had failed to satisfy its burden of proving that Rafael could not be educated in a regular classroom with supplementary aids and services.[318] Because the court decided the case based on an application of the first prong of the *Daniel R.R.* test, the court did not reach the second prong.[319] The Third Circuit noted, however, that even if it was determined in the future that Rafael cannot be satisfactorily educated in a regular classroom, school officials would be obligated under the IDEA to mainstream Rafael in regular school programs whenever possible.[320]

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[313] *Id.* at 1220.
[314] *Id.* at 1220-21.
[315] *Id.* at 1222.
[316] *Id.*
[317] *Id.* at 1223.
[318] *Id.*
[319] *Id.*
[320] *Id.* at 1223-24.

### *Sacramento City v. Rachel H. (1994)*[321]

The fourth significant case involving LRE consideration was *Sacramento City School District v. Rachel H*. In this case, the Ninth Circuit Court of Appeals was asked to resolve the issue of how much time was appropriate for a student with mental retardation to spend in a general education classroom. Rachel Holland, an eleven-year-old student with an I.Q. of 44, attended a variety of special education programs in the Sacramento School District from 1985-89.[322] In the fall of 1989, Rachel's parents requested that she be placed full time in a general education classroom for the 1989-90 school year.[323] School officials rejected the family's request and proposed a placement that would have divided Rachel's time between a special education class for academic subjects and a general education class for non-academic activities, such as music, art, and P.E.[324] Instead, the Hollands enrolled Rachel in a regular kindergarten class at a private school called Shalom School and appealed the placement decision to a state hearing officer.[325]

Rachel's parents maintained that Rachel best learned social and academic skills in a regular classroom and would not benefit from being in a special education class. The district contended Rachel was too severely disabled to benefit from full-time placement in a regular class.[326] The hearing officer concluded school officials had failed to make an adequate effort to educate Rachel in a regular class pursuant to the IDEA.[327] The hearing officer found Rachel had

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[321] *Sacramento City Unified School District Board of Education v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994).
[322] *Id.* at 1400.
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Id.*

benefitted from her regular kindergarten class, she was not disruptive and school officials had overstated the cost of putting Rachel in regular education. The hearing officer ordered the district to place Rachel in a regular classroom with support services, including a special education consultant and a part-time aide.[328]

The Sacramento School District appealed this determination to the United States District Court for the Eastern District of California.[329] The district court affirmed the decision of the hearing officer that Rachel should be placed full-time in a regular classroom. In considering whether school officials had proposed an appropriate placement for Rachel, the district court examined four factors.[330] The first consideration was the educational benefits available to Rachel in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom.[331] The district court gave great weight to the testimony of Rachel's current teacher who stated Rachel was a full member of the class, participated in all activities, and was making progress on her IEP goals.[332]

Under the second consideration, the non-academic benefits of interaction with children who were not disabled, the district court also found in favor of placing her in a regular classroom.[333] The court noted the Hollands' evidence indicating Rachel had developed her social and communications skills as well as her self-confidence from placement in a regular class.[334] Looking at the third consideration, the effect of Rachel's presence on the teacher and

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[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Sacramento v. Rachel H.*, 14 F.3d 1398, 1400-01 (9th Cir. 1994).
[332] *Id.*
[333] *Id.*
[334] *Id.*

other children in the classroom, both parties agreed Rachel followed directions and was not a distraction in class.[335]

Under the final consideration, the cost of mainstreaming Rachel in a regular classroom, the court found school officials had not offered any persuasive or credible evidence to support its claim that educating Rachel in a regular classroom would be significantly more expensive.[336] School officials contended it would cost $109,000 to educate Rachel full time in a regular classroom, which was based upon costs for a full-time aide and $ 80,000 to provide sensitivity training at the school.[337] The district court affirmed the decision of the hearing officer that the appropriate placement for Rachel was full time in a regular second grade classroom with supplemental services.[338]

The school district then appealed the decision to the Ninth Circuit Court of Appeals, arguing that a child who qualifies for special education must be taught by a teacher who has a certificate in that particular disability area.[339] The circuit court did not specifically address the issue of certification but stated that this assertion runs directly counter to the congressional preference that children with disabilities be educated in regular classes with children who are not disabled.[340] The Ninth Circuit Court affirmed the judgment of the district court and held that the determination of the present and future placements for Rachel should be based on the considerations set forth by the district court.[341]

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[335] *Id.*
[336] *Id.* at 1400-02.
[337] *Id.*
[338] *Id.* at 1402.
[339] *Id.* at 1405.
[340] *Id.*
[341] *Id.*

## Unilateral Private Placements

### *Sch. Comm. of Burlington v. Dep't of Educ. (1985)*[342]

The first major case to specifically address private placements was *School Committee of Burlington v. Department of Education*. In *Burlington*, a child with "emotional difficulties" and a "learning disorder" was given an IEP that proposed placing him in a class with six special education students in a public school.[343] Michael Panico was a first grader in the public school system of Burlington, Massachusetts, when he started experiencing academic difficulties.[344] By the time Michael was in third grade he had been found eligible for special education services under the category of "specific learning disabilities" and was receiving one hour of instruction with a reading specialist and an hour of counseling each week.[345]

For Michael's fourth-grade placement, district officials proposed placing him in a highly structured class designed for children who had special academic and social needs.[346] However, this program was located at another public school, so Michael's father rejected the IEP and requested an impartial due process hearing.[347] After the request for a hearing was filed, the Panicos received the results of an expert evaluation by a specialist who determined Michael's "emotional difficulties were secondary to a rather severe learning disorder."[348] The expert evaluation specifically noted Michael suffered from "perceptual difficulties" and recommended "a highly specialized setting for children with learning handicaps."[349] The specialist further

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[342] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).
[343] *Id.* at 361-62.
[344] *Id.* at 361.
[345] *Id.*
[346] *Id.* at 362.
[347] *Id.*
[348] *Id.* at 361.
[349] *Id.* at 362.

recommended that Michael be placed somewhere like the "Carroll School," which was a state-approved private school for special education.[350]

Based on their belief that the school district's proposed placement was not suited to their child's needs, the parents filed for a review by the Massachusetts Department of Education's Bureau of Special Education Appeals. Concurrently while filing for a due process hearing, Michael's parents removed him from the public school he was attending and unilaterally enrolled him at Carroll School.[351] In January 1980, six months after Michael was removed from the public school, the impartial hearing officer (IHO) found the school's proposed public school placement was inappropriate. Additionally, the IHO found the private school where Michael was currently attending was the least restrictive adequate program for Michael's needs.[352] The hearing officer ordered the school district to pay for Michael's tuition and transportation to the Carroll School, as well as reimbursing the parents for the costs incurred for those services so far that year.[353] With pressure from the Massachusetts Department of Education's Bureau of Special Education Appeals, school officials agreed to pay for the child's tuition expenses.[354] However, the school district refused to retroactively reimburse the tuition expenses because the family had violated the "stay-put" provision in EAHCA by unilaterally moving Michael during the hearing.[355]

The school district sought judicial review of the State's decision in the United States District Court for the District of Massachusetts.[356] As part of this decision, the district court

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[350] *Id.*
[351] *Id.*
[352] *Id.* at 363.
[353] *Id.*
[354] *Id.*
[355] *Id.*
[356] *Id.*

upheld the retroactive reimbursement ordered by the hearing officer and ruled 20 U.S.C. § 1415(e)(3) did not require that a violation of the stay-put provision constituted a waiver of reimbursement.[357] However, the First Circuit Court of Appeals vacated the judgment on the state-law claim, holding that review under the state statute was pre-empted by 1415(e)(2), which established a "preponderance of the evidence" standard of review rather than the "substantial evidence" standard of review applied by the district court.[358]

On remand, the district court ruled 20 U.S.C. § 1415(e)(3) did not bar reimbursement regardless of the fact the Panicos had unilaterally made a change in placement during the administrative review proceedings.[359] The court also granted compensatory education to the Panicos due to the fact that no IEP had been developed for either the 1980-81 or 1981-82 school years.[360] The court also interpreted the statute as placing the burden of proof on the school district to show the IEP was appropriate for 1979-80.[361] At the same time, the court also placed the burden of proof on the Panicos and the State to show that relief for the subsequent two years of school was appropriate. The District Court for the District of Massachusetts overturned the hearing officer's decision, holding the appropriate placement for Michael was the one proposed by the school district.[362] As a result, the court concluded that the school district was not responsible for the cost of Michael's education at the Carroll School.[363]

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[357] *Id.* at 364.
[358] *Sch. Comm. of Burlington v. Dep't of Educ.*, 651 F.2d 428, 431-32 (1981). A preponderance of evidence is just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true.
[359] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 364 (1985).
[360] *Id.*
[361] *Id.*
[362] *Id.* at 364-65.
[363] *Id.* at 365.

Despite losing the case on the merits of the IEP in August 1982, Mr. Panico argued he should be reimbursed for his expenditures because the school terms fell within the pendency of the administrative and judicial review.[364] After consolidating the Panicos' claim with two other cases, the courts rejected Mr. Panico's argument that the Carroll School was the "current educational placement" during the review proceedings.[365] Though no actual placement was in effect during the summer of 1979, the court reasoned the Panicos' unilateral action in placing Michael at the Carroll School without the school district's consent could not "confer thereon the imprimatur of continued placement."[366]

The Panicos appealed this decision to the First Circuit Court of Appeals. The appellate panel ruled the district court erred in starting over and rehearing the entire trial (de novo). The First Circuit also found the district court had given insufficient weight to the Bureau of Special Education Appeals findings and had not properly evaluated the IEP.[367] The First Circuit Court of Appeals also held a unilateral placement would not bar the Panicos from reimbursement if their actions were found to be appropriate at final judgment.[368] Additionally, the circuit court suggested a lack of parental consultation with the school or an "attempt to achieve a negotiated compromise and agreement on a private placement" may be taken into account when deciding upon the appropriate tuition reimbursement.[369] To guide the district court on this second remand, the circuit court stated, "Whether to order reimbursement, and at what amount, was a question determined by balancing the equities."[370]

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[364] *Id.*
[365] *Doe v. Anrig*, 561 F.Supp. 121 (1983).
[366] *Id.* at 129.
[367] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 366 (1985).
[368] *Id.*
[369] *Id.* at 366-67.
[370] *Id.* at 367.

Before the case was again heard by the United States District Court for the District of Massachusetts, the school district filed a petition for writ of certiorari to the Supreme Court. The district challenged the First Circuit Court of Appeals on numerous issues, including the scope of the judicial review of the administrative decision and relevance of procedural violations.[371] When the Court granted *certiorari*, it was only to consider whether the potential relief available under §1415(e)(2) included private school tuition reimbursement and whether it barred reimbursement to parents who reject an IEP proposal and then unilaterally place their child in a private school.[372] In April 1985, the Court ruled on behalf of the parents and upheld their right to seek reimbursement for the expenses associated with their private school placement.[373] The Court decided the IDEA directed a court to "grant such relief as it determines is appropriate."[374] Although the statute was not more specific on the type of relief authorized, the Supreme Court held this provision of the IDEA "confers broad discretion on the court" to determine what is "appropriate."[375]

The *Burlington* Court noted the statutory provision requiring the student to remain in his or her current educational placement did not mention "financial responsibility, waiver, or parental right to reimbursement."[376] The Court also stated that prospective relief ordering the school officials to develop a new, appropriate IEP might be sufficient if the administrative and judicial review process "could be completed in a matter of weeks."[377] However, since the process often required years for the due process procedure to be resolved, parents would

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[371] *Id.*
[372] *Id.*
[373] *Id.* at 366.
[374] *Id.* at 369.
[375] *Id.*
[376] *Id.* at 372.
[377] *Id.* at 370.

otherwise have to follow an inappropriate IEP and risk their child's educational success or pay private school tuition.[378] The *Burlington* Court described the IDEA process as "ponderous."[379] The Court also stated that denying reimbursement when a court subsequently finds an IEP to be inappropriate would be considered an "empty victory" for parents and would contradict their right to FAPE.[380] However, while the Court did not want to force parents to keep their child in an inappropriate placement during review, the Justices emphasized parents who unilaterally placed their child is a private placement during the pendency of an IEP review proceeding did so at their own financial risk.[381]

The *Burlington* Court reasoned the IDEA's principal purpose would be thwarted if the statute were interpreted to foreclose the parental right of reimbursement when the parents unilaterally transferred their child to an appropriate placement.[382] Finding the IDEA was "intended to give handicapped children both an appropriate education and a free one," the Court stated, "It should not be interpreted to defeat one or the other of those objectives."[383] Under the reading proposed by the school district, the parents would theoretically have had to choose between leaving their child in what they believed was an inadequate placement or placing their child in a supposedly appropriate placement and giving up their claim for reimbursement.[384]

To support its finding that "Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case," the Court referenced the IDEA's legislative

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[378] *Id.*
[379] *Id.*
[380] *Id.*
[381] *Id.*
[382] *Id.* at 372.
[383] *Id.*
[384] *Id.*

history favoring interim placement pending resolution of IDEA appeals.[385] The Congressional Record included a statement by Senator Robert T. Stafford, who said:

> The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child have been completely protected. We did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach to try to meet the needs of both the child and the State.[386]

The *Burlington* Court ultimately decided a parent's failure to maintain a child in his or her current educational environment during pending due process did not constitute a bar to tuition reimbursement.[387] However, the parents would only be eligible for reimbursement if a final adjudication of the dispute found both that the school's IEP was inappropriate and the parents' chosen placement was appropriate.[388] Finally, the Court ended with a cautionary note that parents who unilaterally change their child's placement during a review, without the consent of state or local officials, did so at their own financial risk.[389] If the courts ultimately determined the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement.[390] The Court rejected school officials' repeated argument that tuition reimbursement was a form of damages, concluding instead, "Reimbursement merely requires the town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[391]

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[385] *Id.* at 373.
[386] *Id.*
[387] *Id.* at 370.
[388] Baiman, A.M., *Educating Special Education Students Who Have Only Attended Private Schools: After Tom F., Who Is Left with the Bill?,* 71 U. PITT. L. REV.121, 142. (2009).
[389] *Id.* at 373-74.
[390] *Id.*
[391] *Id.*

The *Burlington* decision provided two important components that allow parents to unilaterally place their child in a private school and then seek tuition reimbursement. First, as mentioned above, tuition reimbursement is available to privately placed students when parents can show their child was not receiving appropriate special education services. Second, the Court found parents were not required to wait until administrative proceedings were concluded before placing their child in a private school to be eligible for reimbursement.

### *Individuals with Disabilities Education Act (1990)*[392]

In October of 1990, Congress passed Public Law 101-476, which reauthorized the Education for All Handicapped Children Act, while also changing its name to the Individuals with Disabilities Education Act of 1990 (IDEA 1990).[393] This 1990 amendment also provided funding for research, staff training, and technical assistance to improve educational services for disabled students.[394] In 1991, Congress passed Public Law 102-119,[395] which added additional services as well as new student-first terminology that focused attention on the individual rather than on their handicapping condition.

The 1990 Individuals with Disabilities Education Act included some important provisions for special education services, including the requirement for transition plans.[396] The transition services were designed to assist disabled students with moving from special education to higher education, gainful employment, and independent living.[397] IDEA 1990 required that by a

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[392] Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990).
[393] *Id.*
[394] Pub. L. No. 101-476, 104 Stat. 1103 (1990).
[395] Individuals with Disabilities Education Act, Pub. L. No. 102-119 § 3 (amending Title VI §602 (a)), 105 Stat. 587 (1991) (current version at 20 U.S.C. 1400 (2006)).
[396] 20 U.S.C. § 1401(a)(1)) (1990).
[397] *Id.*

student's 16th birthday he/she must have an individual transition plan as part of their IEP. The plan allows for a coordinated set of activities and interagency linkages designed to promote the student's successful movement to a functional life after school. These services included instruction, community experiences, independent living skills and the development of employment and other post-school adult living objectives.[398] IDEA 1990 required that the coordinated set of activities shall be based upon "the individual student's needs, and take into account their preferences and interests."[399]

Prior to the 1990 amendments, the disability categories in the Education for All Handicapped Children Act[400] were mental retardation, speech or language impairments, visual impairments, blindness, serious emotional disturbance, orthopedic impairments, other health impairments, and specific learning disabilities.[401] The IDEA amendments in 1990 added autism and traumatic brain injury to the list of disabilities that qualified a student for special education.[402] Also, the IDEA amendments expanded the scope of the related services provision by adding two services, social work and rehabilitation counseling.[403] The 1990 IDEA amendments also made a number of other technical changes, such as changing "including classroom instruction" to "instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings."[404] It also added assistive technology services, which is a service that directly assists in the selection, acquisition, or use of an assistive technology

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[398] *Id.*
[399] *Id.*
[400] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).
[401] 20 U.S.C. § 1401(3)(A) (1975).
[402] *Id.* at § 1401(a)(1) (1990).
[403] *Id.* at § 1401(a)(17) (1990).
[404] *Id.* at § 1401(a)(16) (1990).

device.[405] Under IDEA 1990, these services included evaluations, purchases, fittings, trainings, and technical assistance, related to the use of any assistive technology device. Although the 1990 IDEA amendment did not directly address unilateral private placements, it did serve to overall strengthen the rights of children with disabilities.

### *Florence Cnty. Sch. Dist. Four v. Carter (1993)*[406]

After the *Burlington*[407] case, it became clear that parents could be reimbursed for tuition when they unilaterally place their child in a private school. Although this process involves risk on the parent's behalf, the Court's findings opened the door for dissatisfied parents to challenge their child's placement.[408] Simultaneously, it also provided a way for parents to give their child immediate access to an educational setting that they believe will allow them to progress in their IEP goals. However, the facts in the *Burlington* case limited its holding to situations where parents placed their child in a state-approved private facility.[409] The significant issue of whether IDEA would permit reimbursement of tuition for unilateral parental placement in private schools that were not state-approved facilities was left to the lower courts to decide, until the *Florence County School District Four v. Carter* case.[410]

The *Carter* case centered on a ninth-grade student named Shannon Carter. Shannon had attended a private school from grades two through six but had re-entered the public school system in the fall of 1982 for seventh grade.[411] However, during the seventh grade at

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[405] *Id.* at § 1401(a)(25) (1990).
[406] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361 (1993).
[407] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).
[408] *Id.* at 373-74.
[409] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 362 (1985).
[410] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 364 (1993).
[411] *Id.* at 363.

Timmonsville School, Shannon began to exhibit academic difficulties, prompting the Florence County School District to test her on two separate instances for potential learning disabilities.[412] Florence County School District concluded that although Shannon scored below average, she was not eligible for special education under the category of learning disability.[413] At her parents' request, Shannon was tested for a second time in 1985, and this time the district concluded that Shannon did in fact have a learning disability.[414]

After finding her eligible for special education, school officials met with her parents to formulate an Individualized Educational Plan to address her academic deficits.[415] The IEP provided that Shannon would stay in general education classes except for three periods of individualized instruction per week.[416] Shannon's parents were dissatisfied with the school's plan and requested a due process hearing challenging the appropriateness of the IEP.[417] Both the local educational officer and the state educational agency hearing officer held that the school's IEP was adequate, rejecting the Carters' claim that it failed to provide a free appropriate public education.[418]

While the case was pending in the fall of 1985, Shannon's parents placed her in Trident Academy, a private school in Mt. Pleasant, South Carolina, that specialized in working with learning disabilities.[419] Shannon remained at Trident Academy until she graduated in the spring of 1988. Trident had not been approved as a school for learning-disabled students by the state of South Carolina because it employed non-certified teachers and did not conform procedurally

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[412] *Id.*
[413] *Id.*
[414] *Florence Cnty. Sch. Dist. Four v. Carter*, 950 F.2d 156, 158 (4th Cir. 1991).
[415] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 363 (1993).
[416] *Id.*
[417] *Id.*
[418] *Id.*
[419] *Id.* at 364.

to IDEA.[420] However, Florence County School District had placed children with disabilities at Trident School in the past.[421] Another important consideration was that Shannon's parents had never requested approval for her placement in Trident School from the State Department of Education, nor was it ever granted.

Shannon's parents filed suit in the United States for the District of South Carolina in July 1986, alleging the school district breached its statutory duty to provide Shannon with a free appropriate education as well as seeking reimbursement for tuition and other costs incurred at Trident.[422] After a bench trial, the district court ruled in the parents favor, holding that the school district's proposed IEP was "wholly inadequate."[423] Also, while Trident may not have complied procedurally with the Act, they "provided Shannon an excellent education in substantial compliance with all the substantive requirements" of IDEA.[424] The court found that Trident evaluated Shannon quarterly, not yearly as mandated in IDEA, provided her with low teacher-student ratios, and developed a plan which allowed her to receive passing marks and progress from grade to grade.[425] Further, and more significantly, the court held "nothing in the existing law or regulations barred reimbursement simply because the State Department of Education had not approved Shannon's placement by her parents at the Trident Academy."[426] Under the equitable relief provisions of the IDEA, the court awarded the Carters $35,716.11

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[420] *Id.* at 365.
[421] *Id.* at 366.
[422] *Id.* at 364.
[423] *Id.*
[424] *Id.*
[425] *Id.*
[426] *Florence Cnty. Sch. Dist. Four v. Carter*, 950 F.2d. 156, 159-60 (4th Cir. 1991).

plus prejudgment interest for tuition, fees, room and board, mileage to school, and four trips home per year during her three years at Trident.[427]

The Court of Appeals for the Fourth Circuit affirmed the previous ruling. The court agreed with the district court that the school's proposed IEP was inappropriate and unlikely to permit Shannon to advance from grade to grade with passing marks.[428] The Fourth Circuit Court of Appeals held that "the Act itself simply imposes no requirement that the private school be approved by the state in parent placement reimbursement cases."[429] Instead, Congress intended IDEA's state-approval requirement to apply only when the student is directly placed in the private school by the state or local school system.[430] "When a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated' to enable the child to receive educational benefits."[431] The Fourth Circuit held that the Act provides for reimbursement for private school placement of a disabled child when "the program proposed by the state failed to provide the child a free appropriate public education" and "the private school in which the child is enrolled succeeded in providing an appropriate education."[432]

Still feeling that reimbursement was not proper because the parents' chosen private school was not approved by the State, Florence County School District appealed to the Supreme Court. The Court granted certiorari to resolve the conflict among the courts of appeals, since in Tucker v. Bay Shore Union Free School District[433] the Second Circuit Court of Appeals held

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[427] *Id.* at 160.
[428] *Id.* at 159.
[429] *Id.* at 162.
[430] *Id.* at 160.
[431] *Id.* at 163.
[432] *Id.* at 164.
[433] *Tucker v. Bay Shore Union Free School Dist.*, 873 F.2d 563, 568 (1989).

that parental placement in a private school cannot be proper under the Act unless the private school in question meets the standards of the state education agency.[434] The certiorari was also granted to address the question of whether Shannon's parents are barred from reimbursement because the private school in which she was enrolled did not meet the section 1401(a)(18) definition of a "free appropriate public education."[435]

In a unanimous decision, the Court ruled that the requirements of FAPE that state special education be "provided at public expense, under public supervision and direction" (26 U.S.C. 412(1)), did not make sense in the context of a unilateral parental placement."[436] Therefore, the parents were still eligible for tuition reimbursement as long as the placement was otherwise appropriate.[437] This would hold true if the parents placed their child in private school setting that, while not meeting all the requirements of the IDEA, provided a substantially proper education.[438] The *Carter* Court also rejected the argument that allowing reimbursement to parents placed an unreasonable burden on financially strapped school districts.[439] According to figures offered by Florence County School District, the average per pupil expenditure in the school district was $4,102.56 a year, while the court's order to reimburse Shannon Carter amounted to nearly $12,000 a year.[440] The Court reiterated that public educational agencies who want to avoid reimbursing parents for the private education of a disabled child can either

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[434] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 364 (1993).
[435] *Id.*
[436] *Id.* at 365.
[437] *Id.*
[438] *Id.*
[439] *Id.* at 366.
[440] Petitioner's Brief at 26-27, Carter (No. 91-1523).

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.[441]

The Supreme Court found that parents who unilaterally place their child in an appropriate private school while an appeal is pending are not barred from reimbursement.[442] However, such reimbursement is available only if a federal court concludes the public school's proposed IEP was inappropriate and the parents' private school selection was proper under the standards of the IDEA.[443] The Court pointed out that parents in the position of Shannon's have no way of knowing at the time they select a private school whether the school meets state standards.[444] Additionally, since IDEA mandates the public education system to provide FAPE to all disabled children, the school district's allegation that having to pay for a unilateral private placement would place a significant burden on the state was unfounded.[445]

In light of the ultimate goals of the IDEA, the Court found it would be inconsistent with *Burlington* to restrict reimbursement only to parents who place their child in private schools that meet state standards.[446] In Shannon Carter's case, it was readily apparent that the private school provided her with an "excellent education in substantial compliance with all the substantive requirements" of the Act, although it was not precisely in compliance with several of its procedural details.[447] In fact, the trial court found Shannon's education was of higher quality

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[441] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 366 (1993).
[442] *Id.* at 365.
[443] *Id.* at 366.
[444] *Id.*
[445] *Id.*
[446] *Id.* at 365.
[447] *Id.*

and that she made more significant progress than she would have made had she remained in the Florence County public schools.[448]

The Court also clarified that IDEA's promise of a "free appropriate public education" for disabled children would normally be met by an IEP's provision for education in the regular public schools or in a private school chosen jointly by the parents and school district.[449] However, in cases where cooperation fails, parents' who disagree with the proposed IEP services are left with a choice. The parents can either go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement.[450] The Court observed that to apply to parents the FAPE requirement that education in private schools be provided at public expense, under public supervision and direction, would effectively eliminate the right of unilateral withdrawal recognized in *Burlington*.[451] Also, for parents willing and able to place their child in a private placement, it would be an empty victory for a court to tell them years later that they were right but the expenditures cannot be reimbursed by school officials.[452] Because this result would be contrary to IDEA's guarantee of FAPE, the Court held that "Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case."[453]

The *Carter* Court also warned that parents who unilaterally change their child's placement during review proceedings do so at their own financial risk.[454] The parents are entitled to reimbursement only if a federal court is able to conclude that the public school's IEP

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[448] *Id.* at 363.
[449] *Id.* at 365.
[450] *Id.*
[451] *Id.*
[452] *Id.*
[453] *Id.*
[454] *Id.* at 366.

was inappropriate and the private school placement is appropriate.[455] At least until Congress commands otherwise, "that risk is simply one factor that the parents must consider in deciding where to educate their child."[456] The Court closed with two additional cautionary observations that were to provide the basis for subsequent lower court interpretations and the 1997 amendments of the IDEA regarding reimbursement.[457] Parents are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under IDEA. Also, under IDEA, "equitable considerations are relevant in fashioning relief" and the court enjoys "broad discretion" in doing so.[458] Finally, a court is to consider the level of reimbursement and should not order total reimbursement if a court determines the cost of the private education was not "appropriate and reasonable."[459]

The Supreme Court's decision in *Carter* reinforced the earlier decision in *Burlington* that parents have a right under IDEA to unilaterally place their children in a private school and a right to be reimbursed if the public school district failed to provide FAPE.[460] The decision also clarified that parents are not restricted to unilaterally placing their child in a public school placement but may utilize a private placement that offers appropriate services. Finally, while the courts may reduce tuition reimbursement based upon the appropriateness of the private school services, the high cost of a private placement does not prevent parents from unilaterally placing their child in a private placement.[461]

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[455] *Id.*
[456] *Florence Cnty. Sch. Dist. Four v. Carter*, 950 F.2d. 156, 164 (4th Cir. 1991).
[457] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 366 (1993).
[458] *Id.*
[459] *Id.*
[460] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 389 (1985).
[461] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 366 (1993).

### *Individuals with Disabilities Education Act (1997)*[462]

Prior to the 1997 IDEA amendments, IDEA was silent regarding the availability of tuition reimbursement as a possible remedy for a school district's failure to provide a free appropriate public education to a disabled student. Rather than explicitly recognizing tuition reimbursement as an available remedy, IDEA stated that a court, "basing its decision on the preponderance of the evidence, shall grant such relief as [it] determines is appropriate."[463] According to the Court, the ordinary meaning of the phrase "grant such relief as [it] determines is appropriate" found in 20 U.S.C. X 1415(i)(2)(iii) "confers broad discretion on the court."[464] The Court also determined that because IDEA did not specify what "appropriate" means, courts must use their delegated discretion to fashion relief "in light of the purposes of the Act."[465] Noting that the principal purpose of IDEA is to ensure that disabled students are provided with FAPE, the Court held that tuition reimbursement is an appropriate remedy. This is due to the fact that without tuition reimbursement as a possibility, "the child's right to a free and appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete."[466]

The Court's decision in *Burlington* allowed for tuition reimbursement as an "appropriate" remedy under IDEA. However, at the time of the 1997 amendments, there was still a significant amount of controversy regarding whether the *Burlington* holding still applied to students who had never received special education in a public school. The 1997 amendment to IDEA included

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[462] Individuals with Disabilities Education Act, Pub. L. No. 105-17, 111 Stat. 37 (1997).
[463] 20 U.S.C. § 1415(i)(2)(C)(iii) (1997).
[464] *Sch. Comm. of Burlington v. De't of Educ.,* 471 U.S. 359, 369 (1985).
[465] *Id.*
[466] *Id.* at 370.

a new provision, 20 U.S.C. X 1412(a)(10)(C)(ii), which explicitly commented on this issue. This section, "Reimbursement For Private School Placement," states:

> 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 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.[467]

The 1997 Amendments did not substantially change IDEA[468] and were only intended to clarify and strengthen the Act.[469] They were focused on improving the educational outcomes of children with disabilities to prepare them to lead "productive independent adult lives."[470] Although Congress acknowledged some improvements in educational outcomes, testimony also reported that the educational achievement of children with disabilities was still less than satisfactory.[471] The Senate report discussing the 1997 amendments noted the discrepancy in high school dropout rates for non-disabled and disabled students, with almost twice as many students with disabilities dropping out as compared to non-disabled students.[472] The 1997 amendments strengthened the procedural requirements and increased the role of parents in the IEP process. IDEA 1997 also required that parents be allowed to participate as members of the IEP team and

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[467] 20 U.S.C. § 1412(a)(10)(C)(ii) (1997).
[468] The preamble to the 1997 amendment explains the focus of the legislation: "While retaining the basic rights and protections that have been in the law since 1975, the amendments strengthened the focus of the law on improving results for children with disabilities. The amendments accomplished this through changes that promote the early identification of, and provision of services to, children with disabilities … the education of children with disabilities with nondisabled children."
[469] Sen. Rpt. 105-17, 4 (May 9, 1997).
[470] *Id.* at 5.
[471] *Id.*
[472] *Id.* at 5.

also allowed students to have input into IEP decisions.[473] It also required that schools keep parents informed about the student's progress on their IEP goals and required parents to be included in any educational decisions affecting the student's placement.[474]

The 1997 amendments continued to emphasize the importance of inclusion with a focus on the least restrictive environment requirement. These amendments provided more of a focus on students with disabilities participating in the general curriculum, as this was perceived to be a key factor in ensuring better results for those children.[475] IDEA 1997 also added a general education teacher as a required IEP team member.[476] It was hoped that adding a general education teacher would increase the level of participation of students with disabilities in the general education curriculum.[477] These amendments provided a strong preference that, to the maximum extent appropriate, children with disabilities be educated in regular classes with their nondisabled peers with appropriate supplementary aides and services.[478] Removal from the regular education environment should occur "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[479]

The IDEA 1997 amendments defined what a change in placement was in relationship to disciplinary removals. These regulations stated that a change in placement occurred when a student with a disability has been "subjected to a series of removals that constitute a pattern,"

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[473] 20 U.S.C. § 1414(d)(1)(B)(i) (1997).
[474] *Id.* at § 1414(d)(1)(A)(viii)(II) (1997).
[475] *Id.* at § 1414(d)(1)(A)(iv) (1997).
[476] *Id.* at § 1414(d)(1)(B(ii) (1997).
[477] Sen. Rpt. 105-17, 5 (May 9, 1997).
[478] *Id.* at § 1414(d)(1)(A)(iii)(III) (1997).
[479] *Id.* at § 1414(d)(1)(A)(iv) (1997).

because they cumulate to more than ten school days during the school year.[480] The 1997 amendments also clarified that multiple short-term removals of less than ten consecutive days, for separate incidents of misconduct, are allowable.[481] This is permissible to the extent that such removals are also permitted for nondisabled children and those removals are not in such a pattern as to constitute a change in placement.[482]

The 1997 amendments also addressed the disciplinary provisions in IDEA, including use of manifestation determinations, functional behavior assessments and behavior intervention plans. This included that within ten business days of either removing the child for more than ten school days in a school year or commencing a removal that constitutes a change in placement, the school was required to convene an IEP meeting where they would conduct a manifestation determination review.[483] In addition, the school was required to begin developing a functional behavior assessment and a behavior intervention plan.[484] If the child in question already has a behavioral intervention plan, the IEP team must meet to review and modify the plan and its implementation.[485]

The IDEA 1997 amendments also required that school officials conduct a manifestation determination review whenever they contemplate: (a) removing a child with a disability for behavior relating to weapons or the illegal use of drugs, (b) seeking an order from a hearing officer to place a child in an interim alternative educational setting because of behavior that is substantially likely to result in injury to self or others, or (c) removing a child when such removal

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[480] 34 C.F.R. §300.519(a) (1997).
[481] 20 U.S.C. § 1415(k)(1)(A)(i) (1997).
[482] *Id.* at § 1415(k)(5)(A) (1997).
[483] *Id.* at §1415(k)(4)(A)(ii) (1997).
[484] *Id.* at §1415(k)(1)(B) (1997).
[485] *Id.*

constitutes a change.[486] If it is determined that the behavior of a child with a disability was not a manifestation of the child's disability, then the child can be disciplined in the same manner as nondisabled children, except that appropriate educational services must be provided.[487] The IDEA 1997 amendments also addressed the stay-put provision, which allows a child with a disability to stay in his or her current placement pending the resolution of due process and court action.[488] The amendments also provided that in cases involving weapons or drugs, the school district could unilaterally place a student into an interim alternative educational setting.[489] School authorities can unilaterally remove a child with a disability from the child's regular placement for up to 45 days at a time if the child has brought a weapon to school or to a school function; or knowingly possessed or used illegal drugs at school or a school function.[490]

The new IDEA 1997 provisions also mandated that school districts must provide protections to students not yet eligible for special education and related services who have engaged in behavior that violated the school code of conduct.[491] This section only protects general education students when there was previous reason to believe that they could have a disability.[492] The regulations specified the circumstances under which a district would be considered to have such knowledge. These included documentation of a parent's written concerns and a teacher's expressed concerns regarding the student's school performance.[493] If the school did not have knowledge that the student may have a disability prior to taking disciplinary action against the student, the student could be subjected to disciplinary measures, as

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[486] *Id.* at §1415(k)(4)(A) (1997).
[487] *Id.* at §1415(k)(5)(A) (1997).
[488] *Id.* at § 1415(j) (1997).
[489] *Id.* at § 1415(k)(1)(A)(ii) (1997).
[490] *Id.*
[491] *Id.* at §1415(k)(8)(A) (1997).
[492] *Id.*
[493] *Id.*

they would be applied to students without identified disabilities.[494] Parents were also given the right to request an evaluation during the period in which the discipline was being imposed. In those cases, school districts are required to evaluate the student in an expedited manner to determine his/her eligibility as a disabled student.[495] If it was determined that the student had a disability, the school would provide special education and related services for the student from that point forward.[496]

While the 1997 amendments provided the opportunity for tuition reimbursement in a unilateral private placement, they stopped short of becoming a clear, easily understood Act. In fact, the revision actually brought additional confusion and controversy to the process by which a child with disabilities might be unilaterally placed in a private school while being eligible for reimbursement.[497] First, while it does speak to the public school's requirement to provide FAPE, it did not clarify which party bears the burden of proof in a due process or court hearing.[498] Second, while the public school is required under IDEA to provide a placement in the least restrictive environment, the 1997 revision is silent as to whether reimbursement is available if the parents' placement is more restrictive than the public school's proposed placement.[499] Third, IDEA 1997 did not address whether reimbursement is available for additional services purchased by the parents if the child continues in the public school placement.[500]

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[494] *Id.* at §1415(k)(8)(C)(i) (1997).
[495] *Id.* at §1415(k)(8)(C)(ii) (1997).
[496] *Id.*
[497] Natalie Pyong Kocher, *Lost in Forest Grove: Interpreting IDEA's Inherent Paradox*, 21 HASTINGS WOMEN'S L.J. 333, 338 (2010).
[498] Ralph D. Mawdsley, *Diminished Rights of Parents to Seek Reimbursement Under the IDEA for Unilateral Placement of Their Children in Private Schools*, 2012 BYU EDUC. & L.J. 303, 310 (2012).
[499] *Id* at 309.
[500] *Id.*

The fourth issue not addressed was whether reimbursement could be denied if the parents' placement was not able to implement some or all of the services designed for the IEP.[501] The IDEA 1997 also did not address whether a parent could recover reimbursement for a child placed in a private school even though that child had never received special education.[502] Finally, the amendment did not address the costs of residential placements, the failure of parents to provide notice, or the adequacy of the private facility in providing a meaningful benefit.[503] The 1997 amendment to IDEA left many unresolved issues related to unilateral private placements open to judicial interpretation.

### ***Berger v. Medina City School District (2003)*[504]**

After *Carter*, the Supreme Court did not hear another case specifically related to unilateral private placements until 2005; however, there were two meaningful circuit court cases in the meantime. In *Berger v. Medina City School District*, the Sixth Circuit Court of Appeals was called upon to decide whether private placements must provide at least some element of special education services.[505] This case centered on the education of Travis Berger, a five-year-old child with a profound hearing loss, who was enrolled in the Medina City School District for kindergarten.[506] Due to Travis's profound hearing loss, he was eligible for special education services under IDEA, and therefore the school district provided him with a frequency modulation (FM) system for use at school.[507] During the next four years, Travis attended first through fourth

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[501] *Id.*
[502] *Id.*
[503] *Id.*
[504] *Berger v. Medina City Sch. Dist.,* 348 F.3d 513 (6th Cir. 2003).
[505] *Id.* at 523.
[506] *Id.* at 516.
[507] *Id.*

grades at Medina's Heritage Elementary School. Heritage Elementary School had an "open" classroom structure with dividers that did not reach all the way to the ceiling, which increased the noise level in the classroom.[508] In each of these years, Travis was educated in a regular education classroom with special education support, was provided additional speech and language therapy, and was offered some "pre-tutoring" of new vocabulary and concepts.[509] An evaluation completed at the end of his third-grade year noted that Travis had demonstrated some progress, but he also continued to have difficulty with comprehension and abstract concepts.[510]

It was during the fourth grade when Travis really began to struggle, which resulted in him having as much as four hours of homework.[511] When Travis received a "D" in written language and an "F" in both math and reading, his parents made it known that they thought Travis should be retained in fourth grade.[512] However, the district recommended that Travis be promoted to fifth grade and placed in the resource room for part of the day to receive small group instruction in math and language arts and to allow the instruction to be presented in a more concrete form.[513] The family admittedly consented to this placement and did not advise the school that they rejected this plan nor mentioned the possibility of removing Travis from Heritage Elementary.[514]

Before the next school year started, Travis's parents sent the district a letter stating their dissatisfaction with the proposed services, requested a due process hearing, and informed the district about the expectation of tuition reimbursement for "properly educating him

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[508] *Id.*
[509] *Id.*
[510] *Id.* at 516-17.
[511] *Id.* at 517.
[512] *Id.*
[513] *Id.* at 516.
[514] *Id.*

elsewhere."[515] Travis was enrolled at the alternate placement of Medina Christian Academy, where he repeated fourth grade.[516] At Medina Christian Academy, Travis received no special education services but had a smaller class size and had a "closed" classroom.[517] Travis's teacher at Medina Christian Academy, Mrs. Chase, received training on how to use the FM system and took care to speak directly into the microphone.[518] The plaintiffs testified that Travis did well at Medina, his grades improved, and he progressed in both reading and math.[519]

Both the impartial hearing officer (IHO) and state-level review officer (SLRO) found that while the district failed to provide Travis with a FAPE, plaintiffs were not entitled to reimbursement.[520] This decision was based upon the notion that a unilateral private placement cannot be regarded as proper when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient.[521] The family appealed the decision of the hearing officers to the U.S. District Court for the Northern District of Ohio. The district court found that although the procedural defects in the IEP were minimal, the IEP was substantively flawed so as to deprive Travis of FAPE.[522] However, the plaintiffs were not entitled to reimbursement because Medina Christian Academy was not a "proper placement" and because the family unilaterally withdrew Travis without first giving them an opportunity to

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[515] *Id.* at 518.
[516] *Id.*
[517] *Id.*
[518] *Id.*
[519] *Id.*
[520] *Id.* at 519.
[521] *Id.* at 523.
[522] *Id.* at 519.

remedy the IEP.[523] Finally, the district court ruled that the family was not entitled to attorney's fees as a "prevailing party" under the IDEA.[524]

Travis's parents appealed to the Sixth Circuit Court of Appeals.[525] The Sixth Circuit reiterated the Court's finding in *Burlington* that IDEA authorizes the courts to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than the district's proposed IEP, is proper.[526] The Sixth Circuit Court of Appeals found that although Travis's fourth-grade IEP was procedurally deficient because of inadequately stating his present levels of educational performance, they ruled that the deficiencies were minimal because the student's academic progress was known to all parties.[527] The Sixth Circuit also agreed with the IHO and district court findings that placement at MCA was inappropriate. The circuit court found:

> Although nothing in *Carter* or *Burlington* indicates that a private school must be readily identifiable as a 'special education placement,' a unilateral private placement cannot be regarded as 'proper under the Act' when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient.[528]

The plaintiffs maintained that the placement at MCA met Travis's needs because it had smaller classes, a better and more attentive teacher, and he was getting better grades.[529] However, the circuit court found that evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA.[530] Even though the statutory requirements of FAPE do not apply to private school placements, parents

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[523] *Id.*
[524] *Id.* at 518.
[525] *Id.*
[526] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).
[527] *Berger v. Medina City Sch. Dist.,* 348 F.3d 513, 520 (6th Cir. 2003).
[528] *Id.* at 523.
[529] *Id.* at 522.
[530] *Id.*

are not entitled to reimbursement for a private school placement unless it offers their disabled child "an education otherwise proper under [the] IDEA."[531]

The appeals court also denied the plaintiffs' request for reimbursement due to the fact that they failed to inform the district about their objection to the IEP before removing their child from the public school.[532] Even before the IDEA was amended to explicitly require such notice, this court held that dissatisfied parents were required to complain to the public school to afford the school a chance to remedy the IEP before removing their disabled child from the school.[533] The court reiterated that the only circumstances when IDEA does not require parents to meet the notice requirement is when the parent is illiterate, compliance would result in harm to the child, the school prevented the parent from providing notice, or the parents had not received information about the notice requirement.[534] The Sixth Circuit Court also found that the other technical violations, such as predetermining placement and failing to provide notice about the intention to change educational placement, were insufficient to excuse the parents of their requirement to notify the district before unilaterally withdrawing Travis.[535]

### ***Greenland School District v. Amy N. (2004)*[536]**

One year after *Berger* (2004), the First Circuit Court of Appeals also weighed in on private placements with *Greenland School District v. Amy N.* (2004). In this case, the family removed their daughter Katie, who had never been evaluated for special education, and placed

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[531] *Id.* at 523.
[532] *Id.*
[533] *Id.*
[534] 20 U.S.C § 1412(a)(10)(C)(iv) (1997).
[535] *Berger v. Medina City Sch. Dist.,* 348 F.3d 513, 525 (6th Cir. 2003).
[536] *Greenland School District v. Amy N*, 358 F.3d 150 (1st Cir. 2004).

her in a private school that did not focus on special education services.[537] The courts then had to decide whether Katie's parents were still eligible for tuition reimbursement after placing her in a private school, without first enrolling her in a public school special education program.

Katie was first enrolled at Greenland Central School in New Hampshire during her first-grade year and attended there through the end of her fourth-grade year.[538] While Katie was in first grade, her teacher noticed that she had difficulty focusing on classroom activities and was easily distracted.[539] During the summer after first grade, Katie's parents took her to a private psychologist who diagnosed her with Attention Deficit Hyperactivity Disorder (ADHD) and recommended several classroom accommodations.[540] During second, third, and fourth grades, Katie's teachers each used techniques similar to those recommended by the psychiatrist to help her stay on task.[541] Katie's mother, Amy N., was a special education teacher at a nearby high school and spent a considerable amount of time helping her daughter with the work.[542] By the time Katie was in fourth grade, her parents had hired a tutor to work with her two times a week.[543]

Katie continued to perform reasonably well in third and fourth grades, earning mostly A's and B's on her report card. Her academic marks were consistent with her scores on the California Achievement Test, a national standardized test that Katie took in the second and fourth grades.[544] Even though Katie was having academic success, she still occasionally had difficulty maintaining her concentration, had problems making friends, and was sometimes

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[537] *Id.* at 152.
[538] *Id.*
[539] *Id.*
[540] *Id.*
[541] *Id.*
[542] *Id.*
[543] *Id.* at 153.
[544] *Id.*

teased by her classmates.[545] However, at no point during Katie's time at Greenland did her parents or any of her teachers request that she be evaluated for special education services.[546] In August of 2000, after Katie had completed fourth grade, Katie's parents unilaterally removed her from the Greenland Central School and enrolled her in Mont Blanc Academy, a school that does not have a focus on special education.[547] In February of 2001, for reasons unspecified, Katie's parents withdrew her from Mont Blanc Academy and enrolled her at the Learning Skills Academy (LSA) for the remainder of her fifth-grade year.[548] LSA was a private school of about thirty students, primarily consisting of students with either a learning disability or ADHD.[549]

At approximately the same time that Katie started at LSA, Amy N. contacted Greenland Central School and requested that Katie be evaluated by a school psychologist.[550] The school district subsequently evaluated Katie and found that even though Katie had ADHD and an anxiety disorder, those conditions did not adversely affect her educational performance.[551] The district also concluded that Katie did not have a learning disability because there was no discrepancy between her ability and achievement.[552] Katie's family disagreed with the findings and had an independent evaluator conclude that Katie suffered from Asperger's disorder.[553] During Katie's sixth-grade year at LSA, Greenland reversed its earlier determination that Katie did not qualify for special education services.[554] Rather than find her eligible under the category of Autism, the team agreed to find her eligible as "other health

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[545] *Id.*
[546] *Id.*
[547] *Id.*
[548] *Id.*
[549] *Id.*
[550] *Id.* at 154.
[551] *Id.* at 154.
[552] *Id.*
[553] *Id.* at 155.
[554] *Id.*

impaired."[555] However, as the details of Katie's IEP were being finalized, her parents filed a due process hearing request, seeking reimbursement for Katie's tuition at LSA.[556]

The hearing officer rejected Greenland's argument that it was not required to develop an IEP for Katie because she was unilaterally placed in a private school by her parents.[557] The hearing officer also found that Greenland had made an error when it had previously failed to find Katie eligible for special education services.[558] Based on these findings, the hearing officer ordered Greenland to reimburse Katie's parents $48,000 for tuition at LSA for both the second semester of her fifth-grade year and the entirety of her sixth-grade year.[559] The school district appealed the hearing officer's decision to the United States District Court for New Hampshire.[560] The district court reversed the majority of the hearing officer's findings, concluding that the hearing officer had incorrectly considered the adequacy of the IEP offered by Greenland and the availability of tuition reimbursement.[561] The district court pointed out that Katie was enrolled in private school before her parents ever raised the question of special education and that FAPE was not an issue when Katie was removed from Greenland.[562] Therefore, the district court concluded that the hearing officer had only the statutory authority to consider whether Greenland had violated its Child Find obligation.[563]

Katie's parents appealed the portion of the decision reversing the hearing officer's determinations, while Greenland School District cross-appealed the portion of the decision that

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[555] *Id.*
[556] *Id.*
[557] *Id.* at 156.
[558] *Id.*
[559] *Id.*
[560] *Id.*
[561] *Id.*
[562] *Id.*
[563] *Id.*

Katie should have been found eligible for special education at an earlier date.[564] The First Circuit Court of Appeals held that 20 U.S.C. § 1412(a)(10)(C) limits reimbursement to circumstances when parents provide notice to the school district of the need for special education services before removing the child from the public school.[565]

The First Circuit Court of Appeals turned to the 1997 amendments to explain their findings. First, the court clarified that because Katie was enrolled at LSA when the due process hearing request was filed, her rights under IDEA are governed by 20 U.S.C. § 1412(a)(10).[566] That subsection divides children in private school into two categories: (1) children enrolled in private schools by their parents and (2) children placed in or referred to private schools by public agencies.[567] The court clarified that Katie fell into the former category, as she was not placed in or referred to Mont Blanc or LSA by a public agency.[568] In the event that a district fails to meet its Child Find obligations for a private school student, the parents must proceed through an alternative procedure within the state's administrative apparatus.[569]

Second, the court found while IDEA 1997 stated local school systems had Child Find obligations for students in private schools, they do not have to provide those students with the full complement of services that a student in public school with special needs would receive.[570] These services were described by the court to be different in scope and less extensive than the

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[564] *Id.*
[565] *Id.* at 157-58.
[566] *Id.* at 157.
[567] 20 U.S.C. §§ 1412(a)(10)(A), (B) (1997).
[568] *Greenland School District v. Amy N* 358 F.3d 150, 156 (1st Cir. 2004).
[569] 34 C.F.R. §§ 300.504-300.515.
[570] 20 U.S.C. § 1412(a)(10)(A) (1997).

services that a disabled child in the public schools is entitled to receive.[571] Finally, the court observed the amendments limited the circumstances in which parents who have unilaterally placed their child in a private school were entitled to reimbursement for that placement.[572]

The First Circuit Court of Appeals reiterated that *Burlington* does provide courts with the power to provide the equitable remedy of tuition reimbursement, even when parents unilaterally remove their child from the public school.[573] Although a few courts have precisely defined the level of cooperation necessary by parents, most thought it clear that, at a minimum, the parents had to inform the school district of their concerns about their child's special needs, as well as issues with the proposed IEP, before removing the child from public school.[574] Additionally, IDEA 97 helped to clarify this in the section: "Payment for education of children enrolled in private schools without consent of or referral by the public agency."[575] The court concluded the IDEA did not require a local education agency 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.[576]

The circuit court described threshold requirements that were key to a parent's claim for reimbursement. First, the court noted tuition reimbursement was only available for children who have previously received "special education and related services" while in the public school system, or at least for those who timely requested such services while their child was in

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[571] *Greenland School District v. Amy N,* 358 F.3d 150, 157 (1st Cir. 2004).
[572] 20 U.S.C. § 1412(a)(10)(C) (1997). See *Berger v. Medina City Sch. Dist.,* 348 F.3d 513, 523-24 (6th Cir. 2003). Several courts, relying on the parents' failure to challenge the IEP's adequacy, have found insufficient notice to the school district even when the parents requested an evaluation and received an IEP before removing their child.
[573] S*ch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 372 (1985).
[574] *Greenland School District v. Amy N,* 358 F.3d 150, 157 (1st Cir. 2004).
[575] 20 U.S.C. § 1412(a)(10)(C) (1997).
[576] *Greenland School District v. Amy N,* 358 F.3d 150, 159 (1st Cir. 2004).

public school.[577] These statutory provisions made clear Congress's intent that before parents place their child in private school, they must at least give the school a chance to assemble a team, evaluate the child, devise an appropriate plan, and determine whether FAPE can be provided in the public schools.[578] Finally, the circuit court noted that once a child's parents unilaterally removed the child from public school, subsequent notice almost a year after removal did little good.[579] The circuit court quoted the *Burlington* Court from twenty years earlier: "Parents who unilaterally change their child's placement, without the consent of state or local school officials, do so at their own financial risk."[580]

### *Individuals with Disabilities Education Improvement Act (2004)*[581]

Shortly after the conclusion of *Greenland School District v. Amy N. (*2004), Congress reauthorized IDEA and renamed it the Individuals with Disabilities Education Improvement Act. This 2004 reauthorization placed a high priority on standardized achievement levels while including children with disabilities as a subgroup in the No Child Left Behind legislation of 2001.[582] Instead of focusing solely on access to education for students with disabilities, IDEA 2004 promoted accountability measures and standards that every child, regardless of disability,

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[577] *Id.* at 160.
[578] *Id.*
[579] *Id.* at 162.
[580] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373-74 (1985).
[581] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400-1482).
[582] On December 3, 2004 President Bush signed the reauthorization of IDEA, known as the Individuals with Disabilities Education Improvement Act. 20 U.S.C. 1400 et seq. "Our goal is to align IDEA with the principles of [NCLB] by ensuring accountability, more flexibility, more options for parents, and an emphasis on doing what works to improve student achievement." U.S. Dept. of Educ., Paige Releases Principles for Reauthorizing Individuals with Disabilities Education Act (IDEA), http://www.ed.gov/news/pressreleases/2003/02/02252003.html (Feb. 25, 2003).

must meet.[583] The IDEA legislation also attempted to simplify the evaluation procedural requirements by requiring that special education evaluations only needed to occur at least every three years, and no more frequently than once a year, unless both the parent and district agreed to it.[584] One main intent behind the 2004 Reauthorization was to reduce the administrative burden placed on special educators, since Congress felt that "IDEA paperwork takes time away from important teaching responsibilities."[585]

The 2004 Reauthorization also made important changes in the Individualized Educational Plan (IEP) meeting, such as allowing required participants to be excused if both the parent and district agree.[586] It required that the IEP include a statement of any individual accommodations that were necessary to measure the academic achievement and functional performance of the child on state and district-wide assessments.[587] The 2004 IDEA amendments added a requirement that the IEP must consider "the academic, developmental, and functional needs of the child."[588] The reauthorization also eliminated the requirement that each goal in the IEP has a benchmark and short-term objectives, except for those children who are the most cognitively disabled.[589] Additionally, the IDEA 2004 amendments also authorized fifteen states to issue three-year IEPs on a trial basis.[590]

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[583] 20 U.S.C. § 1412(a)(16) (2005).
[584] *Id.* at § 1414(a)(2)(B)(i-ii) (2005).
[585] AMERICAN YOUTH POLICY FORUM AND CENTER ON EDUCATION POLICY, *Twenty-Five Years of Educating Children with Disabilities: The Good News and the Work Ahead,* 56 Am. Youth Policy Forum and Ctr. on Educ. Policy (2001).
[586] 20 U.S.C. § 1414(d)(1)(C) (2005).
[587] *Id.* at § 1414(d)(1)(A)(i)(VI)(aa) (2005).
[588] *Id.* at § 1414(d)(3)(A)(iv) (2005).
[589] *Id.* at § 1414(d)(1)(A)(i)(I)(cc) (2005).
[590] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400-1482) (reference to three-year IEPs at 20 U.S.C. § 1414(d)(5)(A)(ii) (2005)).

Another focus of the 2004 Reauthorization was the eligibility criteria.[591] Prior to 2004, most states used the discrepancy model to determine which students were eligible for special services.[592] This model earned the derisive nickname of the "wait-to-fail" model because it required children to fall behind their classmates before being eligible for special education.[593] IDEA 2004 moved away from the discrepancy model and utilized a system that provided for research-based instruction and interventions that allowed for younger students to be identified and assisted through specialized instruction.[594] This system utilizes frequent assessments to identify students struggling in reading and math, who then become eligible to receive supplemental academic instruction. IDEA 2004 also included provisions that required schools to provide high-quality, intensive professional development for all personnel who work with children with disabilities."[595] This professional development was designed to provide staff with "skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities."[596]

The 2004 Reauthorization also made a number of changes related to the discipline of students with disabilities. IDEA 2004 added a section on the services that must be provided when a child with a disability is removed from his or her current placement, whether or not the behavior that triggered the move was determined to be a manifestation of the child's disability.[597] Under these new changes, children with disabilities must continue to receive educational services

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[591] 20 U.S.C. § 1414(b)(6) (2005).
[592] Brett Schaeffer, *The History and Reauthorization of IDEA*, GREAT SCHOOLS, http://www.greatschools.org/special-education/legal-rights/803-the-history-and-reauthorization-of- idea.gs (last visited Jan. 28, 2014).
[593] *Id.*
[594] 20 U.S.C. § 1414(b)(6) (2005).
[595] *Id.* at § 1400(c)(5)(E) (2005).
[596] *Id.*
[597] *Id.* at § 1415(k)(1)(D) (2005).

that enable them to continue to participate in the general education curriculum and to progress toward meeting their IEP goals.[598] Another change in the 2004 Reauthorization was the addition of "serious bodily injury" to the list of situations when a district can place a student in an interim alternative educational setting (IAES).[599] The reauthorization also changed the "stay-put" provision during an appeal when a student is placed in an IAES for carrying a weapon, possessing drugs, or inflicting serious bodily injury.[600] Under these circumstances, when an appeal has been requested by either a parent or the school district, an expedited hearing must occur within 20 school days from when the hearing is requested.[601]

The 2004 Reauthorization also added some protections for students not yet eligible for special education and related services.[602] Under the 2004 changes, a district was deemed to have knowledge that a child might have a disability if the parent expressed concern in writing to an administrator that their child is in need of special education, if a parent had requested an evaluation, or if an LEA personnel expressed specific concerns about a pattern of behavior to supervisory personnel.[603] IDEA also requires that districts consult with private schools and parents of parentally placed private school children with disabilities about the Child Find process, proportionate share, and what special education services will be provided for parentally placed private school children with disabilities.[604] Finally, the 2004 Reauthorization also

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[598] *Id.*
[599] *Id.* at § 1415(k)(1)(G) (2005).
[600] *Id.* at § 1415(k)(4) (2005).
[601] *Id.*
[602] *Id.* at § 1415(k)(5) (2005).
[603] *Id.* at § 1415(k)(4) (2005).
[604] *Id.* at § 1412(a)(10)(A)(iv) (2005).

addressed the provision of services at private schools by clarifying that the services are to be "secular, neutral, and nonideological."[605]

The 2004 Individuals with Disabilities Education Improvement Act had a few provisions that directly impacted the process of parents unilaterally placing their child in a private placement and then seeking reimbursement from the school district.[606] As in the previous version of IDEA (1997), tuition reimbursement may be reduced or denied if the child's parents did not give certain notice to the public school district.[607] However, under IDEA 2004, the cost of reimbursement is not to be reduced or denied for the failure to provide notice if: (a) the school prevented the parent from providing such notice, (b) the parents had not received notice of the notice requirement, or (c) compliance would likely result in physical harm to the child.[608] Additionally, under the new provision, at the discretion of a court or hearing officer, the reimbursement cannot be reduced or denied if the parent is illiterate or cannot write in English or compliance with the notice requirement would like result in serious emotional harm to the child.[609] This was more extensive than the "if the parent is illiterate" and "serious emotional harm" provision that was used in IDEA 1997.[610]

### ***Schaffer v. Weast (2005)***[611]

In 2005, the U.S. Supreme Court heard the case of *Schaffer v. Weast*, which addressed the issue of which party bears the burden of persuasion in a due process hearing.[612] In this case, the

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[605] *Id.*
[606] *Id.* at § 1412(a)(10)(C) (2005).
[607] *Id.* at § 1412(a)(10)(C)(iii) (2005).
[608] *Id.* at § 1412(a)(10)(C)(iv) (2005).
[609] *Id.*
[610] *Id.* at § 1412(a)(10)(C) (1997).
[611] *Schaffer v. Weast,* 546 U.S. 49 (2005).

Schaffers unilaterally placed their child in a private placement and initiated a due process hearing challenging their child Brian's IEP and seeking compensation for the cost of his subsequent private education.[613] Brian was a student with learning disabilities who attended a private school in Maryland from preschool through seventh-grade.[614] Brian struggled at his private school and therefore after his seventh grade year, the private school officials informed his mother that he needed a school that could better accommodate his needs.[615] Therefore, his parents sought placement with Montgomery County Public Schools System (MCPS), who evaluated Brian and provided an initial IEP offering in either of two MCPS middle schools.[616] However, the Schaffers did not agree that the middle school placement that MCPS offered would provide the smaller class sizes and intensive services that Brian needed.[617] The Schaffers therefore enrolled Brian in another private school and requested a due process hearing.

The administrative law judge (ALJ)[618] deemed the evidence provided by both parties to be equally compelling.[619] After deciding that the burden of persuasion belonged to the parents because they challenged the IEP, the ALJ ruled in favor of the school district.[620] The parents appealed the ALJ's ruling to the United States District Court for the District of Maryland, who reversed the ALJ's decision, finding that the burden of persuasion as to the adequacy of an initial IEP should be placed on the district.[621] The school district then appealed the decision to the

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[612] *Id.* at 56.
[613] *Id.*
[614] *Id.* at 55.
[615] *Id.*
[616] *Id.* at 55-56.
[617] *Id.* at 56.
[618] In Maryland, IEP hearings are conducted by administrative law judges (ALJs). See Md. Educ. Code Ann. § 8-413(c) (Lexis 2004).
[619] *Schaffer v. Weast,* 546 U.S. 49, 56 (2005).
[620] *Id.*
[621] *Id.*

United States Court of Appeals for the Fourth Circuit, who reversed the decision.[622] Brian Schaffer's parents appealed to the U.S. Supreme Court who affirmed the judgment of the Fourth Circuit.[623]

The Court reiterated that if the statute was silent regarding which party had the burden of proof (such as with IDEA), then the proceedings would begin with the "ordinary default rule that plaintiffs bear the risk of failing to prove their claims."[624] The Court reasoned that although schools might put more resources into preparing proper IEPs, due process hearings are expensive and Congress has repeatedly amended IDEA to reduce litigation costs.[625] Finally, the Court was not persuaded by what it described as the parents' most plausible argument, that considerations of fairness require that the burden not be placed on a party to establish "facts peculiarly within the knowledge of his adversary."[626] Justice O'Connor explained that Congress addressed this "natural advantage" through procedural safeguards and through the right of parents to obtain an independent educational evaluation at public expense.[627]

### ***M.M. ex rel. C.M. v. School Board of Miami-Dade County (2006)***[628]

In January of 2006, two months after *Schaffer v. Weast*, the Court of Appeals for the Eleventh Circuit heard the case of *M.M. ex rel. C.M. v. School Board of Miami-Dade County*. In this case, the Eleventh Circuit was asked to decide whether parents are always required to follow an inadequate IEP by first enrolling their child in public school in order to preserve their right to

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[622] *Schaffer v. Weast,* 377 F.3d 449 (4th Cir. 2009).
[623] *Schaffer v. Weast,* 546 U.S. 49, 51 (2005).
[624] *Id.*
[625] *Id.* at 58-59.
[626] *Id.* at 60.
[627] *Id.*
[628] *M.M. ex rel. C.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006).

reimbursement.[629] The *M.M. ex rel. C.M. v. School Board of Miami-Dade County* case centered on C.M., who was born with a profound bilateral sensorial hearing loss.[630] C.M. began receiving auditory-verbal therapy (AVT) when she was nine months old. The Miami-Dade County Early Intervention Program paid for one weekly hour of AVT for C.M. until she turned age three.[631] The district completed its evaluation of C.M. a few days after her third birthday and drafted an IEP recommending that she be placed in a special education class using the verbotonal (VT) approach.[632] However, during multiple IEP and mediation meetings, C.M's parents repeatedly asked that the district provide AVT services instead.[633]

On January 31, 2002, C.M.'s parents filed a due process hearing request on behalf of C.M. challenging the school board's refusal to provide C.M. with AVT.[634] The hearing officer denied C.M.'s parents' request for reimbursement, based on the fact that they had never been enrolled in a public school.[635] The ALJ determined that "while there can be no question that C.M. has benefitted significantly from the AVT she has received from Ms. Bricker, AVT is not the only accepted and proven therapeutic methodology that can help C.M. become a better oral communicator and thereby access her education."[636] The ALJ concluded that VT is an accepted and proven therapy and that "it is the School Board's prerogative, not the Parents, to choose

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[629] *Id.* at 1098-99.
[630] *Id.* at 1089.
[631] *Id.* at 1090.
[632] *Id.* at 1090-91 *(11th Cir. 2006)*. The VT (verbotonal) approach is a recognized and well-established means by which to teach hearing-impaired children to speak. VT is a flexible methodology that can be adapted to meet the individual needs of a child with a cochlear implant. Like AVT (auditory-verbal therapy), VT focuses on sharpening listening skills and strengthening the auditory pathway. Visual and tactile clues, vibratory stimulation, and body movements are often utilized. Unlike AVT, VT does not rely on parental participation for successful results.
[633] *Id.* at 1090-92.
[634] *Id.* at 1092.
[635] *Id.* at 1093.
[636] *Id.* at 1093-94.

which of these accepted and proven methodologies will be provided at public expense."[637] The parents then appealed the case to the United States District Court for the Southern District of Florida but the court dismissed the parents' IDEA claim for lack of subject matter jurisdiction.[638] The parents then appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit Court of Appeals found in favor of the district, stating that IDEA does not permit an IEP to be challenged on the grounds that it is not the best or most desirable program for that child.[639] Since C.M.'s parents were merely asserting that AVT is the best and most desirable method to educate C.M., they failed to state a claim under the IDEA and there is no entitlement to the "best" program. However, the Eleventh Circuit Court of Appeals also acknowledged that the district court had made an error when deciding whether or not the family was eligible for tuition reimbursement.[640] First, if the district court found that a school district had failed to follow the IDEA's procedural requirements, or that the IEP was not reasonably calculated to enable the student to receive education benefits, it "shall grant such relief as the court determines is appropriate."[641] Therefore, if the public school failed to offer FAPE, the family was eligible for tuition reimbursement and related services, including C.M.'s private AVT, transportation to and from AVT, programming for C.M.'s cochlear implant, and batteries for C.M.'s implant.[642] The circuit court pointed out that sole reliance on the fact that C.M. never attended public school is legally insufficient to deny reimbursement under §

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[637] *Id.*
[638] *Id.* at 1094.
[639] *Id.* at 1102-03.
[640] *Id.* at 1098-99.
[641] 20 U.S.C. § 1439(a)(1) (2004).
[642] *Id.* at 1101.

1412(a)(10)(C)(ii).[643] To support this, the court described how in *Burlington*, the United States Supreme Court recognized the difficult decisions facing parents of children with disabilities.[644]

The second issue addressed by the Eleventh Circuit Court of appeals was that C.M. actually "received special education and related services under the authority of a public agency" as provided under 20 U.S.C. § 1412(a)(10)(C)(ii).[645] As stated above, C.M. previously received AVT until the age of three through the Miami-Dade County Early Intervention Program.[646] In addition, until the age of three, C.M. received oral motor therapy and other special education services under the authority of a public agency.[647] Consequently, if the school board failed to offer C.M. a free and appropriate public education, *C.M.* satisfies the precondition in 20 U.S.C. § 1412(a)(10)(C)(ii) for reimbursement.[648] So, *M.M. ex rel. C.M. v. School Board of Miami-Dade County* was a victory for the school district regarding the choice of methodology and whether C.M. was offered FAPE. However, the case was a victory for parents of children with disabilities too, since it challenged the *Greenland* court's decision that children must be enrolled in the public schools to be eligible for tuition reimbursement.

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[643] *Id.* at 1099.
[644] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 361 (1985). "It would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete."
[645] *M.M.*, 437 F.3d 1085, 1098 (11th Cir. 2006).
[646] *Id.*
[647] *Id.*
[648] *Id.*

### *Frank G. v. Bd. of Educ. (2006)*[649]

In 2006, the Second Circuit Court of Appeals was asked to determine whether IDEA reimbursement provisions required the receipt of special education services by a state agency as a prerequisite to tuition reimbursement.[650] The case of *Frank G.* involved a child named Anthony who had been diagnosed with Attention Deficit Hyperactive Disorder (ADHD) from the time that he was three years old.[651] Anthony lived with his adoptive parents, Diane and Frank G., and resided in Wappingers Falls, New York.[652] During the 1997-98 school year, Anthony attended kindergarten at the Randolph School, a private school, where he initially did well.[653] However, as Anthony progressed through school, his academic performance began to decline. When he got to fourth grade, Frank and Diane G. requested a special education evaluation from the school district.[654]

The district's evaluation revealed deficits in visual memory and visual sequential memory skills, resulting in Anthony being eligible for special education services under the category of "learning disabled."[655] The family simultaneously took Anthony for an independent neuropsychological evaluation, which recommended more personalized attention, a smaller class size, occupational therapy, social skills training, and counseling.[656] In August of 2001, the school district offered services that placed Anthony in a public school (general education) class with 26 to 30 other students.[657] The IEP also provided for a full-time individual aide, special

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[649] *Frank G. v. Bd. of Educ.,* 459 F.3d 356 (2nd Cir. 2006).
[650] *Id.* at 368.
[651] *Id.* at 359.
[652] *Id.*
[653] *Id.* at 359-60.
[654] *Id.* at 360.
[655] *Id.*
[656] *Id.*
[657] *Id.*

help for "math and organizational skills," as well as "counseling, group occupational therapy, and a behavior modification program."[658] Two days later, the parents requested an impartial hearing to review the district's recommendation that Anthony receive special education services at the Smith School, asking instead for services at Bishop Dunn School.[659] The family stated that a class with more than 25 students was not "appropriate," a position consistent with recommendations provided by Anthony's teachers and therapists.[660]

While their request for an impartial hearing was pending, the parents placed Anthony at Upton Lake Christian School, where he repeated fourth grade in a class of 14 students.[661] Although the school district eventually agreed that Anthony's IEP did not meet the requirements for a FAPE, it argued that the school Anthony's parents placed him in was "equally inappropriate" and therefore they were not required to bear the expense of his education there.[662] The IHO agreed that the new private school was not an appropriate placement, citing Anthony's lack of "academic or social progress."[663] Although he did not order tuition reimbursement, the IHO ordered the school district to provide Anthony with special services, occupational therapy, and an individual aide while he attended Upton Lake. Both parties filed an appeal to the state review officer (SRO). The SRO affirmed both the IHO's order denying tuition reimbursement and the order requiring the school district to provide Anthony a direct consultant teacher and a one-to-one aide at Upton Lake.[664]

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[658] *Id.*
[659] *Id.* at 360-61.
[660] *Id.*
[661] *Id.* at 361.
[662] *Id.* at 360.
[663] *Id.* at 361.
[664] *Id.*

Anthony's parents appealed to the U.S. District Court for the Southern District of New York. After a bench trial, the Southern District of New York held that the parents' private school placement was appropriate, based on additional evidence of Anthony's social, behavioral and academic progress as well as his improved emotional state.[665] Therefore, the district court judge decided in favor of the parents and granted their request for tuition reimbursement for $3,660, along with attorney's fees in the amount of $34,567.[666] The school district appealed to the Second Circuit Court of Appeals, asserting two principal arguments. First, the district alleged that the private school where Anthony's parents had enrolled him was an inappropriate placement, considering his needs. Second, even if the private school was considered appropriate, the district argued that Anthony's parents were not entitled to reimbursement because he had never received special education services in a public school.[667] The school district asserted that Anthony's parents were not entitled to tuition reimbursement even if his private school placement offered him FAPE because Anthony had never received special education services from a public agency.[668] The school district argued that IDEA "implicitly excluded reimbursement" when the child has not received special education services from a public agency.[669] In 2006, the Second Circuit affirmed the district court's holding and awarded the parents retroactive tuition reimbursement.[670] In response to the school district's first argument that Anthony's school was inappropriate, the court stated that Anthony's private school

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[665] *Id.* at 362.
[666] *Id.*
[667] *Id.* at 362-63.
[668] *Id.* at 367. In support of this argument, the school district offered the "plain language" of § 1412(a)(10)(C)(ii), which explicitly states that tuition reimbursement is available when parents of a disabled child "who previously received special education and related services under the authority of a public agency" unilaterally enroll their child in a private school without consent of the agency
[669] *Id.* at 368.
[670] *Id.* at 367.

placement was "reasonably calculated to enable him to receive educational benefits" and provided him with "meaningful access" to education.[671] The Second Circuit disagreed with the school district's "absolute defense" and held that § 1412(a)(10)(C)(ii) of IDEA does not limit reimbursement to cases where the disabled child previously received special education services from a public agency.[672]

The court stated that, "as in all statutory interpretation cases," it would begin its analysis by looking at the plain language of the statute.[673] The court's "first task" was to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.[674] The court found that the language in § 1412(a)(10)(C)(ii) was ambiguous because it did not explicitly state that tuition reimbursement was only available when a child had previously received public special education services, nor did it explicitly exclude parents whose child had not previously received such services.[675]

The court reiterated that the express purpose of IDEA is to ensure that all disabled children have access to services that are tailored to their present and future needs.[676] Furthermore, one of the "primary" vehicles for providing FAPE under IDEA is giving the courts "broad discretion" to grant relief they deem appropriate."[677] Although the court noted that the language added by the 1997 amendments may guide the manner in which the authority is exercised, they found nothing to suggest that Congress sought to alter prior law in a manner that would constrain the power of a district court judge to award reimbursement for a private

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[671] *Id.* at 364-66.
[672] *Id.* at 367-74.
[673] *Id.* at 368.
[674] *Id.*
[675] *Id.*
[676] *Id.* at 371.
[677] *Id.*

placement.[678] The court also reasoned that the reenactment of § 1415(i)(2)(C) without any substantive revision was "significant" because it implied that Congress intended to uphold the statutory interpretation of the Supreme Court in *Burlington*.[679] The Second Circuit cited the *Burlington* holding that the IDEA should not be interpreted to defeat the objectives of providing disabled children with a free and appropriate education.[680]

The final issue considered by the Second Circuit was the idea that ambiguous statutes are to be construed as to avoid "absurd" results.[681] The court explained that the school district's interpretation would produce such results by proffering several hypothetical situations (e.g., not finding a student eligible for an IEP to avoid reimbursing tuition).[682] It would, for instance, prevent children who are provided with inadequate IEPs from receiving a free appropriate public education if their disabilities were detected before they reached school age.[683] The court also hypothesized that it would place the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement.[684] The Second Circuit "declined to interpret § 1412(a)(10)(C)(ii) to require parents to jeopardize their child's health and education, in order to qualify for the right to seek tuition reimbursement."[685]

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[678] *Id.* at 371-72.
[679] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985). (Quoting 20 U.S.C. § 1415(i)(2)(C) (2006)…. the courts have "broad discretion" and "shall grant such relief as the court determines is appropriate.")
[680] *Frank G. v. Bd. of Educ.,* 459 F.3d 356, 372 (2nd Cir. 2006).
[681] *Id.* at 368.
[682] *Id.* at 372.
[683] *Id.*
[684] *Id.*
[685] *Id.*

### *Bd. of Educ. of N.Y. v. Tom F. (2007)*[686]

The next important case, *Tom F.,* occurred at approximately the same time as *Frank G.*, with both cases originating in New York. In the *Tom F.* hearings, the district argued that the child should at least have to come into the public school placement for a short period of time, so that the district has the opportunity to work with the parents and arrive at a solution. The family argued that placing a child in an inappropriate public placement for even one day contradicted the underlying notion of FAPE.

Gilbert F., the son of Tom F., was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) when he was a toddler.[687] Since he became eligible for public school services in 1995, Gilbert attended Stephen Gaynor School (Gaynor), a private school that was not approved by the State of New York to provide special education services.[688] Gilbert was initially referred to the public school district for special education during the 1997-98 school year, where he received an eligibility of learning disabled.[689]

In both the 1997-98 and 1998-99 school years, the school developed an Individualized Education Program (IEP) with which Tom F. disagreed.[690] Instead, Tom F. maintained Gilbert's enrollment in the Stephen Gaynor School and requested tuition reimbursement from the public school district under the procedure provided in the IDEA.[691] Instead of challenging Tom F.'s claims and engaging in litigation, the school elected to settle and pay the tuition.[692]

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[686] *Bd. of Educ. of N.Y. v. Tom F.*, 552 U.S. 1 (2007).
[687] Brief of Respondent, 3, *Tom F.* (No. 06-637).
[688] *Tom F.*, 552 U.S. 1, 6 (2007).
[689] *Id.*
[690] *Id.* at 6-7.
[691] Brief of Respondent, 3, *Tom F.* (No. 06-637).
[692] *Tom F.*, 552 U.S. 1, 7 (2007).

In anticipation of the 1999-2000 school year, the public school once again evaluated Gilbert and then developed a new IEP at a meeting in which Tom F. participated.[693] This IEP called for placement at the New York City Lower Lab School for Gifted Education.[694] As such, Gilbert would not be eligible for placement in a mainstream class but would be placed in a self-contained class. That meant that he would not have the advantages of a mainstream placement, such as interaction with non-disabled peers.[695] Tom F. rejected the placement at the New York City Lower Lab School for Gifted Education, placed Gilbert at the Stephen Gaynor School and requested an impartial hearing to contest his son's placement.[696]

The respondent's complaint requested $21,819 in tuition reimbursement for attendance at the Gaynor School for the 1999-2000 school year.[697] The hearing officer concluded that the public school placement in the Lower Lab School was not an appropriate placement for Gilbert.[698] The school district filed an administrative appeal, and the state review officer (SRO) affirmed the decision, which rejected the school district's argument that tuition reimbursement should not be available to Tom F. in this circumstance.[699] The school district, having exhausted its administrative remedies, appealed to the U.S. District Court for the Southern District of New York, alleging violations of 20 U.S.C. §§ 1400 et seq. and challenging the SRO's decision.[700]

The district court did not evaluate whether the placement was appropriate and ruled that, as a matter of law, the "clear implication of the plain language of § 1412(a)(10)(C)(ii) is that where a child has not previously received special education from a public agency, there is no

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[693] *Id.*
[694] *Id.* at 9.
[695] Brief of Respondent, 4, *Tom F.* (No. 06-637).
[696] *Tom F.*, 552 U.S. 1, 9 (2007).
[697] *Id.*
[698] *Id.* at 14-15.
[699] *Id.* at 15-16.
[700] *Id.* at 17.

authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school."[701] Thus, the district court reversed the SRO and denied tuition reimbursement.[702]

On January 31, 2005, Tom F. filed a notice of appeal to the Second Circuit Court of Appeals.[703] In his appeal, Tom F. argued that the district court had incorrectly interpreted the law and that reimbursement is not restricted solely to parents whose child has previously received services from a public school.[704] The Second Circuit considered the appellant's argument but vacated and remanded because *Frank G.* had just been decided on the same issue.[705] This decision by the Second Circuit Court of Appeals permitted parents who have never given the local education agency an opportunity to provide FAPE to their child to have the same protections as those who have given the public entity a chance to do so.[706] In 2007, the U.S. Supreme Court granted certiorari for *Tom F.* while also denying certiorari to also hear *Frank G.* The main distinguishing feature between those two cases was that in the proceedings of *Frank G.*,[707] the school district conceded that the IEP it had proposed did not provide FAPE, whereas the school district in *Tom F.* argued that their services were appropriate.[708]

During the oral arguments in *Tom F.,* Justice Alito asked the school board's attorney, "What possible purpose is served by simply requiring the student to be in a placement that is by

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[701] *Id.*
[702] *Id.*
[703] *Id.*
[704] Brief of Respondent, 9, *Tom F.* (No. 06-637).
[705] *Tom F.*, 552 U.S. 1, 18 (2007).
[706] *Id.*
[707] *Frank G.,* 459 F.3d 356, 360 (2nd Cir. 2006).
[708] *Tom F.*, 552 U.S. 1, 18 (2007). In the appeal to the SRO, the Board argued that the IHO incorrectly held that the IEP meeting was not properly constituted and that the proposed placement was reasonably calculated to confer educational benefits for the student.

definition not providing a free appropriate public education for a very short period of time?"[709] The district's attorney argued that the school district believed that it could provide Tom F.'s child with an appropriate education.[710] The district felt that the child should at least come into the public school system so that they would have an opportunity to work with the parents and arrive at a solution.[711] Tom F.'s attorney countered by stating that placing a child in an inappropriate placement for even one day in order to retain reimbursement contradicts the statute's goal of providing FAPE.[712]

The Court rendered its decision in October 2007, in which the U.S. District Court's judgment was affirmed by an equally divided court, requiring students to be in a public school placement before parents can be eligible for reimbursement.[713] The Court clarified that rather than guiding all circuit courts with a definite decision, they were affirming a decision that would have no precedential value outside of the Second Circuit.[714] It was noted that this decision, or lack of a decision, temporarily created a "chasm" between the circuit court decisions while leaving a "dichotomy in place on this crucial issue."[715]

### ***Forest Grove v. T.A. (2009)***[716]

The last in a series of three landmark decisions, the Supreme Court was asked to weigh the interests of schools and parents in *Forest Grove v. T.A.* (2009). The question presented in this case is whether the IDEA amendments of 1997 categorically prohibited reimbursement for

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[709] Transcript of Oral Argument at 9-10, *Bd. of Educ. v. Tom F.*, 128 S. Ct.1 (2007).
[710] *Id.* at 13, *Bd. of Educ. v. Tom F.*, 128 S. Ct.1 (2007).
[711] *Id.*
[712] *Id.* at 34-35, *Bd. of Educ. v. Tom F.*, 128 S. Ct.1 (2007).
[713] *Tom F.*, 552 U.S. 1, 1 (2007).
[714] *Id.*
[715] *Id.*
[716] *Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009).

private education costs when a child has not previously received special education and related services under the authority of a public agency.[717] Since the U.S. Supreme Court's judgment was 4-4 in *Tom F.*, it was anticipated that the Court would grant certiorari in another private placement case to help clarify the Court's stance.[718]

T. A. attended public school in the Forest Grove School District (Oregon) from the time he was in kindergarten through the winter of his junior year of high school.[719] From kindergarten through eighth grade, T.A.'s teachers observed that he had trouble paying attention in class and completing his schoolwork.[720] These difficulties increased during T.A.'s freshman year and prompted his mother to contact the school counselor. At the end of his freshman year, T.A. was evaluated by a school psychologist from the Forest Grove School District.[721] After interviewing him, examining his school records, and administering cognitive ability tests, the psychologist concluded that further testing was unnecessary.[722] The psychologist and other school officials discussed the evaluation results with T.A.'s mother in June 2001, and all agreed that he was ineligible for special education services under IDEA.[723] Throughout the remainder of his time at Forest Grove, T.A.'s parents did not request additional special education evaluations.

T.A.'s school problems grew worse during his junior year, resulting in his parents talking to the school district about T.A. completing high school through a partnership program with the

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[717] *Id. at* 2484.
[718] Emily Blumberg, Recent Development*: Forest Grove School District v. T.A.*, 45 HARV. C.R.-C.L. L. REV. 163, 168 (2010).
[719] *Forest Grove v. T.A.*, 129 S. Ct. 2484, 2488 (2009).
[720] *Id.*
[721] *Id.*
[722] *Id.*
[723] *Id.*

local community college.[724] In March of 2003, the family took T.A. for a private evaluation with a psychologist, Dr. Fulop, which resulted in the diagnosis of ADHD as well a number of disabilities related to learning and memory.[725] Dr. Fulop then recommended a residential program for T.A., which would provide an environment that could help T.A. with his learning difficulties, ADHD, and behavioral problems.[726] On the basis of that recommendation, T.A.'s family enrolled him in Mount Bachelor Academy, which focused on educating children with special needs.[727]

Four days after enrolling him in private school, T.A.'s parents provided the school district with written notice of private placement. A few weeks later, they requested an administrative due process hearing seeking an order that would require Forest Grove to evaluate T.A. for "all areas of suspected disability."[728] In June 2003, the district once again agreed to evaluate T.A. to determine whether he had a disability that significantly interfered with his educational performance. The hearing officer allowed the school district to complete T.A.'s evaluation for special education services before hearing the case.[729] The multidisciplinary team concluded that T.A. remained ineligible for special education because his ADHD did not have a significant adverse affect on his educational performance.[730]

In September 2003, after considering the testimony of numerous experts, the hearing officer decided in favor T.A.'s parents.[731] The hearing officer found that T.A.'s ADHD adversely affected his educational performance and that the school district failed to meet its

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[724] *Id.*
[725] *Forest Grove v. T.A.*, 523 F.3d 1078, 1082 (9th Cir. 2008).
[726] *Id.*
[727] *Id.*
[728] *Id.*
[729] *Id.*
[730] *Forest Grove v. T.A.*, 129 S. Ct. 2484, 2489 (2009).
[731] *Id.*

obligations under IDEA by not identifying T.A. as a student eligible for special education services.[732] Because the district did not offer T.A. FAPE and his private school placement was appropriate under IDEA, the hearing officer ordered Forest Grove School District to reimburse T.A.'s parents for the cost of the private school tuition.[733]

The school district appealed the hearing officer's decision to the United States District Court for the District of Oregon.[734] The district court accepted the hearing officer's findings of fact but set aside the reimbursement award after finding that the 1997 amendments categorically barred reimbursement of private school tuition for students who had not "previously received special education and related services under the authority of a public agency."[735] The district court further held that even though tuition reimbursement may be ordered in an extreme case where the need for special education should have been obvious to school authorities, the facts of this case did not support equitable relief.[736]

T.A. appealed the district court's ruling to the Ninth Circuit Court of Appeals, who reversed and remanded for further proceedings.[737] The circuit court first noted that, prior to the 1997 amendments, IDEA was silent on the subject of private school reimbursement, but courts had granted such reimbursement as appropriate relief under principles of equity.[738] It then held that IDEA did not impose a categorical bar to reimbursement when a parent unilaterally placed a

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[732] *Id.*
[733] *Id.*
[734] *Forest Grove v. T.A.*, 523 F.3d 1078, 1083 (2008). The IDEA guarantees that: Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action….in a state court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.
[735] 20 U.S.C. § 1412(a)(10)(C)(ii) (2004).
[736] *Forest Grove v. T.A.*, 129 S. Ct. 2484, 2489 (2009).
[737] *Id.*
[738] *Id.*

child in a private school when they had not previously received special education services through the public school.[739] Rather, such students "are eligible for reimbursement, to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to § 1415(i)(2)(C)."[740]

The Ninth Circuit also held that the district court made two distinct legal errors when it denied tuition reimbursement.[741] First, the district court incorrectly considered the statutory requirements[742] because neither T.A. nor the school district had disputed that T.A. had never received special education services through the school district.[743] Second, the district court applied the wrong legal standards when it stated tuition reimbursement was available only in extreme cases.[744] The Ninth Circuit noted that nothing in § 1412(a)(10)(C), Supreme Court precedent, or Ninth Circuit precedent suggested that reimbursement was available only in extreme cases.[745] The court of appeals therefore remanded with instructions to reexamine the equities, including the failure of T.A.'s parents to notify the school district before removing him from the public school.[746]

The Forest Grove School District appealed to the U.S. Supreme Court, which granted certiorari.[747] The Court again faced the question that it had been presented with in *Tom F.*, whether the 1997 amendments bar parents from receiving tuition reimbursement if their child has

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[739] *Id.*
[740] *Forest Grove v. T.A.*, 523 F.3d 1078, 1087-88 (9th Cir. 2008).
[741] *Id.* at 1088 (9th Cir. 2008). The Ninth Circuit applied an abuse of discretion standard because "IDEA makes clear that the district court exercises its discretion in fashioning appropriate relief" (citing 20 U.S.C. § 1415(i)(2)(C) (2006)).
[742] 20 U.S.C. § 1412(a)(10)(C) (2005).
[743] *Forest Grove v. T.A.*, 523 F.3d 1078, 1088 (9th Cir. 2008).
[744] *Id.*
[745] *Id.*
[746] *Id.* at 2490.
[747] *Id.*

never received special education services at a public school.[748] There were four primary arguments used by the school district in trying to limit tuition reimbursement. The first was that the plain language of the statute creates an "inference" that children must receive special education services in order to be eligible for reimbursement.[749] The second argument used by the district was that since IDEA was passed under its "spending clause," this requires Congress to provide states with "clear notice" of the need to reimburse parents for these expenses.[750] The third argument was that reimbursing a parent for private school should be a last resort, since IDEA provides a collaborative framework that encourages cooperation between the family and district.[751] The district argued that T.A.'s parents had not met the requirement to appropriately discuss school placements before unilaterally placing T.A. at a private school. Finally, the district argued that setting this precedent would have a disastrous financial effect on districts, since it would not only be expensive but would also make it difficult to create a workable budget.[752]

The Supreme Court affirmed the Ninth Circuit's decision.[753] In accordance with the decisions in *Burlington* and *Carter*, the Court found that IDEA authorizes reimbursement for the cost of private school tuition when a school district fails to provide FAPE and the private school placement is appropriate.[754] This holds true even if the child has not previously received special education or related services from the public school. Additionally, the Court held that when a

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[748] Brief of Petitioner at i, *Forest Grove v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305), 2009 WL 507022.
[749] *Forest Grove v. T.A.*, 129 S. Ct. 2484, 2492 (2009).
[750] *Id.* at 2493.
[751] *Id.* at 2496.
[752] *Id.*
[753] *Id.* The Court held that the IDEA amendments of 1997 did not amend the text of § 1415(i)(2)(C) and the addition of § 1412(a)(10)(C) did not alter the meaning of § 1415(i)(2)(C).
[754] *Id.*

hearing officer or court determines that a school district denied a student FAPE and the private placement was suitable, it must consider all relevant factors when determining whether reimbursement is an equitable remedy.[755]

The Court described how the *Burlington* Court looked to IDEA's "broad purpose," as well as to the impact of administrative inefficiency on the education of children with disabilities, in holding that "the ordinary meaning of [§ 1415(i)(2)(C)(iii)] confers broad discretion on the court."[756] This broad discretion authorizes a court or hearing officer to order reimbursement for private school tuition when a parent unilaterally enrolls a child in private school because the public school provided an inadequate IEP.[757] Additionally, the *Burlington* decision also emphasized that in requiring states to provide FAPE to every special education student, Congress could not have intended to require parents to either accept an inadequate public school education placement or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act.[758]

The Court acknowledged that *Burlington* and *Carter* involved children for whom the school districts had offered inadequate special education, in contrast to T.A., whom the school district had failed to offer any special education or related services at all.[759] It emphasized that these differences were "insignificant" because the language and purpose of IDEA, not the particular facts involved, drove the Court's analysis in *Burlington* and *Carter*.[760] In addition, the Court articulated its commonsense view that "a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an

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[755] *Id.*
[756] *Id.* at 2490.
[757] *Id.*
[758] *Id.* at 2491.
[759] *Id.*
[760] *Id.*

adequate IEP."[761] The Court wanted to "avoid an irrational rule" where a school district could refuse to find a student eligible for special education, regardless of how compelling that child's need was.[762] Having determined that the reasoning underlying the two earlier cases applied here, the Court proceeded to evaluate whether the 1997 amendments "required a different result."[763]

The Court stated that the changes in the 1997 amendments were intended to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education.[764] The Supreme Court looked to the fact that Congress did not change the language of § 1415(i)(2)(C)(iii) in the 1997 amendments or otherwise state an intent to repeal it or the Court's decisions in *Burlington* and *Carter* as evidence for continuing to read that provision to authorize the equitable remedy of tuition reimbursement.[765] The Court described the result produced by the school district's reading as "bordering on the irrational."[766]

Finally, the Court addressed the fears of the school district that the decision would impose a significant financial burden on school districts while also encouraging parents to enroll their children in private schools without even attempting to cooperate with the school district. The Court found these fears to be "unfounded."[767] The Supreme Court highlighted that courts may order school districts to reimburse parents only if they find that both the public school placement violated IDEA and the private school placement was proper under IDEA.[768] Moreover, the Court reiterated that, "even then courts retain discretion to reduce the amount of a

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[761] *Id.*
[762] *Id.* at 2502.
[763] *Id.* at 2491.
[764] *Id.* (quoting S. Rep. No. 105-17, 3 (1997)).
[765] *Id.* at 2492.
[766] *Id.* at 2495.
[767] *Id.* at 2496.
[768] *Id.*

reimbursement award if the equities so warrant."[769] Finally, the Court acknowledged that they must also consider the "school district's opportunities for evaluating the child."[770]

Justice Souter filed a dissenting opinion, including a description of the limitation imposed by § 1412(a)(10)(C)(ii) on reimbursement for private school tuition incurred without the consent of the school district.[771] Justice Souter described as "overstretching" the majority's interpretation that, in those cases, reimbursement could still be authorized.[772] Justice Souter highlighted the cost of special education for public school districts and the corresponding importance of collaboration between parents and public schools to keeping as many children with disabilities as possible in public school placements.[773] He reminded the Court of the administrative and judicial review available if parents believe that their children need more services for FAPE than the school offers.[774] He also noted that his interpretation of the statute required parents to take part in the collaborative process of developing an IEP, which "makes good sense" given the financial burden of private school placements.[775]

In its June 2009 decision, the Supreme Court remanded T.A.'s case back to the district court with orders to reconsider the case in light of the factors set out in their decision.[776] On remand, the district court held that T.A.'s parents were not entitled to reimbursement.[777] The district court held that T.A.'s parents were not entitled to reimbursement because they placed

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[769] *Id.*
[770] *Id.*
[771] *Id.* at 2497.
[772] *Id.* at 2499.
[773] *Id.* at 2502-03.
[774] *Id.* at 2503.
[775] *Id.*
[776] *Id.* at 2496.
[777] *Id.* at 1235.

their son in the private school "solely because of his drug abuse and behavioral problems."[778] Once again, T.A.'s parents appealed to the Ninth Circuit Court of Appeals. On April 27, 2011, in a split decision, the Ninth Circuit upheld the district court's ruling.[779] The Ninth Circuit found that although the hearing officer generally discussed both T.A.'s behavioral and academic difficulties and the dual services Mount Bachelor provided, it held "it was T.A.'s escalating drug abuse, depression and out of control behavior that caused his parents to remove him."[780]

The Ninth Circuit reviewed whether reimbursement was appropriate under "general principles of equity," based upon the preponderance of the evidence.[781] The circuit court pointed out that even if the district court was bound by a factual determination that T.A.'s enrollment was motivated by reasons both related and unrelated to his disabilities, the court could have held the non-disability reasons so outweighed the disability reasons as to make reimbursement inequitable.[782] The Ninth Circuit held that there was sufficient evidence in the record to support the district court's factual determination that T.A.'s parents enrolled him at Mount Bachelor solely because of his drug abuse and behavioral problems.[783] The fact that T.A.'s father listed "ADHD" in response to questions that specifically asked him to list that condition did not compel the conclusion that T.A. was enrolled at Mount Bachelor because of his ADHD.[784] In conclusion, the Ninth Circuit found that in this case the district court's determination that T.A. was enrolled at Mount Bachelor due to his behavior and drug problems was not "illogical,

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[778] *Id.* at 1239.
[779] *Id.* at 1234.
[780] *Id.* at 1239.
[781] 20 U.S.C. § 1415(i)(2)(C)(iii).
[782] *Forest Grove v. T.A.*, 638 F.3d 1234, 1239 (9th Cir. 2008).
[783] *Id.*
[784] *Id.* at 1241.

implausible, or without support in inferences which may be drawn from facts in the record."[785] On January 23, 2012, the Supreme Court denied T.A.'s petition for a writ of certiorari.[786]

## Post-Forest Grove Appellate Decisions

### *Mary Courtney T. v. Sch. Dist. (2009)*[787]

In *Mary Courtney T. v. Sch. Dist.*, the Third Circuit was asked to consider whether a district was responsible for the cost of a student's placement in a residential health care facility. Courtney was a 17-year-old student who suffered from learning disabilities, speech and language impairments, ADHD, and other mental health disorders.[788] Due to her intensive educational needs, the school district paid for Courtney to attend private schools beginning in 1993, when she entered kindergarten.[789] At the end of April 2005, the private school where Courtney attended, Rancho Valmora, informed Courtney's parents that it could no longer provide sufficient care for Courtney because of her self-abusive and aggressive behaviors.[790]

Courtney's parents then enrolled her in Supervised LifeStyles (SLS), a long-term psychiatric residential treatment center in New York.[791] For the first six months at SLS, Courtney was treated in the acute care wing before being transferred to the post-acute ward in December 2005.[792] In November 2005, Courtney's parents requested a due process hearing seeking reimbursement for the tuition from Rancho Valmora and Supervised LifeStyles.[793] The

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[785] *Id.*
[786] *Forest Grove v. T.A.*, 132 S. Ct. 1145 (2012).
[787] *Mary Courtney T. v. Sch. Dist.*, 575 F.3d 235 (3rd Cir. 2009).
[788] *Id.* at 238-39.
[789] *Id.* at 239.
[790] *Id.*
[791] *Id.*
[792] *Id.* at 239-40.
[793] *Id.* at 240.

school district agreed to reimburse Courtney's parents for her stay at Rancho Valmora but opposed reimbursement for the Supervised LifeStyles placement on the grounds that a medical crisis precipitated Courtney's stay there.[794] The hearing officer rejected arguments that Courtney's expenses at SLS were medical, as opposed to educational, concluding that her educational needs were not "severable" from her medical needs.[795] The hearing officer awarded tuition reimbursement for Courtney's stay at Supervised LifeStyles from May 2005 through January 2006.[796]

The school district appealed and the appeals panel reversed the decision of the hearing officer.[797] The panel noted the acute nature of Courtney's condition when she was admitted to SLS and concluded that Courtney's "admission to the New York facility was prompted by a psychiatric crisis, was necessary for medical reasons rather than educational purposes, and that the services provided during the first four months were medical rather than educational in nature."[798] Courtney's family appealed this decision to the United States District Court for the Eastern District of Pennsylvania.[799] The district court concluded that Courtney was not entitled to tuition reimbursement for the period of time when she was in the acute care wing, since the placement did not contain any "appreciable academic component."[800]

The school district and Courtney's parents appealed this decision to the Third Circuit, who affirmed the decision that Courtney's family was not entitled to tuition reimbursement for

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[794] *Id.*
[795] *Id.* at 240-41.
[796] *Id.* at 241.
[797] *Id.*
[798] *Id.*
[799] *Id.*
[800] *Id.*

her stay at the treatment center between May 29, 2005, and January 26, 2006.[801] Tuition reimbursement was denied because the treatment goals and services were almost entirely devoted to stabilizing her mental health, and the treatment plan did not contain any academic goals.[802] The case was not appealed.

### ***Richardson Indep. Sch. Dist. v. Michael Z. (2009)***[803]

In *Richardson Indep. Sch. Dist. v. Michael Z.*, the Fifth Circuit was asked to decide whether a family was entitled to tuition reimbursement after they unilaterally removed their daughter from the district and placed her at a psychiatric facility without notifying the district. Leah Z. was diagnosed with attention deficit disorder, oppositional defiant disorder, bipolar disorder, autism, separation anxiety disorder, and pervasive developmental disorder.[804] During Leah's ninth-grade year, she began leaving class without permission almost daily.[805] In February, it was discovered that during unsupervised absences from class, Leah was engaging in sexual activities with other students in the bathroom.[806] Leah was then transferred to another public school in the district and placed in a behavioral classroom.

Later in March, an incident occurred at home where Leah scratched her father and caused him to bleed, which resulted in her being admitted to the Texas NeuroRehab Center (TNRC).[807] In April 2004, Leah's parents unilaterally removed her from Richardson Independent School

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[801] *Id.* at 243.
[802] *Id.*
[803] *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009).
[804] *Id.* at 289.
[805] *Id.* at 290.
[806] *Id.* at 291.
[807] *Id.*

District (RISD) without notice to the district.[808] Leah was discharged from TNRC on November 12, 2004, with the recommendation that she attend a special education class with one-on-one supervision.[809] In June 2004 Leah's parents requested an IEP meeting to change Leah's placement to TNRC.[810] However, the IEP team found that RISD remained capable of providing her with a FAPE and denied the request for private residential placement.[811] In July 2004, Leah's parents filed a request for an administrative due process hearing and the IHO found in favor of the parents in the amount of $56,000.[812] After an appeal by the school district, the United States District Court for the Northern District of Texas affirmed the IHO's decision.[813]

The school district appealed to the Fifth Circuit, who agreed with the district court that placement in the public school did not meet Leah's educational needs.[814] However, the Fifth Circuit vacated the district court's order and remanded for further proceedings, since the district court had erred in finding that the private residential placement was appropriate without considering whether the placement was primarily oriented toward enabling the child to obtain a meaningful educational benefit.[815] The Fifth Circuit held that in order for a residential placement to be appropriate under IDEA, the placement must be necessary for the disabled child to receive a meaningful educational benefit and primarily oriented toward enabling the child to obtain an education.[816] No record of appeal or other information was available after the case was remanded to the district court.

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[808] *Id.*
[809] *Id.*
[810] *Id.*
[811] *Id.*
[812] *Id.*
[813] *Id.*
[814] *Id.* at 302.
[815] *Id.*
[816] *Id.* at 298.

### *Houston Sch. Dist. v. P. (2009)*[817]

In *Houston Sch. Dist. v. P.* (2009), the Fifth Circuit was asked to decide whether a student's IEP was reasonably calculated to provide a meaningful educational benefit. The student at the center of this case, V.P., was an eight-year-old student eligible for special education services under the category of Auditory and Speech Impairments.[818] In May 2004, V.P.'s IEP team developed a plan for the 2004-05 school year, which placed her in a regular education classroom with special education and related services.[819] V.P.'s mother disagreed with the proposed IEP for 2004-05 and indicated that she wished to withdraw V.P. from the Houston School District and place her in a private institution.[820] In September 2004, V.P.'s parents enrolled her at the Parish School, a private school for children with language-learning disabilities.[821] At the Parish School, V.P. was in a small classroom and received ten hours of group speech-language therapy per week, as well as phonemic awareness training and auditory memory training.[822]

In August 2004, V.P.'s parents requested a due process hearing to address whether the school district had failed to provide V.P. with a FAPE. Additionally, V.P's parents alleged that the district had failed to develop or implement an IEP that was reasonably calculated to provide V.P. with educational benefit and failed to consider an appropriate placement for V.P.[823] The hearing officer found that V.P. required extensive auditory and memory training and that the

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[817] *Houston Sch. Dist. v. P.,* 582 F.3d 576 (5th Cir. 2009).
[818] *Id.* at 579.
[819] *Id.* at 581.
[820] *Id.*
[821] *Id.*
[822] *Id.*
[823] *Id.*

school district had failed to include many of those necessary services in her IEP.[824] Ultimately, the hearing officer determined that the district did not provide V.P. with a FAPE, that the Parish School was an appropriate placement for V.P., and reimbursement for V.P.'s placement was appropriate.[825] In May 2005, the district appealed the IHO's decision to the United States District Court for the Southern District of Texas.[826] In June 2006, V.P.'s parents filed another action in which they sought tuition reimbursement for the 2005-06 school year, in addition to the tuition they were already seeking for the 2004-05 school year.[827]

In March 2007, the district court found that the Houston School District had failed to provide a FAPE, failed to develop an educationally beneficial IEP, and failed to consider an appropriate placement for V.P.[828] The district court affirmed the hearing officer's decision that V.P. was entitled to reimbursement for the Parish School placement, however, only for the 2004-05 school year.[829] V.P.'s parents then appealed, arguing that the district court erred in failing to award reimbursement for the 2005-06 school year, and the district filed a cross-appeal alleging that the district court erred in concluding that it failed to provide V.P. with a FAPE.[830] The Fifth Circuit used four factors[831] to determine whether the IEP was reasonably calculated to provide a meaningful educational benefit under the IDEA.[832] The Fifth Circuit found that the school district failed to provide appropriate services under all four categories and ruled that the move to

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[824] *Id.* at 582.
[825] *Id.*
[826] *Id.*
[827] *Id.*
[828] *Id.*
[829] *Id.*
[830] *Id.*
[831] (1) The program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner; and (4) positive academic and non-academic benefits are demonstrated.
[832] *Houston Sch. Dist. v. P.,* 582 F.3d 576, 584 (5th Cir. 2009).

the Parish School was justified.[833] The circuit court not only affirmed the district court's decision to reimburse tuition for the 2004-05 school year but also reversed the decision not to reimburse tuition for the 2005-06 school year.[834] The school district appealed to the U.S. Supreme Court and certiorari was denied.

### *T. Y. v. New York City Dep't of Educ. (2009)*[835]

In *T.Y. v. New York City Dep't of Educ.*, the Second Circuit was asked to determine whether IDEA requires that an IEP name a specific school placement.[836] T.Y. was a child with autism who had significant developmental delays and a severe language disorder.[837] After a May 2006 IEP meeting, T.Y.'s father visited the proposed placement and found it unsuitable for T.Y. for various reasons.[838] Subsequently, the parents enrolled T.Y. in the Rebecca School, a specialized private school for children with autism, and notified the school district about their intent to seek reimbursement.[839]

The IHO rejected the parents' argument that the IEP was procedurally deficient because it failed to name a specific school placement.[840] After the parents appealed this decision, the SRO agreed with the IHO's findings and conclusions about naming a specific school placement.[841] T.Y.'s parents subsequently filed suit in the United States District Court for the

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[833] *Id.* at 591.
[834] *Id.* at 601.
[835] *T.Y. v. New York City Dep't of Educ.,* 584 F.3d 412 (2nd Cir. 2009).
[836] *Id.* at 414.
[837] *Id.* at 416.
[838] *Id.*
[839] *Id.*
[840] *Id.*
[841] *Id.* at 417.

Eastern District of New York, who also found for the school district.[842] Finally, T.Y.'s parents appealed to the Second Circuit, who affirmed the judgment of the district court.[843] The Second Circuit held that IDEA does not require that an IEP name a specific school placement; therefore, T.Y.'s IEP was not procedurally deficient.[844] T.Y.'s parents appealed to the U.S. Supreme Court and certiorari was denied.

### ***Souderton Area Sch. Dist. v. J.H. (2009)*[845]**

In *Souderton Area Sch. Dist. v. J.H.*, the Third Circuit was asked to determine whether substantive concerns with an IEP, including a lack of occupational therapy and speech therapy services, warranted tuition reimbursement. J.H. was a child who suffered from learning disabilities who received special education services during his fifth-grade year at the Souderton Area School District.[846] His parents then unilaterally removed him from the school district and placed him in Crossroads School, a private school for children with learning disabilities.[847] In August 2006, J.H.'s parents asked for a due process hearing, seeking tuition reimbursement for Crossroads School.[848]

In April 2007, the IHO concluded that the school district had satisfied its obligation to offer J.H. a FAPE for the 2006-07 year, so no tuition reimbursement was warranted.[849] In August 2007, J.H.'s parents appealed the decision to the United States District Court for the

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[842] *Id.*
[843] *Id.* at 420.
[844] *Id.*
[845] *Souderton Area Sch. Dist. v. J.H.*, 351 Fed. Appx. 755 (3rd Cir. 2009).
[846] *Id.* at 757.
[847] *Id.*
[848] *Id.*
[849] *Id.*

Eastern District of Pennsylvania, which affirmed the decision in its entirety.[850] The school district then issued a new IEP for J.H. for the 2007-08 school year and the parents requested a second administrative hearing, seeking tuition reimbursement for the 2007-08 year.[851] In February 2008, the hearing officer ruled in favor of the school district, finding that since the last hearing officer's decision, "nothing has changed except that the school district has strengthened its proposed IEP."[852] Next, J.H.'s parents appealed to an appeals panel, which reversed the hearing officer's ruling, finding that there were a number of deficiencies in the proposed IEP.[853] The appeals panel awarded private school tuition reimbursement for the 2007-08 school year.[854]

The school district appealed this decision to the United States District Court for the Eastern District of Pennsylvania, which overturned the appeals panel's decision and granted summary judgment in favor of the school district.[855] The district court noted that the appeals panel report was sparse and provided very little explanation as to why it found certain items objectionable.[856] J.H. and his family appealed the decision to the Third Circuit Court of Appeals, which affirmed the judgment of the district court.[857] The court of appeals found that the district court's description of the facts reflected a fair and accurate review of the record with respect to J.H.'s education.[858] Since the district offered a FAPE to the student, J.H. and his family were not entitled to tuition reimbursement.[859] The case was not appealed.

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[850] *Id.*
[851] *Id.*
[852] *Id.*
[853] *Id.* at 758.
[854] *Id.*
[855] *Id.*
[856] *Id.*
[857] *Id.* at 762.
[858] *Id.*
[859] *Id.*

### *Ashland School Dist. v. Parents of Student E.H. (2009)*[860]

In *Ashland School Dist. v. Parents of Student E.H.*, the Ninth Circuit was asked to decide the extent to which a district court must defer to a hearing officer's decision in cases when the district has been ordered to reimburse a family for tuition expenses.[861] E.H., a student in the Ashland School District (ASD), first began suffering from emotional problems in 1998, while in the third grade.[862] During E.H.'s ninth-grade year, the emotional problems had increased and the district and parents agreed that homebound instruction was appropriate.[863] On January 24, the parents transferred E.H. from ASD to Youth Care, a private out-of-state residential treatment program.[864] Prior to the transfer, the parents never indicated any dissatisfaction with the education the school district had provided the child, and the district had never volunteered to pay for the residential placement.[865]

In September 2005, after E.H. had been enrolled in Youth Care for approximately seven months, the student's parents mailed the district a formal letter indicating that they were unhappy with the educational services they had been provided and requested reimbursement for the cost of E.H.'s residential placement.[866] After receiving the letter, the district convened a meeting to draft a new proposed IEP.[867] E.H.'s parents rejected that IEP in January 2006, and requested a due process hearing before a hearing officer to determine whether the district had provided E.H. with a FAPE and whether the family was entitled to reimbursement for the costs of residential

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[860] *Ashland School Dist. v. Parents of Student E.H.*, 587 F.3d 1175 (9th Cir. 2009).
[861] *Id.* at 1178.
[862] *Id.*
[863] *Id.* at 1179.
[864] *Id.*
[865] *Id.*
[866] *Id.* at 1180.
[867] *Id.*

treatment.[868] The hearing officer concluded that the IEPs the district had offered did not provide E.H. with a FAPE and that Youth Care was an appropriate placement.[869] The hearing officer also found that since the parents had removed E.H. from Ashland High School without notifying the district, the hearing officer was permitted to deny or reduce the amount of reimbursement.[870] Therefore, the hearing officer ordered the district to pay for half of the cost of the residential program prior to the time when the parents provided notice and pay the full cost of the tuition for the period of time after they had been provided notice about their dissatisfaction with the IEP.[871]

The school district appealed the decision to the U.S. District Court for the District of Oregon, which reversed the hearing officer's award of tuition reimbursement.[872] Conducting an independent review of the record, the district court determined that the parents were not entitled to reimbursement for the expenses associated with the residential placement either before or after they provided ASD with notice.[873] The district court's determination rested on several factors, such as the high cost of residential facilities, the parents' clear failure to adhere to the statutorily required notice requirement, and the parents' apparent unwillingness to consider returning E.H. to a district school.[874]

The parents appealed to the Ninth Circuit, contending that the district court applied the wrong standard of review (de novo) to the hearing officer's decision.[875] The appellate court affirmed the district court's judgment and clarified that while the district court must give deference to the state hearing officer's findings, the district court is free to determine how much

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[868] *Id.*
[869] *Id.*
[870] *Id.*
[871] *Id.*
[872] *Id.* at 1181.
[873] *Id.*
[874] *Id.*
[875] *Id.*

weight to give the state hearing officer's determinations.[876] The court found that although the district court did not address whether the 2004 IEP failed to provide E.H. with a FAPE, that failure did not mean that the court did not properly consider the hearing officer's conclusions.[877] The Ninth Circuit held that the district court had properly applied the correct standard of review, considered the high cost of residential treatment and the parents' failure to give notice, and properly concluded that the residential placement was necessitated by medical, rather than educational, concerns.[878] The case was not appealed.

### ***Ashland School Dist. v. Parents of Student R.J. (2009)***[879]

In *Ashland School Dist. v. Parents of Student R.J.*, the Ninth Circuit was asked to determine whether the district court applied the proper standard of review and whether it properly considered whether the residential placement was necessary for R.J. to receive a FAPE.[880] R.J. was a student who received special education services due to a diagnosis of ADHD.[881] When school resumed for her sophomore year, R.J. informed her counselor that she had been physically and emotionally abused by another student and that she was attracted to one of the custodians at the school.[882] In late September 2005, R.J.'s mother advised the school district that she was considering placing R.J. in a more restrictive program.[883] The district held

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[876] *Id.* at 1188.
[877] *Id.* at 1187.
[878] *Id.*
[879] *Ashland School Dist. v. Parents of Student R.J*, 588 F.3d 1004 (9th Cir. 2009).
[880] *Id.* at 1005.
[881] *Id.*
[882] *Id.* at 1006.
[883] *Id.* at 1007.

an IEP meeting at which R.J.'s mother stated that there would be "no option" but to "put her in a residential facility" if such behavior continued.[884]

In November 2005, R.J.'s mother formally notified ASD of her plans to remove R.J. from the public school and place her at Mount Bachelor Academy, a private residential facility in central Oregon.[885] However, in August 2006, R.J. was expelled from Mount Bachelor Academy for having sex with another student.[886] R.J.'s parents then enrolled her at Copper Canyon Academy, a "more restrictive" private residential facility in Arizona.[887] In May 2006, R.J.'s parents requested a hearing before an IHO who found that R.J.'s parents were entitled to tuition reimbursement.[888] The hearing officer decided that the district had failed to make a FAPE available to R.J. due to various procedural violations between 2003 and 2005. However, the hearing officer only granted tuition reimbursement for the time spent at Copper Canyon, due to the fact that Mount Bachelor was determined not to be an appropriate placement.[889]

The school district appealed to the United States District Court for the District of Oregon, which overturned the decision.[890] The court rejected the conclusion that the district failed to provide R.J. a FAPE and also rejected the conclusion that Copper Canyon was an appropriate private school placement for R.J.[891] In the district court's view, placement in the residential facility was not "necessary to meet R.J.'s educational needs."[892] R.J.'s parents appealed this decision to the Ninth Circuit, contending that the district court applied the wrong standard of

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[884] *Id.*
[885] *Id.*
[886] *Id.*
[887] *Id.*
[888] *Id.* at 1008.
[889] *Id.*
[890] *Id.*
[891] *Id.*
[892] *Id.*

review to the state hearing officer's decision.[893] The Ninth Circuit determined that the district court had applied the proper standard of review and did not abuse its discretion in denying the parents tuition reimbursement.[894] The circuit court found that residential placement was not necessary for a FAPE since R.J. was not disruptive in class and earned good grades when she managed to complete her work.[895] Instead, it was her behaviors outside of school that prompted her parents to enroll her at the private residential facilities.[896] The case was not appealed.

### ***C.B. v. Special Sch. Dist. No. 1 (2010)***[897]

In *C.B. v. Special Sch. Dist. No. 1*, the Eighth Circuit was asked to decide whether a private school could be considered an appropriate placement even if was not the least restrictive environment for a child.[898] The student, C.B., was a child with a learning disability who resided within the Special School District No. 1 in Minneapolis, Minnesota.[899] During the fall of C.B.'s fourth grade, the district initiated an early three-year re-evaluation after they noticed severe regression after the summer break.[900] The evaluation showed that C.B.'s response to prior interventions was "inadequate" and that he was "severely underachieving" in reading and writing.[901] At the end of his fifth-grade year, C.B.'s reading was showing only "slight" and "moderate" progress.[902]

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[893] *Id.*
[894] *Id.* at 1011.
[895] *Id.*
[896] *Id.*
[897] *C.B. v. Special Sch. Dist. No. 1,* 636 F.3d 981 (8th Cir. 2010).
[898] *Id.* at 991.
[899] *Id.* at 983.
[900] *Id.* at 984.
[901] *Id.*
[902] *Id.* at 985.

Because of their son's continued lack of progress, C.B.'s parents arranged for him to meet with a neurocognitive psychologist and language specialist.[903] The independent evaluator diagnosed C.B. with an auditory processing disorder and severe dyslexia and advised C.B.'s parents to place their son at Groves Academy.[904] In July 2008, C.B.'s parents notified the school district of their intention to enroll C.B. at Groves and requested that the district pay his private school tuition.[905] C.B.'s parents also noted the fact that their son had "made no demonstrable progress" in his years in Minneapolis public schools and expressed their belief that he had "not been provided with the right interventions to address his disabilities."[906] Despite the school district's refusal to pay, C.B. enrolled at Groves Academy in the fall of 2008.[907] In September 2008, C.B.'s parents requested an administrative hearing to review the school district's decision to deny reimbursement.[908]

The hearing officer determined that C.B. was entitled to tuition reimbursement because the school district had failed to make a FAPE available to C.B. and because Groves was an appropriate placement under IDEA.[909] C.B. then brought an action to the United States District Court for the District of Minnesota, seeking attorney's fees and costs arising from the administrative hearing.[910] The school district counterclaimed, challenging the decision of the hearing officer.[911] The district court denied C.B.'s motion, granted the school district's motion,

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[903] *Id.*
[904] *Id.* at 986.
[905] *Id.*
[906] *Id.*
[907] *Id.*
[908] *Id.*
[909] *Id.*
[910] *Id.*
[911] *Id.*

and reversed the hearing officer's order granting reimbursement.[912] The court agreed with the hearing officer that the school district had failed to offer a FAPE for C.B. but determined that Groves was not an "appropriate placement" under the IDEA. The district court determined that Groves was an inappropriate placement for C.B. because all of the students at Groves received special education services and C.B.'s disability could be adequately addressed in a less restrictive public school setting.[913] The court reasoned that a primary objective of the IDEA is to educate children with disabilities in the "least restrictive environment" and that such children "must be educated in a classroom along with children who are not disabled to the maximum extent possible."[914]

C.B. and his parents appealed the district court's decision to deny tuition reimbursement for the 2008-09 school year.[915] The Eighth Circuit reversed the decision and ordered that the parents be reimbursed for the private school tuition for the 2008-09 school year. The court found that the placement at the private school was proper and reimbursement for tuition was not precluded by the IDEA's preference for education in the least restrictive environment, since the district did not fashion an IEP that was reasonably calculated to provide some educational benefit.[916] The case was not appealed.

### ***C.H. v. Cape Henlopen Sch. Dist. (2010)***[917]

In *C.H. v. Cape Henlopen Sch. Dist.,* the Third Circuit was asked to determine whether a district's failure to have an IEP in effect on the first day of class warranted a family's decision to

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[912] *Id.*
[913] *Id.* at 987.
[914] *Id.* at 986-87.
[915] *Id.* at 987.
[916] *Id.* at 991.
[917] *C.H. v. Cape Henlopen Sch. Dist.,* 606 F.3d 59 (3rd Cir. 2010).

remove their child from the public school and place him in a private residential school.[918] C.H., a student at Henlopen School District during the 2005-06 school year, received special education services under the category of Learning Disability.[919] The dispute between C.H.'s parents and the district over the provision of educational services was longstanding and included two previous unilateral private placements by the family.[920] The district and the parents entered into a settlement agreement regarding the 2005-06 school year under which the district agreed to pay C.H.'s tuition and certain educational costs at the Gow School, a private residential school for boys with language-based learning disabilities.[921]

During the 2005-06 school year, the parents and the school district discussed C.H.'s return to the district for the following year and the need to develop an IEP for C.H.[922] However, on the first day of the 2006-07 school year, C.H.'s parents unilaterally placed him at the Gow School and filed a request for a due process hearing.[923] The parents sought reimbursement of the private school tuition due to multiple procedural violations, including the district's failure to provide an IEP on the first day of the 2006-07 school year.[924] The hearing panel concluded that all of the parents' claims failed under the IDEA because the alleged deficiencies on the district's part did not act to deprive C.H. of a FAPE.[925]

The parents filed an appeal to the United States District Court for the District of Delaware seeking review of the hearing panel's decision.[926] The district court granted summary

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[918] *Id.* at 62.
[919] *Id.*
[920] *Id.* at 63.
[921] *Id.*
[922] *Id.*
[923] *Id.* at 64.
[924] *Id.*
[925] *Id.*
[926] *Id.* at 65.

judgment to the school district and noted that the parents' conduct in delaying and then refusing to participate in the IEP meetings was a substantial contributing factor to any alleged delays in the IEP development.[927] The parents appealed to the Third Circuit, who affirmed the district court's decision that none of the deficiencies rose to the level of substantive harm.[928] The case was not appealed.

### *Garden Grove Unified School District v. C.B. (2011)*[929]

In *Garden Grove*, the Ninth Circuit Court of Appeals was asked to review whether a parent was entitled to full reimbursement when the services provided by a non-public agency met some but not all of a disabled child's needs.[930] In this case, C.B. was eligible for special education and related services because of autism and attention deficit disorder.[931] In 2006, the district concluded that he had unique needs in reading comprehension, math, math applications, written communications strategies, pre-vocational skills, gross motor skills, fine motor skills, socialization, and social skills communication.[932] The district had an IEP meeting and assigned C.B. to various specialized services designed to meet his needs.[933]

The guardian for C.B. submitted a letter to the district informing them that she would be obtaining supplemental private services and seeking reimbursement.[934] C.B. began receiving supplemental services at the Center, which was a nonpublic agency but not a certified nonpublic

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[927] *Id.*
[928] *Id.* at 71.
[929] *Garden Grove Unified School District v. C.B.*, 635 F.3d 1155 (9th Cir. 2011).
[930] *Id.* at 1159.
[931] *Id.* at 1158.
[932] *Id.*
[933] *Id.*
[934] *Id.*

school.[935] The Center's certification allowed it to provide only language-based services. In the summer of 2007, the school district proposed a new IEP for the coming school year, which was again rejected by C.B.'s guardian.[936] Beginning in the summer of 2007, C.B. attended the Center exclusively and no longer attended public school.[937] While at the Center, C.B. showed "significant growth" in many academic areas and in social development.[938] The hearing officer found that the district had failed to provide C.B. with a FAPE and held that the Center was an appropriate placement while C.B. was receiving supplemental and summer instruction.[939]

The hearing officer therefore awarded full reimbursement for tuition and transportation for the 2006-07 school year and the summer of 2007.[940] However, for the 2007-08 school year, the hearing officer held that since the Center could not meet all of C.B.'s unique educational needs (e.g., the Center could not instruct him in arithmetic), the equities justified only partial reimbursement.[941] The guardian challenged the hearing officer's award of partial reimbursement in the United States District Court for the Central District of California.[942] The district court rejected the hearing officer's conclusion that reimbursement was warranted only when a private placement provides a full range of educational services.[943] Because C.B. received educational benefits from all of the Center's services, the district court awarded full reimbursement to the guardian for the cost of obtaining those services, along with transportation.[944]

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[935] *Id.*
[936] *Id.*
[937] *Id.*
[938] *Id.*
[939] *Id.*
[940] *Id.*
[941] *Id.*
[942] *Id.*
[943] *Id.*
[944] *Id.* at 1158-59.

The school district appealed to the Ninth Circuit, who acknowledged that the *Florence County School District Four v. Carter* first requirement for tuition reimbursement was met because the public placement violated the IDEA requirements.[945] In regards to the second *Carter* requirement, the circuit court found in favor of C.B.'s guardian that placement at the Center was "proper."[946] In this case, while the Center did not satisfy all of C.B.'s needs, everything that the Center provided was proper, reasonably priced, appropriate, and the program benefitted him educationally.[947] The school district appealed to the U.S. Supreme Court and certiorari was denied.

### ***Fort Osage R-I Sch. Dist. v. Nichole (2011)***[948]

In *Fort Osage R-I Sch. Dist. v. Nichole*, the Eighth Circuit was asked whether an IEP was procedurally and substantively flawed because the district allegedly failed to properly evaluate and fully identify a student's disability.[949] The student in this case, B.S., had been diagnosed with Downs Syndrome.[950] In January of 2005, after expressing some concerns about the last IEP, B.S.'s parents (the Sims) had her evaluated by an independent evaluator, who concluded that B.S. met the diagnostic criteria for autism.[951] In March of 2005, the school district met with the Sims to consider the independent diagnosis of autism and to discern if B.S. met the criteria for autism or another disabling condition.[952] In May 2005, the school district agreed that B.S.

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[945] *Id.* at 1159.
[946] *Id.*
[947] *Id.* at 1160.
[948] *Fort Osage R-I Sch. Dist. v. Nichole,* 641 F.3d 996 (8th Cir. 2011).
[949] *Id.* at 1003.
[950] *Id.* at 998.
[951] *Id.* at 999.
[952] *Id.*

met the state criteria for "other health impaired," based upon the medical diagnoses of Downs Syndrome and autism.[953]

During the 2005-06 school year, the school district met with the Sims numerous times to review B.S.'s progress and agreed to the family's request for a functional behavioral assessment.[954] After the district began implementing the behavior plan, B.S. did not exhibit any further negative behavior during the remainder of the school year.[955] In May 2006, the Sims provided the district with a ten-day notice that they would be placing her in a "more appropriate educational setting."[956] The Sims also informed the school district that they "might" be seeking reimbursement for placing B.S. at a private facility.[957]

The following day, the school district met with the Sims and created an IEP for the 2006-07 school year.[958] The IEP included many accommodations, contained an extensive behavioral plan, and indicated that B.S. was diagnosed with autism and met the Missouri definition of "other health impaired."[959] However, the school district had no opportunity to implement this IEP because B.S. was immediately enrolled by her parents in a private educational facility, the Rainbow Center.[960] After some subsequent discussions with the school district, the Sims ultimately initiated a due process proceeding, claiming that the district was failing to provide B.S. with a FAPE and requesting private placement and tuition reimbursement.[961]

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[953] *Id.*
[954] *Id.*
[955] *Id.*
[956] *Id.*
[957] *Id.*
[958] *Id.* at 1000.
[959] *Id.*
[960] *Id.*
[961] *Id.*

An administrative panel concluded that the school district had denied the Sims a meaningful opportunity to participate in the formation of the June 2006 IEP; therefore, the district had not offered B.S. with a FAPE.[962] However, the panel also found that the procedural issue from the June 2006 IEP did not affect the April 2007 IEP, so the district was not responsible for tuition reimbursement for that period of time.[963] The panel also looked at whether the district's purported failure to identify B.S. as suffering from autism rendered the IEP substantively flawed.[964] The panel reasoned that the diagnostic label attached to a disabled student is not particularly important because "the transcending consideration is whether a district developed an IEP that addressed the manifestations of a student's conditions and addressed his/her needs."[965] The school district appealed to the United States District Court for the Western district of Missouri, which overturned the decision that the school district had deprived the Sims of a meaningful ability to participate in the formation of the June 2006 IEP. Just as with the panel, the district court declined to decide whether B.S. suffered from autism, apparently agreeing with the panel's determination that such a finding "was of no legal consequence."[966]

The Sims family appealed to the Eight Circuit, which affirmed the judgment of the district court in all respects.[967] The circuit court found that the parents failed to show that the lack of an autism diagnosis by the district compromised their daughter's right to an appropriate education, seriously hampered their chance to participate in the process, or caused a deprivation

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[962] *Id.*
[963] *Id.* at 1001.
[964] *Id.*
[965] *Id.*
[966] *Id.* at 1002.
[967] *Id.* at 1005.

of educational benefits.[968] The IEP would not have materially changed if it had included an autism diagnosis because the IEP was highly customized to meet the daughter's specific needs.[969] The case was not appealed.

### *D.B. v. Sutton School District (2012)*[970]

In *D.B. v. Sutton School District*, the First Circuit was asked whether an IHO could properly determine the appropriateness of a child's IEP program without first determining the child's potential for learning and self-sufficiency.[971] In this case, D.B. was a fifteen-year-old child who received special education services due to developmental delay, verbal apraxia (a motor speech disorder) and dysarthria (a weakening of the speech-producing muscles).[972] In 2005, after being dissatisfied with the services D.B. was receiving, his parents removed him from the Sutton School District and enrolled him in a private school called the Lindamood-Bell Learning Center.[973] D.B.'s parents also filed for an administrative hearing in order to be reimbursed for the private school tuition.[974]

The IHO ruled for the Sutton school system, finding that "IDEA does not require school districts to maximize a student's potential, but rather to assure access to a public education and the opportunity for meaningful educational benefit."[975] D.B. and his parents appealed the decision to the United States District Court for the District of Massachusetts, which upheld the

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[968] *Id.* at 1004.
[969] *Id.*
[970] *D.B. v. Sutton School District*, 675 F.3d 26 (1st Cir. 2012).
[971] *Id.* at 29.
[972] *Id.*
[973] *Id.* at 32.
[974] *Id.*
[975] *Id.*

IHO's decision.[976] D.B.'s family then appealed to the First Circuit, who affirmed the ruling of the district court.[977]

The First Circuit found that even without knowing the upper limit of the child's potential for learning and self-sufficiency, the child's achievements were meaningful for him and "advanced him measurably toward the goal of increased learning and independence."[978] Furthermore, the circuit court found that it is not always feasible to determine a disabled child's potential for learning and self-sufficiency "with any precision, particularly where the child's disability significantly impairs his or her capacity for communication."[979] The circuit court clarified that even without a complete understanding of the upper limits of the child's abilities, there can still be an assessment about whether the IEP will confer a meaningful educational benefit.[980] The case was not appealed.

### ***M.H. v. New York City Dep't of Educ. (2012)***[981]

In *M.H. v. New York City Dep't of Educ.,* the Second Circuit agreed to simultaneously hear appeals from two cases decided in the United States District Court for the Southern District of New York.[982] The plaintiffs in both cases were the parents of children with autism who challenged the substantive adequacy of their child's IEP and were seeking tuition

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[976] *Id.* at 33.
[977] *Id.* at 29.
[978] *Id.* at 36.
[979] *Id.*
[980] *Id.*
[981] *M.H. and E.K. on behalf of P.H. v. New York City Department of Education, M.S. on behalf of D.S. v. New York City Department of Education, L.S. on behalf of D.S. v. New York City Department of Education,* 685 F.3d 217, (2nd Cir. 2012).
[982] *M.H. v. New York City Dep't of Educ.*, 712 F. Supp. 2d 125 (2010). *M.S. v. New York City Dep't of Educ.*, 734 F. Supp. 2d 271 (2010).

reimbursement.[983] In the first case, *M.H. v. New York City Dep't of Educ*.,[984] P.H. was a child with autism who attended a public preschool during the 2006-07 school year.[985] The New York Department of Education (DOE) convened a meeting in April of 2007 to discuss P.H.'s IEP kindergarten program for the 2007-08 school year.[986]

P.H.'s parents objected to the placement because they felt the children in the class were lower functioning than P.H. and had "little expressive language."[987] Therefore, P.H.'s parents explored other options, including the Brooklyn Autism Center (BAC), a private school.[988] In October 2007, P.H.'s parents requested a due process hearing and sought reimbursement for P.H.'s BAC tuition.[989] In the due process request, P.H.'s parents alleged that the DOE failed to provide P.H. with a FAPE.[990] The impartial hearing officer (IHO) found for the parents that the IEP's proposed placement did not offer sufficient 1:1 applied behavioral analysis (ABA) instruction to meet P.H.'s educational needs.[991] The DOE appealed the IHO's decision to the state review officer (SRO), who reversed the IHO's decision.[992] The SRO found that it was procedurally improper for the IHO to base her finding on the determination that the appropriate methodology for P.H. was ABA.[993]

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[983] *M.H.*, 685 F.3d 217, 222 (2nd Cir. 2012).
[984] *M.H. v. New York City Dep't of Educ.,* 712 F. Supp. 2d 125 (2010).
[985] *M.H.*, 685 F.3d 217, 226 (2nd Cir. 2012).
[986] *Id.* at 226-27.
[987] *Id.* at 228.
[988] *Id.*
[989] *Id.* at 229.
[990] *Id.*
[991] *Id.* at 230.
[992] *Id.*
[993] *Id.*

P.H.'s parents challenged the SRO's decision in the United States District Court for the Southern District of New York, who reversed the SRO's decision.[994] The district court decided that the SRO had erred by declining to consider the plaintiffs' evidence regarding the proper methodology for teaching P.H.[995] The district court agreed with the IHO's conclusion that the IEP did not provide a program that would meet P.H.'s needs.[996]

The second case, *M.S. v. New York City Dep't of Educ,*[997] involved D.S., a preschool student with autism. D.S. received 40 hours of ABA therapy by the time he "aged out" of early intervention.[998] The DOE convened a meeting in June of 2007 to discuss D.S.'s IEP for his kindergarten year.[999] The district looked at a number of placements and finally recommended that D.S. attend a classroom-based 6:1:1 student-to-teacher-to-paraprofessional program.[1000] The plan did not, however, reflect any consideration of a 1:1 student-to-therapist ratio ABA program.[1001] In December of 2007, the plaintiffs filed a request for an impartial hearing.[1002] The plaintiffs alleged that the DOE failed to provide D.S. a FAPE for the 2007-08 school year, and among other concerns, the 6:1:1 program could not provide adequate supervision and instruction.[1003] The parents sought reimbursement for D.S.'s BAC tuition for the 2007-08 school year.[1004]

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[994] *Id.* at 231.
[995] *Id.* at 232.
[996] *Id.*
[997] *M.S. v. New York City Dep't of Educ.*, 734 F. Supp. 2d 271 (2010).
[998] *M.H.*, 685 F.3d 217, 232 (2nd Cir. 2012).
[999] *Id.* at 233.
[1000] *Id.* at 234.
[1001] *Id.*
[1002] *Id.* at 235.
[1003] *Id.*
[1004] *Id.*

The IHO rejected the plaintiffs' challenge, concluding that the 6:1:1 class was "substantively appropriate and calculated for D.S. to make educational progress."[1005] The IHO also noted that an IEP "need not specify or provide one type of methodology," but that it "must provide for specialized instruction in the child's areas of need."[1006] The parents appealed to an SRO, who agreed that the district had offered D.S. an appropriate program for the 2007-08 school year.[1007] The plaintiffs then appealed to the United States District Court for the Southern District of New York.[1008] The district court denied the plaintiffs' motion, thereby leaving in place the IHO's findings that the DOE provided D.S. with a FAPE for 2007-08.[1009]

The Second Circuit Court of Appeals agreed to simultaneously hear the appeals from both *M.H. and M.S.* The Second Circuit found that in *M.H.*, the district court properly agreed with the determinations of the IHO and properly rejected the subsequent determinations of the SRO.[1010] The Second Circuit clarified that while courts should generally defer to the state administrative hearing officers concerning matters of methodology, the SRO's failure to consider any of the evidence regarding the ABA methodology was a significant error in the analysis of proper educational methodology.[1011] In *M.S.*, the Second Circuit concluded that the magistrate judge who recommended granting the motion for summary judgment overstated the extent to which federal courts must defer to the findings of an SRO.[1012] However, the circuit court also

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[1005] *Id.* at 237.
[1006] *Id.* at 238.
[1007] *Id.*
[1008] *Id.*
[1009] *Id.*
[1010] *Id.* at 240.
[1011] *Id.* at 252.
[1012] *Id.* at 255.

found that the application of the proper standard of review would have resulted in the same outcome in favor of the school district.[1013] The case was not appealed.

### ***Sebastian M. v. King Philip Regional School District (2012)*[1014]**

In *Sebastian M. v. King Philip Regional School District*, the First Circuit was asked to review whether a hearing officer had given enough weight to the testimony of expert witnesses about the appropriateness of a proposed IEP.[1015] In this case, Sebastian was a student who received special education services for visual-motor and visual-spatial deficits, as well as deficits in receptive language skills.[1016] In 1998, when Sebastian was twelve, he was transferred to the Bi-County Educational Collaborative (BICO), a vocational training school.[1017] During the 2004-05 school year Sebastian's parents became frustrated by Sebastian's progress, as well as what they perceived to be poor communication from BICO, and began asking the district to place him in a year-round private residential program.[1018]

In December of 2006, Sebastian's parents notified the school system that they intended to unilaterally withdraw Sebastian and then place him in Cardinal Cushing School, a private residential facility.[1019] Sebastian's parents then requested an administrative due process hearing, seeking tuition reimbursement for the cost of the private school.[1020] In January 2009, the hearing officer found in favor of the school district, finding that they had provided a FAPE and were not

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[1013] *Id.*
[1014] *Sebastian M. v. King Philip Regional School District*, 685 F.3d 79 (1st Cir. 2012).
[1015] *Id.* at 80.
[1016] *Id.* at 82.
[1017] *Id.*
[1018] *Id.* at 83.
[1019] *Id.*
[1020] *Id.*

responsible for tuition reimbursement.[1021] Sebastian and his parents appealed to the United States District Court for the District of Massachusetts, which upheld the hearing officer's decision.[1022]

The family then appealed to the First Circuit and asked the court to review whether their expert witnesses' testimony were given enough weight by the hearing officer.[1023] The court held that the testimony offered by the family's experts was less compelling than the testimony provided by the child's educators, who interacted with Sebastian more frequently.[1024] Therefore, it was entirely proper for the district court to give due deference to the hearing officer's weighing of the testimony offered by the experts.[1025] The judgment of the district court was affirmed.[1026] The case was not appealed.

### ***R.E., M.E., et al v. NYC Dep't of Education (2012)***[1027]

In *R.E., M.E., et al v. NYC Dep't of Education*, the Second Circuit agreed to simultaneously review three unilateral private placement cases,[1028] where the parents in each case alleged that the state review officer relied on "retrospective testimony."[1029] In all three cases, parents of autistic children declined school placements offered by the district and placed

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[1021] *Id.*
[1022] *Id.*
[1023] *Id.* at 86.
[1024] *Id.*
[1025] *Id.*
[1026] *Id.* at 87.
[1027] *R.E., M.E., et al v. NYC Dep't of Education,* 694 F.3d 167 (2nd Cir. 2012).
[1028] *R.E. & M.E. v. N.Y. City Dep't of Educ.*, 785 F. Supp. 2d 28, 2011 U.S. Dist. LEXIS 26537 (S.D.N.Y., 2011). *R.K. v. New York City Dep't of Educ.*, 2011 U.S. Dist. LEXIS 32235 (S.D.N.Y. 2011); *E.Z.-L. ex rel. R.L. v. N.Y.C. Dep't of Educ.*, 763 F. Supp. 2d 584 (S.D.N.Y. 2011).
[1029] *R.E., M.E., et al v. NYC Dep't of Education*, 694 F.3d 167, 174 (2nd Cir. 2012).

their children in private schools.[1030] The parents brought due process claims for tuition reimbursement on the grounds that the districts' public school placement offers were inadequate.[1031] In each case, the parents were initially granted relief following a hearing before an impartial hearing officer (IHO) but subsequently were denied relief after the IHO's decision was reversed on appeal by the state review officer (SRO).[1032] In each case, the SRO relied in part on testimony from district personnel about the educational program the student would have received if he or she had attended public school.[1033] The parents challenged the appropriateness of relying on such "retrospective testimony."[1034]

In the *R.E. and M.E.* case, J.E., a student with autism, started attending a private school called McCarton during the 2001-02 school year.[1035] At McCarton, J.E. received approximately 30 hours of "ABA" therapy per week.[1036] In May 2007, the public school district offered a placement in a special public school for the 2007-08 school year.[1037] The parents rejected the public school's placement offer, kept J.E. at McCarton, and filed for a hearing. During the hearing, the district conceded that the 2007-08 placement had failed to provide a FAPE; therefore, the IHO found that the parents were entitled to reimbursement.[1038] This conclusion was not challenged in the district's later appeal.[1039]

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[1030] *Id.*
[1031] *Id.*
[1032] *Id.*
[1033] *Id.*
[1034] *Id.*
[1035] *Id.* at 175.
[1036] *Id.*
[1037] *Id.*
[1038] *Id.*
[1039] *Id.*

In May of 2008, the IEP team offered J.E. a 12-month placement in a special class in a public school.[1040] After the parents visited the classroom, R.E. sent a letter to the district rejecting the proposed placement because it lacked sufficient 1:1 instruction.[1041] The school district did not offer an alternative placement, and the parents filed for due process seeking tuition reimbursement for the 2008-09 school year.[1042] The hearing officer concluded that the testimony and the evidence did not support the district's conclusion that the program was calculated to provide J.E. with meaningful educational progress.[1043]

The district appealed, and the SRO reversed the IHO's decision and denied tuition reimbursement.[1044] The SRO concluded that the goals and objectives listed in the IEP were adequately linked to J.E.'s academic level and needs.[1045] The parents then appealed to the United States District Court for the Southern District of New York, who reversed the SRO's decision in March 2011 and granted summary judgment for the parents.[1046] The district court found that the SRO had based his conclusion on "after-the-fact testimony" as to what the teacher would have done if J.E. had attended his class.[1047] It adopted the rule that "[t]he sufficiency of the IEP is determined from the content within the four corners of the IEP itself."[1048]

In the case of *R.K. v. New York City Dep't of Educ.*, R.K. was a preschool student with autism who attended a full-day public school preschool program. During this period of time, R.K.'s parents also paid for five two-hour 1:1 ABA therapy sessions per week at home through a

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[1040] *Id.* at 176.
[1041] *Id.*
[1042] *Id.*
[1043] *Id.* at 177.
[1044] *Id.*
[1045] *Id.*
[1046] *Id.* at 178.
[1047] *Id.*
[1048] *Id.*

private company.[1049] The school district developed an IEP for the 2008-09 school year that offered a program in a special public school.[1050] However, R.K's parents notified the district that they rejected the proposed placement and would be sending R.K. to the Brooklyn Autism Center.[1051] The family primarily cited inadequate 1:1 ABA support as the reason why the IEP would not meet R.K.'s educational needs.[1052]

In February of 2009, the IHO issued a decision awarding tuition reimbursement to R.K.'s parents.[1053] The IHO found that because the IEP's recommended program provided only 25 minutes of 1:1 ABA therapy per day, it did not have an adequate level of support for R.K.[1054] However, the IHO also found that the parents were entitled to only partial reimbursement because the BAC program selected by the parents met only part of R.K.'s special education needs and provided more individualized instruction than her assessments warranted.[1055] The district appealed, and in June of 2009, the SRO issued a decision reversing the IHO and denying tuition reimbursement entirely.[1056] The SRO found that the IEP provided an adequate program to address R.K.'s speech and language deficits as well as her motor sensory deficits.[1057]

R.K.'s parents then appealed to the United States District Court for the Eastern District of New York.[1058] The district court concluded that the IEP was inadequate and that R.K. had been denied FAPE.[1059] The court noted that the district's failure to conduct an FBA and develop a

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[1049] *Id.*
[1050] *Id.* at 178-79.
[1051] *Id.* at 179.
[1052] *Id.*
[1053] *Id.* at 180.
[1054] *Id.*
[1055] *Id.*
[1056] *Id.*
[1057] *Id.*
[1058] *Id.* at 181.
[1059] *Id.*

BIP was significant because the record plainly established that R.K.'s behavioral problems impeded her learning.[1060] The court also noted that the SRO had ignored the clear consensus of R.K.'s evaluators and failed to consider the cumulative effect of the numerous procedural deficiencies.[1061] The district court overturned the IHO's partial award determination and awarded the parents with full tuition reimbursement.[1062]

In *E.Z.-L. ex rel. R.L. v. N.Y.C. Dep't of Educ.,* E.Z.-L. was a child with autism who attended the Rebecca School, a private school located in Manhattan.[1063] In 2007, the district offered E.Z.-L. a public school placement for the 2007-08 school year.[1064] However, E.Z.-L.'s parents rejected this placement, re-enrolled her at the Rebecca School, and then sought tuition reimbursement.[1065] During the due process hearing, the district conceded that it had failed to provide FAPE but argued that the Rebecca School was not an appropriate placement.[1066] The IHO concluded that the Rebecca School was appropriate and awarded the parents tuition for the 2007-08 school year.[1067] The district did not appeal this decision.[1068]

In April of 2008, the IEP team offered E.Z.-L. placement in a specialized public school; however, E.Z.-L's parents rejected the district's recommendation and requested a due process hearing.[1069] In March of 2009, the IHO found that the district should have conducted an FBA and created a BIP in light of the district's admission that E.Z.-L. exhibited self-injurious

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[1060] *Id.*
[1061] *Id.*
[1062] *Id.*
[1063] *Id.* at 182.
[1064] *Id.*
[1065] *Id.*
[1066] *Id.*
[1067] *Id.*
[1068] *Id.*
[1069] *Id.*

behaviors.[1070] The IHO concluded that E.Z.-L. had been denied FAPE, that the Rebecca School was appropriate, and that the parents were entitled to reimbursement.[1071]

The district appealed and the SRO reversed the IHO's decision and denied tuition reimbursement.[1072] The SRO found that the failure to conduct an FBA or create a BIP was not a procedural violation of IDEA because E.Z.-L.'s teacher did not feel that one was necessary.[1073] After examining the IEP, the SRO concluded that the proposed program adequately took into account E.Z.-L.'s difficulties and abilities and was reasonably calculated to confer educational benefit.[1074] E.Z.-L.'s parents appealed the SRO decision to the United States District Court for the Southern District of New York, which granted summary judgment in favor of the district.[1075] The district court agreed with the SRO that the school district had provided a FAPE and had not committed any procedural or substantive violations.[1076]

The Second Circuit agreed to review each of the three cases and chose to address them in a single opinion because of four shared issues of law.[1077] In regards to the first issue, retrospective testimony, the Second Circuit declined to adopt a four-corners rule, but did hold that testimony regarding services may only explain or justify what is listed in the written IEP.[1078] The court clarified that testimony may not support a modification that is materially different

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[1070] *Id.* at 183.
[1071] *Id.*
[1072] *Id.* at 184.
[1073] *Id.*
[1074] *Id.*
[1075] *Id.*
[1076] *Id.*
[1077] *R.E., M.E., et al v. NYC Dep't of Education,* 694 F.3d 167, 184 (2nd Cir. 2012). Four issues: (1) augmenting the written IEP with retrospective testimony about additional services that would have been provided at the proposed placement; (2) conflicting IHO and SRO conclusions; (3) procedural errors that amount to a denial of FAPE; (4) parental involvement in the selection of a specific school.[1077]
[1078] *R.E., M.E., et al v. NYC Dep't of Education,* 694 F.3d 167, 185 (2nd Cir. 2012).

from the IEP, and thus a deficient IEP may not be fixed after the fact through testimony regarding services that do not appear in the IEP.[1079] On the second issue, the *R.E. and M.E.* court clarified that when an IHO and SRO reach conflicting conclusions, deference should primarily be given to the SRO's decision.[1080] However, the deference owed to an SRO's decision depends on the quality of that opinion.[1081] The Second Circuit stated that reviewing courts must look to the factors that normally determine whether any particular judgment is persuasive.[1082]

For the third shared issue, the Second Circuit reviewed at which point procedural violations entitle a family to tuition reimbursement.[1083] The court clarified that substantive inadequacy automatically entitles parents to reimbursement, but procedural violations only do so if they "impede the child's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process," or "caused a deprivation of educational benefits."[1084] Additionally, multiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not.[1085] Finally, the *R.E.* court addressed whether it is a procedural violation when a district does not inform parents at the IEP meeting of the exact school at which their child would be placed.[1086] In this case, the parents argued that this practice violates 20 U.S.C. § 1414(e), which mandates: "Each local educational agency or state educational agency shall ensure that the parents of each child with a disability are members

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[1079] *Id.*
[1080] *Id.* at 188-89.
[1081] *Id.* at 189.
[1082] *Id.*
[1083] *Id.* at 190.
[1084] *Id.* at 190-91. See 20 U.S.C. § 1415(f)(3)(E)(ii) (2004).
[1085] *R.E., M.E., et al v. NYC Dep't of Education,* 694 F.3d 167,190 (2nd Cir. 2012). See *Werner v. Clarkstown Cent. Sch. Dist.,* 363 F. Supp. 2d 656, 659 (S.D.N.Y. 2005).
[1086] *R.E., M.E., et al v. NYC Dep't of Education,* 694 F.3d 167, 191 (2nd Cir. 2012).

of any group that makes decisions on the educational placement of their child."[1087] However, the Second Circuit held that the term "educational placement" refers only to the general type of educational program in which a child is placed.[1088]

In light of the decisions on the four legal concepts, the Second Circuit reached the following conclusions in the three appeals. In *R.E.*, the circuit court found that the district offered the student a free and appropriate public education (FAPE) and reversed the decision of the district court.[1089] In *R.K.*, the circuit court found that the district failed to offer the student FAPE and affirmed the decision of the district court.[1090] In *E.Z.-L.*, the circuit court found that the district offered the student FAPE and affirmed the decision of the district court.[1091] R.E.'s parents appealed to the U.S. Supreme Court and certiorari was denied.

### ***M.M. v. District 0001 Lancaster County School (2012)*[1092]**

In *M.M. v. District 0001 Lancaster County School*, the Eighth Circuit was asked to determine whether a child's IEP provided him with a FAPE and whether he was entitled to tuition reimbursement.[1093] L.M., a child diagnosed with autism, attended Sheridan Elementary School (public) during his third-grade year.[1094] L.M. had aggressive behaviors, but his test results and writing samples indicated that he was making academic progress.[1095] Before L.M. completed his third-grade year, his parents took him to the Kennedy Krieger Institute (KKI), a

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[1087] *Id.*
[1088] *Id.* at 191-92.
[1089] *Id.* at 195-96.
[1090] *Id.*
[1091] *Id.*
[1092] *M.M. v. District 0001 Lancaster County School*, 702 F.3d 479 (8th Cir. 2012).
[1093] *Id.* at 481.
[1094] *Id.* at 482.
[1095] *Id.*

short-term rehabilitation facility.[1096] L.M. stayed at KKI from April to September 2009 while functional behavioral assessments were conducted and medications were adjusted.[1097] The institute's research concluded there was a correlation between the use of a calming room and increased aggressive behavior by L.M. and that his problem behaviors would decrease if a calming room was not used as a punishment.[1098]

When L.M. returned to Sheridan Elementary School, district personnel reviewed L.M.'s behavior data, interviewed his teachers, and developed a BIP for him that would be attached to his IEP.[1099] However, L.M.'s parents disagreed with the IEP and the BIP because the district had not adopted KKI's plan in full.[1100] The district plan allowed personnel to move L.M. to a calming room when he engaged in problem behaviors, which was contrary to the institute's recommendations.[1101] L.M.'s parents withdrew him from the district before the start of his fourth-grade year and enrolled him at the Prairie Hill Learning Center, a private Montessori school.[1102] L.M.'s parents requested that the district pay for L.M.'s education at Prairie Hill.[1103] The district denied these requests, stating that Sheridan provided "the least restrictive environment" for L.M. and offered him "appropriate general and special education services."[1104]

L.M.'s parents requested a due process hearing asserting that the district had denied L.M. a FAPE by failing to create an appropriate IEP for his fourth-grade year.[1105] They also contended that the district had denied them meaningful participation in the process of creating an

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[1096] *Id.*
[1097] *Id.*
[1098] *Id.*
[1099] *Id.* at 483.
[1100] *Id.* at 484.
[1101] *Id.*
[1102] *Id.*
[1103] *Id.*
[1104] *Id.*
[1105] *Id.*

IEP for their son.[1106] The hearing officer concluded that the district had provided a FAPE for L.M.[1107] The hearing officer found that the district had acted in good faith and that "clearly" L.M. was "making some progress and receiving some educational benefit" because he had advanced from grade to grade and was meeting some of the district's educational assessments.[1108]

L.M.'s parents appealed the hearing officer's decision to the United States District Court for the District of Nebraska.[1109] The district court determined that the school district had made a FAPE available to L.M. because its IEP included L.M.'s achievements, measurable goals, and behavioral strategies.[1110] L.M.'s parents appealed the decision to the Eighth Circuit, who affirmed the district court's decision.[1111] The circuit court found that the record supported the district court's conclusions that the child's IEP was reasonably calculated because the child was advancing from year to year and he was gaining educational skills.[1112] The Eighth Circuit also agreed with the district court's conclusion that Sheridan School was the least restrictive environment and L.M.'s parents were given a meaningful opportunity to participate in the creation of the IEP.[1113] The case was not appealed.

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[1106] *Id.*
[1107] *Id.*
[1108] *Id.* at 484-85.
[1109] *Id.* at 485.
[1110] *Id.*
[1111] *Id.* at 489.
[1112] *Id.* at 486.
[1113] *Id.* at 488.

### *Jefferson County Sch. Dist. R-1 v. Elizabeth E. (2012)*[1114]

The Tenth Circuit was asked to rule on whether parents who enrolled their child at a residential treatment center in another state were eligible for tuition reimbursement.[1115] Elizabeth E. was a student in the Jefferson County (Colorado) school system who received special education services for behavioral and emotional issues.[1116] In November 2008, Elizabeth's parents enrolled her at Innercept, a residential treatment center in Idaho, and subsequently sought reimbursement.[1117] After Elizabeth's parents requested a due process hearing, an IHO concluded that even though the placement was in another state, the parents were still entitled to tuition reimbursement. The school district appealed the IHO's decision, first to an SRO and then to the United States District Court for the District of Colorado, which both affirmed the IHO's decision that the parents were eligible for tuition reimbursement.[1118]

The district again appealed to the Tenth Circuit, arguing that Innercept was not a reimbursable placement under the IDEA and that the parents' conduct (not making her available for evaluation) precluded reimbursement.[1119] The court of appeals affirmed the judgment of the district court.[1120] The Tenth Circuit determined that the student's placement at the center was reimbursable because (1) the district did not provide a FAPE to her, (2) the center met the IDEA's definition of a "secondary school" as determined under state law, (3) the unchallenged findings of the IHO, SRO, and district court supported the conclusion that the center provided specially designed instruction to meet her unique needs, and (4) the placement provided services

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[1114] *Jefferson County Sch. Dist. R-1 v. Elizabeth E.,* 702 F.3d 1227 (10th Cir. 2012).
[1115] *Id.* at 1229.
[1116] *Id.* at 1230.
[1117] *Id.* at 1231.
[1118] *Id.* at 1229.
[1119] *Id.* at 1232.
[1120] *Id.* at 1243.

required for her to benefit from that instruction.[1121] The school district appealed to the U.S. Supreme Court and certiorari was denied.

### *M.N. v. Hawaii (2013)*[1122]

In *M.N. v. Hawaii*, the Ninth Circuit Court of Appeals was asked to determine whether a private school placement was appropriate and whether a parent was eligible for tuition reimbursement.[1123] A.B. was an eight-year-old child with autism, severe communication issues, and academic and behavioral difficulties.[1124] In 2006, A.B. was found eligible for special education under the category of autism.[1125] A.B. attended Ewa Beach Elementary, a public school, through the 2008-09 school year.[1126] In June 2009, A.B.'s mother M.N. removed him from the public school district and enrolled him in the Pacific Autism Center (PAC), a private school that primarily utilizes ABA.[1127] In March 2010, the district developed an IEP for A.B. to return to the public school district and M.N. agreed to the services for the following school year.[1128] However, in August 2010, M.N. informed the district that he would be staying at PAC and then filed for an administrative hearing seeking tuition reimbursement.[1129] M.N. claimed that the district's proposed IEP did not offer A.B. a FAPE.[1130]

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[1121] *Id.* at 1236-37.
[1122] *M.N. v. Hawaii*, 509 Fed. Appx. 640 (9th Cir. 2013).
[1123] *Id.* at 641.
[1124] *M.N. v. Hawaii*, 2011 U.S. Dist. LEXIS 138120, 4 (D. Haw., Dec. 1, 2011).
[1125] *Id.*
[1126] *Id.*
[1127] *Id.* at 4-5.
[1128] *Id.* at 6.
[1129] *Id.*
[1130] *Id.*

In January of 2011, the IHO concluded that the proposed IEP did not offer A.B. a FAPE, since it failed to address his transitional needs.[1131] However, the IHO denied M.N.'s request for reimbursement since M.N. had failed to prove that the unilateral placement of A.B. at PAC was appropriate.[1132] The IHO found that many of A.B.'s needs had not been addressed and there were many areas in which A.B. had shown no progress at all.[1133] M.N. appealed the decision to the United States District Court for the District of Hawaii, which affirmed the ruling of the IHO that A.B. was not entitled to tuition reimbursement. M.N. then appealed to the Ninth Circuit Court of Appeals, which affirmed the district court's decision not to grant reimbursement.[1134]

Although the Ninth Circuit agreed with the parents that the district's placement did not offer a FAPE, the court reiterated that the parent's private placement would have been "proper" only if it provided educational instruction specially designed to meet the unique needs of a handicapped child.[1135] The court clarified that instruction must be supported by such services as are necessary to permit the child to benefit from instruction.[1136] The circuit court stated that the educational benefits conferred at the private placement were "meager" and there was a host of essential areas in which the child was making no progress at all.[1137] The case was not appealed.

### ***Munir v. Pottsville Area Sch. Dist. (2013)***[1138]

In *Munir v. Pottsville Area Sch. Dist.*, the Third Circuit was asked to decide whether a student's father was entitled to reimbursement for the costs of placing a child at a private

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[1131] *Id.* at 7.
[1132] *Id.*
[1133] *Id.*
[1134] *M.N. v. Hawaii*, 509 Fed. Appx. 640, 641 (9th Cir. 2013).
[1135] *Id.*
[1136] *Id.*
[1137] *Id.*
[1138] *Munir v. Pottsville Area Sch. Dist.,* 723 F.3d 423 (3rd Circuit 2013).

residential facility following multiple suicide attempts by the child.[1139] O.M. was a Pottsville student who had been diagnosed as suffering from an emotional disturbance.[1140] After multiple hospitalizations, the district created a 504 Plan for O.M. in November 2008.[1141] In January 2009, O.M. again threatened suicide and was hospitalized for treatment.[1142] When he was released, his parents enrolled him for the remainder of the school year at Wediko Children's Services, a therapeutic residential treatment center in New Hampshire.[1143] In May and September of 2009, the school district increased the proposed IEP services to provide emotional support services, including a cognitive-behavioral curriculum for students experiencing anxiety and depression.[1144]

In September 2009, O.M.'s parents rejected the proposed IEP because it did not provide for smaller classes and specific types of counseling that were provided at Wediko.[1145] At this time, O.M.'s parents also decided to place him in a less intensive placement due to the fact that his suicide risk level had decreased.[1146] Therefore, they enrolled him in Phelps School, a residential school located in Malvern, Pennsylvania.[1147] O.M.'s parents then filed a due process complaint alleging that the school district had failed to conduct a timely evaluation of O.M. and had failed to provide specialized educational services.[1148] The family sought reimbursement for the cost of O.M.'s placements at both Wediko and Phelps.[1149] The hearing officer concluded that the school district had no obligation to evaluate O.M. or provide him with special education

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[1139] *Id.* at 434.
[1140] *Id.* at 426.
[1141] *Id.* at 427-28.
[1142] *Id.* at 428.
[1143] *Id.*
[1144] *Id.*
[1145] *Id.*
[1146] *Id.*
[1147] *Id.*
[1148] *Id.*
[1149] *Id.* at 429.

services between 2005 and spring of 2008, since there was no evidence that O.M.'s condition was affecting his ability to learn at that time.[1150] The hearing officer also determined that O.M.'s parents were not entitled to reimbursement for the costs of attending Wediko because the primary purpose of that placement was the provision of mental health treatment, rather than provision of special education services.[1151]

In April 2010, O.M.'s parents appealed the hearing officer's decision to the United States District Court for the Middle District of Pennsylvania, which granted summary judgment in favor of the school district.[1152] O.M.'s parents then appealed to the Third Circuit, which affirmed the decision of the district court.[1153] The circuit court determined that the father was not entitled to reimbursement for the costs of placing the student because the primary purpose of that placement was the provision of mental health treatment and any educational benefit that the student received was incidental.[1154] The father was not entitled to reimbursement for the costs of placing the student at a private boarding school because, at the time that the student went there, the school district had proposed an IEP that met all of the student's educational needs.[1155] The case was not appealed.

### ***M.W. v. New York City Dep't of Educ. (2013)***[1156]

In *M.W. v. New York City Dep't of Educ*., the Second Circuit was asked to review whether the lack of an FBA rose to the level of denying a student a FAPE, even when the IEP

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[1150] *Id.*
[1151] *Id.*
[1152] *Id.* at 430.
[1153] *Id.* at 434.
[1154] *Id.* at 433-34.
[1155] *Id.*
[1156] *M.W. v. New York City Dep't of Educ.*, 725 F.3d 131 (2nd Cir. 2013).

addressed the student's behavioral needs.[1157] A child with autism, M.W., was enrolled by his parents in a private school after they concluded that the New York City DOE had failed to provide their son with a FAPE.[1158] During the entire proceedings, the parents never contended that the IEP misidentified or overlooked their son's behavioral issues.[1159] However, M.W.'s family alleged that the district was always required to complete an FBA anytime they developed a BIP.[1160]

The IHO found that tuition reimbursement was warranted because of the district's failure to develop an FBA. The school district appealed this decision to an SRO, who reversed the decision.[1161] The SRO concluded that the BIP accurately described the behaviors that interfered with learning: "emotional meltdowns, poor self-regulation, and poor attention."[1162] The parents then filed an appeal to the United States District Court for the Eastern District of New York, which affirmed the order denying tuition reimbursement.[1163] Finally, the parents then appealed to the Second Circuit, who also agreed with the SRO's determination that the BIP adequately described M.W.'s behavioral impediments.[1164] The court of appeals concluded that the SRO correctly determined that the IEP was substantively adequate and, despite alleged procedural flaws, provided M.W. a FAPE.[1165] The case was not appealed.

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[1157] *Id.* at 133.
[1158] *Id.* at 134.
[1159] *Id.* at 141.
[1160] *Id.* at 140.
[1161] *Id.* at 138-39.
[1162] *Id.* at 137.
[1163] *Id.* at 135.
[1164] *Id.* at 147.
[1165] *Id.*

### *S.L. v. Upland Unified Sch. Dist. (2013)*[1166]

In *S.L. v. Upland Unified Sch. Dist.,* the Ninth Circuit was asked to decide whether tuition reimbursement was warranted when a district failed to complete the agreed-upon assessments within a reasonable amount of time.[1167] The student, S.L., was a kindergartener who was eligible for special education services under the category of intellectual disability.[1168] During the 2002-03 school year, S.L.'s parents became unhappy with Upland Unified School District's educational program and placed S.L. in a private school, Our Lady of Assumption.[1169] In 2005, S.L.'s parents filed for due process, alleging that her right to a FAPE was violated between 2002 and 2006.[1170] As part of the settlement, Upland agreed to reimburse S.L. a total of $18,000 for educational expenses. Additionally, S.L.'s mother agreed to make S.L. available for assessments at reasonable times so that the district could develop an appropriate IEP for the 2007-08 school year.[1171]

In the four months following the settlement agreement, S.L.'s mother and the district had a series of contentious exchanges regarding the assessment process (location, length of time, etc.).[1172] In December 2007, S.L.'s mother filed a second due process complaint alleging that the district denied S.L. a FAPE by failing to hold an IEP meeting at the parents' request to discuss the proposed assessment plan.[1173] The complaint also alleged that the district failed to conduct the agreed-upon assessments.[1174] Weighing the district's failure to assess S.L. on the one hand

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[1166] *S.L. v. Upland Unified Sch. Dist*., 2014 U.S. App. LEXIS 6127 (9th Cir. 2013).
[1167] *Id.* at 1.
[1168] *Id.* at 3.
[1169] *Id.*
[1170] *Id.*
[1171] *Id.* at 4.
[1172] *Id.* at 4-5.
[1173] *Id.* at 5.
[1174] *Id.*

and the mother's failure to place S.L. at an appropriate school and unreasonable behavior with the assessments on the other hand, the administrative law judge (ALJ) ruled that S.L. was entitled to "some reimbursement" for costs incurred during the 2007-08 school year.[1175]

S.L.'s parents appealed the ALJ's decision regarding partial reimbursement to the United States District Court for the Central District of California, which upheld the ALJ's decision in its entirety.[1176] After further appeal by S.L.'s mother, the Ninth Circuit affirmed in part and reversed in part the district court's order upholding the hearing officer's partial denial of reimbursement.[1177] Reversing in part, the panel held that the student was entitled to reimbursement for the full cost of tuition at a private school because the school district denied her a FAPE when they failed to comply with a previous settlement agreement's assessment requirements, and the private placement was appropriate.[1178] The case was not appealed.

### ***M.R. v. Ridley Sch. Dist. (2014)*[1179]**

In *M.R. v. Ridley Sch. Dist.,* the Third Circuit was asked whether the stay-put provision applies through the final resolution of the appeals process and whether this obliges a district to provide funding until the appeals process is complete.[1180] During the 2007-08 school year, E.R. attended first grade at Grace Park Elementary School in the Ridley School District, receiving special services to address her learning disabilities and health-related issues.[1181] During the summer after first grade, E.R.'s parents concluded that the public school was not meeting their

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[1175] *Id.* at 6.
[1176] *Id.* at 7.
[1177] *Id.* at 8-9.
[1178] *Id.* at 8-10.
[1179] *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112 (3rd Cir. 2014).
[1180] *Id.* at 114.
[1181] *Id.* at 115.

daughter's needs, and they enrolled her at a private school, Benchmark.[1182] In April 2009, an administrative hearing officer found that E.R. was denied a FAPE for part of first grade and all of second grade.[1183] The hearing officer ordered Ridley to reimburse the plaintiffs for the tuition and transportation costs associated with E.R.'s enrollment at Benchmark in 2008-09.[1184]

Two years later, in February 2011, the United States District Court for the Eastern District of Pennsylvania reversed the hearing officer's placement assessment, finding that Ridley's proposed IEP was adequate and, hence, that the school district had offered E.R. a FAPE in the local public school.[1185] The parents appealed and the Third Circuit affirmed the district court's ruling in May 2012.[1186] Meanwhile, in March 2011, after filing their appeal from the district court's judgment, E.R.'s parents sent a letter to the school district requesting payment for the Benchmark tuition costs from the date of the hearing officer's decision, pursuant to the IDEA's stay-put provision.[1187] When the school district declined to pay, plaintiffs appealed to the district court, claiming that the IDEA required Ridley to finance E.R.'s private placement until all appeals had concluded in the previous litigation over the adequacy of her IEP.[1188]

The district court found in favor of E.R.'s parents and ordered the district to pay $57,658.38.[1189] The school district appealed to the Third Circuit, which affirmed the decision of the district court. The court of appeals found that despite two judicial determinations that Ridley

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[1182] *Id.*
[1183] *Id.* at 116.
[1184] *Id.*
[1185] *Id.*
[1186] *Id.*
[1187] *Id.* See 20 U.S.C. § 1415(j).
[1188] *Id.*
[1189] *Id.* at 117.

did not deny E.R. a FAPE, the school district would be assessed the cost of E.R.'s private school education for that entire period of time.[1190] The court stated:

> It is impossible, however, to protect a child's educational status quo without sometimes taxing school districts for private education costs that ultimately will be deemed unnecessary by a court. We see this not as "an absurd result," but as an unavoidable consequence of the balance Congress struck to ensure stability for a vulnerable group of children.[1191]

The school district appealed to the U.S. Supreme Court, which responded by inviting the Solicitor General to file a brief to express the view of the United States. No decision had been made in this case as of March 2015.

### *C.F. v. New York City Dep't of Educ. (2014)*[1192]

In *C.F. v. New York City Department of Education*, the Second Circuit was asked to determine whether the lack of an appropriate BIP and a 1:1 student-to-teacher ratio denied FAPE to a six-year-old boy with autism.[1193] For the 2006-07 and 2007-08 school years, C.F. attended McCarton, a private school located in Manhattan, where he received ABA therapy at a 1:1 student-to-therapist ratio.[1194] In July 2007, C.F. and his parents moved from New Jersey into New York City.[1195] After a May 2008 IEP meeting with the New York school district, the plaintiffs alleged that the district's failure to conduct an FBA led to the development of an inappropriate BIP and caused the district to offer an inappropriate placement.[1196] As a result,

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[1190] *Id.* at 128.
[1191] *Id.*
[1192] *C.F. v. New York City Dep't of Educ.*, 2014 U.S. App. LEXIS 4083, (2nd Cir. 2014).
[1193] *Id.* at 1.
[1194] *Id.* at 7-8.
[1195] *Id.* at 8.
[1196] *Id.*

C.F.'s parents unilaterally placed him at the McCarton School, after which they sought reimbursement by filing a due process complaint with the DOE.[1197]

In June of 2010, an IHO granted C.F.'s parents' request for tuition reimbursement. The district appealed this decision, which was reversed by an SRO.[1198] The family appealed to the United States District Court for the Southern District of New York, which affirmed the ruling by the SRO that the family was not eligible for tuition reimbursement.[1199] After the family again appealed, the Second Circuit Court of Appeals held that the district procedurally and substantially violated the IDEA by creating a vague BIP that failed to match the child's behaviors with specific interventions and strategies.[1200] Furthermore, the court pointed out that the deficient BIP had an adverse impact on the team's placement recommendation.[1201] The Second Circuit vacated a judgment for the district and remanded the case with instructions to award the parents tuition reimbursement.[1202] The case has not been appealed.

### ***C.L. v. Scarsdale Union Free School District (2014)*[1203]**

In *C.L. v. Scarsdale Union Free School District*, the Second Circuit was asked to determine whether a private placement would be considered inappropriate if it were more restrictive than the public school placement the child previously attended.[1204] In this case the student, C.L., was diagnosed with ADHD and a nonverbal learning disability.[1205] He also

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[1197] *Id.* at 9.
[1198] *Id.* at 14.
[1199] *Id.* at 16.
[1200] *Id.* at 19-20.
[1201] *Id.* at 32-33.
[1202] *Id.* at 35.
[1203] *C.L. v. Scarsdale Union Free Sch. Dist.*, 2014 U.S. App. LEXIS 4478 (2nd Cir. 2014).
[1204] *Id.* at 7.
[1205] *Id.*

exhibited problems with anxiety, stuttering, fine motor development, and visual motor coordination, which also impacted his ability to learn.[1206] As a result of these deficits, C.L. received services through a Section 504 Plan, which included 15 hours of classroom aide time each week.[1207]

During the 2007-08 school year, when C.L. was attending Greenacres Elementary School, his parents requested a special education evaluation.[1208] After the school district determined that C.L. was not eligible for an IEP, the parents enrolled him at Eagle Hill School, a specialized private school in Greenwich, Connecticut.[1209] The parents then requested a hearing in order to receive tuition reimbursement under the IDEA.[1210] An IHO awarded tuition reimbursement to C.L.'s parents, holding that Scarsdale School District denied C.L. a FAPE and that the parents' private placement was appropriate.[1211]

After the district appealed, an SRO reversed the decision, agreeing that C.L. was denied a FAPE but finding that the parents' private placement was not appropriate.[1212] The SRO's conclusion was due to the fact that the specialized private school was a more restrictive environment than the public school in which C.L. had been previously been placed.[1213] After the parents appealed, the United States District Court for the Southern District of New York

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[1206] *Id.* at 8-11.
[1207] *Id.* at 10-11.
[1208] *Id.* at 12.
[1209] *Id.* at 13-14.
[1210] *Id.* at 15.
[1211] *Id.* at 15-16.
[1212] *Id.* at 16.
[1213] *Id.* at 16-17.

affirmed the SRO's conclusion in favor of the district.[1214] The parents then appealed to the Second Circuit Court of Appeals, which reversed the decision.[1215]

The Second Circuit held that the SRO's decision was insufficiently reasoned and instead deferred to the IHO's decision, which was more thorough and carefully considered.[1216] The SRO did not examine the kind of education and services the parents' placement provided C.L., effectively ruling that the school was inappropriate only because it was more restrictive than the public school he previously attended.[1217] The Second Circuit clarified that when a child is denied a FAPE, his parents may turn to an appropriate specialized private school designed to meet special needs, even if the school is more restrictive.[1218] The case has not been appealed

[1214] *Id.* at 17-18.
[1215] *Id.* at 18.
[1216] *Id.* at 25.
[1217] *Id.* at 26.
[1218] *Id.* at 22-24.

CHAPTER THREE

HISTORICAL ANALYSIS

## Overview

When a school district fails to provide an eligible child a free and appropriate public education, one of the parental options is unilaterally placing their child in a private placement and seeking tuition reimbursement. Since the 2009 *Forest Grove*[1219] decision there have been 24 cases[1220] involving unilateral private placements decided by the federal circuit courts of appeal. The significance of many of these decisions may have been overlooked by school officials due to the fact the U.S. Supreme Court has not granted certiorari for any unilateral private placement cases since *Forest Grove.* This historical analysis begins with an overview of the case law and legislative acts that have had a meaningful impact on present-day unilateral private placements. The chapter concludes with an analysis of recent unilateral private placement cases that have been reviewed by the federal appellate courts.

In Chapter Two, the decisions and legislation that have most impacted unilateral private placements were reviewed. The following timeline briefly summarizes those significant occurrences. In 1972, inspired by the decision in *Brown,*[1221] the *PARC*[1222] and *Mills*[1223]

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[1219] *Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009).
[1220] This includes only the 24 "non-summary judgment" cases. Some of these cases involved multiple cases being heard at one time, resulting in 27 separate decisions.
[1221] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
[1222] *PARC*, 343 F. Supp. 279 (1972).
[1223] *Mills v. Bd. of Educ.* of D.C., 348 F. Supp. 866 (1972).

decisions placed the exclusion of disabled children from the public schools on the congressional agenda. Congress became aware this exclusion was not only stigmatizing but violated disabled students' Fourteenth Amendment rights to due process and equal protection under the law. These rights were ultimately codified by P.L. 94-142, which was initially passed in 1975 as the Education for All Handicapped Children Act (EAHCA)[1224] and subsequently reauthorized as IDEA 1990,[1225] IDEA 1997,[1226] and IDEIA 2004.[1227] Each reauthorization strengthened the rights of students with disabilities. In *Rowley*,[1228] the U.S. Supreme Court interpreted the EAHCA's free and appropriate public education (FAPE) provision mandating delivery of special education services but did not require school districts to maximize each student's potential.[1229]

In the first case dealing specifically with unilateral private placements, *Burlington,* the Supreme Court determined the IDEA's broad grant of authority allowed courts to grant tuition reimbursement if the school's IEP was judged to be inappropriate and the unilateral private placement was found to be appropriate. [1230] The Court also reasoned it would result in an empty victory if parents were required to "stay-put"[1231] during the pendency of judicial review.[1232] Therefore, although the "stay-put" provision typically required that the student remain in his or her current educational placement until the dispute was resolved, *Burlington* allowed parents to immediately place their child in a private placement during the pendency of administrative and

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[1224] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).
[1225] Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990).
[1226] Individuals with Disabilities Education Act, Pub. L. No. 105-17, 111 Stat. 37 (1997).
[1227] Individuals with Disabilities Education Improvement, Pub. L. No. 108-446, 118 Stat. 2647 (2004).
[1228] *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).
[1229] *Id.* at 189-90 (1982).
[1230] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373-74 (1985).
[1231] 20 U.S.C. § 1415(j). Provides that during the course of due process proceedings, a child shall stay in his or her current placement unless the parents and school officials agree otherwise.
[1232] *Id.* at 370.

judicial review, albeit at their own financial risk. The next U.S. Supreme Court case addressing unilateral private placements was *Carter.*[1233] *Carter* found there is no requirement for the parentally selected facility to be state approved. Instead, the unilateral placement would be "proper under the Act" if the education provided by the facility was reasonably calculated to enable the child to receive educational benefits.[1234]

In *Tom F.,*[1235] the U.S. Supreme Court was equally divided on whether a child must receive special education services in order for the parents to be eligible for tuition reimbursement.[1236] However, in *Forest Grove*,[1237] the U.S. Supreme Court found if a hearing officer or court determined a student was denied a FAPE, and the private placement was suitable, tuition reimbursement could be an appropriate remedy even if that student had never received special education services in a public school. The Court reasoned a school district's failure to propose an IEP of any kind was at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.[1238]

Subsequent to *Forest Grove* the federal circuit courts have issued many decisions involving unilateral parental placements, and analyzing these decisions may help to uncover important trends. Additionally, these decisions aid in predicting future areas of litigation. When looking at the broad trends involved in the recent unilateral private placement decisions, FAPE (free and appropriate public education), LRE (least restrictive environment), and appropriateness

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[1233] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361 (1993).
[1234] *Id. at* 364.
[1235] *Bd. of Educ. of N.Y. v. Tom F.*, 552 U.S. 1 (2007).
[1236] *Tom F.*, 552 U.S. 1, 1 (2007). Since Justice Kennedy recused himself in this case, there were only eight justices, which allowed for a 4-4 tie. When this occurs, the decision of the court below is affirmed, but the decision is not considered to be a binding precedent.
[1237] *Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009).
[1238] *Id.* at 2491.

of the private placement emerge as the predominant issues. However, this analysis also examined how retrospective testimony, the standard of review, as well as other trends, affected unilateral private placements.

## FAPE Issues

School districts are required to provide special education students with an IEP, described by the Supreme Court as the "centerpiece" of the IDEA and the "primary vehicle" for carrying out Congress' goals.[1239] An IEP must include the following:

> (1) A statement of the student's current level of functioning; (2) a statement of "measurable annual goals" designed to meet the student's individual needs; (3) a description of how and when progress towards these goals will be measured; (4) a statement of the related services to be provided to the student; (5) a statement explaining to what extent, if any, a child will be excluded from the regular classroom; and (6) a statement outlining any testing accommodations to be provided to the student. The IDEA regulations also require the IEP to be developed and reviewed annually by an "IEP Team," which must include the parents and specified teaching professionals.[1240]

Each of the reviewed unilateral private placement decisions involved a parental allegation that school officials had failed to provide the child a FAPE. Therefore, the determination of whether a FAPE had been provided became the threshold issue.[1241]

As previously described a FAPE must fulfill three primary requirements. First, the school district's IEP must be free of procedural errors that could compromise the delivery of

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[1239] *Honig v. Doe*, 484 U.S. 305, 311 (1988).
[1240] T. Daris Isbell, *Note: Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 BROOKLYN L. REV. 1717, 1729 (2011). Citing 34 C.F.R. § 300.320(a), 34 C.F.R. § 300.321.
[1241] Perry A. Zirkel, *"Appropriate" Decisions Under the Individuals with Disabilities Education Act*, 33 J. NAT'L ASS'N L. JUD. 242, 256 (2013).

special education services to the child.[1242] Second, the school district must provide a substantively appropriate IEP.[1243] *Rowley* and *Carter* defined a substantively appropriate IEP as being "reasonably calculated to enable the child to receive educational benefits."[1244] Third, parents must be provided a meaningful opportunity to participate in the development of their child's IEP.[1245] While *Rowley* only required school officials to supply some educational benefit to students with disabilities, later decisions have required more.[1246] For example, in *Polk v. Central Susquehanna Intermediate Unit 16*,[1247] the Third Circuit held the IDEA requires "more than a trivial educational benefit."[1248] *Polk* relied upon both the IDEA's legislative history and *Rowley*, requiring a meaningful educational benefit rather than a "trivial educational benefit."[1249]

A number of legal analysts[1250] have urged adopting a FAPE standard more closely aligned with Congress' emphasis on the IEP and IDEA amendments, stressing the importance of

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[1242] John Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 418 (2011).
[1243] *Id.*
[1244] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 364 (1993). *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).
[1245] John Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 418 (2011); 34 CFR § 300.501(b).
[1246] T. Daris Isbell, *Note: Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 BROOKLYN L. REV. 1717, 1731 (2011).
[1247] *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (1988).
[1248] T. Daris Isbell, *Note: Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 BROOKLYN L. REV. 1717, 1731 (2011).
[1249] *Id.*
[1250] See David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 87-96 (2010) (comparing the "materiality" standard with the per se approach); Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 373-77 (2008) (advocating for an updated FAPE standard).

measuring student attainment of individual IEP goals.[1251] This augmented FAPE standard would require courts to consider whether a student had made substantial progress toward attainment of the IEP goals.[1252] It has been suggested linking the FAPE determination to the demonstrated level of progress towards IEP goals would produce greater judicial attention to the IDEA's IEP requirements.[1253]

This analysis of unilateral private placement decisions did not examine in great depth the specific substantive errors that prompted each parental unilateral private placement. There was considerable variance in the nature of alleged substantive violations. Typically the hearing officer or court's analysis was so fact specific it could not be applied to other fact patterns. Additionally, the number of times issues related to alleged substantive violations[1254] were overturned at the next level of review suggested a high degree of subjectivity.[1255] The dissimilarity in judicial applications of the "meaningful benefit" standard resulted in unclear and inconsistent rulings.[1256] The following decisions are examples of substantive claims where

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[1251] T. Daris Isbell, *Note: Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 BROOKLYN L. REV. 1717, 1733-34 (2011).
[1252] *Id.* at 1734.
[1253] *Id.*
[1254] In this legal review, out of 27 opportunities to overturn the lower court's decision, the higher court reversed the decision 13 times (48% of the time).
[1255] See *M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 248 (2nd Cir. 2012). The parents alleged a FAPE violation because the students in the proposed placement had little expressive language and not enough ABA was offered. The IHO found for the parent, SRO reversed, district court reversed, circuit court affirmed.
[1256] T. Daris Isbell, *Note: Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the* IDEA, 76 BROOKLYN L. REV. 1717, 1732 (2011).

school officials prevailed because a FAPE had been offered (appropriateness of placement was not an issue).[1257]

In *D.B. v. Sutton School District*,[1258] the parents argued that without a thorough evaluation to determine the upper limit of their child's potential for learning and self-sufficiency, school officials would not be able to provide their child with a FAPE. The IHO ruled in favor of school officials, reasoning D.B.'s potential for learning and self-sufficiency could not be determined due to the severity of his disabilities.[1259] Additionally, the IHO noted, "The IDEA does not require [school] districts to maximize a student's potential, but rather to assure access to a public education and the opportunity for meaningful educational benefit."[1260] The district court and First Circuit affirmed the IHO's decision finding the child's achievements were meaningful for him and "advanced him measurably toward the goal of increased learning and independence."[1261]

In *M.M. v. District 0001 Lancaster County School,*[1262] after their child returned from a behavioral treatment facility, the parents alleged the district's BIP denied their child a FAPE because it included the use of a time-out room. The hearing officer found in favor of school officials, noting they had considered the parent's plan, adopted portions of it, and stated legitimate reasons for allowing school personnel to place the student in a calming room. The district court and Eighth Circuit affirmed the decision, concluding school officials had acted in

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[1257] *D.B. v. Sutton School District*, 675 F.3d 26 (1st Cir. 2012); *M.M. v. District 0001 Lancaster County School*, 702 F.3d 479 (8th Cir. 2012); *Fort Osage R-I Sch. Dist. v. Nichole,* 641 F.3d 996 (8th Cir. 2011).
[1258] *D.B. v. Sutton School District*, 675 F.3d 26 (1st Cir. 2012).
[1259] *Id.* at 32.
[1260] Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N L. JUD. 423, n.84 (2012).
[1261] *D.B. v. Sutton School District*, 675 F.3d 26, 28 (1st Cir. 2012).
[1262] *M.M. v. District 0001 Lancaster County School*, 702 F.3d 479 (8th Cir. 2012).

good faith in developing the BIP.[1263] The Eighth Circuit reasoned when a child's learning is impeded by behavioral issues, the IDEA requires the IEP team to "consider the use of positive behavioral interventions and supports, and other strategies, including positive behavioral interventions."[1264] The court determined the IEP team was required only to consider the results of outside evaluations, but not necessarily to adopt them. The court further observed the school district was required only to make a "good faith effort" to help the student achieve IEP goals and academic progress was an "important factor" in deciding whether the IEP was reasonably calculated to provide educational benefit.[1265]

Finally, in *Fort Osage R-I Sch. Dist. v. Nichole*,[1266] the parents alleged the district's failure to include an autism diagnosis prevented the IEP from being tailored to their child's unique needs.[1267] However, the Eighth Circuit found in favor of the district, reasoning that while the IDEA intended that IEPs contain accurate disability diagnoses, an IEP should not be automatically set aside for failing to include a specific disability diagnosis or stating an incorrect diagnosis.[1268] Instead, the court observed the IEP should only be rejected as substantively unreasonable when there was evidence of de minimis progress by the student.[1269] The appeals court found the IEP was highly customized to meet the student's needs and therefore declined to

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[1263] *Id.* at 488.
[1264] *Id.* at 488. Citing 20 U.S.C. § 1414(d)(3)(B)(i).
[1265] Alice K. Nelson & Carol Quirk, *Litigating Behavioral-Services Cases*, 48 CLEARINGHOUSE REV. 30, 35 (2014).
[1266] *Fort Osage R-I Sch. Dist. v. Nichole,* 641 F.3d 996 (8th Cir. 2011).
[1267] *Id.* at 1003.
[1268] *Id.* at 1004.
[1269] *Id.*

rule on whether she should have had an autism diagnosis, since it would not have materially changed the services the student received.[1270]

**Procedural Errors**

When courts determine that there is substantive inadequacy[1271] in an IEP, this automatically entitles parents to reimbursement. However, procedural violations only entitle parents to tuition reimbursement if they "impeded the child's right to a FAPE," "significantly impeded the parents' opportunity to participate in the decision-making process," or "caused a deprivation of educational benefits."[1272] Multiple procedural violations may cumulatively result in a denial of a FAPE even if the violations, when considered individually, were de minimus.[1273] However, the decisions lack clarity on whether an IDEA procedural violation, in the absence of a substantive violation, "always, sometimes, or never results in the denial of a FAPE."[1274]

The courts have suggested some procedural violations are more serious than others. For example, in *R.E.,*[1275] the Second Circuit described how the failure to include parent counseling in the IEP was less serious than the omission of a functional behavior assessment (FBA).[1276] The Second Circuit reasoned because the FBA must be conducted before the behavior intervention plan (BIP) to ensure the IEP was based on adequate information, the presence or absence of a

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[1270] Journal of Law & Education, *Recent Cases and Commentary: Recent Decisions: Primary and Secondary Education*, 41 J.L. & EDUC. 201, 212 (2012).
[1271] See *C.B. v. Special Sch. Dist. No. 1,* 636 F.3d 981 (8th Cir. 2010). In this case, the parents successfully argued that the wrong reading interventions were used, which resulted in the student's evaluations showing slow progress.
[1272] *R.E., M.E., at et al v. NYC Dep't of Education,* 694 F.3d 167, 190 (2nd Cir. 2012). See 20 U.S.C. § 1415(f)(3)(E)(ii) (2005).
[1273] *Id.*
[1274] John Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 417 (2011).
[1275] *R.E., M.E., et al v. NYC Dep't of Education,* 694 F.3d 167, 190 (2nd Cir. 2012).
[1276] *Id.* at 191.

parent counseling provision did not necessarily have a direct effect on the substantive adequacy of the plan.[1277] To further illustrate the point, the court gave the example of how failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE.[1278] However, in most cases, this failure would not be sufficient enough to warrant tuition reimbursement.[1279]

Of the 27 reviewed unilateral private placement decisions, nine involved alleged procedural errors. In these nine cases, parents prevailed three times and school officials prevailed in the remaining six. Among these decisions parents did not win cases when their FAPE allegation involved only a single procedural error. Whether or not a procedural error results in a denial of FAPE is a complicated issue, and the decisions lack clarity and consistency on this issue.[1280] John Romberg suggests, "Attempting to answer that question, courts of appeals have issued decisions that are inconsistent and stated general principals that, while sensible, are opaque, malleable, and undefined."[1281] Since adequate evaluative information is necessary to determine the child's needs and develop appropriate IEP goals for the child, incomplete evaluations or the complete absence of an evaluation will result in a denial of FAPE.[1282] Many of the decisions reviewed alleging procedural errors also included additional substantive

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[1277] *Id.*
[1278] *Id.*
[1279] *Id.* See *Lazerson v. Capistrano Unified Sch. Dist.*, 56 IDELR 213 (C.D.Cal. 2011). Failure to provide notice of procedural safeguards, and initiate the evaluation in a timely manner did not prevent a FAPE.; *M.B. v. Hamilton Southeastern Schools*, 668 F.3d 851 (7th Cir. 2011). Lack of general education teacher and district designee did not prevent a FAPE; *M.W. v. New York City Dep't of Educ.* (2nd Cir. 2013), lack of an FBA did not prevent a FAPE.
[1280] John Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 417 (2011).
[1281] *Id.*
[1282] 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, 192 (2006).

allegations. This made it difficult to determine which aspect of FAPE the courts were more concerned about.

The circuits have developed three primary standards[1283] for evaluating procedural errors.[1284] The standard used by the Fifth and Eighth Circuits (*Bobby R*. standard) contradicts the Third Circuit (*Melissa S.* standard) and the Ninth Circuit (*Van Duyn* standard).[1285] While the *Bobby R.* standard holds that only failures to implement a substantial or significant portion of an IEP violates the IDEA, the *Melissa S*. standard focuses on whether school officials were deliberately indifferent in failing to comply with the IEP's provisions.[1286] Under the *Van Duyn* standard there must be a "material failure"[1287] during the implementation of an IEP.[1288] Unlike *Bobby R*., the *Van Duyn* standard does not focus on the importance of the IEP's provisions but instead applies a more rigorous de minimis standard.[1289] In general, the Fourth, Fifth, and Sixth Circuits have held procedural violations are of the utmost importance.[1290] This contrasts with the Eighth and Eleventh Circuit decisions, where twenty years after *Rowle*y held procedural errors

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[1283] *Bobby R.* significant provision standard, *Melissa S.* standard examining the reasons for the school district's failure to implement the student's IEP, *Van Duyn* materiality standards.
[1284] Gabriela Brizuela, Note, *Making an "IDEA" a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act*, 45 VAL. U.L. REV. 595, 607 (2011).
[1285] *Id.* at 616.
[1286] *Id.* at 607-12.
[1287] A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. The materiality standard does not require that the student suffer demonstrable educational harm in order to prevail.
[1288]Gabriela Brizuela, Note, *Making an "IDEA" a Reality: Providing a free and Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act*, 45 VAL. U.L. REV. 595, 625 (2011).
[1289] *Id.* at 626. The educational benefit that an IEP is designed to achieve must be more than minimal, it must be "meaningful."
[1290] John Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 431 (2011).

did not constitute an IDEA violation if the IEP was reasonably calculated to provide some educational benefit.[1291] These analytical differences illustrate the inherent difficulty in evaluating whether a school district's failure to implement the IEP's provisions constitute a denial of a FAPE.[1292] These varying interpretations among the circuits have produced varying judicial interpretations of a FAPE.[1293]

Three principles have emerged from the circuits for identifying the procedural errors of sufficient magnitude to deny a FAPE. These principles include errors compromising the student's right to an appropriate education, seriously hampering the parents' opportunity to participate in the formulation of the IEP, or causing a deprivation of educational benefits.[1294] However, the decisions provided little interpretation about these principles and did not clarify whether they are co-extensive, overlapping, or entirely distinct.[1295] Highlighting this lack of clarity, one appellate panel observed such a procedural violation, standing alone, "always," "sometimes" and "never" results in judgment for the parents.[1296]

In *M.H. v. New York City Dep't of Education*,[1297] the court found the lack of an FBA along with goals that were not individualized combined to deny the student a FAPE. In *M.H.*,[1298]

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[1291] *Id.* at 430, 432.
[1292] Gabriela Brizuela, Note, *Making an "IDEA" a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act*, 45 VAL. U.L. REV. 595, 630 (2011).
[1293] *Id.* at 616; See Scott Goldschmidt, *A new idea for special-education law: Resolving the "appropriate" educational benefit circuit split and ensuring a meaningful education for students with disabilities*, 60 CATH. U.L. REV. 749, 759-61 (2011). Second, Third, Fourth, Fifth, Sixth and Ninth Circuit courts require a "meaningful educational benefit." First, Eighth, Tenth, Eleventh, and D.C. Circuits require "some educational benefit."[1293] The Seventh Circuit has taken a hybrid approach between the two levels of services.
[1294] John Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 418 (2011).
[1295] *Id.*
[1296] *Id.*
[1297] *M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 248 (2nd Cir. 2012).

the parents asserted the IEP goals were generic and vague and lacked evaluative criteria. The parents also alleged school officials had failed to conduct an FBA to evaluate the student's social needs, and the IEP did not mandate counseling despite school officials' acknowledgment counseling was necessary.[1299]

The district court concluded the failure to conduct an FBA did not amount to a procedural violation where the IEP set forth other means to address the student's problem behaviors. Thus the absence of an FBA did not render the IEP "unreasonable."[1300] However, on review the Second Circuit found school officials failed to consider highly relevant evidence in the record, resulting in academic goals that were insufficiently individualized and did not accurately reflect the student's special education needs.[1301] The appellate panel also concluded school officials had committed a substantive violation by not placing the student in a 1:1 student/teacher-ratio classroom.[1302]

Another case involving procedural errors, *R.K. v. New York City Dep't of Education*, found school officials' failure to conduct an FBA resulted in a denial of a FAPE.[1303] In *R.K.*, parents alleged the student was denied a FAPE because (1) the school failed to conduct an FBA despite R.K.'s serious behavioral problems; (2) the IEP lacked the required provisions for parent counseling and speech and language therapy; and (3) the proposed placement offered insufficient 1:1 remedial instruction and ABA instruction.[1304] The parents initially filed for an administrative

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[1298] *Id.*
[1299] *Id.* at 229.
[1300] *Id.* at 232.
[1301] Journal of Law & Education, *Recent Cases and Commentary: Lower Federal Courts and State Courts*, 42 J.L. & EDUC. 338, (2013).
[1302] *M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 251 (2nd Cir. 2012).
[1303] Alice K. Nelson & Carol Quirk, *Litigating Behavioral-Services Cases*, 48 CLEARINGHOUSE REV. 30, 36 (2014).
[1304] R.E., M.E., at et al v. NYC Dep't of Education 694 F.3d 167, 193 (2nd Cir. 2012).

hearing, alleging only substantive issues with the IEP (i.e., insufficient ABA support). On review, a Second Circuit panel concluded sua sponte school officials' failure to conduct an FBA and develop a BIP were significant procedural errors. This conclusion was based upon the fact the evidentiary record plainly established the student's behavioral problems impeded her learning.[1305] While the SRO had ruled an FBA was not required because the student's behaviors were "not unusual for a student with autism," the appellate panel relied upon New York regulations mandating that an FBA be developed when a student manifested behaviors that impeded his or her learning.[1306] Therefore, the Second Circuit panel concluded the failure to create an FBA compounded the IEP's substantive deficiency, resulting in the denial of a FAPE.[1307] The court further observed, while not all such failures will constitute a denial of a FAPE, "when a functional behavioral assessment is not conducted, a court must take particular care to ensure that the IEP adequately addresses the child's problem behaviors."[1308]

In *C.F. v. New York City Dep't of Educ*ation,[1309] the court found the lack of an FBA rendered the BIP inadequate and thereby deprived the student of a FAPE. In *C.F.*, the parents alleged three procedural violations: failure to include the family in school site selection, failure to develop an FBA or adequate BIP, and failure to include parent counseling and training in the IEP.[1310] The court acknowledged assessments were only required when needed to ascertain the physical, mental, behavioral and emotional factors contributing to the suspected disabilities, and the law did not "raise the IDEA bar by rendering IEPs developed without an FBA legally

[1305] *Id.* at 181.
[1306] *Id.* at 190.
[1307] *Id.* at 194.
[1308] Alice K. Nelson & Carol Quirk, *Litigating Behavioral-Services Cases*, 48 CLEARINGHOUSE REV. 30, 36 (2014). See *R.E., M.E., et al v. NYC Dep't of Education*, 694 F.3d 167, 193 (2nd Cir. 2012).
[1309] *C.F. v. New York City Dep't of Educ*., 2014 U.S. App. LEXIS 4083 (2nd Cir. 2014).
[1310] *Id.* at 24.

inadequate."[1311] The court reiterated procedural violations only satisfied the first element of the *Burlington/Carter* test if they, either individually or cumulatively, "impeded the child's right to a FAPE," "significantly impeded the parents' opportunity to participate in the decision-making process," or "caused a deprivation of educational benefits."[1312] However, as a result of not completing an FBA (thereby rendering the BIP inadequate), not offering parent counseling, and not offering a placement with a 1:1 teacher-student ratio, the Second Circuit ruled for the parents. The Second Circuit concluded school officials were also at fault for failing to consider the parents' educational preferences.[1313]

In the two decisions where school officials prevailed on parental claims that procedural errors had denied their child a FAPE, the courts determined the lack of an appropriate FBA was a procedural violation, but it did not constitute denial of a FAPE.[1314] In *Munir v. Pottsville Area School District,*[1315] the court found school officials did not commit a Child Find violation because the student's behavioral concerns were not present during the period of time when he was initially placed in a residential treatment facility. Years later, when the student took an overdose of medication and was again hospitalized, the courts found school officials had offered the student a FAPE, and therefore, the school district had complied with the IDEA's provisions.[1316]

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[1311] *Id.* at 28.
[1312] *Id.* at 30.
[1313] Journal of Law & Education, *Recent Cases and Commentary: Supreme Court Decisions*, 43 J.L. & EDUC. 535, 544 (2014).
[1314] *M.W. v. New York City Dep't of Educ.*, 725 F.3d 131 (2nd Cir. 2013); *R.E., M.E., et al v. NYC Dep't of Education*, 694 F.3d 167 (2nd Cir. 2012).
[1315] *Munir v. Pottsville Area Sch. Dist.,* 723 F.3d 423 (3rd Circuit 2013).
[1316] Ronald D. Wenkart, *Residential Placements and Special Education Students: Emerging Trends, 304 WELR 1, 12-13* (2014).

In *T.Y. v. New York City Dep't of Educ.,*[1317] a Second Circuit panel concluded it was not a procedural violation for school officials to identify only the "type" of school placement, without listing the specific name of the school placement. The court reasoned the term "educational placement" referred only to the general type of educational program in which a child is placed. This ruling differed from the Fourth Circuit's *A.K v. Alexandria City School Board* decision,[1318] concluding a failure to include a specific school name in an IEP constituted both a procedural and substantive IDEA violation.[1319] In *C.H. v. Cape Henlopen Sch. Dist.,*[1320] the parents alleged school officials' failure to have an IEP prepared on the first calendar day of school resulted in a denial of a FAPE. However, a Third Circuit panel found this error did not warrant tuition reimbursement.

In summary, to provide a student with a FAPE, the IEP must be free of procedural errors, must be "reasonably calculated"[1321] to enable the child to receive educational benefits, and must provide the parent with meaningful opportunity to participate in the development of the IEP.[1322] However, differences in the interpretation of the FAPE requirement has resulted in unclear and inconsistent rulings. The various interpretations about the level of services needed for a FAPE has also resulted in varying outcomes when considering the impact of procedural errors. The courts have suggested some procedural violations are more serious than others, especially when there are multiple, compounding errors. Ultimately, the decision about whether a procedural

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[1317] *T.Y. v. New York City Dep't of Educ.,* 584 F.3d 412 (2nd Cir. 2009).
[1318] *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4th Cir. 2007).
[1319] Michael T. McCarthy, *Don't Get the Wrong IDEA: How the Fourth Circuit Misread the Words and Spirit of Special Education Law—and How to Fix it*, 65 WASH & LEE L. REV. 1707, 1737 (2008).
[1320] *C.H. v. Cape Henlopen Sch. Dist.,* 606 F.3d 59 (3rd Cir. 2010).
[1321] *Florence Cnty. Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 364 (1993). *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).
[1322] John Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 418 (2011); 34 CFR § 300.501(b).

error resulted in a denial of FAPE often is determined by whether the error caused a deprivation of the educational benefits required for the student to make educational progress.

## LRE's Impact Upon Unilateral Placement Litigation

LRE refers to the educational placement where a child with a disability can receive an appropriate education designed to meet his or her educational needs while, to the maximum extent appropriate, receiving special education services alongside peers without disabilities. In order to comply with the LRE mandate public school officials must ensure:

> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
> (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[1323]

As described in Chapter Two, four significant LRE decisions[1324] yielded three recognized judicial tests for determining whether a child was being educated with general education peers to the maximum extent possible.

The Roncker Portability test requires when a segregated facility is deemed superior, school officials must have considered whether the services making the segregated placement superior could have feasibly been provided in an integrated setting.[1325] The second test, the two-part *Daniel R.R.* test, first asks whether a satisfactory level of educational services could be

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[1323] 34 C.F.R. § 300.114(a).
[1324] *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Oberti*, 995 F.2d 1204 (3rd Cir. 1993); *Sacramento City Unified School District Board of Education v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994).
[1325] *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

delivered within a regular classroom setting by providing supplemental aids and services.[1326] If the answer to this initial question is "no," and the school intends to remove the child from a regular education classroom, the test asks whether school officials have mainstreamed the child to the maximum extent appropriate.[1327] The third test, *Rachel H. v. Sacramento*, utilizes four prongs: (1) The educational benefits available in a regular classroom, supplemented with appropriate aids and services, are compared to the educational benefits resulting from placement in a special education classroom. (2) The non-academic benefits of interaction with children who are not disabled are considered. (3) The impact of the child's presence on the teacher and other children in the regular classroom setting are assessed. (4) The cost of mainstreaming the child in a regular classroom may be considered.[1328]

Since *Forest Grove*,[1329] there have been four federal circuit court of appeals decisions[1330] in which school officials argued the parents' private placement was not an appropriate LRE placement. The post-*Forest Grove* cases were decided by the First, Second, and Eighth Circuit Courts. Prior to *Forest Grove*, the Fifth, Sixth, and Ninth Circuit Courts issued four unilateral placement decisions where LRE was a significant issue.[1331] Since none of the post-*Forest Grove* cases were decided in a circuit where the LRE tests originated, it was not always clear what test the court would have potentially applied if they were looking at the LRE as a major factor in the

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[1326] *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1050 (5th Cir. 1989).
[1327] *Id.*
[1328] *Sacramento v. Rachel H.*, 14 F.3d 1398, 1400-02 (9th Cir. 1994).
[1329] *Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009).
[1330] *C.B. v. Special Sch. Dist. No. 1,* 636 F.3d 981 (8th Cir. 2010); *Sebastian M. v. King Philip Regional School District*, 685 F.3d 79 (1st Cir. 2012); *M.M. v. District 0001 Lancaster County School*, 702 F.3d 479 (8th Cir. 2012); *C.L. v. Scarsdale Union Free Sch. Dist.*, 2014 U.S. App. LEXIS 4478 (2nd Cir. 2014).
[1331] *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Oberti*, 995 F.2d 1204 (3rd Cir. 1993); *Sacramento City Unified School District Board of Education v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994).

decision. In most of the decisions, even though school officials argued LRE was a consideration, that aspect of the placement received much less attention. The courts have received little guidance in this area, considering the IDEA amendments are silent as to whether reimbursement is available if the parents' unilateral placement is more restrictive than the public school's placement.[1332]

In *C.B. v. Special Sch. Dist. No. 1*,[1333] after the impartial hearing officer (IHO) found for parents, the district court reversed the decision and found for the school district. The district court concluded that although school officials had not provided a FAPE, the private school was not appropriate because all of the students attending the school received special education services, and C.B's services could have been effectively delivered in a less restrictive public school setting.[1334] However, the Eighth Circuit reversed the decision, concluding that because school officials had failed to offer a FAPE, reimbursement for tuition was not precluded by the IDEA's "preference for education in the least restrictive environment."[1335] The court reasoned once the school officials failed to develop an IEP that provided a FAPE, C.B.'s parents had a "right of unilateral withdrawal," regardless of the restrictiveness of the placement.[1336]

The Eighth Circuit panel opined that although a less restrictive environment would have been ideal, this was not required from a parental unilateral private placement. The court ruled following years of frustration in the public schools that a private placement was the lesser of two evils, i.e., the "apparently widespread practice of relegating handicapped children to private

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[1332] Ralph D. Mawdsley, *Diminished Rights of Parents to Seek Reimbursement Under the IDEA for Unilateral Placement of Their Children in Private Schools*, 2012 BYU EDUC. & L.J. 303, 310 (2012).
[1333] *C.B. v. Special Sch. Dist. No. 1,* 636 F.3d 981 (8th Cir. 2010).
[1334] *Id.* at 987.
[1335] *Id.* at 991.
[1336] *Id.*

institutions or warehousing them in special classes."[1337] The *C.B*. decision aligned the Eighth Circuit with the Third and Sixth Circuits in concluding a parental unilateral private placement need not satisfy the IDEA's least restrictive environment mandate to be "proper."[1338] The *C.B*. decision suggests (at that time) only the Third, Sixth, and Eighth Circuits had clearly ruled courts did not need to follow the LRE mandate in parental unilateral placement cases where school officials had not offered the child a FAPE. The *C.B.* decision did not reference a specific LRE test. School officials' failure to offer a FAPE became the controlling factor and the court found no need to analyze which placement would have met LRE expectations. In effect, the Eighth Circuit altered the balancing of equities by eliminating LRE from the balancing process.[1339]

In the second unilateral private placement case involving LRE, *Sebastian M. v. King Philip Regional School District*,[1340] the court determined the services offered by the school district were provided in the appropriate LRE setting, thus the restrictiveness of the private placement was largely irrelevant. In this case, the IHO, district court, and First Circuit Court all found in favor of the school district. School officials argued Sebastian's parents were not entitled to tuition reimbursement because the district's proposed IEP had offered Sebastian a FAPE in the least restrictive environment.[1341] The hearing officer found the private school was "too restrictive a program" for Sebastian, as the school offered only limited off-site vocational experiences.[1342] Furthermore, the private school was also found to be overly restrictive because

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[1337] *Id.*
[1338] Ralph D. Mawdsley, *Diminished Rights of Parents to Seek Reimbursement Under the IDEA for Unilateral Placement of Their Children in Private Schools*, 2012 BYU EDUC. & L.J. 303, 318 (2012).
[1339] *Id.*
[1340] *Sebastian M. v. King Philip Regional School District*, 685 F.3d 79 (1st Cir. 2012).
[1341] *Id.* at 83.
[1342] *Id.* at 86.

it did not allow students to use public transportation, thereby providing additional exposure to non-disabled individuals.[1343]

Since the IHO, district court and appellate panel agreed school officials had offered a FAPE in the least restrictive environment, it seemed further analysis of the placement was unneeded. However, the central principle of IDEA is that a student's individual needs are the most important consideration when determining educational services and placement.[1344] Placement, like educational services, is determined based on the student's individual needs and neither the IDEA nor case law indicates LRE considerations are intended to replace considerations of appropriateness.[1345] Therefore, in determining a student's special education program and placement, questions of what educational services are required must precede questions of where the services should be provided.[1346] Although "removal" is only necessary when the nature of the disability is such that regular classes cannot be achieved satisfactorily, this perspective also depends upon the availability of the services the IEP team determines necessary for a FAPE.[1347]

The district court and First Circuit both affirmed the IHO's ruling that the parents were not entitled to tuition reimbursement; however, both courts focused on the fact school officials had offered a FAPE.[1348] The First Circuit panel reasoned the services available to the student at

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[1343] *Id.*
[1344] Mitchell L. Yell, Terrye Conroy, Antonis Katsiyannis, & Tim Conroy, *Special Education in Urban Schools: Ideas for a Changing Landscape: Individualized Education Programs and Special Education Programming for Students with Disabilities in Urban Schools,* 41 FORDHAM URB. L.J. 669, 700 (2013).
[1345] *Id.*
[1346] *Id.*
[1347] Gabriela Brizuela, *Note: Making an "IDEA" a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities under the Individuals with Disabilities Act*, 45 Val. U.L. Rev. 595, 604 (2011).
[1348] *Sebastian M. v. King Philip Regional School District*, 685 F.3d 79, 84 (1st Cir. 2012).

the private school were immaterial to the outcome of the case, since Sebastian's public school placement was the appropriate LRE.[1349] Although the IDEA requires LRE to be a consideration when determining appropriate services,[1350] restrictiveness of the parents' unilateral private placement was not significant to the final outcome of the *Sebastian* case. Once the hearing officer and courts determined the less restrictive environment offered by the school district provided a FAPE, the LRE became less relevant.

In the third case involving LRE, *M.M. v. District 0001 Lancaster County School*,[1351] the IHO, district court, and the Eighth Circuit panel all found school officials had provided a FAPE in the least restrictive environment**.** Similar to *Sebastian M.*, the LRE analysis centered on whether school officials had offered a FAPE in the least restrictive environment. The Eighth Circuit panel described how the IDEA had a "strong preference for disabled children attending regular classes with children who were not disabled," thereby creating a "presumption in favor of public school placement."[1352] The court found the least restrictive environment for the student was not the private school he attended with mostly typical peers. Rather, the district's school was the least restrictive environment, even though the student would be in his regular classroom only 45 minutes a day under the school district's proposed schedule.[1353]

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[1349] *Id. at* 87.
[1350] See 20 U.S.C. § 1412(5)(B). "A student who has a disability should have the opportunity to be educated with non-disabled peers, to the greatest extent appropriate."
[1351] *M.M. v. District 0001 Lancaster County School*, 702 F.3d 479 (8th Cir. 2012).
[1352] *Id.*
[1353] Alice K. Nelson & Carol Quirk, *Litigating Behavioral-Services Cases*, 48 CLEARINGHOUSE REV. 30, 35 (2014). Although the student would have only been with non-disabled peers for 45 minutes per day, he would have been at his neighborhood public school and would have been mainstreamed whenever possible.

This finding is consistent with the idea of the regular education environment as the "presumptive least restrictive environment" for a student.[1354] Although the LRE component augmented the school district's proposed placement, FAPE was the controlling factor in the court's decision. Nonetheless the panel allocated considerable discussion on the LRE's relevance in the *M.M.* case.[1355] Although the IDEA is frequently described by both scholars and courts as having a clear LRE preference the federal circuit courts and legal pundits are not unanimous in their support of this perceived preference, or the role LRE considerations should play in judicial analysis.[1356] Since the Supreme Court has yet to consider the LRE requirement, there is no clear, uniform standard to guide either school officials or the courts.[1357]

In the fourth and final case, *C.L. v. Scarsdale Union Free School District*,**[1358]** the court delineated a clearer rationale for why a more restrictive parental unilateral placement may be approved if the district's placement fails to provide a FAPE. **[1359]** In *C.L.* the IHO found school officials had violated their Child Find responsibilities by providing the student with a 504 Plan, instead of an IEP, and therefore awarded the parents tuition reimbursement.[1360] The state review officer (SRO) reversed the IHO's decision based upon a conclusion the parents' unilateral

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[1354] Theresa M. DeMonte, *Comment: Finding the Least Restrictive Environment for Preschoolers under the IDEA: An Analysis and Proposed Framework*, 85 WASH. L. REV. 157, 182 (2010).

[1355] *M.M. v. District 0001 Lancaster County School*, 702 F.3d 479, 488 (8th Cir. 2012). "[Parents argued] that Sheridan was not the least restrictive environment for L.M. because he had spent almost all of his time in the calming room in his third grade year and his proposed fourth grade schedule would only give him 45 minutes each day of academic instruction in his regular classroom. The record nevertheless supports the district court's conclusion that Sheridan was the least restrictive environment for L.M. It was his neighborhood public school attended by both disabled and non-disabled students.

[1356] Adam B. Diaz, *How the Mainstreaming Presumption Became the Inclusion Mandate*, 40 J. LEGIS. 220, 233 (2013).

[1357] *Id.*

[1358] *C.L. v. Scarsdale Union Free Sch. Dist.*, 2014 U.S. App. LEXIS 4478 (2nd Cir. 2014).

[1359] *Id.*

[1360] *Id.* at 16.

private placement was overly restrictive.[1361] The district court affirmed but the appellate panel reversed the SRO's decision.[1362] The Second Circuit panel observed when a child is denied a FAPE, his parents may turn to an appropriate specialized private school designed to meet their child's special needs, even if this option is a more restrictive placement. The parents' unilateral placement only needs to be "reasonably calculated to enable the child to receive educational benefits.[1363] The Second Circuit panel also cited *Carter*'s observation that the "IDEA's LRE requirement was aimed at preventing schools from segregating disabled students from the general student body, but not necessarily to restrict parental options when the public schools fail to comply with the requirements of the IDEA."[1364] Finally, the appellate panel reasoned, "inflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in *Burlington*."[1365]

Although only the Second and Eighth Circuits have expressly ruled a parental unilateral placement may be more restrictive if school officials fail to provide a FAPE, both circuits rely upon Third, Fourth, and Sixth Circuit decisions to provide addition support for that position. While there have been no recent unilateral private placement decisions in the Fifth Circuit involving LRE, the framework used in *Houston Sch. Dist. v. P.*[1366] considered whether parental unilateral private placements conformed with the IDEA's LRE expectations. However, the Fifth

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[1361] *Id.* at 17
[1362] *Id.* at 17-18.
[1363] *Id.* at 19. Quoting *Rowley*, 458 U.S. 176, 207.
[1364] *Id.* at 22.
[1365] *Id.*
[1366] *Houston Sch. Dist. v. P.,* 582 F.3d 576, 581 (5th Cir. 2009). Fifth Circuit's considerations when looking at the appropriateness of a program: (1) The program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner; and (4) positive academic and non-academic benefits are demonstrated.

Circuit panel found for the parents in that case, so it is difficult to determine how restrictive a placement would need to be in order to fail that component of the framework. Analyses of previous Fifth Circuit decisions suggest support for mainstreaming students in the general education environment, which is a closely related aspect of least restrictive environment.[1367]

The 1997 IDEA amendments first explicitly provided parents the right to seek tuition reimbursement.[1368] However, this arguably contrasts with the IDEA's goal "to strengthen the LRE requirement" and "develop and improve the role and rights of the family in determining what that LRE should be."[1369] The courts have interpreted legislative intent to imply that cost should be a relevant consideration in LRE placement and Congress intended for the courts to balance the needs of a disabled child against competing economic realities.[1370] *Rowley* also implied a recognition of the need to limit special education costs, i.e., "to require . . . the furnishing of every special service necessary to maximize each handicapped child's potential is further than Congress intended to go."[1371] As Ashley Oliver suggests, when a school district is required to reimburse a parent for tuition, it is "just the same as cases decided under *Rachel H*. or *Roncker*, the district loses the money that could have gone to support other special needs children."[1372]

In summary, school officials should not ignore the LRE mandate, since this is an IDEA prerequisite for a FAPE. Furthermore, if school officials can prove they were offering a FAPE, then the restrictiveness of the parental unilateral private placement is rendered largely irrelevant.

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[1367] Adam B. Diaz, *How the Mainstreaming Presumption Became the Inclusion Mandate*, 40 J. LEGIS. 220, 242 (2013).
[1368] 20 U.S.C. § 1412(a)(10)(C)(ii) (1997).
[1369] Ashley Oliver, *Survey: Should Special Education Have a Price Tag? A New Reasonableness Standard for Cost*, 83 Denv. U.L. Rev. 763, 764 (2006).
[1370] *Id.* at 781.
[1371] *Id.* at 782.
[1372] *Id.* at 783.

However, in situations where either the hearing officer or the courts determine school officials failed to provide a FAPE, school officials should be cautious about basing their defense on the fact the private placement is not the LRE. The LRE is considered a "pertinent but not primary consideration" when looking at the appropriateness of a private placement.[1373] Because of the IDEA's emphasis on the LRE, there is a potential for school administrators to be overly focused on that aspect when arguing about the appropriateness of a private placement. Current case law suggests courts consider the LRE issue subordinate to the FAPE obligation.

**Appropriateness of Private Placement**

*Florence County School District Four v. Carter*[1374] clarified §1401(a)(18) of the IDEA did not require facilities used by parents for unilateral placements to be on a state's list of approved private placement facilities in order for the parents to be eligible for tuition reimbursement. However, a private placement could nevertheless be deemed unable to confer sufficient educational benefit to a child and thus not appropriate for reimbursement purposes. As discussed in the LRE section, arguments going to the appropriateness of the private placement must focus on general substantive educational deficiencies rather than upon failure to comply with IDEA's more technical or procedural requirements.[1375] To support a reimbursement claim, private schools must provide specially designed educational services, meet the broad areas of educational need, and provide the services necessary to meet a child's identified educational

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[1373] Perry A. Zirkel, *"Appropriate" Decisions Under the Individuals with Disabilities Education Act,* 33 J. NAT'L ASS'N L. JUD. 242, 256 (2013).
[1374] *Florence Co. Sch. Dist. Four v. Shannon Carter*, 510 U.S. 7 (1993).
[1375] Perry A. Zirkel, *"Appropriate" Decisions Under the Individuals with Disabilities Education Act,* 33 J. NAT'L ASS'N L. JUD. 242, 256 (2013). IDEA makes it clear that an IHO may find the unilateral private placement appropriate even if it does not meet the State standards that apply to education provided by SEA and LEAs.

needs.

In unilateral parental private placement cases, the court must first determine whether the public school district's recommended placement offered the student a FAPE.[1376] If the court determines the school district did not offer a FAPE, then it must be determined whether the parents' unilateral placement was appropriate.[1377] For example, in *C.F. v. New York City Dep't of Educ*., the Second Circuit panel cited *Frank G.* in observing, "The same considerations and criteria that apply in determining whether the school district's placement is appropriate should be considered in determining the appropriateness of the parents' placement."[1378] In the reviewed unilateral private placement cases, hearing officers and courts found parental unilateral placements to be inappropriate for three main reasons:

*(1) The private placement was not primarily educational (ex: medical);*
*(2) The private placement was not individualized to that student's specific needs; or*
*(3) The private placement did not provide a service the school district had failed to offer.*

Three circuit court decisions[1379] concluded parental unilateral placements were inappropriate, resulting in a denial or reduction of tuition reimbursement.

In *Mary Courtney T. v. Sch. Dist.*,[1380] a Third Circuit panel found the private school services were primarily medical, therefore making the placement ineligible for tuition reimbursement. In this case a seventeen-year-old child with self-abusive and aggressive behaviors was parentally placed in a long-term psychiatric residential treatment center in New

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[1376] *Id.*
[1377] *Id.*
[1378] *C.F. v. New York City Dep't of Educ*., 2014 U.S. App. LEXIS 4083, 33 (2nd Cir. 2014).
[1379] *Mary Courtney T. v. Sch. Dist.*, 575 F.3d 235 (3rd Cir. 2009); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009); *M.N. v. Hawaii*, 509 Fed. Appx. 640, 641 (9th Cir. 2013).
[1380] *Mary Courtney T. v. Sch. Dist.*, 575 F.3d 235 (3rd Cir. 2009).

York.[1381] The parents then requested tuition reimbursement, which the school district opposed on the grounds the unilateral placement had been precipitated by a medical crisis.[1382] Although many residential facilities provide some level of medical services, public schools are generally not required to provide medical treatment to students.[1383] The hearing officer rejected school officials' arguments that the student's expenses were medical, as opposed to educational, concluding instead the student's educational needs were not "severable" from her medical needs.[1384] However, the hearing officer's decision was subsequently reversed by the court of appeals.

The appellate panel reasoned a wide variety of facilities could claim to be residential programs, but only facilities providing special education should qualify for reimbursement under the IDEA.[1385] Citing *Kruelle v. New Castle County School District* (1981),[1386] the appellate panel found federal regulations required residential placements to be for educational purposes because "ultimately any life support system or medical aid can be construed as related to a child's ability to learn."[1387] Every circuit that has considered the issue of payment for residential placements has cited *Kruelle* and a majority of the circuits have endorsed the *Kruelle* ruling (albeit with semantic adaptations).[1388] One of the family's main arguments in *Mary Courtney T. v. Sch. Dist.* was that the private placement offered some of the same modalities employed by the

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[1381] *Id.* at 239.
[1382] *Id.* at 240.
[1383] Erin M. Heidrich, *Note: Expanding Access to Residential Treatments for Mentally Ill Youth Through the Individuals with Disabilities Education Act*, 41 N. KY. L. REV. 295, 300 (2014).
[1384] *Mary Courtney T. v. Sch. Dist.*, 575 F.3d 235, 240-41 (3rd Cir. 2009).
[1385] *Id.* at 244.
[1386] *Kruelle v. New Castle County School District*, 642 F.2d 687 (3rd Cir. 1981).
[1387] *Mary Courtney T. v. Sch. Dist.,* 575 F.3d 235, 244 (3rd Cir. 2009).
[1388] Erin M. Heidrich, *Note: Expanding Access to Residential Treatments for Mentally Ill Youth Through the Individuals with Disabilities Education Act*, 41 N. KY. L. REV. 295, 300 (2014).

school; therefore, it was providing special education.[1389] These services included a token-economy program and one-to-one supports.[1390]

The Third Circuit panel responded by pointing out the relevant consideration was not the tools the institution used, but rather the substantive goal sought to be achieved through the use of those tools.[1391] Finally, the Third Circuit panel pointed out how the U.S. Supreme Court had defined medical services in order to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence."[1392] The court compared the services the student received to programs in blood sugar management, which are useful and important skills but not specially designed instruction as defined by the IDEA.[1393] The Third Circuit panel concluded the student's care in the private placement was "unduly expensive."[1394]

In the second case, *Richardson Independent School District v. Michael Z.*,[1395] the Fifth Circuit ruled private placements must be primarily educational and necessary to provide the student with a meaningful educational benefit. The *Michael Z.* case involved a student who had been parentally placed in a rehabilitation center due to a number of mental health concerns.[1396] The IHO and the district court both found the school district had not offered a FAPE and therefore the parents were entitled to tuition reimbursement. However, the Fifth Circuit panel vacated the district court's order and remanded the case for further proceedings because the

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[1389] Ronald D. Wenkart, *Residential Placements and Special Education Students: Emerging Trends, 304 WELR 1, 9* (2014).
[1390] *Mary Courtney T. v. Sch. Dist.,* 575 F.3d 235, 244 (3rd Cir. 2009).
[1391] *Id.* at 245.
[1392] *Id.* at 248. *Citing Irving Independent School District v. Tatro,* 468 U.S. 883, 892 (1984).
[1393] Erin M. Heidrich, *Note: Expanding Access to Residential Treatments for Mentally Ill Youth Through the Individuals with Disabilities Education Act*, 41 N. KY. L. REV. 295, 304 (2014).
[1394] *Id.*
[1395] *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009).
[1396] *Id.* at 289-91.

district court had not considered whether the unilateral placement was needed in order for the child to obtain a meaningful educational benefit.[1397]

In *Michael Z.*, school officials argued since the rehabilitation facility had both private and public components, it should therefore meet all IDEA requirements, rather than just the "otherwise proper" level established in *Carter* for private schools.[1398] The panel determined the rehabilitation facility was a public/private "hybrid" facility and therefore should be assessed under *Carter*. This finding prompted the panel to adopt the Third Circuit's "inextricably intertwined" test to determine whether the student's placement was proper under the IDEA.[1399] The court reiterated parents "have no way of knowing at the time they select a private school whether the school meets state or other relevant standards."[1400]

The Fifth Circuit panel acknowledged no specific test existed for determining when, in the face of an inappropriate IEP, a private residential placement was proper under the Act.[1401] The panel observed two distinct approaches for analyzing this problem had emerged from the Third Circuit's decision in *Kruelle v. New Castle County Sch. Dist*.[1402] and the Seventh Circuit's decision in *Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist*. *No. 307*.[1403] The court further noted while there were similarities between the two approaches, the Third Circuit's method focused on whether a child's medical, social, or emotional problems were "inextricably

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[1397] *Id.* at 302.
[1398] *Id.* at 295-96.
[1399] *Id.* at 295.
[1400] *Id.* at 296.
[1401] *Id.* at 298.
[1402] *Kruelle v. New Castle County Sch. Dist*, 642 F.2d 687 (3d Cir. 1981).
[1403] *Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist*. No. 307, 237 F.3d 813, 817 (7th Cir. 2001).

intertwined" with the learning process, whereas the Seventh Circuit analysis focused on whether the private residential placement was "primarily educational."[1404]

Under the Third Circuit approach, if a court cannot segregate a child's medical, social, or emotional problems from the learning process, school officials must reimburse the parents for the private residential placement.[1405] The Seventh Circuit determined the proper inquiry was whether the private residential placement was "primarily educational."[1406] The Fifth Circuit suggested the Third Circuit's *Kruelle* test required districts to undertake the 'Solomonic task' of determining when a child's medical, social, and emotional problems are segregable from educational needs, resulting in the school district's liability exposure being expanded beyond what was required by the IDEA."[1407] The Fifth Circuit expressed concern about whether the Third Circuit's test would expose school districts to too much liability.[1408] Therefore, the Fifth Circuit formulated two requirements for determining whether a residential placement was appropriate. First, the placement must be essential in order for the disabled child to receive a meaningful educational benefit. Second, the placement must be primarily oriented toward enabling the child to obtain an education.[1409]

Most circuits have relied upon the Third Circuit's more conservative application of the "inextricably intertwined" test in deciding parental unilateral residential placements for mentally

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[1404] *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 298 (5th Cir. 2009). See *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990); *Tenn. Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir. 1996); *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990).

[1405] *Id.* at 299.

[1406] *Id.* at 298. A placement can be considered "primarily educational" when full-time placement is considered necessary for educational purposes, rather than as a response to medical, social or emotional problems that are not directly tied to the learning process.

[1407] *Id.*

[1408] Erin M. Heidrich, *Note: Expanding Access to Residential Treatments for Mentally Ill Youth Through the Individuals with Disabilities Education Act*, 41 N. KY. L. REV. 295, 304 (2014).

[1409] *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 298 (5th Cir. 2009).

ill students.[1410] However, the Tenth Circuit refrained from applying both the "inextricably intertwined" and primarily oriented" tests and developed it's own test.[1411] In *Jefferson County School District v. Elizabeth E.*,[1412] the panel observed the IDEA's plain language provided for reimbursement of a parental unilateral residential placement when: (1) the placement provides special education ("instruction"), and (2) the additional services provided beyond instruction can reasonably be characterized as "related services."[1413] However, unless the placement provides direct academic instruction, the placement is not reimbursable under IDEA.[1414] In *Jefferson County School District v. Elizabeth E.*, the parent was awarded tuition reimbursement because the center provided specially designed instruction and services designed to meet the student's unique needs.[1415] The Supreme Court declined to settle the circuit court split on this issue in *Jefferson County School District v. Elizabeth E.*[1416]

In *M.N. v. Hawaii*,[1417] the Ninth Circuit required a showing of student progress in the essential areas, regardless of the educational methodology used by the private school. In *M.N.*, a parent removed her child from the public school district and enrolled him in a private school

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[1410] Erin M. Heidrich, *Note: Expanding Access to Residential Treatments for Mentally Ill Youth Through the Individuals with Disabilities Education Act*, 41 N. KY. L. REV. 295, 306 (2014).
[1411] *Id.*
[1412] Jefferson Cnty. Sch. Dist. v. Elizabeth E., 702 F.3d 1227 (10th Cir. 2012).
[1413] Jefferson Cnty. Sch. Dist. v. Elizabeth E., 702 F.3d 1227, 1237 (10th Cir. 2012).
[1414] Erin M. Heidrich, *Note: Expanding Access to Residential Treatments for Mentally Ill Youth Through the Individuals with Disabilities Education Act*, 41 N. KY. L. REV. 295, 307 (2014).
[1415] Jefferson Cnty. Sch. Dist. v. Elizabeth E., 702 F.3d 1227, 1239 (10th Cir. 2012).
[1416] Jefferson Cnty. Sch. Dist. v. Elizabeth E., 133 S. Ct. 2857 (2013). Circuit court split was caused by *Kruelle v. New Castle County Sch. Dist.* (3d Cir. 1981) and *Richardson Indep. Sch. Dist. v. Michael Z.* (5th Cir. 2009). See also Erin M. Heidrich, *Note: Expanding Access to Residential Treatments for Mentally Ill Youth Through the Individuals with Disabilities Education Act*, 41 N. KY. L. REV. 295, 307 (2014).
[1417] *M.N. v. Hawaii*, 509 Fed. Appx. 640, 641 (9th Cir. 2013).

utilizing the applied behavioral analysis (ABA) methodology.[1418] After the parent filed for an administrative hearing, the IHO concluded the school district's proposed IEP did not offer the student a FAPE but nonetheless denied the request for reimbursement because the parent failed to prove the unilateral placement was appropriate.[1419] The IHO found many of the student's needs had not been addressed at the private placement and there were many areas in which the child had shown no progress.[1420] Both the district court and the Ninth Circuit panel affirmed the denial of reimbursement.[1421] Other courts have also reached this same conclusion when the student has not demonstrated sufficient progress at the private placement facility.[1422]

In *C.B. v. Garden Grove Unified School District*,[1423] a Ninth Circuit panel ruled that in order to establish eligibility for tuition reimbursement, parents needed to "only demonstrate that the placement provide[d] educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction."[1424] In *M.N. v. Hawaii*, the parent's primary argument was the private school was indeed addressing the child's educational needs, but doing so using a medical model that, "despite using terms different from what academics use, was no less focused or effective than an educational model."[1425] The parents also argued the private school's technique was a "modern

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[1418] *M.N. v. Hawaii*, 2011 U.S. Dist. LEXIS 138120, 4-5 (D. Haw., Dec. 1, 2011).
[1419] *Id.* at 7.
[1420] *Id.*
[1421] *M.N. v. Hawaii*, 509 Fed. Appx. 640, 641 (9th Cir. 2013).
[1422] See *Davis ex rel. C.R. v. Wappingers Cent. Sch. Dist., 772 F. Supp. 2d 500 (S.D.N.Y. 2011), aff'd, 431 F. App'x 12 (2nd Cir. 2011)*; See Perry A. Zirkel, *"Appropriate" Decisions Under the Individuals with Disabilities Education Act, 33 J. NAT'L ASS'N L. JUD. 242, 257 (2013).*
[1423] *C.B. v. Garden Grove Unified School District,* 635 F.3d 1155 (9th Cir. 2011).
[1424] *Id.* at 1159 (9th Cir. 2011).
[1425] *M.N. v. Hawaii*, 2011 U.S. Dist. LEXIS 138120, 15 (D. Haw., Dec. 1, 2011).

perspective on educating children with a severe disability," and when the student's progress was evaluated from that perspective, the private school was an appropriate placement.[1426]

However, the Ninth Circuit panel noted the issue was not that the private school utilized an alternative educational methodology but rather a host of essential areas existed where the child was making no progress at all.[1427] The Ninth Circuit panel affirmed while the private placement focused on language acquisition it did not provide the student with instruction designed to meet all of his unique needs, such as reading, writing, math, and communication.[1428] Under *Burlington's* two-prong test, parents have the burden of showing that both the IEP offered by school officials was inappropriate and their unilateral placement was necessary to meet their child's educational needs.[1429] Additionally, parents needed to prove both the reasonableness of their actions and that a tuition reimbursement was an appropriate equitable remedy, ensuring their claim was made in good faith.[1430]

In summary, judicial decisions show the federal appellate courts will use their own set of standards to determine whether a parental unilateral private placement is appropriate. In general, private placements are only reimbursable if the services provided by the private placement are primarily educational, rather than medical. The *Kruelle*[1431]decision states residential placements must be for educational purposes because "ultimately any life support system or medical aid can be construed as related to a child's ability to learn."[1432] The courts also require that unilateral placements be both oriented toward enabling the child to obtain an education and essential to

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[1426] *Id.* at 17.
[1427] *M.N. v. Hawaii*, 509 Fed. Appx. 640, 641 (9th Cir. 2013).
[1428] *Id.* Citing *M.N. v. Hawaii*, 2011 U.S. Dist. LEXIS 138120, 16 (D. Haw., Dec. 1, 2011).
[1429] *Id.*
[1430] *Id.*
[1431] *Kruelle v. New Castle County School District*, 642 F.2d 687 (3rd Cir. 1981).
[1432] *Mary Courtney T. v. Sch. Dist.,* 575 F.3d 235, 244 (3rd Cir. 2009).

receiving meaningful educational benefit.[1433] Finally, private unilateral placements must be individualized, provide a service the school district failed to offer, and enable the child to make progress in their identified deficit areas.

**Retrospective Testimony**

When parents decide whether to either accept the IEP services offered by the school district or reject these services and unilaterally place their child in a private school, they must be aware of the services their child would receive in the public school. According to the IDEA, a student's IEP must specifically identify the amount of services and identify the instructional setting where the student will receive those services. Retrospective testimony, also referred to as the "four corners rule," has been interpreted as special education services not expressly listed in the IEP which would have been provided if the child had attended the school district's proposed placement.[1434] The four corners rule is grounded on the premise that allowing school officials to present extrinsic evidence, often times directly contradictory to the programming laid out in the IEP, disadvantages inexperienced parents who do not have the educational background to understand about the provision of assumed services.[1435] Currently, a split in the federal appellate courts exists on the issue of whether courts and administrative law judges (ALJs) may look beyond the four corners of the written IEP in determining whether the document's content provides a FAPE.[1436]

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[1433] *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 298 (5th Cir. 2009).
[1434] Matthew Saleh, *Public Policy, Parol Evidence and Contractual Equity Principles in Individualized Education Programs: Marking the "Four Corners" of the IEP to Mitigate Unequal Bargaining Power between Parent-Guardians and School Districts*, 43 J.L. & EDUC. 367, 367-68. (2014).
[1435] *Id.* at 370.
[1436] *Id.* at 369.

In disputes about the substantive adequacy of the IEP, many jurisdictions refuse to consider evidence of educational gains the student made when the services were not expressly listed in the IEP. These jurisdictions include the Second, Seventh, Ninth, and Eleventh Circuits where evidence of actual progress, and sometimes other retrospective evidence, is excluded.[1437] However, the First, Third, Fourth, Fifth, Eighth, and Tenth Circuits generally permit retrospective evidence in evaluating an IEP's appropriateness.[1438] In the following cases, although school officials argued the student would have received additional services not expressly identified in the IEP, the courts did not recognize those services as being materially different from the services listed in the IEP. In three of the reviewed unilateral private placement cases,[1439] all arising in the Second Circuit, the parents argued the school district based part of their defense on retrospective testimony.

In *R.K. v. New York City Dep't of Educ*., the special education teacher from the proposed public school placement testified she would have created a BIP once the student was placed in her classroom. Although three other federal appellate circuits[1440] had not allowed retrospective testimony, this was the first time the Second Circuit had to decide whether it was an error to consider retrospective evidence in assessing an IEP's substantive validity.[1441] The Second Circuit panel concluded an IEP must be evaluated prospectively at the time of its drafting, and

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[1437] Dennis Fan, *Note: No IDEA What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 1505 (2014).
[1438] *Id.*
[1439] *R.E., M.E., et al v. NYC Dep't of Education*, 694 F.3d 167, 191 (2nd Cir. 2012); *C.F. v. New York City Dep't of Educ*., 2014 U.S. App. LEXIS 4083, 32 (2nd Cir. 2014); *M.W. v. New York City Dep't of Educ.*, 725 F.3d 131, 142 (2nd Cir. 2013).
[1440] *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3d Cir. 1995); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).
[1441] *R.E., M.E., et al v. NYC Dep't of Education*, 694 F.3d 167, 185 (2nd Cir. 2012).

therefore retrospective testimony should not be considered in a *Burlington/Carter* proceeding.[1442] While *R.E.* purported to adopt a rule in line with a "majority" of circuits, in reality the Second Circuit panel modified the general rule.[1443] Instead of outright exclusion, *R.E.* concluded under the Second Circuit's "materially alters" standard parties could only bring evidence that either explained or justified what was stated in the IEP.[1444] The *R.E.* panel's reasoning for excluding retrospective evidence was markedly different from the reasoning of other circuits because it was partially motivated by parity and fairness concerns.[1445]

Later, in *C.F. v. New York City Dep't of Educ*., a Second Circuit panel reiterated retrospective testimony cannot "cure the failures of the IEP itself," which must allow parents "to make an informed decision as to [the IEP's] adequacy prior to making a placement decision."[1446] In *M.W. v. New York City Dep't of Educ.*, a Second Circuit panel provided an example of an IEP where a specific teaching method would be used to instruct a student. The panel opined school officials should be allowed to introduce testimony at the subsequent hearing to describe the proposed teaching method and explain why the methodology was appropriate for the student.[1447] However, the panel pointed out school officials could not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used.[1448] Thus, rather than adopting a rigid "four corners" rule prohibiting any testimony about services beyond what was

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[1442] *Id.* at 186.
[1443] Dennis Fan, *Note: No IDEA What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 15031 (2014).
[1444] *Id.*
[1445] *Id.*
[1446] *C.F. v. New York City Dep't of Educ*., 2014 U.S. App. LEXIS 4083, 32 (2nd Cir. 2014).
[1447] *M.W. v. New York City Dep't of Educ.*, 725 F.3d 131, 142 (2nd Cir. 2013).
[1448] *Id.*

expressly written in the IEP, the panel indicated testimony explaining or justifying the services listed in the IEP could be allowed.[1449]

The Second Circuit panel reasoned these parameters were necessary for parents to be able to unilaterally place their child in private school, as provided for by the IDEA. The panel found that parents must be provided sufficient information about the IEP to make an informed decision regarding its adequacy in order to make an informed placement decision.[1450] Therefore, the Second Circuit concluded that testimony supporting a modification that is materially different from the IEP would not be accorded significant weight.[1451] This is because a deficient IEP may not be rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP.[1452]

While courts do not often differentiate between categories of retrospective evidence, it has been argued some types of retrospective evidence should be allowable.[1453] Dennis Fan argued that retrospective evidence that comes in the form of evidence of student progress (e.g., grades, goal attainment, grade-level advancement) or lack of progress under the proposed IEP may be relevant in demonstrating the IEP's appropriateness.[1454] However, Fan also argued subsequent IEPs and "actual implementation" retrospective evidence should not be allowed.[1455] This is because considering the evidence in the subsequent IEP may suggest the previous IEP

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[1449] *Id.*
[1450] *Id.*
[1451] *Id.*
[1452] *Id.*
[1453] Dennis Fan, *Note: No IDEA What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 1523 (2014).
[1454] *Id.*
[1455] *Id.* at 1524-25.

was inadequate (or make school officials reluctant to make IEP revisions).[1456] Additionally, using "actual implementation" evidence may create an incentive for school officials to draft IEPs in vague terms.[1457] Since IEPs often present an incomplete picture of a student's education, allowing evidence of student progress helps courts determine if the IEP had been appropriately crafted.[1458] Though the four corners of the IEP might be the "centerpiece" of the *Rowley* inquiry, in order to make a fair, effectual decision, a judge would benefit from evidence of student progress.[1459] In summary, approximately half of the federal circuits exclude all retrospective testimony, and the other half take varying approaches that generally permit retrospective evidence in evaluating an IEP's appropriateness.[1460] Therefore, it is important for school officials to be familiar with the precedent that has been set in their particular jurisdiction.

**Standard of Review**

The standard of review is the amount of deference given by a court or tribunal in reviewing a lower court or tribunal's decision.[1461] The higher the standard of review, the less likely the decision under review will be disturbed because the reviewing court might have decided the matter differently.[1462] Often, the standard of review, or the amount of due deference given to the lower court decision, is a contentious issue. This analysis found although the district

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[1456] *Id.* at 1525.
[1457] *Id.* at 1546.
[1458] *Id.* 1542.
[1459] *Id.* 1542-43.
[1460] Dennis Fan, *Note: No IDEA What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 1505 (2014).
[1461] See http://www.ca9.uscourts.gov, click on "Guides and Legal Outlines," then "Standards of Review."
[1462] *Id.*

court should consider a state review officer's (SRO) rationale, the federal court is generally free to independently determine how much weight to give that decision.

In *Ashland School Dist. v. Parents of Student*,[1463] the parents contended the district court applied the wrong standard of review to the state hearing officer's decision. They argued the district court should have reviewed the hearing officer's findings of fact for "clear error" and his grant of reimbursement for "abuse of discretion."[1464] The appellate panel directed the district court to receive the records of the administrative proceedings and hear additional evidence at the request of a party. Thereafter, the lower court was instructed to formulate a decision using a preponderance of the evidence standard, thereby allowing the court to grant such relief as the court determined appropriate.[1465] The panel also pointed out the IDEA called for a de novo review[1466] of the state hearing officer's findings and conclusions. The panel further reasoned the district court must give deference to the state hearing officer's findings, particularly when they are thorough and careful, and avoid substituting its own notions of sound educational policy for those of the school authorities.[1467] The panel also noted the court is free to determine independently how much weight to give the state hearing officer's determinations.[1468]

In *R.E., M.E. et al v. NYC Dep't of Education*, the parties disputed the degree of deference that should be afforded to the IHO's and SRO's rulings.[1469] School officials contended the district court should defer entirely to the SRO's decision and give no weight to the IHO's

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[1463] *Ashland School Dist. v. Parents of Student R.J.*, 588 F.3d 1004, (9th Cir. 2009).
[1464] *Id.* at 1008.
[1465] *Id.* See 20 U.S.C. § 1415(i)(2)(C) (2004).
[1466] 20 U.S.C. § 1415(i)(2)(C) (2004). When an appeals court hears a case *de novo it* may refer to the trial court's record to determine the facts but will rule on the evidence and matters of law without giving deference to that court's findings. See http://www.law.cornell.edu/wex/de_novo.
[1467] *Ashland School Dist. v. Parents of Student R.J*, 588 F.3d 1004, 1008-09 (9th Cir. 2009).
[1468] *Id*. at 1009.
[1469] *R.E., M.E. et al v. NYC Dep't of Education*, 694 F.3d 167, 188 (2nd Cir. 2012).

findings.[1470] Conversely, the parents argued the SRO's opinions were not sufficiently reasoned to warrant deference, so the district court should defer to the IHO's opinion.[1471] The appellate panel stated when an IHO and SRO reached conflicting conclusions the deference owed to an SRO's decision depended on the quality of that opinion.[1472] The panel also noted reviewing courts must look to the factors that normally determine whether any particular judgment is persuasive.[1473] Examples of these factors included whether the decision being reviewed was well reasoned and based on substantially greater familiarity with the evidence and the witnesses than the reviewing court.[1474]

*R.E., M.E. et al v. NYC Dep't of Education* also discussed how decisions involving appropriate educational methodology should be afforded more deference than determinations concerning whether there have been objective indications of progress.[1475] The court also described how determinations grounded in thorough and logical reasoning should be provided more deference than decisions that were not.[1476] Finally, the panel stated courts should defer to the SRO's decision on matters requiring educational expertise unless the court concludes the decision was inadequately reasoned, in which case a better reasoned lower court opinion may be considered instead.[1477] There are two scenarios where limited deference may be due and where district courts have been willing to disagree with administrative decisions.[1478] First, though deference is owed on matters of educational policy, courts may still conduct an independent,

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[1470] *Id.*
[1471] *Id.* at 188-89.
[1472] *Id.* at 189.
[1473] *Id.*
[1474] *Id.*
[1475] *Id.*
[1476] *Id.*
[1477] *Id.*
[1478] Dennis Fan, *Note: No IDEA What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 15016 (2014).

unhindered review of objective evidence.[1479] Second, *Rowley's* deference command[1480] limits a district court's fact-finding, not the district court's application of relevant legal standards.[1481] The judiciary can always review the applicable legal standards for evaluating evidence, as well as determine the kinds of evidence that are permissible.[1482] In summary, while district and circuit courts are expected to consider the hearing officer or lower court's rationale, they are free to independently determine how much weight to give that decision.

**Circuit Court Split**

Following *Rowley,* lower federal courts have struggled to define an appropriate standard for judging the educational plans for students. Cases decided shortly after *Rowley* tended to give a strict interpretation to *Rowley*'s *r*equirements, finding that an IEP was appropriate as long as it conferred some benefit.[1483] In later cases, however, courts began to apply various standards that required more than superficial benefit.[1484] However, a circuit split has emerged as the courts have attempted to quantify the level of benefits necessary to satisfy the *Rowley* test, which states only "some" benefit is necessary. The federal circuit courts are split on the level of services needed for a FAPE, with the Second, Third, Fourth, Fifth, Sixth and Ninth Circuits requiring a "meaningful educational benefit" and the First, Eighth, Tenth, Eleventh, and D.C. Circuits

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[1479] *Id.*
[1480] *Rowley* applied the principles of deference to the local school district's expertise (especially in regards to methodology) and also stressed the need for courts to give "due weight" to state administrative decisions when reviewing special education disputes.
[1481] *Id.* at 1517.
[1482] *Id.*
[1483] T. Daris Isbell, *Note: Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 BROOKLYN L. REV. 1717, 1731 (2011).
[1484] *Id.*

requiring "some educational benefit."[1485] The Seventh Circuit has taken a hybrid approach between the two levels of services. This seemingly contradicting system has the Seventh Circuit taking a "meaningful educational benefit" standard with regard to whether students have received an appropriate education but then taking a "some educational benefit" standard as a gauge to determine whether the student received a FAPE.[1486]

Of the 27 decisions included in this study, 78% of the unilateral private placement cases took place in circuits having more rigorous FAPE requirements. However, it is difficult to ascertain whether the increased FAPE requirement in those circuits actually resulted in a trend where more parents have unilaterally placed their children in private placements. It is possible a parent would be more likely to file for an administrative hearing in a circuit with higher legal FAPE threshold. However, it is also possible parents in circuits with higher FAPE requirements are more likely to appeal their cases to higher courts, since it is at the circuit court level where the FAPE level has been established in each geographical area. In the absence of reviewing all administrative hearings in the United States, it is difficult to determine whether there is a higher incidence of tuition reimbursement hearings in circuits with a higher FAPE requirement or whether these cases are just more likely to be appealed to a higher level of review (and therefore show up in this study).

Another possible reason why 78% of these cases occurred in circuits with higher FAPE expectations is that New York is located in one of these circuits. Perry Zirkel describes the high rate of special education administrative hearings in New York (and New Jersey) as being a result

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[1485] Scott Goldschmidt, *A New idea for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 CATH. U.L. REV. 749, 759-61 (2011).
[1486] *Id.* at 761.

of a "culture of litigiousness."[1487] Nine of the 27 reviewed unilateral private placement decisions (33%) occurred in the Second Circuit. Removing the nine Second Circuit cases from the analysis would result in a less significant percentage (67%) of these cases originating in circuits with a higher FAPE requirement.

**Court Inconsistencies**

Generally, judicial decisions are guided by weighing only the relevant factors of a case when deciding the inequities, including the reasonableness of the parents' unilateral placement decision.[1488] In *Forest Grove*, the Supreme Court endowed the lower courts with great latitude to either deny or approve reimbursement, as it was only necessary for a court to find the parents acted unreasonably in unilaterally placing their child in a private school. Additionally, the definition of a FAPE remains vague and manifests itself in the form of nuanced variances among the circuit courts. Although LRE is an IDEA mandate, the courts have ruled if school officials do not provide a substantively appropriate IEP, the unilateral placement facility's conformance with LRE requirements becomes a less significant factor. This stands in stark contrast to *Burlington's* statement that "at least one purpose of § 1415(e)(3)[1489] was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings."[1490] So, while the procedural safeguards require conformity with the stay-put provision, parents have the right to unilaterally

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[1487] Perry A. Zirkel, & Karen L. Gischlar, *Due Process Hearings Under the IDEA: A Longitudinal Frequency Analysis,* 21 JOURNAL OF SPECIAL EDUCATION LEADERSHIP, 25, March 2008.
[1488] *Forest Grove*, 129 S. Ct. 2484, 2496 (2009).
[1489] Procedural Safeguards located at U.S.C. § 1415(e)(3).
[1490] *Sch. Comm. V. Dep't of Educ.*, 471 U.S. 359, 373 (1985).

place their child (albeit at their own financial risk) in a private school without concern for the IDEA's LRE requirements.

During this review of unilateral private placement cases, nine of the 27 decisions were issued by Second Circuit panels. When looking more closely at these Second Circuit decisions, a number of trends were discovered. The most significant trend was the level of inconsistency between the lower courts in the Second Circuit. In the nine Second Circuit decisions, the IHO found for the parent/child in seven out of nine decisions (78%). At this first level of administrative hearing, there appeared to be a marked advantage for the parents. At the second level of review, the SRO found for the school district in nine out of nine cases. Therefore, the SRO overturned the IHO's decision in seven out of nine instances at that level (78% of the time). The SRO level provided school officials with the highest likelihood of victory of any of the review levels. At the next level of review, the district court found for the school district in six out of nine cases, overturning the SRO's decision three times. While still upholding the decision in favor of the school district in 67% of the cases, the district court more often found for the parent/student than the SRO. At the final level of review, the circuit court found for the district in five out of nine cases, overturning the district court's decision three times. Therefore, by the time these cases reached the circuit court, a decision in favor of the school district resulted in 55% of the cases.

When looking at the Second Circuit decisions, one trend is how frequently an appellate panel reversed a district court's decision. In 27 opportunities to overturn a district court's decision, the appellate court reversed the decision 13 times (48% of the time). In contrast, of all the cases decided upon merits (52%) at the federal circuit court level, only 8.6% of all cases were

reversed during a one-year time span ending March 2011.[1491] This seems to be a high percentage and would seemingly be encouraging for parties considering an appeal. Another trend in the cases was a pattern regarding which party typically won at each level of hearing or court. The IHO was the only level of hearing in these cases that was more likely to find for the parents,[1492] whereas the SRO found for the school district in every case. These results would seemingly encourage the school district to appeal the IHO's decision and for the parent to appeal the SRO's ruling.

**Other Trends**

When looking at the 27 reviewed unilateral private placement decisions decided at the federal circuit court level, 24 of the cases had a clear prevailing party. Of these 24 decisions, school districts won 15 (62.5%), parents/student won nine (37.5%), and three rulings yielded partial victories for one of the parties. Although this is a relatively small sample of cases, it suggests school officials have the advantage in unilateral private placement proceedings. This might be due to the fact that parents must prove the student was not offered a FAPE *and* the private unilateral placement was appropriate, whereas school officials must only show a FAPE was offered *or* the parents' unilateral private placement was inappropriate.

Another trend was that in 12 of the 27 (44%) reviewed cases the child in the case was eligible under Autism or had a medical diagnosis of autism. In five of the 12 cases involving autism, at least part of the disagreement was over the parent's preference for ABA methodology.

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[1491] Erik W. Scharf & Wayne R. Atkins, *What Are My Chances? Federal Courts of Appeal by the Numbers*, THE FLORIDA BAR JOURNAL, 31, Volume 87, No. 1, January 2013.

[1492] In the 23 decisions at the IHO level when there was a clear prevailing party (no partial reimbursement), the decision was in favor of the parent/student 14 times (61%).

Disagreements over programming for students with autism seem to be on the increase in recent years, and the large number of private placements that specialize in ABA may result in more tuition reimbursement claims.[1493] This was true in the Second Circuit, where eight out of the nine cases that were reviewed involved a child with autism.

Finally, another interesting finding is the possibility the U.S. Supreme Court will hear another case related to the stay-put provision if they grant certiorari to *M.R. v. Ridley School District*.[1494] As of March 2015, the U.S. Supreme court had invited the Solicitor General to file a brief to express the view of the United States in this matter. Despite the fact two different judicial determinations found school officials did not deny the student a FAPE, the school district was assessed the cost of the student's private school education.[1495] The Third Circuit panel reasoned it would be impossible to protect a child's educational status quo without sometimes taxing school districts for private education costs that ultimately will be deemed unnecessary by a court. The court did not view this as "an absurd result," but rather as an unavoidable consequence of the balance Congress struck to ensure stability for a vulnerable group of children.[1496] In other circuits, school districts have not been required to pay for private placements if the highest court to hear the case did not determine the district denied the student a FAPE and the placement was appropriate. If the U.S. Supreme Court does not grant certiorari in

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[1493] See *C.F. v. New York City Dep't of Educ*., 2014 U.S. App. LEXIS 4083, (2nd Cir. 2014); *M.H. v. New York City Dep't of Educ.*, 712 F. Supp. 2d 125 (2010); *M.S. v. New York City Dep't of Educ.*, 734 F. Supp. 2d 271 (2010); *R.E., M.E., et al v. NYC Dep't of Education*, 694 F.3d 167 (2nd Cir. 2012). Autism services are increasing because the number of children ages 6 through 21 diagnosed with autism served under the IDEA has increased by more than 500% in the last decade. See Laura C. Hoffman, *Special Education for a Special Population: Why Federal Special Education Law Must be Reformed for Autistic Children*, 39 RUTGERS L. REC. 128, 147 (2011).

[1494] *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 128 (3rd Cir. 2014). Petition for certiorari was filed in June 2014.

[1495] *Id.*

[1496] *Id.*

*Ridley*, it is likely this same argument will be heard in many other circuits. Since there is a strong possibility there would be a split between the circuits on this issue, it very well may end up being heard by the highest court in the land.

Since *Forest Grove*, there have been 27 special education tuition reimbursement decisions made at the federal circuit court level. As described in this analysis, tuition reimbursement cases can involve a number of complex legal issues. Each decision can also potentially be affected by other variables, such as the level of services that each circuit court requires for a FAPE. Due to the frequency of unilateral private placement cases making it to the circuit court of appeals level, school administrators need to be vigilant and continue to closely monitor these new cases. The final chapter will further condense these findings into the most important considerations for a school district to consider during a unilateral private placement.

# CHAPTER FOUR

# CONCLUSION

## Summary

When parents do not believe their child is receiving a FAPE, the IDEA affords them the right to unilaterally place their child in a private placement and then seek reimbursement from the public school district.[1497] Private placements represent a significant area of contention in special education law, with approximately 47% of all decisions involving tuition reimbursement.[1498] Administrative due process hearings can result in enormous tuition reimbursement awards to prevailing parents. This study was designed to provide school administrators with a broad historical overview of special education rights as well as information on current federal case law addressing unilateral parental placements. Hopefully this information and analysis will assist administrators in understanding how to respond to private placement disputes and also prepare them for future changes that may occur with respect to unilateral private placements.

It is important for school administrators to have knowledge and understanding of the IDEA's provisions and their implementation, since preventing FAPE violations is the easiest way for school officials to avoid being ordered to provide parents with tuition reimbursement.

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[1497] 20 U.S.C. § 1412(a)(10)(C).

[1498] Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*. 33 J. NAT'L ASS'N L. JUD. 214, 228 (2013).

However, reaching consensus with parents on substantively appropriate services their child should receive can be a difficult process. Even with substantively appropriate IEPs and the provision of thorough and effective special education services, school officials may still find themselves facing a parental demand for tuition reimbursement. Therefore, this study concludes by providing an extensive list of factors school officials should consider when parents unilaterally place their child in a private school and seek tuition reimbursement.

## Recommendations for School Administrators

School administrators need to have an in-depth understanding of the IDEA's provisions related to unilateral private placements. There are a number of prophylactic measures school officials may proactively implement to minimize the chance of being judicially ordered to reimburse a parent for private school tuition. First, school administrators need to be knowledgeable about how the special education laws in their state affect the administrative hearing process, especially with respect to the burden of proof in tuition reimbursement hearings. In *Schaffer v. Weast*,[1499] the U.S. Supreme Court determined the party seeking relief has the burden of proof in a due process proceeding. However, many states have passed laws placing the burden of proof on the public school district.[1500] It is therefore important for school

[1499] *Schaffer v. Weast,* 546 U.S. 49 (2005). Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N L. JUD. 1, 3, (2011).

[1500] Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act?*, 13 Conn. Pub. Int. L.J. 1, 6-8 (2013).

administrators to be aware of state laws as well as state and federal decisions impacting this issue.[1501]

A school district should also periodically review their Child Find procedures to ensure they effectively locate students who may be eligible to receive special education supports and services.[1502] Courts have rigorously enforced these requirements in recent years, finding IDEA violations when school officials fail to assess students in all areas of suspected disability.[1503] As the U.S. Supreme Court declared in *Forest Grove*, "a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP."[1504] Additionally, school administrators should continue to provide special education services in the least restrictive environment, thereby ensuring students have access to the general education curriculum. A number of recent court decisions[1505] suggest if school officials fail to provide a child with a FAPE, the school district should not base their defense on the fact that the parent's private unilateral placement does not comply with the IDEA's least restrictive environment mandate.

Finally, school administrators should ensure their school districts are offering a FAPE to each child who is eligible for special education services. In order to offer a FAPE, school officials need to ensure three things. First, the IEP needs to be substantively appropriate, defined

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[1501] *Id.* at 17. Zirkel describes how in the next reauthorization of the IDEA, Congress should consider providing a clear and comprehensive resolution as to the burden of persuasion (due to its complicated nature and impact on cases).
[1502] Mark C. Weber, *"All Areas of Suspected Disability,"* 59 LOY. L. REV. 289, 290-95 (2013).
[1503] *Id.* at 291.
[1504] *Forest Grove School District v. T.A.*, 129 S. Ct. 2484, 2491 (2009).
[1505] *C.B. v. Special Sch. Dist. No. 1,* 636 F.3d 981 (8th Cir. 2010); *Sebastian M. v. King Philip Regional School District*, 685 F.3d 79 (1st Cir. 2012); *M.M. v. District 0001 Lancaster County School*, 702 F.3d 479 (8th Cir. 2012); *C.L. v. Scarsdale Union Free Sch. Dist.*, 2014 U.S. App. LEXIS 4478 (2nd Cir. 2014).

as being "reasonably calculated to enable the child to receive educational benefits."[1506] Second, the IEP needs to be free of procedural errors that may compromise the services provided in the IEP.[1507] The third requirement for a FAPE is that parents need to be offered meaningful participation in the IEP development process.[1508] However, the level of student progress required for a FAPE varies between the federal circuit courts, so school administrators need to be familiar with the FAPE expectations required within their federal circuit appellate court jurisdiction.

The IEP is the primary evidence of a student's educational program; therefore, it is at the evidentiary focus in most IDEA disputes involving an alleged denial of a FAPE. There are five common errors[1509] school administrators should avoid to ensure their district's IEPs are procedurally and substantively appropriate. The first potential error is a lack of parental involvement in the IEP development process. Parents must be equal partners in developing, reviewing, and revising a student's IEP and must be provided with proper notification before meetings occur. As the Supreme Court has recognized, the IEP meeting is intended to be a "cooperative process ... between parents and schools."[1510] The second error, predetermination of the IEP services or placement, occurs when school officials decide on a student's program or placement prior to the IEP meeting. School personnel may come to an IEP meeting with

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[1506] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).
[1507] T. Daris Isbell, *Note: Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*. 76 BROOKLYN L. REV. 1717, 1729 (2011).
[1508] *Id.*
[1509] M. Yell, *Research to Practice 2: Avoiding Errors in the IEP Process*, Indiana IEP Resource Center (2011).
[1510] Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N L. JUD. 423 (2012). Citing *Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

suggestions and opinions, but they must be open to discussing and considering parental suggestions. As *Doyle v. Arlington* stated, "'Prepare, don't predetermine'…. School officials must come to the IEP table with an open mind but this does not mean that they should come to the IEP table with a blank mind."[1511] With budget issues affecting most school districts, the incidence of predetermining placement may be on the rise, since the needs of an individual student are often seen as less pressing than the needs of the school district as a whole.[1512]

The third potential procedural error is convening a meeting with improper IEP team membership.[1513] An IEP developed by an improperly constituted team may be found invalid by the courts, unless the parents have excused required members who are not in attendance.[1514] In the case of a unilateral private placement, failure to include the private school teacher in the IEP development process can also be considered a procedural violation.[1515] The fourth error school administrators should avoid is conducting inadequate assessments. A thorough assessment provides information to a multidisciplinary team necessary to determining if a student has a disability as well as to determine a student's present levels of academic achievement and functional performance. Often, multidisciplinary teams focus on the eligibility determination and fail to use the evaluative information for instructional planning.

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[1511] *Doyle v. Arlington*, 806 F.Supp. 1253, 1262 (E.D. VA 1992).

[1512] Alex Meyer, *Note: Disabling Parents: How the Minnesota Supreme Court's Well-Intentioned Decision in Independent School District No. 12 v. Minnesota Department of Education Undermines the Role of Parents on IEP Teams*, 34 HAMLINE L. REV. 623, 635 (2011).

[1513] 20 U.S.C. § 1414(d)(1)(B). IEP team should include: (i) the parents of a child with a disability; (ii) general education teacher; (iii) special education teacher; (iv) representative of the local educational agency; (v) an individual who can interpret evaluation results; (vi) other individuals who have knowledge or special expertise regarding the child, including related services personnel; (vii) whenever appropriate, the child with a disability.

[1514] See *M.L. v. Fed. Way Sch. Dist.*, 391 F.3d 631 (9th Cir. 2001).

[1515] See *Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072 (9th Cir. 2003).

The final IEP procedural error school officials need to avoid is failing to use goals that adequately measure student progress.[1516] Frequently measuring a student's progress toward his or her annual IEP goals is essential; otherwise, it is impossible to determine if the student's IEP program if working. Special education teachers are required to collect data to monitor student progress toward the IEP goals so their educational decisions are guided by objective information, rather than subjective opinion.[1517] The U.S. Department of Education (DOE) stated, "Measurable annual goals are critical to the strategic planning process used to develop and implement the IEP for each child with a disability. Once the IEP team has developed measurable annual goals for a child, the team can develop strategies that will be most effective in realizing those goals."[1518]

Even when school officials follow these recommendations to ensure student IEPs are substantively and procedurally appropriate, parents may still unilaterally place their child in a private placement and seek tuition reimbursement. Therefore, the following checklist can help to guide school administrators who become involved in a unilateral private placement dispute:

> □ 1. Did the parent provide timely notice of the rejection of the proposed placement to the district, at either the most recent IEP meeting or in writing at least ten business days before the parent's "removal" of the child?[1519] This notice must include a statement about their concerns and their intent to enroll their child in a private school at public expense. The following are valid exceptions why the

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[1516] See *Escambia Cnty. Bd. of Educ. v. Benton*, 106 F. Supp. 2d 1351 (N.D. Ga. 2005).
[1517] Jean b. Crockett, Mitchell, L. Yell, *Epilogue--Without Data all we have are Assumptions: Revisiting the Meaning of a Free Appropriate Public Education,* 37 J.L. & EDUC. 381, 88 (2008).
[1518] Mitchell L. Yell, Terrye Conroy, Antonis Katsiyannis, & Tim Conroy, *Special Education in Urban Schools: Ideas for a Changing Landscape: Article: Individualized Education Programs and Special Education Programming for Students with Disabilities in Urban Schools,* 41 FORDHAM URB. L.J. 669, 687 (2013).
[1519] Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist, WEST'S EDUCATION LAW REPORTER* 785-94, 87 (2012).

parent did not provide timely notice to the district: (a) The parent is illiterate and cannot write in English. (b) The district prevented the parent from providing said notice. (c) The district did not inform parents, via the procedural safeguards notice, of this requirement.[1520]

□ 2. Once a parent provides timely notice to the district, it is often prudent for the school district to initiate a re-evaluation of the child, unless a thorough evaluation has recently taken place. If the parent refuses to make the child available for the evaluation, then an IHO or court may take this into account and reduce or deny reimbursement.[1521] The courts have generally been strict in applying the timely notice requirement, denying reimbursement altogether.[1522]

□ 3. Was the district's proposed placement appropriate, or, more specifically, did school officials make a free appropriate public education available to the child in a timely manner prior to the parent's unilateral placement?[1523] Three FAPE requirements include: (1) Substantive adequacy, defined by whether the IEP is "reasonably calculated to enable the child to receive educational benefits." (2) Procedural requirements as codified by IDEA 2004. (3) Meaningful participation in the IEP process was offered to the parents.[1524]

□ 4. Is the parent's unilateral placement appropriate, even if it does not meet state standards? Neither the Establishment Clause of the Fourteenth Amendment to the U.S. Constitution[1525] nor the IDEA preclude sectarian schools from being an appropriate unilateral private placement.[1526] Similarly, the IDEA does not categorically bar for-profit schools from being appropriate for purposes of reimbursement. Private schools are typically found to be inappropriate when it is determined one of the following three situations exist: (1) Private placement is not primarily educational (ex: medical); (2) Private placement is not individualized to that student's needs; (3) Private placement does not provide at least one of the services in which the district's proposed IEP was deficient.[1527] The costs of hybrid, therapeutic placements are not necessarily reimbursable.

□ 5. Were the parents' actions unreasonable in any other way? This can include whether the cost of the private education was unreasonable or whether there was a lack of parental cooperation with the district.[1528]

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[1520] *Id.* at 788.
[1521] *Id.* at 788.
[1522] *Id.* at 788.
[1523] *Id.* at 788
[1524] *Id.* at 789.
[1525] U.S. Const. amend. XIV, § 1.
[1526] *Id.* at 791-92.
[1527] *Id.* at 792.
[1528] *Id.* at 793.

The preceding recommendations for school administrators are supported by the findings in Chapter Three and place an emphasis on the requirements of a FAPE while minimizing the importance of the LRE in unilateral private placements. This guidance also identifies a consistent process courts go through when reviewing whether parents are entitled to tuition reimbursement. Since the judicial process always begins by assessing whether the school district offered a FAPE, ensuring that IEP services meet procedural and substantive requirements is the single most important step school administrators can do to safeguard their district from this process. Next, the review of recent court decisions supports the recommendation that administrators need to assess whether the unilateral private placement offered services that were primarily educational, individualized to the student's needs, and not offered by the school district. Finally, the inconsistencies between the various federal courts and the large number of reversals by higher courts suggest this process is subjective in nature, and school administrators must be familiar with previous legal decisions in their own geographical area.

## Recommendations for Further Study

This study set out to answer the following three research questions:

1. What is the legal history of special education rights and how do these rights relate to unilateral private placements in the United States?

2. What do school administrators need to know about the federal special education jurisprudence and how it is related to unilateral private placements?

3. What is the history and current provisions of IDEA as it relates to unilateral private placements?

While these questions have been addressed and answered, there are other areas outside the scope of this investigation worthy of further consideration and study. First, due to the high frequency of unilateral private placement cases being decided at the federal circuit court level each year, continued monitoring and study would help school administrators stay up-to-date on these cases, as well as allow for a better analysis of trends.

If the U.S. Supreme Court agrees grants certiorari in *M.R. v. Ridley Sch. Dist*.,[1529] or the Solicitor General provides additional clarification about the stay-put provision, this could have a substantial impact upon unilateral placement litigation. In *M.R.*, the Third Circuit rejected each of the school district's timeliness contentions and concluded the IDEA's stay-put provision entitled the parents to reimbursement for the costs they incurred during the pendency of the review. The cost at issue, $57,658.38, covered the approximately three years from the hearing officer's decision in April 2009 through proceedings in the court of appeals. This is significant because it would be a huge incentive for parents to appeal their cases if they only needed to win at one review level to receive at least partial reimbursement (versus winning the final appeal).

The next IDEA reauthorization will likely impact unilateral private placements in some manner. This could include a change in the definition of a FAPE or the "stay-put provision," which could have a significant impact upon the tuition reimbursement process. Future researchers will want to examine all new case law after the next IDEA reauthorization to determine whether this impacts the outcome of future litigation. Typically, when the IDEA is reauthorized, this strengthens the rights of students. Additionally, since many of the cases in this study involved students eligible under the category of Autism, future researchers might examine

[1529] *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 128 (3rd Cir. 2014). Petition for certiorari was filed in June 2014.

whether there is a higher incidence of hearings or greater chance of parental victory within this eligibility category. Further study of cases involving disputes over methodology (e.g., ABA) may also yield beneficial trend data since the frequency of those hearings seems to be on the increase.

In the current economic climate, it has become increasingly important for districts to fully understand all aspects of unilateral private placements, including the history of litigation and the current IDEA provisions. It is imperative this legal process be studied and updated regularly, so administrators can be provided with the most updated information about this important legal process. Public school IEP teams must continue to be increasingly proactive about providing each of their students with FAPE services. However, school districts must also be prepared for the inevitable time when parents disagree with the IEP services and unilaterally place their child in a private placement.

# APPENDIX

# SUMMARY JUDGMENT CASES

**Summary Judgment Cases**

| Case | Court | Summary of Issue | Decision |
|---|---|---|---|
| *J.H. v. The New York City D.O.E. (2010)* | 2nd Circuit Court of Appeals | When a casemanager does not participate in an IEP meeting, does this procedural error amount to a lack of a FAPE? | Decision for District |
| *M.B. v. Pine Plains Central S.D. (2010)* | 2nd Circuit Court of Appeals | Whether a lack of homework modifications and no writing intervention denies FAPE. | Decision for District |
| *Christopher R. v. Wappingers Central School District (2011)* | 2nd Circuit Court of Appeals | Whether an improper composition of the IEP team and failure to implement the IEP before the school year started denied FAPE. | Decision for District |
| *B. D-S v. Southold Union Free School District (2012)* | 2nd Circuit Court of Appeals | FAPE was not provided but the district argued that the placement was inappropriate due to its restrictiveness. | Decision for District |
| *M.C. v. Katonah-Lewisboro-Union Free S.D. (2013)* | 2nd Circuit Court of Appeals | Whether FAPE was denied as a result of the assistive technology model used to address a hearing impairment. | Decision for District |
| *K.L. v. New York City D.O.E. (2013)* | 2nd Circuit Court of Appeals | Whether no FBA/BIP, no 1:1 instruction, and no specific methodology selected denied FAPE. | Decision for District |
| *L.C. v. Minisink Valley Central School District* (2013) | 2nd Circuit Court of Appeals | Whether the private school placement was inappropriate because the school failed to develop an IEP and did not address the disability. | Decision for District |
| *F.L. v. The New York City D.O.E. (2014)* | 2nd Circuit Court of Appeals | Whether the burden of persuasion should have been more on the district. Also, whether retrospective evidence was used. | Decision for District |
| *A.W. v. Enlarged City School District (2014)* | 2nd Circuit Court of Appeals | Whether child had been provided with a FAPE, and whether the private placement was appropriate. | Decision for District |