Tuition and Related Reimbursement under the IDEA

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In its ten major decisions under the Individuals with Disabilities Education Act (IDEA),[1] the Supreme Court has issued three concerning tuition reimbursement under the IDEA—*School Committee of Burlington v. Department of Education of Massachusetts* in 1986,[2] *Florence County School District Four v. Carter* in 1993,[3] and *Forest Grove v. T.A*. in 2009.[4] Meanwhile, after the first pair of these decisions, Congress codified this remedy in the 1997 Amendments, resulting in an elaboration of the equities step of *Burlington-Carte*r; thus, as the checklist shows, the two- or three-part test can be viewed as a four-step framework. The 2004 Amendments and 2006 regulations made negligible refinements.[5] During the entire period tuition and related reimbursement has been a major area of IDEA adjudication at the hearing/review and lower court levels.[6]

This checklist provides, in flowchart-like form, the criteria for reimbursement of tuition and related expenses[7] under the IDEA along with the applicable statutory, regulatory, and case law citations. **The basic framework items, which are based on the IDEA legislation/ regulations and *Burlington-Carter***, are in bold font, whereas the specific clarifications and examples from lower court case law are in regular font. Because this document is designed primarily for IDEA impartial hearing officers (IHOs) in New York, the citations for the decisions of the Second Circuit and the federal district courts in New York are in grey highlighting.[8] Moreover, the checklist items are worded as neutral questions to avoid the issue of burden of proof, which may vary depending on state law.[9]

Burlington-Carter focuses on two appropriateness steps, based on the IDEA's central mandate for "free appropriate public education" (FAPE), with only brief attention—in what is

generally characterized as the third step—to the equities. However, for its flowchart sequencing and decision-making specificity, the checklist extends to equitable considerations at the preliminary and concluding levels, thus consisting of four sequential items. The preliminary step is largely limited to timely notice. In contrast, the statutory language about "the child with a disability, who previously received special education . . . under the authority of a [school district]"[10] is not included as a prerequisite step in light of the Supreme Court's *Forest Grove* decision.[11] Similarly, the coverage of the preliminary step does not extend to preliminary or ancillary adjudicative issues, which were not specific to the merits of tuition reimbursement analysis.[12]

A. PRELIMINARY EQUITIES[13] STEP:

1. Did the parent provide timely notice to the district—at either the most recent IEP meeting or in writing at least 10 business days before the parent's' "removal" of the child—of the rejection of the proposed placement, "including stating their concerns and their intent to enroll their child in a private school at public expense"?[14]

Exceptions: If not, was the reason for the lack of timely notice any one of the following:[15]

- **"the parent is illiterate and cannot write in English"**[16]
- **the district prevented the parent from providing said notice**
- **the district did not inform, via the procedural safeguards notice, of this requirement**[17]

2. Prior to the child's removal, did the district duly request to evaluate the child and, if so, did the parent refuse to make the child available for the evaluation?[18]

Exception: the parent's compliance would "likely result in physical or serious emotional harm to the child"[19]

If the answer to question 1 and/or 2 is YES, after applying any applicable exceptions, then the IHO "may" reduce or deny reimbursement.[20]

The courts have generally been relatively strict in applying the timely notice requirement, denying reimbursement altogether.[21]

B. APPROPRIATENESS STEPS

1. Was the district's proposed placement appropriate,[22] or, more specifically, did the district "make a free appropriate public education available to the child in a timely manner prior to [the parent's unilateral placement][23]?

For this step, courts have applied the *Rowley* two-part test for appropriateness. The 2004 IDEA amendments have codified the procedural part, with special emphasis on the opportunity for parental participation.[24] The substantive part remains as whether the IEP is "reasonably calculated to enable the child to receive educational benefits?"[25]

The jurisdictions vary in terms of whether the "snapshot" approach, which measures the appropriateness in terms of the what the IEP team knew or had reason to know at the time of formulating the proposed IEP, is applicable; where this approach applies, the exception is for subsequent evidence of progress, not the lack thereof.[26] For example, the Second Circuit has declined to decide this issue,[27] while acknowledging that lower courts in New York have used it.[28]

The predominance of the plethora of tuition reimbursement lower court decisions have focused on this appropriateness step, with the vast majority—due in part to the selective sequence of the multi-step test—ruling in favor of the district.[29]

In some of these cases, the key consideration is the IDEA's least restrictive environment (LRE) mandate.[30]

2. If not,[31] was the parent's unilateral placement appropriate[32] (even if it does not meet state standards)?[33]

For the cases that have reached this step, the proportion of lower court decisions in favor of each side is much closer in light of the relatively relaxed standard.[34]

Some lower courts have used evidence of progress, thus at least an aspect of the snapshot standard, for this second step determination.[35]

Neither the Establishment Clause nor the IDEA precludes sectarian schools from being appropriate in tuition reimbursement context.[36]

Similarly, the IDEA does not categorically bar for-profit schools from being appropriate for purposes of reimbursement.[37]

The courts are divided on the role of LRE. In the Second Circuit, LRE is a pertinent but not primary consideration.[38]

C. FINAL EQUITIES STEP

If so, were the actions of the parent—beyond those in items A1 and A2—unreasonable?[39]

Example: "the cost of the private education was unreasonable"[40]
Example: lack of parental cooperation with the district[41]

Where the district alleges that parent's motivation is to obtain public funding, the claim fails absent sufficient proof.[42]

The courts in the New York jurisdiction require review officers—and, thus, IHOs—who apply the equitable factors to reduce or deny reimbursement to show, in their written opinions, sufficient factual foundation for doing so.[43]

Alternative to denying reimbursement altogether, some courts have proportionally reduced it in relation to the balance of the equities against the parents.[44]

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If the answer to item B1 is YES or the answer to both B2 and C is NO, the IHO "may" order reimbursement.[45]

In at least one court's view, the IHO must allow the parent a flexible opportunity to present the costs for reimbursement.[46]

The recoverable costs are not strictly limited to tuition.[47]

If the unilateral placement is residential and medical, the federal appeals courts have developed more than one test to determine whether the costs are reimbursable.[48]

A federal district court in New York recently ruled that the payment may be direct, i.e., need not be reimbursement, if the parent could not afford the tuition where the child had been unilaterally placed.[49]

The review officer's reimbursement order or, in a one-tier jurisdiction, that of the IHO is effective as the stay-put, thus triggering the district's payment obligation during judicial appeals.[50] However, if the final judicial ruling reverses the reimbursement order, the parent need not pay back the reimbursed amount.[51]

End Notes

[1] The Supreme Court also issued four other decisions that have relatively limited effect on IDEA interpretation. Two focused on the application of the First Amendment establishment clause. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). Congress subsequently reversed the other two. Dellmuth v. Muth, 491 U.S. 223 (1989) (ruling that states have Eleventh Amendment immunity under the IDEA); Smith v. Robinson, 468 U.S. 992 (1986) (ruling that the IDEA does not provide for attorneys' fees and is the exclusive avenue for claims with its scope).

[2] 471 U.S. 359 (1985) setting forth the three-part test for tuition reimbursement—appropriateness of district's proposed placement, appropriateness of the parent's unilateral placement, and application of the equities).

[3] 510 U.S. 7 (1993) (ruling that parents are not held to the same standards as districts, thus making the second step of the test relatively relaxed).

[4] 129 S. Ct. 2484 (2009) (ruling that the child's lack of previous enrollment in special education did not preclude application of the reimbursement test).

[5] For example, the 2004 Amendments refined the exceptions for the parent's timely notice provision. 20 U.S.C. § 1412(a)(10)(C)(iv)(I)(cc). Similarly, the 2006 regulations merely made explicit that "financial reimbursement" for placement disputes is within the jurisdiction of the impartial hearing process. 34 C.F.R. § 300.148(b).

[6] See e.g., Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001).

[7] This phraseology is intended to show that the remedy referred to, as a matter of shorthand, "tuition reimbursement" applies generically to parental expenses arising directly from a unilateral placement, which in some cases are in addition to or in lieu of formal tuition. See, e.g., Bucks County Dep't of MH/MR v. De Mora, 379 F.3d 61 (3d Cir. 2004) (ruling that reimbursement be for time expended by parent serving as Lovaas instructor). For reinforcement of this broad equitable authority, see *supra* note 5 and *infra* notes 13 and 39-44. In a ruling that merits careful scrutiny, a federal court in New York interpreted the IDEA and New York law as reserving reimbursement for related services (as contrasted with tuition) to the IHO's separable jurisdiction under state law, with final review by the Commissioner. Gabel v Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005).

[8] The cited decisions for this jurisdiction are limited to those that are officially published or in the Federal Appendix. Thus, except for the court decisions cited as examples of exclusions (*infra* note 12), a limited new substantive issue (*infra* note 37), and the occasional summary affirmances of published decisions, the coverage does not extend to the many decisions solely reported in WESTLAW and/or the specialized database—the Individuals with Disabilities Law Reports (IDELR).

[9] The Supreme Court's decision in *Schaffer v. Weast*, 546 U.S. 49 (2005) put the burden of persuasion at the first appropriateness step on the parent, but the Court ducked the question as to whether a contrary state law would be controlling. Pre-*Schaffer*, some courts put this burden on the district but shifted the burden of persuasion to the parents at the second appropriateness step. See, e.g., M.S. v. Bd. of Educ., 231 F.3d 96 (2d Cir. 2000), *cert. denied*, 532 U.S. 942 (2001); Carlisle Area Sch. Dist. v. Scott F., 62 F.3d 520, 524 (3d Cir. 1995). Post-*Schaffer*, the Second Circuit had placed the burden of persuasion on the parent for both appropriateness steps. Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112 (2d Cir. 2007). However, the New York legislature more recently clarified the matter as follows:

> [The district] shall have the burden of proof, including the burden of persuasion and burden of production, in … [the] impartial hearing, except that a parent … seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of [the unilateral] placement.

N.Y. EDUC. LAW Art. § 4404(c)(1). For recognition of this change as of October 14, 2007, see, e.g., J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 641 n.29 (S.D.N.Y. 2011)

[10] 20 U.S.C. § 1412(a)(10)(C)(i).

[11] See *supra* note 4.

[12] See, e.g., Nemlich v. Bd. of Educ., 170 F. App'x 727 (2d Cir. 2006) (attorney's fees); R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694 (S.D.N.Y. Sept. 16, 2011) (statute of limitations); New York City Dep't of Educ. v. V.S., 2011 WL 3273922 (S.D.N.Y. June 29, 2011) (mootness); Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669 (S.D.N.Y. 2011) (exhaustion); B.J.S. v. New York State Educ. Dep't, 699 F. Supp. 2d 586 (S.D.N.Y. 2010) (personal jurisdiction over state defendants); New York City Dep't of Educ. v. S.S., 2010 WL 983719 (S.D.N.Y. Mar. 17, 2010) (reimbursement liability during pendency of IHO proceedings); Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692 (S.D.N.Y. 2006) (stay-put); Arlington Cent. Sch. Dist. v. State Review Officer, 741 N.Y.S.2d 276 (App. Div. 2002) (second-tier scope of review when the respondent fails to file an answer); *cf*. Bd. of Educ. v. Greek Archdiocese Inst. of St. Basil, 905 N.Y.S.2d 271 (App. Div. 2010) (residency).

[13] In *Burlington*, after reciting the First Circuit's calculus based on "'balancing the equities,'" the Supreme Court upheld the relevance of "equitable considerations." *Sch. Comm. of Burlington*, 471 U.S. at 367 and 374. In *Carter*, the Court broad discretionary remedial authority as requiring consideration of "all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 16. The sequential checklist, in light of Congress's subsequent codification, divides the equitable considerations between its preliminary and concluding steps.

[14] 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d)(1). For an added, judicially developed equitable exception, see R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235 (S.D.N.Y. 2010) (district's failure to have a proposed placement at the time).

[15] 20 U.S.C. § 1412(a)(10)(C)(iv); 34 C.F.R. § 300.148(e).

[16] In contrast to the legislation, the regulations refer to illiteracy "or" inability to write in English. 34 C.F.R. § 300.148(e)(2)(i). For an example of a parent's failure to prove this exception, see Ms. M. v. Portland Sch. Comm., 360 F.3d 267 (1st Cir. 2004).

[17] For application of this exception, see, e.g., W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497 (S.D.N.Y. 2011).

[18] 20 U.S.C. § 1412(a)(10)(C)(iii)(II); 34 C.F.R. § 300.148(d)(2). For the foundational case law that led to this codified exception, see, e.g., Patricia P. v. Bd. of Educ., 203 F.3d 462 (7th Cir. 2000); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998); Tucker v. Calloway Cnty. Sch. Dist., 136 F.3d 495 (6th Cir. 1998).

[19] 20 U.S.C. § 1412(a)(10)(C)(iv)(II). The regulations appear to separate physical and serious emotional harm as arguably alternative to each other. *Id*. §§ 300.148(e)(1)(iii) and 300.148(e)(2)(ii). For a decision where the court found that the parent failed to proof this exception, thus triggering this threshold equitable step, see P.S. v. Brookfield Bd. of Educ., 353 F. Supp. 2d 306 (D. Conn. 2005), *aff'd on other grounds*, 186 F. App'x 79 (2d Cir. 2006).

[20] 20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. ¶ 300.148(d). The word may is emphasized here to show the discretionary nature of this equitable authority.

[21] For Second Circuit and New York decisions, which are representative of the case law elsewhere, see, e.g., S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346 (S.D.N.Y. 2009); A.H. v. New York City Dep't of Educ., 652 F. Supp. 2d 297 (E.D.N.Y. 2009), *aff'd on other grounds*, 394 F. App'x 718 (2d Cir. 2010); *cf*. M.C. v. Voluntown Bd. of Educ., 226 F.2d 60, 66 (2d Cir. 2000) (related services pre-IDEA codification). *But see* W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497 (S.D.N.Y. 2011); G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552 (S.D.N.Y. 2010) (reduced reimbursement).

[22] The Supreme Court's originally framed the issue in terms of the district's proposed "IEP" and, used interchangeably, whether it was "proper" or "appropriate." *Sch. Comm. of Burlington*, 471 U.S. at 369 and 374.

[23] 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. §§ 300.148(a) and 300.148(c).

[24] 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2):

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--
> (i) Impeded the child's right to a FAPE;
> (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
> (iii) Caused a deprivation of educational benefit.

[25] Bd. of Educ. v. Rowley, 458 U.S. 276, 206-07 (1982).

[26] See, e.g., Perry A. Zirkel, *The "Snapshot Standard" under the IDEA*, 269 EDUC. L. REP. 455 (2011).

[27] D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 599 (2d Cir. 2005); *see also* T.P. v. Mamaroneck Union School District, 554 F.3d 24 247, 252 n.1 (2d Cir. 2009).

[28] See, e.g., J.R. v. Bd. of Educ., 345 F. Supp. 2d 386 (S.D.N.Y. 2004); Antonaccio v. Arlington Cent. Sch. Dist., 281 F. Supp. 2d 710 (S.D.N.Y. 2003); *see also* J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684 (S.D.N.Y. 2009).

[29] The Second Circuit and New York decision are representative of the national trend. For a sampling of Second Circuit and New York decisions focusing on procedural appropriateness, *compare* A.H. v. Dep't of Educ. of New York City, 394 F. App'x 718 (2d Cir. 2010); T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247 (2d Cir. 2009); Cabouli v. Chappaqua Cent. Sch. Dist., 202 F. App'x 519 (2d Cir. 2006); Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377 (2d Cir. 2003); J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387 (S.D.N.Y. 2010); R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283 (S.D.N.Y. 2009), *aff'd on other grounds*, 366 F. App'x 239 (2d Cir. 2010); J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684 (S.D.N.Y. 2009); M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498 (S.D.N.Y. 2008) (in favor of district), *with* Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 771 N.Y.S.2d 572 (App. Div. 2004) (in favor of parent). For a sampling of Second Circuit and New York decisions focusing on substantive appropriateness, *compare* Bougades v. Pine Plains Cent. Sch. Dist., 376 F. App'x 95 (2d Cir. 2010); M.H. v. Monroe-Woodbury Sch. Dist., 296 F. App'x 126 (2d Cir. 2008); M.H. v. Monroe-Woodbury Sch. Dist., 250 F. App'x 428 (2d Cir. 2007); A.S. v. Bd. of Educ., 47 F. App'x 615 (2d Cir. 2002); C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355 (S.D.N.Y. 2010); D.G. v. Cooperstown Cent. Sch. Dist., 746 F. Supp. 2d 435 (N.D.N.Y. 2010); M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271 (E.D.N.Y. 2010); Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361 (S.D.N.Y. 2010); J.R. v. Bd. of Educ., 345 F. Supp. 2d 386 (S.D.N.Y. 2004); Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501 (E.D.N.Y. 1996) (in favor of district), *with* T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289 (E.D.N.Y. 2011); E.S. v. Katonah Lewisboro Sch. Dist., 742 F. Supp. 2d 417 (S.D.N.Y. 2010) (mixed outcome), *with* P.K. v. New York City Dep't of Educ., __ F. Supp. 2d __ (E.D.N.Y. 2011); Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 771 N.Y.S.2d 572 (App. Div. 2004) (in favor of parent). For those addressing both the procedural and substantive sides, see T.Y. v. New York City Dep't of Educ., 584 F.3d 412 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3277 (2010); A.C. v. Bd. of Educ., 553 F.3d 165 (2d Cir. 2009); Mr. B. v. E. Granby Bd. of Educ., 201 F. App'x 834 (2d Cir. 2006); B .O. v. Cold Spring Harbor Cent. Sch. Dist., __ F. Supp. 2d __ (E.D.N.Y. 2011); A.L. v. New York City Dep't of Educ., __ F. Supp. 2d __ (S.D.N.Y. 2011); C.T. v. Croton-Harmon Union Free Sch. Dist., __ F. Supp. 2d __ (S.D.N.Y. 2011); E.Z.-L v. New York City Dep't of Educ., 763 F. Supp. 2d 584 (S.D.N.Y. 2011); M.F. v. Irvington Union Free Sch. Dist., 719 F. Supp. 2d 302 (S.D.N.Y. 2010); W.T. v. Bd. of Educ., 716 F. Supp. 2d 270 (S.D.N.Y. 2010); E.G. v. City Sch. Dist., 606 F. Supp. 2d 384 (S.D.N.Y. 2009); P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371 (S.D.N.Y. 2008); W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134 (S.D.N.Y. 2006); Viola v.

Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366 (S.D.N.Y. 2006) (in favor of district), *with* Davis v. Wappingers Cent. Sch. Dist., 772 F. Supp. 2d 500 (S.D.N.Y. 2011), *aff'd*, 56 IDELR ¶ 248 (2d Cir. 2011); J.G. v. Kiryas-Joel Union Free Sch. Dist., 777 F. Supp. 2d 606 (S.D.N.Y. 2011) (in favor of parent). Occasionally, a tuition reimbursement claim is predicated instead on a child find or mis-evaluation theory. See, e.g., Muller v. Comm. on Special Educ., 145 F.2d 95 (2d Cir. 1998); Mr. N.C. v. Bedford Cent. Sch. Dist., 300 F. App'x 11 (2d Cir. 2008); J.D. v. Pawlet Sch. Dist., 224 F.3d 60 (2d Cir. 2000); W.G. v. New York City Dep't of Educ., __ F. Supp. 2d __ (S.D.N.Y. 2011).

[30] See, e.g., G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552 (S.D.N.Y. 2010).

[31] As a general, although not absolute rule, the analysis does not proceed to the next appropriateness step if the determination is that the district's proposed IEP met the standards for FAPE. See, e.g., T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 582 (3d Cir. 2000); M.C. v. Voluntown Bd. of Educ., 226 F.2d 60, 66 (2d Cir. 2000).

[32] This step is only implicit in the IDEA and its regulations. Its basis is *Carter*, which may be viewed as either implicitly incorporated in or a residuum beyond the statutory codification. The Supreme had referred to whether the parents' "private placement" was "proper." *Sch. Comm. of Burlington*, 471 U.S. at 369 and 370; *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 15.

[33] 34 C.F.R. § 300.148(c). The issue in *Carter* was a bit broader, referring to whether the parents' private placement met the statutory definition of FAPE, which includes various other criteria, including an IEP according to IEP specifications. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 13.

[34] For a sampling at the Second Circuit and in New York, *compare* Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006); Muller v. Comm. on Special Educ., 145 F.2d 95 (2d Cir. 1998); Mrs. B. v. Milford Bd. of Educ., 103 F.2d 1114 (2d Cir. 1997); P.K. v. New York City Dep't of Educ., __ F. Supp. 2d __ (E.D.N.Y. 2011); M.H. v. New York City Dep't of Educ., 712 F. Supp. 2d 125 (S.D.N.Y. 2010); A.D. v. Bd. of Educ., 690 F. Supp. 2d 193 (S.D.N.Y. 2010); Gabel v Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005); Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 771 N.Y.S.2d 572 (App. Div. 2004) (in favor of the parent), *with* Matrejek v. Brewster Cent. Sch. Dist., 293 F. App'x 20 (2d Cir. 2008); Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 (2d Cir. 2007); M.S. v. Bd. of Educ., 231 F.3d 96 (2d Cir. 2000), *cert. denied*, 532 U.S. 942 (2001); Weaver v. Millbrook Cent. Sch. Dist., __ F. Supp. 2d __ (S.D.N.Y. 2011); Davis v. Wappingers Cent. Sch. Dist., 772 F. Supp. 2d 500 (S.D.N.Y. 2011), *aff'd*, 56 IDELR ¶ 248 (2d Cir. 2011); J.G. v. Kiryas-Joel Union Free Sch. Dist., 777 F. Supp. 2d 606 (S.D.N.Y. 2011); Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529 (S.D.N.Y. 2010); Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477 (S.D.N.Y. 2007); Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656 (S.D.N.Y. 2005) (in favor of the district).

[35] These New York examples are representative: Matrejek v. Brewster Cent. Sch. Dist., 293 F. App'x 20 (2d Cir. 2008); Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006); M.H. v. New York City Dep't of Educ., 712 F. Supp. 2d 125 (S.D.N.Y. 2010). For a discussion of this issue at this second appropriateness step, see Davis v. Wappingers Cent. Sch. Dist., 772 F. Supp. 2d 500 (S.D.N.Y. 2011), *aff'd*, 56 IDELR ¶ 248 (2d Cir. 2011). However, the Second Circuit provided the overriding caveat that the child's progress "does not itself demonstrate that a private placement was appropriate." *Gagliardo,* 489 F.3d at 115.

[36] See, e.g., L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290 (D.N.J. 2003); Matthew J. v. Massachusetts Dep't of Educ., 989 F. Supp. 380 (D. Mass. 1998).

[37] New York City Dep't of Educ. v. V.S., 57 IDELR ¶ 77, 2011 WL 3273922 (S.D.N.Y. 2011) (alternatively fitting in this multi-step analysis as an equitable consideration).

[38] See, e.g., Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 (2d Cir. 2007); M.S. v. Bd. of Educ., 231 F.3d 96 (2d Cir. 2000); Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529 (S.D.N.Y. 2010); Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477 (S.D.N.Y. 2007). Not all circuits agree with the Second Circuit's view. See, e.g., C.B. v. Special Sch. Dist. No 1, 636 F.3d 981 (8th Cir. 2011) (ruling the LRE is not a relevant factor). Conversely, in an occasional case, the LRE factor supports the unilateral placement. See, e.g., M.H. v. New York City Dep't of Educ., 712 F. Supp. 2d 125 (S.D.N.Y. 2010); *cf*. J.G. v. Kiryas-Joel Union Free Sch. Dist., 777 F. Supp. 2d 606 (S.D.N.Y. 2011) (ruling that the unilateral placement was inappropriate for other reasons).

[39] 20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. §§ 300.148(d)(3). The narrow language is: "upon a judicial finding of unreasonableness with respect to actions taken by the parents." *Id*. However, the light of the overall structure of the Act and the specific contours of *Burlington-Carter* (see *supra* note 13 and *infra* text accompanying notes 43-44) this equitable criterion implicitly extends to IHOs and also implicitly amounts to a balancing of the equities, thus extending to the reasonableness of the district's action. For an example of a case where the court weighed the equities on both sides, concluding that the balance favored the parent, see Gabel v Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005).

[40] *Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 16.

[41] Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656 (S.D.N.Y. 2005); *cf*. Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402 (S.D.N.Y. 2005), *aff'd mem.*, 192 F. App'x 62 (2d Cir. 2006) (alternative rationale); S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346 (S.D.N.Y. 2009) (alternative rational intertwined with lack of timely notice). For examples from other jurisdictions, see, e.g., Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093 (C.D. Cal. 2000) (parent's withholding of assessment records).

[42] See, e.g., Sudbury Pub. Sch. v. Massachusetts Dep't of Elementary & Secondary Educ., 762 F. Supp. 2d 254 (D. Mass. 2010).

[43] See, e.g., Wolfe v. Taconic-Hills Cent. Sch. Dist., 167 F. Supp. 2d 530 (N.D.N.Y. 2001); *see also* Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402 (S.D.N.Y. 2005), *aff'd mem.*, 192 F. App'x 62 (2d Cir. 2006). For a similar ruling elsewhere, see Loren F. v. Atlanta Indep. Sch. Dist., 349 F.3d 1309 (11th Cir. 2003). Conversely, where the court overruled the administrative adjudicator's decision in the parent's favor for failure to consider the full balance of the equities, see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346 (S.D.N.Y. 2009).

[44] See, e.g., W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497 (S.D.N.Y. 2011); G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552 (S.D.N.Y. 2010); Cone v. Randolph Cnty. Sch. Bd. of Educ., 657 F. Supp. 2d 667 (M.D.N.C. 2009); Hogan v. Fairfax Cnty. Sch. Bd., 645 F. Supp. 2d 554 (E.D. Va. 2009); Kitchelt v. Weast, 341 F. Supp. 2d 553 (D. Md. 2004).

[45] 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c). Here, the quotation is merely to reinforce the equitable nature of this remedy, but its exercise is presumably automatic at this final stage, i.e., upon the specified answers to the earlier questions. For cases that succeeded on all of the applicable steps, see, e.g., Muller v. Comm. on Special Educ., 145 F.2d 95 (2d Cir. 1998); Mr. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403 (S.D.N.Y. 2011); M.H. v. New York City Dep't of Educ., 712 F. Supp. 2d 125 (S.D.N.Y. 2010); A.D. v. Bd. of Educ., 690 F. Supp. 2d 193 (S.D.N.Y. 2010); Jennifer D. v. Harrison Cent. Sch. Dist., 550 F. Supp. 2d 420 (S.D.N.Y. 2008); Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 771 N.Y.S.2d 572 (App. Div. 2004).

[46] A.G. v. Dist. of Columbia, __ F. Supp. 2d __ (D.D.C. 2011)

[47] See, e.g., JP v. Cnty. Sch. Bd., 641 F. Supp. 2d 499 (E.D. Va. 2009) (credit-card transaction fees and interest);

[48] See, e.g., Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286 (5th Cir. 2009) (two-part test); Mary T. v. Sch. Dist., 575 F.3d 235 (3d Cir. 2009) (inextricable intertwined test). For an overview of the competing tests, see Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E., __ F. Supp. 2d __ (D. Colo. 2011).

[49] Mr. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403 (S.D.N.Y. 2011).

[50] See, e.g., Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 (2d Cir. 2002), *aff'd on other grounds*, 548 U.S. 291 (2006); St. Tammany Parish Sch. Bd. v. State of Louisiana, 142 F.3d 776 (5th Cir. 1998); Ashland Sch. Dist. v. V.M., 494 F. Supp. 2d 1180 (D. Or. 2007); L.B. v. Greater Clark Cnty. Sch., 458 F. Supp. 2d 845 (S.D. Ind. 2006); *cf.* Mackey v. Bd. of Educ., 386 F.3d 158 (2d Cir. 2004) (as of the due date—not, if later, the actual date—of the state-level administrative decision)

[51] See, e.g., Rome Sch. Comm. v. Mrs. B., 247 F.3d 29 (1st Cir. 2001).