# TUITION REIMBURSEMENT REMEDIES UNDER THE IDEA

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Reimbursement of tuition and other expenses is a key remedy under the IDEA, 20 U.S.C. §§ 1400-1482. This paper will discuss some of the issues that impartial hearing officers (IHOs) face in disputes in which parents request reimbursement. The following topics are included within the general subject of reimbursement:

- The Basics of Reimbursement Relief
- Whether Free, Appropriate Public Education Has Been Offered
- Whether the Unilateral Placement Is Appropriate
- Equitable Considerations

## Tuition Reimbursement Basics

The basics of reimbursement relief track to two Supreme Court decisions and amendments to the IDEA that were put into place in 1997. The Second Circuit has its own gloss on the requirements.

### *Burlington-Carter* and the 1997 Codification

In one of its first decisions interpreting the federal special education law, *Burlington School Committee v. Department of Education*, 471 U.S. 359, 556 IDELR 389 (1985), the Supreme Court ruled that a court (and thus a hearing officer) may order a school district to reimburse parents for the cost of a placement they undertake unilaterally, when the placement proposed by the school district does not offer appropriate education. The Court reasoned that the reimbursement remedy is necessary so that parents are free to provide appropriate education to their child during the lengthy administrative process. Moreover, reimbursement merely requires the public school system to pay what it should have been paying in the first place. The obligation not to remove the child from the current placement during the pendency of proceedings applies to public schools, not parents. *Florence County School District Four v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993), extended *Burlington*, holding that the fact that the placement chosen by the parents was not approved by the state does not bar reimbursement when the placement offered by the district is not appropriate but that chosen by the parent is.

Congress codified a reimbursement remedy in the 1997 IDEA Amendments. The statute currently provides:

> . . .
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> (ii) Reimbursement for private school placement
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> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.
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> (iii) Limitation on reimbursement
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> (I) if--
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> (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
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> (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);
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> (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
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> (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

20 U.S.C. § 1412(a)(10)(C).

In *Forest Grove School District v. T.A.*, 557 U.S. 230, 52 IDELR 151 (2009), the Supreme Court held that this provision was not the exclusive basis for tuition

reimbursement, and specifically ruled that a student who had never previously received special education under the authority of a public school, because the school had not found him eligible, could be entitled to tuition reimbursement relief.

The Second Circuit Approach

In recent New York cases, the Second Circuit has employed a three-step approach to tuition reimbursement claims:

> "(1) the DOE [Department of Education] must establish that the student's IEP actually provided a FAPE; should the DOE fail to meet that burden the parents are entitled to reimbursement if (2) they establish that the unilateral placement was appropriate and (3) the equities favor them."

A.M. v. New York City Dep't of Educ., 845 F.3d 523, 534, 69 IDELR 51 (2d Cir. 2017) (quoting M.W. v. New York City Dep't of Educ., 725 F.3d 131, 135, 61 IDELR 151 (2d Cir. 2013)).

Prong One: The IEP Does Not Offer Free, Appropriate Public Education

The Supreme Court just revisited the free, appropriate public education requirement in *Endrew F. v. Douglas County School District RE 1*, 137 S. Ct. 988, 69 IDELR 174 (2017). There the Court vacated and remanded a decision that had upheld a school district's proposed IEP. The Court ruled that the IDEA establishes a FAPE standard "markedly more demanding than the 'merely more than de minimis' test applied by the Tenth Circuit" Court of Appeals. *Id.* at 1000. Instead, an "educational program must be appropriately ambitious in light of [the student's] circumstances." *Id.* The Court did not overrule *Board of Education v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982), the first decision it rendered on the meaning of appropriate education under the federal law, but it rejected a minimalist reading of what that case required and for the first time interpreted the requirement in the situation of a child who, unlike the child in *Rowley*, was not performing successfully in a fully mainstreamed setting.

A recent Second Circuit case applying the *Endrew F.* decision in the context of a claim for compensatory education is *Mr. P v. West Hartford Board of Education*, 885 F.3d 735, 71 IDELR 207 (2d Cir. 2018). The court stated that "Prior decisions of this Court are consistent with the Supreme Court's decision in *Endrew F.*" *Id.* at 757. The court said that its earlier decisions had rejected the more-than-merely-trivial-advancement standard that the lower court applied in *Endrew F.* In *Mr. P*, the court of appeals affirmed the district court and hearing officer determinations that the district offered the student "a meaningful educational program that was reasonably calculated to enable" the student "to make progress appropriate in light of his circumstances." *Id.* The court looked to the accommodations and services provided before the student was found eligible, and it noted that the program provided the student after eligibility enabled him to pass from junior to senior year and achieve mostly As and Bs, allowing the student to meet graduation requirements and make progress in his behavior. In a

recent case concerning FAPE and a reimbursement claim, the Southern District of New York ruled that a student who was offered an integrated co-teaching class with up to 30 students was not offered FAPE when he had significant problems with distractibility and had demonstrated success in learning only in much smaller classroom settings. A.W. v. New York City Dep't of Educ., No. 15-CV-3534 (VSB), 2018 WL 1027435, 71 IDELR 198 (S.D.N.Y. Feb. 21, 2018); *see also* S.B. v. New York City Dep't of Educ., No. 15-CV-1869, 2017 WL 4326502, 70 IDELR 221 (E.D.N.Y. Sept. 28, 2017) (ruling that 12:1:1 public school placement with related services was not sufficient to provide FAPE; awarding tuition reimbursement).

The topic of when a proposed program for a child offers or fails to offer free, appropriate public education merits a paper by itself. Nevertheless, it may be possible to suggest answers to some questions that have arisen in IHO cases regarding the relation of denial of FAPE to tuition reimbursement remedies.

Does an IEP that is deficient in only one area justify tuition reimbursement?

The question here is whether an IEP's miss by an inch is as good as a mile – whether denial or reduction in reimbursement may be proper when the IEP's failing, though real, is nonetheless limited. By and large, courts treat FAPE and its denial as dichotomous: either FAPE has been offered or it has not. When it has not, the whole range of remedies may be considered, including tuition reimbursement. That being said, there are many instances in which courts have awarded reimbursement for specific services that should have been offered but were not. *E.g*., L.K. v. New York City Dep't of Educ., 674 F. App'x 100, 69 IDELR 90 (2d Cir. 2017) (remanding for determination if parents should receive reimbursement for occupational therapy privately obtained for child but not covered by pendency order). And when a unilateral placement provides services that are segregable from the program as a whole and those particular services exceed what is needed to provide appropriate education, courts have reduced reimbursement. *See* L.K. v. New York City Dep't of Educ., No. 14-cv-7971, 2016 WL 899321, 67 IDELR 123 (S.D.N.Y. Mar. 1, 2016), *aff'd in part & remanded in part*, 674 F. App'x 100, 69 IDELR 90 (2d Cir. 2017) (further discussed below under Prong Three).

How should the retrospective nature of evidence about a program or placement be evaluated for purposes of reimbursement awards?

In *R.E. v. New York City Department of Education*, 694 F.3d 167, 59 IDELR 241 (2d Cir. 2012), the Second Circuit Court of Appeals ruled that hearing officers should not admit evidence to show that services to be provided by the public school system are adequate to furnish FAPE to a child if the services are not included in the IEP. The testimony may explain or justify the services, but if services are not in the IEP, the parent cannot make an informed decision whether to exercise procedural rights to challenge the program. The court thus disapproved the district's use of this "retrospective evidence." At the same time, it said that parents may use retrospective evidence to show the adequacy of a unilateral parental placement. *Id*. at 187 n.3.

*Endrew F.* relied on precisely that sort of evidence in vacating the court of appeals decision that had rejected the parents' tuition reimbursement claim. *See* 137 S. Ct. at 996-97 ("[I]n April 2010, the school district presented Endrew's parents with a proposed fifth grade IEP that was, in their view, pretty much the same as his past ones. So his parents removed Endrew from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism. Endrew did much better at Firefly. The school developed a 'behavioral intervention plan' that identified Endrew's most problematic behaviors and set out particular strategies for addressing them. . . . Firefly also added heft to Endrew's academic goals. Within months, Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school.").

Although evidence of the child's progress or lack of progress in the parental placement may be admissible, the fact that the child has poor success there does not necessarily mean that the placement was inappropriate. To that extent, the program is to be evaluated prospectively. *See* C.B. v. New York City Dep't of Educ., No. 02 CV 4620, 2005 WL 1388964, 108 LRP 2761 (E.D.N.Y. 2005) (ruling that private program appeared appropriate when viewed prospectively even though student made minimal progress; noting that parent could not afford more supplemental services); Rairdan M. v. Solanco Sch. Dist., Nos. CIV. 97–5864, CIV. 98–1672, 1998 WL 401637, 28 IDELR 723 (E.D. Pa. 1998) (pointing out that other factors may have contributed to lack of success, and that prospective approach is what is used in evaluating school district programs).

Prong Two: The Unilateral Placement Is Appropriate

With regard to burdens of producing evidence and persuading the trier of fact, New York Law treats the appropriateness of the unilateral placement differently from other issues before the IHO:

> The board of education or trustees of the school district or the state agency responsible for providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing, except that a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement.

N.Y. Educ. Law § 4404(1)(c). Thus New York law resolves questions about who has the burden of production and persuasion about the appropriateness of the unilateral placement. Nevertheless, a number of other questions have emerged in regard to prong two.

How effective must the private placement be in meeting the child's needs?

Some guidance on this issue might be found in the well-known case *Gagliardo v. Arlington Central School District*, 489 F.3d 105, 48 IDELR 1 (2d Cir. 2007). That case involved an emotionally disturbed high school senior whose parents placed him at Oakwood Friends School, which was not approved by the state for the provision of special education services, when the school district wanted to place him at Karafin School, a small day school that had approval. In overturning a district court decision in favor of the parents, the court of appeals acknowledged that the district court found that Oakwood, with its small classes of 12 to 15 students, effective policies against bullying, and traditional classroom group activities, was appropriate. But the court of appeals relied instead on the IHO's conclusion that the student required a therapeutic setting, with a staff trained in dealing with the student's special needs from his emotional disorder. The district court's view was said to ignore the evaluator's recommendations. The court of appeals further declared that the student's success at Oakwood did not by itself establish that the placement was appropriate.

A somewhat more recent case in which the Second Circuit found a unilateral placement not to be appropriate is *Doe v. East Lyme Board of Education*, 790 F.3d 440, 65 IDELR 255 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2022 (2016), in which the court of appeals ruled that the school district failed to offer a child with autism FAPE, but denied reimbursement on the strength of the hearing officer's finding that the placement was not sufficiently tailored to meet the special needs of the student. The court declared:

> A representative from Solomon [School] testified that the school did not offer any special education services and did not modify its curriculum to fit the Student; to receive the special instruction recommended by Dr. Kemper, the Student had to be pulled out of classes frequently. The main benefits of Solomon to the Student were small class sizes and some modified grading procedures. But the former is the kind of educational and environmental advantage[ ] . . . that might be preferred by parents of any child, disabled or not. And the latter, while an accommodation, did not provide the special education services specifically needed by [the Student]—namely, an educational setting consistent with [the clinician's] recommendation. Solomon did not provide any of the specialized instruction recommended by Dr. Kemper.

*Id.* at 452 (citation and quotation marks omitted). The court nonetheless ordered reimbursement for the parents of various costs they incurred, on the ground that the district violated the IDEA's maintenance-of-placement provision, 20 U.S.C. § 1415(j), by not funding certain related services during the course of the litigation.

Some decisions are quite demanding on the subject of the showing as to appropriateness of the private placement. *E.g.*, Hardison v. Board of Educ. of the Oneonta City Sch. Dist., 773 F. 3d 372, 387, 64 IDELR 161 (2d Cir. 2014) (reasoning that district court should defer to SRO determination that parents failed to put forward adequate information about services at private placement and how services related to

student's educational progress; stating, "After marshalling the evidence, the SRO concluded that to make an appropriate determination he needed more specific information as to the types of services provided to A.N.H. and how those services tied into A.N.H.'s educational progress. Expertise in an area speaks not only to the ability to reach the right conclusion about a given factual situation but also the ability to discern how much evidence is required to reach a supportable conclusion at all."); L.H. v. Hamilton Cnty. Dep't of Educ., No. 1:14-CV-00126, 2016 WL 6581235, 68 IDELR 274 (E.D. Tenn. Nov. 4, 2016) (ruling that school district's placement for child with Down Syndrome in comprehensive development classroom was overly restrictive, but denying reimbursement for parental placement in private Montessori school on ground it did not give enough systematic instruction on basic skills and was not adequately structured, even though child made progress there).

A frequently cited case in which the Second Circuit ruled that a parent's unilateral placement satisfied the appropriateness standard for a reimbursement award is *Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356, 46 IDELR 33 (2d Cir. 2006). There the court declared that "parents are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a free appropriate public education." *Id.* at 364. "Ultimately, the issue turns on whether a placement—public or private—is reasonably calculated to enable the child to receive educational benefits." *Id.* (quotation marks omitted). The court said that triers of fact should look at grades, test scores, and regular advancement as evidence of educational benefit, but that the totality of the circumstances had to be taken into account. "To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential." *Id.* at 365. The court found that a parochial school placement at Upton Lake Christian School was appropriate and affirmed reimbursement. It noted that the Upton Lake teacher adapted her instruction to meet the student's needs, providing one-on-one time, creating a communications book for him, giving him extra time to complete work and allowing him to work free from distractions. He was also allowed to take tests orally. The student's grades increased dramatically in his time there and by the end his performance in standardized testing did as well.

Various other cases, some quite recent, uphold parents' unilateral placements as appropriate even though they did not meet all of a child's needs or did not meet them as well as might have been possible. *See* Board of Educ. of Wappingers Cent. Sch. Dist. v. M.N., No. 16-CV-09448(TPG), 2017 WL 4641219, 71 IDELR 9 (S.D.N.Y. Oct. 13, 2017) (affirming SRO determination that private school chosen by parents met appropriateness standard, for it adjusted its treatment plans to needs of student and used multiple strategies to address her behavior, even though progress she made was slow), *appeal dismissed*, No. 17-3707 (2d Cir. Feb. 28, 2018); A.W. v. Board of Educ. of the Wallkill Cent. Sch. Dist., No. 1:14–CV–1583, 2016 WL 4742297, 68 IDELR 164 (N.D.N.Y. Sept. 12, 2016) (holding that Kildonan School was appropriate program for child, overturning SRO determination that upheld placement for only one of three years, even though placement did not completely address child's behavioral problems; granting full tuition reimbursement for all three years), *appeal withdrawn*, No. 16-3464 (2d Cir. Nov. 23, 2016); *see also* C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826,

840, 63 IDELR 1 (2d Cir. 2014) ("[T]he IHO ruled that Eagle Hill is an appropriate, if not an ideal placement for C.L. We are persuaded by the IHO's reasoning, and we thus defer to the IHO's conclusion that Eagle Hill was appropriate for C.L.") (internal quotation marks omitted).

As noted above, the fact that a student does not do well in the parentally chosen placement does not necessarily mean that it is inappropriate. See C.B. v. New York City Dep't of Educ., No. 02 CV 4620, 2005 WL 1388964, 108 LRP 671 (E.D.N.Y. 2005); Rairdan M. v. Solanco Sch. Dist., Nos. CIV. 97–5864, CIV. 98–1672, 1998 WL 401637, 28 IDELR 723 (E.D. Pa. 1998) (both cited under Prong One).

May Related Services That Are Provided Unilaterally Be Eligible for Reimbursement?

As the *Doe v. East Lyme* case holds in the context of maintenance of placement, the answer is yes. The Second Circuit has required reimbursement for services provided by uncertified providers when a public agency failed to furnish the services due to a shortage of qualified personnel. Still v. DeBuono, 101 F.3d 888, 25 IDELR 32 (2d Cir. 1996).

Does the private placement have to provide special education?

The *Frank G.* case, discussed above, makes clear that the school chosen by the parents need not be a special education school or even have a special education program, in order to support an award of reimbursement. The key instead is whether the education in the unilateral placement responds to the child's needs. Thus, the placement at an ordinary parochial school qualified for reimbursement under the facts of the case. *See also* R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235, 54 IDELR 223 (S.D.N.Y. 2010) (awarding reimbursement for supplemental program in private school but not general education program when parents enrolled child in general education private school that provided limited instruction from special education teacher and some educational supports). On the other hand, a placement at a school that specializes in educating children with disabilities will not merit reimbursement if it does not address the child's needs. Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 57 IDELR 126 (S.D.N.Y. 2011).

Justice Alito, while still on the Third Circuit, upheld the reimbursement of a parental out-of-district placement of a student with a disability who was subjected to severe and continual harassment at his home district public school. Although the out-of-district school did not initially create an IEP for the student, it did place him in a special education class for math and give him academic support; moreover, it provided an effective anti-bullying program, and the student thrived academically and socially. Thus the parental placement was appropriate and reimbursement was required. Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 41 IDELR 234 (3d Cir. 2004); *see also* M.G. v. District of Columbia, 246 F. Supp. 3d 1, 69 IDELR 246 (D.D.C. 2017) (in case of teenager with depression, anxiety, and ADHD, whose IEP was prepared without proper IEP meeting and sent to parent just three days before school year began, reversing

denial of reimbursement, and holding that parent's placement of student at general education school was proper; determining that placement was reasonably calculated to enable student to receive educational benefits, in light of its small classes and quiet environment).

What is the significance of the restrictiveness of the environment in the unilateral placement?

Parents usually do not have the ability to place their children who have disabilities in mainstreamed settings. These settings are typically those of the public schools, and a non-resident of a school district cannot ordinarily buy a child's way into those schools, rare instances like *Shore v. P.S.* notwithstanding. Accordingly, courts have not held parents to the same least restrictive environment standards to which a public school system would be held. *See, e.g.*, C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 837, 63 IDELR 1 (2d Cir. 2014) (finding private placement at school for students with disabilities to be appropriate; declaring that "parents whose children are denied a FAPE may be and often are forced to turn to specialized private schools that educate only disabled children. Such private schools are necessarily restrictive as they do not educate disabled and nondisabled children together, and may be more restrictive than the public school from which the child was removed. 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.*"); *see also* Warren G. v. Cumberland Cnty. Sch. Dist., 190 F.3d 80, 31 IDELR 27 (3d Cir. 1999) (rejecting reduction of reimbursement on basis of restrictiveness of unilateral placement, pointing out unfairness of imposing least restrictive environment obligation on parents); Cleveland Heights–University Heights City Sch. Dist. v. Boss, 144 F.3d 391, 399-400, 28 IDELR 32 (6th Cir. 1998) (holding private placement's failure to meet IDEA's mainstreaming requirement does not bar reimbursement); S.C. v. Katonah-Lewisboro Cent. Sch. Dist., 175 F. Supp. 3d 237, 67 IDELR 184 (S.D.N.Y. 2016) (noting that parents are not held to same mainstreaming requirements as districts, but finding level of participation with general education students at private placement to be appropriate), *aff'd sub nom.* J.C. v. Katonah-Lewisboro Cent. Sch. Dist., 690 F. App'x 53, 70 IDELR 2 (2d Cir. 2017) (deferring to impartial hearing officer on conclusion that private placement was appropriate).

A number of decisions nevertheless consider restrictiveness as one factor in the appropriateness determination. *E.g.*, M.S v. Board of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 105, 33 IDELR 183 (2d Cir. 2000) ("IDEA's requirement that an appropriate education be in the mainstream to the extent possible remains a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate.") (citation omitted), *abrogation on other grounds recognized*, C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d at 836.

Is it proper to order compensatory education when FAPE has been denied but reimbursement is barred?

Some courts have required provision of compensatory education, sometimes in the form of cash, rather than services, when appropriate education has been denied but for one reason or another, tuition reimbursement is not proper. *See* Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456-57, 65 IDELR 255 (2d Cir. 2015) ("We therefore conclude that when an educational agency has violated the stay-put provision, compensatory education may—and generally should—be awarded to make up for any appreciable difference between the full value of stay-put services owed and the (reimbursable) services the parent actually obtained. In this case, the Board owes reimbursement in the amount the Parent expended for services the Board was required to provide, plus compensatory education to fill the gap of required services that the Parent did not fund."), *cert. denied*, 136 S. Ct. 2022 (May 16, 2016); *see also* H.L. v. Marlboro Twp. Bd. of Educ., No. 16–9324, 2017 WL 5463347, 71 IDELR 42 (D.N.J. Nov. 14, 2017) (remanding for determination of propriety of compensatory education relief if tuition reimbursement is found to be barred by failure of parents to give timely notice).

On the other hand, in some cases courts have found that needs for remediation may be met in the context of providing ongoing services. *See* Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 26, 47 IDELR 121 (1st Cir.2007). *But see* Boose v. District of Columbia, 786 F.3d 1054 (D.C. Cir. 2015) (holding that compensatory education claims demand something more than appropriate education that would be offered by an IEP that looks to the child's present abilities, rather than one aiming to undo damage done by prior violations of FAPE).

Prong Three: The Equities Do Not Counsel Denial or Reduction of Reimbursement

As noted at the outset of this paper, 20 U.S.C. § 1412(a)(10)(C)(iii) permits denial or reduction of reimbursement if the parent does not give timely notice of the rejection of the public program, with a statement of concerns and of intent to enroll the child in a private school at public expense, or if the parent does not make the child available for evaluation, or upon a judicial finding of unreasonableness. The statute goes on to provide:

> (iv) Exception
>
> Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement--
>
> (I) shall not be reduced or denied for failure to provide such notice if--
>
> (aa) the school prevented the parent from providing such notice;
>
> (bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if--

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

Even before the 1997 Amendment was enacted, the Supreme Court indicated that courts when ordering reimbursement "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Carter*, 510 U.S. at 16 (1993).

These provisos form the background for a discussion of questions that may arise concerning the reduction or denial of reimbursement on the basis of the equities of the case.

What notice must the parents provide the public school system?

The statute is grammatically awkward but nonetheless specific as to the notice obligations of the parents: The parents must "inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense." The notice may be simply offering criticisms of the district's proposal and some statement of intent. *See* A.W. v. New York City Dep't of Educ., No. 15-CV-3534 (VSB), 2018 WL 1027435, 71 IDELR 198 (S.D.N.Y. Feb. 21, 2018) (finding that parents sufficiently voiced their objections to defendant's proposed program at IEP meeting and informed defendant of their intent to place child at private school for relevant school year). In *M.G. v. District of Columbia*, 246 F. Supp. 3d 1, 69 IDELR 246 (D.D.C. 2017), cited above, the court held that giving a ten-day notice of unilateral placement was not required when no public school placement existed. With respect to the notice provision, the fact of enrollment is not significant if adequate notice of removal is provided. *See* Letter to Miller, 55 IDELR 293 (OSEP 2010) ("Thus, removal and not enrollment, establishes the regulatory benchmark when determining compliance with the parental notice provision.").

The reality remains that very vague indications of intention will not suffice. *See, e.g.,* Shipler v. Maxwell, No. JFM 08–2057, 2009 WL 2230026, 52 IDELR 279 (D. Md. 2009) (finding that statement by parents that they were exploring private schools was not adequate, nor was informing principal after beginning of school year).

Does failure to provide the ten-day notice necessarily bar tuition reimbursement?

The denial or reduction of tuition reimbursement on the ground that the parent failed to provide notice of a private placement ten days before removal is discretionary, and an award of full tuition reimbursement may be given even though the parents did not give timely notice. Board of Educ. of Wappingers Cent. Sch. Dist. v. M.N., No. 16-CV-09448(TPG), 2017 WL 4641219, 71 IDELR 9 (S.D.N.Y. Oct. 13, 2017) (affirming SRO's determination that equitable considerations favored reimbursement, noting that reduction in reimbursement for noncooperation, including not providing notice of private placement ten days before removal, is discretionary), *appeal dismissed*, No. 17-3707 (2d Cir. Feb. 28, 2018); *see also* H.L. v. Marlboro Twp. Bd. of Educ., No. 16–9324, 2017 WL 5463347, at *8, 71 IDELR 42 (D.N.J. Nov. 14, 2017) (remanding case when ALJ denied reimbursement due to parental failure to make timely notification but failed to justify total denial of award and specifically "did not explain the extent to which Defendant was prejudiced by receiving late notice of Plaintiffs' decision."). One court has reduced an award by 10% in the exercise of discretion. Wood v. Kingston City Sch. Dist., No. 1:08–CV–1371, 2010 WL 3907829, 55 IDELR 132 (N.D.N.Y. 2010). A greater reduction may be imposed under more extreme circumstances. *See* J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011) (75%).

What failures on the part of the school district in providing notice will excuse parental notice?

A failure to provide the parents a copy of the proposed IEP before the beginning of a school year and failure to provide the parents a chance to inquire as to the resources of the proposed school placement to implement the IEP were found to excuse late notice on the part of the parent. C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 63 IDELR 126 (S.D.N.Y. 2014) (parents sent notice nine days before removing child); *see also* M.G. v. District of Columbia, 246 F. Supp. 3d 1, 69 IDELR 246 (D.D.C. 2017) (cited above).

What constitutes likely physical harm so as to excuse notice?

A case of interest on this point is *J.M. v. Kingsway Regional School District*, No. Civ. 04–4046, 2005 WL 2000179, 44 IDELR 43 (D.N.J. 2005). There the court denied the school district's summary judgment motion on the reimbursement claim, reasoning that evidence existed that the child, who had an adjustment disorder and conduct disturbance, was a danger to himself, and that the parent believed she was threatened by him); *see also* Fort Bend Indep. Sch. Dist. v. Z.A., 62 IDELR 231 (S.D. Tex. 2014) (granting full tuition reimbursement despite lack of notice in light of danger of student's suicide and no negative impact from absence of notice).

When will failure to make a child available for evaluation lead to reduction or denial of reimbursement?

A court has denied reimbursement on this ground, despite the argument that consent was justifiably refused because (1) the school district did not identify the child as eligible solely on the basis of a hospital discharge form, (2) the proposed evaluator was a psychologist rather than psychiatrist, and (3) the parent believed that the evaluation would be harmful but the only evidence on harm was that an improper evaluation would be harmful and the hearing officer found that the real reason the parents refused consent was that they feared the evaluator would not be impartial and would make a recommendation with which they disagreed. P.S. v. Brookfield Bd. of Educ., 353 F. Supp. 2d 306, 42 IDELR 204 (D. Conn. 2005), *aff'd*, 186 F. App'x 79, 106 LRP 68984 (2d Cir. 2006).

Must the tuition actually have been paid?

The short answer is no, as long as the liability has been accrued in some fashion. *See* A.W. v. Board of Educ. of the Wallkill Cent. Sch. Dist., No. 1:14–CV–1583, 2016 WL 4742297, 68 IDELR 164 (N.D.N.Y. Sept. 12, 2016) (granting full tuition reimbursement for all three years despite financial assistance to parents from Kildonan School, when parents remained legally obligated to pay), *appeal withdrawn*, No. 16-3464 (2d Cir. Nov. 23, 2016). If someone other than the parent paid, an award is still proper. *See* School Dist. of Phila. v. Kirsch, Nos. CV 14-4910, CV 14-4911, 2016 WL 3092082 (E.D. Pa. June 1, 2016) (granting reimbursement to parents when private school tuition was advanced by grandparent rather than furnished by parents themselves), *adopting* 2016 WL 3101964, 116 LRP 16206 (E.D. Pa. Apr. 21, 2016) (magistrate judge recommendation), *aff'd in part and rev'd in part not relevant*, No. 17-1038, 2018 WL 707410, 71 IDELR 123 (3d Cir. Feb. 5, 2018) (unpublished).

How open must a parent be to the public school system's offer of services?

Courts generally employ a practical approach in considering whether a parent has behaved unreasonably by not being open to the school district's proposed placement and program for the child. On the one hand, a rigid refusal to cooperate and consider the school district's proposal counts as a negative for full reimbursement. *See* Rockwall Indep. Sch. Dist. v. M.C., 816 F.3d 329, 67 IDELR 108 (5th Cir. 2016) (affirming reversal of reimbursement award, stating that parents acted unreasonably during IEP development process by refusing to attend meetings after first meeting at which parent demanded private placement, and parent adopted all-or-nothing approach which caused breakdown of process). On the other hand, simply maintaining a firm view of what the child needs does not bar recovery. *See* N.R. v. Department of Educ. of the City Sch. Dist. of the City of New York Dep't of Educ., No. 07 Cv. 9648, 2009 WL 874061, 52 IDELR 92 (S.D.N.Y. 2009) (holding that failure to notify school system of parent's arrangements for enrollment of child in private placement did not bar reimbursement when school system did not offer appropriate education and parent's actions did not impede IEP process).

Does Making Arrangements with a Private School Affect Reimbursement?

In light of the difficulty in finding a unilateral placement in time for the beginning of a given school year, making arrangements with a private school does not necessarily show a lack of receptiveness to public school options. S.C. v. Katonah-Lewisboro Cent. Sch. Dist., 175 F. Supp. 3d 237, 67 IDELR 184 (S.D.N.Y. 2016) (finding equities to favor reimbursement, even though parents entered into private school enrollment contract before IEP was offered, in light of fear of losing enrollment slot), *aff'd sub nom.* J.C. v. Katonah-Lewisboro Cent. Sch. Dist., 690 F. App'x 53, 70 IDELR 2 (2d Cir. 2017); Board of Educ. v. Bauer, No. CIV. JFM–99–3219, 2000 WL 1481464, at *4 n.7, 33 IDELR 267, (D. Md. 2000) (["W]e reject the district court's conclusion of 'unreasonableness' as a matter of law because, on the present record there is a significant disputed factual issue of whether [the child's] parents were gaming the system to extract free tuition for private school, or simply hedging their bets when faced with a demonstrably under-resourced public school system (one that, as it turns out, generated only an 'interim' IEP by the start of [the] school year)"); *see also* Leggett v. District of Columbia, 793 F.3d 59, 65 IDELR 251 (D.C. Cir. 2015) (requiring reimbursement, stating that boarding school, even if not strictly necessary, was reasonably calculated to provide educational benefits and was needed in that it was only placement on record and school district failed to offer timely IEP); G.S. v. Fairfield Bd. of Educ., No. 3:16-CV-1355, 2017 WL 2918916, 70 IDELR 93 (D. Conn. July 7, 2017) (reversing finding that reimbursement ought to be denied on equitable considerations, noting that hearing officer's conclusion should receive minimal deference, further noting that parent's resistance to participating in intake process for public school program occurred after school year had already begun and contract with private school had already been signed; finding that charges of duplicitous conduct were not supported and stating that subjective intent of parents does not matter without manifestation of intent).

What factors are relevant to reasonableness determinations as to the cost of the unilateral placement?

In a recent decision, Judge Nathan of the Southern District of New York pointed out that *Carter* "did not provide much in the way of guidance for lower courts, other than to indicate that '[t]otal reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.'" L.K. v. New York City Dep't of Educ., No. 14-cv-7971, 2016 WL 899321, at *5, 67 IDELR 123 (S.D.N.Y. Mar. 1, 2016) (quoting *Carter*, 510 U.S. at 16), *aff'd in part & remanded in part*, 74 F. App'x 100, 69 IDELR 90 (2d Cir. 2017). The district court agreed with the parents in that case that courts often ask whether the parents acted in good faith, and quoted an opinion by Judge McMahon listing as considerations:

> [W]hether the parents cooperated with the CSE (e.g., providing reports, attending the meeting, participating in the meeting); whether the parents timely notified the school district of their intent to place their child in a private school; whether the parents visited the DOE's proposed placement; whether the parents intended to genuinely consider a proposed public

> placement, or whether they would have kept their child in private school regardless of the proposed public placement; whether the parents or the DOE unreasonably delayed anything; and the appropriateness of the DOE's conduct.

GB v. N.Y.C. Dep't of Educ., 145 F. Supp. 3d 230, 257, 66 IDELR 223 (S.D.N.Y. Nov. 5, 2015) (internal citations omitted), (quoted in *L.K.*, 2016 WL 899321, at *6).

The *L.K.* court nevertheless concluded that even when parents act in good faith, courts have the power to award less than full reimbursement, and if services privately obtained are beyond those the school system would have been required to provide, reimbursement may be reduced accordingly. Typically, however, private services are embedded in an entire program. Judge Nathan cited B*oard of Education of the City School District of the City of New York v. Gustafson*, No. 00-CV-7870, 2002 WL 313798, 36 IDELR 98 (S.D.N.Y. Feb. 27, 2002), and interpreted the rule it articulated as:

> [W]hen a school district fails to provide a FAPE, parents that place their children in private programs will often end up paying for services that go beyond what the school district would have been required to provide if it had fulfilled its obligations under the IDEA in the first place. Parents should not be denied full reimbursement in each of these cases, as that would unfairly punish parents for finding an appropriate private placement. Rather, parents' reimbursement should only be reduced if there are identifiable services, whose costs can reasonably be estimated, that are segregable from the rest of the private program and that exceed the services that constitute a FAPE.

*L.K.*, 2016 WL 899321, at *7. Third Circuit and Ninth Circuit precedent appears to be in accord. *Id*.

As an additional matter, the state of the local market for specialized services necessarily affects whether costs incurred were reasonable and so ought to be fully reimbursed. L.K. v. New York City Dep't of Educ., 674 F. App'x 100, 69 IDELR 90 (2d Cir. 2017) (remanding for determination whether amount offered by school system to reimburse parents for costs of services covered by pendency order was reasonable in light of New York City market rates for service providers).

Additional Reference: Mark C. Weber, "Reimbursement of Tuition and Other Costs," *Special Education Law and Litigation Treatise* § 22.3(4) (LRP Pubs. 4th ed. 2017).

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