RESIDENTIAL PLACEMENT ISSUES UNDER THE IDEA

NYS IDEA IMPARTIAL HEARING OFFICER TRAINING – WEBINAR 3
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Among the most contentious cases that Impartial Hearing Officers must resolve are those that concern parental requests for residential placement for their children or reimbursement for a residential program the parents have already put into place. This outline discusses:

- Relevant Provisions of the Individuals with Disabilities Education Act, the Federal Regulations, and New York Statutes and Regulations
- Standards for Residential Placement
- Least Restrictive Environment Concerns
- Concerns over Medical Services and Placements in Psychiatric Hospitals
- Placements Not Approved by State Education Authorities
- Reimbursement Issues

<u>The IDEA, the Federal Regulations, and New York Law and Regulations</u>

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, school districts must offer children with disabilities free, appropriate public education. 20 U.S.C. § 1412(a) requires that states must ensure that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." A free, appropriate public education means:

> [S]pecial education and related services that--
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9).

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Under the applicable regulations, school districts and states need to offer a continuum of alternative placements that includes special schools and instruction in institutional settings:

> Continuum of alternative placements.
>
> (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
>
> (b) The continuum required in paragraph (a) of this section must—
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> (1) Include the alternative placements listed in the definition of special education under § 300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
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> (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. § 300.115.

The IDEA regulations specifically provide for residential placements, and declare that such a placement must be free to the parent, including the costs of room and board:

> If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

34 C.F.R. § 300.104. Various cases enforce this provision, requiring that maintenance or similar charges not be imposed on parents of children placed by state agencies or school districts in residential settings. *See, e.g.,* Parks v. Pavkovic, 753 F.2d 1397, 1406, 556 IDELR 372 (7th Cir. 1985).

State law has a number of provisions that bear on residential placement. N.Y. Education Law § 4401(3) provides for "maintenance," which is "the amount charged for room and board and allocable debt service as determined by the commissioner for the living unit of the residential facility by a residential school and such reasonable medical expenses actually and necessarily incurred by a handicapped child while actually in attendance at a residential school, provided that such medical expenses shall be for diagnostic, evaluative, educationally related, and emergency care services as defined by regulations of the commissioner. Such amount, which shall not include expenses which are otherwise reimbursable to a residential facility by a federal, state or local agency, shall be approved by the commissioner of social services and the director of the division of the budget and shall not be otherwise payable or reimbursable."

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Subsection (4) of § 4401 defines "Transportation expense," which means "any cost incurred by the school district for the transportation of a handicapped child pursuant to the provisions of subdivision 4 of section 4402 of this article, notwithstanding any minimum or maximum aidable limits established by other provisions of the education law or pursuant to regulations of the commissioner or school district, allowed pursuant to the applicable provisions of parts 2 and 3 of article 73 of this chapter, provided, however, that such transportation shall not be in excess of 50 miles from the home of such pupil to the appropriate special service or program unless the commissioner shall certify that no appropriate non-residential special service or program is available within such 50 miles, and that the commissioner may establish by regulation a maximum number of trips between a pupil's home and the private residential school which provides special services or programs to such pupil. Such cost shall include the cost of joint or regional transportation provided by school districts or boards of cooperative educational services for such purposes and subject to the same limits."

Out of state placements, which may be residential, are provided for in § 4407:

> 1.a. When it shall appear to the satisfaction of the department that a child with a handicapping condition is not receiving instruction because there are no appropriate public or private facilities for instruction of such a child within this state because of the unusual type of the handicap or combination of handicaps as certified by the commissioner, the school district of which each such pupil is a resident is authorized to contract with an educational facility located outside the state, which, in the judgment of the department, can meet the needs of such child for instruction. Contracts, rates, payments and reimbursements pursuant to this section shall be in accordance with section 4405 of this article.
>
> . . .
>
> 2. The state education department shall maintain a register of such educational facilities which are outside of the state which, after inspection, it deems qualified to meet the needs of certain children for instruction pursuant to subdivision one of this section.

The New York regulations on special education, 8 NYCRR § 200.6 discuss residential and other private placements in some detail:

> (j) In-state or out-of-state private schools.
>
> (1) State assistance for instruction of public school students placed in approved private schools. An application by a board of education for State reimbursement pursuant to section 4405 of the Education Law for a student in an in-state or out-of-state private school shall be approved by the commissioner provided that:

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(i) The committee on special education of the school district in which the student resides has provided a current individual evaluation or reevaluation of the student, as prescribed by section 200.4(b) of this Part. For purposes of this subparagraph, the individual evaluation and the classroom observation where applicable, and any other evaluations necessary to describe the relevant circumstances leading up to the recommendation and the basis for the recommendation for change of placement shall have been completed within six months prior to the committee on special education's initial recommendation for private school placement.

(ii) The committee on special education has provided a current individualized education program (IEP) for the student as required by section 200.4(d)(2) of this Part.

(iii) The committee on special education has certified that the student is of school-age and has a disability or combination of disabilities, and has further documented that the nature or severity of the student's disability is such that appropriate public facilities for instruction are not available. This documentation shall include, but need not be limited to:

(a) documentation of efforts to place the student in a public facility and the outcomes of those efforts, and/or of committee on special education findings regarding the lack of suitability of each currently available and geographically accessible public placement;

(b) documentation of all efforts to enable the student to benefit from instruction in less restrictive settings using support services and supplementary aids and special education services as set forth in subdivisions (d), (e), (f), (g) and (h) of this section, and/or for those services not used, a statement of reasons why such services were not recommended;

(c) detailed evidence of the student's lack of progress in previous less restrictive programs and placements or a statement of reasons that such evidence is not available;

(d) in the case of a recommendation by the committee on special education for placement of a student in a residential program, documentation that residential services are necessary to meet the student's educational needs as identified in the student's IEP, including a proposed plan and timetable for enabling the student to return to a less restrictive environment or a statement of reasons why such a plan is not currently appropriate;

(e) in the case of a recommendation by the committee on special education for placement of a student in an educational facility outside of the State,

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documentation that there are no appropriate public or private facilities for instruction available within this State;

(f) in the case of a reapplication for reimbursement, documentation of the continuing need for placement of the student in a private school. . . .

Several other provisions of the state regulations also bear upon residential placement. The topic of approval of private schools is addressed in § 200.7. Section 200.8 concerns funding for placements pursuant to N.Y. Educ. Law § 4406 (procedures through the family court; cost of certain educational services) and § 4410 (special education services and programs for preschool children).

Standards for Residential Placement

The standard for residential placement under the IDEA is essentially that of the obligation to provide free, appropriate public education (FAPE). If the child needs residential placement to obtain a FAPE, the school district must provide it. Hence the question is governed by the two Supreme Court cases interpreting the FAPE requirement, *Rowley v. Board of Education,* 458 U.S. 176, 553 IDELR 656 (1982), and *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 69 IDELR 174 (2017). The Supreme Court's decision in *Endrew F.* vacated and remanded a Tenth Circuit decision that had applied a "merely more than de minimis" standard for determining what constitutes appropriate education. The Court relied on the understanding of the appropriate education obligation articulated in *Rowley*, and said that "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 998. The child's IEP must be "appropriately ambitious in light of his circumstances . . . every student should have the chance to meet challenging objectives"; the standard is "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit" in the case before the Court. *Id.* at 1000.

Many cases apply the basic standard for appropriate education to require residential placements or to order reimbursement of parents who undertook the placements unilaterally. An example is *Independent School District No. 284 v. A.C.*, 258 F.3d 769, 35 IDELR 59 (8th Cir. 2001), where the court upheld a residential placement of a student with emotional and behavioral disorders who "used alcohol and illegal drugs, was sexually promiscuous, repeatedly ran away from home, was thought to have forged checks, and was hospitalized three times for threatening or attempting suicide." *Id.* at 771. The parent unsuccessfully tried to obtain a residential placement through the juvenile court, and the school offered a self-contained class for students with emotional problems, which the student refused to attend, and homebound services, which were also unsuccessful. The district offered to pay for educational costs of a residential placement, but that was only about one-third of the expense. An independent evaluator traced the student's educational problems to her psychological difficulties and recommended a secure facility largely to prevent truancy; a private psychologist found the student had borderline personality development. The hearing officer ordered a residential placement, the review officer affirmed, but the district court reversed.

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The court of appeals reversed that judgment and affirmed the residential placement decision. The court said there was much to agree with in the district court's assessment that the student was unwilling but not unable to attend school and comply with her IEP, but concluded, "We do not believe, however, that the analysis can be limited to a stark distinction between unwillingness and inability to behave appropriately." *Id*. at 775. "Read naturally and as a whole, the law and the regulations identify a class of children [with emotional disturbance] who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations." *Id*. at 775-76. The court said it did not agree that a problem resulting from disability can be separated from the learning process if it is not primarily educational, *id*. at 777 (disagreeing with Dale M. v. Board of Educ. of Bradley–Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813, 817, 33 IDELR 266 (7th Cir.2001)); instead, it declared, "What should control our decision is not whether the problem itself is 'educational' or 'non-educational,' but whether it needs to be addressed in order for the child to learn," *id*.

Applying the test of whether the placement was needed for the student to learn, the court stated:

> The remaining question, then, is whether A.C. can reasonably be expected to make academic progress outside of a residential program. If we regard this as an educational question, there appears to be a consensus in the negative. A.C.'s treating psychologist, her IEE evaluator, her old district's school psychologist, her mother, and both state hearing officers all have reached the conclusion that a residential placement is necessary in order for A.C. to get an education. It is true that the evaluator testified that a day program like the one recommended by the District "would educationally meet [A.C.'s] needs," Hearing Transcript at 621, but it is clear from the context that this remark referred only to the appropriateness of the kind of instruction provided and not to the "related services."

Id.

Applications of the FAPE standard, simpliciter, to residential placement questions go back to some of the very first leading opinions under the federal special education law. *See, e.g.,* Abrahamson v. Hershman, 701 F.2d 223, 226–27, 554 IDELR 403 (1st Cir. 1983) ("The central question before us is whether or not the district court erred in finding that the IEP proposed by [the school board] failed to afford Daniel with a 'free appropriate public education' as defined by the Act because Daniel required some form of residential care in order to achieve educational progress. . . . In the instant case, however, the district court did not order residential care in order to maximize Daniel's potential. Rather the court found that educational benefits which could only be provided through residential care were essential if Daniel was to make any educational progress at all. Daniel's unique condition was found to demand that he receive round-the-clock training and reinforcement. Given the evidence before the district court, see supra, we cannot say that this conclusion was clearly erroneous."); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 140, 551 IDELR 157 (D.D.C. 1979) (granting preliminary injunction; stating "under applicable laws and regulations the educational authorities

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have the clear duty to place a school-age child in a residential facility when that is necessary in order to provide him with the appropriate educational program.").

In contrast to the approach that simply asks if the residential placement is needed for the child to make adequate educational progress, some courts have adopted an approach that looks to the underlying purposes of the placement and tries to determine whether it is educational (thus required under the IDEA and free of charge to the parents) or some other purpose (not required under IDEA and at least some costs may be imposed on the parents). A recent example is *M.S. v. Los Angeles Unified School District*, 913 F.3d 1119, 73 IDELR 195 (9th Cir. 2019). The court adopted the opinion of the district court, which held that the student, a ward of the superior court and Department of Child and Family Services, who had mental health needs and history of violent actions, was denied appropriate education when the school district failed to consider whether residential placement should have been offered to her. The court said that the school district should have considered whether the placement ought to have been offered for educational purposes as part of her IEP, even though a county agency had placed her residentially for mental health treatment under state law, pursuant to an order of the juvenile court. The court said that the school district had an independent obligation to ensure that a continuum of placements was available to meet the student's educational needs, and to consider whether residential placement was necessary for educational reasons. In requiring consideration of the placement by the school district, the court proceeded from the premise that the IDEA would require residential placement only if it were justified by educational reasons rather than other needs:

> Generally, in order to determine whether a residential placement under the IDEA is necessary to provide a student a FAPE, the relevant analysis in the Ninth Circuit must focus on whether the residential placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process.

Id. at 1136 (internal quotation marks, italics, and brackets omitted).

This educational-purposes approach has met with criticism, however. In *Jefferson County School District R-1 v. Elizabeth E.*, 702 F.3d 1227, 60 IDELR 91 (10th Cir. 2012), the court affirmed a reimbursement award for a placement of a student with significant learning disabilities and emotional and behavioral issues at Innercept, an out-of-state residential treatment center, following a psychiatric hospitalization. The court held that the district failed to offer appropriate education, that the treatment facility provided specially designed its instruction to meet the unique needs of the student, and that additional services the treatment facility provided could be characterized as related services under the IDEA. The court compared several appeals court decisions and said they broke down into "the so-called 'inextricably intertwined' approach of the Third Circuit or the 'primarily oriented [toward enabling a child to obtain an education]' standard of the Fifth and Seventh Circuits." *Id*. at 1237 (footnotes omitted). Looking directly to Supreme Court precedent and the text of the IDEA, the court said it should not apply either. Instead, declared the court:

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> The plain language of the Act . . . supplies the appropriate framework through which to determine whether a unilateral private school placement without the consent of or referral by the school district is reimbursable. A court or hearing officer must:
>
> (1) Determine whether the school district provided or made a FAPE available to the disabled child in a timely manner; if it did, the unilateral parental placement is not reimbursable. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); then
>
> (2) Determine whether the private placement is a state-accredited elementary or secondary school; if not, the placement is not reimbursable. *Id.* §§ 1412(a)(10)(C)(ii), 1401(27); then
>
> (3) Determine whether the private placement provides special education, i.e., "specially designed instruction ... to meet the unique needs3 of a child with a disability"; if the placement provides no such instruction, it is not reimbursable. *Id.* § 1401(29)(A).
>
> (4) If the private placement provides additional services beyond specially designed instruction to meet the child's unique needs, determine whether such additional services can be characterized as "related services" under the Act, i.e., "transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education," excepting medical services which are not for diagnostic and evaluation purposes. *Id.* § 1401(26). If the additional services cannot be so characterized, they are not reimbursable.

Id. at 1236-37. Essentially, then, the court asked whether the child needs the residential placement in order to learn and whether the services provided by the placement are special education and related services covered under the Act. "Because the placement at Innercept provided both specially designed instruction to meet Elizabeth's unique needs and services required for her to benefit from that instruction, the district court properly concluded it was reimbursable." *Id.* at 1239.

For its part, the Second Circuit has adopted the view that "In deciding if a school must fund a residential placement, the court must determine whether the child requires the residential program to receive educational benefit." *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1122, 25 IDELR 217 (2d Cir. 1997) (citing, among other authorities, *Abrahamson v. Hershman,* 701 F.2d 223, 227–28 (1st Cir.1983)). The *Mrs. B.* court rejected the idea that the emotional nature of the problems interfering with the child's education meant that residential placement was not required by the Act:

> The defendants simply miss the issue by relying on the hearing officer's conclusion that they were not obligated to pay for anything other than the educational portion of M.M.'s residential program because M.M. was placed in that program by DCYS for "non-educational reasons." . . . If institutionalization is required due to a child's emotional problems, and

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> the child's emotional problems prevent the child from making meaningful educational progress, the Act requires the state to pay for the costs of the placement.

Id.

Mrs. B. relied on a prominent case from the Southern District of New York, *Vander Malle v. Ambach*, 667 F. Supp. 1015, 559 IDELR 164 (S.D.N.Y. 1987), *see* Mrs. B. v. Milford Bd. of Educ., 103 F.3d at 1122 (2d Cir. 1997), which involved a student with chronic schizophrenia and a history of self-mutilation, emotional outbursts, and assaults against his parents and others. After he was disenrolled from several placements, the school district placed him at a facility described as "an accredited psychiatric hospital which is fully staffed to treat a broad range of mental and nervous disorders," *Vander Malle*, 667 F. Supp. at 1020, that offered educational and therapeutic programs, but the district paid only for what it described as tuition costs, and said that the placement had not accepted the state rate for maintenance costs. The parents sought reimbursement and other damages.

The court held that all but purely medical services defined as provided by physicians had to be reimbursed. The court said that the Act provided for residential placement "when such placement may be necessary to meet the individual needs of a handicapped child," and that included "room, board, and related services . . . at no cost to the child's parents." *Id.* at 1038. "States may not escape responsibility for the costs properly associated with a residential placement simply by stating that the placement addresses physical, emotional, psychological, or behavioral difficulties rather than or in addition to educational problems." *Id.* at 1039. "As long as the child is properly educable only through a residential placement, when the medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem, the states remain responsible for the costs of the residential placement." *Id.*; *see also* North v. District of Columbia, *supra* at 141 ("It may be possible in some situations to ascertain and determine whether the social, emotional, medical, or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them.").

The approach used by the Second Circuit does not guarantee that residential schooling will be found to be needed to provide appropriate education, even in cases where children have quite significant needs. *See, e.g.,* Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 131, 27 IDELR 1135 (2d Cir. 1998) (in case concerning child with learning disability, ruling that school district program was adequate when child made "impressive" academic and behavioral progress there, so the case was "completely distinguishable from *Mrs. B.*"); *see also* Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 40 IDELR 2 (2d Cir. 2003) (applying *Rowley* and least restrictive environment principles to reject private placement; not specifying if placement was day or residential).

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Similar approaches to that of the Second Circuit in *Mrs. B.* can be found in other decisions. *See, e.g.*, Parks v. Pavkovic, 753 F.2d 1397, 1405-06, 556 IDELR 372 (7th Cir. 1985) ("[T]he courts that have considered the question have rejected the argument that a state can avoid its obligations under the Act by showing that the child would have had to be institutionalized quite apart from educational needs that also required institutionalization."); Board of Educ. of the City of Chi. v. Illinois State Bd. of Educ., No. 13 C 2782, 2013 WL 5477596, 62 IDELR 53 (N.D. Ill. Oct. 1, 2013) (upholding reimbursement order for two residential placements undertaken for student with depression and ADHD who received both college-preparatory academic instruction and substance abuse treatment there). *But see* Dale M. v. Board of Educ. of Bradley–Bourbonnais High School Dist. No. 307, 237 F.3d 813, 817, 33 IDELR 266 (7th Cir. 2001) (denying reimbursement for residential program not providing psychological services to student and deemed by court to be a "jail substitute"; adopting separation-of-needs approach criticized in *Elizabeth E.*).

A number of district court cases in New York have applied the appropriate-education test to conclude that residential placements were not needed for children to make adequate educational progress. In *D.B. v. Ithaca City School District*, No. 5:14-CV-01520, 2016 WL 4768824, 68 IDELR 161 (Sept. 13, 2016), *aff'd*, 690 F. App'x 778, 70 IDELR 1 (2d Cir. 2017), the court concluded that the IEP offered by the school district "was reasonably calculated to enable L.B. to receive educational benefits in the least restrictive environment possible" without the residential placement that the parents thought necessary to address the needs of a student with a nonverbal learning disability. *Id.* at *5. The nonprecedential court of appeals opinion further stated that a witness the parents said testified that the school district program was not appropriate in fact was less than clear. 690 F. App'x at 783; *see also* J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., No. 12-CV-2896, 2013 WL 3975942, at *14, 61 IDELR 219 (S.D.N.Y. Aug. 5, 2013) (rejecting claim for reimbursement for residential placement for student with ADHD and learning disorder when district offered elaborate set of modifications and accommodations in general education classroom, stating "I understand why the Parents may feel that Eagle Hill is the best placement for their child, but I am bound by the IDEIA, which does not require the best placement, just one at which the student may make educational progress—that is, one likely to produce progress, not regression.").

In *S.H. v. Eastchester Union Free School District*, No. 10 CV 03927, 2011 WL 6108523, 58 IDELR 46 (S.D.N.Y. Dec. 8, 2011), the court affirmed administrative determinations that the public school program featuring significant specialized services was adequate and that the parent should not be reimbursed for a unilateral residential placement for a child with emotional disturbance and a reactive attachment disorder. The court relied on the SRO's finding that the student "made some progress" at the public school in the previous year and said the progress "belies S.H.'s claim that W.H. requires a residential placement in order to be afforded educational benefit." *Id.* at *11. The court further stressed principles of education in the least restrictive environment.

C.T. v. Croton-Harmon Union Free School District, 812 F. Supp. 2d 420, 57 IDELR 37 (S.D.N.Y. 2011) involved a 12th-grader with anxiety, depression, substance abuse and a record of violent behavior. His parents placed him in a wilderness program

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in Utah where he did well academically, graduated, and despite some difficulties toward the end of his time there, improved significantly in his behavior. The court, however, affirmed the SRO's decision that previous time away from the public school setting had worked enough improvement that "the weight of the evidence demonstrated that M.T. had progressed significantly in his months away from CHHS and could return to the high school with the benefit of increased support services and more structure to his school day." *Id.* at 433. Moreover, he had performed well academically while in a non-residential setting for his first two years of high school. The court also felt that concerns over a potential relapse into substance abuse did not justify reimbursement. *See also* P.K. v. Bedford Cent. School District, 569 F. Supp. 2d 371, 387, 50 IDELR 251 (S.D.N.Y.2008) ("[W]hile a residential placement may have been the most effective way to treat [the student's] substance-abuse problem, that treatment was not the District's responsibility."). The *P.K.* case appears to depart from the *Mrs. B.* approach in separating the educational and non-educational needs of the student, reasoning that the student's difficulties in the district's therapeutic program were caused by substance abuse, not the inappropriateness of the placement. *See also In re* Student with a Disability, No. 10-079, 110 LRP 67594 (N.Y. SRO Jan. 15, 2010) (rejecting claim for reimbursement of residential placement, stating that main reason for placement was student's behavior at home).

An administrative decision, *In re Student with a Disability*, No. 09-130, 110 LRP 7288 (N.Y. SRO Jan. 15, 2010), rejected a request for a residential placement, finding that a student with reactive attachment disorder who displayed emotional and behavioral problems made progress in a non-residential setting with extensive accommodations and services, and cited evidence that a residential setting could exacerbate his condition.

Factors deemed relevant to the residential placement determination by these New York courts thus included the lack of clarity of the expert testimony in support of the need for residential placement (*D.B.*), the depth of interventions offered in a nonresidential setting (*J.C.S.*, *S.H., Case No. 09-130*), least restrictive environment concerns (*S.H.*; see next section below), and judicial attitudes concerning responsibilities for drug abuse treatment (*C.T.*, *P.K.*). The holdings in these cases about whether the programs offered by the school districts actually provided appropriate education should, of course, be treated with caution in light of the recent clarification of the FAPE standard in *Endrew F.*

<u>Least Restrictive Environment Concerns</u>

Providing education in a residential setting would appear, at least in some instances, to be in tension with the obligation to educate children with disabilities with children who do not have disabilities, to the maximum extent appropriate. Nondisabled children are not frequently found in residential settings in which children with disabilities are placed because they need to be there to learn. As courts have pointed out, however, the way to resolve the tension between the need to provide appropriate education and the need to educate children with disabilities with those without disabilities is to offer related services to the children with disabilities in the integrated setting. *Oberti v. Board of Educ.*, 995 F.2d 1204, 1214, 19 IDELR 908 (3d Cir. 1993)

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("The key to resolving this tension appears to lie in the school's proper use of 'supplementary aids and services'"). When that can be accomplished satisfactorily, there will be no need for a residential setting that does not include children without disabilities. In *Walczak v. Florida Union Free School District*, 142 F.3d 119, 132, 27 IDELR 1135 (2d Cir. 1998), noted above in connection with the Second Circuit's general approach to residential placement cases, the court declared: "While some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. IDEA's preference is for disabled children to be educated in the least restrictive environment capable of meeting their needs."

Nevertheless, the IDEA recognizes that there are children who need residential settings. As the court noted in *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 24 IDELR 68 (9th Cir. 1996), *abrogation on other grounds recognized*, Department of Educ. v. Patrick P., 609 F. App'x. 509, 510 (9th Cir. 2015), a school district was not entitled to attempt to day-school a child when it had already recognized the child's serious problems for several years and had tried multiple nonresidential interventions. The court stated:

> The School District contends that day-schooling should have been attempted before the more restrictive proposal of residential placement was ordered. However, even though the School District had not previously identified A.S. as disabled, it had recognized her serious problems and been attempting various forms of intervention to no avail for several years. A.S.'s problems were becoming progressively more severe. The experts testified that A.S. was at a crucial age and any further delay in getting her appropriate placement would significantly worsen her chances of improvement. The IDEA does not require A.S. to spend years in an educational environment likely to be inadequate and to impede her progress simply to permit the School District to try every option short of residential placement.

Id. at 1501.

The obligation to provide a continuum of alternative placements, 34 C.F.R. § 300.115, is a further recognition that residential settings will be needed for some children despite least restrictive environment concerns. In *M.S. v. Los Angeles Unified School District*, cited above as an example to the Ninth Circuit's general approach to residential placement in contrast to the approach of the Second Circuit's *Mrs. B.*, the court of appeals specifically pointed out the school district "had an independent obligation to ensure that a continuum of alternative placements was available to meet M.S.'s educational need," before it went on to adopt the entirety of the district court decision. 913 F.3d at 1121 (internal quotation marks and brackets omitted).

There are some instances in which the decision maker – IHO or judge – is uncertain whether the child can be educated satisfactorily in a setting less restrictive than a residential one, but where the parent did not appear to have any other good option at the time he or she undertook a unilateral placement in a residential setting,

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and so the IHO or judge rules that the placement must be reimbursed. In *Leggett v. District of Columbia*, 793 F.3d 59, 65 IDELR 251 (D.C. Cir. 2015), the school system promised services over the summer, but then failed to provide them and did not actually put an IEP in place until two weeks into the fall semester, by which time the parent had placed the child residentially. The court held that even if the residential setting was not strictly necessary for the child to obtain educational benefits, it was the only placement on record that could meet the child's needs and had to be funded. *Id*. at 74.

Concerns over Medical Services and Placements in Psychiatric Hospitals

The IDEA regulations provide that medical services need be furnished free of cost when they are "for diagnostic and evaluation purposes only." 20 U.S.C. § 1401(26)(A). The Supreme Court, however, has construed this exception quite narrowly to cover only those services that must be provided by a licensed physician. *Irving Independent School District v. Tatro*, 468 U.S. 883, 553 IDELR 656 (1984), held that clean, intermittent catheterization was a related service and not excluded under the provision that medical services need to be provided only if they are for diagnostic purposes. The Court reasoned that services that may be provided by a nurse or other person with qualifications lesser than those of a physician are not excluded medical services. The Court followed the reasoning of *Tatro* in *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 29 IDELR 966 (1999), which held that a wide range of services had to be provided for a student who depended on a ventilator to breathe. The activities included bladder catheterization, suctioning in connection with tracheotomy care, ventilator maintenance (including air bag administration during maintenance), monitoring and observation, and other daily services. The Court reasoned that none of these activities needed to be performed by a licensed physician, and therefore the case was governed by *Tatro*'s precedent and the services had to be provided free of charge by the school.

Although some cases emphasize the medical services provided in a residential placement as a basis for concluding the placement is not covered by the IDEA's guarantee of free, appropriate public education, *see, e.g. Mary T. v. School Dist. of Phila.*, 575 F.3d 235, 52 IDELR 211 (3d Cir. 2009), others point out that the IDEA standard is whether the child needs a residential placement to learn, and that the IDEA requires all services be free except for those that are medical in the sense that a physician is the only one who can perform them, *see, e.g., Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1502, 24 IDELR 68 (9th Cir. 1996) ("That A.S.'s disability, like most disabilities under the IDEA, stems from medical or psychiatric disorders, . . . and that Intermountain's program addresses these disorders in an attempt to ensure that A.S. is able to benefit from her education, does not render the program invalid or remove the District's financial responsibility."). A previous Ninth Circuit case had held that the psychiatric hospital placement at issue there did not need to be provided free of cost to the parent. Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635, 16 IDELR 944 (9th Cir. 1990). But the *Clovis* court reasoned that the medical services exclusion should not be construed to apply only to those services provided by a licensed physician, *id*. at 643, a position that does not survive *Garret F.*

One court within the Ninth Circuit appeared to recognize the weakness of an approach to psychiatric placements that would deny reimbursement on the ground that

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a placement's services could be characterized as medical in nature. *Edmonds Sch. Dist. v. A.T.*, 299 F. Supp. 3d 1135, 71 IDELR 31 (W.D. Wash. Nov. 7, 2017), involved a student diagnosed with ADHD, oppositional defiant disorder, and schizophrenia, who was placed by his parents in a residential facility in Utah. The court affirmed an ALJ decision awarding tuition reimbursement, rejecting argument that placement was excluded medical service. The court rejected an expansive view of the medical exception:

> Just because a child would be capable of learning in a general education class without support if he were not disabled does not mean that any support given is "medical." There are many supportive services that treat or ameliorate the physical or mental impacts of a disability that are not, in and of themselves, educational but are defined as a covered "related service." Supportive services offered at Provo—including psychological services, therapeutic recreation, social work services, medication management, counseling, etc.—are specifically identified as "related services" in the Act and/or are the type of services that would be offered in the school nurse's office. The record shows that in order for these covered services to reach A.T., they must be offered in a structured residential setting to overcome the tendency toward elopement and truancy resulting from the "perfect storm" of his disabilities.

Id. at 1142-43 (footnote omitted).

Placements Not Approved by State Educational Authorities

In *Florence County School District 4 v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993), the Supreme Court ruled unanimously that parents are not barred from obtaining tuition reimbursement when they place their children in schools that lack state approval. The test is that the school district's placement did not offer appropriate education, and that the placement chosen by the parents did. The court noted that a variety of requirements that the IDEA imposes on public school placements would be impossible for private schools to meet, for example, the requirement that the education be under public supervision and direction, and that demanding the placement meet state educational standards would eliminate the reimbursement remedy altogether. It is also true that the parents lack any ability to require a state to approve a program if the state does not want to do so. The state agency in *Florence County* approved private placements on a case-by-case basis, and even those states that maintain public lists change the composition of the lists in response to administrative determinations that the parents do not control. Of course, "parents who . . . unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. . . . They 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 the Act." *Id.* at 15 (citation and internal quotation marks omitted).

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Reimbursement Issues

Many issues regarding reimbursement of parents for unilateral residential placements of their children overlap with reimbursement issues more generally. One such issue is that the parental placement may not be the least restrictive setting that could effectively serve the child, an issue explored above in connection with the appropriateness of non-residential settings when the parent desires a residential setting. Courts in reimbursement cases recognize that parents usually do not have the ability to place their children who have disabilities in mainstreamed settings when they opt for private education. Mainstreamed settings are typically found in the public schools, and a non-resident of a school district cannot ordinarily buy the child's way into those schools.

Accordingly, courts in private placement cases 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 that 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 of a number of factors in the determination whether a reimbursement award should be entered. *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 826, 836, 63 IDELR 1 (2d Cir. 2014); *see also* D.D.-S. v. Southold Union Free Sch. Dist., 506 F. App'x 80, 82, 60 IDELR 94 (2d Cir. Dec. 26, 2012) (stating that parent "has presented no evidence that this extremely restrictive residential immersion was appropriate for

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B.'s educational needs."); A.S. v. Board of Educ. of Shenendohowa Cent. Sch. Dist., No. 1:17-CV-0501, 2019 WL 719833, at *9, 73 IDELR 260 (N.D.N.Y. Feb. 20, 2019) (rejecting reimbursement for home-based program, stating, "Here, the only deficiency with the IEP the SRO identified was the district's failure to consider the extent to which its program constituted a removal from the general education setting in a manner inconsistent with A.S.'s LRE. . . . As the Court upholds the SRO conclusion that the only deficiency in the IEP was the LRE issue, the unilateral placement can only be regarded as proper, or appropriate, if the unilateral placement addressed that LRE deficiency. . . The parents' unilateral placement did not address this deficiency. The parents did not place A.S. in a more general education setting or in a plausibly less restrictive environment. Rather, the parents provided A.S. home-based instruction that removed him even further from a general education setting.").

A court may find, however, that the district's claim that a residential placement is too restrictive rings hollow. *Anchorage Sch. Dist. v. M.G.*, No. 3:17-cv-00157-SLG, 2018 WL 3015746, 72 IDELR 124 (D. Alaska June 15, 2018), *appeal dismissed*, No. 18-35574 (9th Cir. Mar. 27, 2019), concerned a student with autism, gastrointestinal problems, severe nonverbal intellectual disability, and an eye disease that would progressively tunnel his vision to near total blindness. The student's IEP provided for residential placement, with the location to be determined. Perkins School for the Blind, located in Massachusetts, was identified at a meeting subsequent to the IEP meeting as the only school that had a weekend program and the ability to serve a student with autism as well as visual impairments, but the district rejected the placement, eventually proposing homebound services, but not offering any available alternative residential placement. The parents filed for due process, placed the student at Perkins and sought payment of the tuition and other relief. The court affirmed a hearing officer decision ordering the school district to pay the tuition, ruling that the IEP providing for residential placement was binding, even when the precise location for the services was not identified in the IEP. Thus, the district denied the student FAPE by not promptly implementing his IEP. The court affirmed the hearing officer's exclusion of an opinion by the school district's expert witness that residential placement was not needed; it also affirmed the holding that various other schools identified by the district at hearing could not meet the student's needs.

Of course, reimbursement for residential or similar placements may be rejected on the ground that the services in the placement do not meet the child's needs, quite apart from considerations of least restrictive environment. *See* Ward v. Board of Educ. of the Enlarged City Sch. Dist. of Middletown, 568 F. App'x 18, 63 IDELR 121 (2d Cir. 2014) ("As to A.W.'s needs in math, the SRO observed that Franklin [the private school chosen by the parent] had not tried to [address] deficiencies when prior [efforts] failed, that A.W. performed worse in Franklin's less demanding consumer math class than in a more challenging math class at Glenholme during the prior school year, and that Franklin moved A.W. to a lower level math class rather than provide her with special instruction. As to A.W.'s behavioral deficits, the SRO observed that Franklin Academy failed to set goals for A.W. and that A.W.'s lack of emotional regulation negatively affected her academic performance as well as her interactions with others."); Omidian v. Board of Educ. of the New Hartford Cent. Sch. Dist., No. 6:05CV0398, 2009 WL

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890625, 52 IDELR 95 (N.D.N.Y. Mar. 31, 2009) (finding that child needed residential placement, but affirming SRO ruling that parental placement at Family Foundation did not meet child's needs when there was no evidence child received counseling or therapy from qualified professionals to address emotional and behavioral needs affecting educational progress); *In re* Student with a Disability, No. 14-015, 114 LRP 20327 (N.Y. SRO Mar. 18, 2014) (ruling that private school was not shown to provide specially designed instruction to address student's organizational needs, need to develop insight, and lack of coping skills related to anxiety and somatization).

Reimbursement cases involving schools not specifically identified as residential may involve similar considerations. *See* Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 48 IDELR 1 (2d Cir.2007) (denying reimbursement for parental placement of student in private school that did not provide special education services required by student's condition); Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 364–65, 46 IDELR 33 (2d Cir. 2006) ("No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. 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. They need only demonstrate that the placement provides 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.") (citations and internal quotation marks omitted).

On the other hand, before rejecting reimbursement for the placement, the hearing officer should give careful attention to all evidence concerning the student's progress in the residential setting. *See* I.W. v. Lake Forest High Sch. Dist. No. 115, No. 17 C 7426, 2019 WL 479999, 73 IDELR 236 (N.D. Ill. Feb. 7, 2019) (vacating hearing officer denial of reimbursement for residential placement at Eagle Hill School in Massachusetts on ground that hearing officer gave no attention to teacher narratives about student's progress there). S.B. v. Murfreesboro City Schs., No. 3-15-0106, 2016 WL 927441, 67 IDELR 117 (M.D. Tenn. Mar. 11, 2016) (in case of eight-year-old with behavioral disability enrolled by parent in residential placement at child and adolescent mental health center, ruling that school district placement was not appropriate when IEP required full-time special education behavior management teacher but teacher provided was not certified to teach special education; holding that residential placement was appropriate even though it was not approved as school by state and used treatment plan rather than IEP).

In cases where the IHO concludes that the district did not offer appropriate education, but there remains a dispute about whether the child needed the residential placement undertaken by the parent, it may be desirable to hear evidence about which costs are room and board costs or other expenses not needed to supply appropriate education. The information may be important in crafting the remedial order.

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Additional Reference: Mark C. Weber, "Private Placement," *Special Education Law and Litigation Treatise* § 6.4 (LRP Pubs. 4th ed. 2017).

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