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***785** TUITION AND RELATED REIMBURSEMENT UNDER THE IDEA: A DECISIONAL CHECKLIST [FNa1]

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In its ten major decisions under the Individuals with Disabilities Education Act (IDEA), [FN1] the Supreme Court has issued three concerning tuition reimbursement under the IDEA—*School Committee of Burlington v. Department of Education of Massachusetts* in 1986, [FN2] *Florence County School District Four v. Carter* in 1993, [FN3] and *Forest Grove v. T.A.* in 2009. [FN4] Meanwhile, after the first pair of these decisions, Congress codified this remedy in the 1997 Amendments, resulting in an elaboration of the equities step of *Burlington–Carter*; thus, as the checklist shows, the two–or three–part test can be viewed as a four–step framework. The 2004 Amendments and 2006 regulations made negligible refinements. [FN5] During the entire period tuition and related reimbursement has been a major area of IDEA adjudication at the hearing/review and lower court levels. [FN6]

***786** This checklist provides, in flowchart–like form, the criteria for reimbursement of tuition and related expenses [FN7] under the IDEA along with the applicable statutory, regulatory, and case law citations. [FN8] **The basic framework items, which are based on the IDEA legislation/ regulations and *Burlington–Carter*, are in bold font**, whereas the specific clarifications and examples from lower court case law are in regular font. Moreover, the checklist items are worded as neutral questions to avoid the issue of burden of proof, which may vary depending on state law. [FN9] Due to the various jurisdictional differences, the items within each of the uniform, multi–stepped framework are customized, by way of illustration, to the state with the most IDEA litigation [FN10] and, by far the most tuition reimbursement court cases [FN11]—New York; thus, the citations for the decisions of the Second Circuit and the federal district courts ***787** in New York are in grey highlighting. [FN12] Use of this checklist in particular circuits or states would warrant corresponding customization for applicable judicial interpretations and state legislation or regulations.

Burlington–Carter focuses on two appropriateness steps, based on the IDEA's central mandate for "free appropriate public education" (FAPE), with only brief attention—in what is generally characterized as the third step—to the equities. However, for its flowchart sequencing and decision–making specificity, the checklist extends to equitable considerations at the preliminary and concluding levels, thus consisting of four sequential items. The preliminary step is largely limited to timely notice. In contrast, the statutory language about "the child with a disability, who previously received special education ... under the authority of a [school district]" [FN13] is not included as a prerequisite step in light of the Supreme Court's *Forest Grove* decision. [FN14] Similarly, the coverage of the preliminary step does not extend to preliminary or ancillary adjudicative issues, which were not specific to the merits of tuition reimbursement analysis. [FN15]

A. PRELIMINARY EQUITIES [FN16] STEP:

1. Did the parent provide *timely notice* to the district—at either the most recent IEP meeting or in writing at least 10 business days before the parent's' "removal" of the child—of the rejection of the proposed placement, "including stating their concerns and their intent to enroll their child in a private school at public expense"? [FN17]

***788 Exceptions: If not, was the reason for the lack of timely notice any one of the following: [FN18]**

- **"the parent is illiterate and cannot write in English" [FN19]**
- **the district prevented the parent from providing said notice**
- **the district did not inform parents, via the procedural safeguards notice, of this requirement [FN20]**

2. Prior to the child's removal, did the district duly request to evaluate the child and, if so, did the parent refuse to make the child available for the evaluation? [FN21]

Exception: the parent's compliance would "likely result in physical or serious emotional harm to the child" [FN22]

If the answer to question 1 and/or 2 is YES, after applying any applicable exceptions, then the IHO "*may*" reduce or deny reimbursement. [FN23]

The courts have generally been relatively strict in applying the timely notice requirement, denying reimbursement altogether. [FN24]

B. APPROPRIATENESS STEPS

1. Was the district's proposed placement appropriate, [FN25] or, more specifically, did the district "make a free appropriate public education available *789 to the child in a timely manner prior to [the parent's unilateral placement]" [FN26]?

Showing the breadth of this FAPE step, in an occasional tuition reimbursement case, the claim is predicated on the threshold issues of eligibility, [FN27] child find, [FN28] or mis–evaluation. [FN29]

For this step, courts have applied the *Rowley* two–part test for appropriateness. The 2004 IDEA amendments have codified the procedural part, with special emphasis on the opportunity for parental participation. [FN30] The substantive part remains as whether the IEP is "reasonably calculated to enable the child to receive educational benefits?" [FN31]

The jurisdictions vary in terms of whether the "snapshot" approach, which measures the appropriateness in terms of what the IEP team knew or had reason to know at the time of formulating the proposed IEP, is applicable; where this approach applies, the exception is for subsequent evidence of progress, not the lack thereof. [FN32] For example, the Second Circuit has declined to decide this issue, [FN33] while acknowledging that lower courts in New York have used it. [FN34] However, this approach has less applicability in the tuition reimbursement context, because the typical posture is the parent's unilateral placement in the immediate wake of ***790** the district's proposed IEP, thus obviating implementation of the IEP and the child's resulting progress or lack thereof. [FN35]

The predominance of the plethora of tuition reimbursement lower court decisions have focused on this appropriateness step, with the vast majority—due in part to the selective sequence of the multi–step

test—ruling in favor of the district. [FN36]

***791** In some of these cases, the key consideration is the IDEA's least restrictive environment (LRE)mandate. [FN37]

2. If not, [FN38] was the parent's unilateral placement appropriate [FN39] (even if it does not meet state standards)? [FN40]

For the cases that have reached this step, the proportion of lower court decisions in favor of each side is much closer in light of the relatively relaxed standard. [FN41]

Some lower courts have used evidence of progress, thus at least an aspect of the snapshot standard, for this second step determination. [FN42]

***792** Neither the Establishment Clause nor the IDEA precludes sectarian schools from being appropriate in tuition reimbursement context. [FN43]

Similarly, the IDEA does not categorically bar for–profit schools from being appropriate for purposes of reimbursement. [FN44]

The courts in the various jurisdictions are not uniform on the role of LRE at this step. In the Second Circuit, LRE is a pertinent but not primary consideration. [FN45]

In some cases, the issue of pendency, or stay–put, intersects with this appropriateness step. [FN46]

C. FINAL EQUITIES STEP

1. If so, were the actions of the parent—beyond those in items A1 and A2—unreasonable? [FN47]

Example: "the cost of the private education was unreasonable" [FN48]

Example: lack of parental cooperation with the district [FN49]

***793** Where the district alleges that parent's motivation is to obtain public funding, the claim fails absent sufficient proof. [FN50]

The courts in the New York jurisdiction require review officers—and, thus, IHOs—who apply the equitable factors to reduce or deny reimbursement to show, in their written opinions, sufficient factual foundation for doing so. [FN51]

Alternative to denying reimbursement altogether, some courts have proportionally reduced it in relation to the balance of the equities against the parents. [FN52]

If the answer to item B1 is YES or the answer to both B2 and C1 is NO, the IHO "may" order reimbursement. [FN53]

In at least one court's view, the IHO must allow the parent a flexible ***794** opportunity to present the costs for reimbursement. [FN54]

The recoverable costs are not strictly limited to tuition. [FN55]

If the unilateral placement is residential and medical, the federal appeals courts have developed more than one test to determine whether the costs are reimbursable. [FN56]

A federal district court in New York recently ruled that the payment may be direct, i.e., need not be reimbursement, if the parent could not afford the tuition where the child had been unilaterally placed. [FN57]

The review officer's reimbursement order or, in a one–tier jurisdiction, that of the IHO is effective as the stay–put, thus triggering the district's payment obligation during judicial appeals. [FN58] However, if

the final judicial ruling reverses the reimbursement order, the parent need not pay back the reimbursed amount. [FN59]

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[FN1]. The Supreme Court also issued four other decisions that have relatively limited effect on IDEA interpretation. Two focused on the application of the First Amendment establishment clause. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 [91 Ed.Law Rep. [810]] (1994*); Zobrest v. Catalina Foothills Sch. Dist*., 509 U.S. 1 [83 Ed.Law Rep. [930]] (1993). Congress subsequently reversed the other two. *Dellmuth v. Muth*, 491 U.S. 223 [53 Ed.Law Rep. [792]] (1989) (ruling that states have Eleventh Amendment immunity under the IDEA); *Smith v. Robinson*, 468 U.S. 992 [18 Ed.Law Rep. [148]] (1986) (ruling that the IDEA does not provide for attorneys' fees and is the exclusive avenue for claims with its scope).

[FN2]. 471 U.S. 359 [23 Ed.Law Rep. [1189]] (1985) (setting forth the three–part test for tuition reimbursement—appropriateness of district's proposed placement, appropriateness of the parent's unilateral placement, and application of the equities).

[FN3]. 510 U.S. 7 [86 Ed.Law Rep. [41]] (1993) (ruling that parents are not held to the same standards as districts, thus making the second step of the test relatively relaxed).

[FN4]. 129 S.Ct. 2484 [245 Ed.Law Rep. [551]] (2009) (ruling that the child's lack of previous enrollment in special education did not preclude application of the reimbursement test).

[FN5]. For example, the 2004 Amendments refined the exceptions for the parent's timely notice provision. 20 U.S.C. § 1412(a)(10)(C)(iv)(I)(cc). Similarly, the 2006 regulations merely made explicit that "financial reimbursement" for placement disputes is within the jurisdiction of the impartial hearing process. 34 C.F.R. § 300.148(b).

[FN6]. *See e.g.*, Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001).

[FN7]. This phraseology is intended to show that the remedy referred to, as a matter of shorthand, "tuition reimbursement" applies generically to parental expenses arising directly from a unilateral placement, which in some cases are in addition to or in lieu of formal tuition. *See, e.g.*, *Bucks County Dep't of MH/MR v. De Mora*, 379 F.3d 61 [191 Ed.Law Rep. [41]] (3d Cir. 2004) (ruling that reimbursement be for time expended by parent serving as Lovaas instructor*)*. For reinforcement of this broad equitable authority, see *supra* note 5 and *infra* notes 16 and 47–52. Moreover, the regulations expressly give New York IHOs remedial authority to provide "monetary reimbursement." N.Y. COMP. CODES R. & REGS. tit. 8, 200.5(l)(2)(v)(e)(1). However, in a ruling that merits careful scrutiny, a federal court in New York interpreted the IDEA and New York law as reserving reimbursement for related services to the IHO's separable jurisdiction under state law, with final review by the Commissioner. *Gabel v Bd. of Educ*., 368 F.Supp.2d 313 [198 Ed.Law Rep. [538]] (S.D.N.Y. 2005).

[FN8]. For a flowchart–like synthesis in an analogous area, see Perry A. Zirkel, *Independent Educational Evaluations at District Expense under the Individuals with Disabilities Education Act*, 231 Ed. Law Rep. [21] (2008).

[FN9]. The Supreme Court's decision in *Schaffer v. Weast*, 546 U.S. 49 [203 Ed.Law Rep. [29]] (2005) put the burden of persuasion at the first appropriateness step on the parent, but the Court ducked the question as to whether a contrary state law would be controlling. Pre–*Schaffer*, some courts put this burden on the district but shifted the burden of persuasion to the parents at the second appropriateness step. *See, e.g.*, *M.S. v. Bd. of Educ.*, 231 F.3d 96 [148 Ed.Law Rep. [606]] (2d Cir. 2000), *cert. denied*, 532 U.S. 942 (2001); *Carlisle Area Sch. Dist. v. Scott F.*, 62 F.3d 520, 524 [102 Ed.Law Rep. [450]] (3d Cir. 1995). Post–*Schaffer*, the Second Circuit had placed the burden of persuasion on the parent for both appropriateness steps. *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 [221 Ed.Law Rep. [544]] (2d Cir. 2007). However, the New York legislature more recently clarified the matter as follows:

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

N.Y. EDUC. LAW Art. § 4404(c)(1). For recognition of this change as of October 14, 2007, see, e.g., *J.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F.Supp.2d 606, 641 n.29 [270 Ed.Law Rep. [135]] (S.D.N.Y. 2011)

[FN10]. *See, e.g.*, Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEAD. 22 (2008) (New York as the leading state, both on an absolute and enrollment–proportioned basis, in adjudicated first–tier IDEA hearings, surpassed only by the specialized jurisdiction of the District of Columbia).

[FN11]. **11.** In the absence of an empirical study, the author relies for this conclusion on the extensive highlighted case law in this compilation and his experience compiling IDEA court decisions nationally. *See, e.g* ., Perry A. Zirkel, *A National Update of Case Law under the IDEA and Sec. 504/ADA* (2012) (available at www. nas dse. org).

[FN12]. The cited decisions for this jurisdiction are limited to those that are officially published or in the Federal Appendix. Thus, except for the court decisions cited as examples of exclusions (*infra* note 15), limited emerging issues (*infra* notes 34 and 44), and the occasional summary affirmances of published decisions, the coverage does not extend to the many decisions solely reported in WESTLAW and/or the specialized database—the Individuals with Disabilities Law Reports (IDELR).

[FN13]. 20 U.S.C. § 1412(a)(10)(C)(i).

[FN14]. See *supra* note 4.

[FN15]. *See, e.g.*, *Nemlich v. Bd. of Educ.*, 170 Fed.Appx. 727 (2d Cir. 2006) (attorney's fees); *R.B. v. Dep't of Educ. of the City of New York*, 2011 WL 4375694 (S.D.N.Y. Sept. 11, 2011) (statute of limitations); *New York City Dep't of Educ. v. V.S.*, 2011 WL 3273922 (S.D.N.Y. June 29, 2011) (mootness); *Piazza v. Florida Union Free Sch. Dist.*, 777 F.Supp.2d 669 [270 Ed.Law Rep. [189]] (S.D.N.Y. 2011) (exhaustion*); B.J.S. v. New York State Educ. Dep't*, 699 F. Supp. 2d 586 [258 Ed.Law Rep. [140]] (S.D.N.Y. 2010) (personal jurisdiction over state defendants); *New York City Dep't of Educ. v. S.S.*, 2010 WL 983719 (S.D.N.Y. Mar. 17, 2010) (reimbursement liability during pendency of IHO proceedings); *Arlington Cent. Sch. Dist. v. L.P.*, 421

F.Supp.2d 692 [208 Ed.Law Rep. [389]] (S.D.N.Y. 2006) (stay–put); *Arlington Cent. Sch. Dist. v. State Review Officer*, 741 N.Y.S.2d 276 [164 Ed.Law Rep. [835]] (App. Div. 2002) (second–tier scope of review when the respondent fails to file an answer).

[FN16]. In *Burlington*, after reciting the First Circuit's calculus based on " 'balancing the equities,' " the Supreme Court upheld the relevance of "equitable considerations." *Sch. Comm. of Burlington*, 471 U.S. at 367 and 374. In *Carter*, the Court broad discretionary remedial authority as requiring consideration of "all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 16. The sequential checklist, in light of Congress's subsequent codification, divides the equitable considerations between its preliminary and concluding steps.

[FN17]. 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d)(1). For an added, judicially developed equitable exception, see *R.B. v. New York City Dep't of Educ.*, 713 F.Supp.2d 235 [260 Ed.Law Rep. [689]] (S.D.N.Y. 2010) (district's failure to have a proposed placement at the relevant time); *cf. J.S. v. Scarsdale Union Free Sch. Dist.*, (S.D.N.Y. 2011)(partially excused, used instead as part of calculus of overall equities at the final stage).

[FN18]. 20 U.S.C. § 1412(a)(10)(C)(iv); 34 C.F.R. § 300.148(e).

[FN19]. In contrast to the legislation, the regulations refer to illiteracy "or" inability to write in English. 34 C.F.R. § 300.148(e)(2)(i). For an example of a parent's failure to prove this exception, see *Ms. M. v. Portland Sch. Comm.*, 360 F.3d 267 [185 Ed.Law Rep. [819]] (1st Cir. 2004).

[FN20]. For application of this exception, see, e.g., W.M. v. Lakeland Cent. Sch. Dist., 783 F.Supp.2d 497 [271 Ed.Law Rep. [233]] (S.D.N.Y. 2011).

[FN21]. 20 U.S.C. § 1412(a)(10)(C)(iii)(II); 34 C.F.R. § 300.148(d)(2). For the foundational case law that led to this codified exception, see, e.g., *Patricia P. v. Bd. of Educ.*, 203 F.3d 462 [141 Ed.Law Rep. [986]] (7th Cir. 2000); *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379 [124 Ed.Law Rep. [808]] (8th Cir. 1998); *Tucker v. Calloway Cnty. Sch. Dist.*, 136 F.3d 495 [124 Ed.Law Rep. [73]] (6th Cir. 1998).

[FN22]. 20 U.S.C. § 1412(a)(10)(C)(iv)(II). The regulations appear to separate physical and serious emotional harm as arguably alternative to each other. *Id.* §§ 300.148(e)(1)(iii) and 300.148(e)(2)(ii). For a decision where the court found that the parent failed to prove this exception, thus triggering this threshold equitable step, see *P.S. v. Brookfield Bd. of Educ.*, 353 F.Supp.2d 306 [195 Ed.Law Rep. [539]] (D. Conn. 2005), *aff'd on other grounds*, 186 Fed.Appx. 79 [213 Ed.Law Rep. [402]] (2d Cir. 2006).

[FN23]. 20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. ¶ 300.148(d). The word may is emphasized here to show the discretionary nature of this equitable authority.

[FN24]. For Second Circuit and New York decisions, which are representative of the case law elsewhere, see, e.g., *S.W. v. New York City Dep't of Educ.*, 646 F.Supp.2d 346 [250 Ed.Law Rep. [337]] (S.D.N.Y. 2009); *A.H. v. New York City Dep't of Educ.*, 652 F.Supp.2d 297 [250 Ed.Law Rep. [1015]] (E.D.N.Y. 2009), *aff'd on other grounds*, 394 Fed.Appx. 718 [263 Ed.Law Rep. [56]] (2d Cir. 2010); *cf. M.C. v. Voluntown Bd. of Educ.*, 226 F.2d 60, 66 (2d Cir. 2000) (related services pre–IDEA codification). *But see R.E. v. New York City Dep't of Educ.*, 785 F.Supp.2d 28 [271 Ed.Law Rep. [825]] (S.D.N.Y. 2011); *cf. W.M. v. Lakeland Cent. Sch. Dist.*, 783 F.Supp.2d 497 [271 Ed.Law Rep. [233]] (S.D.N.Y. 2011); *G.B. v. Tuxedo Union Free Sch. Dist.*, 751 F.Supp.2d

552 [265 Ed.Law Rep. [680]] (S.D.N.Y. 2010) (reduced reimbursement).

[FN25]. The Supreme Court originally framed the issue in terms of the district's proposed "IEP" and, used interchangeably, whether it was "proper" or "appropriate." *School Comm. of Burlington*, 471 U.S. at 369 and 374.

[FN26]. 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. §§ 300.148(a) and 300.148(c).

[FN27]. *See, e.g., P.C. v. Oceanside Union Free Sch. Dist.*, 818 F.Supp.2d 516 [277 Ed.Law Rep. [888]] (E.D.N.Y. 2011); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F.Supp.2d 282 [256 Ed.Law Rep. [234]] (S.D.N.Y. 2010); *A.J. v. Bd. of Educ.*, 679 F.Supp.2d 299 [254 Ed.Law Rep. [826]] (E.D.N.Y. 2010).

[FN28]. Child find was the underlying theory of the parents' claim in *Forest Grove* and its Second Circuit predecessors—*Frank G.* and *Tom F.*

[FN29]. *See, e.g., Muller v. Comm. on Special Educ.*, 145 F.3d 95 [127 Ed.Law Rep. [36]] (2d Cir. 1998); *Mr. N.C. v. Bedford Cent. Sch. Dist.*, 300 Fed.Appx. 11 [241 Ed.Law Rep.[60]] (2d Cir. 2008*); J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 [147 Ed.Law Rep. [39]] (2d Cir. 2000); *W.G. v. New York City Dep't of Educ.*, 801 F.Supp 2d 142 [274 Ed.Law Rep. [438]] (S.D.N.Y. 2011).

[FN30]. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2):

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

The Second Circuit has applied the harmless–error–type approach to New York state law requirements that extend beyond the IDEA. *See, e.g., A.C. v. Bd. of Educ.*, 553 F.3d 165 [240 Ed.Law Rep. [546]] (2d Cir. 2009).
[FN31]. *Bd. of Educ. v. Rowley*, 458 U.S. 276, 206–07 (1982).

[FN32]. *See, e.g.*, Perry A. Zirkel, *The "Snapshot Standard" under the IDEA*, 269 Ed. Law Rep. [455] (2011).

[FN33]. *D.F. v. Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 599 [203 Ed.Law Rep. [500]] (2d Cir. 2005); *see also T.P. v. Mamaroneck Union Sch. Dist.*, 554 F.3d 24, 247, 252 n.1 (2d Cir. 2009).

[FN34]. *See, e.g., J.R. v. Bd. of Educ.*, 345 F.Supp.2d 386 [194 Ed.Law Rep. [162]] (S.D.N.Y. 2004); *Antonaccio v. Arlington Cent. Sch. Dist.*, 281 F.Supp.2d 710 [181 Ed.Law Rep. [584]] (S.D.N.Y. 2003); *see also J.A. v. E. Ramapo Cent. Sch. Dist.*, 603 F.Supp.2d 684 [243 Ed.Law Rep. [326]] (S.D.N.Y. 2009). A recent unpublished opinion identifies district court decisions in New York on both sides of this issue. *C.F. v. New York City Dep't of Educ.*, 44 NDLR ¶ 47, 2011 WL 5130101(S.D.N.Y. 2011).

[FN35]. Nevertheless, such so–called "retrospective evidence" (because, although subsequent to the IEP meeting, it is prior to the IHO's or court's decision) sometimes arises in tuition reimbursement cases, typically

via expert testimony. *See, e.g.*, *W.T. v. Bd. of Educ.*, 716 F.Supp.2d 270 (S.D.N.Y. 2010).

[FN36]. The Second Circuit and New York decisions are representative of the national trend. For a sampling of Second Circuit and New York decisions focusing on procedural appropriateness, *compare A.H. v. Dep't of Educ. of New York City*, 394 Fed.Appx .718 [263 Ed.Law Rep. [56]] (2d Cir. 2010); *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247 [241 Ed.Law Rep. [22]] (2d Cir. 2009); *Cabouli v. Chappaqua Cent. Sch. Dist.*, 202 Fed.Appx. 519 [215 Ed.Law Rep. [665]] (2d Cir. 2006); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377 [181 Ed.Law Rep. [370]](2d Cir. 2003); *J.G. v. Briarcliff Manor Union Free Sch. Dist.*, 682 F.Supp.2d 387 [255 Ed.Law Rep. [647]] (S.D.N.Y. 2010); *R.R. v. Scarsdale Union Free Sch. Dist.*, 615 F.Supp.2d 283 [245 Ed.Law Rep. [158]] (S.D.N.Y. 2009), *aff'd on other grounds*, 366 Fed.Appx. 239 (2d Cir. 2010); *J.A. v. E. Ramapo Cent. Sch. Dist.*, 603 F.Supp.2d 684 [243 Ed.Law Rep. [326]] (S.D.N.Y. 2009); *M.M. v. New York City Dep't of Educ.*, 583 F.Supp.2d 498 [239 Ed.Law Rep. [414]] (S.D.N.Y. 2008) (in favor of district), *with R.E. v. New York City Dep't of Educ.*, 785 F.Supp.2d 28 [271 Ed.Law Rep. [825]] (S.D.N.Y. 2011*); Pawling Cent. Sch. Dist. v. New York State Educ. Dep't*, 771 N.Y.S.2d 572 [185 Ed.Law Rep. [339]] (App. Div. 2004) (in favor of parent). For a sampling of Second Circuit and New York decisions focusing on substantive appropriateness, *compare Bougades v. Pine Plains Cent. Sch. Dist.*, 376 Fed.Appx. 95 [259 Ed.Law Rep. [483]] (2d Cir. 2010); *M.H. v. Monroe–Woodbury Sch. Dist.*, 296 Fed.Appx. 126 [239 Ed.Law Rep. [947]] (2d Cir. 2008); *A.S. v. Bd. of Educ.*, 47 Fed.Appx. 615 (2d Cir. 2002); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119 [126 Ed.Law Rep. [54]] (2d Cir. 1998); *C.G. v. New York City Dep't of Educ.*, 752 F.Supp.2d 355 [265 Ed.Law Rep. [984]] (S.D.N.Y. 2010); *D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F.Supp.2d 435 [265 Ed.Law Rep. [154]] (N.D.N.Y. 2010); *M.S. v. New York City Dep't of Educ.*, 734 F.Supp.2d 271 [263 Ed.Law Rep. [231]] (E.D.N.Y. 2010); *Adrianne D. v. Lakeland Cent. Sch. Dist.*, 686 F.Supp.2d 361 [255 Ed.Law Rep. [830]] (S.D.N.Y. 2010); *J.R. v. Bd. of Educ.*, [345 F.Supp.2d [386]] (S.D.N.Y. 2004); *Wall v. Mattituck–Cutchogue Sch. Dist.*, 945 F.Supp. 501 [114 Ed.Law Rep. [834]] (E.D.N.Y. 1996) (in favor of district), *with T.K. v. New York City Dep't of Educ.*, 779 F.Supp.2d 289 [270 Ed.Law Rep. [593]] (E.D.N.Y. 2011); *E.S. v. Katonah Lewisboro Sch. Dist.*, 742 F.Supp.2d 417 [264 Ed.Law Rep. [724]] (S.D.N.Y. 2010) (mixed outcome), *with P.K. v. New York City Dep't of Educ.*, 818 F.Supp.2d 516 [277 Ed.Law Rep. [888]] (E.D.N.Y. 2011)(in favor of parent). For those addressing both the procedural and substantive sides, see *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412 [249 Ed.Law Rep. [742]] (2d Cir. 2009), *cert. denied*, 130 S.Ct. 3277 (2010); *A.C. v. Bd. of Educ.*, 553 F.3d 165 [240 Ed.Law Rep. [546]] (2d Cir. 2009); *Mr. B. v. E. Granby Bd. of Educ.*, 201 Fed. Appx. 834 [215 Ed.Law Rep. [658]] (2d Cir. 2006); *B .O. v. Cold Spring Harbor Cent. Sch. Dist.*, 807 F.Supp.2d 130 [275 Ed.Law Rep. [776]] (E.D.N.Y. 2011); *A.L. v. New York City Dep't of Educ.*, 812 F.Supp.2d 492 [276 Ed.Law Rep. [270]] (S.D.N.Y. 2011); *C.T. v. Croton–Harmon Union Free Sch. Dist.*, 812 F.Supp.2d 420 [276 Ed.Law Rep. [226]](S.D.N.Y. 2011); *E.Z.–L v. New York City Dep't of Educ.*, 763 F.Supp.2d 584 [267 Ed.Law Rep. [201]] (S.D.N.Y. 2011*); M.F. v. Irvington Union Free Sch. Dist.*, 719 F.Supp.2d 302 [261 Ed.Law Rep. [601]] (S.D.N.Y. 2010); *W.T. v. Bd. of Educ.*, 716 F.Supp.2d 270 (S.D.N.Y. 2010); *E.G. v. City Sch. Dist.*, 606 F.Supp.2d 384 [244 Ed.Law Rep. [77]] (S.D.N.Y. 2009); *P.K. v. Bedford Cent. Sch. Dist.*, 569 F.Supp.2d 371 [237 Ed.Law Rep. [127]] (S.D.N.Y. 2008) ; *W.S. v. Rye City Sch. Dist.*, 454 F.Supp.2d 134 [214 Ed.Law Rep. [288]] (S.D.N.Y. 2006); *Viola v. Arlington Cent. Sch. Dist.*, 414 F.Supp.2d 366 (S.D.N.Y. 2006) (in favor of district), *with* Davis *v. Wappingers Cent. Sch. Dist.*, 772 F.Supp.2d 500 [269 Ed.Law Rep. [110]] (S.D.N.Y. 2011), *aff'd*, 56 IDELR ¶ 248 (2d Cir. 2011); *J.G. v. Kiryas–Joel Union Free Sch. Dist.*, 777 F.Supp.2d 606 [270 Ed.Law Rep. [135]] (S.D.N.Y. 2011) (in favor of parent); *cf. J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635 [279 Ed.Law Rep. [229]] (S.D.N.Y. 2011)(in favor of parent but placement, not IEP).

[FN37]. *See, e.g.*, *G.B. v. Tuxedo Union Free Sch. Dist.*, 751 F.Supp.2d 552 [265 Ed.Law Rep. [680]] (S.D.N.Y.

2010).

[FN38]. As a general, although not absolute rule, the analysis does not proceed to the next appropriateness step if the determination is that the district's proposed IEP met the standards for FAPE. *See, e.g.*, *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 582 [142 Ed.Law Rep. [656]] (3d Cir. 2000); *M.C. v. Voluntown Bd. of Educ.*, 226 F.2d 60, 66 (2d Cir. 2000); *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 582 [142 Ed.Law Rep. [656]] (3d Cir. 2000); *D.R. v. Dep't of Educ., Hawaii* (D. Hawaii 2011).

[FN39]. This step is only implicit in the IDEA and its regulations. Its basis is *Carter*, which may be viewed as either implicitly incorporated in or a residuum beyond the statutory codification. The Supreme Court had referred to whether the parents' "private placement" was "proper." *School Comm. of Burlington*, 471 U.S. at 369 and 370; *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 15.

[FN40]. 34 C.F.R. § 300.148(c). The issue in *Carter* was a bit broader, referring to whether the parents' private placement met the statutory definition of FAPE, which includes various other criteria, including an IEP according to IEP specifications. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 13.

[FN41]. For a sampling at the Second Circuit and in New York, *compare Davis v. Wappingers Cent. Sch. Dist.*, 431 Fed.Appx. 12 [271 Ed.Law Rep. [814]] (2d Cir. 2011); *Matrejek v. Brewster Cent. Sch. Dist.*, 293 Fed.Appx. 20 [239 Ed.Law Rep. [344]] (2d Cir. 2008); *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105 [221 Ed.Law Rep. [544]] (2d Cir. 2007); *M.S. v. Bd. of Educ.*, 231 F.3d 96 [148 Ed.Law Rep. [606]] (2d Cir. 2000), *cert. denied*, 532 U.S. 942 (2001); *P.C. v. Oceanside Union Free Sch. Dist.*, 818 F.Supp.2d 516 [277 Ed.Law Rep. [888]] (E.D.N.Y. 2011); *Weaver v. Millbrook Cent. Sch. Dist.*, 812 F.Supp.2d 514 [276 Ed.Law Rep. [284]] (S.D.N.Y. 2011); *J.G. v. Kiryas–Joel Union Free Sch. Dist.*, 777 F.Supp.2d 606 [270 Ed.Law Rep. [135]] (S.D.N.Y. 2011); *Schreiber v. E. Ramapo Cent. Sch. Dist.*, 700 F.Supp.2d 529 [258 Ed.Law Rep. [231]] (S.D.N.Y. 2010); *Pinn v. Harrison Cent. Sch. Dist.*, 473 F.Supp.2d 477 [217 Ed.Law Rep. [444]] (S.D.N.Y. 2007); *Werner v. Clarkstown Cent. Sch. Dist.*, 363 F.Supp.2d 656 [197 Ed.Law Rep. [244]] (S.D.N.Y. 2005) (in favor of the district), *with Frank G. v. Bd. of Educ.*, 459 F.3d 356 [212 Ed.Law Rep. [35]] (2d Cir. 2006); *Muller v. Comm. on Special Educ.*, 145 F.3d 95 [127 Ed.Law Rep. [36]] (2d Cir. 998); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114 [115 Ed.Law Rep. [324]] (2d Cir. 1997); *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635 [279 Ed.Law Rep. [229]] (S.D.N.Y. 2011); *R.E. v. New York City Dep't of Educ.*, 785 F.Supp.2d 28 [271 Ed.Law Rep. [825]] (S.D.N.Y. 2011); *P.K. v. New York City Dep't of Educ.*, (E.D.N.Y. 2011); *M.H. v. New York City Dep't of Educ.*, 712 F.Supp.2d 125 [260 Ed.Law Rep. [639]] (S.D.N.Y. 2010); *A.D. v. Bd. of Educ.*, 690 F.Supp.2d 193 [256 Ed.Law Rep. [746]] (S.D.N.Y. 2010); *Gabel v. Bd. of Educ.*, 368 F.Supp.2d 313 [198 Ed.Law Rep. [538]] (S.D.N.Y. 2005); *Pawling Cent. Sch. Dist. v. New York State Educ. Dep't*, 771 N.Y.S.2d 572 [185 Ed.Law Rep. [339]] (App. Div. 2004) (in favor of the parent).

[FN42]. These New York examples are representative: *Matrejek v. Brewster Cent. Sch. Dist.*, 293 Fed.Appx. 20 [239 Ed.Law Rep. [344]] (2d Cir. 2008); *Frank G. v. Bd. of Educ.*, 459 F.3d 356 [212 Ed.Law Rep. [35]] (2d Cir. 2006); *M.H. v. New York City Dep't of Educ.*, 712 F.Supp.2d 125 [260 Ed.Law Rep. [639]] (S.D.N.Y. 2010) ; *Gabel v. Bd. of Educ.*, 368 F.Supp.2d 313 [198 Ed.Law Rep. [538]] (S.D.N.Y. 2005). For a discussion of this issue at this second appropriateness step, see *Davis v. Wappingers Cent. Sch. Dist.*, 772 F.Supp.2d 500 [269 Ed.Law Rep. [110]] (S.D.N.Y. 2011), *aff'd*, 56 IDELR ¶ 248 (2d Cir. 2011). However, the Second Circuit provided the overriding caveat that the child's progress "does not itself demonstrate that a private placement was appropriate." *Gagliardo,*.

[FN43]. *See, e.g.*, *L.M. v. Evesham Twp. Bd. of Educ.*, 256 F.Supp.2d 290 [176 Ed.Law Rep. [728]] (D.N.J. 2003); *Matthew J. v. Massachusetts Dep't of Educ.*, 989 F.Supp. 380 [124 Ed.Law Rep. [552]] (D. Mass. 1998).

[FN44]. *New York City Dep't of Educ. v. V.S.*, 57 IDELR ¶ 77, 2011 WL 3273922 (S.D.N.Y. 2011)(alternatively fitting in this multi–step analysis as an equitable consideration).

[FN45]. **45.** *See, e.g.*, *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105 [221 Ed.Law Rep. [544]] (2d Cir. 2007); *M.S. v. Bd. of Educ.*, 231 F.3d 96 [148 Ed.Law Rep. [606]] (2d Cir. 2000); *Schreiber v. E. Ramapo Cent. Sch. Dist.*, 700 F.Supp.2d 529 [258 Ed.Law Rep. [231]] (S.D.N.Y. 2010); *Pinn v. Harrison Cent. Sch. Dist.*, 473 F.Supp.2d 477 [217 Ed.Law Rep. [444]] (S.D.N.Y. 2007). Not all circuits agree with the Second Circuit's view. *See, e.g.*, *C.B. v. Special Sch. Dist. No 1*, 636 F.3d 981 [266 Ed.Law Rep. [71]] (8th Cir. 2011) (ruling the LRE is not a relevant factor). Conversely, in an occasional case, the LRE factor supports the unilateral placement. *See, e.g.*, *M.H. v. New York City Dep't of Educ.*, 712 F.Supp.2d 125 [260 Ed.Law Rep. [639]] (S.D.N.Y. 2010); *cf. J.G. v. Kiryas–Joel Union Free Sch. Dist.*, 777 F.Supp.2d 606 [270 Ed.Law Rep. [135]] (S.D.N.Y. 2011) (ruling that the unilateral placement was inappropriate for other reasons).

[FN46]. *See, e.g.*, *Gabel v. Bd. of Educ.*, 368 F.Supp.2d 313 [198 Ed.Law Rep. [538]] (S.D.N.Y. 2005).

[FN47]. 20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. §§ 300.148(d)(3). The narrow language is: “upon a judicial finding of unreasonableness with respect to actions taken by the parents.” *Id.* However, the light of the overall structure of the Act and the specific contours of *Burlington–Carter* (see *supra* note 15 and *infra* text accompanying notes 50–51) this equitable criterion implicitly extends to IHOs and also implicitly amounts to a balancing of the equities, thus extending to the reasonableness of the district's action. For an example of a case where the court weighed the equities on both sides, concluding that the balance favored the parent, see *Gabel v Bd. of Educ.*, 368 F.Supp.2d 313 [198 Ed.Law Rep. [538]] (S.D.N.Y. 2005).

[FN48]. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 16.

[FN49]. *Werner v. Clarkstown Cent. Sch. Dist.*, 363 F.Supp.2d 656 [197 Ed.Law Rep. [244]] (S.D.N.Y. 2005); *cf. Carmel Cent. Sch. Dist. v. V.P.*, 373 F.Supp.2d 402 [199 Ed.Law Rep. [666]] (S.D.N.Y. 2005), *aff'd mem.*, 192 Fed.Appx. 62 [214 Ed.Law Rep. [531]] (2d Cir. 2006) (alternative rationale); *S.W. v. New York City Dep't of Educ.*, 646 F.Supp.2d 346 [250 Ed.Law Rep. [337]] (S.D.N.Y. 2009) (alternative rational intertwined with lack of timely notice). For examples from other jurisdictions, see, e.g.,. v. *Glendale Unified Sch. Dist. Almasi*, 122 F.Supp.2d 1093 [149 Ed.Law Rep. [477]] (C.D. Cal. 2000) (parent's withholding of assessment records). Some courts have used this equitable rationale at the first appropriateness step to negate a parent's challenge to the district's proposal, where the defects (e.g., incompleteness) are attributable to their own obstructionist conduct. *See, e.g.*, *C.G. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279 [229 Ed.Law Rep. [18]] (1st Cir. 2008).

[FN50]. *See, e.g.*, *Sudbury Pub. Sch. v. Massachusetts Dep't of Elementary & Secondary Educ.*, 762 F.Supp.2d 254 [267 Ed.Law Rep. [142]] (D. Mass. 2010).

[FN51]. *See, e.g.*, *Wolfe v. Taconic–Hills Cent. Sch. Dist.*, 167 F.Supp.2d 530 [158 Ed.Law Rep. [271]] (N.D.N.Y. 2001); *see also Carmel Cent. Sch. Dist. v. V.P.*, 373 F.Supp.2d 402 [199 Ed.[Law Rep. 666]] (S.D.N.Y. 2005), *aff'd mem.*, 192 Fed.Appx. 62 [214 Ed.Law Rep. [531]] (2d Cir. 2006). For a similar ruling elsewhere, see *Loren F. v. Atlanta Indep. Sch. Dist.*, 349 F.3d 1309 [182 Ed.Law Rep. [770]] (11th Cir. 2003). Conversely, where the court overruled the administrative adjudicator's decision in the parent's favor for failure to consider the full balance of the equities, see *S.W. v. New York City Dep't of Educ.*, 646 F.Supp.2d 346 [250

Ed.Law Rep. [337]] (S.D.N.Y. 2009).

[FN52]. *See, e.g.*, *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635 [279 Ed.Law Rep. [229]] (S.D.N.Y. 2011); *W.M. v. Lakeland Cent. Sch. Dist.*, 783 F.Supp.2d 497 [271 Ed.Law Rep. [233]] (S.D.N.Y. 2011); *G.B. v. Tuxedo Union Free Sch. Dist.*, 751 F.Supp.2d 552 [265 Ed.Law Rep. [680]] (S.D.N.Y. 2010); *Cone v. Randolph Cnty. Sch. Bd. of Educ.*, 657 F.Supp.2d 667 (M.D.N.C. 2009); *Hogan v. Fairfax Cnty. Sch. Bd.*, 645 F.Supp.2d 554 [250 Ed.Law Rep. [273]] (E.D. Va. 2009*); Kitchelt v. Weast*, 341 F.Supp.2d 553 [193 Ed.Law Rep. [448]] (D. Md. 2004).

[FN53]. 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c). Here, the quotation is merely to reinforce the equitable nature of this remedy, but its exercise is presumably automatic at this final stage, i.e., upon the specified answers to the earlier questions. For cases that succeeded on all of the applicable steps, see, e.g., *Muller v. Comm. on Special Educ.*, 145 F.3d 95 [127 Ed.Law Rep. [36]] (2d Cir. 1998); *P.K. v. New York City Dep't of Educ.*, 818 F.Supp.2d 516 [277 Ed.Law Rep. [888]] (E.D.N.Y. 2011); *R.E. v. New York City Dep't of Educ.*, 785 F.Supp 2d 28 [271 Ed.Law Rep. [825]] (S.D.N.Y. 2011); *Mr. A. v. New York City Dep't of Educ.*, 769 F.Supp.2d 403 [268 Ed.Law Rep. [153]] (S.D.N.Y. 2011); *M.H. v. New York City Dep't of Educ.*, 712 F.Supp.2d 125 [260 Ed.Law Rep. [639]] (S.D.N.Y. 2010); *A.D. v. Bd. of Educ.*, 690 F.Supp.2d 193 [256 Ed.Law Rep. [746]] (S.D.N.Y. 2010); *Jennifer D. v. New York City Dep't of Educ.*, 550 F.Supp.2d 420 [233 Ed.Law Rep. [588]] (S.D.N.Y. 2008); *Gabel v. Bd. of Educ.*, 368 F.Supp.2d 313 [198 Ed.Law Rep. [538]] (S.D.N.Y. 2005); *Pawling Cent. Sch. Dist. v. New York State Educ. Dep't*, 771 N.Y.S.2d 572 [185 Ed.Law Rep. [339]] (App. Div. 2004).

[FN54]. *A.G. v. Dist. of Columbia*, 794 F.Supp.2d 133 [273 Ed.Law Rep. [686]] (D.D.C. 2011)

[FN55]. *See, e.g.*, *JP v. Cnty. Sch. Bd.*, 641 F.Supp.2d 499 [250 Ed.Law Rep. [122]] (E.D. Va. 2009) (credit–card transaction fees and interest);

[FN56]. *See, e.g.*, *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 [249 Ed.Law Rep. [34]] (5th Cir. 2009) (two–part test); *Mary T. v. Sch. Dist.*, 575 F.3d 235 [248 Ed.Law Rep. [35]] (3d Cir. 2009) (inextricable intertwined test). For an overview of the competing tests, see *Jefferson Cnty. Sch. Dist. R–1. v. Elizabeth E.*, 798 F.Supp.2d 1177 [274 Ed.Law Rep. [118]] (D. Colo. 2011)

[FN57]. *Mr. A. v. New York City Dep't of Educ.*, 769 F.Supp.2d 403 [268 Ed.Law Rep. [153]] (S.D.N.Y. 2011).

[FN58]. *See, e.g.*, *Bd. of Educ. v. Schutz*, 290 F.3d 476 [165 Ed.Law Rep. [76]] (2d Cir. 2002*); Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 [167 Ed.Law Rep. [591]] (2d Cir. 2002), *aff'd on other grounds*, 548 U.S. 291 (2006); *St. Tammany Parish Sch. Bd. v. State of Louisiana*, 142 F.3d 776 [126 Ed.Law Rep. [76]] (5th Cir. 1998); Ashland *Sch. Dist. v. V.M.*, 494 F.Supp.2d 1180 [222 Ed.Law Rep. [688]] (D. Or. 2007); *L.B. v. Greater Clark Cnty. Sch.*, 458 F.Supp.2d 845 [214 Ed.Law Rep. [1113]] (S.D. Ind. 2006); *cf. Mackey v. Bd. of Educ.*, 386 F.3d 158 [192 Ed.Law Rep. [642]] (2d Cir. 2004) (as of the due date—not, if later, the actual date—of the state–level administrative decision). The application of this settled "stay–put" ruling has nuanced variations. *Compare L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900 [242 Ed.Law Rep. [23]] (9th Cir. 2009), *cert. denied*, 130 S.Ct. 90 (2009)(ruling against stay–put where district court, the focus of the parent's argument, did not specifically determine that the unilateral placement was appropriate), *with Sudbury Pub. Sch. v. Massachusetts Dep't of Elementary & Secondary Educ.*, 762 F.Supp.2d 254 [267 Ed.Law Rep. [142]] (D. Mass. 2010) (ruling for stay–put where IHO did not clearly limit prospective placement).

[FN59]. *See, e.g.*, *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29 [153 Ed.Law Rep. [42]] (1st Cir. 2001).
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