Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*

Perry A. Zirkel

In its ten major decisions under the Individuals with Disabilities Education Act (IDEA),[1] the Supreme Court has issued three concerning tuition reimbursement under the IDEA—*School Committee of Burlington v. Department of Education of Massachusetts* in 1985,[2] *Florence County School District Four v. Carter* in 1993,[3] and *Forest Grove School District v. T.A*. in 2009.[4] Meanwhile, after the first pair of these decisions, Congress codified this remedy in the 1997 Amendments, resulting in an elaboration of the equities step of *Burlington-Carte*r; thus, as the checklist shows, the two- or three-part test can be viewed as a four-step framework. The 2004 Amendments and 2006 regulations made negligible refinements.[5] During the entire period tuition and related reimbursement has been a major area of IDEA adjudication at the hearing/review and lower court levels.[6]

This checklist provides, in flowchart-like form, the criteria for reimbursement of tuition and related expenses[7] under the IDEA along with the applicable statutory, regulatory, and case law citations.[8] **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.[9] 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[10] and, by far the most tuition reimbursement court cases[11]—New York; thus, the citations for the decisions

---

* An earlier version of this document was published in vol. 282 of *West's Education Law Reporter*, 2012, pp. 785-794. The updates are highlighted in yellow.

of the Second Circuit and the federal district courts in New York are in grey highlighting and are generally limited to those with stronger precedential value.[12] 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]"[13] is not included as a prerequisite step in light of the Supreme Court's *Forest Grove* decision.[14] Similarly, the coverage of the preliminary step extends neither to preliminary nor ancillary adjudicative issues, which were not specific to the merits of tuition reimbursement analysis,[15] nor to inconclusive (i.e., remanded) tuition reimbursement decisions.[16]

Finally, the coverage here focuses on students who are subject to unilateral parental placements when FAPE is at issue, thus invoking the range of steps—including the first appropriateness step—that lead to tuition reimbursement. The reader is forewarned that children with disabilities in unilateral placements subject to tuition reimbursement are generally distinct from parentally-placed private school children with disabilities but that the limited overlaps, or exceptions, are still crystallizing.[17]

A. PRELIMINARY EQUITIES[18] STEP:

1. Did the parent fail to 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"?[19]

Exceptions: If so, was the reason for the lack of timely notice any one of the following:[20]

- **"the parent is illiterate and cannot write in English"**[21]
- **the district prevented the parent from providing said notice**
- **the district did not inform, via the procedural safeguards notice, of this requirement**[22]

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?[23]

Exception: the parent's compliance would "likely result in physical or serious emotional harm to the child"[24]

If the answer to question 1 and/or 2 is YES, after applying any applicable exceptions, then the IHO "may" reduce or deny reimbursement.[25]

The courts have been generally but not entirely strict in applying the timely notice requirement, thereby denying reimbursement altogether.[26]

The issue of constructive notice is unsettled.[27]

B. APPROPRIATENESS STEPS:

1. Was the district's proposed placement appropriate,[28] or, more specifically, did the district "make a free appropriate public education available to the child in a timely manner prior to [the parent's unilateral placement][29]**?**

Showing the breadth of this FAPE step, in an occasional tuition reimbursement case the claim is predicated on the threshold issues of eligibility,[30] child find,[31] or mis-evaluation.[32]

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.[33] The Supreme Court recently refined the substantive part to be whether the IEP is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances?"[34]

The jurisdictions vary in terms of whether the "snapshot" approach, which measures the appropriateness in terms of the what the IEP team knew or had reason to know at the time of formulating the proposed IEP, is applicable; where this approach applies, the exception is for subsequent evidence of progress, not the lack thereof.[35] The Second Circuit's recently adopted this approach (combined with modified four-corners evidentiary rule), with an express exception for amendments made during the resolution period[36]; however, the court subsequently clarified that consideration of such evidence does not invalidate the adjudication where permissible evidence supports it.[37] In any event, the snapshot part of this combined approach has less applicability in the tuition reimbursement context, because the typical posture is the parent's unilateral placement in the immediate wake of the district's proposed IEP, thus obviating implementation of the IEP and the child's resulting progress or lack thereof.[38]

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.[39]

In some of these cases, the key consideration is the IDEA's least restrictive environment (LRE) mandate.[40]

B. APPROPRIATENESS STEPS (CONTINUED):

2. If not,[41] was the parent's unilateral placement appropriate[42] (even if it does not meet state standards)?[43]

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.[44]

Courts tend to focus on the substantive standard with a totality approach, which includes but is not limited to or controlled by progress, for this second step determination.[45] More specifically, the applicable test in the Second Circuit, based on the *Rowley* Court's substantive analysis is whether the unilateral placement "'provides education instruction specifically designed to meet the unique needs of … [the] child.'"[46] However, the applicable test now appears to be the Supreme Court's more recent substantive standard, which may or may not be the equivalent to this Second Circuit test.[47]

Neither the Establishment Clause nor the IDEA precludes sectarian schools from being appropriate in tuition reimbursement context.[48]

Similarly, the IDEA does not categorically bar for-profit schools from being appropriate for purposes of reimbursement.[49]

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.[50]

In some cases, the issue of pendency, or stay-put, intersects with this appropriateness step.[51]

Whether viewed as a matter of appropriateness or reimbursability, hybrid, therapeutic placements (i.e., those with medical as well as educational services), which are usually but not always residential, are subject to a test in the Second Circuit that is one of various approaches among the circuits.[52]

Reimbursability does not extend to supplemental services that were not necessary, i.e., services beyond FAPE.[53]

C. FINAL EQUITIES STEP:

1. If so, were the actions of the parent—beyond those in items A1 and A2—unreasonable?[54]

Example: **"the cost of the private education was unreasonable"**[55]

Example: lack of parental cooperation with the district[56]

Where the district alleges that parent's motivation is to obtain public funding, the claim fails absent sufficient proof.[57] A pre-IEP deposit alone is insufficient to show such inequity.[58]

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.[59]

Alternative to denying reimbursement altogether, some courts have proportionally reduced it in relation to the balance of the equities against the parents.[60]

- - - - - - - - - - - - - - -

If the answer to item B1 is NO, the answer to B2 is YES, the IHO "may" reduce or deny reimbursement depending on the answers to A1–A2 and C1.[61]

In at least one court's view, the IHO must allow the parent a flexible opportunity to present the costs for reimbursement.[62]

The recoverable costs are not strictly limited to tuition.[63]

The costs of hybrid, therapeutic placements are not necessarily reimbursable.[64]

More than one federal district court in New York has ruled that the payment may be directly to the private school, i.e., need not be reimbursement, if the parents could not afford the tuition of the unilateral placement, including—for the needy parents—a permissive payment schedule that shifted some of the risk to the private school.[65] The Second Circuit recently affirmed this view as a matter of standing in the context of the IDEA.[66]

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.[67] However, if the final judicial ruling reverses the reimbursement order, the parent need not pay back the reimbursed amount.[68]

End Notes

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

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

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

[4] 557 U.S. 230 (2009) (ruling that the child's lack of previous enrollment in special education did not preclude application of the reimbursement test).

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

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

[7] This phraseology is intended to show that the remedy referred to, as a matter of shorthand, "tuition reimbursement" applies generically to parental expenses arising directly from a unilateral placement, which in some cases are in addition to or in lieu of formal tuition. See, e.g., Bucks County Dep't of MH/MR v. De Mora, 379 F.3d 61 (3d Cir. 2004) (ruling that reimbursement be for time expended by parent serving as Lovaas instructor). For reinforcement of this broad equitable authority, see *supra* note 5 and *infra* notes 18 and 52-64. Moreover, the regulations expressly New York IHOs with 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 (S.D.N.Y. 2005).

[8] 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: The Latest Update*, 341 Ed.Law Rep. 555 (2017).

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

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

N.Y. EDUC. LAW Art. § 4404(c)(1). For recognition of this change as of October 14, 2007, see, e.g., J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 641 n.29 (S.D.N.Y. 2011). For recognition that the validity of such state changes is an open question, see Reyes v. N.Y.C. Dep't of Educ., 760 F.3d 211 (2d Cir. 2014).

[10] 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).

[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 (2019) (available at perry.zirkel.com).

[12] 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* note 48 and accompanying text), 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).

[13] 20 U.S.C. § 1412(a)(10)(C)(i).

[14] See *supra* note 4.

[15] See, e.g., Nemlich v. Bd. of Educ., 170 F. App'x 727 (2d Cir. 2006) (attorney's fees); R.B. v. Dep't of Educ. of the City of New York, 59 IDELR ¶ 104 (S.D.N.Y. 2012) (statute of limitations); N.Y.C. Dep't of Educ. v. V.S., 2011 WL 3273922 (S.D.N.Y. June 29, 2011) (mootness); B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356 (S.D.N.Y. 2013); Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669 (S.D.N.Y. 2011) (exhaustion); B.J.S. v. New York State Educ. Dep't, 699 F. Supp. 2d 586 (S.D.N.Y. 2010) (personal jurisdiction over state defendants); N.Y.C. Dep't of Educ. v. S.S., 2010 WL 983719 (S.D.N.Y. Mar. 17, 2010) (reimbursement liability during pendency of IHO proceedings); Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692 (S.D.N.Y. 2006) (stay-put); Arlington Cent. Sch. Dist. v. State Review Officer, 741 N.Y.S.2d 276 (App. Div. 2002) (second-tier scope of review when the respondent fails to file an answer).

[16] See, e.g., P.G. v. N.Y.C. Dep't of Educ., 959 F. Supp. 2d 499 (S.D.N.Y. 2013); T.L. v. N.Y.C. Dep't of Educ., 938 F. Supp. 2d 417 (S.D.N.Y. 2013).

[17] See, e.g., Letter to Chamberlain, 60 IDELR ¶ 77 (OSEP 2012); Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools, 111 LRP 32532 (OSEP 2011).

[18] 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.

[19] 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. N.Y.C. Dep't of Educ., 713 F. Supp. 2d 235 (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., 826 F. Supp. 2d 635 (S.D.N.Y. 2011) (partially excused, used instead as part of calculus of overall equities at the final stage).

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

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

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

[23] 20 U.S.C. § 1412(a)(10)(C)(iii)(II); 34 C.F.R. § 300.148(d)(2). For the foundational case law that led to this codified exception, see, e.g., Patricia P. v. Bd. of Educ., 203 F.3d 462 (7th Cir. 2000); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998); Tucker v. Calloway Cty. Sch. Dist., 136 F.3d 495 (6th Cir. 1998).

[24] 20 U.S.C. § 1412(a)(10)(C)(iv)(II). The regulations appear to separate physical and serious

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

[25] 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. However, a close reading of the exceptions reveals a differentiation—the IHO may not reduce or deny reimbursement if any of the first set of exceptions apply. 20 U.S.C. § 1412(a)(10)(C)(iv); 34 C.F.R. § 300.148(e).

[26] For Second Circuit and New York decisions, which are representative of the case law elsewhere, see, e.g., S.W. v. N.Y.C. Dep't of Educ., 646 F. Supp. 2d 346 (S.D.N.Y. 2009); A.H. v. N.Y.C. Dep't of Educ., 652 F. Supp. 2d 297 (E.D.N.Y. 2009), *aff'd on other grounds*, 394 F. App'x 718 (2d Cir. 2010); *cf*. M.C. v. Voluntown Bd. of Educ., 226 F.2d 60, 66 (2d Cir. 2000) (related services pre-IDEA codification). *But see* R.E. v. N.Y.C. Dep't of Educ., 785 F. Supp. 2d 28 (S.D.N.Y. 2011), *rev'd on other grounds*, 694 F.3d 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013); M.M. v. N.Y.C. Dep't of Educ., 26 F. Supp. 2d 249 (S.D.N.Y. 2014); C.U. v. N.Y.C. Dep't of Educ., 23 F. Supp. 2d 210 (S.D.N.Y. 2014); *cf.* W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497 (S.D.N.Y. 2011); G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552 (S.D.N.Y. 2010) (reduced reimbursement).

[27] See, e.g, K.S. v. Summit Bd. of Educ., 63 IDELR ¶ 253 (D.N.J. 2014) (ruling, arguably as dicta, that oral notice did not fulfill the 10-day notice requirement).

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

[29] 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. §§ 300.148(a) and 300.148(c).

[30] See, e.g., M.M. v. N.Y.C. Dep't of Educ., 26 F. Supp. 3d 249 (S.D.N.Y. 2014); P.C. v. Oceanside Union Free Sch. Dist., 818 F. Supp. 2d 516 (E.D.N.Y. 2011); Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282 (S.D.N.Y. 2010); A.J. v. Bd. of Educ., 679 F. Supp. 2d 299 (E.D.N.Y. 2010).

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

[32] See, e.g., Mr. N.C. v. Bedford Cent. Sch. Dist., 300 F. App'x 11 (2d Cir. 2008); J.D. v. Pawlet Sch. Dist., 224 F.3d 60 (2d Cir. 2000); Muller v. Comm. on Special Educ., 145 F.2d 95 (2d Cir. 1998); W.G. v. N.Y.C. Dep't of Educ., 801 F. Supp. 2d 142 (S.D.N.Y. 2011).

[33] 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 (2d Cir. 2009).

[34] Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017).

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

[36] R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 185-86 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013). However, in doing so the court did not address its previously posited possible distinction between "IDEA claims that dispute the validity of a proposed IEP, on the one hand, and suits that question whether an existing IEP should have been modified in light of changed circumstances, new information, or proof of failure." D.F. ex rel. N.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 592 n.2 (2d Cir. 2005) (citing J.R. v. Bd. of Educ., 345 F. Supp. 2d 386 (S.D.N.Y. 2004); Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710 (S.D.N.Y. 2003)). For examples of the resulting application of the *R.E.* approach, see Reyes v. N.Y.C. Dep't

of Educ., 760 F.3d 211 (2d Cir. 2014); E.M. v. N.Y.C. Dep't of Educ., 758 F.3d 442 (2d Cir. 2104); C.F. v. N.Y.C., 746 F.3d 68 (2d Cir. 2014); B.R. v. N.Y.C. Dep't of Educ., 910 F. Supp. 2d 670 (S.D.N.Y. 2012).

[37] K.L. v. N.Y.C. Dep't of Educ., 530 F. App'x 81 (2d Cir. 2013).

[38] 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., F.L. v. N.Y.C. Dep't of Educ., 553 F. App'x 2 (2d Cir. 2014); W.T. v. Bd. of Educ., 716 F. Supp. 2d 270 (S.D.N.Y. 2010).

[39] The Second Circuit and New York decision are representative of the national trend. For a sampling of Second Circuit and New York decisions focusing on procedural appropriateness, *compare* Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735 (2d Cir. 2018); R.B. v. N.Y.C. Dep't of Educ., 689 F. App'x 48 (2d Cir. 2017); T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145 (2d Cir. 2014); A.H. v. Dep't of Educ. of N.Y.C., 394 F. App'x 718 (2d Cir. 2010); T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247 (2d Cir. 2009); Cabouli v. Chappaqua Cent. Sch. Dist., 202 F. App'x 519 (2d Cir. 2006); Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377 (2d Cir. 2003); Scott v. N.Y.C. Dep't of Educ., 6 F. Supp. 3d 424 (S.D.N.Y. 2013); FB v. N.Y.C. Dep't of Educ., 923 F. Supp. 2d 570 (S.D.N.Y. 2013); J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387 (S.D.N.Y. 2010); R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283 (S.D.N.Y. 2009), *aff'd on other grounds*, 366 F. App'x 239 (2d Cir. 2010); J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684 (S.D.N.Y. 2009); M.M. v. N.Y.C. Dep't of Educ., 583 F. Supp. 2d 498 (S.D.N.Y. 2008) (in favor of district), *with* T.K. v. N.Y.C. Dep't of Educ., 810 F.3d 860 (2d Cir. 2016); A.W. v. N.Y.C. Dep't of Educ., 287 F. Supp. 3d 420 (S.D.N.Y. 2018); J.E. v. N.Y.C. Dep't of Educ., 229 F. Supp. 3d 223 (S.D.N.Y. 2017); S.Y. v. N.Y.C. Dep't of Educ., 210 F. Supp. 3d 556 (S.D.N.Y. 2016); S.C. v. Katonah-Lewisboro Cent. Sch. Dist., 175 F. Supp. 3d 237 (S.D.N.Y. 2016); W.W. v. N.Y.C. Dep't of Educ., 160 F. Supp. 3d 618 (S.D.N.Y. 2016); V.S. v. N.Y.C. Dep't of Educ., 25 F. Supp. 3d 295 (S.D.N.Y. 2014); C.U. v. N.Y.C. Dep't of Educ., 23 F. Supp. 3d 210 (S.D.N.Y. 2014); R.G. v. N.Y.C. Dep't of Educ., 980 F. Supp. 2d 345 (E.D.N.Y. 2013); Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 771 N.Y.S.2d 572 (App. Div. 2004) (in favor of parent).

For a sampling of Second Circuit and New York decisions focusing on substantive appropriateness, *compare* J.P. v. N.Y.C. Dep't of Educ., 717 F. App'x 30 (2d Cir. 2017); R.C. v. Bd. of Educ. of Wappingers Cent. Sch. Dist., 705 F. App'x 29 (2d Cir. 2017); N.B. v. N.Y.C. Dep't of Educ., 711 F. App'x 29 (2d Cir. 2017); Dervishi v. Stamford Bd. of Educ., 659 F. App'x 3 (2d Cir. 2016); Y.F. v. N.Y.C. Dep't of Educ., 634 F. App'x 845 (2d Cir. 2015); B.P. v. N.Y.C. Dep't of Educ., 634 F. App'x 845 (2d Cir. 2015); M.O. v. N.Y.C. Dep't of Educ., 793 F.3d 236 (2d Cir. 2015); R.B. v. N.Y.C. Dep't of Educ., 589 F. App'x 572 (2d Cir. 2014); G.W. v. Rye City Sch. Dist., 554 F. App'x 56 (2d Cir. 2014); K.L. v. N.Y.C. Dep't of Educ., 530 F. App'x 81 (2d Cir. 2013); H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 F. App'x 64 (2d Cir. 2012); Bougades v. Pine Plains Cent. Sch. Dist., 376 F. App'x 95 (2d Cir. 2010); M.H. v. Monroe-Woodbury Sch. Dist., 296 F. App'x 126 (2d Cir. 2008); A.E. v. Westport Bd. of Educ., 251 F. App'x 685 (2d Cir. 2007); A.S. v. Bd. of Educ., 47 F. App'x 615 (2d Cir. 2002); Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998); Z.C. v. N.Y.C. Dep't of Educ., 222 F. Supp. 3d 326 (S.D.N.Y. 2017); S.B. v. N.Y.C. Dep't of Educ., 174 F. Supp. 3d 798 (S.D.N.Y. 2016); M.T. v. N.Y.C. Dep't of Educ., 200 F. Supp. 3d 447 (S.D.N.Y. 2016); S.E. v. N.Y.C. Dep't of Educ., 113 F. Supp. 3d 695 (S.D.N.Y. 2015); J.W. v. N.Y.C. Dep't of Educ., 95 F. Supp. 3d 592 (S.D.N.Y. 2015); L.M. v. E. Meadow Sch. Dist., 11 F. Supp. 3d 306 (E.D.N.Y. 2014); M.O. v. N.Y.C. Dep't of Educ., 996 F. Supp. 2d 269 (S.D.N.Y. 2014); T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554 (S.D.N.Y. 2013); E.W.K. v. Bd. of Educ., 884 F. Supp. 2d 39 (S.D.N.Y.2012); C.G. v. N.Y.C. Dep't of Educ., 752 F. Supp. 2d 355 (S.D.N.Y. 2010); D.G. v. Cooperstown Cent. Sch. Dist., 746 F. Supp. 2d 435 (N.D.N.Y. 2010); M.S. v. N.Y.C. Dep't of Educ., 734 F. Supp. 2d 271 (E.D.N.Y. 2010); Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361 (S.D.N.Y. 2010); J.R. v. Bd. of Educ., 345 F. Supp. 2d 386 (S.D.N.Y. 2004); Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501 (E.D.N.Y. 1996) (in favor of district), *with* E.S. v. Katonah-Lewisboro Sch. Dist., 487 F. App'x 619 (2d Cir. 2012) (mixed outcome), *with* J.C. v. Katonah-Lewisboro Sch. Dist., 690 F. App'x 53 (2d Cir. 2017); Reyes v. N.Y.C. Dep't of Educ., 760 F.3d 211 (2d Cir. 2014); P.K. v. N.Y.C. Dep't of Educ., 819 F. Supp. 2d 90 (E.D.N.Y. 2011), *aff'd,* 526 F. App'x 135 (2d Cir. 2013); L.R. v. N.Y.C. Dep't of Educ., 193

F. Supp. 3d 209 (S.D.N.Y. 2016);W.S. v. N.Y.C. Dep't of Educ., 188 F. Supp. 3d 293 (S.D.N.Y. 2016); K.R. v. N.Y.C. Dep't of Educ., 107 F. Supp. 3d 295 (S.D.N.Y. 2015); P.L. v. N.Y.C. Dep't of Educ., 56 F. Supp. 3d 147 (E.D.N.Y. 2014); Scott v. N.Y.C. Dep't of Educ., 6 F. Supp. 3d 424 (S.D.N.Y. 2013); F.O. v. N.Y.C. Dep't of Educ., 976 F. Supp. 2d 499 (S.D.N.Y. 2013); B.R. v. N.Y.C. Dep't of Educ., 910 F. Supp. 2d 670 (S.D.N.Y. 2012) (in favor of parent).

For those addressing both the procedural and substantive sides, see D.B. v. Ithaca Sch. Dist., 690 F. App'x 778 (2d Cir. 2017); J.C. v. N.Y.C. Dep't of Educ., 690 F. App'x 53 (2d Cir. 2016); D.A.B. v. N.Y.C. Dep't of Educ., 630 F. App'x 73 (2d Cir. 2015); R.B. v. N.Y.C. Dep't of Educ., 589 F. App'x 572 (2d Cir. 2014); A.S. v. N.Y.C. Dep't of Educ., 573 F. App'x 63 (2d Cir. 2014); F.L. v. N.Y.C. Dep't of Educ., 553 F. App'x 2 (2d Cir. 2014); M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131 (2d Cir. 2013); R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013); T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412 (2d Cir. 2009); A.C. v. Bd. of Educ., 553 F.3d 165 (2d Cir. 2009); Mr. B. v. E. Granby Bd. of Educ., 201 F. App'x 834 (2d Cir. 2006); F.L. v. Bd. of Educ. of Great Neck U.F.S.D. 274 F. Supp. 3d 94 (S.D.N.Y. 2017); J.B. v. N.Y.C. Dep't of Educ., 242 F. Supp. 3d 186 (S.D.N.Y. 2017);P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, (S.D.N.Y. 2017); C.R. v. N.Y.C. Dep't of Educ., 211 F. Supp. 3d 583 (S.D.N.Y. 2016); M.H. v. Pelham Union Free Sch. Dist., 167 F. Supp. 3d 667 (S.D.N.Y. 2016); J.M. v. N.Y.C. Dep't of Educ., 171 F. Supp. 3d 236 (S.D.N.Y. 2016); C.W. v. N.Y.C. Dep't of Educ., 171 F. Supp. 3d 126 (S.D.N.Y. 2016); C.W.L. v. Pelham Union Free Sch. Dist., 149 F. Supp. 3d 451 (S.D.N.Y. 2015); J.S. v. N.Y.C. Dep't of Educ., 104 F. Supp. 3d 392 (S.D.N.Y. 2015); S.W. v. N.Y.C. Dep't of Educ., 92 F. Supp. 3d 143 (S.D.N.Y. 2015); B.K. v. N.Y.C. Dep't of Educ., 12 F. Supp. 3d 343 (S.D.N.Y. 2014); M.S. v. N.Y.C. Dep't of Educ., 2 F. Supp. 3d 311 (E.D.N.Y. 2013); T.G. v. N.Y.C. Dep't of Educ., 973 F. Supp. 2d 320 (S.D.N.Y. 2013), D.A.B. v. N.Y.C. Dep't of Educ., 973 F. Supp. 2d 344 (S.D.N.Y. 2013); D.B. v. N.Y.C. Dep't of Educ., 966 F. Supp. 2d 315 (S.D.N.Y. 2013); N.K. v. N.Y.C. Dep't of Educ., 961 F. Supp. 2d 577 (S.D.N.Y. 2013); A.M. v. N.Y.C. Dep't of Educ., 964 F. Supp. 2d 270 (S.D.N.Y. 2013); R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256 (S.D.N.Y. 2012); B.P. v. N.Y.C. Dep't of Educ., 841 F. Supp. 2d 605 (E.D.N.Y. 2012); B .O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130 (E.D.N.Y. 2011); A.L. v. N.Y.C. Dep't of Educ., 812 F. Supp. 2d 492 (S.D.N.Y. 2011); C.T. v. Croton-Harmon Union Free Sch. Dist., 812 F. Supp. 2d 420 (S.D.N.Y. 2011); E.Z.-L v. N.Y.C. Dep't of Educ., 763 F. Supp. 2d 584 (S.D.N.Y. 2011), *aff'd sub nom*. R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013); M.F. v. Irvington Union Free Sch. Dist., 719 F. Supp. 2d 302 (S.D.N.Y. 2010); W.T. v. Bd. of Educ., 716 F. Supp. 2d 270 (S.D.N.Y. 2010); E.G. v. City Sch. Dist., 606 F. Supp. 2d 384 (S.D.N.Y. 2009); P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371 (S.D.N.Y. 2008); W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134 (S.D.N.Y. 2006); Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366 (S.D.N.Y. 2006) (in favor of district), *with* A.M. v. N.Y.C. Dep't of Educ., 845 F.3d 523 (2d Cir. 2017); C.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68 (2d Cir. 2014); Davis v. Wappingers Cent. Sch. Dist., 700 F. Supp. 2d 552 (S.D.N.Y. 2011), *aff'd*, 56 IDELR ¶ 248 (2d Cir. 2011); E.M. v. N.Y.C. Dep't of Educ., 213 F. Supp. 3d 607 (S.D.N.Y. 2016); T.Y. v. N.Y.C. Dep't of Educ., 213 F. Supp. 3d 446 (S.D.N.Y. 2016); E.H. v. N.Y.C. Dep't of Educ., 164 F. Supp. 3d 539 (S.D.N.Y. 2016); GB v. N.Y.C. Dep't of Educ., 145 F. Supp. 3d 230 (S.D.N.Y. 2015); FB v. N.Y.C. Dep't of Educ., 132 F. Supp. 3d 522 (S.D.N.Y. 2015; S.B. v. N.Y.C. Dep't of Educ., 117 F. Supp. 3d 355 (S.D.N.Y. 2015); J.G. v. Kiryas-Joel Union Free Sch. Dist., 777 F. Supp. 2d 606 (S.D.N.Y. 2011) (in favor of parent); *cf*. J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635 (S.D.N.Y. 2011) (in favor of parent based on placement, not IEP); Scott v. N.Y.C. Dep't of Educ., 6 F. Supp. 3d 424 (S.D.N.Y. 2014) (in favor of parent based on placement, though procedural violations were not prejudicial).

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

[41] 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., 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 (3d Cir. 2000); D.R. v. Dep't of Educ., Hawaii, 827 F. Supp. 2d 1161 (D. Hawaii 2011).

[42] This step is only implicit in the IDEA legislation, although added in the regulations. Its basis is *Carter*, which may be viewed as either implicitly incorporated in or a residuum beyond the statutory codification. The Supreme had referred to whether the parents' "private placement" was "proper." *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.

[43] 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. For the lack of specialized staff certification not being a bar, see, e.g., D.C. v. N.Y.C. Dep't of Educ., 950 F. Supp. 2d 494 (S.D.N.Y. 2013).

[44] For a sampling at the Second Circuit and in New York, *compar*e R.H. v. Bd. of Educ. of Saugerties Cent. Sch. Dist., 776 F. App'x 719 (2d Cir. 2019); W.A. v. Hendrick Hudson Cent. Sch. Dist 927 F.3d 126 (2d Cir. 2019); Doe v. E. Lyme Bd. of Educ., 790 F.3d 440 (2d Cir. 2015); Hardison v. Bd. of Educ., 773 F3d 372 (2d Cir. 2014); Ward v. Bd. of Educ., 568 F. App'x 18 (2d Cir. 2014); C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 (2d Cir. 2014); M.B. v. Minisink Valley Cen. Sch. Dist., 523 F. App'x 76 (2d Cir. 2013); D.D.-S. v. Southold Union Sch. Dist., 506 F. App'x 80 (2d Cir. 2013); R.S. v. Lakeland Cent. Sch. Dist., 471 F. App'x 77 (2d Cir. 2012); Davis v. Wappingers Cent. Sch. Dist., 431 F. App'x 12 (2d Cir. 2011); Matrejek v. Brewster Cent. Sch. Dist., 293 F. App'x 20 (2d Cir. 2008); Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 (2d Cir. 2007); M.S. v. Bd. of Educ., 231 F.3d 96 (2d Cir. 2000); D.C. v. N.Y.C. Dep't of Educ., 950 F. Supp. 2d 494 (S.D.N.Y. 2013); L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467 (S.D.N.Y. 2013); P.C. v. Oceanside Union Free Sch. Dist., 818 F. Supp. 2d 516 (E.D.N.Y. 2011); Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514 (S.D.N.Y. 2011); J.G. v. Kiryas-Joel Union Free Sch. Dist., 777 F. Supp. 2d 606 (S.D.N.Y. 2011); Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529 (S.D.N.Y. 2010); Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477 (S.D.N.Y. 2007); Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656 (S.D.N.Y. 2005) (in favor of the district), *with* J.C. v. Katonah-Lewisboro Sch. Dist., 690 F. App'x 53 (2d Cir. 2017); C.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68 (2d Cir. 2014); E.S. v. Katonah-Lewisboro Sch. Dist., 487 F. App'x 619 (2d Cir. 2012); M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217 (2d Cir. 2012); Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006); Muller v. Comm. on Special Educ., 145 F.2d 95 (2d Cir. 1998); Mrs. B. v. Milford Bd. of Educ., 103 F.2d 1114 (2d Cir. 1997); P.K. v. N.Y.C. Dep't of Educ., 819 F. Supp. 2d 90 (E.D.N.Y. 2011), *aff'd,* 526 F. App'x 135 (2d Cir. 2013); A.W. v. N.Y.C. Dep't of Educ., 287 F. Supp. 3d 420 (S.D.N.Y. 2018); J.E. v. N.Y.C. Dep't of Educ., 229 F. Supp. 3d 223 (S.D.N.Y. 2017); E.M. v. N.Y.C. Dep't of Educ., 213 F. Supp. 3d 607 (S.D.N.Y. 2016); S.Y. v. N.Y.C. Dep't of Educ., 210 F. Supp. 3d 556 (S.D.N.Y. 2016); S.C. v. Katonah-Lewisboro Cent. Sch. Dist., 175 F. Supp. 3d 237 (S.D.N.Y. 2016); S.B. v. N.Y.C. Dep't of Educ., 117 F. Supp. 3d 355 (S.D.N.Y. 2016) ; W.W. v. N.Y.C. Dep't of Educ., 160 F. Supp. 3d 618 (S.D.N.Y. 2016); E.H. v. N.Y.C. Dep't of Educ., 164 F. Supp. 3d 539 (S.D.N.Y. 2016) ; GB v. N.Y.C. Dep't of Educ., 145 F. Supp. 3d 230 (S.D.N.Y. 2015); FB v. N.Y.C. Dep't of Educ., 132 F. Supp. 3d 522 (S.D.N.Y. 2015; P.L. v. N.Y.C. Dep't of Educ., 56 F. Supp. 3d 147 (E.D.N.Y. 2014); V.S. v. N.Y.C. Dep't of Educ., 25 F. Supp. 3d 295 (S.D.N.Y. 2014); M.M. v. N.Y.C. Dep't of Educ., 26 F. Supp. 3d 249 (S.D.N.Y. 2014); F.O. v. N.Y.C. Dep't of Educ., 976 F. Supp. 2d 499 (S.D.N.Y. 2013); J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635 (S.D.N.Y. 2011); R.E. v. N.Y.C. Dep't of Educ., 785 F. Supp. 2d 28 (S.D.N.Y. 2011), *rev'd on other grounds*, 694 F.3d 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013); A.D. v. Bd. of Educ., 690 F. Supp. 2d 193 (S.D.N.Y. 2010); Gabel v. Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005); Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 771 N.Y.S.2d 572 (App. Div. 2004) (in favor of the parent).

[45] These New York examples are representative: M.B. v. Minisink Valley Cen. Sch. Dist., 523 F. App'x 76 (2d Cir. 2013); M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217 (2d Cir. 2012); Matrejek v. Brewster Cent. Sch. Dist., 293 F. App'x 20 (2d Cir. 2008); Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006); Gabel v. Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005. For a discussion of this issue at this second appropriateness step, see Davis v. Wappingers Cent. Sch. Dist., 700 F. Supp. 2d 552 (S.D.N.Y. 2011), *aff'd*, 56 IDELR ¶ 248 (2d Cir. 2011). However, the Second Circuit provided the overriding caveat that the child's progress "does not itself demonstrate that a private placement was appropriate." *Gagliardo*, 489 F.3d at 115.

[46] Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 115 (2d Cir. 2007) (citing *Frank G.*, 459 F.3d at 369 and *Rowley*, 458 U.S. at 188–89). For an alternative or more specific standard, see A.S. v. Shenendehowa Cent. Sch. Dist., 73 IDELR ¶ 260 (N.D.N.Y. 2019 (citing *Frank G.* at 465 that, "a unilateral

private placement cannot be regarded as proper under the IDEA when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient").

[47] See, e.g., L.H. v. Hamilton Cty. Sch. Dist., 900 F.3d 779, 796 (6th Cir. 2019) (citing Endrew F. v. Doughlas Cty. Sch. Dist., 137 S. Ct. 988 (2017).

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

[49] N.Y.C. 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).

[50] See, e.g., Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 (2d Cir. 2007); M.S. v. Bd. of Educ., 231 F.3d 96 (2d Cir. 2000); Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529 (S.D.N.Y. 2010); Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477 (S.D.N.Y. 2007). Not all circuits agree with the Second Circuit's view. See, e.g., C.B. v. Special Sch. Dist. No 1, 636 F.3d 981 (8th Cir. 2011) (ruling the LRE is not a relevant factor). Conversely, in an occasional case, the LRE factor supports the unilateral placement. See, e.g., M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217 (2d Cir. 2012); *cf*. J.G. v. Kiryas-Joel Union Free Sch. Dist., 777 F. Supp. 2d 606 (S.D.N.Y. 2011) (ruling that the unilateral placement was inappropriate for other reasons).

[51] See, e.g., Gabel v. Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005).

[52] *Compare* M.H. v. Monroe-Woodbury Cent. Sch. Dist., 296 F. App'x 126 (2d Cir. 2008); Ashland Sch. Dist. v. Parents of Student R.J., 588 F.3d 1004 (9th Cir. 2009) (whether the placement is necessary for child's education needs), *with* Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E., 702 F.3d 1227 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2857 (2013) (whether it fits "straightforward application" of IDEA for accredited education facility plus mental health—not medical—support as related services) *and* Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286 (5th Cir. 2009) (whether it is 1) essential for the child to receive meaningful educational benefit; and 2) primarily oriented toward enabling the child to obtain an education) *and* Mary T. v. Sch. Dist., 575 F.3d 235 (3d Cir. 2009) (whether it is necessary for educational purposes or instead a response to medical, social or emotional problems that are segregable from the learning process).

[53] L.K. v. N.Y.C. Dep't of Educ., 674 F. App'x 100 (2d Cir. 2019).

[54] 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, in light of the overall structure of the Act and the specific contours of *Burlington-Carter* (see *supra* note 18 and *infra* note 59), this equitable criterion implicitly extends to IHOs and also implicitly amounts to a balancing of the equities, thus extending to the reasonableness of the district's action. For an example of a case where the court weighed the equities on both sides, concluding that the balance favored the parent, see Gabel v Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005); *cf*. E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417 (S.D.N.Y. 2010), *aff'd*, 487 F. App'x 619 (2d Cir. 2012) (upheld parents' equitable conduct and cost).

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

[56] T.M. v. Kingston City Sch. Dist., 891 F. Supp. 2d 289 (N.D.N.Y. 2012); Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656 (S.D.N.Y. 2005); *cf*. Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402 (S.D.N.Y. 2005), *aff'd mem.*, 192 F. App'x 62 (2d Cir. 2006) (alternative rationale); S.W. v. N.Y.C. Dep't of Educ., 646 F. Supp. 2d 346 (S.D.N.Y. 2009) (alternative rational intertwined with lack of timely notice). For examples from other jurisdictions, see, e.g., Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093 (C.D. Cal. 2000) (parent's withholding of assessment records). 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 (1st Cir. 2008). However, the courts are not receptive to claims of lack of cooperation without specific, persuasive evidentiary support. See, e.g., P.L. v. N.Y.C. Dep't of Educ., 56 F. Supp. 3d 157 (E.D.N.Y. 2014).

[57] *Compare*, e.g., D.C. v. N.Y.C. Dep't of Educ., 950 F. Supp. 2d 494 (S.D.N.Y. 2013); Sudbury Pub. Sch. v. Massachusetts Dep't of Elementary & Secondary Educ., 762 F. Supp. 2d 254 (D. Mass. 2010) (no denial), *with* Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402 (S.D.N.Y. 2005), *aff'd mem.*, 192 F. App'x 62 (2d Cir. 2006) (denial but flagrant facts).

[58] See, e.g., T.K. v. N.Y.C. Dep't of Educ., 810 F.3d 860 (2d Cir. 2016); F.O. v. N.Y.C. Dep't of Educ., 976 F. Supp. 2d 499 (S.D.N.Y. 2013).

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

[60] See, e.g., J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635 (S.D.N.Y. 2011); W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497 (S.D.N.Y. 2011); G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552 (S.D.N.Y. 2010); Cone v. Randolph Cty. Sch. Bd. of Educ., 657 F. Supp. 2d 667 (M.D.N.C. 2009); Hogan v. Fairfax Cty. Sch. Bd., 645 F. Supp. 2d 554 (E.D. Va. 2009); Kitchelt v. Weast, 341 F. Supp. 2d 553 (D. Md. 2004).

[61] 20 U.S.C. § 1412(a)(10)(C)(ii)–(iii); 34 C.F.R. § 300.148(c)-(d) ("a court or a hearing officer may require[,] . . . reduce[] or den[y]"). Here, the "may" merely reinforces the equitable nature of this remedy, especially because (1) steps A and C both fit as equitable considerations, and (2) at step C the parent's conduct, if unreasonable, at least implicitly warrants balancing against the district's conduct, which may also have been unreasonable. For cases that succeeded on all of the applicable steps, see, e.g., J.C. v. Katonah-Lewisboro Sch. Dist., 690 F. App'x 53 (2d Cir. 2017); C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 (2d Cir. 2014); C.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68 (2d Cir. 2014); M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217 (2d Cir. 2012); Muller v. Comm. on Special Educ., 145 F.3d 95 (2d Cir. 1998); P.K. v. N.Y.C. Dep't of Educ., 819 F. Supp. 2d 90 (E.D.N.Y. 2011), *aff'd,* 526 F. App'x 135 (2d Cir. 2013); A.W. v. N.Y.C. Dep't of Educ., 287 F. Supp. 3d 420 (S.D.N.Y. 2018); J.E. v. N.Y.C. Dep't of Educ., 229 F. Supp. 3d 223 (S.D.N.Y. 2017); E.M. v. N.Y.C. Dep't of Educ., 213 F. Supp. 3d 607 (S.D.N.Y. 2016); T.Y. v. N.Y.C. Dep't of Educ., 213 F. Supp. 3d 446 (S.D.N.Y. 2016); S.Y. v. N.Y.C. Dep't of Educ., 210 F. Supp. 3d 556 (S.D.N.Y. 2016); L.R. v. N.Y.C. Dep't of Educ., 193 F. Supp. 3d 209 (S.D.N.Y. 2016);W.S. v. N.Y.C. Dep't of Educ., 188 F. Supp. 3d 293 (S.D.N.Y. 2016); S.C. v. Katonah-Lewisboro Cent. Sch. Dist., 175 F. Supp. 3d 237 (S.D.N.Y. 2016); S.B. v. N.Y.C. Dep't of Educ., 117 F. Supp. 3d 355 (S.D.N.Y. 2016) ; W.W. v. N.Y.C. Dep't of Educ., 160 F. Supp. 3d 618 (S.D.N.Y. 2016); E.H. v. N.Y.C. Dep't of Educ., 164 F. Supp. 3d 539 (S.D.N.Y. 2016) ; GB v. N.Y.C. Dep't of Educ., 145 F. Supp. 3d 230 (S.D.N.Y. 2015); FB v. N.Y.C. Dep't of Educ., 132 F. Supp. 3d 522 (S.D.N.Y. 2015; M.M. v. N.Y.C. Dep't of Educ., 26 F. Supp. 3d 249 (S.D.N.Y. 2014); V.S. v. N.Y.C. Dep't of Educ., 25 F. Supp. 3d 295 (S.D.N.Y. 2014); C.U. v. N.Y.C. Dep't of Educ., 23 F. Supp. 3d 210 (S.D.N.Y. 2014); Scott v. N.Y.C. Dep't of Educ., 6 F. Supp. 3d 424 (S.D.N.Y. 2013); D.C. v. N.Y.C. Dep't of Educ., 950 F. Supp. 2d 494 (S.D.N.Y. 2013); F.O. v. N.Y.C. Dep't of Educ., 976 F. Supp. 2d 499 (S.D.N.Y. 2013); B.R. v. N.Y.C. Dep't of Educ., 910 F. Supp. 2d 670 (S.D.N.Y. 2012); Mr. A. v. N.Y.C. Dep't of Educ., 769 F. Supp. 2d 403 (S.D.N.Y. 2011); R.B. v. N.Y.C. Dep't of Educ., 713 F. Supp. 2d 235 (S.D.N.Y. 2010); A.D. v. Bd. of Educ., 690 F. Supp. 2d 193 (S.D.N.Y. 2010); Jennifer D. v. N.Y.C. Dep't of Educ., 550 F. Supp. 2d 420 (S.D.N.Y. 2008); Gabel v. Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005); Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 771 N.Y.S.2d 572 (App. Div. 2004).

[62] A.G. v. Dist. of Columbia, 794 F. Supp. 2d 133 (D.D.C. 2011).

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

[64] See *supra* note 51 and accompanying text.

[65] Scott v. N.Y.C. Dep't of Educ., 6 F. Supp. 3d 424 (S.D.N.Y. 2013); Mr. A. v. N.Y.C. Dep't of Educ., 769 F. Supp. 2d 403 (S.D.N.Y. 2011); *cf.* P.K. v. N.Y.C. Dep't of Educ., 819 F. Supp. 2d 90 (E.D.N.Y. 2011), *aff'd in summary order*, 526 F. App'x 135 (2d Cir. 2013) (applying *Mr. A* without clarifying circumstances regarding the parents' need or the contract); M.M. v. N.Y.C. Dep't of Educ., 26 F. Supp. 3d 249 (S.D.N.Y. 2014) (repayment of grandparent's loan). Whether the language about a permissive payment schedule applies to such permissive contractual arrangements with parents who can afford the tuition is an open question.

[66] E.M. v. N.Y.C. Dep't of Educ., 758 F.3d 442 (2d Cir. 2014) (ruling that " as a result of the [district's] alleged failure to provide a FAPE, [the parent] has incurred a financial obligation to [the private school] under the [loan receipt-type] terms of the enrollment contract"). In this decision, the court distinguished rather than overruled *S.W. v. N.Y.C. Department of Education*, 646 F. Supp. 2d 346 (S.D.N.Y. 2009), where the enrollment contract relieved the parent of financial responsibility.

[67] See, e.g., Bd. of Educ. v. Schutz, 290 F.3d 476 (2d Cir. 2002); Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 (2d Cir. 2002), *aff'd on other grounds*, 548 U.S. 291 (2006); St. Tammany Parish Sch. Bd. v. State of Louisiana, 142 F.3d 776 (5th Cir. 1998); Ashland Sch. Dist. v. V.M., 494 F. Supp. 2d 1180 (D. Or. 2007); L.B. v. Greater Clark Cty. Sch., 458 F. Supp. 2d 845 (S.D. Ind. 2006); *cf.* Mackey v. Bd. of Educ., 386 F.3d 158 (2d Cir. 2004) (as of the due date—not, if later, the actual date—of the state-level administrative decision). The application of this settled "stay-put" ruling has nuanced variations. *Compare* L.M. v. Capistrano Unified Sch. Dist., 556 F.3d 900 (9th Cir. 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 (D. Mass. 2010) (ruling for stay-put where IHO did not clearly limit prospective placement).

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