A Step-by-Step Overview of Tuition Reimbursement Under the IDEA

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- **The IDEA reimbursement remedy is a high-stakes issue for both districts and parents.**
- **Congress and the courts have provided a rather systematic decisional framework that warrants careful consideration by both parties.**
- **In addition to the central sequential questions of (a) whether the district's proposed placement meets the applicable standards for appropriateness and, if not, (b) whether the parents' unilateral placement is substantively appropriate, the framework requires consideration of the "equities" at the threshold and concluding steps.**
- **On balance, in many such potential cases, prompt and proactive collaboration is in the interest of both parties and the child.**

Key words: *Endrew F.,* Equities, FAPE, Reimbursement, Remedies.

The Individuals with Disabilities Education Act (IDEA) continues to account for an expansive and expensive segment of education litigation. The most longstanding remedy under the IDEA is tuition reimbursement, interpreted broadly to include not only private school tuition, but also related transportation and stand-alone related services. The costs can be staggering. As an approximate example, the average cost of private day placements and residential placements in Massachusetts, upon adjustment for inflation to current dollars, is $64k and $132k, respectively, as compared with the state's average per pupil cost of $17k (Deninger & O'Donnell, 2009). Moreover, both districts and parents face the added cost of attorneys' fees for litigating this issue, with the understanding that prevailing parents are entitled to seek recovery of that cost from the district.

Probably because it represents such a high-stakes risk to both parents and school districts, this remedy accounts for (a) three Supreme Court cases, which is more than that for the central obligation of a free appropriate public education (FAPE), and (b) specialized provisions in the IDEA. More specifically, the Supreme Court established the general multistep framework in *School Committee of Burlington v. Department of Education of Massachusetts* (1985) and *Florence County School District Four v. Carter* (1993); Congress then added codified refinements in the 1997 amendments of the IDEA; and, more recently, the Supreme Court interpreted part of this codified language in *Forest Grove School District v. T.A.* (2009). Finally, a continuing multitude of lower court decisions have filled the gaps with varying further interpretations.

Rather than summarizing each of these successive sources of law, this article provides a systematic synthesis of the applicable adjudicative steps in the form of a yes–no checklist. Each step starts with a question followed by a relatively concise explanation, along with a few lower court rulings that illustrate its prevailing or varying applications. Although special education leaders and other stakeholders understandably have their own perceptions, it is worthwhile for them to consider the applicable steps from the perspective of the "adjudicator," who may be a due process hearing officer or, in the relatively few states that have opted for a second tier under the IDEA, review officer or, upon appeal, a court.

As a prefatory clarification for the checklist, many courts and commentators refer to the applicable analysis as having two steps—whether the district's proposed individualized education program (IEP) provides FAPE and, if not, whether the parents'

unilateral placement meets the respective standard for appropriateness. However, this checklist provides a more complete multistep analysis that includes the so-called "equities" that come into play before and after the two basic appropriateness steps. The first and final equities steps shape the outcome in a considerable segment of the IDEA reimbursement cases at the hearing/review officer and court levels. Because the IDEA does not generally provide for money damages, its remedies are based on these adjudicators' "equitable" authority. These remedies are injunctions, or binding orders, for violation of legal standards, such as the procedural and substantive requisites of FAPE, that also reflect the conduct of both parties. More specifically, the "balancing of the equities" refers to taking into account whether each party has acted within societal norms for reasonableness and good-faith fairness and, if not, whether the "unclean hands" are only on one party's side.

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The meaning of equities becomes clearer in the first of the four potentially applicable steps. Posed as a question initially for the special education leader's consideration and, if not resolved, ultimately for adjudication, the obvious purpose of this first step to provide early warning. As a matter of fairness, this warning provides the district with the opportunity to resolve the matter with the parents prior to their choice of whether to proceed with a unilateral private placement of the child.

Did the parent provide timely notice to the district?

Although also addressing other threshold equitable considerations, including whether the parents' made the child reasonably available upon due notification for an evaluation, the IDEA (2018) focuses this step on timely notice. The Act specifies that "timely" here means at either the most recent IEP meeting or in writing at least 10 business days before the parents' "removal" of the child (§ 1412[a][10][C]). Moreover, the same statutory section specifies the contents of the "notice" as informing the district of (a) their rejection of the proposed IEP and also (b) a statement of "their concerns and their intent to enroll their child in a private school at public expense." The legislation also specifies limited exceptions to this timely notice step, such as the district's failure to inform the parents, via the standard procedural safeguards notice, of this early-warning requirement. Finally, the IDEA leaves to the hearing/review officer or court the discretion to reduce or reject reimbursement for a violation of this first equities step.

For violations of Step 1, the courts have varied in their exercise of this discretionary authority. The majority have, in effect, counted it as a strike, not as a strike out. For example, in *W.D. v. Watchung Hills Regional High School District* (2017), the Third Circuit Court of Appeals upheld the denial of reimbursement to a parent who failed not only to provide the requisite timely notice but also to show that the district denied him a meaningful opportunity for participation in the IEP process. For the substantial number of cases in which the parents either fulfilled this threshold equitable consideration or did not receive a judicial strike-out, the key appropriateness question is next.

Is the school district's proposed IEP appropriate?

As the IDEA (2018) makes clear, the scope of this key question is whether the district, via the proposed IEP, fulfilled its core obligation to "make a [FAPE] available to the child in a timely manner" (§ 1412[a][10][C]). The answers to this question trigger, in most cases, one or both of the primary dimensions of FAPE—procedural and substantive (e.g., Zirkel, in press). For procedural denial of FAPE, the IDEA specifies a two-step approach: The adjudicator must find not only one or more violations of the required procedures but also a resulting loss (§ 1415[f][3][E]). The loss, according to this statutory provision, must be to (a) the child in the district's

resulting failure to meet the substantive standard for FAPE or (b) the parents in the district's significantly impeding their opportunity for participation in the IEP process. For substantive denial of FAPE, the Supreme Court recently refined the applicable standard for the adjudicator to determine whether the proposed IEP is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances?" (*Endrew F. v. Douglas County School District RE-1*, 2017).

Moreover, the Supreme Court in *Forest Grove School District v. T.A.* (2009) effectively extended the IDEA's reimbursement remedy to child find cases by interpreting the applicable statutory language that refers children "who previously received special education and related services" as only illustrative and, thus, nonexclusive for this FAPE step. Consequently, if the parents proved that the district should have known that their child was eligible under the IDEA and did not provide an IEP, they are not foreclosed from reimbursement, depending on the application of the rest of this multistep analysis.

However, in the majority of cases at this step, parents do not succeed, largely due to the harmless-error approach to procedural FAPE (e.g., Zirkel & Hetrick, 2016), which includes child find claims, and the generally insignificant effect that *Endrew F*. has had on the outcomes of the substantive FAPE cases (e.g., Moran, 2020). In a few cases at this step, the IDEA's overlapping obligation for "least restrictive environment" (LRE) has come into play, without significant change in this overall outcomes trend. For example, in *C.D. v. Natick Public School District* (2020) the First Circuit Court of Appeals rejected the parents' reimbursement claim based on not only *Endrew F*. but also LRE. First, rejecting the parents' contention that *Endrew F*. enunciated a separate, more stringent standard in addition to its equivocal progress formulation, the court in *C.D.* concluded that "*Endrew F.* used terms like "demanding," "challenging," and "ambitious" to define "progress appropriate in light of the child's circumstances," not to announce a separate dimension of the FAPE requirement" (p. 629). Second, the court similarly declined the parents' formulation and application of LRE, instead adhering to the usual judicial approach to deferring to the expertise of school authorities.

Conversely, though, if the parents' reimbursement claim survives this appropriateness step, they face much better outcome odds at the next step.

Is the parents' unilateral placement appropriate?

Although the IDEA does not address this step in its codification, the Supreme Court's foundational *Burlington-Carter* decisions made clear its role in the overall analysis. First, in *School Committee of Burlington v. Department of Education of Massachusetts* (1985), the Court held:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school. (p. 370)

Next, in *Florence County School District Four v. Carter* (1993) the Court clarified that for this question of whether the parents' unilateral placement was "proper," the answer is a matter of substantive, not procedural, FAPE. More specifically, the *Carter* Court concluded that applying the Act's procedural requirements of meeting state standards and obtaining state approval to the parents' self-help action "would effectively eliminate the right of unilateral [placement] recognized in *Burlington*" and "would defeat [the overriding FAPE] statutory purpose" (pp. 14–15).

The more recent extensive case law has extended the *Carter* reasoning to apply to the Act's various procedural requirements more generally, thus focusing the determination at this step on the substantive standard for FAPE. Moreover, the Sixth Circuit Court of Appeals came to the conclusion that other courts are bound to follow, which is that the *Endrew F*. standard is the controlling criterion for determining whether the unilateral placement is proper, or appropriate (*L.H. v. Hamilton County Department of Education*, 2018). More specifically, the court concluded that even though the IDEA's [procedural] requirements do not apply to private schools …, for reimbursement purposes, the private school must satisfy the substantive IEP requirement, i.e., it must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (p. 791)

Thus, in general, for the minority of reimbursement cases that survive Step 2, the outcomes odds shift to the parents' favor at Step 3 for

two reasons. First, the sole standard is substantive FAPE. Second and perhaps more significantly, just as school districts have benefited from the application of *Endrew F.* for this purpose, in effect, what is good for the goose is good for the gander. More specifically, its relatively relaxed application provides the converse outcome-favorable impact for parents' unilateral placements at this appropriateness step.

Moreover, in recent years lower courts have added nuances at this step that provide some jurisdictional variety. For example, in this same *L.H. v. Hamilton County Department of Education* decision, the Sixth Circuit upheld the appropriateness of the unilateral placement of the child at a Montessori School, concluding that it also met its jurisdictional refinement of having "some element of special education services in which the public school placement was deficient," such as "specific special-education programs, speech or language therapy courses, or tutoring services" (p. 796).

As another example of jurisdictional variations, some courts, including the Eighth Circuit Court of Appeals, regard LRE as an irrelevant factor at this step (e.g., *C.B. v. Special School District No. 1*, 2011). Others, including the Second Circuit, regard LRE as a secondary but not fundamental factor (e.g., *C.L. v. Scarsdale Union Free School District*, 2014). If LRE were the controlling criterion, it would further eviscerate the remedy that the Supreme Court and Congress have so firmly established, because often such private alternatives are due to their specialized, more restrictive clientele.

However, given the daily diet of the congested courts, which includes bitter battles for millions of dollars in damages and lifetime criminal penalties, the judicial view of unreasonable conduct often differs from the perception of school district officials.

Other lower court refinements that are not necessarily uniform across all the jurisdictions include the following: (a) appropriateness at this step does not exclude sectarian schools (e.g., *Bellflower Unified School District v. Lua*, 2020); (b) this step similarly does not exclude reimbursement for for-profit schools (e.g., *New York City Department of Education v. V.S.*, 2011); and, conversely, (c) the remedial scope at this step does not extend to related or supplemental services that are beyond, rather than necessary for, FAPE (e.g., *L.K. v. New York City Department of Education*, 2019). Finally, as various specialists, including Wenkart (2014), have shown, the federal circuits vary widely concerning the extent that therapeutic placements may be reimbursable. For example, the Tenth Circuit awarded reimbursement for a therapeutic residential placement based on a straightforward application of the necessity test (*Jefferson County School District R-1 v. Elizabeth B.*, 2012). Yet, the Fifth Circuit denied it based on the placement's primarily medical, rather than educational, basis (*Fort Bend Independent School District v. Douglas A.*, 2015).

Were the actions of the parents (beyond Item 1), when balanced against those of the district, unreasonable?

In clarifying the final reference to the equities in *School Committee of Burlington v. Department of Education of Massachusetts* (1985), the Supreme Court in *Florence County School District Four v. Carter* (1993) clarified that one of the discretionary equitable factors for the adjudicator's discretionary consideration is whether the requested total cost for reimbursement is unreasonable. Other potential examples are parental refusal to cooperate in the IEP process or their manipulation of the process.

However, given the daily diet of the congested courts, which includes bitter battles for millions of dollars in damages and lifetime criminal penalties, the judicial view of unreasonable conduct often differs from the perception of school district officials. For example, in *Warren G. v. Cumberland County School District* (1999), the Pennsylvania review officer had reduced the amount of reimbursement in agreement with the district's assertion that the parents' demands were unreasonable, but the Third Circuit reversed, nullifying this reduction. The appeals court reasoned that the Act anticipates vigorous advocacy and that the parents' advocacy had not reached the point of obstructing the district from developing an appropriate IEP or causing it to provide an inappropriate IEP. As a result, reductions are not frequent, and complete denials of reimbursement on equitable grounds are rare, especially at the precedential level of federal appeals courts. In one of the rare exceptions, the Fifth Circuit upheld the

denial of reimbursement to the parents for responding to the district's notably collaborative efforts with an adamant "all or nothing" position that resulted in an incomplete IEP (*Rockwall Independent School District v. M.C.*, 2016).

The same rather nonnuanced general approach of courts may lead to a rather broad and blunt approach to the equities that redounds against reimbursement. For example, in the subsequent proceedings after the aforementioned Supreme Court decision in *Forest Grove School District v. T.A.* (2009), the Ninth Circuit ultimately denied tuition reimbursement based on the lower court's finding that the parents' reason for the unilateral placement was their child's drug abuse and behavioral problems rather than FAPE for his disability (*Forest Grove School District v. T.A.*, 2011).

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As a final example of the equities step, in a series of lower court cases, New York City argued that parents' contracts with expensive unilateral placements, in which they paid negligible installments for the child's tuition, were a sham. More specifically, the district contended that this arrangement (a) shifted an inflated liability to district budgets, and (b) distorted the parental reimbursement remedy to a direct payment to the private school. However, the courts in these cases ruled that these contracts amounted to shared risk rather than the requisite bad faith (e.g., *Mr. and Mrs. A. v. New York City Department of Education*, 2011). Similarly, the courts in the same circuit have ruled that the parents' payment of a deposit for a private placement well before the IEP meeting does not in itself constitute bad faith (e.g., *T.K. v. New York City Department of Education*, 2016).

Concluding Considerations and Implications

Various other legal lessons concerning this high-stakes remedy are of practical significance. First, although the Supreme Court and Congress have established the basic framework, courts vary among and within jurisdictions based on their interpretation of the nuances of each step and their assessment of the evidence in each case. Thus, this checklist-type synopsis is illustrative, not exhaustive.

Second, although often referred to as tuition reimbursement, this remedy may extend to a variety of parental self-help within the broad rubric of FAPE, including home-based applied behavior analysis services (e.g., *R.L. v. Miami-Dade County School Board*, 2014). Indeed, in one case a federal court's reimbursement award extended to reasonable interest amounts and the private school's transaction fees for the parents' credit card payments in addition to the attorneys' fees award of more than $300k (*JP v. School Board of Hanover County*, 2009).

Third, the IDEA regulations (2019, § 300.518[d]) have codified, as a matter of IDEA "stay-put," the prevailing judicial view that applies in tuition reimbursement cases. Specifically, liability for reimbursement starts with a decision in favor of the parents at the hearing officer level or, in the relatively few two-tier states, at the review officer level, regardless of whether the ultimate judicial appeal is in the district's favor (e.g., *Joshua A. v. Rocklin Unified School District*, 2009). Moreover, various lower courts have ruled that in such circumstances the district is not entitled to recoup from the parents its reimbursement outlays (e.g., *Atlanta Independent School System v. S.F.*, 2010).

As a rather striking example of the potential cumulative costs, consider the case in which the school district did not have an appropriate IEP available for twins with autism until halfway through the school year. The Third Circuit ruled that the parents were entitled to the following additions to the half-year tuition reimbursement that the hearing officer had awarded: $228K under the stay-put provision, approximately $100K for the aides that the parents separately arranged and paid for, and $190K in attorneys' fees and court costs (*School District of Philadelphia v. Kirsch*, 2018).

Finally, these additional legal considerations apply in tandem with the recap of the foregoing four steps. At the first step, timely notice is a matter of fairness, but its absence is not necessarily fatal upon adjudication. At the next and central step, the appropriateness of the proposed IEP, the outcome odds favor the district upon adjudication, but the applicable legal standards are not synonymous with practical wisdom or professional norms. At the next appropriateness step if reached in adjudication, the outcome odds shift considerably in favor of the

parents. Using the proverbial and simplistic car analogy, if the district did not provide a serviceable Chevrolet, it may well have to pay for the Cadillac. At the last step, the question of whether, as a matter of balancing the equities, the parent has been unreasonable as a consequential factor is likely to have a different answer in the court room than it does in the school offices.

In sum, it is in both the district's and the parents' interest to engage in consistent proactive collaboration and appropriate compromise to fashion FAPE via the IEP process rather than in reimbursement adjudication. Careful and systematic consideration of these systematic steps will facilitate making informed decisions that include the respective risks and costs of litigation for this high-stakes remedy. For the parent before implementing a unilateral placement and for the district upon facing a resulting due process hearing, this systematic legal analysis suggests simple practical advice: Think not just twice, but at least thrice.

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Conflict of Interest Disclosure. The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding Disclosure. The author received no financial support for the research, authorship, and/or publication of this article.