

## UNILATERAL PLACEMENT FOR SPECIAL EDUCATION STUDENTS: A BIG GAMBLE?

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### I. INTRODUCTION

- A. Today, school districts are frequently presented with requests from parents to fund their disabled child's private placement.
- B. This presentation will review the statutory provisions governing when a school district may be required to reimburse a parent for the cost of a unilateral private school placement and the tests utilized by hearing officers and various courts, including the 7<sup>th</sup> Circuit and Illinois courts, to determine whether a school district must pay for a disabled child's private placement.

### II. UNILATERAL PLACEMENTS UNDER THE IDEA

- A. What is a unilateral placement?

A unilateral placement occurs when a child is placed by a parent in a private educational program and the parent seeks school district reimbursement by claiming the public school district did not provide or offer the student with a free appropriate public education ("FAPE").

- B. What is a School District's Tuition Obligations for Private Placements?

If the school district has made FAPE available to the child, the district is not obligated to fund the private placement. If a parent elects to place his/her child in a private school or facility, the *Individuals with Disabilities Education Act* ("IDEA") does not require the school district to pay for the child's educational costs, including special education and related services. 20 U.S.C. §1412(a)(10)(C)(i).

### III. BACKGROUND REGARDING REIMBURSEMENT FOR UNILATERAL PRIVATE SCHOOL PLACEMENT

- A. A school district may be required to reimburse the parent for the cost of a private school placement (i.e. therapeutic day or residential) if a court or hearing officer finds the following:
  - a. The school district has not made a FAPE available to the child in a timely manner prior to the child's enrollment in a private placement, and
  - b. The private placement is appropriate for the child. *School Committee of Town of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359 (1985).
- B. A hearing officer or court may find the private placement to be appropriate even if it does not meet the State standards that apply to SEAs and LEAs. *Florence County School District Four v. Carter*, 10 U.S. 7 (1993); codified at 34 C.F.R. § 300.148(c).

Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

- C. Both *Burlington* and *Carter* involved children who had previously received special education services from the public school district.
  - a. However, since then, reimbursement has been recognized for children who did not previously receive special education services from the public school because “when a child requires special education services, a school district’s failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.” *Forest Grove School District v. T.A.*, 557 U.S. 230 (June 22, 2009).
  - b. The Supreme Court noted that although the children in *Burlington* and *Carter* had previously received special education services from the public school, the decisions in those cases “in no way depended on their prior receipt of services” and therefore apply regardless of whether the child has previously received special education services. *Id.*
- D. At the time *Burlington* and *Carter* were decided, the IDEA did not specifically address private school tuition reimbursement. Instead, the court relied on language in the IDEA which gives courts broad authority to grant “appropriate” relief when a school district fails to provide a FAPE.

#### **IV. REQUIREMENTS FOR REIMBURSEMENT UNDER IDEA: THE DISTRICT’S OBLIGATION AND THE COURT’S ROLE**

- A. “If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a *private elementary school or secondary school* without the consent of or referral by the public agency, a *court or a hearing officer* may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education [FAPE] available to the child in a timely manner prior to that enrollment.” 20 U.S.C. §1412(a)(10)(C)(ii) (emphasis added) <sup>1</sup>
- B. The reimbursement of educational costs for a unilateral private school placement may be reduced or denied if parents do not comply with the following requirements in the IDEA:
  - a. At the most recent IEP meeting the parents attended prior to removal of the child from the public school, the parents did not:

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<sup>1</sup> This section of the *IDEA* applies to private residential and therapeutic day placements in Illinois. Under the *IDEA*, “Elementary school” is defined as “a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.” 20 U.S.C. § 1401(6) (emphasis added). Additionally, “secondary school” is defined as “a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under State law. . . .” 20 U.S.C. § 1401(27). Moreover, in Illinois, the majority of residential and therapeutic day placements are privately operated.

- i. Inform the IEP Team that they were rejecting the placement proposed by the public agency;
    - ii. Provide notice of their dissatisfaction with the IEP and intent to unilaterally place the student; and
    - iii. Indicate their intent to enroll their child in a private school at public expense (i.e. unilateral placement “at public expense”); or
    - iv. At least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described.
  - b. If, prior to the parents’ removal of the child from the public school, the school district provided prior written notice to the parents of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or
  - c. Upon a judicial finding that the parents’ actions were unreasonable. 20 U.S.C. §1412(a)(10)(C)(iii).
- C. The courts have weighed in on the various elements tied to unilateral placements including what constitutes notice, the appropriateness of the placement, and cooperation with the evaluation process and reasonableness. Many courts have denied or limited parents’ right to seek reimbursement from a school district for a unilateral placement when based on these elements.

## V. NOTICE: PRECEDENT AND CASE LAW UPDATE

- A. Notice of dissatisfaction of an IEP is a critical precursor to seeking reimbursement. *Mary P. v. Illinois State Bd. of Educ.*, 934 F.Supp. 989 (N.D. Ill. 1996).
- B. The purpose of the notice requirement is to give school districts the opportunity to provide a FAPE before a child leaves public school and enrolls in private school. *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).
- C. Parents who unilaterally placed their child in a private school without notice to the school district and without offering the school district an opportunity to prepare an IEP that was appropriate to the child’s needs were not eligible for tuition reimbursement. *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004).
- D. Courts have found it proper to deny reimbursement when the child’s parents agreed to the IEP proposed by the school and only informed the school district of their concerns after parents arranged for the child’s enrollment in private school. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513 (6th Cir. 2003).
- E. Parents cannot simply state they intend to place their child elsewhere and ask for financial support. *Pollowitz v. Weast*, 90 F. App’x. 438 (4th Cir. 2001). See also,

*Lauren V. v. Colonial Sch. Dist.*, No. 07-308, 2007 WL 3085854 (E.D. Pa. 2007) (noting that the IDEA does not permit parents to act at will and simply bill the school district later).

In *Pollowitz*, the parents unilaterally placed their child in private school and then sought reimbursement from the school district for the child's private school tuition expenses. The parents indicated they provided notice to the school district in the form of a letter dated in June 1998, which stated that:

Our clients have explored other placement options for Andrew and have procured his placement into The Lab School of Washington for the coming year. They intend to place Andrew there and are requesting that MCPS consider supporting that placement. They have also procured additional assessments, copies of which are enclosed, in support of their request. Please refer this matter to the Central Placement Unit for consideration of the new assessments and the family's request for consideration of Lab School as a placement for Andrew.

*Pollowitz* at 440.

Andrew enrolled in The Lab School for the 1998-1999 school year. At the conclusion of that school year, the parents requested an administrative hearing seeking tuition reimbursement for their enrollment of Andrew at the Lab School. The District moved to dismiss based on the parents' failure to provide notice of their rejection of the proposed IEP in accordance with 20 U.S.C. § 1412(a)(10)(C)(iii). On appeal, the district court granted summary judgment in favor of the District and upheld the administrative decision holding that the parents failed to provide timely notice of their rejection of the proposed IEP and the District was prejudiced by the parents' failure to provide timely notice of their unilateral placement of the student.

F. Constructive Notice

- a. Courts have found that "constructive notice is simply not sufficient. Even when parents have partially satisfied the notice provision, failure to comply with all of the requirements has resulted in denial of tuition reimbursement for residential placements." *W.-Linn Wilsonville Sch. Dist. v. Student*, No. 3 2014 WL 3778571, at \*36 (D. Or. July 30, 2014).
- b. However, the District Court for the Northern District of Illinois opened the door on the possibility that "some form of constructive notice with subsequent, albeit late, written notice" may constitute sufficient notice to request reimbursement for unilateral placements. *Erin K. v. Naperville Sch. Dist. No. 203*, 2009 WL 3271954 (N.D. Ill. 2009).

The Court declined to rule on the merits, however, and remanded the case to the administrative hearing level for further proceedings.

G. Notice as it Relates to the Timing of Removal

- a. The notice prior to removal refers to the physical removal of the child from public school. *Sarah M. v. Weast*, 111 F.Supp.2d 695 (D. Md. 2000).
  - i. Schools have good reason to want to know what the parents intend for their child, but defining enrollment in terms of the mere act of registering or inscribing the child several weeks or months earlier for possible attendance in private school later is problematic. *Sarah M. v. Weast*, 111 F. Supp. 2d 695, 701 (D. Md. 2000).
- b. A child is physically placed in a private school when he attends the private school's orientation even when the first day of school for the private school and the public school is at a time after the orientation. *W.D. v. Watchung Hills Reg'l High Sch. Bd. of Educ.*, 602 F. App'x 563, 568 (3d Cir. 2015).

#### H. Exceptions to the Notice Requirements

- a. The cost of reimbursement for unilateral placement shall not be reduced or denied for failure to provide the required notice if:
  - i. The District prevented the parent from providing such notice;
  - ii. The parent had not received notice of his/her responsibility to provide the notice described above; or
  - iii. Compliance with the requirements would likely result in physical harm to the child; and
- b. May not, in the discretion of the court or hearing officer, be reduced or denied for failure to provide the required notice if:
  - i. The parent is illiterate or cannot write English; or
  - ii. Compliance with the requirements would likely result in serious emotional harm to the child.

## VI. REQUIREMENTS FOR REIMBURSEMENT UNDER IDEA: THE SPLIT AMONG THE FEDERAL CIRCUIT COURTS

### A. The Third Circuit: “Segregable” or “Inextricable” Standard

- a. In *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir.1981), the Third Circuit ruled that whether a public school district is required to reimburse parents for a private residential placement depends “on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are *segregable from* the learning process.” *Id.* at 693 (emphasis added).

- b. Court held that the parents there were entitled to reimbursement for the residential placement of their mentally retarded child with cerebral palsy who needed assistance with basic skills such as speaking, walking, dressing himself, eating unaided, and using the toilet. *Id.* at 688–89, 693–95.
- c. The Court noted that, where a child is afflicted with such severe conditions, formal education begins with such basic life skills. *Id.* at 693.
- d. The Fourth, Sixth, Eighth and D.C. Circuits have adopted the *Kruelle* approach. See *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir.1990); *Tenn. Dep’t of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir.1996); *Indep. Sch. Dist. No. 284 v. A.C.*, by & through her Parent, C.C., 258 F.3d 769, 774 (8th Cir. 2001); *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C.Cir.1985).
- e. The Third Circuit’s holding in *Kruelle* was most recently upheld in 2013 in *Munir*, where the parents unilateral placement of the child in a private residential facility and private boarding school after multiple suicide attempts was denied reimbursement, *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 425–26 (3d Cir. 2013), and in 2009 in *Mary T.*, when the cost of placement for the child in a residential health care facility was denied as a request for reimbursement or in the alternative as compensatory education. *Mary T. v. Sch. Dist. of Philadelphia*, 575 F.3d 235, 238 (3d Cir. 2009).

B. Ninth Circuit: “Apart” Standard

- a. In *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir.1990), the Ninth Circuit ruled that reimbursement under the IDEA for a residential placement depends on “whether [the child’s] placement may be considered necessary for educational purposes or whether the placement is a response to medical, social, or emotional problems that is necessary *quite apart from* the learning process.” *Id.* at 643 (emphasis added).
- b. *Clovis* involved the placement of a child in an acute care psychiatric hospital. See *id.* at 639. Despite the fact that the school district sent educators to the hospital for 1–2 hours of instruction per day, the court denied reimbursement because the services provided by the hospital were medical in nature, including six hours of intensive psychotherapy per day. *Id.* at 645–47.
- c. The Ninth Circuit’s holding in *Clovis* was most recently upheld in 2009 in *Ashland*, where the Court determined placement of student in a private residential facility was not necessary to meet student’s educational needs. *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 F.3d 1004, 1010 (9th Cir. 2009).

C. Fifth Circuit: “Primarily Oriented” Standard

- a. The Fifth Circuit recently reviewed the various circuits’ respective tests and came up with a test of its own in *Richardson Independent School District v. Michael Z.*, 580 F.3d 286 (5th Cir.2009).

- b. *Michael Z.* involved a child who was placed by his parents in a private residential treatment center. The court adopted the following test: “In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education.” *Id.* at 299.
- c. Because the district court had not issued findings of fact related to the second prong of the test, the court remanded the case for the district court to consider that issue.
- d. The Fifth Circuit’s holding in *Michael Z.*, was most recently upheld in 2015 in *Douglas A.*, where the Court found the parents were not eligible for reimbursement of a private placement. *Fort Bend Indep. Sch. Dist. v. Douglas A.*, 601 F. App’x 250, 253 (5th Cir. 2015).

D. Tenth Circuit: “Plain Language” Standard

- a. In *Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1239 (10th Cir. 2012), the Tenth Circuit ruled that the placement at the private school provided both specially designed instruction to meet the student’s unique needs and services required for her to benefit from that instruction, and was properly reimbursable.
- b. The student had substantial behavioral and emotional issues for which she required special education under the Individuals with Disabilities in Education Act (“IDEA” or the “Act”), 20 U.S.C. § 1400. The parents enrolled the student in a residential treatment center in Idaho, and sought reimbursement.
- c. The Court opined that the plain language of the Act supplies the appropriate framework through which to determine whether a unilateral private school placement without the consent of or referral by the school district is reimbursable. Because the case can be resolved by a straightforward application of the statutory text, it is unnecessary to adopt either the so-called “inextricably intertwined” approach of the Third Circuit or the “primarily oriented” standard of the Fifth and Seventh Circuits. This permits us to avoid some of the interpretive difficulties presented by the approaches of the other circuits. *Id.* at 1236–38.

E. Seventh Circuit: “Primarily Oriented” Standard

- a. In *Dale M. v. Board of Education of Bradley–Bourbonnais High School District No. 307*, 237 F.3d 813 (7th Cir. 2001), the Court was presented with a student with dyslexia and a number of substance abuse and behavioral difficulties as well as several arrests. The parents sought reimbursement for unilaterally placing their child in a boarding school for troubled youth.

- b. The Seventh Circuit established the following test to determine whether a residential placement is reimbursable: “[t]he essential distinction is between services *primarily oriented* toward enabling a disabled child to obtain an education and services oriented more toward enabling the child to engage in non-educational activities.” *Id.* at 817.
  - i. The services that are primarily oriented toward enabling a child to access education are ‘related services’ within the meaning of the statute” and, therefore, placement at a school that provides such is reimbursable, whereas placement at school which only allows the child to engage in non-educational activities is not. *Id.*
- c. In applying the above test, the court held that the Dale’s parents were not entitled to reimbursement for placing their child in a private boarding school after his release from jail because the purpose of the placement was confinement due to non-educational problems, which is not a “related service” under the IDEA. *Id.* at 816–17.
- d. In making this ruling, the *Dale M.* Court noted that the Third Circuit took a different approach in *Kruelle*. There, the Third Circuit ruled that whether a public school district is required to reimburse parents for a private residential placement depends “on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are *segregable from* the learning process.” *Id.* at 693 (emphasis added). The Court opined that the parents there were entitled to reimbursement for the residential placement of their mentally retarded child with cerebral palsy who needed assistance with basic skills such as speaking, walking, dressing himself, eating unaided, and using the toilet. *Id.* at 688–89, 693–95.
- e. *Dale M.* expressly limited the *Kruelle* reasoning to situations where “training in the basic social skills of using the toilet, dressing, feeding, and simple communication” in a residential placement are “a necessary predicate for learning.” *Dale M.*, 237 F.3d at 817. Unlike the student in *Kruelle*, Dale had “no cognitive defect or disorder...that prevent[ed] him from applying his intelligence to the acquisition of an education, without special assistance.” *Id.* Dale’s problem was that he “lacked proper socialization.” *Id.*
- f. Analysis and Implication for School Districts:
  - i. Where a student’s problems are not primarily educational so that they can be said to interfere with the child’s education, a school district has no obligation to provide for a placement whose sole function is to provide services to address said non-educational needs. *See id.*
  - ii. Courts can draw a distinction between those services that are necessary primarily for treating a child’s medical or behavioral



problems and those services that are primarily for enabling educational instruction.

- iii. Subsequent courts have held that while payment by school districts for services at residential medical facilities is possible under *Dale M.*, parents are not entitled to reimbursement for their placement in such facilities where the “placement ... was a response to medical, social, or emotional problems that [were] necessary quite apart from the learning process.” *Doe v. Shorewood Sch. Dist.*, 2005 WL 2387717 at \*21 (E.D. Wis. 2005).

## VII. ILLINOIS COURTS’ APPROACH: THE *JENNA R. CASE*

### *Jenna R.P. v. City of Chicago School District No. 229*, 2013 IL App (1st) 112247

- A. Jenna was a high school student who was adopted at a young age; she suffered sexual abuse, had a range of behavioral issues, repeatedly ran away from home and was hospitalized for mental health reasons and suicidal ideations on multiple occasions. She was not diagnosed with reactive attachment disorder. CPS recommended a placement for 80% in general education and 20% in special education at a CPS high school. The hearing officer and Circuit Court opined that such placement was not denial of FAPE because CPS indicated it could have considered private day school or other placement; therefore, reimbursement was not required.
- B. The Appellate Court reversed, but in doing so, the court did not expressly articulate any test for determining when a district must reimburse a parent for residential placement or cite to the *Dale M.* standard:
  - a. Instead, the court based its opinion on the fact that the hearing officer and circuit court made errors of law by evaluating a hypothetical IEP/placement that the district *could* have offered. *Id.* at 10. Instead, the law requires a district to look at the placement that was actually offered. *Id.* In this case, the court found that the CPS placement which was actually offered - 80% general education and 20% of special education - was inappropriate. *Id.*
  - b. Additionally, the court found that the lower decisions erred by placing significant emphasis on the requirement of educating a student in the least restrictive environment. *Id.* at 11. Rather, the court noted that there are a number of factors to consider when determining if a parent’s choice provided an appropriate education, including whether the placement provided an element of special education services that the public school placement did not offer and that the residential school offered specially designed instruction to meet the unique needs of the child. *Id.*

## VIII. REASONABLENESS: PRECEDENT AND CASE LAW UPDATE

- A. The court found that the parents’ actions of taking an all or nothing approach in contrast to the District’s ongoing efforts to work collaboratively disrupted and frustrated the IEP process, stalling its consummation and preventing the development of a final IEP.

Moreover, the court found, the parents did so despite their knowledge that the school district planned to complete the unfinished portions with the parents' help. The court found that the cause of the disruption was the parents' single-minded refusal to consider any placement other than a residential one and denied reimbursement. *Rockwall Indep. Sch. Dist. v. M.C.*, 816 F.3d 329, 340–41 (5th Cir. 2016).

- B. The parents' actions of stalling the development of the IEP, whether or not well-intentioned, constituted an unreasonable approach to the collaborative process envisioned by the IDEA. The attitude of the parents' sufficed to undermine the process and prevented the court from granting reimbursement. *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 288 (1st Cir. 2008).

## IX. PRACTICAL TIPS

- A. When conducting case study evaluations, carefully document all evaluations and the reasons why a student is denied special education services and programs because if a District determines that a student is ineligible for special education services and the parent makes a unilateral placement, the District must be prepared to defend its finding of non-eligibility.
- B. Continue to comply with child find obligations at all grade levels.
- C. When a student is withdrawn from a public school and placed by a parent in a private school, be sure to gather information regarding the student's performance and progress in the public school program (academic, social and behavioral). This evidence will help the district to show that the student was progressing in his public school program.
- D. Critically study the evidence of progress and documentation to determine whether there are issues or concerns with either the evidence of progress or the paperwork.
- E. Consider meeting with the parents to discuss their concerns and/or whether to convene a formal IEP meeting. Provide a response in writing to the notice.
- F. Organize all records and materials gathered in the event of a due process hearing.
- G. If parents mention possible private placement or provide formal notice, propose a reevaluation of the student to address the program concerns being raised.
- H. Consider whether to initiate a due process hearing to obtain a hearing decision that the program offered by the school district provided a FAPE to the student. June 2009 guidance from the Office of Special Education and Rehabilitative Services states that a school district may file a due process complaint when parents provide notice that they intend to unilaterally place their student in a private school because they believe FAPE is at issue. This exact question arose in *Yates v. Charles County*, 212 F.Supp.2d 470 (D. Md. 2002) and the court found that the public agency had a right to initiate a due process complaint in order to prove that their program did provide the student with FAPE. Filing for due process invokes stay-put provisions and ensures the FAPE issue is addressed *before* parents accrue private education costs and seek reimbursement from the District.