RESIDENTIAL PLACEMENT OF STUDENTS WITH DISABILITIES

BIE 2011 Special Education Academy

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I. INTRODUCTION

Court cases involving parents who want funding or reimbursement for the cost of their child's 24-hour residential placement appear to be on the rise. Changing legal standards complicate the determination of who should pay for the placement and whether a residential placement is necessary for educational purposes. These materials will explore the evolution of residential placement cases; the critical issues of LRE, FAPE and unilateral placement; and emerging standards and principles that courts rely upon when deciding a student's need for residential placement services and the responsibility for funding it.

II. RELEVANT PROVISIONS UNDER STATUTES AND REGULATIONS

A. Relevant Provisions of the Individuals with Disabilities Education Act (IDEA) and its Regulations

1. Definition of special education

The IDEA defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions and in other settings…." 20 U.S.C. § 1402(29) and 34 C.F.R. § 300.39.

2. Definition of related services

The IDEA defines "related services" to include:

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individual education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, (except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1402(26). The regulations add early identification and assessment of disabilities in children, as well as school health services, school nurse services, social work services in schools, and parent counseling and training to the list of related services. 34 C.F.R. § 300.34.

3. Children placed in or referred to Private Schools by Public Agencies

School agencies must ensure that children with disabilities in private schools and facilities are provided special education and related services, in accordance with an IEP and at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate LEA as the means of providing FAPE. 20 U.S.C. § 1415(a)(10)(B) and 34 C.F.R. § 300.146.

The IDEA regulations specifically contain a provision regarding "residential placement":

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

34 C.F.R. § 300.104.

4. Payment for Education of Children Enrolled in Private Schools without Consent of/Referral by the Public Agency

The IDEA contains provisions that specifically address payment for unilateral private school placements as follows:

> This part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
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> REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT.— 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 available to the child in a timely manner prior to that enrollment.
>
> LIMITATION ON REIMBURSEMENT.—The cost of reimbursement described [herein] may be reduced or denied if—(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (bb) 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 in item (aa); (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements [of the IDEA] 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 such evaluation; or (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.
>
> EXCEPTION.—Notwithstanding the notice requirement [above], the cost of reimbursement—(I) shall not be reduced or denied for failure to provide such notice if— (aa) the school prevented the parent from providing such notice; (bb) the parents had not received notice, pursuant to [IDEA], of the notice requirement [above]; or (cc) compliance with [the notice requirement] would likely result in physical harm to the child; and (II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if— (aa) the parent is illiterate or cannot write in English; or (bb) compliance with [the notice requirement] would likely result in serious emotional harm to the child.

20 U.S.C. § 1415(a)(10)(C). The regulations add that reimbursement for a unilateral private placement may be obtained if the court or hearing officer finds that the agency did not make FAPE available *and* that the private placement is appropriate. "A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs." 34 C.F.R. § 300.148(c).

5. <u>Least Restrictive Environment</u>

School districts must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1415(a)(5).

6. <u>Civil Actions</u>

In any court action brought under the IDEA, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party and "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i).

B. <u>Relevant Provisions of Section 504 of the Rehabilitation Act of 1973 (Section 504)</u>

Although Section 504 itself provides nothing relative to residential placement, the 504 regulations do. Specifically, 34 C.F.R. § 104.33(c)(3) provides that "[i]f a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian."

III. STATUTORY BARS TO PRIVATE/RESIDENTIAL PLACEMENT CASES

<u>Prior Enrollment in Public School Required?</u>

<u>Forest Grove Sch. Dist. v. T.A.</u>, 52 IDELR 151, 129 S. Ct. 2484 (2009). The prior receipt of special education services from the public school system is not required for parents to bring a

lawsuit for private school tuition reimbursement. The language in the 1997 IDEA Amendments does not serve as an absolute bar to such lawsuits. However, parents are not entitled to reimbursement if the district makes FAPE available. Case was remanded to the district court for further proceedings. [Note: As discussed below, the parents did not succeed in their efforts to have the district fund residential placement].

IV. THE *BURLINGTON* CASE – THE ORIGINAL STANDARD FOR DETERMINING WHETHER FUNDING FOR PRIVATE/RESIDENTIAL SCHOOLING IS REQUIRED

The initial question in assessing whether a school district is responsible for funding a unilateral private placement, including residential placement, is whether such funding is an appropriate remedy at all under the IDEA. In 1985, the United States Supreme Court decided the case of *School Comm. of the Town of Burlington v. Department of Educ. of Massachusetts*, 471 U.S. 359 (1985). In *Burlington*, the Court set forth the following standard for determining whether parents are entitled to reimbursement or funding under the IDEA for a unilateral private school placement:

> 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 could include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

Thus, it was held that reimbursement or prospective private school funding is authorized under the Act where the parents can show that the private placement is "proper" and that the school agency's IEP is not appropriate.

Since *Burlington*, hundreds of courts have been asked to resolve questions of reimbursement and prospective funding for private school, including residential placement. In each case, the *Burlington* decision has played a significant role in determining whether the parents are entitled to public funding for their unilateral private placement.

V. *BURLINGTON'S* FIRST INQUIRY: WHETHER THE PRIVATE PLACEMENT IS "PROPER" OR APPROPRIATE

As instructed in *Burlington* (and later in the IDEA regulations), courts should generally turn first to the question of whether the parents' placement of the student in their chosen residential facility/school was "proper" in determining whether reimbursement at public expense is warranted.

A. "Proper" does not Require Full IDEA Compliance, but must Meet Student's Needs

1. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). When a parent unilaterally withdraws a child from public school and enrolls the child in a private school, the parent is entitled to reimbursement if a hearing officer or court later determines that the private school education was "otherwise proper under IDEA," even if it did not meet each specific IDEA requirement. IDEA requirements "cannot be read as applying to parental placements." Fourth Circuit's decision is affirmed where it rejected the school district's argument that reimbursement is never proper when the parents choose a private school that is not approved by the State or that does not comply with all the terms of IDEA. According to the Court of Appeals, "neither the text of the Act nor its legislative history imposes a 'requirement that the private school be approved by the state in parent-placement reimbursement cases' [citation omitted]. To the contrary, the

Court of Appeals concluded, IDEA's state-approval requirement applies only when a child is placed in a private school by public school officials. Accordingly, 'when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'"

2. Green v. New York City Dept. of Educ., 50 IDELR 40, 2008 WL 919609 (S.D. N.Y. 2008). Parent did not meet the burden of proving that the private placement unilaterally chosen for her daughter, who is SED, is appropriate. Although it was agreed that the student needed a "full-time residential treatment program," the parent's unilateral choice did not specialize in meeting the needs of students with IEPs, did not provide specially-designed instruction or programs and did not provide the student with any clinical or psychological services to address her social and emotional needs.

3. Covington v. Yuba City Unif. Sch. Dist., 56 IDELR 37, 2011 WL 489612 (E.D. Cal. 2011). District is not required to reimburse the parents of a 13-year-old ED student with bipolar disorder and SLD for the cost of his placement in a church-operated residential program. Although the district denied FAPE to the student by not addressing his escalating behavior, the private program did not address his behavioral or academic needs. Though a private unilateral placement need not meet state-mandated certification requirements in order for the parents to obtain reimbursement, the private placement must be appropriate for the student. Here, the religious school had no credentialed special education teachers on staff nor staff members trained to provide behavioral interventions; nor did it address the student's weaknesses in math and reading. Clearly, the school's "religious based curriculum, which apparently included significant Bible study and application, had nothing to do with [the student's] special needs."

B. "Proper" Requires Placement to be Necessary for Educational Purposes/Benefit

1. North v. District of Columbia Bd. of Educ., 551 IDELR 157 (D. D.C. 1979). While it may be possible in some situations to ascertain and determine whether the social, emotional, medical, or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem, in this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the "Solomon-like task of separating them."

2. Kruelle v. New Castle County Sch. Dist., 552 IDELR 350, 642 F.2d 687 (3d Cir. 1981). The analysis "must focus…on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is in response to medical, social or emotional problems that are segregable from the learning process." If the needs are "inextricably intertwined" with the learning process and a court cannot segregate a child's medical, social or emotional problems from the learning process, the school district must reimburse the parents for the private residential placement. "[H]ere, consistency of programming and environment is critical to Paul's ability to learn, for the absence of a structured environment contributes to Paul's choking and vomiting which, in turn interferes fundamentally with his ability to learn."

3. Clovis Unified Sch. Dist. v. California Office of Administrative Hearings, 16 IDELR 944, 903 F.2d 635 (9th Cir. 1990). Hospitalization to treat psychiatric illness is not educational and, therefore, is not a "related service." Medically excluded services are not only those services provided by a physician, but also those services provided in a psychiatric hospital. Thus, the psychotherapeutic services provided by the acute care facility, which were intended to treat the child's current

medical crisis, did not become related services simply because the providers were not always licensed physicians. While the child's hospitalization may have been necessary for her continued mental health, such a confinement was not essential for the child to receive an educational benefit. The district, therefore, was not obligated to fund the placement at the acute care facility.

4. Taylor v. Honig, 16 IDELR 1138, 910 F.2d 627 (9th Cir. 1990). Private treatment facility is accredited as an education institution and it operates a full-time school. Thus, it is educational and should be funded by the school district, particularly where the student's IEP called for long-term residential treatment, but the school district had been unable to locate an available, in-state facility.

5. Field v. Haddonfield Bd. of Educ., 18 IDELR 253, 769 F. Supp 1313 (D. N.J. 1991). School district is not responsible for funding placement in drug treatment program. The drug treatment program was designed to cure an illness and not to assist the student in deriving an benefit from his educational program. Thus, therefore, the drug treatment program is excludable as a medical service under the EHA, and the district is not obligated to provide such a program as a related service.

6. Ash v. Lake Oswego Sch. Dist., 19 IDELR 482, 980 F.2d 585 (9th Cir. 1992). District court used correct standard in holding that residential placement was required for an autistic child, where daily living skills such as toileting and dressing could only be taught and reinforced for him in the consistency of a residential setting.

7. Dale M. v. Board of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 33 IDELR 266, 237 F.3d 813 (7th Cir. 2001). The test for determining when private residential placement is required under the IDEA is whether the services are "primarily oriented toward enabling a disabled child to obtain an education" or whether they are "oriented more toward enabling the child to engage in noneducational activities. The former are 'related services' within the meaning of the statute, the latter are not." Thus, the proper inquiry is whether the residential placement is "primarily educational." Under this inquiry, though the student has "the intelligence to perform well as a student," he suffers from a "lack of socialization," and the purpose of the private treatment is keeping him out of jail, not to educate him. Rather, the placement is simply a "jail substitute."

8. Independent Sch. Dist. No. 284 v. A.C., 35 IDELR 59, 258 F.3d 769 (8th Cir. 2001). The results of an IEE, which concluded that the student could not receive educational benefit until her emotional and behavioral issues were resolved, are accepted. The residential placement offered the high degree of structure and support the student needed, as her previous truancy and disruptiveness prevented her from making progress in the district's self-contained classroom. There was a consensus that the student would be unable to obtain any educational benefit in a setting other than a residential program. However, the case is remanded to the district court for further findings of fact and for an appropriate remedy, as it is unclear whether the student continues to reside in the district and whether the out-of-state facility suggested by her parent is an appropriate residential placement.

9. Kings Local Sch. Dist. Bd. of Educ. v. Zelazny, 38 IDELR 236, 325 F.3d 724 (6th Cir. 2003). Parents are denied residential placement reimbursement for placement of a high-schooler with Tourette's syndrome, Asperger's disorder and ODD because the district offered the child an appropriate program during his freshman year. Although the student exhibited increased behavior problems at home, they did not prevent him from succeeding at school. To assess whether a public funding of a residential placement is appropriate, a court or administrative officer must

determine whether the setting is necessary for educational purposes, as opposed to medical, social or emotional problems that can be separated from the learning process. While the student's mother felt her son's behavior at home was making her life "a living hell," she indicated she was satisfied with his school situation.

10. S.C. v. Deptford Township Bd. of Educ., 38 IDELR 212, 248 F.Supp.2d 368 (D. N.J. 2003). Because the child's maladaptive behaviors were increasing and he was regressing academically in his day program, his parents are entitled to funding for a residential placement with appropriate behavioral controls. The student demonstrates potential for academic advancement, but only with full-time behavior modifications, and his behavioral problems in his current setting negatively impact, and in some cases preclude, his ability to participate in activities that are well within his mental and physical capabilities. Testimony indicates that without a residential placement, the child would be "totally uncontrollable in two or three years."

11. Ms. K. v. Maine Sch. Admin. Dist. No. 40, 46 IDELR 247 (D. Me. 2006). In a case seeking, among other things, reimbursement for placement of a student in a residential wilderness camp program, court denied parents' request noting that "a contrary ruling under the circumstances of this case would essentially put the Court in the position of establishing as an education policy that children with depression stemming from family conflict must be provided an IEP having a residential component whenever a treatment provider identifies a link between clinical depression and the home environment and that child's depression merely has some impact on academic performance." The evidence was clear that the student could receive educational benefit without being in a residential placement.

12. Avjian v. Weast, 48 IDELR 61, 242 F. App'x 77 (4th Cir. 2007) (unpublished). Where parents signed IEP that recommended a private day school placement, the school district is not required to fund the residential component which was needed for non-educational reasons. The student's IEP clearly stated that she did not require a residential placement to receive an educational benefit. Although the district recommended a residential school when the parents expressed interest in a residential program, the court pointed out that the IEP called for the student to be placed in a private day school and the parents consented to the proposed placement when they signed the IEP. Courts must constrain their review to the terms of an IEP when considering whether a district offered FAPE. "Expanding the scope of the offer to include comments made during the IEP process undermines the important policies served by requiring a formal written IEP."

13. P.K. v. Bedford Cent. Sch. Dist., 50 IDELR 251, 569 F. Supp. 2d 371 (S.D.N.Y. 2008). Because teenager can receive FAPE in district's therapeutic program, the district had no obligation to reimburse the parents for the child's unilateral residential placement. Clearly, the student's difficulties in the district's program resulted from substance abuse rather than an inappropriate placement. Where the parents contended that the student's drug and alcohol problems were "inextricably intertwined" with his emotional disturbance and, as such, the IEP team should have offered a placement that addressed the student's emotional needs and his substance abuse issues, such arguments are rejected. The student made significant progress in the district's therapeutic program during the 2004-05 school year, and the IEP team decided to continue that placement for the 2005-06 school year. Clearly, the student's performance deteriorated after he began abusing drugs and alcohol and "[i]t was…reasonable for the district to attribute [the student's] difficulties during the 2005-06 school year to his substance abuse, and not to his disability or any shortcomings of the [therapeutic] program." Districts have no obligation to fund private substance abuse programs and because the therapeutic program met the student's needs when he

did not abuse drugs and alcohol, the student does not need a residential placement to receive FAPE.

14. Christopher B. v. Hamamoto, 50 IDELR 195 (D. Haw. 2008). Although the Hawaii ED might have denied FAPE to a student with an undisclosed disability, that did not require it to pay for all of the student's privately obtained services. Thus, $42,564 worth of hospital, pharmaceutical and post-school year expenses will be deducted from the parents' reimbursement request. Although the student is entitled to a residential placement, he does not require a hospital placement. Placement in a mental health center does not qualify as a residential placement and "[b]ecause the [mental health center]…served as a hospital rather than a residential placement, [the parents] cannot recover these costs from [the ED]." Moreover, medical services qualify as related services only to the extent that they are used for diagnostic and evaluation purposes. As such, the parents can not recover the cost of prescription medications that were part of the student's regular treatment.

15. Richardson Indep. Sch. Dist. v. Michael Z., 52 IDELR 277, 580 F.3d 286 (5th Cir. 2009). The following test is applicable in determining whether residential placement is required: "In order for a residential placement to be appropriate under the 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." Unlike *Kruelle*, "this test does not make the reimbursement determination contingent on a court's ability to conduct the arguably impossible task of segregating a child's medical, social, emotional, and educational problems." "IDEA, though broad in scope, does not require school districts to bear the costs of private residential services that are primarily aimed at treating a child's medical difficulties or enabling the child to participate in non-educational activities….This is made clear in IDEA's definition of 'related services,' which limit reimbursable medical services to those 'for diagnostic and evaluation purposes only.'" While the district court did make the factual finding that residential placement was necessary for this student to receive a meaningful educational benefit and that she could achieve no educational progress short of residential placement, the case is remanded for the district court to make factual findings as to whether treatment at the particular residential facility was primarily designed for, and directed to, enabling her to receive a meaningful educational benefit.

16. Mary Courtney T. v. School Dist. of Philadelphia, 52 IDELR 211, 575 F.3d 235 (3d Cir. 2009). Although emotionally disturbed teenager is entitled to services under the IDEA, her parents are not entitled to funding for placement in a psychiatric residential facility. "Only those residential facilities that provide special education…qualify for reimbursement under *Kruelle* and IDEA." Although the court acknowledged that some services received at the facility may have provided educational benefit, they are not "the sort of educational services that are cognizable under *Kruelle*." At the facility, the child "received services that are not unlike programs that teach diabetic children how to manage their blood sugar levels and diets—both sorts of programs teach children to manage their conditions so that they can improve their own health and well being. However, because both programs are an outgrowth of a student's medical needs and necessarily teach the student how to regulate his or her condition, they are neither intended nor designed to be responsive to the child's distinct 'learning needs.'" Clearly, the residential program is designed to address medical, rather than educational, conditions and the child's admission there was necessitated, not by a need for special education, but by a need to address her acute medical condition. The residential placement here is also not a "related service;" rather, it is an excluded medical service. "[W]hile the Supreme Court stated that physician services other than those provided for diagnostic purposes are excluded, it also specifically excluded hospital services." Note: The court also held that the school district acted promptly to propose services to the child (and provide her with tutoring) when notified of her

hospitalization and her ability to be evaluated by the school district. On that basis, compensatory education was also denied.

17. Ashland Sch. Dist. v. Parents of Student E.H., 53 IDELR 177, 587 F.3d 1175 (9th Cir. 2009). Clearly, the student's placement in residential was not necessary for FAPE/ educational purposes. The majority of the expenses were for medical care rather than for education. In addition, the student's case manager testified that his parents told him that they were searching for a residential placement because of problems at home, not at school, and evidence of psychiatric hospitalizations further supported the lower court's view that the residential placement was unrelated to the student's education. Finally, the parents waited seven months to notify the district of the student's residential placement, even though they were aware of their obligation to provide the district with notice of the placement. Importantly, too, the parents did not dispute any of the student's IEPs until they sought reimbursement and this supports the lower court's belief that the parents' challenge to the student's IEP was not genuine. Thus, the lower court's reversal of tuition reimbursement is upheld.

18. Forest Grove Sch. Dist. v. T.A., 56 IDELR 185, 638 F.3d 1234 (9th Cir. 2011). Parents are not entitled to reimbursement for placement in a residential facility where the evidence was clear that the parents decided to enroll the student in the residential school after the student's behavioral and drug problems escalated at home. Specifically, the student's father responded to a question on the application to the school that "inappropriate behavior, depression, opposition, drug use, runaway," were the specific events that precipitated the placement. Thus, the student's placement was not academic or educational in nature. "This is particularly true in light of the fact that [the student] was enrolled at [the boarding school] after several months of escalating drug abuse and behavioral problems—and *directly after* he attempted to run away from home—and not during the two-year period when ADHD and poor scholastic performance alone…were the problem."

19. Linda E. v. Bristol Warren Regional Sch. Dist., 55 IDELR 218, 758 F.Supp.2d 75 (D. R.I. 2010). Hearing officer's award of residential placement for a 17-year-old emotionally disturbed student is upheld. School district's argument that the student's difficulties were segregable from the learning process because her behavioral problems occurred in the home is rejected. It is clear that the student's teacher reported behavioral issues as early as second grade and sixth-grade disciplinary records reported incidents of rudeness, disruptive behavior and theft and that she had threatened to harm another student. In addition, the school system's suggestion that there was not evidence that the residential placement was for the purpose of making educational progress is rejected, where at least one of her treating psychiatrists wrote in a report and stated unequivocally that "if [S.E.] is to make reasonable educational progress, [she] needs a highly structured therapeutic residential placement."

20. Shaw v. Weast, 53 IDELR 313, 364 F. App'x 47 (4th Cir. 2010) (unpublished). 20 year-old ED student with post-traumatic stress disorder did not require residential placement in order to receive FAPE. Rather, her parents placed her in a residential facility because they were concerned about her safety and medication compliance. Where residential placement is necessitated by medical, social or emotional problems that are segregable from the learning process, a district need not fund it. Clearly, this is not a situation where the student required around-the-clock assistance with basic self-help and social skills. While her progress slowed in the district's special day school placement during psychiatric episodes, she made educational progress when those issues stabilized and the school continued to offer the services necessary to implement her IEP. "That [student's] emotional and mental needs required a certain level of care beyond that provide at [the district's day school] does

not necessitate a finding that the state should fund that extra care when it can adequately address her educational needs separately."

21. Jefferson County Sch. Dist. R-1, 57 IDELR 13, 2011 WL 2565513 (D. Colo. 2011). Although the 10th Circuit has not adopted a test for determining when residential placement is appropriate, this ED student's placement in a 24-hour educational program was appropriate under all other circuit standards. Clearly, the student's mental health is intertwined with her educational success, which satisfied the "educationally necessary" test set forth by the 3rd, 4th, 6th and D.C. Circuit Courts of Appeal. In addition, testimony reflected that the treatment of the student's psychiatric condition was not "quite apart" from her educational needs, which is the test that the 9th Circuit uses. Further, the services provided in the residential program were "primarily oriented" toward allowing the student to receive an education, as required by the 5th and 7th Circuits. "[The residential center] is an educational institution accredited by the State of Idaho, staffed by state-accredited teachers, in which [the student] is working towards her high school diploma." While the parents may not recover for the cost of any services that were provided by a licensed physician (because they were not "related services"), they can recover the remaining costs of the placement.

22. C.T. v. Croton-Harmon Union Free Sch. Dist., 57 IDELR 37 (S.D. N.Y. 2011). Where school district's proposed IEP offered a structured school day with support services, including the addition of small group learning labs, one-on-one counseling and weekly group meetings with a consultant teacher, it was reasonably calculated to confer educational benefit to the student. While this 12-grader with anxiety, depression and substance abuse problems had a history of behavioral difficulties, the evidence reflected that he passed all of his classes and received passing scores on five Regents exams. In addition, he made significant progress in the therapeutic residential program he attended during his 11th grade year. Thus, the student can return to his public high school's program and a residential placement is not appropriate. Though the parents are concerned that his substance abuse problems may resurface if he leaves the residential program, substance abuse is not a proper reason for residential placement under the IDEA.

C. Residential Placement not "Proper" if it is not the Least Restrictive Environment (LRE)

1. Lenn v. Portland Sch. Comm., 20 IDELR 342, 998 F.2d 1083 (1st Cir. 1993). The IDEA's preference for mainstreaming means that a student who would make educational progress in a day school program is not entitled to a residential placement, even if it would more nearly enable the student to reach his/her full potential.

2. Doe v. Tullahoma City Schs., 20 IDELR 617, 9 F.3d 455 (6th Cir. 1993). Parental request for out-of-state private school reimbursement is denied because the district's proposed IEP constitutes a good faith effort to provide an educational environment in a less restrictive public school placement.

3. Board of Educ. of Arlington Heights Sch. Dist. No. 25 v. Illinois State Bd. of Educ., 35 IDELR 6 (N.D. Ill. 2001). Student who was diagnosed as ED could have better resolved her problems by being close to her family rather than in an out-of-state residential placement. In addition, the private school did not individualize its program to students' needs and it did not allow students any contact with their nondisabled peers. While the district's initial IEP was inappropriate, the parent was aware that the IEP team intended to revise the document before the beginning of the school year. Thus, she should have given the district a chance to prove the adequacy of its program before removing the student to the residential school. The district's amended IEP

appeared to be responsive to the student's needs and was much less restrictive than the private placement.

4. Corey H. v. Cape Henlopen Sch. Dist., 40 IDELR 37, 286 F.Supp.2d 380 (D. Del. 2003). The parents' preferred 24-hour residential school is not the LRE for the student because it is hours away from his home and does not include nondisabled students. The district developed an appropriate IEP within a reasonable time.

5. Corpus Christi Indep. Sch. Dist. v. Christopher N., 45 IDELR 221 (S.D. Tex. 2006). A district that attempted to address a high school junior's escalating academic difficulties that resulted from his multiple disabilities by adding components to his IEP, such as a more restrictive class setting, a one-to-one aide and counseling acted appropriately, a federal District Court decided. It concluded that an IHO should not have awarded his parents reimbursement for their costs of placing him in a residential treatment center. The court found the district's untested intermediate proposals were the LRE for the student to obtain an appropriate education. And, the residential placement was not appropriate. While the student was making progress in the district's high school, the evidence showed he had experienced limited to marginal academic progress while residentially placed. The court reversed the IHO's order for the district to reimburse the parents their costs in unilaterally placing him in a residential treatment center. Taking the "drastic step" of placing him in involuntary residential treatment was inappropriate.

6. J.E.B. v. Indep. Sch. Dist. No. 720, 48 IDELR 2 (D. Minn. 2007). Residential placement is not proper where district complied with the IDEA by placing a 13-year-old student with an emotional disturbance in a public school program that emphasized both academic instruction and behavior management. The district's program allowed the student to receive a meaningful educational benefit and residential placements should be regarded as a last resort. "When a student makes educational progress in a day program, removal from the home and placement in a residential facility is neither necessary nor appropriate." The student made varying degrees of progress on each of his academic goals, for example, by scoring an average of 93 percent on his spelling tests, which was a significant change from his previous refusal to work on spelling at all. More importantly, the student's behavior improved during his 15 months in the district program.

7. C.B. v. Special Sch. Dist. No. 1, 56 IDELR 187, 636 F.3d 981 (8th Cir. 2011). That the private school for LD students in which the parents placed the student was not the LRE for him was not a sufficient reason to find that the placement was not "proper" for purposes of reimbursement under the IDEA. Where the parents were able to show that the district did not provide FAPE and the private school placement was appropriate, that was sufficient. "[T]he mainstreaming preference of the IDEA does not make [the private school in question] an inappropriate private placement under the circumstances." The LRE provision of IDEA is more aspirational than mandatory, particularly where the student made significant progress there. Thus, this court joins the Third and Sixth Circuits in concluding that a private placement need not satisfy the LRE requirement to be "proper" under the Act.

8. S.H. v. New York City Dept. of Educ., 56 IDELR 68 (S.D. N.Y. 2011). Parents' request for reimbursement for the cost of placement of student with ADHD at a residential school strictly for LD students is rejected. The hearing officer's decision that residential placement is unnecessary and overly restrictive is correct, as the record does not demonstrate that the student needs a six-to-one teacher-student ratio or a setting limited solely to LD students in order to obtain educational benefits. There was substantial evidence that the student had progressed significantly since 2006

and, by 2008, was performing average and better in all classes, as his behavior no longer impeded his learning.

VI. ***BURLINGTON'S*** **SECOND INQUIRY: WHETHER THE SCHOOL DISTRICT'S IEP/PROGRAM IS APPROPRIATE**

In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court set forth the standard for determining the appropriateness of an IEP and whether FAPE was made available by using the following two-pronged test:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

458 U.S. at 207. The *Rowley* Court also made it clear that, in providing FAPE, states must provide a "basic floor of opportunity" to disabled students, not a "potential-maximizing education" and that states must "confer *some* educational benefit upon the handicapped child." 458 U.S. at 197-200.

A. Recent Challenges to the *Rowley* Standard

Recently, several courts have faced arguments challenging the *Rowley* "some educational benefit" standard based upon the theory that post-*Rowley* amendments to the IDEA somehow changed the standard for the provision of FAPE. Thus far, the courts have rejected the notion that Congress meant to change the *Rowley* standard, including courts faced with requests for funding for residential placements.

1. Leighty v. Laurel Sch. Dist., 46 IDELR 214 (W.D. Pa. 2006). Parents' contention that the No Child Left Behind Act changed the way that cases brought under the IDEA should be analyzed is rejected. The FAPE determination under IDEA does not depend on how well a particular student performs on standardized tests administered by a participating State. NCLB contains no specific language that purports to alter the IDEA's FAPE and IEP requirements.

2. School Bd. of Lee County v. M.M., 47 IDELR 220, 2007 WL 983274 (M.D. Fla. 2007). Parent's argument that language in the Florida Constitution referencing "high quality education" elevates the substantive standard for FAPE in Florida is rejected. Given the well-established nature of the federal standard, an intent to impose an enhanced requirement for IDEA purposes would have been more clearly stated. In addition, the existence of a gifted child program in Florida and the provisions of NCLB do not establish a higher state standard that would require that a child's potential be maximized.

3. Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist., 49 IDELR 180, 518 F.3d 18 (1st Cir. 2008). The parents' assertion that the 1997 IDEA raised the bar for the provision of IEP transition services and directs that those services must result in actual and substantial progress toward integrating disabled children into society is rejected. The Court refused to defenestrate the Rowley standard for FAPE.

4. Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6, 49 IDELR 281, 538 F.Supp.2d 298 (D. Me. 2008). The parents' argument that the 2004 IDEA amendments increased the substantive goals for the education of disabled students (namely in the field of outcome-oriented academic and transition services) so that the goals now go beyond simply opening the door to public education

is rejected. Given the ubiquity of Rowley in the context of IDEA proceedings, one would expect Congress (or the Department of Education) to speak clearly if the intent were to supersede it.

5. J.L. v. Mercer Island Sch. Dist., 52 IDELR 241 (9th Cir. 2009). In a case seeking residential placement at the Landmark School in Massachusetts, the argument that Congress sought to supersede *Rowley* or otherwise change the FAPE standard via the 1997 IDEA Amendments is rejected. Had Congress sought to change the FAPE standard—"a standard that courts have followed vis-à-vis *Rowley* since 1982—it would have expressed a clear intent to do so." Thus, the proper standard to determine whether a disabled child has received a FAPE is the "educational benefit" standard set forth in *Rowley*. On remand, the district court must review the ALJ's determination that the District provided a FAPE as required by *Rowley*.

B. *Rowley's* First Prong: Procedural Compliance

1. G.D. v. Westmoreland, 930 F.2d 942 (1st Cir. 1991). Bringing a draft IEP to a meeting is not a procedural violation where it was clear that it was only a draft for discussion purposes. In addition, there is no need to consider the residential option on the continuum when the school district has offered an appropriate less restrictive day program.

2. Seattle Sch. Dist. No. 1 v. B.S., 24 IDELR 168, 82 F.3d 1492 (9th Cir. 1996). Where school district's evaluation of a student with emotional and behavior disabilities was inappropriate because the evaluation team did not include anyone familiar with the student's disorders, and where school personnel failed to consider the recommendations of several of the student's doctors that a residential placement was appropriate, parent is entitled to reimbursement for placement in a residential program. The district's argument that it should not have to pay for the residential program because it is "medical" in nature is rejected, because the program is an accredited educational institution.

3. Knable v. Bexley City Sch. Dist., 34 IDELR 1, 238 F.3d 755 (6th Cir. 2001). Parents are entitled to reimbursement for residential placement costs for student with ADHD due to school district's failure to convene an IEP meeting within the time mandated by the IDEA and prior to the beginning of the school year. This seriously infringed on the parents' ability to participate in their child's IEP process. Even where the parents fail to cooperate with school officials, the district must adhere to timeline requirements.

4. Brandon H. v. Kennewick Sch. Dist. No. 17, 34 IDELR 145, 82 F.Supp.2d 1174 (D. Wash. 2001). Although the district violated state law by failing to properly sign and distribute the student's summary evaluation analysis, its procedural mistakes did not deny the student FAPE and did not support a private residential placement at public expense. The district's IEP properly addresses the student's social, emotional and vocational needs. Thus, residential placement is not warranted for the student. In addition, the parents were not so opposed to the proposed IEP as to create so much hostility that it would undermine the IEP's value to the student.

5. Lakin v. Birmingham Pub. Schs., 39 IDELR 152, 70 F. App'x 295 (6th Cir. 2003). Parents are entitled to partial reimbursement for the cost of an out-of-state residential educational facility for the period of time there was no appropriate IEP in place and where the district failed to timely provide the parents of notice of their procedural safeguards, as well as the failure to comply with IDEA's child find requirements. However, once the district presented an appropriate IEP, the unilateral placement was no longer justifiable. Although the court is concerned that the student's treating physician was excluded from the IEP conference, especially because it was he who

recommended the residential placement, the trial court's finding that the IEP was appropriate and provided FAPE is upheld. "We cannot say under these circumstances that the omission of [the doctor] from the "IEP team' or from the IEP conference was fatal to the adequacy of the plan, especially in light of the educational experts who were involved."

6. New Paltz Cent. Sch. Dist. v. St. Pierre, 40 IDELR 211, 307 F.Supp.2d 394 (N.D. N.Y. 2004). High-schooler suffers from ED, has a disability and the district denied him FAPE. Thus, the district must reimburse the student's parent for tuition, room, board and laptop computer expenses incurred at the private school for the 1999-2000 and 2000-01 school years. The evidence is clear that the student was very successful academically until his parents' divorce, when his grades began to suffer and he began acting out and using drugs. Because the district failed to refer the student for an evaluation once his parent informed it of the difficulties he was experiencing and the school psychologist and principal both recommended that the parent place the student at the private school, the court determined that the district denied the student FAPE. Further, by failing to conduct an observation of the student in the residential school and to conduct a psychiatric evaluation or a functional behavioral assessment, the district failed to conform to the state education regulations.

7. Bend-Lapine Sch. Dist. v. K.H., 43 IDELR 191 (D. Or. 2005), aff'd in unpublished opinion, 48 IDELR 33, 234 F. App'x 508 (9th Cir. 2007). District must reimburse the parents for private residential placement costs, as statements included in the IEP were insufficient to determine an accurate baseline of the behaviors affected by the student's disability, failed to adequately state measurable goals and lacked sufficient specificity to determine what supplementary aids might be required to implement the IEP. In addition, the student's placement was decided before the IEP was completed and was drafted to support the decision. The residential school is run by qualified personnel, is fully accredited and has a full curriculum in place, offering a small class size, highly structured environment and the assistance of a clinical program to assist the student in meeting her behavioral goals.

8. Hjortness v. Neenah Joint Sch. Dist., 48 IDELR 119, 498 F.3d 655 (7th Cir. 2007), opinion amended, 107 LRP 65900 (7th Cir. 2007). Although the IEP Team discussed only one out of the four IEP goals with the parents, there was no loss of educational opportunity that resulted in a denial of FAPE to the student. At several times during IEP conferences, the Team attempted to set specific goals and objectives, but the parents insisted that the issue on the table was whether the school district would fund a private residential placement. In addition, the school district did not predetermine placement, as the IDEA requires the school district to assume public placement and the school district did not need to consider private placement once it determined that public placement was appropriate.

9. Virginia S. and Milton M. v. Dept. of Educ., State of Hawaii, 47 IDELR 42, 2007 WL 80814 (D. Haw. 2007). Proposed IEP contained measurable goals and objectives. They were specific, capable of measurement, and directly related to the student's areas of weakness identified in the PLEP. Though the student's Transition Plan was not individualized, this procedural error was harmless, as student was entering 10th grade and would receive assistance with the college planning process and opportunities to explore career options. Thus, there was no loss of educational opportunity shown. Finally, the district did not predetermine placement, as it considered the residential placement requested by the parents. That a draft IEP was given to the parents before the meeting, especially when they requested a draft, did not prove that student's placement was "predetermined" before the IEP was completed.

10. A.K. v. Alexandria City Sch. Bd., 50 IDELR 13, 544 F.Supp.2d 487 (E.D. Va. 2008). On remand from the 4th Circuit and with the directive that the school district had violated FAPE by not identifying a specific private residential school in the IEP, the parents' choice was an appropriate placement. Thus, parents are entitled to reimbursement for the cost of the private school for the periods of time that the IEP did not designate the particular private school for the student.

11. Board of Educ. of the New Hartford Cent. Sch. Dist., 52 IDELR 95 (N.D. N.Y. 2009). The absence of a regular education teacher at the IEP Team meeting did not render the IEP inadequate because at least one parent and their attorney were present at every meeting and the evidence is clear that the only IEP proposal the parents would have accepted was placement at a private residential school.

12. J.L. v. Mercer Island Sch. Dist., supra. Although case is remanded for district court to address the issue of substantive compliance with the IDEA, the procedural issues are not remanded because the district court's analysis did not turn on any disputed legal standards. There is no evidence supporting the district court's finding that there was a predetermination of placement at a "pre-meeting meeting." In addition, the parents actively participated in the IEP formulation process and the district changed various aspects of the program based on the recommendations of the parents and their expert. Nor did the district commit a procedural violation by not specifying teaching methodologies in the IEP or specifying the minutes of instruction to be devoted to each of K.L.'s services in her IEPs.

13. C.H. v. Cape Henlopen Sch. Dist., 54 IDELR 212, 606 F.3d 59 (3d Cir. 2010). Although the school district did not have an IEP in place at the beginning of the 2006-07 school year for an LD student, the procedural violation was harmless and did not amount to a denial of FAPE because it did not impede the student's right to FAPE nor did it impede his parents' right to participate in the IEP process. Rather than attending school that year, the parents placed the student in a residential school for LD students. While the district's failure to have an IEP in place by the beginning of the year is not condoned, a denial of FAPE did not occur and the parents can not show any substantive harm as a result of the violation. Importantly, the parents did not cooperate over the summer and declined to attend IEP meetings because of their travel schedule. In addition, they did not provide the district with notice of their intent to place the student in a residential school. Therefore, tuition reimbursement for the residential placement could also have been denied based upon equitable grounds.

B. *Rowley's* Second Prong: Substantive/Content Compliance

1. Tucson Unif. Sch. Dist. v. Murray, 33 IDELR 239 (D. Ariz. 2000). A 15-year-old deaf student also classified as LD and ED (and ADHD) needs to be placed at a residential treatment center with an ASL environment, since compelling evidence demonstrates that his 1998-99 IEP can not be properly implemented in the State's designated school for the deaf. The student has made no more than minimal educational progress in the State's school for the deaf and has failed to make progress in academic subjects, communication skills, social skills, counseling and behavioral goals. He has the potential to learn if he receives the services that his needs require, including attention in an "intensive, comprehensive and therapeutic approach" that further offers him "the possibility that he will later be able to successfully reintegrate into his community." The residential placement is required in order for the student to access the learning environment and receive FAPE.

2. A.S. v. Board of Educ. of the Town of West Hartford, 35 IDELR 179 (D. Conn. 2001), aff'd in unpublished opinion, 37 IDELR 246, 47 F. App'x 615 (2d Cir. 2002). Appropriateness of non-special education, all male, college preparatory boarding school need not be addressed where the proposed IEP, which offered the student services at a district high school, was consistent with the IDEA's LRE requirement. The parents' argument that placing their son in public school was inappropriate because, with the freedom available to him, he would self-medicate, not do his homework and not progress academically is rejected. This is particularly the case where the student's public school classes would have been small enough to permit individualized instruction. Additionally, the student would have been taught by certified special education teachers and supported by home tutoring and weekly individual counseling.

3. Lamoine Sch. Comm. v. Ms. Z, 42 IDELR 172, 353 F.Supp.2d 18 (D. Me. 2005). The district failed to provide FAPE to a student diagnosed with reading, writing, language and math learning disabilities, as well as emotional difficulties, because its IEP did not address his attendance problem and did not provide for him to receive academic services or behavioral and emotional supports. Accordingly, the parents are entitled to reimbursement for their unilateral placement of the student at residential facilities. The student's emotional difficulties frequently made him tardy to class and often prevented him from attending school altogether and, although the district was aware of the student's tardiness and attendance issues, it did not make an attempt to remedy or improve them. While the district could not be expected to rouse the student from bed or escort him to school on time, it also could not have provided him with FAPE in his absence.

4. J.A. v. Mountain Lakes Bd. of Educ., 46 IDELR 164 (D. N.J. 2006) (unpublished decision). Parents of high school student with mild LD were not entitled to reimbursement for the cost of unilaterally placing their child at the Forman School, a residential preparatory school in Litchfield, Connecticut. The evidence was uncontroverted that the student made substantial progress in each of his public school classes and was functioning in conformity with the grades he was given—all A's and B's. There was no evidence to support the parents' contention that his grades were inflated.

5. Corpus Christi Indep. Sch. Dist. v. Christopher N., 2006 WL 870739, 45 IDELR 221 (S.D. Tex. 2006). Parents' request for funding for residential placement is rejected where school district's proposed program was the LRE and offered FAPE. Factors indicating that IEP is appropriate were met: 1) the program is individualized based on student's assessment and performance; 2) program is administered in the LRE; 3) services are provided in a coordinated and collaborative manner by the key "stakeholders"; and 4) positive academic and non-academic benefits are demonstrated.

6. Roxanne J. v. Nevada County Human Services Agency, 46 IDELR 280 (E.D. Cal. 2006). Hearing Officer's decision is upheld to award the cost of student's therapy sessions with a private provider, because the district did not provide the counseling services identified in the student's IEP. However, the failure to provide these services was not sufficient reason to award the cost of a residential placement in Utah because none of the numerous experts consulted by the parents deemed a residential placement to be necessary and, importantly, the testimony established that the student made significant gains in the district's program prior to being placed in the residential program.

7. San Rafael Elem. Sch. Dist. v. California Special Educ. Hearing Office, 47 IDELR 259, 482 F.Supp.2d 1152 (N.D. Cal. 2007). Parents of a 13-year-old student with autism who exhibited significant behavioral problems away from school failed to prove that their son required a

residential placement in order to receive FAPE. The school district offered the student a meaningful educational benefit when it proposed placing him in a private school for children with behavioral problems, and the IDEA does not require districts to address all of a student's emotional or behavioral problems, regardless of where and when they arise. "The district is not required to ensure that a student takes behavioral skills learned at school into the home." Rather, "[t]he district is only required to ensure that a student's IEP is 'reasonably calculated to provide educational benefits.'" Although the student frequently exhibits defiant and noncompliant behavior at home and in community settings, the student's behavior at school is "much more controlled." Moreover, the student satisfied nine out of twelve of his IEP goals. Because the district has no duty to ensure that the student's classroom behavior carries over to other settings, the ALJ's ruling in favor of residential placement is reversed.

8. A.S. v. Madison Metropolitan Sch. Dist., 47 IDELR 304, 477 F.Supp.2d 969 (W.D. Wis. 2007). District is not required to reimburse the parents of an 18-year-old autistic student for placement in a residential facility, where the district's proposed IEP could be implemented in a public school. The parents' claim that the district predetermined the student's placement in a public high school is rejected where the IEP team spoke with staff at the student's previous school, considered reports from independent evaluations and conducted its own assessments before it decided on the student's placement. In addition, there was no evidence that the student required a residential placement in order to receive an educational benefit, as there was no connection between the student's aggressive behavior in the home and the services he received at school. "The [IEP team] concluded that the primary reason for the [residential] placement was the parents' previous difficulty in managing his behavior at home." Because there is no evidence that the student's behavioral problems in the home are educationally related, the parents have not established a need for residential placement.

9. Sitka Sch. Dist. v. Parents of C.I.R., 47 IDELR 194 (Alaska Super. Ct. 2007). District is required to pay for the residential placement of an epileptic high schooler in an out-of-state boarding school for children with language-learning disabilities. The district's reliance on the student's alleged academic progress is rejected, and the district's failure to develop an IEP that met the student's educational needs and its apparent inability to do so amounts to a denial of FAPE. Evidence that the student passed all of her academic classes in the second semester in her sophomore year did not invalidate the hearing officer's conclusion that the district denied FAPE, as the student continued to struggle to adapt to school, which overshadowed her limited educational progress. The student's grades were not an accurate measure of her performance, because her teachers often modified or excused assignments to accommodate her disability. Moreover, she had difficulty managing her part-time schedule, which consisted of three academic classes and, at one time, she was failing English. In addition, she continued to experience significant stress during the semester, which was unlikely to lessen. "The district's assertion that [the student] was passing from grade to grade was questionable in light of testimony that graduating on time would require a more demanding schedule than [the student] had managed since the beginning of high school." The district did not provide the small classes or one-to-one instruction that the student's evaluators recommended and because the private program offers the student small, therapeutic classes and around-the-clock assistance, it is appropriate.

10. M.H. v. Monroe-Woodbury Cent. Sch. Dist., 51 IDELR 91, 296 F. App'x 126 (2d Cir. 2008) (unpublished), cert. denied, 129 S. Ct. 1584 (2009). Therapeutic day placement proposed by the district is appropriate. As a general rule, a residential placement is not required under the IDEA unless there is objective evidence that the student is regressing in a day program. The student in this case made progress in the therapeutic day program. "Not only do her grades reflect that she

was achieving academically, but reports from certified counselors demonstrate that she was making improvements in her social and emotional problems as well." Though the Parents are "understandably worried" about the stability of their daughter's mental health and whether relapses into past emotional difficulties will upset her education in the future, no testimony by certified experts supported their fears.

11. Thompson R2-J Sch. Dist. v. Luke P., 50 IDELR 212, 540 F.3d 1143 (10th Cir. 2008), cert. denied, 129 S. Ct. 1356 (2009). As a general rule, generalization of skills across settings is not necessary to establish educational benefit under the IDEA. As long as the student is making some progress in the classroom, the school district does not need to ensure that the autistic student is able to apply his newly learned skills outside of school. Although the autistic student may have exhibited severe behavioral problems outside of the classroom environment, that does not require the district to pay for the student's residential placement. The parents' reliance on IDEA language regarding the obligation to provide transition services that focus on "improving…independent living or community participation" is misplaced and "[n]o educational value or goal, including generalization, carries special weight under IDEA." "The fact that…the student made some educational progress and had an IEP reasonably calculated to ensure that progress continued is sufficient to indicate compliance, not defiance, of the Act." [Note: See also, Gonzalez v. Puerto Rico Dept. of Educ., 34 IDELR 291, 254 F3d 350 (1st Cir. 2001); Devine v. Indian River Co. Sch. Bd., 34 IDELR 203, 249 F.3d 1289 (11th Cir. 2001); and JSK v. Hendry County Sch. Bd., 18 IDELR 143, 941 F.2d 1563 (11th Cir. 1991)].

12. Ashland Sch. Dist. v. Parents of Student R.J., 53 IDELR 176, 588 F.3d 1004 (9th Cir. 2009). Parent is not entitled to funding for residential placement, as the high school student with ADHD did not need a residential placement to receive FAPE and it was not educationally necessary. Rather, the student did not engage in disruptive behavior in class and she was well-regarding by her teachers and able to learn in the general education environment. "Although [student's] teachers reported that she had difficulty turning in assignments on time, the record shows that she earned good grades when she managed to complete her work." Clearly, the parents enrolled her in a residential facility because of "risky" and "defiant" behaviors at home, including sneaking out of the house at night to visit with friends and having a relationship with a school custodian.

13. Z.D. v. Niskayuna Cent. Sch. Dist., 52 IDELR 250 (N.D. N.Y. 2009). Parent is not entitled to reimbursement for unilateral residential placement because the student made progress academically in the public school program and was able to answer questions and participate in classroom discussions despite his attentional difficulties. Specifically, "[the student] received the same material content and was graded using the same standards as regular education students and, in November 2004, received grades in the B to C range with positive comments." In addition, progress reports evidenced social interaction with his peers and independent use of his locker. Further, his reliance on his one-to-one aide decreased to the point that he was able to work cooperatively in groups. The parent's experts advocating for therapeutic placement focused only upon the benefits of the residential program.

14. J.L. v. Howell R-3 Sch. Dist., 54 IDELR 5 (E.D. Mo. 2010). When student with ADHD and history of psychiatric issues was withdrawn from public school and placed by his parents in a residential facility, he was making progress. Because the district's program offered the student FAPE, there is no basis for reimbursement, even if the residential facility was considered a better fit or improved the student's interaction with his parents and his grades. Here, each of the student's IEPs appropriately addressed his changing academic needs, including his reading difficulties. In addition, the student's grades and credits earned demonstrated that he was progressing adequately in public school. His

emotional needs were addressed as well, as his teachers testified that he was no longer having significant behavioral problems at school and that his behavior was not impeding his ability to learn. Finally, the mother's statement in the residential facility's questionnaire that the student's tantrums occurred only at home worked against her.

15. Rodrigues v. Fort Lee Bd. of Educ., 56 IDELR 48, 2011 WL 486151 (D. N.J. 2011). Parents' request for three years of compensatory education via placement in a residential facility is denied, where the district created and implemented an adequate transition plan for student with C.P. While the Third Circuit Court of Appeals has not yet defined what amount of transition planning is required in an IEP, a transition plan is substantively adequate if it includes a discussion of transition services under the IDEA. In this case, the transition plan included assessments and goals related to training, education, employment, independent living skills, and the transition services needed to reach those goals. The plan included information that was specific to the student and addressed her individual needs and goals, including her desire to attend college. Further, the district implemented the plan by providing information about local agencies, including a community college and an independent living program that could assist the student in transitioning. The district also created a social skills class for her and a small group of peers to help improve her interpersonal skills and "street smarts." Finally, all versions of her senior IEP included a "senior year checklist" of what students needed to do in order to facilitate a smooth transition to post-school life.

VII. MISCELLENEOUS CASES/ISSUES

A. "Opportunity to Try" Cases

Often, courts will deny parents funding for residential placement where the parents have not given the school district an "opportunity to try" to educate and implement an IEP for a child with a disability. In such cases, the courts have ruled that the equities require them to deny reimbursement or prospective funding for a unilateral residential placement.

1. Amanda S. v. Green Bay Area Sch. Dist., 33 IDELR 209, 132 F. Supp. 718 (E.D. Wis. 2000). Parents are not entitled to reimbursement for either of the student's two stays in the residential facility, as the parents' failure to cooperate with the district was ultimately the factor that led to the student's first stay in the residential facility. The district regularly communicated with the parents about the student's problems and recommended that the parents consent to an evaluation of the student. Reimbursement for the second of the student's residential placements is denied because the IEP provided by the district upon the student's return to school was appropriate. The parents did not complain about the district's program or placement and never asked the district to revise the student's IEP.

2. T.F. v. Special Sch. Dist. of St. Louis County, 45 IDELR 237, 449 F.3d 816 (8th Cir. 2006). Student with disabling diagnoses, including PDD, ODD, OCD and ADHD, is not entitled to residential placement reimbursement. Where parents rejected the proposed IEP on the basis that only a full-time residential placement would provide FAPE, the school district should have had the opportunity, and to an extent the duty, to try its proposed less restrictive alternatives before recommending a residential placement.

3. C.G. v. Five Town Community Sch. Dist., 49 IDELR 93, 513 F.3d 279 (1st Cir. 2008). Where the parents made a unilateral choice to abandon the collaborative IEP process without allowing the process to run its course and for the school district to finalize a proposed IEP, they are precluded from obtaining reimbursement for the costs of the Chamberlain School placement. The district

was continuing its efforts to develop an IEP when the parents filed their due process complaint. In addition, the IEP team was continuing to work with an independent evaluator to develop a crisis plan and other positive behavioral supports for the student.

4. M.V. v. Shenendehowa Cent. Sch. Dist., 49 IDELR 98 (N.D. N.Y. 2008). Because the district conceded that it failed to offer FAPE, the parent only needs to show that the private placement was appropriate and that she conducted herself properly during the IEP process. While the parent failed to attend an interview at one of the district's proposed placements, the parent did not receive notice of it until after she had enrolled her son in the residential facility. The equities weigh in favor of reimbursement.

B. Responsibility if Residential Facility Closes

Alston v. District of Columbia, 46 IDELR 43, 49 F.Supp.2d 86 (D. D.C. 2006). The IDEA's stay-put provision operates as an automatic injunction. Thus, when residential program in which student was placed via an IEP was closed, the school district was required to find a suitable alternative when the parent invoked the Act's stay-put provision.

C. Transfer Student with a Residential IEP

L.G. v. School Bd. of Palm Beach County, 47 IDELR 64, 512 F.Supp.2d 1240 (S.D. Fla. 2007), aff'd in an unpublished opinion, 48 IDELR 271, 2007 WL 3002331 (11th Cir. 2007). The district did not violate the IDEA when it offered to place an 8-year-old transfer student with a serious emotional disturbance in a therapeutic day school rather than a residential program as recommended in his New York IEP. The residential placement was intended to address the student's violent behavior at home, and not his behavior at school. The goal of the IEP team is to provide the student with an educational benefit through the least restrictive means and "[s]ince placement in a residential facility is more restrictive than placement at a therapeutic day school and since the number and variety of services at [the school] was greater than those offered in New York, [the district] was required to first attempt to implement the IEP without the residential placement." It is also important that the student made progress in his day program in New York, and that the educational component of the student's IEP did not change when his parents rejected the district's proposal and placed him in a residential facility. Because the district could have implemented the student's IEP in the therapeutic day school, the parents are not entitled to reimbursement for the residential placement. As the ALJ determined, although a residential placement may have been the least restrictive environment in New York, it was not in Florida. [Note: The Eleventh Circuit re-emphasized its prior rulings that the standard for appropriate education is whether the student is making "measurable and adequate gains in the classroom," not whether the child's progress in a school setting carried over to the home setting].

D. Students Placed in Residential Facility by another Agency

1. Rieman v. Waynesville R-VI Sch. Dist., 36 IDELR 265 (W.D. Mo. 2002). There is no basis under IDEA to require the district or SEA to fund the residential placement of a student with behavior disorder, OHI, ADHD, ODD/OCD and depression. He was placed in the private psychiatric treatment center by a family court for non-educational reasons and the parents were required to fund $590.00 ordered by the family court. The district's provision of and funding of the educational services at the facility was appropriate and nothing more is required.

2. In re: D.D., 42 IDELR 8, 819 N.E.2d 300 (Ill. 2004). District is not required to pay for the educational portion of a high school student's placement in an out-of-state residential facility

because the placement was not for educational purposes. Rather, the placement was to ensure that the student complied with the terms of his probation and the decision to place him at the residential facility was made solely by the juvenile court, without the district's involvement and without first giving the district the opportunity to provide the student with FAPE. Under these circumstances, the district can not be forced to fund the student's placement. The failure of the juvenile court to involve the district in the decision to place the student meant the district was not provided with the opportunity to provide the student with his educational needs, a requirement under the IDEA.

3. Letter to Covall, 48 IDELR 106 (OSEP 2006). Even if a non-educational public agency decides that a student requires placement in a residential facility, the state in which the student/parents resides will remain responsible for ensuring that the student receives the special education and related services that he requires, as the SEA retains responsibility for ensuring the child receives FAPE. OSEP noted that both the IDEA and the Part B regulations require states to provide special education services to all eligible children with disabilities who live within its borders. "This obligation to ensure that FAPE is available encompasses children with disabilities who are placed by a non-educational public agency, such as a mental health, social services or juvenile justice agency." Although the IDEA does not indicate which LEA in the state is responsible for providing FAPE to a student in a non-educational residential placement, the SEA's duty to exercise general supervision over all educational programs for children with disabilities requires it to resolve any disputes between districts. Further, the SEA in which the student resides is responsible for ensuring a timely receipt of special education services. However, the SEA or LEA could seek reimbursement from the non-educational public agency if the agency fails to supply any services that the law obligates it to provide.

4. Orange County Dept. of Educ. v. A.S., 50 IDELR 222, 567 F.Supp.2d 1165 (C.D. Cal. 2008). In a situation where state law does not designate an entity responsible for "parentless dependents" placed in out-of-state residential treatment centers by a local health care agency, the California Department of Education must retain responsibility for implementing and funding the IEP and program for the student.

E. Cooperative Agreements to Cover Residential Placement Costs

Lawrence Township Bd. of Educ. v. State of New Jersey, 43 IDELR 242, 417 F.3d 368 (3d Cir. 2005). Local education agencies do not have standing to sue the state for the funding of a residential placement for a student with autism.

G. Responsibility of State Educational Agency

1. Missouri Dept. of Elementary and Secondary Educ. v. Springfield R-12 Sch. Dist., 40 IDELR 204, 358 F.3d 992 (8th Cir. 2004). The Missouri Department of Elementary and Secondary Education (DESE), which operates three state schools for children with disabilities, including the Missouri School for the Blind (MSB), is financially responsible for the majority of the cost of placing a student with multiple severe disabilities in an out-of-state school for the blind. In addition, DESE and the MSB violated the IDEA by failing to provide a person from MSB knowledgeable about its curriculum and financial resources at the student's 2000-01 IEP meeting. This case presents a situation "in which a local education agency is unable to educate a student, and the state education agency then steps in to provide direct services to the student." Under Missouri law, the DESE is the provider of direct services to a "severely handicapped" child to whom a district cannot provide services and is not part of a special school district. Under the

IDEA, if the state agency provides direct services, it is responsible for developing and implementing a student's IEP. In addition, one of the persons who must be involved in that process is "a representative of the public agency who (1) can provide or supervise specially designed instruction to meet the child's needs, (2) is knowledgeable about the general curriculum, and (3) knows the availability of resources of the public agency." Thus, DESE, as the provider of services, was required to provide a representative of MSB at the student's IEP meeting.

2. Todd D. v. Andrews, 17 IDELR 986 (11th Cir. 1991). District denied FAPE to high school SED student by placing him in an out-of-state residential facility when his IEP included a goal of transitioning him back to his neighborhood and home community. The student requires a residential placement close enough to his home community to implementation of his transition goals and the State Education Agency may be responsible for that if the district can not locate a placement within the State of Georgia.

H. Responsibility where Parents have Joint Custody

Cumberland Regional High Sch. Dist. Bd. of Educ. v. Freehold Regional High Sch. Dist. Bd. of Educ., 51 IDELR 62, 293 F. App'x 900 (3d Cir. 2008) (unpublished). Where parents' divorce decree provided them with joint legal and physical custody, school districts of both parents' residence are responsible for equally funding residential placement for disabled student.

I. Lack of Funding to pay for Residential

County of Tuolumne v. Special Education Hearing Office, 45 IDELR 15 (Cal. Ct. App. 2006). Lower court's order requiring a California county to pay for a student's residential placement from the date it withdrew funding forward is affirmed. All of the county's arguments, including that it was not obligated to pay for the student's placement because it was an "unfunded mandate" are rejected. Compliance with the IDEA is a "serious matter," particularly when the student was told his residential placement would be terminated, he attempted suicide twice.

J. Responsibility to Fund Parent Visits to Residential Facility

1. Aaron M. v. Yomtoob, 38 IDELR 122 (N.D. Ill. 2003). Hearing officer's ruling is affirmed that the district can reduce the number of reimbursable parental training trips to the student's out-of-state residential placement from 12 to 6. This is so where the parents have never taken the allotted 12 trips to the facility for purposes of receiving training, they have made significant progress with their son when he returns home for visits, and they have developed skills to generalize the child's improved behavior from his residential placement to his home. In addition, the parents admitted to the hearing officer that they had achieved the necessary skills for successful at-home visits and the residential facility did not include parent training as a goal in the student's IEP.

2. Aaron M. v. Yomtoob, 40 IDELR 65 (N.D. Ill. 2003). The parents of a child with autism placed in an out-of-state residential facility are not required to reimburse the district for trips in excess of the 6 yearly trips the court determined was a reasonable number of publicly-funded parental visits. Approximately three years after the child was placed, the parents challenged the appropriateness of his new IEP, which decreased the number of reimbursable yearly trips from 12 to 6. The challenged reduction in visits was made because the parents never took more than six yearly round-trips to visit their son, but during the challenge to the IEP, the parents took 12 trips in excess of the six yearly trips ultimately found to be reasonable. After the court affirmed that 6

yearly trips were reasonable, the district sought reimbursement for the parents' travel expenses in excess of that number. The district was required to pay the interim travel expenses for the child's parents under the IDEA's stay-put provision and because the stay-put provision's purpose is to protect parents and their children, "parents who maintain their child's stay-put placement should not be required to reimburse a school district for stay-put expenses even if he proposed IEP is found to be appropriate." It concluded that to hold otherwise would cause parents without financial resources to hesitate to use the stay-put protections.

K. Maintaining "Exit Criteria" for Determining Residential is no longer Necessary

Letter to Allen, 23 IDELR 996 (OSEP 1995). State's use of exit criteria as an additional component of IEPs for students with disabilities who are placed at residential facilities furthers, rather than inhibits, compliance with the IDEA. The stated purpose of "exit criteria," defined as the "minimum amount of educational/behavioral progress as specified in the IEP that would indicate when the educational placement of a child shall be reviewed to determine whether the child can be moved to a less restrictive placement," is to ensure that students do not remain in a residential placement any longer than is educationally appropriate or are not prematurely removed from that setting. Additionally, such criteria can not be the sole determinant for a change in placement and serve only as an indicator that a change in placement may be appropriate. See also, Letter to Lund, 23 IDELR 994 (OSEP 1995).