Residential Placements: Current Issues and Trends in Residential Placements

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A Potentially Emerging Modern Analysis

A review of modern residential placement caselaw under the IDEA reveals that the longstanding legal analyses used to decide the cases is being questioned by a potentially growing number of federal courts. These courts are forging a reform analysis that attempts to avoid the slippery inquiries of determining to what degree a child's psychiatric needs are intertwined with their educational needs. Instead, the new focus is on the nature and focus of the residential program sought to be publicly funded, and whether its primary orientation is the education of the child. And, some courts are also engaging in a segregation of non-educational and educational costs when they are awarding reimbursement for residential placements. That is an important financial consideration, since in cases where the claim seeks reimbursement of the costs of private residential facilities, the costs of such placements tend to be high, due to the 24-hour nature of the services, the therapeutic interventions, the psychiatric care, and the overall mental health care that goes along with the educational services that may be provided as part of the residential program.

The case that promises to shake up this area of caselaw is ***Richardson Independent Sch. Dist. v. Leah Z.*, 109 LRP 52635 (5th Cir. 2009).** There, the parents of a girl with diagnoses including ADHD, oppositional defiant disorder, bipolar disorder, autism, separation anxiety disorder placed her in a residential psychiatric facility after Leah was found to have engaged in sexual activities during her frequent self-removals from the classroom. Apparently, Leah often left class and wandered around the halls, sometimes also engaging in violent and profane episodes when confronted. A long-term substitute who taught her class was given little assistance, did not have Leah's IEP, and did not know of her tendency to flee the classroom setting. At the psychiatric facility, Leah groped staff members and patients, attempted to remove other patients' clothing,

refused to follow directions or attend class, and engaged in self-mutilation. After a change in medication, however, Leah improved and was discharged with a recommendation for a special education class with one-on-one supervision.

The district court found that Leah's IEPs were not appropriate and were substantially similar to previous IEPs that contained measures that proved ineffective in curbing Leah's problem with staying in class. Thus, it awarded reimbursement for the residential psychiatric facility costs. Noting that the residential program was addressing significant psychiatric issues, the Fifth Circuit held that caselaw supporting the notion that when psychiatric and educational problems are "intertwined," reimbursement may be warranted for the full costs of the residential program, "expands school district liability beyond that required by IDEA." In light of that finding, the court wrote that "we adopt the following test: In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education." The court explained that "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. IDEA ensures that all disabled children receive a meaningful education, but it was not intended to shift the costs of treating a child's disability to the school district." Thus, the court instructed, if a court finds that a residential placement was primarily oriented toward enabling the child to receive an education, "the court must then examine each constituent part of the placement to weed out inappropriate treatments from the appropriate (and therefore reimbursable) ones." The court therefore remanded the case back to the district court so it could make these determinations.

> *Note*—Practically, the main costs of residential placements are not the educational costs. The expensive services are the psychiatric care, mental health services, and therapeutic interventions. The costs of educational services and services directly designed to assist the child in progressing educationally are likely to be a minor part of the total costs of the placement. In some residential placements, public schools or charter schools in fact provide the educational services at no cost. Thus, this opinion potentially reduces significantly the potential reimbursement parents can recover in most residential placement situations that involve students with psychiatric needs.

> *Note*—The Fifth Circuit thus posits that the proper inquiry is whether a particular residential program is "primarily oriented" toward enabling the child to receive an education. This analysis is an alternative to the "inextricably intertwined" formulation of various circuit courts, under which if a child's educational and non-educational/medical needs are intertwined to the point that they cannot be meaningfully segregated, and in conjunction require residential placement, then such a placement is proper under the IDEA. The Fifth Circuit's analysis appears to shift the focus to the nature of the residential program, its immediate and long-term objectives, its component parts, and the degree to which it focuses on education. The "inextricably intertwined" formulation instead focuses on the

student's deficits and needs. The Fifth Circuit's concern with that analysis is that a child's problems may be primarily non-educational, and to a lesser degree educational, but nevertheless intertwined to the point that public funding for the residential placement is still afforded under the IDEA. It remains to be seen, however, whether the *Leah Z.* test affects other circuit courts and represents a more workable legal framework for these cases.

In ***Munir v. Pottsville Area Sch. Dist*., 59 IDELR 35 (M.D.Pa. 2012)**, evidence that a 17-year-old with severe depression and eligible as ED made progress in a residential facility was not enough to prove that the public school was responsible for its costs. The student had engaged in suicide attempts, leading his parents to place him in a residential placement. After a hearing officer found that the public school was not liable for the costs of the residential placement, the matter proceeded to court. The court first noted that unlike in a variety of cases where the student's educational and medical needs are "inextricably intertwined" beyond segregation, here the student was achieving average grades for a significant period of time. "Testimony presented at the administrative hearing demonstrates that O.M.'s parents feared for his personal safety, and that he posed a physical threat to himself." The court noted that upon arriving at the residential facility, the student was put on suicide watch. "Although O.M. undoubtedly benefitted from the educational opportunities offered by the residential placements, these educational benefits were subsidiary to the therapeutic and emotional benefits O.M. received in an effort to prevent another suicide attempt." The court thus found that the "clear purpose" of the student's residential placement was to receive mental health treatment to prevent his suicide, not for him to receive a FAPE. In cases seeking residential or private placement at public expense where both educational and psychiatric purposes are at work, wrote the court, "the critical element of the analysis should be to determine whether the primary purpose of the placement is for special education or mental health treatment." Finally, the court held that the parents were not entitled to reimbursement for the private school placement they unilaterally made after the student was discharged from the residential facility, finding that the public school's IEP was appropriate, and the parents and the student essentially preferred the smaller classes and more supportive environment of the private school.

Note—Modern residential placement cases are more closely scrutinizing the nature of the services the residential program provides, and insist that the evidence show such a placement is oriented primarily for the student's education, and not to simply provide mental health treatment.

In ***E.S. v. Weast*, 53 IDELR 313 (4th Cir. 2010)**, the Maryland parents of a 20-year-old young lady adopted from an orphanage in the Philippines sought reimbursement for a unilateral residential placement after her multiple hospitalizations, suicidal ideations and attempts, and other instances of self-injury. The girl had diagnoses of bipolar disorder, depression, and post-traumatic stress disorder (from an alleged unwanted sexual encounter). For several years, the public school had placed her in a private special education day school, where she earned 20 credits toward high school graduation. During times of psychiatric crises, which involved suicidal ideations and attempts, self-

mutilation, and consequent short-term hospitalizations, her educational progress slowed, but would recover when she was stabilized and on medications. After a hospitalization, the parents submitted private psychiatric and psychological evaluations recommending residential placement. The public school agreed to change her placement to another private day school, as she indicated she did not want to return to the original placement, but disagreed that she needed residentialization in order to receive a FAPE. After yet another suicide attempt, another private psychologist recommended residential placement to reduce the risk of self-injury and allow for consistent medication management. The parents then placed her in a residential facility in Massachusetts, and initiated a legal action under the IDEA to recover reimbursement of its costs.

Both a hearing officer and a district court held for the school district. On appeal, the Circuit Court first noted that its precedent indicated that residential placement at public expense is warranted "if the educational benefits which can be provided through residential care are essential for the child to make *any* progress at all…." But, the IDEA "does not authorize residential care merely to enhance an *otherwise sufficient* day program." Further, "if residential placement is necessitated by medical, social, or emotional problems that are segregable from the learning process, then the local educational agency need not fund the residential placement." Applying this analysis, the court held that the parents' decision to place their daughter residentially "was based on their desire to ensure E.S. did not hurt herself, that she took her medicine, and that she was in a safe environment." It agreed with the hearing officer that the demand for residential placement was primarily to address the student's safety needs as a result of her psychiatric issues, and not her educational needs. Moreover, the court found that the placement provided by the district provided her with a FAPE, although her educational progress was at times slowed during her psychiatric episodes. The court thus denied reimbursement. "That E.S.'s emotional and mental needs required a certain level of care beyond that provided at [the private day school] does not necessitate a finding that the state should fund that extra care when it can adequately address her educational needs separately."

> *Note*—The 4th Circuit is attempting to fit the modern analysis of residential placement cases within the framework of the traditional "inextricably intertwined" analysis, but some tension surfaces. If a student is suicidal to the point of multiple suicide attempts can we satisfactorily say her educational needs can be addressed "separately," even if she remains at risk for death? Or, is the court simply saying that suicide prevention by means of psychiatric treatment is beyond schools' obligations under the IDEA? It may simply be that the analysis is moving away from examining the student's multiple needs and toward analyzing what is being primarily provided at the residential setting, as in the 5th Circuit's formulation in *Leah Z.*, which plainly abandons the "inextricably intertwined" analysis of many older cases.

Another Variant Analysis

One of the Circuit Courts of Appeal mentioned in the *Richardson ISD* decision above issued recently an opinion of its own touching on the question of a medically-oriented residential placement. In ***Mary Courtney T. v. School Dist. of Philadelphia*, 52 IDELR 211 (3rd Cir. 2009)**, the parents of a girl with multiple psychiatric conditions, and who had been dismissed from several facilities, placed her in a psychiatric residential facility in New York and sought public reimbursement for the placement. The placement came as a result of a crisis situation where the student was increasingly self-abusive and aggressive. The court noted that the facility had no educational accreditation, no on-site school, no on-site educators, no appreciable educational component. Focusing on the goals sought to be achieved by the facility, the court found that they were related to helping the student be aware of her condition and how to respond to it. "Courteney received services that are not unlike programs that teach diabetic students 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." It also noted that Courtney's placement was necessitated by a need to address her acute medical condition. The medical interventions, psychiatric treatment, and drug interventions to address her conditions are "far beyond the capacity and responsibility of the School District." The court also found that the costs of such a facility "may undoubtedly be classified as 'unduly expensive.'" Thus, the court denied reimbursement.

> *Note*—In the above case, the court dealt with a fairly clear example of a placement that was not primarily oriented at enabling the child to receive an education. Thus, one could argue that the Third and Fifth Circuit are not that far off in their respective analyses, although they certainly use different wording and structure their "tests" in different ways. But, most likely the tow courts would part ways when it came to a placement that was educationally oriented, but where significant costs are associated with non-educational interventions and treatment. At that point, the Fifth Circuit would proceed to segregate the costs associated with education from those associated with treatment, and would not reimburse the latter.

Uncollaborative Conduct on the Part of Parents

Federal courts have long held that equitable factors may work to reduce or obviate reimbursement for a unilateral private placement under the IDEA. See, e.g., *Alamo Heights ISD v. State Bd. of Education*, 790 F.2d 1153 (5th Cir. 1986)(equitable considerations may work to reduce reimbursement, even in situations where the school district has failed to provide an appropriate IEP). In 1997, the Congress included a provision in the IDEA codifying the doctrine allowing consideration of equitable considerations in deciding reimbursement cases. *See* 20 U.S.C. §1412(a)(10)(C)(iii). The provision harkens to the ancient "clean hands" doctrine of equity—he who comes to the court seeking relief based on fairness considerations must come to the court with "clean hands," in terms of the fairness of his own actions in the dispute. Numerous district court decisions in this area turn on the actions of parents leading up to, and during, the legal action for reimbursement. Indeed, some courts view parental collaboration with the public school almost like a prerequisite to reimbursement. Clearly, courts take seriously

the collaborative structure envisioned by the Congress with respect to educational decision-making for students with disabilities, as well as the IDEA provision's guidance on reduction or denial of reimbursement based on unreasonable parental conduct or lack of notice of private placement to the public school. The focus on the parties' conduct is in line with the equitable nature of the reimbursement determination, which is, ultimately, a basic fairness decision. The following cases show some fact scenarios stressing this area of analysis.

The case of ***A. S. v. Five Town Community Sch. Dist.*, 49 IDELR 93 (1st Cir. 2008)** highlights the importance of collaborative action on the part of parents in the educational decision-making process. A. S. is a teenage girl with an emotional disability. When she was first enrolled in the District, her parents requested that the District pay for private residential placement. Before the school could consider this request, the student went into crisis and her parents unilaterally placed her in an out-of-state residential facility, and then brought her back to Maine to a private boarding school, unbeknownst to the District. After an independent evaluator found that A. S. could receive an appropriate education in a public school setting, the school prepared a preliminary IEP that called for public school placement and left various areas open for later development. At the meeting to discuss the IEP, discussion became contentious, as the parents insisted on residential placement. The court held that the parents had frustrated the collaborative process that was intended to complete the IEP. "Once the parents realized that the school district was focused on a non-residential placement, the essentially lost interest in the IEP process." The district court and the circuit court concluded that, had the parents allowed the IEP process to run its course, the school would have developed a complete and appropriate IEP. Noting that the Congress deliberately fashioned an interactive IEP process, "it expressly declared that if parents act unreasonably in the course of the process, they may be barred from reimbursement under the IDEA." Citing Section 1412(a)(10)(C)(iii)(III), the court held that the parents' fixed idea of residential placement disrupted the IEP process and was unreasonable, and denied any reimbursement. "The parents made a unilateral choice to abandon the collaborative IEP process without allowing that process to run its course."

> *Note*—Any evidence that the parents are entrenched in an *idée fixe* that the student must be educated in a private setting, tends to have a powerful influence in the equitable calculation that is a key aspect of the unilateral placement remedy. At times, the evidence of such an attitude is the parents' statements at IEP team meetings, while in other situations, failure to participate in the IEP process demonstrates a parent's unwillingness to consider public program options. In other situations, parental actions, such as signing an enrollment contract with a private school, or putting down a sizeable unrefundable deposit show that the parent is not seriously considering placement in the public school.

After a teenage girl who had not been identified as IDEA-eligible began making suicidal statements, the parent requested an evaluation from the District. ***Lazerson v. Capistrano Unified Sch. Dist.*, 56 IDELR 213 (C.D.Cal. 2011).** Two days later, the school contacted the parents asking them to bring the girl in for evaluation. Instead, the

parents placed her in a residential facility with one-day notice to the school, and did not communicate further with the school for nine months. The school continued attempting to evaluate the child while she was in her facility to no avail. The parents filed suit requesting reimbursement. Although the court found technical violations in failing to provide notice of procedural safeguards and initiating the evaluation in a timely evaluation, it found that the parents thwarted the evaluation process, in addition to providing "incredibly short notice," and failing to research alternative options with the District. Although the parents may have believed immediate placement was necessary to prevent imminent harm, "Districts, however, are not responsible for providing emergency mental health services."

The case of ***Eschenasy v. New York City Dept. of Educ*., 52 IDELR 66 (S.D.N.Y. 2009)** is another example of a difficult eligibility case, this time finding ED eligibility and not just social maladjustment. Ann was a 19-year-old student at the time of the litigation, and had a complicated history, including stealing by 8, dressing inappropriately, engaging in sexual misconduct, using drugs heavily, running away, forging checks, getting kicked out of private schools, cutting herself, pulling her hair out, and skipping classes. A school evaluation found that Ann was not ED or IDEA-eligible. After her parents placed her in a specialized residential school, they sought reimbursement from the school. Although a lower hearing officer ruled that Ann was *both* emotionally disturbed and socially maladjusted, a review hearing officer reversed, finding that Ann was not IDEA-eligible and did not exhibit a need for special education services. The federal court held that there was evidence to support a finding of ED, and that the ED adversely affected educational performance, in that Ann's grades were erratic and she exhibited truancy. "Reviewing Ann's eligibility de novo, it is more likely than not that all of Ann's problems, not just her misconduct, underlie her erratic grades, expulsions and need for tutoring and summer school." The court thus ordered reimbursement, even though the parents failed to provide the school prior notice of the unilateral placement, and they took Ann on vacation shortly after requesting a District evaluation, rendering her unavailable for evaluation for a time. But, it denied attorneys' fees due to the parents' conduct.

> *Note*—Although the court spends a significant amount of time on the question of whether the student's ED adversely affected her educational performance, it failed to mention that a private evaluation had concluded that "Ann's intellectual ability was in the average range and her academic achievement was on or above the expected level." Is this uncontroverted finding not relevant to the issue? Normally, this would be significant evidence that despite her long-term problems, the student was able to receive benefit from academic instruction. If the educational reasons for her eligibility were non-academic in nature, the court does not explain its analysis. Moreover, improper conduct on the part of parents as part of a unilateral private placement case normally requires consideration of reduction or denial of reimbursement, and not generally a loss of attorneys' fees. *See* 20 U.S.C. §1412(a)(10)(C)(iii)(III). The court, however, makes a specific finding that "there has been no showing that [the parents] acted unreasonably under the circumstances," but in the next paragraph denies them attorneys' fees as a result

of their conduct in delaying the District's evaluation and failing to provide notice to the unilateral placement.

Suicidal Students and Residential Placement

An unfortunate number of residential placement cases under the IDEA involve students that have engaged in suicidal ideations or attempts. The acute mental health crises posed in these sometimes heart-breaking situations add to the complexity of the legal analysis, as can be seen in the following case.

In ***Linda E. v. Bristol Warren Regional Sch. Dist*., 55 IDELR 196 (D.R.I. 2010)**, the court found that the public school was responsible for the costs of a 17-year-old's residential placement. The student had a long history of behavioral problems, including stealing, threatening classmates, and disruptive behavior. She first threatened suicide in elementary school. Later, the student exhibited self-mutilation behavior, more suicidal and homicidal thoughts, and threats to peers. She also exhibited severe behavioral outbursts at home, including threatening her mother with a knife, physically assaulting her, and threatening to kill her. Her private attending psychiatrist believed that due to the severity and duration of her mental illness, as well as her lack of response to treatment, she was incapable of making emotional or academic progress in any setting other than residential placement. The school consistently determined that the student was not IDEA-eligible and proposed §504 plans. By the time of litigation, the student was unable to attend school and was failing her academic courses. The court disagreed with the school's assertion that the student's problematic behavior was primarily occurring in the home setting, finding such a claim to be unsupported by the evidence, as there was a long history of behavior problems at school including self-mutilation, theft, and threats against peers. While the student clearly had problems with her mother, the difficulties and troubling conduct were not limited to the home. The evidence also showed, moreover, that the public school was not able to provide a FAPE to the student.

> *Suicide prevention protocols and the role of the IEP Teams*—As part of suicide prevention or intervention protocols, schools should address the IEP and placement implications of students' suicidal gestures. For IDEA-eligible students that express suicidal ideations, the IEP team should meet to review the student's status and determine whether additional evaluation is warranted, or what changes to the IEP should be considered in response to the student's suicidal gestures. A proper, coordinated, and meaningful response to the student's crisis is key to help avoid the need for residentialization.

Parental Notice of Unilateral Private Placement

Even before the 1997 IDEA included a provision on parental notice to the public school in unilateral placement situations, caselaw addressed the need for parents to notify school districts prior to seeking reimbursement for a unilateral private placement. See e.g., *Evans v. Dist. No. 17 of Douglas County*, 841 F.2d 824 (8th Cir. 1988); *Garland Independent School District v. Wilks*, 657 F.Supp. 1163 (N.D. Tex. 1987). The policy

underlying the doctrine and IDEA provision is straightforward—parental notice affords public schools an opportunity to address potential deficiencies in the student's IEP before the parent resorts to a private placement. See *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (1st Cir. 2004). Armed with notice that the parents intend to unilaterally place the student at public expense, the school may choose to conduct re-evaluations, add services, revise the IEP, or otherwise address potential deficiencies in the public educational program for he student. While courts will always examine notice irregularities, they vary in terms of deciding the consequences of a parental failure to provide notice to the public school. Some courts will view a notice failure as a bar to reimbursement. In fact, the IDEA provision states that reimbursement "may" be reduced or denied if there is no notice, expressly indicating the discretionary nature of the provision. See *Ashland Sch. Dist. v. Parents of Student E. H.*, 583 F.Supp.2d 1220 (D.Ore. 2008). Others will deny reimbursement of private placement costs incurred prior to the date notice was provided to the public school. Others will simply "eyeball" a reduction in the total reimbursement costs in no-notice situations. Yet others will excuse non-compliance with the notice provision in certain circumstances. Since there can be such a variety of factual situations surrounding unilateral placements, it makes sense to afford fact-finders significant discretion in applying the notice provision. The case below is an example of the notice provision in action.

In ***Erin K. v. Naperville Sch. Dist. No. 203*, 109 LRP 63178 (N.D.Ill. 2009)**, Illinois parents of a girl with mental and emotional disorders were able to revive their reimbursement action despite not providing prior written notice of their unilateral out-of-state residential placement. After a hospitalization, Erin's parents placed her in a Utah residential facility. Three days later, they wrote the school district regarding their placement and intent to seek reimbursement. After a due process hearing request was filed nine months later, the parents and the school district agreed in a resolution session that the district would assume financial responsibility for the residential placement, but the parents also requested retroactive reimbursement. The hearing officer dismissed the hearing request, finding that since the parents had failed to provide prior written notice, they were precluded from seeking retroactive reimbursement for the residential placement. The court disagreed, finding that the parents had spoken with the district's special education director about their intent to place Erin in a residential facility about a month prior to the placement. In addition, the court noted that failure to provide notice is not a firm bar to reimbursement, but rather allows a fact-finder to reduce or deny reimbursement. "That Congress left some discretion to the decision maker is understandable, given the remedial purpose of the IDEA and myriad of factual circumstances that arise under the IDEA." The court thus ordered the parents to re-submit their hearing request so the hearing officer could determine whether circumstances dictate that reimbursement should be reduced or denied entirely due to the parents' failure to provide written notice.

> *Note*—If the notice provision is intended to provide public schools with an opportunity to review its IEP and address parental concerns, is a failure to provide prior *written* notice of significance if the parents otherwise alert the school of their intent to seek reimbursement for a private placement due to concerns over

the IEP? Certainly, the notice provision would allow a hearing officer to find that such technical failure to comply with the precise terms of the law should not result in a reduction of reimbursement, if other requirements are met.

Lack of Generalization to the Home

In ***B. G. v. School Bd. of Palm Beach County*, 48 IDELR 271 (11th Cir. 2007)**, the parents of an 8-year-old with emotional disturbance failed in their bid to win reimbursement for his unilateral placement in a residential behavioral health facility. The student, who had received various diagnoses, including mood disorder, impulse control disorder, ADHD, bipolar disorder, and schizoaffective disorder, was hospitalized after a violent episode at home (he threw things and tried to smash a mirror over his mother's head). Subsequently, his parents placed him in a residential facility, where his behavior remained uncontrollable. The parents argued that although the student's performance was acceptable in the public school setting, he was not transferring those gains into the home. The court stated that "the standard for an appropriate education is whether the student is making 'reasonable and adequate gains in the classroom,' not whether the child's progress in a school setting carried over to the home setting." Indeed, the parents' expert, who recommended residential placement, testified to the need for such a setting based on the difficulties that the student was having with his parents at home. The court denied reimbursement, finding that the student was making adequate progress in the public school classroom, and that "the IDEA does not require that the student be able to generalize behaviors from the classroom to the home setting."

Note—But, are educational gains made solely in the classroom, and exhibited only in the classroom, meaningful educational benefit as envisioned in *Rowley* and its progeny of caselaw? If a child's primary area of educational need is in the emotional/behavioral domain, and the child does not demonstrate improvement in that area at home and society, has there really been improvement? Does such a situation not indicate the potential need for in-home services, parent training, or parent counseling? The court here may be taking an "old-school" approach to education—i.e., if the student is making progress on the three R's, then the student is receiving educational benefit—without fully recognizing that education is a broader concept than academic proficiency, particularly for students with emotional disturbance or autism spectrum disorder.

The more limited analysis, focusing on performance in the classroom rather than the home and community nevertheless persists. In the more recent case of *Doe v. Hampden-Wilbraham Reg'l Sch. Dist*., 54 IDELR 214 (D.Mass. 2010), for example, the court rejected the parents' argument that the IEP was deficient because it failed to include goals or strategies to address the at-home behavioral problems of a child with autism. The court found that the IEP properly addressed behaviors that interfered with the child's learning in the school setting, and thus, the IEP was held to be appropriate under the IDEA. Similarly, a Missouri court rejected reimbursement for a residential placement that improved the parents' interaction with the student and addressed behavior problems that took place in

the home setting. *J. L. v. Francis Howell R-3 Sch. Dist*., 54 IDELR 5 (E.D.Mo. 2010). The court found that the student had made progress in the school setting under the public school's IEP although behavior problems persisted in the home setting.

An example of a more nuanced position on this question is the district court's decision in *Thompson R2-J Sch. Dist. v. Luke P*., 48 IDELR 63 (D.Co. 2007), *reversed*, 50 IDELR 212 (10th Cir. 2008). There, the district court agreed that a child with severe autism spectrum disorder needed residential placement because he was not generalizing any life skills gains made at school to the home or community settings, even with use of consistent strategies at home. "[W]hatever educational progress Luke made on the most fundamental life skills, such as feeding and toileting and communicating basic needs, was meaningless if there was no strategy to ensure that those skills would be transferred outside of the school environment and not lost to regression." While the court conceded that inability to generalize certain academic skills across environments would not always mean an IEP is not providing educational benefit, "the lack of generalization of the most basic life skills, such as an appropriate behavior, toileting, and eating indicate that the educational benefits received by Luke…were *de minimis*."

But, in ***Thompson R2-J Sch. Dist. v. Luke P*., 50 IDELR 212 (10th Cir. 2008)**, the circuit court panel reversed the district court decision discussed above, holding that the Act does not guarantee generalization of skills needed to reach self-sufficiency. Despite progress in many areas of goals and objectives, the student manifested serious behavior problems in the home and community, including violent outbursts, sleep problems, and intentionally spreading bowel movements around his bedroom at night. After a consultant observed the student in the public school setting and made recommendations regarding his IEP goals and objectives, the school agreed to revise the IEP, but refused to pay for residential placement. The court disagreed with the lower court's view of the generalization issue. "Though one can well argue that generalization is a critical skill for self-sufficiency and independence, we cannot agree with appellees that IDEA always attaches essential importance to it." Finding that the Congress did not provide in IDEA a guarantee of self-sufficiency, together with the fact-finders' conclusions that the student made progress at school, the court felt compelled to reverse the lower court. It thus held that schools do not need to show progress on generalization of skills, in all cases, to ensure an appropriate educational program under the IDEA. At most, the court added, there could be a case where the child's problems generalizing skills across settings were so severe that they prevented the child from receiving any educational benefit.

Note—The stage seems set for a future Supreme Court battle on the issue of generalization of skills from school to home and community. The First, Tenth, and Eleventh Circuits are clearly skeptical of tying generalization of skills to the concept of FAPE and educational benefit in a general way. See *Gonzalez v. Puerto Rico Dep't of Educ*., 34 IDELR 291 (1st Cir. 2001); *Thompson R2-J* (10th

Cir. 2008); *B. G.* (11th Cir. 2007). Other circuits, when faced with appropriate dispute scenarios, are likely to disagree. Regarding the Tenth Circuit's analysis, do we have to agree that self-sufficiency is guaranteed under the IDEA in order to also say that an IEP must address generalization of skills to be appropriate, particularly with students exhibiting problems in the home? A circuit court may, in a future case, decide that while self-sufficiency is not guaranteed under the IDEA, the IEP must address generalization of skills in order to be appropriate under the Act in cases where generalization of skills is an identified area of educational need.

Courts' Treatment of Substance Abuse Issues

A striking number of residential placement cases involve students that are engaging in drug use, creating difficult chicken-and-egg questions of whether the drug abuse is the result of the psychiatric conditions, or whether the student's difficulties are the result of drug abuse. Also at work is the question of whether the IDEA was intended to subsidize drug treatment under its educational mission, and if so, under what circumstances.

In ***Fort Bend Independent Sch. Dist. v. Z. A*., 62 IDELR 231 (S.D.Tex. 2014)**, the adoptive parents of a boy from a Russian orphanage succeeded in obtaining the majority of the costs of his residential placement in a highly specialized facility. After providing him a succession of mostly unsuccessful §504 Plans due to ADHD to address failure to complete work, work refusal, and lack of focus, the District evaluated the student under IDEA since his problems had escalated to suicidal ideations and marihuana use. After evaluating him, the IEP team qualified the student for special education as a student with Emotional Disturbance (due to anxiety and depression) and an Other Health Impairment (due to ADHD). The initial IEP provided for a full mainstream placement, with accommodations similar to those in his prior §504 plans, counseling from a school psychologist weekly for nine weeks, and inclusion support services. After a single counseling session, the school psychologist concluded that the primary problem was the boy's marihuana use and its resulting lack of motivation, and thought that "I really didn't see anything that a school psychologist could … because I thought [the marihuana] was kind of overwhelming everything else." Despite the requirements of the IEP, the school psychologist discontinued the counseling after that one session and referred the student to the drug counselor. After the boy was refusing drug testing, stealing from his parents, and demanding money to finance drug buying and selling, they decided to place him in a private wilderness facility in Utah, fearing that he otherwise would escalate to a suicide attempt.

At the facility, a therapist diagnosed the student with Reactive Attachment Disorder (RAD) due to his lack of attachment to a parent figure in the first four years of his life in a Russian orphanage. The therapist indicated that the RAD caused anxiety and a sabotaging of attempts to educate, and that the drug use was likely a means for the boy to self-medicate his anxiety, rather than the root cause of his problems. The Utah program, however, offered no educational assessments, classrooms, or real educational

services. The therapist, however, recommended a residential facility in Missouri that specialized in students with RAD, where he was placed for nine months. The parents filed an IDEA action seeking reimbursement for both residential placements. A hearing officer granted the majority of the costs, and an appeal was taken.

The court found that the District's IEP was insufficient to meet the student's needs, as it did not provide specialized instruction to address his anxiety and resulting work refusal, contained only two sparse goals with no real strategies to address his anxiety and depression, and included accommodations and interventions that had been proven unsuccessful in prior §504 plans. Importantly, the court held that the school psychologists' unilateral discontinuation of counseling services in the IEP constituted a failure on the part of the District to act in a collaborative and coordinated manner. Moreover, even after the parents placed the student in a residential facility, the IEP team did not propose a revised IEP. Following Fifth Circuit precedent requiring that the residential placement be primarily oriented to providing the student an education, the court agreed with the hearing officer that the second specialized residential placement met that standard, although not the wilderness program. Lastly, the court excused the parents' failure to provide notice to the District prior to the unilateral placement, as they feared serious harm could befall their son. She thus awarded nearly $8,000 per month of reimbursement (out of about $11,000 per month total costs) for the nine months the student was placed at the facility.

> *Note*—While the court accurately finds the major problems with the District's IEP and services in this case, and likely reaches the correct overall conclusion under the law and facts, the decision also raises some questions. The Fifth Circuit's precedent in the *Richardson ISD v. Leah Z.* case refocuses the analysis away from the complexities of the interplay between students' educational and psychiatric needs, and toward the nature and focus of the residential program itself. Under *Leah Z.*, the program must be primarily oriented to educational progress. Here, the court could go no further than state that "there is evidence in the record that [the program] places great weight on education," since the psychologist from the facility testified mainly regarding the therapeutic benefits of the program. Another curiosity in the case is that the court excuses the parents' failure to provide prior notice of the placement by pointing out that they sought residential placement "so he would be safe," when other cases have specifically ruled against residential placement at public expense when the reason for the placement is to keep the student safe. Lastly, it is also difficult to understand how facility therapists so easily attributed the student's drug use to his anxiety when he was admittedly also engaging in selling drugs, stealing money, and making his parents pay off his drug debts to dealers. Would his significant marihuana use not have any contributing impact on his lack of motivation to start and complete school work?
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> *****Update on Appeal***—On appeal to the Fifth Circuit Court of Appeals, the panel wholly reversed the decision of the District Court. ***Fort Bend Ind. Sch. Dist. v. Z. A.*, 65 IDELR 1 (5th Cir. 2015)**. The Panel noted that the record evidence in support of the finding that the residential program was primarily oriented to

education was quite weak. Moreover, the program, which focused on treating the student's Reactive Attachment Disorder (RAD) as its "number one goal." The program's founder expressly denied that his facility's primary purpose was educational, and the student's progress was judged with regard to his RAD, not educational achievement. "Measuring progress by success in treating the underlying condition, on the theory that such progress will eventually yield educational benefits as well, is insufficient."

Cases from other jurisdictions—In *M.T. v. Croton-Harmon Union Free Sch. Dist*., 57 IDELR 37 (S.D.N.Y. 2011), the parents of a 12th-grader with anxiety, depression, and substance abuse problems who had progressed well in a residential program resisted the District's proposal to return him to a high school with a structured program and support services. Although the student had a history of behavior problems, he passed all his classes and various statewide assessments. Given this history of academic ability, the court agreed that small-group learning labs, counseling, meetings with a consultant teacher, and other IEP interventions were reasonably calculated to confer FAPE. Although the parents expressed concern that the student's drug issues would return if he left the residential program, the court quoted that "while a residential placement may have been the most effective way to treat the student's substance abuse problem, that treatment was not the District's responsibility." See *P.K. v. Bedford Cent. Sch. Dist*., 569 F.Supp.2d 371, 387 (S.D.N.Y. 2008).

Practical Implications—What lessons does this case hold for school districts faced with these complex cases?

- Students who have expressed suicidal ideations may require in-depth psychological assessment, psychological services, and coordination with private therapists or counselors.

- After a parent unilaterally places the student in a residential facility, schools are well advised to consider reevaluation and revisions to the existing IEP, services, and placement.

- School counseling services may need to address the student's drug use as part of the counseling process, hopefully in collaboration with outside drug intervention programs.

One can compare the analysis in the *Fort Bend ISD* case above, where the court segregated the non-educational and educational portions of the residential placement to that in ***Board of Educ. of The City of Chicago v. W.E.*, 62 IDELR 53, N.D. Ill. 2013)**. There, the court awarded the full costs for two successive residential placements despite the fact that the programs included a significant drug treatment component. The parents had approached the District inquiring about special education testing at the recommendation of a private psychologist when a previously high-performing boy's grades plummeted in high school. The District instead initiated an Intervention

Assistance Team (IAT) process that did not result in formal testing. After the parents had the student tested privately, showing diagnoses of depression, cannabis abuse, and ADHD, they provided the report to the District, which again did not evaluate the student. The student was subsequently suspended for "tagging" and marihuana possession. Months after the parents told the District they would be removing W.E. from school and they placed him in a residential program, the school finally evaluated the student and found him eligible under the IDEA. His IEP, proposed while he was in a residential program, called for mainstream placement with accommodations, 10 minutes of consultation per day with a special education teacher, and 30 minutes per week of social work services. After a hearing officer awarded over $150,000 of reimbursement, the District appealed, arguing that the residential programs were not appropriate for reimbursement under IDEA because they were primarily drug treatment programs. The court disagreed, finding that both programs focused significantly on individualized educational programs and that the drug treatment components "were incidental to, and enabled him to benefit from, their academic program." The court thus upheld the large reimbursement award, with interest.

> *Note*—The court here easily concludes that the residential program's drug treatment components were within the realm of related services that enabled the student to benefit from his educational services. Based on current caselaw, other courts might demand more of a link between the educational and non-educational program components, or choose to reimburse only the portions of the residential program not associated with drug treatment. At work may be the fact that in many residential programs, the true educational components are far less costly than the purely therapeutic and drug treatments parts, which can require highly trained and accredited professionals and significant time. In the *Fort Bend ISD* case, the hearing officer segregated the educational and non-educational components by calculating the hours spent on classroom and other instruction, as opposed to time spent on non-educational pursuits. The federal court there upheld that method of cost allocation. Other courts might have scrutinized the itemized billing records from the residential program and "line-vetoed" purely treatment-related entries.

In another case of a student with Reactive Attachment Disorder (RAD) who was adopted from overseas, the parent of a high school boy sought reimbursement for a unilateral private residential school placement. ***S.H. v. Eastchester Union Free Sch. Dist.*, 58 IDELR 46 (S.D.N.Y. 2011).** The student was placed for one semester in the District's alternative school program, which included a therapeutic component, and he made academic progress and also improved behaviorally and emotionally. The parent withdrew her son from the alternative program because she believed that students at the school were using drugs, that her son had used drugs with peers there, and that its teachers were not trained in RAD. The student was first placed in a wilderness program and then a specialized residential program for students with RAD. The court disagreed with the parent's claims, first reasoning that the IDEA does not require public school staff to be specifically trained in every type of psychiatric disorder. Although the student did not complete all of his classwork while in the public program, he attended on time, formed relationships, communicated more openly, and progressed socially and

behaviorally, even in the span of one single semester. The lack of an FBA was not fatal, as the staff's strategies assisted effectively with behavior and social issues. Even if the parent's preferred placement was superior to the alternative school program offered by the district, the school was not required to fund it. The evidence supported the school district's claim that the student was progressing in its alternative school.

> *Note*—The key distinction between the above case and the *Fort Bend ISD* decision above it is that the public school's IEP and placement in the New York case was working to the student's benefit, and contained the necessary services to address his educational needs, even if not his drug abuse problems. The evidence showed the student progressed both academically and non-academically. While it is certainly understandable that the parent here would prefer that her son attend a residential program where the opportunity for substance abuse would be minimized, the court here was unwilling to see that problem as an intertwined component of the student's educational needs.

The case of ***Forest Grove Sch. Dist. v. T.A.*, 56 IDELR 185 (9th Cir. 2011)** is well-known because before it was sent back to the lower courts, the U.S. Supreme Court heard the case and ruled that a parent could attempt to seek reimbursement for a unilaterial private placement even if the public school had never actually provided special education services to the child. The Court ruled that a child-find failure would be even more serious of an IDEA violation than merely providing an inappropriate program, as a child-find lapse would mean the student received no program at all. The Court, however, ordered a remand to reconsider the equitable factors at play in the facts of the case. The Ninth Circuit upheld a District Court decision denying reimbursement after all, finding that the student's behaviors at home, including running away and using drugs, were the true reason the parents placed him in a residential facility. The court noted that escalating home behaviors and drug use took place immediately before the placement, and the parents wrote on intake documents that the enrollment was precipitated by drug use and runaway behaviors.

Appropriateness of Public School IEP

Under the reimbursement remedy formulation of the Supreme Court's opinion in the *Burlington* case, a parent can place their child unilaterally in a private facility and obtain reimbursement of the costs in an IDEA action if they can prove that the public school's program is inappropriate and the private program is appropriate. *School Committee of Burlington v. Dept. of Education of Massachusetts*, 471 U.S. 359 (1985). The *Burlington* analysis applies in residential placement contexts to a significant degree, in that the parent must still show that the public program is inappropriate and the private placement is appropriate to confer a FAPE. But, when the placement sought is a highly restrictive residential placement, which in many situations is an out-of-town or out-of-state 24-hour placement, courts must ensure that the residential placement is necessary in order to confer a FAPE to also ensure compliance with the Act's Least Restrictive Environment (LRE) mandate. In any event, a key focus of the courts' decisions rests on whether the public school IEP and placement are reasonably calculated to confer an

educational benefit to the student. The following cases show how this analysis is applied to disparate fact situations.

In the matter of ***Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E., by and through her parents, Roxanne B. and David E.*, 702 F.3d 1227 (10th Cir. 2012), *cert. denied* (2013)**, parents sought a residential placement for their adoptive daughter Elizabeth, a student with significant behavioral and emotional issues. The program that they chose was a residential treatment center in Idaho known as Innercept. The court reviewed, but did not adopt, either the *Kruelle* test or the *Richardson* test ("amorphous, judicially crafted 'primarily oriented' standard of the Fifth and Seventh Circuits"). Tuition was granted because the proposed IEP was not appropriate and the private residential program provided educational services in an accredited facility. In fact, the District never challenged the hearing officer and lower court findings that it had denied the student a FAPE. The court observed that the parents could recover the cost of the student's placement if: 1) the district denied the student FAPE; 2) the residential facility was a state-accredited elementary or secondary school; 3) the facility provided specially designed instruction to meet the student's unique needs; and 4) any nonacademic services the student received met the IDEA's definition of "related services." To the court, the record evidence supported the educational orientation of the Innercept program. "Her schedule at Innercept included three hours of classroom time in the morning and one hour to ninety minutes of homework during the evening; and Innercept provided one-on-one instruction to Elizabeth for those times she was unable to participate in the classroom." The court noted, however, that the analysis it used in this case might not be applicable to all cases seeking reimbursement for a residential placement. "Assuredly, there are some cases in which courts must decide just how broadly the Act's definition of 'special education' extends in order to effectuate the Act's requirement that all children, no matter how disabled, receive some meaningful educational benefit."

> *Note*—The Tenth Circuit appears to view both the traditional "inextricably intertwined" analysis and the Fifth and Seventh Circuits emerging modern analysis with suspicion. Its proposed analysis, however, raises its own questions. Is it not crucial to inquire whether residential placement is necessary in order to provide the student a FAPE to satisfy the Act's LRE requirement? If a highly structured public school program with emotional and behavioral supports were reasonably calculated to confer a FAPE, the court could order that such a program be provided in the LRE. And, admittedly, the Innercept program provided at best a half-day educational program.

The school district in the case of ***J.S. v. Blind Brook-Rye Union Free Sch. Dist.*, 61 IDELR 219 (S.D.N.Y. 2013)** proposed an IEP with care after the parents of a child with learning difficulties and ADHD indicated they were considering a residential placement. As private evaluations indicated the 12-year-old boy was functioning at an average level on academics, the school proposed an IEP based around mainstream placement for most classes, numerous classroom accommodations, assistance from a special education teacher and aide, and aide assistance in specials, gym, and lunch. In addition, the special education teacher would have a role in both monitoring his progress

and ensuring implementation of accommodations and services. For behavioral issues, the IEP included counseling and services from the school psychologist, as well as twice monthly parent counseling sessions to help manage the student's outbursts at home, although behavior was generally appropriate at school. The parents nevertheless placed the student in the residential facility and sought reimbursement. The court rejected the parents' claim that the instructional assistance contained in the IEP was insufficient because it did not provide for one-to-one teacher instruction, finding that one-to-one instruction was not provided in the residential program either. The fact that the IEP goals drew from the previous year's goals was also not a problem, as the student's needs remained the same and the goals were in fact reworked. The court also found that the numerous accommodations could be implemented in the classroom, particularly in light of the assistance of both a special education teacher and an aide. The fact that the District wanted to wait until the student began attending public school to conduct an FBA and develop a BIP was understandable, as the student had not attended the District in the last year. Lastly, the proposed placement was consistent with the LRE mandate of the law, while providing for the student's needs. Therefore, the court denied reimbursement, stating that "I understand why the Parents may feel that Eagle Hill is the best placement for their child, but I am bound by the IDEIA, which does not require the best placement…."

> *Note*—The school district in this case was well-advised to propose a solid IEP that addressed all the student's needs, included significant special education assistance in regular classes (three 40-minute sessions every six days), some resource class instruction (40 minutes per day), teacher assistant help on days when the special education teacher was not scheduled, aide assistance even in lunch and gym, and provided for both counseling services from the school psychologist (30 minutes every six days), 18 annual goals in study skills, academics, and social/behavioral skills, 80 minutes of parent counseling per month, and numerous classroom accommodations. It was thus difficult to argue that these services would not suffice to meet the needs of a student whose academic achievement was in the average range, and who did not exhibit much problematic behavior at school. The IEP even addressed the student's apparently frequent behavior outbursts at home by offering parent counseling services.

An Indiana court in the case of ***Mt. Vernon Sch. Corp. v. A.M.*, 59 IDELR 100 (S.D.Ind. 2012) and 59 IDELR 187 (S.D.Ind. 2012)**(upholding decision of Magistrate), heard a claim involving the placement of a teenager with severe autism and significant behavioral issues, including aggression, sexual touching, spitting, self-injurious repetitive behaviors, sleep problems, and difficulty with transitions. The student had been placed in two successive residential facilities for a total of nearly five years. After an IEP team was convened to address the student's potential transition back to school, the team put together a plan for interim services while evaluations were pending. The interim plan called for a "step-down" plan for fading the student from one-to-one services to a public school setting. Implementation of the step-down plan did not go well, and once the student started at school, the promised instructional aide was not provided until after two weeks. Then, the parents were called to pick up the student at school, where they were

told that placement at school was not going to work out. Two weeks later, the school proposed a homebound placement. The parents expressed concern that this was not an appropriate placement and declined services. Months passed, the evaluations went undone, and the parents sent emails asking for appropriate services and residential placement. After the parents filed a state complaint, the IEP team met and proposed a restricted classroom placement, but neither considered, nor responded to, the parent's request for residential placement. After finding that the failure to conduct the evaluations constituted a procedural violation that resulted in a denial of FAPE, the Magistrate also found that the proposed placement was inappropriate. "Homebound was not reasonably calculated to provide meaningful educational benefits because A.M. could not accomplish the goals listed in the IEP. The goals set forth in the IEP could not be accomplished in a homebound setting for two reasons: (1) the goals were specifically designed for a school or residential setting, and (2) A.M.'s behavioral problems interfered with his ability to learn and accomplish the IEP's goals outside of a residential setting." The IEP contained goals including keeping hands to himself in groups in a school setting and assisting with cafeteria tasks. Moreover, a homebound placement could not address his behavioral and daily living needs. The Magistrate thus upheld the hearing officer's findings and orders for two years of compensatory education, finding evidence that the school's failures resulted in regression in important educational areas. The court upheld the Magistrate's decision. *See* 59 IDELR 187.

> *Notes*—While in a more conventional residential placement case, the school has implemented an IEP in the school setting, here the school did not offer placement in a school setting until months after sending the student home, and failed to complete its planned evaluations. Moreover, a failure to consider the parent's request for residential placement in a context where the student has been placed in two such facilities in previous years is difficult to understand. Indeed, when the school explored potential placements under Medicaid, it was looking primarily at residential placements. The pileup of violations thus led the hearing officer, Magistrate, and court to order residential placement and two years of compensatory services. The court cited the analysis of the Seventh Circuit, which holds that "A residential placement is required when it is a 'necessary predicate for learning" as opposed to a "response to medical, social or emotional problems that are segregable from the learning process.' *Dale M. ex rel. Alice M v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307,* 237 F.3d 813, 817-18 [33 IDELR 266] (7th Cir. 2001)." Thus, the Seventh Circuit appears to adhere to the "traditional" analysis where, if the educational needs are inextricably intertwined with non-educational needs, public funding of residential placement under the IDEA is possible.

Appropriateness of Private Program

The second prong of the *Burlington* test, which applies in residential placement cases, asks whether the private program for which reimbursement is sought is appropriate under the IDEA. After 1985, a question arose as to whether reimbursement was possible in situations where the private placement was not on the state's list of "approved" private

schools. Could a program meet the standards of the state education agency, as required by the Act, if it was not approved by the state?

In 1993, the Supreme Court issued its opinion in *Florence County School District Four v. Carter*, 114 S.Ct. 361, 20 IDELR 532 (1993). The lower court had split from other courts to hold that reimbursement could be awarded for a unilateral placement in a non-approved facility. The Supreme Court granted *certiorari* (review) to resolve the conflict among the courts of appeals. The Supreme Court's opinion in *Carter* agreed with the lower court and held that a parent could obtain reimbursement for a non-approved unilateral private placement if the public IEP was inappropriate and the private placement provided an appropriate program. This was so even if the private placement did not develop IEPs or meet other technical requirements applicable to educational placements effected by school districts. The doctrine of the *Carter* opinion is now incorporated in the applicable IDEA regulation, which states that "[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).

If failure to comply with the regular requirements of the IDEA, such as state educational agency approval, does not mean that a parent-initiated placement is inappropriate under the Act, what is the standard then, for determining the appropriateness of a unilateral private placement after *Carter*? The consensus among the commentators and caselaw is that a private placement will be found inappropriate only if it fails to confer an educational benefit to the child, or if it lacks specific components designed to meet the child's unique needs. The lack of IEPs, of certified staffpersons, or of specific objectives, is not fatal to reimbursement—so long as a private program meets the IDEA's minimum standard of substantive appropriateness under *Rowley*—a program reasonably calculated to provide educational benefit (i.e. more than trivial progress) to the child.

The parents of a teenaged girl with SLDs and behavior problems sought reimbursement for their unilateral residential placement in the case of ***Ward v. Board of Educ. of the Enlarged City Sch. Dist. of Middletown, New York*, 63 IDELR 121 (2nd Cir. 2014)**. After a state review officer found that the public school's proposed placement was appropriate, the parents argued only a procedural claim, which the Circuit Court rejected. The court found that the public placement provided specialized instruction that addressed the student's SLDs, as well as behavioral interventions to address her behavior issues. Then, the court's attention turned to whether the residential program was appropriate, a finding that is required for the court to award reimbursement for the placement. "A unilateral private placement is only appropriate if it provides educational instruction *specifically* designed to meet the *unique* needs of a handicapped child." There, the court found that the residential program failed to provide any special instruction in math, the area of primary academic weakness, and instead placed the student in a lower level "consumer" math course, where she struggled. At the public school, the court noted, the student performed successfully in a higher-level math class. And, the residential program failed to either set behavioral goals or implement a behavior intervention plan. The program's learning specialist testified that "we don't do behavior plans, that not what

we do here." Thus, the court found that the residential program was not appropriate to support an award of reimbursement, and denied relief.

In ***Covington v. Yuba City Unified Sch. Dist*., 56 IDELR 37 (E.D.Cal. 2011)**, the parents of a 13-year-old with emotional disturbance sought reimbursement for a residential program run by a church. Although the hearing officer and court found that the District had denied the student a FAPE by properly revising the student's IEP and services, they also found that the private program was not appropriate under the *Carter* standard. The program had no credentialed special education teachers, and did not address either the student's problems in math and reading, or provide any behavioral supports. Staff had no training in individualized behavioral interventions. The religious-based curriculum, found the court, "which apparently included significant Bible study and application, had nothing to do with [the student's] special needs." Unsurprisingly, the court found that the student exhibited the same behaviors he exhibited prior to his removal from public school.

Note—Parents tend to lose reimbursement cases where the private school program suffers the very deficiencies upon which they premise their claim that the public school has failed to confer a FAPE. Here, the parents alleged that the public IEP failed to address the student's growing behavioral and emotional needs, but placed the student in a program that offered no services to address those very needs. The *Burlington* remedy is not intended to replace an inappropriate public program with an inappropriate private program.

Note on LRE Issue—The court here agreed that the private program was too restrictive, in that it only provided for one-to-one instruction, and no opportunities for social interaction with peers. Although there is some debate as to the degree to which the LRE requirement applies to private schools post-*Carter*, the court wrote that "[w]hile it is clear that the least restrictive environment requirement should not be applied in the strictest sense, it remains a consideration that bears upon the parents' choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate." See also, *P. H. v. New York City Dept. of Educ.*, 54 IDELR 221 (S.D.N.Y. 2010) citing *M.S. v. Board of Educ. of the City Sch. Dist. of the City of Yonkers*, 33 IDELR 183 (2d Cir. 2000)(LRE may be considered in determining whether a parent's unilateral placement choice is appropriate); *Steven P. v. Harrison Central Sch. Dist*., 47 IDELR 133 (S.D.N.Y. 2007)(LRE is a factor to consider in assessing appropriateness of private program); *S. S. v. East Ramapo Cent. Sch. Dist.*, 54 IDELR 161 (S.D.N.Y. 2010)(As part of determining appropriateness of private program, court found private program inappropriate due to insufficient level of mainstreaming for student with SLD).

Modified Appropriateness Standard—Most cases, however, stand for the proposition that the private program must be specially designed to meet the student's needs, and include the services necessary to meet the student's broad areas of educational need. See, e.g, *Frank G. v. Bd. of Educ. of Hyde Park*, 459

F.3d 356 (2nd Cir. 2006). If speech/language skills are a basic area of deficiency, can a program be appropriate if it does not address the area altogether? Generally, hearing officers and courts would find a public IEP inappropriate if it lacked speech therapy and speech/language was an identified area of educational need. See also, *C. R. v. Wappingers Cent. Sch. Dist*., 111 LRP 24529 (S.D.N.Y. 2010)(student made no progress in a private program that was not tailored to meet the needs of student with dyslexia and attention problems, despite the claims of its promotional brochures).