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Retroactive Reimbursement: The Standard of Review for a Parent's Unilateral Placement Under the Education for All Handicapped Children Act

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NOTES

RETROACTIVE REIMBURSEMENT: THE STANDARD OF REVIEW FOR A PARENT'S UNILATERAL PLACEMENT UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

The Education for All Handicapped Children Act of 1975 ("the Act")[1] was enacted to assure all handicapped children "a free appropriate public education."[2] The Act requires school districts to de-

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[1] 20 U.S.C. §§ 1400-61 (1982 & Supp. IV 1986).

[2] Id. § 1400(c). See Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982) (explaining that "appropriate" under the Act means that the handicapped child must "benefit" from the educational placement). The definition of "appropriate," "[l]ike many statutory definitions . . . tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent." Id. at 188. Most courts apply a more rigid standard of appropriateness than the *Rowley* Court when reviewing a school district's placement. See, e.g., School Comm. of Burlington v. Department of Educ., 471 U.S. 359 (1985).

Included in the definition of an appropriate education is the requirement that the child be placed in the "least restrictive environment." 20 U.S.C. § 1412(1). A "least restrictive environment" is characterized by mainstreaming handicapped children into the local school community. It requires that the state's policy assure that

> to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that . . . removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id. § 1412(5).

Senate discussions of the Act reveal that mainstreaming is designed to enhance relations between handicapped and nonhandicapped people in later life.

> A child who goes to school everyday with another child who is confined to a wheelchair will understand far better in later life the limitations and abilities of such an individual when he or she is asked to work with, or is in a position to hire, such an individual.

121 Cong. Rec. 19,484 (1975) (statement of Sen. Stafford). See also Hill, Legal Conflicts in Special Education: How Competing Paradigms in the Education for All Handicapped Children Act Create Litigation, 64 U. Det. L. Rev. 129, 140 (1986) ("[M]ainstreaming was planned to enable [handicapped children] to better cope with the 'real world' and to expose nonhandicapped children to differences in individuals. . . .").

Mainstreaming has been implemented throughout the nation. A study of mainstreaming in five metropolitan school districts notes that

> for the severely handicapped, there has been movement from state facilities to public school facilities, from separate schools of all kinds into regular schools, and from private contract arrangements to publicly organized programs. Among the less severely handicapped, there has been movement toward more resource rooms, more noncategorical placements, and fewer self-contained classrooms.

velop individualized education programs ("IEPs")[3] detailing special education services to be provided for each handicapped child in the school district. Further, the Act authorizes federal funding to local school districts that provide private educational programs for handicapped children[4] when an appropriate education is not available within the public school system. A school district's failure to meet its obligations under the Act, either by not developing an IEP or by developing an inappropriate one,[5] has dramatic effects on the handicapped child's educational, social, and emotional development. Consequently, if the parent believes that the school district has failed to meet its obligations, then she may unilaterally[6] place her child in a different educational program and seek retroactive tuition reimbursement from the school district.[7] Although the Act does not expressly allow for retroactive reimbursement, the Supreme Court in *School Committee of Burlington v. Department of Education* ruled that such relief is available under the Act's broad remedial provision.[8] The Court based its decision to award retroactive reimbursement on a finding that the program the parent selected was appropriate, and that

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Singer & Butler, The Education for All Handicapped Children Act: Schools as Agents of Social Reform, 57 Harv. Educ. Rev. 125, 135 (1987).

3 See infra note 24 and accompanying text.

4 The term "handicapped children" is defined as children who are "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(1).

5 Unless otherwise indicated, subsequent references to an "inappropriate IEP" will include inappropriate IEPs (i.e. an IEP that does not provide the child with all of the services necessary to constitute an appropriate IEP) as well as the school district's failure to provide an IEP.

6 Future references to a parent's placement denote a unilateral placement.

7 See, e.g., School Comm. of Burlington v. Department of Educ., 471 U.S. 359 (1985); Antkowiak v. Ambach, 838 F.2d 635 (2d Cir.), cert. denied sub nom. Doe v. Sobol, 109 S. Ct. 133 (1988); Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987); Alamo Heights Ind. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986).

Unilateral placements violate the Act's plain language. Section 1415(e)(3) of the Act provides, "[d]uring the pendency of any proceedings conducted pursuant to this section . . . the child shall remain in the then current educational placement . . . ." Despite this express language, the Supreme Court ruled that Congress meant to include retroactive reimbursement to parents as an available remedy for appropriate unilateral placements when the IEP is deemed inappropriate. *Burlington*, 471 U.S. at 370.

8 *Burlington*, 471 U.S. 359. Private schools that are selected for an IEP must be approved by the State Education Department ("SED"). 20 U.S.C. § 1413(a)(4)(B). This section provides that a school district receiving public funding must meet the state educational standards. The state is required to set forth an educational plan that assures that handicapped children educated in private schools will receive the same level of services as if they were educated in a public school. Id. Public schools do not need to be approved for special education because they are run by the state and presumably meet state requirements.

the school district's IEP was inappropriate.[9] The Court warned, however, that a parent making a unilateral placement does so at her own risk[10]—if the court determines that the school district's placement is appropriate, then the parent is not entitled to reimbursement.

The *Burlington* decision is critical to interpreting the Act's language and expanding the educational rights of handicapped children. Nevertheless, the Court has not set forth a well-defined standard for reviewing a parent's educational placement. The definition of "appropriate" in the context of a unilateral educational placement remains open. Another unresolved question is the significance of the state-approved status of a parent's placement. Awards of retroactive reimbursement are often limited to dissatisfied parents who select a private program that is approved by the state. However, the state-approved/non-state-approved dichotomy is inapposite to the quality of a private educational placement. Reluctance to approve the placement of a child in an appropriate non-state-approved program is especially troubling when there is no appropriate state-approved program for that child;[11] this unwillingness prevents the school district from placing the child in an appropriate program and creates unique obstacles for a parent seeking tuition reimbursement for an appropriate non-state-approved program.

This Note argues that a parent should be retroactively reimbursed for a unilateral placement that substantially cures the deficiency in the school district's placement. Part I outlines the Act's legislative background. Part II then analyzes the Supreme Court's development of retroactive reimbursement. Part III creates a substantive standard for reviewing a parent's unilateral educational placement[12] and suggests that a parent's entitlement to reimbursement should be commensurate with the extent to which a parent's selection substantially cures the deficit in the school district's place-

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9 *Burlington*, 471 U.S. at 370. The Court established a standard whereby a parent is entitled to reimbursement from the school district, if the court determines that the parent's placement was "proper under the Act." Id.

On the other hand, the *Burlington* Court stated, "[i]f the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which the child's placement violated section 1415(e)(3)." Id. at 374.

10 Id. at 373-74; see infra notes 50-51 and accompanying text.

11 See *Antkowiak*, 838 F.2d at 638-39 (reversing a lower court ruling that placed a child in "a suitable placement . . . [that] meets most, if not all, of [the child's] needs," because of the program's non-state-approved status).

12 See Guernsey, When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act, 36 Clev. St. L. Rev. 67 (1988) (discussing evidentiary standards for proving a defect in an IEP).

ment. Part III also argues that a reimbursement award based on the state-approved status of the program is contrary to the Act's purpose and therefore should not be a factor in reviewing a parent's selection. This Note concludes that a well-defined standard for reviewing a parent's unilateral placement will insure the educational rights of handicapped children to a greater extent than the present ill-defined standard.

I. LEGISLATIVE BACKGROUND

Before 1972, the educational rights of handicapped children received little attention.[13] That year, the court in *Pennsylvania Association for Retarded Children ("PARC") v. Pennsylvania*[14] ruled that a state cannot deny a mentally retarded child access to a public school without a due process hearing.[15] Another federal court adopted the *PARC* court's reasoning,[16] and recognized a constitutional right to public education for handicapped children.[17] These decisions heightened public awareness and led to the enactment of The Education for All Handicapped Children Act of 1975.[18]

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[13] Prior to 1972, handicapped children in many states did not have a statutory right to education. A Pennsylvania statute actually relieved the state board of education from any obligation to educate a child certified as uneducable by the public school psychologist, and allowed an indefinite postponement of admission to public school for those children with an I.Q. of 35 or lower. 24 Pa. Cons. Stat. §§ 13-1375, 13-1330 (1962). These statutory provisions were successfully challenged in Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 282 (E.D. Pa. 1972).

[14] *PARC*, 343 F. Supp. at 282.

[15] Id. at 301, 304-05.

[16] Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972). Although the school district admitted that it had denied handicapped students entrance to public school, it argued that it would be impossible to provide the requested relief due to a lack of funds. Id. at 875. *Mills* is significant because the court rejected the defendant's lack-of-funding argument, stating,

> [i]f sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.

Id. at 876. See Comment, After Rowley: The Handicapped Child's Right to an Appropriate Education, 38 U. Miami L. Rev. 321, 328 (1984).

[17] *PARC* has been called the *Brown v. Board of Education* of public special education. See Brown v. Board of Educ., 347 U.S. 483 (1954) (recognizing constitutional right for blacks to receive public education); see also Comment, supra note 16, at 326-28 (analogizing *PARC* and *Brown*).

[18] 20 U.S.C. §§ 1400-61 (1982 & Supp. IV 1986). In the early 1970s, parents of handicapped children began to utilize the courts to assure that their children were afforded the same opportunities as nonhandicapped children. By 1975, Congress was called on to "take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." S. Rep. No. 168, 94th Cong., 1st Sess. 6, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1433 [hereinafter S. Rep. No. 168]. See also 121 Cong. Rec. 19,485 (1975) (Senate discussion of *PARC* and *Mills*). This

The Act seeks to encourage states and educational agencies to provide free, appropriate[19] education for all handicapped children.[20] Under the Act, Congress allocates federal funds for the education of handicapped children to states and local school authorities that comply with the Act's extensive requirements. To qualify for funding, a state must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education,"[21] identifies all handicapped children in need of special education, and educates handicapped children with nonhandicapped children to the greatest extent possible.[22]

The Act also requires participating states to meet each handicapped child's "unique needs."[23] This is implemented through a provision requiring that an IEP[24] be developed by a team[25] comprised of a local educational agency representative,[26] a teacher, and the parents.[27] The IEP must be reviewed annually by the school district;[28]

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judicial activity alerted Congress to the need for legislation and led to the enactment of the Education for All Handicapped Children Act.

19 The definition of "appropriate educational placement" has been the subject of debate. Seven years after the Act was enacted, the Supreme Court, in Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), held that the Act's intent was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Id. at 192. The Court held that while the Act required that a child benefit educationally from the placement, it did not require a school district to maximize the child's potential. Id. at 188-89; see also Muth v. Central Bucks School Dist., 839 F.2d 113, 119 (3d Cir. 1988) (a school district must only provide a program in which the child can benefit educationally from the instruction, not one that will maximize the child's potential).

20 See supra note 2 and accompanying text.

21 20 U.S.C. § 1412(1).

22 Id. § 1412(5)(B). See supra note 2 and accompanying text.

23 20 U.S.C. § 1401(19).

24 Id. An IEP is a written statement that sets forth an evaluation of the child's present educational level, educational goals for the child, and specific educational services to be provided. The IEP must set forth these elements with specificity. See, e.g., *In re* Handicapped Child, N.Y. State Comm'rs Rep. on Educ. No. 11,572, at 260 (Jan. 15, 1986).

Goals likely to appear in an IEP would be: "Michael will correctly tell the time to the minute using the classroom wall clock. . . . Lisa will achieve at the 6.5 grade level in math by June 1, as measured by the *Key Math* test." K. Shore, The Special Education Handbook: How to Get the Best Education Possible for Your Learning Disabled Child 73 (1986). Specificity allows school officials and parents to assess whether the goals have been met. Id.

25 The Act also provides that, where appropriate, the child shall be included in the individualized educational program (IEP) conference. 20 U.S.C. § 1401(19).

26 A "local educational agency" is a municipal agency within the state that controls or services a public elementary or secondary school system, including any agency that controls such a system. Id. § 1401(8).

27 School officials must notify a parent in advance of an IEP meeting and provide them with a convenient time and place. J. Norback & P. Weitz, Sourcebook of Aid for the Mentally and Physically Handicapped 189 (1981). The requirement that the school district work with the parent indicates a desire for parental involvement in the child's education as well as pro-

this provision requires the school district to evaluate the child's program, to assess the child's progress, and to adjust the IEP to meet the child's current educational needs.

Pursuant to the Act, school districts must place handicapped children in public or private programs that are approved by the state education agency.[29] This last requirement insures that a private school placement, recommended in an IEP, meets the standard of education that is met by public schools.[30] Any state that satisfies these requirements and desires to participate in the program must submit a plan assuring that funds paid to the state under the Act are properly appropriated to special education programs.

In addition to the academic safeguards, Congress designed a rigid program of review, assuring that states comply with the procedural rights of handicapped children. The Act provides that a parent

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ductive interaction between the parent, the school, and the teacher. 20 U.S.C. § 1401(19). A parent may contribute to the process of developing an IEP in the following ways: discussing her observations and concerns during the evaluation process; requesting an independent evaluation because she is dissatisfied with the school district's evaluation; monitoring the educational program to ensure its appropriateness; examining her child's school records and giving or withholding consent for their release to persons outside the school district; and challenging school decisions either through informal procedures or through a due process hearing. K. Shore, supra note 24, at 97-98. One study, however, reveals that expectations of high parental involvement have not materialized. In four of five metropolitan test sites, fewer than 50% of the parents attended their child's most recent IEP conference. One test site, in a relatively affluent community with generally well-educated parents, had 95% attendance. The majority of parents polled, however, especially in low-income communities, were passive towards their children's special education. See Singer & Butler, supra note 2, at 141.

Nevertheless, parents taking an active role in their child's education often find that the cooperative approach to education is unsuccessful, and the parents resort to administrative and judicial review to solve their differences with the school district. See School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 362 (1985) (parents and school district disagreed over the nature of the child's educational disabilities, and the parents ultimately rejected the school district's proposed IEP and sought administrative review).

[28] 20 U.S.C. § 1414(a)(5). Section 1414(a)(5) requires that the local educational unit: "establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually."

The Act also requires the state to evaluate the educational program's effectiveness in meeting the needs of a range of handicapped children. Id § 1413(a)(11).

[29] Id. § 1413(a)(4)(B). Further, section 1413(a)(4)(B) states that "the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies." Id. § 1413(a)(4)(B)(ii). See infra notes 84 and 86 and accompanying text (arguing that although this restriction is proper for the school district's placement, it should not govern a parent's unilateral placement).

[30] 20 U.S.C. § 1413(a)(4)(B)(i). See also Schimmel v. Spillane, 819 F.2d 477, 484 (4th Cir. 1987) (requiring that a handicapped child placed in a private school must be afforded a free education that meets the state and local educational agencies' standards). The requirement only refers to the school district's placement and is silent as to any standards for a parent's placement.

who is dissatisfied with the school district's placement of her handicapped child must be provided an "impartial due process hearing"[31] conducted by either the state educational agency[32] or the local educational agency.[33] The hearing is designed to offer both parties a forum to redress their complaints before entering the courts.[34] A parent aggrieved by the hearing officer's decision can appeal to the federal or state courts. Compliance with the Act's provisions is assured both by the federal government's ability to withhold funds from the local educational agency[35] and by the procedural safeguards of administrative review and judicial review of administrative decisions.[36] While the Act accomplishes many of its legislative goals,[37] judicial interpretation of some of its provisions often leads to either an inappropriate education or no education for handicapped children.[38]

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31 20 U.S.C. § 1415(b)(2).

32 A "State educational agency" or state education department (SED) is a state board of education or other agency responsible for the state supervision of public elementary and secondary schools. Id. § 1401(7).

33 Id. § 1401(8). A due process hearing may not be conducted by an employee of such an agency or unit involved in the education or care of the child. Id. § 1415(b)(2).

34 See id. § 1415(c). The Act provides for a one or two-tiered administrative process. In the two-tiered approach, an administrative hearing is conducted by the local educational agency, and an appeal may be taken to the SED and then to the state or federal courts. In the one-tiered system, an administrative hearing is conducted by the SED, and an aggrieved party may appeal directly to the state or federal courts. Id.

35 Id. § 1414(a), § 1414(b)(2)(i). Section 1414(a) provides that a local or intermediate educational unit seeking financial assistance under the Act must submit an application to the state educational agency, assuring that payments under the Act will be used for excess costs directly attributable to programs which comport with the educational goals of the Act. Section 1414(b)(2)(i) provides that if a state educational agency finds that a local educational agency or an intermediate educational unit has not satisfied a requirement in its application to the state educational agency, then the state shall discontinue payments to the local or intermediate educational unit until the state is satisfied that all requirements are being met. Id. § 1414(b)(2)(A)(i).

36 See supra note 34.

37 See Singer & Butler, supra note 2. A total of 3.7 million elementary and secondary school students were receiving special education services in 1977 when the Act went into effect. The special education teaching force numbered 179,000 teachers, and the federal government contributed $252 million to support the program. By 1986, the Act's effect was apparent; the number of handicapped children receiving an education had increased to 4.3 million, the number of teachers had increased to 275,000, and federal assistance had increased to $1.16 billion. These figures, nevertheless, are tempered by statistics indicating that federal contribution still represents less than 12% of "excess expenditure" on special education. Id. at 129.

38 See S. Rep. No. 168, supra note 18, at 8-9, reprinted in 1975 U.S. Code Cong. & Admin. News 1432-33 (during the 1975 hearings before the Senate Subcommittee on the Handicapped and the House Subcommittee on Select Education, participants agreed on an estimate of 1.75 million unserved children).

II. RETROACTIVE REIMBURSEMENT

Ironically, one of the Act's provisions that was designed to secure and promote the educational rights of handicapped children created a barrier to this goal. While Congress may have contemplated unilateral educational placement,[39] it did not provide for it in the Act.[40] Rather, Congress required that the child remain in the "then

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[39] Congress may have anticipated a situation where a parent would unilaterally place the child, and a court would step in to adjudicate the dispute between the parent and the school district. See S. Rep. No. 168, supra note 18, at 32, reprinted in 1975 U.S. Code Cong. & Admin. News 1456:

> If a parent contends that he or she has been forced, at the parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures . . . appl[y].

Id. The Act, nevertheless, made no reference to this consideration. See 20 U.S.C. § 1415(e)(3) (1982 & Supp. IV1986); supra note 7 and accompanying text.

[40] Congress deliberately used broad language to allow the states to construe the Act's terms (i.e. "appropriate education") and to implement their own programs to meet the Act's objectives. The Supreme Court in Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), found that the term "appropriate" under the Act means that a handicapped child must receive some educational benefit from the educational placement, rather than a requirement to maximize the child's education. See supra note 19. In *Rowley*, "some educational benefit" meant that a deaf child was denied a qualified sign-language interpreter because she was advancing easily from grade to grade. 458 U.S. at 189, 210. The Court justified the denial of an interpreter, stating that "a 'free appropriate public education,' consists of educational instruction specifically designed to meet the unique needs of the handicapped child," id. at 188-89 (citing 20 U.S.C. § 1400(c)), including services that are necessary to permit the child "to benefit" from the instruction. Id. at 189.

The Supreme Court also found that

> grading and advancement . . . constitute[ ] an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been 'educated' at least to the grade level they have completed, and access to an 'education' for handicapped children is precisely what Congress sought to provide in the Act.

Id. at 203. Since the child was able to progress approximately according to grade levels used in the state's regular education system, the Court reasoned that the child did not need a sign-language interpreter. Id. at 203-04. But see Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985) (a dyslexic child was pushed through various grade levels due to school policy against repeating two grades in succession). Promotions are not necessarily an accurate measure of academic progress, and thus, they are an inaccurate measure of the appropriateness of an IEP. Id. at 635-36.

Rowley has been widely criticized. One critic, commenting on the effects of the *Rowley* decision, noted that:

> The Act functions only to give the student a boost to minimal competence. As long as there is some personalized education and the student is able to progress, compliance with the law is achieved. In the case of Amy Rowley, the court doomed her to mediocrity. She will constantly struggle with half of the material her peers receive, and despite her high intelligence and efforts she will barely pass.

Hill, supra note 2, at 160.

current educational placement" during litigation.[41] When the "then current" placement is inappropriate, this requirement conflicts with the Act's primary purpose: providing all handicapped children with a free, appropriate public education.[42] The Supreme Court considered whether the requirement[43] was intended to prohibit a parent contesting the appropriateness of an IEP from unilaterally placing her child in another program during the extended litigation period.

The Court in *Burlington*[44] resolved this question, ruling that courts have the authority to reimburse a parent of a handicapped child for tuition expenditures on a private special education program if the court ultimately finds that the parent's unilateral placement is appropriate under the Act, and that the school district's IEP is inappropriate.[45] The Court reasoned that Congress did not intend to permit a situation where a court finds, after several years of litigation, that the parent's unilateral placement of her child was appropriate,

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41 20 U.S.C. § 1415(e)(3) (1982). See supra note 7.

42 20 U.S.C. § 1400(c).

43 Id. § 1415(e)(3). In *Burlington*, the parents bypassed this provision when they removed their child from the designated IEP and placed him in a state-approved private program. The Supreme Court stated that the parents did not have to resolve the academic question of the child's "then current educational placement," because the town and the parents had agreed that a placement was needed. School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 371 (1985). The Court assumed that the school designated in the IEP was the current placement, and that the parents changed the placement after they rejected the IEP and had initiated the administrative review proceedings. Id. The Court found that the intent of section 1415(e)(3) was "to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." Id. at 373.

44 *Burlington*, 471 U.S. 359 (1985).

45 Id. at 370. Courts have the authority to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). The Court in *Burlington* also stressed that if the administrative and judicial proceedings moved swiftly, rather than taking several years, then "it would be difficult to imagine a case in which such prospective injunctive relief would not be sufficient." 471 U.S. at 370. Less than six months after *Burlington*, the Fourth Circuit in Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985), awarded retroactive reimbursement to the parents of a handicapped child for the same reasons. The court found that the school had failed to provide the handicapped child with an appropriate IEP. The Board of Education argued that the district court erred in disregarding the rule of *Rowley* that the Act does not require schools to maximize a child's educational benefit. The Fourth Circuit responded that the district court "properly considered the evidence introduced at trial, including two independent evaluations and the results of several standardized tests, in determining that [the child's] education was not reasonably calculated to enable him to receive educational benefits, as required by the Act and *Rowley*." Id. at 635. The *Hall* court also awarded retroactive reimbursement notwithstanding blatant violations of the procedural requirements of the Act. Id. See also Linkous v. Davis, 633 F. Supp. 1109, 1115 (W.D. Va. 1986) (parent's unilateral placement of handicapped daughter in a private program during the pendency of review proceedings of the school district's IEP did not serve as a bar to recovery, unless the court ultimately determined that the proposed IEP was appropriate).

but that she is not entitled to reimbursement.[46] However, if the school district as well as the parent selects an appropriate program, then reimbursement is denied because the school district has complied with the Act.[47] Further, the Court reasoned that "reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[48] Thus, the Supreme Court ruled that a parent could bypass the "then current" requirement in certain instances without penalty.

Retroactive reimbursement creates an incentive for a parent to unilaterally place her child in an educational program when the child has been deprived of an appropriate IEP.[49] While there is no guarantee of reimbursement for a parent's tuition expenditures on a unilateral placement,[50] a parent who finds that the school district has not met its obligations under the Act will be reimbursed if the court agrees that the school district has failed to satisfy its obligations under the Act and further, that the parent has remedied the situation by selecting an appropriate placement. Without the incentive of reimbursement, some parents may hesitate to risk the high cost of private special education programs[51] and will allow the child either to remain in an inappropriate placement, or at home receiving no educational instruction.

III. STANDARD OF REVIEW FOR A PARENT'S UNILATERAL EDUCATIONAL PLACEMENT

When the Supreme Court in *Burlington* made an exception to the Act by awarding reimbursement for a parent's tuition expenditures for a unilateral educational placement, it did not formulate a definitive standard of review for a parent's placement. Rather, the Court

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[46] *Burlington*, 471 U.S. at 370. The Court stated that "it would be an empty victory to have a court tell [parents] several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." Id.

[47] The Court stated, "[i]f the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated section 1415(e)(3)." Id. at 374.

[48] Id. at 370-71.

[49] Parents without economic means cannot take advantage of the *Burlington* remedy because of the high cost of a unilateral private educational placement.

[50] See Burlington, 471 U.S. at 373-74; supra note 10 and accompanying text.

[51] The Court stressed that a parent who makes such a unilateral selection during the pendency of judicial review of the school district's program does so at her own financial risk. *Burlington*, 471 U.S. at 373-74; see Note, The Burlington Decision: A Vehicle to Enforce Free Appropriate Public Education for the Handicapped, 19 Akron L. Rev. 311, 320 (1985) (quoting Burlington, 471 U.S. at 373-74).

proffered an ambiguous model, using vaguely defined terms such as "appropriate." The Court stated that a parent's entitlement to reimbursement was predicated on a finding that the unilateral educational placement was "appropriate" and the school district's IEP was inappropriate.[52] The term "appropriate" is expansive[53] and may have different meanings in different contexts. In the context of a school district's placement, a placement is appropriate if it meets the child's individual educational needs[54] and provides services to help the child profit from the instruction.[55] The school district must present precise written statements setting forth the services to be provided, the duration of those services,[56] and long- and short-term goals for the handicapped child's education. Meaningful educational instruction alone does not constitute an appropriate placement. The school district is also required to provide related services[57] that enable the child to benefit from the academic instruction. The school district, however, is not obligated to maximize the child's potential.[58]

When the *Burlington* Court applied the "appropriate" standard in the context of a parent's unilateral placement, lower courts and parents were left to discern its meaning. To implement the Supreme Court's objectives, the meaning of "appropriate" must be clarified in the context of a parent's unilateral placement made in response to an inappropriate IEP. Given the additional problems that a parent faces in selecting a program, such as lack of familiarity with special education programs, the standard of review of a parent's placement should be more lenient than that of a school district's IEP[59]—a parent should

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52 *Burlington*, 471 U.S. at 360.

53 The Act defines "free appropriate public education" as "special education and related services which . . . include an appropriate preschool, elementary, or secondary school education. . . ." 20 U.S.C. § 1401(18)(C) (1982). This section is not particularly helpful as it uses the term "appropriate" to define "appropriate."

54 Id. § 1400(c) (educational placement must be designed to meet the child's "unique needs"). See supra note 2 and accompanying text.

55 20 U.S.C. § 1401(17) (for example, transportation, psychological services, and physical therapy).

56 Id. § 1401(19).

57 Id. § 1400(c). The purpose of the Act is to assure that handicapped children have available to them a free appropriate education which emphasizes special education and "related services." Id. "Related services" means transportation and other "supportive" services including speech and language therapy, occupational therapy, psychological services, recreation, medical and counseling services, or adaptive physical education that will enable the child to benefit from the special education placement. Id. § 1401(17).

58 See supra note 2 and accompanying text; see also K. Shore, supra note 24, at 76 (discussing "appropriate" as defined by Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)).

59 Further, courts should apply a less rigid standard to a parent's placement because the

not be required to meet the Act's rigid requirements for a school district.

Congress intended to provide all handicapped children with a free and appropriate education.[60] If a school district fails to meet its obligations under the Act and the parent unilaterally places her child in an educational program that cures the deficiency of an inappropriate IEP, then reimbursement should be granted. Further, the state-approved status of a program should not be interposed to frustrate either of the Act's goals.[61]

A. *Substantially Curing-the-Deficit*

A parent unilaterally placing her handicapped child is entitled to reimbursement for tuition expenditures on an "appropriate" placement.[62] The definition of "appropriate" in the context of a parent's placement should include any educational program that substantially cures the deficiencies in the school district's IEP. This means that the unilateral placement must provide most of the services omitted from the IEP. For example, a parent placing her blind child, deprived of daily tutoring in Braille, in a program providing such tutoring would be reimbursed for her expenditures. Conversely, a speech-impaired child given a defective IEP providing speech therapy for only one hour a week would not be substantially cured by a unilateral placement providing two hours of tutoring a week. The supplemented services must substantially fill the educational void in the IEP by providing the omitted academic, social, or vocational instruction, as well as the related services, which are needed to address the child's educational, emotional, and physical needs.[63] Further, the supplemented services provided in the parent's selected placement should not be required to afford the "best" services for the child's particular handicap.[64]

Act's requirements were designed to apply solely to school districts, and application of the Act's requirements to parents will prevent parents from promoting the Act's purpose.

60 20 U.S.C. § 1400(c); S. Rep. No. 168, supra note 18, at 16, reprinted in 1975 U.S. Code Cong. & Admin. News 1440; see also School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 372 (1985) ("The Act was intended to give handicapped children both an appropriate education and a free one.").

61 See infra notes 77-101 and accompanying text.

62 See *Burlington*, 471 U.S. at 370; supra note 9 and accompanying text.

63 A parent should consider that the child's transfer to a new academic environment will likely cause emotional difficulties, and the parent should balance the extent to which the unilateral selection will remedy the deficit in the IEP against the traumas of a new placement.

64 Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 (5th Cir. 1986) (awarding retroactive reimbursement for a summer program that did not meet all of the state educational requirements). The *Alamo* court held that "[the] *Burlington* rule is not so

The standard for a parent should be less rigid than the standard for a school district. First, while the school district and the state are expressly bound by the standards set forth in the Act, a parent unilaterally placing her child is not so bound because the Act does not set forth a standard of review for a parent's placement. Second, most parents are less qualified than a school district to select the "best" program for their children. A parent, unlike a school district representative, is typically untrained in special education,[65] and cannot make sophisticated evaluations of an educational placement. Parents are typically less familiar with the reputation of private schools, and therefore they may face difficulties in targeting an appropriate program for their child that a school district may not face. Further, a parent is typically unfamiliar with specific techniques for teaching handicapped children and therefore is not in as good a position as a school district to select the program that provides the most modern or "appropriate" techniques for teaching the child. A parent is not an expert in special education and her unilateral decision should be viewed in that light.

Nevertheless, a parent has some advantages over a school district which must be factored into the standard of review of a parent's unilateral placement. Most parents spend many hours with their children. Contact with the child outside the classroom as well as the child's feedback from his experiences at school may alert the parent that the child is having difficulty grasping the material in the present placement.[66] A parent's unilateral placement satisfies the substantially curing-the-deficit standard if the parent demonstrates an awareness of the child's handicapping condition and that she has made a well-researched and thoughtful decision that will provide the child with the services needed to achieve reasonable educational and social goals—that is, helping the child become a self-sufficient and productive member of society. This interpretation imposes an obligation on a parent to explore the quality and suitability of a range of private schools before selecting a program.

If a child has been given an inappropriate IEP, and the parent desires to make a unilateral placement, then the parent should contact a local, state, or national organization that provides information and

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narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement required under the Act." Id.

65 K. Shore, supra note 24, at 9.

66 Parents "offer a combination of knowledge, . . . and commitment that is unique . . . . [The parent is the] child's first and best teacher . . . . [The parent has] developed a profound understanding of [her] child." Id. at xiv.

support for parents of handicapped children.[67] Guidance from these organizations will assist a parent in her search for private programs that cater to her child's handicap. Counselling services available to a parent and the parent's capacity to understand the child's educational needs should be considered when reviewing a parent's unilateral placement. A parent satisfying the above-mentioned guidelines should be awarded retroactive reimbursement when the school district's IEP is inappropriate. On the other hand, a parent of a child deprived of an IEP altogether often has a more difficult task of finding necessary educational services than a parent of a child provided with an inappropriate IEP. Where no IEP is developed, a parent must identify an array of services that the child should have been afforded and construct a program from scratch. Where an inappropriate IEP is presented by the school district, a parent typically has fewer omitted services to identify and remedy—such parent is supplementing the school district's job.

A parent of a child deprived of an IEP should be required to secure the same level of educational services as a parent of a child given an inappropriate IEP. Thus, a parent of a child deprived of an IEP must select a program that substantially provides the child with an appropriate educational placement. A parent can satisfy this standard by providing her child with the basic services that should have been included in the IEP. While a parent is not expected to identify the precise services that should have been included in an IEP for her child, a parent is expected to consult with an expert in the field and identify a program that will satisfy the child's basic educational needs.

B. *Partial Reimbursement*

Under the current "all or nothing" scheme,[68] a parent selecting an appropriate placement will receive full reimbursement, while a parent selecting anything less than an appropriate placement will receive nothing. Instead, a parent should receive "partial reimbursement" for virtually any unilateral placement, because some educational placement is better than no educational placement.[69] The amount of reim-

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[67] Special education professionals within the local school district or the state department of education can assist parents in finding appropriate organizations within the state. A comprehensive list of organizations and their descritpions can be found in the Clearinghouse on the Handicapped of the U.S. Department of Education, 1982 Directory of National Information Sources on Handicapping Conditions and Related Sevices. For additional information, contact the National Information Center for Handicapped Children and Youth, Rosslyn, VA. Phone number (703) 893-6061.

[68] School Comm. of Burlington v. Department of Educ., 471 U.S. 359 (1985).

[69] While the "some educational benefit" interpretation of "appropriate" suggested in this

bursement should be determined by the extent to which the parent's selection cures the educational deficit left by the school district. For example, a parent placing a child in a program that caters to her child's reading problems but not to her child's speech problems would nonetheless be reimbursed for the portion of her expenditures devoted to reading instruction. However, if a parent provides more services than necessary to fill the educational deficit, then the parent will be reimbursed only for those expenses necessary to cure the IEP. Further, if the school district can demonstrate that the parent selected a program that provides the necessary services to fill the educational void, yet the tuition far exceeds that of comparable programs, then the parent will be reimbursed for the tuition of a comparable, less expensive program despite her actual expenditures.

The Supreme Court's reasoning behind the all-or-nothing reimbursement scheme also supports the partial-reimbursement scheme. The partial-replacement scheme compensates parents for doing the school district's work. When the school district abdicates authority by failing to develop an appropriate IEP, a parent often seizes control of the placement process. This responsibility rests with the school district rather than with the parent. A parent assuming this control should be reimbursed by the school district for her expenses on educational services when those expenses are used for an appropriate placement. Thus, partial-retroactive reimbursement, like retroactive reimbursement "merely requires the Town to belatedly pay expenses

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Note resembles the widely criticized standard set forth in *Rowley*, this Note applies the "some educational benefit" standard to a parent deprived of an appropriate IEP, rather than to a school district's IEP. See supra note 40 and accompanying text (discussing wide cricitism of *Rowley*).

In Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986), where the child was deprived of a summer educational placement, the Fifth Circuit cited the district court finding at length:

> In this case, while the district court found that [the child] was entitled to some sort of continuous, structured summer programming, it did not explicitly find that the substitute summer placements chosen by [the parent] constituted the specific type of programming necessitated by the Act. This distinction, however, need not preclude [the parent] from receiving *any* reimbursement from the School District. The rationale behind *Burlington's* holding is that parents who elect to risk shouldering the costs of what they perceive to be a more appropriate placement, and whose judgment is wholly or in part vindicated by the district court, should receive more than an "empty victory." . . . The *Burlington* rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement required under the Act.

Id. at 1161 (quoting *Burlington*, 471 U.S. at 370).

The Fifth Circuit found that a parent is not required to select the exact appropriate placement; a parent seeking reimbursement is not held to the same high standards as the school district and the state. The court suggested a "something is better than nothing" standard. Id.

that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[70]

1. Benefits of Partial Reimbursement

Compliance with the Act's objectives can be better secured by implementing a partial-reimbursement scheme.[71] First, the partial reimbursement provision will be instrumental in controlling violations of the Act. A school district will have to pay a parent out of its own pocket when a parent is awarded partial reimbursement.[72] The threat of having to pay a percentage of the tuition for any unilateral placement that affords some additional educational benefit will encourage school districts to be attentive to the Act's goal of providing handicapped children a free, appropriate education. As a result, school districts will promptly develop IEPs and cure inappropriate IEPs. Imposing such a penalty for a school district's noncompliance will deter violations of the Act.

Second, partial-retroactive reimbursement protects against school districts trying to manipulate the Act and improves on the "better-than-nothing"[73] scheme. Under the better-than-nothing scheme, if the school district fails to provide an appropriate IEP, then the parent, failing to research special education programs, may place the child in a daycare program.[74] The better-than-nothing scheme discourages parents and school districts from working cooperatively

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70 *Burlington*, 471 U.S. at 370-01.

71 Under the Act's existing provision, states must assure that the requirements of the Act are carried out and that educational programs for the handicapped satisfy the standards set by the state educational department. 20 U.S.C. § 1412(6) (1982 & Supp. V 1988). This provision of the Act, however, has not successfully secured the educational rights of handicapped children. The Senate considered and rejected a proposal for a "compliance entity" authorized to conduct compliance reviews of state and local educational agencies, receive complaints, make findings of fact, assure correction of violations by state and local agencies, and inform the United States Commissioner of Education if corrective actions are not taken. 121 Cong. Rec. 19, 499 (1975) (statement of Sen. Dole). While this agency would have provided an alternative arena for parents to resolve their grievances when they were frustrated by the administrative and judicial proceedings, the Senate was concerned that the compliance entity would get "bogged down in lengthy and formal judicial proceedings." Id. Perhaps this method would have afforded greater compliance than the scheme adopted by Congress.

72 It is unlikely that the federal or state government will reimburse the school district for its expenses on partial reimbursement awards to parents.

73 *Alamo*, 790 F.2d 1153. The court awarded retroactive reimbursement to the parents based on the notion that some educational benefit is better than no educational benefit. Id. at 1161. While the *Alamo* decision should be commended for rewarding parents who take the initiative to find a placement for their handicapped child, the decision does not provide an incentive for a parent to do her best in identifying an appropriate program.

74 Id. at 1157-58, 1161 (parents of child denied summer programming retroactively reimbursed for unilateral placement in a daycare program that afforded some educational benefit, although not the exact proper placement).

to place the child in an appropriate educational program. In this situation, the school district would be content to pay the lower cost of daycare rather than the costly private special education tuition, and the parent would be content because she would be reimbursed for her expenses. Although both the parent and the school district are satisfied in this situation, the child's educational needs are ill-served.[75] The partial-reimbursement scheme improves on the better-than-nothing standard by encouraging a parent to do more than just find a program that is better than no program at all. Further, the partial-reimbursement scheme discourages school districts from passively allowing parents to hire "babysitters" or enroll the child in a nonacademic program that satisfies the better-than-nothing standard. The partial-reimbursement scheme creates financial incentives for parents to locate an appropriate program rather than to settle for a program (that is, a daycare program) where the child develops social skills but not educational ones.

Third, the partial-reimbursement scheme furnishes an incentive for a parent to unilaterally place her child by eliminating the risk that her time, money, and effort will not be rewarded—it insures that she will receive at least some reimbursement for her expenses. In contrast, the all-or-nothing scheme discourages parents from making a unilateral placement because they fear that the court will find that the selected placement is inappropriate and reimbursement will therefore be denied. This risk is too great for many parents, and as a consequence, some children will remain without an appropriate placement. The partial-reimbursement scheme insures the educational rights of handicapped children to a greater extent than the current "all-or-nothing" reimbursement method. Thus, the substantially curing-the-deficit standard incorporates a reasonable expectation of a parent's abilities, and the partial-reimbursement scheme rewards a parent to the extent she satisfies this expectation.

2. Judicial Discretion

Partial reimbursement could open the door to broad judicial discretion, allowing courts to determine the extent to which the unilateral placement is appropriate and the corresponding amount of reimbursement. While judicial discretion may cause disparate results, this concern is no more problematic here than it is in any other area

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[75] When all of the child's educational needs are being met, a parent unilaterally placing her child in a daycare program should receive partial funding because the child is learning valuable social skills, being supervised, observing role models, practicing communication skills with adults and other children, and interacting with other children.

in which courts use discretion—including when they decide whether a particular placement is appropriate—and it should not prevent the application of the partial-reimbursement scheme. Like any other remedy, in assessing a parent's entitlement to partial-retroactive reimbursement, courts determine the extent to which the aggrieved parent was injured and award damages accordingly.

Congress anticipated judicial discretion when it authorized courts to "grant such relief as [they] determine[ ] is appropriate."[76] Congress gave the courts jurisdiction to assess an appropriate remedy for parents of a child deprived of the educational services guaranteed by the Act. Therefore, the discretionary aspect of partial reimbursement is at least tacitly approved by Congress.

C. *Non-State-Approved Placement*

The meaning of "appropriate" in the context of a parent's unilateral placement is not the only question left unresolved by *Burlington*. The Court has not addressed a closely related issue: the availability of retroactive reimbursement to a parent who unilaterally places her handicapped child in an "appropriate" *non-state-approved* program.[77] The only court that directly addressed this issue[78] awarded the par-

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[76] 20 U.S.C. § 1415(e)(2) (1982).

[77] This remedy is only available to financially able parents who can afford the costs of private special education. Parents without adequate means, who cannot afford a unilateral educational placement, may seek compensatory educational services (CES), which are damages in the form of intensive educational services. See infra notes 99-100 and accompanying text.

[78] Other courts have indirectly addressed this issue and in doing so they have misconstrued two well-known cases, Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987) and Antkowiak v. Ambach, 838 F.2d 635 (2d Cir.), cert. denied sub nom. Doe v. Sobol, 109 S. Ct. 133 (1988), to suggest that a parent placing her child in a non-state-approved program is not entitled to reimbursement for a non-state-approved placement. In *Schimmel*, the school district recommended a state-approved residential placement. 819 F.2d at 479. The parents were discontent with the school district's selection and unilaterally placed the child in a non-state-approved private program, and then challenged the school district's placement in an administrative due process hearing. Id. The district court found the school district's selection was appropriate. The district court and the court of appeals upheld the administrative hearing's determination that the school district's IEP was appropriate and denied retroactive reimbursement. While the court noted that the parent's unilateral selection was not proper because it was not on the state-approved list, the issue of the parents' selection was never properly before the court because the school district's selection was deemed appropriate, satisfying the requirement of the Act. Thus, the discussion of the non-state-approved status of the unilateral placement is dictum. The *Schimmel* ruling merely affirms that a school district must select an educational placement from a set of state-approved programs and that a parent is not entitled to reimbursement if the IEP is deemed appropriate, irrespective of the quality of the parent's unilateral placement.

The Second Circuit denied retroactive reimbursement to parents who unilaterally placed their handicapped daughter in a non-state-approved private school recommended by the hearing officer. *Antkowiak*, 838 F.2d 635. The court held "[t]he hearing officer had no jurisdiction

ent, deprived of summer educational services for her child, retroactive reimbursement for her expenditures for a summer program even though it was not state-approved.[79] A unilateral educational placement should be reviewed according to its appropriateness rather than its state-approved status.

If a parent's unilateral placement must satisfy the same requirements as a school district, including the selection of a state-approved program, then a parent is remediless when there is no appropriate state-approved program, and it would be impossible to afford the child an appropriate educational placement under the Act—the parent's and the school district's hands would be tied.[80] Thus, a parent unilaterally placing her child should not have to meet all the educational requirements that a school district must meet when it develops an IEP—specifically, the parent should not have to select a state-approved program.[81] Further, a parent's non-state-approved private school placement should be reviewed according to the substantially curing-the-deficit standard.

1. Congressional Intent

Congress provided strict requirements for a school district to

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to compel either the school or the state to violate federal law," and voided the officer's decision to the extent that it ordered a placement at the unapproved school. 838 F.2d at 640. While the court found that neither a school district, a hearing officer, nor the district court was empowered to order a placement in a non-state-approved private program, the court did not address the issue of a parent's right to place a child in a non-state-approved program. Id. (citing *Schimmel*, 819 F.2d at 484). Therefore, *Antkowiak* could not be used to support the proposition that a parent is subject to the state-approved restriction imposed on school districts. This case merely reinforces the Act's explicit language—the *school district* must select a placement from a set of state-approved private programs.

[79] Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986). In *Alamo*, the school district refused to provide summer programming for a multiply handicapped child and the parent unilaterally placed the child in non-state approved programs. Id. at 1156-57. The court found that the child was entitled to some sort of "continuous, structured summer programming," and relying on *Burlington*, it reasoned that a parent taking the risk of shouldering the private education costs should be retroactively reimbursed when their selection is "wholly or in part vindicated" by the district court. Id. at 1161. The parents' selection, despite its failure to satisfy the requirements of the Act, was better than no program at all. Id.

[80] Consider the following chain of events which would unfold if a parent could succeed in her claim against the school district and receive reimbursement for unilateral placement in an appropriate non-state-approved program: the district, faced with the prospect of having to pay for a private placement, would pressure the SED to include additional programs on its approved list. Fear of liability of retroactive tuition expenditures would provide the needed incentive for a school district to pressure the state to approve more programs. Thus, the school district would be able to place this child, as well as other children, in that appropriate non-state-approved program in subsequent IEPs.

[81] See 20 U.S.C. § 1413(1)(4)(B)(i)-(ii) (1982).

qualify for federal funding.[82] Since Congress expressly forbade a parent from making a unilateral placement, the Act is silent on whether a parent's entitlement to reimbursement is contingent upon satisfying all of the requirements that the school district must satisfy. Nevertheless, some courts deny retroactive reimbursement for a parent's unilateral placement in a non-state-approved program based on the Act's requirement "that handicapped children be educated at public expense only in those private schools that meet State educational standards."[83] Reliance on the Act's provision denying funding to school districts who place children in unapproved programs is misplaced with respect to the parent's selection, because the Act does not comment on the parent's selection.[84] Courts should not look to the Act to ascertain the requirements for a parent making a placement, because a parent's right to place her child is a judicially created right, rather than a right created by Congress. Thus, courts faced with this issue should award reimbursement for an appropriate unilateral placement regardless of whether the parent's placement satisfies all the Act's requirements for a school district.

A parent will sometimes place the child in a non-state-approved program either because the school district ignored its responsibilities or because the school district was unable to place the child in the only appropriate program due to its non-state-approved status. The latter scenario is plausible because state approval is only awarded to those qualified private programs that seek state approval; for example, some private schools may meet state educational standards for the education of handicapped children and have successful programs for the education of handicapped children, yet remain unapproved simply because they never sought state approval. Nevertheless, if no appropriate state-approved program exists for a child, it is impossible for the school district to fulfill its obligations under the Act. The Act does not provide a remedy for a parent when there is no appropriate state-approved private program.[85] When the child's educational needs can only be met in a non-state-approved program, the parent should be

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82 Id. § 1412 (1982 & Supp. V 1988).

83 Schimmel v. Spillane, 819 F.2d 477, 484 (4th Cir. 1987) (relying on a Virginia statute which required a school district to place a child in a state-approved private program when there is no appropriate public program); see also Va. Code Ann. § 22.1-218(A) (1950) (requiring school districts to pay for private school tuition for handicapped children that cannot receive an appropriate education within the public school system).

84 See supra note 30. Rather, the Act only establishes requirements for a school district developing an IEP. 20 U.S.C. § 1413(a)(4)(B)(i).

85 While a parent can obtain a list of state-approved private schools, this list may be useless if there are no appropriate private schools on the list. A list of state-approved private schools may be obtained from the SED. New York's list of private schools approved for reimburse-

awarded retroactive reimbursement for her expenditures on that program. Congress did not intend for a handicapped child to be deprived of an education merely because the state has not approved one of several appropriate private programs.[86]

Congress believed that the Act would provide a "flexible and reasonable" approach for the government to follow.[87] This language, in conjunction with Congress's commitment to provide free education for all handicapped children,[88] suggests that the Act should be adapted to unanticipated situations. The reality that many handicapped children are presently deprived of an appropriate education[89] indicates that the Act's objectives are not being met. If any handicapped child is deprived of a free and appropriate education solely because of the non-state-approved status of a parent's placement, then the Act's flexibility has not been implemented as intended. When the placement's non-state-approved status bars retroactive reimbursement, then the future of a handicapped child's education depends not on whether the placement is appropriate, but on the happenstance of state recognition.[90]

Further, the legislators were concerned with the social and financial consequences of failing to provide an appropriate education for all handicapped children. If courts frustrate the Act's goal of affording a free and appropriate education by denying a parent retroactive reimbursement merely because she failed to satisfy the Act's rigid requirements for a school district, then many of these children will remain uneducated. If provided with an education, many of these handicapped children will be able to hold jobs and support themselves;[91] if

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ment with public funds is available at the Rate Setting Unit of the New York State Education Department.

86 In New York, the SED does not seek out private schools for state approval; rather, private schools must fill out detailed applications to the SED requesting state approval. Regulations of the Commissioner of Education, subch. P, pt. 200.7 (promulgated pursuant to N.Y. Educ. Law §§ 207, 4403 (McKinney 1981 & Supp. 1989)). Pt. 200.7 (a)(2)(i) requires private schools seeking approval to submit financial information, program information, and fire safety information to the SED. Final approval is based on at least two site visits by the staff of the Office for Education of Children with Handicapping Conditions. Id. pt. 200.7 (a)(2)(ii).

87 121 Cong. Rec. 19,485 (1975) (statement of Sen. Stafford).

88 "While much progress has been made in the last few years we can take no solace in that progress until all handicapped children are, in fact, receiving an education." Id. (statement of Sen. Williams).

89 See Singer & Butler, supra note 2 and accompanying text (statistics).

90 But see Note, supra note 51, at 321. "[T]he [Act] only authorizes reimbursement for expenses incurred in private school placement if the courts determine that placement (rather than a public school setting) is appropriate under the statute." Id. This statement suggests that a parent may only be reimbursed if her decision complied with the provsions of the Act, i.e., placement in a state-approved program.

91 IEPs often provide occupational therapy and, when necessary, emphasize self-care skills,

they receive no educational benefit, then these same children may need constant attention and supervision throughout adulthood. Congressional debates illustrate Congress's recognition that each handicapped person's worth as a productive member of society must be tapped to create a more prosperous society. Thus, the courts must act now and award reimbursement for appropriate non-state-approved private programs to prevent a financial and social burden in the future.[92]

2. Judicial Interpretation

The absence of statutory language addressing a parent's unilateral placement necessitates a review of the Act's purpose as well as judicial interpretation of the Act to determine the standard for reviewing a parent's selection of a non-state-approved program. The Supreme Court has stated that "[t]he Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives."[93] It follows that if a non-state-approved program is the only appropriate placement for a handicapped child, then nothing should prevent the child from being placed in that program at public expense.[94] In light of the Supreme Court's reasoning and the Act's silence as to a parent's placement, the Act's goals can only be achieved if a parent is reimbursed for tuition expenditures for an appropriate non-state-approved placement. The Act's provisions are satisfied because the child is receiving a free and appropriate education. The Supreme Court's reasoning in *Burlington* is adhered to because nothing, not even the state-approved status of the unilateral placement, is

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such as grooming, dressing, and feeding. See K. Shore, supra note 24, at 57, 90. Also, IEPs often provide vocational training for those who could benefit from the development of a particular skill. Id. at 137-40. The development of these skills will enable handicapped children to become self-sufficient adults.

92 During the Senate debates on the Act, Senator Williams reflected on statistics showing that over half of the nation's handicapped children are not receiving a free appropriate education:

> These figures have far reaching implications. Failure to provide appropriate educational services for all handicapped children results in public agencies and taxpayers spending billions of dollars over the lifetime of these individuals to maintain them as dependents in minimally acceptable lifestyles. Yet, providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds.

121 Cong. Rec. 19,492 (1975) (statement of Sen. Williams).

93 School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 372 (1985).

94 See, e.g., Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986). *Alamo* is the only case directly on point stating that a parent's choice is not held to the rigid standard under which a school district's selection is proscribed. Id. at 1161.

interfering with the handicapped child's right to a free and appropriate education.[95]

3. Justification for Reimbursing Non-State-Approved Placement

Many parents of handicapped children lack funds to place their children in appropriate private programs, and thus, they are unable to benefit from the Supreme Court's provision for retroactive reimbursement.[96] When a school district neglects its obligation to design an IEP, a parent lacking financial resources is forced to leave the child at home or place the child in an institution[97] or daycare program where the child may not receive any educational instruction.[98] A parent in

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[95] See *Burlington*, 471 U.S. at 372. "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." Id.

[96] Id. at 359.

[97] Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986) (child was placed in an institution because child was deprived of an appropriate education and the parents could not fund their child's education in a private special education program).

[98] 800 F.2d 749. The *Miener* court was "confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs." Id. at 753 (emphasis in original).

Some of the problems facing financially insecure parents of handicapped children can be eliminated with a *pendente lite* process, similar to the procedure afforded parties in matrimonial suits. In matrimonial disputes, a *pendente lite* order provides the parties with a provisional settlement for the period prior to the final judicial resolution of the dispute. This settlement includes alimony provisions as well as provisions for custody of any minor children of the marriage. While the courts seek to secure the child's welfare when parents are involved in divorce proceedings, the courts have failed to demonstrate their concern for children's educational needs when their parents are involved in litigation with the school district. While the court seeks to place a child of divorcing parents in the home of the parent that is most fit to care for the child and to meet the child's physical and emotional needs, the courts have failed to place sufficient emphasis on placing handicapped children in appropriate educational programs during pending litigation. The children in both scenarios need a supportive environment due to their sensitive situations. Children should not get caught up in a tug of war between their parents or between their parents and the school district.

Pendente lite relief will afford handicapped children appropriate placements during extended periods required for administrative and judicial review. See Doe v. Brookline School Comm., 722 F.2d 910, 913 (1st Cir. 1983) (parents requesting the court to order the school district to continue paying for the child's education at a private school styled their motion as a "Motion For Temporary Relief, *Pendente Lite*"). The district court treated the motion as one for summary judgment. Id. The parents in *Doe* used the *pendente lite* procedure so they could afford to leave the child in the private school placement. In contrast, the emphasis in the previous discussion is on an interim evaluation of the child's handicap and a placement for the child pending the review proceedings.

In Pitsenberger v. Pitsenberger, 287 Md. 20, 410 A.2d 1052, appeal dismissed, 449 U.S. 807 (1980), the Maryland Court of Appeals stated that the objective of *pendente lite* relief is to give particular attention to children's needs and to avoid removing the children from their school, home, and social environment. This immediate concern for the emotional and educational needs of children whose parents are seeking a divorce is absent from the Act's procedure for securing the educational welfare of handicapped children. The effects of excluding handicapped children from judicial intervention until administrative review is completed has had

this situation may sue the school district for compensatory educational services ("CES") or for remedial education.[99] CES relief is designed to compensate a parent and a child for the deprivation of educational services. A parent seeking CES asks the court to provide her child with an appropriate placement if the district has failed to do so, and to provide intensive remedial educational services designed to bring the child up to the level he would have been at had he attended an appropriate program throughout his educational career.[100] Courts

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detrimental effects on handicapped children. The administrative review procedure could coexist with a *pendente lite* provision; the school district and the parents would attempt to resolve their differences without judicial involvement, while the court would temporarily place the child—given the limited period to assess the child's educational needs—in the program that it deemed appropriate. If the school district and the parents ultimately agree on an appropriate program, then the child would be removed rom the *pendente lite* placement and enrolled in the placement agreed upon by the parents and the school district.

There are, however, potential problems with the *pendente lite* solution. If the court places a handicapped child in a program pursuant to a *pendente lite* order, and the administrative or judicial review process ultimately selects a different program, then the child may be shuffled around between placements. Ideally, a child would remain in the same educational environment for sustained periods so that he could adjust to the academic and social atmosphere. Frequent changes in academic placements can be unsettling, especially for a handicapped child. Thus, although the *pendente lite* solution is not without problems, the benefits of this solution outweigh the problems.

99 See Sido & King, Monetary Remedies Under the Education for All Handicapped Children Act: Toward a New Civil Rights Act?, 23 Tort & Ins. L.J. 711, 734-36 (1988). Handicapped children deprived of an educational placement may sue the school district or the state for CES relief in state or federal court after exhausting administrative remedies. *Miener*, 800 F.2d at 754. CES relief is often inadequate for several interdependent reasons. First, in some states, a child is not entitled to educational services beyond the age of twenty-one. In New York, for example, where a child's right to public education terminates at age twenty-one, N.Y. Educ. Law § 4401 (McKinney 1981 & Supp. 1989), court decisions often "have the effect of saying that it is permissible for education agencies to provide inappropriate services to otherwise eligible children if the agencies can stall out claims against them until the children reach the jurisdictional age limit." Note, Compensatory Educational Services and the Education for All Handicapped Children Act, 1984 Wis. L. Rev. 1469, 1487. Thus, it is useless in these states for a nineteen or twenty-year-old student to initiate an action. Second, CES relief may be insufficient for a child who has lost three years of educational benefit; it may take longer for the child to learn the same material at a later age than when the child was younger. Third, it is difficult to develop a formula for assessing the amount of lost services for the period that the child had an inappropriate IEP or no IEP at all.

Nevertheless, the author of Compensatory Educational Services has devised a formula to determine the extent of CES relief: "CES should continue for a period determined by the duration of the child's erroneous placement unless an independent evaluation earlier finds that the child has made up the ground lost as a consequence of the misplacement." Id. at 1474. This CES formula, as well as any other CES formula, is insufficient to compensate a child for lost educational services. As mentioned above, CES relief often will not be able to compensate the child for lost time—the damage to the child's educational potential may be irreparable.

100 See Note, supra note 99, at 1473. The Courts have been split over the validity of CES relief under the Act. In 1981, the Seventh Circuit, in Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), found that damages were inconsistent with the goals of the Act and were an inappropriate form of relief under the Act. Id. at 1217. Subsequent court decisions relying on *Anderson* refused to award CES relief. See e.g., Powell v. Defore, 699 F.2d 1078 (11th Cir.

have held that CES, like retroactive reimbursement, merely requires the school district "to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[101]

It would be absurd to deny relief to a parent who unilaterally locates an appropriate non-state-approved private program, yet to award relief (that is, CES) to a parent deprived of appropriate services for her child and unable to remedy the deficiency. A financially insecure parent forced to leave her child at home or place the child in a state institution should not be afforded greater compensation for an educational loss than a financially secure parent who places her child in an appropriate non-state-approved private program. Parents with the financial means who expend time, effort, and money to secure an appropriate program should be awarded compensation commensurate to the relief afforded parents financially unable to make a placement.

CONCLUSION

Handicapped children have benefitted from the Education for

1983) (per curiam); Adams Cent. School Dist. Number 090, Adams County v. Deist, 214 Neb. 307, 334 N.W.2d 775, cert. denied, 464 U.S. 893 (1983). Nonetheless, some cases decided after the 1985 decision in *Burlington* found that CES relief was appropriate under the Act. These courts relied on the *Burlington* language justifying retroactive reimbursement. See *Miener*, 800 F.2d 749.

[101] *Miener*, 800 F.2d at 753 (quoting *Burlington*, 471 U.S. at 370-01). See also Note, supra note 99, at 1469 (overview of the bases and justifications of awarding CES relief). Critics of CES relief often rely on Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), arguing that a CES claim asks the court to maximize a child's educational potential and therefore transgresses the standard set in *Rowley*. See Note, supra note 99, at 1513 (published prior to *Burlington*, and therefore not relying on retroactive reimbursement to bolster the argument that CES relief is proper under the Act); see also supra note 12 (discussing *Rowley*).

The Eighth Circuit, relying on *Anderson*, 658 F.2d 1205, concluded that damages were not within the relief foreseen by Congress and that appropriate relief was restricted to injunctive relief. *Miener*, 800 F.2d at 752. The *Miener* court stated that *Burlington* had altered our understanding of the meaning of "damages" under the Act. Id. at 753.

See Timms v. Metropolitan School Dist., 718 F.2d 212 (7th Cir.), amended, 722 F.2d 1310, 1313 (7th Cir. 1983) (finding that CES relief to a twenty-one-year old woman is precluded). Relying on Judge Cudahy's forceful dissent, the court disbanded the original opinion on the grounds that the Timms had failed to exhaust their administrative remedies before commencing their action in federal court. 722 F.2d at 1316; see also Brookhart v. Ill. State Bd. of Educ., 697 F.2d 179, 188 (7th Cir. 1983) (excusing handicapped children from the "Minimal Competency Test" as a prerequisite for a high school diploma, because the school district failed to provide necessary educational preparation for the exam); Max M. v. Thompson, 566 F. Supp. 1330 (N.D. Ill. 1983) (amending the court's original decision denying CES relief and deferring to the amended *Timms* decision to justify a CES award. Max M. v. Thompson, 585 F. Supp. 317 (N.D. Ill. 1984); see also Campbell v. Talladega City Bd. of Educ., 518 F. Supp. 47, 56 (N.D. Ala. 1981) (the first case to provide CES relief under the Act, finding that a handicapped person was entitled to "a free and appropriate public education for two years past his 21st birthday").

All Handicapped Children Act. Nevertheless, the courts must remove the remaining barriers to appropriate education for all handicapped children by defining and clarifying the Act's ill-defined terms. Courts can eliminate these barriers by awarding retroactive reimbursement for a unilateral placement that substantially cures the deficiency in the school district's IEP. Further, the courts can create incentives for parents to make the best placement possible by implementing a partial-reimbursement scheme whereby reimbursement is awarded commensurate with the extent to which the parent cures the deficiency in an inappropriate IEP. Finally courts should disregard the state-approved status of the parent's placement because it is inapposite to the quality of the educational placement and prevents handicapped children from being placed in an appropriate program.

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