



Unilateral Placements

Private School Tuition Reimbursement in New Jersey

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When the parents of a student with a disability and the student's public school district disagree about the child's special education program, the parents are often at a crossroad about what to do. Some may choose to unilaterally place their child in a private or nonpublic school at their own expense and, subsequently, seek reimbursement from the district through a due process proceeding. Parents in such instances must follow very specific notice requirements before proceeding to avoid forfeiting their right to tuition reimbursement. This article reviews the applicable statutory provisions at issue when considering a unilateral placement.

The need for a change in a student's placement occurs in many situations. A school district may not have the appropriate program to meet the child's educational needs. Children may have behavioral issues that are not adequately addressed because the district does not have the appropriate facilities, staff, or programs to meet the child's needs. A child may also have an appropriate Individual Education Plan (IEP) in place, but it may not be properly implemented. Other children may have mental health



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issues that require a unique program or more intensive interventions. In addition, the return to school after virtual learning implemented during COVID-19 proved challenging due to learning loss, regression and/or mental health issues as the result of or exacerbated by the COVID-19 pandemic.¹ In such instances, the question becomes whether the child's current public school can provide what is needed through appropriate programs, services, and accommodations.

Ideally, when such a situation arises, the school district and parents would agree that the current school setting does not and cannot provide what the student needs, and the student's IEP is amended to provide an out-of-district placement. This simply means that, on the recommendation of the district's child study team, the student is placed at a specialized school or program outside the local school district at the district's expense, unless there is an agreement that the parents contribute financially. Out-of-district placements are schools outside of the home district, including placements at another public school district, specialized education schools, charter schools, parochial schools, and residential schools. Some schools are specialized for a particular disability (e.g., St. Joseph's School for the Blind), while others provide learning for students with various disabilities (e.g., ADHD, dyslexia, auditory processing disorder). Students with more pervasive disabilities or significant mental health issues may require a residential placement, some of which are located outside the state. These placements may be on New Jersey's approved private school lists² or students may also be placed in accredited nonpublic schools, which are not specifically approved by the state.³

When a public school district and parents disagree about whether a child is receiving an appropriate education in the public school district, the situation becomes more challenging, and a unilateral

placement may be considered by the parents.

Defining a Unilateral Placement

A unilateral placement simply means the student is placed out-of-district by the parents, who believe their child is not being provided with a free and appropriate public education (FAPE),⁴ after a disagreement and without a referral from the home public school district, at their own expense. The parents may then seek reimbursement from the public school district through a due process proceeding.⁵ The Individuals with Disabilities Education Act (IDEA) and New Jersey regulations specifically authorize the remedy of private school tuition reimbursement where a public school district has failed to offer an appropriate education to a student with disabilities who has been deemed eligible for special education services.⁶ Ultimately, New Jersey parents who unilaterally place their children out-of-district are responsible for tuition absent a settlement agreement with the school district, a ruling by an administrative law judge, or a decision by an appellate court after an appeal has been filed.⁷

Requirements for Tuition Reimbursement

There are three factors courts consider in determining whether reimbursement is required: (1) whether the district provided FAPE; (2) whether the private school chosen by the parents is appropriate; and (3) whether equitable considerations favor an award of tuition, including whether the parents followed proper notice requirements.⁸ The first step in determining whether reimbursement is required is whether the school district made FAPE available to the student in a timely manner prior to the enrollment in private school.⁹ New Jersey regulations track the federal requirement that a school district is not required to pay for the cost of education of a student with a disability if the district provided FAPE.¹⁰ A

child's FAPE is implemented through an IEP, which allows for an array of placement options.¹¹

The court next considers whether the unilateral placement is appropriate, which the parents are required to demonstrate at the due process proceeding.¹² Notably, a unilateral placement does not need to be a school specifically approved by the state for the education of students with disabilities for it to be deemed appropriate.¹³ Moreover, unilateral placements are not held to the same FAPE standards as public schools.¹⁴ The appropriateness determination is fact-sensitive and includes a review of the student's individual educational needs, academic progress, and emotional needs. The Third Circuit Court of Appeals has determined that parents seeking reimbursement for a unilateral placement show that the private placement "provides significant learning and confers meaningful benefit."¹⁵

Finally, equitable considerations are addressed, including whether the parents complied with the notice requirements under applicable laws.¹⁶ Reimbursement may be reduced or denied if the following procedural requirements are not met:

Formally Reject the IEP

In New Jersey, if parents intend to seek tuition reimbursement, they must reject the IEP at the most recent IEP meeting.¹⁷ If the IEP has not been rejected *at an IEP meeting*, annual or otherwise, parents should first request an IEP meeting in writing to discuss their concerns and determine whether the district will agree to an out-of-district placement. If the IEP team determines that the school district is not able to provide FAPE, and, as such, agrees to an out-of-district placement, the parents will not need to pursue a unilateral placement. To the extent that the district disagrees with the parents that an out-of-district placement is necessary, the parents should formally reject the

IEP proposed by the district. It is also recommended to notify the team of their concerns and intent to make a unilateral placement, then follow up with a letter as detailed below.

10-Day Written Notice

Parents must provide the district with written notice at least 10 days (excluding weekends and holidays) *prior* to unilaterally placing the student in a private school, advising the school district of the intent to enroll the student in a nonpublic school at public expense and detailing parental concerns.¹⁸ This 10-day notice requirement is designed to permit a school district sufficient time to propose a new IEP in an attempt to remedy the parents' concerns prior to the student leaving the school district. To preserve the possibility of tuition reimbursement, neither removal nor enrollment should occur until the 10-day time period has expired. Although there is some debate by practitioners about what "removal" means, to avoid a denial or reduction of reimbursement, it is recommended that parents should not sign an enrollment contract, make a down payment or deposit, or engage in any other activity to reserve a student's place in a private school, as this may be viewed as a "removal" under the 10-day notice rule pursuant to IDEA and corresponding New Jersey law.

Parents Must Act Reasonably

Federal and state law both provide that reimbursement may be reduced or denied if parents are not reasonable.¹⁹ While a determination of unreasonableness is fact-specific, compliance with the above requirements may preclude such a finding. Before requesting an out-of-district placement, parents should document their concerns and cooperate with the district in an effort to meet the child's needs, such as trying a different program offered by the district or agreeing to additional services. Documenting

any lack of progress and efforts to obtain further support is also important to a tuition reimbursement request. Also, if the district has provided written notice of its intent to evaluate the child before removal from the public school, parents should make the student available to the district for evaluation in order to protect the claim for reimbursement.²⁰

Administrative law judges have reduced or denied tuition reimbursement on the grounds of parental unreasonableness where the parents failed to, for example, reject the IEP during the most recent IEP meeting, provide a 10-day written notice, and/or make the child available for evaluation.²¹

Differences Between State and Federal Notice Requirements

New Jersey laws appear to be more stringent than IDEA regarding unilateral placements. Prior to placement, the IDEA provides parents the option to either notify the IEP team at the most recent meeting that they are rejecting the IEP, including stating their concerns and intent to enroll their child, at public expense, in a nonpublic school *or* provide 10 business days written notice of same.²² New Jersey regulations appear to require both rejection at the IEP meeting *and* 10 days written notice as the regulations do not include an "or" in between those requirements.²³ If an IEP meeting needs to be scheduled, the IEP meeting requirement affords the school district more time to remedy the parental concerns, but also causes the child to temporarily remain in a school setting where they are not getting what they need. Although there is some debate in New Jersey about whether both forms of notification are required for a unilateral placement because New Jersey's requirements appear to require more of parents than federal law, it is recommended that parents and practitioners comply with both the formal rejection of the IEP at the most recent IEP meeting and the 10-

day notice requirement to avoid a denial or reduction in tuition reimbursement.

Exceptions to State and Federal Notice Requirements

The IDEA and New Jersey regulations also have different exceptions.²⁴ Both state that reimbursement shall not be reduced or denied for failure to provide notice if the school district prevented the parent from providing notice and the parents were not advised of the statutory notice requirements.²⁵

The IDEA further states that reimbursement may not be reduced or denied in the discretion of a court for failure to provide notice if the parent is illiterate *or* would likely cause serious emotional harm to the child.²⁶ New Jersey regulations provide that, at the discretion of the administrative law judge or court, reimbursement may not be denied if the parent is illiterate *and* compliance with the notice requirements would likely result in serious emotional or physical harm to the student.²⁷

Due Process Proceeding

Compliance with the aforementioned requirements does not automatically trigger tuition reimbursement. If the parents and the school district do not amicably resolve the parental concerns during the 10-day notice period, the parents must then seek tuition reimbursement by filing a due process petition against the school district. Pursuant to New Jersey regulations that track the IDEA, a due process request, "shall be filed within two years of the date the party knew or should have known about the alleged action that forms the basis for the due process petition."²⁸ At that point, the matter will be resolved by way of settlement agreement or after a due process hearing. In New Jersey, a due process hearing is considered an administrative proceeding that takes place in the Office of Administrative Law before an administrative law judge. Parents can file a due

process petition *pro se* or hire an attorney to assist with the process, which, given the procedural requirements discussed in this article, is highly recommended.²⁹

Conclusion

In an ideal world, parents and school districts would agree on the proper placements for children, but this is often not the case. In the face of a disagreement, parents may decide unilaterally to place the child at a private school and file an administrative due process proceeding seeking reimbursement of tuition costs. Because these cases are highly fact-sensitive and the law details specific procedural requirements, it is critical that parents and practitioners be familiar with the process before making the unilateral decision to place a child in a private school. ■

Endnotes

1. See [cnbc.com/2021/03/30/learning-loss-from-virtual-school-due-to-covid-is-significant-.html](https://www.cnbc.com/2021/03/30/learning-loss-from-virtual-school-due-to-covid-is-significant-.html); [jerseycan.org/blog/jerseycan-releases-first-new-jersey-public-study-on-covids-impact-on-learning-loss/](https://www.jerseycan.org/blog/jerseycan-releases-first-new-jersey-public-study-on-covids-impact-on-learning-loss/); rutgers.edu/news/back-school-brings-mental-health-challenges-rutgers-steps-efforts-help.
2. [homerom5.doe.state.nj.us/apssd/](https://www.homerom5.doe.state.nj.us/apssd/); [nj.gov/education/specialed/outofstate/](https://www.nj.gov/education/specialed/outofstate/).
3. See N.J.A.C. § 6A:14-6.5; N.J.S.A. § 18A:46-14. Placements at an accredited nonpublic school are commonly known as Naples placements and must be done with the consent of the Commissioner of Education or ordered by an administrative law judge in a due process proceeding.
4. N.J.A.C. § 6A:14-1.1 tracks the federal FAPE standard set forth in the IDEA at 20 U.S.C. § 1401(3)(A)(9) and the Code of Federal Regulations at 34 C.F.R. § 300.17; see also *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232 (2009). Moreover, the seminal case *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 1001 (2017), found that a public school must provide an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”
5. See N.J.A.C. § 6A:14-2.10; 20 U.S.C. § 1412(a)(10)(C); see also *Munir ex rel. O.M. v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 426 (3d Cir. 2013).
6. See 20 U.S.C. § 1412(a)(10)(C)(ii); N.J.A.C. § 6A:14-2.10(b); see also *Forest Grove*, 557 U.S. at 247; see also generally *Sch. Comm. of the Town of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359 (1985) (finding reimbursement available to parents when a public school program was inappropriate).
7. See N.J.A.C. § 6A:14-2.10.
8. See generally, *Sch. Comm. of the Town of Burlington*, 471 U.S. at 359; *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); see also *T.R. ex rel. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 582 (3d Cir. 2000); *Forest Grove*, 557 U.S. at 230.
9. See 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa); N.J.A.C. § 6A:14-2.10(b).
10. See N.J.A.C. § 6A:14-2.10(a); 20 U.S.C. § 1412(a)(10)(C)(i).
11. See N.J.A.C. § 6A:14-4:3.
12. See N.J.A.C. § 6A:14-2.10(b); 20 U.S.C. § 1412(a)(10)(C)(i); see also *T.R. ex rel.*, at 205 F.3d at 582.
13. See N.J.A.C. § 6A:14-2.10(b) and N.J.A.C. § 6A:14-6.5.
14. See N.J.A.C. § 6A:14-2.10(b); see also *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1078 (D.N.J. 2011).
15. *Mary Courtney T. v. Sch. Dist.*, 575 F.3d 235, 242 (3rd Cir. 2009)(quoting *Lauren W. v. DeFlaminis*, 480 F.3d 259, 276 (3d Cir. 2007)).
16. See N.J.A.C. § 6A:14-2.10(b)-(d); 20 U.S.C. § 1412(a)(10)(C)(iii).
17. N.J.A.C. 6A:14-2.10(c)(1)
18. N.J.A.C. 6A:14-2.10(c)(2).
19. 20 U.S.C. § 1412(a)(10)(C)(iii)(III); N.J.A.C. 6A:14-2.10(c)(4); see also *Forest Grove*, 557 U.S. at 247.
20. See N.J.A.C. 6A:14-2.10(c)(3).
21. See N.J.A.C. 6A:14-2.10(c)(4); see N.J.A.C. 6A:14-2.10(c)(4); *I.G. et al. v. Linden City Bd. of Educ.*, No. 20-12761, 78 IDELR 273 (D.N.Y. June 8, 2021)(upholding finding that the parents failed to act reasonably because they did not collaborate with the district to resolve the issues); *M.I. ex rel. M.I. v. North Hunterdon-Voorhees Reg’l High Sch. Dist. Bd. Educ.*, No. 20-870, 78 IDELR 259 (D.N.Y. Apr. 30, 2021)(rejecting finding that a parent acted unreasonably where parent and student attended meetings with district personnel and visited the public school the student would attend).
22. 20 U.S.C. § 1412(a)(10)(C)(iii)(I) (aa) and (bb).
23. N.J.A.C. 6A:14-2.10(c)(1) and (2).
24. 20 U.S.C. § 1412(a)(10)(C)(iv); N.J.A.C. 6A:14-2.10(d).
25. *Id.*
26. 20 U.S.C. § 1412(a)(10)(C)(iv).
27. N.J.A.C. § 6A:14-2.10(d).
28. N.J.A.C. § 6A:14-2.7 (a)(1); see also 20 U.S.C. § 1415(f)(3)(c).
29. The IDEA has a statutory fee-shifting provision that allows courts to award attorneys’ fees to a prevailing party. See *M.R. v. Ridley Sch. Dist.*, 868 F.3d 218, 224 (3d Cir. 2017).