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Teaching the Children Appropriately: Publicly Financed Private Education under the Individuals with Disabilities Education Act

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Notes

Teaching the Children "Appropriately:" Publicly Financed Private Education Under the Individuals with Disabilities Education Act

Florence County School District Four v. Carter[1]

I. INTRODUCTION

The issue of educating the child with disabilities is a relatively new one in the scope of civil rights law. First addressed by Congress in 1975, the rights of the disabled child to a free and appropriate education are just now being defined with some particularity. This Note addresses one of the most important aspects of the right to a public education: Who will foot the bill?

Clearly, the goal of educating all disabled children is an admirable one. What rational person would deny a child, no matter how disabled he or she is, the opportunity to gain an education on equal footing with his or her peers? Virtually every child can gain benefit from some time in a classroom, and every child deserves the chance to reach his or her full potential. Yet with admirable goals come astronomical costs. A child with disabilities is guaranteed by federal law a free, appropriate public education, but the cost of such a program often comes at the expense of "normal" children in the same classroom who are perhaps held back from achieving because of school district funds diverted for disabled education, or the diverted attention of the teacher.

The high cost of disabled education was the focus of the United States Supreme Court's latest foray into the rights of the disabled child. Shannon Carter suffered from a learning disability that prevented her from learning as efficiently as other children her age. Her parents were unhappy with the educational offerings her local school provided, so they placed her in a private, specialized environment where she would get proper attention as well as the best education available. On behalf of Shannon, her parents then sued the school district for reimbursement of tuition and costs.

This Note traces the history of the Individuals with Disabilities Education Act, the right of parents to unilaterally withdraw their child from a public school and place the child in a private school, and the duty of the state to pay

1. 114 S. Ct. 361 (1993).

the bill in light of the Supreme Court's decision in *Florence County School District v. Carter*.[2]

II. LEGAL BACKGROUND

A. The Individuals with Disabilities Education Act

First introduced in the 93rd Congress on January 1, 1974, the Individuals with Disabilities Education Act ("IDEA" or "the Act") was designed to "assure that full educational opportunities are available to all handicapped children."[3] The act's legislative history explicitly identifies an influential force behind the provisions as a series of "right to education" cases beginning with *Brown v. Board of Education*.[4] Although the Supreme Court had not faced the issue of whether disabled children have a constitutional right to education,[5] the Senate report accompanying the act recognized courts in several states had established that very guarantee.[6] Specifically, the Senate focused on two lower federal court cases decided in 1971 and 1972.[7] Relying on the Equal

2. *Id.*

3. S. REP. NO. 168, 94th Cong., 1st Sess. 3 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1427. The bill was introduced and passed into law as the Education for All Handicapped Children Act in 1975. Following amendments in 1990, the name was changed to the Individuals with Disabilities Education Act. Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, 104 Stat. 1103 (effective Oct. 1, 1990). Several other substantive changes were made to the act with the 1990 amendments, the most significant of which was to substitute the phrase "children with disabilities" for "handicapped children." *Id.* For consistency, this Note will refer to the IDEA throughout.

4. 347 U.S. 483 (1954).

5. Note, *Enforcing the Right to an "Appropriate" Eduction: The Education for all Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1104 (1979).

6. S. REP. NO. 168, *supra* note 3, at 6, U.S.C.C.A.N. at 1431 ("In recent years decisions in more than 36 court cases in the States have recognized the rights of handicapped children to an appropriate education.").

7. Mills v. Board of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972) (holding under the Equal Protection and Due Process clauses of the United States Constitution that "no [handicapped] child eligible for a publicly-supported education in the District of Columbia shall be excluded from a regular public school assignment . . . unless such child is provided adequate alternative educational services suited to the child's needs); Pennsylvania Ass'n for Retarded Children ("PARC") v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (enjoining the Commonwealth of Pennsylvania from applying a statute relating to the postponement or denial of any mentally retarded child access to a free public education and training), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972).

Protection and Due Process clauses of the United States Constitution, those cases "guarantee the right to free publicly-supported education for handicapped children."[8]

In passing the IDEA, Congress found that of the 8 million disabled children below the age of twenty-one in 1974-1975, "only 3.9 million . . . [were] receiving an appropriate education. 1.75 million handicapped children [were] receiving no educational services at all, and 2.5 million handicapped children [were] receiving an inappropriate education."[9] The IDEA was designed to remedy this problem by helping to finance state programs and requiring states to provide some level of educational opportunities to all handicapped children as well as procedural safeguards for parents in the evaluation and placement of their children.[10]

The crux of the IDEA is found in the statute's purpose: "to assure that all children with disabilities have available to them . . . a free appropriate public education" ("FAPE").[11] A state must demonstrate it has met this free appropriate education standard, defined in section 1401(a)(18),[12] to assure eligibility for federal funding assistance for the state.[13] For seven years

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Although the United States Supreme Court has never specifically held a disabled child enjoys a constitutional guarantee to a public education, the Court appears to have implicitly acknowledged that right in Board of Educ. v. Rowley, 458 U.S. 176 (1982). In *Rowley* the Court noted the IDEA provided the guarantee of a public education, but imposed no substantive obligation on the state beyond the requirement of equal access. Neither *PARC*, or *Mills*, nor the Act itself requires any particular substantive level of education. However, the *Rowley* Court noted the significance of these two cases: "The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports [of the IDEA] suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act." *Id.* at 192.

8. *See* S. REP. NO. 168, *supra* note 3, at 6, U.S.C.C.A.N. at 1430.

9. S. REP. NO. 168, *supra* note 3, at 8, U.S.C.C.A.N. at 1432.

10. S. REP. NO. 168, *supra* note 3, at 8, U.S.C.C.A.N. at 1432.

11. 20 U.S.C. § 1400(c) (Supp. V 1993).

12. The Act defines free appropriate public education as

> special education and related services that:
> (A) have been provided at public expense, under public supervision and direction, and without charge,
> (B) meet the standards of the State educational agency,
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
> (D) are provided in conformity with the individualized education program . . .

20 U.S.C. § 1401(a)(18) (1988).

13. 20 U.S.C. § 1412(1) (Supp. V 1993). The requisite features of the plan for a state desiring participation in IDEA are found in 20 U.S.C. § 1413, the assurances necessary in a state's application are found in § 1414, and the required procedural

following the IDEA's enactment, only the lower courts addressed the meaning of "appropriate" education. Then, in 1982, the United States Supreme Court heard arguments in *Board of Education v. Rowley*.[14]

An eight-year-old deaf child was the plaintiff in the Supreme Court's first opportunity to hear a case involving a disabled child's right to an education. Amy Rowley had sued the Hendrick Hudson Central School District in Peekskill, New York, alleging her right to receive a qualified sign-language interpreter in all her classes.[15] The district court held,[16] and a divided panel of the court of appeals affirmed,[17] that because of Amy's great potential compared to her average achievement she was not receiving a FAPE. Stating there was no statutory definition of appropriate education, the district court defined it as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[18] In contrast to that mandate, the school district had provided Rowley with only an "adequate" eduction and, because she was an above average student, the court ordered the school district to provide her with a sign language interpreter in the classroom to allow her to reach her full potential as a student.[19] The United States Supreme Court granted certiorari to review the lower courts' interpretation of the Act.[20]

The Court disagreed with the district court's finding that the Act itself did not expressly define "free appropriate public education."[21] In fact, the Court found that section 1401(a)(18) expressly defines the phrase. Though that

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safeguards for the parents and the children are located in § 1415. 20 U.S.C. §§ 1413-1415 (1988).

The state must demonstrate that it has a policy in effect assuring all handicapped children the right to a FAPE, tailored to the unique needs of each child by means of an Individualized Education Plan ("IEP"), prepared by school officials with input from the child's parents and reviewed at least annually. *See infra* note 29.

14. 458 U.S. 176 (1982).

15. *Id.* at 184-85.

16. Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *cert. granted*, 454 U.S. 961 (1981).

17. Rowley v. Board of Educ., 632 F.2d 945, 947 (2d Cir. 1980), *cert. granted*, 454 U.S. 961 (1981).

18. *Rowley*, 483 F. Supp. at 534. The court considered two definitions of the term "appropriate education." On the one end it could mean adequate, enough to advance a child from grade to grade. On the other end, it could mean an education that "enables the handicapped child to achieve his or her full potential." *Id.* The standard arrived at, according to the court, was between those two extremes but "more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense." *Id.*

19. *Id.*

20. 454 U.S. 961 (1981).

21. *Rowley*, 458 U.S. at 185-86.

definition[22] "like many statutory definitions . . . tends toward the cryptic,"[23] the Court embarked on a quest to discover Congress' intent through other portions of the Act itself as well as its legislative history.[24] Instead of an educational opportunity that would allow Amy to reach her full potential as a student, the Court held the Act's sole purpose was to open previously closed public school doors to all handicapped children and provide them with personalized, individual instruction.[25] In the Court's view, the Act was not designed to guarantee any substantive standard as to the level of education to be provided a child with disabilities, only that some benefit be provided. According to the Court, the Act was clearly not intended to offer a "potential-maximizing" education,[26] but a "basic floor of opportunity," consisting of access to specialized instruction individually designed for the handicapped child.[27]

The Court concluded a state satisfies the requirement of FAPE by providing educational instruction specially designed to meet the needs of the child having a disability and such services as are necessary to permit the child to benefit educationally from such instruction.[28] Furthermore, if a child is being educated within a public education classroom, he or she receives sufficient educational benefits to satisfy the requirements of the IDEA if the student's individualized education program ("IEP")[29] is "reasonably

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22. *See supra* note 12.

23. *Rowley*, 458 U.S. at 188.

24. *Id.* at 188-201. For specific examples in the legislative history *see, e.g., id.* at 194 nn.15-18, 201 n.23. The Court also pointed to the Act's definition of "supportive services," which states "supportive services . . . as may be required to assist a handicapped child to benefit from special education." *Id.* at 188 (citing 20 U.S.C. § 1401(a)(17) (Supp. V 1993)).

25. *Rowley*, 458 U.S. at 188.

26. *Id.* at 197 n.21.

27. *Id.* at 200.

28. *Id.* at 201. The majority was answered by a strong dissent written by Justice White.

> This [decision] falls far short of what the Act intended. . . . The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign-language interpreter, comprehends less than half of what is said in the classroom—less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.

Id. at 215 (White, J., dissenting). Justice White's dissent was joined by Justices Brennan and Marshall.

29. 20 U.S.C. § 1414(a)(5) (Supp. V 1993). An IEP is to be developed by the

calculated to enable the child to achieve passing marks and advance from grade to grade."[30] Thus, because Amy performed better than the average child in school, the Court concluded Amy was receiving an appropriate education under the IDEA. Therefore, the school was not required to provide her with a sign-language interpreter.[31]

B. The "Stay Put" Provision and the Burlington Decision

After the Supreme Court's decision in *Rowley*, parents, school boards, and courts for the first time had a uniform standard to apply when determining the needs of a disabled student. The Act provides extensive administrative appeal procedures to be included in state plans, allowing a child's parents to challenge the appropriateness of the education and to seek review of any change in the student's status.[32] Furthermore, any party aggrieved by the state's final determination has the right to bring the case to a competent state court or United States District Court.[33]

Under the Act, it is clear the family of a disabled student has a right to challenge whether instruction is "reasonably calculated to enable the child to receive educational benefits."[34] It is also clear this appeal process could take

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local educational agency or school with the parents' input and consent. 20 U.S.C. § 1401(a)(20) (Supp. V 1993). It is a written statement that shall include a statement of the child's present educational levels as well as the annual goals and objectives of his or her educational program. 20 U.S.C. § 1401(a)(20)(A) & (B) (Supp. V 1993). The IEP is to state the necessary services to be provided the student along with the extent to which he or she may participate in regular educational programs. 20 U.S.C. § 1401(a)(20)(C) (Supp. V 1993). The Act requires that each disabled child be provided with an IEP and that it be reviewed at least annually. 20 U.S.C. § 1401(a)(20)(F) (Supp. V 1993). The IEP's importance is repeatedly stressed in the statute and the cases interpreting it. It has been called, alternatively, the Act's "centerpiece" or its "modus operandi." Town of Burlington v. Department of Educ., 471 U.S. 359, 368 (1985).

30. *Rowley*, 458 U.S. at 204.

31. *Id.* at 206-07.

32. *See* 20 U.S.C. § 1415 (1988).

33. 20 U.S.C. § 1415(e)(2) (1988).

34. *Rowley*, 458 U.S. at 204.

months and more likely years.[35] What happens to the child in the interim, while the appeals process is taking place, is much less clear.

On its face, the statute provides for such contingencies. The so called "stay-put" provision of section 1415(e)(3) states that "[d]uring the pendency of any proceedings conducted pursuant to this section . . . the child shall remain in the then current educational placement of such child."[36] Parents who disagreed with their public school's determination of their child's educational future understandably fought the apparent application of this provision. On one hand, the Act's goal was clear: to guarantee the child a free and sufficient education. On the other hand, if parents elected to exercise their right to challenge what the school deemed appropriate, the stay-put provision prohibited them from taking their child out of the disagreeable placement and placing him or her where they believed the child would experience an appropriate educational environment. Often such an environment could be found only at a private institution, and typically at a significantly higher price than a public school.

Parents were faced with a most unfortunate decision: "[G]o along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement."[37] Because a private school comes with a high price tag, and because (on its face) the stay-put provision creates a presumption against unilateral private placement by a parent, the private school option simply did not exist for many students. As a result, many children had no choice but to remain in an inappropriate

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35. By way of example, Florence County School District Four first presented Shannon Carter's IEP to her parents in May, 1985. *Carter*, 950 F.2d 156, 159 (4th Cir. 1991). In July, 1986, they had exhausted their state administrative remedies and filed their suit against the school district in U.S. District Court. *Id.* Although a three day trial took place in January, 1988, the district court's final decision was not handed down until February 6, 1991. Brief for Respondents at 11, n.10, *Carter* (No. 91-1523). It was affirmed by the Fourth Circuit Court of Appeals in November, 1991, *Carter*, 950 F.2d at 156, argued before the United States Supreme Court on October 6, 1993, and the final opinion was issued on November 9, eight and a half years after the process began. *Carter*, 114 S. Ct. at 361. Shannon Carter graduated from Trident in 1988. *Carter*, 950 F.2d at 158.

See also Burlington, 471 U.S. at 361 ("Where as in the present case review of a contested IEP takes years to run its course—years critical to the child's development . . ."). The *Burlington* decision, discussed *infra*, began with a third grade student's IEP in July, 1979, and ended after four published opinions with a landmark Supreme Court decision in April, 1985.

36. 20 U.S.C. § 1415(e)(3) (1988).

37. *Burlington*, 471 U.S. at 370.

educational setting and, at least in regards to these children, it appeared the Act's goal had ultimately failed.[38]

The IDEA's goal of an appropriate education for all disabled children is primarily to be met through placements in public schools,[39] with the child participating in "mainstreamed" environments as much as possible.[40] However, there is no doubt the Act contemplates private placement where appropriate public placement is unavailable.[41]

If a public school does not believe it can provide an appropriate education for a child with a disability, the school board can agree to a proper private school placement. Alternatively, dissatisfied parents can unilaterally withdraw their child from the inappropriate public school, place the child in a private school of their choice, and challenge the school's IEP as inappropriate under the Act. In that situation, if the parents were successful in the lawsuit, the courts could require the district to pay for the appropriate education in the private school from the time of that decision. But the issue remained: who would be financially responsible for the interim period—the time between the parents' appeal and initial private placement, and the judge's final decision? Would a defaulting school district be obligated to reimburse the parents retroactively, or would the parents be solely responsible for any violation of the stay put clause while their case was pending?

The stay-put provision was first litigated in the Fourth Circuit. In *Stemple v. Board of Education of Prince George's County,*[42] and later in *Rowe v. Henry County School Board,*[43] the court held a plaintiff's parents who unilaterally elected to send their child to a private school while appealing placement were under a duty not to remove the child from the school until a final determination was made. In finding this duty, the court admitted to reading the section 1415(e)(3) requirement literally. "Of course, that duty may not be totally enforceable by the state, but it certainly negates any right

38. *See generally* Jerry R. Parkinson, *Parents' Unilateral Placement of a Disabled Child in an Unapproved Private School,* 76 EDUC. L. REP. 893 (1992).

39. 20 U.S.C. § 1400(c) (Supp. V 1993).

40. The IDEA requires that, "to the maximum extent appropriate" children with disabilities are to be educated with children who are not disabled. 20 U.S.C. § 1412(5)(B) (Supp. V 1993). Further, removal of a child from such environment is to occur "only when the nature or severity of the disability is such that education in regular classes . . . cannot be achieved satisfactorily." *Id.*

41. *See, e.g.,* 20 U.S.C. §§ 1412(5), 1413(a)(4)(B)(i) (Supp. V 1993). *See also* 34 C.F.R. §§ 300.349, 300.400-.487 (1993); S. REP. No. 168, *supra* note 3, at 32, U.S.C.C.A.N. at 1456.

42. 623 F.2d 893 (4th Cir. 1980).

43. 718 F.2d 115 (4th Cir. 1983).

on the part of parents . . . to elect unilaterally to place their child in private school and recover the tuition costs thus incurred."[44]

Although several courts followed the holding in *Stemple*,[45] the Supreme Court disagreed with this analysis. The Court faced the issue of retroactive reimbursement for unilateral parental placements in *Town of Burlington v. Department of Education*.[46] The case involved Michael Panico, a learning disabled third grade student in the public schools of Burlington, Massachusetts.[47] It began in 1979, when Michael's parents challenged the school's IEP and, after mediation failed, placed him in a state-approved private school, specially designed for children with learning disabilities.[48] The state's appeals board decided the district's proposed placement was inappropriate for Michael under the IDEA and ordered the town of Burlington to pay the cost of Michael's tuition and transportation, as well as reimburse the Panicos for their private school expenses during the appeal.[49] The school district appealed to the United States District Court for the District of Massachusetts, naming the Panicos and the Massachusetts Department of Education as defendants.[50]

After years of appeals, remands, and transfers,[51] the Court of Appeals for the First Circuit ruled for the Panicos on the issue of reimbursement. The

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44. *Stemple*, 623 F.2d at 897.

45. *See, e.g.*, Rowe v. Henry County Sch. Bd., 718 F.2d 115, 118-19 (4th Cir. 1983); Doe v. Anrig, 692 F.2d 800, 809-12 (1st Cir. 1982); Miener v. Missouri, 673 F.2d 969, 980 (8th Cir. 1982); Monahan v. Nebraska, 645 F.2d 592, 598 (8th Cir. 1981); Anderson v. Thompson, 658 F.2d 1205, 1209-14 (7th Cir. 1981). *See also* Mountain View-Los Altos United High Sch. Dist. v. Sharron B.H., 709 F.2d 28, 29 (9th Cir. 1983).

But see Town of Burlington v. Department of Educ., 736 F.2d 773, 797-99 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985); Doe v. Brookline Sch. Comm., 722 F.2d 910, 920-21 (1st Cir. 1983) (stating in dictum that "permitting reimbursement promotes the purpose and policy of the Act"); Blomstrom v. Massachusetts Bd. of Educ., 532 F. Supp. 707, 713 (D. Mass. 1982); William S. v. Gill, 536 F. Supp. 505, 512 (N.D. Ill. 1982); Foster v. District of Columbia Bd. of Educ., 523 F. Supp. 1142 (D.D.C. 1981); Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981), *aff'd*, 703 F.2d 823 (5th Cir. 1983).

46. 471 U.S. 359 (1985).

47. *Id.* at 361.

48. Id. at 362.

49. *Id.* at 363.

50. *Id.*

51. *Burlington*, 736 F.2d at 778-79. Michael's case began with an administrative appeal filed in 1979. *Id.* at 779. The First Circuit released its second opinion in the case in 1984, *id.* at 773, and the Supreme Court affirmed the following April. *Burlington*, 471 U.S. at 359.

court held, *inter alia*, if at final judgment the school's IEP provided an inappropriate education for Michael, the parent's unilateral placement in a private school would not bar reimbursement.[52] The court based its finding on the conclusion that the stay-put provision of section 1415(e)(3) is "directory rather than mandatory" and should not be followed literally where it directly clashes with the overall goal of appropriate education.[53] In holding that the court in *Stemple* incorrectly exalted form over substance, the court relied on the Act's legislative history and structure, as well as the "purposes of the Act as a whole."[54]

The Supreme Court granted certiorari[55] to consider two issues: whether the type of relief provided for in the Act allows retroactive reimbursement to parents for private school placement and whether the stay-put provision bars such reimbursement to parents who unilaterally place their child in a private school without the consent of the local school officials.

Addressing the first issue, the Court held such reimbursement was allowed under the Act's broad conference of power on a reviewing court.[56]

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.[57]

Thus, the Court held retroactive reimbursement was appropriate relief available in the proper case. In reaching this decision, the Court emphasized the conflict between the purposes of the Act and the lengthy determination process provided for in the Act.[58] Since a final judicial decision would most likely come "a year or more after the school term covered by the IEP has

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52. *Burlington*, 736 F.2d at 798.

53. *Id.* at 797-98.

54. *Id.* at 797. The court stated that to hold the "stay-put" provision as binding on a dissatisfied parent would "not only [be] contrary to the explicit legislative history of the (e)(3) provision, but [it would] treat these special needs children as though they were nonperishable commodities able to be warehoused until the termination of in rem proceedings." *Id.* at 798.

55. 469 U.S. 1071 (1984).

56. "The statute directs the court to 'grant such relief as [it] determines is appropriate.' The ordinary meaning of these words confers broad discretion on the court." *Burlington*, 471 U.S. at 369 (interpreting 20 U.S.C. § 1415(e)(2) (1988)).

57. *Id.* at 370.

58. *Id.*

passed,"[59] parents who disagree with the IEP face an unenviable decision: leave their child where they do not think he or she belongs, or place the child—at their own, often great, expense—in a private educational setting.[60]

> If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. . . . Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.[61]

As to the second issue, the Court held a violation of the stay-put clause of the Act does not subject a parent to a waiver of this right to reimbursement. "The provision says nothing about financial responsibility, waiver, or parental right to reimbursement at the conclusion of judicial proceedings."[62] The Court observed a unilateral private placement, by definition, implies the school district disagrees with the parents' view of their child's education. Therefore, it is unlikely the school will agree to an interim private placement while the parents appeal the school's determination. To interpret the provision to deny the parental right to reimbursement would defeat the "principal purpose of the Act," namely to provide children with disabilities an appropriate and free education.[63] In light of this overall purpose, and the remedy provision of section 1415(e)(2) allowing the award of "such relief as the court determines

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 372.

63. *Id.* at 373. Under § 1415(e)(3), the child shall remain in his or her current placement, "unless the State or local educational agency and the parents or guardian otherwise agree." 20 U.S.C. § 1415(e)(3) (1988).

The Court quoted the same legislative history language as did the First Circuit in *Burlington* and *Brookline*.

> We [the Congressional conference committee] did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach to try to meet the needs of both the child and the State.

121 CONG. REC. 37,412 (1975) (statement of Sen. Stafford).

is appropriate," the Court held upheld the equitable award of reimbursement.[64]

The Court stressed, however, the provision of section 1415(e)(3) would still have a significant effect on parents' decisions. Essentially, parents who unilaterally remove their child from the state's educational placement "do so at their own financial risk."[65] The allowance of reimbursement is dependant upon a court's determination of the IEP's appropriateness. A determination in favor of the school's plan would subsequently bar any claim for reimbursement for the child's interim placement.[66] In addition, the Court did not determine whether this reimbursement award would be automatic if the parents were victorious in court. The court below called reimbursement "equitable relief, committed to the sound discretion of the district court."[67] The Supreme Court expressly reserved decision on this question, stating only "[w]e do think that the [First Circuit] was correct in concluding that ['appropriate' relief] means that equitable considerations are relevant in fashioning relief."[68]

C. *The Question of Carter*

After *Burlington*, it is clear that parents can be reimbursed for unilateral interim placement of their child in a private school. Although the prospect involves risk, the door was opened for dissatisfied parents to challenge their child's placement and, at the same time, provide for the child what they believed was a truly proper education. But the facts in *Burlington* limited its holding to parents who place their children in *state-approved* private facilities. The significant issue of whether the IDEA would permit reimbursement of expenses for unilateral parental placement in a private school *not* pre-approved under state standards was left to the lower courts to decide, until that very issue confronted the Supreme Court in *Florence County School District Four v. Carter*.[69]

The Second Circuit addressed this issue in two separate cases prior to *Carter*.[70] The first was *Antkowiak v. Ambach*.[71] The *Antkowiak* court noted the Act defines FAPE as "special education and related services

64. *Burlington*, 471 U.S. at 374.

65. *Id.* at 373-74.

66. *Id.*

67. *Burlington*, 736 F.2d at 801.

68. *Burlington*, 471 U.S. at 374.

69. 114 S. Ct. 361, 364 (1993).

70. Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563 (2d Cir. 1989); Antkowiak by Antkowiak v. Ambach, 838 F.2d 635 (2d Cir. 1988).

71. 838 F.2d 635 (2d Cir. 1988).

that . . . meet the standards of the state educational agency."[72] In addition, the court held the Act clearly provides that a FAPE may be found in a private school or facility at no cost to parents[73] but, following the language of section 1413(a)(4)(B)(ii), "in all such instances the [s]tate educational agency shall determine whether such schools and facilities meet standards that apply to [s]tate and local educational agencies."[74]

Just over a year later, the same court followed *Antkowiak* in a precise reading of the IDEA's language. The court in *Tucker v. Bay Shore Union Free School District*[75] held "a placement in an unapproved school, whether by school officials or through unilateral action by parents, cannot be considered 'proper under the Act.'"[76] Thus, despite the fact that the private school met the child's educational needs,[77] reimbursement of the parents' cost was denied.[78] Since, under *Burlington,* section 1415(e)(2) of the Act only allows equitable reimbursement when the court finally determines the private placement is appropriate, such reimbursement would not be proper.[79]

The United States Court of Appeals for the Fourth Circuit rejected the analysis of *Antkowiak* and *Tucker* in *Carter v. Florence County School District Four.*[80] The court first held, under section 1415(e)(2) and its interpretation in *Burlington,* reimbursement in the case before it was permissible.[81] Next, the court rejected the school district's argument that the mere fact the child's placement by her parents in a non-approved private school was not pre-approved by state officials was fatal to her reimbursement claim.[82] Such

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72. *Id.* at 639 (quoting 20 U.S.C. § 1401(a)(18)(B) (1988)).

73. *Id.* (citing 20 U.S.C. § 1413(a)(4)(B)(i) (Supp. V 1993)).

74. *Id.* (quoting 20 U.S.C. § 1413(a)(4)(B)(ii) (1988)). The court further held against the parents in denying the district court's injunction to order state officials to place their child in an unapproved school. *Id.* at 640-41. Apparently, parents cannot force the state to place a child in an unapproved school, but after *Carter,* they can gain reimbursement from a unilateral placement in such a setting. It appears, in this situation, a parent is forced to take the risk the Court described in *Burlington.* Though it is beyond the scope of this Note, it may be worthy to consider whether *Carter* mandates a change in this area as well. Instead of the parents taking the initial risk of unilateral withdrawal of their child, should they not be able to force the school district to place their child in an appropriate educational setting, whether or not it is approved by the state?

75. 873 F.2d 563 (2d Cir. 1989).

76. *Id.* at 568.

77. *Id.* at 564.

78. *Id.* at 568.

79. *Id.*

80. 950 F.2d 156 (4th Cir. 1991), *aff'd sub nom.* 114 S. Ct. 361 (1993).

81. *Id.* at 161.

82. *Id.* at 161-62.

a reading of the statute—that reimbursement is available only for state-approved private schools—in the court's opinion was clearly wrong.[83] Reading the provisions of section 1413(a)(4)(B) as a whole, the court found the section's requirement that "private schools receiving funds under the Act meet state educational standards, would apply only when the child is placed in the private school by the state or local school system."[84] In light of the fact that the legislative history provides no indication to the contrary, the court concluded "that the Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases."[85]

While expressing its difference with the Fourth Circuit in *Tucker*, the court held rather than state approval, the standard for appropriateness for a unilateral private placement under the Act was the standard used in *Rowley* for approval of an IEP: "a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'"[86] According to the court, such flexibility is inherent in the broad equitable powers granted to the courts in section 1415(e)(2) and essential to supporting the Act's purpose of providing the best education possible for all disabled children. When a school fails in its statutory duty to provide a FAPE for a child, requiring state approval of the parents' choice of private schools would present an anomalous situation.

> [I]t hardly seems consistent with the Act's goals to forbid parents from educating their [children at the school of their choice] "simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place."[87]

Recognizing that the court in *Carter* expressly contradicted the Second Circuit in *Tucker*, the Supreme Court granted certiorari on the issue of state approval,[88] and affirmed the opinion of the Fourth Circuit.[89]

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83. *Id.* at 162.

84. *Id.* at 162.

85. *Id.*

86. *Id.* at 163 (quoting *Rowley*, 458 U.S. at 207). *See also Burlington*, 471 U.S. at 369-70 (allowing interim reimbursement for unilateral placements by parents if, upon final judgment, a court determines that such placement is "proper under the Act"). The court in *Tucker* stated that a non-approved placement was not "proper under the Act" because it would violate § 1401(a)(18)(B) (1988) of the Act. *Tucker*, 873 F.2d at 568.

87. *Carter*, 950 F.2d at 164.

88. 113 S. Ct. 1249 (1993)

89. *Carter*, 114 S. Ct. at 362.

III. FACTS AND HOLDING

After attending a private school from grades two through six, Shannon Carter re-entered the public school system in the fall of 1982.[90] Because of her poor performance in the seventh grade at Timmonsville School, the Florence County School District Four tested her twice for potential learning disabilities. The district concluded although she scored below average, she was not learning disabled.[91] In 1985, at her parents' request, Shannon was again tested by a psychologist who concluded Shannon was indeed learning disabled.[92] Thus began the proceedings that ultimately took Shannon and her family to the United States Supreme Court.

As required by the IDEA,[93] after determining Shannon had a learning disability, school officials met with her parents to formulate her individualized education program.[94] The Carters were dissatisfied with the school's plan and requested a due process hearing challenging the program's appropriateness.[95] Both the local educational officer and a state educational agency hearing held the school's IEP adequate,[96] rejecting the Carters' claim that it failed to provide a free appropriate public education.[97]

While the case was pending in the fall of 1985, Shannon's parents placed her in Trident Academy ("Trident"), a private school in Mt. Pleasant, South Carolina that specializes in learning disabled education. She remained there until graduation in the spring of 1988.[98] Trident had not been approved as a school for learning disabled students by the state of South Carolina.

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90. *Carter*, 950 F.2d at 158.

91. *Id.*

92. *Id.*

93. 20 U.S.C. §§ 1400-1485 (1988).

94. 20 U.S.C. § 1414(a)(5) (1988); Shannon's initial IEP, proposed by the school, provided that she spend at least two periods per day in a resource room (while remaining in regular classes the rest of the day). *Carter*, 950 F.2d at 158-59. After considering the Carters' dispute and suggestion of a "learning disabilities itinerant program" that would provide for individualized instruction from a special education teacher, the school district modified its plan. *Id.* at 159. The IEP adopted on May 2, 1985 placed Shannon in such an itinerant program three periods per week with individualized instruction. *Id.* She was to spend the remainder of the week in regular classes. *Id.* It was this plan that her parents appealed. *Id.*

95. *Carter*, 950 F.2d at 159. *See* 20 U.S.C. § 1415(b)(2) (1988) ("Whenever a complaint has been received . . . the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted . . . as determined by State law or by the State educational agency.").

96. *Carter*, 114 S. Ct. at 363.

97. *Id. See also* 20 U.S.C. § 1400(c) (1988).

98. *Carter*, 950 F.2d at 159.

Further, Shannon's parents never requested approval for her placement in Trident from the State Department of Education, nor was it ever granted. Nevertheless, several public school districts in South Carolina had previously placed learning disabled students in Trident as part of an individual child's IEP.[99]

Shannon's parents filed suit in the United States District Court for the District of South Carolina in July 1986, alleging the school district breached its statutory duty to provide Shannon with a free appropriate education and praying for actual damages for reimbursement of costs incurred.[100] After a bench trial, the court held for the parents, ruling the school district's proposed IEP was "wholly inadequate" and that, while it did not comply procedurally with the Act, Trident "provided Shannon an excellent education in substantial compliance with all the substantive requirements" of the IDEA.[101]

Further, and more significantly, the court held "[n]othing in the existing law or regulations barred reimbursement simply because the State Department of Education had not approved Shannon's placement by her parents at the Trident Academy."[102] Under the equitable relief provisions of the IDEA,[103] the court awarded the Carters $35,716.11 plus prejudgment interest for tuition, fees, room and board, mileage to school, and four trips home per year during her three years at Trident.[104]

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99. *Carter*, 114 S. Ct. at 363. Trident had not been granted comprehensive approval by the state board of eduction because it employed uncertified teachers and did not conform procedurally to IDEA or the requirements of the IEP. *Id.* at 365. However, Florence County School District had placed children with disabilities at Trident in the past. *Id.* at 366.

100. Carter, 950 F.2d at 159. 20 U.S.C. § 1415(e) (1988) grants jurisdiction to the district courts of the United States for appeal by an aggrieved party to the agency due process hearing.

101. *Carter*, 114 S. Ct. at 364. Under the school district's adopted IEP, Shannon was to spend three hours a week in individualized instruction and the remainder of the week in the regular classroom. The IEP set goals of four month's reading and math progress during the school year. *Carter*, 950 F.2d at 159.

In contrast, under Trident's program, Shannon was evaluated quarterly (not yearly as required by IDEA), and with the benefit of low teacher student ratios experienced "significant progress." For example, her reading comprehension rose more than three grade levels in her three years at the school. *Id. See also infra* notes 120-21 and accompanying text.

102. *Carter*, 950 F.2d at 159-60.

103. 20 U.S.C. § 1415(e)(2) (1988). The section grants jurisdiction over IEP disputes to the district courts of the United States and allows them to "grant such relief as the court determines is appropriate." *Id.*

104. *Carter*, 950 F.2d at 160.

The Court of Appeals for the Fourth Circuit affirmed.[105] The court agreed with the district court in its finding that the school's proposed IEP was inadequate and "unlikely to permit [Shannon] to advance from grade to grade with passing marks."[106] The court held "[t]he Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases."[107] Instead, Congress intended section 1413(a)(4)(B) of the IDEA,[108] which requires private schools receiving funds under the Act to meet state educational standards, to apply *only* when the student is directly placed in the private school by the state or local school system.[109] "[W]hen a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'"[110] The court held the Act provides for reimbursement for private school placement of a disabled child when (1) "the program proposed by the state failed to provide the child a free appropriate public education" and (2) "the private school in which the child is enrolled succeeded in providing an appropriate education."[111]

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105. *Id.* at 165.

106. *Id.* at 160. This finding by the district court followed the minimum standards set by *Rowley*, namely that the IEP must be "reasonably calculated to enable the child to receive educational benefits." Board of Educ. v. Rowley, 458 U.S. 176, 207 (1982). The modest IEP established by the school district set a goal of four months progress over a school year and a month. *Carter*, 950 F.2d at 159. While under *Rowley*, advancing from grade to grade with passing marks is not dispositive as to the reasonably calculated standard, it is "one important factor in determining educational benefit." *Rowley*, 458 U.S. at 207 n.28. According to the district court and the court of appeals, *Rowley* was clearly violated, the only issue of the case on appeal to the United States Supreme Court was the issue of reimbursement. *Carter*, 114 S. Ct. at 365.

107. *Carter*, 950 F.2d at 162.

108. In pertinent part, § 1413(a)(4)(B) states

> (i) handicapped children in private schools and facilities will be provided special education and related services . . . at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities *by the State or appropriate local educational agency* . . . ; and (ii) in all such instances, 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 is served by such agencies.

20 U.S.C. § 1413(a)(4)(B) (1988) (emphasis added).

109. *Carter*, 950 F.2d at 162.

110. *Id.* at 163 (quoting *Rowley*, 458 U.S. at 207).

111. *Id.* at 164.

The United States Supreme Court granted certiorari[112] to resolve the conflict among the courts of appeals and to address a single narrow question: "[W]hether Shannon's parents are barred from reimbursement because the private school in which Shannon enrolled did not meet the section 1401(a)(18) definition of a 'free appropriate public education.'"[113] The Court held they were not, stating the requirements of section 1401(a)(18) do not apply to unilateral parental placements.[114] To hold otherwise, the Court stated, would eliminate the parental right to unilateral withdrawal of their child the Court had recognized previously in *Burlington*.[115]

The Court held in favor of parents who unilaterally withdraw their child from a public school that provides an inappropriate education under the IDEA. If the parents, in turn, place their child in private school setting that, while not meeting all the requirements of the IDEA, provides a substantially proper education, a court may order the state to reimburse the parents for all tuition and expenses.

IV. INSTANT DECISION

In affirming the Fourth Circuit, Justice O'Connor, writing for a unanimous Supreme Court, found parents who unilaterally place their child in an appropriate private school while an appeal is pending are not barred from reimbursement.[116] However, such reimbursement is available only if a federal court concludes the public school's proposed IEP was inappropriate and the parents' private school election was proper under the standards of the IDEA.[117] Because the IDEA mandates the public education system provide a FAPE to every disabled child, the school district's allegation that having to pay for a unilateral private placement would place a significant burden on the state was unfounded. "[P]ublic educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: Give the child a free appropriate public education in a public setting or place the child in an appropriate private setting of the State's choice."[118]

In light of the ultimate goals of the IDEA, the Court found it would be inconsistent with *Burlington* to restrict reimbursement only to parents who

112. 113 S. Ct. 1249 (1993).
113. *Carter*, 114 S. Ct. at 365. *See supra* note 12.
114. *Carter*, 114 S. Ct. at 365.
115. *Id.*
116. *Id.*
117. *Id.* at 366.
118. *Id.*

place their child in private schools that meet state standards.[119] In Shannon Carter's case, it was readily apparent that the private school provided her with an "excellent education in substantial compliance with all the substantive requirements" of the Act, although it was not precisely in compliance with several of its procedural details.[120] In fact, the trial court found Shannon's education was of higher quality, and that she made more significant progress than she would have made had she remained in the Florence County public schools.[121]

The IDEA was intended to provide children with disabilities an education that was free and appropriate as defined in section 1401(a)(18) of the Act. However, contrary to the Second Circuit's decision in *Tucker*, the Court held the precise requirements of section 1401(a)(18) cannot apply to unilateral private placements. Specifically, section 1401(a)(18)(A) requires the FAPE be provided under public supervision and section 1401(a)(18)(B) requires the school to meet overall state educational standards. According to the Court, to require a parent to meet these standards would not make sense in a case, like the Carters', where the parents were placing their child in a private school over the objection of the public school district. Such approval by the state would require it to cooperate with the parents with whom they are fighting in the courts. "Accordingly, to read the section 1401(a)(18) requirements as applying to parental placements would effectively eliminate the right of unilateral withdrawal recognized in *Burlington*."[122]

As further evidence in support of its position, the Court noted in states like South Carolina where state approval of a private placement is on a case by case basis (with no comprehensive public list of approved schools), the parents would need the cooperation of the state even before they could know if their selected school met state educational standards. "As we recognized in *Burlington*, such cooperation is unlikely in cases where the school officials disagree with the need for the private placement."[123] Therefore, the Court

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119. *Id.* at 365.

120. *Id.* at 363. Although Trident was accredited by the Southern Association of Colleges and Schools, the Carters never sought approval for Shannon's placement from the state department of education. Previously, however, Trident had accepted and enrolled students sent on recommendation by the public school system. *Carter*, 950 F.2d at 159. Trident never attempted to comply with the letter of the IDEA. *Id.* at 161. Although it never used the term IEP, the school set goals for its students and reviewed them four times a year, more than is required by the IDEA. *Id.* However, at least two faculty members at Trident were not certified by the state and thus, argued the school district, precluded any possible pre-approval of Shannon's placement. *Id.*

121. *Carter*, 114 S. Ct. at 363.

122. *Id.*

123. *Id.* at 366.

held "[t]o read the provisions of section 1401(a)(18) to bar reimbursement in the circumstances of this case would defeat [the statute's purpose]."[124]

The Court rejected the holding of *Tucker*, concluding that non-approval by the state of a parent-selected private school program for their child's education would not in itself serve as a complete bar to state reimbursement.[125] Instead, consistent with *Burlington*, a court is to use the broad grant of discretionary power found in section 1415(e)(2) to fashion equitable relief on a case-by-case basis, considering all relevant factors.[126] The Court noted, although South Carolina kept no publicly available list of state approved private schools, the absence of such a list was not essential to its holding.[127] However, the Court implied such a list would be helpful to the state's case as it would eliminate much guesswork on the part of the parents. Since South Carolina provided no list, its private placements were approved on a case by case basis, requiring the parent to cooperate with state officials before they knew if the school they chose was state-approved. In light of the disagreement between the parents and the school district, the Court stated such cooperation is "unlikely."[128]

In addition, a court is to consider the level of reimbursement prayed for in making its determination. Total reimbursement is not to be provided if a court determines the cost of the private education was not appropriate and reasonable.[129] The Court further noted parents who unilaterally change their child's placement while review proceedings continue do so at their own risk. If the parents are unable to show the public school's IEP was inappropriate and, in turn, the private school placement is appropriate, then the parents will not recover interim reimbursement.[130] At least until Congress commands otherwise, "that risk is simply one factor that the parents must consider in deciding where to educate their child."[131] In the meantime, if the parents gamble and win, they have a right to be reimbursed for the risk they took.

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124. *Id.* at 365.
125. *Id.* at 366.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Carter*, 950 F.2d at 164.

V. COMMENT

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[132]

Twenty one years passed from the time Chief Justice Earl Warren wrote these words in *Brown v. Board of Eduction*[133] until Congress addressed the issue in the context of children with disabilities. Acting under the premise set out in *Brown*, and reiterated in *Mills v. Board of Education of District of Columbia*,[134] Congress embarked on a mission to equalize the education offered disabled students to that offered all students. After hearing the testimony of more than 100 legislators, parents, and educators on the local, state, and national level, Congress, in the form of the IDEA, decided 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."[135] Now, almost twenty years have passed since Congress codified this ambitious and worthy goal in the IDEA. By no fault of the states, crippled by financial constraints, or of the children themselves, asking only the opportunity to be educated equally with their peers, it appears Congress has summarily failed.[136]

Such failure can be sufficiently illustrated by considering the ultimate impact of the line of cases that culminated in *Carter*. Although the *Carter* Court's legal reasoning is sound and its decision correct in light of the IDEA's language and purpose, the solution it requires— that schools pay for unilateral placements by dissatisfied parents— creates an unwieldy burden on both states and school districts.

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132. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

133. *Id.*

134. 348 F. Supp. 866 (D.D.C. 1972). *See supra* note 7.

135. S. REP. NO. 168, *supra* note 3, at 9, U.S.C.C.A.N. at 1433.

136. *See generally* Joseph P. Shapiro et al., *Separate and Unequal*, U.S. NEWS & WORLD REPORT, Dec. 13, 1993, at 46.

> In the 18 years since [the passage of the IDEA], the good intentions have yielded decidedly mixed results. While millions of American children have received educations as a result of [the IDEA], the school system created by the law hurts many of the very children it is intended to help even as it costs taxpayers billions.

Id. at 46.

Under *Burlington* parents may have a right to reimbursement for the unilateral private placement of their child. *Carter* merely took that holding one step further by extending the right to private placements that do not receive the state's blessing. Holding otherwise and preventing reimbursement recovery to Shannon Carter and her parents would have effectively destroyed her rights under the IDEA.[137] Further, as the First Circuit noted in *Burlington*, to hold strictly to the language of the stay-put provision would be akin to treating special needs children as "nonperishable commodities able to be warehoused until the termination of in rem proceedings."[138] Without the ability to recover reimbursement for a unilateral placement, students would be trapped indefinitely in an environment with which they have already expressed displeasure. Further, barring reimbursement would strip parents of their constitutional right to educate their children as they like,[139] and barring reimbursement based on something as arbitrary as state-approval of the private school placement clearly elevates form over substance.[140] In light of the language of the law, and the clear intent of the Act as a whole, the *Carter* decision stands as a significant—and sound—victory for the silent minority, the disabled child.

But the child was not the only recipient of good news in the *Carter* opinion. Arguably, the Court strove to forge a compromise between two extremes. The decision not only went a long way toward ensuring educational rights for the disabled child, but it allayed educators and states' worst fears of new and far-reaching obligations.

In support of the school's position, the Court did not *mandate* interim reimbursement. Quite the contrary, in *Burlington* and now in *Carter*, it specifically held that the award of retroactive interim relief should depend upon "all relevant factors."[141] No single factor should prohibit the court from exercising its broad discretionary powers granted in section 1415(e)(2).[142] As a result, there is no guarantee a parents who make the decision to educate their child at a private school will be reimbursed even if the school's original IEP is later deemed inadequate.

In addition to the requirements outlined in *Burlington* that reimbursement turns on a court's determination of the public school's proposal as inappropriate and the private school as an appropriate environment, the court must weigh the equities in awarding relief. For example, a parent that acts in

137. *See supra* notes 122-28 and accompanying text.

138. Town of Burlington v. Department of Educ., 736 F.2d 773, 798 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985).

139. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

140. *Carter*, 736 F.2d at 798.

141. *Carter*, 114 S. Ct. at 366.

142. *See supra* note 56.

bad faith in altering a child's educational environment should be denied relief in the form of interim reimbursement. Additionally, it would appear the state's approval or disapproval of a private placement will at least factor into the court's decision process. Parents who decide to alter their child's placement without the school's approval will continue to "do so at their own financial risk."[143] Not only must they foot the initial bill of a private education but, if a court rules against them, they will lose out on a claim for reimbursement.

In addition, the *Carter* Court went out of its way to say that, contrary to the school district's (and others') belief,[144] it was not imposing a significant financial burden on the states and school districts. First, Justice O'Connor made it clear the school need only meet its obligations under the IDEA in order to avoid reimbursement for a unilateral private placement. "This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims."[145] Instead of anxiety, the states' hearts should be filled with certainty: Do as the law requires and face no extra liability. Second, any losses the schools face are limited by a standard of reasonableness. The Court rejected any hope of a parent looking to place his or her child in a "cadillac" school. "Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable."[146]

On the other hand, the Court did in fact strike a powerful blow in the students' favor. Dissatisfied parents need not beg for state approval before they place their children in a superior private educational environment. In Shannon Carter's case, for example, there was no published list of pre-approved private facilities so, in order to conform to the letter of the IDEA, her parents would have been forced to solicit school approval of their chosen institution. Such cooperation is not realistically expected from a school the parents already consider inadequate.[147] Further, as the Court stated in

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143. *Carter*, 114 S. Ct. at 366.

144. *See, e.g.*, Petitioners' Brief at 26-29, *Carter* (No. 91-1523).

> Education is easily the largest of all state expenditures; . . . Yet having dedicated a large portion of their revenue to educational spending, most state governments—now facing their worst financial crisis in decades—are ill-equipped to shoulder the extra cost of funding for inappropriate placements.

Id. at 27-28.

145. *Carter*, 114 S. Ct. at 366.

146. *Id.*

147. *See Burlington*, 471 U.S. at 362-63. The Court stated if the parents' failure to obtain approval were held to bar relief, the Act's purpose would be defeated to the extent as if reimbursement were never available. *Id.* School officials who disagree with parents concerning the adequacy of the state's placement are unlikely to "agree

Carter, it is hardly consistent with the principles of the IDEA to "forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place."[148] Clearly, the Court has allowed significantly more flexibility in the parents' difficult decision.

Additionally, by reading the IDEA as it has in *Burlington* and *Carter*, there is little doubt the Court has greatly enhanced the educational opportunities for disabled children. Instead of waiting for a seemingly interminable appeal process to run its course, a disabled child can be placed immediately by his or her parents in an appropriate educational setting, wasting the least amount of time in the all-important learning process. As the Court pointed out in *Burlington*:

> [c]urrent research indicates that full development of reading and other skills will more likely occur with learning disabled children . . . if adequate remedial services are provided in the early primary grades. Later intervention generally appears to require special services over a longer period of time to achieve a similar rate of remediation . . . . Delay in remedial teaching is therefore likely to be highly injurious to such children.[149]

Finally, the increased likelihood of reimbursement may encourage the family with less financial means to do without delay what they feel is best for the child, regardless of the initial monetary commitment.

However, the concept of reimbursement for unilateral placement, while excellent in ideal, will prove impractical in reality. Without further action by Congress, mandates created by the IDEA and supported by decisions like *Carter* will have a devastating impact on American public schools. The Florence County School District (as well as several states and the National League of Cities in *Amicus* briefs) argued that a holding for Shannon Carter would have a long lasting and adverse impact on the already depleted coffers

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to an interim private school placement while the review process runs its course." *Id.* Thus, parents would be forced to choose:, either leave their child in what may be determined later as an inappropriate placement (to the detriment of their child) or unilaterally choose a private placement only to sacrifice any claim for reimbursement. The former alternative could prove devastating to the child. The latter alternative would be available only to the wealthiest of families. The Act's dual goals of providing a free and appropriate education for all children with disabilities would be defeated.

148. *Id.* at 365 (quoting *Carter*, 950 F.2d at 164).

149. *Burlington*, 736 F.2d at 798 (quoting 121 CONG. REC. 37,412, 37,416 (Nov. 19, 1975)).

of state and local governments.[150] Despite the assurances of the Court,[151] it would appear such a concern is valid. In an area where the child's concerns should predominate, it all boils down to money.

Financial concerns are nothing new to the issue of disabled education. In fact, it appears financial issues played a key role in the Act's genesis. As the Court noted in *Rowley*,[152] the Senate's emphasis on the financial benefits for all of society was implicit in its passage of the IDEA. "With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society."[153] With this cry of cost efficiency, Congress established its most sweeping educational plan for children with disabilities and turned the states loose, left to fend for themselves in the economically inefficient business of educating children.

According to figures offered by the Florence County School District, the average per pupil expenditure in the school district was $4,102.56 a year.[154] The district court's order to reimburse Shannon Carter amounted to nearly $12,000 a year.[155] The reality is, in the words of the school district, "[e]very dollar paid to reimburse the Carters for Shannon's private education is one less dollar available to the students of [the already poor district.]"[156] The question must be addressed: How much is too much? At what point does the cost to provide one student a reasonably calculated benefit in a private setting outweigh the cost to a school district trying to provide the best services possible to the most children within a tightly restricted budget? When do the "ordinary" needs of the majority outweigh the "extraordinary" needs of the special child?

The cost of educating the disabled child can be astronomical. In 1989, the U.S. Department of Education reported to Congress that the average expenditure for the average pupil in a school district resource program was

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150. *See* Petitioner's Brief at 26-29, *Carter* (No. 91-1523). Similar arguments were maintained in *amicus curiae* briefs of the National School Boards Association, the National Association of State Boards of Education, the National League of Cities, the U.S. Conference of Mayors, the Council of State Governments, the National Association of Counties, the International City/County Management Association, the National Governors' Association, the National Institute of Municipal Law Officers as well as the joint brief of 17 states.

151. *See supra* notes 141-46 and accompanying text.

152. Board of Educ. v. Rowley, 458 U.S. 176, 201 n.23 (1982).

153. S. REP. NO. 168, *supra* note 3, at 9, U.S.C.C.A.N. at 1433.

154. Petitioner's Brief at 26, *Carter* (No. 91-1523).

155. *Id.* at 27.

156. *Id.*

$2,398 for a year of instruction.[157] In a self-contained program, the district would pay $5,700 a year,[158] and a student in a private residential program cost $31,616 a year.[159]

Furthermore, the 1989 report indicated the national average total cost for a full-time student in the regular classroom was $2,780 a year.[160] In sharp contrast, for fiscal year 1992, the average federal contribution under the IDEA was about $409 per child each year.[161] Although the IDEA indicates a Congressional willingness to fund the Act at a level as high as forty percent of a state's average expenditure per child,[162] today just seven percent of the children with disabilities cost is repaid by the federal government.[163] With close to 5 million children under the aegis of the Act in the 1990-91 school year,[164] the remaining, unfunded ninety-three percent is no small burden. In a practical sense, it may be a burden impossible for the states to meet.[165]

As Justice O'Connor wrote, there is no doubt the financial burden of paying reimbursement costs can be easily avoided by a state that merely conforms to the mandate of the IDEA: "[G]ive the child a free appropriate

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157. U.S. DEPARTMENT OF EDUCATION, ELEVENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE EDUCATION OF THE HANDICAPPED ACT 119, 127 (1989).

158. *Id.*

159. *Id.*

160. *Id.*

161. U.S. DEPARTMENT OF EDUCATION, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: PROGRAM-FUNDED ACTIVITIES, FISCAL YEAR 1992, at 4 (1992).

162. 20 U.S.C. § 1411(a)(1)(B)(v) (1988); *See also* S. REP. NO. 168, *supra* note 3, at 16, U.S.C.C.A.N. at 1439.

> [T]he [Committee on Labor and Public Welfare] wished to provide, on a per-handicapped child basis, a reasonable dollar amount which relates to actual dollars spent on handicapped children, and which could assist the State in paying for part of the cost of educating each child. Studies done by the National Education Finance Project estimated that the actual cost of educating a handicapped child is on the average, double the cost of educating a non-handicapped child.

Id.

163. U.S. DEPARTMENT OF EDUCATION, JUSTIFICATION OF APPROPRIATION ESTIMATES TO THE CONGRESS FISCAL YEAR 1993 F-19 (1992).

164. U.S. DEPARTMENT OF EDUCATION, FOURTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT xvii (1992).

165. *See, e.g.*, Brief *Amicus Curiae* of National School Boards Association and the National Association of State Boards of Education at 27-28, *Carter* (No. 91-1523) ("Special education expenditures have risen from approximately $11.75 billion in 1982-1983 to over $16 billion in 1986-1987, with the federal government picking up only slightly more than $1 billion.").

public education in a public setting, or place the child in an appropriate private setting of the State's choice."[166] However, there are several problems with this apparently obvious solution. First, funding a FAPE for a special child is often cost prohibitive for a financially strapped school district. Second, even if the school complies to the letter of the IDEA, it faces the increasingly likely prospect of defending against challenges from concerned parents and, in turn, the long term expenses of litigation and appeal.

Finally, and most significantly, in order to win an IEP challenge, the parents need only demonstrate their child did not receive an appropriate education in the public system. In practice, that would not appear to be such a difficult burden to meet. Shannon Carter went from a public school to an special need-intensive private setting. Is it any wonder her progress increased dramatically? By what standard is a judge to determine appropriateness of an education: from the dry statistics and reports offered by the school district and its experts or the demonstration of significant improvement of a child plaintiff standing before the court? Clearly, it would be difficult to tell a child, like Shannon Carter, to leave a private setting that offers much more individual attention and room for advancement among her true peers and return to the public school, even if it is "appropriate" under the IDEA, where she stands out as a special child and can not hope for nearly as much personal benefit. Thus, it would appear that a student challenging his or her IEP from the stimulating environment of a unilateral private placement is more likely than not to be awarded reimbursement. In turn, such increased likelihood may lead to increased IEP challenges requesting private placement and the cost of educating the disabled child will likely increase significantly beyond a state's ability to pay.[167]

VI. CONCLUSION

The future of disabled education is not so clear in a post-*Burlington* world. Under *Rowley*, it is clear that no child with a disability in America is guaranteed free access to education commensurate with his or her full potential. However, every student is guaranteed some level of a free, appropriate, public education. That guarantee continues to appear more and more illusory. In light of *Carter*, it is time Congress either rethink the FAPE standards it has created in the interests of the disabled child, or finally

166. *Carter*, 114 S. Ct. at 366.

167. *See generally* Thomas Toch, *Beating the System*, U.S. NEWS & WORLD REPORT, Dec. 13, 1993, at 56 (citing a Pennsylvania study that shows 25% of requests for IEP hearings demand private placement, and "[n]ationally, 100,000 students, 2 percent of the special ed population, are in private programs" making private placements "by far the most expensive sector of special education").

reaffirm its commitment to financially support the states to whom it has unfairly shifted the burden of the IDEA. Until Congress meets its funding mandate and supports the states financially, and until states have a clear definition of FAPE that judges may consistently follow, the worthy goals created by *Brown* and enacted by the IDEA will continue to go unfulfilled.

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