

11-1-2009

Special Education Law

William H. Hurd
Troutman Sanders, L.L.P.

Stephen C. Piepgrass
Troutman Sanders, L.L.P.

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

 Part of the [Disability Law Commons](#), [Education Law Commons](#), [Juvenile Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

William H. Hurd & Stephen C. Piepgrass, *Special Education Law*, 44 U. Rich. L. Rev. 17 (2009).

Available at: <https://scholarship.richmond.edu/lawreview/vol44/iss1/6>

This Essay is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

SPECIAL EDUCATION LAW

William H. Hurd *

Stephen C. Piepgrass **

I. INTRODUCTION

The year 2010 marks the thirty-fifth anniversary of the enactment by Congress of the Education for All Handicapped Children Act,¹ a law designed “to end the long history of segregation and exclusion of children with disabilities from the American public school system.”² In the ensuing years, that law has been amended, improved, and renamed.³ Since 1990, the law has been known as the Individuals with Disabilities Education Act (“IDEA”), and it forms the foundation of special education law in the United States.⁴

The IDEA provides states with federal funds for special education, and in return, states are required to “ensure that all children with disabilities have available to them a free appropriate public education [“FAPE”] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent liv-

* Partner, Troutman Sanders, LLP, Richmond, Virginia; Adjunct Professor of Law, George Mason School of Law. J.D., 1977, University of Virginia School of Law; B.A., 1973, University of Virginia. William H. Hurd is a former Solicitor General of Virginia and a former Deputy Attorney General for Health, Education, and Social Services.

** Associate, Troutman Sanders, LLP, Richmond, Virginia. J.D., 2005, University of Virginia School of Law; A.B., 1999, Duke University.

One or more of the authors, together with other counsel at Troutman Sanders, provided representation to the parents in several of the cases discussed in this article, including *Schaffer v. West*, *Hogan v. Fairfax County School Board*, *M.S. v. Fairfax County School Board*, and *County School Board v. RT*.

1. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1482 (2006)).

2. NATIONAL COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS 16 (2000), available at http://www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm.

3. See THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 3–5 (3d ed. 2008).

4. See generally 20 U.S.C. § 1400 (2006).

ing.”⁵ In addition, the IDEA makes school systems *individually* accountable to the parents of children with disabilities.⁶ Instead of allowing school systems to decide unilaterally the educational program a child will receive, the IDEA gives parents an equal seat at the table in developing their child’s Individual Education Program (“IEP”).⁷

The IEP is the “primary vehicle” and “centerpiece of the [IDEA’s] education delivery system.”⁸ It is a written document developed by an “IEP team” that includes, among others, the child’s parents, teacher, and local school system representatives.⁹ The IEP must explain “how the child’s disability affects his involvement and progress in the general education curriculum.”¹⁰ It also must set annual goals and explain how progress toward those goals will be evaluated, and must include a statement of services and accommodations that the school system will provide to the child.¹¹

If the school system and parents cannot agree on the IEP, or if other disputes arise, the parents have the right to challenge the school system through an “impartial due process hearing.”¹² Moreover, a party who is dissatisfied with the results of the due process hearing may seek judicial review in either federal district court or in a state court of competent jurisdiction.¹³

Such a complex system for resolving educational disputes must inevitably give rise to significant procedural and substantive issues. Surprisingly, some of the issues that seem most obvious were not definitively addressed—at least not in Virginia—until relatively recently. This article will focus on several of those issues and examine how the United States Supreme Court, the Fourth Circuit, and, in some cases, federal district courts and hearing officers have resolved them in the years since 2005. Among the issues recently decided and discussed in this article

5. *Id.* § 1400(d)(1)(A).

6. See GUERNSEY & KLARE, *supra* note 3, at 10 (citing 20 U.S.C. §§ 1414(c)–(e), 1415(b), 1415(d) (2006); 34 C.F.R. §§ 300.501–300.504 (2009)).

7. *Id.* (citing 20 U.S.C. § 1414(d)(1)(B)(i) (2006); 34 C.F.R. § 300.306 (2009)).

8. *Honig v. Doe*, 484 U.S. 305, 311 (1988).

9. 20 U.S.C. § 1414(d)(1)(B).

10. *Id.* § 1414(d)(1)(A)(i)(I)(aa).

11. *Id.* § 1414(d)(1)(A)(i)(II)–(IV).

12. See *id.* §§ 1415(b)(6), 1415(f).

13. *Id.* § 1415(i)(2).

are: (1) whether parents have a right to appear in court without a lawyer;¹⁴ (2) whether parents are entitled to reimbursement for expert witness fees;¹⁵ (3) who must carry the burden of proof;¹⁶ (4) how specific an IEP must be;¹⁷ (5) what happens when parents win a change in placement at a due process hearing, but the school system appeals;¹⁸ (6) what rules govern the statute of limitations;¹⁹ and (7) when parents may obtain public payment for a private placement.²⁰

II. DO PARENTS HAVE A RIGHT TO APPEAR IN COURT WITHOUT A LAWYER?²¹

One of the obstacles facing parents in their disputes with school districts is the cost of hiring legal counsel. It is true that parents who prevail may receive an award of attorney's fees under the fee-shifting provisions of the IDEA,²² however, such an arrangement is no panacea. Parents must either find counsel willing to forego compensation if the case is lost or be willing and able to pay legal fees out of pocket in the hope of obtaining reimbursement months, perhaps years, later. Some parents have attempted to avoid the cost issue by the simple expedient of being their own advocates, even though they are not trained as lawyers.²³ Others have sought to avoid reliance on lawyers in the be-

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

17. See *infra* Part V.

18. See *infra* Part VI.

19. See *infra* Part VII.

20. See *infra* Part VIII.

21. See *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007) (holding that parents may appear in court on IDEA claims without counsel).

22. The IDEA provides: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability . . ." 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2006). In sharp contrast, a school system that prevails may obtain an award of attorney's fees only under two very narrow circumstances. First, a court may award attorney's fees against the attorney of a parent if the attorney "files a complaint . . . that is frivolous, unreasonable, or without foundation," or if the attorney "continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation . . ." *Id.* § 1415(i)(3)(B)(i)(II). Second, a court may award attorney's fees against the parent or his attorney "if the parent's complaint . . . was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." *Id.* § 1415(i)(3)(B)(i)(III).

23. See, e.g., *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 228 (3d Cir. 1998) (parents proceeding pro se could not afford an attorney nor find one willing to take the

lief, mistaken or not, that they would be more effective advocates than someone who does not know their child nearly so well.²⁴

For parents to appear without counsel has not been particularly controversial with respect to administrative proceedings.²⁵ In federal court, however, school systems across the country have sought to prevent non-attorney parents from moving forward without obtaining legal counsel.²⁶ The school systems argued that rights at issue in IDEA litigation belong to the *child*, not the parent,²⁷ and they invoked the common law rule that non-attorneys cannot litigate the interests of another.²⁸ These objections were, in part, a strategy by which school systems sought to win at the threshold without any judicial examination into the merits of a case. Yet, courts also were concerned that allowing laymen to argue IDEA cases would detract from the quality of representation and burden courts with the inefficiencies that often characterize pro se litigation.²⁹

Before the Supreme Court resolved the issue of parental representation in *Winkelman*,³⁰ the Fourth Circuit had not addressed the issue squarely. Yet, Fourth Circuit precedents were so aligned as to leave little doubt what the outcome would be if such a case had come before it. In *Doe v. Board of Education*, the Fourth Circuit held that “parents and children are distinct legal entities under the IDEA”³¹ and that a parent-attorney was representing his *child’s* interest—not his own—when he appeared in federal court in an IDEA case.³² The Fourth Circuit held that because the parent-attorney in *Doe* was representing the child, he was not sub-

case on a pro bono or contingent fee arrangement).

24. Cf. Erin Phillips, Note, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1806, 1808–09, 1814, 1816 (2008) (acknowledging that parents are effective representatives of their children’s general interests, but arguing that parents alone are not the best advocates for their children’s special education needs).

25. See, e.g., *Collinsgru*, 161 F.3d at 227, 233; *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 126 (2d Cir. 1998) (per curiam), *overruled on other grounds by Winkelman*, 550 U.S. at 518.

26. E.g., *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 755 (6th Cir. 2005); *Collinsgru*, 161 F.3d at 228. *Contra Maroni v. Pemi-Baker Reg’l Sch. Dist.*, 346 F.3d 247, 248 (1st Cir. 2003).

27. E.g., *Maroni*, 346 F.3d at 248; see, e.g., *Collinsgru*, 161 F.3d at 235–37.

28. See *Cavanaugh*, 409 F.3d at 756; *Collinsgru*, 161 F.3d at 232.

29. See *Maroni*, 346 F.3d at 258 (citing *Collinsgru*, 161 F.3d at 231).

30. *Winkelman*, 550 U.S. at 535 (“Parents enjoy rights under IDEA; and they are, as a result, entitled to prosecute IDEA claims on their own behalf.”).

31. 165 F.3d 260, 263 (4th Cir. 1998).

32. *Id.* at 262.

ject to the rule barring pro se lawyers from an award of attorney's fees (though it denied such an award on other grounds).³³ Of course, saying that the interests belong to the child rather than the parent does not necessarily mean that the parent cannot *represent* those interests. In a later case, however, the Fourth Circuit "join[ed] the vast majority of [its] sister circuits in holding that non-attorney parents generally *may not* litigate the claims of their minor children in federal court."³⁴

Among those circuits that had expressly addressed the issue before *Winkelman* was decided, there was a split of opinion with the great weight of authority ruling against parents. The First Circuit stood alone in allowing parents to represent their children's substantive claims.³⁵ The Second, Third, Sixth, Seventh, and Eleventh Circuits prohibited such representation, at least where the issue before the court involved something other than the procedural rights and reimbursement demands that the IDEA expressly vested in parents.³⁶ Even before *Winkelman*, the Sixth Circuit joined the previous four-circuit majority when it ruled

33. *Id.* at 262, 264–65; *accord* *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299, 300, 300 n.2 (4th Cir. 2005) (holding that a claim for reimbursement of private school costs belonged to the parents, not the child, and was barred by statute of limitations notwithstanding minority tolling rule).

34. *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395, 401 (4th Cir. 2005) (emphasis added). *Myers* involved a pledge of allegiance controversy, not an IDEA dispute; however, among the circuit decisions cited by *Myers* were two cases that applied the rule against parental representation to deny parents the right to represent their children in IDEA cases. *See id.* at 397, 401 (citing *Navin v. Park Ridge Sch. Dist.*, 64, 270 F.3d 1147, 1149 (7th Cir. 2001) (per curiam); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581 (11th Cir. 1997)).

35. *Compare* *Mosely v. Bd. of Educ.*, 434 F.3d 527, 532 (7th Cir. 2006) (holding a parent could not represent her child in an IDEA claim), *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756 (6th Cir. 2005) (holding a non-lawyer may not represent his child in an IDEA claim), *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 227 (3d Cir. 1998) (holding non-attorney parents cannot represent their children in federal court), *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998) (per curiam) (holding a parent could not represent his child's interest in court), *and Devine*, 121 F.3d at 581 (holding the IDEA does not allow an exception for non-attorneys to represent others' interest), *with Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 250 (1st Cir. 2003) (holding parents were "parties aggrieved" and could sue pro se on both procedural and substantive grounds).

36. *Collinsgru*, 161 F.3d at 227; *see Wenger*, 146 F.3d at 124, 126 (holding a non-attorney parent was only entitled to represent his own procedural rights under the IDEA, not his child's); *cf. Navin*, 270 F.3d at 1149 (stating the IDEA grants rights to parents, but non-lawyer appellant could not represent his son); *Devine*, 121 F.3d at 582 (holding non-attorney parents may participate in IDEA due process hearings, but may not represent their children in federal court proceedings).

that “non-lawyer parents may not represent their child in an action brought under the IDEA.”³⁷ It was this precedent the Sixth Circuit followed in the *Winkelman* case, holding in an unreported decision that the parents of Jacob Winkelman, a child with autism, could not appear in federal court to argue that the IEP offered by the school system was deficient.³⁸

Overruling the Sixth Circuit, the United States Supreme Court held that parents do not appear in IDEA cases as mere guardians of their children’s rights. Instead, “[the IDEA’s] text and structure[] creates in parents *an independent stake* not only in the procedures and costs implicated by [the IDEA] but also in the *substantive decisions* to be made.”³⁹ As the Court explained, “[the] IDEA does not differentiate . . . between the rights accorded to children and the rights accorded to parents.”⁴⁰ Given this analysis, the outcome was clear, because “there is no question that a party may represent his or her *own* interests in federal court without the aid of counsel.”⁴¹ Thus, the Sixth Circuit erred when it dismissed the Winkelmans’ case based on their refusal to obtain legal counsel.⁴²

As a result of the *Winkelman* decision, parents now have the right to appear in federal court and advocate for their child’s education under the IDEA without obtaining legal counsel.⁴³

37. *Cavanaugh*, 409 F.3d at 756 (citing *Navin*, 270 F.3d at 1149; *Collinsgru*, 161 F.3d at 227; *Wenger*, 146 F.3d at 124–25; *Devine*, 121 F.3d at 582).

38. See *Winkelman*, 550 U.S. at 521 (discussing the Sixth Circuit’s order dismissing the Winkelmans’ appeal unless the parents obtained counsel to represent Jacob).

39. *Id.* at 531 (emphasis added).

40. *Id.* While the Court was able to base its decision on the IDEA rather than on constitutional principles, it nevertheless noted that its decision was in keeping with “the liberty of parents and guardians to direct the upbringing and education of children under their control.” *Id.* at 529 (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925)).

41. *Id.* at 522 (emphasis added) (citing 28 U.S.C. § 1654 (2000)).

42. *Id.* at 535. Given the Supreme Court’s decision that the parents represent their *own* rights in an IDEA case, there was no need to address the Winkelmans’ alternative argument that they could represent their *child’s* rights without legal counsel. *Id.*

43. While *Winkelman* did not expressly address whether parents have a similar right in state court, the general state law rule is that individuals have a right to appear in court to argue their own cases. Because the *Winkelman* Court decided that the IDEA grants rights to parents—not just to their children—parents would seem to have the right to argue for those rights in state court.

III. ARE PARENTS ENTITLED TO REIMBURSEMENT FOR THEIR EXPERT WITNESS FEES?⁴⁴

As noted by Peter Wright, a nationally known advocate for children with disabilities, special education litigation is “a mixture of divorce, medical malpractice and wrongful death cases *It’s a battle of experts*, with intense emotions and both sides feeling betrayed by the other.”⁴⁵

Given the need for expert testimony, one might have thought that Congress would require school systems to reimburse parents’ expert witness fees when the parents prevail, just as it required school systems to pay the attorney’s fees of prevailing parents.⁴⁶ Indeed, many in Congress probably thought they did exactly that. In 1986, when Congress amended the IDEA, it did so by a vote that adopted a Conference Report reconciling two competing versions of the legislation (“1986 Conference Report”).⁴⁷ That report discusses the IDEA’s authorization for courts to award “attorneys’ fees as part of the costs.” As the report explains:

The conferees intend that the term “attorneys’ fees as part of the costs” include *reasonable expenses and fees of expert witnesses* and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian’s case in the action or proceeding.⁴⁸

Yet, in *Arlington Central*, decided by the Supreme Court in 2006, this argument persuaded only three Justices.⁴⁹ A majority of the

44. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 293–94 (2006) (holding that parents who prevail in litigation with school systems under the IDEA are not entitled to have their expert witness fees reimbursed by the school system).

45. Michael Alison Chandler, *Who Speaks Best for Matthew? Legal Fight Over Payment for Tutoring Fairfax Special-Ed Student Illustrates Growing Trend*, WASH. POST, Aug. 30, 2009, at C1 (emphasis added).

46. See *supra* note 22.

47. See H.R. REP. NO. 99-687 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.C.A.N. 1807.

48. H.R. REP. NO. 99-687, at 5, reprinted in 1986 U.S.C.C.A.N. 1807, 1808 (emphasis added).

49. See 548 U.S. at 308 (Breyer, J., joined by Stevens and Souter, JJ., dissenting). Before the decision in *Arlington Central*, there was a split in the circuits, with the Seventh, Eighth, and District of Columbia Circuits ruling that expert fees were not reimbursable and the Second Circuit ruling that expert fees were reimbursable. *Compare* T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 480–82 (7th Cir. 2003) (holding that expert fees are not recoverable), *Neosho R-V Sch. Dist. v. Clark ex rel. Clark*, 315 F.3d 1022, 1031–33 (8th Cir. 2003) (same), and *Goldring v. District of Columbia*, 416 F.3d 70, 73–77 (D.C. Cir. 2005) (same), *with* *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 335–39 (2d Cir. 2005) (holding that expert fees *are* recoverable). The Fourth Circuit was presented with this question on at least two occasions, but the court did not rule on the ques-

Court held that the fee-shifting provisions of the IDEA do not “authorize[] prevailing parents to recover fees for services rendered by experts in IDEA actions.”⁵⁰ In reaching this decision, the Court was guided by the fact that the IDEA is Spending Clause legislation, and thus, any conditions attached by Congress “must be set out unambiguously.”⁵¹ Analogizing the IDEA to a “contract” between the federal and state governments, the Court noted that states can only be bound by conditions that they accept “voluntarily and knowingly.”⁵² Thus, the Court explained:

[W]e must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees.⁵³

Deciding whether states have been given adequate notice of a condition of federal funding would seem to depend largely on the particular sources—for example, statutory text, regulations, court decisions, and legislative history—that state officials are expected to read and rely upon. In *Arlington Central*, the majority concluded that reading the statutory text would not give the requisite notice because the word “costs” is a term of art that generally does not include expert fees.⁵⁴ The majority also noted that the general federal statutes governing what may be taxed as court costs do not authorize recovery of expert witness fees.⁵⁵

Also key for the majority were rulings in two non-IDEA cases—*Crawford Fitting v. Gibbons*⁵⁶ and *West Virginia University Hospitals, Inc. v. Casey*.⁵⁷ In *Crawford Fitting*, petitioners urged the Court to rule that, by giving a district court authority to award “costs,” the Federal Rules of Civil Procedure effectively empowered the district court to circumvent congressional limitations

tion either time because the expert fee issue was rendered moot given the court’s disposition of other issues. See *DiBuo ex rel. DiBuo v. Bd. of Educ.*, 309 F.3d 184, 191–92 (4th Cir. 2002); *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 538 n.18 (4th Cir. 2002).

50. *Arlington Cent.*, 548 U.S. at 293–94.

51. *Id.* at 296 (internal quotation marks and citations omitted).

52. *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

53. *Id.*

54. *Id.* at 297 (internal quotation marks and citation omitted).

55. *Id.* at 297–98 (citing 28 U.S.C. §§ 1821(b), 1920 (2000)).

56. 482 U.S. 437 (1987).

57. 499 U.S. 83 (1991).

and award expenses not listed among the “costs” identified in 28 U.S.C. §§ 1821 and 1920.⁵⁸ The Court rejected this argument, finding the term “costs” as used in Rule 54(d) to be limited by the statutes.⁵⁹ In *Arlington Central*, the Court compared the argument it rejected in *Crawford Fitting* to the argument advanced by the parents under the IDEA, finding the two “very similar.”⁶⁰ Thus, the parents’ argument was rejected, too.

Similarly, in *Casey*, the Court rejected the argument that 42 U.S.C. § 1988—a fee-shifting statute often used in civil rights cases—authorizes a court to award prevailing parties their expert witness fees.⁶¹ In the eyes of the *Arlington Central* majority, the *Casey* decision was especially important because the operative language found in § 1988 was virtually identical to the operative language found in the IDEA.⁶² Thus, in order to rule for the parents, the Court “would have to . . . hold that the relevant language in the IDEA *unambiguously means* exactly the opposite of what the nearly identical language in 42 U.S.C. § 1988 was held to mean in *Casey*.”⁶³ Despite the legislative history suggesting that Congress may have intended exactly that result, the Court was unwilling to take this stance.⁶⁴ “[W]here everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough.”⁶⁵

58. *Crawford Fitting*, 482 U.S. at 441.

59. *Id.*

60. *Arlington Cent.*, 548 U.S. at 301 (stating that plaintiffs in both cases advanced an expansive reading of the term “costs” and rejecting both).

61. *Casey*, 499 U.S. at 102.

62. *Arlington Cent.*, 548 U.S. at 301–02. Compare 42 U.S.C. § 1988(b) (2006) (explaining that a court has discretion to award a prevailing party “a reasonable attorney’s fee as part of the costs”), with 20 U.S.C. § 1415(a)(i)(3)(B)(i) (2006) (“[T]he court, in its discretion, may award reasonable attorneys’ fees as part of the costs . . .”).

63. *Arlington Cent.*, 548 U.S. at 302.

64. The parents in *Arlington Central* argued that *Casey* supported their position because of a footnote discussing the 1986 Conference Report in terms that seemed to draw a distinction between the IDEA and § 1988. See *id.* In that footnote, *Casey* described the 1986 Conference Report as undermining the argument that costs under § 1988 included expert fees. 499 U.S. at 91–92 n.5 (“The specification would have been quite unnecessary if the ordinary meaning of the term [“costs”] included those elements. The statement is an *apparent effort to depart* from ordinary meaning and to define a term of art.”) (emphasis added). It was an effort that the *Arlington Central* majority found unavailing. 548 U.S. at 302.

65. *Arlington Cent.*, 548 U.S. at 304.

As the majority explained:

In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds. Here, in the face of the unambiguous text of the IDEA and the reasoning in *Crawford Fitting* and *Casey*, we cannot say that the legislative history on which respondents rely is sufficient to provide the requisite fair notice.⁶⁶

Although the majority ruled in favor of the school system, it did not note any disagreement with the dissent's view that "[i]n IDEA cases, experts are *necessary*."⁶⁷ Neither did the majority disagree with the dissent's observation about the potential impact of the Court's ruling:

Experts are also *expensive* The costs of experts may not make much of a dent in a school district's budget, as many of the experts they use in IDEA proceedings are already on the staff. . . . But to parents, the award of costs may matter enormously. Without potential reimbursement, parents may well lack the services of experts entirely.⁶⁸

As a result of this decision, parents will be discouraged from bringing complaints in cases—even highly meritorious cases—that they would have otherwise brought had the *Arlington Central* decision come down in their favor. For example, instead of paying a doctor for time spent testifying about why a child with autism needs to receive speech/language therapy over the summer, parents may find it cheaper to simply pay for the services themselves. Children of low-income parents, who do not have the money to pay for either the expert or the services, may simply have to do without needed services if the school system refuses to provide them.⁶⁹

66. *Id.*

67. *See id.* at 314 (Breyer, J., dissenting) (emphasis added).

68. *Id.* (emphasis added) (citations omitted); *see* Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 39–40 (1997) (discussing the findings of studies showing a correlation between the success of parents in challenging a school district's plan and their capacities to use effective procedures in due process hearings).

69. Such concerns are, of course, a matter for Congress to address. In 2007, legislation was introduced to add expert witness fees to the list of recoverable costs available to prevailing parents. *See* H.R. 4188, 110th Cong. (2007). Thus far, however, legislation has not passed. *See Group Sets Special Ed Agenda for New Congress*, SPECIAL EDUCATOR (Arlington, Va.), Dec. 5, 2008, at 3.

IV. WHO HAS THE BURDEN OF PROOF?⁷⁰

At first blush, allocating the burden of proof may seem relatively unimportant, at least in a civil case where a mere preponderance of evidence carries the day. A party wins by tipping the scales even slightly in his favor, and only when the evidence is perfectly balanced—in equipoise—does the burden of proof determine the outcome.⁷¹ Or so the theory goes. Yet, as a practical matter, hearing officers and courts do not always balance the evidence on the edge of a razor. Often, a far wider mental fulcrum is used, and the party bearing the burden will lose unless he can prove his case more decidedly than the textbook preponderance standard might seem to require.⁷² It was, perhaps, the recognition of this practical reality that led child advocates and the public school lobby to contest so vigorously the allocation of the burden of proof in *Schaffer v. Weast*.⁷³

The case arose in Montgomery County, Maryland and involved the question of whether the student's disability required him to be placed in small classes in order to learn.⁷⁴ The parents said he needed small classes; the school system said he did not.⁷⁵ Two years after litigation began, the school system changed its mind, agreed that the student needed small classes, and wrote a new IEP that placed him in a public program providing this accommodation. Even so, the school system continued its refusal to pay the private school costs incurred by the parents in the interim.⁷⁶ Thus, the lawsuit continued on a long, tortuous path that eventually led to the United States Supreme Court.

70. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005) (holding that, in the absence of any statutory rule allocating the burden of proof, the burden is allocated to the party seeking relief, typically the parents).

71. *See, e.g., id.*, at 58 (noting that shifting the burden of proof will have little impact on due process hearing dispositions because very few cases are in "evidentiary equipoise.").

72. *See, e.g.,* Christoph Engel, *Preponderance of the Evidence Versus Intime Conviction: A Behavioral Perspective on a Conflict Between American and Continental European Law*, 33 VT. L. REV. 435, 456-57 (2009) (discussing the polarizing effect of coherence shifts on jury deliberations and the resulting tendency of jurors to overvalue some evidence and undervalue other evidence).

73. *See Schaffer*, 546 U.S. at 54-55.

74. *Id.* The student was classified as "learning disabled, language-impaired and other health impaired." Brief of Petitioners at 8, *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (No. 04-698).

75. *Schaffer*, 546 U.S. at 54-55.

76. *Id.* at 55.

In a 1998 due process hearing, the Administrative Law Judge (“ALJ”) found the evidence to be in equipoise and, placing the burden of proof on the parents (who had sought the hearing), ruled in favor of the school system.⁷⁷ The parents sought federal court review, and in 2000 the district court reversed the ALJ on the burden of proof issue, placed the burden on the school system, and remanded the case for further proceedings.⁷⁸ With the burden of proof placed on the school system, the ALJ reaffirmed his view that the evidence was in equipoise and ruled for the parents on the merits—holding that the IEP proposed by the school district was inappropriate and that the program favored by the parents was appropriate.⁷⁹

Meanwhile, the school system had appealed the district court’s decision to the Fourth Circuit.⁸⁰ In 2001, without deciding the burden of proof issue, the court of appeals vacated the district court’s 2000 decision and remanded the case for further proceedings, including an appeal from the ALJ’s second decision on the merits.⁸¹

In 2002, the district court again placed the burden of proof on the school system, and it affirmed the ALJ’s 2000 ruling for the parents on the merits.⁸² The school system again appealed and, in 2004, a divided court of appeals reversed the district court on the burden of proof issue and once again imposed the burden on the parents.⁸³

The Fourth Circuit’s decision added to an already well-developed split among the circuits. Four circuits—the Fourth, Fifth, Sixth, and Tenth—placed the burden of proof on the parents,⁸⁴ while seven circuits—the First, Second, Third, Seventh, Eighth, Ninth, and the District of Columbia—placed the burden

77. *Id.*

78. *Brian S. v. Vance*, 86 F. Supp. 2d 538, 545 (D. Md. 2000).

79. *See Schaffer*, 546 U.S. at 55.

80. *Schaffer ex rel. Schaffer v. Vance*, 2 Fed. App’x 232, 233 (4th Cir. 2001) (per curiam).

81. *Schaffer*, 2 Fed. App’x at 233.

82. *Weast v. Schaffer*, 240 F. Supp. 2d 396, 348, 402 (D. Md. 2002).

83. *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 450 (4th Cir. 2004).

84. *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff’d in part and rev’d in part sub nom. Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 888 (1984); *Doe ex rel. Doe v. Bd. of Educ.*, 9 F.3d 455, 458 (6th Cir. 1993); *Johnson ex rel. Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990).

of proof on the school system.⁸⁵ In order to resolve the split, the Supreme Court granted certiorari.

Both sides of the case drew strong amicus support, with Virginia interests being divided. Among the amici supporting the parents were a large number of disability rights groups,⁸⁶ as well as a group of nine states led by Virginia, appearing through its attorney general.⁸⁷ Among the amici supporting the school system were the National School Boards Association, the National Education Association, a group of state school board associations led by the Virginia School Board Association, a group of three states (and one territory) led by Hawaii, and the United States, represented by the U.S. Solicitor General.⁸⁸ This involvement by the United States was somewhat odd because, when the case was first before the Fourth Circuit in 2001, the United States had appeared on the side of the parents.⁸⁹

The Supreme Court decided that, at least in the absence of a different state law rule, “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”⁹⁰ It is, of course, typically the parents who seek

85. *L.T. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (dictum); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *Carlisle Area Sch. Dist. v. Bess P. ex rel. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993); *Susan and Tom B. ex rel. Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir. 2002) (dictum); *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999); *E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Clyde K. ex rel. Ryan K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994); *McKenzie v. Smith ex rel. Smith*, 771 F.2d 1527, 1532 (D.C. Cir. 1985). *McKenzie* may be better viewed as the result of regulatory compliance rather than a judicial allocation of the burden of proof. *Id.*

86. Brief for the ARC of the United States et al. as Amici Curiae Supporting Petitioners, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (No. 04-698); Brief of Amici Curiae Council of Patent Attorneys and Advocates et al. Supporting Petitioners, *Schaffer*, 546 U.S. 49 (No. 04-698).

87. Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae in support of the Petitioners, *Schaffer*, 546 U.S. 49 (No. 04-698).

88. See Brief of the Council of the Great City School et al. as Amici Curiae in Support of Respondent, *Schaffer*, 546 U.S. 49 (No. 04-698); Brief Amici Curiae of the States of Hawaii et al. in Support of Respondents, *Schaffer*, 546 U.S. 49 (No. 04-698); Brief of Amicus Curiae National School Boards Association in Support of Respondents, *Schaffer*, 546 U.S. 49 (No. 04-698); Brief of Virginia School Boards Association et al. as Amici Curiae in Support of Respondents, *Schaffer*, 546 U.S. 49 (No. 04-698); Brief of the United States as Amicus Curiae Supporting Respondent, *Schaffer*, 546 U.S. 49 (No. 04-698).

89. See Brief for the United States as Amici Curiae Supporting Appellees, *Schaffer ex rel. Schaffer v. Vance*, 2 F. App'x 232 (4th Cir. 2001) (No. 00-1471).

90. *Schaffer*, 546 U.S. at 62.

such relief.⁹¹ Indeed, a school system is hardly going to challenge its own IEP, and it can typically have its way without litigation merely by withholding the services at issue.⁹² Even so, as the National School Boards Association has pointed out, school systems sometimes seek a due process hearing “where, for instance, the district wishes to resolve the appropriateness of a public placement proposal in the face of the unilateral withdrawal of a child by its parents from public school and placement in a private school.”⁹³ Presumably, under the *Schaffer* decision, the school system would have the burden in such a case.

On a collateral matter, the parents and several states asked the Court to make it clear that states always have the option to put the burden of proof on their school system regardless of which side seeks the hearing.⁹⁴ Although the Court declined to resolve this issue,⁹⁵ it is hard to imagine that such a state law would be invalid. After all, school systems are creatures of the states and, if the states wish them to bear a heavier burden than federal law requires, it would seem to be within the states’ prerogative to do so.⁹⁶

Since the decision in *Schaffer*, at least two states—New York and New Jersey—have enacted legislation placing the burden of proof on school systems.⁹⁷ The District of Columbia moved in the opposite direction, repealing its pre-*Schaffer* law that placed the burden of proof on its school system.⁹⁸ In Virginia, legislation

91. *Id.* at 53–54 (citing Brief of Petitioner-Appellant at 7, *Schaffer*, 546 U.S. 49 (No. 04-698)).

92. Allan G. Osborne, Jr., & Charles J. Russo, *The Burden of Proof in Special Education Hearings: Schaffer v. Weast*, 200 ED. L. REP. (West) 1, 10 (2005).

93. Brief of Amicus Curiae National School Board Association in Support of Respondents at 5 n.3, *Schaffer*, 546 U.S. 49 (No. 04-698) (citing *Krista P. v. Manhattan Sch. Dist.*, 212 F. Supp. 2d 873 (N.D. Ill. 2003); *Yates v. Charles County Bd. of Educ.*, 212 F. Supp. 2d 470 (D. Md. 2002)).

94. *Schaffer*, 516 U.S. at 61.

95. *Id.* at 61–62.

96. *See, e.g.*, *Gill ex rel. Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000) (citing *Bd. of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 198 (1981) (holding that the State may afford parents more rights and impose more duties on the school system than required by the IDEA)); *Johnson ex rel. Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1029 (10th Cir. 1990) (citing *Bd. of Educ. v. Diamond ex rel. Diamond*, 808 F.2d 987, 992 (3d Cir. 1986); *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 417, 420 (1st Cir. 1985)).

97. Christina A. Samuels, *Some States Shift IEP Burden of Proof to School Districts*, EDUCATION WEEK, Jan. 30, 2008, at 1, 13.

98. *Id.* at 13. In addition, several other states have placed the burden of proof on the

placing the “burden of persuasion” on school systems in due process hearings was introduced in 2006, but died in committee.⁹⁹

The burden of proof in a typical due process hearing is now clearly decided. When the parents pursue a hearing to challenge an IEP for a particular year, they will have the burden.¹⁰⁰ But some issues still remain. Suppose, for example, that the parents rejected the IEPs proposed by the school system for two years in a row, but, for strategic reasons, they challenge only the first year. The school system may want the adequacy of the other IEP decided as well, perhaps for its own strategic reasons or just to put the entire dispute behind it. If the school system successfully persuades the hearing officer to address the second IEP, which side should bear the burden of proof on that issue? There is no governing precedent on that point. However, the parents would have a strong argument under *Schaffer* that the school system would have the burden since it became “the party seeking relief” with respect to the second year.

V. HOW SPECIFIC MUST AN IEP BE?¹⁰¹

In drafting IEPs, school systems sometimes omit details that parents want to see included.¹⁰² For example, an IEP may state that the child will receive speech/language therapy but fail to state *how often* those services will be provided. The school system may contend that such an approach is educationally sound because it allows educators to increase or decrease the amount of therapy provided throughout the year, according to their professional assessments of the child’s changing needs.¹⁰³ On the other

school systems since *Schaffer*. See, e.g., DEL. CODE ANN. tit. 14, § 3140 (Repl. Vol. 2007); MINN. STAT. § 125A.091(16) (West 2008).

99. S.B. 241, Va. Gen. Assembly (Reg. Sess. 2006).

100. See *Schaffer*, 546 U.S. at 62.

101. An IEP lacking the requisite specificity may be deemed inadequate to provide a child with an FAPE. See, e.g., *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007) (holding that school system denied FAPE because it failed to identify which school the child would attend under proposed IEP); *M.S. v. Fairfax County Sch. Bd.*, No. 1:05cv1476, 2007 U.S. Dist. LEXIS 33735, at *39 (E.D. Va. May 8, 2007) (holding that a school system denied FAPE because it failed to specify the amount of one-on-one instruction the child would receive, when such instruction was found essential to a basic floor of opportunity).

102. See, e.g., *A.K.*, 484 F.3d at 676 (noting the IEP failed to identify which school the student would attend).

103. See, e.g., *M.S.*, 2007 U.S. Dist. LEXIS, at *35–36 (summarizing the school’s argument for a flexible and less defined IEP approach based on the student’s changing needs).

hand, parents may argue that the IDEA forbids school systems from making such important educational decisions unilaterally.¹⁰⁴ Moreover, vesting the school system with such discretion means that there will be no objective standard by which to judge the adequacy of the IEP or the school's compliance with its terms.

Both sides may have a point. The IDEA is very specific in identifying the content that an IEP must include. It must contain for example, "a statement of the special education and related services" as well as the "program modifications" that will be provided to the child.¹⁰⁵ The IEP must also include "the anticipated frequency, location and duration of . . . services and modifications."¹⁰⁶ Yet, it surely would be an unreasonable interpretation of the statute to argue that an IEP must contain *all* the details of a child's special education program, down to specific homework assignments and test questions.¹⁰⁷ Somewhere along the way, a line must be drawn.

Two recent decisions from Virginia have sought to draw such a line by indicating how much specificity an IEP must contain. The first decision, *A.K. ex rel. J.K. v. Alexandria City School Board*, deals with the naming of a particular school that a child will attend under the IEP.¹⁰⁸ The second, *M.S. v. Fairfax County School Board*, deals with the amount of one-on-one services a child will receive.¹⁰⁹

When the school system agrees that the child needs to be placed in a private school, its IEP team members are sometimes reluctant to specify *which* private school will be selected. In part, this may be because IEP team members do not always know whether a particular private school will be willing to accept the child. Yet, such a concern would not keep the IEP team from making a contingent decision or stating a preference. There is of-

104. See 20 U.S.C. § 1415(b)(3) (2006) (requiring a parent to receive written notice before a change or refusal to change an IEP is implemented by the school).

105. *Id.* § 1414(d)(1)(A)(i)(IV).

106. *Id.* § 1414(d)(1)(A)(i)(VII).

107. See *Bd. of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 198 (1981) (noting that the state must provide specialized education to disabled children but does not need to maximize every disabled child's potential).

108. See *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007) (holding that a school system denied FAPE because it failed to identify which school the child would attend under proposed IEP).

109. *M.S. v. Fairfax County Sch. Bd.*, No. 1:05cv 1476, 2007 U.S. Dist. LEXIS 33735, at *39 (E.D. Va. May 8, 2007) (holding that a school system denied a FAPE because it failed to specify the amount of one-on-one instruction the child would receive).

ten something else afoot. By instructing their IEP team members not to name a particular school, school administrators are able to keep tighter rein on a decision having a potentially significant effect on their budget.¹¹⁰ Moreover, the IDEA gives parents the right to challenge IEP decisions they do not like.¹¹¹ By keeping the choice of a school out of the IEP process, school systems may hope to avoid challenges to their decision making on an issue where parents are likely to have particularly strong opinions.

In *A.K.*, the child spent his eighth grade year in a private, out-of-state *residential* school pursuant to a settlement agreement between the parents and the Alexandria City Public Schools.¹¹² In preparing an IEP for the next school year, the school system announced that, in its opinion, the child could be educated in a private day school.¹¹³ Although school system representatives orally suggested two possible schools meeting that description, the mother did not believe that either of them would be appropriate.¹¹⁴ When the meeting ended, the school system had written the general placement category “private day school” in the IEP but failed to name any particular school in that document.¹¹⁵ Based on their objection to a private day school placement, the parents refused to sign the IEP.¹¹⁶ After further investigation of the private day schools that had been suggested by the school system, the parents requested a due process hearing and sought reimbursement for another year at the residential school.¹¹⁷

At the hearing, the parents did not dispute the idea that a private day school could, in theory, meet their child’s needs.¹¹⁸ Instead, they argued that the two schools suggested by the school system were inappropriate, and that the failure to name a partic-

110. Of course, under the IDEA, budgetary concerns are not *supposed* to enter into decisions about what a child needs for an appropriate education. But theory does not always match reality. As one court has observed: “Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system’s indifference to a child’s individual potential is a greater expense to society as a whole.” *Deal ex rel. Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864–65 (6th Cir. 2004).

111. GUERNSEY & KLARE, *supra* note 3, at 121–22.

112. *A.K.*, 484 F.3d at 676.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 677.

118. *Id.*

ular school in the IEP constituted a denial of FAPE.¹¹⁹ Losing at the initial hearing and on review in federal district court, the parents appealed to the Fourth Circuit where they prevailed.¹²⁰ In ruling for the parents, the Fourth Circuit did not address the district court's decision that the two suggested schools were both appropriate. Instead, the Fourth Circuit focused on the content of the IEP, holding that, "because it failed to identify a particular school" where the child would be placed, "the IEP was not reasonably calculated to enable [the child] to receive educational benefits."¹²¹ In other words, the failure to name a school in the IEP constituted a substantive denial of FAPE as a matter of law. The case was remanded for further proceedings on the parents' reimbursement claim.¹²²

While the decision was a clear victory for A.K.'s parents, the Fourth Circuit stopped short of extending its holding to *every* IEP. Instead, the court emphasized that it was *not* holding that "a school district could *never* offer a FAPE without identifying a particular location" for the services to be provided.¹²³ Leaving that issue open for another day, the court limited its holding to cases where "parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes."¹²⁴

As a result of A.K., there has been a substantial change in the way school systems in Virginia write IEPs. After analyzing the A.K. decision, the Virginia Department of Education ("VDOE") wrote to all local school systems in the Commonwealth, giving them the following guidance:

[O]ur Department's position is that A.K. applies to both private and public school sites *when the parent expresses skepticism and reservation or outright refusal, leading to potential dispute*. In such cases, the school division needs to provide a list of anticipated schools, offer some discussion regarding the advantages or disadvantages of each school, and clearly identify in the child's IEP an appropriate placement from the range of possibilities.¹²⁵

119. *Id.*

120. *Id.* at 674.

121. *Id.* at 681.

122. *Id.* at 682.

123. *Id.* (emphasis added).

124. *Id.* & n.12.

125. VDOE Instructional Memorandum from H. Douglas Cox to LEA Adm'rs of Special

While school systems still may prefer to omit the name of a particular school from an IEP, they now do so at the risk of having that IEP declared inappropriate, regardless of the excellence of the schools they actually may have had in mind.

In *M.S. v. Fairfax County School Board*, the issue was whether the IEP made sufficient provision for one-on-one instruction, which the evidence established the child needed.¹²⁶ The IEPs were written in such broad terms as to *allow* one-on-one instruction if the school later elected to provide it; however, the IEPs did not expressly *require* any one-on-one instruction much less specify the number of hours of such instruction that was to be provided.¹²⁷

The school system defended this “flexibility” on the theory that “an *opportunity* for one-on-one instruction was provided, and it is the *decision of the educators* how to best meet the identified goals.”¹²⁸ The school system argued, for example, that “under the IEPs, [the child] would receive speech therapy in a group setting and if a speech clinician ‘saw the need to pull him to do some one-on-one work, she would be able to do that.’”¹²⁹

The court rejected the school system’s approach. Noting that “individualized attention is essential to [this child’s] education,”¹³⁰ the court found that the “flexibility” written into the IEPs by the school system denied the child a “basic floor of opportunity.”¹³¹ As the court explained, “a flexible program that may provide some one-on-one instruction upon an additional determination of need, as provided by the [IEPs at issue], is insufficient.”¹³²

Courts following this precedent could readily invalidate IEPs that identify a *potential* service or setting, but do not *require* it, at least in cases where the court determines that the service or setting is necessary for FAPE. A similar result could befall IEPs that purport to require a service or setting but fail to specify the time devoted to such service or setting. Similarly, IEPs that *defer* deci-

Educ. (May 7, 2008).

126. No. 1:05cv1476 (JCC), 2007 U.S. Dist. LEXIS 33735, at *19–20, 22 (E.D. Va. May 8, 2007).

127. *Id.* at *33.

128. *Id.* (emphasis added).

129. *Id.* at *35.

130. *Id.*

131. *Id.* at *36.

132. *Id.* at *35.

sion making about a particular service until the school conducts an evaluation sometime after the IEP start date may also be vulnerable.

VI. WHAT HAPPENS WHEN PARENTS WIN A CHANGE OF PLACEMENT AT A DUE PROCESS HEARING, BUT THE SCHOOL SYSTEM APPEALS?¹³³

Under the IDEA, hearing officers are required to decide cases very quickly.¹³⁴ Not counting a brief preliminary period used for a resolution meeting and/or mediation session, no more than forty-five days may elapse between the time the due process request is filed and the time a hearing is held and decision rendered.¹³⁵ This requirement for expedited decision making reflects the fact that delays in providing an appropriate education can be very harmful to a child, perhaps irreparably so.¹³⁶

In order to balance the need for quick decision making against the need for judicial review, the IDEA and its implementing regulations—both federal and state—contain a “stay put” provision governing a child’s placement.¹³⁷ Rooted in the text of the IDEA, this rule has the effect of giving parents the benefit of a favorable ruling at the hearing officer level, *pendente lite*, while the school system appeals.¹³⁸ The IDEA states that, “during the pendency of any proceedings conducted pursuant to this section, *unless the State or local educational agency and the parents otherwise agree*, the child shall remain in the then-current educational placement”¹³⁹ Although the statute is not as explicit as some might like, it is a matter of long-standing judicial interpretation that,

133. *E.g.*, *County Sch. Bd. v. RT*, 433 F. Supp. 2d 692, 716 (E.D. Va. 2006) (holding that, at least as a matter of state regulations, the school system must pay for the parents’ placement on a *pendente lite* basis).

134. *See* 34 C.F.R. § 300.515 (2009).

135. *Id.*

136. *See, e.g.*, *RT*, 433 F. Supp. 2d at 696 & nn.4–5.

137. *See* 20 U.S.C. § 1415(j) (2006); *see also* 34 C.F.R. § 300.518; Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2872, 2947 (Apr. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-210(J)).

138. *See Honig v. Doe*, 484 U.S. 305, 324 (1988) (“Congress . . . provided for meaningful parental participation in all aspects of a child’s educational placement, and barred schools, through the stay put provision, from changing that placement over the parent’s objection until all review proceedings were completed.”) (discussing Education of All Handicapped Children Act).

139. 20 U.S.C. § 1415(j) (2006) (emphasis added).

when a hearing officer agrees with the parents' proposed change of placement, his decision is treated as an agreement between the state or locality and the parents for purposes § 1415(j).¹⁴⁰ This means that the school system is obligated to pay for the costs of the parents' proposed placement on an ongoing basis throughout the course of any appeal the school system pursues.

Before the *RT* case arose, both federal and Virginia regulations recognized these implications of the IDEA.¹⁴¹ According to the federal regulation:

If the decision of a hearing officer in a due process hearing conducted by the [State Education Agency] . . . agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of [the "stay put" provisions of the IDEA].¹⁴²

Virginia adopted a comparable provision:

If the decision of a hearing officer agrees with the child's parent or parents that a change of placement is appropriate, that placement shall be treated as an agreement between the local educational agency and the parent or parents for the purposes of maintaining the child's placement during the pendency of any administrative or judicial appeal proceeding.¹⁴³

140. See, e.g., *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 372 (1985); *Susquenita Sch. Dist. v. Raelle S. ex rel. Heidi S.*, 96 F.3d 78, 84 (3d Cir. 1996); *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 641 (9th Cir. 1990).

141. The United States District Court decided *County School Board v. RT* on June 14, 2006. 433 F. Supp. 2d 692 (E.D. Va. 2006). Virginia finalized special education regulations effective March 27, 2002, which included an agreement provision consonant with the judicial interpretations described above. See *Regulations Governing Special Education Programs for Children with Disabilities*, 18 Va. Reg. Regs. 1657, 1676-77 (Feb. 25, 2002) (codified at 8 VA. ADMIN. CODE § 20-80-76(E)(3) (2002)), *repealed by* 25 Va. Reg. Regs. 2872, 2947 (Apr. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-210(J)(3)). The federal government promulgated similar regulations in 2004. See 34 C.F.R. § 300.514 (2004). No substantive changes were made to these particular federal regulations when the Department of Education amended other IDEA procedures. See 70 Fed. Reg. 35,809, 35,874 (June 21, 2005).

142. 34 C.F.R. § 300.514(c) (2004). Slightly revised in 2006, the regulation now reads: If the hearing officer in a due process hearing conducted by the [state education agency] or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes [the "stay put" provisions of the IDEA].
34 C.F.R. § 300.519(d) (2009).

143. 8 VA. ADMIN. CODE § 20-80-76(E)(3) (2002) (*repealed*) (*emphasis added*). Effective July 7, 2009, Virginia adopted new rules governing special education; however, no substantive changes occurred for the regulation at issue. See *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, 25 Va. Reg. Regs. 2872,

Indeed, the Virginia regulations contained another provision, one even more emphatic than the federal:

If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change in placement is appropriate *In those cases, the hearing officer's order must be implemented while the case is being appealed.*¹⁴⁴

Despite the clear direction of both federal and state law, some staff members in the VDOE took the position that local school systems need not comply.¹⁴⁵ The VDOE staff members based this position on their reading of a 2003 federal court ruling in *Prince William County School Board v. Hallums*.¹⁴⁶ Such a reading of *Hallums* was, however, strained at best.¹⁴⁷ While *Hallums* denied the parents reimbursement for private school expenses, most of the district court's explanation for its decision dealt with the parents' failure to give the school system the requisite notice.¹⁴⁸ The *Hallums* court never addressed the regulations calling for pendent lite relief.¹⁴⁹ Yet, rightly or wrongly, soon after *Hallums* was decided, VDOE staff began negating federal and state law by telling local school systems that they need not comply with the "stay put" regulations that both governments had adopted.¹⁵⁰

2947 (Apr. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-210).

144. 8 VA. ADMIN. CODE § 20-80-76(O)(3) (2002) (repealed). The 2009 regulations do not affect the substance of this provision. See 25 Va. Reg. Regs. 2872, 2953 (Apr. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-210(T)(3)).

145. See *RT*, 433 F. Supp. 2d at 716-17 (discussing an affidavit from a VDOE staff member on which the school board mistakenly relied and finding that, whatever interim positions the staff of the VDOE had taken, the Department's official position is that compliance with state regulations will be enforced).

146. *Id.* (noting *Prince William County Sch. Bd. v. Hallums*, No. 02-1005-A, 2003 U.S. Dist. LEXIS 27233 (E.D. Va. Aug. 12, 2003)).

147. *Id.* at 717.

148. *Hallums*, 2003 U.S. Dist. LEXIS 27233, at *25-27.

149. Moreover, neither the United States Department of Education ("USDOE"), nor the VDOE was a party to *Hallums*. While the decision of a federal court of appeals would establish the "law of the circuit," there is no such thing as "law of the district." *E.g.*, *In re Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) ("District Court decisions do not establish the law of the circuit . . . nor, indeed, do they even establish the law of the district.") (citations omitted). The decision in *Hallums* bound the parties then before the court, but no one else. Thus, it was difficult to see why the VDOE would use the case to allow local school systems to escape the obligations owed parents under federal and state law.

150. *RT*, 433 F. Supp. 2d at 716-17.

The issue came to a head in 2006 in *County School Board v. RT*, a case involving the Henrico County Public Schools (“HCPS”) and RT, a young boy with autism.¹⁵¹ In late 2003, a state hearing officer ruled that the public school placement offered by HCPS was inappropriate and that the private placement chosen by the parents, the Faison School for Autism, was appropriate.¹⁵² Under § 1415(j) and its implementing regulations, HCPS was required to fund the private placement during the pendency of any appeal the school system might choose to pursue.¹⁵³ Yet, HCPS refused to do so.¹⁵⁴ Instead, it waited until almost a year later, then challenged the hearing officer’s decision in federal court.¹⁵⁵

HCPS was aided in its resistance to the law—both before and after the litigation began—by the VDOE, which had advised HCPS that it was free to withhold payment of tuition while the appeal was in progress and that the VDOE “could not compel the payment of the tuition under the stay-put provision of the state regulations.”¹⁵⁶ In support of its argument, HCPS brought to court an affidavit from a high-ranking VDOE employee.¹⁵⁷ As the litigation progressed, however, HCPS’s reliance on the VDOE collapsed. The court explained:

As briefing progressed in this case, and as the position of the School Board and the existence of [the VDOE employee’s] affidavit became known in the State and federal departments of education, it became obvious that [her] affidavit was neither authorized by, nor was the position of, the State Department of Education. To the contrary, the record clarified that, whatever interim positions the staff of the State Department of Education had taken based on their strained interpretation of the *Hallums* decision, the official position of the State Department of Education is that 8 VAC 20-80-76(E)(3) is valid and is being enforced by the State Department of Education.¹⁵⁸

With its ally at VDOE having been overruled by her superiors in the agency and by the Office of the Virginia Attorney General,¹⁵⁹ HCPS tried a new tactic by arguing that the federal regula-

151. *Id.* at 695.

152. *Id.* at 696.

153. *Id.* at 696, 715–16.

154. *Id.* at 697.

155. *Id.* at 696.

156. *Id.* at 716.

157. *See id.*

158. *Id.* at 717 (footnotes omitted).

159. *See id.* at 717 & n.42.

tion was invalid, basing a Spending Clause argument on the alleged absence of statutory clarity.¹⁶⁰ HCPS also argued that the state regulation must be ignored because it was adopted by the State Board of Education under the mistaken belief that the federal regulation was valid.¹⁶¹ Furthermore, the School Board argued that the First Circuit's opinion in *Town of Burlington v. Department of Education*¹⁶² precluded enforcement of the state regulations, in that the doctrine of "cooperative federalism" foreclosed a claim under state regulations."¹⁶³

The district court found a number of flaws with this approach, including the belatedness with which the argument was raised.¹⁶⁴ Not stopping there, however, the court went on to explain that, even if the federal regulation exceeded what was permitted under a Spending Clause analysis (a question not reached), the validity of the *state* regulation would not be affected because the IDEA "permits a State to impose regulations more stringent than the parallel federal regulations."¹⁶⁵ Finding that it had jurisdiction to consider a pendent state law claim, the court said "the State regulations are in full force and effect and, by their clear terms, the School Board is obligated to fund the Faison placement for RT during the period of judicial review of the State Hearing Officer's decision."¹⁶⁶

Following *RT*, VDOE staff ceased advising local school districts that they could disregard their pendent lite obligations under federal and state law.¹⁶⁷ Indeed, when Virginia adopted new special education regulations, effective July 7, 2009, those revised regulations contained virtually the same provisions that the federal court cited when it decided *RT* in favor of the parents.¹⁶⁸ Episodes where a school system disregards the "stay put" require-

160. *Id.* at 715.

161. *See id.* at 716.

162. 736 F.2d 773 (1st Cir. 1984).

163. *RT*, 433 F. Supp. 2d at 717.

164. *Id.*

165. *Id.*

166. *Id.* at 718.

167. This is in accordance with the holding of the court in *County School Board v. RT*. *Id.* at 718.

168. *Compare* Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2872, 2947, 2953 (Apr. 13, 2009) (codified at 8 VA. ADMIN. CODE §§ 20-81-210(J)(3), 20-81-210(T)(3) (2009)), *with* 8 VA. ADMIN. CODE §§ 20-80-76(E)(3), 20-80-76(O)(3) (2002) (repealed).

ments of the law, such as the one endured by RT and his family, are not likely to arise again.

VII. WHAT RULES GOVERN THE STATUTE OF LIMITATIONS IN IDEA CASES?

It is a familiar principle of law that a civil claim must be brought within a limitations period—typically defined by statute—or else the claim will be forever barred.¹⁶⁹ Claims brought under the IDEA are no exception, and the limitations period in Virginia has long been set at two years.¹⁷⁰ Originally, this was the result of court decisions that “borrowed” from a Virginia statute;¹⁷¹ however, the two-year limitation period was explicitly written into federal law as part of the IDEA amendments that took effect on July 1, 2005.¹⁷² The IDEA now provides:

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.¹⁷³

169. See, e.g., BLACK'S LAW DICTIONARY 1546 (9th ed. 2009) (defining “statute of limitations”).

170. VA. CODE ANN. § 8.01-248 (Repl. Vol. 2007 & Cum. Supp. 2009).

171. See, e.g., Manning *ex rel.* Manning v. Fairfax County Sch. Bd., 176 F.3d 235, 238 (4th Cir. 1999) (explaining that in the absence of a specific federal statute of limitations for IDEA claims, the court will look to the most analogous Virginia statute and selecting Virginia Code section 8.01-248); see also Schimmel *ex rel.* Schimmel v. Spillane, 819 F.2d 477, 482–83 (4th Cir. 1987) (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985) (same)).

172. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 1415(f)(3)(C), 118 Stat. 2647, 2722 (2004) (codified as amended at 20 U.S.C. § 1415(f)(3)(C) (2006)).

173. 20 U.S.C. § 1415(f)(3)(C). It should be mentioned that the IDEA also provides exceptions to the two-year limitation period:

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

Id. § 1415(f)(3)(D). The same 2005 IDEA amendments adopted a very short time frame for seeking judicial review of an unfavorable hearing officer decision. Under the new provisions: “The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter in such time as the State law allows.” *Id.* §

Yet, to specify the length of the limitations period does not address all relevant issues. It is also necessary to determine precisely when the two-year clock begins to run. To say that it begins to run from “the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint”¹⁷⁴ raises as many questions as it answers. Moreover, it is necessary to determine the circumstances under which the running of time is tolled, i.e., suspended.

A. *Starting the Clock*

In *R.R. ex rel. R. v. Fairfax County School Board*, the Fourth Circuit used language very similar to what was later adopted by Congress in the July 1, 2005 amendments.¹⁷⁵ The court held that a claim under the IDEA accrues “when the parents know of the injury or the event that is the basis for their claim.”¹⁷⁶ The court then identified two possible instances when a cause of action could be deemed to accrue. One possibility was when a parent “reject[s] the proposed IEP as inadequate,” while another was when the parent withdraws the student “from the public school system because it [is] at that time that [the student is] entitled to initiate

1415(i)(2)(B). The new language took effect on July 1, 2005, and for four years, the VDOE took the position that Virginia had just such an explicit time limitation, based on a 2002 VDOE regulation, which stated: “A decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court.” 8 VA. ADMIN. CODE § 20-80-76(O)(1) (2002) (emphasis added). By naming a one-year limitations period for filing a complaint in state court, but specifying *no* limitations period for filing a complaint in federal court, the 2002 regulation left the federal remedy to whatever limitations period other law might supply. Thus, after the new ninety-day federal language went into effect, Virginia hearing officer decisions typically provided that “[a] decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of the decision, or in a state circuit court within one year of the date of the decision.” See VDOE Dispute Resolution and Administrative Services Hearing Officer Decisions, <http://www.doe.virginia.gov/VDOE/dueproc/HearingOfficerDecisions/> (last visited Oct. 11, 2009) [hereinafter VDOE Dispute Resolution].

Effective July 7, 2009, however, Virginia has in place a new regulation that mirrors the federal law by requiring that complaints in state court also be filed within ninety days from the date of the hearing officer’s decision. The regulation states in pertinent part: “A decision by the special education hearing officer in any hearing . . . is final and binding unless the decision is appealed by a party in a state circuit court or a federal district court within 90 days of the issuance of the decision.” Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 25 Va. Reg. Regs. 2872, 2953 (Apr. 13, 2009) (to be codified at 8 VA. ADMIN. CODE § 20-81-210(T)(1)).

174. 20 U.S.C. § 1415(f)(3)(C).

175. Compare 338 F.3d 325, 332–33 (4th Cir. 2003), with 20 U.S.C. § 1415(b)(6)(B).

176. *Id.* at 332 (citation omitted).

a due process hearing or an administrative appeal.”¹⁷⁷ However, because the two-year statutory limitations period had expired for *R.R.* under either approach, the court was able to decide the case without deciding which approach is correct.¹⁷⁸

Arguably, the suggestion that one of the two named options applies was dictum. Certainly there are other possibilities, not mentioned by the court, which would have caused the time to run out before the claim was filed in *R.R.*, and which might be used in a future case as the accrual date for a cause of action. One such possibility would be when the objectionable IEP is initially proposed. Another possibility would be when the school year covered by the proposed IEP actually begins, on the theory that the start of school is when the school system is required to have an appropriate IEP in place.¹⁷⁹ Still another possibility might be when the student begins to receive private services, on the theory that there could be no reimbursement claim before there were actual expenses to reimburse.

While the Fourth Circuit has not decided the issue definitively, one federal district court and several hearing officers in Virginia have addressed the question of when an IDEA claim accrues.¹⁸⁰ While the federal court discussed only the two options expressly recognized by the Fourth Circuit in *R.R.*, several hearing officers have recognized an even earlier accrual date.

1. *M.S. v. Fairfax County School Board*

In *M.S. v. Fairfax County School Board*, the court stated that “a claim based on a denial of a FAPE accrues when a parent rejects a proposed IEP as inadequate or withdraws a child from school.”¹⁸¹ Having recognized that the Fourth Circuit named these two possible accrual dates, the court in *M.S.* went on to say that “[p]laintiffs’ claims based on FAPE denial therefore accrued, at the latest, on . . . the date when they rejected the proposed ninth

177. *Id.* at 333.

178. *Id.*

179. See 20 U.S.C. § 1414(d)(2)(A) (“At the beginning of each school year, [the school system] shall have in effect, for each child with a disability in the agency’s jurisdiction, an individualized education program . . .”).

180. See *infra* Parts VII.A.1.–2.

181. No. 1:05cv1476(JCC), 2006 U.S. Dist. LEXIS 53323, at *15 (E.D. Va. Mar. 20, 2006) (citing *R.R.*, 338 F.3d at 332–33) (emphasis added).

grade IEP.¹⁸² The court's syllogism would seem to imply that, in its view, the two choices named by *R.R.* comprise an exhaustive list of possible accrual dates. However, the court was not forced to choose between them because, in either event, the request for a due process hearing was timely filed.

2. Administrative Hearings¹⁸³

In *[Unnamed] Student v. [Unnamed] Public Schools I*, the hearing officer held that the *creation* of the allegedly improper IEP, rather than the date of the parents' *rejection* of the IEP, was the starting point for purposes of determining the running of the statute of limitations.¹⁸⁴ On that basis, the parents' claim was dismissed.¹⁸⁵

In *[Unnamed] Student v. [Unnamed] Public Schools II*, the hearing officer expressly rejected the parents' contention that the accrual date should have been when the IEP was rejected or when the parents withdrew the student from the public school based on alleged flaws in the IEP.¹⁸⁶ The hearing officer held the claim accrued earlier than the signing of the IEP because the parents' request for due process delineated *past* shortcomings by the school district, and it was the occurrence of these shortcomings that actually triggered the running of the statute of limitations.¹⁸⁷

In *[Unnamed] Student v. [Unnamed] Public Schools III*, the parents alleged that a previous hearing officer, who later recused himself, had determined that the operative date for accrual of the cause of action was the date of the student's admission applica-

182. *Id.*

183. Although VDOE publishes hearing officer decisions on its website, it does so only after redacting the name of the student and often, though not always, redacting the name of the school district. Thus, these cases can best be identified by reference to their case number and date. See VDOE Dispute Resolution *supra*, note 173. In light of this, the following adjudications are assigned roman numerals to delineate.

184. Commonwealth of Va. Dep't of Educ., Case No. 08-023, Due Process Hearing Order of Dismissal, at 4 (Nov. 2, 2007), available at <http://www.doe.virginia.gov/VDOE/dueproc/HearingOfficerDecisions/HOD-08-023.pdf>.

185. *Id.* at 6.

186. Commonwealth of Va. Dep't of Educ., Case No. 09-013, Public School Motion to Dismiss Decision, at 9 (Sept. 17, 2008), available at <http://www.doe.virginia.gov/VDOE/dueproc/HearingOfficerDecisions/HOD-09-013.pdf>.

187. *Id.* at 8–9.

tion and diagnostic assessment at the private school.¹⁸⁸ The second hearing officer who took the case disagreed and held that the date of accrual was when the allegedly faulty IEP was created.¹⁸⁹

While none of these hearing officer decisions were appealed, the discrepancy between the accrual dates they cite and the potential accrual dates noted in *R.R.* could easily provoke further litigation in a future case.

B. Tolling

It is a well-recognized principle that, even when a cause of action has accrued, a limitations period will not begin to run against a minor until he attains the age of majority or is otherwise emancipated.¹⁹⁰ Thus, if a minor receives a serious bodily injury when he is a newborn (a tort that carries a two-year limitations period), he will have until his twentieth birthday to file suit against his tortfeasor, thus preserving his claim for twenty years.¹⁹¹ Whether a minor's IDEA claims are similarly preserved by tolling until he attains his majority is an issue that has been bubbling beneath the surface—and sometimes erupting—over the past few years in Virginia. This should be an issue of particular concern to school systems because their obligation to provide special education services can begin as early as a child's second birthday.¹⁹² If the child's IDEA claims are preserved by tolling, then the school system could theoretically be sued for failure to provide FAPE until the child's twentieth birthday—a period of eighteen years. Indeed, by invoking the “minority tolling” doctrine, a young adult could conceivably claim that the entire course of his public school education constituted a denial of

188. Commonwealth of Va. Dep't of Educ., Case No. 06-068, Due Process Hearing, at 2, 5 (Oct. 10, 2006), available at <http://www.doe.virginia.gov/VDOE/dueproc/HearingOfficerDecisions/HOD-06-068.pdf>.

189. *Id.* at 21.

190. VA. CODE ANN. § 8.01-229(A)(2)(a) (Repl. Vol. 2007 & Cum. Supp. 2009).

191. See, e.g., *Perez ex rel. Perez v. Espinola*, 749 F. Supp. 732, 734 & n.3 (E.D. Va. 1990) (although mother's claim was time-barred, court noted that infant's claim was not barred until age of majority plus length of statute of limitations).

192. See VA. CODE ANN. § 22.1-213 (Repl. Vol. 2006); *id.* § 22.1-214(A) (Cum. Supp. 2009).

FAPE, thus entitling him to a very substantial remedy if he were to prevail.¹⁹³

In Virginia, such a nightmarish result for school systems is largely precluded—though not entirely eliminated—by the Fourth Circuit’s decision in *Sellers ex rel. Sellers v. School Board*, in which the court held that *monetary damages* are not available for violation of the IDEA.¹⁹⁴ Relief under the IDEA is almost entirely prospective, rather than retrospective: generally speaking, a successful litigant can obtain FAPE moving forward but cannot obtain relief for past deprivations.¹⁹⁵

However, there are two exceptions to this approach. First, courts are authorized to award reimbursement for the expenses of a private educational placement in certain circumstances.¹⁹⁶ It should go without saying that the costs of a private educational placement can be quite high.¹⁹⁷ Second, courts may also award “compensatory education,” which is defined as “educational services ordered by the court to be provided *prospectively* to compensate for a *past deficient program*.”¹⁹⁸ While compensatory education seems to involve services rather than monetary payment, providing appropriate services to an adult can be expensive as well.¹⁹⁹

With respect to reimbursement, school systems obtained significant protection against the minority tolling doctrine in *Emery v. Roanoke County School Board*.²⁰⁰ In *Emery*, a nine-year-old boy suffered a traumatic brain injury in 1991 and did not leave the hospital until late September of that year.²⁰¹ Given the student’s

193. School systems may retort that because the statute of limitations in the IDEA is cast in terms of when the “parent . . . knew or should have known about the alleged action that forms the basis of the complaint,” 20 U.S.C. § 1415(f)(3)(C) (2006) (emphasis added), the statute implicitly runs against the child as well. It seems unlikely, however, that courts will discard a doctrine as well entrenched in the law as the minority tolling doctrine based on a less-than-explicit statement of congressional intent.

194. 141 F.3d 524, 526–28 (4th Cir. 1998).

195. See *id.* at 527 (stating retroactive awards of damages are inconsistent with the structure of the IDEA).

196. See *id.*

197. See, e.g., *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 296 (4th Cir. 2005) (referring to private placement costs of over \$200,000 incurred in six months).

198. *G ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir. 2003) (emphasis added).

199. See, e.g., *id.* at 301 (referring to costs of more than \$30,000 for home therapy).

200. See 432 F.3d 294.

201. *Id.* at 296.

disabilities, the school system provided him with an IEP for the 1991–92 school year, first placing him in a public program and later in a private program at public expense.²⁰² The situation continued to deteriorate, and at the end of the 1991–92 school year, the private program expelled the student for behavior issues.²⁰³

The school system prepared no IEP for the following school year.²⁰⁴ Instead, the school system allegedly told the father that “he would have to find his son a placement on his own.”²⁰⁵ The father placed the student at a private facility for the bulk of the 1992–93 school year and paid for the placement with his own funds and insurance proceeds.²⁰⁶ It was the cost of the 1992–93 private placement that later became the subject of a due process hearing; however, years passed before any claim was filed.²⁰⁷ Then, sometime after the fall of 1999, the *student* filed for a due process hearing.²⁰⁸

There was little question that the school district failed to provide an IEP during the 1992–93 school year, but the court held that the district court properly dismissed the student’s reimbursement request.²⁰⁹ In so ruling, the court focused not on the minority tolling doctrine, but on the question of standing.²¹⁰ The court reasoned that any claim for reimbursement was the *father’s* not the student’s because it was the father’s insurance that had paid for student’s education.²¹¹ Yet the student, not the father, was the plaintiff in the case.²¹² Moreover, the court observed that the father’s cause of action was long expired, though it again avoided addressing when the cause of action actually began to run:

[T]he [father’s] cause of action . . . accrued, *at the very latest*, on June 2, 1993, at which point [the student] had completed his time [in the

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 296–97.

208. *See id.* at 297.

209. *See id.* at 296, 298.

210. *See id.* at 298–300.

211. *Id.* at 299–300.

212. *Id.* at 296.

private institution] without an IEP. The applicable statute of limitations gave his parents one year from this date [now two years] to request a due process hearing.²¹³

School systems are, however, not out of the woods entirely. While monetary damages are not available under the IDEA, such relief is available for violations of the Americans with Disabilities Act (“ADA”) and § 504 of the Rehabilitation Act.²¹⁴ Moreover, at least one court has expressly held that the minority tolling doctrine applies to ADA and Rehabilitation Act claims.²¹⁵ Even under the IDEA, circumstances may be envisioned in which—unlike *Emery*—payment for years of private placement came from funds belonging to the child, thus entitling the child to reimbursement.²¹⁶

With respect to compensatory education, there appear to be no reported cases in Virginia where an adult has sought services for the denial of FAPE and where the minority tolling doctrine was implicated. Indeed, there is a dearth of court cases involving compensatory education,²¹⁷ making this a potentially fertile ground for future litigation.

213. *Id.* at 300 n.2 (emphasis added). Virginia’s “catch-all” statute of limitations was amended to provide for a two-year limitations period for claims “accruing on or after July 1, 1995.” VA. CODE ANN. § 8.01-248 (Repl. Vol. 2007 & Cum. Supp. 2009). Because the father’s claim in *Emery* accrued before that date, it was governed by the old, one-year statute. *See* VA. CODE ANN. § 8.01-248 (Repl. Vol. 1992). By holding out the possibility that the cause of action did not arise until the end of the school year, *Emery* lends credence to the view that the decision in *R.R.* was not intended to constitute an exhaustive list of possible accrual dates, at least where no IEP is proposed. *See* *R.R. v. Fairfax County Sch. Bd.*, 338 F.3d 325, 332–33 (4th Cir. 2003).

214. 42 U.S.C. § 12133 (2006); 29 U.S.C. § 794a (2006).

215. *M.S. v. Fairfax County Sch. Bd.*, No. 1:05cv1476 (JCC), 2006 U.S. Dist. LEXIS 53323, at *16 (E.D. Va. Mar. 20, 2006).

216. One example expressly recognized by the *Emery* court would be where “the expenses paid to the private school through [the student’s] insurance plan diminished the amount of future benefits she could receive from it.” 432 F.3d at 300 (distinguishing the facts of *Emery* from *Shook ex rel. Shook v. Gaston County Bd. of Educ.*, 882 F.2d 119, 122–23 (4th Cir. 1989)).

217. *But see* *Hogan v. Fairfax County Sch. Bd.*, No. 1:08cv250 (JCC), 2009 U.S. Dist. LEXIS 67773, at *50 (E.D. Va. Aug. 3, 2009) (awarding eight weeks of compensatory education plus partial reimbursement for tuition where school system failed to provide an IEP for an entire school year and where father used private educational services for a portion of the year).

VIII. WHEN MAY PARENTS OBTAIN PUBLIC PAYMENT FOR A PRIVATE PLACEMENT?²¹⁸

It has long been the law that, under certain circumstances, parents may require a school system to pay for the costs of private education for a child with disabilities. The issue arose in *School Committee of Burlington v. Massachusetts Department of Education*, which held that a court may order such payment as part of its statutory authorization to “grant such relief as the court determines is appropriate.”²¹⁹

Several years later, in 1997, Congress adopted amendments to the IDEA.²²⁰ Among those amendments was a provision which, depending on one’s point of view, merely codified *Burlington* or else limited the ability of courts to award reimbursement for a private placement. Under the latest version of this provision, if the child has

*previously received special education and related services under the authority of a public agency . . . a court or a hearing officer may require the agency to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available.*²²¹

In *Forest Grove School District v. T.A.*, after the school district found the student in question ineligible for special education under the IDEA and refused to provide an IEP, his parents removed him from the public school and placed him in a private academy.²²² A hearing officer found the child eligible for special education and awarded the parents reimbursement for private school tuition; however, the district court set aside the award.²²³ Reading the 1997 amendment as a limitation on its authority, the district court held that the IDEA prohibited reimbursement unless a student has “previously received special education and related ser-

218. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. ___, 129 S. Ct. 2484, 2488 (2009) (holding that a child need not have received special education or related services from a public school system in order to be eligible for public payment for a private placement).

219. 471 U.S. 359, 369 (1985) (quoting 20 U.S.C. § 1415(i)(2)(C)(iii) (2006) (previously 20 U.S.C. § 1415(e)(2))).

220. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1998) (codified as amended at 20 U.S.C. §§ 1400–1482 (2006)).

221. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006) (emphasis added).

222. 557 U.S. at ___, 129 S. Ct. at 2488–89.

223. *Id.* at ___, 129 S. Ct. at 2489.

vices under the [school's] authority."²²⁴ The Ninth Circuit reversed, holding that courts could still grant reimbursement despite a lack of previous services.²²⁵

The Supreme Court "granted certiorari to determine whether § 1412(a)(10)(C) establishes a categorical bar to tuition reimbursement for students who have not previously received special-education services under the authority of a public education agency."²²⁶ In deciding the question, the Court held that its previous decisions in *Burlington*, and *Florence County School District Four v. Carter*²²⁷ controlled the outcome.²²⁸ Although based on an earlier version of the IDEA, *Burlington* and *Carter* made clear that under the IDEA a court has the authority to "grant such relief as the court determines is appropriate."²²⁹ This "grant of authority includes 'the power to order school authorities to reimburse parents for their expenditures on private special-education [sic] services if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.'"²³⁰

The Court held that the 1997 amendments to the IDEA did not abrogate this broad grant of authority because those amendments "do not expressly prohibit reimbursement under the circumstances of this case, and the District offers no evidence that Congress intended to supersede . . . *Burlington* and *Carter*."²³¹ Furthermore, the school district's interpretation was inconsistent with the IDEA's purpose of "ensur[ing] that all children with disabilities have available to them a [FAPE] that emphasizes special education . . . designed to meet their unique needs,"²³² and it would have the irrational result of providing a remedy to students whose public schools offer inadequate special education

224. *Forest Grove Sch. Dist. v. T.A.*, No. CV 04-331-MO, 2005 WL 6331233, at *11 (D. Or. May 11, 2005).

225. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1087–88 (9th Cir. 2008).

226. *Forest Grove*, 557 U.S. at ___, 129 S. Ct. at 2490. The Court had granted certiorari to address this same question in an earlier case; however, Justice Kennedy recused himself from that case, and the judgment of the Second Circuit ruling in favor of the parents was affirmed without opinion by an equally divided vote. See *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007) (per curiam).

227. 510 U.S. 7 (1993).

228. *Forest Grove*, 557 U.S. at ___, 129 S. Ct. at 2496.

229. *Id.* at ___, 129 S. Ct. at 2490 (quoting 20 U.S.C. § 1415(i)(2)(C)(iii) (2006)).

230. *Id.* at ___, 129 S. Ct. at 2491 (quoting *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985)).

231. *Id.* at ___, 129 S. Ct. at 2492.

232. *Id.* at ___, 129 S. Ct. at 2494 (citing 20 U.S.C. § 1400(d)(1)(A)).

services while refusing a remedy to students whose schools deny access to such services altogether.

Of course, parents who seek reimbursement for a private placement still must show “that the public placement violated IDEA and the private school placement was proper under the Act.”²³³ “And even then courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant—for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school.”²³⁴ What is key about *Forest Grove* is that the Supreme Court reaffirmed the plenary equity powers granted to courts under the IDEA to provide any and all “appropriate” relief to children and parents denied a FAPE by public schools, and it confirmed that such powers remain available to courts under the current version of the IDEA.

IX. CONCLUSION

Recent years have produced a mixed collection of legal precedents in the special education arena. Parents have won cases giving them the right to appear in court without an attorney. They have also won the right to demand more specificity in the IEPs proposed by school systems, as well as the right to obtain public payment for a private placement, in certain cases, without first having to receive services from the public school system. In a hard fought contest, they have forced public school systems—and the VDOE—to abide by the “stay put” provisions of federal and state law.

School systems have won important decisions as well. These cases have established a rule that parents are not entitled to compensation for their expert witness expenses, even when the parents prevail. Schools won the burden of proof issue. By imposing the burden on the party seeking the due process hearing, the burden is now, as a practical matter, almost always imposed on the parents. The statute of limitations, while still subject to future litigation, has been used by some hearing officers to foreclose

233. *Id.* at ___, 129 S. Ct. at 2496 (citing *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 15 (1993)).

234. *Id.*

parents' claims sooner than one might have expected based on a reading of Fourth Circuit case law.

The playing field, while not level, is one on which hardier parents can compete. With good facts, good representation, and perhaps a bit of good luck, parents can prevail against school systems that fail to offer the free appropriate public education envisioned by Congress when it enacted the IDEA's predecessor thirty-five years ago.