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## Disability Law - Susquenita School District v. Raelee S., Pendent Placement and Financial Responsibility under the Individuals with Disabilities Education Act: The Third Circuit's Extension of Burlington

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1997]

DISABILITY LAW—*SUSQUENITA SCHOOL DISTRICT v. RAELEE S.*,  
PENDENT PLACEMENT AND FINANCIAL RESPONSIBILITY  
UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION  
ACT: THE THIRD CIRCUIT'S EXTENSION OF *BURLINGTON*

I. INTRODUCTION

In 1975, after failing for decades to provide educational opportunities to Americans with disabilities, Congress finally acknowledged the educational rights of those individuals with the passage of the Education for All Handicapped Children Act of 1975 (EAHCA).<sup>1</sup> Although the EAHCA sought to guarantee a free appropriate public education to persons with

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1. See S. REP. NO. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433 ("This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity. . . . Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue."); see also *Hearings on H.R. 5, The IDEA Improvement Act of 1997, Before the Subcomm. on Early Childhood, Youth and Families of the Congressional Comm. on Education and the Workforce*, 104th Cong. 22-23 (1997) [hereinafter *Hearings*] (statement of Judith E. Heumann, Assistant Secretary, Office of Special Education and Rehabilitative Services) (stating that Congress enacted Education for All Handicapped Children Act of 1975 (EAHCA) to assist states in meeting their constitutional obligation to ensure equal protection of law for children with disabilities and their right to free appropriate public education ("FAPE") and noting further that before EAHCA's enactment, over 4.5 million children with disabilities were receiving either inappropriate or no educational services); MILTON BUDOFF ET AL., *DUE PROCESS IN SPECIAL EDUCATION: ON GOING TO A HEARING* 4-6 (1982) (noting that there was exclusion of "slow" children from classroom before reform of educational legislation); THOMAS G. GUERNSEY & KATHE KLARE, *SPECIAL EDUCATION LAW* 1 (1993) (stating that EAHCA was landmark legislation designed to assure that children with disabilities received FAPE); ALLAN G. OSBORNE, JR., *LEGAL ISSUES IN SPECIAL EDUCATION* 3-12 (1996) (detailing prior exclusionary policies of educators, legislators and courts toward students with disabilities and EAHCA requirement that states provide FAPE to all students with disabilities); STEPHEN B. THOMAS & CHARLES J. RUSSO, *SPECIAL EDUCATION LAW: ISSUES & IMPLICATIONS FOR THE '90s* 1-10 (1995) (discussing exclusion of students with disabilities from mainstream educational systems and enactment of EAHCA and noting historical neglect of individuals with disabilities by government); ROBERTA WEINER & MAGGIE HUME, . . . *AND EDUCATION FOR ALL, PUBLIC POLICY AND HANDICAPPED CHILDREN* 15 (2d ed. 1987) (noting Senator Robert Stafford's comments during Senate debate over EAHCA: "We can all agree that all handicapped children should be receiving an education . . . [but t]he fact is, our agreeing on it does not make it the case. There are millions of [handicapped] children . . . who are receiving no services at all."); Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretations of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 355-64 (1990) (discussing prior legal exclusion of children with disabilities from public education and congressional enactment of EAHCA as response thereto); Heather J. Russell, Note, *Florence County School District Four v. Carter: A Good "IDEA"; Suggestions for Implementing the Carter Decision and Improving the Individuals with Disabilities Education Act*, 45 AM. U. L. REV. 1479, 1480-81 (1996) (stating that EAHCA was landmark legislation and marked victory for individuals with disabilities who had earlier been denied access to free appropriate education).

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disabilities, concerns about parental ability to assume financial responsibility for special education, as well as the appropriateness of that education, still exist today.<sup>2</sup> The EAHCA was subsequently amended and renamed

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The legislative history of the EAHCA discussed the government's prior failure to provide educational services and opportunities to individuals with disabilities. See S. REP. NO. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433 (maintaining that government failed to treat children with and without disabilities equally). Additionally, the legislative history recognized the need for legislation to ensure the rights of individuals with disabilities to FAPE. See *id.* (stating that "Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity"). For the definition of a FAPE under the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400-1485 (1994), see *infra* note 58 and accompanying text. The legislative history states that

[o]ne need only to look at public residential institutions to find thousands of persons [with disabilities] whose families are no longer able to care for them and who themselves have received no educational services. . . . This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.

S. REP. NO. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433.

2. See *Susquenita Sch. Dist. v. Raelle S.*, 96 F.3d 78, 86 (3d Cir. 1996) (stating that child's receipt of FAPE should not depend on parents' ability to front costs of private educational placement); see also *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985) (noting that parents who find that special education offered to their child by school district is inappropriate may, if they have means, pay for placement they consider appropriate); *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 395 (3d Cir.) (noting that financial hardship forced parents to withdraw their child from what court later determined to be appropriate educational setting), *cert. denied*, 117 S. Ct. 176 (1996); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 865 (3d Cir. 1996) (concluding that IDEA's stay put provision requires school districts to finance appropriate educational placement and that cutting off funds would be change in placement prohibited by IDEA); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 536 (3d Cir. 1995) (stating that "student's access to a remedy [for deprivation of FAPE] should not depend on the parents' ability to 'front' the costs of the education and sue for reimbursement" (quoting *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986))), *cert. denied*, 116 S. Ct. 1419 (1996); *Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990) (stating that Congress intended child to receive FAPE and that this should not depend on parents' ability to "front" its costs" (quoting *Miener*, 800 F.2d at 753)); *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988) (stating that child should not be deprived of FAPE because parents could not afford appropriate private education), *vacated on other grounds*, 492 U.S. 902 (1989); *Board of Educ. v. Diamond*, 808 F.2d 987, 989 (3d Cir. 1986) (noting financial hardship forced parents to remove their child from what court held to be appropriate educational setting); *Miener*, 800 F.2d at 753 (noting that father was unable to pay for private placement and that school district failed to offer FAPE during that period and concluding that child's right to FAPE should not turn on parents' ability to "front" its costs); *Delaware County Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206, 1222 (E.D. Pa. 1993) (stating that law should not force parents to predict their financial ability to pay for child's private education in event that decision finding parents' private school placement of child was appropriate is overturned); *Lake Erie Inst. of Rehabilitation v. Marion County*, 798 F. Supp. 262, 263 (W.D. Pa. 1992) (noting father's insufficient financial assets to pay

the Individuals with Disabilities Education Act (IDEA).<sup>3</sup> The IDEA contains procedural mechanisms and safeguards which are designed to ensure that each child under the IDEA receives an education tailored to his or her special needs at the expense of the school district.<sup>4</sup> Despite these provisions, disputes arise between parents and school districts as to the appropriateness of the educational plan or placement and the financial responsibility therefor.<sup>5</sup>

Such a dispute was the focus of the United States Court of Appeals for the Third Circuit in *Susquenita School District v. Raelee S.*<sup>6</sup> The court broke new ground for the rights of disabled students by extending the Supreme Court's rationale in *School Committee of Burlington v. Department of Education*<sup>7</sup> to awards of prospective tuition reimbursement.<sup>8</sup> Prospective tuition reimbursement imposes financial responsibility on school districts for pendent placements during litigation as soon as an administrative appeals panel or judicial decision vindicates the parents' opposition to the individualized education program (IEP) provided by the school district.<sup>9</sup> The *Burlington* Court only established the right to tuition reimbursement *after* a final decision regarding the appropriateness of the IEP had been ren-

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for private educational setting in suit seeking tuition reimbursement for that placement).

3. 20 U.S.C. §§ 1400-1485 (1994).

4. *See id.* § 1400(c) (stipulating that purpose of IDEA is to ensure that all children with disabilities have FAPE available which emphasizes education and services that meet child's unique needs); *see also Burlington*, 471 U.S. at 367 (same).

5. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 9 (1993) (resolving whether parents' placement of child in private school, which was not state approved, is appropriate placement under IDEA and who must finance such placement); *Burlington*, 471 U.S. at 367 (deciding appropriateness of educational setting offered by school district versus parents' private school placement of child and financial responsibility for private placement); *Susquenita*, 96 F.3d at 81 (stating that court was asked to determine appropriate pendent placement of child and who should pay for that placement); *Drinker*, 78 F.3d at 865 (deciding child's pendent placement during course of litigation); *Bayonne Bd. of Educ. v. R.S.*, 954 F. Supp. 933, 941 (D.N.J. 1997) (deciding child's pendent placement and financial responsibility for that placement); Ralph V. Seep, Annotation, *Construction of "Stay-Put" Provision of Education of the Handicapped Act (20 U.S.C.A. § 1415(3)), That Handicapped Child Shall Remain in Current Educational Placement Pending Proceedings Conducted Under Section*, 103 A.L.R. FED. 120 (1991) (noting that courts have been confronted with numerous cases regarding pendent placements).

For a further discussion of the Supreme Court's holding in *Burlington*, *see infra* notes 77-101 and accompanying text.

6. 96 F.3d 78 (3d Cir. 1996).

7. 471 U.S. 359 (1985).

8. *See Susquenita*, 96 F.3d at 85 (stating rationale of *Burlington* should not be confined to awards of retroactive tuition reimbursement, but should be extended to awards of prospective tuition reimbursement).

9. *See id.* at 85-86. (stating that policies underlying IDEA require imposition of financial responsibility upon school district when there has been administrative or judicial decision establishing appropriateness of placement advocated by parents and, thus, inappropriateness of school district's proposed individualized education program).

dered, otherwise known as retroactive tuition reimbursement.<sup>10</sup> The Supreme Court has remained silent about whether prospective tuition reimbursement—tuition payable prior to the outcome of litigation—is an available remedy under the IDEA.<sup>11</sup> Nonetheless, the Third Circuit in *Susquenita* found the policy rationale expressed in *Burlington* to warrant the creation of such relief.<sup>12</sup>

The issue of retroactive versus prospective tuition reimbursement was one of first impression for the Third Circuit.<sup>13</sup> Consequently, this Casebrief focuses on the policy behind retroactive tuition reimbursement awards under the IDEA as the foundation for awarding tuition payments prior to the outcome of litigation. Part II discusses the history of special education in the United States and the enactment of the IDEA.<sup>14</sup> Part III focuses on the procedural safeguards established to protect the rights of individuals with disabilities under the IDEA and the case law establishing the remedies available for IDEA violations.<sup>15</sup> Part IV discusses the Third Circuit's analysis of the IDEA and its remedies in *Susquenita*.<sup>16</sup> Finally, Part V analyzes the decision's impact on persons with disabilities and their legal counsel and comments on the potential problems created by the Third Circuit's decision.<sup>17</sup>

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10. See *Burlington*, 471 U.S. at 369-70 (concluding that Congress intended to offer retroactive tuition reimbursement as remedy when school district's individualized education program (IEP) is deemed inappropriate and parents' private school placement of child is found to be appropriate educational placement for child).

11. See *Susquenita*, 96 F.3d at 84-85, 87 n.10 (stating that *Burlington* dealt with retroactive tuition reimbursement and, thus, was not binding precedent in this case and noting further that at least one other court of appeals has addressed issue of prospective tuition payments under IDEA).

12. See *id.* at 86 ("We are convinced that the concerns cited by the Court in support of retroactive reimbursement favor including the interim assessment of financial responsibility in the range of relief available under the IDEA.").

13. See *id.* at 84, 87 n.10 (stating that *Burlington* was not controlling precedent and noting that United States Court of Appeals for the Ninth Circuit was only other court of appeals to have addressed issue of new pendent placement and financial responsibility).

14. For a discussion of the history of special education in the United States before the enactment of the IDEA, see *infra* notes 18-57 and accompanying text.

15. For a discussion of IDEA's procedural safeguards designed to protect the educational rights of individuals with disabilities and remedies available under the IDEA, see *infra* notes 58-154 and accompanying text.

16. For a discussion of the United States Court of Appeals for the Third Circuit's analysis of awards of prospective tuition reimbursement, see *infra* notes 155-228 and accompanying text.

17. For a discussion of the questions left unanswered by the Third Circuit's decision in *Susquenita*, see *infra* notes 229-40 and accompanying text.

## II. BACKGROUND OF THE IDEA

### A. *The Civil Rights Movement and Brown v. Board of Education Set the Stage for the Rights of Children with Disabilities*

In the House Hearings on the IDEA, one government official recalled her own personal experiences with educational discrimination:

I was a child in the 1950's and 60's, too early to benefit from the IDEA. I was one of more than one million disabled children who were being denied the right to go to school.

I contracted polio . . . [and w]hen I was five years old and ready for kindergarten, our . . . public school would not take me because I used a wheelchair. Instead, the school system sent a tutor to my house twice a week. I received exactly two and half hours of education a week!

Throughout my years as a student, the school system seemed to continually send me the message that my prospects were limited and my future unimportant. But my mother and father . . . always believed in their hearts that I had a right to an education . . . .

However, since there was no law to guarantee that right, my parents soon learned they had to fight for my right to achieve. . . .

My parents and hundreds of thousands of others waged a fight to open the school house doors for their disabled children.<sup>18</sup>

Stories such as that of Judith Herman, Assistant Secretary for Secretary of Special Education and Rehabilitative Services were common among the disabled prior to the establishment of their educational rights.<sup>19</sup> The Civil

18. *Hearings*, *supra* note 1, at 23-24 (statement of Judith E. Heumann, Assistant Secretary, Office of Special Education and Rehabilitative Services) (recounting her own educational experiences prior to enactment of EAHCA).

19. *See* S. REP. NO. 94-168, at 41 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1464 (recognizing inadequate educational services provided to handicapped children and that parents were forced to seek such services outside of public school system at substantial cost).

Before the federal courts and Congress required school districts to provide a FAPE to children with disabilities, these children were excluded from public schools. *See* BUDOFF ET AL., *supra* note 1, at 5-6 (discussing exclusion of children with disabilities from public schools); OSBORNE, *supra* note 1, at 1, 3 (same); THOMAS & RUSSO, *supra* note 1, at 3-6 (same).

Children were often excluded because educators were seldom willing to adapt educational programs to meet the special needs of children with disabilities. *See* THOMAS & RUSSO, *supra* note 1, at 3 (noting that school officials even went so far as to restrict admission of students with disabilities or have them expelled). These exclusions resulted because behavior that was in fact a manifestation of a child's disability was instead regarded as misbehavior requiring punishment. *See id.* at 4 (noting that historically, educators punished students who misbehaved without examining causes of child's misbehavior). Two cases provide glaring examples of

Rights movement and the Supreme Court's decision in *Brown v. Board of Education*,<sup>20</sup> however, inadvertently provided persons with disabilities with the constitutional foundation for fighting their wholesale exclusion from public schools.<sup>21</sup> In *Brown*, the Supreme Court held that "where [a] state

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these exclusions. See *Watson v. City of Cambridge*, 32 N.E. 864, 864 (Mass. 1893) (affirming expulsion of child with disability from school); *State ex rel. Beattie v. Board of Educ.*, 172 N.W. 153, 154 (Wis. 1919) (same). In *Watson*, the court upheld the suspension from public school because the child was "so weak in mind as not to derive any marked benefit from instruction" and "was 'troublesome to other children, making unusual noises, pinching others, etc.'" THOMAS & RUSSO, *supra* note 1, at 4 (quoting *Watson*, 32 N.E. at 864). In *Beattie*, a child with cerebral palsy was expelled because: (1) he drooled uncontrollably; (2) he had a speech impairment and facial contortions; (3) he "had a 'depressing and nauseating' effect on the teachers and students"; and (4) "his physical disabilities required an undue portion of the teacher's time." *Id.* (quoting *Beattie*, 172 N.W. at 154). Even though the child had the academic ability to benefit from an education, the court ruled that the child's right to attend public school "could not be insisted on when his presence there was harmful to the best interests of the school." OSBORNE, *supra* note 1, at 4 (quoting *Beattie*, 172 N.W. at 154). Moreover, the *Beattie* court indicated that "the school had an 'obligation' to exclude him" because his presence was contrary to the school's best interests. *Id.* (citing *Beattie*, 172 N.W. at 154).

20. 347 U.S. 483 (1954). The Supreme Court addressed the rights of African-American children to have equal access to educational opportunities in a class action suit brought by African-American students seeking admission to public schools on a nonsegregated basis. See *id.* at 487 (examining discrimination claims brought by African-American students seeking access to public schools on nonsegregated basis). The Supreme Court held that when a state has undertaken to provide educational services, it "is a right which must be made available to *all* on equal terms." *Id.* at 493 (emphasis added). The Supreme Court coupled this mandate with the observation that:

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

*Id.*; see OSBORNE, *supra* note 1, at 5 (stating that this language from *Brown* has been quoted either directly or paraphrased by courts in subsequent cases addressing equal educational opportunities for students with disabilities); WEINER & HUME, *supra* note 1, at 27 (noting that *Brown* decision cleared path for special education law).

21. See S. REP. NO. 94-168, at 6 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1430 (classifying *Brown* as landmark case establishing child's "right to education" and noting Supreme Court's mandate in *Brown* that educational opportunity "is a right which must be made available to all on equal terms" (quoting *Brown*, 347 U.S. at 493)); see also GUERNSEY & KLARE, *supra* note 1, at 2 (stating "modern legal history of education for children with disabilities began with *Brown v. Board of Education*" and Supreme Court's holding that "education, 'where the state has undertaken to provide it, is a right which must be available to all on equal terms'" (quoting *Brown*, 347 U.S. at 493)); OSBORNE, *supra* note 1, at 4 (stating that Civil Rights movement and *Brown* decision provided initial impetus for movement to

has undertaken to provide [education], it is a right which must be available to all on equal terms."<sup>22</sup> Unfortunately, for twenty years following *Brown*, these rights were established and protected by the federal courts and not Congress.

B. *Landmark Cases of Pennsylvania Association of Retarded Citizens v. Pennsylvania and Mills v. Board of Education Establish the Educational Rights of Individuals with Disabilities and Provide the Impetus for Federal Legislation to Assure These Rights*

The class action cases that are credited with being the foundation of federal legislation establishing the educational rights of the individuals with disabilities are *Pennsylvania Association of Retarded Citizens v. Pennsylvania*<sup>23</sup> ("PARC") and *Mills v. Board of Education*.<sup>24</sup> In each case, the plaintiffs sought to establish the right of persons with disabilities not to be excluded from public schools and the states' obligation to provide them with a free appropriate public education.<sup>25</sup>

In *PARC*, the United States District Court for the Eastern District of Pennsylvania addressed the claims of exclusion brought by thirteen children with mental retardation on behalf of such persons.<sup>26</sup> Here, the ex-

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secure educational rights of students with disabilities); THOMAS & RUSSO, *supra* note 1, at 6 (stating that "[t]he principles of equal educational opportunity enunciated in *Brown* have ensured its place in history as the cornerstone upon which all subsequent legal developments protecting the rights of the disenfranchised, including individuals with disabilities, are grounded" and thus, "*Brown* has been applied in a number of cases involving the disabled"); WEINER & HUME, *supra* note 1, at 27 (noting that Supreme Court's decision in *Brown* "cleared a path for special education law"); Weber, *supra* note 1, at 356 (discussing that advocates of persons with disabilities relied on *Brown* to gain equal access for students with disabilities to public schools).

22. *Brown*, 347 U.S. at 493.

23. 343 F. Supp. 279 (E.D. Pa. 1972).

24. 348 F. Supp. 866 (D.D.C. 1972). Both commentators and the legislators that enacted the IDEA have recognized the importance of the *PARC* and *Mills* decisions in the formation of legislation protecting the educational rights of individuals with disabilities. See S. REP. NO. 94-168, at 6 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1430 (noting that legislation followed landmark cases, which included *PARC* and *Mills*); GUERNSEY & KLARE, *supra* note 1, at 2 (noting that *PARC* and *Mills* decisions made significant progress in ensuring right to education of children with disabilities); OSBORNE, *supra* note 1, at 8-9 (stating that *PARC* and *Mills* cases had "profound effect on the education of students with disabilities in the United States" and noting procedures mandated therein were foundation of federal legislation); WEINER & HUME, *supra* note 1, at 28 ("The *PARC* agreement and the *Mills* ruling laid not just the foundation but some of the building blocks of [the IDEA].").

25. See *Mills*, 348 F. Supp. at 868 (noting that plaintiffs with disabilities sought to enjoin defendants from excluding them from public schools and to compel defendants to provide plaintiffs with adequate education); *PARC*, 343 F. Supp. at 283-85 (discussing plaintiffs' challenge to Pennsylvania laws that excluded children with mental retardation from receiving public education).

26. *PARC*, 343 F. Supp. at 281-82.



clusion was a result of state legislation that relieved the state of the obligation to educate any child deemed by a psychologist to be “uneducable” or “untrainable.”<sup>27</sup> While the Supreme Court had not recognized the right to education as a fundamental right, the district court acknowledged the plaintiffs’ argument, supported by *Brown*, that at a minimum, education was a cognizable interest under the Constitution.<sup>28</sup> Raising the tenet of *Brown*, that where a state provides educational services it must provide them to all on an equal basis, the plaintiffs satisfied the court that there were serious doubts as to the existence of a rational basis for Pennsylvania’s exclusionary practices.<sup>29</sup> Consequently, the court settled the dispute in favor of the educational rights of persons with disabilities by endorsing a stipulation and a consent agreement between the parties.<sup>30</sup> The stipulation and the consent agreement were the heart of the district court’s holding in *PARC*.<sup>31</sup> Together, they established that (1) no child

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27. *Id.* at 282. In *PARC*, there were four Pennsylvania statutes at issue. *See id.* at 282 (listing applicable state statutes) (citing 24 PA. CONS. STAT. §§ 13-1304, -1326, -1330, -1375 (West 1949)). First, section 13-1375 relieved the state of the obligation to educate any child found to be “uneducable” or “untrainable.” *Id.* § 13-1375. This statute shifted the burden for such a child’s education to the Department of Welfare, which was also under no legal obligation to educate the child. *See id.* (discussing responsibilities of Department of Public Welfare in caring for “uneducable” children). Second, section 13-1304 permitted the indefinite postponement of admission to public school of any child who had not achieved the mental age of five. *See id.* § 13-1304 (stating that “[t]he board of school directors may refuse to accept or retain beginners who have not attained a mental age of five years”). Third, section 13-1330 excused a child deemed by a psychologist to be unable to benefit from education from school attendance. *See id.* § 13-1330 (stating that students who have been found to be unable to profit from public school education will not be compelled to attend school). Finally, section 13-1326 defined the compulsory age for school attendance to be from the age of 8 to 17, but also had been used to postpone admission to public school of retarded children until age 8 and also eliminated them from the public schools after the age of 17. *See id.* § 13-1326 (defining “compulsory school age”).

28. *See PARC*, 343 F. Supp. at 283 n.8 (stating in response to plaintiffs’ argument that education is fundamental right, that they had at least established “a colorable constitutional claim even under the less stringent rational basis test”).

29. *See id.* at 298 (responding to plaintiffs’ argument that because state has undertaken to provide public education, it may not entirely deny it to children with disabilities and concluding, based on *Brown*, state had failed to provide rational basis for exclusion of children with disabilities).

30. *See id.* at 302 (concluding that agreement allowing children with mental retardation to receive public education is fair and reasonable).

31. *See* BUDOFF ET AL., *supra* note 1, at 20-21 (discussing consent decree in *PARC* as landmark and that IDEA’s procedural safeguards are based on *PARC* consent decree); GUERNSEY & KLARE, *supra* note 1, at 2 (noting that consent decree in *PARC* recognized right to education of child with disability and established procedural safeguards that “set a detailed model for future advocates” (quoting STEVEN S. GOLDBERG, SPECIAL EDUCATION LAW 3 (1982))); OSBORNE, *supra* note 1, at 8 (stating stipulation and consent decrees established right of child with disability to FAPE and that such children could not be excluded from public schools without due process); WEINER & HUME, *supra* note 1, at 27-28 (stating that “lightning struck” with *PARC* consent decree finding that children with mental retardation could benefit from education and were entitled to it). The *PARC* decision has

with mental retardation could be excluded from the public schools without due process of law and (2) the state had an obligation to provide these children with a free appropriate education tailored to their individual needs.<sup>32</sup>

Only months after *PARC*, the United States District Court for the District of Columbia followed suit with a similar holding in *Mills*.<sup>33</sup> This class action, brought on behalf of seven children with various disabilities, requested the court to declare their educational rights and to enjoin the school district from excluding them from public schools.<sup>34</sup> The school district conceded that it had an affirmative duty under District of Columbia law to provide the plaintiffs with publicly supported education.<sup>35</sup> Nevertheless, the school district argued that it had insufficient funds to provide special educational services.<sup>36</sup> The *Mills* court rejected the insufficient funds defense and held that the failure to provide a free public education to students with disabilities would not be tolerated because of a lack of funding.<sup>37</sup> More significantly, the *Mills* court held that under *Brown* and similar precedent, the Constitution's Due Process Clause requires a hearing before public schools can exclude students with disabilities.<sup>38</sup>

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been credited not only with laying the foundation of the IDEA, but awakening the public's consciousness. See *id.* at 28 (“*PARC* was a consciousness-raising; it wasn't just a legal decision. It printed the bumper stickers' for disability rights.” (quoting Reed Martin, attorney with Advocacy Inc., Texas)).

32. See *PARC*, 343 F. Supp. at 302-16 (setting forth conditions contained in stipulation and consent agreements).

33. See *Mills v. Board of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (concluding that Board of Education had obligation to provide specialized instruction for children with disabilities and Board's failure to provide such instruction violated Board's own regulations and District of Columbia law); see also OSBORNE, *supra* note 1, at 8-9 (stating that *Mills* extended holding of *PARC* to include other classes of students with disabilities and also established that lack of funding is insufficient reason for denying educational services); THOMAS & RUSSO, *supra* note 1, at 8 (stating that “*Mills* was similar to *PARC* in that it greatly increased the educational rights of children with disabilities”).

34. See *Mills*, 348 F. Supp. at 868 (stating that case was founded on two problems: (1) District of Columbia's failure to provide publicly funded education to children with disabilities and (2) the exclusion, suspension, expulsion, reassignment and transfer from public school of these children without affording them due process of law).

35. See *id.* at 875-76 (discussing Board of Education's failure to comply with Board of Education regulations and District of Columbia Code).

36. See *id.* (noting that Board of Education claimed that it would be impossible to grant plaintiffs relief unless Congress granted millions of dollars in aid to improve special education services in District of Columbia).

37. See *id.* at 876 (holding further that if sufficient funds are not available to provide special educational services, school district must expend its funds in manner which assures “that no child is entirely excluded from a publicly supported education consistent with his or her needs and ability to benefit therefrom”).

38. See *id.* at 875 (reasoning that denying FAPE to children with disabilities, while providing such education to able children, violated Due Process Clause) (citing *Hobson v. Hansen*, 269 F. Supp. 401, 493 (D.D.C. 1967)). Moreover, the court stated that

Thus, the court ordered the school district to provide each school-age child with a "free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment."<sup>39</sup>

The district courts in both *PARC* and *Mills* helped to establish the basic right to an education for all children with disabilities.<sup>40</sup> In reaching this end and as a means to assure it, both courts set forth detailed mandates for the states to follow.<sup>41</sup> Consequently, the holdings served not only to secure the educational rights of individuals with disabilities, but also provided the actual foundation for the EAHCA.<sup>42</sup> Despite these

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[n]ot only are plaintiffs and their class denied the publicly supported education to which they are entitled many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination of classification into a special program.

*Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Williams v. Dade County Sch. Bd.*, 441 F.2d 299 (5th Cir. 1971); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Vought v. Van Buren Pub. Sch.*, 306 F. Supp. 1388 (E.D. Mich. 1969)).

39. *Id.* at 878. The court ordered the establishment of additional safeguards to ensure that no child with a disability was excluded from the public schools unless the child is provided "(a) adequate alternative educational services suited to the child's needs, . . . and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative." *Id.* For a further discussion of the *Mills* decision and its influence on special education law, see GUERNSEY & KLARE, *supra* note 1, at 2; OSBORNE, *supra* note 1, at 8-9; THOMAS & RUSSO, *supra* note 1, at 6-8 and WEINER & HUME, *supra* note 1, at 28-29.

40. See S. REP. NO. 94-168, at 6 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1430 (noting legislation followed landmark cases including *PARC* and *Mills*); GUERNSEY & KLARE, *supra* note 1, at 2 (noting *PARC* and *Mills* decisions made significant progress in ensuring right to education of children with disabilities); OSBORNE, *supra* note 1, at 8-9 (stating *PARC* and *Mills* cases had "profound effect on the education of students with disabilities in the United States" and noting procedures mandated therein were foundation of federal legislation); WEINER & HUME, *supra* note 1, at 28 ("The *PARC* agreement and the *Mills* ruling laid not just the foundation but some of the building blocks of [the IDEA].").

41. See *Mills*, 348 F. Supp. at 877-83 (detailing order of court); *Pennsylvania Ass'n of Retarded Citizens v. Pennsylvania*, 343 F. Supp. 279, 303-16 (D.D.C. 1972) (detailing stipulation and consent agreement).

42. See WEINER & HUME, *supra* note 1, at 28 (stating that *PARC* agreement and *Mills* ruling ensured rights of students with disabilities and laid groundwork for IDEA). The schoolhouse doors were not only opened to children with disabilities by these landmark decisions, but states were also required to locate and evaluate an individualized program for each child. See *id.* (discussing state's responsibility to provide specialized programs for each child with disability). Furthermore, the *PARC* and *Mills* courts prohibited schools from excluding or changing educational placements of these children without due process of law. See *id.* (discussing due process requirement). Finally, rather than being provided an education in isolation, the courts now favored integration of these students with able children. See *id.* (stating that "integration was favored over more restrictive placements").

cases, there was still no uniform precedent in the United States regarding the rights of individuals with disabilities to a free public education.<sup>43</sup>

The move towards uniformity came when Congress first became involved in special education by passing the Elementary and Secondary Education Act of 1965 (ESEA).<sup>44</sup> The 1966 amendments to the ESEA created Title VI, which provided grants to states as a means of subsidizing programs for individuals with disabilities.<sup>45</sup> Finally, in 1970, Congress enacted the separate Education of the Handicapped Act (EHA).<sup>46</sup> Expanding Title VI, the EHA increased the financial assistance available to states for educational programs for individuals with disabilities.<sup>47</sup>

The next congressional action on behalf of individuals with disabilities came with the enactment of section 504 of the Rehabilitation Act of 1973.<sup>48</sup> The statute provided that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance.”<sup>49</sup> The legislation, however, did not mark the end of Con-

43. *See id.* (noting lack of applicable clear precedent in states other than Pennsylvania or District of Columbia).

44. 20 U.S.C. § 6310-8962 (1994); *see* THOMAS & RUSSO, *supra* note 1, at 22-23 (discussing amendments of Elementary and Secondary Education Act of 1965 (ESEA) that benefited children with disabilities); Weber, *supra* note 1, at 357-58 (discussing federal legislation impacting on individuals with disabilities and passage of ESEA).

Congress originally enacted the ESEA in 1964 to aid educationally deprived children in school districts with a high percentage of low-income families. *See* THOMAS & RUSSO, *supra* note 1, at 22 (noting that ESEA was not originally designed to benefit children with disabilities). Nevertheless, students with disabilities were among those served by the ESEA and as such it marked the beginning of legislation significantly affecting them. *See id.* (noting that ESEA was subsequently amended to benefit children with disabilities).

45. Elementary and Secondary Education Act Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191 (codified as amended at 20 U.S.C. §§ 1201-1213d (1994)); *see* Weber, *supra* note 1, at 358-59 (discussing amendments to ESEA in 1966). These amendments established Title VI as a means for providing grants to subsidize the programs for individuals with disabilities. *See id.* at 358 (discussing purpose of Title VI).

46. *See* Weber, *supra* note 1, at 358 (discussing passage of Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1401-1491 (1994), *reprinted in* 1970 U.S.C.C.A.N. 2832)).

47. *See* THOMAS & RUSSO, *supra* note 1, at 22 (noting increased funding available under EHA); Weber, *supra* note 1, at 358 (stating that immediately following passage of EHA, federal subsidies for children with disabilities “increased markedly”). The EHA was the “framework for subsequent federal initiatives in primary and secondary education of handicapped children.” *Id.*

48. 29 U.S.C. § 794 (1994); *see* GUERNSEY & KLARE, *supra* note 1, at 2-3 (noting enactment of section 504 of Rehabilitation Act of 1973).

49. 29 U.S.C. § 794 (1994); *see also* GUERNSEY & KLARE, *supra* note 1, at 2-3 (discussing enactment of section 504 of Rehabilitation Act of 1973); OSBORNE, *supra* note 1, 12-13 (stating that this legislation was first civil rights legislation to guarantee rights of individuals with disabilities).

gress's legislative involvement in special education—rather, it was only the beginning.

In 1974, Congress amended the ESEA of 1965 to require states receiving federal funding to give assurances that all children with disabilities would receive special educational services.<sup>50</sup> More important, these amendments mandated the creation of procedural safeguards for those denied a free appropriate education.<sup>51</sup> The numerous statutory enactments and amendments in the years after *Brown* were significant to disability rights advocates, yet they nevertheless fell short of providing a level of enforceability adequate to ensure the educational rights of individuals with disabilities.<sup>52</sup> The deficiencies in the statutes were highlighted by the fact that as late as 1975, approximately 1.75 million children with disabilities were receiving no educational services, while another 2.75 million were in inadequate programs.<sup>53</sup>

Congress addressed these deficiencies with the passage of the EAHCA in which the federal government assumed an increased role in special education.<sup>54</sup> In 1990, Congress amended the EAHCA and renamed it the Individuals with Disabilities Education Act (IDEA).<sup>55</sup> The passage of the IDEA and its procedural safeguards had such a significant impact on special education that it has become known as the “‘Bill of Rights’ for the education of children with disabilities.”<sup>56</sup> Thus, by 1975, more than twenty years after the Supreme Court’s decision in *Brown*, the federal government had finally “‘fulfill[ed] the promise of the Constitution that there shall be equality of education for all people, and [assured] that handicapped children w[ould] no longer be left out.’”<sup>57</sup>

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50. See Weber, *supra* note 1, at 358-59 (discussing 1974 amendments to ESEA).

51. See *id.* at 359 (noting that state must provide assurances of procedural protections for parents of children who were denied proper education).

52. See *id.* (stating that “the law still did not provide the enforceability that advocates of the handicapped believed was necessary”).

53. See *id.* (noting education statistics for children with disabilities) (citing H.R. REP. NO. 94-332, at 11-12 (1975)).

54. See 34 C.F.R. § 300.550 (1997) (requiring children with disabilities to be educated, to extent appropriate, in same programs as children without disabilities; see also THOMAS & RUSSO, *supra* note 1, at 22-23 (noting increased role of federal government under EAHCA). The EAHCA was an amendment to the EHA that completely revised Part B of the EHA. See *id.* at 23 (discussing effect of EAHCA on EHA). These revisions contained most of the procedural safeguards now embodied in section 1415 of the IDEA. See DATA RESEARCH, INC., STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION 2 (13th ed. 1996) (discussing history of IDEA).

55. See 20 U.S.C. § 1400(a) (1994) (renaming EAHCA as IDEA); see also DATA RESEARCH, INC., *supra* note 54, at 2 (noting renaming of EAHCA to IDEA).

56. THOMAS & RUSSO, *supra* note 1, at 23.

57. *Id.* (quoting 121 CONG. REC. 37,413 (1975) (statement of Sen. Harrison Williams)).

## III. THE IDEA: ITS PROMISES AND THE PROCEDURES USED TO KEEP THEM

The fundamental goal of the IDEA is to ensure that children with disabilities receive a free appropriate public education (“FAPE”).<sup>58</sup> To

58. *See id.* at 24 (noting IDEA is designed to ensure FAPE is made available to all children with disabilities between ages of 3 and 21). The IDEA, however, does not require a school district to provide a FAPE to a child with a disability after his or her high school graduation. *See Wexler v. Westfield Bd. of Educ.*, 784 F.2d 176, 182-83 (3d Cir. 1986) (noting that state is only required to provide education for students with disabilities beyond high school graduation to same extent that state provides such education to students without disabilities). Instead, the IDEA makes an exception for those students between the ages of 18 and 21, inclusive. *See id.* (noting that exception applied when school district sought early termination of its responsibility to educate students with disabilities by graduating these students irrespective of their performance in school). The exception provides that a school district will not be required to provide a FAPE to those students if that “requirement would be inconsistent with State law or practice . . . respecting public education within such age groups in the State.” 20 U.S.C. § 1412(2)(B) (1994). Consequently, if a state does not provide a public education beyond high school for students without disabilities, the school district is not obligated to provide a FAPE for a student with disabilities. *See Wexler*, 784 F.2d at 183 (noting that states are obligated to treat students with and without disabilities equally when providing education beyond high school graduation). This exception does not apply, however, to awards of compensatory education if the child has been denied a FAPE while eligible for one. *See id.* (awarding child with disability compensatory education because of school district’s failure to provide FAPE when child was eligible). For a further discussion of awards of compensatory education, see *infra* notes 146-54 and accompanying text.

To be eligible for a FAPE, the child must have a disability within the meaning of the IDEA. *See* 20 U.S.C. § 1400(c) (1994) (stating that IDEA’s purpose is “to assure that all children with disabilities have [FAPE] available to them”). “Children with Disabilities” are defined as those “(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, need special education and related services.” *Id.* § 1401(a)(1)(A)(i)-(ii).

The IDEA defines a FAPE as:

[S]pecial education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge,
- (B) meet the standards of the State educational agency,
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
- (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

*Id.* § 1401(a)(18)(A)-(D). Additionally, a FAPE is to be designed in a manner which emphasizes that the special education is to be made available in the least restrictive environment (“LRE”). *See* 34 C.F.R. § 300.550 (1997) (requiring child with disability to be educated in least restrictive environment); *see also* THOMAS & Russo, *supra* note 1, at 24-25 (discussing FAPE and goals of IDEA to assure FAPE).

The IDEA defines the term “special education” as “specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including— (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.” 20 U.S.C. § 1401(a)(16) (1994). As stated, these educational services are to be provided in the LRE in order to foster integration of individuals with

protect this goal and the educational rights of individuals with disabilities and their parents, the IDEA contains numerous procedural safeguards detailed in section 1415.<sup>59</sup>

A. *The Individualized Education Program and Procedural Safeguards Regarding Disputes Over the Individualized Education Program*

Under the IDEA, every school district must develop an IEP for each child with a disability as the means for providing a FAPE tailored to his or her unique needs.<sup>60</sup> The IEP is essentially a written statement of the

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disabilities, rather than their exclusion. See 34 C.F.R. § 300.550 (requiring child with disability to be educated in least restrictive environment); see also THOMAS & RUSSO, *supra* note 1, at 24 (same).

59. See 20 U.S.C. § 1400(c) (stating purpose of IDEA). Congress, in enacting the IDEA, set forth its purpose as to "assure that all children with disabilities have available to them . . . a free appropriate public education . . . [and] to assure that the rights of children with disabilities and their parents or guardians are protected." *Id.*

60. See *id.* § 1401(a)(20) (stating that IEP is written statement designed to meet unique need of child with disabilities); see also DATA RESEARCH, INC., *supra* note 53, at 3 (noting IEP is procedural device mandated by IDEA to achieve goal of providing individually tailored education program to students with disabilities); THOMAS & RUSSO, *supra* note 1, at 25-26 (discussing IEP). The IEP has been interpreted by the Supreme Court as being the "modus operandi" of the IDEA. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 368 (1985). The IEP is

a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and whenever appropriate, such child, which statement shall include—

- (A) a statement of the present levels of educational performance of such child,
- (B) a statement of annual goals, including short-term instructional objectives,
- (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,
- (D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting,
- (E) the projected date for initiation and anticipated duration of such services, and
- (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

20 U.S.C. § 1401(a)(20).

child's present educational level, performance and annual goals, and establishes methods to attain these goals.<sup>61</sup>

Having recognized the failure of the government and the courts to protect the due process rights of students with disabilities, the IDEA also establishes numerous procedural safeguards to prevent the exclusion of students with disabilities without due process.<sup>62</sup> Sections 1415(b)-(e) of the IDEA guarantee this due process.<sup>63</sup> These sections establish the right to administrative and eventual judicial review as a means of challenging the educational services provided by the school district.<sup>64</sup> To prevent school districts from changing the educational placement of students with disabilities, section 1415(e)(3)(A) requires that, pending administrative and judicial review, the child remain in his or her then current educational placement unless his or her parents and the state agree otherwise.<sup>65</sup>

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61. See DATA RESEARCH, INC., *supra* note 54, at 3 (defining IEP).

62. See 20 U.S.C. § 1415(b)-(e) (1994) (enumerating procedural safeguards of IDEA); see also S. REP. NO. 94-168, at 12, 14 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1436, 1438 (noting that procedural safeguard of IEP is intended to provide parents with opportunity to participate in planning child's education and to protect right of child with disability to FAPE). Additionally, Congress intended "to provide and reinforce procedural protections for parents and children in all matters relating to the educational process." S. REP. NO. 94-168, at 14 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1438; see also *Burlington*, 471 U.S. at 373 (acknowledging Congress's concern over exclusion of children with disabilities from public schools and stating one purpose of section 1415(e)(3)(A) was to prevent school officials from excluding child with disability without review process).

63. See 20 U.S.C. § 1415(b)-(e) (detailing procedural safeguards of IDEA). Commentators have recognized the safeguards implemented in the IDEA as an assurance that a child with a disability receives a FAPE and that disagreements over the IEP are resolved in accordance with due process. See GUERNSEY & KLARE, *supra* note 1, at 8 (noting that if disagreements arise between parents and school district about IEP, either party may request due process hearing); OSBORNE, *supra* note 1, at 12 (stating that IDEA "contains very elaborate due process safeguards to protect the rights of students and ensure that its provisions are enforced"); THOMAS & RUSSO, *supra* note 1, at 61 (stating "student's substantive right to special education under the IDEA is accompanied by the safeguard of procedural due process"). See generally THOMAS & RUSSO, *supra* note 1, at 61-70 (discussing IDEA procedural safeguards in depth).

64. See 20 U.S.C. § 1415(b), (d) (establishing right to administrative and judicial review). Section 1415(b) provides for the independent evaluation of the child, written notice to the parents prior to a change or a refusal to change an IEP and the right to administrative review by an impartial hearing officer of complaints. See *id.* § 1415(b) (listing parents' rights with regard to education of child with disability). Additionally, if a parent or the school district is not satisfied with the decision rendered at the hearing, that party may appeal that decision to the state educational agency for an impartial review of that decision. See *id.* § 1415(c) (providing that "any party aggrieved by the findings and decision rendered in . . . a hearing [under section 1415(b)(2)] may appeal to the State educational agency which shall conduct an impartial review of such hearing"). Finally, either party may appeal the decision of a state educational appeals panel by filing a civil action in a state or federal court. See *id.* § 1415(e)(1)-(2) (detailing appeals process).

65. See *id.* § 1415(e)(3)(A) (stating that child cannot be moved from his or her educational placement unless certain requirements are met).



This provision is known as the “stay put” or “pendent placement” provision.<sup>66</sup> The stay put provision is intended to be used by parents who wish to prevent a change in their child’s IEP.<sup>67</sup> Consequently, in the majority of cases, the stay put provision has been invoked to prevent the state from removing a child from a public school placement and placing him or her in a special education private school.<sup>68</sup>

On occasion, however, parents are dissatisfied with the IEP offered in the public school setting and opt to place their child in a private school.<sup>69</sup> Such placements are regarded as “unilateral placements” because the parent acts against the school district’s recommendations for the education of the child in the public school.<sup>70</sup> In this context, the issue of financial responsibility for placement arises.<sup>71</sup> Factors that are central to the resolution of such disputes are: (1) whether the IEP offered by the school district was inappropriate and the parents’ unilateral placement was appropriate; (2) whether the state has agreed to the private school as the

66. See *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 82 (3d Cir. 1996) (noting that section 1415(e)(3)(A) has become known as stay put or pendent placement provision and further commenting that provision “was included in the IDEA to protect handicapped children and their parents during the [IEP] review process”). The stay put provision requires that

[e]xcept as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(e)(3)(A).

67. See *Burlington*, 471 U.S. at 373 (noting that one purpose of section 1415(e)(3)(A) was to prevent school districts from removing child “from public school classroom over the parents’ objection pending completion of the review proceedings”); *Susquenita*, 96 F.3d at 83 (emphasizing “protective purpose” of stay put provision and that it is invoked by parents to block school districts from unilaterally changing their child’s educational placement); see also DATA RESEARCH, INC., *supra* note 54, at 68-74 (discussing stay put provision as preventing school districts from changing child’s educational placement over parents’ objections).

68. See *Burlington*, 471 U.S. at 373 (discussing purpose of section 1415(e)(3)(A)); *Susquenita*, 96 F.3d at 83 (noting purpose and function of stay put provision).

69. See *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 10 (1993) (noting parents contested appropriateness of proposed IEP and eventually unilaterally placed their child in private school specializing in learning disabilities); *Burlington*, 471 U.S. at 362 (noting parents found school district’s proposed IEP inappropriate and unilaterally placed their child in private school at their own expense); *Susquenita* 96 F.3d at 83 (stating that parents were dissatisfied with IEP and chose to place child in private school rather than to invoke stay put provision).

70. See *Burlington*, 471 U.S. at 373-74 (discussing parents’ change in child’s educational placement from public to private school as unilateral change in placement).

71. See *id.* at 367 (stating that case presents issue as to who is financially responsible for child’s private school placement when parties dispute appropriateness of that placement).

pendent placement of the child during litigation; and finally (3) whether financial responsibility for the unilateral placement should be in the form of retroactive or prospective tuition reimbursement.<sup>72</sup>

The resolution of either of the first two factors in favor of the parents will result in an award of tuition reimbursement under the IDEA.<sup>73</sup> The IDEA, however, states only that a court “shall grant such relief as the court determines appropriate.”<sup>74</sup> Therefore, to fashion relief under the IDEA, the courts must interpret what relief is “appropriate” under the IDEA.<sup>75</sup> Forms of relief that courts have found appropriate include retroactive tuition reimbursement, compensatory education and attorneys’ fees.<sup>76</sup> Be-

72. See *Susquenita*, 96 F.3d at 81 & n.3 (discussing district court’s establishment of private school as Raelee’s pendent placement and noting that this decision “effectively decided the reimbursement question in favor of Raelee’s parents” and, finally, noting issue of whether such reimbursement is imposed retroactively or prospectively).

73. See *Burlington*, 471 U.S. at 373-74 (awarding retroactive tuition reimbursement when IEP was found to be inappropriate and determining that unilateral parental placement was appropriate placement); *Susquenita*, 96 F.3d at 84 (stating that once state has agreed to new pendent placement, school district’s financial responsibility for that placement follows and discussing issue of retroactive versus prospective tuition reimbursement).

74. 20 U.S.C. § 1415(e)(2) (1994); see *Burlington*, 471 U.S. at 369 (stating that IDEA only requires that relief be “appropriate”).

75. See *Burlington*, 471 U.S. at 369-70 (stating that, to interpret what is “appropriate” relief under IDEA, court must look to purpose of statute, which is to provide FAPE to students with disabilities).

76. See *id.* at 369 (recognizing retroactive tuition reimbursement as remedy available under section 1415(e)(2) of IDEA); *Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990) (finding that compensatory education was appropriate remedy under section 1415(e)(2) when child had been denied FAPE during years for which he was eligible to receive FAPE); *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986) (same); see also *Smith v. Robinson*, 468 U.S. 992, 1014 (1984) (denying award of attorneys’ fees under IDEA), *superseded by* Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended 20 U.S.C. § 1415(e)(4)(B)-(G)).

Section 1415(e)(4)(B) provides that “[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys’ fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.” 20 U.S.C. § 1415(e)(4)(B). For a further discussion of awards of attorneys’ fees, see GUERNSEY & KLARE, *supra* note 1, at 209-23.

In light of the Supreme Court’s decision in *Burlington*, compensatory education was found to be an appropriate remedy under the IDEA. See *Miener*, 800 F.2d at 753 (extending rationale of *Burlington* to awards of compensatory education). Claims for compensatory education arise when it is alleged that a student with disabilities has been deprived of his or her right to a FAPE. See DATA RESEARCH, Inc., *supra* note 54, at 177 (stating that “[t]he belated provision of necessary educational services by a school district to a student with a disability is described as compensatory education”). In *Miener*, the United States Court of Appeals for the Eighth Circuit reasoned that “[l]ike the retroactive reimbursement in *Burlington*, imposing liability for compensatory educational services . . . ‘merely requires [school districts] to belatedly pay expenses [they] should have paid all along.’” *Miener*, 800 F.2d at 753 (quoting *Burlington*, 471 U.S. at 370-71); see also *Lester H.*, 916 F.2d at 873 (awarding compensatory education when school district had failed

cause the newest remedy promulgated by the Third Circuit in *Susquenita* deals with a form of tuition reimbursement, this Casebrief focuses its discussion on tuition reimbursement.

B. *Retroactive Tuition Reimbursement: An Appropriate Remedy Under the IDEA*

The Supreme Court has determined that retroactive tuition reimbursement is appropriate relief under the IDEA.<sup>77</sup> In *Burlington*, the Court addressed a claim for retroactive tuition reimbursement by parents who had unilaterally placed their child in a private school because they were dissatisfied with the IEP that the school district offered.<sup>78</sup> At issue in the case was whether the potential relief available under section 1415(e)(2) included tuition reimbursement for private school and whether section 1415(e)(3)(A) barred the parents' claim for reimbursement because they had unilaterally placed their child in private school.<sup>79</sup> The Court found in favor of retroactive tuition reimbursement as an appropriate remedy under the IDEA.<sup>80</sup> Such relief is available under section 1415(e)(3)(A) if a court ultimately determines both that the unilateral, private school placement was appropriate and that the IEP was an inappropriate placement.<sup>81</sup> In establishing this remedy, the Supreme Court affirmed the United States Court of Appeals for the First Circuit's holding

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to place child with disability in appropriate school). For a further discussion of compensatory education, see *infra* notes 146-54 and accompanying text.

77. See *Burlington*, 471 U.S. at 360 (finding that retroactive tuition reimbursement is appropriate relief under IDEA because to deny such relief would frustrate child's right to FAPE, parent's right to participate fully in developing proper IEP and procedural safeguards of IDEA).

78. See *id.* at 362.

79. See *id.* at 367 (detailing issues raised on appeal from United States Court of Appeals for First Circuit).

80. See *id.* at 374 (establishing remedy as retroactive tuition reimbursement under IDEA).

81. See *id.* at 369 (stating that IDEA gives courts power to order school districts "to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act"). Parents, however, who violate section 1415(e)(3)(a)'s pendent placement provision and incur the costs of private education do so at their own financial risk. See *id.* at 373-74 (noting that section 1415(e)(3)(A) is safeguard largely for benefit of parents and child, yet that does not mean "that [section] 1415(e)(3)(A) has no effect on parents. . . . [The provision] operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk."). Under *Burlington*, if a court ultimately determines the IEP to be the appropriate placement for the child, the parents will be barred by section 1415(e)(3)(A) from obtaining tuition reimbursement for any interim period that their unilateral placement violated section 1415(e)(3)(A). See *id.* at 374 (noting parents assume financial risk of unilaterally changing child's school).

that in fashioning relief under the IDEA, equitable considerations are relevant.<sup>82</sup>

The equitable considerations of primary relevance to the Supreme Court in *Burlington* were the purposes of the IDEA.<sup>83</sup> The Court reiterated that the IDEA principally seeks to provide individuals with disabilities with a FAPE that emphasizes each child's special needs.<sup>84</sup> Consequently, if a court were to find that the public school was unable to provide a FAPE, that court could order a prospective injunction requiring the school district to develop and implement an IEP for private special education at public expense.<sup>85</sup> The Supreme Court, however, emphasized that the review process under the IDEA is generally ponderous and often takes several years.<sup>86</sup> Therefore, the Court concluded that prospective injunctive relief is not an adequate remedy under the IDEA.<sup>87</sup> According to the Court, the lengthy review process presented parents with two unpalatable choices if retroactive tuition reimbursement was not available under the IDEA: (1) parents could acquiesce to the IEP to the detriment of their child if the IEP was inappropriate or (2) parents could unilaterally place the child in private school at their own expense.<sup>88</sup> Regardless of that choice, without tuition reimbursement, the Court recognized that it would be a Pyrrhic victory for parents to later learn that their assertions were correct; they had nonetheless either sacrificed years of their child's education or were not entitled to tuition reimbursement for the proper placement in private school.<sup>89</sup> According to the *Burlington* Court, such a result would undermine the child's rights to a FAPE and the procedural safe-

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82. *See id.* (stating that court of appeals was correct in its interpretation of section 1415(e)(2)'s language, "such relief as the court determines is appropriate," as meaning that equitable considerations are relevant in fashioning relief).

83. *See id.* at 369 (applying IDEA's purposes in analysis).

84. *See id.* (noting purpose of IDEA is to provide FAPE to children with disabilities and that relief under IDEA should be "appropriate in light of th[is] purpose of the Act").

85. *See id.* at 369-70 (stating that when court determines that private placement was appropriate instead of IEP in public school, "it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school").

86. *See id.* at 370 (stating "review process is ponderous" and noting that final judicial decision on merits of IEP will usually come more than one year after school term covered by IEP has passed).

87. *See id.* (noting that prospective injunction relief would be sufficient if "review under the Act could be completed in a matter of weeks, rather than years").

88. *See id.* (noting that without retroactive tuition reimbursement, IDEA's lengthy review process would require parents to choose between going along with inappropriate IEP or placing child in appropriate educational setting at their own expense, yet without possibility of reimbursement).

89. *See id.* (detailing parents' "empty victory").

guards of the IDEA.<sup>90</sup> Therefore, because Congress did not intend either to occur, the Court held that retroactive tuition reimbursement is the only relief that would simultaneously ensure a child's right to a FAPE and give complete effectiveness to the procedural safeguards of the IDEA.<sup>91</sup>

Turning its focus to the stay put provision of the IDEA, the Supreme Court held that the provision should not be used to force parents to keep their children in what parents deem an inappropriate educational setting.<sup>92</sup> Instead, Congress intended parents to use section 1415(e)(3)(A) to prevent inappropriate changes in their child's placement.<sup>93</sup> As such, although section 1415(e)(3)(A) prohibits school districts from changing the child's pendent placement, it does not prohibit parents from doing so.<sup>94</sup> Rather, the *Burlington* Court stated that parents are free to change their child's placement during litigation and place their child in private school, but at their own financial risk.<sup>95</sup> If the school district's IEP is ultimately determined by a court to have been an appropriate placement, sec-

90. *See id.* (finding that such result would make "child's right to [FAPE], the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards . . . less than complete").

91. *See id.* (noting that "[b]ecause Congress undoubtedly did not intend this result, we are confident . . . Congress meant to include retroactive reimbursement . . . as an available remedy"); *see also* S. REP. NO. 94-168, at 32 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1456 (stating that disagreements and question of financial responsibility are to be determined by due process procedures); 34 C.F.R. § 300.403(B) (1997) (same). As the Supreme Court in *Burlington* noted, the IDEA's legislative history requires that:

"If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under [the predecessor to § 1415] appl[y]."

*Burlington*, 471 U.S. at 371 (emphasis added) (alteration in original) (quoting S. REP. NO. 94-168, at 32 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1456); *see* 34 C.F.R. § 300.403(b) (1997) (same).

92. *See Burlington*, 471 U.S. at 373 (rejecting school district's argument that section 1415(e)(3)(A) requires parents to leave child in pendent placement during litigation). In fact, the Court held that section 1415(e)(3)(A) is a procedural safeguard for parents, not school districts. *See id.* (stating further that "at least one purpose of § 1415(e)(3)(A) was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of review proceedings"). Therefore, because the IDEA seeks to ensure that children with disabilities receive a FAPE, section 1415(e)(3)(A) should not be interpreted to defeat either purpose by requiring parents to leave their child in what may later be deemed an inappropriate placement or by permitting a change in placement "only by sacrificing any claim for reimbursement." *Id.* at 373-74.

93. *See id.* at 373 (noting Congress's desire to prevent exclusion of individuals with disabilities from public schools which occurred in past).

94. *See id.* (concluding that section 1415(e)(3)(A) is primarily for protection of children with disabilities and their parents).

95. *See id.* at 373-74 (noting operation of statute).

tion 1415(e)(3)(A) will bar the parents' right to reimbursement for any period they violated the statute.<sup>96</sup>

In addition, the Supreme Court interpreted the language of section 1415(e)(3)(A), which requires the child to remain in his or her then current placement "unless the state and the parents otherwise agree."<sup>97</sup> The Court stated that a decision by a state's special education appeals panel in favor of the parents' unilateral, private school placement can constitute an agreement by the state to change the child's pendent placement within the meaning of section 1415(e)(3)(A).<sup>98</sup> Such an agreement, therefore, changes the child's pendent placement and means that the parents are no longer violating section 1415(e)(3)(A) as of the date of that agreement.<sup>99</sup>

Therefore, the Supreme Court's decision in *Burlington* clearly established that parents are entitled to retroactive tuition reimbursement for the unilateral, private placement of their child as long as a court ultimately determines that this placement was the appropriate one for the child.<sup>100</sup> Moreover, in the eyes of the Court, the grant of such relief is not an award of "damages" . . . [because it] merely requires [a school district] to belatedly pay expenses it should have paid all along and would have borne in the first instance had it developed a proper IEP."<sup>101</sup>

Finally, as the Supreme Court later warned in *Florence County School District Four v. Carter*,<sup>102</sup> school districts who wish to avoid reimbursing parents for their unilateral private placements "can do one of two things: give the child a [FAPE] in a public setting, or place the child in an appropriate private setting of the State's choice. This is the IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims."<sup>103</sup>

96. *See id.* at 374 ("If a handicapped child has available a [FAPE] and the parents choose to place the child in a private school or facility the [school] . . . is not required . . . to pay for the child's education at the private school or facility." (quoting 34 C.F.R. § 300.403)).

97. 20 U.S.C. § 1415(e)(3)(A) (1994); *see Burlington*, 471 U.S. at 371-72 (analyzing section 1415(e)(3)(A)).

98. *See Burlington*, 471 U.S. at 372 (interpreting language of section 1415(e)(3)(A)).

99. *See id.* (noting parents were no longer in violation of section 1415(e)(3)(A) after state Bureau of Special Education Appeals' decision approved of parents' unilateral, private school placement).

100. *See id.* (holding father's change of child's placement during administrative proceedings did not bar reimbursement).

101. *Id.* at 370-71.

102. 510 U.S. 7 (1993).

103. *Id.* at 15. *Florence* also involved a claim for retroactive tuition reimbursement by parents who had unilaterally placed their child in a private school. *Id.* at 9. It was, however, distinguishable from *Burlington* because the parents in *Florence* placed their child in a private school that did not meet all of the requirements of the IDEA's section 1401(a)(18). *See id.* Consequently, the Court addressed the narrow issue of whether the parents were barred from recovering retroactive tuition reimbursement because the school did not meet the section 1401(a)(18) definition of a FAPE. *See id.* at 12 (stating that issue on appeal was whether court may

### C. *Pendent Placement and Tuition Reimbursement in the Third Circuit*

Although the IEP is regarded as the “modus operandi”<sup>104</sup> to ensure that a child with a disability receives a FAPE tailored to his or her special needs, the stay put provision is the primary procedural safeguard invoked by parents to assure their child’s continued access to a FAPE.<sup>105</sup> Additionally, when a school district either fails to maintain the pendent placement or the parents’ unilateral, private placement is deemed “appropriate,” retroactive tuition reimbursement is available as a means of assuring the child’s access to a FAPE.<sup>106</sup> The Third Circuit has recognized the stay put provision and retroactive tuition reimbursement as essential to the maintenance of the educational rights of children with disabilities.<sup>107</sup>

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order reimbursement for parents who place child in private school that does not meet statutory requirements). The Supreme Court held that section 1401(a)(18)’s requirements apply to school district placement, but not to parental placements. *See id.* at 13 (allowing parents reimbursement for education costs). Therefore, the *Florence* Court extended the decision of *Burlington* to awards of retroactive tuition reimbursement for unilateral placements even if that placement does not qualify as a FAPE under section 1401(a)(18). *See id.* at 13-14 (“To read the provisions of [section] 1401(a)(18) to bar reimbursement in the circumstances of this case would defeat th[e] statutory purpose.”). For a detailed analysis of the *Florence* decision, see Russell, *supra* note 1, at 1496-1505. For the statutory language of section 1401(a)(18), see *supra* note 58 and accompanying text.

104. *See Burlington*, 471 U.S. at 368 (stating that IEP as “modus operandi” of IDEA is comprehensive statement of educational needs of child with disability and specially designed education and services to be utilized to meet those needs).

105. *See id.* at 373 (stating one purpose of stay put provision is to prevent school officials from changing child’s placement over parents’ objections, but was not intended to prevent parents from changing their child’s placement); *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996) (noting protective purpose of stay put provision and that it is utilized by parents “to block school districts from effecting unilateral change[s]” to their child’s educational program).

106. *See Burlington*, 471 U.S. at 370 (holding that if retroactive tuition reimbursement was not available remedy under IDEA, then child’s right to FAPE would be less than complete and stating that Congress did not intend this result).

107. *See Susquenita*, 96 F.3d at 83-84 (stating stay put provision was intended to protect children with disabilities and their parents during review process and recognizing importance of retroactive tuition reimbursement as means to ensuring that child with disability receives FAPE); *M.C. v. Central Reg’l Sch. Dist.*, 81 F.3d 389, 395 (3d Cir.) (acknowledging tuition reimbursement as “vehicle for satisfying both IDEA’s pronouncement that children are entitled to [FAPE] and the congressional intent to provide relief for the deprivation of this right” (citing *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990))), *cert. denied*, 117 S. Ct. 176 (1996); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996) (stating, in case for retroactive tuition reimbursement, that language of stay put provision is “‘unequivocal’” in that it requires child to remain in his or her current educational placement during review process, was intended to strip school districts of their traditional unilateral authority to exclude children with disabilities and implicitly mandates school district’s financial responsibility to maintain placement. (quoting *Honig v. Doe*, 484 U.S. 305, 323 (1988))); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 536 (3d Cir. 1995) (acknowledging Supreme Court’s holding in *Burlington* that retroactive tuition reimbursement is appropriate remedy under IDEA), *cert. denied*, 116 S. Ct. 1419 (1996); *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149,

The stay put provision of the IDEA is generally invoked by parents who wish to prevent a change in their child's current educational placement.<sup>108</sup> As such, in *Drinker v. Colonial School District*,<sup>109</sup> the Third Circuit stated that the provision acts as an "automatic preliminary injunction" that

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157 (3d Cir. 1994) (affirming "right to [retroactive] reimbursement for private tuition incurred from a unilateral enrollment during the pendency of any proceeding if it is ultimately determined that the IEP in question was inappropriate") (citing *Burlington*, 471 U.S. at 370); *Lester H.*, 916 F.2d at 872 (stating that retroactive tuition reimbursement "addresses '[a] child's right to a [FAPE],' and satisfies congressional intent to provide relief that remedies the deprivation of that right" (quoting *Burlington*, 471 U.S. at 370)); *Grymes v. Madden*, 672 F.2d 321, 322 (3d Cir. 1982) (awarding retroactive tuition reimbursement in pre-*Burlington* case and stating that stay put provision requires school district's financial maintenance of that placement and concluding that failure to do so violated stay put provision); *Bayonne Bd. of Educ. v. R.S.*, 954 F. Supp. 933, 940-41 (D.N.J. 1997) (noting stay put provision as important procedural safeguard of IDEA and policy concerns underlying it); *N.S. v. Pennsylvania Dep't of Educ.*, 875 F. Supp. 273, 275 (E.D. Pa. 1995) (recognizing parents' right to seek retroactive tuition reimbursement as undisputed if child fails to receive appropriate FAPE); *B.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1158, 1163 & n.4 (D.N.J. 1988) (recognizing parents' right to retroactive tuition reimbursement when school district fails to provide child with appropriate FAPE and stating that stay put provision is means of ensuring that school district does not exclude child without complying with IDEA's due process requirements), *aff'd*, 882 F.2d 510 (3d Cir. 1989).

108. See *Susquenita*, 96 F.3d at 83-84 (discussing parental use of stay put provision as means of maintaining child's placement).

109. 78 F.3d 859 (3d Cir. 1996). The *Drinker* court awarded retroactive tuition reimbursement to the parents for the school district's failure to maintain the then current placement. See *id.* at 868 (ordering school district to "reimburse all costs billed to the [parents] for [the child's] education").

In *Drinker*, a child with a disability, Daniel, lived within the Colonial School District. See *id.* at 861. Because the Colonial School District lacked the means to educate Daniel, he was placed in a program at the Gladwyne Elementary School in the neighboring Lower Merion School District. See *id.* The Colonial School District paid approximately \$25,000 a year for Daniel's education. See *id.* The following year, the Colonial School District claimed that it had developed an appropriate program in its own school district. See *id.* Consequently, the school district notified his parents that it would change his placement to a school within the Colonial School District. See *id.* The parents disagreed with the change in placement and invoked their rights to a hearing under section 1415(b)(2) of the IDEA. See *id.*

The hearing officer held that Colonial could change Daniel's placement, but not until the beginning of the 1994-95 school year and not until a transition plan had been completed. See *id.* at 861-62. Subsequently, both the state appeals panel and the Third Circuit noted the hearing officer's failure to find that Colonial's unilateral change in Daniel's Notice of Recommended Assignment ("NORA") had violated Daniel's rights under the IDEA. See *id.* at 861 n.3. Colonial contended that the delay in the change in placement was too long and appealed. See *id.* at 862. On appeal, the three-judge administrative panel agreed with Colonial and moved up the date for Daniel's change in placement. See *id.* The parties, however, failed to develop a transition plan for Daniel because of his parents' refusal to cooperate with Colonial. See *id.* Consequently, on April 25, 1994, the date that the appeals panel had determined as the date for a change in Daniel's placement, Colonial stopped paying for Daniel's education at Gladwyne Elementary School. See *id.* Daniel, nevertheless, remained at Gladwyne. See *id.* Daniel's parents paid his tuition until they exhausted their financial resources. See *id.*



prevents school districts from unilaterally changing a child's IEP or placement.<sup>110</sup> Moreover, implicit in the maintenance of the pendent placement is the requirement that the school district continues to finance it until the dispute is resolved.<sup>111</sup> Consequently, a school district's failure to fund a pendent placement during litigation is regarded as a unilateral change in placement by the school district and, thus, is prohibited under the IDEA.<sup>112</sup>

The stay put provision requires a child to remain in his or her then current educational placement pending the outcome of litigation.<sup>113</sup> In two situations, however, this mandate does not apply.<sup>114</sup> First, as the Supreme Court in *Burlington* held, section 1415(e)(3)(A) does not bar

110. *Id.* at 864 (citing *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982)). Because section 1415(e)(3)(A) functions as an "automatic preliminary injunction" against a proposed change in a child's IEP/placement, the Third Circuit adopted the United States Court of Appeals for the Second Circuit's reasoning in *Zvi* that the standard for granting a preliminary injunction under section 1415(e)(3)(A) is different than the traditional inquiry for preliminary injunctions. *See id.* ("[T]he statute substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships." (quoting *Zvi*, 694 F.2d at 906)).

111. *See Drinker*, 78 F.3d at 865 (stating that "[i]mplicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent . . . . 'To cut off public funds would amount to a unilateral change in placement,'" which IDEA prohibits (quoting *Zvi*, 694 F.2d at 906)).

112. *See id.* (citing *Monohan v. Nebraska*, 491 F. Supp. 1074, 1089 (D. Neb. 1980), *aff'd in part, vacated in part on other grounds*, 645 F.2d 592, 597-98 (8th Cir. 1981)).

In *Burlington*, the Supreme Court acknowledged that section 1415(e)(3)(A) requires a child to remain in his or her then current educational placement—to stay put—pending litigation. *See School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 373 (1985) (noting that provision arose from parents' efforts to prevent unilateral expulsion or exclusion of their children from public schools). Therefore, the stay put provision was enacted with the intent to prevent school districts from unilaterally changing a placement of a child with a disability. *See id.* (noting purpose of provision "was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings"). Consequently, the *Burlington* Court concluded that section 1415(e)(3)(A) is a "procedural safeguard[ ] [that is] largely for the benefit of the parents and [their] children [with disabilities]. *Id.*

In *Grymes*, the Third Circuit, in a pre-*Burlington* decision, awarded tuition reimbursement to parents. *See Grymes*, 672 F.2d at 322. The court held that the school district's withdrawal of funding for tuition violated the stay put provision of the IDEA, which requires the "maintenance of a current educational placement during the pendency of any proceeding." *Id.* at 323 (quoting 20 U.S.C. § 1415(e)(3)(A) (1994)).

113. *See* 20 U.S.C. § 1415(e)(3)(A) (setting forth stay put provision). For the language of section 1415(e)(3)(A), see *supra* note 66 and accompanying text.

114. *See Burlington*, 471 U.S. at 373 (stating that section 1415(e)(3)(A) does not bar parents from changing child's pendent placement, but they do so at their own financial risk); *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 84 (3d Cir. 1996) (holding that stay put provision may not be used by school district to force parents to maintain child in public school placement).

parents from unilaterally changing the child's placement at any time.<sup>115</sup> Second, the pendent placement may be changed under section 1415(e)(3)(A) if the "[s]tate or local educational agency and the parents . . . agree."<sup>116</sup> If such an agreement is made, a new pendent placement is established under section 1415(e)(3)(A) and must likewise be maintained during litigation.<sup>117</sup>

Disputes arise, however, as to what qualifies as the child's pendent placement that must be maintained under section 1415(e)(3)(A).<sup>118</sup> The Third Circuit has determined that the dispositive factor for determining the child's "current educational placement" [is] . . . the 'IEP' . . . actually

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If during the administrative review process, a state education appeals panel finds the parents' unilateral private school placement to be appropriate, this will constitute an agreement under the stay put provision. See *Burlington*, 471 U.S. at 372 (stating that section 1415(e)(3)(A) requires agreement by "either the State or the local education agency," and concluding Massachusetts Department of Education's Bureau of Special Education Appeals' ("BSEA") decision in favor of parents' private school placement "seem[ed] to constitute agreement by the State to the change of placement" (emphasis added)). Thus, a new pendent placement is created and from the date of such decision forward, parents' unilateral change in placement is no longer regarded as a violation of that section for the purpose of eligibility for retroactive tuition reimbursement. See *id.* (noting that BSEA's decision changed pendent placement and as of date of that decision, parents were no longer in violation of section 1415(e)(3)(A)); see also *Susquenita*, 96 F.3d at 83-84 (stating that appeals panel's agreement that parents' unilateral private school placement was appropriate created new pendent placement under section 1415(e)(3)(A) and school district thus became financially responsible for that placement).

115. See *Burlington*, 471 U.S. at 373-74 (stating that court could not order parents to leave child in what they deem inappropriate placement under section 1415(e)(3)(A)); see also *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 157 (3d Cir. 1994) (affirming parents' right to unilaterally place child in private school and seek retroactive tuition reimbursement); *N.S. v. Pennsylvania Dep't of Educ.*, 875 F. Supp. 273, 275 (E.D. Pa. 1995) (stating it is undisputed that if school district fails to provide child with FAPE, parents may unilaterally place their child in private educational program and seek tuition reimbursement). For a further discussion of unilateral placements and retroactive tuition reimbursement, see DATA RESEARCH, INC., *supra* note 54, at 125-43 and THOMAS & RUSSO, *supra* note 1, at 66-67.

116. 20 U.S.C. § 1415(e)(3)(A); see also *Burlington*, 471 U.S. at 372 (stating education appeals panel decision constitutes agreement to new pendent placement within meaning of section 1415(e)(3)(A)); *Susquenita*, 76 F.3d at 83 (same). For the complete language of section 1415(e)(3)(A), see *supra* note 66 and accompanying text.

117. See *Susquenita*, 96 F.3d at 83-84 (stating that agreement by education appeals panel created new pendent placement and that agreement imposes financial responsibility on school district to pay for that placement); *Crymes*, 672 F.2d at 323 (stating that section 1415(e)(3)(A) requires school districts to maintain pendent placement and that withdrawal of funding for that placement violates stay put provision and holding "that continued funding is required until due process proceedings and appeals have been completed").

118. See *Susquenita*, 96 F.3d at 81 (noting that issue before court was to decide practical question of child's pendent placement); see also *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 865-66 (3d Cir. 1996) (resolving issue of pendent placement in suit for retroactive tuition reimbursement).

functioning when the 'stay put' [provision] is invoked."<sup>119</sup> Because the failure to maintain an IEP or the inappropriateness of an IEP can give rise to liability for tuition reimbursement during the period, the resolution of this dispute is critical to the issue of tuition reimbursement.<sup>120</sup>

Even before the Supreme Court's decision in *Burlington*, the Third Circuit recognized retroactive tuition reimbursement as a remedy under the IDEA.<sup>121</sup> In *Grymes v. Madden*,<sup>122</sup> the school district and State Board

119. *Drinker*, 78 F.3d at 867 (quoting *Woods v. New Jersey Dep't of Educ.*, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 430, 440 (3d Cir. Sept. 17, 1993)). The Third Circuit in *Drinker* adopted the reasoning of the United States Court of Appeals for the Sixth Circuit in interpreting the meaning of "then current educational placement." *Id.* In one case, the court reasoned that because the term "then current placement" means the preservation of the status quo, "it refers to the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then that program's placement will be the one subject to the stayput provision." *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir. 1990). Moreover, in *Thomas*, the Sixth Circuit noted that if an IEP has not yet been implemented, the current educational placement will be the "operative placement under which the child is actually receiving instruction at the time the dispute arises." *Id.* at 626. The Third Circuit in *Drinker* agreed with these definitions of "current educational placement." *Drinker*, 78 F.3d at 867.

If, however, the child has yet to be enrolled in the public school, section 1415(e)(3)(A) requires that the child, "with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed." 20 U.S.C. § 1415(e)(3)(A).

120. *See Susquenita*, 96 F.3d at 82 (stating that child's pendent placement has "great significance for all concerned. 'Where as in the present case review of a contested IEP takes years to run its course—years critical to the child's development—important practical questions arise concerning interim placement of the child and financial responsibility for that placement.'" (quoting *Burlington*, 471 U.S. at 361)); *Drinker*, 78 F.3d at 865 (discussing liability for retroactive tuition reimbursement). The Third Circuit in *Drinker* stated that

"[i]mplicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act."

*Id.* (quoting *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982)); *see Grymes*, 672 F.2d at 323 (stating that school district is required under stay put provision to financially maintain pendent placement). If a school district's IEP or placement is found by a court to be inappropriate and the parents' placement to be appropriate, a court will impose financial responsibility on that school district in the form of retroactive tuition reimbursement. *See Florence County Sch. Dist. Four v. Carter*, 501 U.S. 7, 12-13 (1993) (awarding retroactive tuition reimbursement when school district failed to provide FAPE and parents unilaterally placed child with disability in private school and further stating that section 1401(a)(18)'s requirements do not apply to private parental placements); *Burlington*, 471 U.S. at 369 (recognizing award of retroactive tuition reimbursement when parents' unilateral, private placement was found to be appropriate and school district's IEP inappropriate).

121. *See Grymes*, 672 F.2d at 322-23 (affirming district court's award of tuition reimbursement to parents who incurred costs of maintaining current placement pending litigation of their claim).

122. 672 F.2d 321 (3d Cir. 1982).

had declared James Grymes, a child with a learning disability, ineligible for financial assistance to attend a private educational facility.<sup>123</sup> Nevertheless, the parents placed James in a private school and sought retroactive tuition reimbursement from the school district.<sup>124</sup> Because the school district failed to meet its burden of proof as to its ability to provide James with a FAPE, the Delaware District Court awarded James's parents full tuition reimbursement.<sup>125</sup> The following year, the school district proposed to change James's placement to a public school and eventually withdrew financial support for the private educational placement.<sup>126</sup> The parents again won full tuition reimbursement.<sup>127</sup> More important, the district court determined that the school district's withdrawal of funding violated the stay put provision of the IDEA, which required the "maintenance of a current educational placement" during the pendency of any proceedings under section 1415(e)(3)(A).<sup>128</sup> On appeal, the Third Circuit affirmed not only the award of retroactive tuition reimbursement, but held that continued funding of a current educational placement is required "until due process and appeals have been completed."<sup>129</sup> Since *Grymes* and the Supreme Court's decision in *Burlington*, the Third Circuit and the district

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123. *See id.* at 322 (noting that district court's decision was reached after state and local level hearings).

124. *See id.* Initially, the parents only received an award for partial tuition reimbursement. *See id.* On appeal to the district court, however, the parents were awarded full tuition reimbursement. *See id.*

125. *See id.* (citing *Grymes v. Madden*, No. 78-105, 1979 U.S. Dist. LEXIS 12604, at \*11 (D. Del. May 3, 1979)).

126. *See id.*

127. *See id.* (noting district court ordered school district to reimburse parents for that year's tuition).

128. *Id.* at 322-23 (quoting 20 U.S.C. § 1415(e)(3)(A) (1994)).

129. *Id.* at 323. The Third Circuit noted that both the case law and legislative history supported its holding. *See id.* (finding that "[f]ederal agency interpretations and existing case law provide ample support" for decision) (citing *Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd*, 645 F.2d 592 (8th Cir. 1981); *Gargani v. School Comm.*, No. 77-0612, slip op. at 7 (D.R.I. May 4, 1978), *aff'd*, 601 F.2d 571 (1st Cir. 1979)). The *Grymes* holding is significant because it demonstrates the Third Circuit's early recognition that once a pendent placement is established, the withdrawal of funding will be deemed a unilateral change in placement, which is a violation of the IDEA. *See* 20 U.S.C. § 1415(e)(3)(A) (requiring "maintenance of a current educational placement" during pendency of IDEA proceeding). Moreover, once the placement is established, as the court in *Susquenita* held, the school district's financial responsibility for it follows. *See Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 84 (3d Cir. 1996) (stating that it is undisputed that once there is state agreement on pendent placement, school district is financially responsible for that placement). Therefore, because failure to maintain a placement is deemed a violation of the IDEA, the financial responsibility for that placement is immediate and may not be postponed. *See id.* (holding that "from the point of the panel decision forward . . . and following—Raelee's pendent placement, by agreement of the state, is the private school and Susquenita is obligated to pay for that placement").

courts therein have continually recognized retroactive tuition reimbursement as a remedy under the IDEA.<sup>130</sup>

There are three scenarios that can give rise to the award of retroactive tuition reimbursement: (1) when the parents contest an IEP and unilaterally place their child in another school at their own expense; (2) when the school district fails to maintain the costs of a child's pendent placement; and (3) when under section 1415(e)(3)(A), the school or state and parents agree to placement, other than the one functioning at the time the dispute arose.<sup>131</sup> Under the first scenario, the right to retroactive tuition reimbursement is not absolute.<sup>132</sup> The Third Circuit has followed the

130. See, e.g., *Susquenita*, 96 F.3d at 84 (recognizing retroactive tuition reimbursement and extending rationale therefor to awards of prospective tuition reimbursement); *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 395 (3d Cir.) (acknowledging retroactive tuition reimbursement awards), *cert. denied*, 117 S. Ct. 176 (1996); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 868 (3d Cir. 1996) (awarding retroactive tuition reimbursement when school district failed to maintain child's pendent placement); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 536 (3d Cir. 1995) (recognizing retroactive tuition reimbursement as appropriate relief under IDEA), *cert. denied*, 116 S. Ct. 1419 (1996); *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 160 (3d Cir. 1994) (same); *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990) (same); *Board of Educ. v. Diamond*, 808 F.2d 987, 993 (3d Cir. 1986) (same); *Grymes*, 672 F.2d at 323 (awarding retroactive tuition reimbursement); *Bayonne Bd. of Educ. v. R.S.*, 954 F. Supp. 933, 943 (D.N.J. 1997) (recognizing retroactive tuition reimbursement awards as available remedy under IDEA); *N.S. v. Pennsylvania Dep't of Educ.*, 875 F. Supp. 273, 275 (E.D. Pa. 1995) (same); *B.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1158, 1163 (D.N.J. 1988) (same), *aff'd*, 882 F.2d 510 (3d Cir. 1989).

131. See, e.g., *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 9-11 (1993) (noting that parents unilaterally placed child in private school and affirming retroactive tuition reimbursement award); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985) (same); *Susquenita*, 96 F.3d at 84 (awarding prospective tuition reimbursement when state educational appeals panel agreed that private school was new pendent placement); *Drinker*, 78 F.3d at 868 (awarding retroactive tuition reimbursement when school district failed to financially maintain pendent placement); *Bernardsville*, 42 F.3d at 151 (awarding retroactive tuition reimbursement when parents had unilaterally placed child in private boarding school that court held was appropriate placement); *Diamond*, 808 F.2d at 992-93 (affirming award of retroactive tuition reimbursement when parents unilaterally placed child in private residential setting); *Grymes*, 672 F.2d at 323 (awarding retroactive tuition reimbursement for school district's failure to financially maintain pendent placement).

132. See *Burlington*, 471 U.S. at 369-70 (stating that retroactive reimbursement may be awarded when court determines that school placement was inappropriate and that parents' placement was appropriate); *Bernardsville*, 42 F.3d at 158-59 (denying award of retroactive tuition reimbursement when parents waited more than two years to file claim for reimbursement).

In *Bernardsville*, the parents unilaterally placed their child in a private boarding school because of the school district's failure to provide their child with an education suitable to his special needs. See *id.* at 151. Two years after this unilateral placement, the parents sought retroactive tuition reimbursement from the Bernardsville School District. See *id.* The Third Circuit held that the parents' failure to bring suit earlier denied the school district the opportunity to modify the child's IEP and attempt to offer him a FAPE tailored to his needs. See *id.* at 157-58 (noting school district serves large student population, and given numerous con-

mandate of *Burlington* in awarding this remedy.<sup>133</sup> In cases similar to *Burlington* in which parents have unilaterally changed the child's placement, a court will award tuition reimbursement only when it has made the following two findings: (1) that the IEP offered by the school district is inappropriate and (2) that the parents' placement is appropriate.<sup>134</sup> These requirements, however, do not apply under the second scenario when the parents invoke the stay put provision and the school district is required to maintain that placement.<sup>135</sup> Instead, a court will award retroactive tuition reimbursement for the school district's failure to maintain the placement as the Third Circuit did in *Grymes*.<sup>136</sup> Finally, under the third scenario, the

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tacts it has with parents, "mere notice of parental 'dissatisfaction' does not alone put the Board on reasonable notice that the parents" will sue). Consequently, the court stated that "[a]bsent initiation of review proceedings [under the IDEA] within a reasonable time of a unilateral decision to transfer a child to a private institution, a school district would not know to continue to review and revise an IEP." *Id.* at 158. Moreover, according to the court, the parents were fully aware that their right to have their child's IEP reviewed "contain[ed] a corresponding parental duty to unequivocally place in issue the appropriateness of an IEP." *Id.* Therefore, the court concluded that waiting more than two years to seek reimbursement, without a mitigating excuse, was an "unreasonable delay" on the part of the parents. *Id.* Thus, the court vacated the district court's award of retroactive tuition reimbursement for these two years. *See id.* at 158-59 (denying parents reimbursement for two years of school). The court affirmed, however, retroactive tuition reimbursement for the third year because there was no unreasonable delay as to that year. *See id.* at 160 (stating that "J.H.'s parents adequately placed in issue their dissatisfaction with J.H.'s IEP for purposes of reimbursement" for third school year).

133. *See Drinker*, 78 F.3d at 868 (awarding retroactive tuition reimbursement when school district failed to financially maintain pendent placement that was held to be appropriate placement); *Bernardsville*, 42 F.3d at 151 (awarding retroactive tuition reimbursement when parents had unilaterally placed child in private boarding school that was held to be appropriate placement and when school district's placement was determined to be inappropriate); *Diamond*, 808 F.2d at 992-93 (affirming award of retroactive tuition reimbursement when parents unilaterally placed child in private residential setting that was held to be appropriate educational environment); *Grymes*, 672 F.2d at 323 (awarding retroactive tuition reimbursement because of school district's failure to financially maintain appropriate pendent placement).

134. *See Bernardsville*, 42 F.3d at 151 (awarding retroactive tuition reimbursement when parents unilaterally placed child in private boarding school that was held to be appropriate placement, while school district's placement was found to be inappropriate); *Diamond*, 808 F.2d at 992-93 (affirming award of retroactive tuition reimbursement when parents unilaterally placed child in what was held to be appropriate educational setting).

135. *See Drinker*, 78 F.3d at 865 (stating that implicit in stay put provision is school district's continued financial responsibility for then current educational placement); *see also Grymes*, 672 F.2d at 323 (awarding retroactive tuition reimbursement for school district's failure to financially maintain appropriate pendent placement).

136. *See Grymes*, 672 F.2d at 323 (awarding retroactive tuition reimbursement when school district withdrew funds for pendent placement and stating that "continued funding [was] required until due process proceedings and appeals [had] been completed"); *see also Drinker*, 78 F.3d at 867 (awarding retroactive tuition reimbursement for school district's failure to maintain pendent placement).

parents and state may agree under section 1415(e)(3)(A) to a placement other than the one functioning when the dispute occurs.<sup>137</sup> According to the Supreme Court in *Burlington*, such an agreement occurs when an educational appeals panel finds that the IEP was inappropriate.<sup>138</sup> If this occurs, as the *Susquenita* court held, a new pendent placement is established and the school district is required to maintain it pending the outcome of litigation.<sup>139</sup> Moreover, the United States Court of Appeals for the Ninth Circuit in *Clovis Unified School District v. California Office of Administrative Hearings*,<sup>140</sup> held that the financial obligation to maintain a pendent placement is absolute.<sup>141</sup> Therefore, in the Ninth Circuit, school districts may not recover tuition payments even if the public school placement is ultimately held to have been the appropriate one.<sup>142</sup> In awarding prospective tuition reimbursement for new pendent placements, the *Susquenita* court, however, declined to decide whether school districts may recover these funds.<sup>143</sup>

In awarding relief under the IDEA, the Third Circuit places great emphasis on the parents' financial ability to "front the costs" of their child's FAPE.<sup>144</sup> Just as the Supreme Court in *Burlington* balanced equitable con-

137. See 20 U.S.C. § 1415(e)(3)(A) (1994) (providing that child shall remain in pendent placement "unless the State or local education agency and the parents . . . otherwise agree"); see also *Burlington*, 471 U.S. at 372 (stating that decision by state educational appeals panel constitutes agreement to pendent placement within meaning of section 1415(e)(3)(A)); *Susquenita Sch. Dist. v. Raellee S.*, 96 F.3d 78, 84 (3d Cir. 1996) (finding that state education appeals panel's agreement with parents' unilateral placement created new pendent placement within meaning of section 1415(e)(3)(A)). For the complete language of section 1415(e)(3)(A), see *supra* note 66 and accompanying text.

138. See *Burlington*, 471 U.S. at 372 (stating that decision by state educational appeals panel constitutes an agreement to pendent placement within meaning of section 1415(e)(3)(A)); *Susquenita*, 96 F.3d at 83-84 (reiterating Supreme Court's language in *Burlington* that educational appeals panel "'decision in favor of the [parents] and the [private school] placements would seem to constitute agreement by the state to the change of placement.'" (alteration in original) (quoting *Burlington*, 471 U.S. at 372)). For a further discussion of the Supreme Court's decision in *Burlington*, see *supra* notes 77-101 and accompanying text.

139. See *Susquenita*, 96 F.3d at 84 (holding that state education appeals panel constituted an agreement within meaning of section 1415(e)(3)(A) to create new pendent placement and school district was financially responsible for that placement). For a further discussion of the Third Circuit's decision in *Susquenita*, see *infra* notes 155-228 and accompanying text.

140. 903 F.2d 635 (9th Cir. 1990).

141. *Id.* at 641 ("*Burlington* concluded that the school was required to maintain that placement pending the court review proceedings. . . . We reach the same conclusion here.").

142. See *id.* (holding school district financially responsible for pendent placement regardless of which party ultimately prevailed on appeal).

143. See *Susquenita*, 96 F.3d at 87 n.10 (acknowledging Ninth Circuit's decision in *Clovis*, but finding that issue of whether school district would be entitled to repayment if they ultimately prevailed in case was "premature").

144. See *id.* at 86-87 (stating that right and access of child with disability to FAPE is not assured by requiring parents to "front the funds for continued private

siderations in determining that retroactive tuition reimbursement should be available under the IDEA, so too has the Third Circuit in awarding remedies under the IDEA.<sup>145</sup>

The Third Circuit and other circuit courts have also interpreted *Burlington* to permit the remedy of compensatory education.<sup>146</sup> Compensatory education is a remedy under the IDEA “designed to provide remedial educational programming to make up for the time when the school system was responsible for providing educational services but failed to do so.”<sup>147</sup> The Third Circuit in *Lester H. v. Gilhool*<sup>148</sup> reasoned that in awarding compensatory education to a child who was deprived of his right to a FAPE,

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education” and noting substantial burden on parents if they were forced to do so); *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 395 (3d Cir.) (noting that Congress did not intend child's entitlement to FAPE to “‘turn upon . . . parent's ability to ‘front’ its costs’” (quoting *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986))), *cert. denied*, 117 S. Ct. 176 (1996); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 536 (3d Cir. 1995) (awarding compensatory education when child had been denied FAPE because child's access to FAPE should not depend on his or her parents ability to “‘front’ the costs” and citing *Miener*, 800 F.2d at 753), *cert. denied*, 116 S. Ct. 1419 (1996); *Lester H. v. Gilhool*, 916 F.2d 865, 872-73 (3d Cir. 1990) (stating in case for compensatory education that school districts “‘should [not] escape liability for [educational] services simply because [the parent] was unable to provide them in the first instance’” (alteration in original) (quoting *Miener*, 800 F.2d at 753)).

145. *See, e.g., Susquenita*, 96 F.3d at 85-87 (relying upon and discussing equitable concerns of Supreme Court in *Burlington* in awarding prospective tuition reimbursement, such as parents financial ability to bear burden of private special education); *M.C.*, 81 F.3d at 395 (awarding compensatory education because child's right to FAPE should not hinge on parents' financial ability to “‘front’” costs); *Carlisle*, 62 F.3d at 536-37 (stating that compensatory education remedy is intended to cure deprivation of child's right to FAPE and characterizing Supreme Court's finding in *Burlington* as allowing equitable remedies when child's rights have been violated); *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 157-58 (3d Cir. 1994) (denying retroactive tuition reimbursement because parents failed to give school district reasonable notice of claim by waiting more than two years to seek reimbursement); *Lester H.*, 916 F.2d at 873 (concluding that Congress empowered courts to award compensatory education under IDEA and stating Congress “did not intend to offer a remedy only to those parents able to afford an alternative private education”).

146. *See M.C.*, 81 F.3d at 395 (ordering award remedy of compensatory education and noting further that federal courts began awarding compensatory education following Supreme Court's award of retroactive tuition reimbursement in *Burlington*); *Carlisle*, 62 F.3d at 536-37 (same); *Lester H.*, 916 F.2d at 872 (same).

147. *GUERNSEY & KLARE, supra* note 1, at 191; *see DATA RESEARCH, INC., supra* note 54, at 177 (stating compensatory education is “[t]he belated provision of necessary educational services by a school district to a student with a disability . . . [who has] been deprived of [his or her] right to a [FAPE]”); *OSBORNE, supra* note 1, at 183 (stating compensatory education is awarded when school district did not provide child with FAPE and such compensatory services “are provided during a time period when the student would not be otherwise eligible for services”); *THOMAS & RUSSO, supra* note 1, at 65-66 (discussing award of compensatory education when school district failed to provide eligible child with FAPE).

148. 916 F.2d 865 (3d Cir. 1990).



the court was providing a remedy for the deprivation of a right.<sup>149</sup> Further, if compensatory education was not an available remedy, the court would be allowing the school district to escape liability simply because the parent could not afford the appropriate placement during the pendency of litigation.<sup>150</sup> In other words, compensatory education is a remedy available when the parents are unable to “front the costs” of the appropriate placement.<sup>151</sup> Thus, the Third Circuit noted that remedies under section 1415(e)(3)(A) should be in accord with congressional intent.<sup>152</sup> Regarding that intent, the *Lester H.* court concluded that

Congress empowered the courts to grant a compensatory remedy. Furthermore, we conclude that Congress, by allowing the courts to fashion an appropriate remedy to cure the deprivation of a child’s right to a free appropriate public education, did not intend to offer a remedy only to those parents able to afford an alternative private education.<sup>153</sup>

It is out of this concern for the parental ability to “front the costs” and from the policies laid down in *Burlington* that the *Susquenita* court extended the remedies under section 1415(e)(3)(A) to include prospective tuition reimbursement.<sup>154</sup>

IV: ANALYSIS: *SUSQUENITA SCHOOL DISTRICT v. RAELEE S.*: NEW  
PENDENT PLACEMENTS AND RETROACTIVE VERSUS PROSPECTIVE  
TUITION REIMBURSEMENT IN THE THIRD CIRCUIT:  
ANOTHER VICTORY FOR PARENTS

A. *The Issue, Facts and Procedural Posture*

In the summer of 1994, shortly before *Raelee S.*, a ninth grader with a learning disability, was to enter *Susquenita High School*, the *Susquenita School District* sent a Notice of Recommended Assignment (“NORA”) and

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149. *Id.* at 872-73 (“[C]ompensatory education . . . cures the deprivation of a handicapped child’s statutory rights, thus providing a remedy which Congress intended to make available.”).

150. *See id.* (stating that rationale for awarding compensatory education is to ensure child receives FAPE, and therefore, “[s]chool [d]istrict [should] [not] escape liability for [educational] services simply because [the parent] was unable to provide them in the first instance” (alteration in original) (quoting *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986))).

151. *See id.* at 873 (noting that child’s right to FAPE should not depend on parents’ ability to “front” costs of private placement and later pursue retroactive tuition reimbursement).

152. *See id.* at 873 (stating that in IDEA, Congress empowered courts to grant remedy of compensatory education).

153. *Id.*

154. *See Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 86 (3d Cir. 1996) (awarding prospective tuition reimbursement because child’s right to FAPE would not be advanced by requiring his or her parents to front costs for private education and discussing financial hardship that would be imposed on families if they were required to front costs).

a proposed IEP to her parents.<sup>155</sup> Soon after Raelee began high school, her parents rejected the NORA and the proposed IEP.<sup>156</sup> Thereafter, the parents withdrew Raelee from Susquenita High School and unilaterally placed her in a private school for students with learning disabilities.<sup>157</sup> Raelee's parents then invoked their right to a due process hearing under section 1415(b)(2) to determine the appropriateness of the private school placement and whether they were entitled to tuition reimbursement.<sup>158</sup>

In April 1995, the hearing officer found the proposed IEP to be appropriate and held that the school district should not be financially responsible for the parents' unilateral decision to place Raelee in a private school.<sup>159</sup> The parents appealed the decision to the state special education appeals panel and won.<sup>160</sup> The appeals panel reversed the hearing officer's decision and found that the proposed IEP was inappropriate.<sup>161</sup> Finding that the parents' private placement was the appropriate one, the appeals panel held that Raelee's parents were entitled to tuition reimbursement.<sup>162</sup> More important, however, the appeals panel established the private school as Raelee's pendent placement for future disputes between the parties.<sup>163</sup> Under section 1415(e)(2), the school district ap-

155. *See id.* at 79 (noting that Raelee S. was child with learning disability within meaning of IDEA).

156. *See id.*

157. *See id.*

158. *See id.* Pennsylvania has a two-tiered administrative review process under the IDEA. *See* *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 863 n.10 (3d Cir. 1996) (explaining Pennsylvania's special education hearing system). The first tier requires an evidentiary hearing at the local level by a single impartial hearing officer. *See id.* (denoting "local" and "state" levels as distinction between tiers) (citing 22 PA. CODE § 14.64(m) (1994)). Either party may then appeal the hearing officer's decision to the state level before a panel of three impartial appellate officers. *See id.* (noting system conforms to requirements of sections 1415(b)(2) and (c) of IDEA) (citing 22 PA. CODE § 14.64(m)).

159. *See Susquenita*, 96 F.3d at 79.

160. *See id.*

161. *See id.* (noting that appeals panel found that school district's proposed IEP was deficient in many respects and that it was not "reasonably calculated to provide for meaningful education benefit." (quoting Special Education Opinion No. 672, Typescript at 13)). The unilateral private school placement, although a more restrictive placement, was nevertheless dedicated to the education of children with learning disabilities. *See id.* (discussing reasoning of appeals panel). Consequently, the appeals panel held that "Raelee's current [educational] needs . . . outweigh[ed] her need for integration with nondisabled peers." *Id.* (quoting Special Education Opinion No. 672, Typescript at 13).

162. *See id.* at 79-80 (stating that under IDEA, parents have right to withdraw their child from public school unilaterally, place him or her in private school and receive tuition reimbursement when school district fails to offer child FAPE).

163. *See id.* (holding that "unless this order is overturned in a Commonwealth or federal district court, the private school placement shall be the pendent placement in any future disputes between the parent and the District." (quoting Special Education Opinion No. 672, Typescript at 6)). The appeals panel's language is based on section 1415(e)(3)(A), which provides that during the pendency of any proceedings under section 1415(e)(3)(A), a child shall remain in his or her

pealed the decision of the special education appeals panel by filing a complaint in the United States District Court for the Middle District of Pennsylvania.<sup>164</sup>

In the complaint, the school district claimed that the special education appeals panel had incorrectly identified the private school as Raelee's pendent placement and awarded tuition reimbursement.<sup>165</sup> Additionally, the school district asked the district court to stay the special education appeals panel decision "insofar as it direct[ed the school district] to reimburse the parents for expenses and . . . state[d] that Raelee's placement within the meaning of . . . § 1415(e)(3)(A) [was] a private school."<sup>166</sup>

The district court denied the motion for stay.<sup>167</sup> Further, the district court held that Raelee's pendent placement during the pendency of the appeal would be the private school until further order from the court otherwise.<sup>168</sup> Thus, the district court's holding effectively required the

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"then current educational placement" unless "the State or local educational agency and the parents or guardian otherwise agree." 20 U.S.C. § 1415(e)(3)(A) (1994); see also *Susquenita*, 96 F.3d at 80 n.1 (discussing section 1415(e)(3)(A)). In *Burlington*, the Supreme Court stated that a decision of an appeals panel can constitute an agreement within the meaning of section 1415(e)(3)(A). School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 372 (1985).

164. See *Susquenita*, 96 F.3d at 80 (noting that school district filed "Complaint in the Nature of an Appeal from the decision of the special education appeals panel" and that district court's jurisdiction was based on section 1415(e)(2)).

Section 1415(e)(2) provides that:

Any party aggrieved by the findings and decision [by a State educational agency] under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

20 U.S.C. § 1415(e)(2).

165. See *Susquenita*, 96 F.3d at 80 (noting that School District alleged further that appeals panel had improperly disregarded hearing officer's credibility determinations and made findings of fact unsupported by record). For purposes of appeal to the Third Circuit, however, the school district's allegations regarding placement and tuition reimbursement are the most important. See *id.* (stating that "most importantly for purposes of this appeal," school district alleged that appeals panel "erred when it identified the private school as Raelee's pendent placement and awarded tuition reimbursement").

166. *Id.* The motion for a stay was filed pursuant to Rules 62(d) and (f) of the Federal Rules of Civil Procedure. See *id.* (noting school district's request that district court grant motion for stay pending appeal).

167. See *id.* at 81.

168. See *id.* In evaluating the motion for a stay, the district court held that Federal Rule of Civil Procedure 62(d) requires an analysis similar to one employed for preliminary injunctions. See *id.* at 80 (discussing preliminary injunction analysis). The analysis requires four factors to be considered: "1) the movant's likelihood of success on the merits; 2) whether the movant will suffer irreparable harm if the request is denied; 3) whether third parties will be harmed by the stay; and 4) whether granting the stay will serve the public interest." *Id.* As to the first factor, the district court noted that success on the merits of the case was difficult to predict, but concluded, based "on the then current state of the record, . . . the likelihood of success favors Raelee S." *Id.* On the public interest factor, the district

school district to reimburse the parents for past private school tuition expenses and to maintain the pendent placement by prospectively paying the tuition.<sup>169</sup> The school district then appealed the denial of the stay to the Third Circuit.<sup>170</sup> Specifically, the school district asked the Third Circuit to decide if the school district was financially responsible for the costs of the learning disabled child's private schooling pending the outcome of litigation establishing the propriety of that placement.<sup>171</sup>

B. *The Third Circuit's Analysis of Pendent Placements and Financial Responsibility*

In *Susquenita*, the parties asked the Third Circuit to decide the appropriate pendent placement for Raelee, the party financially responsible for

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court again noted that the state of the record made assessment difficult. *See id.* (finding nevertheless, that public interest factor favored Raelee's receiving FAPE and that if district court was compelled to make assessment at that juncture, court would find for Raelee). Next, the district court evaluated the argument that the school district would suffer irreparable harm if it had to pay for the private placement. *See id.* at 80-81 (noting additionally that under current case law, even if school district ultimately prevailed on appeal, it would not be entitled to recover funds for Raelee's private school); *see also* *Clovis Unified Sch. Dist. v. California Office of Admin.* Hearings, 903 F.2d 635, 641 (9th Cir. 1990) (awarding prospective tuition reimbursement and finding that parents would not be required to repay those funds even if school district ultimately prevailed in suit). Although the court acknowledged the risk of irreparable harm, it ultimately found that the prospect of harm was not sufficient grounds on which to grant the stay. *See Susquenita*, 96 F.3d at 81 (stating that although there was merit to school district's claim of harm, it was insufficient to justify granting of motion for stay pending appeal). Finally, as to the third factor, the district court held that third parties would not be harmed if the stay was denied. *See id.* at 80 (concluding that third parties—students—would not be harmed by denial of stay). On the issue, the district court stated that

"[t]he only harm which we can conceive of is the financial burden which will be borne by the district during the pendency of this appeal. We have nothing before us to suggest that other students will be denied a proper or adequate education if the order compelling the district to fund [Raelee's] private school remains in effect during the pendency of this appeal."

*Id.* at 80 (quoting Special Education Opinion No. 672, Typescript at 4).

169. *See Susquenita*, 96 F.3d at 81 & n.3 (noting that district court holding effectively decided reimbursement issue in favor of parents). The district court's order denying the stay required the school district to reimburse Raelee's parents for the tuition incurred during the 1994-1995 academic year. *See id.* at 81 n.3 (stating that order also effectively made school district financially responsible for continuing private school placement as well). Moreover, the district court's affirmation of the special education appeals panel order established the private school as the pendent placement and made the school district "financially responsible for *continuing the private school placement* . . . [and] thus decided both reimbursement for and *prospective payment of private school tuition*." *Id.* (emphasis added).

170. *See id.* at 79.

171. *See id.* at 78.

that placement and when that party must pay for the placement.<sup>172</sup> The school district argued that the private school placement was not the pendent placement.<sup>173</sup> Moreover, the school district contended that even if the appeals panel had correctly decided that the private school was the pendent placement, financial responsibility therefore could not be imposed until the end of the appellate process, in light of the Supreme Court's decision in *Burlington*.<sup>174</sup> Because the issues of pendent placement and financial responsibility are linked, the Third Circuit first addressed these issues and then turned to the school district's interpretation of *Burlington*.<sup>175</sup>

### 1. *Pendent Placement and Financial Responsibility*

Section 1415(e) of the IDEA details the procedural safeguards that are designed to guarantee parents the opportunity to participate in all decisions affecting their child's education.<sup>176</sup> When a school district plans to change a child's established educational program, the IDEA requires it to provide parents with written notice of the proposed change.<sup>177</sup> If parents object to a change in their child's placement, however, parents may invoke section 1415(e)(3)(A) to ensure that the child remains in his or

172. *See id.* at 81 (noting that appeal involved three practical questions: (1) where Raelee should attend school pending litigation; (2) who must pay for Raelee's placement; and (3) when payment must be made).

173. *See id.* (noting school district's argument that it was not financially responsible).

174. *See id.* at 81, 84 (acknowledging that "issues of pendent placement and financial responsibility are linked").

175. *See id.* (stating that pendent placement and financial responsibility are linked and addressing timing of financial responsibility in light of *Burlington*).

176. *See* 20 U.S.C. § 1415(e) (1994) (listing parents' appeals rights when school district seeks to change child's placement); *see also Susquenita*, 96 F.3d at 82 (stating that "[t]hese safeguards are meant to 'guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate'" (quoting *Honig v. Doe*, 484 U.S. 305, 311-12 (1988))). Additionally, section 1415(e) allows parents to seek a review of any decisions regarding their child's education that the parents feel is inappropriate. *See* 20 U.S.C. § 1415(e) (authorizing parents to appeal decisions); *Susquenita*, 96 F.3d at 82 (explaining section 1415(e)). The court further noted that Congress "repeatedly emphasized throughout the [IDEA] the importance of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." *Id.* (quoting *Honig*, 484 U.S. at 311-12) (citing 20 U.S.C. §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), 1415(b)(2)).

177. *See* 20 U.S.C. § 1415(b)(1)(C) (requiring written notice to parents when school system either proposes or refuses to change child's educational program); *see also Susquenita*, 96 F.3d at 82 (noting IDEA requires "written notice of any proposed changes in the child's established educational program" (citing 20 U.S.C. § 1415(b)(1)(C))). Moreover, section 1415(e)(2) authorizes parents to seek an administrative review of such changes and may appeal any adverse decision to state or federal court. *See id.* (listing dissatisfied parents' appeal options) (citing 20 U.S.C. § 1415(e)(2)).

her then current educational placement during the course of administrative and judicial proceedings.<sup>178</sup>

Although the stay put provision is usually invoked by parents to prevent a change in placement, the Third Circuit noted that this was not the case in *Susquenita*.<sup>179</sup> In *Susquenita*, the parents disagreed with the proposed IEP in the public school and unilaterally placed their child in a private school instead.<sup>180</sup> Consequently, the Third Circuit stated that because the parents chose not to invoke the stay put provision, the provision was inoperative when the parents changed Raelee's placement.<sup>181</sup>

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178. See *Susquenita*, 96 F.3d at 82 (stating that section 1415(e)(3)(A) is known as IDEA's pendent placement or stay put provision and discussing its role as procedural safeguard). A state's compliance with the IDEA is monitored by federal review and assured by the IDEA's procedural safeguards extended to parents and their children. See *id.* (listing compliance mechanisms) (citing 34 C.F.R. §§ 104.61, 100.7 (1997)); see also 20 U.S.C. § 1415(a)-(f) (setting forth procedural safeguards).

Moreover, section 1415(e)(3)(A) has been interpreted by the Supreme Court as having a protective purpose. See *Susquenita*, 96 F.3d at 82-83 (stating protection benefits parents and child) (citing *Honig*, 484 U.S. at 323; *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 361 (1985)). The protective purpose was to strip school districts of the unilateral power they traditionally had to exclude children with disabilities from school. See *id.* at 82 (stating school districts could exclude children with disabilities over their parents' objections) (citing *Honig*, 484 U.S. at 324); see also *Burlington*, 471 U.S. at 373 (stating Congress's concern about apparent widespread practice of excluding children with disabilities from public schools or warehousing them in private institutions and special classes); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864-65 (3d Cir. 1996) (recognizing that policy concerns underlying section 1415(e)(3)(A) demonstrate Congress's "choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved" (citing *Woods v. New Jersey Dep't of Educ.*, 20 *Indivs. Disabilities Educ. L. Rep.* (LRP Publications) 439, 440 (3d Cir. Sept. 17, 1993))).

179. See *Susquenita*, 96 F.3d at 83 (noting stay put provision is often invoked by parents in order to maintain placements when parents disagree with the school district's proposed change in placement). To ascertain what the current placement is for purposes of the stay put provision, the Third Circuit has held that the "dispositive factor" is the child's current educational placement at the time the stay put provision is invoked. *Id.* (citing *Drinker*, 78 F.3d at 867).

180. *Id.* at 79.

181. See *id.* at 83 (noting that Raelee's parents had decided that public school IEP was inadequate, they chose not to invoke protections of section 1415(e)(3)(A) and instead decided to place her in private school at their own expense). The *Susquenita* court reasoned that because Raelee's parents made a unilateral change in placement before they sought administrative review, the stay put provision was inoperative. See *id.* (finding this case differs from many where pendent placement is at issue).

At the time Raelee's parents transferred her to private school, the public school would have been the pendent placement under section 1415(e)(3)(A) of the IDEA. See *id.* (stating that school district argued that because last functioning IEP was in public school system, it must remain Raelee's pendent placement). The parents did not dispute this point, but instead argued that a new pendent placement, and the financial responsibility therefor, was created by the education appeals panel decision in their favor. See *id.* (agreeing with parents' argument).

The parents, however, contended that the education appeals panel decision designating the private school as Raellee's pendent placement had created a new pendent placement from that point forward.<sup>182</sup> According to the parents, this new pendent placement was the private school.<sup>183</sup> The school district, on the other hand, argued that a pendent placement under section 1415(e)(3)(A) is fixed for the duration of the proceedings and cannot be changed.<sup>184</sup> Therefore, according to the school district, because the public school was the pendent placement at the commencement of the administrative proceedings, it remained the pendent placement throughout.<sup>185</sup> The Third Circuit disagreed with the school district based on the language of section 1415(e)(3)(A) of the IDEA and the Supreme Court's interpretation of that language in *Burlington*.<sup>186</sup>

Beginning with section 1415(e)(3)(A), the Third Circuit noted that the language requires a child to remain in his or her pendent placement "unless the state or local educational agency and the parents or guardian otherwise agree."<sup>187</sup> Next, the Third Circuit relied on the Supreme Court's interpretation of this language in *Burlington*.<sup>188</sup> The Third Circuit

182. *See id.* (stating that parents contended that appeals panel decision altered pendent placement and financial responsibility landscape). The education appeals panel held that the school district's proposed IEP was inadequate and that the private school placement was the appropriate placement for Raellee. *See id.* More importantly, the panel directed that the private school be the pendent placement "in any future disputes 'unless the [panel] order is overturned in a Commonwealth or federal district court.'" *Id.* (quoting Special Education Opinion No. 672, Typescript at 14 n.27).

183. *See id.* (noting that "the parents argue[d] that a new pendent was created and that, from the time of the panel decision forward, Susquenita [was] . . . required to bear the financial burden of maintaining Raellee at the private school").

184. *See id.* at 84 (noting school district's contention that "a pendent placement that is appropriate at the outset of administrative proceedings is fixed for the duration of the proceedings and cannot be altered by an administrative ruling in the parents' favor").

185. *See id.* at 84 & n.6 (discussing school district's argument that pendent placement is fixed at outset of administrative proceedings and school district's misplaced reliance on *Drinker*).

186. *See id.* at 84 (noting parents' position was derived from language of IDEA and to adopt school district's argument would "contravene the language of the statute and the holding of *Burlington*").

187. *Id.* at 83 (quoting 20 U.S.C. § 1415(e)(3)(A) (1994)). Thus, in the eyes of the *Susquenita* court, the parents' argument regarding the creation of a new pendent placement by the appeals panel was derived directly from the language of the IDEA itself. *See id.* at 84 (citing *Burlington* as additional authority for parents' position).

188. *See id.* (analyzing and applying *Burlington* Court's interpretation of statute). Judge Becker, concurring in the result, would have relied solely on the Supreme Court's suggestion in *Burlington* that an agreement by a state appeals panel constitutes an agreement for purposes of section 1415(e)(3)(A). *See id.* at 84 n.5. Consequently, Judge Becker would have imposed financial responsibility for Raellee's pendent placement on the school district because the state education appeals panel had agreed to the pendent placement in accordance with section 1415(e)(3). *See id.* ("Judge Becker would rest the decision . . . on the block quote

stated that the *Burlington* Court established that “a ruling by the education appeals panel in favor of the parents’ position constitutes agreement for purposes of section 1415(e)(3)[(A)].”<sup>189</sup> Therefore, the Third Circuit held that the education appeals panel decision created a new pendent placement by agreement under section 1415(e)(3)(A).<sup>190</sup>

In addressing the school district’s position on pendent placements, the Third Circuit again relied on *Burlington* as well as the statutory language of the IDEA.<sup>191</sup> The court rejected the school district’s argument that pendent placements are fixed for the duration of the dispute and may not be altered.<sup>192</sup> Rather, the Third Circuit held that to accept such an argument would contravene the statutory language and the holding of *Burlington*.<sup>193</sup>

The Third Circuit also rejected the school district’s reliance on the Third Circuit’s decision in *Drinker*.<sup>194</sup> The court stated that *Drinker* was distinguishable because: (1) the parents in that case had invoked the stay put provision to maintain the current placement that the school district had proposed to change and (2) there had been no agreement on the pendent placement.<sup>195</sup> In *Drinker*, the Third Circuit held that a child’s “then current educational placement” under section 1415(e)(3)(A) is de-

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from *Burlington* in which the Court suggested that a decision by an appellate panel in favor of the parents constitutes agreement by the state for purposes of § 1415(e)(3)[(A)].”.

189. *Id.* at 83. The Third Circuit relied on the Supreme Court’s interpretation of section 1415(e)(3)(A) in *Burlington* where the Court stated that [a]s an initial matter, we note that . . . [§ 1415(e)(3)(A)] calls for agreement by either the State or the local educational agency. The [Bureau of Special Education Appeal’s] decision in favor of the [parents] and the [private] [s]chool placement would seem to constitute an agreement by the State to the change of placement.

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

190. *See Susquenita*, 96 F.3d at 83 (stating that, from point of educational appeals panel decision forward, Raelee’s pendent placement was private school as created by agreement of state).

191. *See id.* (stating that school district’s argument is contrary to language of statute and Supreme Court’s holding in *Burlington*).

192. *See id.* at 84 (noting school district argued that pendent placement that is appropriate at outset of review proceedings is fixed and cannot be changed by administrative decision finding parents’ placement appropriate).

193. *See id.* (stating that school district’s position would render appeals panel decision “of no practical significance unless and until it is affirmed by a decision that cannot be or is not appealed”).

194. *See id.* at 84 n.6. (stating that school district’s reliance on *Drinker* is misplaced). Judge Becker, concurring in the result, also believed the school district’s reliance on *Drinker* to be misplaced, but for different reasons than the majority. *See id.* (Becker, J., concurring) (noting Judge Becker’s differing reasoning). He believed that *Drinker* “related not to the appropriate placement, but to the timing of the placement and [that] timing [was] not an issue here.” *Id.* (Becker, J., concurring).

195. *See id.* (detailing factual distinctions between *Drinker* and *Susquenita*).



terminated by reference to the then functioning IEP.<sup>196</sup> Moreover, the *Drinker* court held that the pendent placement could not be changed pending the resolution of the litigation, at least at the district court level.<sup>197</sup> The Third Circuit in *Susquenita*, however, held that *Drinker* could not be interpreted to negate a state education appeals panel's decision establishing an appropriate pendent placement.<sup>198</sup> The Third Circuit stated that section 1415(e)(3)(A) was enacted to protect the interests of their children and parents.<sup>199</sup> Therefore, the court concluded that section 1415(e)(3)(A) could "not be used . . . as a weapon by the Susquenita school district" to force parents to leave their child in placement that an educational panel has determined to be inappropriate.<sup>200</sup>

Having established that Raelee's new pendent placement was the private school and that this placement was created by state agreement, the Third Circuit turned to the financial responsibility for that placement.<sup>201</sup> The court held that once a state agreed to a pendent placement, a school district's financial responsibility for that placement follows.<sup>202</sup> Therefore, the court concluded that because the state had agreed to the new pendent placement in the private school, the school district was obligated to pay for the pendent placement.<sup>203</sup> The Third Circuit's task was not yet complete, however, because the school district argued that the imposition of prospective tuition reimbursement or reimbursement "pendente lite" was barred by the Supreme Court's holding in *Burlington*.<sup>204</sup> The school district contended that *Burlington* permits only retroactive tuition reimburse-

196. *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir. 1996). The *Drinker* court stated that "the dispositive factor in deciding a child's 'current educational placement' should be the . . . IEP . . . actually functioning when the 'stay put' [provision] is invoked." *Id.* (quoting *Woods v. New Jersey Dep't of Educ.*, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440 (3d Cir. Sept. 17, 1993)); see *Susquenita*, 96 F.3d at 84 n.6 (noting that Third Circuit in *Drinker* held that "child's pendent placement should be determined with reference to the last functioning IEP").

197. *Drinker*, 78 F.3d at 867 (holding "that a child should remain in that placement pending resolution of the litigation at least at the district court level"); see also *Susquenita*, 96 F.3d at 78, 84 n.6 (discussing *Drinker* holding).

198. See *Susquenita*, 96 F.3d at 84 n.6 (stating that such interpretation of *Drinker* is too broad).

199. See *id.* at 84 ("[Section] 1415(e)(3)(A) was drafted to guard the interests of parents and their children.").

200. See *id.* ("We cannot agree that this same section should be used here as a weapon by the Susquenita School District to force parents to maintain a child in a public school placement which the state appeals panel has held inappropriate.").

201. See *id.* (analyzing financial responsibility for new pendent placements "pendente lite").

202. See *id.* ("It is undisputed that once there is state agreement with respect to pendent placement, *a fortiori*, financial responsibility on the part of the local school district follows.").

203. See *id.* (stating that "from point of the panel decision forward . . . Raelee's pendent placement, by agreement of the state, is the private school and [the school district] . . . is obligated to pay for that placement").

204. See *id.* (addressing argument raised by school district).

ment after the appropriateness of a placement is conclusively established.<sup>205</sup>

2. *Tuition Reimbursement for New Pendent Placements Under the IDEA: When Does Financial Responsibility Begin?*

Just as equitable concerns weighed heavily in the Supreme Court's decision in *Burlington* to make retroactive tuition reimbursement a remedy available under section 1415(e)(3)(A) of the IDEA, these same considerations formed the basis for the Third Circuit's recognition of prospective tuition reimbursement in *Susquenita*.<sup>206</sup> In *Susquenita*, the school district contended that because the parents unilaterally placed Raelee in a private school, they bore the financial burden to pay for that placement until a court conclusively established its appropriateness.<sup>207</sup> In response, the Third Circuit noted that because the procedural context of *Burlington* made retroactive tuition reimbursement appropriate, it was not controlling precedent on the issue of prospective tuition reimbursement.<sup>208</sup> Nevertheless, the Third Circuit found that the concerns underlying the decision in *Burlington*, as well as the Court's analysis therein, applied with equal force to claims for tuition payments due during the pendency of litigation or, in other words, to prospective tuition reimbursement claims.<sup>209</sup> Accordingly, the *Susquenita* court relied on these policy concerns in extending the rationale of *Burlington* to claims for prospective tuition reimbursement.<sup>210</sup> These concerns focused on (1) the lengthy duration of IDEA litigation; (2) the IDEA's mandate to provide children with

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205. *See id.* (declining to adopt school district's "restrictive reading" of *Burlington*).

206. *Id.* at 84-85 (stating that *Burlington* dealt with retroactive tuition reimbursement and, thus, was not binding precedent on court in case at hand). Nevertheless, the *Susquenita* court reasoned that the concerns underlying the Supreme Court's decision in *Burlington* were equally applicable to tuition payments made during the pendency of the litigation. *Id.* at 84 (concluding that Supreme Court's analysis should not be confined to retroactive tuition reimbursement cases, but should also apply to claims for prospective tuition reimbursement like those in *Susquenita*).

207. *See id.* (noting that school district based its argument on Supreme Court's holding in *Burlington*). The school district argued that *Burlington* "mandate[d] that prospective tuition reimbursement or reimbursement 'pendente lite' be barred under the IDEA; without exception." *Id.*

208. *See id.* (stating that because *Burlington* arose in context that made discussion of retroactive reimbursement appropriate, its holding was not controlling in *Susquenita*).

209. *See id.* at 84-85 (recognizing similar concerns underlying claims for retroactive and prospective tuition reimbursement and stating that "the analysis employed by the Supreme Court [in *Burlington* is] useful in resolving the issue now before us").

210. *See id.* (reiterating Supreme Court's analysis and holding in *Burlington*). The court noted that under *Burlington*, section 1415(e)(2) permits courts to order school districts to retroactively reimburse parents for private school tuition "where the court ultimately determines that private, rather than public, education under a proposed IEP is appropriate." *Id.* at 85.

a FAPE; and (3) the parents' right to fully participate in the development of their child's IEP.<sup>211</sup> Concluding that these concerns also exist in claims for prospective tuition reimbursement, the Third Circuit held that they "favor including the interim assessment of financial responsibility in the range of relief available under the IDEA."<sup>212</sup>

Next, the Third Circuit applied the policy concerns underlying retroactive tuition reimbursement to the facts in *Susquenita*.<sup>213</sup> Parents, such as Raelee's, who disagree with a proposed IEP for their child must choose

211. *See id.* at 81 n.4, 85 (noting that when merits of Raelee's case eventually reach Third Circuit on appeal, Raelee may have spent years in what may be determined to have been inappropriate educational setting either because appropriate placement was misidentified or her parents were unable to pay for appropriate one). Thus, the court relied on the language of *Burlington* that:

"A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by the IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or to pay for what they consider to be the appropriate placement. If they choose the latter course . . . it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed. . . . If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP and all of the procedural safeguards would be less than complete."

*Id.* at 85 (alteration in original) (quoting *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985)). Additionally, the Third Circuit acknowledged that if retroactive tuition reimbursement were not an available remedy under the IDEA, parents would be "forced to leave the child in what may turn out to be an inappropriate educational placement." *Id.* (quoting *Burlington*, 471 U.S. at 372).

212. *Id.* at 86. The legislative history of the IDEA also convinced the court that Congress did not intend to shield school districts from financial responsibility prior to the close of litigation. *See id.* at 85 (stating that neither IDEA nor its legislative history evidences congressional intent to "shield school districts from financial responsibility prior to the close of litigation"). Rather, the Third Circuit concluded that "[t]he IDEA was enacted to guarantee handicapped children a *free* and appropriate education and its legislative history is devoid of any indication that Congress intended to limit the timing of a school district's financial obligations in accordance with some pre-determined formula." *Id.* at 85-86. Moreover, the legislative history itself requires financial disputes to be resolved through the IDEA's administrative processes. *See id.* at 86 ("Resolution of financial disputes is not governed by rigid rules but is, instead, committed to the administrative process." (citing S. REP. NO. 94-168, at 32 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1426)). The legislative history indicates that when parents are forced to place their child in a private school at their own expense because an appropriate program is not available in the public school, and the school district disagrees with that placement, "question of who remains financially responsible is a matter to which the due process procedures . . . app[ly]." *Id.* (alteration in original) (quoting S. REP. NO. 94-168, at 32 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1426).

213. *See id.* at 86-87 (stating purpose of IDEA is to ensure every child receive FAPE).

where to educate their child until the merits of their case are decided.<sup>214</sup> Consequently, parents must choose either to continue their child's education in what the parents believe to be an inappropriate placement or to place their child in an educational placement they deem appropriate at their own expense.<sup>215</sup> Such a choice, however, is real only for those parents with the financial resources to pay for an alternative placement.<sup>216</sup> Moreover, because the "review process is ponderous" and the cost of private special education is substantial, families without adequate financial resources would face an overwhelming financial burden if required to pay for the alternative placement in the interim.<sup>217</sup> Additionally, when the state, as here, has agreed to the alternate placement and thus created a new pendent placement, prospective tuition reimbursement is crucial to ensuring that the child receives a FAPE.<sup>218</sup> Therefore, the Third Circuit concluded:

Without interim financial support, a parent's "choice" to have his child remain in what the state has determined to be an appropriate private school placement *amounts to no choice at all. The prospect of reimbursement at the end of the litigation turnpike is of little consolation to a parent who cannot pay the toll at the outset.*<sup>219</sup>

The Third Circuit in *Susquenita* was determined to give parents a choice in cases in which a state educational appeals panel had created a new pendent placement by agreement.<sup>220</sup> As such, the court held that "[w]hile parents who reject a proposed IEP bear the initial expenses of a unilateral placement, the school district's financial responsibility should begin when there is an administrative or judicial decision vindicating the parent's position."<sup>221</sup> Thus, the Third Circuit in *Susquenita* concluded

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214. *See id.* at 86 (stating that here, and in many other cases, when parents disagree with IEP proposed and wait for case to be addressed through administrative and judicial review, they must make choice either to leave child in what they believe is inappropriate placement or elect to pay for what they deem appropriate one).

215. *See id.* (discussing parents' options when they disagree with proposed IEP).

216. *See id.* (stating that such options are "real only for parents who have the financial wherewithal to pay for alternate placement").

217. *Id.* at 87 (quoting *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985)).

218. *See id.* at 86-87 (stating that purpose of IDEA is to ensure that every child receives FAPE and concluding further that this is not advanced by requiring parent, who succeeds in obtaining ruling that private school is appropriate placement, to front costs for that private educational placement).

219. *Id.* at 87 (emphasis added).

220. *See id.* (noting that without prospective tuition reimbursement, parents would have no choice as to where to educate their child because review process is ponderous and cost of private education would impose overwhelming financial burden).

221. *Id.* at 86. Therefore according to the *Susquenita* court, prospective tuition reimbursement is available whenever there has been a decision of an educa-

that a school district “cannot avoid interim responsibility for funding what the state has agreed is an appropriate pendent placement.”<sup>222</sup>

Cognizant of the financial burden this may place on school districts, the Third Circuit relied on the Supreme Court’s decision in *Florence*.<sup>223</sup> On the issue of retroactive tuition reimbursement, the *Florence* Court stated that Congress undoubtedly had placed a significant financial burden on states and school districts that participate in the IDEA.<sup>224</sup> Nonetheless, the Third Circuit concluded that school districts must either provide appropriate public education for each child with a disability or, in the alternative, pay for a private one.<sup>225</sup>

Thus, in affirming the district court’s denial for a stay of payment of tuition, the Third Circuit placed immediate financial responsibility for Raelle’s private pendent placement on the school district and stated that these payments may not be deferred until the outcome of litigation.<sup>226</sup> In the eyes of the court, the result was “distilled from the unambiguous language of the IDEA, the Act’s legislative history, and the case law interpreting the Act.”<sup>227</sup> Nevertheless, although the *Susquenita* holding appears on its face to be clear and simple, it actually leaves many questions unanswered about financial responsibility for pendent placements.<sup>228</sup>

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tional appeals panel or a court. *See id.* (awarding prospective tuition reimbursement in instant case).

The Third Circuit in *Susquenita* did not decide, however, if a decision by a hearing officer would also impose such financial responsibility. *See id.* at 85 n.8 (declining to address issue). Because the hearing officer ruled against the parents in this case, the Third Circuit stated that the case “[did] not present and we do not decide whether a decision of the hearing officer in favor of the parents would constitute agreement by the state for purposes of pendent placement and tuition reimbursement.” *Id.*

222. *Id.* at 87.

223. *See id.* (adopting *Florence* language) (citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993)).

224. *See id.* (minding possible financial burden, but dismissing argument because school districts can avoid reimbursement claims by heeding *Florence* advice) (citing *Florence*, 510 U.S. at 15).

225. *See id.* The court explained that:

“[P]ublic educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State’s choice. This is the IDEA’s mandate, and school officials who conform to it need not worry about reimbursement claims.”

*Id.* (quoting *Florence*, 510 U.S. at 15).

226. *See id.* (holding that school district was responsible to fund private school placement and “financial obligations with respect to the pendent placement are immediate and may not be deferred until the close of litigation”).

227. *Id.*

228. *Id.* at 87 n.10 (stating that court would not address issue of whether school district would be able to recover tuition payments from parents if school district ultimately prevailed in dispute); *see Terri Weintraub, School District Must Pay Private School Tuition for Disabled Student During Dispute, 3rd Circuit Rules*, WEST’S LEGAL NEWS, Oct. 4, 1996, available in 1996 WL 561172 (stating that case could

## V. PRACTITIONER'S NOTES

The Third Circuit's decision in *Susquenita* marks the first time that the court has required a school district to prospectively reimburse parents for funds expended on a new pendent placement in a private school during litigation.<sup>229</sup> Financial responsibility for pendent placements, however, existed prior to the court's decision in *Susquenita*.<sup>230</sup> Nevertheless, the holding in *Susquenita* clarifies a school district's financial responsibility for all pendent placements. Despite the clarity of the court's holding, the Third Circuit's decision in *Susquenita* leaves two important questions unanswered.<sup>231</sup> First, if parents are successful in winning a decision holding

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have big financial impact on school districts). Naomi Gittens, staff attorney with National School Boards Association's Council of School Attorneys, stated: "If you look at the stay put provision, the child is supposed to stay put until the proceedings are over. . . . What if the parents win at the hearing level? At what point do you switch the [financial] responsibility?" *Id.*

229. *Susquenita*, 96 F.3d at 87 n.10 (noting that court was aware of only one other court of appeals that had decided case turning on creation of new pendent placement). Despite the holding in *Susquenita*, the Third Circuit has long required school districts to financially maintain a pendent placement. *See Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996) ("Implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by an agency and consented to by the parent."); *Grymes v. Madden*, 672 F.2d 321, 323 (3d Cir. 1982) (requiring school district to maintain pendent placement until due process proceeding and appeals had been completed).

230. *See Drinker*, 78 F.3d. at 864 (requiring school district to retroactively reimburse parents for failing to financially maintain pendent placement); *Grymes*, 672 F.2d at 323 (awarding retroactive tuition reimbursement when school district withdrew funding for pendent placement and stating further that financial maintenance of that placement is required until due process and appeals panel has been completed).

231. *See Susquenita*, 96 F.3d at 87 n.10 (stating that court would not address whether school district would be entitled to reimbursement of funds expended on tuition if they ultimately prevailed). Specifically, the Third Circuit expressly recognized an earlier Ninth Circuit's holding that awarded prospective tuition reimbursement and imposed an absolute duty on the school district to fund the pendent placement even if the district were to prevail on appeal. *See Susquenita*, 96 F.3d at 87 n.10 (citing *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990)). Finding that to decide the issue would be "premature," the Third Circuit stated that analysis of the issue was not necessary to affirm the district court's denial of the stay. *Id.* The district court held that the school district would suffer irreparable harm if the stay were denied and the school district was liable for prospective tuition reimbursement in light of the Ninth Circuit's decision in *Clovis*. *See id.* at 80-81, 87 n.10 (stating district court found that "under current case law, the [school district] would not be entitled to recover funds expended to maintain Raelee in private school even if it were to prevail on appeal. The court thus found merit in *Susquenita's* argument that it would suffer irreparable harm if the stay were denied."). Nevertheless, the district court denied the stay and concluded that all other relevant factors—such as likelihood of Raelee succeeding on the merits, her right to receive a FAPE and lack of harm to third parties if stay were denied—weighed in favor of denying the stay. *See id.* (citing Special Education Opinion No. 672, Typescript at 4). Thus, the Third Circuit noted that even if it was to find that the school district were entitled to reimbursement if they ultimately prevailed, there would be no risk of irreparable harm and,

their unilateral, private placement to be the appropriate placement and that decision is later reversed by a district court, do the parents then reassume financial responsibility for that placement?<sup>232</sup> Second, if the school district's placement is ultimately judged to be appropriate, must the parents repay any funds expended by the school district for the parents' unilateral placement?<sup>233</sup>

The answer to the first question is, as of yet, unknown. In light of the policy of assuring the right of a child with a disability to a FAPE, it would seem that the parents would probably not have to reassume financial responsibility.<sup>234</sup> Because the courts have continually stated that a child's right to a FAPE should not depend on his or her parents' financial ability to "front the costs," it seems unlikely that courts would advocate shifting the financial burden.<sup>235</sup> Such a shift could result in some parents being

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therefore, the argument in favor of denying the stay would be even stronger. *See id.* at 87 n.10 (noting that "argument in favor of denying the stay would be even stronger" if court failed to find that school district's financial obligation was absolute and that school district would suffer irreparable harm); *see also* Weintraub, *supra* note 228 (noting that after Third Circuit's decision in *Susquenita*, it is unclear if financial responsibility for pendent placement will shift back to parents if decisions of special appeals panel or district court subsequently finds in favor of school district's placement).

232. *See* Weintraub, *supra* note 228 (stating that it is unclear whether school districts or parents will be financially responsible if parents ultimately lose in court).

233. *See Susquenita*, 96 F.3d at 87 n.10 (declining to resolve whether parents must repay school district if school district ultimately prevails).

234. *See id.* at 87 (noting that child's right to FAPE is not advanced by requiring parents to "front the funds" for private education). In awarding remedies for a school district's failure to provide a FAPE to a child with a disability, the Third Circuit has repeatedly held that a child's right to a FAPE should not hinge on his or her parents' financial ability to "front" the costs of that education. *See id.* (noting that without interim financial support for pendent placement parents would face overwhelming financial burden in paying for private education during lengthy litigation process); *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 395 (3d Cir.) (awarding compensatory education because child's right to FAPE should not hinge on parents' financial ability to "front" costs), *cert. denied*, 117 S. Ct. 176 (1996); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 536-37 (3d Cir. 1995) (same), *cert. denied*, 116 S. Ct. 1419 (1996); *Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990) (concluding that Congress empowered courts to award compensatory education under IDEA and stating Congress "did not intend to offer a remedy only to those parents able to afford an alternative private education").

235. *See Susquenita*, 96 F.3d at 87 (stating that purpose of IDEA, which is to ensure child receives FAPE, is not advanced by requiring parents to "front the funds" for private education when they have succeeded in obtaining ruling that school district's IEP is inappropriate); *M.C.*, 81 F.3d at 395 (awarding compensatory education because child's right to FAPE should not hinge on parents' financial ability to "front" costs); *Carlisle*, 62 F.3d at 536-37 (same); *Lester H.*, 916 F.2d at 873 (concluding that Congress empowered courts to award compensatory education under IDEA and stating that Congress "did not intend to offer a remedy only to those parents able to afford an alternative private education"); *see also* Delaware County Intermediate Unit No. 25 v. Martin K., 831 F. Supp. 1206, 1221 (E.D. Pa. 1993) (awarding prospective tuition reimbursement and holding that parents are entitled to rely on ruling of state administrative body in favor of private place-

forced to withdraw their child from what may ultimately be held to be the appropriate placement and, thus, would strip children of their right to a FAPE.<sup>236</sup> Therefore, it is likely that courts will require school districts with deeper pockets to continue funding the placement until the issue is ultimately resolved.<sup>237</sup>

As to the second unanswered question, the Third Circuit explicitly withheld a decision on the issue of repayment.<sup>238</sup> Although the Ninth Circuit in *Clovis* held that parents will not be liable for repayment of such funds, it is not clear if the Third Circuit will do the same.<sup>239</sup> Moreover, the Supreme Court in *Burlington* mandated that when parents unilaterally change their child's placement, they do it at their own financial risk.<sup>240</sup> Thus, if parents are not liable for repayment of such funds, in effect, they

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ment). In *Martin K.*, the district court relied on the First Circuit's decision in *Burlington* and stated that

"where a state agency orders a town to fund a private placement, after ruling against a town's IEP, parents will be placed in the difficult position of having to choose between the state directive to maintain the child in the private placement at the risk of ultimately using their own funds, or of moving the child to the town's placement which the state agency has determined to be inadequate. Choosing the latter option would contravene the express congressional policy of consistency and adequacy in a disabled child's education during an IEP contest; should the judicial decision uphold the State and parents, the child will have spent two and possibly three years in an inappropriate school. In sum, in order for the Act to provide appropriate education for disabled children from wealthy and poor families alike, parents must be entitled to rely on a state administrative decision in their child's favor, and not be put at risk of reimbursement by a judicial judgment which reverses that decision."

*Id.* at 1222 (quoting *School Comm. of Burlington v. Department of Educ.*, 736 F.2d 773, 800 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985)). Consequently, the district court agreed with the First Circuit's decision in *Burlington* that the school was "equitably estopped from challenging the parents' right to require the school to fund the private placement" as of the date of the administrative decision. *Id.* (citing *Burlington*, 736 F.2d at 801).

236. See *Martin K.*, 831 F. Supp. at 1222 (noting that parents should be permitted to rely on administrative decision in favor of private placement because to do otherwise would contravene child's right to FAPE).

237. See *id.* (permitting parents to rely on administrative decision in favor of private placement as means to assure that children from poor as well as wealthy families are assured access to FAPE).

238. See *Susquenita*, 96 F.3d at 87 n.10 (declining to address issue of school district's "ability to recover tuition payments from . . . parents should the school district ultimately prevail").

239. See *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 641 (9th Cir. 1990) (finding in favor of parents' contention that after administrative decision in favor of parents' unilateral private placement, school district was responsible for costs of that placement regardless of which party prevailed in case); see also *Susquenita*, 96 F.3d at 87 n.10 (declining to address repayment issue).

240. See *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 373-74 (1985) (holding that when parents unilaterally place child in private school during pendency of IDEA review proceedings, they do so at their own financial risk and may only receive tuition reimbursement if court ultimately determines that



are able to unilaterally change their child's placement without financial risk. Consequently, it seems likely that if the Third Circuit continues to rely on *Burlington* for the rationale behind remedies under the IDEA, the court will require parents to repay such funds should the school district ultimately prevail.

## VI. CONCLUSION

The Third Circuit in *Susquenita* again came down on the side of children and their parents.<sup>241</sup> The decision in *Susquenita* solidifies a child's right to a FAPE by requiring school districts to pay the costs of a pendent placement determined by an appeals panel or court to be the appropriate placement.<sup>242</sup> Although prior IDEA case law in the Third Circuit required school districts to financially support and maintain pendent placements, *Susquenita* solidifies this obligation as immediate in the form of prospective tuition reimbursement.<sup>243</sup> Consequently, school districts in the Third Circuit will no longer be able to hide behind the "retroactive tuition reimbursement" cloak of *Burlington*.<sup>244</sup> More important, though, children with disabilities are assured a FAPE regardless of their parents' ability to "front the costs" of that education.<sup>245</sup> Therefore, in the words of the court, parents will now be able to take the educational turnpike without concern over their financial ability to afford "the toll at the outset."<sup>246</sup>

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school district's IEP was inappropriate). For a further discussion of the Supreme Court's decision in *Burlington*, see *supra* notes 77-101 and accompanying text.

241. See *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir. 1996) (awarding retroactive tuition reimbursement for school district's failure to maintain pendent placement); *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 151 (3d Cir. 1994) (awarding retroactive tuition reimbursement when parents had unilaterally placed child in private boarding school that was held to be appropriate placement); *Board of Educ. v. Diamond*, 808 F.2d 987, 992 (3d Cir. 1986) (affirming award of retroactive tuition reimbursement when parents unilaterally placed child in private residential setting); *Grymes v. Madden*, 672 F.2d 321, 323 (3d Cir. 1982) (awarding retroactive tuition reimbursement for school district's failure to financially maintain pendent placement).

242. *Susquenita*, 96 F.3d at 86 (holding that although parents who unilaterally place their child bear initial costs of that placement, school districts' financial responsibility should begin as soon as there is administrative or judicial decision vindicating parents' placement).

243. See *id.* (awarding prospective tuition reimbursement).

244. See *id.* at 84 (rejecting school district's contention that Supreme Court's decision in *Burlington* bars prospective tuition reimbursement as restrictive reading of that case's holding and concluding, therefore, that "a school district may be required to pay for tuition and expenses associated with a pendent placement prior to the conclusion of litigation").

245. See *id.* at 87 (noting that school district had immediate financial responsibility for the appropriate pendent placement).

246. *Id.*