

Chapter

Thirteen

The Special Education Process: Remedies

The principal private remedies are as follows:
the provision of related services by private providers;
private school placement;
compensatory education;
damages and attorneys' fees

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In a sense, this entire manual is about remedies available from the local public school system for students with disabilities. The right to a free, appropriate public education (FAPE), inclusive of the rights to be identified and evaluated by the school, to have an educational program designed by the school to meet one's unique needs, and to have an educational placement capable of implementing one's individual program, are all, in themselves, remedies. This chapter, however, is principally about private remedies in those cases where the school fails to provide an appropriate public education. The principal private remedies are as follows: the provision of related services by private providers; private school placement; compensatory education; and attorneys' fees.

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I. Some general strategic considerations

As a practical matter, attorneys representing children with disabilities should ensure that the child receives all the services which the student needs, regardless of whether the school has the public resources available or not. While seeking out private providers can be time consuming and requires creativity, counsel should not be content with accepting the limitations imposed by the school system's resources. A successful argument that the school has failed to provide FAPE and a successful demand that the school be required to provide FAPE in the future may be in-sufficient to protect the client's interest. Unlike other areas of the law, special education

practice requires that counsel not only hold the school system accountable to the legal standard, but also that counsel develop remedies independent of the school in order to meet the needs of clients.¹

While "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," as a practical matter, a great deal of the case law involves the school's obligations to reimburse the parents for costs the parents have already incurred as a result of the school's failure to provide FAPE. *See, e.g., School Comm. of the Town of Burlington, Massachusetts v. Department of Educ. of the Commonwealth of Massachusetts*, 471 U.S. 359, 370 (1985). Most clients involved in the delinquency system, however, do not have sufficient cash on hand to pay for private services up front. As a result, counsel seeking payment for private services will ordinarily need to pursue one of two strategies. The first, and most preferable strategy, is to make a contingency arrangement with the private provider to provide services immediately in exchange for counsel's agreement to seek reimbursement for the providers' expenses at a due process hearing. This strategy is preferable because it prevents delay in the provision of services, it gives the service provider amply time before the hearing to develop familiarity with the child, thereby improving the service provider's testimony; and once services have been initiated, hearing officers are loathe to disrupt services which are benefitting the child. Many private providers, however, are leery of the financial risks associated with a contingency agreement. This hesitancy may be more

¹This discussion concerning counsel's seeking private resources, including placement for children in private schools, is not an endorsement of the proposition that a private service or private school is the only remedy or even the best remedy in every case in which the public school system fails to provide FAPE. Each case is different. Each client has different needs and makes unique choices.

pronounced if the child has a history of failing or refusing to participate in service delivery.

The other alternative is to seek in a due process hearing an order against the school for future payment of private services. This strategy has the advantage of being a fairly low-risk proposition for the service provider, who merely has to testify at the hearing about the services they provide, generally, and the services they would provide to the child, specifically, if the school system were ordered to pay for the services. As a result, private providers who refuse to accept the risk inherent in a contingency arrangement may nonetheless agree to participate in a hearing for prospective relief. The difficulties with this strategy are that it delays services to the child, it gives the school system more time to develop a program of its own which, if inappropriate, counsel must defeat at the hearing; absent direct experience with the child, the private service provider is not very knowledgeable about the unique needs of the child.

Attorneys should consider the private resources available in the local jurisdiction. Is there a hospital or a university or other professional group that could be a source of information on private providers of related services? Is there a listing of private, special education schools available? What summer programs or individual tutoring services exist in the area? While generating information on these kinds of resources may be labor intensive, the result will be that children will have more options open to them and will not be constrained by the lack of resources in the public school system.

II. Private related services

Related services are incorporated into an individualized educational program's (IEP) as supplementary services to enable the child to benefit from special education. 34 C.F.R. § 300.16 (1997). For example, a child who is seriously emotionally disturbed may not be able to learn without psychological counseling. Thus, the IEP may require that the child receive psych-

ological counseling to address the child's emotional needs in addition to special education services for the child's academic deficiencies. Due to the chronic lack of resources in schools, however, the school may fail to provide the child with the counseling required by the IEP. In such cases, the parent may seek to have these services provided by private providers at the school's expense.

Courts have ordered that public schools pay for many kinds of privately provided, related services where the school has failed to provide the necessary services itself. One frequently required related service is counseling. In *Max M. v. Illinois State Bd. of Ed.*, 629 F.Supp. 1504 (N.D. Ill. 1986), the Court ordered that the school pay for the child's private psychotherapy, subject to some cost limitations, where the school failed to provide him with counseling as required by the student's IEP. Similarly, in *Vander Malle v. Ambach*, 667 F.Supp. 1015 (S.D.N.Y. 1987), the Court required that the school reimburse the parent for psychotherapy and other services the child received with in a hospital setting.

Another common related service is transportation to and from the educational program. Courts have often directed that schools pay the bill for private transportation services where the school has failed to provide the child with transportation itself. See *Northeast Cent. Sch. Dist. v. Sobol*, 584 N.Y.S.2d 525 (N.Y. 992) (affirming order directing school to reimburse parents for cost of transportation as a necessary related service). In addition to ordering payment for transportation, courts have ordered that schools pay the cost of a parent's lodging that is associated with the child's placement. In *Union School v. Smith*, 15 F.3d 1519 (9th Cir. 1994), *cert. denied*, 513 U.S. 965 (1994), the Court held that the term "related services" included the cost of transportation and lodging for both the parent and the child near the special education day school where the school was not within daily commuting distance from the parent's home. Similarly, in *Ojai Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 90

(1993), the Court ordered that the school pay “caretaker” fees to the grandparents of a deaf, blind and developmentally disabled student where the grandparents resided within daily commuting distance to the only appropriate facility for the child.

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In addition to counseling and transportation, related services may include a variety of therapies, such as physical therapy, occupational therapy, and speech/language therapy. Again, if these services are necessary for the child to benefit from special education and the school fails to provide the services, parents may seek an order directing that these services be provided privately at public expense. *See Rapid City Sch. Dist. v. Vahle*, 733 F.Supp. 1364 (D.S.D. 1990), *aff’d*, 922 F.2d 476 (directing school to reimburse parents costs of private occupational therapy); *accord Das v. McHenry Sch. Dist.*, 20 IDELR 979 (N.D.Ill. 1994) (requiring school to reimburse parents for privately-provided additional occupational therapy services where hearing officer concluded that the amount of occupational therapy provided by school was insufficient to meet child’s needs). *See also, Johnson v. Lancaster-Lebanon Intermediate Unit*, 757 F. Supp. 606 (E.D. Pa. 1991) (ordering reimbursement for private speech therapy where hearing officer found that child needed three times as much speech therapy as the school was actually providing).

Tutoring services are not generally considered “related services” because tutoring is academic instruction itself; nevertheless, courts have ordered that parents be reimbursed for special

education tutoring services, as a substitute for special education, where the school has failed to provide FAPE. Thus, in *W.G. v. Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992), the Court ordered that the parents be reimbursed for the cost of private tutorial services where the school failed to develop an appropriate IEP for the student. The Court agreed with the parent that the school had failed to provide the child with any special education services and that reimbursement for privately-obtained special education tutoring was an appropriate remedy because, under the circumstances, the parents were entitled to seek a special education placement. Of course, the child must actually be eligible for special education in order for a court to conclude that reimbursement for private tutoring services provided during the period the school failed to provide FAPE is an appropriate remedy. *Hiller v. Bd. of Ed. of Brunswick*, 743 F.Supp. 958 (N.D.N.Y. 1990) (parents not entitled to reimbursement for private tutorial services where child not eligible for special education.)

III. Private placement

A. Legal entitlement to private placement

The single most sought after, and most often contested, remedy is private school placement. In short, the public school system may be liable for private school tuition for an appropriate private facility when it fails to propose an appropriate public special education placement. In *Burlington v. Mass. Dept. of Ed.*, 471 U.S. 359 (1985), the Supreme Court held that the IDEA confers the power to order school authorities to reimburse parents for their expenditures on private special education if the public placement offered by the school system is inappropriate. The Court expressly rejected the education department’s argument that tuition reimbursement was the equivalent of monetary damages, holding instead that reimbursement was a form of injunctive relief because it “merely requires the Town to belatedly pay expenses it should have paid all along and would have borne in the first instance had it developed

a proper IEP.” *Id.* at 370-71. *See, also, Union School v. Smith*, 15 F.3d 1519 (9th Cir. 1994), *cert. denied*, 513 U.S. 965 (1994); *Northeast Central Sch. Dist. v. Sobol*, 584 N.Y.S.2d 525 (N.Y. 1992); *Max M. v. Illinois Bd. of Ed.*, 629 F.Supp. 1504 (N.D. Ill. 1986) (giving Burlington retroactive application).

After *Burlington*, there was considerable conflict among the Circuits regarding whether parents could obtain reimbursement for private school placements where the private school had not been approved by the state as a special education facility. However, the Supreme Court resolved this issue in 1993 in its decision in *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). In *Carter*, the Supreme Court held that tuition reimbursement for a unilateral placement by parents in a private school is an appropriate remedy where the public school fails to provide an appropriate public placement, even where the private school selected by the parents was not on the state’s list of approved private schools. Specifically, the Court explicitly rejected the school system’s argument that parental placements must meet the state education standards. Instead, the issue is whether the program offered by the school selected by the parents offers an appropriate education for the child as determined on a case-by-case basis before a hearing officer or a court. *Id.* at 366.

Reimbursement for private placement first emerged through case law, as a judicially created remedy; *Burlington* held that IDEA language authorizing courts to award “appropriate” relief² endowed them with broad equitable powers to fashion remedies, including tuition reimbursement.³ The IDEA Amendments

²See 20 U.S.C. §1415(i)(2)(B)(iii), formerly codified at 20 U.S.C. §1415(e)(2).

³In the years following *Burlington*, it generally was agreed that due process hearing officers have this authority as well. The 1997 amendments to IDEA explicitly provide for reimbursement awards by hearing officers. See

of 1997 brought tuition reimbursement into the statute itself for the first time. The statute now imposes a number of procedural requirements that parents must follow before removing their child from the public school. See 20 U.S.C. §1415(a)(10)(C) (iii), (iv).⁴ Failure to do so may result in a reduction or denial of reimbursement. *Id.*⁵

U.S.C. §1412(a)(10)(C)(ii).

⁴These include rejecting the school’s proposed placement at the most recent IEP meeting prior to the removal, including stating their concerns and their intent to enroll the child in a private school at public expense, OR giving written notice containing all of this information 10 business days prior to re-moving the child from the public school, and cooperating with a school’s request to evaluate the child if made prior to the removal from the public school. 20 U.S.C. §1412(a)(10)(C)(iii). Reimbursement may also be reduced or denied upon a judicial finding of unreasonableness with respect to actions taken by the parents. 20 U.S.C. §1412(a)(10)(C)(iii)(III). Reimbursement cannot be reduced or denied for failure to give the required notice if the “parent is illiterate and cannot write in English; . . . compliance [with the notice requirement] would likely result in physical or serious emotional harm to the child; . . . the school prevented the parent from providing such notice; or the parents had not received notice, pursuant to 20 U.S.C. §1415, or the notice requirement . . .” 20 U.S.C. §1412(a)(10)(C)(iv).

⁵The amended statute also includes language that may cause confusion in some cases. The Act now states that “[i]f the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private . . . School without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost. . . . If the court of the hearing officer finds that the agency had not made a free appropriate public education available in a timely manner prior to that enrollment.” 20 U.S.C. §1412(a)(10)(C)(ii)(emphasis added). The emphasized language may lead some school attorneys to contend that reimbursement is not available unless a child has al-

There are numerous ways to pursue a private placement, but the fundamental legal strategy is always the same: to establish that the public school has failed to provide FAPE and the private placement proposed by the parent is appropriate to meet the child's needs.

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 In some cases, children become
 "behavior problems" only after
 school personnel have ignored for
 years the children's learning
 disabilities.
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B. Strategies for attacking public placement

There are several methods to defeat the public school's claim that it has provided FAPE. A parent may be able to establish that the public placement is inappropriate because the school failed to adhere to the procedural requirement imposed by the Act and, therefore, the resulting placement is fatally flawed under the *Rowley* decision. See *Union School District v. Smith*, 15 F.3d 1519 (9th Cir. 1994), *cert. denied*, 513 U.S. 7 (1993) (failure to provide valid notice rendered proposed placement inappropriate), but see, *Max M. v. Illinois State Bd. of Ed.*, 629

ready received special education services, thus eliminating, for example, cases where parent and school disagree over the appropriateness of a proposed initial placement, or there is undue delay in initiating services after an initial determination of eligibility, or where a school fails to timely provide an initial evaluation. This view is incorrect. The 1997 revision of IDEA retained the language cited in *Burlington* and *Carter* as endowing courts with broad equitable powers to fashion relief. See 20 U.S.C. §1415(I)(2) (B)(iii). While the provisions of 20 U.S.C. §1412(a) (10)(C)(ii) may apply to those situations described by the emphasized language, the provisions of 20 U.S.C. §1415(i)(2)(B)(iii), as interpreted in *Burlington* and *Carter*, applies to the rest.

F.Supp. 1504, 1517-1518 (N.D. Ill. 1986) (failure to provide written notice of rights was not fatal where parents participated in developing educational program); and *Hiller v. Bd. of Ed. of Brunswick Cent. Sch. Dist.*, 743 F.Supp. 958, 970 (N.D.N.Y. 1990) (procedural failings did not result in denial of FAPE where parents were "thoroughly involved" in educational planning for child). While procedural failings alone should be sufficient to establish that the school's placement is inappropriate, counsel should also be prepared to argue specific prejudice to the child resulting from the procedural errors and the substantive deficiencies of the program.

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To establish that the school's proposed placement is substantively deficient, counsel may take any one of, or a combination of, several approaches. One alternative, often the case with children involved in the delinquency system, is that the child has failed to make sufficient, or any, progress in the public school's program. In *Ojai Unified School v. Jackson*, 4 F.3d 1467 (9th Cir. 1992), *cert. denied*, 115 S. Ct. 90 (1993), the Court held that a private school placement was warranted where the child made little, if any, progress on meeting his IEP goals in the public placement over a period of seven years. Similarly, in *Straube v. Florida Union Free School*, 801 F.Supp. 1164, 1177 (S.D.N.Y. 1992), the Court held that when "education within the regular school system is not effective, as clearly it was not in this case, then a private placement must be considered by the

educational agencies.” In this regard, courts have held that the practice of “social promotion,” i.e., passing a child from grade to grade for social reasons related to the child’s age, even if the child is not making academic progress, does not constitute academic progress under the IDEA.⁶

To establish a lack of progress from year to year in the public school program, counsel should carefully examine the school’s documents regarding the child. For a child who is already in special education, the IEP’s for each year in special education will be critical evidence. The standardized testing reflecting the child’s current functioning which is done each year may reveal no progress; for example, the child may remain at the first or second grade reading level for several years in a row. Another good guide is to compare the IEP goals and objectives for each year. If the goals and objectives do not change, that generally means the child has made no progress during the year. If the student is meeting the goals and objectives and they are changing every year, insufficiently rigorous IEP goals and objectives may render the placement substantively inappropriate nonetheless. Thus counsel should also compare the child’s progress and educational achievement with the standards set in the general curriculum or elsewhere for what students of similar age and grade level are expected to know and be able to do. For a child who is not in special education, counsel should review the child’s progress reports to determine if the child has consistently made substandard grades and should also ascertain whether the child has ever been retained and, if so, how often.

⁶See also Chapter 6, discussing the concept of educational “benefit” and progress under IDEA.

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School system personnel commonly argue that a child’s failure to progress in school is attributable to the child’s truancy rather than to any inadequacy of inappropriateness in the educational program. In other words, school system personnel argue that the program is appropriate but the child refuses to participate. Under such circumstances, counsel should argue that, if a child is not progressing academically, school system personnel must modify the child’s program. Moreover, children’s academic difficulties often precede truancy issues. Instead of truancy being the cause of academic difficulty, it is at least as likely that the child’s academic problems caused the refusal to participate in school.

Another method of attacking the school’s proposed placement is to establish that the proposed placement can not implement the child’s IEP. 34 C.F.R. §300.552 (1997). There are several fairly simple but effective methods of demonstrating that a placement can not implement the child’s IEP. First, the placement may be overcrowded based on the State’s standards for student:teacher ratios in various educational settings. Generally speaking, the more intensive the level of special education services, the smaller the student:teacher ratio. If the child’s IEP designates the child as needing a small, special education classroom (or counsel can establish the child’s need for a small student:teacher ratio independent of the IEP), but the only public alternative is already overcrowded, a private placement with a small student: teacher ratio may be justified.

Alternatively, the public placement may not have access to all the necessary related services.

Many public placements do not have unrestricted access to the services of a speech pathologist or a psychologist but must share the services of a limited number of professionals with a number of schools. Thus, for a child who needs counseling three or four times a week may not get this service in a public placement where the psychologist only visits the school once or twice a week and already has a high caseload. As a result, a private placement may be the best alternative. Additionally, some students, particularly students with behavior problems, may require a comprehensive behavioral support program to be incorporated into all aspects of their educational programming. Such programming may not be available in a public school setting.

At times, a parent's or a child's hostility to the public school's program may render the public placement inappropriate. In *Board of Educ. of Community Consolidated Sch. v. Illinois Bd. of Educ.*, 938 F.2d 712 (7th Cir. 1992), *cert. denied*, 502 U.S. 1066 (1992), the parents disagreed with the school's proposed placement for their son, characterized as "behavior disordered." In the course of developing an educational plan for the student, the parents became extremely hostile to the school and, as a result, hostile to any placement the school proposed. As a result of this "parental hostility," the court concluded that "the parents' attitudes were severe enough to doom any attempt to educate" the student at the school's proposed placement. *Id.* at 716. See also *Greenbush School Committee v. Mr. and Mrs. K.*, 949 F.Supp. 934 (D. Me. 1996) (parental hostility and child's fear of the school in which placement was proposed would prevent him from receiving educational benefit if IEP were implemented there). The converse is equally true. A history of suspensions or other disciplinary actions against the student for conduct related to the student's disability may well establish that the public school placement is inappropriate for the child.

In some jurisdictions, local rules and case law may provide a quick procedural mechanism for obtaining a private placement. In the District of

Columbia, a "Conciliation Agreement" between the District of Columbia Public Schools and the U.S. Department of Education, enables parents to obtain private services at public expense virtually automatically where the school fails to provide the services publicly within a time frame set by a hearing officer. In New York City, a consent decree enables parents to obtain a private placement at public expense if the public school fails to propose a placement within sixty days of the parents' request. *Zvi D. v. Ambach*, 694 F.2d 904, n. 6 (2nd Cir. 1982); *Bd. of Educ. of City of New York v. Ambach*, 682 F.Supp. 972 (E.D.N.Y. 1986). Consequently, counsel should become familiar with any uniquely local rights conferred on parents.

C. Strategies for demonstrating appropriateness of private placement

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If the school system is unable to meet its burden of proof to establish that its placement is appropriate, a parent does not automatically or necessarily win the parent's preferred private placement. Parents still have the burden of showing that their proposed placement is capable of meeting the needs of the child. Consequently, counsel should always be prepared to come forward with evidence supporting the appropriateness of the parents' proposed placement. In the absence of such evidence, the hearing officer may well simply order the school system to propose a difference placement. In order to prevail, counsel will need to present information from the parent and child, from the parent's proposed placement, as well as, in many circumstances, an independent expert.

D. Documents

In addition to all the documents upon which counsel might rely to defeat the public school's placement, counsel must also obtain and submit to the hearing officer documents relating to the private program. Most private placements have brochures or other materials that describe the educational program offered by the facility and the population of students served. Additionally, counsel should attempt to secure a letter of acceptance from the private school, indicating that the admissions staff have met with the student, have reviewed the student's educational records and testing results, and that the student has been accepted as appropriate for the program. It is often helpful for the admissions staff to include a brief statement describing why the school believes its program is appropriate for the student. Some schools will be so accommodating as to allow counsel to review and suggest re-visions to a draft of the acceptance letter before it is finalized.

If counsel is also relying on an independent educational consultant or a psychologist, counsel should obtain that person's resume as well as, in some circumstances, a written report. The expert's resume should establish the individual's credentials as an expert – usually in the areas of special education placement and programming or diagnosis and treatment. Whether a written report is helpful depends on whether the nature of the child's disability and need for services is disputed. In addition, counsel must analyze whether a report will do more to assist the hearing officer or more to assist opposing counsel prepare for the hearing. If counsel is satisfied that the public school's evaluations and IEP sufficiently describe the child's needs and the necessary educational program, then an additional report is probably cumulative. If the evaluations or IEP are deficient, then counsel may wish to consider having the expert prepare a written report for the hearing officer to review in juxtaposition with the school's documents. Unless the parent's program is truly unique, the expert should not make a specific placement recommendation in the report but should des-

cribe the child's needs, functioning, and, in general, the type of program the child needs in order to make educational progress. In addition, the report must be couched in the legal terms of "appropriate" and "necessary" and never employ the phrases "the best program" or the program which will "maximize potential."

E. Testimony

The testimony should include at least the parent's or the child's impressions of the placement as well as testimony regarding the placement. If the parent and the school disagree concerning the child's level of functioning and needs, then counsel should consider securing the testimony of an independent expert, as well. The parent's testimony generally includes the child's educational history, including a description of the child's failure to make progress in the public setting, and the parent's impressions of the private program. The parent actually needs to visit the private program in order to be able to testify effectively. Depending on the child's age, the child may also testify regarding why the program is appropriate. Some juvenile clients find testifying to be an empowering experience.

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In addition to preparing the parent and the child, counsel also must prepare to elicit private school personnel – usually by the admissions director – to testify, and, if the child's functioning and needs are in dispute, from an independent expert, as well. The testimony of the admissions director should include the following elements: the individual's education, work experience and

current responsibilities; familiarity with the child; de-scription of the child's current functioning and needs (if in dispute); general description of the type of program offered by the private school; more specific description of how the private school will meet the child's needs; and the private school's decision to accept the child and the date on which the child can enroll. Many, if not most, private school admissions directors will have had previous experience testifying. Counsel should not hesitate, specifically when just beginning this kind of practice, to seek the assistance of this witness in developing testimony.

Whether an independent expert is necessary depends on the nature of the dispute with the school system. In some cases, school system representatives do not genuinely challenge the parent's claims regarding the child's educational needs and, in essence, may be signaling that the parent need only to establish that the parent's proposed placement is appropriate. In such a case, the parent may not need to engage an expert witness (in addition to a representative of the parent's proposed placement who can testify about that placement and its ability to implement the IEP).

In cases characterized by more fundamental disputes regarding the child's educational needs and the appropriateness of proposed placements, counsel should seriously consider securing expert testimony to buttress the parent's case. A parent may seek, for example, a 100 percent special education day program, while school system representatives contend that the child requires residential treatment. In another case, by contrast, school system representatives may argue that the child needs a part-time special education program within a neighborhood school, but the parent may contend that a full-time program is appropriate. Despite the parent's contention that the child is not making progress in a current program, school system personnel may argue that the program is appropriate. In disputes of these sorts, counsel should probably engage expert support and prepare the expert to testify.

In engaging an expert, counsel has several fundamental responsibilities. One responsibility is arranging for payment.⁷ Counsel also must ensure that the expert is actually competent to testify about the matters in dispute. Counsel must ascertain whether the expert will be available to testify and will not just write a report. Counsel also must make sure that the expert has reviewed all of the documents and that the expert has sufficient personal knowledge of the child – through, to the extent necessary, interviews, testing, and observations – to testify persuasively.

The actual testimony should include at least the following elements: the witness' qualifications (including whether the witness has testified before); familiarity with the child (including personal experience with the child); a description of the child's current functioning and needs (including any independent testing done by the expert as well as a critique of the school's testing); the expert's opinion that the student has failed to make progress in the setting that the parent is challenging and the basis of the opinion; the expert's opinion regarding the kind of program the student needs in order to make progress and the basis for this opinion; the expert's familiarity with the parent's proposed school; and the expert's opinion that the school is appropriate to meet the needs of the student.

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 During the testimony, counsel should encourage the expert to use specific examples and make specific recommendations drawn from the expert's experience with the child.
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⁷Of course, if the parent prevails then the school system is liable for attorneys' fees as well as costs (including the cost of engaging an expert).

the expert to use specific examples and make specific recommendations drawn from the expert's experience with the child. The expert should make eye contact with the hearing officer and should never simply read from a prepared report. Experts should avoid professional jargon whenever possible, and, to the extent that terms of art are necessary, the expert should define those terms. The expert should avoid phrases – both in testimony and in written reports – like “the best program to meet the student's needs” or the “program which is most likely to maximize the student's potential.” Instead, the expert should use the terms “appropriate” and “necessary.”

F. Some pros and cons of private placement for students in the delinquency system

Counsel should consider some of the practical pros and cons of seeking a private placement for a student who is also involved in the delinquency system. One advantage of private school placement is that a new school gives a child who has had a history of school failure a “fresh start”; a private placement may provide an educational program, typically in a smaller setting, that more specifically meets the needs of the child. As a result, counsel may be able to obtain a dismissal of the child's juvenile case by demonstrating the availability of a new school program, offering coordinated services designed to meet the child's unique needs, provided at no cost to the court. In a juvenile justice system which is overloaded, a private placement offers the court an easy and attractive way to end a case. In that sense, a private school placement may be the figurative or even the literal equivalent to “sending a child to military school” as a quid pro quo for a delinquency dismissal.

A private school placement also presents significant negative considerations. Many private school administrators, not surprisingly, reject summarily applicants who have a juvenile court history. Counsel, therefore, may decide to withhold – to the extent practicable and ethical – in-

formation about the child's delinquency involvement. Further, the private school program may not be near the child's home, and the child, quite reasonably, may resist a school placement proposal that entails a lengthy, daily commute. Moreover, private schools may present racial, cultural, and class barriers for many children in the delinquency system. Hence, a private school placement is not necessarily the best choice in every situation.

IV. Compensatory education

Compensatory education is a remedy designed to meet the needs of children who have been denied FAPE for a specific period of time. Frequently referred to as “the poor man's Burlington,” the remedy initially came into being for children whose parents were unable to pay in advance the costs of private school tuition; hence, those children would remain in inappropriate placements while the parents pursued a challenge to the public school placement. While a parent ultimately might have prevailed, sometimes years elapsed before the parent's position was vindicated. Compensatory education, in essence, gives the child back the years lost languishing in an inappropriate placement. *Brown v. Wilson County Sch.*, 747 F.Supp. 436 (M.D. Tenn. 1990). Different jurisdictions vary in the standards they apply in determining when compensatory education is appropriate. Where a child has been denied services, courts generally agree that compensatory education should be awarded. *See, e.g., Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991); *Burr v. Sobol*, 863 F.2d 1071 (2nd Cir. 1989), *vacated and remanded*, 109 S. Ct. 3209 (1989), *aff'd per curiam on remand*, 999 F.2d (1909); *Harris v. District of Columbia*, 19 IDELR 105 (1992). In regard to children who have received inappropriate services, rather than no services at all, compensatory education should be awarded if the school knew or should have known that the child had an inappropriate IEP or was not receiving sufficient educational benefit, yet failed to correct the situation. *M.C. v. Central Regional School District*, 81 F.3d 389 (3rd Cir.

1996), *cert. denied*, 117 S. Ct. 176 (rejecting “good faith” defense mounted by school district, and contention that compensatory education award requires “gross” deprivation of the right to free appropriate public education).⁸

Often, compensatory education is awarded in the form of a day-for-day remedy: for each day the child was deprived of an education, the child is entitled to an additional day of compensatory education. *Burr v. Ambach*, 863 F.2d 1071 (2nd Cir. 1988) *vacated and remanded*, 492 U.S. 902, *reaff’d on recon.*, 888 F.2d 258 (1989) (awarding one and one-half years of compensatory education to student who was unable to attend school due to school’s errors and procedural delays). Some recent case law suggests, to the contrary, that compensatory education is an equitable remedy, not a contractual one, so “there is no obligation to provide a day-for-day compensation for time missed.” *Parents of Student W. v. Puyallup Sch.*, 31 F.3d 1489 (9th Cir. 1994) (compensatory education for lost time refused where student was able to graduate from high school before age twenty-one without additional services).

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⁸Some courts, however, have required a higher level of school misconduct, at least in certain situations. *See, e.g. Garro v. Connecticut*, 23 F.3d 734 (2nd Cir. 1994) (requiring showing of “gross procedural violations” for award of compensatory education to students already past the age of entitlement to services under IDEA).

More than other remedies, compensatory education lends itself to creativity both in terms of measuring the duration of the entitlement and in terms of crafting a remedy. Counsel is not limited to seeking compensatory relief simply for the period the parent was actively challenging the school’s placement but may seek relief for the entire period the child was deprived FAPE. For a child who has not been previously identified as needing special education services but who has performed poorly in school, counsel may argue that the school violated its obligation to identify the child as needing special education and thus the child is entitled to compensatory education dating from the time the child first began to perform poorly until the time the child was identified as needing special education. *Parents of Student W.* at 1496. Counsel may seek compensatory education for each school year the child had an inappropriate IEP and failed to make educational progress. Similarly, counsel may seek compensatory education for each year that the school system personnel failed to implement a child’s IEP. In yet another scenario, counsel may seek compensatory education for the period of any unlawful suspensions or exclusions from school.

The parameters of compensatory education are unclear. Stated most broadly, compensatory education is whatever supplemental services are necessary, over and above whatever the school must already provide as “appropriate,” to remediate the educational damage done to the child during the period the child was deprived of FAPE. *See Chicago Bd. of Educ.*, July 9, 1984 IDELR 257:568 (Department of Education’s Office of Civil Rights states that compensatory education includes services “over and above” the services required by the IEP as compensation for lost time). Initially, compensatory education tended to be in the form of additional years of eligibility for special education services beyond the age of 21. *See, e.g., Harris v. D.C.*, 19 IDELR 105 (1992). Another common form of compensatory education is summer school. When developing a summer program, counsel should not be limited to simply academic remediation. Special education programs combining

camp experiences with remedial instruction may be a more appropriate remedy.

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Tutoring may be particularly useful remedy for students who balk at summer school. Regular, individualized attention may even make schoolwork accessible for the the first time for students who have historically performed poorly in a group setting but who do not want a more restrictive environment.

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Instead of summer programming and extended years of eligibility, counsel may wish to argue for immediate, supplemental services so that relief will not be further delayed. *See Chicago Bd. of Educ.*, July 9, 1984 IDELR 257:568. Thus, individual tutoring in the areas in which the student is experiencing the most difficulty, in tandem with an appropriate special education program, may be an appropriate remedy. *See Hall v. Detroit Public Schools*, 823 F. Supp. 1377, 13?? (E.D. Mich. 1993); *Phil v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 188 (1st Cir. 1993). Tutoring may be a particularly useful remedy for students who balk at summer school. Regular, individualized attention may even make schoolwork accessible for the first time for students who have historically performed poorly in a group setting but who do not want a more restrictive environment.

Tactically, compensatory education has a number of advantages for students involved in the juvenile delinquency system. First, it shifts the focus of blame from the child to the school. If the child can establish that the school failed to provide him with the services he needed in order to succeed in school, the child may be able to defeat the school's action to punish the child for his academic failures. Second, compensatory education can be part of a comprehensive pack-

age of remedial services which will so occupy the child's time that participation in additional activities through the court would not only be superfluous but may interfere with the child's education. By the same token, a child who is occupied with constructive activities is, arguably, less likely to become involved in delinquent conduct. Moreover, the court views a child who is receiving tutoring in the afternoon and who will participate in a summer academic enrichment program as being less available to participate in delinquent acts, and thus less of a threat to the community. Finally, a child who fails to participate in court-ordered programs and services may face, as a consequence, revocation of probation or parole (aftercare). In contrast, a child who fails to take advantage of special education services does not, as a practical matter, face incarceration as a sanction.

V. Damages and fees

The law on the availability of damages for violations of the Individuals with Disabilities Act (IDEA) rights, whether under IDEA directly or in an action linking IDEA to § 1983, is in a state of flux and confusion. While there are many cases stating that damages beyond tuition reimbursement are not available, the majority of these cases (or the authority upon which they rely), pre-date the U.S. Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). Franklin held that as a general rule, absent "clear direction to the contrary by Congress," federal courts have the power to award any appropriate relief, including damages, in a cognizable cause of action brought pursuant to a federal statute. Applying *Franklin*, the Third Circuit in *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995), found no such "clear direction" in IDEA, and accordingly held that compensatory damages, including damages for violations of IDEA. *See also, Walker v. D.C.*, 969 F.Supp. 794 (D.D.C. 1997); *Brantley v. Independent School District No. 625*, 939 F.Supp. 649 (D. Minn. 1996) (compensatory damages may be available for IDEA/§ 1983 claim where plaintiff can prove actual injury); *McMillan v. Cheatham Co. Schools*, 25 IDELR

398, 407 (M.D. Tenn. 1997) (stating that youth who has aged-out of the IDEA entitlement may recover compensatory damages for “gross violation” of IDEA). Other post-Franklin courts have rendered adverse decisions without discussing, or even acknowledging, Franklin and its implications. *See, e.g., Heideman v. Rother*, 84 F.3d 1021 (8th Cir. 1996) (“general damages” for emotional injury or injury to dignitary interest not available); *Whitehead v. School Board for Hillsborough County*, 918 F. Supp. 1515 (M.D. Fla. 1996).

To the extent that money damages may be recoverable, parents may also bring claims based upon § 504 of the Rehabilitation Act (and the implementing regulations), under which damages are available for at least intentional disability-based discrimination. *See, e.g., W.B. v. Matula, supra; Rodgers v. Magnet Cove Public Schools*, 34 F.3d 462 (8th Cir. 1994); *Pandazides v. Virginia Bd. of Ed.*, 13 F.3d 823 (4th Cir. 1994). Alternatively, parents may argue that their civil rights were violated by the school’s failure to adhere to the procedural protections of the IDEA. *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141 (2nd Cir. 1983), *cert. denied*, 104 S. Ct. 1426.

In contrast, attorneys’ fees are available to the parents or guardians of a student with disabilities who is the “prevailing party” in either an administrative proceeding or a judicial proceeding. 20 U.S.C. § 1415(i)(3)(B). The amount of the fees “shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished.” 20 U.S.C. § 1415 (i)(3)(C). The court has the discretion to reduce the fees if the parent unreasonably protracted the case or the fees are excessive, except in cases where the school system also unreasonably protracted the final resolution of the matter. 20 U.S.C. § 1415(i)(3) (F), (G). The court may also reduce a fee award if parents’ counsel did not provide in the due process hearing complaint the information required by 20 U.S.C. § 1415(b)(7). 20 U.S.C. § 1415(i)(3)(F)(iv). In the event the school system makes a settlement offer within

the time period prescribed by rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins and the offer is not accepted within 10 days, the parent is not entitled to fees for work performed after the settlement offer if the relief finally obtained by the parents is not more favorable to the parents than the settlement offer. 20 U.S.C. § 1415(i)(3) (D)(I). An exception may be made, however, and full fees awarded, if the parent was substantially justified in rejecting the offer. 20 U.S.C. § 1415 (i)(3)(e). Expert witness fees are also recoverable as part of the necessary fees and costs to the prevailing party. *See, e.g., Aranow v. District of Columbia*, 791 F.Supp. 319 (D.D.C. 1992), *reversing* 780 F.Supp. 46. Attorneys seeking fees should check the law in their local jurisdiction to determine what the statute of limitations is on actions to obtain fees. *Dell v. Town-ship High*, 32 F.3d 1053 (7th Cir. 1994).