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## I. INTRODUCTION – UNDERSTANDING THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (“IDEA”).

Congress first enacted what has come to be known as the *Individuals with Disabilities Education Improvement Act of 2004* (the “IDEA”) in the 1970s. At the time, students with special needs were routinely excluded from public school systems across the country. They were cut off from their fellow students and denied opportunities that most of us took for granted as children, namely going to school, being able to interact with peers, and learning. As a result, Congress acted to force public school districts throughout the United States to allow students with disabilities to go to school and to provide those students with special education and related services that would allow them to learn.

Congress did this by requiring public school districts to provide all children with disabilities residing within their boundaries between the ages of three and twenty-one with a *Free Appropriate Public Education (“FAPE”)* in the *Least Restrictive Environment (“LRE”)*.

What does FAPE mean?

- A. **Free** means that the services provided are at no cost.
- B. **Appropriate** means that the services are suited to the individual needs of the child and reasonably calculated to confer some educational benefit upon the child in the LRE. School districts have to provide students with services that are appropriate, not optimal. Attorneys and educators sometimes colloquially refer to this as the “*Chevrolet v. Cadillac*” argument. In essence, a school district is required to help a child get from one point to another. However, it does not have to do so in comfort or style. School districts are only required to offer a child what he or she needs to allow him or her to make some educational progress. *School districts are not required to offer services that will allow students to optimize their performance or rise to their fullest potential.* School districts often use the *Chevrolet v. Cadillac* argument as an excuse to deny services to students with disabilities or to try to force parents to allow their children to attend programs that already exist instead of creating or funding programs that the children may need to be successful.

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- C. **Public** means that the services are either provided or funded by the school district.
- D. **Education** means schooling or its equivalent.

What is the LRE requirement?

School Districts are required to place students with disabilities in the LRE. *Placement in the LRE requires school districts to maximize the exposure of students with disabilities to their non-disabled (typically developing) peers. A student with a disability may only be removed by a school district to a segregated special education environment outside of the general education setting when the nature or severity of his or her disability rises to a level that makes it inappropriate to educate him or her in a general education environment. Education in a general education environment may include, and often includes, the use of supplementary aids and services.*

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## II. DEVELOPING AN INDIVIDUAL EDUCATION PLAN (“IEP”).

School districts are supposed offer their students a FAPE by developing an IEP for each of their resident students with a disability. To develop an IEP, the district must assemble a multidisciplinary team, known in New York as a *Committee on Special Education (“CSE”)* or a *Committee on Preschool Special Education (“CPSE”) review team*. The CSE review team includes the student’s parent(s) and must consider various evaluations, progress reports, and any other relevant information. Among other things, the CSE must determine:

- A. Whether the student should be classified as having an educational disability;
- B. The student’s classification (federal and New York Law recognize thirteen classifications of educational disabilities);
- C. The student’s current levels of performance, learning characteristics, and management needs;
- D. The student’s social and emotional performance and management needs;
- E. The student’s health and physical development status and his or her management needs;
- F. Appropriate and objectively measurable annual goals based upon the student’s abilities and deficits;
- G. The extent to which the student will participate in school activities and assessments;
- H. What related services, if any, the student should receive; and
- I. The educational program into which the student should be placed.

Each of the points listed above must be incorporated into the student’s IEP. In addition, the CSE review team must include a statement in the IEP that provides the parent(s) with a recitation of the other programs and/or services that it considered for the student and an explanation as to why such other programs and/or services were rejected.

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### **III. WHAT IS A PARENT ENTITLED TO WHEN A SCHOOL DISTRICT DOES NOT PROVIDE A CHILD WITH A FAPE?**

Unfortunately, many school districts are either unwilling or unable to meet even this minimal standard and provide students with disabilities with the “*Chevrolet*” to which the students are entitled. As a result, many families have been forced to remove their children from the public school system and enroll them in private schools that can provide them with appropriate special education services. Fortunately, the IDEA and the case law interpreting it *currently* allow the parent(s) of a child with a disability who was not offered a FAPE by the school district and placed by his or her parent(s) in a private school (that provides appropriate special education and related services) to commence a lawsuit against the school district to recover the private school tuition. In order to be awarded funding for a private school, the parent(s) must prove that:

- (1) The school district failed to offer the child a FAPE;
- (2) The program selected by the parent(s) is appropriate to address the student’s educational needs; and
- (3) Equitable considerations support the parent’s claim.

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#### **IV. THE LAWSUIT (IMPARTIAL HEARING) SEEKING FUNDING FOR PRIVATE SCHOOL TUITION.**

The lawsuit for tuition reimbursement is called an *impartial hearing* and usually occurs in an office of the school district. The hearing is either recorded or transcribed by a court reporter and a written transcript of the proceedings is generated. The parties to the hearing, the parents and school district, can introduce evidence through witnesses and documents to support their claims.

Prior to November 2005, when a parent commenced an impartial hearing, the school district was responsible for proving the appropriateness of its IEP and proposed placement. Thus, during the impartial hearing, the district was required to present its witnesses and documentary evidence first. *In November 2005, the United States Supreme Court declared that the party commencing the hearing was responsible for persuading the hearing officer that the IEP and/or placement offer were not appropriate.* However, the Supreme Court provided no definitive ruling nor was there a definitive regulation to provide hearing officers with guidance as to whether districts or parents should be required to present witnesses and evidence first. As a result, it was up to each individual hearing officer to determine which party would present its case first at the hearing. In general, the party that goes first may be at a disadvantage because it does not know what evidence or testimony the other side will offer and thus, cannot modify its initial presentation to counter the testimony and evidence offered by the other side.

Practically, the Supreme Court's November 2005 decision changed the rules in New York by creating a situation in which parents had to be prepared to produce witnesses and documentary evidence at the beginning of the hearing to prove that IEPs and placement offers were inappropriate. Unfortunately, school districts, not parents, generally have custody and control of most of the documents and witnesses that parents may need to attack the validity of the proposed IEPs and placement offers.

In response, New York State enacted a law providing that school districts would bear the burden of proving the appropriateness of their IEPs and placement recommendations, regardless of who initiated the impartial hearing, for all hearings commenced on or after October 14, 2007. From time to time, school districts, bureaucrats within the New York State Education Department, politicians, lobbyists, and others have tried to convince the New York State Legislature to change the law and reassign the burden of proving the inappropriateness of the school district's recommendations to parents. Such a shift would, presumably, increase litigation costs to parents.

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*Regardless, parents should be prepared to produce witnesses who can attack every possible facet of a school district's proposed IEP and placement recommendation. Further, parents should expect that some school district friendly impartial hearing officers may seek to have them present their witnesses and documentary evidence at the commencement of the testimony phase of impartial hearings.*

In addition, some Courts have issue decisions noting that the validity of the law placing the burden of proving the appropriateness of IEPs and placement recommendations on school districts has never been tested. Accordingly, parents and their advocates should be prepared to present overwhelming evidence to support their claims.

**A. Proving that the District Failed to Offer the Student a FAPE.**

1. Parents Should Be Prepared to Attack the IEP Development Process on Procedural Grounds.

During the hearing, a parent seeking tuition reimbursement may argue that the district failed to offer the student a FAPE in two ways. The first is by introducing testimony and documentary evidence to challenge the way in which the district developed the student's IEP. *The IDEA assumes that parents and school districts are equal participants and will collaborate in the IEP development process. As a result, school districts are required to adhere to certain procedures to ensure that they provide parents with an opportunity for meaningful participation in the IEP development process.* During an impartial hearing, if the parents can prove that the district failed to comply with the procedural requirements set forth in the IDEA, a hearing officer may declare that the district's failure resulted in a substantive denial of a FAPE to the student.

2. Parents Must Be Prepared to Substantively Challenge the Recommendations Contained in the IEP as well as the District's Proposed Placement.

However, if the district can show that the procedural violations were minimal and that the results of the CSE review meeting would have been the same regardless of whether it adhered to proper procedures, the hearing officer is unlikely to declare the IEP invalid. As a result, in addition to challenging any alleged procedural violations on the part of the district, parents seeking tuition reimbursement must be prepared to raise substantive challenges to the IEP and corresponding placement recommendation. For example, if a child's evaluations indicate that he or she can only function and learn appropriately in a small, highly structured class with a small student to teacher ratio and the district recommends placing the student in a large general education class with only minimal special education supports, the parent should be prepared to introduce testimony and documentary evidence indicating the inappropriateness of the district's proposed placement recommendation.

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**B. Proving that the Parental Placement is Appropriate.**

After introducing evidence regarding the inappropriateness of the IEP and placement offer, the parent must introduce witnesses and documents to convince the hearing officer that the parental placement is educationally appropriate for the student. Oftentimes, a parent will rely upon some of the same evaluations and reports as the school district, such as report cards, progress and other reports from the student's school, and witnesses from the student's school. Generally, by the time of the hearing, witnesses from the student's school, such as the school's educational or placement director and/or the student's classroom teacher, will have met and will know the student. As a result, the school witnesses are usually a good source of information for a hearing officer. They can explain who the student is, what his or her strengths, weaknesses, and educational needs are, and how they are being addressed in the student's school. In addition, private school personnel can advise the hearing officer as to how the student has adjusted to the school and describe what progress the student is making at the school.

**C. Proving that Equitable Considerations Support the Parent's Claim.**

Finally, a parent must prove that equitable considerations support his or her claim for tuition reimbursement. What this means, in plain English, is that the parent must demonstrate, among other things, that:

- (1) He or she made the student available to the district and allowed it to conduct appropriate evaluations during the IEP development process;
- (2) He or she provided copies of any privately obtained evaluations (that he or she seeks to rely upon in connection with the impartial hearing) to the district;
- (3) He or she cooperated in the IEP development process;
- (4) He or she considered the school district's recommendations;
- (5) He or she attended the CSE review meeting;

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- (6) He or she attempted to meaningfully participate in the IEP development process;
- (7) He or she did not do anything that might interfere with the school district's placement process; and
- (8) He or she timely and properly notified the school district of the intent to remove the student from public school in favor of a private school and seek tuition reimbursement.

If the parent proves: (1) the inappropriateness of the district's program recommendations and placement offer and (2) the appropriateness of the private school placement, but fails to conclusively prove that (3) equitable considerations support his or her claim, then the hearing officer may *reduce or deny* a tuition reimbursement award, depending upon the specific circumstances of the case. If the parent prevails on all three criteria at the hearing, a hearing officer can order the district to reimburse the parent's tuition expenses. In addition, if the parent prevails at the impartial hearing, he or she is entitled to make a claim against the school district to be reimbursed for reasonable attorneys' fees expended in pursuit of the tuition reimbursement claim. However, parents and their attorneys should be aware that, under certain limited circumstances, such as if the school district prevails and can prove that the parent's case was filed for an improper purpose or that the parent acted in ways that unnecessarily prolonged the litigation merely to increase the costs to the school district, then there may be instances in which the school district may seek to recover its reasonable attorneys' fees from the parent's attorney and/or the parent.

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