Abstract

The spring 1996 issue of *The Future of Children* on special education reviewed the legislative and litigation history of the Individuals with Disabilities Education Act (IDEA). This Revisiting article examines the impact of the two U.S. Supreme Court cases setting forth school districts’ responsibility to reimburse parents of students with disabilities for private school tuition under certain circumstances. An extensive examination of published cases reveals that the number of cases litigated has increased but that the courts are no more likely to decide in favor of parents than they were before the Supreme Court rulings.

According to recent press coverage and commentary, growing numbers of parents of students with disabilities are rejecting the services offered by their local school districts and suing for reimbursement of private school tuition. Supreme Court decisions authorizing such awards in 1985 (*Burlington School Committee v. Department of Education*) and 1993 (*Florence County School District Four v. Carter*) are reported to have put the public educational system in fiscal jeopardy. For example, an October 1996 article in the *New York Times* claimed that, while the cases in the wake of the 1993 *Carter* decision “are too new to get an accurate national count,” they appear to have “mushroomed dramatically.” Similarly, a subsequent *New York Times* article reported that the number of *Carter*-type cases is increasing rapidly in New York City and across the country, causing “hemorrhaging” of enrollments and costs. Adding to the public perception of fiscal horrors are selective stories of individual court cases such as the Ninth Circuit Court of Appeals 1994 decision awarding $20,000 in tuition reimbursement and $130,000 in attorneys’ fees to the parents of a miscreant student with attention deficit disorder. The problem with these accounts, including those in the professional literature, is that they are often impressionistic, lacking in comprehensive, systematic study.
To test the validity of these impressionistic accounts, 416 decisions—consisting of virtually all published court decisions and administrative rulings concerning parental claims under IDEA for reimbursement of private tuition and/or comparable related expenses such as tutoring, counseling, physical therapy, or transportation—were analyzed.

In the past two decades, the number of court decisions concerning special education has increased, even though the overall level of litigation against school districts dropped during the same period. Here, only those special education cases involving parental demands for reimbursement of privately obtained services are discussed. These cases are based upon Public Law 94-142, now called the Individuals with Disabilities Education Act (IDEA). In some cases, parents additionally or alternatively asserted claims under either Section 504 of the Rehabilitation Act or the Americans with Disabilities Act (ADA).

Results of this analysis indicate that news reports of Carter’s causing “hemorrhaging” of public money to pay private tuition for students with disabilities are exaggerated. The number of published cases dealing with parental demands for privately obtained services has increased steadily and now approaches 50 opinions per year. However, the percentage of rulings in favor of the parents has not changed significantly since the 1975 inception of federal laws protecting the educational rights of students with disabilities.

Parental Rights Under IDEA

In 1975, Congress passed the IDEA (at that time called the Education for All Handicapped Children Act). The 1975 law was based upon federal court rulings that the Constitution required equal educational opportunity for school-age children with disabilities.

Under the IDEA, a team, which includes the child’s teacher and parent, develops an individualized education program (IEP) for the child. In the majority of cases, the parents and other team members agree upon the services to be provided under the IEP. However, where the parents and the school cannot reach agreement, aggrieved parties may appeal to an impartial hearing officer, then (in about half the states) to a second-tier administrative review, and finally through the federal or state courts. During the appeal process, the child is supposed to “stay put” in his or her existing placement. In 1986, the IDEA was amended to authorize courts, at their discretion, to award reasonable attorneys’ fees for parents who prevail on appeal.

Supreme Court Cases

What if the parents, during an appeal over the appropriateness of an IEP, unilaterally remove their child from the public school in favor of a private school of their own choice? Can the school district be held responsible for paying the private school tuition retroactively?

In the early cases, the hearing officers and courts were split in their rationales and results. Then, in 1985 the Supreme Court
issued the Burlington decision which established that parents are entitled to retroactive reimbursement for private school tuition where (1) the school district’s proposed placement is inappropriate and (2) the parent’s placement is appropriate. Even where these two conditions are met, the court’s decision to award full, partial, or no reimbursement to the parents depends on the equities of the particular case, such as whether the school district or parent engaged in bad faith.3

In 1993, the Supreme Court in Carter addressed a narrower question: What if the parents prevail on appeal, but the parents’ chosen private school is not on the state’s list of private schools approved to provide special education services? The Court ruled that the lack of the state’s stamp of approval does not bar reimbursement if the private school provides the child with an appropriate education. However, a court has the option of awarding less than total tuition reimbursement if the cost of the private school is found to be unreasonable.4,10

The Impact of Burlington and Carter

Table 1 presents a compilation of virtually all published court decisions and administrative rulings concerning reimbursement of private school tuition and/or related expenses under the IDEA since 1978, when the first published decisions appeared. Rulings are grouped in three time periods: (1) from 1978 until the ruling in Burlington, (2) between Burlington and Carter, and (3) subsequent to Carter. A review of the data in Table 1 reveals that the average number of published decisions per year has increased steadily. The table also reveals that the Burlington and Carter cases have not made courts more inclined to rule in favor of parents. The percentage of parent victories (including both partial and total victories) at the administrative level increased somewhat in the wake of Burlington and decreased after Carter. However, these changes were not statistically significant.

The review of cases highlighted the compartmentalized results caused by the three-step process laid out by the Supreme Court in Burlington and Carter. First, the hearing/review officer or court must determine whether the IEP offered by the school was appropriate.11 An appropriate education requires procedural compliance and an IEP reasonably calculated to provide meaningful benefit. For example, in denying a parental request for tuition reimbursement, the Sixth Circuit Court of Appeals commented: “The Act requires that the [school district] provide the educational equivalent of a serviceable Chevrolet to every handicapped student. [The parent], however, demands that the ... school system provide a Cadillac solely for [their child’s] use. We suspect that the Chevrolet offered to [him] is in fact a much nicer model than that offered to the average [district] student. Be that as it may, we hold that the Board is not required to provide a Cadillac and that the IEP is reasonably calculated to provide benefits to [the child].”12

Second, if the school’s offer is found not appropriate, the hearing/review officer or court then decides whether the private program in which the parents enrolled the student was appropriate. The fact that a private program or package of services is expensive will not deter the court from requiring appropriate services.13 For example, in the most extreme cases, an appropriate education was held to require private tuition and/or related expenses such as: (1) out-of-state travel (for example, Massachusetts to Arizona)14 or transportation in the form of commuting expense, including not only mileage allowance but also baby-sitting;15 (2) a full-time aide;16 (3) lodging costs, including rent and utilities, at a second apartment;17 or (4) the expense of hospitalization,18 a rehabilitation center,19 or an intensive training program in the home.20 In one case, the parents, who lived in Georgia, received partial reimbursement for a unilateral placement first in Japan (for two years) and then in Boston (for one year).21

Finally, at the third step, it was not uncommon for courts to dismiss parents’ reimbursement claims on technical or equitable grounds, such as the parents’ failure to exhaust administrative remedies or the parents’ refusal to allow their child to be reevaluated. Congress recently passed amendments to IDEA spelling out some of the circumstances in which courts should reduce or deny reimbursements to parents.22
New Developments

One of the most recent decisions in the post-Carter period, which has thus far largely escaped public attention, further complicates the question of who pays private school tuition and when. In *Susquenita School District v. Raelee S.* (1996), the U.S. Court of Appeals for the Third Circuit ruled that the school district must begin paying the private school tuition as soon as a state administrative decision or a judicial decision is made in favor of the parent, even while the decision is being appealed. This ruling is no doubt meant to protect students whose parents could not afford to pay private tuition during a lengthy appeal, but it goes against a long judicial tradition of not imposing financial obligations while a case is under appeal.

By going against common appellate practice, *Susquenita* raises more questions than it settles. For example, does this ruling apply to decisions made at the hearing officer level? Also, if the district prevails on the final appeal, must the parents then reimburse the district for tuition paid?

### Table 1

<table>
<thead>
<tr>
<th>Time Periods</th>
<th>Court Decisions</th>
<th>Administrative Rulings</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>P</td>
<td>D</td>
<td>P</td>
</tr>
<tr>
<td>Pre-Burlington</td>
<td>19</td>
<td>22</td>
<td>2</td>
</tr>
<tr>
<td>(1978–85)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>46%</td>
<td></td>
<td>40%</td>
</tr>
<tr>
<td>Burlington–Carter</td>
<td>58</td>
<td>55</td>
<td>49</td>
</tr>
<tr>
<td>(1985–93)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>51%</td>
<td></td>
<td>67%</td>
</tr>
<tr>
<td>Post-Carter</td>
<td>32</td>
<td>35</td>
<td>43</td>
</tr>
<tr>
<td>(1993–96)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>48%</td>
<td></td>
<td>51%</td>
</tr>
</tbody>
</table>

**Key**

- **P** = Parent prevailed at least in part
- **D** = School district prevailed at least in part
- **x** = Mean (or arithmetic average) of number of published decisions during this time period

### Note

Cases were selected for review from the topical index for the *Individuals with Disabilities Education Law Report* (IDELR), the digest for *West’s Education Law Reporter*, and the Lexis computerized database. The IDELR publishes the most extensive sample of court decisions and administrative rulings concerning special education. The author read each case (a total of 416 cases) to categorize the type of expense (for example, residential tuition, transportation, or tutoring), the prevailing party, and, where specified, the financial amount awarded. The author omitted from the table only those cases that were inconclusive on the question of responsibility for tuition or expenses (for example, court denied dismissal motion). In addition to all published cases concerning private tuition, Table 1 includes cases where the parent sought reimbursement for comparable related expenses, such as tutoring, counseling, physical therapy, or transportation (but not for independent evaluations or attorneys’ fees).

Source: Data compiled by author.
Conclusion

In sum, national news about the 1993 *Carter* case’s causing “hemorrhaging” of public funds to pay for private tuition is exaggerated. While the number of published opinions has risen steadily, the rulings issued by the Supreme Court in *Carter* and *Burlington* have not made the courts more likely to rule in favor of parents.

13. In fact, in well over 90% of the cases, the published opinion does not even mention the dollar amount sought or obtained by the parents. To the extent such amounts are detectable in the decisions, tuitions at day programs appear to be in the neighborhood of $10,000 to $20,000, and those at residential programs tend to be in the range of $40,000 to $80,000. In comparison, for 1993, the year of the *Carter* decision, the national average per-pupil expenditure in public schools was approximately $5,500.