

# **“There’s No Place Like Home”: The Law Pertaining to Out-of-District Placements**

**Presented to the New Hampshire Association of Special Education Administrators**

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### A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a deeper understanding of the law pertaining to out-of-district placements under the IDEA. This material does not include every aspect of the law, nor does it discuss every case involving the IDEA. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

## **I. Overview**

The purpose of this material is to provide the special educator with an overview of the law pertaining to out of district placements under the Individuals with Disabilities Education Act (IDEA). Over the past few years, Courts have continued to render decisions that further define and refine the contours of the IDEA requirements with regard to when our FAPE obligation warrants a placement other than a child's local public school. The goal of this material is to review and discuss some of the leading decisions in this area of the law in order to provide the special education administrator with a better understanding of the circumstances when FAPE does, and does not warrant an out-of-district placement. This material does not include every aspect of the law, nor does it discuss every case involving the IDEA and you are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

## **II. Placement of Children with Disabilities: An Overview**

The IDEA contains a presumption that children with disabilities will be educated, to the maximum extent appropriate, with children who are not disabled. 20 USC 1412(5)(A); see also 34 CFR 300.114(a) (public agencies must ensure that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled"); see also Ed. 1111.01 (LEAs "shall ensure that, to the maximum extent appropriate, children with disabilities, including children in public or private providers of special education, are educated with children who do not have disabilities and that, consistent with 34 CFR 300.114, special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily"); Ed. 1113.08(a)-(c) (to the maximum extent appropriate, children with disabilities must have access to the general curriculum, and the curriculum must be accommodated and/or modified to meet the unique needs of the child. Preschool children must also have full access to the preschool curriculum and appropriate preschool activities).

"[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment" is to "occu[r] only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 USC 1412(5)(A); see also 34 CFR 300.114(b). The Office of Special Education and Rehabilitation Services ("OSERP") has opined that these provisions set forth a "strong preference," for inclusion, rather than a mandate. Vol. 71, No. 156, Fed. Reg. at 46585 (Aug. 14, 2006).

The Congressional findings provide further support for the “inclusion preference.” Congress found that the education of children with disabilities can be made more effective by:

- Ensuring “access to the general education curriculum in the regular classroom, to the maximum extent possible in order to meet developmental goals, and to the maximum extent possible, the challenging expectations that have been established for all children”
- “[P]roviding appropriate special education and related services, and aids and supports in the regular classroom . . . whenever appropriate”
- “[S]upporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.”

20 USC ' ' 1400(c)(5)(A)(i), 1400(c)(5)(D), 1400(c)(5)(H).

To effectuate these goals, local educational agencies are required to:

- Provide supplementary aids and services, which are “aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate. . .” 34 CFR ' 300.42; see also Ed. 1102.05(k) (adopting the definition of “supplementary aids and services” set forth in ' 300.42).
- “[T]ake steps, including the provision of supplementary aids and services determined appropriate and necessary by the child’s IEP Team, to provide nonacademic<sup>1</sup> and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.” 34 CFR ' 300.107(a); see also Ed. 1102.01(o) (defining “extracurricular and nonacademic activities” as the “activities and services set forth in 34 CFR 300.107”).

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<sup>1</sup> “Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.” 34 CFR ' 300.107(b).

- Children with disabilities “must be afforded the opportunity to participate in the regular physical education program available to nondisabled children.” 34 CFR ‘ 300.108(b). This requirement does not apply to children who are “enrolled full time in a separate facility” or to children who require “specially designed physical education,” as set forth in their IEPs. Id.
- In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, supplementary aids and services, public agencies must ensure that children with disabilities participate with nondisabled children to the maximum extent appropriate to the needs of each child. 34 CFR ‘ 300.117.
- Ensure that “a continuum of alternative placements is available to meet the needs of children with disabilities.” 34 CFR ‘ 300.115(a). This continuum must “[m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.” Id.

In addition, placement decisions must be “made in conformity with the [least restrictive environment] LRE provisions . . .” The placement must be “as close as possible to the child’s home,” and, “[u]nless the IEP of a child with a disability requires some other arrangement, the child [must be] educated in the school that he or she would attend if nondisabled.” 34 CFR ‘ 300.116(b)(3), (c). Public agencies must also ensure that children with disabilities are “not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.” 34 CFR ‘ 300.116(e).

The State Board of Education has adopted the following continuum of learning environments for students ages 6-21:

- Regular classroom: A child with a disability attends a regular class with supports and services required in the IEP.
- Regular classroom with consultative assistance: A child with a disability attends a regular class with assistance being provided to the classroom teacher by consulting specialists.
- Regular classroom with assistance by specialists: A child with a disability attends a regular class with services provided to the child by specialists.

- Regular classroom plus resource room help: A child with a disability attends a regular class and receives assistance at or through the resource room program.
- Regular classroom plus part-time special class: A child with a disability attends a regular class and a self-contained special education classroom.
- Full-time special class: A child with a disability attends a self-contained special class full-time.
- Full-time or part-time special day school: A child with a disability attends a publicly or privately operated special day program full-time or part-time.
- Full-time residential placement: A child with a disability attends a publicly or privately operated residential program full-time.
- Home instruction: A child with a disability receives all or a portion of her/his special education program at home in accordance with Ed 1111.05.
- Hospital or institution: A child with a disability receives special education while in a hospital or institution.

Ed. Table 1100.4.

OSERP has opined that “[t]he overriding rule in ‘ 300.116 is that placement decisions for all children with disabilities must be made on an individual basis and ensure that each child with a disability is educated in the school the child would attend if not disabled unless the child’s IEP requires some other arrangement.” Vol 71, No. 156, Fed. Reg. at 46587 (Aug. 16, 2006). Moreover, “section 612(a)(5)(A) of the [IDEA] presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement.” Id. at 46588 (emphasis added). OSERP went on to state that, “before a child with a disability can be placed outside of the regular educational environment, the full range of supplementary aids and services that could be provided to facilitate the child’s placement in the regular classroom setting must be considered.” Id. It is only when the Team determines that the child “cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that the child could be placed in a setting other than the regular classroom.” Id.

Despite this strong preference, there are circumstances in which the regular education setting is not an appropriate placement for children with disabilities. The remainder of this material focuses on specialized out of district placements, such as

therapeutic placements, and the circumstances under which hearing officers and courts have determined that those placements are appropriate, or inappropriate, for a student.

### **A. Residential Placements**

A district is required to place a student in a residential facility if such placement is necessary to provide the student with special education and related services. 34 CFR 300.104. In other words, a district will be obligated to place a child in a residential facility if the child requires that placement to receive a free, appropriate public education.

The First Circuit Court of Appeals<sup>2</sup> has characterized the IDEA's preference for mainstreaming as "signif[ying] that a student who would make educational progress in a day program is not entitled to a residential placement even if the latter would more nearly enable the child to reach his or her full potential." Lenn v. Portland Sch. Committee, 998 F.2d 1083 (1st Cir. 1993) (quotations and citation omitted).

At times, parents may seek a residential placement because of concerns related to the student's behavior in the home setting, rather than for educational reasons. As the following case illustrates, a less-restrictive educational setting may be appropriate for the student.

Gonzalez v. Puerto Rico Dep't of Education, 254 F.3d 350 (1st Cir. 2001).

Facts: Gabriel G. attended a residential school in Boston; the school specialized in the education of children with autism. Gabriel progressed well at that school, and his parents wanted him to continue at that school, or another comparable residential facility. The district proposed an IEP and placement at Gabriel's local public school. His parents requested due process. The Hearing Officer and the District Court held for Puerto Rico, finding that Gabriel did not require a residential placement.

The court rejected the parents' argument that their concerns about safety in their home (Gabriel had a history of throwing tantrums in the home) required a residential placement, noting: "a court deciding on the appropriateness of residential placement must determine whether such placement is necessary for the child's education . . . , rather than for any social, medical, or emotional problems distinct from his learning problem. . . . Although a child may have severe behavior problems at home which make it difficult for his parents to control, the educational agency is not necessarily responsible to remedy this problem." Parents appealed.

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<sup>2</sup> New Hampshire is located within the First Circuit Court of Appeal and therefore, when the First Circuit issues a special education decision, the decision is more than informative, it constitutes the federal law within the Circuit.

Held: For Puerto Rico. The First Circuit noted that the District Court had accurately recited the legal standard pertaining to residential placements, and noted that it had previously held that districts are not required to place a child in a residential facility “simply to remedy a poor home setting or to make up for some other deficit not covered by the [IDEA]. It is not the responsibility of local officials under the [IDEA] to finance foster care as such: other resources must be looked to.” However, the court noted that

“where all agree that the student’s activities need to be highly structured both during and after school in order for him to receive an appropriate education, clear lines can rarely be drawn between the student’s educational needs and his social problems at home. Thus, typically an IEP in cases where the student’s disability is this serious (and requires such a degree of structure) must address such problems in some fashion, even if they do not warrant residential placement.”

Thus, the student did not require a residential placement, and the proposed IEP, which included services and training for the student’s parents designed to help them manage Gabriel’s behavior at home, was appropriate.

In King Philip Regional Sch. Dist., 58 IDELR 179 (Mass. SEA Jan. 24, 2012), the hearing officer found that a student required a residential placement.

Facts: Student was a 21 year old, who resided with her parents; parents had guardianship over the student. She had been diagnosed with autism and significant cognitive limitations, as well as several medical issues. Her most recent full-scale IQ test score was 48, and she had receptive and expressive language impairments, visual-spatial deficits, memory and learning limitations, and executive dysfunction. She also demonstrated social withdrawal, difficulty with emotional control and self-monitoring, and social communication difficulties consistent with autism.

Since February 2003, student has been placed at a substantially separate day program. The district proposed to continue that placement for the 2011-2012 school year; the parents rejected that proposal. Parents wanted the student to be placed at a residential facility.

Held: For the parents. The Hearing officer noted that the standard for placement in a residential facility is “whether the educational benefits to which a student is entitled can only be provided through around-the-clock special education and related services, thus necessitating placement in an educational residential facility.”

He found that the student has made “demonstrable progress with respect to her behavior in school and during educational activities.” However, her behavior at school was not a current area of concern and was not addressed in the proposed IEP. He also noted that the student has made progress in academic and non-academic areas, but

that the progress has been “exceedingly limited.” In particular, he noted that the limited independent living skills that the student learned within the school environment had not been demonstrated in her home, and with respect to independent living skills in the home-setting, the student had regressed. The student could not independently dress herself, take a shower, comb her hair, brush her teeth, or use the toilet.

In addition, the student’s behaviors in the home-setting had also regressed, and had become dangerous. At home, the student was “frequently self-injurious, including head-banging and picking at or gnawing on her fingers. On one occasion, she banged her head through a window.” She was also aggressive towards her parents and strangers, hitting, scratching and pushing people, including, in one instance, a toddler.

Because the student was bigger than her mother, it had become virtually impossible for her mother to teach student daily living skills in the home and the community, as student’s behavior escalated whenever mother attempted to place demands on the student (i.e., make your bed, get dressed, etc.).

The Hearing Officer noted that the IEP proposed by the district included in-home services to address the student’s deficits with independent living skills and social/emotional skills. The Hearing Officer also found that the “ability to generalize learned skills to environments outside of school is fundamental to the purpose of transition services because transition skills are only useful if they can actually be applied where Student will be living and working after secondary school.

The Hearing Officer found that in order for the student to make progress on her transition goals, it was necessary to “begin to reverse Student’s extreme and dangerous behaviors in the home and community,” and “without appropriately addressing her behaviors in the home and community, it is simply not conceivable that Student can gain any degree of independence as an adult.” The student “requires around-the-clock consistency, reinforcement and hands-on instruction from educational staff in multiple environments (including where she is living) in order to learn skills and behavior that are necessary for her to have a meaningful opportunity to live and work in the community.” Thus, she required a residential placement.

In Munir v. Pottsville Area Sch. Dist., 59 IDLER 35, 2012 U.S. Dist. LEXIS 82996 (M.D. Pa. June 14, 2012), the court affirmed the denial of a request for reimbursement for costs associated with unilateral placements in two residential facilities, on the basis that the student was placed for medical, rather than educational, reasons.

Facts: In early 2005, when Student was 13, he was hospitalized due to threats of suicide and suicidal gestures. At the hospital’s request, the District submitted behavior ratings and conducted an evaluation. Thereafter, on the basis of the evaluation and the behavior ratings, the District concluded that the Student did not have a learning disability, and that he did not have an emotional disturbance.

From the fall of 2005 through the spring of 2008, Student had no difficulty attending school, expressed no concerns about school, and earned grades in the B-C range. In April 2008, Student was again hospitalized after he overdosed on prescription medicine. Parent notified District of the hospitalization, but provided no details or medical records.

In July 2008, Student was hospitalized on two occasions, for extreme emotional upset, manifested by suicide threats and gestures and a suicide attempt. Other suicide attempts followed.

In August 2008, parent notified the District that Student was withdrawing from school to attend a private boarding school attended by Student's older brother. However, after one day at the boarding school, plaintiff withdrew Student after Student indicated that he felt depressed and was going to harm himself. Thereafter, parents re-enrolled Student in the District prior to the commencement of the 2008-2009 school year.

In early September 2008, Student expressed suicidal thoughts and was admitted to the hospital for an overnight stay. Parent notified the District of the hospitalization and sought assistance for low academic performance during the fall of 2008. After that hospitalization, parent requested an IEP for the student. In mid-October 2008, the District received correspondence from Student's physician, indicating that the student was being treated for depression and had been diagnosed with ADHD. The letters requested accommodations for the Student. The District requested and received permission to conduct an evaluation and a Section 504 team concluded that he qualified for services. A plan was developed that provided for some classroom and testing accommodations, and the opportunity for the student to contact the nurse and guidance as needed. On two occasions, in the fall of 2008, the Student became upset, and spoke to guidance. On those occasions, the Student went home early. Otherwise, the Student attended and participated in all classes and interacted with peers and other Students on a regular basis.

During the fall of 2008, parent explored residential treatment facilities for student. During the winter break in 2008, Student again threatened suicide and received in-patient hospital treatment. On January 12, 2009, parent enrolled Student at Wediko Children's Services, a therapeutic/residential treatment center in New Hampshire. Student remained there until July 2009.

While at Wediko, Student received a full school day and daily therapy. He was overseen by a staff psychologist. In February 2009, Wediko evaluated Student. The evaluations were presented to the District and parent requested that it consider developing an IEP. The District reviewed the testing and the team concluded that the Student had an emotional disturbance. It rejected the conclusion that the Student had a

non-verbal learning disability. The District offered an IEP with emotional support goals and services.

During the summer of 2009, after receipt of additional information from Wediko, the District amended the proposed IEP to include additional services, including a cognitive behavioral curriculum for students experiencing anxiety and depression. The District also increased the level of proposed social work services and added psychological services. The IEP incorporated most of the recommendations from Wediko. The IEP's proposed by the District provided that the Student would receive all academic instruction in regular education classes. Parents rejected the District's IEP's.

During the summer of 2009, parent and Wediko agreed that the Student's level of risk had decreased to the point that he could function without the intensive therapeutic environment offered by Wediko. They also agreed that he should attend a residential school closer to home that offered small classes and a supportive environment. Thus, parent enrolled Student in a private residential facility, located in Pennsylvania. Parent then sought reimbursement through a due process proceeding.

Parent filed a request for due process, seeking reimbursement for the costs associated with both private, residential placements. The hearing officer found for the district and the parent appealed.

Held: For the District. The court first noted that the District's failure to develop an IEP prior to 2009 did not result in a denial of FAPE. Up until that point, Student had made academic progress and did not require special education services. The Student's hospitalizations during that period did not impact his education.

The court also found that the IEP's that were developed by the District were appropriate, and then incorporated the recommendations from Wediko. Thus, the parent's request for reimbursement for the residential placement located in Pennsylvania was denied.

With regard to the request for reimbursement for the costs associated with Wediko, the court noted that although the Student received substantial academic support during his time there, he did not attend Wediko primarily to address educational issues. Instead, he was enrolled there, because his parents feared for his personal safety and were fearful that he posed a physical threat to himself. Although the student received educational benefit from the educational opportunities offered at Wediko, "these educational benefits were subsidiary to the therapeutic and emotional benefits [student] received in an effort to prevent another suicide attempt. Federal regulations only require residential 'placements which are made by public agencies for educational purposes.'" Id. (citation omitted). The court went on to note that the "clear purpose" of Student's residential placement was to prevent harm to the student. "A school district is only responsible to provide financial support for a private placement if the stay at that

facility is necessary primarily to provide educational services.” Thus, the parent was not entitled to reimbursement for the costs associated with the placement at Wediko.

### **1. Residential Placements and the Duty to Provide Ancillary Services**

When a child is placed at a residential facility, a parent may request reimbursement for services such as transportation to and from the facility. The Office of Special Education Programs (“OSEP”) has opined that “when transportation is required to assist a [child with a disability] placed in a residential facility for educational purposes to benefit from special education, it must be provided as a ‘related service.’” OSEP went on to state that “at a minimum . . . a child placed in a residential school must be provided transportation to and from the facility at the beginning and end of the school term and when the school is officially closed to students. Reimbursement for other trips home would have to be determined on a case-by-case basis.” Letter to Anonymous, 231 IDELR 164 (OSEP Sept. 12, 1988).

In addition, a trip to/from the school by a parent “that could be considered to be contributing to the goals and objectives in a child’s [IEP] would be covered as a related service in individual circumstances.” Similarly, “[t]elephone calls to discuss the student’s program may be reimbursed as part of parent training if the calls are required to assist the child who is [disabled] to benefit from special education. As with all related services, the nature and extent of the service to be provided is an educational judgment which must be made at an IEP meeting.” Id.

The case of Agawam Public Schools, 42 IDELR 284 (Mass. SEA July 20, 2004) involved a parental request for reimbursement of specific expenses for a child in a residential placement.

Facts: Student was a 16 year old, who was eligible for services due to a learning disability. His team determined that he could not be properly educated in the public school setting, and placed in him a private residential school in New York.

The parent and the school became involved in a dispute pertaining to which, if any, expenses incurred by the parent or student in connection with the Student’s residential placement should be reimbursed by the public school. Parent requested reimbursement for the following items:

- Clothing: \$1,141.90 reimbursement for clothing conforming to the private school dress code
- Laundry Service: Up to \$700 per school year to cover costs of laundry, dry cleaning, and dress shirt service

- Telephone: Up to \$25 per month to cover phone calls between home and school
- Transportation: Actual mileage (or airfare plus rental car) plus costs for lodging and food for Parent visits to private school to visit Student and attend parent-teacher conferences, sporting events, music recitals, etc.
- Laptop computer

When the district denied those requests, the parent requested due process.

Held: For the district. The Hearing Officer indicated that the parent would be entitled to reimbursement if “the requested items or services [were] necessary for the achievement of the goals and objectives in [student’s] IEP.” He noted that none of the requested items constituted “special education” because they could not be characterized as “instruction,” and therefore did not meet the definition of “special education.”

However, the items would be considered “related services” if they constituted a required “supportive service.” The Hearing Officer noted that the Supreme Court had indicated that a service constitutes a “supportive service” “if without [the service] the student cannot attend school and thereby benefit from special education.” Id. (citing Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 891 (1984); Cedar Rapids Community Sch. Dist. v. Garret F., 526 U.S. 66 (1999)).

Turning to each of the requested items, the Hearing Officer found as follows:

- Clothing: Request denied. The school had a dress code, which required the student to purchase new clothes; however, the Hearing Officer found that a dress code was not equivalent to a uniform. “There is no indication here that [the school] requires students to purchase identical items from a single source at a standard price that would be unsuitable for use or wear outside of the . . . school environment. Nor is there any indication that . . . the school requires the Student to wear specialized clothing. . . . The fact that the purchased items may not conform to the Student’s taste for school attire does not render the clothing unsuitable for use outside [the school].” Thus, the parent was not entitled to reimbursement for the costs associated with the purchase of clothes that conformed to the dress code.
- Laundry Service: Request denied. The hearing officer noted that the district was paying a \$50 per semester laundry fee to permit the student to do his own laundry free of charge in the dormitory. However, the parent and student requested public funding for a \$700 per year laundry service, on the basis that the student was “too busy focusing on his studies and

otherwise too tired to launder his own clothing.” The Hearing Officer noted that the student’s IEP does not contain any reference to any cognitive, emotional, or physical disabilities which would prevent the student from washing his own laundry, and there was no evidence that the laundry service was required in order for the student to access the school. The Hearing Officer also noted that the student may derive a significant, if ancillary, benefit from washing his own laundry.

- Telephone costs: Request denied. The school provided telephone jacks, voice mail, and free local calls to all students. Cell phones were prohibited. Parent argued that the long distance telephone charges were only incurred because the district had determined that the student required a residential placement to receive a FAPE. Thus, those expenses should be borne by the district. The Hearing Officer agreed with the district’s argument that the telephone charges were personal in nature and were not necessary for the student to access or benefit from the special education program at the school.
- Transportation: Request denied. The Hearing Officer noted that the district was responsible for, and was providing, door to door transportation to the student for all authorized school holidays and at the beginning and end of the school year. Parent requested reimbursement for transportation to and from the school for attendance at certain school activities. The Hearing Officer found that the student’s IEP did not contain any goals, objectives, or accommodations that would necessitate a parental presence at the school, and that there was no indication that the student “cannot participate fully in the special education program at the [school] in the absence of the Parent.”
- Laptop: Request denied. The school strongly encouraged students to bring a computer for personal use, but had several computers available for students to use if they did not have their own computer. Student’s IEP did not provide for a laptop and there were no goals or objectives that required the use of a personal computer. Thus, the laptop was not necessary for the student.

*Practice Pointer:* When a district places a child at a residential facility, it will be responsible for transporting students to and from the facility. The scope of the district’s responsibility for other charges will depend on the contents of the student’s IEP, and whether the student requires the service or item to receive a FAPE at the residential facility.

## 2. IEPs and Placement

I.M. v. Northhampton Public Schools, 112 LRP 31471, 2012 U.S. Dist. LEXIS 82930 (D. Mass. June 12, 2012).

Facts: I.M. was a ten year old student who had been diagnosed with dystonic quadriplegic cerebral palsy, cortical visual impairment, and apraxia of speech. He attended Leeds Elementary School in Northhampton until April 2010. At that time, his parents withdrew him from school and applied to place him at the Perkins School for the Blind.

Following his acceptance and placement at Perkins, the parents and district were involved in two due process proceedings, neither of which was appealed. In the first, the parents sought public funding for a home-based program during the period of April 2010, until the student was accepted at Perkins. This request was denied on the basis that the IEP developed by the District for the 2009-10 school year was appropriate for the student.

Once student was accepted to Perkins, parents informed the Team that they agreed with the proposal to place him at Perkins, but disagreed with the Teams decision to provide transportation to and from Perkins in accordance with the school vacation calendar, but not on a daily or weekly basis. The Hearing Officer found that daily or weekly transportation was not required because the parents had failed to establish that “absent such transportation, I.M. would not receive an appropriate education.”

When the Team agreed to placement at Perkins, the Team agreed to reconvene at the start of the 2010-11 school year to review, and revise, as necessary, the student’s IEP. The Team met in November 2010, and agreed to an IEP. In January 2011, however, parents indicated that they disagreed with the number of services set forth in the IEP, believing that certain services, such as speech, needed to be increased. Parents also rescinded their consent to the Perkins placement. Parents requested due process, alleging that the IEP was inappropriate and that the placement was too restrictive. The Hearing Officer found for the district and the parents appealed.

Held: For the District. The court rejected the parents’ argument that the IEP was inappropriate due to the “drastic reduction” in services. The court noted that the November 2010 IEP contained fewer services than the 2009-10 IEP, but found that “the Perkins program is extremely integrated. This results in the services delivery grid looking different from IEPs from public school programs. . . . Given the substantially different environment for which the prior 2009-2010 IEP was created, it was, as the hearing officer found, reasonable and appropriate that the 2010 November IEP for the 2010-2011 school year represented a departure from the service delivery grid of its predecessor.

## **B. Mental Health Emergencies**

School districts frequently encounter children who are unilaterally placed by parents as the result of a mental health crisis or emergency. This issue was addressed in Lazerson v. Capistrano Unified School District, 56 IDELR 213, 2011 U.S. Dist. LEXIS 35253, No. 09-958 (C.D. Cal. March 25, 2011).

Facts: Student was a student who received excellent grades her freshman year, but by her sophomore year, her grades had begun to slip and she began to experience emotional difficulties. In the fall of 2006, parents received a phone call from their daughter who was crying and admitted that she wanted to injure herself. Parents responded by taking her to the hospital where she was admitted based on signs of self-mutilation and attempted suicide. After 8 days of hospitalization, she returned to the public school where she appeared to have a successful sophomore year, passing all of her classes including college preparatory classes. However, Student reported drinking and taking Advil at school in order to “numb out” for the remainder of the year. She indicated that she would frequently leave class for periods of up to 30 minutes at a time.

At the beginning of her junior year, Student attended only two weeks of school before being hospitalized again after abusing the family dog, becoming physically abusive toward her father and making suicidal threats. Approximately one month later, Student’s parents inquired about developing an Individualized Education Program for Student. This inquiry resulted in a referral and a request on the part of the parents for a comprehensive assessment of their daughter.

The school offered to evaluate Student, but the parents placed their daughter at Copper Canyon Academy in Arizona. The school district informed the parents of their IDEA rights and the parents responded by letter alleging that they “wanted to go on record and state that we believe that Tesoro High School . . . ‘dropped the ball’ when it came to Student” and asserting that they were “extremely upset and disturbed” by how the school district handled their case. Subsequent efforts by the district to propose the evaluation were not met with parental cooperation. Instead, the parents initiated due process, seeking reimbursement for the costs associated with Student’s attendance at Copper Canyon Academy. The hearing officer denied the parents’ request for reimbursement and the parents appealed.

Held: For the district. The court affirmed the decision of the hearing officer observing that “[t]he court does not mean to cast aspersions on parents’ actions. Parents acted swiftly in response to an emergency situation and did what they felt they needed to do in order to protect their daughter from harm. School districts, however, are not responsible for providing emergency mental health services. . . . Therefore, to the extent that Student’s placement at CCA arose in response to a mental health emergency, the school district need not reimburse parents for the expenses they incurred.”

The court also found that the parents' lack of communication with the school district resulted in the breakdown of the evaluation process. While the school district may have been technically in violation of its child find duties by failing to submit a timely formal assessment plan, it was the parents' actions that ultimately stymied the evaluation process. The court went on to note that in light of the fact the student was not in special education at the time of placement, reimbursement in such a case would only be available on equitable grounds consistent with Forest Grove School District v. T.A., 523 F.3d 1078 (9<sup>th</sup> Cir. 2008). The court observed that in this case, the equities do not favor the parents in that they gave the school only one day's notice of the unilateral placement, there were suitable placement alternatives to explore, and the parents did not make much of an effort to explore other alternative placements.

### **C. Placements for Rehabilitative Purposes**

District's also have encountered an increasing number of circumstances where parents have placed their child in a drug/alcohol treatment program, and contended that the program arose from an underlying emotional disturbance, which in turn triggered an obligation on the part of the district to reimburse the placement as a unilateral parental placement. The case of P.C. v. Oceanside Union Free Sch. Dist., 2011 U.S. Dist. LEXIS 57112, No. 09-CV-1204, 56 IDELR 252 (E.D.N.Y. May 24, 2011) addresses this issue.

Facts: Beginning in the 7th grade (2004-2005), and continuing through the 8th grade, K.C., a pupil in the Oceanside School District, started receiving failing grades in his classes. Coinciding with his declining academic performance, K.C. also began smoking marijuana in the amount of three grams per day (sometimes laced with cocaine), as well as abusing alcohol and prescription medications.

Concerned about K.C.'s alarming deterioration, his parents requested that Oceanside conduct a psychological evaluation. Oceanside obliged, evaluating K.C.'s social and psychological history, observing him in class, and soliciting information regarding his academic performance from his teachers. The Committee on Special Education ("CSE") for the district determined that although K.C. was not eligible for special education, he would be afforded more liberal testing accommodations, pursuant to Section 504. Parents never challenged this meeting in any respect.

On August 22, 2005, K.C.'s parents placed him in a drug treatment program, where his admission diagnoses included abuse of alcohol, cannabis, opiates, and amphetamines; attention deficit hyperactivity disorder; and "parent-child relational problem." K.C. continued to test positive for marijuana use, refused to be tested on other occasions, and learned how to foil the drug tests. On March 17, 2006, K.C.'s parents unilaterally placed him in a private residential preparatory school, which has never been approved by the New York State Commissioner of Education as a school for

children with disabilities. The school's guiding philosophy is centered on a Twelve-Step program which requires students to follow a twelve-step "process of self-examination in dealing with whatever issues he or she presents."

About one month later, the district convened another CSE meeting with the CSE chairperson, a school psychologist, a special education teacher, a standard education teacher, K.C.'s father, Parents' attorney, and the district's attorney. In spite of the extensive psychological testing already conducted by the district, the CSE determined that more data was needed. Because both K.C. and the district employed different experts to conduct psychoeducational evaluations and because the report of K.C.'s expert was not shared with the district until June 6, 2006, the district's expert was prevented from conducting a complete psychological evaluation in order to avoid the "practice effect" associated with duplicative testing. K.C.'s expert concluded that K.C. suffered from an emotional disturbance and the district's expert concluded that he did not suffer from one. K.C.'s expert further found that the supports and services offered to K.C. at Family Foundation appropriately addressed his learning, emotional, and behavioral needs.

The district's psychologist performed a classroom observation at the Family Foundation and analyzed questionnaires presented to K.C.'s teachers. During his single-day observation, K.C. did not demonstrate any signs of emotional disturbance. K.C. was given high praise by his teachers.

To review and deliberate upon the new data, the CSE reconvened on June 16, 2006, with virtually the same participants who attended the April 28 meeting. A school psychologist reviewed the parents' and the district's evaluations. She opined that "it seems quite likely the increase in drug use could lead to a decrease in academic performance." The CSE decided that even if K.C. were properly diagnosed with a mood disorder recognized in the DSM-IV, classification was not warranted in view of the likelihood that his poor academic performance was more attributable to drug abuse than emotional illness.

Unsatisfied with the CSE's classification decision, parents' counsel sought and received an impartial hearing seeking a reversal of the unfavorable result. On June 28, 2008, an impartial hearing officer found in favor of the District. Parents appealed.

Issue: Whether K.C. was eligible for IDEA assistance, where his deteriorating academic performance appeared to be due to substance abuse and not emotional disturbance.

Held: For the school district. The Court affirmed the hearing officer's finding that the student's poor grades coincided with his daily marijuana use, as well as his abuse of alcohol and prescription drugs. The fact that the student's academic performance and interpersonal relationships improved dramatically after he overcame his substance

abuse problems indicated that his drug and alcohol use were the source of his earlier difficulties. Moreover, the court observed, an assessment by an independent psychologist characterized the student's depressive behavior as being in the average range. The court noted that all of the instances in which the student appeared angry or anxious, became aggressive, or struggled academically occurred while he was abusing drugs and alcohol. Concluding that the student's substance abuse was the cause of his academic and behavioral problems, and not the result of them, the court held that the student did not have an emotional disturbance as defined by the IDEA.

To reach this finding, the Court evaluated the five elements of the definition of “emotional disturbance” under New York law:

- (i) an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (iii) inappropriate types of behavior or feelings under normal circumstances;
- (iv) a generally pervasive mood of unhappiness or depression; or
- (v) a tendency to develop physical symptoms or fears associated with school or personal problems.

N.Y. Comp. Codes R. & Regs. tit. 8, § 200.1(zz)(4).

Although noting that a child must display only one of these characteristics, the Court also emphasized that the “‘emotional disturbance’ category does not encompass students who are merely ‘socially maladjusted’ without an accompanying emotional disturbance.”

The Court found that K.C. did not display any of the five characteristics, where (1) any admission by the school district that K.C. may have suffered from mental or emotional impairment under Section 504 was not “an automatic admission that K.C. was classifiable under the IDEA”; (2) there was evidence that K.C. successfully made friends at school; (3) difficult external circumstances explained K.C.’s apparently inappropriate or abnormal behavior; (4) K.C.’s depressive mood was judged to be in the “average range” in June of 2006 and K.C.’s mood improved markedly once he stopped abusing drugs and alcohol; and (5) there was no evidence that K.C.’s alleged physical symptoms resulted from anxiety.

The Court additionally found that even if K.C. were eligible under the IDEA, the unilateral placement by K.C.’s parents was not appropriate, because K.C.’s parents

failed to demonstrate that (1) the IEP proposed by the school district was inappropriate, and (2) the private placement was appropriate to meet K.C.'s needs. In making this finding, the Court noted that the "IDEA does not require (already heavily burdened) public school districts to pay for private substance abuse treatment." The Court did not permit parents to recover under the Rehabilitation Act where the claims stated under the Rehabilitation Act were "in actuality, merely restatements of their IDEA claims."

The case of Forest Grove Sch. Dist. v. T.A., 638 F.3d 1234 (9th Cir. 2011)<sup>3</sup>, cert. denied, T.A. v. Forest Grove Sch. Dist., \_\_\_\_ U.S. \_\_\_\_, 132 S. Ct. 1145 (Jan. 23, 2012), also involved a request for reimbursement for a unilateral placement.

Facts: T.A. was enrolled in the Forest Grove School District from kindergarten until the spring semester of his junior year in high school. At that point, he was removed by his parents and enrolled at Mount Bachelor Academy, a private boarding school. While at Forest Grove High School, T.A. received mostly C's and D's; however, a school evaluation conducted in 2001 revealed that he did not have a learning disability. Accordingly, T.A. was not eligible for special education services.

In fall 2002, T.A. began to use marijuana regularly, and in early 2003, he ran away from home. As a result, T.A.'s parents took him to a psychiatrist to be evaluated, and they enrolled him in a three-week program for troubled youth at Freer Wilderness Therapy Expeditions, where it was also revealed that T.A. had used cocaine. After the psychiatric evaluation, conducted in March 2003, T.A. was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), depression, and marijuana addiction.

T.A.'s parents immediately removed him from public school and enrolled him at Mount Bachelor Academy. On the Mount Bachelor application, T.A.'s father did not mention T.A.'s ADHD or schoolwork in response to a question asking "which specific events precipitated enrollment in the program?" Instead, he cited T.A.'s drug use and behavioral problems.

After enrolling T.A. at Mount Bachelor, in April 2003, his parents filed a complaint against Forest Grove for a failure to provide T.A. with a Free Appropriate Public Education ("FAPE") under the IDEA and requested an administrative due process hearing. In July 2003, a team of specialists from Forest Grove confirmed T.A.'s

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<sup>3</sup> This case is a continuation of a line of cases pertaining to the parent's request for reimbursement for their unilateral placement. In 2009, the United States Supreme Court issued a decision in Forest Grove School District v. T.A., 557 U.S. 230 (2009). This decision was discussed at length in "Special Education Case Law: An Overview of Recent Decisions," which was presented to the New Hampshire Association of Special Education Administrators on August 3, 2009. The Court remanded the case back to the district court level; that court issued a decision in December 2009. See Forest Grove Sch. Dist. v. T.A., 675 F.Supp.2d 1063 (D. Or. 2009). The District Court's decision on remand was discussed at length in "Special Education Case Law: An Overview of Recent Decision," which was presented to the New Hampshire Association of Special Education Administrators on April 9, 2010.

diagnosis of ADHD but determined that he was not eligible for services under the IDEA because his ADHD did not have a severe adverse effect on his academic performance.

In 2004, the hearing officer issued an opinion in favor of T.A.'s parents, holding that T.A. was disabled, that the diagnosis had a severe adverse effect on his academic performance, and that Forest Grove had thus failed to provide T.A. with a FAPE. Accordingly, the hearing officer held that Forest Grove was responsible for the costs associated with his placement at Mount Bachelor.

On appeal, the district court reversed, holding that T.A. was statutorily ineligible for reimbursement of private school expenses under 20 U.S.C. § 1412(a)(10)(C) and that principles of equity did not support an award of reimbursement. The Ninth Circuit Court of Appeals reversed the decision that T.A.'s parents were not entitled to reimbursement, holding that, under general principles of equity, students who had not previously been diagnosed with a disability are nonetheless entitled to reimbursement as 'appropriate' relief pursuant to 20 U.S.C. § 1415(i)(2)(C). Additionally, the court rejected the district court's conclusion that "tuition reimbursement is available only in *extreme cases* for parents who place their children in private school before receiving special education services in public school." Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078 (9th Cir. 2008) (italics in original).

The Ninth Circuit remanded to the district court to determine whether, after considering all relevant factors, principles of equity applied to the present case. The school district appealed to the Supreme Court, and the Court affirmed that reimbursement under IDEA is not precluded where the child had not previously received special education under the authority of a public agency. On remand, the district court held that the parents were not entitled to reimbursement because they had unilaterally placed him in private school as a result of his drug abuse and behavioral problems, not due to an educational disability recognized by IDEA. The district court cited the timing of the change in schools and the fact that his father listed T.A.'s behavioral issues, depression, and drug use as the reasons for enrollment at Mount Bachelor as relevant factors in the decision. The parents again appealed the decision to the Ninth Circuit Court of Appeals.

Issue: Whether the district court abused its discretion in determining that the parents of a student with ADHD and depression could not recover the cost of his placement in a private boarding school.

Holding: For the district. There was sufficient evidence in the record to support the finding that T.A.'s parents enrolled him at Mount Bachelor solely because of his drug abuse and behavioral problems, and as a result, his parents were not entitled to reimbursement for the cost of his private school tuition.

The Ninth Circuit found that there were ample facts to support the conclusion that T.A. was transferred to Mount Bachelor solely for non-academic purposes. The timing of T.A.'s enrollment directly coincided with the escalation of his drug and behavioral problems and his attempt to run away from home. There was no attempt to transfer the student during the two-year period when his ADHD and poor academic performance were the sole issues. Furthermore, statements made by T.A.'s father on the boarding school application specifically indicated that T.A.'s drug and behavioral problems were the sole reason for his enrollment, and his academic difficulties were not mentioned.

When the statements made on the application were considered in conjunction with the timing of T.A.'s enrollment, it was not illogical, implausible, or without support for the district court to infer that the enrollment was solely for non-academic purposes.

The court reiterated that its decision "does not seek to establish a rule of law which requires parents who seek to address all of their child's needs to answer each and every question with the response: Disability." Rather, a fact-specific weighing of the equities of the case must be conducted, and the particular circumstances of this case warrant a finding that there was no clear factual error in the determination that T.A.'s academic performance did not play a role in his transfer to Mount Bachelor. Accordingly, the circumstances of this case weighed against reimbursement.

#### **D. Homebound Placements**

A homebound placement may be appropriate for a student with a disability who is unable to attend school for medical reasons. Depending on the nature of the student's disability, such placement may be on a temporary or long-term basis.

The requirements for home bound placements in New Hampshire are set forth in N.H. Ed 1111.05. Such placements must, among other things, provide the child with access to the general curriculum and comply with RSA 186-C:15, regarding the number of days per year of instruction. Ed 1111.05(a).

Homebound students must also have the opportunity to participate in events sponsored by the school district, including extra- curricular activities, when appropriate for the child. See Morris (NJ) Sch. Dist., 31 IDELR 170 (OCR, Feb. 2, 1999).

Georgetown Indep. Sch. Dist., 45 IDELR 116 (Tx. SEA Sept. 23, 2005).

Facts: The student, JK, enrolled in Georgetown High School (GHS) at the start of his sophomore year, in the fall of 2002. Shortly thereafter, he was hospitalized and diagnosed with aplastic anemia, a bone marrow failure. He was placed on a transplant list and began receiving treatment. His admitting physician completed a "Homebound Needs Assessment," confining the student to his home for all activities due to the risk of infectious complications.

The IEP Team determined that JK was eligible for special education and related services, due to an other health impairment, and developed an IEP. The IEP included homebound instruction in the general education curriculum for at least 4 hours per week, with minor modifications to address his potential weaknesses or lack of stamina. The Team relied on recommendations from JK's physician in developing the IEP and determining that the homebound placement was the least restrictive environment for JK.

By December 2002, JK continued to require homebound instruction. He was considerably behind in his classes, but his parents did not want to modify the general education curriculum. JK continued to require homebound instruction for the remainder of the 2002-2003 school year.

In May 2003, JK's parents learned that a teacher at GHS had complained about mold in her classroom. JK's mother met with the Superintendent to express concerns about air quality at GHS. The Superintendent informed parent that the issues had been resolved, and he provided her with copies of three studies that had been performed. The most recent study, conducted in February 2003, indicated that "the air quality samples were excellent."

Parent continued to be concerned about the air quality in the school, and she collected surface samples of suspected mold from classrooms and had them tested. The tests indicated the presence of certain fungi and mycotoxins but did not provide the results of the amounts found. She presented the results to the school, and in response the district retained an environmental consultant recommended by parent to conduct additional testing.

The results of the additional tests showed water damage and/or suspected mold growth on ceiling tiles in various locations, musty odors in certain rooms, and grey dust/debris on ceiling tiles. The report included several recommendations, many of which were implemented by the district.

In September 2003, the consultant performed a follow up test and concluded that no indoor air mold amplification existed, and that the previously damaged ceiling tiles had been replaced. Parent continued to be concerned about the air quality at the school, and obtained a letter from JK's physician, placing him on homebound status for the 2003-04 school year. The doctor indicated that the risk of mold exposure in the school could lead to a life threatening condition.

JK's IEP Team met in August 2003; the Team reviewed the air quality reports and the educational members of the team believed that GHS would be a safe environment for JK. However, due to parent's serious concerns, they agreed to start the year with a homebound placement, and provided JK with 6 hours per week of homebound instruction (4 hours with a teacher, 1.5 hours by a Spanish tutor, and 30 minutes of additional

Algebra II tutoring). In August and September 2003, he actually received an average of over 11 hours of homebound instruction/tutoring per week.

Following the August meeting, the Team contacted JK's physician who opined that JK could return to school one week after all visible mold damage had been repaired. The doctor provided additional recommendations, all of which the district implemented. At the end of September 2003, JK's doctor released him from homebound instruction. JK's Team met and planned for a transition back to school. He attended school at GHS from the end of September until November; at that point, he contracted pneumonia and he returned to homebound status. He remained on homebound status until May 2004.

In May 2004, JK's doctor opined that he could return to school. His Team met and proposed that he return to GHS. Parent requested placement at a private facility. In June 2004, the district discharged JK from special education on the basis that his doctor had opined that he no longer required homebound services. Subsequently, parent requested due process. JK attended a private school for the 2004-05 school year.

Held: For the district. Parent argued that JK could have attended GHS (rather than a homebound placement) if GHS had adequately addressed the air quality issues at GHS. The hearing officer rejected this argument, noting that the need for homebound services was due to his underlying disorder and inability to be around large groups of students for extended periods of time, and not to any air quality issues at school. The hearing officer also found that the homebound program implemented by the district was appropriate for the student and that he made educational progress while he was homebound. The hearing officer also found that the homebound setting was the least restrictive environment in which JK could make educational progress, and that the district took steps to ensure that JK could return to GHS as soon as his doctor released him to do such. Parent was not entitled to reimbursement for the costs associated with the private placement.

In Stamps v. Gwinnett County Sch. Dist., 59 IDELR 1, 2012 U.S. App. LEXIS 11203 (11th Cir. June 4, 2012), the court rejected the parents argument that their children required a homebound placement.

Facts: H.S., S.S., and J.S., were all eligible for services under the IDEA due to genetic and neurological disorders. Parents believed that all three children required homebound placements. The district proposed to place all of the children in public schools, with various services. Parents disagreed with the proposal and requested due process. The administrative hearing officer and the district court found for the district and the parents appealed.

Held: For the district. The testimony from the children's physician did not establish that the children had to be educated at home because of their nonspecific immune deficiencies. Their doctor testified that the:

- “immune deficiency did not require preventative treatment,
- [The children] did not have a ‘bonafide primary immune deficiency,’
- [The children’s] immune systems ‘[would] improve just like anybody’ with age, and
- the children had not been sick in several years.”

His testimony was consistent with that of an expert retained by the district, who reviewed the children’s medical records and spoke with their physician. That doctor testified that “the children ‘would have the same probability of getting sick’ as other children and that, because ‘they did not have any severe or unusual infections,’ they should not have ‘any restrictions on their socialization activities, be it school or going to community functions.’”

Although their physician opined that in home tutoring had prevented the children from contracting illnesses, he had not recommended that the tutors follow any health protocols in the children’s home, and the public schools provided a more sterile environment for the children. The district had placed the children in schools that could accommodate their specific needs for hygiene, and the district was prepared to provide the children with “intermittent homebound instruction” if they fell ill.

#### **E. Compensatory Placements**

If a school district has denied a student a free, appropriate public education, a hearing officer may order that the district place the student in an out of district placement as a form of compensatory education. That was the result of the following case.

Draper v. Atlanta Indep. Sch. System, 518 F.3d 1275 (11th Cir. 2008).

Facts: Student enrolled in school in the district when he was in second grade (1994). At that time, the student could not read and was writing at a kindergarten level. He was evaluated in June 1998 and it was determined that he had an IQ of 63. His next evaluation occurred in 2003, when the student was 16; that evaluation indicated that the student had a specific learning disability and a full-scale IQ of 82. The assessments also indicated that he was reading at a third-grade level, performing at a third-grade level in arithmetic, and performing at a second-grade level in spelling. Parents requested a private school placement and various services, all of which were denied.

In November 2004, when he was eighteen, his parents requested due process. At that time, the student was reading at a third grade level. The hearing officer found in favor of the parent. Specifically, the hearing officer found that the district had denied the student a FAPE during the 2002-03, 2003-04, and 2004-05 school years, and gave the student a choice of two remedial options. The first option included substantial additional support from the district – intensive multi-sensory reading instruction for 60 minutes per day, five days per week; training teachers in dyslexia instructional strategies; providing a

1:1, certified, special education teacher to support him in his classes; one hour per day of tutoring; summer services, and a monthly progress evaluation. In the alternative, the student could enroll in a private school, and the District was ordered to pay tuition up to \$15,000 per year. Either option was available until the earlier of June 2009 (when the student was 22), or when the student received a high school diploma. The student opted to attend a private school.

The district appealed, and the court affirmed the decision but increased the award such that the district was responsible for the full tuition at the private placement. The court also extended the remedy until the earlier of June 2011, or when the student received a high school diploma. The district appealed to the Court of Appeals for the Eleventh Circuit.

On appeal, the district conceded that it violated some of the student's rights and that it provided him with a deficient educational program during one school year.

Held: For the parents. The court noted that a compensatory award should "place children in the position they would have been in but for the violation of the [IDEA]." Thus, a compensatory placement may provide a child with more than "some benefit." The court found that the district denied the student a FAPE during the school years in question by failing to change his IEP and placement, despite the fact that the student was not making progress. As a result, the student was entitled to compensatory services, and the private placement was affirmed.

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