SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions that illustrate the significance, in some cases, of the parties' course of conduct as perceived by the court. This judicial balancing of reasonableness and good faith, referred to as the "equities," is not limited to the remedies, such as tuition reimbursement. It also extends with less frequent prominence to the underlying merits, such as the determination of "free appropriate public education" and "least restrictive environment" (LRE).

In *Alvarez v. Swanton Local School District* (2020), a federal court in Ohio addressed the IDEA claims of the parents of a high school student with multiple disabilities, including apraxia and intellectual disabilities. In April of grade 10, her father kept her home after notifying the police and the school administration that a male student had been having inappropriate sexual contact with her. In response the parents' emotional insistence not to return her to school, rather than pursue truancy proceedings, the district agreed to amend her IEP to change her placement for the remaining month of the school year from a self-contained special education class to instruction in the home. Per the parties' agreement to revisit the issue for grade 11, after a cooling off period, the IEP team met in August. The team proposed two alternative in-school placements, including one with a 1:1 attendant for safety concerns. The parents countered with six conditions, including the special education director's signing a document promising to ensure the student's safety. The school assented to most of the conditions except the promissory document, but the parents and their new attorney kept delaying resolution until mid-March of grade 11, when they agreed to the IEP that placed the student in a cross-categorical classroom at the high school with a 1:1 safety attendant. However, the parents ultimately filed for a hearing, seeking compensatory education for alleged violations of procedural FAPE, substantive FAPE, and LRE. The hearing officer ruled in favor of the district, and, under Ohio's two-tiered system under the IDEA, the review officer affirmed. The parents appealed to federal court.	
The parents' alleged procedural violations focused on the meeting` notice and members for the interim change in placement near the end of grade 10.	The court rejected this challenge, pointing out that the applicable procedures for an IEP amendment allow for a duly documented change without a full IEP team meeting (§ 300.324(a)(4)).
The parents' substantive FAPE claims on appeal did not seem to have a specific focus, although claiming the lack of parental training and counseling and insufficient speech/language services.	Based on a previous case in which the same judge ruled that the parents were responsible for the lack of FAPE (*Horen v. Bd. of Educ*., 2013), he used a totality-of-the-evidence approach to reach "the logical conclusion . . that the parents unreasonably prevented [the district] from doing so."
The parents least restrictive environment (LRE) met the same fate in the view of this court.	"The record convincingly shows the parents . . . . caused the District to implement the more restrictive option of home instruction."
Avoid overgeneralizing this unpublished decision, which the relatively unusual circumstances of the judge's earlier case seems to have colored. However, it illustrates the occasional overall balancing-of-the equities approach to FAPE or LRE claims.	

A recent pair of successive decisions arising in New Jersey illustrate the steps of tuition reimbursement analysis beyond the foundational and frequent issue of whether the district's proposed placement was appropriate. In the first case, *J.F. v. Byram Township Board of Education* (2020), the Third Circuit Court of Appeals addressed the so-called "equities" steps of whether the parents provided the requisite timely notice of their unilateral placement to the district and whether their conduct, in comparison to that of the district personnel, was reasonable and in good faith. Not long thereafter, in *Madison Board of Education v. S.V.* (2020), the federal district court in New Jersey re-visited these equities issues along with whether the parents' unilateral placement is limited, for tuition reimbursement purposes, to a private "school."	
In, *J.F*, the parents kept the child in the private placement in which he had been before moving to the district and, after moving, did not notify the district at the IEP meeting in July of their intent or provide written notice until late August. Moreover, at the July meeting, they refused to accept any alternative but the private school, did not cooperate with the invitation to visit the proposed in-district placement and meet the teachers, and failed to identify specific concerns with the district's proposed IEP.	The Third Circuit denied tuition reimbursement to the parents based on two express reasons: (a) the failure to meet the IDEA's specific timely notice provision, and (b) unreasonable conduct in "fail[ing] to participate in a collaborative process with the [district] from the time they relocated [there]." However, colored by its previous decision concerning comparable services and stay-put upon the parents' relocation to the district, the Third Circuit`s recitation of their conduct appears to be unduly repetitive, narrow, and harsh.
In the subsequent *Madison* case, the parents provided the district with the requisite formal notice in April, when they also informed the district that they wanted their independent expert to evaluate the proposed program.	The lower court found the Third Circuit's J.V. case to be clearly distinguishable. Here, the parents inarguably provided the requisite notice and their use of an expert for a second opinion was reasonable.
In *Madison*, the district's other argument was that the parents' unilateral placement of their preschool child with autism was at a private provider of in-home ABA services, not a "school," which is the term that the IDEA's tuition reimbursement provisions specify.	Citing an ample sample of court decisions before and after the IDEA 1997 codification of tuition reimbursement rulings, the *Madison* court cogently concluded that the statutory reference to "school" in no way excludes various alternatives, including tutoring, related services, and in-home arrangements.
Reinforced by the express language in the IDEA that a hearing officer or court "may' reduce or deny reimbursement based on various equitable grounds, these two cases illustrate the rather wide latitude for and variance among courts in exercising their discretion for this high stakes remedy. This broad range is bounded by the "letter" and the "spirit" of the law.	