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Educational Expense Deductions from the Chapter 13 Plan: Creating a "Reasonably Necessary" Standard

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EDUCATIONAL EXPENSE DEDUCTIONS FROM THE CHAPTER 13 PLAN: CREATING A "REASONABLY NECESSARY" STANDARD

ABSTRACT

The current state of bankruptcy law concerning chapter 13 educational expense deductions from a debtor's disposable income is cloudy at best. The vague guidelines provided by the drafters of the Bankruptcy Code have created a system where this issue is analyzed on a case-by-case basis. Bankruptcy judges possess great discretion in deciding whether a particular tuition deduction is "reasonably necessary," as required by 11 U.S.C. § 1325(b)(2), creating inconsistent decisions across jurisdictions. BAPCPA created even more chaos in this context, as it split debtors into two groups depending on their income and forced judges to use the new "means test" to evaluate certain debtors' tuition claims. This makes it very difficult for debtors and objecting creditors to predict whether a tuition deduction will be upheld or shifted to the debtor's disposable income to be paid to creditors.

Congress expressed a desire for debtors to make lifestyle sacrifices in return for the benefits of chapter 13 bankruptcy. In addition, the legislature contemplated a definite standard for courts to use in calculating a debtor's disposable income. After more than twenty-five years of bankruptcy litigation concerning tuition expense deductions, no such standard has emerged.

This Comment proposes a new test concerning educational expense deductions that heeds more closely to the legislative intent. This new standard would cap tuition deductions and require debtors to repay a minimum percentage of their debt to unsecured creditors. In addition, debtors would have to show one of an exclusive group of compelling circumstances. This new test would create a more functional, universal standard for bankruptcy judges to apply and would alleviate the inconsistencies that have plagued this area of bankruptcy law.

INTRODUCTION

There are over five million students in grades pre-K–12 who attend private school in the United States, accounting for around 10% of all students.[1] The average cost of tuition at these institutions is over $8,500 per year.[2] While the general public may consider the families of such students to be without financial burden, many individuals and families who file for chapter 13 bankruptcy have dependents who attend private schools. Understandably, these families want their children to continue attending their respective schools. But, should these families be allowed to direct a substantial amount of their future income towards private school tuition while debts owed to legitimate creditors go unpaid?

Whereas chapter 7 bankruptcy essentially liquidates the debtor's estate and leaves the debtor with no collateral,[3] chapter 13 bankruptcy allows consumer debtors to retain certain property and earnings. Instead, chapter 13 requires that debtors pay off their debts over some future period of time according to a court-approved plan.[4] This plan must detail exactly how much of the debtor's future disposable income must be paid to creditors.[5] However, creditors and bankruptcy trustees may object to the confirmation of the plan.[6] Creditors and trustees often object because the debtor is withholding private school tuition or some other educational cost as a monthly expense, rather than including that amount in the disposable income to be paid to creditors.[7]

Chapter 13 debtors may deduct certain expenses from their disposable income to be paid to creditors.[8] The Bankruptcy Code (the "Code") evaluates these expenses differently, depending on whether the debtor's monthly income

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[1] SUSAN AUD ET AL., NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., NCES 2012-045, THE CONDITION OF EDUCATION 2012, at 138 (2012), *available at* http://nces.ed.gov/pubs2012/2012045.pdf.

[2] *Schools and Staffing Survey (SASS)—Percentage of Private Schools that Charged Tuition, Percentage of Schools Charging Tuition that Allowed Tuition Reductions, and Average Full Tuition at Each School Level, by Selected School Characteristics: 2007–08*, NAT'L CTR. FOR EDUC. STAT., http://nces.ed.gov/surveys/sass/tables/sass0708_008_s2n.asp (last visited Oct. 4, 2012).

[3] *See Chapter 7—Liquidation Under the Bankruptcy Code*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx (last visited Feb. 25, 2012).

[4] 7 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 3D § 139:13 (2008).

[5] 11 U.S.C. § 1322(a) (2006).

[6] *Id.* § 1325(b)(1).

[7] *See, e.g.*, *In re* Crim, 445 B.R. 868, 869 (Bankr. M.D. Tenn. 2011); *In re* Cleary, 357 B.R. 369, 370 (Bankr. D.S.C. 2006); *In re* Ehret, 238 B.R. 85, 86 (Bankr. D.N.J. 1999); *In re* Jones, 55 B.R. 462, 465 (Bankr. D. Minn. 1985).

[8] 11 U.S.C. § 1325(b)(2).

is above or below the median income of the state in which the debtor resides.[9] For below-median income debtors, these expenses must be "amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor."[10] For above-median debtors, § 707(b)(2)(A)(ii)(IV) sets a ceiling of up to $1,775 per year per child for certain tuition costs that may be deducted from a debtor's disposable income.[11] Section 707(b)(2)(A)(ii)(IV) also qualifies such tuition costs by requiring the debtor to show that these costs are "reasonable and necessary."[12]

Courts have consistently struggled to determine the meaning of "reasonably necessary" and "reasonable and necessary" in the context of chapter 13 debtors seeking to deduct tuition expenses from their disposable income. Currently, no definitive standard exists that debtors can look to in their attempts to show that tuition expenses are reasonably necessary.[13] This determination ends up in the sole discretion of the bankruptcy judge presiding over the confirmation hearing.[14] While one jurisdiction may consider a claim for tuition expenses to be "reasonably necessary," another jurisdiction could declare a substantially similar claim of tuition expenses to be abusive.[15] Unclear standards of allowable tuition expenses create inconsistency across jurisdictions, thereby making it difficult for debtors to plan for their and their dependents' educational futures.

This Comment attempts to reconcile the current inconsistencies and difficulties in this area of bankruptcy law by proposing certain changes that would give way to a new universal test for courts to use in deciding the reasonableness and necessity of an educational expense. Bankruptcy judges have considered a number of different individualized factors when faced with this issue in the past, and this Comment seeks to narrow those issues to a few easily identifiable factors. In addition, this Comment suggests certain statutory barriers that would preclude a claim for educational expenses altogether. The

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9 *See id.* § 1325(b)(3).

10 *Id.* § 1325(b)(2).

11 *Id.* § 707(b)(2)(A)(ii)(IV). As this Comment explains, the statutory ceiling has served more as a guideline which courts have routinely ignored, and the question of reasonableness and necessity plays a much larger role in the confirmation of a chapter 13 plan than the statutorily prescribed amount. *See infra* Part I.F.

12 11 U.S.C. § 707(b)(2)(A)(ii)(IV).

13 *See In re* Crim, 445 B.R. 868, 871 (Bankr. M.D. Tenn. 2011) ("[T]he allowance of private school tuition as a reasonable and necessary expense is not settled law . . . .").

14 *See* NORTON, *supra* note 4, § 151:22.

15 *See Bankruptcy and Your Child's Private School Fees*, THE ONLINE BANKRUPTCY BLOG (Aug. 18, 2011), http://onlinebankruptcyblog.com/bankruptcy-law/bankruptcy-private-school-fees/.

resulting test would hold true to the legislative history and policy concerns that go along with chapter 13, while also allowing debtors to deduct these expenses where a compelling circumstance exists.

This Comment is organized into five parts. Part I provides a thorough examination of the applicable Code sections. It includes not only the text of such sections, but also a deeper look into the legislative history behind their creation. Part I also explains the major statutory changes created by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and examines the distinction that BAPCPA made between chapter 13 debtors with different incomes. In addition, Part I explores the applicable IRS Standards and how they relate to educational expense deductions.

Beginning with the earliest case to decide the issue of tuition deductions in chapter 13, Part II takes a chronological look at how bankruptcy courts have interpreted the applicable Code sections. Important pre-BAPCPA cases developed certain tests to resolve this issue, but these tests have changed over time. BAPCPA created new standards for courts to grapple with, and Part II explains the development of the rubric used by courts to decide if educational costs are reasonably necessary. Part II then summarizes the present judicial standard.

Using several case illustrations, Part III discerns the most important factual circumstances in cases where a tuition expense is in dispute. Part III is broken down into several subparts, each focusing on a factor that courts have considered relevant and discussing how that factor has affected the courts' decisions. Part III also analyzes how well these factors adhere to the Code and legislative history regarding educational expense deductions in chapter 13.

Part IV proposes a new evaluative standard that would provide more guidance to the courts. This new standard best encompasses the congressional intent and purpose of chapter 13, while also balancing the rights of creditors and debtors. It is much more workable than the current standard and does away with the arbitrariness and inconsistency currently plaguing decisions on this issue. Part V summarizes the issue at hand and explains why the proposed standard from Part IV would better suit all parties involved in chapter 13 litigation.

I. THE MEANING OF DISPOSABLE INCOME—AN EVOLUTIONARY LOOK AT §§ 1325(B) AND 707(B)(2) OF THE CODE

The crux of the issue of whether a debtor may deduct tuition expenses from a chapter 13 plan lies in the Code's definition of "disposable income." After filing a petition for chapter 13 bankruptcy, a debtor must submit a repayment plan[16] providing for the submission of as much of the debtor's future income and earnings as the United States trustee deems "necessary for the execution of the plan."[17] The court then holds a confirmation hearing, where the trustee or any unsecured creditor who has filed a proper proof of claim[18] may object to the approval of the plan if they believe that the debtor is not contributing all of his or her disposable income to the repayment plan.[19] The proper determination of disposable income is essential because a bankruptcy court may not confirm a chapter 13 plan unless that plan "provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan."[20] Thus, it is extremely important for chapter 13 debtors, trustees, and judges to understand how to calculate disposable income.

BAPCPA changed the standard bankruptcy courts followed when determining this amount,[21] but only for debtors who have above-median income.[22] These new guidelines subject above-median debtors to the much more complex "means test" of § 707(b)(2), where courts must determine whether certain expenses being withheld from the plan are abusive before confirming the plan.[23] Educational expenses are mentioned in a subsection of the means test,[24] but as this Comment will explain, this subsection has done

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16 11 U.S.C. § 1321; FED. R. BANKR. P. 3015(b).

17 11 U.S.C. § 1322(a)(1).

18 *See* FED. R. BANKR. P. 3002.

19 11 U.S.C. §§ 1324(a), 1325(b)(1).

20 *Id.* § 1325(b)(1).

21 *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(h)(2), 119 Stat. 23, 33–34 (codified as amended at 11 U.S.C. § 1325(b) (2006)).

22 *See id.* § 102(h)(2), 119 Stat. at 34 (codified as amended at 11 U.S.C. § 1325(b)(3) (2006)). Chapter 13 debtors who do not have above-median income are still subject to the language of § 1325(b)(2). *See* 11 U.S.C. § 1325(b)(3); *see also* CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME, OFFICIAL FORM 22C committee note ¶ A (12/08), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_08_Official/Form_22C_1208_Combined.pdf.

23 *See* 11 U.S.C. § 707(b)(2).

24 *See id.* § 707(b)(2)(A)(ii)(IV).

little to clear up the issue of tuition deductions from a debtor's disposable income.

An examination of these Code sections and the legislative history behind their creation provides a good starting point for discerning whether an educational expense deduction is allowable in a chapter 13 plan. Part I.A lays out the plain language of § 1325(b)(2) and how it governed the issue of tuition deductions before BAPCPA. Part I.B examines the genesis of BAPCPA and the changes it effected. It analyzes BACPA's legislative history, its newly created means test, and the resulting split of debtors into two income groups. Part I.C explains how the means test is applied to above-median income debtors. Part I.D addresses a language discrepancy between §§ 1325(b)(2) and 707(b)(2)(A)(ii)(IV) and how it may affect debtors of different incomes in a bankruptcy proceeding. Part I.E explores the IRS Standards now used in determining an above-median debtor's disposable income. Finally, Part I.F summarizes the current Code sections relating to educational expense deductions.

A. The Language and History of § 1325(b)(2)

Before BAPCPA, every chapter 13 debtor's disposable income was determined in accordance with the provisions of § 1325, regardless of whether the debtor had above- or below-median income.[25] Section 1325(b) defines the term "disposable income" as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor."[26] The statute also explicitly lists several allowable deductions from a debtor's disposable income,[27] none of which include tuition expenses. Thus, if a pre-BAPCPA debtor wished to deduct any educational costs from his or her chapter 13 disposable income, that debtor had to show[28] that such costs were "amounts reasonably necessary" for the maintenance or support of the debtor

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[25] *See* 9D AM. JUR. 2D *Bankruptcy* § 3146 (2006).

[26] 11 U.S.C. § 1325(b)(2).

[27] *Id.* The statute allows for the deduction of child support payments, foster care payments, disability payments for a dependent child, domestic support obligations, certain charitable contributions, and certain business expenditures from the debtor's disposable income. *Id.* Thus, because none of these statutorily allowable deductions include tuition expenses, a judge must determine whether tuition expenses are allowable according to the vague language.

[28] The debtor has the ultimate burden of proof to show the court that such deductions from disposable income are indeed "reasonably necessary." *See, e.g.*, *In re* Webb, 262 B.R. 685, 688 (Bankr. E.D. Tex. 2001).

or the debtor's dependents.[29] Historically, this statutory language left bankruptcy courts with very little guidance in determining how to test whether certain amounts were "reasonably necessary." The Code consequently gave bankruptcy judges great discretion in answering this question on a case-by-case basis.[30]

In construing ambiguous Code provisions, a proper and necessary step for courts to take is to look to the legislative history.[31] Section 1325(b) was implemented as a part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[32] The most pertinent change to § 1325 was that it restricted courts from confirming a chapter 13 plan unless all of a debtor's disposable income during the applicable period was to be paid to the plan.[33] The Senate Committee on the Judiciary noted its displeasure with the "vague and uncertain standards" previously given concerning the portion of the debt to be repaid by the debtor.[34] In response, the Committee stated that "it is necessary to have a definite standard delineating how much of the debtor's future income should be committed to the plan."[35] However, the Committee simultaneously left the formation of such a "definite standard" to the courts, asserting that "[t]he courts may be expected to determine norms" for the support of the debtor and his family and that "Labor Department cost of living figures may provide some help."[36] While Congress expressed its desire for the creation of a definite standard delineating the amount of disposable income to be committed to a chapter 13 plan, it declined to create such a standard itself.

The Senate Committee on the Judiciary also acknowledged that chapter 13 relief contemplates a substantial effort by the debtor to pay off his debts, and that such an effort "may require some sacrifices by the debtor, and some

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[29] This logic still applies to below-median debtors after BAPCPA, as BAPCPA only modified the definition of "amounts reasonably necessary" for above-median debtors. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(h)(2), 119 Stat. 23, 34 (codified as amended at 11 U.S.C. § 1325(b)(3) (2006)).

[30] *See* NORTON, *supra* note 4, § 151:22.

[31] *See* Barstow v. IRS (*In re* Markair, Inc.), 308 F.3d 1038, 1043 (9th Cir. 2002); 1 NORTON, *supra* note 4, § 2:22.

[32] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317(3), 98 Stat. 333, 356 (codified at 11 U.S.C. § 1325(b) (2006)).

[33] *See* NORTON, *supra* note 4, § 139:12. Some courts have recognized that BAPCPA also made a minor change to § 1325(b), noting that after BAPCPA, all disposable income had to be allocated exclusively to unsecured creditors, where it previously only had to be allocated to the plan in general. *Id.* § 151:22.

[34] S. REP. NO. 98-65, at 21 (1983).

[35] *Id.*

[36] *Id.* at 22.

alteration in prepetition consumption levels."[37] Noting the benefits that chapter 13 provides to the debtor, such as retaining the debtor's property and avoiding most non-dischargeable debts, the Committee on the Judiciary called for the debtor to attempt to pay off his or her debt to the best of the debtor's ability.[38] The Committee stated that the first criterion to be considered when calculating the amount of disposable income to be contributed to the plan "must be the debtor's obligations to support himself and his family."[39] Presumably, this is why the phrase "reasonably necessary" is applied to the "maintenance or support of the debtor" or a dependent, as opposed to applying the reasonably necessary standard to the repayment plan itself. The Committee also stated that "repayment of debt should take precedence over expenses for non-necessary or luxury items."[40] This Comment will focus on the resulting dispute between bankruptcy courts over whether private school tuition is a "non-necessary or luxury item," especially where adequate public schooling is available.[41]

Section 1325(b)'s legislative background offered some guidance to bankruptcy judges as they attempted to develop a test to decide which expenses were reasonably necessary for the maintenance or support of the debtor and the debtor's dependents. However, the "definite standard" Congress requested never developed in the context of calculating a chapter 13 debtor's disposable income.[42] Instead, judges decided whether tuition expenses were reasonably necessary on a case-by-case basis, which led to varying and inconsistent decisions across the courts.[43]

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[37] *Id.*

[38] *Id.* at 21–22.

[39] *Id.* at 21.

[40] *Id.* (citing *In re* Stollenwerck, 8 B.R. 297 (Bankr. M.D. Ala. 1981)).

[41] *Compare In re* Crim, 445 B.R. 868, 872 (Bankr. M.D. Tenn. 2011) (allowing a tuition deduction where, even though public schooling was available, there was compelling testimony that the debtor's daughter could not succeed in that environment), *with In re* Weiss, 251 B.R. 453, 462 (Bankr. E.D. Pa. 2000) (denying a deduction of private school tuition where there was no persuasive testimony showing that the debtor's children could not attend a nearby public school).

[42] *See In re Crim*, 445 B.R. at 871 ("[T]he allowance of private school tuition as a reasonable and necessary expense is not settled law . . . .").

[43] *See* Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 722 (2011).

B. The BAPCPA Amendments and the Introduction of the Means Test

BAPCPA made several important changes to the Code, altering the way certain debtors' disposable income was calculated.[44] These changes included new provisions that define "current monthly income"[45] and split chapter 13 debtors into two groups based on how a debtor's income compares to the median income in the state in which the debtor resided.[46] For above-median income debtors, BAPCPA created a new set of guidelines for acceptable deductions from disposable income under § 1325.[47] Understanding the reasons behind BAPCPA is important to determine how and why it affects tuition deductions from disposable income.

A debtor's current monthly income is the starting point for properly calculating the disposable income to be paid to creditors.[48] Although this calculation is somewhat tedious,[49] it is essentially the debtor's average monthly income recorded in the six months prior to filing for bankruptcy.[50] After BAPCPA, this calculation has become important because it determines whether a chapter 13 debtor is subject to the vague language of § 1325(b) or the more detailed specifications of the new "means test" of § 707(b)(2).

Before BAPCPA, debtors of all incomes could file for chapter 7,[51] thus allowing high-income debtors to seek an immediate discharge despite having the ability to repay their debts with substantial future income.[52] Congress felt that bankruptcy benches were using too much discretion in deciding whether abuse had occurred under § 707(b)(2) and that the new reforms would allow creditors to be repaid more substantially by shifting some debtors into chapter

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[44] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(h)(2), 119 Stat. 23, 33–34 (codified as amended at 11 U.S.C. § 1325(b)(2) (2006)); AM. JUR. 2D, *supra* note 25, § 3146.

[45] *See* 11 U.S.C. § 101(10A) (2006); *see also* OFFICIAL FORM 22C (12/08), *supra* note 22, committee note ¶ B.

[46] *See* Bankruptcy Abuse Prevention and Consumer Protection Act § 102(h)(2), 119 Stat. at 34 (codified as amended at 11 U.S.C. § 1325(b)(3) (2006)).

[47] *See id.*

[48] 11 U.S.C. § 1325(b)(2); OFFICIAL FORM 22C (12/08), *supra* note 22, committee note ¶ A.

[49] *See* CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME, OFFICIAL FORM 22C (12/10), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Forms%201210/B_22C_1210.pdf.

[50] OFFICIAL FORM 22C (12/08), *supra* note 22, committee note ¶ B.

[51] *See Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)*, YOURLEGALGUIDE.COM, http://www.yourlegalguide.com/bapcpa/ (last visited Oct. 18, 2010) ("Prior to the BAPCPA, there was no Chapter 7 'means test' and debtors could file Chapter 7, 11 or 13 at their option.").

[52] Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 233 (2005).

13 bankruptcy.[53] These congressional themes of restricting judicial discretion and increasing debtors' payments to creditors led to the creation of the new § 707(b)(2), commonly referred to as the "means test."

The primary purpose of the BAPCPA means test was to give bankruptcy courts a tool to measure whether a chapter 7 debtor seeking liquidation could actually repay a portion of his or her debt, and if so, to steer that debtor away from chapter 7 and into chapter 13.[54] However, the means test also functions in a chapter 13 context. The means test essentially computes the disposable income that an above-median income debtor would be required to pay under § 1325(b).[55] If a debtor's current monthly income[56] is greater than the median income of the state in which the debtor resides, then that debtor is subject to the means test in determining which costs can be deducted.[57] As the Supreme Court recently stated, the means test was created to replace "the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations."[58] Curiously, the addition of the means test did not change the calculation of a below-median income debtor's disposable income, as those debtors are still subject to the language of § 1325(b)(2).[59]

In the chapter 13 context, the means test now governs debtors whose income is above the median in the state where they reside. The guidelines for a court to follow in determining the question of tuition expense deductions by an above-median debtor are now distinct from those governing below-median debtors. Consequently, it is important to understand exactly how the means test is applied to above-median debtors.

C. Applying the Means Test to Above-Median Income Debtors

The Code, citing its own provisions, takes above-median income chapter 13 debtors on a proverbial wild goose chase through the statutes to determine the proper monthly expenses to be deducted from disposable income. The enactment of BAPCPA changed § 1325 by channeling above-median income

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53 *See* H.R. REP. NO. 109-31, pt. 1, at 51 (2005).
54 *See* 151 CONG. REC. S1856 (daily ed. Mar. 1, 2005) (statement of Sen. Chuck Grassley).
55 Wedoff, *supra* note 52, at 240.
56 Current monthly income is calculated using OFFICIAL FORM 22C (12/10), *supra* note 49.
57 *See* 11 U.S.C. § 1325(b)(3) (2006); AM. JUR. 2D, *supra* note 25, § 3146.
58 Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 722 (2011).
59 *See* 11 U.S.C. § 1325(b)(2)–(3); *see also supra* Part I.A.

debtors to the new means test.[60] The "amounts reasonably necessary to be expended" for above-median-income debtors and their dependents are now "determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)."[61] In addition, above-median debtors now have a maximum "applicable commitment period" of five years, compared to only three years for below-median debtors.[62] For above-median debtors to properly claim that their respective tuition expenses are reasonably necessary for the maintenance or support of themselves or their dependents, they must now show that such expenses are in accordance with the provisions of the new § 707(b)(2).[63]

Section 707(b)(2) defines a debtor's monthly expenses by the "amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides . . . for the debtor [and] the dependents of the debtor."[64] Thus, above-median debtors have a great deal of material to look to when discerning whether their claimed educational expenses are valid deductions from their disposable income.

In discerning whether certain tuition deductions are allowable under the means test, the first and most logical place to look is the statute itself. The BAPCPA amendments included the addition of § 707(b)(2)(A)(ii)(IV), which directly addresses tuition costs.[65] Section 707(b)(2)(A)(ii)(IV) originally allowed for the actual expenses of private elementary or secondary school tuition—up to $1,500 per year per child—to be deducted from the debtor's disposable income to be paid to creditors.[66] The statutorily allowable number now stands at $1,775 per year per child,[67] and that amount is subject to adjustment every three years by the Judicial Conference of the United States.[68] While the reasons for this addition are unclear, courts have noted that, "[f]or some purposes at least, Congress has set forth the public policy that private

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[60] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(h)(2), 119 Stat. 23, 33–34 (codified as amended at 11 U.S.C. § 1325(b) (2006)).

[61] 11 U.S.C. § 1325(b)(3).

[62] *Id.* § 1325(b)(4)(A). The applicable commitment period represents the length of time a chapter 13 debtor must commit to, or live under, the approved plan. *See id.* § 1325(b)(1)(B).

[63] *See* AM. JUR. 2D, *supra* note 25, § 3146.

[64] 11 U.S.C. § 707(b)(2)(A)(ii)(I). For a more in-depth analysis of these IRS Standards, see *infra* Part I.E.

[65] *See* Bankruptcy Abuse Prevention and Consumer Protection Act § 102(a)(2)(C), 119 Stat. at 28 (codified as amended at 11 U.S.C. § 707(b)(2)(A)(ii)(IV) (2006)).

[66] *Id.*

[67] 11 U.S.C.A. § 707(b)(2)(A)(ii)(IV) (West 2010).

[68] 11 U.S.C. § 104.

school tuition can be a reasonable and necessary expense."[69] However, this tuition amount is vastly below the actual costs of private schooling in the United States,[70] so it is curious that Congress would choose such an amount.

Senator Chris Dodd expressed this feeling when he proposed an amendment to the BAPCPA means test to allow for educational expenses.[71] He noted that not only was $1,500 insufficient to pay for "some fancy prep school or boarding school," but that amount would not even cover the cost of "a basic parochial school education."[72] Thus, whatever purpose Congress was contemplating when it added § 707(b)(2)(A)(ii)(IV), the shockingly low tuition amount that the provision allows suggests either that Congress did not perform due diligence in researching how much private schooling costs or that § 707(b)(2)(A)(ii)(IV) is not meant to cover such costs in their entirety.[73] Consequently, many courts have avoided the prescribed amount in § 707(b)(2)(A)(ii)(IV) altogether, as tuition deductions far exceeding the statutory amount have been considered reasonably necessary to the maintenance or support of the debtor or the debtor's dependents.[74]

Section 707(b)(2)(A)(ii)(IV) only allows expenses for elementary and secondary schools and only applies to dependents under eighteen.[75] Accordingly, it has been read to exclude all college expenses.[76] In a recent decision, the Bankruptcy Court for the District of Montana stated:

> Applying the doctrine of *expressio unius est exclusio alterius* to § 707(b)(2)(A)(ii)(IV), the omission from that subsection of college education expenses for children over 18 years of age suggests an exclusion, makes sense as a matter of legislative purpose, and does not produce a result contrary to the statute's purpose. If Congress had wished to include college expenses for children over 18 years of age

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69 *In re* Cleary, 357 B.R. 369, 373 (Bankr. D.S.C. 2006).

70 *See* 151 CONG. REC. S2224 (daily ed. Mar. 8, 2005) (statement of Sen. Chris Dodd).

71 *See id.* at S2223–24.

72 *Id.* at S2224.

73 Unfortunately, commentary as to the origin of this statutory tuition amount is quite scarce. Given the purpose of chapter 13, however, it seems that the latter is more likely.

74 *See, e.g.*, *In re* Crim, 445 B.R. 868, 872 (Bankr. M.D. Tenn. 2011); *In re* Urquhart, No. 09-71058, 2009 WL 3785573, at *5 (Bankr. C.D. Ill. Nov. 12, 2009); *In re Cleary*, 357 B.R. at 374.

75 11 U.S.C. § 707(b)(2)(A)(ii)(IV) (2006).

76 *See, e.g.*, *In re* Featherston, Nos. 07-60296-13, 07-60441-13, 2007 WL 2898705, at *12 (Bankr. D. Mont. Sept. 28, 2007), *aff'd sub nom.* Featherston v. Drummond (*In re* Featherston), No. CV 08-16-GF-SHE, 2008 WL 5217936 (D. Mont. Dec. 11, 2008).

> in § 707(b)(2)(A)(ii)(IV), it could have drafted that subsection accordingly.[77]

Bankruptcy courts have followed this reasoning even after the enactment of BAPCPA, holding that college tuition expenses are not reasonably necessary in a variety of chapter 13 cases.[78] Thus, in post-BAPCPA cases, only elementary and secondary school tuition expense deductions have a chance of being considered reasonably necessary and surviving a court's review or confirmation hearing.

Unfortunately, § 707(b)(2)(A)(ii)(IV) negates whatever stability it could bring by requiring the debtor to provide "a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses."[79] This language raises two important issues: (1) how the phrase "reasonable and necessary" of § 707(b)(2)(A)(ii)(IV) relates to the "reasonably necessary" language of § 1325(b)(2); and (2) what exactly is included in the IRS Standards.

D. "Reasonable and Necessary" vs. "Reasonably Necessary"

The discrepancy in statutory language between §§ 1325(b)(2) and 707(b)(2)(A)(ii)(IV)[80] is notable because judges must apply different language to debtors depending on the debtors' income. The phrase "disposable income," as used in § 1325(b), is the "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor."[81] Thus, the phrase "reasonably necessary" applies to the needs of the debtor and the debtor's family, rather than to the debtor's general plan. Presumptively, the "maintenance or support" of each distinct debtor or debtor's dependent varies widely, and courts and legislators alike have struggled to set uniform standards

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[77] *Id.* at *15.

[78] *See, e.g.*, *In re* Saffrin, 380 B.R. 191, 193–94 (Bankr. N.D. Ill. 2007); *In re* Goins, 372 B.R. 824, 827 (Bankr. D.S.C. 2007); DeHart v. Boyd (*In re* Boyd), 378 B.R. 81, 83–84 (Bankr. M.D. Pa. 2007).

[79] 11 U.S.C. § 707(b)(2)(A)(ii)(IV).

[80] Section 1325(b)(2) requires deducted expenses to be "reasonably necessary," whereas § 707(b)(2)(A)(ii)(IV) requires a debtor to show why deducted tuition expenses are "reasonable and necessary." *Compare id.* § 1325(b)(2), *with id.* § 707(b)(2)(A)(ii)(IV).

[81] *Id.* § 1325(b)(2).

as to what costs are reasonably necessary to maintain and support a typical debtor's family.[82]

For above-median debtors, the statutory language becomes even more confusing because the phrase "amounts reasonably necessary" is further defined by § 707(b)(2).[83] In the context of school tuition, § 707(b)(2)(A)(ii)(IV) states that, despite the statutorily-provided amount of $1,775 per year per child, the debtor must also provide a "detailed explanation of why such expenses are *reasonable and necessary*" and why such costs are not covered by the IRS Standards.[84] Not only does an above-median income debtor have to show that the tuition costs claimed are "reasonable and necessary," but the debtor must also show that those reasonable and necessary costs are "reasonably necessary for the maintenance or support" of the debtor and the debtor's dependents. This additional requirement adds much confusion to what an above-median income debtor must show to meet the burden of proof. Because of the lack of precision in the statutory language, courts have taken it upon themselves to create their own tests to determine what constitutes a "reasonably necessary" deduction of educational expenses.[85]

E. The IRS Standards

The IRS Standards define what monthly expenses may be deducted from above-median income debtors' disposable income.[86] Section 707(b)(2)(A)(ii)(I) states, "The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides."[87] This section provides additional clarity and structure to the calculation of a debtor's expenses in the areas specifically addressed by the IRS and the statute itself, such as housing, food, and healthcare costs.[88] However, a thorough examination of the IRS Standards referred to by § 707(b)(2) yields no usable

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[82] *See In re* Crim, 445 B.R. 868, 871 (Bankr. M.D. Tenn. 2011) ("[T]he allowance of private school tuition as a reasonable and necessary expense is not settled law . . . .").

[83] *See* 11 U.S.C. § 1325(b)(3).

[84] *Id.* § 707(b)(2)(A)(ii)(IV) (emphasis added).

[85] *See infra* Part II.

[86] *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I).

[87] *Id.*

[88] *See id.*; IRM 5.15.1.7 (Oct. 2, 2009).

standard when it comes to the majority of chapter 13 educational cost deductions.

The IRS National Standards account for "Food, Clothing and Other Items" and "Out-of-Pocket Health Care Expenses."[89] The "Food, Clothing and Other Items" category allows "reasonable amounts" for five types of expenses: "food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous."[90] While these five categories are all distinct, the IRS combines all of the amounts into "one total national standard expense,"[91] which is a fixed dollar amount based on household size and income, derived annually from the Bureau of Labor Statistics Consumer Expenditure Survey.[92] The "Out-of-Pocket Health Care Expenses" category predictably establishes a similar standard for out-of-pocket health costs and accounts for expenses such as prescription drugs and contact lenses.[93] Allowances for out-of-pocket healthcare expenses are based on data from the Medical Expenditure Panel Survey.[94] The IRS provides one "Out-of-Pocket Health Care Expenses" amount for its National Standards and allows for these monthly expenses per se, without questioning the amount a debtor actually spends.[95]

While it is fairly obvious that tuition costs would not fall under any of the above-listed categories, one may wonder if educational expenses may be covered under the "miscellaneous" expenses addressed in the "Food, Clothing and Other Items" category. The IRS defines the "miscellaneous" category simply as "a percentage of the other categories . . . based on BLS data," but gives no further explanation as to what types of monthly expenses it is meant to cover.[96] This subcategory essentially amounts to a small additional stipend given by the IRS, and the issue of whether educational expenses are included in this subcategory has yet to be discussed in a relevant bankruptcy proceeding.

The Local Standards given by the IRS also list two categories of necessary expenses: "Housing and Utilities" and "Transportation."[97] The "Housing and Utilities" category establishes a localized expense standard for each county in

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89 IRM 5.15.1.7(3).

90 *Id.* 5.15.1.7(3)(A).

91 *Id.*

92 *Id.*

93 *Id.* 5.15.1.7(3)(B). It is worth noting, however, that "elective procedures," such as plastic surgery, are generally not covered under "Out-of-Pocket Health Care Expenses." *Id.* 5.15.1.8(5).

94 *Id.* 5.15.1.7(3)(B).

95 *Id.*

96 *Id.* 5.15.1.8(1)(E). The acronym "BLS" refers to the Bureau of Labor Statistics.

97 *Id.* 5.15.1.9(1).

each state, and the prescribed amount is derived from both Census and Bureau of Labor Statistics data.[98] The "Transportation" category covers loan or lease payments and operating costs for debtors who own a vehicle, while also providing one nationwide allowance for those without a vehicle.[99] However, neither category addresses the educational costs of a debtor or a debtor's dependents.

The only other way for a debtor to account for tuition expenses would be under the "Other Necessary Expenses" category of the IRS Standards.[100] For an expense to qualify under this standard, it must meet the "necessary expense test" by either providing "for the health and welfare of the taxpayer and/or his or her family"[101] or "for the production of income."[102] The "Other Necessary Expenses" category is the only one of the three IRS Standards given in § 707(b)(2)(A)(ii)(I) that explicitly refers to educational expenses.[103] In a table laying out examples of expenses that may qualify under this category, the IRS states that an educational expense may be necessary "[i]f it is required for a physically or mentally challenged child and no public education providing similar services is available" or if such an expense is "required as a condition of employment."[104] While the Internal Revenue Manual provides these helpful explanatory guidelines, they are by no means binding on bankruptcy courts.[105] The IRS explicitly states that such a determination depends on the facts and circumstances of each case.[106] As a result, debtors attempting to claim educational expenses that are not required by their jobs or related to a child's disabilities are still left in the dark and lack any standards on which to base their arguments.

Thus, even after examining the IRS Standards, courts are still left with a fact-based question of reasonableness and necessity, which is basically what

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98 *Id.* 5.15.1.7(4)(A). The "Housing and Utilities" category includes "mortgage (including interest) or rent, property taxes, insurance, maintenance, repairs, gas, electric, water, heating oil, garbage collection, telephone and cell phone." *Id.*

99 *Id.* 5.15.1.7(4)(B). These costs are derived from standard nationwide loan figures and census data. *Id.*

100 *Id.* 5.15.1.10.

101 *Id.* 5.15.1.10(1). While the language in the Internal Revenue Manual refers to a "taxpayer," these standards are applied to a debtor when they are referred to in a bankruptcy matter. *See* DeHart v. Boyd (*In re* Boyd), 378 B.R. 81, 84 (Bankr. M.D. Pa. 2007).

102 IRM 5.15.1.10(1).

103 *Compare id.* 5.15.1.10(3), *with id.* 5.15.1.8, *and id.* 5.15.1.9.

104 *Id.* 5.15.1.10(3).

105 Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 726 (2011).

106 IRM 5.15.1.10(1).

the means test prescribes in the first place.[107] Following the statutes brings a debtor and the bankruptcy courts full circle back to a non-uniform, case-by-case analysis, and the debtor must show that the claimed tuition expenses are reasonably necessary for the maintenance or support of the debtor and his or her dependents.[108]

F. Statutory Summary

The large amount of information in the Code, BAPCPA, legislative history, and IRS Standards can be overwhelming. Below is a succinct summary of the calculation of chapter 13 disposable income as it stands today.

When assessing whether an educational expense deduction will be allowed, all chapter 13 debtors must start with § 1325(b)(2), which defines disposable income.[109] Disposable income is calculated by subtracting "amounts reasonably necessary to be expended" from a debtor's "current monthly income."[110] All debtors use the same definition of current monthly income[111] and calculate such income using a standard bankruptcy form.[112] Because of BAPCPA, however, there are now two different definitions of "amounts reasonably necessary to be expended," the use of which depends on a debtor's income.

For below-median income debtors, the phrase "amounts reasonably necessary to be expended" is defined by the statutory language surrounding it.[113] Allowable tuition expense deductions must be "amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor."[114] Recall that this determination is a question of fact that courts must decide on a case-by-case basis.[115] For courts to answer this question, they "must become involved in many difficult questions" of the debtor's lifestyle and beliefs.[116]

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107 *See* 11 U.S.C. § 707(b)(2)(A)(ii)(IV) (2006).

108 *See id.* §§ 707(b)(2)(A)(ii)(IV), 1325(b)(3).

109 *See id.* § 1325(b)(2).

110 *Id.*

111 *See id.* § 101(10A).

112 *See* OFFICIAL FORM 22C (12/10), *supra* note 49.

113 *See* 11 U.S.C. § 1325(b)(2).

114 *Id.* Recall that there are other statutorily allowable deductions, but they are specific and not tuition-related. *See id.* § 1325(b)(2)(A)–(B). Therefore, tuition deductions could only fall under the catchall "maintenance or support" phrase. *See id.* § 1325(b)(2)(A).

115 NORTON, *supra* note 4, § 151:22.

116 *Id.*

For above-median income debtors, the definition of "amounts reasonably necessary to be expended" is more complicated.[117] These debtors must turn to the means test of § 707(b)(2).[118] Section 707(b)(2)(A)(ii)(IV) explicitly limits educational expenses to "private or public elementary or secondary" school tuition for "each dependent child less than 18 years of age."[119] Additionally, this subsection seemingly sets a ceiling on these tuition expenses at "$1,775 per year per child."[120] While post-BAPCPA courts have followed the age and school requirements of § 707(b)(2)(A)(ii)(IV) by excluding college tuition from consideration,[121] they have also allowed amounts far exceeding $1,775 per year per child.[122] This practice indicates that bankruptcy judges have recognized that such a low statutory amount is unworkable.

The IRS National Standards, Local Standards, and "Other Necessary Expenses" include other deductible expenses for above-median income debtors.[123] While these standards list a large number of acceptable expenses,[124] the only place where an educational expense deduction may fall is under "Other Necessary Expenses," where such a deduction must pass the "necessary expense test."[125] An educational expense passes this test if the tuition "is required for a physically or mentally challenged child and no public education providing similar services is available" or if the tuition is "required as a condition of [the debtor's] employment."[126] Despite these guidelines, the IRS explicitly states that this test is "determined based on the facts and circumstances of each case."[127]

As a result, debtors and bankruptcy judges are forced to grapple with a fact-based determination of the reasonableness and necessity of a tuition expense, regardless of the debtor's income. The legislative history of these Code

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117 *See* 11 U.S.C. § 1325(b)(2)–(3).
118 *Id.* § 1325(b)(3).
119 *Id.* § 707(b)(2)(A)(ii)(IV).
120 *Id.*
121 *See, e.g.*, *In re* Featherston, Nos. 07-60296-13, 07-60441-13, 2007 WL 2898705, at *14 (Bankr. D. Mont. Sept. 28, 2007), *aff'd sub nom.* Featherston v. Drummond (*In re* Featherston), No. CV 08-16-GF-SHE, 2008 WL 5217936 (D. Mont. Dec. 11, 2008).
122 *See, e.g.*, *In re* Crim, 445 B.R. 868, 872 (Bankr. M.D. Tenn. 2011); *In re* Urquhart, No. 09-71058, 2009 WL 3785573, at *5 (Bankr. C.D. Ill. Nov. 12, 2009); *In re* Cleary, 357 B.R. 369, 374 (Bankr. D.S.C. 2006).
123 *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I).
124 *See generally* IRM 5.15.1.7–.10 (Oct. 2, 2009).
125 *Id.* 5.15.1.10(1).
126 *Id.* 5.15.1.10(3).
127 *Id.* 5.15.1.10(1).

sections reveals somewhat helpful background information that may help courts make this case-by-case determination less arbitrary.

The legislative history helps to clarify the congressional intent concerning chapter 13 disposable income. Congress first contemplated a chapter 13 bankruptcy that emphasizes sacrifice on the part of the debtor as compared to his previous lifestyle and maximum repayment to creditors.[128] However, the addition of § 707(b)(2)(A)(ii)(IV) to the Code makes it clear that Congress wished to include some sort of educational tuition expense deduction. It remains unclear under what circumstances a debtor's deduction of tuition costs from disposable income is "reasonably necessary" and how bankruptcy courts should make such a determination. As Congress explicitly left the development of a definite standard to the courts,[129] it is proper to examine the relevant case law analyzing educational expense deductions.

II. JUDICIAL INTERPRETATION AND THE TESTS FOR REASONABLY NECESSARY TUITION EXPENSE DEDUCTIONS

The Bankruptcy Amendments and Federal Judgeship Act of 1984 directed the courts to develop a definite standard for delineating the proper amount to contribute to a chapter 13 plan.[130] Through valid methods of statutory interpretation, different jurisdictions have created a variety of tests to decide what constitutes a reasonably necessary expense for the maintenance or support of a debtor and a debtor's dependents.[131] However, none of these tests have caught on with a majority of the jurisdictions, and courts still disagree as to what types of educational expenses are "reasonably necessary."[132]

Part II.A explains the decisions by the earliest courts tasked with resolving the issue of educational cost deductions in chapter 13 cases, culminating with an explanation of a two-prong test that was prevalent just prior to the BAPCPA amendments. Part II.B examines two related cases that provide an explanation of a balancing test prevalent post-BAPCPA. Additionally, Part II.B analyzes how courts use the new means test to resolve an above-median debtor case after BAPCPA. Finally, Part II concludes with an attempt to reconcile these

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128 S. REP. NO. 98-65, at 22 (1983).
129 *Id.*
130 *Id.*
131 *See infra* Parts II.A–B.
132 *See In re* Crim, 445 B.R. 868, 871 (Bankr. M.D. Tenn. 2011).

different tests and explains what the current standard of review is concerning chapter 13 tuition deductions.

A. Jones, Watson, *and the Pre-BAPCPA Cases*

The Bankruptcy Court of the District of Minnesota was the first bankruptcy panel to assess whether private school tuition was "reasonably necessary" within the meaning of § 1325(b)(2).[133] In *In re Jones*, an unsecured creditor objected to a chapter 13 debtor's plan because the creditor did not consider the listed monthly tuition expenditures of $500 for each of the debtor's children to be reasonably necessary.[134] At the time, no cases had analyzed this new statutory language, and no standard had yet been created.[135] The *Jones* court observed that the legislative history left the development of such a standard up to the courts and took it upon itself to create one by employing "other methods of construction to determine that meaning."[136]

The *Jones* court used the age-old canon of *in pari materia*[137] in constructing its standard, noting that "if similar terms can be found used to similar purpose in the Bankruptcy Code, guidance may be taken from the judicial interpretations of those terms."[138] The court then turned to §§ 522(d)(10)(E) and 523(a)(2)(C) to find such similar terms.[139] Section 523(a)(2)(C) defined the phrase "luxury goods or services" as "goods or services [not] reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor."[140] Thus, the court reasoned that goods and services that are reasonably necessary within the meaning of § 1325(b)(2) are not "luxury goods and services," as defined in § 523(a)(2)(C).[141]

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133 *See In re* Jones, 55 B.R. 462, 465 (Bankr. D. Minn. 1985).

134 *Id.*

135 *Id.*

136 *Id.*

137 *See* 73 AM. JUR. 2D *Statutes* § 95 (2012) ("It is a basic canon of statutory construction that statutes in pari materia should be construed together so that all parts of the statutory scheme are given effect. Two statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object." (footnote omitted)).

138 *In re Jones*, 55 B.R. at 465–66.

139 *Id.* at 466.

140 *Id.* (quoting 11 U.S.C. § 523(a)(2)(C) (Supp. II, Vol. I 1983–1985)). That section of the Code has since been modified. *See* 11 U.S.C. § 523(a)(2)(C) (2006).

141 *In re Jones*, 55 B.R. at 466.

Section 522(d)(10)(E) exempted certain payments "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."[142] Another bankruptcy court had previously interpreted this section in *In re Taff*,[143] a decision to which the *Jones* court turned to further clarify its new standard.[144] The *Taff* court had decided that the reasonably necessary amount to be set aside for a debtor "ought to be sufficient to sustain basic needs, not related to [the debtor's] former status in society or the lifestyle to which he is accustomed."[145] Because the *Jones* court considered § 522(d)(10)(E) to be substantially similar to § 1325(b)(2)(A) in that both sections provide the debtor with some retention amount to support the debtor and the debtor's dependents, it adopted the *Taff* standard and applied it to the *Jones* case.[146]

The *Jones* court concluded that the monthly expenditures of $500 for each of the debtor's children were not reasonably necessary because the court did not consider private school education to be a "basic need."[147] This "basic needs" test set the precedent for later courts to follow. It is considered a fairly strict approach, however, and many courts have declined to follow it, developing their own distinct tests instead.[148] Nonetheless, the basic needs test appears to adhere to the original purpose of chapter 13 bankruptcy, which requires a substantial effort by the debtor to repay as much debt as possible and may require some sacrifices on the part of the debtor and the debtor's dependents.[149]

After the *Jones* decision, bankruptcy courts took a wide range of stances on what constituted a reasonably necessary tuition expense. For example, the court in *In re Gonzales* tempered *Jones*'s basic needs test, stating that "Congress did not direct that to qualify for chapter 13 relief a debtor must take a vow of three years of monastic existence. Instead, Congress demanded only '*some* sacrifices . . . and *some* alteration in prepetition consumption levels.'"[150] The *Gonzales* court found that tuition costs of $700 for two dependent college

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142 *Id.* (quoting 11 U.S.C. § 522(d)(10)(E) (1982)).

143 *See generally* Warren v. Taff (*In re* Taff), 10 B.R. 101 (Bankr. D. Conn. 1981).

144 *In re Jones*, 55 B.R. at 466.

145 *In re Taff*, 10 B.R. at 107.

146 *In re Jones*, 55 B.R. at 466.

147 *Id.* at 467.

148 *See, e.g.*, Watson v. Boyajian (*In re* Watson), 309 B.R. 652, 660–61 (B.A.P. 1st Cir. 2004), *aff'd*, 403 F.3d 1 (1st Cir. 2005); *In re* Crim, 445 B.R. 868, 871 (Bankr. M.D. Tenn. 2011).

149 S. REP. NO. 98-65, at 22 (1983).

150 *In re* Gonzales, 157 B.R. 604, 611 (Bankr. E.D. Mich. 1993) (quoting S. REP. NO. 98-65, at 22).

students were a reasonably necessary expense.[151] Conversely, some bankruptcy panels followed the precedent set in *Jones*, rejecting the premise that private school tuition is a basic need in most circumstances.[152]

In *In re Watson*, the Bankruptcy Appellate Panel for the First Circuit delineated a "totality of the circumstances" test, which summarized the standard for determining reasonably necessary tuition expenses immediately preceding BAPCPA.[153] The panel first noted that, standing alone, private school tuition is not a reasonably necessary expense.[154] However, the panel held that such expenses could be considered reasonably necessary if a compelling circumstance existed or if the debtor had "compensated for such an expense by eliminating other reasonably necessary expenses."[155] The panel suggested that other courts should "examine the totality of the circumstances to determine whether the debtor's plan reflects a good faith effort to maximize repayment to creditors."[156]

The *Watson* court laid out a two-prong test for future bankruptcy courts to follow. First, a court must consider the debtor's reasoning for private schooling, "examining the adequacy of the public school alternative as a general matter and with respect to the particular educational needs of the student in question."[157] In *Watson*, the debtors failed to demonstrate that the tuition costs deducted from disposable income ($735 per month for two children to attend private school) met this standard, as the debtors' only reasoning was a preference for private schooling based on the family's religious beliefs.[158]

Second, if a debtor fails to demonstrate compelling circumstances, then the court must examine the proposed plan to see if the debtor has compensated for the tuition costs by contributing other reasonably necessary expenses to the plan.[159] In this second prong, courts analyze "the expense of private school tuition relative to the debtor's other expenses, the debtor's total debt

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151 *Id.*

152 *See, e.g.*, Univest-Coppell Vill., Ltd. v. Nelson, 204 B.R. 497, 500 (E.D. Tex. 1996).

153 *See In re Watson*, 309 B.R. at 660–61. This case was decided just one year before the BAPCPA amendments were enacted.

154 *In re Watson*, 309 B.R. at 660 (citing *In re* Webb, 262 B.R. 685, 690 (Bankr. E.D. Tex. 2001); *Univest-Coppell Vill., Ltd.*, 204 B.R. 497).

155 *Id.* at 660–61.

156 *Id.* at 660 (citing *In re Webb*, 262 B.R. at 690; *Univest-Coppell Vill., Ltd.*, 204 B.R. 497).

157 *Id.* at 661.

158 *Id.*

159 *Id.* at 660–61.

obligations under the plan, and the distribution creditors would receive."[160] This second prong is rooted in the good faith requirement of chapter 13,[161] calling for a substantial effort by the debtor to repay his debts.[162]

If a debtor fails both parts of the totality of the circumstances test, then the tuition is not reasonably necessary, and the plan cannot be confirmed.[163] This result is precisely what occurred in *Watson*, as the debtor did not offset the tuition costs by eliminating other necessary expenses and the plan only proposed to pay back 25% of the debt owed to creditors.[164] The totality of the circumstances test encompasses the legislative intent concerning disposable income in chapter 13 plans, while balancing the needs of both debtors and creditors. This Comment uses the precedent set by *Watson* as a basis for developing a new standard for discerning what educational deductions are reasonably necessary.

The case law concerning chapter 13 educational expense deductions before BAPCPA shows that courts were inconsistent in their approaches to determining reasonably necessary education costs. This inconsistency created a system that allowed for great judicial discretion and forced courts to immerse themselves in the facts surrounding each particular case.[165] While the BAPCPA amendments were supposed to do away with these issues, the relevant case law shows that BAPCPA did little to resolve these problems.

B. Cleary/Crim *Balancing and the Post-BAPCPA Cases*

One of the most important changes made by BAPCPA was the split it created between above- and below-median income debtors. This split certainly required a change in the way courts evaluated tuition deductions for above-median debtors, but courts were still unclear as to what test to use for below-median debtors. This section discusses both situations by examining the reasoning used by bankruptcy courts in three major post-BAPCPA decisions: (1) *In re Cleary*; (2) *In re Crim*; and (3) *In re Boyd*.

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160 *Id.* at 661.

161 11 U.S.C. § 1325(a)(3) (2006).

162 *See In re Watson*, 309 B.R. at 660 (citing *In re* Webb, 262 B.R. 685, 690 (Bankr. E.D. Tex. 2001); Univest-Coppell Vill., Ltd. v. Nelson, 204 B.R. 497 (E.D. Tex. 1996)).

163 *Id.* at 661–62.

164 *Id.*

165 *See* Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 722 (2011).

1. Cleary *and Below-Median Debtors*

The Bankruptcy Court for the District of South Carolina decided *Cleary* just one year after the enactment of BAPCPA, and the court's opinion in that case elaborated on the issue of reasonably necessary tuition deductions.[166] The case dealt with a below-median debtor who tried to claim a monthly parochial school tuition expense of $1,513 for his six children.[167] The court held that, for below-median debtors, the question of whether tuition is a reasonably necessary expense must be determined in the context of the debtor's estimated monthly expenses.[168] The court went on to provide that "[t]hese expenses must undergo judicial analysis, in the face of an objection, as to reasonableness and necessity; or as some might say, 'the old fashion way.'"[169] Essentially, the court applied the same pre-BAPCPA standard of judicial discretion and analysis to a below-median debtor after BAPCPA.

The *Cleary* court swept aside the public policy notion that private school tuition is always a "luxury expense" due to Congress's inclusion of § 707(b)(2)(A)(ii)(IV).[170] The court also noted the pre-BAPCPA split among courts on the subject of private school tuition as a deduction from disposable income.[171] The court stated that those earlier cases had balanced "creditor's rights against the appropriate basic needs of the debtors and their dependents."[172] With this balancing test in mind, the *Cleary* court examined the facts of the case as a whole, assessing the reasonableness and necessity of the tuition deduction in light of the particular circumstances.[173] On one side of the fulcrum, the court noted that the debtor was retaining his real estate in chapter 13, paying only a 1% dividend to unsecured creditors, and that the debtor's children had no special educational needs.[174] Despite these circumstances, the court found the tuition deduction to be reasonably necessary based on other factors.[175] The court asserted that the children's long-term enrollment in parochial schools and the family's deeply held religious

166 *In re* Cleary, 357 B.R. 369, 370 (Bankr. D.S.C. 2006).
167 *Id.* at 370–71.
168 *Id.* at 372.
169 *Id.* at 372–73.
170 *Id.* at 373.
171 *Id.*
172 *Id.* (quoting Watson v. Boyajian (*In re* Watson), 403 F.3d 1, 8 (1st Cir. 2005), *aff'd*, 403 F.3d 1 (1st Cir. 2005)).
173 *See id.* at 373–74.
174 *Id.* at 373.
175 *See id.*

convictions weighed in favor of the debtor.[176] The deciding factor, however, was the family's sacrifice of other basic expenses.[177]

The *Cleary* court also addressed whether a below-median debtor is limited by the private school tuition expense ceiling, which, according to the court, is a presumptively reasonable limit for above-median debtors.[178] The court ruled that this limit does not apply,[179] but for a different reason than expected. Rather than simply noting that § 707(b)(2)(A)(ii)(IV) does not apply to below-median debtors, the court stated that its decision was "limited very narrowly to the facts of this case," specifically citing the lifestyle choices and sacrifices made by the debtor and his family.[180] This case clearly demonstrates the immense discretion bankruptcy judges continued to possess after BAPCPA in deciding whether tuition costs are reasonably necessary.

2. Crim, Boyd, *and Above-Median Debtors*

Following in the footsteps of *Cleary*, the Bankruptcy Court for the Middle District of Tennessee used a balancing test in *Crim*.[181] In *Crim*, the above-median debtors attempted to modify their plan to deduct $500 per month for tuition to allow their dependent, chronically ill daughter to attend private school.[182] The fact that this court was evaluating a modified plan is noteworthy.[183] Section 1329 gives the criteria for the approval of a proposed plan modification and states that "[s]ections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification."[184] The court noted that § 1329 does not incorporate § 1325(b) of the Code, and therefore, the disposable income requirements of § 1325(b) and § 707(b)(2) did not apply.[185] Thus, rather than evaluating the tuition expense claim using the means test, the court looked to the debtor's actual income and

176 *Id.*

177 *Id.* at 374. These sacrifices included giving up food, transportation, clothing and recreational costs; opting for chapter 13 repayment instead of chapter 7 liquidation; giving up furniture secured by purchase-money loans; and the fact that Mrs. Cleary's paycheck was reduced in order to pay for her children's tuition. *Id.*

178 *Id.* at 373–74.

179 *Id.* at 374

180 *Id.*

181 *In re* Crim, 445 B.R. 868, 871–72 (Bankr. M.D. Tenn. 2011).

182 *Id.* at 869–70.

183 *Id.* at 871.

184 11 U.S.C. § 1329(b)(1) (2006).

185 *In re Crim*, 445 B.R. at 871.

expenses at the time of the proposed modification to determine whether the plan should be adjusted.[186]

The *Crim* court next looked to the *Cleary* decision, noting the importance of the fact that post-BAPCPA law was not settled on whether private school tuition is a reasonable and necessary expense.[187] The court concluded that the balancing test still applied, turning on the "reasonableness and necessity" of "sustaining the basic needs of the debtor and the debtor's dependents."[188] Noting that the debtors had made significant sacrifices in attempting to pay back their creditors and that no other public school options were available for the debtors' child, the court found the $500 monthly tuition expense to be reasonable and necessary.[189]

In an explanatory footnote, the *Crim* court addressed whether the means test applies when evaluating a plan modification.[190] The court noted that, while the issue is not settled, the disposable income test did not apply in the context of this particular case.[191] The court continued to explain that even if the means test had applied, its decision would have been the same:

> Even if the court is incorrect and these above-median income debtors had to satisfy § 707(b)(2) via § 1325(b), the court would find that the debtors are entitled to their $500 monthly tuition payments pursuant to § 707(b)(2)(A)(II) and (IV) as proven monthly educational expenses up to $1,775 per year and all tuition costs above that amount approved as actual expenses incurred to care for a chronically ill dependent.[192]

This explanation shows that even if the means test had applied to the above-median debtor in this case, the tuition costs would nevertheless be covered in part by the $1,775 tuition ceiling of § 707(b)(2)(A)(ii)(IV). Furthermore, the difference fell under the scope of § 707(b)(2)(A)(ii)(II), which allows for reasonable and necessary expenses for the care and support of a chronically ill dependent.[193] That the court applied § 707(b)(2)(A)(ii)(II) to tuition expenses is creative and shows that the special learning needs of a debtor's dependent is

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186 *Id.* (quoting *In re* Prieto, No. 3:08-bk-3308-PMG, 2010 WL 3959610, at *2 (Bankr. M.D. Fla. Sept. 22, 2010)).
187 *Id.* (citing *In re* Cleary, 357 B.R. 369, 371 (Bankr. D.S.C. 2006)).
188 *Id.*
189 *Id.* at 872.
190 *See id.* at 871 n.1.
191 *Id.*
192 *Id.*
193 11 U.S.C. § 707(b)(2)(A)(ii)(II) (2006).

an important factor for courts to consider in assessing whether a tuition expense is reasonable and necessary.

Boyd is another example of a post-BAPCPA decision involving an above-median income debtor.[194] In *Boyd*, the court had to decide whether to allow a monthly deduction for a college tuition expense of $200 for the debtor's daughter.[195] The court first turned to § 707(b)(2)(A)(ii)(IV) and, using the principle of *ejusdem generis*,[196] concluded that the tuition costs were not reasonably necessary.[197]

Next, the court entertained the possibility that the tuition deduction may qualify as an "Other Necessary Expense" under the IRS Standards.[198] Looking to an example given by the IRS's Financial Analysis Handbook,[199] the court concluded that college tuition payments for an adult child were not included in the "Other Necessary Expense" category, "except to the extent that the 'tax' obligation could still be paid within five years."[200] The court then analogized the tax obligation to unsecured debt.[201] Because the debtor's plan only provided for partial repayment of the unsecured claims, the tuition costs of the debtor's daughter did not qualify under the IRS Standards.[202]

In the end, the BAPCPA amendments seem to have done little to affect judicial review of tuition deductions from disposable income in chapter 13 cases.[203] Most cases are highly fact-intensive, with courts reviewing the circumstances of each particular debtor. The balancing test set forth in *Cleary* and *Crim* has developed over time, but this test remains vague and lacks

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194 *See* DeHart v. Boyd (*In re* Boyd), 378 B.R. 81, 82 (Bankr. M.D. Pa. 2007).

195 *Id.*

196 Meaning "of the same kind," e*jusdem generis* is a canon of construction that provides that general words in a statute should be construed to be similar in scope to any preceding specific words. NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 47:17 (7th ed. 2007).

197 *In re Boyd*, 378 B.R. at 83–85 (noting that the debtor's expenditure was larger than the statutorily approved amount, his daughter was an adult, and college is not an elementary or secondary school).

198 *Id.* at 84–85.

199 *Id.* at 84 (quoting IRM 5.15.1-1 (May 1, 2004)).

200 *Id.*

201 *Id.*

202 *Id.* at 83–84.

203 What has been settled is that post-secondary tuition expenses are generally not allowable after the addition of 11 U.S.C. § 707(b)(2)(A)(ii)(IV). *See, e.g.*, *In re* Saffrin, 380 B.R. 191, 192 (Bankr. N.D. Ill. 2007); *In re Boyd*, 378 B.R. at 83–84; *In re* Featherston, Nos. 07-60296-13, 07-60441-13, 2007 WL 2898705, at *12 (Bankr. D. Mont. Sept. 28, 2007), *aff'd sub nom.* Featherston v. Drummond (*In re* Featherston), No. CV 08-16-GF-SHE, 2008 WL 5217936 (D. Mont. Dec. 11, 2008); *In re* Goins, 372 B.R. 824, 827 (Bankr. D.S.C. 2007).

uniformity. It seems that Congress erred in its decision to leave the development of a definite standard to the bankruptcy courts, as such a standard has not developed in the twenty-eight years since the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[204]

III. CASE LAW—WHICH FACTORS MATTER MOST?

Bankruptcy courts have looked to several different factors in confirming or denying a plan based on an objection to educational expenses being deducted from a debtor's disposable income. While a mere preference for private schooling is not sufficient to meet the burden of proof for showing that such deductions are reasonably necessary,[205] there are several other assertions debtors can make that may increase their chances of being allowed to deduct tuition costs from disposable income.

The following subparts discuss the factors used in bankruptcy cases where tuition expenses are in dispute. Courts have considered the following factors: (1) length of attendance; (2) religious convictions; (3) cost of tuition; (4) percentage of repayment to creditors; (5) debtor sacrifices; (6) availability and quality of public schools; and (7) special needs of the debtor or a dependent of the debtor. In applying these factors, courts have given insight into the types of circumstances that comprise a reasonably necessary tuition expense and those that do not.

A. Length of Attendance

The length of time a debtor or a debtor's dependent has attended a private educational institution has factored in courts' assessments of whether tuition expenses can be deducted from disposable income contributed to a chapter 13 plan. Generally, if a debtor or a debtor's dependent has attended private school for a short period of time, courts are less likely to confirm the plan. For example, in *Univest-Coppell Village, Ltd. v. Nelson*, a creditor objected to the debtors' deduction of $395 per month for private high school tuition for the debtors' daughter, who was in her first year at the school.[206] The debtors and

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[204] *See In re* Crim, 445 B.R. 868, 871 (Bankr. M.D. Tenn. 2011) ("[T]he allowance of private school tuition as a reasonable and necessary expense is not settled law . . . .").

[205] *See, e.g.*, Watson v. Boyajian (*In re* Watson), 309 B.R. 652, 660–61 (B.A.P. 1st Cir. 2004), *aff'd*, 403 F.3d 1 (1st Cir. 2005); Univest-Coppell Vill., Ltd. v. Nelson, 204 B.R. 497, 500 (E.D. Tex. 1996); *In re* Jones, 55 B.R. 462, 467 (Bankr. D. Minn. 1985).

[206] *Univest-Coppell Vill., Ltd.*, 204 B.R. at 497.

their daughter were adamant about not switching to public school, in part because the daughter was the first freshman to make the cheerleading squad.[207] Nonetheless, the court found that the debtors' tuition expense was not reasonably necessary and that the daughter could attend the same public high school that her older sister attended.[208]

On the other hand, the fact that a debtor or dependent has attended the school in question for a long period of time increases the likelihood that a court will find the tuition expenses to be reasonably necessary.[209] This factor played a part in the court's decision in *In re Nicola*.[210] There, the court upheld the debtors' deduction of $260 per month for their daughter's Catholic school tuition against the trustee's objection[211] because the debtor's situation was "more like those of the cases where courts found tuition payments to be reasonably necessary."[212] The court based its decision on the following facts: the tuition amount was less than amounts that were not considered reasonably necessary in past cases; the local public school was inadequate based on low standardized test scores; the debtors were devout Catholics; and their daughter had "attended Catholic school her entire life."[213]

As is the case with most of the factors discussed in this section, length of attendance alone is not dispositive. As the *Nicola* court noted, "[a]ny of the [the case's] facts alone may not be enough to warrant a finding that the tuition expense is reasonably necessary."[214] In fact, no court has found a debtor's educational expenses to be reasonably necessary solely on the basis of length of attendance. Courts need additional evidence to deem tuition costs an allowable expense.[215]

B. Religious Convictions

Bankruptcy courts are split on the issue of whether a debtor's religious convictions are dispositive in deciding whether tuition costs are reasonably

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207 *Id.* at 497–98.
208 *Id.* at 500.
209 *See, e.g.*, *In re* Nicola, 244 B.R. 795, 799 (Bankr. N.D. Ill. 2000).
210 *Id.*
211 *Id.*
212 *Id.* at 798.
213 *Id.* at 799.
214 *Id.*
215 *See, e.g.*, *id.* (noting not only that the debtor's child had attended Catholic school her whole life, but also that the tuition amount was not excessive and that the available public schooling was of low quality).

necessary.[216] At least one court has concluded that religious education for a debtor or a debtor's dependent is not per se unreasonable.[217] Other courts assert that religious convictions alone, no matter how strong or sincere, are not sufficient to meet the debtor's burden of showing that tuition expenses are reasonably necessary.[218] It is almost always the case that debtors asserting a religious conviction have set forth additional compelling factors.[219]

In the case of *In re Navarro*, the court was hesitant to infringe on the debtors' religious beliefs. [220] There, the court held that the debtors' $100 monthly expense to send their child to parochial school was reasonably necessary.[221] The court partially based its decision on the fact that the debtors had made lifestyle sacrifices to send their child to parochial school.[222] The court also found that religious education is not a per se unreasonable choice for the maintenance and support of the debtor's family.[223] The court noted that because the debtors obtained no tangible benefit by paying this tuition, it was not a luxury good or service.[224] The court admitted, however, that its ruling may have been different if the debtors were paying this tuition "as part of a conscious choice to presently favor their religious beliefs over unsecured creditors."[225] The issue of whether a debtor's religious views should usurp unsecured creditors' rights to be repaid is an ongoing discussion among courts on whether tuition expenses are reasonably necessary.

The court's reasoning in *Watson* is particularly compelling when addressing this issue.[226] The debtors argued that the Religious Freedom Restoration Act ("RFRA") protected their right "to use disposable income to pay for their children's private religious school tuition."[227] RFRA restricts the

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[216] *Compare id.* (holding that a debtor's religious convictions can be taken into consideration when deciding whether private school tuition is "reasonably necessary"), *with* Watson v. Boyajian (*In re* Watson), 309 B.R. 652, 661 (B.A.P. 1st Cir. 2004) (holding that a preference for a religious education is not sufficient to render private school tuition reasonably necessary), *aff'd*, 403 F.3d 1 (1st Cir. 2005).

[217] *See, e.g.*, *In re* Navarro, 83 B.R. 348, 357 (Bankr. E.D. Pa. 1988).

[218] *See, e.g.*, *In re Watson*, 309 B.R. at 661 ("Such a preference, while apparently sincere, is not sufficient to render the expense of private school tuition reasonably necessary.").

[219] *See, e.g.*, *In re* Cleary, 357 B.R. 369, 374 (Bankr. D.S.C. 2006); *In re Nicola*, 244 B.R. at 799.

[220] *In re Navarro*, 83 B.R. at 357.

[221] *Id.* at 356.

[222] *See id.* at 357.

[223] *Id.* at 356.

[224] *Id.*

[225] *Id.* at 357.

[226] *See* Watson v. Boyajian (*In re* Watson), 309 B.R. 652, 663–64 (B.A.P. 1st Cir. 2004), *aff'd*, 403 F.3d 1 (1st Cir. 2005).

[227] *Id.* at 663.

government's ability to burden the free exercise of religion, unless that burden furthers a compelling governmental interest in the least restrictive way possible.[228] The *Watson* court noted that debtors carry the burden of proving that the court's denial of their plan substantially burdened their right to practice their faith.[229]

The *Watson* court looked to the Catechism of the Catholic Church to show that including the disputed tuition expense in disposable income did not substantially burden the debtors' ability to practice their faith.[230] The Catechism of the Catholic Church states that a parent's responsibilities for religious practice and education take place primarily in the home.[231] Thus, even when a debtor has sincere religious beliefs, an order to include private school tuition in the debtor's disposable income does not substantially burden the debtor's ability or right to practice religion.[232] The *Watson* court concluded that such an order "does not interfere with [a debtor's] ability to attend religious services, pray, worship or fulfill their religious duties."[233]

Clearly, the religious convictions of debtors play a role in bankruptcy decisions regarding tuition expense deductions.[234] However, almost all cases on point have required more than an assertion of religious beliefs for a court to find a tuition deduction to be reasonably necessary.[235]

C. Cost of Tuition

The cost of the tuition in dispute is an important factor in a bankruptcy court's decision of whether the debtor's deduction is reasonably necessary. It may seem logical that courts dealing with above-median income debtors would use the statutorily prescribed annual tuition amount of $1,775 per child under

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228 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2006); *In re Watson*, 309 B.R. at 663 (noting that strict scrutiny is applied to federal laws that place a substantial burden on one's free exercise of religion).

229 *In re Watson*, 309 B.R. at 663 (citing Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111, 122 (D.N.H. 2003), *aff'd*, 374 F.3d 15 (1st Cir. 2004)).

230 *Id.* at 663–64.

231 *Id.* at 664 (citing Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999)).

232 *Id.*

233 *Id.*

234 *See, e.g.*, *In re* Cleary, 357 B.R. 369, 374 (Bankr. D.S.C. 2006); *In re* Nicola, 244 B.R. 795, 799 (Bankr. N.D. Ill. 2000).

235 *See, e.g.*, *In re Watson*, 309 B.R. at 664; *In re Cleary*, 357 B.R. at 373–74; *In re Nicola*, 244 B.R. at 799.

the age of eighteen.[236] Courts rarely cite this provision, however, and often approve amounts far exceeding the statutory limit.[237] Regardless of whether the debtor is an above- or below-median income earner, bankruptcy courts are consistently concerned with the tuition amount in the context of the circumstances surrounding the case.[238]

Generally, relatively high tuition costs are less likely to be considered reasonably necessary because higher tuition costs take more disposable income away from unsecured creditors.[239] In *In re Ehret*, the court found that a $2,000 monthly expense for the debtor's child to attend private school was not reasonably necessary because "a debtor's creditors should [not] pay tuition for the debtor's children."[240] The court gave this ruling in spite of the debtors' claims that their son needed special education not available in public schools.[241]

Conversely, courts are more inclined to approve lower tuition cost deductions,[242] especially in cases where a debtor has made a substantial effort to make up for the deduction by sacrificing some other necessary expense.[243] Recall that in *Nicola*, the court allowed a tuition expense in part because it was far less than the tuition deductions that other courts had rejected.[244] Ultimately, the amount that a debtor deducts for educational expenses does not decide the case by itself and, like the other factors, is merely another piece of evidence for courts to consider in a case-by-case analysis.

D. Percentage of Repayment to Creditors

As noted earlier, one of chapter 13 bankruptcy's main goals is to have the debtor repay as much debt as possible to creditors without jeopardizing the

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[236] *See* 11 U.S.C.A. § 707(b)(2)(A)(ii)(IV) (West 2010).

[237] *See, e.g.*, *In re* Crim, 445 B.R. 868, 872 (Bankr. M.D. Tenn. 2011); *In re* Urquhart, No. 09-71058, 2009 WL 3785573, at *5 (Bankr. C.D. Ill. Nov. 12, 2009); *In re Cleary*, 357 B.R. at 374.

[238] *See, e.g.*, *In re Crim*, 445 B.R. at 872.

[239] *See, e.g.*, *In re* Ehret, 238 B.R. 85, 89 (Bankr. D.N.J. 1999) (debtor claiming $2,000 per month for one dependent); *In re* Jones, 55 B.R. 462, 467 (Bankr. D. Minn. 1985) (debtor claiming $1,000 per month for two dependents).

[240] *In re Ehret*, 238 B.R. at 87 (quoting *In re* McNulty, 142 B.R. 106, 110 (Bankr. D.N.J. 1992)).

[241] *Id.*

[242] *See, e.g.*, *In re* Gonzales, 157 B.R. 604, 611 (Bankr. E.D. Mich. 1993) (debtors claiming $700 per month for two dependents); *In re* Navarro, 83 B.R. 348, 356–57 (Bankr. E.D. Pa. 1988) (debtors claiming $100 per month for one dependent).

[243] *See, e.g.*, *In re Crim*, 445 B.R. at 872; *In re* Cleary, 357 B.R. 369, 374 (Bankr. D.S.C. 2006).

[244] *In re* Nicola, 244 B.R. 795, 799 (Bankr. N.D. Ill. 2000).

basic needs of the debtor and the debtor's dependents.[245] Bankruptcy courts promote this goal by considering the percentage and amount of debts to be paid under a debtor's proposed plan when assessing whether a tuition deduction is reasonably necessary. In cases where the debtor's proposed plan provides for a small percentage of repayment, [246] or where the tuition deduction is relatively high in comparison to the repayment amount,[247] a court is more likely to hold that such tuition expenses must be committed to the plan.

In *Watson*, the court found that a tuition expense of $735 per month was not reasonably necessary in part because the plan proposed to repay only 25% of the unsecured debt.[248] The court found that the debtor's plan did not "reflect a good faith effort to repay creditors,"[249] thereby violating § 1325(a)(3).[250] The *Boyd* court reached a similar conclusion, noting that the "[d]ebtor's proposed plan would only pay a fraction of the unsecured claims."[251]

Overall, the "good faith" analysis of *Watson* often plays a substantial part when a court considers the amount of repayment in the context of a tuition deduction.[252] However, many courts have allowed tuition deductions even where a debtor is repaying a small percentage of the unsecured debt in the chapter 13 plan.[253] This factor demonstrates the arbitrariness of how different courts decide this issue.

E. Debtor Sacrifices

The drafters of chapter 13 noted that the debtor and the debtor's family might need to make sacrifices and lifestyle alterations to satisfy the legislative

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245 *See* S. REP. NO. 98-65, at 22 (1983).

246 *See, e.g.*, DeHart v. Boyd (*In re* Boyd), 378 B.R. 81, 84 (Bankr. M.D. Pa. 2007).

247 *See, e.g.*, Watson v. Boyajian (*In re* Watson), 309 B.R. 652, 662 (B.A.P. 1st Cir. 2004), *aff'd*, 403 F.3d 1 (1st Cir. 2005).

248 *Id.*

249 *Id.* at 664.

250 *See* 11 U.S.C. § 1325(a)(3) (2006).

251 *In re Boyd*, 378 B.R. at 84.

252 *See, e.g.*, *In re* Riegodedios, 146 B.R. 691, 693 (Bankr. E.D. Va. 1992).

253 *See, e.g.*, *In re* Crim, 445 B.R. 868, 869, 872 (Bankr. M.D. Tenn. 2011) (allowing tuition expense of $500 per month where the modified plan reduced repayment to unsecured creditors from 100% to 30%); *In re* Cleary, 357 B.R. 369, 373–74 (Bankr. D.S.C. 2006) (allowing tuition expense of $1,513 per month where the plan provided 1% repayment to unsecured creditors); *In re* Webb, 262 B.R. 685, 687, 691 (Bankr. E.D. Tex. 2001) (allowing tuition expense of $550 per month where the plan provided 1.008% repayment to unsecured creditors); *In re* Nicola, 244 B.R. 795, 796, 799 (Bankr. N.D. Ill. 2000) (allowing tuition expense of $260 per month where the plan provided 10% repayment to unsecured creditors).

intent of maximum creditor repayment.[254] Mindful of this intent, courts consider what sacrifices, if any, a debtor has made to offset the tuition amount being deducted from disposable income. The sacrifice factor is similar to the amount of repayment factor in that both factors are rooted in the good faith doctrine required by the Code[255] and expressed in *Watson*.[256]

If a debtor makes a substantial effort to cut the costs of other basic expenses to compensate for the educational expenses being deducted from disposable income, courts are more likely to consider the education deduction to be reasonably necessary.[257] Conversely, courts might not allow a debtor to deduct educational expenses if the debtor does not put forth a "good faith effort to maximize repayment to creditors," in addition to compensating for the deduction.[258] For example, the *Watson* court found that the debtors did not demonstrate "an attempt to offset the private school tuition expense by eliminating or minimizing other reasonably necessary expenses."[259] This lack of effort weighed against the debtors in a similar fashion as the small percentage of repayment factor.[260]

F. Availability and Quality of Public Schools

Public schools in the United States do not all provide the same quality of education to students, and some debtors have elected to send their children to private school because they live in an area that does not offer a quality public education.[261] Recognizing this lack of uniformity, courts will consider the availability and quality of public schools in a debtor's surrounding area in deciding whether a debtor's claim for school tuition is reasonably necessary.[262]

Some commentators argue that expenses for sending a dependent to private school rather than public school should always be considered reasonably

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254 *See* S. REP. NO. 98-65, at 22 (1983).

255 *See* 11 U.S.C. § 1325(a)(3).

256 *See* Watson v. Boyajian (*In re* Watson), 309 B.R. 652, 660–61 (B.A.P. 1st Cir. 2004), *aff'd*, 403 F.3d 1 (1st Cir. 2005).

257 *See, e.g.*, *In re Crim*, 445 B.R. at 872; *In re Cleary*, 357 B.R. at 374.

258 *In re Watson*, 309 B.R. at 660–61.

259 *Id.* at 661–62.

260 *Id.*

261 *See, e.g.*, *In re* Nicola, 244 B.R. 795, 796–97 (Bankr. N.D. Ill. 2000).

262 *See, e.g.*, Univest-Coppell Vill., Ltd. v. Nelson, 204 B.R. 497, 500 (E.D. Tex. 1996); *In re Nicola*, 244 B.R. at 799.

necessary,[263] aligning their arguments with the unique position taken by the Bankruptcy Court for the Eastern District of New York in *In re Awuku*.[264] While the *Awuku* court did not have to decide the issue of an educational expense deduction,[265] it candidly used educational costs as an example in its general discussion of reasonably necessary expenses in chapter 13 cases.[266] The court wrote:

> Presumably any expenses incurred by a debtor to educate his or her children are justified on the need to equip those children with the fundamental skills that are "reasonably necessary" for future employment or, if it not completely passe, for leading an "examined life" or at least playing an active role as an informed citizen in a free and democratic society.[267]

The court's reasoning is flawed, however, because those "fundamental skills that are reasonably necessary for future employment" can easily be obtained at most public schools in the United States. If anything, public school attendees may even lead a more "examined life," as they are removed from the shelters of private school and exposed to a more socioeconomically diverse range of peers.[268]

Debtors who live in an area with adequate public schooling available will have a difficult time convincing a judge that their claims for private school tuition are reasonably necessary.[269] Those debtors' dependents could receive a suitable education for free, allowing for more money to be paid to creditors. This reasoning underpinned the court's decision in *Nelson*.[270] Recall that the dispute in *Nelson* centered on the debtors' deduction of $395 per month for their daughter's private high school tuition.[271] The court found that this

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263 *See* Richard Corbi, Note, *You Have the Right to Cable TV, But Not Education: A Proposal to Amend the Bankruptcy Code to Permit All Education Expenses in Chapter 13 Bankruptcy Plans*, 43 FAM. CT. REV. 625, 626 (2005).

264 *See In re* Awuku, 248 B.R. 21, 29 (Bankr. E.D.N.Y. 2000).

265 The issue in this case was whether a bi-weekly pension deduction of a debtor city employee was a reasonably necessary expense. *See id.* at 23.

266 *See id.* at 29.

267 *Id.*

268 *See* Rebecca D. Williams, *Many Private Schools Score Higher but Have Less Diversity*, KNOXVILLE NEWS SENTINEL (June 15, 2010, 12:00 AM), http://www.knoxnews.com/news/2010/jun/15/many-private-schools-score-highter-but-have/.

269 *See, e.g.*, Watson v. Boyajian (*In re* Watson), 309 B.R. 652, 661 (B.A.P. 1st Cir. 2004), *aff'd*, 403 F.3d 1 (1st Cir. 2005); Univest-Coppell Vill., Ltd. v. Nelson, 204 B.R. 497, 500 (E.D. Tex. 1996); *In re* Weiss, 251 B.R. 453, 462 (Bankr. E.D. Pa. 2000); *In re* Jones, 55 B.R. 462, 467 (Bankr. D. Minn. 1985).

270 *See Univest-Coppell Vill., Ltd.*, 204 B.R. at 500.

271 *Id.* at 497.

expense was not reasonably necessary, despite the debtors' concerns about transferring their daughter to public school.[272] Noting first that "a private school education is not a basic need," the court concluded that the debtors' daughter could attend the local public high school that her sister attended.[273]

A compelling circumstance may exist when courts find that the public schooling available to a debtor is inadequate and forcing a switch to public school will be overly burdensome. In *Nicola*, the debtors presented evidence that the local public school's average standardized test scores were below the average test scores of the rest of the state.[274] The court weighed this factor in favor of the education expense being reasonably necessary.[275] However, the court did not consider the below average test scores alone to be the deciding factor, but rather looked at this factor along with others to reach its conclusion that the expenses were reasonably necessary.[276]

Although the adequacy of public schooling has been addressed in bankruptcy proceedings on point,[277] courts have not reached a consensus regarding the proper method by which to measure a public school's adequacy. Developing or deciding on such a measuring system would help all parties involved in a chapter 13 tuition dispute.

G. Special Needs of the Debtor or a Dependent of the Debtor

Public schooling, while adequate for the great majority of children in the United States, does not always work for students who have learning disabilities or other special needs. If a debtor's dependent has special needs and requires a unique learning environment, the tuition expense for that dependent has been found reasonably necessary in most cases.[278] However, the debtor will usually need to present evidence, such as testimony from a psychologist[279] or proof that public school simply is not an option,[280] for the court to allow the expense to be deducted from disposable income. In general, if a debtor can provide this

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[272] *Id.* at 498, 500. The court also noted that the father did not have any particular problem with the education offered at the local public school. *Id.* at 500.

[273] *Id.* at 500.

[274] *In re* Nicola, 244 B.R. 795, 799 (Bankr. N.D. Ill. 2000).

[275] *Id.*

[276] *See id.* (noting also that the amount being claimed was low in comparison to other cases).

[277] *See, e.g.*, *Univest-Coppell Vill., Ltd.*, 204 B.R. at 500; *In re Nicola*, 244 B.R. at 799.

[278] *See, e.g.*, *In re* Crim, 445 B.R. 868, 870, 872 (Bankr. M.D. Tenn. 2011); *In re* Webb, 262 B.R. 685, 690–91 (Bankr. E.D. Tex. 2001).

[279] *See, e.g.*, *In re Webb*, 262 B.R. at 690–91.

[280] *See, e.g.*, *In re Crim*, 445 B.R. at 872 & n.3.

proof, courts will be more lenient in finding such educational expenses to be reasonably necessary for the maintenance or support of the debtor's dependent.

The *Ehret* decision sheds some light on how courts consider the special needs factor in tuition deduction disputes. In *Ehret*, the trustee and unsecured creditors objected to the debtor's expense claim of $2,000 per month for a dependent son's tuition expenses.[281] The debtor and his wife asserted that their son needed special education that was unavailable in public schools.[282] However, the debtor presented no evidence, expert testimony or documentation as to the existence or nature of his son's disability.[283] Consequently, the court held that the tuition was not reasonably necessary.[284]

The *Ehret* court provided an additional point of analysis not seen in other cases involving special needs dependents. The opinion stated that if the debtor's son is truly disabled, then the Individuals with Disabilities Education Act ("IDEA"), which requires states to provide disabled students with "free appropriate public education," applies.[285] If public schooling cannot meet a certain child's needs, IDEA mandates that the student's district school board pay for an appropriate private school placement.[286] The fact that the debtor failed to demonstrate how IDEA did not satisfy his son's educational needs at no cost was a factor in the court's decision to reject the debtor's plan.[287] This part of the court's analysis is quite novel because it provides an alternative statute that can be used to provide funding for a special needs student without a corresponding deduction in the debtor's disposable income.

In re Webb provides an example of a dependent's special needs weighing in favor of a reasonably necessary tuition expense.[288] In *Webb*, the trustee objected to the deduction of a monthly private school tuition expense of $550 for the debtors' son.[289] The debtors offered the expert testimony of a licensed physician and child psychiatrist, who testified that the debtors' son suffered from attention deficit-hyperactivity disorder, general anxiety disorder, and an obsessive-compulsive mood disorder.[290] The expert also testified that

281 *In re* Ehret, 238 B.R. 85, 86 (Bankr. D.N.J. 1999).
282 *Id.* at 87.
283 *Id.* at 88.
284 *Id.*
285 *Id.* (quoting 20 U.S.C. § 1412(a)(1).
286 *Id.* (citing Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 248 (3d Cir. 1999)).
287 *Id.*
288 *See generally In re* Webb, 262 B.R. 685 (Bankr. E.D. Tex. 2001).
289 *Id.* at 687.
290 *Id.* at 688.

integrating the dependent into a public school environment would significantly impede the dependent's academic progress.[291] The debtors corroborated the doctor's opinion by providing details of difficulties in their previous attempts to place their son in public school.[292]

In deciding whether the tuition costs were reasonably necessary, the *Webb* court initially expressed the general rule that, "[i]n the absence of some compelling circumstance . . . a private school education is not reasonably necessary."[293] However, the court found that the evidence presented a compelling circumstance: there were significant doubts as to whether the child's specific needs could be properly addressed at the available public school.[294]

The *Ehret* and *Webb* decisions demonstrate that debtors need to present compelling evidence to show that their dependents' tuition costs are reasonably necessary based on their special learning needs. The problem is that there are no guidelines—save for inconsistent case law—for courts and debtors to determine what circumstances rise to this compelling level. Changes are needed at both the statutory and judicial levels to provide concrete standards for what constitutes a reasonably necessary educational expense. Otherwise, judicial discretion will continue to create arbitrary and inconsistent decisions regarding tuition deductions in chapter 13 cases.

IV. THE SOLUTION—A NEW REASONABLY NECESSARY STANDARD

A thorough examination of the case law yields many factors that courts consider when deciding the issue of whether private school tuition is reasonably necessary. Judges may consider any or all of these factors, making the decision difficult to predict in each case. Furthermore, the lack of a more precise standard of evaluation conflicts with Congress's intent.[295] In the legislative history concerning the relevant Code sections, Congress consistently voiced its displeasure with the vague and ambiguous nature of the statutes.[296] The Code's lack of clarity has led to judicial splits on the issue of

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291 *Id.*

292 *Id.*

293 *Id.* at 690.

294 *Id.* The *Webb* court also differentiated its case from *Ehret*, in that the debtors in *Webb* provided documentation and an explanation of the existence and nature of the dependent's disability, while the debtor in *Ehret* did not. *Compare id.*, *with In re* Ehret, 238 B.R. 85, 88 (Bankr. D.N.J. 1999).

295 *See* S. REP. NO. 98-65, at 21 (1983).

296 *Id.*

reasonably necessary expenses[297] and has given bankruptcy judges an enormous amount of discretion in such matters.[298]

Congress took a step in the right direction with the enactment of BAPCPA by defining acceptable monthly expenses for above-median income chapter 13 debtors. Specifically, BAPCPA implemented the referral to the IRS Standards,[299] which are based on annual surveys and census data.[300] Congress essentially wrote a statutory standard for deductions of items like food, clothing, healthcare, and personal care that can be adjusted without new legislation by using the amounts provided by the IRS and other government sources.[301] Despite the addition of § 707(b)(2)(A)(ii)(IV), Congress has yet to provide concrete standards for reasonably necessary educational expenses.[302] In addition, the IRS standards do not apply to below-median income chapter 13 debtors, who are still subject to the vague language of § 1325(b).[303]

Courts generally agree that a debtor's preference for private schooling, in the absence of compelling circumstances, does not meet the reasonably necessary threshold.[304] The issue, however, is that these compelling circumstances vary widely across jurisdictions, and courts have yet to unite on a single, workable test for whether a debtor's claimed tuition expenses are reasonably necessary.[305] This lack of a definitive standard has forced courts to answer "difficult questions of lifestyle and philosophy"[306] in determining a debtor's needs to deduct tuition expenses for the maintenance or support of the debtor and his family.

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297 *See In re* Johnson, 241 B.R. 394, 398 (Bankr. E.D. Tex. 1999) (noting that because there is no precise standard for what expenses are reasonably necessary, courts have scrutinized these expenses in many different ways); *see also* S. REP. NO. 98-65, at 21–22.

298 *See* Corbi, *supra* note 263, at 626; *see also* Justin Harelik, *Bankruptcy May Block Kids' Private School*, BANKRATE.COM (Apr. 5, 2011), http://www.bankrate.com/finance/debt/bankruptcy-may-block-kids-private-school.aspx; Stephen Trezza, *Private School Tuition in Chapter 13 Bankruptcy*, NAT'L BANKR. F. (June 16, 2011), http://www.nationalbankruptcyforum.com/bankruptcy-myths/private-school-tuition-in-chapter-13-bankruptcy/.

299 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(a)(2)(C), 119 Stat. 23, 27–28 (codified as amended at 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006)).

300 *See* IRM 5.15.1.7 (Oct. 2, 2009).

301 *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I).

302 *See In re* Crim, 445 B.R. 868, 871 (Bankr. M.D. Tenn. 2011) ("[T]he allowance of private school tuition as a reasonable and necessary expense is not settled law . . . .").

303 *See* NORTON, *supra* note 4, § 151:22.

304 *See, e.g.*, *In re* Cleary, 357 B.R. 369, 374 (Bankr. D.S.C. 2006); *In re* Webb, 262 B.R. 685, 690–91 (Bankr. E.D. Tex. 2001); *In re* Nicola, 244 B.R. 795, 799 (Bankr. N.D. Ill. 2000).

305 *See In re Crim*, 445 B.R. at 871 ("[T]he allowance of private school tuition as a reasonable and necessary expense is not settled law . . . .").

306 *See, e.g.*, NORTON, *supra* note 4, § 151:22.

Congress has given the bankruptcy courts a substantial amount of time to develop a standard of judicial interpretation of the legislation. It is time for the legislature to use the factors and decisions formulated by the courts to create a standard of its own concerning what constitutes a reasonably necessary tuition expense. While commentators seem to agree that the law concerning the deduction of these expenses is vague and inconsistently applied across jurisdictions,[307] they disagree as to how the Code should be amended to root out the ambiguity and broad judicial discretion relating to these expenses. Some critics have taken the extreme stance that all educational expenses should be allowed to be deducted from a chapter 13 debtor's disposable income, regardless of the tuition amount or the circumstances surrounding the deduction.[308] The better stance aligns itself more closely to the purpose of chapter 13, which is "to provide the *maximum recovery to creditors* while at the same time leaving the debtor sufficient money to pay for his or her *basic living expenses*."[309] This approach also recognizes that a debtor's creditors should not have to pay for the tuition of the debtor or the debtor's children.[310]

Several changes can be made, both at the statutory and judicial level, to create a uniform standard for courts to use when assessing whether tuition deductions are reasonably necessary. In the following subparts, this Comment proposes certain suggestions that will result in a comprehensive, structured and workable standard that all parties involved could look to in considering the deduction of educational expenses from a debtor's disposable income in a chapter 13 plan.

First, this Comment proposes that certain superfluous and preferential factors be eliminated from consideration. Next, this Comment defines a two-prong test derived from the totality of the circumstances test set forth in *Watson*. The first prong is a threshold prong, setting a ceiling for maximum tuition deductions and a floor for minimum repayment to creditors. The second prong requires the existence of a specific compelling circumstance in addition to the threshold requirements of the first prong. These changes attempt to comply with Congress's intent while also protecting the interests of both debtors and creditors.

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307 *See, e.g.*, Corbi, *supra* note 263, at 626; Harelik, *supra* note 298; Trezza, *supra* note 298.
308 Corbi, *supra* note 263, at 630.
309 *In re* Jones, 55 B.R. 462, 466 (Bankr. D. Minn. 1985) (emphases added).
310 *See, e.g.*, *In re* McNulty, 142 B.R. 106, 110 (Bankr. D.N.J. 1992).

A. Eliminating Preferences

Certain factors that have been considered in past bankruptcy proceedings should be disregarded in future cases, as these factors reveal little about the reasonableness or necessity of the tuition costs to the debtor and the debtor's dependents. A mere preference for private school is not enough for debtors to meet their burden of proof[311] because such a preference has no bearing on whether a tuition expense is reasonably necessary for the maintenance or support of the debtor and the debtor's family. The same reasoning suggests that religious beliefs and length of attendance at private school should likewise not factor into a court's decision because these factors do not make a tuition cost any more reasonably necessary.

Religious convictions, no matter how strong, should be treated as a preference for private schooling and should not factor into the decision of whether the tuition payments are reasonably necessary. While freedom of religion is a deeply rooted right in this country,[312] a preference for private schools based on a debtor's religious choice should not preempt the repayment of debt to creditors.

The framers of chapter 13 were careful to include certain provisions to ensure that bankruptcy would account for a debtor's right to practice religion. For example, § 1325(b)(2)(A)(ii) allows for the deduction of charitable contributions to qualified religious entities of up to 15% of the debtor's gross income.[313] However, these accommodations do not extend so far as to justify a debtor withholding money from creditors for tuition expenses. As the *Watson* court properly noted, denying a tuition deduction based on religious convictions does not substantially burden the debtor's right to practice his or her religion.[314] The court reasoned that its denial did not place "a substantial burden on the observation of a central belief or practice"[315] because "[e]ducation at a parochial school is not such a [central] belief."[316] Although

311 *See, e.g.*, Watson v. Boyajian (*In re* Watson), 309 B.R. 652, 661 (B.A.P. 1st Cir. 2004) (citing Univest-Coppell Vill., Ltd. v. Nelson, 204 B.R. 497, 500 (E.D. Tex. 1996)), *aff'd*, 403 F.3d 1 (1st Cir. 2005); *In re* Webb, 262 B.R. 685, 690–91 (Bankr. E.D. Tex. 2001)).

312 *See* U.S. CONST. amend. I.

313 11 U.S.C. § 1325(b)(2)(A)(ii) (2006).

314 *In re Watson*, 309 B.R. at 663–64.

315 *Id.* at 663 (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

316 *Id.* (alteration in original) (quoting Strout v. Albanese, 178 F.3d. 57, 65 (1st Cir. 1999)). It is worth pointing out that Catholicism was the religion being analyzed in *Watson*, so further inquiry would be necessary to determine if a parochial education outside the home is required by other religions.

Congress has recognized tithing as a central practice to many religions, evidenced by the inclusion of § 1325(b)(2)(A)(ii), it has not found parochial education outside of the home to be a "central belief" to religion under this framework.

Furthermore, there is no palpable way to measure the devotion of a debtor and his or her family to their religion, allowing once again for wide judicial discretion when religious beliefs are proposed as a reason why a tuition deduction is reasonably necessary. Because disallowing parochial tuition expenses does not significantly burden a debtor's ability to practice his or her religion,[317] and because there is too much judicial leeway in weighing this factor, a debtor's religious convictions should be excluded from a court's analysis.

While some bankruptcy courts have taken into account the length of time a debtor's dependent has attended private school,[318] length of attendance should not have any relevance in determining whether the tuition expenses are reasonably necessary. Logically, attending a private school for a longer period of time does not make the cost for such a school any more reasonably necessary for the maintenance or support of the debtor and the debtor's family. It is easy to understand why debtors and their dependents would prefer to stay at a school that they have attended for an extended period of time. People naturally foster relationships with peers and develop a comfort zone the longer they attend an institution. What this issue amounts to, however, is a mere preference for a private school education based on feelings and convenience. It is settled law that the mere preference for private school is insufficient to overcome a creditor's right to be repaid and does not affect the maintenance or support of a debtor's family.[319] Therefore, the length of attendance should not factor into a bankruptcy court's decision as to whether the deduction of an educational expense is reasonably necessary.

B. First Prong—Setting a Threshold for Educational Expense Deductions

Receiving a private school education is not a basic right of a debtor or a debtor's dependents[320] and has been considered a luxury or discretionary

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317 *See, e.g.*, *id.* at 663–64.

318 *See, e.g.*, *In re* Nicola, 244 B.R. 795, 799 (Bankr. N.D. Ill. 2000).

319 *See, e.g.*, *In re Watson*, 309 B.R. at 661; Univest-Coppell Vill., Ltd. v. Nelson, 204 B.R. 497, 497–98, 500 (E.D. Tex. 1996); *In re* Jones, 55 B.R. 462, 467 (Bankr. D. Minn. 1985).

320 *See, e.g.*, *In re Jones*, 55 B.R. at 467.

expense by many bankruptcy courts.[321] Although the tuition amount being deducted is always mentioned in cases involving an educational expense dispute, the weight courts give this factor varies widely across jurisdictions. Additionally, Congress's attempt to cap tuition deductions for above-median debtors has failed because § 707(b)(2)(A)(ii)(IV) only allows for a tuition amount that is inadequate for almost any private school in the United States[322] and qualifies that amount by requiring the debtor to prove that the deduction is reasonable and necessary.[323] Congress should have imposed a more realistic cap on tuition amounts and applied that cap to all chapter 13 debtors, regardless of income.

The legislature should provide debtors and the courts with an adjustable standard, as it does with the IRS Standards applied to above-median income chapter 13 debtors. One suggestion would be to use the National Center for Education Statistics' average tuition costs, which come out every three years and are divided by elementary and secondary education.[324] For this proposed cap to adhere to the overarching principle of not allowing bankrupt debtors to retain their former, unsustainable way of life,[325] the cap should be set, at a maximum, to the average tuition cost of private school. However, Congress could more properly set the cap at a point below the average because, as courts and creditors have argued, private schooling is not a basic right of citizenship in this country.[326] This cap would serve as the maximum educational expense deduction.

In conjunction with the tuition cap, the legislature should set a minimum percentage of repayment for chapter 13 debtors wishing to deduct tuition expenses from their disposable income. This minimum repayment floor would serve a screening purpose, similar to the hard cap on the amount of tuition that

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321 *See, e.g.*, *In re Watson*, 309 B.R. at 661–62; *In re* MacDonald, 222 B.R. 69, 77 (Bankr. E.D. Pa. 1998); *In re Jones*, 55 B.R. at 467.

322 *See* 151 CONG. REC. S2224 (daily ed. Mar. 8, 2005) (statement of Sen. Chris Dodd); *see also Private Elementary and Secondary Enrollment, Number of Schools, and Average Tuition, by School Level, Orientation, and Tuition: 1999–2000, 2003–04, and 2007–08*, NAT'L CTR. FOR EDUC. STAT., http://nces.ed.gov/programs/digest/d10/tables/dt10_063.asp (last visited Sept. 14, 2012).

323 11 U.S.C. § 707(b)(2)(A)(ii)(IV) (2006).

324 *See* NAT'L CTR. FOR EDUC. STAT., *supra* note 322, for an example of the National Center for Education Statistics' average tuition costs chart.

325 *See* Warren v. Taff (*In re* Taff), 10 B.R. 101, 107 (Bankr. D. Conn. 1981); S. REP. NO. 98-65, at 22 (1983).

326 *See, e.g.*, James Rodenberg, Comment, *Reasonably Necessary Expenses or Life of Riley?: The Disposable Income Test and a Chapter 13 Debtor's Lifestyle*, 56 MO. L. REV. 617, 653–54 (1991) (citing *In re Jones*, 55 B.R. at 467).

a debtor can claim. Imposing this restriction would be a further manifestation of the good faith doctrine, which heeds closely to Congress's intent concerning chapter 13.[327]

An adequate repayment amount should reasonably satisfy the chapter 13 good faith requirement.[328] Some bankruptcy courts have already developed guidelines for minimum repayment requirements to meet this good faith standard for plan confirmation.[329] Examining the methods of those courts together with statistics showing the average repayment percentage of chapter 13 debtors should yield a workable minimum percentage that debtors must repay to become eligible for an educational tuition expense deduction from disposable income.

As it currently stands, bankruptcy courts must use one of two different Code sections, § 707(b)(2)(A)(ii)(IV) or § 1325(b)(2)(A), when analyzing educational expense deductions. Applying these new suggested barriers to all debtors would provide the courts with concrete and workable guidelines and would lead to more consistent judgments across the board concerning tuition deductions from disposable income.

C. Second Prong—Compelling Circumstances

Once a debtor passes the initial threshold requirements expressed above, that debtor should then be required to show a compelling circumstance for the claimed tuition expense to be reasonably necessary. After examining the case law, only three of the factors examined in Part III of this Comment provide compelling proof that a tuition expense is reasonably necessary: (1) the inadequacy of available public schooling; (2) the special needs of a debtor or a debtor's dependent; and (3) special sacrifices made by the debtor's family. If one of these three factors is present in addition to the two threshold barriers, a court should allow the tuition expense deduction as reasonably necessary.

To show a compelling circumstance based on the inadequacy of public schooling, debtors should be required to show that the public schools in their area do not meet specific adjustable guidelines, which are similar to the IRS Standards. In choosing proper guidelines, Congress should not use average

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327 *See* S. REP. NO. 98-65, at 21.

328 11 U.S.C. § 1325(a)(3).

329 NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 267 (1997), *available at* http://govinfo.library.unt.edu/nbrc/report/08consum.pdf.

standardized test scores as the baseline as the court in *Nicola* did.[330] The reason is that not all schoolchildren, even those whose families pay their bills and are not bankrupt, are able to attend "average" public schools. Additionally, standardized test scores do not always mirror the quality of the education available at a public school.[331]

A better procedure would be to use the list of schools that do not meet the adequate yearly progress ("AYP") requirements[332] of the No Child Left Behind Act ("NCLB") to determine whether the quality of the public school in question is adequate.[333] According to the provisions of NCLB, states must identify schools that do not meet the AYP requirements for two consecutive years.[334] If the public school in the debtor's school district is identified as one of the schools needing improvement, then the debtor should be able to claim this as a compelling circumstance.

Another compelling circumstance to justify a tuition deduction as reasonably necessary may exist if a dependent of the debtor has special learning needs. Many children have unique learning needs, and debtors with such children should have the opportunity to demonstrate that their child requires a special learning environment. While public schooling is sufficient for the vast majority of students, it would be fundamentally wrong to deprive a student with legitimate special needs from his or her right to learn, and these students may require alternative schooling to meet their needs.

The proposed modification would require the debtor to provide specific proof that a compelling circumstance exists. If a child has a learning disability or a health condition that affects his or her ability to learn, bankruptcy courts should require proof of such claims through the expert testimony of a certified psychiatrist, physician, or psychologist. This modification would allow the court to rely on the experience and observations of an expert, rather than on the court's ability to discern the child's needs. If the debtor demonstrates a compelling need through such testimony and the debtor meets the threshold

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330 *See In re* Nicola, 244 B.R. 795, 799 (Bankr. N.D. Ill. 2000).

331 *See* W. James Popham, *Why Standardized Tests Don't Measure Educational Quality*, 56 EDUC. LEADERSHIP, Mar. 1999, at 8, 10.

332 No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(2) (2006).

333 *See generally* Letter from Rod Paige, Sec'y of Educ., U.S. Dep't of Educ., to Colleague (July 24, 2002), *available at* http://www2.ed.gov/print/policy/elsec/guid/secletter/020724.html.

334 20 U.S.C. § 6316(b)(1)(A) ("[A] local educational agency shall identify for school improvement any elementary school or secondary school served under this part that fails, for 2 consecutive years, to make adequate yearly progress . . . .").

requirements,[335] then a court should find the tuition expense claim to be reasonably necessary for the maintenance or support of the debtor and his or her family.

The interaction between the tuition hard cap and the special needs compelling circumstance is important to address because special needs education is often quite costly.[336] However, as noted in *Ehret*, funding for special education students is protected by IDEA.[337] Courts have interpreted IDEA to require local school districts to reimburse the costs of placing a special needs student in a private school if the student's needs are not being met at a public school.[338] Therefore, if a debtor can show a special needs compelling circumstance and the public school is not providing an appropriate education, a court should grant a deduction of the cap amount and order the local school district to pay the remainder of the private school costs. This remedy would comply with IDEA's mandate that a "free and appropriate education" be available to all special needs students.[339] This would then relieve the debtor of any tuition expense, rendering the dispute regarding the reasonable necessity of the tuition deduction a moot point. Alternatively, as pointed out by the court in *Crim*, the difference could be covered by § 707(b)(2)(A)(ii)(II), which allows for reasonable and necessary expenses for the care and support of a chronically ill dependent.[340]

The financial sacrifices a debtor makes to continue payment of tuition expenses should be considered a compelling circumstance if the debtor makes the sacrifices in good faith. If a debtor believes that an education expense is more important than another reasonably necessary expense, such as personal care products or cell phone expenses,[341] the courts should not prohibit that

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335 *See supra* Part IV.B.

336 *See* Matt Carroll, *Costly Schooling*, BOS. GLOBE (Jan. 7, 2010) http://www.boston.com/news/education/k_12/articles/2010/01/07/special_education_costs_soaring_in_area_school_districts/?page=1 (noting that special education costs have grown at double the rate of regular school budgets in the Boston area).

337 *See In re* Ehret, 238 B.R. 85, 88 (Bankr. D.N.J. 1999) (citing 20 U.S.C. § 1412(1).

338 *See* Florence Cnty. Sch. Dist. Four v. Carter *ex rel.* Carter, 510 U.S. 7, 9–10 (1993); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985); Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 247–49 (3d Cir. 1999). S*ee generally* John E. Theuman, Annotation, *Obligation of Public Educational Agencies, Under Individuals With Disabilities Education Act (20 U.S.C.A §§ 1400 et seq.), to Pay Tuition Costs for Students Unilaterally Placed in Private Schools—Post*-Burlington *Cases*, 152 A.L.R. FED. 485 § 3[c] (1999).

339 *See Florence Cnty. Sch. Dist. Four*, 510 U.S. at 9.

340 *See In re* Crim, 445 B.R. 868, 871 n.1 (Bankr. M.D. Tenn. 2011).

341 *See* IRM 5.15.1.9(1) (Oct. 2, 2009).

debtor from sacrificing those deductions for the tuition expense. Therefore, a definitive standard should also be created for sacrifices made by debtors wishing to deduct educational expenses.

The IRS Standards, which should be applied to all chapter 13 debtors, explicitly list many of the expenses that are considered reasonably necessary,[342] while the applicable Code sections list others.[343] If a debtor wants to claim that a tuition cost is reasonably necessary for the maintenance or support of the debtor or the debtor's dependents on the basis that other sacrifices are being made, the debtor should be required to show that other statutorily acceptable expenses, equaling or exceeding the tuition deduction, are being included in the disposable income in place of the tuition deduction.

CONCLUSION

The law concerning chapter 13 tuition expense deductions is plagued with inconsistency and lacks sufficiently defined standards of evaluation for courts to follow. The vague guidelines provided by the Code have created a system in which bankruptcy judges can arbitrarily decide whether tuition expenses are reasonably necessary for the maintenance or support of the debtor and the debtor's dependents. The current system makes it difficult for debtors and objecting creditors to predict whether a tuition deduction will be upheld or shifted to the debtor's disposable income to be paid to the creditors.

Congress clearly intended for definite standards to be created concerning the amount of disposable income to be committed to a chapter 13 plan. Although Congress provided adequate standards for other deductions, it failed to provide a definite standard for what constitutes a reasonably necessary education deduction. The only standards at present are ad hoc tests developed by the bankruptcy courts. The fact that a majority of courts have yet to agree on a test for determining whether an education deduction is reasonably necessary is proof that this is a difficult issue to resolve. However, creating the definite standards that Congress envisioned is still possible.

Having observed the diverging and unpredictable results caused by the current system over the past three decades, lawmakers must finally reform the Code as it pertains to chapter 13 tuition deductions. Private school education is not a basic right; debtors wishing to avail themselves of the benefits of chapter

342 *See generally id.* at 5.15.1.7.–10.
343 *See* 11 U.S.C. §§ 707(b)(2)(A)(ii), 1325(b)(2) (2006).

13 bankruptcy should still be required make sacrifices and lifestyle changes as part of a good faith effort to repay creditors.

First, for a debtor to deduct any educational expenses from disposable income, the deduction should be capped at a defined and adjustable amount, and the good faith plan should provide for a minimum percentage of debt repayment. Second, in addition to these boundaries, a debtor should be required to demonstrate that a compelling circumstance exists which makes the tuition deduction reasonably necessary for the maintenance or support of the debtor and the debtor's dependents. A mere preference for attending private school—whether such preference is based on religious convictions, length of attendance, or otherwise—should not be considered in establishing a compelling circumstance. Rather, the debtor should have to prove that the public schools in the debtor's area are not meeting the AYP requirements of NCLB, that the debtor or dependent has documented special learning needs that require a unique school environment, or that the debtor has sacrificed other recognized necessary expenses to show that a compelling circumstance exists. The new approach that this Comment proposes would provide courts, debtors, and creditors with a definite set of rules on which to base their decisions, claims, and objections concerning whether a tuition deduction from disposable income is reasonably necessary for the maintenance or support of the chapter 13 debtor or the debtor's dependents.

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