2009

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Publication Information
Jay E. Grenig, When is a Student Entitled to Be Reimbursed for the Cost of Private School Tuition?, 36 Preview U.S. Sup. Ct. Cas. 393 (2009).

When Is a Student Entitled to Be Reimbursed for the Cost of Private School Tuition?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 393–399. © 2009 American Bar Association.

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Issue

The Supreme Court is being asked to decide whether the reference in the Individuals with Disabilities Education Act (20 U.S.C. § 1412(a)(10)(C)) to students "who previously received special education and related services" bars private school reimbursement for students who have not "previously received special education and related services," or whether those students remain eligible for private school reimbursement, as they were before 1997, under principles of equity pursuant to 20 U.S.C. § 1415(i)(2)(C).

Facts

T.A. is a former student of the Forest Grove School District (the school district) in Oregon. He was born on September 11, 1985, and enrolled in that school district from kindergarten until the spring semester of his junior year in high school. At that time, T.A.'s parents removed him from public school and enrolled him in a residential private school. Throughout his time in public school, T.A. experienced difficulty paying attention in class and completing his schoolwork. However, T.A. successfully passed from grade to grade due, in part, to extensive at-home help from his parents and sister. T.A. never received special education or related services from the school district.

During his time in public school, the school district evaluated T.A. for a disability on one occasion. In December 2000, T.A.'s guidance counselor suspected T.A. might have a learning disability and referred him for an evaluation for special education services. In internal meetings in early 2001, the school district's staff discussed the possibility that T.A. might have Attention Deficit Hyperactivity Disorder (ADHD). The notes from a January

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Forest Grove School District v. T.A.
Docket No. 08-305

Argument Date:
April 28, 2009
From: The Ninth Circuit

Case at a Glance

A former student at Forest Grove School District is seeking reimbursement under the Individuals with Disabilities Education Act (IDEA) for his expenses in attending a private school although he never received special education and related services from the public school. The Court is being asked to determine whether such a student is barred as a matter of law from receiving reimbursement for private school education in these circumstances.

16, 2001, meeting state "Maybe ADD/ADHD?" and the notes from a February 13, 2001, meeting mention "suspected ADHD." T.A.'s parents were neither present at the meetings nor informed of the School District staff's suspicion that T.A. might have ADHD. T.A.'s parents did not request an evaluation for ADHD, and T.A. was evaluated only for a learning disability.

Several psychologists and educational specialists examined T.A. and administered tests throughout the first half of 2001. On June 13, 2001, the team of specialists unanimously concluded that T.A. did not have a learning disability and therefore was ineligible for special education. T.A.'s mother, who attended the meeting, agreed with that determination. The school psychologist completed his report in September 2001, stating that T.A. was not eligible for special education under the Individuals with Disabilities Education Act (IDEA) on the basis of a learning disability.

At some point during 2002, T.A. began using marijuana. In early 2003, his use became regular, and he exhibited noticeable personality changes. On February 11, 2003, T.A. ran away from home. The police brought him back a few days later. T.A.'s parents took him to a psychologist and, eventually, to a hospital emergency room.

A psychologist, hired by T.A.'s parents, met with T.A. a number of times in early 2003. The psychologist held several lengthy sessions immediately after T.A. ran away from home. On March 15, 2003, the psychologist diagnosed T.A. with ADHD, depression, math disorder, and cannabis abuse. The psychologist recommended a residential program for T.A. because of T.A.'s failure to live up to his potential in school, his difficulties at home, his attitude toward school, his sense of hopelessness, and his drug problem.

In response to T.A.'s behavior, T.A.'s parents removed him from the School District's public high school and, in March 2003, sent him to a three-week program at Catherine Freer Wilderness Therapy Expeditions. The discharge report written by Freer's staff identified T.A.'s primary diagnosis as cannabis dependence and his secondary diagnosis as depression.

Soon after T.A. completed the Freer Expedition, on March 24, 2003, his parents enrolled him in Mount Bachelor Academy, a residential private school that describes itself as "designed for children who may have academic, behavioral, emotional, or motivational problems." On March 28, 2003, four days after enrolling T.A. at Mount Bachelor Academy, T.A.'s parents hired a lawyer. On April 18, 2003, they requested a hearing and sought (among other remedies) an order requiring the school district to evaluate T.A. in all areas of suspected disability. The Office of Administrative Hearings for the State of Oregon initiated a hearing in May 2003, but the assigned hearing officer continued the matter to allow the school district to evaluate T.A.

During the summer months of 2003, several medical and educational specialists from the school district evaluated T.A. On July 7, 2003, a multidisciplinary team of school officials convened to determine T.A.'s eligibility under IDEA. The team acknowledged T.A.'s learning difficulties, his diagnosis of ADHD, and his depression, but a majority found that T.A. did not qualify under IDEA in the areas of learning disability, ADHD, or depression, because those diagnoses did not have a severe effect on T.A.'s educational performance. On August 26, 2003, a similar team convened and determined that T.A. was ineligible for services.

The administrative hearing then resumed in September 2003. Both parties submitted evidence. The evidence included the extensive history recounted above. In addition, another psychologist examined T.A.'s records and testified at the hearing that T.A.'s ADHD "seems to be more of a secondary, possibly, tertiary" cause of his difficulties. The psychologist concluded T.A. would be able to complete public high school without any services beyond those given to all students. She did state, however, that the references to the possibility of ADHD in the meeting notes following the 2001 referral would have caused her to evaluate T.A. for ADHD.

On January 26, 2004, the hearing officer issued a lengthy opinion that contained extensive findings of fact and conclusions of law. She held that T.A. was disabled and therefore eligible for special education under IDEA; that the school district had failed to offer T.A. a free appropriate public education; that the school district was not responsible for the costs of the Freer Expedition or the evaluation by the psychologist; but that the school district was responsible for the costs of sending T.A. to Mount Bachelor Academy. Monthly tuition at Mount Bachelor Academy was $5,200.

Although T.A. committed a number of serious rule violations at Mount Bachelor Academy, he graduated in June 2004. He also would have graduated from public high school in 2004 had he remained there.

The school district appealed the hearing officer's decision to the U.S. District Court for the District of Oregon, arguing that the hearing officer erred by granting reimburse-

ment for T.A.'s tuition at Mount Bachelor Academy. The school district argued that reimbursement was unwarranted because T.A. unilaterally withdrew from public school without providing prior notice to the school district, he never received special education and related services from the school district, and he withdrew for reasons unrelated to his disability (that is, substance abuse and behavioral problems).

The district court reversed the hearing officer's grant of reimbursement to T.A. The court adopted all of the hearing officer's findings of fact, but held that the hearing officer had erred as a matter of law in granting private school reimbursement. The district court held that T.A. was statutorily ineligible for reimbursement under 20 U.S.C. § 1412(a)(10)(C). The court also held that, "[e]ven assuming that tuition reimbursement may be ordered … under general principles of equity … the facts in this case do not support such an exercise of equity."

T.A. appealed to the U.S. Court of Appeals for the Ninth Circuit. In a 2-1 decision, the Ninth Circuit reversed, holding that students who have not previously received special education services are nonetheless eligible for tuition reimbursement under an IDEA provision (20 U.S.C. § 1415(i)(2)(C)) authorizing appropriate relief. *Forest Grove School District v. T.A.,* 523 F.3d 1078 (9th Cir. 2008). The court emphasized that the express purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education." According to the court, interpreting the 1997 amendments as categorically prohibiting reimbursement to students who have not yet received special education and related services runs contrary to this express purpose. Additionally, the court said it would lead to the absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate the special education. If the school district declined to recognize a student as disabled, the court reasoned that the student would never receive special education in public school and therefore would never be eligible for reimbursement under 20 U.S.C. § 1412(a)(10)(C)(ii).

In deciding whether a student who had not previously received special education services was eligible for tuition reimbursement under 20 U.S.C. § 1415(i)(2)(C), the majority said a district court could not consider requirements of 20 U.S.C. § 1412(a)(10)(C) authorizing tuition reimbursement for students who had previously received such services. The majority stated that relief under 20 U.S.C. 1415(i)(2)(C) for a student who has not previously received special education services is not limited to extreme cases.

In deciding whether T.A. was eligible for tuition reimbursement under 20 U.S.C. § 1415(i)(2)(C), the majority observed that the district court would be within its discretion to consider parents' notice to school district as relevant factor. The majority ruled that factors to be considered by a district court, in deciding whether T.A. is eligible for tuition reimbursement under 20 U.S.C. § 1415(i)(2)(C) include the existence of other, more suitable placements, the effort expended by his parents in securing alternative placements, and the general cooperative or uncooperative position of the school district. The majority stated that it would be within the court's discretion to consider that the hearing officer found that T.A.'s parents sent him to private school not only because of his disabilities, but also for substance abuse and behavioral problems.

The dissenting judge asserted that prior Supreme Court cases and regulations of the Department of Education indicate that tuition reimbursement for unilateral private placements is available under principles of equity only when the IDEA requirement for a "free and appropriate public education" (FAPE) was at issue before the child was withdrawn from public school and the school district had improperly denied a free and appropriate education. Even if Congress meant the 1997 amendments to preserve equitable reimbursement when the child has never been enrolled in special education and related services, the judge doubted it intended to expand the principle.

The dissenting judge pointed out that, in 2001, while T.A. was in public school, T.A.'s mother explicitly agreed with the school district's assessment that T.A. was not eligible for special education services. She noted that T.A. was taken out of public school and enrolled in a three-week wilderness program because he had begun to binge on marijuana and had run away from home in early 2003; no Individual Education Plan (IEP) had been requested, proposed, or disputed before then; no IEP was on the table prior to T.A.'s enrollment at Mount Bachelor Academy. Because she believed T.A.'s parents decided to put him in a private school for reasons of their own, the dissenting judge concluded that T.A.'s parents had no right to equitable, retroactive reimbursement for private placement expenses.

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The dissent reasoned that, if FAPE were not at issue and T.A. was not receiving special education and related services before withdrawal from public school, he was being provided a free appropriate public education. The judge stated that, under 20 U.S.C. § 1412(a)(10)(C)(i), a local educational agency that has made a free appropriate public education available has no obligation to pay the cost of education (including special education and related services) of a child with a disability at a private school when the parents elect the private placement. If a child has previously received special education and related services, the dissent observed, costs of a private placement may be reimbursed under 20 U.S.C. § 1412(a)(10(C)(ii) if a court or hearing officer finds that the school district had not made a free appropriate public education available to the child in a timely manner prior to the private enrollment.

The U.S. Supreme Court granted the school district's petition for review. 129 S. Ct. 987 (2009).

Case Analysis

IDEA (20 U.S.C. §§ 1400–1482) seeks to ensure that all disabled children have available to them a free appropriate public education (FAPE). While IDEA does not require public schools to maximize the potential of disabled children, they must provide such children with meaningful access to education. A free appropriate public education under IDEA must include special education and related services tailored to meet the unique needs of a particular child and must be reasonably calculated to enable the child to receive educational benefits.

The key element of IDEA is development of an Individualized Education Program (IEP) for each disabled child, including a comprehensive statement of the educational needs of the disabled child and the specially designed instruction and related services to be employed to meet those needs. In developing a child's IEP, a Committee on Special Education is required to consider four factors: (1) academic achievement and learning characteristics, (2) social development, (3) physical development, and (4) managerial or behavioral needs.

If a public school fails in its obligation under IDEA to provide a free appropriate public education to a disabled child, the parents may enroll the child in a private school. They then may seek reimbursement from the school district for the cost of the private school without the consent of the public school if the child "previously received special education and related services under the authority of the district." 20 U.S.C. § 1412(a)(1)(C)(ii). In addition, IDEA does not require a school district "to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(1)(C)(i).

Prior to 1997, IDEA was silent with regard to private school reimbursement, but courts had granted such reimbursement as "appropriate" relief under principles of equity pursuant to 20 U.S.C. § 1415(i)(2)(C), which provides that a court "shall grant such relief as the court determines appropriate" for violation of the IDEA. See *School Committee of Town of Burlington v. Dept. of Education,* 471 U.S. 359 (1985). See also *Florence County School Dist. 4 v. Carter ex rel. Carter,* 510 U.S. 7 (1993). Congress amended IDEA in 1997 to include a new section entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). Clause (ii) of the new statutory section states:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

T.A. concedes he did not meet the statutory requirements under 20 U.S.C. § 1412(a)(12)(C)(ii) because he had not "previously received special education and related services." Instead, the crux of T.A.'s argument is that, because the school district had failed to provide him a free and appropriate education in a public school, the district's failure to reimburse him for private school tuition would deny him a FAPE altogether and thereby result in the district shirking its responsibilities under IDEA.

The school district first points out that IDEA is a Spending Clause statute, and under the Spending Clause Congress is required to give clear notice of any obligation it imposes on states as a condition of receiving federal funds. Far from unambiguously notifying public school districts that they may be liable for tuition reimbursement awards to parents who unilaterally place in private school a child, like

T.A., who did not previously receive special education services from the district, the school district asserts that the 1997 amendments to IDEA clearly preclude such awards. According to the school district, this conclusion flows from the text, structure, and history of the 1997 amendments, which set forth in detail the circumstances under which school districts are responsible for tuition reimbursement.

T.A. responds that the school district's reliance on the Spending Clause is misplaced. First, T.A. says that the remedy of reimbursement is not a form of damages, but merely a requirement that the school district belatedly pay expenses it should have paid all along and that it would have borne in the first instance had it developed a proper IEP. Second, T.A. contends school districts have clear notice of their potential liability for tuition reimbursement if they fail to provide a free appropriate public education to a child with a disability. Finally, T.A. asserts that states were clearly informed by the Department of Education that the 1997 amendments did not alter the state's obligation to provide tuition reimbursement in appropriate cases where a FAPE has been denied.

The school district next claims that even if the statutory text were ambiguous regarding a school district's tuition reimbursement obligation to students like T.A., the Ninth Circuit erred in resolving that ambiguity against the District. Under the Supreme Court's Spending Clause jurisprudence, the school district says such ambiguities must be resolved in the State's favor, not the claimant's. Because T.A. admits he did not receive special education services from the District prior to enrolling in the private school, the school district declares tuition reimbursement is a remedy that is unavailable.

In response, T.A. argues that IDEA's plain terms permit tuition reimbursement where a school district fails to make available a FAPE. According to T.A., the school district's interpretation of 20 U.S.C. § 1412(a)(12)(C)(ii) is directly at odds with the plain meaning of 20 U.S.C. § 1412(a)(12)(C)(i). T.A. asserts its construction harmonizes and gives meaning to all provisions of IDEA. Further, T.A. says its construction is consistent with the legislative history of the 1997 amendments.

T.A. further argues that the Secretary of Education's construction of the 1997 amendments is entitled to deference. According to T.A., the Department of Education explicitly addressed the question in this case in commentary published in the *Federal Register* accompanying the Department's final regulations implementing the 1997 amendments. The commentary provided that hearing officers and courts retained their authority under 20 U.S.C. § 1415(i)(2)(C)(iii) to award appropriate relief in the form of private tuition reimbursement if a public agency has failed to offer a FAPE to a child with a disability in instances in which the child has not yet received special education and related services. T.A. points out the regulations and commentary were issued by the agency with authority to construe and enforce IDEA.

According to the school district, the Ninth Circuit's reliance on the Department of Education's interpretive commentary is unavailing. The school district argues that no deference is owed because IDEA itself clearly precludes tuition reimbursement here.

The school district next asserts the argument that IDEA does not promote the overarching goal of providing a FAPE to all disabled children at the expense of fiscal and other considerations reflected in Congress's decision to foreclose tuition reimbursement in cases like these. T.A. disagrees, saying that, at a minimum, no negative inference from 20 U.S.C. § 1412(a)(12)(C)(ii) could bar reimbursement where the district wrongly determines eligibility. T.A. declares that the school district is barred by fundamental principles of equity from using its erroneous eligibility determination as a ground for avoiding reimbursement.

T.A. reasons that school districts are required to find and evaluate children with disabilities enrolled in private schools and prepare an IEP for those students. T.A. contends that under the school district's reading, districts could then deny such children an appropriate education with impunity because the children had not previously received an appropriate education or special education services. T.A. declares that IDEA's purposes would be poorly served by precluding reimbursement solely because the district denied the children all special education services.

Finally, the school district says the Ninth Circuit wrongly concluded that the district's reading of IDEA leads to absurd results. It asserts that the numerous procedural protections provided by IDEA ensure that disabled children will not languish if parents cannot recover tuition reimbursement for children who have not previously received special education services.

T.A., however, contends that the school district's reading of IDEA would create perverse incentives that Congress did not intend. Under the school district's approach, T.A. argues, the parents of a child with a disability who has wrongly been denied all special education services

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would be barred from recovering the costs of private special education services, even if they have acted diligently and reasonably to obtain those services from the public school.

T.A. lastly argues that the school district is barred by fundamental principles of equity from using its erroneous eligibility determination as a ground for avoiding reimbursement. He says that nothing in the 1997 amendments alters the equitable nature of the reimbursement remedy. T.A. asserts equity does not allow the school district to come to court and claim immunity based on an asserted statutory condition that the child must have previously received special education services from the district when its own violation of its statutory duties caused the child's asserted failure of the condition.

Significance

This case will allow the Court to address splits amongst the circuit courts of appeals. For example, the Second Circuit has ruled that, when a student's enrollment in private school was appropriate for his needs, IDEA did not preclude reimbursement although the student had not previously received special education and related services from public schools. *Frank G. v. Board of Education of Hyde Park,* 459 F.3d 356 (2d Cir. 2006).

Similarly, the Eleventh Circuit, in *M.M. v. School Board of Miami-Dade County,* 437 F.3d 1085 (11th Cir. 2006), held that a school district's "[s]ole reliance on the fact that [a child] never attended public school is legally insufficient to deny reimbursement under § 1412(a)(10)(C)(ii)." The Eleventh Circuit based this decision on the broad equitable powers of courts and hearing officers under 20 U.S.C. § 1415. The court further stated that "even when a child has never enrolled in a public school, reimbursement is proper if the School Board [has] failed to offer a sufficient IEP and in turn, a FAPE."

On the other hand, in *Greenland School District v. Amy N.,* 358 F.3d 150, 159-60 (1st Cir. 2004), the U.S. Court of Appeals for the First Circuit observed that "tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school (or perhaps those who at least timely requested such services while the child is in public school." However, in that case, the parents removed their daughter from public school and placed her in private school "without ever before raising with the school officials the issue of special education services for [their daughter]."

The Court has recently had the opportunity to look at other special education cases and has considered two special education cases in the last three years. Declaring that Spending Clause legislation that attaches conditions to a state's acceptance of federal funds must provide clear notice of conditions, the Court held, in a 5-4 decision, that a nonattorney expert's fees for services rendered to prevailing parents in an IDEA action are not "costs" recoverable from the state under the IDEA's fee-shifting provision. *Arlington Central School District Board of Education v. Murphy,* 548 U.S. 291 (2006). Later, in *Winkelman ex rel. Winkelman v. Parma City School District,* 550 U.S. 516 (2007), the Supreme Court held that because parents enjoy rights under IDEA, they are entitled to prosecute IDEA claims on their own behalf. And in *Board of Education v. Tom F.,* No. 06-637 (October 10, 2007), an equally divided Court affirmed the second Circuit's ruling in favor of a school district that had contended that the parents of a child who had been properly determined to have a qualifying disability must give a proposed public placement a try before enrolling the child in private school and seeking tuition reimbursement.

Adopting the school district's interpretation of IDEA could leave many children who have been denied a FAPE with no effective remedy. These would include students enrolled in both public and private schools who—in the school board's view—have not previously received special education and related services under the authority of a public agency. This group includes (1) public school students whose disabilities were only recently diagnosed but whose proposed individualized education program for the following school year does not provide a FAPE, (2) public school students who were promised certain services under an individualized education program but who have not received those services in a timely manner, and (3) children entering public school for the first time who were not identified through the IDEA provision requiring the identification of students with special needs who don't attend public school.

On the other hand, adopting T.A.'s view of IDEA could place burdens on the states that Congress never meant to impose. The tuition for one student in a private boarding school can exceed $75,000 a year. This could mean less money available for other educational programs in a school district.

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