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## *Forest Grove: Parents of Special Needs Students May Be Reimbursed for Private School Tuition*

by Jay E. Grenig

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In recent years, and again during the past term, the Supreme Court has begun to look at the rights of an important population of children, those with disabilities. First, the Court considered two special education cases during the 2006 and 2007 terms. 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 non-attorney expert's fees for services rendered to prevailing parents in an Individuals with Disabilities Education Act (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 the IDEA claims on their own behalf. In the 2009 term, the Supreme Court decided a third special education case, this time regarding parents' right to reimbursement for private education tuition under the IDEA (20 U.S.C. §§ 1400-1482).

The IDEA seeks to ensure that all disabled children have access to a free appropriate public education (FAPE). While the IDEA does not require public schools to maximize the potential of dis-

abled children, they must provide such children with meaningful access to education. A FAPE under the 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 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 [usually the school district] made a free appropriate publication 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). However, if a public school fails in its obligation under the IDEA to provide a FAPE to a disabled child, the parents may enroll the child in a private school and seek reimbursement from the school district for the cost of the private school. This can be done 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).

Nevertheless, this wasn't a settled issue, and up until this most recent Supreme Court term, remained in flux. Prior to 1997, the 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 the IDEA in 1997 to include a new section entitled "Payment for education of children

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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.

Even with this new statutory language, the circuit courts of appeal have still been split regarding reimbursement for private school tuition. The Second Circuit ruled that, when a student’s enrollment in private school was appropriate for his needs, the 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). 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 was legally insufficient to deny reimbursement under § 1412(a)(10) (C)(ii)” because of the broad equitable powers of courts and hearing officers under 20 U.S.C. § 1415. The court 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.”

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].”

On the other hand, the Ninth Circuit took a different view. In *Forest Grove School District v. T.A.*, 523 F.3d 1078 (9th Cir. 2008), the Ninth Circuit held 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.

The Supreme Court affirmed the Ninth Circuit in *Forest Grove School District v. T.A.*, 2009 WL 1738644 (U.S. June 22, 2009). The Supreme Court had previously declined to grant certiorari in the Second Circuit’s *Hyde Park* decision even though it presented the same issue as *Forest Grove*. However, Justice Kennedy did not participate in the *Hyde Park* certiorari decision whereas he joined the majority in *Forest Grove*.

The case is a compelling story of a set of parents’ persistent efforts to deal with the myriad problems of an adolescent son. T.A. attended public schools in the Forest Grove School District (the District) from the time he was in kindergarten through the winter of his junior year of high school. From kindergarten through eighth grade, T.A.’s teachers observed he had trouble paying attention in class and completing his assignments. When T.A. entered high school, his difficulties increased.

In December 2000, during T.A.’s freshman year, his mother contacted the school counselor to discuss T.A.’s problems with his schoolwork. At the end of the school year, a school psychologist evaluated T.A. After interviewing T.A., examining his school records, and administering cognitive ability tests, the psychologist concluded T.A. did not need further testing for any learning disabilities or other health impairments, including attention deficit hyperactivity disorder (ADHD). The psychologist and two other school officials discussed the evaluation results with T.A.’s mother in June 2001, and all agreed T.A. did not qualify for special education services. T.A.’s parents did not seek review of that decision.

With extensive help from his family, T.A. completed his sophomore year at Forest Grove High School, but his problems worsened the following year. In February 2003, T.A.’s parents discussed with the school district the possibility of T.A.’s completing high school through a partnership program with the local community college. They also

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sought private professional advice, and in March 2003 T.A. was diagnosed with ADHD and a number of disabilities related to learning and memory. Advised by the private specialist that T.A. would do best in a structured, residential learning environment, T.A.'s parents enrolled him in a private academy focused on educating children with special needs.

Four days after enrolling T.A. in private school, T.A.'s parents hired a lawyer to determine their rights and to give the District written notice of T.A.'s private placement. A few weeks later, in April 2003, T.A.'s parents requested an administrative due process hearing regarding T.A.'s eligibility for special education services. In June 2003, the District engaged a school psychologist to assist in determining whether T.A. had a disability that significantly interfered with his educational performance. T.A.'s parents cooperated with the District during the evaluation process. In July 2003, a multidisciplinary team met to discuss whether T.A. satisfied the IDEA's disability criteria and concluded he did not because his ADHD did not have a sufficiently significant adverse impact on his educational performance. The District maintained that T.A. was not eligible for special education services and therefore it declined to provide an individualized education program (IEP). (An IEP is an education plan tailored to a child's unique needs that is designed by the school district in consultation with the child's parents after the child is identified as eligible for special education services.)

T.A.'s parents consequently kept him enrolled at the private academy for his senior year.

The administrative review process resumed in September 2003, when T.A.'s parents brought the case before a hearing officer to challenge the District's decision to classify T.A. as being ineligible for special education services and asking for reimbursement for the private school tuition. After considering the parties' evidence, including the testimony of numerous experts, the hearing officer issued a decision in January 2004 finding that T.A.'s ADHD adversely affected his educational performance and that the District had failed to meet its obligations under the IDEA by not identifying T.A. as a student eligible for special education services. Because the District did not offer T.A. a FAPE and his private school placement was appropriate under IDEA, the hearing officer

ordered the District to reimburse T.A.'s parents for the cost of the private school tuition.

The District in turn sought judicial review, arguing the hearing officer erred in granting reimbursement. The district court accepted the hearing officer's findings of fact but set aside the reimbursement award after finding that the IDEA 1997 amendments categorically bar reimbursement of private school tuition for students who have not "previously received special education and related services under the authority of a public agency." The district court further held that, "[e]ven assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities," the facts of this case do not support equitable relief.

T.A.'s parents appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed and remanded for further proceedings, noting that, prior to the 1997 Amendments, "IDEA was silent on the subject of 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)." *Forest Grove School District v. T.A.*, 523 F.3d 1078 (9th Cir. 2008). The court then held that the amendments do not impose a categorical bar to reimbursement when a parent unilaterally places in private school a child who has not previously received special education services through the public school. Rather, such students "are eligible for reimbursement, to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to § 1415(i)(2)(C)."

The court of appeals also rejected the district court's analysis of the equities as resting on two legal errors. First, because the district court found that § 1412(a)(10)(C)(ii) generally bars relief in these circumstances, the court of appeals held that the district court was wrong when it stated that relief was appropriate only if the equities were sufficient to "override" that statutory limitation. According to the court of appeals, the district court also erred in asserting that reimbursement is limited to "extreme" cases. The court of appeals remanded the case to the district court with instructions to reexamine the equities, including the failure of T.A.'s parents to notify the District before removing T.A. from public school.

The U.S. Supreme Court granted the District's petition for review. Reversing the Ninth Circuit, the Supreme Court, in a 6-3 vote, held that the 1997 amendments to the IDEA did not categorically bar reimbursement of private education tuition where a child had not previously received special education and related services.

The Court began by examining *School Committee of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359 (1996). In that case, a father challenged the appropriateness of the IEP developed for his child by public school officials. His child had previously received special education services through the public school. While administrative review was pending, private specialists advised the father that his child would do best in a specialized private educational setting. The father enrolled his child in private school without the school district's consent. The hearing officer concluded the IEP was not adequate to meet the child's educational needs and the school district had failed to provide the child a FAPE. Finding also that the private school placement was appropriate under IDEA, the hearing officer ordered the school district to reimburse the father for the cost of the private school tuition.

At that time, the IDEA made no express reference to the possibility of reimbursement, but instead authorized a court to "grant such relief as the court determines is appropriate." In determining the scope of the relief authorized, the Court noted that "the ordinary meaning of these words confers broad discretion on the court" and that, absent any indication to the contrary, what relief is "appropriate" must be determined in light of the Act's broad purpose of providing children with disabilities a FAPE, including through publicly funded private school placements when necessary. Accordingly, the Court held that the provision's grant of authority includes "the power to order school authorities to reimburse parents for their expenditures on private special-education services if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."

The Court in *Forest Grove* observed that its decision in *Burlington* rested in part on the fact that administrative and judicial review of a parent's complaint often takes years. The *Burlington* Court concluded that, having mandated that participating states provide a FAPE for every student,

Congress could not have intended to require parents to either accept an inadequate public school education pending adjudication of their claim or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act. See also *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993) (holding that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the state).

The *Forest Grove* Court did contrast the present dispute from those in *Burlington* and *Carter*. According to the Court, *Forest Grove* concerned not the adequacy of a proposed IEP, but the District's complete failure to provide an IEP to begin with. The Court noted that, unlike T.A., the children in the earlier cases had previously received public special education services. According to the Court, when a child requires special education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under the IDEA as a failure to provide an adequate IEP. Because of this, the Court said it was clear that the reasoning of *Burlington* and *Carter* applies equally to this case—the only question being whether the 1997 amendments required a different result.

According to the Court, the 1997 amendments do not expressly prohibit reimbursement under the given circumstances, and the District offered no evidence that Congress intended to supersede the decisions in *Burlington* and *Carter*. The Court explained that the amendment explicitly bars reimbursement only when a school district makes a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child's needs. According to the Court, the amendments say nothing to prohibit reimbursement when a school district fails to make a FAPE available altogether.

The Court said its reading of § 1412(a)(10)(C) was necessary to avoid the conclusion that Congress abrogated *sub silentio* (without notice) the Court's decisions in *Burlington* and *Carter*. In coming to its decision in *Forest Grove*, the Court pointed out that it construed the IDEA to authorize reimbursement when a school district fails to provide a FAPE and a child's private school placement is appropriate, without regard to the child's

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prior receipt of services in *Burlington* and *Carter*. The Court further declared that it would take more than Congress's failure to comment on the category of cases in which a child has not previously received special education services for the Court to conclude that the amendments substantially superseded the Court's decisions and in large part repealed § 1415(i)(2)(C)(iii).

The Court also pointed out that the Department of Education (the Department), the agency charged with implementing the IDEA, has adopted T.A.'s reading of the Act. The Court pointed out that, in commentary to regulations implementing the 1997 amendments, the Department stated that hearing officers and courts retain their authority, recognized in *Burlington* to award appropriate relief if a public agency has failed to provide a FAPE, including reimbursement in instances in which the child has not yet received special education and related services.

By immunizing a school district's refusal to find a child eligible for special education services no matter how compelling the child's need, the Court reasoned the District's interpretation of § 1412(a)(10)(C) would produce a rule bordering on the irrational. According to the Court, it would be particularly strange for the Act to provide a remedy when a school district offers a child inadequate special education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether.

The Court concluded that the IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private school placement is appropriate, regardless of whether the child previously received special education or related services through the public school. When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, the Supreme Court said court or hearing officer must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted. The Court declared that the district court had not properly considered the equities in this case and will need to undertake that analysis on remand.

In response, the dissenting justices emphasized that the costs of special education can be incredibly expensive, amounting to tens of billions of dollars annually and as much as 20 percent of public schools' general operating budgets. The more private placement there is, the higher a district's special education bill.

The majority acknowledged the expense of special education, but stressed that parents are entitled to reimbursement only if a federal court concludes both that the public school placement violated IDEA and the private school placement was proper under the IDEA. The majority pointed out that the incidence of private school placement at public expense is quite small. And further, according to the majority, courts still retain discretion to reduce the amount of a reimbursement award if the equities so warrant—for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school. The Court said that, in considering the equities, courts should generally presume that public school officials are properly performing their obligations under the IDEA. The Court warned that, as a result of these criteria and the fact that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.

Will *Forest Grove* result in numerous claims for private education costs? Possibly not. First, the parents must have the financial resources to pay the private school tuition to begin with. Second, the parents must be able to show (1) the public school placement violated the IDEA and (2) the private school placement was proper under the IDEA. If the parents are able to do this, a court or hearing officer must still consider all relevant factors, including (1) the notice provided by the parents and (2) the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted. Whether the Court will continue to take an active role in defining the rules governing special education also remains to be seen.