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## **United States Supreme Court Update: Individuals with Disabilities Education Act Does Not Categorically Prohibit Reimbursement For Private Education Costs Where A Child Has Not Previously Received Special Education Services From A Public Agency**

In *Forest Grove School District v. T.A.*, (--- S. Ct. ----, U.S., June 22, 2009), the United States Supreme Court considered whether the 1997 Amendments to the Individuals with Disabilities Education Act ("IDEA") prohibit reimbursement for the cost of private education if a child has not previously received special education services through a public agency. The Supreme Court held "that the Amendments impose no such categorical bar."

### **Facts**

T.A. attended public school in Forest Grove School District ("District") from kindergarten through his junior year in high school. In elementary school and through eighth grade, T. A. experienced problems paying attention in class and completing assignments. His difficulties increased when he entered high school. During his freshman year, T.A.'s mother contacted T.A.'s school counselor to discuss his problems with his schoolwork. The school psychologist interviewed T.A., examined his school records, and administered cognitive ability tests before concluding that T.A. did not need any further testing for health impairments, learning disabilities, or attention deficit hyperactivity disorder ("ADHD"). The psychologist and two other school officials discussed the results of the evaluation with T.A.'s mother and told her that T.A. did not qualify for special-education services. T.A.'s parents did not seek review of the school officials' decision.

T.A. completed his sophomore year with extensive help from his family. His problems, however, worsened in his junior year. T.A.'s parents discussed with District the possibility of T.A. completing high school in a program that partners with a community college. T.A.'s parents consulted a private professional who diagnosed T.A. with ADHD and a number of

### **Update:**

Please see our updated Legal Alert on this case entitled, "[UPDATE: Denial of Award for Private School Tuition Was Proper Where Student Was Enrolled for Non-Educational Reasons](#)", May 31, 2011.

disabilities that are related to learning and memory. The private specialist advised that T. A. would do best in a structured, residential learning environment so T.A.'s parents enrolled him at a private academy that focuses on educating students with special needs.

T.A.'s parents hired a lawyer four days after enrolling him in the private school to ascertain their rights and to give District notice of T.A.'s private placement. T.A.'s parents requested an administrative due process hearing. District engaged a school psychologist to evaluate T.A. to determine if he had a disability that was significantly interfering with his educational performance. A multidisciplinary team ultimately determined that T.A. did not satisfy the IDEA's disability criteria because "his ADHD did not have a sufficiently significant adverse impact on his educational performance." T.A.'s parents left him at the private academy for his senior year because District claimed that he was not eligible for special-education services and declined to provide an individualized education program ("IEP") for him.

A hearing officer determined that T.A.'s ADHD adversely affected his educational performance and that District had failed to meet its obligations under the IDEA because it did not identify T.A. as a student who is eligible for special education services. The hearing officer determined that, because District did not offer T.A. a free appropriate public education ("FAPE"), District is required to reimburse T.A.'s parents for the cost of T.A.'s private school

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education.

District sought judicial review of the hearing officer's decision to require it to reimburse T.A.'s parents. A federal district court found that the 1997 Amendments to the IDEA categorically bar private-school tuition reimbursement for students who have not previously received special education services from a public agency. The Court of Appeals for the Ninth Circuit reversed the district court's decision and remanded the case for the district court to reexamine the equities of the case, including the failure of T.A.'s parents to notify District before removing T.A. from public school.

**Supreme Court Decision**

The Supreme Court affirmed the decision of the Court of Appeals. The Court noted that it had previously "held that when a public school fails to provide a FAPE and a child's parents place the child in an appropriate private school without the school district's consent, a court may require the district to reimburse the parents for the cost of the private education." See *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359 (1985). The Court found that nothing in the 1997 Amendments to the IDEA require a different result for a child who has "not previously received special education and related services under the authority of a public agency."

T.A.'s cases differs from previous Supreme Court cases that found a school district may be required to reimburse for private school placement because it does not concern the adequacy of a proposed IEP but a school district's failure to provide a student with an IEP at all. T.A. had never received public special education services because District had determined that he was not entitled to receive such services under the IDEA. The Court opined that "a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities as a failure to provide an adequate IEP."

The Supreme Court relied on 20 U.S.C. § 1415 (i)(2)(C)(iii) to reach its decision in previous cases that a parent could be reimbursed for private school expenses where the public

school had proposed an inadequate IEP and thus failed to provide a FAPE. At the time the Court reached its decision in Burlington, the IDEA did not make an express reference to the possibility of reimbursement for the cost of private school. Instead, section 1415(i)(2)(C)(iii) merely "authorized a court to 'grant such relief as the court determines is appropriate.'" The Court found that this "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 1997 Amendments to the IDEA did not change the text of section 1415(i)(2)(C)(iii). The Amendments did, however, enact a new section that deals with the payment of education for students enrolled in private schools without consent or referral by a public agency. Section 1412(a)(10)(C)(i) provides that the "IDEA 'does not require a local education agency to pay for the cost of education . . . of a child with a disability at a private school if that agency made a free appropriate education available to the child and his parents nevertheless elected to place him in a private school.'" Section 1412(a)(10)(C)(ii) provides that a hearing officer or court may require a public agency to reimburse for private school costs if the hearing officer or court concludes the agency has not made a FAPE available and "the child 'has previously received special education and related services under the authority of [the] agency.'" Section 1412(a)(10)(C)(iii) states that the cost of reimbursement described under clause (ii) may be reduced or denied because of a parent's failure to give 10 days notice before removing the child from public school or a parent's refusal to make the child available for evaluation.

District claims that, because section 1412(a)(10)(C) only discusses reimbursement for those children who have already received special education services through a public school, the IDEA only authorizes reimbursement for children who have previously received services through a public school. The Court rejected this argument for

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the following reasons: (1) The 1997 Amendments do not expressly prohibit reimbursement where a child has not previously received special education services through a public school and District offers no evidence that Congress intended to supersede prior case law regarding reimbursement; (2) District's interpretation is at odds with the remedial purpose of the IDEA and the 1997 Amendments, which is to ensure all children with disabilities have a FAPE available to them that emphasizes services designed to meet their unique needs; and (3) acceptance of District's interpretation "would produce a rule bordering on the irrational" because it would provide a remedy where a school district offers a child inadequate services but it would "leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether."

District contends that, "because IDEA was an exercise of Congress' authority under the Spending Clause, . . . any conditions attached to a State's acceptance of funds must be stated unambiguously." The Court rejected this argument finding that (1) an award of private school costs where a district has failed to provide a FAPE results in a district belatedly paying expenses it should have already paid; and (2) States have been on notice since the Burlington decision that they may have to reimburse parents for the cost of private special education services.

District also contends that a decision requiring reimbursement under these circumstances will impose a substantial financial burden on public school districts and encourage parents to enroll their children in private schools without first trying to cooperate with school districts. The Court found that District's fears are unfounded because parents may only be reimbursed if a federal court finds that the public placement violated the IDEA and that the placement in a private school was proper under the IDEA. Also, the amount of a reimbursement award may be reduced for failure to give adequate notice to the public school district before parents enroll a child in private school.

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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**Questions**