When Does the Individuals with Disabilities Education Act Permit Tuition Reimbursement?

by Jay E. Grenig

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Case at a Glance

The Individuals with Disabilities Education Act is a federal law intended to ensure that all children with disabilities have access to a free and appropriate education. This case asks the Court to clarify the circumstances in which parents who believe their special-needs children cannot obtain such an education in the public schools may be reimbursed for their private-school tuition payments.

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Issue

Do the 1997 amendments to the Individuals with Disabilities Education Act (IDEA) categorically bar children who have not previously attended a public school from receiving tuition reimbursement for the cost of private schooling?

Facts

Gilbert F. has attended a private school since kindergarten. On June 23, 1999, a Committee on Special Education (CSE) of the New York City Board of Education conducted an annual review to determine Gilbert's appropriate educational placement for the 1999–2000 school year. The CSE recommended that Gilbert continue to be classified as learning disabled, and that he be placed in a Modified Instructional Services I program with a student-teacher ratio of 15:1. The CSE also recommended that Gilbert receive speech/language therapy in a group twice a week and counseling in a group once a week. Gilbert's Final Notice of Recommendation was sent to Gilbert's father on July 29, 1999.

The Recommendation placed Gilbert at P.S. 871, a public school.

Gilbert's father continued Gilbert's placement at the private school for the 1999–2000 school year and requested an impartial hearing, seeking reimbursement for the cost of Gilbert's tuition. In April 2000, an Impartial Hearing Officer found the proposed placement of Gilbert in P.S. 871 was inappropriate for Gilbert's needs and ordered the school board to reimburse Gilbert's father for the cost of the Gilbert's tuition at the private school.

The school board appealed to the State Education Department State Review Officer. The State Review Officer affirmed the hearing officer's decision awarding tuition reimbursement on the grounds that the CSE had not been properly constituted, resulting in Gilbert's inappropriate placement.

The school board filed suit in federal court seeking a reversal of the State Review Officer's decision. The

Board of Education of the City School District of the City of New York v. Tom F. ex rel. Gilbert F.
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school board contended that the decision granting tuition reimbursement was in violation of a provision in the IDEA precluding an award of tuition reimbursement when a student has not previously received special education services from a public agency, and it argued that the CSE was properly constituted. The district court granted the school board's motion for summary judgment reversing the State Education Department's grant of tuition reimbursement on the grounds that the IDEA bars tuition reimbursement.

Gilbert's father sought review by the U.S. Court of Appeals for the Second Circuit. The Second Circuit reversed the district court and returned the case for further proceedings in light of the Second Circuit's decision in *Frank G. v. Board of Education of Hyde Park,* 459 F.3d 356 (2d Cir. 2006). 193 Fed. Appx. 26 (2d Cir. 2006).

The school board then sought review by the U.S. Supreme Court of the Second Circuit's decision. The Supreme Court granted the District's petition for a writ of certiorari. 127 S.Ct. 1393 (2007).

Case Analysis

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

The key element of the IDEA is development of an individualized education program 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 individualized education program, 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 state fails in its obligation under the IDEA to provide a free appropriate public education to a disabled child, the parents may enroll the child in a private school and seek retroactive reimbursement from the state for the cost of the private school.

A two-pronged test is used to determine whether parents are entitled to reimbursement for the cost of private schooling under the IDEA. The test asks (1) whether the individualized education program proposed by the school district was inappropriate, and (2) whether the private placement was appropriate to the child's needs.

Even after establishing that a proposed individualized education program would be inappropriate, parents seeking reimbursement under the IDEA for a private school placement still bear the burden of demonstrating that the private placement is appropriate. Parents are not, however, required to show that a private placement furnishes every special service necessary to maximize their child's potential; they need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a disabled child, supported by such services as are necessary to permit the child to benefit from instruction.

With respect to tuition reimbursement, 1997 amendments to the IDEA provide, in pertinent part, as follows:

> 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 or secondary school, without the consent of or referral by the public agency, a court or 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 has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. [Italics added.]

20 U.S.C. § 1412(a)(1)(C)(ii).

The school board argues that Gilbert's father is not entitled to tuition reimbursement under the IDEA because Gilbert had not previously received special education under the authority of a public agency. According to the school board, the Second Circuit's decision would permit parents who have never given the local educational agency an opportunity to provide a free appropriate public education to their child to invoke the protections of the same remedy available to the parents who have given the public entity a chance to do so. The school board says there is no support in the language of the IDEA or in the legislative history for an interpretation under which a parent could obtain tuition reimbursement without ever trying the public placement.

The school board contends that Gilbert has never received special education and related services under the authority of a public school. It says that the development of an individualized education pro-

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gram is not included in the IDEA's definitions of special education and related services. The board reasons that the IDEA differentiates the initial evaluation from the provision of special education and related services and that therefore they are not the same thing.

The school board stresses that the language of 20 U.S.C. § 1412(a)(10)(C)(ii) is clear and should be strictly construed. It says the district court's reading of the statute renders the statutory language "previously received special education and related services" a nullity and therefore should be rejected. The school board declares that both the plain language of the statute and the IDEA's legislative history demonstrate Congress's intent that children with disabilities be educated with nondisabled children whenever possible and Congress's intent to restrict the availability of reimbursement for private school tuition.

With respect to the Department of Education's comments regarding § 1412(a)(1)(C)(ii), the school board argues that those comments are not entitled to deference because they are devoid of analysis. The board also argues that the comments ignore the plain language of the statute.

Finally, the school board says the language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not provide clear notice that Congress intended to impose upon the states the economic burden of reimbursing parents for unilaterally placing their children in private schools. The school board explains that statutes enacted under Congress's Spending Power must be construed strictly according to the plain meaning of their terms in order to avoid burdening the states with obligations they did not anticipate. The school board says the decision of the Second Circuit in this case imposes an economic burden, not contemplated by Congress, upon local schools implementing the IDEA. The school board concludes that a rule permitting parents to unilaterally place their children in private schools, and then seek tuition reimbursement from the public entity, stands in contradiction to the plain language of the statute and the intent of Congress.

Gilbert's father argues that the plain language of § 1412(a)(10)(C)(ii) does not impose a mandatory public school "try-out" period as a prerequisite for tuition reimbursement. He claims that, while the board repeatedly asserts it is making a "plain language" argument, it is actually "fabricating" statutory "requirements" out of whole cloth.

Gilbert's father contends that § 1412(a)(10)(C)(ii) codifies the tuition remedy in *School Committee of Burlington v. Department of Education,* 471 U.S. 359 (1985). In *Burlington,* the Supreme Court held that children with disabilities are not required to continue in inadequate public school placements while their parents challenge a school district's failure to provide a free appropriate public education.

It is the father's position that the legislative history does not indicate that Congress added a public school "try-out" requirement. He says that the IDEA does not expressly exclude reimbursement when special education and related services have not previously been provided. He claims that the school board "frequently misrepresent[s] the legislative history or cite[s] it out of context."

The father also says the U.S. Department of Education has rejected this try-out requirement. He points out that during the notice-and-comment rulemaking period following the 1997 amendments, the department was asked to clarify whether it would interpret subsection (C)(ii) as barring tuition reimbursement when a child had not previously received "special education and related services under the authority of a public agency." The father asserts that the department responded that "hearing officers and courts retain their authority, recognized in *Burlington* and [*Carter*] to award 'appropriate' relief if a public agency has failed to provide [a free appropriate public education], including reimbursement and compensatory services under [§ 1415] in instances in which the child has not yet received special education and related services."

Yet even if § 1412(a)(10)(C)(ii) does require that all children seeking tuition reimbursement have received "special education and related services under the authority of a public agency," Gilbert's father says Gilbert received such services from the school board. His father reasons that children who are evaluated and assessed by school district personnel as part of the individualized education program procedure have received special education services from a public agency. In addition, the father argues that, in reimbursing Gilbert's private school tuition for the 1997–98 and 1998–99 school years, the school board provided Gilbert with "special education and related services." The father concludes that reading § 1412(a)(10)(C)(ii) to prevent tuition reimbursement in situations in which a school district has not provided a free appropriate public education violates the purpose of the IDEA.

Significance

In another case before a different panel of judges, the U.S. Court of Appeals for 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). As in the present case, Frank G. involved a child who had never attended public school and a school district that provided an individualized education program.

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)" because of the broad equitable powers of courts and hearing officers under § 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 [free appropriate public education]."

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 Supreme Court considered two special education cases in its last two 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 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,* 126 S.Ct. 2455 (2006). Later, in *Winkelman ex rel. Winkelman v. Parma City School District,* 127 S.Ct. 1994 (2007), the Supreme Court held that because parents enjoy rights under the IDEA, they are entitled to prosecute the IDEA claims on their own behalf.

Gilbert's father predicts that adopting the school board's interpretation of the IDEA would leave many children who have been denied a free appropriate public education 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. He suggests 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 free appropriate public education, (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 "child find" provision of the IDEA.

The school board, however, predicts that adopting the father's view of the IDEA would place burdens on the states that Congress never meant to impose. The board suggests that its position is consistent with the emphasis of the IDEA on cooperation between parents and school officials.

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