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**CLIENT ALERT**

## **SUPREME COURT - LEA MAY BE ORDERED TO PAY FOR PRIVATE PLACEMENT EVEN IF STUDENT DID NOT PREVIOUSLY RECEIVE SPECIAL EDUCATION SERVICES – ARE RTI PROGRAMS AT RISK?**

Extending earlier decisions concerning when a school district must reimburse parents for private school placements due to denial of a free appropriate public education (“FAPE”), the U.S. Supreme Court upheld reimbursement when a district concluded that the student was ineligible for services under the Individuals With Disabilities Education Act (“IDEA”), and therefore never offered services. In other words, the denial of FAPE that must occur before IDEA requires a district to pay for a unilateral private placement need not be related to a deficient Individualized Education Plan (“IEP”). Rather, whenever FAPE is denied - regardless of whether this results from an existing IEP or a finding of ineligibility - courts are authorized to order the LEA to pay.

The decision, *Forest Grove School District v. T.A.*, No. 08-30, --- S. Ct. ---- (June 22, 2009), follows the Supreme Court’s reasoning from two prior cases. The first, *Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985), held that courts may order school districts to pay for unilateral parental placements as a remedy for denial of FAPE, even though IDEA had no express reference to such remedy at that time. A second decision, *Florence County School District v. Carter*, 510 U.S. 7 (1993), found that IDEA allows courts to order reimbursement even where the private school has not been approved by the State. As part of the 1997 IDEA amendments, the provision at issue was revised to state that “[i]f 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” if the agency has failed to provide FAPE (emphasis added). The facts of *Burlington* and *Carter* differed from those presented in *Forest Grove* in that the students concerned in the earlier decisions had previously received special education services from the public schools.

In *Forest Grove*, a California school district determined that a high school student was ineligible for IDEA services. Two years later, the student’s parents took him to a private specialist, who diagnosed him with ADHD and other disabilities related to learning and memory. The parents then unilaterally placed the student in a private residential program at the specialist’s advice, and initiated a due process action under IDEA seeking reimbursement for the placement. While this action was pending, the public school conducted a new psychological evaluation, but again the district’s team determined that the student was ineligible for services. Eventually, a hearing officer found that the district had denied FAPE by failing to identify the student’s learning disabilities, and that the private placement was appropriate for the student’s special educational needs. The decision ordering the district to pay for the private placement was reversed by the District Court, which held that IDEA categorically bars reimbursement for private placements of students who have not previously received special education from the public schools. However, the Court of Appeals reversed again, finding reimbursement appropriate, but ordered the district court to consider the equities in making such a reward, given the parents’ failure to notify the district of the removal and to request an IEP.

The school district sought review by the U.S. Supreme Court, which, in finding for the parents, rejected the “categorical bar” argument, observing that “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 IDEA as a failure to provide an adequate IEP.” The Court stated that the permissive language of the 1997 amendments does not expressly prohibit reimbursement where a student has not received services, and that the school district failed to establish that Congress intended the amendments to supersede *Burlington* and *Carter*. The Court further opined that it would contradict IDEA’s remedial purpose to deny parents a remedy when a district fails to identify a student as eligible for special education and that imposition of such a rule would have the incongruous result of allowing parents reimbursement for private placement in cases of *deficient* services, but deny remedy where *no services* whatsoever were offered. The Court concluded by explaining that school districts are protected from abuse of the reimbursement requirement because, under IDEA, parents who unilaterally place their children must foot the bill should a court determine that the public school indeed made FAPE available.

Notably, this decision includes a dissenting opinion by three of the nine Supreme Court justices, who agreed with the school district that the plain language of the IDEA limits reimbursement to those situations in which the student has previously received special education services from the public schools. The dissent rejected the majority’s interpretation of the provision as merely permissive. For now, school districts should be aware of their potential liability for failure to identify and offer a student an IEP and the parents remove their child without seeking review of the district’s determination. This potential liability could significantly impact implementation of response to intervention (“RTI”) plans, if parents choose to out place their children as opposed to waiting for evaluation of regular education interventions. For additional information on this decision, please feel free to contact any of the Firm’s education counsel.

Employers with questions regarding special education issues may call the attorneys of Siegel, O’Connor, O’Donnell & Beck, P.C. at 860-727-8900 or by visiting us online at [www.siegelconnor.com](http://www.siegelconnor.com).

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