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By the EdLaw Group at Lindabury

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## Special Ed Not Required for IDEA Tuition Reimbursement

By Denise Del Priore

In *J.S. and J.S. on behalf of R.S. v. South Orange-Maplewood Board of Education*, the United States District Court for the District of New Jersey determined that the Individuals with Disabilities in Education Act (“IDEA”) does not require that a student receive special education and related services from the district in order to be eligible for tuition reimbursement where a parent unilaterally placed the student in a private educational placement before receiving services from the district.

The student involved in *J.S.* was hospitalized and diagnosed with a depressive disorder. Although the parents consented to a Board initiated evaluation, they never produced their child. Instead, the child was withdrawn from school by her parents and unilaterally enrolled in a series of private schools. The child was never made available to the Board for an evaluation, but the parents submitted psychological and educational evaluations. The Board determined, based on initial evaluations, that the child was ineligible for special education. The Board eventually determined, however, that the child was disabled when they held a new eligibility meeting *one year after* the receipt of a new psychiatric report. A subsequent Administrative Law Judge (“ALJ”) decision found that the Board failed to provide the child with a “free appropriate public education” (“FAPE”) and awarded the child tuition reimbursement for the school year following the receipt of the final psychiatric evaluation.

Section 1412(a)(10)(C)(ii) of the IDEA states in part that a child with a disability, who has previously received special education and related services, and is subsequently enrolled in a private school without the consent of the school district (or public agency), may be eligible for tuition reimbursement if the child was not provided a free and appropriate public education prior to that enrollment. The Board argued that the statute should be interpreted to preclude a parent from being reimbursed for private tuition unless their child has first received special education or related services in the school district. The court disagreed and held that although IDEA provides tuition reimbursement for a child that has previously received special education services, it does not preclude tuition reimbursement where a child is unilaterally placed in a private institution before the child receives special education from the defendant Board of Education. Therefore, the court affirmed the ALJ’s decision.

(cont’d ➔)

## Similar IDEA Case

Similarly, the U.S. District Court for the District of New Jersey held in *D.L. and K.L., on behalf of J.L. v. Springfield Board of Education* that parents are not required, under IDEA, to accept an inadequate placement in order to demonstrate the inadequacy of that placement before they can seek tuition reimbursement.

In *D.L.*, the plaintiff parents asserted a claim against the Board of Education on behalf of their son, who was diagnosed with Autism Spectrum Disorder, arguing that the Individualized Education Program (“IEP”) developed for him failed to provide FAPE. Because the parents’ disagreed with the IEP, the child never received special education or related services from the school district. The parents provided written notice to the Board of their intent to seek reimbursement for expenses relating to their son’s education, and later sought reimbursement for applied behavior analysis (“ABA”).

The Board argued that based on the language of Sections 1412(a)(10)(C) of IDEA and 1412(a)(10)(C)(ii) of the NJ Administrative Code (which is very similar to the IDEA), the plaintiffs were not entitled to tuition reimbursement because the child never received special education or related services from the district. The District Court held that to require parents to possibly jeopardize their child’s health and welfare in order to qualify for the right to seek tuition reimbursement was an unreasonable interpretation of the law. The court therefore held that parents are not required, under IDEA, to accept an inadequate placement in order to demonstrate the inadequacy of that placement before they can seek tuition reimbursement.

### **Plaintiff’s Use of IDEA Due Process Does Not Preclude ADA and Rehabilitation Act Claims**

In *J.M. and M.M., on behalf of A.M., and J.M. and M.M. individually v. East Greenwich*

*Township Board of Education*, the parent plaintiffs objected to the IEP developed for their son and appealed the ALJ’s ruling in favor of the Board of Education. The parents’ appeal to the district court included additional claims of discrimination under the Americans with Disabilities Act (“ADA”), the Rehabilitation Act and New Jersey’s Law Against Discrimination (“NJLAD”). The Board argued that the parents should be precluded from bringing the ADA and Rehabilitation Act claims because the case before the court was an appeal of an ALJ’s ruling based on plaintiff’s due process petition brought pursuant the IDEA appeal procedures. The court held that a district court is not confined to hearing only those issues ruled upon by the ALJ. IDEA allows plaintiffs to raise claims not presented in the state due process hearing if it would have been impossible or futile for them to have done so.

The District Court also held that punitive damages are not available for alleged violations of the ADA and Rehabilitation Act. However, the District Court did not agree with the Board’s assertion that the plaintiffs’ NJLAD claim should be dismissed because the statute allows for punitive damages. The court stated that it could not deny the parents damages available under NJLAD simply because the IDEA, ADA and Rehabilitation Act do not afford the same type of compensation.

The parents also asserted a separate cause of action against the Board under Title 42 U.S.C. Section 1983. However, the District Court held that a plaintiff may not bring IDEA, ADA, or Rehabilitation Act claims pursuant to Section 1983.



*The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Anthony P. Sciarillo of the EdLaw Group at [edlawgroup@lindabury.com](mailto:edlawgroup@lindabury.com).*

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