



Free and Appropriate

Parent's wealth muddies special-education tuition case

BY JOSHUA DUNN AND MARTHA DERTHICK

On the first day of its 2007–08 term, the Supreme Court heard oral argument in a case that pitted the nation's largest school district against a wealthy entertainment executive. At issue in *New York City Board of Education v. Tom F.* was whether parents must enroll their disabled children in public schools before being eligible for placement in a private program. The Second Circuit had ruled that first participating in a public program was not required. The school district appealed.

Under the Individuals with Disabilities Education Act (IDEA), originally passed in 1975 as Education for All Handicapped Children, children with disabilities are entitled to a free appropriate public education based on an individualized education program (IEP). If the public school says it cannot provide an appropriate education or if an appeals board after a hearing determines that the public program is inadequate, parents are entitled to reimbursement for a suitable private program.

Just nine days after hearing oral arguments, the Court produced a two-sentence per curiam decision based on a 4–4, but unidentified, split. The decision upheld the Second Circuit, but lacks precedential value. The tie occurred because Justice Anthony Kennedy had recused himself. While the even split might point to a typical liberal/conservative divide in need of brokering by the unpredictable Kennedy, the facts of the case suggest that the split may not be ideological.

In particular, the parent behind the case muddied it. Tom Freston, the Tom F. of the title, seemed an unlikely person to be leading a challenge against the school board. As a co-founder of MTV (Music Television Network), former Viacom executive, and recipient of an \$85 million golden parachute, Freston could afford to pay for the best education for his son, Gilbert, who was diagnosed in the mid-1990s with attention deficit hyperactivity disorder. However, in both 1997 and 1998 Freston sought a special education evaluation from the district.

The district created an IEP that called for placing Gilbert in a public school. Freston objected, enrolled his son in Manhattan's exclusive Stephen Gaynor School, with tuition of more than \$20,000 per year, and threatened to sue. The district agreed to pay tuition for those two years, but created a new plan for Gilbert in 1999 that would have placed him in a public school. Freston sued. An appeals board sided

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with him, only to be overturned by a federal district court, but the Second Circuit ruled in Freston's favor. While the school district contended that the language of IDEA demanded attendance at a public school first, the Second Circuit had already ruled in a prior case that this was an incorrect reading of the law, and could unreasonably require parents either to place children in an inadequate program or shoulder the financial burden of a private education, a result it called "absurd."

Freston says that he pursued the case out of principle and has promised to give any reimbursement he receives to charity. However, his wealth seemed to trouble the Court at oral argument. Justice Antonin Scalia was particularly vexed by the idea that well-heeled families might game the system to get reimbursed for private school tuition when they never had any intention of using a public school regardless of the quality of the program.

Both the Right and the Left may have difficulty reaching a position on this issue. Conservatives could see a victory for Freston as highlighting the failures of public education and providing a back door to school choice. Or they could view it as one more entitlement that unjustifiably burdens local school systems. Liberals could be torn between their support for public education and that for disabled students and expansive entitlements. The specter of well-to-do parents working the system would give them pause as well, but to impose means testing would undermine popular support for IDEA.

Soon after the Court failed to resolve the case of Tom F., it denied certiorari in the earlier case from the Second Circuit, with Kennedy again recusing himself without explanation. This could mean that the Court as presently composed will never decide the issue, even though a conflicting decision exists in the First Circuit, which read the law differently.

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