

CLIENT NEWS BRIEF

Ninth Circuit Holds that Delay in Making Offer of FAPE Constitutes Consent to Private Placement and Requires Reimbursement of Tuition

The Ninth Circuit Court of Appeals recently upheld the decision of a district court in Hawaii concluding that a student's parents must be reimbursed for the continued placement of their son, Sam K., in a private school due to the Hawaii Department of Education's (DOE) failure to convene an Individualized Education Program (IEP) prior to the start of the school year. In *Sam K. v. Hawaii Dept. of Educ.*, (9th Cir., June 5, 2015) 2015 U.S. App. Lexis 9398, the Ninth Circuit held that the DOE "tacitly consented" to a student's private school enrollment by failing to convene an IEP meeting and make an offer of a free, appropriate public education (FAPE) prior to the beginning of the next school year. This decision is applicable to school districts and other local educational agencies responsible for the offer and provision of FAPE for special education students.

In *Sam K.*, the student was placed in a private school by his parents and remained there for several years pursuant to a settlement agreement between his parents and the DOE. The settlement agreement provided that the DOE would fund the prior year's placement and two prospective years of placement, and the DOE would convene an IEP meeting prior to the end of the 2009-2010 school year, which was the last year of the placement funding pursuant to the settlement agreement.

The DOE convened several IEP meetings during the summer of 2010 through January 2011. However, a written offer of FAPE was not provided to the parents until January 2011. During this time, the student remained at the private school placement, even after the DOE finally made an offer of FAPE in January 2011 for a DOE program. The parents ultimately filed for due process in October 2011 before an administrative law judge (ALJ) to contest the DOE's placement offer.

While the ALJ found that the parents established that the private school placement was appropriate for the purpose of reimbursement, the ALJ determined that the placement in the private school was a unilateral placement and subject to Hawaii's 180-day statute of limitations regarding unilateral placements. The parents were precluded from reimbursement because their complaint was untimely, since it was not filed within 180 days of the offer of FAPE. The parents appealed to the United States District Court, which reversed the ALJ's decision, and agreed that the parents had met their burden of proving that the private school placement was appropriate and thus required the DOE to reimburse the parents for the cost of tuition.

In making its determination, the district court relied on a previous decision in *D.C. v. Dept. of Educ.* (D. Haw. 2008) 550 F. Supp. 2d 1238, which held that a determination by a hearing officer that a private placement was appropriate (and that the DOE's offer of placement was not) effectively amounted to a bilateral agreement between the parties regarding the private placement. The district court in *Sam K.* used this reasoning to find that the placement was not a unilateral placement. Rather, the court held that it was a continuation of a bilateral placement because: i) the student had been placed in the private placement for numerous years; ii) the settlement agreement provided for DOE funding of the private placement for three years and did not specify that there would be a change of placement; and iii) the DOE failed to offer an IEP prior to

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the beginning of the 2010-2011 school year. As the district court found that the placement was bilateral, it held that the 180-day statute of limitations did not apply. This meant that the parents' complaint was timely and they were entitled to reimbursement.

The DOE appealed to the Ninth Circuit, which affirmed the lower court's decision, holding that the DOE "tacitly consented" to the student's enrollment in the private school placement by failing to offer an alternative placement prior to the start of the 2010-2011 school year. The appellate court found that the tacit consent created a bilateral agreement to the private school placement making the 180-day statute inapplicable, allowing the parents to obtain reimbursement for the private school tuition for the 2010-2011 school year.

This case may be applicable in California, even though California does not have a 180-day statute of limitations on recovery of the costs of a unilateral placement. Namely, regardless of such a statute, there is now precedent indicating that in some circumstances a school district's failure to convene an IEP team meeting and make an offer of FAPE might allow for the continuation of a private placement that was previously agreed to only as part of a settlement. The *Sam K.* decision did not determine how the doctrine of "stay put" may have affected the decision, especially if the settlement agreement had provided that the private placement would not be "stay put" and had instead designated an alternative DOE program. However, it also serves as a good reminder that pursuant to the Code of Federal Regulations, school districts must have an offer of placement in place prior to the beginning of the school year. (34 C.F.R. section 300.323.)

If you have any questions regarding the *Sam K.* decisions, or about special education in general, please contact one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).