PUBLIC SCHOOL OBLIGATIONS TO PAY PRIVATE SCHOOL TUITION: REINTERPRETING THE I.D.E.A. IN *FOREST GROVE SCHOOL DISTRICT v. T.A.*

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Like many high school students, T.A.[1] had trouble in school. Unlike most high school students, T.A.'s problems were related to his undiagnosed Attention Deficit Hyperactivity Disorder (ADHD).[2] He found it difficult to concentrate and to complete his assignments, but with the help of his supportive parents and sister he was able to pass his classes.[3] T.A.'s guidance counselor noticed that T.A. was struggling and, suspecting that T.A. might have a learning disability, referred him to the school psychologist to be evaluated for possible special education services.[4] T.A.'s school responded quickly, and the school district's team of psychologists and specialists determined that he might have ADHD.[5]

For about six months following the initial evaluation, the school district had psychologists and educational specialists test T.A. to determine if he had a learning disability.[6] The school district's staff met with T.A.'s parents to discuss his difficulties in school, but they never disclosed that they suspected T.A. might have ADHD or that

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1. In court documents, which are public records accessible by all, minors are identified only by their initials to protect their identity.

2. *See* Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078, 1081 (9th Cir. 2008) (discussing T.A.'s troubles in school and the school district's evaluation that suggested T.A. might have ADHD).

3. *Id.*

4. *Id.*

5. *Id.*

6. *See id.* (discussing the evaluation process, which lasted from Dec. 2000, when the guidance counselor wrote T.A. a referral for evaluation, until the meeting in June 2001, when the school district staff and T.A.'s mother agreed that T.A. did not have a learning disability).

they had evaluated him for ADHD.[7] The team of specialists determined, and T.A.'s parents agreed, that T.A. did not have a learning disability and therefore was not eligible for special education services under the Individuals with Disabilities Education Act (IDEA).[8]

Shortly after the meeting, T.A. began using marijuana.[9] His drug use had become regular by the following year, and he began to exhibit behavioral disturbances.[10] T.A.'s parents took him to a psychologist, who diagnosed T.A. with ADHD, depression, math disorder, and marijuana abuse.[11] The psychologist recommended that T.A.'s parents place him in a three week residential program, and they complied.[12] Following his discharge, T.A.'s parents placed him in a residential private school designed for children with academic and behavioral difficulties.[13]

His parents then requested a due process hearing under 20 U.S.C. § 1415(f) of the IDEA to challenge the school's determination that T.A. was ineligible for special education benefits and to obtain reimbursement for the private school tuition.[14] In response to the initiation of the hearing, the school district reevaluated T.A. for learning disabilities and again determined that T.A. was not eligible for special education under the IDEA.[15] But the hearing officer overseeing T.A.'s due process hearing determined that the school district was to reimburse T.A.'s parents for private school tuition because, contrary to the school's finding, T.A. was eligible for special education under the IDEA and the school district had failed to offer T.A. a free appropriate public education (FAPE).[16]

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7. *Id.*

8. *Id.* If T.A. had been eligible under the IDEA, the school would have been obligated to take additional steps to ensure that he received an education that appropriately met his individual needs. *See infra* text accompanying notes 31–44 (discussing the IDEA and eligibility requirements).

9. *Id.*

10. *Id.* at 1082.

11. *Id.* at 1081–82.

12. *Id.* at 1082.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1082–83 (explaining that the hearing officer determined that the school district was responsible for the costs of the private school, but not for the costs of the rehabilitation center, because the school district failed to provide T.A. with the minimum level of education, a FAPE, mandated by the IDEA).

The school district appealed the hearing officer's decision to the United States District Court for the District of Oregon, which determined that § 1412(a)(10)(C) of the IDEA barred T.A.'s parents from receiving tuition reimbursement.[17] Upon T.A.'s appeal, the Ninth Circuit reversed, holding that § 1412(a)(10)(C) does not act as a statutory bar against private school tuition reimbursement to parents whose IDEA-eligible child never received special education services at public school.[18]

The Supreme Court of the United States granted certiorari upon the school district's appeal.[19] The question before the Court is whether the 1997 amendments of the IDEA, specifically § 1412(a)(10)(C), bar parents of a child with disabilities from receiving private school tuition reimbursement when the child did not previously receive special education services at the public school.[20] The Court will view this case in light of the previous decisions on point. An equally divided Court[21] affirmed without opinion a Second Circuit case, *Board of Education v. Tom F. ex rel. Gilbert F.*[22] In that case, the Second Circuit had issued a summary order reversing the district court's decision and remanding for the district court to decide the case[23] in compliance with the Second Circuit's holding in *Frank G. v. Board of Education*.[24] *Frank G.* held that the 1997 amendments did not bar parents from receiving reimbursement when their child had not previously received special education services at school.[25] The Supreme Court denied certiorari in *Frank G.*[26]

The Court in the pending case will revisit the interpretation of the 1997 amendments to the IDEA to more clearly resolve the circuit

17. *Id.* at 1083.
18. *Id.* at 1086.
19. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 987 (2009).
20. Brief of Petitioner at (i), Forest Grove Sch. Dist. v. T.A., No. 08-305 (Feb. 25, 2009).
21. Justice Kennedy did not participate in the opinion, so the Court was split four to four in its decision. *Forest Grove Sch. Dist.*, 129 S. Ct. at 987. Bd. of Educ. v. Tom F. *ex rel.* Gilbert F., 128 S. Ct. 1 (2007).
22. *Id.*
23. Bd. of Educ. v. Tom F. *ex rel.* Gilbert F., 193 Fed. App'x. 26 (2d Cir. 2006) (not reported).
24. Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007).
25. *Id.* at 376 (holding that § 1412(a)(10)(C)(ii) does not bar private tuition reimbursement when the school district knew, before the child's removal from public school, that the child needed special education services).
26. *Id.*

split between the Second,[27] Eleventh,[28] and Ninth Circuits,[29] finding that parents could receive tuition reimbursement when their child had never received special education at public school, and the First Circuit,[30] holding that they could not. The Court should decide that parents whose children did not previously receive special education in public school may receive tuition reimbursement under the IDEA at the court's discretion as a matter of equity.

I. THE IDEA

The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."[31] A free appropriate public education (FAPE) must include "special education and related services"[32] and must be "reasonably calculated to enable the child to receive educational benefits."[33] The Court has emphasized that a FAPE is a low standard, explaining that "the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[34]

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27. *Frank G.*, 459 F.3d 356; *Tom F.*, 193 Fed. App'x 26.

28. *M.M. ex rel. C.M. v. Sch. Bd.*, 437 F.3d 1085 (11th Cir. 2006) (holding that a child who never attended public school but did receive early childhood special educational services from a public agency is not statutorily barred from receiving private school tuition reimbursement when the school district failed to provide a FAPE).

29. Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078, 1081 (9th Cir. 2008).

30. Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 152, 169–70 (1st Cir. 2004),

31. 20 U.S.C. § 1400(d)(1)(A) (2005).

32. 20 U.S.C. § 1401 (9), (14), (26), and (29); *see also* Bd. of Educ. v. Rowley, 458 U.S. 176, 181–82 (1982) (defining a FAPE in the context of the IDEA's precursor, the Education for All Handicapped Children Act of 1975 (EAHCA)).

33. The Supreme Court interpreted the FAPE provision in the EAHCA in *Rowley*, 458 U.S. at 181–82. The Court set forth a two part test. First, courts should ask whether the state complied with the Act's procedures, then the court should ask whether the IEP was "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206–07.

34. *Id.* at 192. For example, the Tenth Circuit determined in *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1145–46 (10th Cir. 2008), *cert. denied* 129 S. Ct.1356 (2009), that parents could not receive tuition reimbursement because their son was making progress in public school in accordance with his IEP even though he was exhibiting severe behavioral problems (such as tantrums, violent behavior at home and in public, difficulties sleeping, regression in toilet training, and spreading bowel movements over his bedroom). The court cited *Rowley*, 548 U.S. at 201 n.23, in determining that the IDEA does not oblige schools to ensure the "self sufficiency" of all disabled children, rather the IDEA provides school districts with broad discretion in developing an IEP. *Id.* at 1151.

A school must develop an individual education plan (IEP) for a child with disabilities in order to meet the FAPE requirement. An IEP is "a comprehensive statement of the [child's] educational needs . . . and the specially designed instruction and related services" that the school agrees to implement.[35] Determining the content and goals of the IEP is a collaborative effort by the child's parents, school administrators, and other specialists,[36] though the Court gives broad deference to the school administration's choices in developing an IEP.[37] A school district that is unable to provide a FAPE for a child with disabilities can refer the student to a private school at no cost to his parents, but the school district must pay the tuition and other expenses.[38]

A parent dissatisfied with the school's treatment of his child is entitled to a due process hearing presided over by a state-appointed hearing officer.[39] Either the parent or the school district may appeal the hearing officer's decision in federal court[40] and the courts have broad discretion to craft relief to remedy IDEA violations.[41] For example, the Supreme Court in *School Committee of Town of Burlington v. Department of Education*[42] decided that, under the provision authorizing the court to "grant such relief as the court determines is appropriate,"[43] a court may order the school to reimburse parents for private school tuition after determining both that the IEP was inappropriate and that the private placement was appropriate to meet the child's needs.[44]

The legal controversy between the circuit courts arises from the 1997 amendments to the IDEA, specifically 20 U.S.C.

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35. Sch. Comm. of Burlington, Mass. v. Dept. of Ed., 471 U.S. 359, 368 (1985).
36. 20 U.S.C. § 1414(d)(1)(B).
37. *Rowley*, 458 U.S. at 206.
38. 20 U.S.C. § 1412(a)(10)(B)(i).
39. *Id.* at § 1415(b)(6).
40. *Id.* at § 1415(f).
41. Sch. Comm. of Burlington, Mass. v. Dept. of Ed., 471 U.S. 359, 369 (1985).
42. *Id.* (interpreting the Education of the Handicapped Act).
43. Now ,embodied in 20 U.S.C. § 1415(i)(2)(C)(iii) (2005). This provision has not been changed since the time of the *Burlington* decision. Frank G. v. Bd. of Educ., 459 F.3d at 369.
44. *Burlington*, 471 U.S. at 370 ("In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.") The Court reaffirmed this standard in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12–13 (1993).

§ 1412(a)(10)(C)(ii), entitled "Reimbursement for Private School Placement." The statute reads:

> 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 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 for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.[45]

The Second Circuit determined that the statute did not foreclose this remedy for children who never received special education services, rather it merely provided additional rules for parents whose children did previously receive special education at public school.[46] The First Circuit, by contrast, interpreted this provision as overruling the Court's prior holdings that a court may award tuition reimbursement to a parent whose child had not previously received special education services.[47]

II. ARGUMENTS IN FAVOR OF REIMBURSEMENT

Both the Second and Ninth Circuits have held that the 1997 amendments to the IDEA do not bar parents from recovering the cost of private school for a child who did not receive special education and related services at public school.[48] The Second Circuit heard two cases concerning the interpretation of § 1412(a)(10)(C)(ii). In *Board of Education v. Tom F. ex rel. Gilbert F.,* the Southern District of New York relied on *Greenland School District v. Amy N.* in deciding that "where a child has *not* previously received special education from a

45. 20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added).

46. *Frank G.*, 459 F.3d at 373–74 (explaining that Congress intended to limit the availability of private tuition reimbursement when a child had previously received special education services from a public agency).

47. Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 152, 159–60 (2004). One such case was *Carter*, 510 U.S. at 9–10 (holding that a court may award private school tuition reimbursement to parents who withdraw their child from a public school that is not providing a FAPE and place him in a private school that does not meet all of IDEA's requirements).

48. Forest Grove Sch. Dist. v. T.A, 523 F.3d at 1080; Bd. of Educ. v. Tom F. *ex rel.* Gilbert F., 193 Fed. App'x. 26, 26 (2d Cir. 2006) (not reported), *aff'd* 128 S. Ct. 1 (2007); Frank G. v. Bd. of Educ., 459 F.3d 356, 359 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007).

public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school."[49] The Second Circuit issued a summary order reversing and remanding the judgment of the district court to render a decision in accordance with *Frank G. v. Board of Education*, an earlier decision on the same issue with a detailed opinion.[50] The Supreme Court affirmed *Tom F.* without an opinion.[51]

The Second Circuit in *Frank G.* held that the 1997 Amendments to the IDEA did not bar private tuition reimbursement when the child had never received special education in public school.[52] First, the court considered whether the statute contained a plain and unambiguous statement about tuition reimbursement under these conditions.[53] The court determined that 20 U.S.C. § 1412(a)(10)(C)(ii) does not explicitly limit tuition reimbursement to children who previously received special education from a public agency and it does not state that tuition reimbursement is unavailable when the child never received special education through a public agency.[54] The court also pointed out that the portion of the Act upon which *School Committee of Town of Burlington v. Department of Education* relied in authorizing reimbursement, then § 1415(e)(2) and now § 1415(i)(2)(C)(iii), was not changed in the 1997 amendments.[55]

The court then assessed the ambiguous statute in terms of the purposes of the IDEA.[56] One of the ways the statute seeks to secure educational opportunities for children with disabilities is by allowing courts to grant appropriate relief to parents when the IEP is inappropriate and parents place their child in private school.[57]

49. Bd. of Educ. v. Tom F. *ex rel.* Gilbert F., 2005 WL 22866, at *3.
50. *Tom F.*, 193 Fed. App'x. at 26.
51. Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007).
52. *Frank G.*, 459 F.3d at359.
53. *Id.* at 368.
54. *Id.*
55. *Id.* at 369.
56. *Id.* at 370–71.
57. *Id.* at 371 ("One of the primary ways in which the IDEA seeks to ensure that children with disabilities receive a free appropriate education is by conferring broad discretion on the district court to grant relief it deems appropriate to parents of disabled children who opt for a unilateral private placement in cases where the parents' placement is determined to be proper and the proposed IEP is determined to be inadequate.").

Construing the statute to limit the availability of that remedy would undermine the statute's objective.[58]

Finally, the court said that ambiguous rules should be interpreted so as to avoid absurd results.[59] Requiring children to receive special education at public school before parents could place them in private school would mean that some children would have to suffer an education that fails to meet the statutory FAPE requirements for a significant period of time before parents could have the right to place their children in a setting that could provide a FAPE.[60]

The Ninth Circuit adopted the Second Circuit's reasoning in *Forest Grove School District v. T.A.*[61] The court emphasized that the purpose of the IDEA is to provide a FAPE for children with disabilities, and barring reimbursement for children who have not received special education services conflicts with that purpose.[62] Section 1412(a)(10)(C) does not apply to children who have not previously received special education, so their parents may only receive reimbursement as a matter of equity under § 1415(i)(2)(C).[63] The court reiterated that it would be an absurd result to require a child to "wait (an indefinite, perhaps lengthy period) until [he] has received special education in public school before sending [him] to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate the special education."[64]

Judge Rymer in his dissent agreed with the Second Circuit that § 1415(i)(2)(C) "carries forward the pre-1997 law on equitable relief," but argued that *Burlington* and § 1412(a)(10)(C) did not apply in this case if T.A. was removed from public school because of his drug problem and not an IDEA-eligible disability like ADHD.[65] The IDEA requires schools to provide a FAPE for a child only if he has a disability recognized by the statute.[66] The dissent stated, "[a] local

58. *Id.* at 372.
59. *Id.*
60. *Id.*; *see also* M.M. *ex rel.* C.M. v. Sch. Bd., 437 F.3d 1085, 1099 (11th Cir. 2006) ("[F]orcing parents into accepting inadequate IEPs in order to preserve their right to reimbursement runs contrary to the rights recognized in the *Burlington* line of cases.").
61. Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078, 1086 (9th Cir. 2008).
62. *Id.* at 1087.
63. *Id.*
64. *Id.*
65. *Id.* at 1090 (Rymer, J., dissenting).
66. *Id.*

educational agency that has made a FAPE available has no obligation to pay the cost of education . . . of a child with a disability at a private school when the parents elect the private placement."[67] If T.A.'s parents withdrew him from public school for any reason other than that the school was not accommodating his learning disabilities, then the school would not be responsible for tuition reimbursement.[68]

III. ARGUMENTS AGAINST REIMBURSEMENT

The arguments counseling against reimbursing parents for private school expenses can be divided into four main categories: 1) a plain meaning argument; 2) a spending clause argument; 3) a statutory purpose argument; and 4) a public policy argument focusing on the financial burdens associated with increased taxpayer liability for private school tuition.

A. Plain Meaning

Critics of the Ninth Circuit's opinion argue that the court's interpretation of § 1412(a)(10)(C) violated the plain meaning of the statute. In *Greenland School District v. Amy N.*, the First Circuit held that the plain meaning of § 1412(a)(10)(C) reflected Congress's intent to bar tuition reimbursement for children who had never received special education in public school.[69] In supporting this conclusion, the court relied on a report from the Committee on Education and the Workforce recommending that Congress revise the statute to require children to receive special education services in public school before parents can be reimbursed for private school tuition.[70]

The school district similarly argues that the plain language of the statute creates an inference that the statute bars reimbursement by relying on other parts of the statute.[71] For example, the headings of the statute's titles suggest that Congress was setting forth school obligations to provide tuition reimbursement.[72] Additionally, § 1412(a)(10)(C)(ii) places restrictions on receipt of private school

67. *Id.*
68. *Id.* at 1091.
69. Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 152, 169–70 (1st Cir. 2004).
70. *Id.* at 159 (referring to H.R. Rep. No. 105-95 at 90 (1997)).
71. Brief of Petitioner, *supra* note 20, at 19–21.
72. *Id.* at 24 (discussing the heading of 20 U.S.C. § 1412(a)(10)(C)(ii): "Reimbursement for Private School Placement").

tuition reimbursement for children who previously received special education at public school.[73] Finally, the equitable remedy in § 1415(i)(2)(C) is only available at the discretion of the court, whereas either a hearing officer or the courts may grant the remedies under § 1412(a)(10)(C)(ii).[74] The fact that Congress provided a remedial scheme for obtaining private tuition reimbursement when the child received special education services at public school may suggest that the remedy was only to be available for children falling within § 1412(a)(10)(C)(ii): children who previously received special education and related services from a public agency, did not receive a FAPE from the public school, and were enrolled in private school without their school districts' consent.[75]

B. Spending Clause

The school district argues that the Spending Clause bars parents from receiving tuition reimbursement for a child who never received special education services at the public school.[76] Congress passed the IDEA under its Spending Clause authority, and therefore must provide states with "clear notice" of the need to reimburse parents for private school tuition when the parents' child never received special education services at a public school.[77] The school district argued that, after the 1997 revisions, schools did not have notice that they could be liable to parents for these expenses because the statute addresses tuition reimbursement only for children who previously received special education services from the state, and it is not readily apparent that schools could be liable to children who never received special education.[78] Schools should not be liable to this class of plaintiffs, the petitioner contends, until Congress or the courts provide notice that the school may be required to provide private tuition reimbursement under these circumstances.[79]

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73. *Id.* at 23.
74. *Id.* at 24–25.
75. *Id.*
76. *Id.* at 16–17.
77. Reply Brief of Petitioner at 7–9, Forest Grove Sch. Dist. v. T.A., No. 08-305 (Feb. 25, 2009) (citing Arlington Central Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (finding that the IDEA, as a spending clause statute, is subject to the clear notice rule)).
78. Brief of Petitioner at 18–19, *supra* note 20.
79. *Id.*

The respondent countered that this argument was meritless because the remedy sought "merely enforces the Spending Clause contract."[80] Allowing parents to receive tuition reimbursement is a remedy for a violation of a substantive right—the child's right to a FAPE—so schools are on notice that they may be liable to parents and children if they violate their obligations under the IDEA.[81] Ultimately, the petitioner's spending clause argument is likely to be unavailing because courts have previously recognized the availability of tuition reimbursement for similarly situated students,[82] and the language of the statute does not explicitly exclude these parents from receiving reimbursement.

C. Statutory Purpose

The original purpose of the IDEA was to provide a FAPE to children with disabilities, because they received insufficient education prior to the Act's adoption.[83] Reimbursing a parent for private school is a last resort that is only available when public school fails to provide the disabled child with an appropriate education.[84] In an effort to provide education in a public school setting, the IDEA provides a collaborative framework to encourage good faith cooperation between parents and the school.[85] This cooperative framework requires that the school system have the opportunity to

80. Brief of Respondent in Opposition at 29, Forest Grove Sch. Dist. v. T.A, No. 08-305 (Feb. 25, 2009).

81. *See id.* at 28–29 (citing Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007) (rejecting the argument that the IDEA did not provide clear notice of parents' rights because recognizing parents' rights did not impose any obligations on the school that they were not already required to observe)).

82. *See* discussion of Burlington, *supra* text accompanying notes 42–44, and of the First Circuit's holding in *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 152, 169–70 (1st Cir. 2004), *supra* text accompanying note 47.

83. Brief of Nat'l Sch. Boards Ass'n, Am. Ass'n of Sch. Admin. and Nat'l Ass'n of State Directors of Special Educ. as Amici Curiae Supporting Petitioner at 9, Forest Grove Sch. Dist. v. T.A, No. 08-305 (Oct. 6, 2008) (citing Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 51–52 (2005), 20 U.S.C. § 1400(c)(2), and Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)).

84. *Id.* at 10; Brief of Council of the Great City Sch. as Amicus Curiae Supporting Petitioner at 5–7, Forest Grove Sch. Dist. v. T.A, No. 08-305 (Mar. 4, 2009) (explaining that Congress has two goals in ensuring a public education for children with disabilities: that they would receive an education in a more constructive learning environment and that their education would be as cost effective as possible (citing S. Rep. No. 94-168 at 9)).

85. Brief of Nat'l Sch. Bd. Ass'n, *supra* note 83, at 12–13; Brief of City of New York as Amicus Curiae Supporting Petitioner at 12–13, Forest Grove Sch. Dist. v. T.A, No. 08-305 (Feb. 25, 2009) (citing Schaffer v. Weast, 546 U.S. 49, 53 (2005)).

determine whether it can provide a FAPE to a child before his parents withdraw him from public school.[86] Critics of the Ninth Circuit's decision in *Forest Grove School District v. T.A.* argue that it "will encourage parents not to collaborate with public school districts because to do so will disadvantage them if they later seek private-school tuition reimbursement."[87] But § 1412(a)(10)(C)(iii) eliminates that concern. It states that courts may deny or reduce reimbursement if parents do not notify the school that they intend to place the child in a private school.[88] This supports the argument that parents must give the school the opportunity to provide a FAPE before they can receive reimbursement for private school.[89] The Ninth Circuit's holding does not disturb this requirement.

D. Costs of Education

Several of the amici briefs raise concerns about the burdens that tuition reimbursement for children not previously enrolled in special education will place on the educational and judicial systems. Schools will be unable to anticipate their liability because any student could potentially receive private tuition reimbursement, and the cost of placing a child in private school averages about $26,000—more than four times the cost per child in public school.[90] Two amicus briefs suggested that this uncertainty will make it difficult for schools to create a workable budget[91] and will divert special education funds from students who remain at public school.[92] Furthermore, due process hearings alone are costly,[93] and schools may try to settle or to make "bad faith offers to avoid litigation."[94]

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86. Brief of City of New York as Amicus Curiae Supporting Petitioner, *supra* note 85; *Greenland*, 358 F.3d at 160 (stating that requiring a student to receive special education services at the school first "serves the important purpose of giving the school system an opportunity, before the child is removed, to . . . determine whether a free appropriate public education can be provided in the public schools").

87. Brief of Nat'l Sch. Bd. Ass'n, *supra* note 83, at 11.

88. 20 U.S.C. § 1412(a)(10)(C)(iii) (2005).

89. Brief of Nat'l Sch. Bd. Ass'n, *supra* note 83, at 16.

90. *Id.* at 23; Brief of Council of the Great City Sch., *supra* note 84, at 23.

91. Brief of Nat'l Sch. Bd. Ass'n, *supra* note 83, at 20–21.

92. Brief of Council of the Great City Schools, *supra* note 84, at 28–29.

93. Brief of Nat'l Sch. Bd. Ass'n, *supra* note 83, at 23 (explaining that the hearings cost around $10,000 on average).

94. Michael T. McCarthy, *Don't Get the Wrong IDEA: How the Fourth Circuit Misread the Words and Spirit of Special Education Law—And How to Fix It*, 65 WASH. & LEE L. REV. 1707, 1742–43 (2008) ("If some parents abuse the IEP process to place their children in appealing

The amici briefs also caution that the Ninth Circuit's interpretation creates an unfair litigation advantage for parents that will encourage a flood of litigation.[95] If a school district never provided special education services, then it would be hard to prove that they provided a FAPE.[96] This problem of proof, argue the amici briefs, creates incentives for parents who want to place their children in private schools and play the "tuition-reimbursement lottery" to try to have the public school pay the private school tuition.[97]

Whether this is actually a problem is questionable. Because of the high cost of tuition, parents are unlikely to place a child in a private school if they have little reasonable belief that they will receive reimbursement.[98] Even when parents have a reasonable belief that they will prevail, many may be unable to afford private school tuition while they navigate the due process hearing. Others that could temporarily pay the cost of tuition may be unwilling to risk that the hearing could be decided against them.

IV. THE SUPREME COURT SHOULD RENDER A DECISION ALLOWING TUITION REIMBURSEMENT AS A MATTER OF EQUITY

The amendments to the IDEA narrowed the scope of tuition reimbursement for students who are currently receiving special education in schools.[99] Given this indication of congressional intent, it is reasonable to similarly restrict, but not completely eliminate, tuition reimbursement for students who have not previously received special education. The Supreme Court should articulate a clearer standard drawing on the Second Circuit decision in *Frank G. v. Board of Education* and the Court's prior holding in *School Committee of Town of Burlington v. Department of Education*.

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private schools . . . , other children will suffer when public school systems make bad faith offers to avoid litigation based on procedural defects.").

95. Brief of Nat'l Sch. Bd. Ass'n, *supra* note 83, at 25.

96. *Id.* at 17.

97. *Id.* at 25; Brief of Council of the Great City Sch., *supra* note 84, at 27–28.

98. Logan Steiner, *Playing Lawyers: The Implications of Endowing Parents with Substantive Rights under IDEA in Winkelman v. Parma City School District, 127 S. Ct. 1994 (2007)*, 31 HARVARD J. L. & PUB. POL'Y 1169, 1174 (2008) (quoting Justice Scalia's concurring opinion in *Winkelman*).

99. *See* discussion of 20 U.S.C. § 1412(a)(10)(C)(iii), *supra* text accompanying notes 45–46 (explaining statutory limitations on private tuition reimbursement for parents whose child received special education through a public agency).

The 1997 Amendments to the IDEA do not explicitly prohibit tuition reimbursement when a child with disabilities has not previously received special education funds from public school. Section 1412(a)(10)(C)(ii) states *only* that parents of a child who previously received special education may receive tuition reimbursement, but it does not contain any language suggesting that children who had not received special education should be ineligible for reimbursement. The statute provides different remedial schemes for children who did previously receive special education than for those who did not. Section 1412(a)(10)(C)(ii) allows either a court or a hearing officer to award reimbursement to parents whose child did previously receive special education services, subject to the limitations in § 1412(a)(10)(C)(iii). As discussed above, many courts over the past several decades have awarded tuition reimbursement as a matter of equity under § 1415(i)(2)(C) to children who never received special education at public school.[100] As the report of Committee on Education and the Workforce confirms, Congress was fully aware of the availability of this remedy.[101] If Congress had intended to eliminate the availability of this remedy, it was well within its authority to state as much in the statute. The fact that the Committee's recommendation was not reflected in the version of the statute that was adopted is indicative of Congressional intent on this matter.

Although Congress did not eliminate the availability of tuition reimbursement for children who never received public school special education, the 1997 amendments did place additional restrictions on the availability of reimbursement. The most important limitation was provided in § 1412(a)(10)(C)(i), which states:

> this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.[102]

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100. *See supra* note 47 (discussing prior holdings that found an equitable remedy under the IDEA for tuition reimbursement) and text accompanying note 55 (discussing relief under §1415(i)(2)(C)).

101. *See supra* text accompanying note 70 (discussing the Committee Report).

102. 20 U.S.C. § 1412(a)(10)(C)(i).

This provision does not contain the limiting language of § 1412(a)(10)(C)(ii), which applies only when the child previously received special education. This absence of limiting language suggests that the statute applies to all instances in which parents wish to receive tuition reimbursement. Thus, when the public school "ma[kes] a FAPE available," a parent is not eligible to receive private school tuition reimbursement regardless of whether his child previously received special education.

The provision does not provide any guidance as to the relevant time period in assessing whether the school made a FAPE available. The statute's "made available" language does not distinguish between a FAPE provided before the parent removed the child from public school and a FAPE that is to be provided in the future. Because a FAPE may be "made available" to a student even after he is withdrawn from school, courts should interpret "made available" broadly to include both prior and prospective educational opportunities.

The Court should recognize, in light of the 1997 Amendments and the competing policy concerns discussed above, a rebuttable presumption against private school tuition reimbursement when the child has not previously received special education and related services at a public school. Parents may receive reimbursement if the child has a disability rendering him eligible for benefits under the IDEA,[103] the school violated the procedural provisions of the IDEA,[104] the school did not provide the child with an education reasonably calculated to enable the child to receive educational benefits prior to withdrawal,[105] the child's parents notified the school of their intent to place the child in private school or otherwise gave the school the opportunity to evaluate the child and develop an IEP,[106] and the

103. 20 U.S.C. § 1400 (2008); M.M. *ex rel.* C.M. v. Sch. Bd., 437 F.3d 1085, 1096 (11th Cir. 2006).

104. Sch. Comm. of Burlington, Mass. v. Dept. of Ed. v. Dept. of Ed., 471 U.S. 359 (1985).

105. *Id.*

106. 20 U.S.C. § 1412(a)(10)(C)(iii) (2005) (providing that reimbursement for a child who previously received special education may be limited or denied if the parent did not provide notice of intent to withdraw, except in certain circumstances, *e.g.*, the school prevented the parent from providing notice); Ash v. Lake Oswego Sch. Dist. No. 7J, 766 F. Supp. 852 (D. Or. 1991); *see* Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 152, 158–59 (2004) (explaining that, prior to the 1997 amendments, several courts required parents to give notice before removing their children from public school).

school does not have a plan to provide a FAPE or the current IEP is inadequate to meet his needs should he return to school.[107]

Recognizing this rebuttable presumption provides the best balance between the interests of the school and the child. The Court has traditionally afforded broad deference to schools about their decisions regarding the best interests of their students.[108] The assumption underlying this deference is that a school is in a better position than a court to assess students's needs and that schools generally perform their duties adequately.[109] To allow parents to obtain reimbursement for the cost of private school too easily would suggest that schools are incompetent at providing an appropriate education for a broad class of children with disabilities. Because courts operate on the belief that schools are generally competent educational providers, private school should be a last resort available only in circumstances where the school is unable (or perhaps unwilling) to provide a FAPE.[110]

Providing school administrators with deference to identify a disabled student's educational needs requires that courts not unreasonably interfere with school administration, and part of school administration is budgeting. The cost of private school tuition is substantial, so opening the door too wide for parents to receive tuition reimbursement would interfere with a school's ability to budget its expenses and to provide a quality education for all of its students. Accordingly, courts should not endorse a policy that would significantly impair a school's ability to provide for the education of its students.

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107. *See supra* discussion of § 1412(a)(10)(C)(i), text accompanying notes 100–101 (explaining that parents may not receive tuition reimbursement if the public school provided a FAPE and suggesting that the school may meet the FAPE requirement via a prospective IEP).

108. *See supra* text accompanying note 42 (explaining the Court's statement in *Burlington* that the statutory provision grants courts broad deference in determining the appropriate remedy).

109. *See, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176, 208–09 (1982) ("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."); *id.* at 211 (Blackmun, J., concurring) (criticizing the district court for failing to grant adequate deference to the state's Commissioner of Education and the hearing officer).

110. *See supra* text accompanying notes 42–44 (explaining that the statute authorizes courts to award relief when the schools provide an inappropriate education), 99–101 (discussing restrictions on tuition reimbursement when the school did provide or will provide a FAPE).

But courts must also provide a remedy for children with disabilities when their school fails to provide to them an adequate education. It is unknown how many children, like T.A., struggle with their studies for years before teachers or staff even suspect that they might have a learning disability.[111] Even if the school does suspect a learning disability, they may not inform the parents of their assessment.[112] Evaluating whether a student has a disability that qualifies him for IDEA benefits is a lengthy process[113] and may not produce change if a child's education is not sufficiently impaired.[114] If a parent disagrees with the school's decision, they must tolerate a due process hearing—another lengthy process. Any reasonable parent, believing his child is impaired by a learning disability, would attempt to obtain the educational resources necessary for his child quickly, not wait years for an uncertain result.

T.A.'s parents, however, probably would not qualify for tuition reimbursement under this standard. As the Ninth Circuit's dissent noted, T.A.'s parents removed T.A. from public school primarily because of his drug problem, not because of his ADHD.[115] This creates questions of fact for the trial court as to whether the school actually failed to provide a FAPE before T.A. was removed from public school and as to whether the school failed to provide an adequate IEP for him to return to public school.

V. CONCLUSION

The Supreme Court should hold, consistently with its prior opinions, that courts may grant, as a matter of their equitable discretion, private school tuition reimbursement for a child who did not previously receive special education or related services under

111. Recall that T.A.'s guidance counselor, not his teachers, prompted the inquiry. *Supra* text accompanying note 4.

112. Recall that the Forest Grove School District did not tell T.A.'s parents that he had been evaluated for ADHD until much later. *Supra* text accompanying note 8.

113. T.A.'s evaluation took about nine months. Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078, 1081 (9th Cir. 2008).

114. *See supra* text accompanying note 15 (discussing the school's determination that T.A. was ineligible under the IDEA because his ADHD "did not have a severe effect on [his] educational performance").

115. *See supra* text accompanying notes 9–13 (explaining that T.A.'s parents removed him from public school because of his behavioral difficulties and drug problem and placed him in a rehabilitation center).

§ 1415(i)(2)(C) of the IDEA. To guide lower courts that must decide whether to grant tuition reimbursement, the Court should articulate a presumption against reimbursement that the parents may overcome by showing that their child was eligible for and denied IDEA benefits, that the parents gave the school the opportunity to remedy the situation, and that the school refused or was unable. Because there is doubt as to whether T.A. was denied a FAPE and as to whether the school could have provided him with a FAPE, the Court should reverse the Ninth Circuit's opinion and remand for factual determinations.