No. 08-305

In The Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL DISABILITY RIGHTS NETWORK, THE PROTECTION AND ADVOCACY AGENCIES OF ALASKA, ARIZONA, CALIFORNIA, IDAHO, MONTANA, NEVADA, THE NORTHERN MARIANA ISLANDS, OREGON, AND WASHINGTON, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, AND ADVOCATES FOR CHILDREN OF NEW YORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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The National Disability Rights Network, the protection and advocacy agencies of the Ninth Circuit States of Alaska, Arizona, California, Idaho, Montana, Nevada, the Commonwealth of the Northern Mariana Islands, Oregon, and Washington, New York Lawyers for the Public Interest, and Advocates for Children of New York respectfully submit this brief as *amici curiae* in support of respondent.

INTEREST OF *AMICI CURIAE*[1]

This case is of particular interest to *amici curiae*, who advocate on behalf of children with disabilities to ensure that they receive the free appropriate public

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

education they are guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

Amicus National Disability Rights Network, formerly the National Association of Protection and Advocacy Systems, is the membership association of protection and advocacy (P&A) agencies that are located in all 50 States, the District of Columbia, Puerto Rico, and the territories. P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&A lawyers often represent or assist parents of children with disabilities in the impartial due process hearings authorized under the IDEA and know first-hand that often school districts do not provide appropriate special education and related services, forcing parents to make unilateral placement decisions.

Virtually all of the P&As that work in the States within the Ninth Circuit, as well as the Commonwealth of the Northern Mariana Islands, have joined this brief because of the need for strong remedies to redress violations of the IDEA.

Disability Law Center of Alaska (DLCA) is an independent non-profit law firm providing legal

advocacy services for people with disabilities anywhere in Alaska. DLCA is designated as the State of Alaska's P&A agency, and as such, its mission includes ensuring that children with disabilities in Alaska receive the free appropriate public education to which they are entitled under the IDEA.

The Arizona Center for Disability Law (ACDL) is the federally funded P&A for the State of Arizona. ACDL is authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings throughout Arizona. The ACDL received approximately 829 service requests in special education for fiscal year 2008.

Disability Rights California (DRC) is the State of California's designated protection and advocacy agency for people with disabilities. DRC provides counsel and direct representation in administrative and court proceedings to individuals with all categories of disability (including physical, sensory, cognitive, and psychiatric) in many substantive areas, including rights under the IDEA.

Comprehensive Advocacy, Inc. (Co-Ad) is the State of Idaho's P&A system. Since 1976, Co-Ad has received federal grants to advocate on behalf of children with disabilities to ensure that they receive the free appropriate education they are guaranteed under the IDEA. Co-Ad receives numerous requests annually from parents of children attending Idaho's

public schools to assist them with obtaining the special education and related services their children are entitled to under the IDEA. Co-Ad provides free legal services to the families of children with disabilities and assists the families by providing information on their rights, negotiating at school meetings, and representing the child at mediation proceedings or more formal hearings, if necessary.

Disability Rights Montana (DRM) is the federally funded P&A for the state of Montana. DRM is authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings throughout Montana. DRM received approximately 108 service requests in special education for fiscal year 2008.

Nevada Disability Advocacy & Law Center (NDALC) is a private, nonprofit organization and serves as Nevada's federally mandated P&A system for the human, legal, and service rights of children with disabilities. NDALC was designated as Nevada's P&A system by the Governor in March 1995. NDALC's mission includes protecting and advocating for the human and legal rights of children with disabilities, and NDALC's agency priorities include advocating for children in Nevada's school systems.

Northern Marianas Protection and Advocacy System, Inc. (NMPASI) is a non-profit organization that was established in 1993 as the P&A agency for the Commonwealth of the Northern Mariana Islands.

NMPASI's primary function is to protect the rights of individuals with disabilities through legally based advocacy and support.

Disability Rights Oregon (DRO) is a federally funded law office charged with protecting the rights of people with disabilities. One of DRO's primary goals and priorities is ensuring that Oregonians with disabilities receive a free and appropriate education. DRO devotes two attorneys, an advocate, and an intake worker to address the needs of children who need specialized services to succeed in school.

Disability Rights Washington (DRW) is designated by federal law and the Governor of Washington to provide protection and advocacy services for people in Washington with physical, sensory, and mental disabilities. DRW is federally mandated to advocate for the rights of people with disabilities in Washington, including children in educational settings.

In addition to the above P&As from the Ninth Circuit, the issue addressed in this case is also of particular interest to organizations based in New York.

New York Lawyers for the Public Interest (NYLPI) is one of New York's federally funded P&A agencies. Founded in 1976 as a partnership between the public and private bars to assist disadvantaged and underrepresented people in New York City, NYLPI conducts advocacy and litigation concerning disability rights, access to health care, and

environmental justice. Through its Disability Law Center, NYLPI has a long history of advocacy for children with disabilities on educational issues. NYLPI filed an *amicus* brief in the Second Circuit court of appeals and in this Court jointly with the NDRN in *Board of Education of City School District of New York v. Tom F.*, 193 Fed. Appx. 26 (2d Cir. 2006), *aff'd per curiam by an equally divided Court*, 128 S. Ct. 17 (2007).

Advocates for Children of New York (AFC) is dedicated to ensuring access to the best education New York City can provide for all students. For over 37 years, AFC has been working with low-income families in New York City to secure quality and equal public education services for their children. AFC provides a range of direct services, including free individual case advocacy, technical assistance, and training, and also works on institutional reform of educational policies and practices through advocacy and litigation. One of AFC's primary activities is providing free legal representation to low-income parents of students with disabilities at due process proceedings under the IDEA to ensure that their children receive the free appropriate public education to which they are entitled.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires that a State (and its school districts) that accepts federal IDEA

funds provide to each child with a disability a free appropriate public education tailored to accommodate the child's disability and to achieve educational benefit. If a school district violates this statutory mandate, a court may, after exhaustion of administrative procedures, "grant such relief as the court determines is appropriate" for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by this Court to authorize a court to order a school district to reimburse parents for their reasonable expenditures on private special education for a child if the court ultimately determines that such placement, rather than the school district's proposal, is proper under the IDEA. *See School Comm. of the Town of Burlington v. Department of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Congress has not repealed that equitable authority.

A. 1. Contrary to the overstated rhetoric of petitioner and its *amici*, a ruling in favor of the parent in this case should not impose a significant burden on school districts. Fewer than 1.5% of children with disabilities have been placed in private school over the past two decades in order to receive an appropriate special education and related services. Most of those children are placed in private schools with the consent of the public school district and do not implicate the reimbursement remedy at issue in this case. Unilateral placement of children with disabilities in private schools by their parents

because of a public school's failure to offer the appropriate education required by federal law constitutes some very small part of that already narrow slice of children in private placements.

2. The IDEA benefits predominantly lower-income children with disabilities, and the children who are most likely to be placed in private schools are those with less-common disabilities. Moreover, the cost of private placement is not significantly greater and can actually be less than that spent in public school.

3. Petitioner and its *amici* gloss over the fact that the decisions by hearing officers and judges to reimburse parents of children with disabilities placed in private school must be based on findings that public school systems did not comply with the IDEA because they did not offer an appropriate education for the children. Compliance and monitoring reports by the United States Department of Education have revealed that in many localities, school districts are not in compliance with federal law. The myriad cases in which federal and state courts have made similar findings confirms this fact.

B. Congress made clear in the text of the statute, in the legislative history, and in its subsequent 2004 re-enactment of the IDEA that it did not intend to categorically deny the equitable remedy of reimbursement to those relatively few children with disabilities who must be placed in private school in order to receive a free appropriate education simply because they had not previously received

special education under the authority of a public agency.

1. In *Burlington* and again in *Carter*, this Court held that the IDEA authorizes courts to order reimbursement of reasonable private school tuition if a school district is not offering an education appropriate for a child with disabilities. Contrary to petitioner's argument, 20 U.S.C. § 1412(a)(10)(C), first enacted in 1997, did not create a new categorical limitation on the remedies available for violations of the IDEA. This Court had relied in those leading opinions on two statutory provisions in the IDEA to determine that courts can award tuition reimbursement, and Congress has not altered either of them (save for changes in terminology).

2. Nothing in the legislative history suggests that Congress intended to categorically exclude from the equitable remedy of reimbursement children with disabilities who never received special education under the authority of a public agency if the parents can establish that the school district is not offering an appropriate public education. To the contrary, to the extent this issue was discussed at all, the legislative history confirms that Section 1412(a)(10)(C) was intended to codify the prevailing case law that notice to the school district of an intent to place a child in private school because of dissatisfaction with the proposed IEP is a relevant factor for a court to consider in exercising its remedial discretion.

3. Since 1997, the Secretary of Education has repeatedly interpreted Section 1412(a)(10)(C) of the IDEA as not abrogating courts' authority to award reimbursement for private placement under Section 1415(i)(2)(C)(iii), even when the child has not previously received special education from a public agency. Congress ratified that interpretation by re-enacting Sections 1412(a)(10)(C) and 1415(i)(2)(C)(iii) without change in 2004.

ARGUMENT

SECTION 1412(a)(10)(C) OF THE IDEA DOES NOT RESTRICT JUDICIAL AUTHORITY TO AWARD REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT, AND SUCH RELIEF IS CRITICAL TO PARENTS WHOSE CHILDREN ARE BEING DENIED THE FREE APPROPRIATE PUBLIC EDUCATION THAT THE IDEA GUARANTEES

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires that a State (and its school districts) that accepts federal IDEA funds provide each child with a disability with a free appropriate public education tailored to accommodate the child's disabilities and to achieve educational benefit. *See Board of Educ. v. Rowley*, 458 U.S. 176, 209 (1982).[2] If a school district violates this statutory

[2] The free appropriate public education is supposed to be reflected in the particular child's "IEP," the Individualized Education Program developed by a team of teachers, parents, and school administrators to, among other things, describe the

(Continued on following page)

mandate, a court may, after exhaustion of administrative procedures, "grant such relief as the court determines is appropriate" for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by this Court to authorize a court or hearing officer to order school districts to reimburse parents for their reasonable expenditures on unilateral private special education for a child if the court or hearing officer ultimately determines that such placement, rather than a proposed IEP with a public school placement, is proper under the Act. *See School Comm. of the Town of Burlington v. Department of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993).

This equitable authority is rarely invoked, but it is an essential remedy for ensuring that children with disabilities receive timely and appropriate educational services when faced with intransigence or mismanagement by school districts. Contrary to petitioner's argument, 20 U.S.C. § 1412(a)(10)(C), first enacted in 1997, did not impose a categorical limitation on the remedies available for violations of the IDEA.

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regular education, special education and related services, and other accommodations necessary to provide a student with an appropriate education. 20 U.S.C. § 1414(d).

A. Unilateral Private School Placement Is Rare, But When It Occurs, The Equitable Remedy Of Reimbursement Is Often Critical To Secure The Child An Appropriate Education

Contrary to the overstated rhetoric of petitioner and its *amici*, a ruling in favor of the parent in this case should not pose a significant burden on school districts. By contrast, a ruling in favor of petitioner would eliminate the only form of relief that can provide redress to parents who correctly act on the fact that a school district refuses to acknowledge their child has a disability *or* proposes an educational program for their child that would not constitute an appropriate education for the child.

1. The incidence of due process complaints seeking reimbursement for private placement is extremely small

Anecdotal stories that allege a trend of soaring private school placements for children with disabilities should not be confused with the facts. The United States Department of Education has tracked private placements for several decades. From a quantitative standpoint, the number of children with disabilities who are placed in private school is low, and such placement by parents without the concurrence of the school district is extremely small.

A school system in Oregon, just as anywhere else in the country, faces an order of involuntary

reimbursement of tuition for a child with disabilities in a private placement under Section 1415(i)(2)(C)(iii) only if a due process hearing and any subsequent litigation determines that the public school could not provide the child an appropriate education.

The percentage of children receiving services under the IDEA in publicly funded private placements has not changed significantly over the last 23 years. Since 1985, an average of 1.44% of all children served each year under the IDEA were in private placements at public expense.[3] For the past two years for which national data are available, in 2006 only 0.97% of children with disabilities were in private placements at public expense (57,078 out of 5,888,227 children), and in 2007 the percentage was

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[3] U.S. Dep't of Educ., *Data Tables for State Office of Special Education Programs ("OSEP") Data, IDEA Part B Educational Environment*, Table 2-2 (Fall 2007) (hereinafter "2007 OSEP Educational Environment Data Table 2-2"), *available at* https://www.ideadata.org/tables31st/ar_2-2.htm; U.S. Dep't of Educ., *Data Tables for State OSEP Data, IDEA Part B Educational Environment*, Table 2-2 (Fall 2006) (hereinafter "2006 OSEP Educational Environment Data Table 2-2"), *available at* https://www.ideadata.org/tables30th/ar_2-2.htm; U.S. Dep't of Educ., *Data Tables for State OSEP Data, IDEA Part B Educational Environment*, Table 2-5 (1996 through 2005) (Fall 2005), *available at* https://www.ideadata.org/tables29th/ar_2-5. htm; U.S. Dep't of Educ., *Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, at A-156 (1998) (Table AB7, 1986-1996, age group 6-21); U.S. Dep't of Educ., *Nineteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, at A-156 (1997) (Table AB7, 1985-1986, age group 6-21).

only 1.13% of children (66,648 children out of 5,882,835 children).[4]

The majority of these private placements are "agreed placements," meaning that the school district and parents agree that the private placement is necessary to provide the child with an appropriate education. *See* 20 U.S.C. § 1412(a)(10)(B) (discussing children with disabilities who "are placed in, or referred to" private schools "by the State or appropriate local educational agency as the means of carrying out the requirements of" the IDEA); *Amicus* Br. of Nat'l Sch. Bd. Ass'n, at 14 (acknowledging that the "overwhelming majority of these [private] placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA"). Some of these agreements take place at the IEP meeting, while others are not reached until the parents file a request for a due process hearing and the parties reach a settlement agreement that the school district will reimburse the tuition expended by the parents.

Amici are not aware of a study that reports how many of these private placements were unilateral parent placements for which the school district has been ordered by a hearing officer or court to pay reimbursement. But an examination of the data regarding dispute resolution under the

[4] 2007 OSEP Educational Environment Data Table 2-2; 2006 OSEP Educational Environment Data Table 2-2.

IDEA demonstrates that the actual number of reimbursement cases is very small. And the number that would be affected by petitioner's proposed rule would be even smaller.

It is rare for parent-school disputes to reach a due process hearing, much less reach a decision in the parents' favor awarding reimbursement. Starting with the broader universe that includes all requests for due process hearings or mediation under the IDEA as well as other formal complaints to state agencies regarding violation of the IDEA, there are an estimated 25,000 to 27,000 disputes filed annually, which represents approximately 0.4% of the approximately 6 million children with disabilities who are eligible under the IDEA. *See* Judy Schrag & Howard Schrag, National Association of State Directors of Special Education, *National Dispute Resolution Use and Effectiveness Study* 18, 24-25 (September 2004), *available at* http://www.direction service.org/cadre/effectiveness.cfm. Private placement was the key issue in only 3.5% of such disputes in 1999, 1.5% of such disputes in 2000, and 3.3% of such disputes in 2001. *Ibid*.

Of the requests for due process hearings, over 80% never are resolved on the merits; only 18.7% of due process hearings reach a decision. *Id*. at 29-30 (74.9% are withdrawn and 6.4% are dismissed). Nationwide, only approximately 3200 due process

hearings are held each year.[5] Parents prevail in only 29.8% of tuition reimbursement disputes that are resolved in a due process hearing or by a court. *See* Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 Remedial and Special Education 350, 355 (2001).

Due process hearings are concentrated in a small number of States—California, Maryland, New Jersey, New York, Pennsylvania and the District of Columbia—and, within those States, a small number of primarily urban school districts. *See* General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897) 13-14 (2003). In fact, 90% of school districts had no due process hearings at all in 2004-2005, and only 4% of school districts were involved in IDEA litigation of any kind. *See* Ellen Schiller *et al.*, Abt Associates, Inc., *Marking the Progress of IDEA Implementation* 19-20 (April 2006).

The Council of the Great City Schools is thus certainly correct when it notes in its *amicus* brief (at 26) that the volume of disputes involving tuition

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[5] U.S. Dep't of Educ., *Data Tables for State OSEP Data, IDEA Part B Dispute Resolution*, Table 7-3 (2006-2007) (Number of hearings (fully adjudicated) through dispute resolution procedures for children ages 3 through 21 served under IDEA, Part B, by case status and state), *available at* https://www.ideadata.org/tables31st/ar_7-3.xls.

reimbursements in New York City, on which it relies to support its argument, is "unique." The State of New York held approximately one-third (1058) of the entire nation's due process hearings that proceeded to decision in 2004.[6] Yet, even then, only 102 of those due process decisions involved parent tuition reimbursement.[7] The Los Angeles Unified School District, by contrast, reported to the Council of Great City Schools that there were no due process or court decisions ordering payment of tuition for a private placement in 2006-2007, and one decision ordering payment of private school tuition in 2007-2008. *See* Los Angeles Unified Sch. Dist. Tuition Survey, at 2.[8] Similarly, Boston reported to the Council no due process or court decisions ordering payment of tuition for a private placement in 2006-2007 and 2007-2008. Boston Pub. Sch. Tuition Survey, at 2.

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[6] *See* New York State Office of Vocational and Educational Services for Individuals with Disabilities, New York State Part B Annual Performance Report 2003-2004, Appendix 18.5 (Distribution of Issues for Decided Impartial Hearing Cases July 1, 2003—June 30, 2004 Displayed by Upstate and New York City) (hereinafter "New York State Part B Annual Performance Report 2003-2004"), *available at* http://www.vesid.nysed.gov/sedcar/apr/apr0304data/appeigt5.htm.

[7] New York State Part B Annual Performance Report 2003-2004, Appendix 18.5.

[8] In preparation for its *amicus* brief, the Council of Great City Schools sent its members a survey requesting information about school district's tuition payments to private schools. The Council cited the survey responses in its *amicus* brief (at 23-26) and provided them to *amici* upon request. *Amici* cite these surveys using the same format as the Council.

Further, there is no evidence that children who have not previously received special education and related services under the authority of a public agency are obtaining reimbursement in untoward numbers. In Boston, for example, there were 26 due process requests claiming tuition reimbursement for private school placement in 2007-2008, and the school district settled 25 of them, of which 2 involved situations where the students had not previously attended public school (a test that is not co-extensive with the statutory standard). *Ibid*.

2. Private placement costs generally are not significantly greater than public special education costs for comparable services

The IDEA benefits predominantly lower-income children with disabilities, and the children who are most likely to be placed in private schools are those with less common disabilities. Moreover, the cost of private placement is not significantly greater and can actually be less than that spent in public school.

a. The children who benefit most from the IDEA are, by and large, not the children of the wealthy. Rather the IDEA's guarantees benefit most those who cannot afford other educational choices—children who are not only disabled, but also disadvantaged in other ways. Overall, 68 percent of children with disabilities live in households with incomes less than $50,000, compared to only 53 percent of nondisabled

children. *See* Mary Wagner *et al.*, *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* 29 (2002).

Low and middle-income parents often make extreme financial sacrifices (such as obtaining second mortgages) to front the cost of private placement pending hoped-for reimbursement. Some private schools are willing to enroll a child with a disability whose parents cannot afford to pay, pending resolution of a challenge to the school district's placement. And federal courts have fashioned equitable relief in the form of prospective tuition payments payable directly to the private school when the parents demonstrate that the public school's program is not appropriate, that a private school can provide an appropriate program, and that the parents are financially unable to pay the cost of private education in advance. *See Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008); *Connors v. Mills*, 34 F. Supp. 2d 795 (N.D.N.Y. 1998).

b. Private school placements at public expense are usually provided for children with the types of disabilities for which public schools have shown themselves least able to provide an appropriate education. Almost three-quarters (73%) of all private school placements are children classified as emotionally disturbed, having mental retardation,

multiply-disabled, or autistic.[9] This is so even though such children represent only 22% of all children served under the IDEA. These same children are also disproportionately more likely to request due process hearings. *See* Schrag, *National Dispute Resolution Use and Effectiveness Study*, *supra*, at 20-21.

By contrast, children with learning disabilities and speech/language disabilities account for only 15% of children in private placements, despite representing 70% of children served under the IDEA. This is not because these disabilities are trivial, as often portrayed in the popular press; to the contrary, they often constitute significant impediments to learning. Fortunately, however, school districts have more experience, and greater success, with these higher frequency disabilities. Of course, as noted below, non-compliance with the IDEA is rampant and thus it is disappointing, but not surprising, that school districts are on occasion not themselves able to provide an appropriate public education even for children with these more common disabilities, leaving parents no choice but to rely on private placements.

c. Whether in public school or private school, it often costs more to educate a child with a disability.

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[9] Except as otherwise noted, the facts in this paragraph and the next paragraph are drawn from the U.S. Dep't of Education, *Data Tables for State OSEP Data, IDEA Part B Educational Environment*, Tables 1-3 and 2-5 (Fall 2005), *available at* https://www.ideadata.org/tables29th/ar_1-3.htm and https://www.ideadata.org/tables29th/ar_2-5.htm.

But contrary to the views expressed by petitioner's *amici*, the cost does not vary significantly between public and private schools.

It is important to note, however, that such comparisons are difficult to make for at least two reasons. First, in calculating the respective costs of educating a student in a public or private school, the costs are not always measured in the same way. While private school tuition rates reflect all costs, a public school's measure of costs for educating a child with a disability often excludes pension, social security, and health benefits on retirement, as well as facilities construction and associated debt service. Those costs are normally paid by state and/or county tax dollars, not by local school districts, and thus public schools may understate the actual cost of educating children, including children with disabilities, in a public education setting by 25% or more. *See* ASAH, *The Full Cost to New Jersey's Taxpayers for Self-Contained Special Education Programs: A Comparative Analysis of Local Public, County-based, and Private Special Education Programs* 18 (Nov. 2007).

Second, the characteristics of children with disabilities who end up educated in private school vary from the other children with disabilities. When educated within the public school system, students who are classified as emotionally disturbed, having mental retardation, multiply-disabled, or autistic have significantly higher per-pupil costs than other children with disabilities. Almost three-quarters of the children that the Center for Special Education

Finance refers to as "high expenditure" students are drawn from children with these disabilities: multiple disabilities (32.3%); autism (17.2%); emotional disturbance (16.2%); and mental retardation (7.1%).[10]

The average cost of educating a "high expenditure student" in public school in 1999-2000 was $39,909 for elementary school, $35,924 for secondary school, and $57,129 in a public school dedicated to special education.[11] Although no similar breakdown is available for private schools, the average expenditure on tuition, fees, and other special services for children with disabilities placed in private schools or other public agencies was $25,580 in 1999.[12]

In New York City and Los Angeles, for example, the per-pupil cost of special education in public schools is significantly greater than the average settlement those cities claim to have paid in unilateral placement cases. In 2004-2005 and 2005-2006, the average cost of educating a full-time special education student in the New York City public

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[10] *See* Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Characteristics of High-Expenditure Students With Disabilities, 1999-2000, Report 8*, at 21 (May 2004).

[11] *See id.* at 4-5.

[12] *See* Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability, Report 5*, at v, 4-5 (June 2003).

schools was $35,355 and $40,646, respectively,[13] yet it claims its average settlement in tuition cases for those years was $18,552 and $13,717, respectively.[14] Similarly, in 2006-2007 and 2007-2008, the average special education expenditure per special education student in Los Angeles was $16,403 and $17,080, respectively, while that city contends the average claim for private school tuition for those years was $17,774 and $16,294.[15]

Moreover, the local school district will not bear the costs alone. The majority of States have safety net programs allowing school districts to seek state reimbursement of costs when they exceed a certain threshold. "High cost special education disability funding is * * * commonly found across the states. Each state differs somewhat as to exactly how districts are able to qualify for claims under such programs, but all serve as a form of local insurance designed to assist districts faced with unusually high special education expenses." Thomas B. Parrish &

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[13] New York City Dep't of Educ., *School Based Expenditure Reports School Year 2004-2005, Citywide, By Student Type*, *available at* https://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y2004_2005/function.asp?R=2; New York City Dep't of Educ., *School Based Expenditure Reports School Year 2005-2006, Citywide, By Student Type*, *available at* https://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y2005_2006/function.asp?R=2.

[14] New York City Dep't of Educ. Tuition Survey, at 4-5 (2007).

[15] Los Angeles Unified Sch. Dist. Tuition Survey, at 1-2 (2009).

Jenifer J. Harr, American Institutes for Research, *Special Education Funding In Oregon: An Assessment of Current Practice with Preliminary Recommendations* 5 (Aug. 7, 2007), *available at* http://csef.air.org/publications/related/AIR%20OR%20SE%20Finance%208_7_07.pdf. The State of Oregon, for example, has created a High Cost Disabilities fund for reimbursing school districts when the expenditures for a child exceed $30,000 for the fiscal year. *See* Or. Rev. Stat. § 327.348. Thus, the system already has measures in place to mitigate a school district's burden for children with greater needs and, thus, higher costs, whether educated in a public school, in an agreed private placement, or in a unilateral placement subsequently found to be necessary by a hearing officer in a due process hearing or judge in litigation.

3. Private placement costs fall only on school districts that do not provide the appropriate public education required by federal law

Many of the objections voiced by petitioner and its *amici* are objections to the cost of special education or court-ordered placements generally. They gloss over the fact that those decisions by hearing officers and judges to reimburse parents of children with disabilities placed in private school are based on findings that public school systems *did not comply with the IDEA* because they did not offer an appropriate education for the children or, as in this

case, refused to even acknowledge that the child has a disability.

Those decisions where the parent is the prevailing party are not easily achieved. In light of this Court's decision in *Schaffer v. Weast*, 546 U.S. 49, 59-60 (2005), parents will (absent state law to the contrary) normally bear the burden of proof of showing that the school district did not comply with the IDEA. Furthermore, the IDEA now makes clear (in a provision enacted after the events at issue in this case) that even blatant violations of certain procedural provisions of the IDEA are not sufficient to have an IEP declared invalid. *See* 20 U.S.C. § 1415(f)(3)(E)(ii).

Compliance and monitoring reports by the United States Department of Education have revealed, nonetheless, that in many localities, school districts are not in compliance with federal law. Indeed, sometimes the school district simply admits as much. Thus in *Frank G. v. Board of Education*, 459 F.3d 356, 361 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007), the school board challenged reimbursement for a family's placement of a child in a private school because the child never received special education under the authority of a public agency, despite the fact that the school system conceded at the due process hearing that its proposed

IEP did not offer an appropriate education.[16] The myriad cases in which federal and state courts have made similar findings of noncompliance with IDEA's substantive standards confirm this reality. *See also* New York State Comptroller, *Waiting for Special Education*, Report No. 3-2009, at 8 (June 2008), *available at* http://www.osc.state.ny.us/osdc/rpt3-2009.pdf ("The number of unfilled recommendations for related services [in New York City] more than doubled from 28,624 in June 2003 to 64,897 in June 2007.").

The National Council on Disability, an independent federal agency, succinctly summarized the Department of Education's findings: "Every state was out of compliance with the IDEA requirements to some degree; in the sampling of states studied, noncompliance persisted over many years." National Council on Disability, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind* 7 (Jan. 25, 2000), *available at* http://

[16] According to the facts as described in the court of appeals' opinion, the child's declining performance at a Catholic school prompted his parents to request an evaluation from the public school. *Frank G.*, 459 F.3d at 359-360. During the evaluation process, an independent neuropsychologist recommended that the child, who had been diagnosed with attention deficit hyperactivity disorder at the age of three, be placed in a small classroom of 12 students with an aide and related services. *Id.* at 360. The school district's IEP nonetheless proposed a classroom of 26-30 students. *Ibid.*

www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm#2.

Indeed, seven years earlier, the same federal agency reported that the Department of Education had determined that "150 of the 165 local public agencies" surveyed were "in varying degrees of noncompliance with federal and state IEP mandates" and that another Department of Education study of 40 local school districts across 21 States found that almost 10 percent of students with disabilities "either do not have an IEP or have not been properly evaluated" in violation of federal law. National Council on Disability, *Serving the Nation's Students with Disabilities: Progress and Prospects* 3, 25 (Mar. 4, 1993), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/13/9b/d8.pdf.

B. Congress Did Not Clearly Manifest An Intent To Prohibit Courts From Ordering Reimbursement When A School District Violates Federal Law

The question here is whether the IDEA leaves parents of a child with a disability only the choice between accepting the school district's erroneous determination that the child has no disability or paying for an appropriate education with no possibility of reimbursement even if they ultimately establish the school district's error.

When parents are confronted with a school district that they believe is violating federal law by its failure to propose or provide their child a free appropriate education, as required by the IDEA, they are dependent on the federally designed administrative "due process" proceedings and ultimately on the courts to vindicate their federal rights. It takes time, however, for this comprehensive process to resolve disputes. This Court has described the process as "ponderous" and has taken note of the fact that a "final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Indeed, States are often in violation of the IDEA's requirements regarding how long a due process proceeding may take. *See* National Council on Disability, *Back to School on Civil Rights*, *supra*, at 121 (Department of Education found 36% of States failed to resolve due process hearings within the 45 days required by regulations). This case has dragged on for years without a final resolution of respondent's rights under the IDEA. In the meantime, children who remain in an inappropriate placement or end up at home suffer educational setbacks from lost learning opportunities.

In *Burlington*, 471 U.S. at 372, and again in *Florence County School District v. Carter*, 510 U.S. 7 (1993), this Court held that Congress did not intend to force parents to choose between "an appropriate

education and a free one." The Court held that the plain language of the IDEA authorizes parents to receive reimbursement of reasonable private school tuition if the school district was not offering an appropriate education.

Although petitioner suggests that the burden is on Congress in a Spending Clause statute to make clear in the statute the scope of a court's equitable authority for violations of that statute, respondent shows that Congress must employ a clear statement if it wishes to restrict a court's equitable authority. Resp. Br. 27-29. Further, as *amicus* Council of Parent Attorneys and Advocates documents, the IDEA is also an exercise of Congress's power to enforce the Fourteenth Amendment, and statutes enacted pursuant to that authority do not require a clear statement even if they impose burdens on state and local governments. *See Hutto v. Finney*, 437 U.S. 678, 698 n.31 (1978).

In any event, Congress made clear in the text of the statute, in the legislative history, and in its subsequent 2004 re-enactment of the IDEA that it did not intend to categorically deny the equitable remedy of reimbursement to children with disabilities simply because they had not previously received special education under the authority of a public agency.

1. Congress has not altered the statutory provisions that this Court correctly interpreted in *Burlington* and *Carter* to authorize courts to order reimbursement when federal law has been violated

This Court relied on two statutory provisions as the basis for its determinations in *Burlington* and *Carter* that courts can award reimbursement. Congress did not alter either of those provisions (save for changes in terminology) in 1997 or by subsequent amendments. First, the Court looked to Section 1400(d)(1), which sets forth the purpose of the IDEA: to ensure that all children with disabilities (formerly described as "handicapped" children) "have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs" and to ensure "that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1). Second, the Court relied on Congress's grant to federal courts the authority to hear claims by aggrieved parents that their statutory rights were being violated without regard to the amount in controversy and authorized those courts to "grant such relief as the court determines is appropriate" for violations of the statute. *Id.* § 1415(i)(2)(C)(iii).

In *Burlington*, the Court held in a unanimous opinion by Chief Justice Rehnquist that the language used by Congress in that grant of authority to award "appropriate" relief "confers broad discretion on the court." 471 U.S. at 369. The Court explained that,

absent an equitable remedy of reimbursement, the parents were faced with the Hobson's choice to accept a school district's proposed placement "to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Id*. at 370. The Court concluded that "[i]f that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Ibid.* Congress "undoubtedly" could not have intended that result. *Ibid.* This Court was therefore "confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents." *Ibid.*

In *Carter*, the Court unanimously reaffirmed that the "IDEA's grant of equitable authority empowers a court 'to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.'" *Carter*, 510 U.S. at 12 (quoting *Burlington*, 471 U.S. at 369). The "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of [the IDEA] to bar reimbursement in the circumstances of this case would defeat this statutory purpose." *Id.* at 13-14 (internal citation omitted). The Court clarified that parents are "entitled to reimbursement *only* if a federal court concludes both that the public

placement violated IDEA and that the private school placement was proper under the Act." *Id.* at 15.

The broad statutory grant of authority in Section 1415(i)(2)(C)(iii) to award "appropriate" relief, relied on by the Court in both *Burlington* and *Carter*, has not been amended. Thus, nothing in the text of the IDEA reflects an intent by Congress to constrict the power of the courts to award "appropriate" relief, including reimbursement of tuition, to parents under appropriate circumstances.

2. Petitioner's reading of Section 1412(a)(10)(C) is contrary to its legislative history

Section 1412(a)(10)(C) describes circumstances under which the courts "may" grant or deny reimbursement when a child "previously received special education and related services under the authority of a public agency." But that provision does not prohibit the exercise of a court's equitable authority to award reimbursement to parents in circumstances that fall outside the scope of Section 1412(a)(10)(C).

Nothing in the legislative history suggests that Congress intended Section 1412(a)(10)(C) to categorically exclude from the equitable remedy of reimbursement children with disabilities who did not previously receive special education or related services under the authority of a public agency, but can establish that they have been denied an appropriate education by the public school.

a. As respondent discusses, although this issue arises only very sparsely in the legislative history, the statements of the supporters of the 1997 IDEA amendments demonstrate that the enactment of Section 1412(a)(10)(C) was not intended as a departure from the state of the law at that time. *See* Resp. Br. 25 (citing statements of Senators Harkin and Jeffords). Indeed, several proponents of the 1997 IDEA amendments declared that the amendments would preserve all of the core rights that the IDEA granted parents of children with disabilities. Representative Miller stated that the amendments would "maintain[ ] the fundamental rights" in the IDEA, including "that parents are entitled to pursue all legal avenues available for them to ensure" that their child receives a free appropriate education. 143 Cong. Rec. H2536 (daily ed. May 13, 1997). Likewise, Senator Harkin explained that the amendments "retain[ed] all of the basic rights and protections available under current law." 143 Cong. Rec. S4299 (daily ed. May 12, 1997).

The statements of Representative Castle, to which petitioner and its *amici* cite, are not to the contrary. Representative Castle's statement that the amendments would "make[ ] it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense," 143 Cong. Rec. at H2536, was undoubtedly true, but not because the amendments *categorically* excluded children with disabilities who had not previously received special education from a state agency. Rather, as respondent

explains, Resp. Br. 26, and as shown below, the comments were true because of the Section 1412(a)(10)(C) guidance on notice, cooperation, and reasonableness.

b. Rather than exclude an entire class of children with disabilities from reimbursement for private school placement, the legislative history confirms that Section 1412(a)(10)(C) was intended to codify the notice requirement that existed in the prevailing case law—specifically, that a court may consider, in exercising its remedial discretion to award reimbursement, whether the parents provided notice to the school district that they intended to place their child in private school because of dissatisfaction with the proposed IEP. That notice requirement is inapposite in a case like this, where the petitioner school district did not propose any IEP at all because it believed that respondent was not eligible for special education.

The small amount of discussion at the hearings regarding the reimbursement issue prior to 1997 reflects only a desire that Congress clarify that notice and cooperation by parents were appropriate factors that should be considered in determining whether to award reimbursement. There was no suggestion that children who had not previously received special education or related services from a school district should never receive reimbursement, the view currently urged by petitioner.

In a congressional hearing regarding the reauthorization of the IDEA in 1994, the National School Board Association urged Congress to amend the IDEA to expressly provide that "[i]n cases where parents are seeking to place their child in a private school, the school needs to be given adequate advance notice of the services the parents desire." *Hearing on the Reauthorization of the Individuals with Disabilities Education Act: Before the Subcomm. on Select Educ. & Civil Rights of the House Comm. on Educ. and Labor*, 103d Cong. 43 (1994). It explained that requiring advance notice "is cost efficient and still fully protects the rights of students with disabilities." *Ibid.*

The following year, the General Counsel of the Orange County Department of Education explained to Congress that his office had been working with various national and state education organizations to provide recommendations for changes in the IDEA. He stated that the proposal that had been developed "[w]ith regard to unilateral placement of students in private facilities" was that parents would be required "to notify school districts before placing their child in a private school that they intend to seek tuition reimbursement from the school district." *Hearings on the Individuals with Disabilities Educ. Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Econ. & Educ. Opportunities*, 104th Cong. 279 (1995); *see also id.* at 290 (California School Boards Association urges provision requiring parents "to provide ample notice and opportunity for

the districts to provide appropriate services through their own public means" before "unilateral placement of students in non-public schools by parents"); *Hearing on Early Childhood, Youth & Families Staff Draft of the IDEA Improvement Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. 10 (1996) (California school district urges that reimbursement be denied unless there is notice and "the parents or guardian have cooperated in good faith with the local education agency to develop an individualized education program for the child or youth prior to seeking the non-public service or placement").

When a predecessor to Section 1412(a)(10)(C) appeared in a version of the bill reported out of the House Committee on Economic and Education Opportunities in 1996, the committee stated that school districts were sometimes "confronted with the very rare situation where parents place a child in private school without notifying the school district" and that the proposed bill "would require such parents to notify, at a minimum, a local education agency of their concerns, and provide the opportunity for the school to evaluate the child and determine if it can meet that child's needs." H.R. Rep. No. 104-614, at 12 (1996). That committee bill passed in the House but no action was taken in the Senate.

The key point is that the intent of the amendments was to evaluate the child and develop

and implement an IEP that "meet[s] that child's needs." *Ibid.* If the school district could not meet those needs, it would be inconsistent with the IDEA and bad for the child to be placed in an inappropriate educational program.

In hearings the following year, some witnesses supported what they described as the "written notification" language of what would become Section 1412(a)(10)(C). *See Hearings on H.R. 5, The IDEA Improvement Act of 1997: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Educ. & the Workforce*, 105th Cong. 12 (1997) (Los Angeles County Office of Education); *id.* at 80-81 (California Special Education Local Plan Area). A few witnesses urged that Congress eliminate any reimbursement remedy for a unilateral placement in private school. *See Reauthorization of the Individuals with Disabilities Education Act: Before the Senate Comm. on Labor & Human Resources*, 105th Cong. 31 (1997) (Chairman of Bedford School Board); *id.* at 106 (Council for Exceptional Children). But there was no suggestion that Congress should eliminate the reimbursement remedy for one category of students (*i.e.*, those who did not previously receive special education and related services under the authority of a public agency) while permitting it for others.

Thus, it is the "notice" concept that is reflected in the Senate and House Committee reports in 1997, both of which describe the provision as providing that if "the parents do not comply with the notice

[requirement of the bill] and evaluation requests [of the public agency] or engage in unreasonable actions, hearing officers and courts may reduce or deny reimbursement to parents for unilateral private placements." S. Rep. No. 105-17, at 12 (1997); H.R. Rep. No. 105-95, at 92 (1997).

3. Congress has ratified the Secretary of Education's repeated interpretation of the IDEA as granting authority to award reimbursement for private placement even where the child had not previously received special education under the authority of a public agency

As respondent explains, the Secretary of Education, who was intimately involved with the enactment of the 1997 IDEA amendments, has repeatedly interpreted Section 1412(a)(10)(C)(ii) as not limiting the equitable remedy of reimbursement for private school education to only those children who had previously received special education from a public agency. *See* Resp. Br. 39-40.

In the course of promulgating regulations to implement the 1997 IDEA amendments, the Secretary of Education in 1999 rejected a request to amend its regulation to treat Section 1412(a)(10)(C)(ii) as limiting Section 1415(i)(2)(C)(iii). The Secretary reasoned that courts and hearing officers retained the authority, recognized in *Burlington* and *Carter*, to award "appropriate" relief such as private education reimbursement under Section 1415(i)(2)(C)(iii) and

that this authority was "independent" of their authority under Section 1412(a)(10)(C)(ii) to award private education reimbursement to parents of children who had previously received special education under the authority of a public agency. 64 Fed. Reg. 12,406, 12,602 (Mar. 12, 1999). And in a published letter dated March 19, 1999, the Department of Education again explained that no provision of the IDEA "makes a child's prior receipt of special education and related services from a public agency a prerequisite to a parent's obtaining tuition reimbursement from a hearing officer or court for the cost of a unilateral private school placement." 65 Fed. Reg. 9178, 9178 (Feb. 23, 2000).

"It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). Thus, when Congress fully re-enacted Sections 1412(a)(10)(C) and 1415(i)(2)(C)(iii), without amendment in 2004, *see* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, §§ 612(a)(10)(C), 615(i)(2)(C)(iii),

118 Stat. 2647, 2682-2683, 2724, Congress ratified the Secretary's consistent, published interpretation.

CONCLUSION

For the reasons set forth above and in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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