

Opening the Doors to a Quality Public Education for Children with Disabilities or Slamming Them Shut: A Critique of the Supreme Court's Treatment of Private-Tuition Reimbursement Under the IDEA [*Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009)]

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I. INTRODUCTION

“When you think about it, after unconditional love and attention, there may be nothing more powerful a parent can give a child than education.”¹ A quality education provides the necessary skills for children to become self-sufficient, contributing members of society.² In our nation's public schools, however, parents of children with disabilities often watch their children languish in educational programs that do not meet the children's needs.³ In some instances, the public-school district fails to offer an appropriate education altogether.⁴

Frustrated by untimely resolution of deficiencies and a lack of compliance with the law governing special education, many parents seek recourse by placing their child in a private school without the school district's prior consent.⁵ Following the private placement, parents pursue reimbursement for costs from the public school.⁶ Because public schools already face limited resources and special education consumes

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1. Nancy L. Brown, *The Importance of Education*, HEALTHLINE Aug. 31, 2008, http://www.healthline.com/blogs/teen_health/2008/08/importance-of-education.html.

2. See President Barack Obama, Prepared Remarks of President Barack Obama: Back to School Event (Sept. 8, 2009), available at <http://www.whitehouse.gov/mediaresources/PreparedSchoolRemarks>.

3. See N. Jane Dubovy, *Expert Perspective: Thoughts on Forest Grove School District v. T.A.*, *examiner.com*, June 27, 2009, <http://www.examiner.com> (search using “Expert Perspective on Forest Grove”); then follow “Expert Perspective: Thoughts on Forest Grove School District v. T.A.” hyperlink).

4. See *id.*

5. See NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS 66 (2000); Dubovy, *supra* note 3.

6. See Dubovy, *supra* note 3.

20% of schools' operating budgets, public-school officials must contain soaring expenses or risk depletion of funds for education programs.⁷

The United States Supreme Court weighed the interests of children with disabilities and their parents against the interests of public schools in *Forest Grove School District v. T.A.*⁸ In *Forest Grove*, the Court faced the question of whether the 1997 Amendments to the Individuals with Disabilities Education Act (IDEA)⁹ eliminated courts' ability to order private-tuition reimbursement for students who had not previously received special-education services and whose parents removed them unilaterally from a school district.¹⁰ With the quality of public education and hundreds of millions of public dollars at stake, parents, educators, school officials, and service providers, among many others, anxiously awaited the Supreme Court's decision in this landmark case.¹¹

7. See Brief for Council of the Great City Schs. as Amicus Curiae in Support of Petitioner at 22-23, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305); Tamar Lewin, *Court Affirms Reimbursement for Special Education*, N.Y. TIMES, June 23, 2009, at A16, available at <http://www.nytimes.com> (search using "Tamar Lewin Forest Grove v. T.A."; then follow "Court Affirms Reimbursement for Special Education" hyperlink); Tony Mauro, *High Court Justices Weigh Funding for Special Education*, NAT'L L.J., April 29, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202430265066>.

8. 129 S. Ct. 2484 (2009).

9. 20 U.S.C. §§ 1400-1482 (2006); 20 U.S.C. § 1400(d)(1)(A)-(C) states:

The purposes of this chapter are-

- (1) (A) 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 and prepare them for further education, employment, and independent living;
- (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
- (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities[.]

Id.

10. See *Forest Grove*, 129 S. Ct. at 2484; Mauro, *supra* note 7. The 1997 Amendments to the IDEA are at the core of the tension between the public schools and parents of children with disabilities. See *Forest Grove*, 129 S. Ct. at 2486. The amendments created a provision titled "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." *Id.* at 2492. 20 U.S.C. § 1412(a)(10)(C)(ii) provides:

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.

Id. Throughout this Comment, the author will refer to the provision added to the IDEA by the 1997 Amendments as the "private-reimbursement" or "amended" provision.

11. See Zach Lowe, *Supreme Court Sides with Student's Family in Special Ed Funding Case*, THE AMERICAN LAWYER, June 23, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202431664858&rss=newswire>. The Supreme Court examined the amendments in relation to the purpose of the IDEA, the text of a provision in the IDEA granting broad remedial relief, and previously-decided cases to determine whether the amendments categorically barred private reimbursement for a child placed unilaterally who did not receive previous special-education services. *Forest Grove*, 129 S. Ct. at 2486-87. A unilateral removal from a school district or a unilateral placement in a private school is a change pursued by a child's parents without the consent of or referral by state or local public-school officials. See *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). The provision in the IDEA granting the court broad authority for appropriate relief is 20 U.S.C. § 1415(i)(2)(C)(iii). See *Forest Grove*, 129 S. Ct. at 2492. The provision states, "basing its decision on the preponderance of the evidence, [the court] shall grant such relief as the court determines is ap-

In a decision heralded as a victory for children with disabilities, the Supreme Court ruled on June 22, 2009, that the IDEA authorizes public schools to reimburse parents for private-school tuition when a school district fails to provide a free appropriate public education, regardless of whether the child previously received special-education services from the public-school system.¹² The problem with the *Forest Grove* decision, however, is that allowing parents to remove their child from the public school without having tried the special-education program, undermines the collaborative framework and open-door policy inherent in the IDEA.¹³

This Comment analyzes the Court's tenuous statutory construction of the 1997 Amendments to the IDEA and the future implications of the *Forest Grove* decision for public education. Part II of this Comment describes T.A.'s personal history, the facts surrounding his education in the Forest Grove School District in Oregon (School District), and the procedural history of the case including the administrative hearing, the decision of the United States District Court for the District of Oregon, and the ruling by the United States Court of Appeals for the Ninth Circuit.¹⁴ Part III provides a historical overview of the social and cultural responses to individuals with disabilities, examines the "equal education" movement, and explores the legislative mandates addressing public education of children with disabilities.¹⁵ Part IV summarizes the Supreme Court's majority and dissenting opinions.¹⁶ Part V critiques the majority opinion and explores its negative ramifications.¹⁷

II. CASE DESCRIPTION

T.A. was a public-school student in the School District from kindergarten until the spring of his junior year of high school.¹⁸ Throughout T.A.'s education, his teachers noticed that he had difficulty completing school assignments and paying attention in the classroom.¹⁹ The

appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). The author will refer to this provision of the IDEA as the "appropriate-relief" provision throughout the Comment.

12. *Forest Grove*, 129 S. Ct. at 2496. Advocates for children with disabilities describe the *Forest Grove* decision as a "groundbreaking win" for parents of children with disabilities. Earl Simms, *U.S. Supreme Court IDEA Decision a Landmark Win for Special Needs Students* (July 9, 2009), <http://www.childreducationalliance-mo.org/main/supreme-court-idea-decision-landmark>.

13. See *infra* Part V.B.1.-B.2.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

17. See *infra* Part V.

18. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2488 (2009).

19. *Id.* T.A.'s problems increased when he entered high school in September 2000. *Id.* T.A.'s mother was assisting him with homework and classroom assignments for a minimum of two hours per day and as much as half a day each day on the weekends. Brief of Respondent-Appellee at 5, *Forest Grove*, 129 S. Ct. 2484 (2009) (No. 08-305). In December 2000, T.A.'s mother contacted the school's counselor, who recommended an evaluation for special-education services. *Forest Grove*, 129 S. Ct. at 2488; *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1081 (9th Cir. 2008). After completing a cog-

School District evaluated T.A., and in June 2001, school officials, the school psychologist, and T.A.'s mother agreed that he did not qualify for special-education services.²⁰

T.A.'s problems worsened during his junior year of high school, and his family sought a private psychological evaluation.²¹ A clinical psychologist diagnosed T.A. with attention deficit hyperactivity disorder, chronic depression, a number of learning and memory disabilities, and cannabis abuse.²² The clinical psychologist told the family that T.A. would benefit from a structured residential learning environment.²³ T.A.'s parents unilaterally removed him from the School District and enrolled him in a private academy.²⁴ Tuition at the private academy amounted to \$5,200 per month.²⁵

nitive evaluation, the school psychologist concluded that T.A. did not require further testing for learning disabilities. *Forest Grove*, 129 S. Ct. at 2488. However, notes related to T.A.'s evaluation on January 16, 2001, included references to attention deficit disorder and attention hyperactivity disorder. Brief of Respondent, *supra* at 5.

20. *Forest Grove*, 129 S. Ct. at 2488. Although T.A.'s parents did not pursue a review of the decision, the hearing officer later determined that the district's evaluation was legally inadequate because it failed to consider all suspected disabilities. *Id.* The Forest Grove School District's (School District) formal evaluation report, completed three months after the meeting between school officials and T.A.'s parents, indicated that T.A. was ineligible for special-education services in the area of learning disabilities. Brief of Respondent, *supra* note 19, at 6. The evaluation report indicated that T.A. may qualify for services under another section of the law, Section 504 of the Rehabilitation Act of 1973. *Id.* School officials did not pursue qualifications for T.A. under the Rehabilitation Act. *Id.* The School District psychologist did not evaluate T.A. for attention deficit hyperactivity disorder, noting that it was "evident that motivational factors play[ed] a significant role in T.A.'s functioning," and the reasons for T.A.'s motivational problems "[were] beyond the scope of this evaluation." *Id.*

21. *Forest Grove*, 129 S. Ct. at 2488. T.A. became depressed and engaged in marijuana use. Brief of Respondent, *supra* note 19, at 8. T.A. ran away from home, and the police returned him to his family within a few days. *Forest Grove*, 523 F.3d at 1081. Following this event, T.A.'s family sought private clinical evaluations for emotional and learning disorders. *Id.* at 1081-82.

22. Brief of Respondent, *supra* note 19, at 8. The clinical psychologist diagnosed T.A. with attention deficit hyperactivity disorder, a childhood disorder in which symptoms of inattention, hyperactivity, and impulsivity persist for greater than six months to a degree greater than that of children of the same age. See National Institute of Mental Health, <http://www.nimh.nih.gov> (search using "ADHD"; follow hyperlink "NIMH-Attention Deficit Hyperactivity Disorder ADHD"; then follow "more about signs & symptoms") (last visited Jan. 11, 2010). The psychologist also diagnosed T.A. with dysthymia, a chronic type of depression in which a person has a low mood almost every day for two years with other symptoms, which include but are not limited to fatigue, low self-esteem, poor concentration, and sleep disturbance. See Medline Plus, <http://www.medlineplus.gov> (search using "dysthymia"; follow hyperlink "Dysthymia") (last visited Jan. 11, 2010).

23. Brief of Respondent, *supra* note 19, at 8; *Forest Grove*, 523 F.3d at 1082. The clinical psychologist "recommended a residential program for T.A. because of T.A.'s failure to live up to his potential in school, his difficulties at home, his attitude toward school, his sense of hopelessness, and his drug problem." *Forest Grove*, 523 F.3d at 1082. T.A. completed the Catherine Freer Wilderness Therapy Expeditions Program with cannabis dependence as his primary diagnosis and depression as his secondary diagnosis. *Id.*

24. Brief of Respondent, *supra* note 19, at 8-9. T.A.'s parents placed him at Mount Bachelor Academy, a residential school approved by the Oregon Department of Health and Human Services to provide special-education services. *Id.*

25. *Forest Grove Sch. Dist. v. T.A.*, 640 F. Supp. 2d 1320, 1325 (D. Or. 2005). At that time, T.A.'s parents were reportedly not aware that under the IDEA, the School District could be responsible for reimbursing T.A.'s tuition at the private academy. Brief of Respondent, *supra* note 19, at 9.

A. Administrative Hearing

In April 2003, T.A.'s parents requested a special-education due process hearing from the Oregon Office of Administrative Hearings.²⁶ In May 2003, the hearing officer assigned to the case continued the matter so that the School District could re-evaluate T.A.²⁷ In June 2003, the School District arranged for an evaluation by a school psychologist to determine whether T.A. had a disability that negatively impacted his education.²⁸ In July 2003, a multidisciplinary team concluded that T.A. did not satisfy the IDEA's disability criteria for special education.²⁹ Therefore, the School District did not offer T.A. an "individualized education program."³⁰

Despite the School District's decision that T.A. did not qualify for special-education services, the hearing officer assigned to T.A.'s case decided in January 2004 that: (a) T.A. had an "other health impairments disability" that adversely impacted his education; (b) the private-school placement was appropriate; and (c) the School District failed to provide T.A. a free appropriate public education as required by the IDEA.³¹

26. *Forest Grove*, 523 F.3d at 1082. Similar to a trial, an administrative "due process hearing is a formal legal proceeding before a neutral hearing officer." Joel Greenburg, *Special Education Rights of Disabled Children* (Nov. 2008), http://www.osbar.org/public/legalinfo/1006_SpecEdDisabledChildren.htm. Parents have a right to request a due process hearing on any matter related to the education of their child with a disability including, but not limited to, how a school district delivers a free appropriate public education. See 20 U.S.C. § 1415(f)(1)(A) (2006); ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, *SPECIAL EDUCATION AND THE LAW* 129-30 (2003). T.A.'s parents, with legal counsel, sought an administrative order requiring the School District to evaluate T.A. on his eligibility for special-education services for all areas of suspected disability including "other health impairments" under the IDEA. Brief of Respondent, *supra* note 19, at 9.

34 C.F.R. § 300.9 (2009) states:

(9) Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

Id.

27. *Forest Grove*, 523 F.3d at 1082. Oregon law requires that administrative due process hearings be held before an independent hearing officer who is appointed by the Superintendent of Public Instruction. *Forest Grove*, 640 F. Supp. 2d at 1329.

28. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2488 (2009).

29. Brief of Respondent, *supra* note 19, at 9.

30. *Id.* An "individualized education program" or "IEP" is a written statement for each child with a disability that includes, but is not limited to, information regarding the student's current academic performance, short-term goals, annual goals, and specific services provided for the student's education. See 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV) (2006). An individualized education program may also refer to a number of interrelated things such as: (1) the actual meeting at which the district determines a child's eligibility for special education; (2) the yearly meeting where school officials and parents develop the child's education plan; and (3) the written document outlining the child's education program. See LAWRENCE M. SIEGEL, *THE COMPLETE IEP GUIDE HOW TO ADVOCATE FOR YOUR SPECIAL ED CHILD 2* (Betsy Simmons ed., NOLO 2007). T.A.'s parents chose to keep him enrolled at the private academy for his senior year of high school. *Forest Grove*, 129 S. Ct. at 2489.

31. *Forest Grove*, 129 S. Ct. at 2489. Selected based on state law, a hearing officer must be an impartial party who is not an employee of the state or local educational agency involved with the child and does not have a personal or professional interest in the student in question. *Cothern v.*

The hearing officer ordered the School District to reimburse T.A.'s parents for the cost of his private tuition of \$5,200 per month until the School District could meet its obligation to provide a free appropriate public education pursuant to the IDEA.³²

B. The Lower Court Decisions

After the hearing officer ordered the School District to provide private-tuition reimbursement to T.A.'s parents, the district court set the award aside.³³ The court held that the 1997 Amendments to the IDEA "categorically bar reimbursement unless a child has 'previously received special education or related services under the [school's] authority.'"³⁴ However, the Ninth Circuit reversed the decision of the district court and held "that the Amendments did not diminish the authority of courts to grant reimbursement as 'appropriate' relief."³⁵

1. United States District Court for the District of Oregon

The School District argued that the hearing officer erred in ordering reimbursement for T.A.'s tuition at the private academy.³⁶ Although the district court accepted the hearing officer's findings of fact, it held, "[t]he plainest reading of the statute is that *only* children who had

Mallory, 565 F. Supp. 701, 705 (W.D. Mo. 1983). 20 U.S.C. § 1415(f)(3)(A)(i)-(iv) (2006) provides in pertinent part:

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

Id.

32. *Forest Grove*, 129 S. Ct. at 2489. A hearing officer who presides over an administrative due process hearing applies the law to facts with the power to issue orders and grant equitable relief in matters concerning a free appropriate public education. *See OSBORNE & RUSSO, supra* note 26, at 131. The hearing officer's overall authority is limited to issues in the case at hand and does not apply to broad policy or procedural remedies. *See id.* at 131.

33. *Forest Grove*, 129 S. Ct. at 2486.

34. *Id.*

35. *Id.*

36. *Id.* at 2489. 20 U.S.C. § 1415(i)(2)(A) (2006) states:

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

Id.

previously received special education services from the District are even eligible for such tuition reimbursement.”³⁷ The district court also held that, “even assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities,” the facts of T.A.’s case did not support equitable relief.³⁸

2. United States Court of Appeals for the Ninth Circuit

While the *Forest Grove* case was on appeal, the Supreme Court addressed two cases from the United States Court of Appeals for the Second Circuit involving an issue similar to that presented by *Forest Grove*.³⁹ The Court denied certiorari in *Frank G. v. Board of Education of Hyde Park*.⁴⁰ But, the Court’s treatment of *Board of Education of New York v. Tom F.*⁴¹ left intact the split between the Second and First Circuits on the issue of whether the IDEA barred private reimbursement for students who have not previously received special-education

37. *Forest Grove Sch. Dist. v. T.A.*, 640 F. Supp. 2d 1320, 1332 (D. Or. 2005) (emphasis in original). “The plain reading of the statute, in other words, makes T.A. entirely ineligible for reimbursement.” *Id.* The United States District Court for the District of Oregon gave substantial deference to the legal conclusions of the hearing officer who presided over the administrative hearing for T.A. *Id.* at 1330. The district court exercised its judgment as to whether the legal conclusions were supported by the facts in the case, finding that based upon a preponderance of the evidence, the amended provision—20 U.S.C. § 1412(a)(10)(C)(ii) (2006)—bars private tuition reimbursement. *Id.*

38. *Forest Grove*, 129 S. Ct. at 2489.

39. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1083 (9th Cir. 2008). The Ninth Circuit referred T.A.’s case to mediation and deferred submission until the Supreme Court addressed a Second Circuit case, *Frank G. v. Board of Education of Hyde Park*, which involved private-tuition reimbursement for a child placed unilaterally. *Id.* The Ninth Circuit deferred mediation again in T.A.’s case until after the Supreme Court resolved *Board of Education v. Tom F.*, another Second Circuit case dealing with a similar issue. *Id.*

40. 552 U.S. 1 (2007) (cert. denied). In *Frank G.*, the Committee on Special Education (Committee) classified Anthony G. with a learning disability under the IDEA. *Frank G.*, 459 F.3d at 360. An independent neuropsychological evaluation included recommendations that Anthony G. receive individualized attention with a small class size. *Id.* The Committee recommended placement in a public elementary school in a regular education classroom of twenty-six to thirty children with consultant services. *Id.* Anthony G.’s parents requested a hearing to address whether the Committee would consider providing services at the private school Anthony G. attended in the past, citing the large class size at the public school as problematic. *Id.* at 360-61. Anthony G.’s parents enrolled him in a completely different private school than was discussed. *Id.* The United States Court of Appeals for the Second Circuit held that Anthony G.’s placement was appropriate, and the IDEA did not bar reimbursement when the child did not receive special education previously. *Id.* at 376.

41. The Court affirmed the Second Circuit decision in *Tom F.* by an equally divided court without opinion. *Bd. of Educ. of N.Y. v. Tom F.*, 552 U.S. 1 (2007); *Forest Grove*, 523 F.3d at 1083. Tom F. had a son diagnosed with attention deficit hyperactivity disorder. Brief of Respondent at 3, *Bd. of Educ. of N.Y. v. Tom F.*, 552 U.S. 1 (2007) (No. 06-637). Tom F. disagreed with the individualized education programs developed by the public school his son attended. *Id.* at 3-4. Tom F. enrolled his son in a private school and requested tuition reimbursement from the public school district. *Id.* The public school settled, opting to pay tuition reimbursement rather than become involved in litigation. *Id.* at 4. The public school evaluated Tom F.’s son again in anticipation of the 1998-1999 school year and developed a new individualized education program. *Id.* at 3-4. The school again evaluated Tom F.’s son for the 1999-2000 school year, and Tom F. contested the placement the new program set forth. *Id.* at 5. The district court reversed the decision of the state review officer and denied private reimbursement. *Id.* at 8-9.

services in the public-school district.⁴²

A divided Ninth Circuit panel reversed the district court's decision, noting that before the 1997 Amendments, the IDEA was silent on the subject of private-school reimbursement, but the courts nevertheless granted appropriate relief.⁴³ The Ninth Circuit agreed with the Second Circuit's decision in *Frank G.* and held that the IDEA does not bar tuition reimbursement when a parent places a child in a private setting and the child has not previously received special-education services in the public school.⁴⁴

The Ninth Circuit panel held that the district court abused its discretion in denying private-tuition reimbursement to T.A.'s family because it made two legal errors regarding the principles of equity.⁴⁵ First, the district court misread the statute when it concluded that the equitable considerations for granting private-tuition reimbursement did not "override the statutory requirements for tuition reimbursement."⁴⁶ Second, the district court erred in deciding that tuition reimbursement for a child who had not previously received special-education services could only be ordered in an extreme case.⁴⁷ The dissent in the Ninth Circuit opinion reasoned that equitable reimbursement was not appropriate because a free appropriate public education was not at issue when T.A.'s parents unilaterally removed him from the public school.⁴⁸

On January 16, 2009, the U.S. Supreme Court granted certiorari to decide whether the IDEA categorically barred private-tuition reimbursement for students who have not previously received special-education services under the authority of the public-school system.⁴⁹

III. BACKGROUND

Throughout history, the treatment of individuals with disabilities

42. See *Forest Grove*, 523 F.3d at 1083. Compare *Frank G.*, 459 F.3d at 376 (holding that the amended provision § 1412(a)(10)(C)(ii) does not bar reimbursement for students who have not previously received special-education services), with *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004) (holding reimbursement barred for children who have not previously received special-education services under the public agency).

43. *Forest Grove*, 523 F.3d at 1084-85. The "appropriate-relief" provision states that the court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C) (2006).

44. *Forest Grove*, 523 F.3d at 1086-88.

45. *Id.* at 1088.

46. *Id.*

47. *Id.*

48. *Id.* at 1090 (Rymer, J., dissenting). Equity is available "only when [a][free appropriate public education] was at issue before the child was withdrawn from public school and the school district had improperly denied a free and appropriate education." *Id.* In 2001, T.A.'s mother agreed with the School District's evaluation that T.A. did not qualify for special education. *Id.* T.A.'s parents were not collaborating with the School District on an individualized education program at the time of his removal. The dissent indicated T.A.'s case is similar to *Greenland*, not *Frank G.* *Id.*

49. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2490 (2009).

varied with the social and cultural climate of the time.⁵⁰ However, one attitude that persisted was that individuals with disabilities were “incapable of being productive members of society.”⁵¹ Because of this attitude, meeting the educational needs of children with disabilities was not always a concern for public schools in our nation.⁵² A social movement that arose in the twentieth century caused lawmakers and educational leaders to appreciate the concerns of students with disabilities regarding exclusionary educational practices.⁵³ Judicial decisions in the early 1970s set the stage for legislation protecting the rights of children with disabilities in the public-school system.⁵⁴

Since the enactment of the IDEA, U.S. Supreme Court decisions have interpreted what constitutes a “free appropriate public education” and appropriate relief.⁵⁵ Congress amended the IDEA with the goal of achieving a higher quality of education for children with disabilities in the public-school system.⁵⁶ Unfortunately, the amendments have created uncertainty over the extent to which districts must assist parents who, despite the collaborative framework of the IDEA, unilaterally place their child in a private school.

A. *History of Social and Cultural Views on Disability*

In the Middle Ages, people with disabilities were viewed as monsters whose misfortune originated from the anger of the gods.⁵⁷ Society classified these people as subhuman, and the lore of monstrosity associated with the disabled passed from generation to generation.⁵⁸ During the seventeenth century, scientific thought spurred debates that began to challenge the moral overtones associated with disability as a monstrosity.⁵⁹ In the Age of Enlightenment, an interest developed in exam-

50. See HENRI-JACQUES STIKER, *A HISTORY OF DISABILITY* 14 (William Sayers trans., Univ. of Mich. Press 1999). “There is no disability, no disabled, outside precise social and cultural constructions.” *Id.*

51. Barbara P. Ianacone, *Historical Overview: From Charity to Rights*, in *CHANGING PATTERNS OF LAW: THE COURTS AND THE HANDICAPPED* 953 (William R.F. Phillips & Janet Rosenberg eds., 1980). This notion is traceable to the English Poor Law System, which emerged in the colonies as maintenance for those who were dependent on society. See *id.* at 953-54.

52. See OSBORNE & RUSSO, *supra* note 26, at 1. The government provided institutions to care for individuals with disabilities but did not take steps to bring them into the mainstream of society. See ERWIN L. LEVINE & ELIZABETH M. WEXLER, *PL 94-142 AN ACT OF CONGRESS* 38 (1981).

53. See OSBORNE & RUSSO, *supra* note 26, at 1.

54. See RICHARD F. DAUGHERTY, *SPECIAL EDUCATION: A SUMMARY OF LEGAL REQUIREMENTS, TERMS, AND TRENDS* 2 (2001); OSBORNE & RUSSO, *supra* note 26, at 6-8.

55. See *Forest Grove*, 129 S. Ct. at 2487-88.

56. See H.R. REP. NO. 105-95, at 83-84 (1997).

57. STIKER, *supra* note 50, at 40, 92. In Greece and Rome, people practiced “exposure” in which infants born with disabilities were taken to an unknown location and left to die in a hole in the ground. *Id.* at 39. People of the Mesopotamian culture linked illness and disability to wrongdoings of human beings. *Id.* at 41. “The sick person has been rejected by God and, in certain cases, should be rejected by the human community.” *Id.* at 41-42. In contrast, the Egyptians viewed disability not of a moral or ethical origin but as a result of metaphysical drama. *Id.* at 42.

58. *Id.* at 92.

59. *Id.* at 92-93. Thinkers of the time explored causes of disability, such as imaginings of a

ining disabilities when they occurred.⁶⁰ By the end of the Age of Enlightenment, society began to provide remedial training for individuals who had visual or hearing impairments.⁶¹ Aid in the form of reclusion and training continued in the nineteenth century.⁶²

The concept of rehabilitating individuals with disabilities took hold during World War I when staggering numbers of soldiers suffered life-long injuries.⁶³ War-injured soldiers changed society's understanding of disability into something that can and should be remediated.⁶⁴ At the same time, an increase in the number of work-related disabilities also occurred.⁶⁵ Following this rehabilitation movement, the first lawmaking on the matter of disability occurred.⁶⁶

Although reform took place during the rehabilitation movement after World War I, significant factions of society still strongly believed that individuals with disabilities only had a "limited right to live in the world."⁶⁷ Several states adopted eugenic sterilization laws aimed at preventing deterioration of the human race by the genetically inferior.⁶⁸

B. Equal Education Movement

During the nineteenth century, specialized schools and classes began to serve children with visual and hearing impairments and other physical disabilities.⁶⁹ However, "children who were retarded or who had emotional problems or serious physical disabilities were still largely ignored."⁷⁰ These children did not receive attention in the educational system until the late nineteenth and early twentieth centuries.⁷¹

Before 1975, a minority of states had enacted legislation for special-education services for students with disabilities.⁷² Most states, on the other hand, largely upheld exclusionary practices.⁷³ In 1971, for exam-

child's mother, signaling a transition from demonic or moral causation to a more natural sequence of events. *Id.*

60. *Id.* at 102.

61. *Id.* at 102, 106. Specialized institutions emerged for individuals who were blind or deaf. *Id.* at 106.

62. *Id.* at 110.

63. *Id.* at 124.

64. *Id.*

65. *Id.* at 125.

66. *Id.* at 201. Roughly between 1920 and 1930, Congress enacted laws concerning vocational therapy and authorizations for those with work-related disabilities to participate in therapy for the injured soldiers. *Id.* at 201.

67. Ianacone, *supra* note 51, at 956.

68. *Id.* at 955. Eugenic sterilization laws targeted epileptics, paupers, and those with mental illness. *Id.* Sterilization as a method to improve the human race was eventually reversed by fears of uncontrolled extension of the law's reach and constitutional questions. *Id.* at 956.

69. OSBOURNE & RUSSO, *supra* note 26, at 1.

70. *Id.*

71. *Id.* Education programs for children with mental retardation in the public-school system during the nineteenth and early twentieth centuries were segregated, taught by personnel with insufficient training, and offered little substance. *Id.*

72. *Id.* at 6; DAUGHERTY, *supra* note 54, at 2.

73. OSBORNE & RUSSO, *supra* note 26, at 6; DAUGHERTY, *supra* note 54, at 2. Without gov-

ple, Pennsylvania excluded individuals with mental retardation between the ages of six and twenty-one from public school.⁷⁴ In 1972, the public-school board of the District of Columbia denied children with disabilities admission to public schools or excluded them after admission without providing an alternative educational placement.⁷⁵ The public-school board attempted to justify the exclusion of these students from the school system by citing a lack of resources.⁷⁶

The historic *Brown v. Board of Education*⁷⁷ case was the impetus for the creation of equal opportunities for children in the United States.⁷⁸ In *Brown*, a unanimous U.S. Supreme Court asserted:

In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁷⁹

Even today, this passage from the *Brown* decision is cited by parties in court who seek equal educational opportunities for children with disabilities.⁸⁰

The number of students with disabilities in the public-school system began to rise in the 1960s.⁸¹ Two important cases in the 1970s involving Pennsylvania and the District of Columbia motivated Congress to pass legislation to protect children with disabilities.⁸² First, *Pennsylvania Association for Retarded Children v. Pennsylvania*⁸³ required the state to provide a free appropriate public education and training programs for children with mental retardation.⁸⁴ Second, the court in *Mills v. Board*

ernment mandates, few states made strides in mainstreaming. See Daugherty, *supra* note 54, at 2.

74. OSBORNE & RUSSO, *supra* note 26, at 7; LEVINE & WEXLER, *supra* note 52, at 38.

75. OSBORNE & RUSSO, *supra* note 26, at 7-8. Students with mental retardation, emotional disturbances, behavioral issues, or hyperactivity were excluded in the District of Columbia public schools without periodic review or alternative education. DAUGHERTY, *supra* note 54, at 2.

76. OSBORNE & RUSSO, *supra* note 26, at 7-8. The public school board in the District of Columbia argued that it could not afford the costs of providing services to the class of students unless Congress appropriated millions of dollars or the school diverted funds already appropriated elsewhere. DAUGHERTY, *supra* note 54, at 4.

77. 347 U.S. 483 (1954). The Court held that segregation of children in public schools based on race, despite equal facilities and tangible factors, deprived children of equal educational opportunities. *Id.* at 493.

78. OSBORNE & RUSSO, *supra* note 26, at 6. In the 1950s, following *Brown*, the rights of individuals with disabilities continued to be limited to basic rights such as voting, marrying, and obtaining a license to drive. *Id.* One year after the *Brown* decision, the Council for Exceptional Children's Journal began to advocate for ending segregation of individuals with disabilities. DAUGHERTY, *supra* note 54, at 2.

79. *Brown*, 347 U.S. at 493.

80. See OSBORNE & RUSSO, *supra* note 26, at 6; D.S. v. N.Y. City Dep't of Educ., 255 F.R.D. 59, 63-65 (E.D.N.Y. 2008) (citing *Brown*, 347 U.S. at 493).

81. See OSBORNE & RUSSO, *supra* note 26, at 6-7. Compare 12% of children with disabilities in the public-school system in 1948 to 21% in 1963 and 38% in 1968. *Id.*

82. See LEVINE & WEXLER, *supra* note 52, at 38-41; DAUGHERTY, *supra* note 54, at 2; OSBORNE & RUSSO, *supra* note 26, at 7.

83. 343 F. Supp. 279 (E.D. Pa. 1972).

84. *Id.* at 307. Advocates and parents of thirteen individual children with mental retardation brought suit on behalf of all persons between the ages of six and twenty-one with mental retardation. *Id.* at 281-82. Pennsylvania was excluding children with mental retardation from education and training programs in the public-school system based on four statutes. *Id.* These statutes relieved the pub-

of *Education of the District of Columbia*⁸⁵ held that the U.S. Constitution and the District of Columbia Code required the provision of a publicly-funded special education for all children with disabilities.⁸⁶

Although *Pennsylvania Association* and *Mills* did not require a “particular substantive level of education,”⁸⁷ the infringements on children’s due process rights raised by the cases formed the basis for federal legislation designed to safeguard the rights of children with disabilities in the public-school system.⁸⁸

C. Legislative Mandates and Interpretation

Congress enacted the IDEA, originally known as the Education for All Handicapped Children Act, in 1975 to provide children with disabilities access to “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.”⁸⁹ The intent of the IDEA was “to reverse this history of neglect” and open the doors of the mainstream public-school community to children with disabilities.⁹⁰ With the goal of bringing students with disabilities into the mainstream of public education, the IDEA established a collaborative framework for decision making by parents and school officials.⁹¹

Three requirements must be satisfied before a child can qualify for special services under the IDEA. First, the child must be between ages three and twenty-one.⁹² Second, the child must have a disability that the

lic schools from the obligation of providing education or training for any child certified as uneducable or un-trainable by the school psychologist. *Id.* at 282. The consent decree provided that no child with mental retardation or thought to have mental retardation could be assigned to or excluded from special-education programming without due process. *Id.* at 314.

85. 348 F. Supp. 866 (D.D.C. 1972).

86. *See id.* at 878. *Mills* was a civil action pursued on behalf of seven school-age children labeled as having behavior problems, being mentally retarded, and/or exhibiting emotional disturbances. *Id.* at 868. The plaintiffs sought to enjoin the Board of Education of the District of Columbia and its members from excluding the children from an education in the public schools. *Id.* The *Mills* court held that “[t]he District of Columbia shall provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child’s mental, physical, or emotional disability or impairment.” *Id.* at 878.

87. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 193 (1982).

88. *OSBORNE & RUSSO*, *supra* note 26, at 7-8. In this context, due process means that children with disabilities cannot be excluded from a public school or have their educational placement changed unless their parents receive notice and have an opportunity to be heard. *Id.* Generally, due process is “the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.” *BLACK’S LAW DICTIONARY* 575 (9th ed. 2009).

89. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2491 (2009) (citing *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 367 (1985)).

90. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005).

91. *See id.* at 53; *see also Rowley*, 458 U.S. at 177 (noting that Congress attached importance to compliance with IDEA procedures giving parents and guardians a large measure of participation at every stage of the administrative process).

92. 20 U.S.C. § 1412(a)(1)(A) (2006).

statute defines.⁹³ Third, the child must need “special education and related services.”⁹⁴ The public education or state agency conducts an individual evaluation of the child to determine whether the child meets the eligibility requirements under the IDEA.⁹⁵

If a state accepts federal grants under the IDEA, it must provide a free appropriate public education in the least restrictive environment to children with disabilities in conformity with procedural and civil rights protections.⁹⁶ The IDEA does not provide guidance on what constitutes an appropriate education, but it does recognize a number of ways a child may be placed in an educational setting that may meet this requirement.⁹⁷ In its first interpretation of the IDEA, the Supreme Court held that the state meets the requirement of providing a free appropriate public education when the school district provides personalized instruction that educationally benefits the child.⁹⁸

93. 20 U.S.C. § 1401(3)(A)-(B) (2006). Section 1401(3)(A)-(B) provides:

A) In general

The term “child with a disability” means a child—

- (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9

The term “child with a disability” for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child—

- (i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and
- (ii) who, by reason thereof, needs special education and related services.

Id.

94. § 1401(3)(B)(ii).

95. 20 U.S.C. § 1414(a)(1)(A)-(B) (2006). During the initial evaluation process, parents must receive a notice of procedural safeguards. 20 U.S.C. § 1415(d)(1)-(2) (2006). Parents can present a complaint if they disagree with an agency’s decision concerning their child’s education. *Id.* § 1415(b)(6). If a disagreement persists between parties, parents can pursue a due process hearing. *Id.* § 1415(f), (g). The hearing officer’s decision may be appealed, and the court “shall grant such relief as the court determines is appropriate.” *Id.* § 1415 (i)(2)(C)(iii).

96. See H.R. REP. No. 105-95, at 91 (1997). 20 U.S.C. § 1412(a)(5)(A) states:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id.

97. OSBORNE & RUSSO, *supra* note 26, at 21. Options exist for developing a free appropriate public education for a child with disabilities. *Id.* Alternative placements may include full inclusion in a regular classroom, inclusion in a classroom with assistance, partial inclusion with time divided between a regular classroom and a resource setting, or an individualized approach such as a special day school, hospital, homebound instruction, or residential placement. *Id.*

98. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982). The Court also held that the IDEA’s requirement of a free appropriate public education did not require the state “to maximize . . . potential [of each handicapped child] ‘commensurate with opportunity provided other children.’” *Id.* at 196.

In *School Committee of Burlington v. Department of Education*⁹⁹ and *Florence County School District Four v. Carter*,¹⁰⁰ the U.S. Supreme Court interpreted what constitutes appropriate relief under the IDEA.¹⁰¹ In the *Burlington* case, the Court held that a clause within the IDEA stating that a court shall “grant such relief as [it] determines is appropriate” confers broad discretion on courts.¹⁰² That discretion includes the power to order public-school officials to reimburse parents for private-school tuition if the court determines that the private placement, rather than the individualized education plan, is proper under the IDEA.¹⁰³

In *Carter*, the Court held that reimbursement may be ordered for parents who unilaterally withdraw their child from a public school that provides an inappropriate education and place the child in a private school that provides an otherwise proper education under the IDEA.¹⁰⁴ The Supreme Court decisions in both cases authorized courts to provide private-tuition reimbursement when public schools fail to provide a free appropriate public education and the private placement was appropriate for the child.¹⁰⁵

D. 1997 Amendments

In 1997, Congress examined the IDEA and determined that it was a successful law.¹⁰⁶ Despite the gains made in special education as a result of the law, Congress decided that improvements in the implementation of the IDEA were needed in order to provide a better education for

99. 471 U.S. 359 (1985). The Supreme Court granted certiorari to determine whether the IDEA authorizes tuition reimbursement when a parent or guardian unilaterally places the child in a private school. *See id.* at 369. The child’s father rejected the individualized education program developed by the public school, and mediation was unsuccessful. *Id.* at 362. The parents unilaterally placed their child in a private, specialized school. *Id.*

100. 510 U.S. 7 (1993).

101. *See Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2490-91 (2009).

102. *Burlington*, 471 U.S. at 369 (reaffirming the availability of private-tuition reimbursement if the private placement rather than the individualized education plan is proper under the IDEA). The Court’s decision in *Burlington* hinged on Congress’s intent not to have parents accept insufficient public education while awaiting review of the claim for their child and to prevent them from incurring the cost of private tuition if the private school is appropriate. *See id.* at 370.

103. *Id.* at 369-70.

104. *Carter*, 510 U.S. at 7. The parents in *Carter* challenged the appropriateness of the individualized education program developed for their child who had learning disabilities. *Id.* at 10. During the hearing process, the student’s parents unilaterally placed her in a private school and sought tuition reimbursement. *Id.*

105. *See Forest Grove*, 129 S. Ct. at 2486 (stating that the fact that *Burlington* and *Carter* involved children with individualized education programs did not distinguish those cases from *Forest Grove* because the Court’s decision was based on the IDEA’s language, not the specific facts involved).

106. *See H.R. REP. No. 105-95*, at 84 (1997). Before the implementation of the IDEA, an estimated one million children with disabilities in the United States were denied a public education. *Id.* After the enactment of the IDEA, institutionalization of children with developmental disabilities declined by 90%, postsecondary education for young adults with disabilities tripled, and the unemployment rate for individuals with disabilities was half its previous rate. *Id.*

children with disabilities.¹⁰⁷

In amending the IDEA, Congress intended to simplify its structure and organization.¹⁰⁸ The stated purposes of the 1997 Amendments were to: (a) expand opportunities for parents, educators, and related professionals to work together; (b) preserve free appropriate public education; (c) promote educational results; and (d) enhance the capacity of schools to address the needs of children with disabilities.¹⁰⁹

The 1997 Amendments did not alter the purpose of the IDEA or the text interpreted in the *Burlington* decision, which provides that a court “shall grant such relief as the court determines is appropriate.”¹¹⁰ The amendments specifically addressed the public-school district’s “payment for education of children enrolled in private schools without consent of or referral by the public agency.”¹¹¹ The private-reimbursement provision in the amendments indicates that a court may require reimbursement for the costs of private education if the public agency did not make a free appropriate public education available to a child who previously received special-education and related services.¹¹²

107. *See id.* at 85. Congress found that twice as many children with disabilities were failing out of school in comparison to children without disabilities. *Id.* Children of minority backgrounds and those children with limited skill in the use of the English language were in special-education programs. *Id.* School officials commented that education law as it stood emphasized paperwork and procedures as opposed to focusing on obtaining positive academic results for children. *Id.*

108. *Id.* at 84.

109. *Id.* at 82. Congress aimed to clarify and strengthen the IDEA by providing tools to:

Preserve the right of children with disabilities to a free appropriate public education; Promote improved educational results for children with disabilities through early intervention, preschool, and educational experiences that prepare them for later educational challenges and employment; Expand and promote opportunities for parents, special education, related services, regular education, and early intervention service providers, and other personnel to work in new partnerships at both the State and local levels; Create incentives to enhance the capacity of schools and other community-based entities to work effectively with children with disabilities and their families, through targeted funding for personnel training, research, media, technology, and the dissemination of technical assistance and best practices.

Id.

110. 20 U.S.C. § 1415(i)(2)(C)(iii) (2006). At the time *Burlington* was decided, the provision was codified at 20 U.S.C. § 1415(e)(2); its current section number is 20 U.S.C. § 1415(i)(2)(C)(iii). *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2497 (2009).

111. 20 U.S.C. § 1412(a)(10)(C)(i)-(ii) (2006); *Forest Grove*, 129 S. Ct. at 2492.

112. 20 U.S.C. § 1412(a)(10)(C)(i)-(ii). This statute provides in pertinent part:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), 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.

(ii) Reimbursement for private school placement

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.

Id.

Following the 1997 Amendments, considerable uncertainty existed over the extent to which the amended provisions may have abrogated the *Burlington* and *Carter* cases by categorically barring private-tuition reimbursement. The First and Second Circuits reached different conclusions on the issue of whether the amendments abrogated *Burlington* and *Carter*, establishing a split in the courts.

IV. COURT'S DECISION

Justice Stevens delivered the *Forest Grove* opinion, joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito.¹¹³ The Supreme Court's decision concluded the contentious debate in the public-school system between parents and school officials regarding the availability of private-tuition reimbursement.¹¹⁴ The Court held that the 1997 Amendments to the IDEA did not categorically bar reimbursement for students who did not previously receive special education under the authority of a public agency.¹¹⁵

A. *Relevance of Burlington and Carter Supreme Court Decisions*

Although the litigation in *Forest Grove* differed from *Burlington* and *Carter* because it did not involve a proposed individualized education program and T.A. never received special-education services, the Court held that the reasoning of those cases still applied to T.A.'s situation.¹¹⁶ The Court concluded that a school district's failure to propose an individualized education program was at least as serious a violation under the IDEA as a district's failure to provide an adequate program for the child.¹¹⁷ The remaining question for the Court was whether the 1997 Amendments to the IDEA expressly repealed the appropriate-relief provision or abrogated the earlier *Burlington* and *Carter* decisions.¹¹⁸

B. *The Effect of the 1997 Amendments to the IDEA*

From T.A.'s perspective, reimbursement as upheld in *Burlington* and *Carter* was necessary under the IDEA because a denial of reim-

113. *Forest Grove*, 129 S. Ct. at 2487.

114. Mauro, *supra* note 7; *Forest Grove*, 129 S. Ct. at 2487-88.

115. *Forest Grove*, 129 S. Ct. at 2484.

116. *Id.* at 2491. The *Burlington* and *Carter* cases were critical in the Court's analysis of the question posed in *Forest Grove*. *See id.* at 2490. When the Court decided *Burlington*, the IDEA did not expressly address private reimbursement, however, it did indicate that the court had the broad authority to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii) (2006); *see Forest Grove*, 129 S. Ct. at 2490. The Court reaffirmed the availability of private-tuition reimbursement if the private placement rather than the individualized education plan is proper under the IDEA. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

117. *Forest Grove*, 129 S. Ct. at 2491.

118. *See id.* at 2491-92.

bursment would defeat the act's goal of providing a free and appropriate education to all children with disabilities.¹¹⁹ In contrast, the School District contended that the 1997 Amendments provided the exclusive source for answering the reimbursement question.¹²⁰

The Court cited four reasons for rejecting the School District's argument that the amendments to the IDEA prohibited private-tuition reimbursement for students who, like T.A., had never received special-education services. First, the School District did not prove that the text of the "private-reimbursement" provision explicitly indicated that Congress intended to abrogate the *Burlington* and *Carter* decisions.¹²¹ Second, the Court concluded that clause (ii) of the private-reimbursement provision, which expressly authorizes reimbursement in some circumstances for parents of a child "who previously received special-education and related services," does not foreclose other reimbursement awards.¹²² The Court stated that the clauses of the private-

119. See Brief of Respondent, *supra* note 19, at 13. T.A. argued that the 1997 Amendments did not change the free appropriate public education entitlement of the IDEA or undermine the act's grant of broad authority to the court to provide appropriate relief. *Id.*

120. Brief of Petitioner-Appellant at 19-21, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305). The amended provision titled "Payment for education of children enrolled in private school without the consent of or referral by the public agency" specifically addresses the conditions pertaining to private reimbursement. *Id.* at 20. A clause within this provision provides that if a school does not make a free appropriate public education available, the court or hearing officer may award reimbursement but only if the child previously received special-education services from the district. *Id.* at 21. The School District argued that awarding reimbursement cannot be considered appropriate for T.A. because Congress implicitly excluded the general "appropriate-relief" provision by explicitly including the more limited amended provision. *Id.* at 21-22. T.A. claimed that the School District's reading of the private-reimbursement provision conflicted with the IDEA's requirement that public-school systems "identify, locate, and evaluate all children with disabilities in the state." See Brief of Respondent, *supra* note 19, at 24 (emphasis omitted). 20 U.S.C. § 1412(a)(3)(A) (2006) provides in part:

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(3) Child find -

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

Id. Adopting the view of reimbursement as available only for children who have previously received special-education services would create an incentive for school districts to deny special-education services in opposition to the purpose and goals of the IDEA. See Brief of Respondent, *supra* note 19, at 24.

121. *Forest Grove*, 129 S. Ct. at 2492. Clause (i) of this provision expressly bars reimbursement for private-school tuition only if a district provides a free appropriate public education. *Id.* at 2493. It does not expressly bar tuition reimbursement if a district fails to provide a free appropriate education, as it did in T.A.'s case. *Id.*

122. *Id.* at 2497. Reading clause (ii) in conjunction with clauses (iii) and (iv) of the private-reimbursement provision reveals that all of the clauses are:

best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a [free appropriate education] by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services

reimbursement provision are “best read as elucidative rather than exhaustive.”¹²³

Third, the Court rejected the School District’s argument that the amended provision is the only authority granting private reimbursement to parents who remove their child unilaterally.¹²⁴ The provision does not restrict the type of private placement for which parents may receive reimbursement nor does it codify the requirements necessary to ensure that reimbursement is granted.¹²⁵ The Court held that these omissions reveal that Congress did not intend the amended provision to be the sole authority on reimbursement awards.¹²⁶ Moreover, the Court held that by amending the IDEA without modifying the text of the existing appropriate-relief provision, Congress implicitly adopted the construction of the act.¹²⁷ Fourth, the Court held that the School District’s interpretation of the law conflicted with the IDEA’s remedial purpose to ensure that all children with disabilities receive a free appropriate public education.¹²⁸ The Court stated it would be unjust to read the disputed provision of the IDEA in a manner that left parents without a sufficient remedy when the school determined that the child did not fit the criteria of the act.¹²⁹

C. Spending Clause

The School District indicated that Congress enacted the IDEA under the Spending Clause, which required Congress to provide clear notice of the conditions it attached to a state’s acceptance of federal funds.¹³⁰ Using the reasoning of *Arlington Central School District*

are inadequate.

Id. at 2493. The reference to children who previously received special-education services in clauses (ii) and (iv) reflects the IDEA’s intent that parents and the school district cooperate and collaborate before resorting to unilateral removal. *Id.*

123. *Id.*

124. *See id.* at 2493-94.

125. *See id.* at 2493.

126. *See id.* at 2494.

127. *See id.*; *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). In the 1997 Amendments to the IDEA, Congress did not comment on cases that would involve a child who had never received special-education services. *See Forest Grove*, 129 S. Ct. at 2494. The Court determined that the amendments did not repeal the appropriate-relief provision or abrogate the *Burlington* and *Carter* decisions because “absent a clearly expressed congressional intention, repeals by implication are not favored.” *Id.* (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

128. *See id.* at 2494-95. The Court considered the School District’s reading of the provision inconsistent with the IDEA’s requirement to “‘identif[y], locat[e], and evaluat[e]’ ‘all children’” in the state so that they may receive needed services. *Id.*

129. *See id.* at 2495.

130. Brief of Petitioner, *supra* note 120, at 16. “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. CONST., art. I, § 8, cl. 1. Imposing conditions on states in order to receive federal funds “rests on whether the state voluntarily and knowingly accepts the terms of the ‘contract.’” Brief of Petitioner, *supra* note 120, at 17 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). “If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” *Pennhurst*, 451 U.S. at 17.

Board of Education v. Murphy,¹³¹ the School District asserted that the IDEA does not provide sufficient notice to the district for private-tuition reimbursement for children placed unilaterally who never received special-education services.¹³² Furthermore, the *Burlington* decision did not adequately substitute for this lack of notice.¹³³

On the other hand, T.A. asserted that the School District's Spending Clause argument lacked merit because the "clear notice" requirement applies only when funding imposes a "substantive condition or obligation on States they would not otherwise be required by law to observe," and the IDEA's language alone provided clear notice to the School District.¹³⁴

In concluding that *Burlington* and *Carter* satisfied the notice requirement, the Court held that when the states agree to accept IDEA funding, they agree to provide a free appropriate public education.¹³⁵

D. Public Policy

The School District argued that reimbursing private tuition for students like T.A. would result in a heavy financial burden for the public-school system and would not encourage parents to collaborate with a school district before removing their child.¹³⁶ Unforeseen unilateral placements of children in private schools would increase unpredictability in public-school budgeting because districts lack the means of calculating the number of students eligible for private placement.¹³⁷

131. 548 U.S. 291 (2006). In *Arlington*, the Court considered whether the IDEA authorizing a court to award "reasonable attorneys' fees" to prevailing parents also allowed an award of expert fees and expenses. *See id.* at 293-94. The Court recognized the IDEA as a Spending Clause statute. *See id.* at 295. The Court held that the IDEA did not provide clear notice because the statutory text did "not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts." *Id.* at 297.

132. *See* Brief of Petitioner, *supra* note 120, at 17-19.

133. *See id.* at 31 n.2. The Court's decision in *Burlington* did not adequately substitute for the lack of notice because at the time *Burlington* was decided, there was no specific language regarding tuition reimbursement in the IDEA. *See id.* at 30; *see also* Sch. Comm. of *Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985). The School District argued that the 1997 Amendments provided this reference point by specifically addressing private-school placement and grants of reimbursement. *See* Brief of Petitioner, *supra* note 120, at 32. Consequently, the school district concluded that the amended provision regarding private reimbursement trumps the appropriate-relief provision and narrows the range of possible relief under the IDEA. *See id.*; *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (providing that a specific statute "will not be controlled or nullified" by a general one).

134. Brief of Respondent, *supra* note 19, at 42 (citing *Winkelman v. Parma City Sch. Dist.*, 127 U.S. 1994, 2006 (2007)). T.A. indicated that tuition reimbursement was not a supplemented obligation but one the state should have been paying all along. *Id.* The 1997 Amendments did not alter the obligation to provide a free appropriate public education or the court's power to provide appropriate relief. *See id.* at 42-43.

135. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2495 (2009).

136. *Id.* at 2496.

137. *See* Brief of Nat'l Sch. Bds. Ass'n, et al. as Amici Curiae in Support of Petitioner at 23-25, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305). The National School Boards Association, American Association of School Administrators, and National Association of State Directors of Special Education noted that baseline costs of private schooling are more than four times the costs of public education, and the number of private placements is on the rise. *See id.* at 26. As a result of T.A.'s interpretation of the IDEA, more parents will seek private-tuition reimbursement.

Rejecting the School District's financial-burden argument as unfounded, the Court instead noted that the incidence of publicly-funded private placement is small.¹³⁸ The Court determined that parents who "unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk."¹³⁹ Additionally, the Court stated that parents "are entitled to reimbursement only if a federal court concludes both that the public placement violated [the] IDEA and the private school placement was proper under the Act."¹⁴⁰

E. Dissenting Opinion

Justice Souter wrote the dissenting opinion, which Justices Scalia and Thomas joined.¹⁴¹ The dissent concluded that the private-reimbursement provision did not abrogate *Burlington, Carter*, or the provision in the IDEA authorizing courts to grant appropriate relief.¹⁴²

1. Statutory Interpretation

The dissent reasoned that the 1997 Amendments to the IDEA did not repeal the appropriate-relief provision considered in *Burlington*, but, instead, produced a different result for what constitutes relief.¹⁴³ In *Burlington*, the Court referred to the provisions available in the IDEA and decided that, in the absence of a specific rule, the grant of appropriate relief included private reimbursement.¹⁴⁴ The dissent concluded that the presumption against implied repeals of statutory language, on which the majority relied for its holding, did not resolve the issue of whether the amendments limited the previously available relief.¹⁴⁵ Rather, the dissent noted that when two provisions are irreconcilable, the later enactment, such as the amended provision in T.A.'s case, prevails over the presumption against implied repeals.¹⁴⁶

Furthermore, the dissent identified two flaws in the majority's determination that the amendments incorporated the *Burlington* Court's

See id. at 28. Furthermore, school districts will face increasing due process hearings, mediations, and litigation costs. *See id.* at 28-29.

138. *Forest Grove*, 129 S. Ct. at 2496. Courts retain discretion to reduce the amount of reimbursement. *See id.* Considering the equities involved, the courts presume that school officials have adhered to the obligations under the IDEA. *Id.*; Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring).

139. *Forest Grove*, 129 S. Ct. at 2496 (quoting *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993)).

140. *Id.* (emphasis omitted) (quoting *Carter*, 510 U.S. at 15).

141. *Id.* at 2497 (Souter, J., dissenting).

142. *Id.* 2500-02.

143. *Id.* at 2501.

144. *Id.*

145. *Id.* at 2500-01.

146. *Id.* at 2501 n.3 (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion)).

prior interpretation of the IDEA.¹⁴⁷ First, when a new enactment's language weakens prior readings of a provision, no presumption in favor of the old language exists.¹⁴⁸ Second, the private-reimbursement provision that the amendments added to the IDEA is consistent with *Burlington* and *Carter*.¹⁴⁹ The results of those cases under the dissent's reading of the amended provision would remain the same as the decisions rendered by the Court.¹⁵⁰

2. Remedial Objectives of the IDEA

The dissent countered that the majority "overlooks the terms of the IDEA process, the substantial procedures protecting a child's substantive rights under the IDEA, and the significant costs of its rule."¹⁵¹ The IDEA emphasizes collaboration between the school district and parents regarding the education of a child with disabilities.¹⁵² Should cooperation between these parties fail, the IDEA provides procedures to review the parents' claim.¹⁵³ These procedures and the possibility of judicial review address the majority's concern that reading the prior-services condition in the amended provision as a restriction "immunizes the school district's intransigence."¹⁵⁴

Moreover, the dissent warned that allowing reimbursement for unilateral private placements would result in enormous costs for public-school systems.¹⁵⁵ Given the financial burden resulting from private-school placements, the dissent strongly encouraged cooperation between parents and the school district in developing a plan for a free appropriate public education because "[t]he more private placement there is, the higher the special education bill."¹⁵⁶ The dissent noted that prior to the 1997 Amendments, the IDEA's unintended and costly conse-

147. *See id.* at 2500. The majority utilized two principles to support its contention that Congress was obligated to clearly express its intention to alter the court's application of broad appropriate relief by authorizing private-tuition reimbursement for unilateral placements. *See id.* "First, statutes are to be read with a presumption against implied repeals, and second, congressional reenactment of statutory text without change is deemed to ratify a prior judicial interpretation of it." *Id.*

148. *Id.* at 2501 (indicating that the revised statute should be read as a whole).

149. *See id.*

150. *See id.* at 2502. In *Burlington* and *Carter*, each child had a disability recognized by the school district, the parents were involved in the individual education program process, and the only issue was whether the parents could receive reimbursement for later resorting to private schooling if the court determined that the private placement, not the individual education program, was proper under the IDEA. *Id.* at 2501.

151. *Id.* at 2502. The majority criticized the dissent's reading of the private-reimbursement provision for creating an absurd result in which public school officials could refuse requests for special-education services, never satisfying the prior service condition for eligibility. *Id.* The Court rejected the dissent's reading of the private-reimbursement provision because it was "at odds with the general remedial purpose underlying [the] IDEA and the 1997 Amendments." *Id.*

152. *See id.* at 2498.

153. *See id.* at 2502-03.

154. *Id.* at 2503.

155. *Id.* at 2502; Brief for Great City, *supra* note 7, at 22-23 (indicating that special education costs billions of dollars each year).

156. *Forest Grove*, 129 S. Ct. at 2502.

quences forced public schools to pay for private tuitions unnecessarily.¹⁵⁷ Considering the legislative history of the IDEA, the dissent concluded that the purpose of the private-reimbursement provision was to make it more difficult for parents to place their child unilaterally in a private school at the taxpayers' expense.¹⁵⁸

V. COMMENTARY

The Court's tenuous assessment of the legislative intent of the IDEA resulted in a ruling that disregards the limitation imposed by the statute's private-reimbursement provision, compromises the collaborative framework of the IDEA, stifles the open-door policy of the act, and furthers injustice for children with disabilities in our public-school system.¹⁵⁹

A. Statutory Interpretation

"Under any plausible approach to statutory interpretation, the text is very important" because it is readily available for guiding regulatory action.¹⁶⁰ The most natural reading of the IDEA suggests that by including a more limited rule, Congress intended to exclude the general rule.¹⁶¹ The 1997 Amendments to the IDEA did not alter its purpose, explicitly modify the text of the appropriate-relief provision, or expressly abrogate the *Burlington* and *Carter* decisions.¹⁶² However, the private-reimbursement provision specifically addresses reimbursement for children who were "enrolled in private schools without the consent of or referral by the public agency."¹⁶³

The majority's requirement that Congress *needed* to expressly repeal the appropriate-relief provision or expressly abrogate the *Burlington* and *Carter* decisions to overcome a presumption that Congress adopted the previous interpretation of the IDEA is without convincing authority.¹⁶⁴ This requirement is not sufficient because the specific private-reimbursement provision available in the IDEA trumps the general provision relied upon by the Court before the amendments.¹⁶⁵ Al-

157. *Id.* at 2503 n.6.

158. *Id.*

159. *See id.* at 2498; Brief of Nat'l Sch. Bds., *supra* note 137, at 8.

160. KENT GREENAWALT, LEGISLATION STATUTORY INTERPRETATION: 20 QUESTIONS 57 (1999). The text, enacted by the legislators, is the "most straightforward evidence of what legislators were seeking to accomplish." *Id.*

161. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

162. *See Forest Grove*, 129 S. Ct. at 2492 (majority opinion).

163. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).

164. *See Forest Grove*, 129 S. Ct. at 2498 (Souter, J., dissenting).

165. *See TRW*, 534 U.S. at 28. "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*,

though the Court possesses interpretative flexibility in assessing legislative intent, and the majority's interpretation of the IDEA is reasonable in some respects, it is not the best interpretation of the law.¹⁶⁶

Under another general rule of statutory interpretation, courts recognize that when Congress intends to express something in particular, Congress knows how to create a formulation to do so; its election not to use that formulation demonstrates that Congress intended something else.¹⁶⁷ Thus, if Congress intended to make private-tuition reimbursement available to children who never received special-education services, Congress knew how to express that intent fully in the provision.¹⁶⁸

Moreover, "one of the most basic interpretative canons [is] that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'"¹⁶⁹ The majority interpreted the 1997 Amendments to the IDEA such that the private-reimbursement provision does nothing but describe authority already given to the court by the appropriate-relief provision as recognized in the *Burlington* decision.¹⁷⁰ Reading the private-reimbursement provision in a way that it has no effect on tuition reimbursement is not logical.¹⁷¹ This perverse result emerges if the private-reimbursement provision is *not* read to allow reimbursement *only* for children who previously received special-education services.¹⁷²

B. Undermining the IDEA's Collaborative Framework and Open Door Policy

Basing its analysis on a tenuous interpretation of the act, the Su-

451 U.S. 77, 97 (1981); see ROBERT BENSON, *THE INTERPRETATION GAME HOW JUDGES AND LAWYERS MAKE THE LAW* 11 (2008). The Court interpreted the appropriate-relief provision as authorizing private-tuition reimbursement because at the time of the *Burlington* case, the IDEA was silent on the issue. See *Forest Grove*, 129 S. Ct. at 2498.

166. See generally FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 13 (2009) (explaining the use of pragmatism in statutory interpretation and providing the advantages of applying this "best policy" approach); CHRISTIAN E. MAMMEN, *USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION* 2-3 (2002) (indicating different ways in which legislative intent is used in statutory interpretation). Pragmatists place significant emphasis on the text in statutory interpretation; however, they stress examination of the societal consequences of different interpretations before selecting one. See *id.* Pragmatists also contend that courts should consider what the best policy choice is when interpreting statutes in order to correct legislative flaws. See *id.*

167. See MAMMEN, *supra* note 166, at 14. "[W]hen Congress wants to mean x it knows how to do so, or it knows that the courts will interpret a certain verbal formulation to mean x, so its use of that formulation indicates that Congress intended to mean x, and its omission to use that formulation demonstrates that Congress meant something other than x." *Id.*

168. *Id.*

169. *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (citation omitted).

170. *Forest Grove*, 129 S. Ct. at 2499 (Souter, J., dissenting).

171. *Id.*

172. See *id.* at 2500. The 1997 Amendments to the IDEA also added clauses (iii) and (iv), which provide facts upon which reimbursement may be reduced or denied. *Id.* at 2499. In particular, clause (iii) provides limitations on available reimbursement by its direction to the private-reimbursement provision. *Id.* at 2500. The presence of clause (ii)'s reference to the private-reimbursement provision strengthens the argument that the provision is now the exclusive authority on reimbursement. *Id.*

preme Court rendered an ill-advised decision when considered in light of the collaborative framework of the IDEA, the act's goal of opening the doors of the public schools to children with disabilities, and the widespread detrimental effects on public education.¹⁷³

1. Collaborative Framework

"The core of [the IDEA] is the cooperative process that it establishes between parents and schools."¹⁷⁴ Under the act, public schools must attempt in good faith to negotiate individual education programs with parents and help the child make the transition into a private setting if the plan does not achieve an appropriate educational placement that meets the child's needs.¹⁷⁵ In states where public-school districts do not comply with IDEA requirements, the U.S. Department of Education has a responsibility to enforce sanctions or make referrals to the U.S. Department of Justice for legal action.¹⁷⁶ The IDEA encourages parents to work with the public school in good faith to develop an appropriate education plan for their child.¹⁷⁷ The Court's interpretation of the IDEA creates a disincentive to collaborate.¹⁷⁸ More importantly, the interpretation severely compromises the intent of the IDEA because it permits parents to remove their child from the public-school environment and to obtain public funds to finance a private education without ever working with the public school.¹⁷⁹

2. Open Door Policy

The history of the equal education opportunity movement demonstrates that the purpose behind the IDEA was to open the door of the public schools to all children and put an end to the exclusionary practices that dominated at the time of the law's enactment.¹⁸⁰ The IDEA mandates a "least restrictive environment" to encourage greater public access for children with disabilities by requiring states to establish procedures so those children receive a public education "to the maximum

173. See *infra* Part V.B.1.-C.; Brief of Nat'l Sch. Bds., *supra* note 137, at 8. "The purpose of [the] IDEA was 'to reverse this history of neglect' and bring students with disabilities into the mainstream of the public school community." Brief of Nat'l Sch. Bds., *supra* note 137, at 9.

174. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 53 (2005). Congress put as much emphasis on compliance with IDEA procedures providing parents and guardians considerable participation at every stage of the administrative process as it did upon the measurement of the resulting individualized education programs against a substantive standard. See *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982).

175. Brief of Nat'l Sch. Bds., *supra* note 137, at 14 (stating that the individualized education program is central to collaboration between the school district and parents).

176. See NAT'L COUNCIL, *supra* note 5, at 7. States are under a legal obligation to comply with the IDEA requirements on both local and state levels. See *id.*

177. See H.R. REP. NO. 105-95 at 82 (1997); Brief of Nat'l Sch. Bds., *supra* note 137, at 13.

178. Brief of Nat'l Sch. Bds., *supra* note 137, at 11.

179. See *id.* at 10.

180. See OSBORNE & RUSSO, *supra* note 26, at 6.

extent appropriate with children who do not have disabilities.”¹⁸¹ Under the IDEA, the school district and the parents should contemplate segregation of a child with disabilities only if, after best efforts, the inclusion is not reasonable.¹⁸²

Two federal appellate court cases outlined factors for determining the least restrictive environment for a child with disabilities, and courts directed the school boards to place those students into a regular public-education setting as opposed to a segregated one.¹⁸³ “The bottom line is that an inclusionary placement should be the setting of choice and a segregated setting should be contemplated only if an inclusionary placement has failed despite the best efforts of educators or if there is overwhelming evidence that it is not reasonable.”¹⁸⁴ A private school may be able to provide an education in a least restrictive environment; however, the public school district assesses the possibility of such an alternative when formulating the individualized education plan, *not* when a child has never received special-education services.¹⁸⁵

Authorizing private-tuition reimbursement for unilaterally placed children who never received special-education services contradicts the IDEA’s principle that inclusion is the established setting of choice.¹⁸⁶ This authorization “eviscerates the [least restrictive environment] mandate by allowing parents to obtain public funding for a private school placement without ever trying the public school program.”¹⁸⁷

C. Detrimental Ramifications of the Court’s Decision

Requiring public schools to fund unilateral private placements exacerbates the already-considerable costs that public-school systems incur in undertaking their responsibilities to fulfill the mandate for a free appropriate public education as prescribed by the IDEA.¹⁸⁸ There are six million children with special education needs in the public-school system and nearly 90,000 students in private-education placements, most of which are a result of school districts’ referrals.¹⁸⁹ Public-school dis-

181. *Id.* at 25; see 20 U.S.C. § 1412(a)(5)(A) (2006); Brief of Nat’l Sch. Bds., *supra* note 137, at 10 (indicating that the least restrictive environment is also known as “mainstreaming”).

182. See OSBORNE & RUSSO, *supra* note 26, at 27. Four factors are considered in making a placement: (1) the educational benefits of placing a child with a disability in a regular classroom; (2) the nonacademic benefits; (3) the effect that the student would have on the teacher and other children; and (4) the costs of inclusion. Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H., 14 F.3d 1398, 1401-02 (9th Cir. 1994).

183. See OSBORNE & RUSSO, *supra* note 26, at 26.

184. *Id.* at 27.

185. See T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000).

186. See OSBORNE & RUSSO, *supra* note 26, at 27.

187. Brief of Nat’l Sch. Bds., *supra* note 137, at 10.

188. See Brief for Great City, *supra* note 7, at 21.

189. Lewin, *supra* note 7, at A16. During a recent school year, the public-school system expended approximately \$50 billion on special education with costs of \$36 billion for school-age children alone. Brief for Great City, *supra* note 7, at 22 n.10. Out of \$36 billion, the public-school system spent \$5.3 billion on special education of school-age children in private programs or programs

tricts, as a collective, are financially stressed, but the negative impact of reimbursement for private tuition is even more startling for individual districts.¹⁹⁰ The Court's interpretation of the IDEA imposes unexpected financial liability on states' tuition not hinted at in the private-reimbursement provision.¹⁹¹ The *Forest Grove* decision will disrupt special-education services, divert resources from regular-education programming, and create a grim future for our nation's public-school system and the children entrusted to it.

1. Disruption in Special-Education Services

In general, budgeting for special education poses unique challenges because the costs vary based on the number of students enrolled in special education and their particular needs.¹⁹² Allowing reimbursement for unilateral private placements of students who have not previously received special-education services further complicates the already-strained financial situation of public-school systems.¹⁹³ School districts do not have a mechanism for calculating costs when they cannot even determine who may be eligible for private reimbursement.¹⁹⁴

The difference between the costs associated with public and private special-education programs is staggering.¹⁹⁵ The average expenditure per student in a private special-education program is nearly five times as much as the cost per student in a public school.¹⁹⁶ Costs for unexpected, unilateral private placements can reach as much as \$100,000 per student for one year.¹⁹⁷ School district officials across the United States are ex-

operated by institutions not under the authority of a public agency. *Id.* at 22. The term "free appropriate public education" means special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9)(A)-(D); 20 U.S.C. § 1412(a)(1)(A) (2006) states that "A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." *Id.*

190. See Brief for Great City, *supra* note 7, at 23.

191. Brief of Petitioner, *supra* note 120, at 22-23.

192. See Brief of Nat'l Sch. Bds., *supra* note 137, at 24. A school superintendent stated, "You really can have just a few very high-cost students come into your district and have a huge impact on your cost per pupil." *Id.* (quoting Meaghan M. McDermott, *Special Ed.*, Rochester Democrat and Chronicle, Dec. 2, 2007, at 1A).

193. *Id.* at 24-25.

194. See *id.*

195. Brief for Great City, *supra* note 7, at 23. The average cost for a public special-education program is \$5,709 as compared to a private special education at \$26,440. *Id.* A Boston public school tuition survey shows that a public special-education program costs approximately \$13,000 per student, while private special-education costs are an average of \$59,553 per pupil. *Id.*

196. *Id.*

197. Melanie Asmar, *Special Education Costs Soar; Unpredictable Bill Can Strain Local Dis-*

pressing valid concerns about the *Forest Grove* decision and its effects on funding.¹⁹⁸ The majority of the Court, however, rejected arguments of the parties in *Forest Grove* which raised similar financial concerns.¹⁹⁹

The inability of the public-school districts to accurately project their costs and budgets greatly impairs investments in special-education program development and restricts access to necessary in-class resources for children.²⁰⁰ A few unexpected and expensive private-tuition reimbursement claims can debilitate small school districts.²⁰¹

2. Increased Costs with Diversion of Resources

Private-school placements for children with disabilities are certainly an appropriate alternative if, through collaboration, negotiation, and functional adaptation, the individualized education plan still fails to satisfy the child's learning needs. The Court's decision in *Forest Grove* provides a disincentive for parents to engage in the collaborative process and promotes litigation as a remedial approach for parents seeking reimbursement following a unilateral placement.²⁰² The Court's interpretation of the IDEA will likely evolve into a "tuition-reimbursement lottery" in which parents place their child in a private school hoping to gain in the form of a subsidy for tuition they otherwise would be obligated to pay.²⁰³

Even if a school district avoids full litigation of a case, it will still incur costs to manage increasing numbers of mediations and due process hearings surrounding the reimbursement issue.²⁰⁴ As a result of the *Forest Grove* decision, many public-school districts nationwide will be in the untenable position of reimbursing an increasing number of expensive private placements or defending themselves in court.²⁰⁵ Placing school districts in this no-win situation will negatively impact funding for

tricts, CONCORD MONITOR, Feb. 17, 2008, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20080217/FROTPAGE/802170375>.

198. Bonnie Miller Rubin, *Special Education: Public Schools Pressed to Pay for Private Schooling*, CHICAGO TRIBUNE, Sept. 4, 2009, available at <http://archives.chicagotribune.com/2009/sep/04/local/chi-special-education-ruling-cit--dot--ar0sep04>.

"Where do you draw the line when class size is getting bigger and you only have X number of dollars?" asked Mark Friedman, recently retired superintendent of the Libertyville Public Schools. "The community is not happy when we have dwindling resources, when there are 28 students in a class and we're spending \$100,000 for one kid."

Id.

199. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2496 (2009) (majority opinion).

200. See Brief of Nat'l Sch. Bds., *supra* note 137, at 23-24.

201. *Id.* at 24-25, 28.

202. *Id.* at 27.

203. See *id.* at 28. "The growing body of litigation surrounding the IDEA is one of the unintended and costly consequences of this law." S. REP. No. 104-275, at 85 (1996). "Every dollar a school district spends on private placements and litigation to avoid unnecessary private placements is a dollar less for providing special education and related services to students in the public schools." Brief of Nat'l Sch. Bds., *supra* note 137, at 27.

204. *Id.* at 26-27.

205. *Id.* at 28.

special and regular education.²⁰⁶

3. Creating Bias Based on Socioeconomics

During reauthorization of the IDEA through the 1997 Amendment process, parents and advocates for children with disabilities viewed the substance of the IDEA as adequate.²⁰⁷ These groups were most concerned with noncompliance with the IDEA and the failure of the U.S. Department of Education and state departments of education to enforce the federal law.²⁰⁸

Some public schools in our nation successfully collaborate with parents and service providers to promote full participation of and quality education for children with disabilities.²⁰⁹ However, when confronted with soaring special-education costs and limited resources, many public schools strategize to minimize expenditures or risk the assurance of a free appropriate public education.²¹⁰

Despite widespread noncompliance, the Department of Education rarely sanctions public-school systems for violations.²¹¹ To date, effective implementation of the IDEA relies upon parents litigating against public schools to cure deficiencies.²¹² Parents of a lower socioeconomic status are not able to redress their situation through litigation.²¹³ Although proclaimed a victory for *all* children with disabilities, the *Forest Grove* decision only succeeds in creating a bias for those financially able to capitalize on the private-reimbursement relief.²¹⁴

Neither the public-school system nor the parents of children with disabilities created the Department of Education's flawed implementation of the IDEA, however, both are paying the consequences for it.²¹⁵ The decision in *Forest Grove* does not remedy the obstacles to effective implementation of the IDEA. Instead, the decision magnifies current problems and, therefore, should not be considered a victory for children with disabilities.

206. See *id.* at 28-29.

207. See NAT'L COUNCIL, *supra* note 5, at 33.

208. *Id.*

209. Brief for Great City, *supra* note 7, at 21-22.

210. See *id.* at 22.

211. NAT'L COUNCIL, *supra* note 5, at 7.

212. See *id.*

213. *Id.*

214. See Scott H. Greenfield, *Simple Justice: Why Olson's "Better Shake" Is Mostly for the Wealthy*, <http://blog.simplejustice.us/2009/06/29/why-olsons-better-shake-is-mostly-for-the-wealthy.aspx> (last visited Jan. 11, 2010).

215. See Miriam Kurtzig Freedman, *School Law and Reform: More on the Supreme Court Decision, Forest Grove*, <http://www.schoollawpro.com/2009/07/more-on-that-supreme-court-decision.html> (last visited Jan. 11, 2010).

VI. CONCLUSION

In *Forest Grove*, the Court resolved the longstanding dispute between public-school officials and parents of children with disabilities regarding the availability of reimbursement for private tuition under the IDEA.²¹⁶ Using a tenuous standard in its statutory interpretation, the Court held that the 1997 Amendments did not categorically bar reimbursement for unilaterally removed children who never received special-education services.²¹⁷ Parents and advocates of children with disabilities view the *Forest Grove* decision as a ground-breaking win, which opens the door to a quality education for such children.²¹⁸ Inconsistencies between the Court's decision and the structure and intent of the IDEA in addition to the widespread social ramifications of the decision prove otherwise.²¹⁹

Forest Grove compromises the framework of the IDEA by allowing parents to remove their child in the absence of collaboration with the public school despite the preference for cooperative planning and problem-solving.²²⁰ Similarly, the Court's decision undermines the open-door policy of the IDEA by permitting reimbursement for the unilateral removal of a child without first requiring that the child try the public-school program.²²¹

In avoiding the collaborative process, the *Forest Grove* decision promotes litigation as a remedial approach.²²² Although proclaimed a victory for all, *Forest Grove* creates a bias for parents who are financially capable of seeking the relief it offers. School districts will incur increasing costs for management of hearings and mediations involving reimbursement.²²³ The Court's reading of the IDEA imposes a heavy financial burden on the public-school system, which already faces limited resources for educational programming.²²⁴ In addition to these increasing expenditures, school districts will not be able to accurately project their costs and budget accordingly.²²⁵ The Supreme Court caught a glimpse of one child's reality in our nation's public-education system and sympathetically placed a band-aid in the form of private reimbursement over this reality, only to inflict a greater injury.

216. See Mauro, *supra* note 7.

217. See *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2496 (2009).

218. Simms, *supra* note 12.

219. See *supra* Part V.B.1-C.

220. See Brief of Nat'l Sch. Bds., *supra* note 137, at 4, 11.

221. See Lewin, *supra* note 7, at A16.

222. See Brief for Nat'l Sch. Bds. *supra* note 137, at 11, 27-28.

223. See Brief for Great City, *supra* note 7, at 26.

224. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2503 (2009) (Souter, J., dissenting).

225. Brief of Nat'l Sch. Bds., *supra* note 137, at 25.