SCHOOLS—HANDICAPPED CHILDREN: THE UNITED STATES SUPREME COURT RULES THAT THE 1997 AMENDMENTS TO INDIVIDUALS WITH DISABILITIES EDUCATION ACT DO NOT CATEGORICALLY BAR TUITION REIMBURSEMENT FOR UNILATERAL PRIVATE-SCHOOL PLACEMENTS

Forest Grove School District v. T.A., 129 S. Ct. 2484 (2009)

ABSTRACT

In *Forest Grove School District v. T.A.*, the United States Supreme Court held the 1997 Amendments to the Individuals with Disabilities Education Act (IDEA) do not mandate that a child must have received special education or related services under the authority of a public agency to be eligible to receive tuition reimbursement for a placement in private school. Allowing school districts to avoid reimbursing parents for the cost of their child's private special education by claiming the child never received special education in public school would create a perverse incentive for school districts not to identify children as eligible for special education or related services. In so holding, the Court concluded IDEA continues to authorize reimbursement for the costs of special education and related services when school districts fail to provide a free, appropriate public education, and where placement in private school is appropriate under IDEA. Although no categorical bar exists to reimbursement when a child has not previously received special education in public school, tuition reimbursement remains an equitable remedy to be granted by courts in some, but not all, circumstances. After *Forest Grove*, courts remain free to grant or deny reimbursement based on equitable considerations, such as whether the party seeking reimbursement provided to the school district sufficient notice of its intent to place the child in private school. *Forest Grove* removed the categorical bar to tuition reimbursement some circuit courts of appeals had read into the 1997 Amendments, and made clear that tuition reimbursement is an available remedy to be granted when warranted by the equities.

I. FACTS

T.A. was born on September 11, 1985.[1] Beginning in kindergarten, he attended public school in the Forest Grove School District of Forest Grove, Oregon (School District).[2] Throughout his elementary school years, T.A.'s teachers noticed he had difficulty paying attention in class and completing his schoolwork.[3] With extensive help from his parents and sister, however, T.A. managed to pass from grade to grade.[4]

T.A.'s difficulties became increasingly evident while he attended Forest Grove High School (FGHS).[5] In December 2000, while T.A. was a freshman at FGHS, T.A.'s mother contacted his school counselor to discuss T.A.'s problems with his schoolwork.[6] The school counselor suspected T.A. might have a learning disability and referred him for an evaluation to determine whether he qualified for special education services under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (IDEA or the Act).[7] The School District provided notice to T.A.'s mother

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

2. *Id.*

3. Brief of Respondent at 7, Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484 (2009) (No. 08-305).

4. *Forest Grove*, 523 F.3d at 1081. For example, by the time T.A. entered high school in September 2000, his mother was working with him on his schoolwork at least two hours per day. Brief of Respondent, *supra* note 3, at 7. In November 2001, with his mother still helping him with schoolwork, T.A.'s parents hired his sister to tutor him ten hours per week. *Id.* at 9. An administrative hearing officer later noted, without the aid of his mother and sister, T.A. would not have advanced through grades at Forest Grove High School. *Id.*

5. *Forest Grove*, 129 S. Ct. at 2488.

6. *Id.*

7. *Id.* A school psychologist issued a report in September 2001 stating T.A. was not eligible for services under IDEA because he had no learning disability. *Id.*

of its intent to evaluate T.A. for special education services, and she consented.[8] The School District also provided T.A.'s parents with notice of procedural safeguards available to them under IDEA.[9] The notice discussed situations in which parents who enroll their children in private school may be reimbursed for the cost of placement.[10] According to the notice, where parents unilaterally enrolled a child in private school, the School District would reimburse the parents for those costs "only if . . . the child received special education and related services under the authority of a public agency before enrolling in the private school."[11]

Throughout the first half of 2001, several of the School District's psychologists and educational specialists evaluated T.A.[12] On June 13, 2001, a team of school officials, including psychologists and educational specialists, determined T.A. did not have a learning disability and was therefore ineligible for special education.[13] T.A.'s mother agreed with the psychologist's decision that T.A. did not have a learning disability and was ineligible for special education services under the Act.[14] Throughout the rest of T.A.'s time at FGHS, neither of his parents requested additional evaluations regarding whether T.A. was eligible for special education.[15]

Over the next two years, T.A. continued to struggle academically.[16] Again concerned that T.A. had a learning disability, T.A.'s parents hired Dr. Fulop, a psychologist, in early 2003.[17] Dr. Fulop evaluated T.A. on February 21 and 24, 2003.[18] Following those sessions, Dr. Fulop diagnosed T.A. with Attention-Deficit/Hyperactivity Disorder (ADHD) and a math disorder.[19] On March 14, 2003, Dr. Fulop informed T.A.'s parents of his diagnosis and stated T.A. "had several learning problems and academic

8. Brief of Petitioner at 8, *Forest Grove*, 129 S. Ct. 2484 (No. 08-305). Under federal law, public agencies, most often school districts, must attempt to obtain parental consent before conducting an initial evaluation to determine whether a child is eligible for special-education services. 20 U.S.C. § 1414(a)(1)(D)(i)(I) (2006).

9. Brief of Petitioner, *supra* note 8, at 8. For an overview of IDEA's procedural safeguards, including the roles of the administrative law judge and the federal district court in IDEA cases, see M.M. *ex rel.* C.M. v. Sch. Bd. of Miami-Dade Cnty., Fla., 437 F.3d 1085, 1096-98 (11th Cir. 2006).

10. Brief of Petitioner, *supra* note 8, at 8.

11. *Id.* The language in the notice closely resembled that of 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).

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

13. *Id.*

14. *Id.*

15. *Id.*

16. Forest Grove Sch. Dist. v. T.A., 640 F. Supp. 2d 1320, 1323 (D. Or. 2005).

17. *Forest Grove*, 523 F.3d at 1082.

18. Brief of Petitioner, *supra* note 8, at 10.

19. *Forest Grove*, 523 F.3d at 1082. Dr. Fulop also diagnosed T.A. with cannabis abuse and dysthmic disorder, a type of depression. Brief of Petitioner, *supra* note 8, at 11.

limitations, as well as [a] math disorder."[20] Dr. Fulop therefore recommended a residential program for T.A.[21] According to Dr. Fulop, the residential treatment facility at Mount Bachelor Academy, a residential private school, would provide an environment that could help T.A. with his learning difficulties, ADHD, and behavioral problems.[22] On the basis of that recommendation, T.A.'s parents removed him from public school and, on March 24, 2003, enrolled him in Mount Bachelor Academy.[23]

T.A.'s parents hired an attorney on March 28, 2003.[24] On April 18, 2003, seeking an order that would require FGHS to evaluate T.A. for "all areas of suspected disability," T.A.'s parents requested a hearing pursuant to 20 U.S.C. § 1415(f).[25] It was at this time FGHS first learned of T.A.'s placement at Mount Bachelor Academy.[26] The Office of Administrative Hearings for the State of Oregon began the hearing in May 2003, but the hearing officer continued the hearing until September 2003 to allow the School District to further evaluate T.A.[27] Medical and educational specialists from the School District evaluated T.A. during the summer of 2003 and determined he was not eligible for services under IDEA.[28] On January 26, 2004, the hearing officer issued an opinion, concluding T.A. was disabled and therefore eligible for special education under IDEA.[29] The hearing

20. Brief of Petitioner, *supra* note 8, at 11.

21. *Forest Grove*, 523 F.3d at 1082.

22. Brief of Petitioner, *supra* note 8, at 11. Mount Bachelor Academy was a private boarding school located in Prineville, Oregon; T.A. graduated from Mount Bachelor in June 2004. *Id.* After an investigation by the Oregon Department of Human Services that centered on allegations of mistreatment and humiliation of students, Mount Bachelor closed in late 2009. Barney Lerten, *DHS, Mount Bachelor Academy Settle Case*, KTVZ.COM, Oct. 2, 2010, http://www.ktvz.com/news/25258065/detail.html; Maia Szalavitz, *An Oregon School for Troubled Teens is Under Scrutiny*, TIME, Apr. 17, 2009, http://www.time.com/time/health/article/0,8599,1891082,00.html.

23. *Forest Grove*, 523 F.3d at 1082.

24. *Id.*

25. *Id.* Under IDEA, parents and local educational agencies involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A) (2006).

26. Brief of Petitioner, *supra* note 8, at 12. T.A.'s father communicated with FGHS regarding T.A.'s academic placement for some time before T.A. began attending Mount Bachelor Academy, but the Mount Bachelor placement was never discussed. Forest Grove Sch. Dist. v. T.A., 675 F. Supp. 2d 1063, 1066 (D. Or. 2009). In January 2003, because of T.A.'s academic and behavioral difficulties, T.A.'s father arranged with FGHS for T.A. to finish high school through Portland Community College (PCC). Brief of Petitioner, *supra* note 8, at 10. After the February sessions with Dr. Fulop, T.A.'s father notified FGHS that T.A. would attend PCC after medical testing and a three-week "wilderness training program." *Id.* On March 10, 2003, T.A.'s father notified FGHS that T.A. was "officially disenrolled from FGHS and was registered at PCC." *Id.* at 11. Then, on April 18, 2003, FGHS received notice of the request for a hearing under § 1415(f) and learned of the private school placement. *Id.* at 12.

27. *Forest Grove*, 523 F.3d at 1082.

28. *Id.*

29. *Id.*

officer further ruled the School District failed to offer T.A. a free appropriate public education as required by IDEA and was therefore responsible for the costs of T.A.'s placement at Mount Bachelor Academy.[30]

The School District appealed the hearing officer's decision to the United States District Court for the District of Oregon pursuant to § 1415(i).[31] The district court concluded T.A. was statutorily ineligible for reimbursement under § 1412(a)(10)(C) because he had not previously received special education services through the public school, and thus, the hearing officer erred as a matter of law in granting reimbursement.[32] The district court also concluded the facts of the case did not warrant reimbursement under general principles of equity.[33] T.A. appealed the district court's ruling to the Ninth Circuit Court of Appeals.[34]

On appeal from the district court, the Ninth Circuit addressed the issue of whether § 1412(a)(10)(C) "bars private school reimbursement for students who have not 'previously received special education and related services,' or whether those students remain eligible for private school reimbursement, as they were before [the 1997 Amendments to IDEA (1997 Amendments)] under principles of equity pursuant to § 1415(i)(2)(C)."[35] The Ninth Circuit held a student who never received special education and related services from a school district is not barred as a matter of law from recovering the costs of private education.[36] Finding the statutory requirements of § 1412(a)(10)(C) inapplicable to the case, the court held students who have not previously received special education through a public agency are eligible for reimbursement "to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to § 1415(i)(2)(C)."[37]

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30. *Id*. at 1082-83.

31. *Id*. at 1083. The IDEA guarantees that:

> 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 . . . in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

§ 1415(i)(2)(A).

32. *Forest Grove*, 523 F.3d at 1083. The district court refused to reimburse T.A.'s parents for the cost of T.A.'s placement because "[t]he plainest reading of [§ 1412(a)(10)(C)] is that *only* children who had previously received special education services from the District are even eligible for such tuition reimbursement." Forest Grove Sch. Dist. v. T.A., 640 F. Supp. 2d 1320, 1332 (D. Or. 2005).

33. *Forest Grove*, 523 F.3d at 1083. T.A. argued even if § 1412(a)(10)(C) did not authorize reimbursement in this case, the hearing officer could award reimbursement at her discretion under general principles of equity. *Forest Grove*, 640 F. Supp. 2d at 1333.

34. *Forest Grove*, 523 F.3d at 1083.

35. *Id*. at 1086.

36. *Id*. at 1087-88.

37. *Id*. at 1088.

The court therefore reversed the district court's ruling that T.A. was not entitled to reimbursement as a matter of law.[38]

The Ninth Circuit also held the district court abused its discretion in denying reimbursement because the district court made two distinct legal errors.[39] First, the district court erred by considering inapplicable statutory requirements from § 1412(a)(10)(C) in its analysis of the equities.[40] Because neither T.A. nor the School District disputed that T.A. never received special education or related services through the School District, the district court incorrectly considered the statutory requirements of § 1412(a)(10)(C).[41] Second, the district court applied the wrong legal standard when it stated tuition reimbursement was available only in extreme cases.[42] The Ninth Circuit noted nothing in § 1412(a)(10)(C), Supreme Court precedent, or Ninth Circuit precedent, suggested reimbursement was only available in extreme cases.[43] The Ninth Circuit therefore reversed the district court's denial of reimbursement and remanded the case to the district court.[44]

The School District filed a petition for a writ of certiorari to the United States Supreme Court.[45] The Supreme Court granted certiorari in order to determine whether § 1412(a)(10)(C) established a categorical bar to tuition reimbursement for students who had not previously received special education services under the authority of a public education agency.[46] Noting the 1997 Amendments did not alter the text of § 1415(i)(2)(C)(iii), and refusing to read § 1412(a)(10)(C) to alter that provision's meaning, the Supreme Court affirmed the Ninth Circuit's decision, holding IDEA authorizes reimbursement for private special education services regardless of whether the child previously received special education or related services through the public school.[47] Because the district court found T.A. ineligible for tuition reimbursement as a matter of law, and did not properly consider the equities regarding whether reimbursement was warranted, the Supreme Court remanded the case to the district court.[48]

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38. *Id.*

39. *Id.* The Ninth Circuit applied an abuse of discretion standard because "IDEA makes clear that the district court exercises its discretion in fashioning appropriate relief." *Id.* at 1084. (citing 20 U.S.C. § 1415(i)(2)(C) (2006)).

40. *Id.* at 1088.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1089.

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

46. *Id.*

47. *Id.* at 2496.

48. *Id.*

II. LEGAL BACKGROUND

In *Forest Grove School District v. T.A.*, the Supreme Court analyzed the 1997 Amendments to determine whether the amendments categorically barred reimbursement when a child had not previously received special education or related services through a public agency.[49] Thus, to understand the Court's analysis, it is necessary to examine the 1997 Amendments.[50] To provide the appropriate context, it is useful to examine learning disabilities in general[51] and how Congress and the United States Supreme Court have shaped the educational landscape for children with learning disabilities.[52]

A. LEARNING DISABILITIES

Congress has determined "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society" and "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[53] The term "learning disability" does not describe a distinct disability.[54] Instead, the term is an invented category of special education composed of seven specific areas of disability, including receptive language, expressive language, basic reading skills, reading comprehension, written expression, mathematics calculation, and mathematical reasoning.[55] Most children who have learning disabilities have more than one of the seven subtypes.[56]

1. *Learning Disabilities, Generally*

Learning disabilities can be persistent disorders that may not respond well to general or inappropriate instruction.[57] Thus, appropriate instruction is key, and educational interventions are most likely to succeed if carried out by expert teachers.[58] Early intervention is also vital because students

49. *Id.* at 2490.

50. *See* discussion *infra* Part II.D (explaining the reimbursement provisions of the 1997 Amendments).

51. *See* discussion *infra* Part II.A.1 (discussing learning disabilities, generally).

52. *See* discussion *infra* Part II.B-C (outlining Supreme Court decisions as well as statutes commonly cited by courts in IDEA reimbursement cases).

53. 20 U.S.C. § 1400(c)(1) (2006).

54. G. Reid Lyon, *Learning Disabilities*, 6 THE FUTURE OF CHILDREN 54, 55, 60 (1996).

55. *Id.* at 60.

56. *Id.* at 67.

57. *Id.* at 71.

58. *Id.*

with learning disabilities attain higher levels of educational achievement when they are identified early in their educational careers.[59] Despite the need for early intervention, most children with learning disabilities are not identified until the third or fourth grade.[60]

2. *Public Special Education Before IDEA*

Throughout much of the history of public education in America, services to disabled children were provided at the discretion of local school districts.[61] School districts possessed tremendous discretion regarding the identification and education of children with special needs.[62] According to the United States Department of Education, "in 1970, U.S. schools educated only one in five children with disabilities, and many states had laws excluding certain [disabled] students."[63] In 1975, congressional hearings revealed almost one million children with disabilities were receiving no education at all, and an additional 3.5 million were not receiving an education appropriate to their needs.[64] In response to the need for identification and education of children with learning disabilities, and in response to discrimination against children with special needs, Congress passed the Education for All Handicapped Children Act of 1975.[65]

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59. *Id.*

60. *Id.*

61. EDWIN W. MARTIN ET AL., *The Legislative and Litigation History of Special Education*, 6 THE FUTURE OF CHILDREN 25, 26 (1996).

62. Jordan L. Wilson, *Missing the Big Idea: The Supreme Court Loses Sight of the Policy Behind the Individuals with Disabilities Education Act in* Schaffer v. Weast, 44 HOUS. L. REV. 161, 163 (2007).

63. *History: Twenty-Five Years of Progress in Educating Children with Disabilities*, U.S. OFFICE OF SPECIAL EDUC. PROGRAMS, http://www.ed.gov/policy/speced/leg/idea/history.pdf (last visited Mar. 12, 2011). The United States Code provides:

> Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because (A) the children did not receive appropriate educational services; (B) the children were excluded entirely from the public school system and from being educated with their peers; (C) undiagnosed disabilities prevented the children from having a successful educational experience; or (D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

20 U.S.C. § 1400(c)(2) (2006); *see also* Pa. Assoc. for Retarded Children v. Commonwealth of Pa., 334 F. Supp. 1257, 1258 (1971) (per curiam) (enjoining Pennsylvania public school officials from applying state law denying education to children with learning disabilities).

64. MARTIN ET AL., *supra* note 61, at 29.

65. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1482); Wilson, *supra* note 62, at 166-67.

B. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

This section introduces the Education for All Handicapped Children Act, now renamed the Individuals with Disabilities Education Improvement Act.[66] It also describes the responsibilities states assume by accepting IDEA funds, including the identification of disabled children and providing those children with free, appropriate public education.[67]

1. *Overview*

President Gerald Ford signed The Education for All Handicapped Children Act into law in 1975, and the Act took effect on October 1, 1977.[68] The title of the Act was changed by amendment in 1990 to the Individuals with Disabilities Education Act,[69] and again by amendment in 2004 to the Individuals with Disabilities Education Improvement Act.[70] Congress enacted IDEA to aid states in educating students with disabilities by providing federal funding of state efforts.[71] At the heart of the IDEA is the principle that a disabled child should receive from public schools a free education, administered in the least restrictive environment, that is individualized to the child's unique needs.[72]

The United States Supreme Court has described IDEA as "a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for [children with disabilities],"[73] and "an ambitious federal effort to promote the education of handicapped children."[74] The Act did not create substantive educational standards, but rather elaborate procedural safeguards to facilitate parental involvement in school decisions.[75] Nor does the Act protect every student with a disability, but only those students with a disability included in IDEA that adversely impacts the student's education.[76] In the case of a student

66. *See infra* Part II.B.1.

67. *See infra* Part II.B.2.

68. MARTIN ET AL., *supra* note 61, at 30.

69. *Id*. at 29.

70. Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. §§ 1400-1482). Despite the renaming of the Act in 2004, it is still acceptable to cite the Act as the Individuals with Disabilities Education Act. 20 U.S.C. § 1400(a).

71. MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION 72 (1998).

72. Wilson, *supra* note 62, at 167.

73. Smith v. Robinson, 468 U.S. 992, 1009 (1984).

74. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 179 (1982).

75. YELL, *supra* note 71, at 72.

76. *Id*. at 73.

whose disability adversely affects his or her education, IDEA places upon states certain responsibilities to provide appropriate special education.[77]

2. *States' Responsibilities Under IDEA*

Although states are not required to participate in IDEA,[78] each of the fifty states currently receives IDEA funding.[79] As a consequence of their participation, states have specific responsibilities under the Act, including the implementation of a "child-find" system to locate all disabled students from the ages of three to twenty-one residing within the state.[80] In addition to locating children with disabilities, states and school districts are required to make available to all children with disabilities a free appropriate public education.[81] To that end, states and school districts are required to make available to children identified as disabled under IDEA an individualized education program.[82]

a. Free Appropriate Public Education

The purpose of IDEA is "to assure that all handicapped children have available to them . . . 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 handicapped children and their parents or guardians are protected."[83] Thus, IDEA requires states to provide to children with learning disabilities a "free appropriate public education" (FAPE).[84] The Act defines a FAPE as:

> [S]pecial 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

77. *See infra* Part II.B.2.

78. MARTIN ET AL., *supra* note 61, at 30.

79. Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1091-92 (2010).

80. YELL, *supra* note 71, at 74; Seligmann, *supra* note 79, at 1092.

81. Richard Apling & Nancy Lee Jones, *The Individuals with Disabilities Education Act: Overview of Major Provisions, in* THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 1-2 (Ian O. Javier ed., 2005); *see* discussion *infra* Part II.B.2.a (discussing states' responsibilities to provide all students with disabilities a free appropriate public education).

82. 20 U.S.C. § 1414(d) (2006).

83. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 367 (1985) (citing 20 U.S.C. § 1400(c)).

84. 20 U.S.C. § 1401(9).

> provided in conformity with the individualized education program required under section 1414(d) of [the Act].[85]

The IDEA defines "special education" as "specifically designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[86] The Act defines "related services" as services that "may be required to assist a child with a disability to benefit from special education."[87] Under IDEA, related services include transportation and other supportive services such as physical, occupational, and speech therapy.[88]

b. The Individualized Education Program

To ensure each child identified as disabled under IDEA receives a FAPE, school districts must create for each disabled child within the district an "individualized education program."[89] The IDEA defines the term "individualized education program" (IEP) as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of [the Act]."[90] States or school districts developing an IEP must include in the program, among other things, "a statement of the child's present levels of academic achievement and functional performance, . . . a statement of measurable annual goals, . . . [and] a description of how the child's progress towards meeting [those] annual goals will be measured[.]"[91] IDEA mandates procedural requirements in the IEP formulation process to ensure parents and school officials develop an appropriate IEP.[92]

If dissatisfied with a proposed IEP, parents may challenge its appropriateness both administratively and judicially.[93] Interpretation of a standard of appropriateness has been "difficult because of the diversity of the special education population."[94] Neither Congress nor the courts have provided a precise definition of an "appropriate education."[95] Rather, courts have set

85. *Id.*
86. *Id.* § 1401(29).
87. *Id.* § 1401(26)(A).
88. MARTIN ET AL., *supra* note 61, at 36.
89. Schaffer v. Weast, 546 U.S. 49, 51 (2005).
90. 20 U.S.C. § 1401(14).
91. *Id.* § 1414(d)(1)(A)(i).
92. YELL, *supra* note 71, at 169.
93. Parents may challenge the appropriateness of a proposed IEP administratively by requesting an impartial due process hearing. 20 U.S.C. § 1415(f). After exhausting all available administrative remedies, parents dissatisfied with the outcome of the administrative proceedings "have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." *Id.* § 1415(i)(2)(A).
94. MARTIN ET AL., *supra* note 61, at 34.
95. *Id.*

out "broad principles to be applied [in] individual circumstances."[96] The principles can generally be summarized as requiring an educational program that "is (1) related to the child's learning capacity, (2) specially designed for the child's unique needs and not merely what is offered to others, and (3) reasonably calculated to confer educational benefit."[97]

C. SUPREME COURT DECISIONS REGARDING THE IDEA AND REIMBURSEMENT FOR PRIVATE SPECIAL EDUCATION

IDEA mandates a school district that cannot provide a disabled student a FAPE must provide and fund an appropriate private school placement.[98] The Supreme Court has considered several cases concerning reimbursement under IDEA for private special education services.[99] Two cases decided prior to the 1997 Amendments have provided the basic legal framework for IDEA reimbursement cases: *School Committee of Burlington v. Department of Education*[100] and *Florence County School District Four v. Carter*.[101]

1. Burlington

In *Burlington*, the father of a public school student, dissatisfied with the school's proposed IEP, unilaterally placed his child in a state-approved private school for special education.[102] Following a lengthy administrative and judicial process, the Supreme Court granted certiorari to consider two issues: (1) whether reimbursement to parents for private school placement is appropriate relief under IDEA; and (2) whether the Act "bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local school authorities."[103] At the time of the decision in *Burlington*, IDEA made no explicit reference to reimbursement, but rather authorized a court to "grant such relief as the court determines is appropriate."[104] In determining what relief is

96. *Id.*

97. *Id.*

98. Emily S. Rosenblum, *Interpreting the 1997 Amendment to the IDEA: Did Congress Intend to Limit the Remedy of Private School Tuition Reimbursement for Disabled Children?*, 77 FORDHAM L. REV. 2733, 2734 (2009); *see also* Sch. Comm. of Burlington v. Dep't of Ed., 471 U.S. 259, 370 (1985).

99. *See* discussion *infra* Part II.C.1-2 (discussing cases often cited by courts in IDEA reimbursement cases).

100. 471 U.S. 359 (1985).

101. 510 U.S. 7 (1993).

102. *Burlington*, 471 U.S. at 362.

103. *Id.* at 367.

104. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2490 (2009) (quoting 20 U.S.C. § 1415(i)(2)(C)(iii) (2006)).

appropriate under the Act, consideration must be given to "the Act's broad purpose of providing children with disabilities a FAPE, including through publicly funded private-school placements when necessary."[105] The Court held the grant of authority in § 1415(i)(2)(C)(iii) included "the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."[106]

2. Carter

In *Carter*, the parents of a public school student were dissatisfied with the public school's proposed IEP.[107] The parents unilaterally withdrew the student from public school and enrolled her in a private school.[108] The parents then sued the school district, seeking reimbursement for costs incurred as a result of the private school placement.[109] The district court found the private school did not comply with all IDEA requirements because it was not a state-approved private school for special education, but it provided the student with an appropriate education under IDEA.[110] The district court held, although the private school did not meet every IDEA requirement, the student's education at the private school was appropriate under IDEA and the parents were therefore entitled to reimbursement.[111]

The school district appealed, arguing IDEA did not permit reimbursement when parents unilaterally removed their child from public school and placed the child in a private school that did not meet every IDEA requirement.[112] The Fifth Circuit Court of Appeals disagreed and affirmed the district court's decision, holding placement in a private school not approved by the state is not a bar to reimbursement.[113] Citing *Burlington*, the court concluded IDEA "imposes only two prerequisites to reimbursement: that the program proposed by the state failed to provide the child a free appropriate public education, and that the private school in which the child is enrolled succeeded in providing an appropriate education[.]"[114] The school

105. *Id.* at 2491 (citing *Burlington*, 471 U.S. at 369).
106. *Burlington*, 471 U.S. at 369.
107. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 10 (1993).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 11.
112. Carter v. Florence Cnty. Sch. Dist. Four, 950 F.2d 156, 161 (4th Cir. 1991).
113. *Id.* at 158.
114. *Id.* at 164.

district filed a petition for a writ of certiorari to the United States Supreme Court.[115]

The Supreme Court granted certiorari in *Carter* to determine whether a court may order reimbursement for parents who unilaterally enrolled their child in private school when the private school did not meet every IDEA requirement, but nonetheless provided an appropriate education under the Act.[116] The Court affirmed the judgment of the Ninth Circuit, holding courts "may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under IDEA and put the child in a private school that provides an education that is otherwise proper under IDEA, but does not meet all the requirements of [the Act]."[117] Thus, the Court reaffirmed the availability of reimbursement for the costs of private special education, even where a child was placed in a private school that had not been approved by the State, so long as the school district failed to provide a FAPE and the placement was proper under the Act.[118] The Court decided *Carter* in 1993, four years before Congress extensively amended IDEA.[119]

D. THE 1997 AMENDMENTS TO IDEA

In 1997, Congress amended the IDEA, adding several significant provisions and restructuring the Act to make it easier to understand.[120] Congress's purpose in passing the 1997 Amendments was to improve the performance and educational achievement of students with disabilities, as the goal of child identification had largely been met.[121] Congress mandated several changes to the IEP requirements, including the implementation of measurable, annual educational goals.[122] The 1997 Amendments also required states to conduct state- and district-wide assessments on the inclusion of students with disabilities.[123] As part of the Act's restructuring, § 1415(e)(2), the provision of IDEA relied upon by the *Burlington* Court in granting reimbursement as appropriate relief, was renumbered § 1415(i)(2)(C)(iii).[124] Despite the renumbering, Congress left the text of

115. *Carter*, 510 U.S. at 12.
116. *Id.* at 9.
117. *Id.* at 9-10.
118. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2491 (2009).
119. *See infra* Part II.D.
120. YELL, *supra* note 71, at 87.
121. *Id.*
122. *Id.*
123. *Id.*
124. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2490 n.5 (2009).

the provision unaltered.[125] Thus, the provision of the Act interpreted by the Supreme Court to authorize reimbursement as appropriate relief under IDEA was left unchanged.[126]

The 1997 Amendments affected or created several IDEA provisions.[127] One new provision, § 1412(a)(10)(C)(i) (clause (i)), makes clear IDEA does not require a school district to reimburse parents of a child with disabilities for the cost of the child's private special education "if [the district] made a free appropriate public education available to the child and the parents elected to place the child in [the] private school or facility."[128] Under § 1412(a)(10)(C)(ii) (clause (ii)), a court or hearing officer may require such reimbursement "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child" and the child has "previously received special education and related services under the authority of a public agency."[129] Section 1412(a)(10)(C)(iii) (clause (iii)) addresses the circumstances in which a reimbursement under clause (ii) "may be reduced or denied," such as when parents fail to provide the district notice of the private school placement.[130]

E. CIRCUIT SPLIT REGARDING THE IDEA REIMBURSEMENT PROVISIONS

Prior to the Supreme Court's decision in *Forest Grove*, federal appellate courts that considered the issue of whether the 1997 Amendments categorically barred reimbursement when a child had not previously received

125. *Id.*

126. *Id.*

127. *Id.* at 2491-92.

128. 20 U.S.C. § 1412(a)(10)(C)(i) (2006). Clause (i) reads:

> 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.

Id.

129. *Id.* § 1412(a)(10)(C)(ii). Clause (ii), entitled "Reimbursement for private school placement," reads:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Id.

130. *Id.* § 1412(a)(10)(C)(iii). A parent's failure to give adequate notice may be excused in certain circumstances. *See id.* § 1412(a)(10)(C)(iv).

special education or related services reached inconsistent results.[131] The First Circuit held reimbursement was barred in such circumstances,[132] while the Second, Ninth, and Eleventh Circuits reached the opposite result.[133] This section examines the string of IDEA reimbursement cases leading to the Supreme Court's grant of certiorari to resolve the issue in *Forest Grove*.

1. Greenland School District v. Amy N.

In *Greenland School District v. Amy N.*,[134] the parents of a public school student unilaterally placed the student in private school after her fourth-grade year, never having discussed with the public school the possibility of the public school providing special education.[135] The parents sought tuition reimbursement for the girl's entire fifth-grade year and part of her sixth-grade year.[136] The district court reversed the hearing officer's award of reimbursement, holding the parents were not entitled to reimbursement.[137] Quoting *Burlington* for the proposition that "parents who unilaterally change their child's placement . . . without the consent of state or local school officials do so at their own financial risk," the First Circuit Court of Appeals affirmed.[138]

2. M.M. ex rel. C.M. v. School Board of Miami-Dade County, Florida

In *M.M. ex rel. C.M. v. School Board of Miami-Dade County, Florida*,[139] the parents of a child with profound hearing loss enrolled the child in a private preschool.[140] The child was never enrolled in public school and, therefore, never received special education services through a public agency.[141] The district court dismissed the parents' complaint and the parents appealed.[142] The Eleventh Circuit Court of Appeals held that

131. *Forest Grove*, 129 S. Ct. at 2490.

132. Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 159-60 (1st Cir. 2004). The Third Circuit Court of Appeals hinted in dicta and in an unpublished opinion that it might have followed the First Circuit's logic. *See* Rosenblum, *supra* note 98, at 2767-68.

133. Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078, 1087-88 (9th Cir. 2008); Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 376 (2d Cir. 2006); M.M. *ex rel.* C.M. v. Sch. Bd. of Miami-Dade Cnty., Fla., 437 F.3d 1085, 1099 (11th Cir. 2006) (per curiam).

134. 358 F.3d 150 (1st Cir. 2004).

135. *Greenland*, 358 F.3d at 152.

136. *Id.*

137. *Id.*

138. *Id.* at 162 (quoting Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373-74 (1985)).

139. 437 F.3d 1085 (11th Cir. 2006).

140. *M.M.*, 437 F.3d at 1098.

141. *Id.*

142. *Id.* at 1102.

"parents are not required in all cases to first enroll their child in public school pursuant to an inadequate IEP in order to preserve their right to reimbursement."[143] Although the Eleventh Circuit nevertheless agreed with the district court that the parents' complaint should have been dismissed, albeit for different reasons, the court's ruling made clear that parents could be reimbursed, at least in theory, for special education services received as the result of a unilateral placement.

3. Frank G. v. Board of Education of Hyde Park

Six months after the Eleventh Circuit decided *M.M.*, the Second Circuit Court of Appeals issued its decision in *Frank G. v. Board of Education of Hyde Park*.[144] The Second Circuit held the IDEA reimbursement provisions did not require the receipt of special education services by a state agency as a prerequisite to tuition reimbursement.[145] In so holding, the Second Circuit declined to read § 1412(a)(10)(C) as requiring a child to have previously received special education or related services prior to becoming eligible for tuition reimbursement.[146] Although at first blush the *Frank G.* decision seemed to be at odds with the First Circuit's conclusion in *Greenland*, the Second Circuit noted it too would have denied the reimbursement sought by the parents in *Greenland*, but not on the grounds that the child never received special education services.[147] Rather, the Second Circuit stressed parents must provide notice to the public school of their child's need for special education services, which the parents in *Greenland* failed to do.[148] Thus, the Second Circuit concluded it would have denied reimbursement in *Greenland* because the parents' failure to provide notice of the child's need would have precluded the parents from being equitably entitled to tuition reimbursement.[149]

143. *Id.* at 1099 (citing *Burlington*, 471 U.S. at 369-70).

144. 459 F.3d 356 (2006). United States Supreme Court Justice Sonia Sotomayor, then a Second Circuit Judge, sat on the panel that decided *Frank G.*, 459 F.3d at 359. In 2009, Justice Sotomayor left the Second Circuit Court of Appeals to fill the seat vacated by retiring Justice David Souter. Interestingly, Justice Souter authored the dissenting opinion in *Forest Grove*. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2497 (2009) (Souter, J., dissenting).

145. *Frank G.*, 459 F.3d at 376.

146. *Id.* at 359.

147. *Id.* at 376.

148. *Id.*

149. *Id.*

4. Board of Education of City School District of New York v. Tom F.

On August 9, 2006, in light of its decision in *Frank G.*, the Second Circuit vacated a district court's reversal of an award of tuition reimbursement in which the district court "reach[ed] the same conclusion as to the meaning of § 1412(a)(10)(C) that the First Circuit reached in [*Greenland School Dist. v.*] *Amy N.*"[150] The Supreme Court granted certiorari in *Board of Education of City School District of New York v. Tom F.*[151] to resolve the lingering IDEA reimbursement question.[152] In *Tom F.*, after Justice Kennedy recused himself, the Court split 4-4, affirming without opinion the judgment of the Second Circuit Court of Appeals and leaving the circuits split on the issue.[153]

5. Forest Grove School District v. T.A.

In *Forest Grove*, the Ninth Circuit Court of Appeals reversed a district court ruling that found T.A.'s parents ineligible for tuition reimbursement under § 1412(a)(10)(C) because T.A. never received special education or related services in public school.[154] The Supreme Court granted certiorari in *Forest Grove* in order to once again address the question of whether § 1412(a)(10)(C) authorized the award of tuition reimbursement only in the case where a child had previously received special education or related services.[155]

III. ANALYSIS

In *Forest Grove School District v. T.A.*, Justice Stevens wrote the majority opinion, joined by Chief Justice Roberts, Justices Kennedy, Ginsburg, Breyer, and Alito.[156] The majority held the 1997 Amendments to IDEA did not create a categorical bar to reimbursement when a child had not previously received special education or related services under the authority of a public agency.[157] Justice Souter wrote a dissenting opinion, in which Justices Scalia and Thomas joined.[158]

150. Bd. of Ed. of City Sch. Dist. of N.Y.C. v. Tom F., No. 01 Civ. 6845(GBD), 2005 WL 22866, at *3 (S.D.N.Y. Jan. 4, 2005).
151. 552 U.S. 1 (2007).
152. *Tom F.*, 552 U.S. at 2.
153. *Id.*
154. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2489 (2009).
155. *Id.* at 2490.
156. *Id.* at 2487.
157. *Id.* at 2488.
158. *Id.* at 2487.

A. THE MAJORITY OPINION

The majority first identified the analysis in *Burlington* as the appropriate analytical framework for the dispute in *Forest Grove*.[159] Next, the majority concluded the 1997 Amendments to IDEA did not require a reading of the Act's reimbursement provision that is inconsistent with the Court's decision in *Burlington*.[160] Finally, the Court concluded a rule denying reimbursement when a child had not previously received special education through the public school would not comport with the IDEA's remedial purpose, and would produce an irrational rule.[161] The Court remanded the case to the district court with instructions for the district court to consider the equities of the case on remand.[162]

1. Burlington *is the Appropriate Legal Background*

The majority began by noting the unanimous opinion in *Burlington* provided the appropriate legal background for the Court's analysis in *Forest Grove*.[163] The majority then distinguished the dispute in *Forest Grove* from the disputes in *Burlington* and *Carter* because *Forest Grove* did not concern the adequacy of a proposed IEP, but rather the School District's failure to provide an IEP at all.[164] Also, unlike the children in *Burlington* and *Carter*, T.A. had not previously received special education or related services through the public schools.[165] The Court dismissed the factual differences as irrelevant because the Court's decisions in *Burlington* and *Carter* "depended on the language and purpose of the Act and not the particular facts involved."[166] The majority then noted a school district's failure to propose an IEP is as serious a violation under IDEA as failing to propose an adequate IEP.[167] Thus, the Court noted a reimbursement could be authorized in such an instance unless the 1997 Amendments required a different result.[168] The Court then considered whether the 1997 Amendments established a categorical bar to tuition reimbursement when a student had not received special education or related services in public school.[169]

159. *See* discussion *infra* Part III.A.1 (discussing the majority's analysis of whether *Burlington* applies to the question presented in *Forest Grove*).
160. *Forest Grove*, 129 S. Ct. at 2496.
161. *Id.*
162. *Id.*
163. *Id.* at 2490.
164. *Id.* at 2491.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

2. *The 1997 Amendments Do Not Support the School District's Reading of the IDEA's Reimbursement Provisions*

The majority reiterated the *Burlington* Court's statement that Congress's purpose in enacting the IDEA was "to ensure that all children with disabilities are provided '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.'"[170] The 1997 Amendments furthered that goal by preserving the Act's purpose of providing a FAPE to all children with disabilities.[171] Congress did not alter the text of § 1415(i)(2)(C)(iii), which the Court construed in *Burlington* to allow courts to provide reimbursement for the cost of private special education when a school district failed to provide a FAPE, when it amended IDEA in 1997.[172] The majority cited *Lorillard v. Pons*[173] for the proposition that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[174] The Court found no clear expression in the 1997 Amendments, or elsewhere, of Congress's intent to abrogate the Court's decisions in *Burlington* or *Carter* or to repeal some portion of § 1415(i)(2)(C)(iii).[175] Thus, the Court declared it would continue to construe that provision as providing reimbursement for private school placement as "appropriate" relief when a school district failed to provide a FAPE.[176]

The majority then addressed the School District's argument that the 1997 Amendments effectively repealed at least a portion of § 1415(i)(2)(C)(iii).[177] The School District relied primarily on clauses (i) and (ii) for the proposition that "Congress intended § 1412(a)(10)(C) to provide the exclusive source of authority for courts to order reimbursement when parents unilaterally enroll a child in private school."[178] The School District argued because § 1412(a)(10)(C) only discusses reimbursement for children who have previously received special education through the public school, reimbursement under IDEA is only appropriate in those

170. *Id.* (quoting Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 367 (1985)).
171. *Id.* at 2491-92.
172. *Id.* at 2492.
173. 434 U.S. 575 (1978).
174. *Forest Grove*, 129 S. Ct. at 2492 (quoting *Lorillard*, 434 U.S. at 580).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*

circumstances.[179] The majority rejected this argument.[180] Notably, the School District offered no evidence that Congress intended to supersede the Court's decisions in *Burlington* and *Carter*.[181] Also, the majority noted the 1997 Amendments did not explicitly preclude reimbursement in this circumstance.[182] Under clause (i), reimbursement is explicitly barred only when a school district provides a FAPE and an adequate IEP.[183] Because clause (i) makes clear reimbursement is not authorized when a school district provides a FAPE, the majority stated that the clause may be read to indicate reimbursement is appropriate when a school district failed that task.[184]

The majority then explained clause (ii) also failed to support the School District's position.[185] Clause (ii) states that courts "may require" reimbursement in certain circumstances, but does not bar reimbursement in other scenarios.[186] The majority read clause (ii) together with clauses (iii) and (iv) as "elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may affect a reimbursement award."[187] The factors are relevant in the common scenario in which a school district provides some special education but the parents view the services as inadequate.[188] Thus, the majority interpreted the clauses of § 1412(a)(10)(C) as "elucidative rather than exhaustive."[189]

Finally, the majority stated its interpretation of § 1412(a)(10)(C) prevented the abrogation *sub silentio* by Congress of the Supreme Court's decisions in *Burlington* and *Carter*.[190] The majority cited *Branch v. Smith*[191] for its conclusion that "[i]t would take more than Congress' failure to comment on the category of cases in which a child has not previously received special-education services for [the Court] to conclude that the Amendments substantially superseded [the Court's] decisions and in large

179. *Id.* The dissent adopted this interpretation. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 2493.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* (citing United States v. Atlantic Research Corp., 551 U.S. 128, 137 (2007)).
190. *Id.* at 2493-94.
191. 538 U.S. 254 (2003).

part repealed § 1415(i)(2)(C)(iii)."[192] Thus, the majority explained it would continue to read § 1412(a)(10)(C) in a manner consistent with its decisions in *Burlington* and *Carter*.[193]

The majority rejected the School District's reading of § 1412(a)(10)(C) because it found the argument at odds with the remedial purpose behind IDEA, and particularly IDEA's reimbursement provisions.[194] Pointing to the language of the Act, the majority reiterated the purpose of IDEA is to "ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs."[195] A rule denying reimbursement when a child had not previously received special-education services would leave the rights of children with disabilities "less than complete."[196] The majority concluded the School District's reading also conflicted with the Act's "child-find" requirement because it would reward states for refusing to identify children as in need of special-education services.[197]

3. *Avoiding an Irrational Rule*

The majority refused to adopt the School District's reading of § 1412(a)(10)(C) because it would produce a rule that "immuniz[es] a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need."[198] The resulting rule would "border[] on the irrational" because the Act would then provide a remedy when a school district provides inadequate special education services, while failing to provide a remedy in the "more egregious situation in which the school district unreasonably denies a child access to such services altogether."[199] The majority noted the procedural safeguards afforded to parents under the IDEA would not alleviate that "strange" result because the review of a school's failure to provide a FAPE is often delayed and fails to proceed with the "speed necessary to avoid detriment to the child's education."[200]

192. *Forest Grove*, 129 S. Ct. at 2494; *see Branch*, 538 U.S. at 273 (noting absent clearly expressed congressional intent, repeals by implication are disfavored).

193. *Forest Grove*, 129 S. Ct. at 2494.

194. *Id.* at 2494-95.

195. *Id.* at 2494 (quoting 20 U.S.C. § 1400(d)(1)(A) (2006)).

196. *Id.* at 2495 (citing Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985)).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* (citing *Burlington*, 471 U.S. at 370).

4. *The Spending Clause*

The School District argued because IDEA is a Spending Clause statute,[201] "and the Spending Clause requires Congress to give clear notice of any obligation it imposes on the States as a condition of receiving federal funds,"[202] the absence of statutory text regarding reimbursement for unilateral placements prohibits reimbursement in such a circumstance.[203] In support of its argument, the School District noted the Supreme Court's holding in *Arlington Central School District Board of Education v. Murphy*[204] that IDEA does not authorize courts to award expert services fees to parents because IDEA does not provide states notice of the possibility of such awards.[205] In rejecting the School District's Spending Clause argument, the Court distinguished *Forest Grove* from *Arlington*.[206] According to the Court, *Forest Grove* differed from *Arlington* because, as a condition of accepting IDEA funding, "States expressly agree to provide a FAPE to all children with disabilities."[207] By failing to provide a FAPE and later reimbursing parents for the costs of private education, a school district simply "belatedly pay[s] expenses that it should have paid all along."[208] The Court also stated *Burlington* provided notice to states that courts may authorize reimbursement for the costs of private special education in "appropriate circumstances."[209] Thus, despite the complete absence of language in the Act regarding reimbursement for unilateral placements, the Court imputed notice to the states.

5. *Financial Burden on Schools*

The School District argued reading IDEA to authorize reimbursement for unilateral private school placements would impose upon public school districts a substantial financial burden.[210] The majority disagreed, citing *Carter* for the well established safeguard that the Act authorizes reimbursement "only [when] a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the

201. Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2006 (2007).
202. Brief of Petitioner, *supra* note 8, at 14.
203. *Id.* at 19.
204. 548 U.S. 291 (2006).
205. *Arlington*, 548 U.S. at 304; *see* Brief of Petitioner, *supra* note 8, at 17-18.
206. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2495 (2009).
207. *Id.*
208. *Id.* (quoting Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370-71 (1985)).
209. *Id.*
210. *Id.* at 2496.

Act."[211] Even when a court orders reimbursement, the majority noted the award may be reduced "if the equities so warrant."[212] The equities to be considered by the court contemplating reimbursement are presumed to favor the school district.[213] Also, parents who unilaterally enroll their child in private school do so at their own risk.[214] Because of the requirements for reimbursement, the majority noted "the incidence of private-school placement at public expense is quite small."[215] Thus, the majority's holding did not place upon public school districts a substantial financial burden.[216]

6. *Summary of Majority Opinion*

The majority concluded the 1997 Amendments did not modify the text of § 1415(i)(2)(C)(iii) nor alter the provision's meaning.[217] Thus, the majority held IDEA "authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school."[218] The majority therefore affirmed the judgment of the Ninth Circuit Court of Appeals.[219] The Court remanded the case to the district court for that court to consider the equities and decide whether T.A.'s parents were entitled to tuition reimbursement.[220]

211. *Id.* (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993)) (internal citations omitted).

212. *Id.* The majority provided an example of one such circumstance: when parents fail to provide the school district with adequate notice of their intent to enroll the child in private school. *Id.*

213. *Id.* (citing Schaffer v. Weast, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring)).

214. *Id.* (citing *Carter*, 510 U.S. at 15).

215. *Id.* (citing Brief for Nat'l Disability Rights Network et al. as Amici Curiae Supporting Respondents at 13-14, *Forest Grove*, 129 S. Ct. 2484 (No. 08-305)).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

B. JUSTICE SOUTER'S DISSENTING OPINION

Justice Souter's dissent first rejected the majority's reading of § 1412(a)(10)(C)(ii) as "overstretching."[221] Next, the dissent concluded, despite the majority's assertion to the contrary, *Burlington* and *Carter* would be decided the same under its reading of the Act's reimbursement provisions because the dissent's reading was consistent with those decisions.[222] Finally, the dissent rejected the majority's claim that reading clause (ii) as restrictive effectively gave school districts a veto on reimbursement awards.[223]

1. *Limitless Reimbursement*

The dissent categorized the majority's holding as placing no limit on reimbursement for private tuition, despite what the dissent labeled a "clear limitation imposed by § 1412(a)(10)(C)(ii)."[224] Noting the *Burlington* Court emphasized the lack of an IDEA provision addressing reimbursement when it labeled reimbursement as appropriate relief under the Act, the dissent inferred Congress acted explicitly on the issue of reimbursement via the 1997 Amendments, which added to the IDEA several provisions "explicitly addressing the issue of '[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency.'"[225] Justice Souter concluded the language in the 1997 Amendments "generally prohibit[s] reimbursement if the school district made a [FAPE] available, and if they are to have any effect, there is no exception except by agreement or for a student who previously received special education services that were inadequate."[226] Conceding IDEA's silence on the case of a child with no previous special education services and no FAPE, the dissent rejected the majority's conclusion that clause (ii) is merely "one of a variety of circumstances in which such reimbursement is permitted."[227] Justice Souter cited *Corley v. United States*,[228] in which the Court stated

221. *See* discussion *infra* Part III.B.1 (explaining the dissent's concern that the majority's rule places no limit on private tuition reimbursement).

222. *See* discussion *infra* Part III.B.2 (concluding *Burlington* and *Carter* would be decided the same under the dissent's reading of IDEA's reimbursement provisions).

223. *See* discussion *infra* Part III.B.3 (discussing the dissent's argument that IDEA's procedural safeguards protect parents against uncooperative school districts).

224. *Forest Grove*, 129 S. Ct. at 2497-98 (Souter, J., dissenting).

225. *Id.* at 2498 (quoting 20 U.S.C. § 1412(a)(10)(C)(ii) (2006)).

226. *Id.* at 2497 (internal citations omitted) (citing §§ 1412(a)(10)(B); 1412(a)(10)(C)(i)-(ii)).

227. *Id*. at 2499.

228. 129 S. Ct. 1558 (2009).

"[o]ne of the most basic interpretive cannons is that a statute should be construed so that effect is given to all its provisions," for the proposition that the majority's conclusion was incorrect because it rendered clauses (ii) and (iii) unnecessary.[229] The dissent noted the majority's interpretation meant that, in both clauses (i) and (ii), "Congress meant to add nothing to the statutory scheme."[230] To avoid such a result, the dissent would have read clause (ii) to allow reimbursement only in the instance when a child has previously received special education or related services in public school.[231]

2. *Reading § 1412(a)(10)(C)(ii) to Preclude Reimbursement in this Circumstance Would Not Alter the Outcome of* Burlington *or* Carter

The dissent noted, in *Burlington* and *Carter*, both sets of parents were parents of a child with a disability who previously received special education or related services under the authority of a public agency.[232] In each of those cases, the only question was whether parents who cooperated with the school district in formulating an IEP, when all agreed the child was disabled, could be reimbursed for the subsequent placement of the child in private school.[233] Both cases held reimbursement was appropriate "if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."[234] Because the dissent would have read clause (ii) as prohibiting reimbursement when a child has not previously received special education services under the authority of a public agency, the dissent's interpretation of IDEA's reimbursement provisions was consistent with those decisions.[235]

3. *No Conflict with the Remedial Purpose Behind IDEA*

Justice Souter disputed the majority's conclusion that reading § 1412(a)(10)(C) to prohibit reimbursement in the case of a child who has not previously received special education services through the public school was at odds with the general remedial purpose of the Act.[236] The majority

229. *Forest Grove*, 129 S. Ct. at 2499 (Souter, J., dissenting) (quoting *Corley*, 129 S. Ct. at 1560).
230. *Id.* at 2500.
231. *Id.* (quoting 20 U.S.C. § 1412(a)(10)(C)(ii)).
232. *Id.* at 2502.
233. *Id.*
234. *Id.* at 2501 (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12 (1993)).
235. *Id.*
236. *Id.* at 2502.

concluded the dissent's reading would place control of reimbursement awards solely in the hands of school districts because, by refusing to identify a child as in need of special education services, school districts would be essentially immunized from having to pay for the child's private special education.[237] The dissent countered by citing IDEA's elaborate procedural safeguards, which protect a child's substantive rights under the Act, for the proposition that the "administrative and judicial review [process] is the answer to the Court's claim that reading [clause (ii)] as restrictive, not illustrative, immunizes a school district's intransigence, giving it an effective veto on reimbursement for private placement."[238]

IV. IMPACT

The Supreme Court's decision in *Forest Grove* has been characterized as "an illusory win for parents" of children with disabilities.[239] In reality, however, the Court's ruling at least represents a small triumph for such parents when the result is measured against the other possible outcome.[240] Importantly, *Forest Grove*, at the very least, prohibits § 1412(a)(10)(C) from playing a gate-keeping role in IDEA reimbursement cases. That is, after *Forest Grove*, courts can no longer dismiss claims for tuition reimbursement simply because the child whose education is at issue never received special education or related services in public school. Instead, courts must analyze the equities of individual cases to determine whether reimbursement is proper in each circumstance. It may be true that many parents are denied reimbursement after courts have weighed the equities of particular cases, but such a result will rightly be based on an analysis of several important factors, including parental cooperation with school officials, and not simply on whether a child was fortuitous enough to have previously received special education in public school.

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237. *Id.*

238. *Id.* at 2503.

239. *See* Natalie Pyong Kocher, *Lost in Forest Grove: Interpreting IDEA's Inherent Paradox*, 21 HASTINGS WOMEN'S L.J. 333, 348 (2010). One commentator stated:

> *Forest Grove* is viewed as a victory for parents of children with disabilities who may now seek reimbursement for private school tuition, even if their child never attended a public school. The decision, however, provides no actual assurance to parents in this atypical situation and *only removes the absolute bar to tuition reimbursement*, indicating that the actual implications of the decision may be less significant than they appear.

Id. (emphasis added).

240. Had the Supreme Court ruled the 1997 Amendments to IDEA indeed imposed a categorical bar to reimbursement in a case such as T.A.'s, parents of children like him would be left without a remedy. Avoiding such a result is at least a small victory for parents of disabled children.

Having established the Supreme Court's decision in *Forest Grove* is of some value to parents of children with disabilities, this part examines the extent of the case's impact. Section A examines the impact on *Forest Grove* upon the special education litigation landscape. Next, section B describes how *Forest Grove* reinforces the role of equitable principles in the outcomes of IDEA reimbursement cases.

A. AN END TO COSTLY LITIGATION

The case represents the end to a split in the circuit courts of appeals that led to costly, drawn-out litigation. The Forest Grove School District reportedly spent at least $244,000 over a period of six years litigating *Forest Grove*.[241] Now that the Supreme Court has clarified the meaning of § 1412(a)(10)(C), school districts and parents will no longer find themselves in court arguing for or against a categorical bar to tuition reimbursement in cases like *Forest Grove*, *Greenland*, *M.M.*, *Frank G.*, and *Tom F.* Of course, litigation remains a possibility when a district allegedly fails to offer a FAPE and the parents determine private school placement is appropriate under IDEA, but Congress envisioned such litigation as necessary when it drafted the Act.[242] The *Forest Grove* decision does nothing to discourage that type of litigation, nor should it, but it does allow both parties to enter into litigation knowing, at the very least, whether reimbursement in the case of a child who never received special education in a public school is statutorily permissible.

B. THE EMPHASIS ON THE EQUITIES

In *Forest Grove*, the equities seemed to mitigate both for and against an award of reimbursement. On the one hand, the School District's initial evaluation of T.A., which occurred two years before T.A.'s placement at Mount Bachelor, proved to be substantially inaccurate.[243] If the School District would have identified T.A. as learning disabled and eligible for special education in mid-2001, rather than forcing T.A.'s parents to hire an independent specialist after two additional years of academic struggle, perhaps the District would have had a better argument against reimbursement. On the other hand, although T.A.'s parents were mostly cooperative

241. Nancy Townsley, *U.S. Supreme Court Interprets Law to Say that Parents of Special Needs Students Can Seek Tuition Reimbursement for Private Schooling*, FOREST GROVE NEWS-TIMES, June 23, 2009, http://www.forestgrovenewstimes.com/news/story.php?story_id=124582710640480800.

242. *See* 20 U.S.C. § 1415(i)(2)(A) (providing to the parties involved in such a circumstance the right to bring a civil action in state or federal court, regardless of the amount in controversy).

243. *See supra* note 13 and accompanying text.

with School District officials, they became less cooperative as the entire process unfolded. For example, as mentioned above, T.A.'s parents provided the School District notice of T.A.'s placement at Mount Bachelor only after enrolling him at the private school.[244]

On remand from the United States Supreme Court, the United States District Court for the District of Oregon weighed the equitable arguments both for and against reimbursement.[245] In its analysis, the court included a discussion of each of the above factors and found the lack of notice provided by T.A.'s parents favored the School District, but the District's mishandling of the 2001 evaluation favored T.A.[246] In holding reimbursement was not warranted in T.A.'s case, the district court identified the "decisive factor" as the fact that T.A.'s parents apparently enrolled him in Mount Bachelor not because of his learning disabilities, but because of his drug abuse and behavioral problems.[247] The court found compelling the application to Mount Bachelor academy, which T.A.'s father completed on T.A.'s behalf.[248] On it, T.A.'s father listed the "enrollment was precipitated by 'inappropriate behavior, depression, opposition, drug use, runaway.'"[249] Thus, the district court concluded "[t]he equities [did] not favor requiring the District to reimburse T.A.'s parents for a decision to send T.A. to a school because of his drug abuse and behavioral problems that [were] unrelated to his difficulties focusing in school."[250]

The district court's decision not to award reimbursement on remand brings to light the true impact of *Forest Grove*: although no categorical bar to reimbursement exists in the case of a student who has not previously received special education in public school, courts will continue to decide individual cases on the equities. In essence, although *Forest Grove* clarified a hotly contested point of law, the practical implications of the case are somewhat limited because the case only clarified *who* is eligible for reimbursement.[251] The framework courts must follow in deciding IDEA reimbursement cases remains unchanged.

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244. *See supra* note 26 and accompanying text.

245. Forest Grove Sch. Dist. v. T.A., 675 F. Supp. 2d 1063, 1066-68 (D. Or. 2009).

246. *Id.* at 1066-67.

247. *Id.* at 1067.

248. *Id.*

249. *Id.* (quoting A.L.J.'s Final Order Findings of Fact ¶ 89).

250. *Id.* at 1068.

251. *See* Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2488 (2009) (clarifying that the 1997 Amendments to IDEA do not bar tuition reimbursement in the case of a child who has not previously received special education under the authority of a public agency).

In his dissent in *Forest Grove*, Justice Souter wrote that the majority's decision placed no limit on reimbursement in IDEA cases.[252] Federal circuit court opinions handed down since *Forest Grove* both prove and disprove his point. In *Ashland School District v. Parents of Student R.J.*,[253] the Ninth Circuit denied reimbursement to the parents of a student eligible for services under IDEA because his private school placement was not "appropriate" under the Act.[254] In *Richardson Independent School District v. Michael Z.*,[255] however, the Fifth Circuit Court of Appeals held a district court did not abuse its discretion in awarding tuition reimbursement despite the parents' failure to notify the school district of the child's withdrawal from public school.[256] Thus, it is clear courts continue to decide IDEA reimbursement cases on the equities of individual circumstances.[257] The entirety of the litigation that was *Forest Grove* serves to reinforce the vital role of the equities in IDEA "appropriate relief," a role that has been clearly articulated by the Supreme Court since *Burlington*.[258]

V. CONCLUSION

In *Forest Grove School District v. T.A.*, the United States Supreme Court held § 1412(a)(10)(C) did not categorically bar reimbursement for private school tuition when a child had not previously received special education or related services through a public school.[259] In clarifying the meaning of § 1412(a)(10)(C), the Supreme Court resolved a split among the circuit courts and reinforced the validity of the well-established, equity-based framework used by courts in IDEA reimbursement cases.[260] Although *Forest Grove* notably makes reimbursement an available remedy to the parents of children who have not previously received special

252. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2497-98 (2009) (Souter, J., dissenting).

253. 588 F.3d 1004 (9th Cir. 2009).

254. *Ashland*, 588 F.3d at 1010-11. Essentially, the Ninth Circuit reached the same conclusion in *Ashland* that the United States District Court for the District of Oregon reached on remand in *Forest Grove*. Forest Grove Sch. Dist. v. T.A., 675 F. Supp. 2d 1063, 1068 (D. Or. 2009).

255. 580 F.3d 286 (5th Cir. 2009).

256. *Richardson*, 580 F.3d at 301.

257. *See*, *e.g.*, *Forest Grove*, 675 F. Supp. 2d at 1068 (holding that, although tuition reimbursement was available to parents of a child who had not previously received special education through a public agency, reimbursement was not warranted because "[t]he equities [did] not favor" such a result).

258. C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 71 n.9 (3d Cir. 2010) ("[T]he principles stated [in *Forest Grove*] with regard to equitable relief under the IDEA are not new.") (citing Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 374 (1985)).

259. *Forest Grove*, 129 S. Ct. at 2496.

260. *Id.*

education in public school, the case's impact on IDEA reimbursement cases is, and will most likely remain, somewhat limited, due in most part to the Act's and the Supreme Court's requirement that courts decide such cases under equitable principles.[261] The clarification of the meaning of IDEA's reimbursement provisions is significant, however, because it puts to rest a costly period in the history of special education law.[262]

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261. 20 U.S.C. § 1415(i)(2)(C) (2006); *Forest Grove*, 129 S. Ct. at 2496; *Burlington*, 471 U.S. at 374.

262. *See supra* Part IV.A.

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