No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency.

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The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 523 F.3d 1078, and its order denying rehearing and rehearing en banc (Pet. App. 160a) is unreported. The opinions of the district court (Pet. App. 25a-55a) and the State of Oregon Office of Administrative Hearings (Pet. App. 56a-159a) are unreported.

JURISDICTION

The court of appeals entered judgment on April 28, 2008, and denied rehearing and rehearing en banc on June 5, 2008. The petition for a writ of certiorari was timely filed on September 3, 2008, and granted on January 16, 2009. 129 S. Ct. 987 (2009). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*., are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

The parents of respondent T.A., then a high school junior suffering from drug abuse and depression, withdrew him from public school and placed him in an expensive private school. T.A.'s parents did so without asking petitioner Forest Grove School District ("District") to evaluate him for a disability under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*., without informing the District that they believed T.A. was receiving a deficient public education, and without T.A. ever having received special education services from the District. Shortly thereafter, T.A.'s parents hired a

lawyer and commenced these proceedings, during which a hearing officer found T.A. disabled and ordered the District to reimburse his parents for tuition paid to the private school.

The question here is whether IDEA, in light of amendments enacted in 1997, permits a tuition reimbursement award to parents who unilaterally place their child in private school, when the child had not previously received special education services from the public school district. The district court held that IDEA, as amended, precluded such an award. The Ninth Circuit disagreed, but did so without acknowledging that IDEA is a Spending Clause statute, and thus without finding that IDEA unambiguously imposes a tuition reimbursement obligation under these circumstances.

A. Statutory Background

1. Congress first enacted IDEA, Pub. L. No. 102-119, 105 Stat. 587 (1991), as part of the Handicapped Act, Pub. L. No. 91-230, tit. VI, 84 Stat. 175 (1970), amending it in the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 ("1975 Amendments"), the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 ("1986 Amendments"), the Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 ("1997 Amendments"), and the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 ("2004 Amendments"). The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and

related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A) (2000 & Supp. II 2003).[1]

Consistent with its purpose, IDEA provides funds to assist state and local agencies in educating children with disabilities, and conditions such assistance on compliance with numerous obligations expressly set forth in the statutory text. 20 U.S.C. § 1412(a)(1)-(22) (setting forth obligations); *id.* § 1416 (authorizing the Secretary of Education to withhold funds from noncompliant States); see also 2004 Amendments § 612(a)(1)-(25), 118 Stat. at 2676-2691, *codified at* 20 U.S.C. § 1412(a)(1)-(25) (2006) (imposing additional obligations). Among other things, States must ensure that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "free appropriate public education" ("FAPE") means "special education and related services that" are "provided at public expense, under public supervision and direction." *Id.* § 1401(8).

To facilitate compliance with the FAPE obligation, IDEA requires school districts to create and implement an "individualized education program" ("IEP") for disabled children eligible for services under the Act. *Id.* § 1412(a)(4). An IEP is a written statement explaining a disabled child's needs and specifying the nature of the special services the school will provide. *Id.* § 1414(d)(1). Before an IEP may be developed, a state or local education agency must evaluate the child and determine that he or she

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[1] Unless otherwise noted, all statutory citations are to the 2000 edition and 2003 supplement of the United States Code, which reflect the 1997 Amendments and set forth the version of IDEA at issue when this dispute arose.

is "disabled" within the meaning of IDEA. *Id.* § 1414(a)-(c). Prior to conducting any such evaluation, the agency must provide notice to the child's parents and obtain their informed consent. *Id.* § 1414(b)(1), (a)(1)(C)(i).

The development of and revision to an IEP is a collaborative process among the school district, teachers, and the child's parents or guardians. 20 U.S.C. §§ 1414(d)(1), (3), 1415(b)(1), (3). Recognizing that parents may be unsatisfied with a district's failure to evaluate their child, with the results of an evaluation, or with the district's proposed FAPE, IDEA provides a host of procedural safeguards that allow parents to seek redress at almost every stage of the process. *E.g.*, *id.* § 1415(a), (b), (f)-(i); see generally *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000-2002 (2007); *Schaffer* v. *Weast*, 546 U.S. 49, 53-54 (2005).

Parents may request that their child be evaluated for a disability. 20 U.S.C. § 1414(a)(2)(A); see also *id.* § 1415(d)(1)(A)(i) (Supp. IV 2004). Parents must be given "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." 20 U.S.C. § 1415(b)(6). Parents presenting such a complaint may elect mediation, *id.* § 1415(e), and, if mediation fails or is not pursued, may request an impartial due process hearing before a hearing officer provided, though not employed, by the state or local education agency, *id.* § 1415(f). And parents dissatisfied with the hearing officer's decision may seek review in federal court. *Id.* § 1415(i)(2). In any such lawsuit, the court "shall grant such relief as the court determines is appropriate," and may award attorneys' fees

to the parents, if they prevail. *Id.* § 1415(i)(2)(B)(iii), (3).

2. Prior to the 1997 Amendments, IDEA said little about the placement of disabled children in private school. One provision made clear that a State could refer a disabled child to a private school and, under those circumstances, would pay the tuition. See 1975 Amendments § 613(4)(B), 89 Stat. at 783 ("handicapped children in private schools and facilities will be provided special education and related services * * * at no cost to their parents * * * if such children are placed in or referred to such schools or facilities by the State"), *currently codified at* 20 U.S.C. § 1412(a)(10)(B). Before 1997, however, IDEA did not speak to responsibility for tuition where parents placed a child in private school without the public school's consent.

This Court addressed that issue in *School Committee of the Town of Burlington* v. *Department of Education*, 471 U.S. 359 (1985). *Burlington* concerned a disabled child who, after receiving special education services from a public school, was removed by his parents and placed in private school. The question presented was whether, when parents move a child from a public special education program to private school without the district's consent, and when the court ultimately finds the district's IEP to have been inadequate, the court may order the district to reimburse the parents for private school tuition. *Id.* at 367. This Court held that such reimbursement could be ordered under IDEA's general grant of remedial authority, which provides: "In any action brought under this paragraph the court * * * shall grant such relief as the court determines is appropriate." 1975 Amendments § 615(e)(2), 89 Stat. at 789, *recodified at* 20 U.S.C.

§ 1415(i)(2)(B)(iii). According to the Court, "[a]bsent other reference" in IDEA, "the only possible interpretation" of the general remedial provision was that tuition reimbursement was an "'appropriate'" remedy "in light of the purpose of the Act." *Burlington*, 471 U.S. at 369; see also *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 13-15 (1993) (applying *Burlington* and further defining circumstances under which parents are eligible under § 1415(i)(2)(B)(iii) for reimbursement in unilateral placement cases).

3. The 1997 Amendments comprehensively set forth the States' obligations to disabled children in private schools. See 1997 Amendments § 612(a)(10), 111 Stat. at 62 ("CHILDREN IN PRIVATE SCHOOLS"), *codified at* 20 U.S.C. § 1412(a)(10). The Amendments retained the then-existing provision requiring a state or local agency to pay private school tuition where a child is placed in or referred to a private school by the agency. 20 U.S.C. § 1412(a)(10)(B). In addition, Congress—in the face of conflicting circuit court decisions—clarified that another then-existing provision did not obligate States to spend their *own* funds on disabled children placed by their parents in private schools outside the typical IDEA process. *Id.* § 1412(a)(10)(A); see generally Br. of the United States as *Amicus Curiae*, *K.R.* v. *Anderson Cmty. Sch. Corp.* (U.S. Jun. 4, 1997) (No. 96-323) ("U.S. *K.R.* Brief"), *available at* 1997 WL 33561754.

Pertinent here, Congress expressly addressed for the first time whether and, if so, under what circumstances a public school district must provide tuition reimbursement to parents who unilaterally enroll their children in private school without the district's consent:

> (C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY.—
>
> (i) IN GENERAL.— * * * [T]his 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 [FAPE] 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 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 [FAPE] available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(i)-(ii). Accordingly, § 1412(a)(10)(C)(ii) permits tuition reimbursement where the public school district does not provide a FAPE to a disabled child, where the child's parents enroll the child in private school without the district's consent, and where the child previously received special education services from the district. Even when those conditions are satisfied, Congress further provided that reimbursement "may be reduced or denied" under certain circumstances. *Id.* § 1412(a)(10)(C)(iii)-(iv).

B. Procedural History

1. T.A. was enrolled in the District from kindergarten until March 2003, the spring of his junior year at Forest Grove High School ("FGHS"). Pet. App. 26a-34a. T.A. never received special education services from the District or any other public agency. *Ibid.*

T.A. experienced emotional, behavioral, and educational difficulties while attending FGHS. Pet. App. 26a-27a, 29a-31a, 61a. During his freshman year, his physician referred him to a therapist due to depression and susceptibility to mood swings. *Id.* at 64a. In December 2000, the FGHS guidance counselor recommended that T.A. be evaluated for eligibility for special education services. *Id.* at 26a-27a.

The District provided T.A.'s mother with notice that it sought to evaluate him for a disability, and she consented. Pet. App. 65a-66a. The District provided T.A.'s parents with notice of their procedural safeguards under IDEA. *Id.* at 28a-29a. Among other things, the notice stated that parents may be reimbursed for the "cost of private school placement made without the consent of or referral by the school district *only if* * * * the child received special education and related services under the authority of a public agency before enrolling in the private school." *Id.* at 28a (emphasis added).

The District formed a multidisciplinary team to conduct the evaluation. Pet. App. 3a, 27a, 66a. In Spring 2001, a special education teacher observed that T.A. was quiet, worked independently, and behaved appropriately in class. *Id.* at 27a. In June 2001, in response to the District's request for a medical statement addressing whether T.A. had health conditions that would affect his educational

performance, T.A.'s primary care medical provider reported only that T.A. needed glasses. *Id.* at 67a. Also in June, a FGHS psychologist evaluated T.A. for a learning disability and concluded that the symptoms listed in the referral did not merit an evaluation for ADHD. *Id.* at 27a, 70a; see also *id.* at 71a-72a (results of cognitive testing).

On June 13, 2001, T.A.'s mother met with a school psychologist, a learning disability specialist, and a learning specialist and special needs coordinator to review the results of the evaluations. Pet. App. 27a, 67a, 72a. Everyone present, including T.A.'s mother, agreed that T.A. did not have a disability and was not eligible for special education. *Id.* at 27a. T.A.'s parents never requested another special education evaluation while T.A. was enrolled in the District, and FGHS personnel did not refer T.A. for such an evaluation. *Id.* at 28a.

2. T.A. progressed from grade-to-grade, but continued to have behavioral problems. Pet. App. 29a. During the fall of his sophomore year, T.A. was suspended for bringing a knife to school, *ibid.*, and his six-week progress report was poor, *id.* at 78a. Soon thereafter, T.A.'s older sister began tutoring him, and by twelve weeks into the term his "grades had greatly improved." *Id.* at 29a. However, T.A. used marijuana in the winter of 2002, *id.* at 30a, and during the same period refused to cooperate with his sister under the terms of their tutoring arrangement, *id.* at 78a. His grades then fell. *Id.* at 30a, 78a-79a.

At the start of his junior year, T.A. admitted marijuana use to his parents and told them "that he really wanted to change things." Pet. App. 30a, 81a. His first progress report that year "was his best in high school with four As, two Bs, and one C/D." *Id.* at 30a. T.A. then grew reclusive, *id.* at 81a, and by

November 2002 was falling behind in school and having mood swings and angry outbursts, *id.* at 30a. T.A. also began using marijuana with increasing frequency, to the point that he was "so drugged" at times that he "could not get out of bed or speak." *Ibid.*; see *id.* at 86a-87a.

In January 2003, T.A.'s parents took him to see Dr. Michael J. Fulop, Psy.D., for an initial diagnostic interview concerning his "odd pattern of behavior." J.A. 31 (assessment conducted into T.A.'s "depressive ideation, irritability, impulsiveness, and over-dependence on his family"); see also Pet. App. 31a. Additionally, T.A.'s father arranged with FGHS for T.A. to apply to finish high school through the "Partnership Program" at Portland Community College ("PCC"). Pet. App. 31a.

In the meantime, T.A. continued to use marijuana, his inappropriate Internet use caused his parents to remove the computer from the home, and he also made over $1000 worth of phone calls to adult chat lines. Pet. App. 30a, 87a. T.A. ran away from home on February 11, 2003. *Ibid.* Police picked up T.A. three days later and returned him home. *Id.* at 31a, 87a. T.A.'s parents then took him to meet with his therapist, Dr. Susan Patchin, Psy.D., whom he had seen since April 2000 for school and anger issues. *Ibid.* T.A. refused to stop using marijuana, control his outbursts, or obey his parents. *Ibid.*

On February 21 and 24, 2003, T.A. underwent testing and evaluation by Dr. Fulop. Pet. App. 31a. On February 27, T.A.'s father informed FGHS that T.A. was undergoing medical testing, was going to enter a three-week wilderness training program, and then would attend PCC. *Ibid.* The next day, T.A.'s father told FGHS that T.A. was enrolled at PCC, had completed the necessary placement tests, and had

met with an advisor. *Ibid.* On March 10, 2003, T.A.'s father informed the assistant principal that T.A. was "officially disenrolled" from FGHS and was registered at PCC. *Id.* at 32a. Neither T.A. nor his parents expressed any dissatisfaction with his placement at PCC, and the assistant principal understood that T.A. was attending PCC as of the beginning of the spring quarter. *Ibid.*

Meanwhile, on March 2, 2003, T.A. commenced a program at Catherine Freer Wilderness Therapy Expeditions ("Freer"). Pet. App. 31a-32a. Freer admitted him because of his "substance abuse and oppositional behavior." *Id.* at 31a; see also *id.* at 33a; J.A. 61. On March 12, Freer recommended to T.A.'s parents that T.A. be placed in a structured out-of-home facility that could address his drug use and depression. Pet. App. 32a.

On March 14, 2003, Dr. Fulop discussed with T.A.'s parents the results of his evaluation. Pet. App. 32a. He diagnosed T.A. with ADHD (combined subtype) and dysthmic disorder (a form of depression characterized by long-term symptoms, such as sadness). *Ibid.* He found that T.A. had several learning problems and academic limitations, as well as "math disorder and cannabis abuse." *Id.* at 32a-33a. Dr. Fulop recommended that T.A. attend the residential treatment program at Mount Bachelor Academy ("Academy") because he needed an environment that could address his drug abuse, school difficulties, ADHD, and depression. *Id.* at 33a; see also *id.* at 99a (describing T.A. as "'most likely suffering from a primary alcohol and drug problem'").

On March 24, 2003, two days after his discharge from Freer, T.A. began attending the Academy. Pet. App. 33a-34a. T.A.'s father reported to the Academy that T.A.'s enrollment was precipitated by "'inappro-

priate behavior, depression, opposition, drug use, [and] runaway.'" *Id.* at 105a. The Academy states that it provides a "well-rounded academic and emotional growth curriculum that is designed for children who may have academic, behavioral, emotional, or motivational problems." *Id.* at 34a (internal quotation marks omitted); see also http://www.mtba.com (last visited Feb. 24, 2009). Monthly tuition was $5,200. Pet. App. 34a.

3. Four days after T.A. enrolled in the Academy, his parents hired a lawyer. Pet. App. 34a. On April 18, 2003, they requested a hearing seeking an order requiring the District to evaluate T.A. in all areas of suspected disability. *Ibid.* This was the first time District officials learned that T.A. was not attending PCC. *Id.* at 35a.

District officials evaluated T.A. and reviewed his records. Pet. App. 35a-36a. On July 7, 2003, a multidisciplinary team assembled to determine T.A.'s eligibility for services under IDEA. *Id.* at 36a-37a. Present at the meeting were T.A.'s parents, Dr. Patchin (T.A.'s therapist), and several officials from the District and FGHS. *Ibid.* Everyone in attendance except T.A.'s parents and Dr. Patchin concluded that T.A. did not qualify for special education. *Id.* at 37a. The team found that T.A.'s ADHD was not a qualifying disability because it did not adversely impact his educational performance. *Ibid.*

4. T.A.'s parents requested an impartial due process hearing, which was held in September and October 2003. Pet. App. 38a; see also *id.* at 56a-159a. The hearing officer concluded that the District had not shown that T.A. received a FAPE while at FGHS, reasoning that his ADHD adversely impacted his educational performance and thus made him eligible under IDEA. *Id.* at 38a-39a. Among other things,

the hearing officer ordered the District to reimburse T.A.'s parents for the cost of sending him to the Academy. *Id.* at 39a-40a; *id*. at 158a.

5. The District brought suit to challenge the hearing officer's order. The district court accepted the hearing officer's factual findings, but held that IDEA barred the tuition reimbursement award because T.A. had not received special education services from the District before his parents unilaterally placed him at the Academy. Pet. App. 49a-51a. The court found it undisputed that T.A.'s parents agreed with the 2001 ineligibility determination; that they never requested another evaluation; that they removed T.A. from the District for reasons unrelated to special education services; and that T.A. never received special education services from the District. *Id.* at 51a. Accordingly, the district court concluded that T.A. was "not within the category of children eligible for tuition reimbursement" under 20 U.S.C. § 1412(a)(10)(C). *Ibid.*

6. A divided panel of the Ninth Circuit reversed. T.A. conceded that he did "not meet the statutory requirements under 20 U.S.C. § 1412(a)(10)(C), because he had not 'previously received special education and related services.'" Pet. App. 11a. The panel concluded, however, that this did not bar T.A. from receiving tuition reimbursement under IDEA. *Id.* at 14a-15a.

According to the Ninth Circuit, § 1412(a)(10)(C)(ii) is ambiguous because it "does not *clearly* create a categorical bar" to tuition reimbursement when the child did not previously receive special education services from a public agency. Pet. App. 14a. The court reasoned that although "Congress chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing

officers when deciding whether to award reimbursement to students who previously received special education and related services," "[f]or students who never received" such services, "the new provisions of § 1412(a)(10)(C) simply do not apply." *Id*. at 16a. Rather, students like T.A. "are eligible for reimbursement[] to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to" 20 U.S.C. § 1415(i)(2)(B)(iii). *Ibid.*

In so holding, the Ninth Circuit did not acknowledge that IDEA was enacted pursuant to Congress's powers under the Spending Clause. Nor did the Ninth Circuit interpret IDEA in light of the principle, reaffirmed nearly two years earlier in *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006), that school districts may be subject to liability under IDEA only insofar as the statute "'unambiguously'" imposes such liability. *Id*. at 296.

SUMMARY OF THE ARGUMENT

IDEA is a Spending Clause statute, 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. Far from unambiguously providing that public school districts may be liable for tuition reimbursement awards to parents who unilaterally place in private school a child, like T.A., who did not previously receive special education services from the district, the 1997 Amendments to IDEA clearly preclude such awards. This conclusion flows from the text, structure, and history of the 1997 Amendments, which set forth in detail the circumstances under which school districts are responsible for tuition reimbursement—circumstances not present here.

Even if the statutory text were ambiguous regarding a school district's tuition reimbursement obligation to students like T.A., the Ninth Circuit erred in resolving that ambiguity against the District. Under this Court's Spending Clause jurisprudence, such ambiguities must be resolved in the State's favor, not the claimant's. Accordingly, because T.A. admits he did not receive special education services from the District prior to enrolling at the Academy, tuition reimbursement is not an available remedy.

The Ninth Circuit's other rationales for allowing tuition reimbursement are without merit. The Ninth Circuit appealed to IDEA's overarching goal of providing a FAPE to all disabled children, but IDEA does not promote that goal at the expense of fiscal and other considerations reflected in Congress's decision to foreclose tuition reimbursement in cases like these. The Ninth Circuit's reliance on *Burlington* is doubly flawed in that *Burlington*: (i) did not address the issue here—the availability of tuition reimbursement following the unilateral private school placement of a child who never received special education services from the school district; and (ii) interpreted an earlier iteration of IDEA, twelve years before the 1997 Amendments articulated precisely when school districts are obligated to provide tuition reimbursement to parents of children unilaterally placed in private school.

The Ninth Circuit's reliance on the Department of Education's interpretive commentary is equally unavailing. No deference is owed because IDEA clearly precludes tuition reimbursement here, and even if the Act were ambiguous, the Spending Clause would require resolving that ambiguity against reimbursement. Finally, the Ninth Circuit wrongly concluded that the District's reading of IDEA leads to

absurd results. The numerous procedural protections provided by IDEA ensure that disabled children will not languish if parents cannot recover tuition reimbursement for children who have not previously received special education services. To the contrary, it is the Ninth Circuit's reasoning that leads to untenable results.

ARGUMENT

I. AS AMENDED IN 1997, IDEA PRECLUDES TUITION REIMBURSEMENT FOR CHILDREN UNILATERALLY PLACED IN PRIVATE SCHOOL WHO HAVE NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY.

It has long been settled that Congress enacted IDEA pursuant to its Spending Clause power, Art. I, § 8, cl. 1. See *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2006 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 295 (2006); *Schaffer* v. *Weast*, 546 U.S. 49, 51 (2005); *Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11, 204 n.26 (1982). When exercising its Spending Clause authority, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives'"—including objectives "not thought to be within Article I's 'enumerated legislative fields'"—"'by conditioning receipt of federal moneys upon compliance * * * with federal statutory and administrative directives.'" *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (citations omitted). When attaching such "conditions to a State's acceptance of federal funds," however, "the conditions must be set out 'unambiguously.'"

Arlington, 548 U.S. at 296 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)).

The Spending Clause plain statement rule is rooted in federalism. See *Dole*, 483 U.S. at 207-208; *Pennhurst*, 451 U.S. at 17; *Davis ex rel. Lashonda D.* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 654-655 (1999) (Kennedy, J., dissenting); see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 457, 469-470 (1991) (importing Spending Clause plain statement rule). The rule has particular resonance here, as education is "perhaps the most important function of state and local governments." *Honig* v. *Doe*, 484 U.S. 305, 309 (1988) (internal quotation marks omitted); accord, *Rowley*, 458 U.S. at 208 n.30. So, when States cede their traditional authority over education in exchange for federal funds disbursed pursuant to Spending Clause legislation, the exchange "is much in the nature of a contract." *Pennhurst*, 451 U.S. at 17. Congress's power to impose conditions on the receipt of federal funds "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Ibid.* Those terms must be articulated in the statutory text. See *ibid.* (holding that "if *Congress* intends to impose a condition on the grant of federal moneys, *it* must do so unambiguously," and "insisting that *Congress* speak with a clear voice") (emphases added); accord, *Dole*, 483 U.S. at 207.

The Court applied these principles in *Arlington*, which considered whether 20 U.S.C. § 1415(i)(3)(B), an IDEA provision authorizing a court to award "reasonable attorneys' fees as part of the costs" to prevailing parents, allowed an award of expert fees and expenses. 548 U.S. at 293-294. Recognizing that IDEA is a Spending Clause statute, the Court "view[ed] the IDEA from the perspective of a state official who is engaged in the process of deciding

whether the State should accept IDEA funds and the [attendant] obligations," and asked "whether such a state official would clearly understand that" the "liability at issue" is "one of the obligations of the Act." *Id*. at 296. "In other words," the Court added, "we must ask whether the IDEA furnishes clear notice regarding" a school district's "liability" for expert fees incurred by a prevailing parent. *Ibid*.

The Court held that IDEA provided no such notice. Examining the statutory text, the Court noted that § 1415(i)(3)(B), which authorized "an award of 'reasonable attorneys' fees,'" "does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts." 548 U.S. at 297. The Court then pointed to 20 U.S.C. § 1415(i)(3)(C)-(G), which "contains detailed provisions * * * designed to ensure that [attorney fee] awards are indeed reasonable." 548 U.S. at 298. As the Court explained, the fact that IDEA includes no "comparable provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized." *Ibid*.

Given this, the Court concluded that "the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants," and that "[c]ertainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds." *Id*. at 300. The Court reached this conclusion even though the Conference Committee Report expressly stated the conferees' intention "'that the term "attorneys' fees as a part of the costs" [in § 1415(i)(3)(B)] include reasonable expenses and fees of expert witnesses.'" *Id*. at 304 (quoting H.R. Conf. Rep. No. 99-687, at 5, *reprinted in* 1986 U.S.C.C.A.N. 1807, 1808). Placing primacy on

the statutory text, the Court cautioned that "[i]n a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Ibid.*

Like the parents in *Arlington*, T.A. relies upon a remedial provision in § 1415(i) to justify his claim for private school tuition reimbursement. The Ninth Circuit agreed, holding that 20 U.S.C. § 1415(i)(2)(B)(iii)—which provides that "the court * * * shall grant such relief as the court determines is appropriate"—allows hearing officers and courts to award tuition reimbursement to children unilaterally placed in private school without first having received special education services from the school district. This was error. Congress amended IDEA in 1997 to permit tuition reimbursement for children sent to private school without the school district's consent or referral, but *only* if the child "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). Given this provision and others, it cannot possibly be said that IDEA unambiguously obligates school districts, as a condition of receiving federal funds, to reimburse parents for private school tuition under the circumstances present here.

A. As Amended In 1997, IDEA Plainly And Categorically Precludes Tuition Reimbursement Here.

IDEA has a general remedial provision requiring "the court * * * [to] grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). The Ninth Circuit held that this provision allows a hearing officer to order a public school district to provide tuition reimbursement to

parents who unilaterally place a child in private school, where the child did not previously receive special education services from the district. Pet. App. 12a-18a. This holding cannot be reconciled with the text and structure of IDEA. As amended in 1997, IDEA categorically prohibits reimbursement under those circumstances, which means that such reimbursement can never be "appropriate" under § 1415(i)(2)(B)(iii).

Prior to 1997, IDEA did not expressly address whether and, if so, under what circumstances school districts were obligated to provide tuition reimbursement to parents who placed their children in private school without the district's consent or referral. In 1997, Congress amended IDEA to address that issue, in a subsection entitled "PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY." 1997 Amendments § 612(a)(10)(C), 111 Stat. at 63, *codified at* 20 U.S.C. § 1412(a)(10)(C).

Section 1412(a)(10)(C)(i) considers children unilaterally placed in private school where the public school district made a FAPE available:

> (i) IN GENERAL.—Subject to subparagraph (A), this subchapter does not require a local education 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 [FAPE] available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i). For those children, IDEA does not require the district to reimburse parents for private school tuition. The district's only obligation to those children is to allocate to them

under § 1412(a)(10)(A) a proportionate share of the federal funds received under IDEA. See *id.* § 1412(a)(10)(A)(i)(I)-(III); 34 C.F.R. § 300.453 (1999); see generally U.S. *K.R.* Br. at 9-10, 12-13, 18.

Section 1412(a)(10)(C)(ii) considers children unilaterally placed in private school where the public school district did *not* make a FAPE available:

> (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 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 [FAPE] available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added). Thus, if the district does not make a FAPE available prior to a child's enrollment in private school, this provision allows a court or hearing officer to award tuition reimbursement, but only if the child previously received special education services from the district.

Neither § 1412(a)(10)(C) nor any other provision in IDEA expressly grants courts and hearing officers the authority to award tuition reimbursement under any other circumstances—including circumstances where, as here, parents unilaterally place in private school a child who had not received special education services under the authority of a public agency. It follows that reimbursement is not available under those

circumstances. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("The most natural reading of § 1681p is that Congress implicitly excluded a general discovery rule by explicitly including a more limited one.") (citing *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)); *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985) (the "'presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme'") (citation omitted). Such an award, in other words, cannot be "appropriate" relief within the meaning of § 1415(i)(2)(B)(iii).

This conclusion flows from *Arlington*. As noted above, *Arlington* considered whether IDEA permits prevailing parents to recover expert fees and expenses. In the abstract, a court might reasonably find it appropriate to allow such recoveries. See 548 U.S. at 307 (Ginsburg, J., concurring) (noting that Congress "wisely might have included" a provision allowing recovery of expert fees); *id.* at 313-316 (Breyer, J., dissenting) (explaining why allowing such recovery would be sound as a matter of policy). But decisions regarding appropriate relief under IDEA are not made in the abstract; they are made, rather, in the context of a comprehensive statutory scheme that details the relief available to prevailing parents. Because the provision specifically addressing litigation costs, § 1415(i)(3)(B), does not mention expert fees, the Court concluded that IDEA prohibits parents from recovering the costs of experts. See *id.* at 297 (while § 1415(i)(3)(B) "provides for an award of 'reasonable attorneys' fees,'" it "does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts"). By the same token,

the IDEA provision specifically addressing tuition reimbursement for children unilaterally placed in private school, § 1412(a)(10)(C), "does not even hint" at reimbursement for students who had not previously received special education services from the school district. *Ibid*. Under the reasoning in *Arlington*, IDEA prohibits tuition reimbursement for those students.

Other textual clues in IDEA confirm this conclusion. *First*, immediately following the authorization in § 1412(a)(10)(C)(ii) for tuition reimbursement to parents who unilaterally place in private school a child who previously received special education services from the district, IDEA sets forth "detailed provisions that are designed to ensure that such awards are indeed reasonable." *Arlington*, 548 U.S. at 298. Those provisions articulate standards to guide the discretion of courts and hearing officers in awarding, reducing, or even denying tuition reimbursement to such parents. 20 U.S.C. § 1412(a)(10)(C)(iii)-(iv). As the Ninth Circuit acknowledged, IDEA does not provide any standards regarding tuition reimbursement for children, like T.A., who are unilaterally placed in private school without first having received special education services from the school district. Pet. App. 16a. As *Arlington* recognized, "[t]he absence of any comparable provisions" guiding the reduction or denial of tuition reimbursement for those children "suggests that [such reimbursement] is not authorized." 548 U.S. at 298.

Second, § 1412(a) provides that "[a] State is eligible" for federal financial assistance if it "demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets" approximately two dozen sets of

conditions. 20 U.S.C. § 1412(a). The set of conditions pertaining to disabled children placed in private school is set forth in § 1412(a)(10), entitled "CHILDREN IN PRIVATE SCHOOLS." 1997 Amendments § 612(a)(10), 111 Stat. at 62, *codified at* 20 U.S.C. § 1412(a)(10). And, as noted above, the conditions pertaining specifically to tuition reimbursement are set forth in § 1412(a)(10)(C), entitled "PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY," and § 1412(a)(10)(C)(ii), entitled "REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT." *Id*. § 612(a)(10)(C), 111 Stat. at 63, *codified at* 20 U.S.C. § 1412(a)(10)(C). Those headings were "not added by the publisher or codifier, but w[ere] part of the Act as written and passed by Congress," and thus "constitute[] an indication of congressional intent." *Hardin* v. *City Title & Escrow Co.*, 797 F.2d 1037, 1039 (D.C. Cir. 1986); see also *Fla. Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336 (2008). It is difficult to imagine that Congress would have specified the States' tuition reimbursement obligations under provisions with the categorical and pellucid headings "REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT" and "PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY," only to intend that § 1415(i)(2)(B)(iii), which does not mention tuition reimbursement, be construed to impose *additional* reimbursement requirements.

Third, there is a key difference between § 1415(i)(2)(B)(iii) and § 1412(a)(10)(C)(ii) in terms of the remedial authority each grants. Section 1415(i)(2)(B)(iii) provides that "*the court* * * * shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii) (emphasis

added). Section 1412(a)(10)(C)(ii), by contrast, provides that "a court *or* a hearing officer" may require tuition reimbursement where the child previously received special education services. 20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added). Section 1412(a)(10)(C)(ii) is IDEA's only explicit grant of authority to hearing officers to award tuition reimbursement. Given its enactment of that provision, Congress cannot be thought to have intended § 1415(i)(2)(B)(iii), which grants authority only to "courts," to enable *hearing officers* to award tuition reimbursement beyond the scope permitted by § 1412(a)(10)(C)(ii).

Finally, insofar as it is relevant, the legislative history of the 1997 Amendments further confirms that § 612(a)(10)(C)(ii) prohibits tuition reimbursement in these circumstances. During the debate preceding enactment of the 1997 Amendments, Representative Castle stated:

> This law * * * has had unintended and costly consequences. * * * It has resulted in school districts unnecessarily paying expensive private school tuition for children. It has resulted in cases where lawyers have gamed the system to the detriment of schools and children * * * This bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts.

143 Cong. Rec. H2536 (daily ed. May 13, 1997); see also *ibid.* (IDEA previously had "resulted in school districts unnecessarily paying expensive private school tuition for children"). This floor statement is incompatible with the notion that Congress intended to authorize tuition reimbursement awards beyond

those expressly contemplated by the 1997 Amendments.

Even more telling are the House and Senate Reports to the 1997 Amendments, each stating:

> The bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools.
>
> * * * *
>
> Section 612 [20 U.S.C. § 1412] * * * specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a [FAPE] available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). *Previously, the child must have had received special education and related services under the authority of a public agency*.

H.R. Rep. No. 105-95, at 92-93 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 90 (emphasis added); see also S. Rep. No. 105-17, at 13 (1997) (same). The reports make clear that Congress, in "clarify[ing] the responsibility of public school districts to" children placed in private school, intended to permit tuition reimbursement only if the child "[p]reviously * * * received special education and related services." *Ibid.*; compare *Arlington*, 548 U.S. at 309-313, 323 (Breyer, J., dissenting) (noting that the legislative history of the 1986 Amendments supported the parents' claim to recover expert fees).

In sum, as amended in 1997, IDEA unambiguously imposes a categorical bar on tuition reimbursement

for parents who unilaterally place a child in private school, when the child did not previously receive special education services from the public school district. Accordingly, the Ninth Circuit's contrary judgment should be reversed irrespective of the Spending Clause "clear notice" requirement. See *Arlington*, 548 U.S. at 296-297 ("When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'"); *id.* at 307-308 (Ginsburg, J., concurring) (concluding, without applying the "clear notice" standard, that IDEA does not permit award of expert fees).

B. At A Minimum, IDEA Does Not Unambiguously Impose A Tuition Reimbursement Obligation Here.

Even if IDEA did not clearly prohibit tuition reimbursement awards for parents who unilaterally place in private school a child who had not received special education services from the school district, the Act is at best ambiguous on the subject. The Ninth Circuit agreed, holding that IDEA "is ambiguous because its text does not *clearly* create a categorical bar" to reimbursement under those circumstances. Pet. App. 14a.

In resolving that ambiguity against the District, the Ninth Circuit turned the Spending Clause on its head. As this Court made clear in *Arlington*, two years before the Ninth Circuit ruled, the question under the Spending Clause is not whether the statute clearly *relieves* the State of an obligation, but whether the statute clearly *imposes* the obligation. 548 U.S. at 296 ("when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously'"). Thus, even if IDEA were ambiguous concerning tuition

reimbursement under the present circumstances, the ambiguity must be resolved in the District's favor, for an ambiguous statute, by definition, cannot provide the "clear notice" demanded by the Spending Clause. *Ibid.*; accord, *Pennhurst*, 451 U.S. at 17 ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").

C. T.A.'s Parents Are Ineligible For Tuition Reimbursement.

Whether read plainly or through the lens of the Spending Clause, IDEA categorically prohibits tuition reimbursement to parents who unilaterally place in private school a child who has not previously received special education services from the public school district. T.A. has "concede[d] that * * * he does not meet the statutory requirements under 20 U.S.C. § 1412(a)(10)(C), because he had not 'previously received special education and related services.'" Pet. App. 11a. Accordingly, the District may not be required to reimburse T.A.'s parents for the cost of enrolling him at the Academy.

II. NONE OF THE NINTH CIRCUIT'S RATIONALES FOR ALLOWING TUITION REIMBURSEMENT HAS MERIT.

The Ninth Circuit's misinterpretation of IDEA, coupled with its failure to view IDEA through the lens of the Spending Clause, fatally undermines its holding that T.A.'s parents are not categorically precluded from receiving a tuition reimbursement award from the District. The Ninth Circuit's other rationales for permitting reimbursement here are without merit.

A. The Ninth Circuit's Appeal To IDEA's Broad Purpose Does Not Support Its Interpretation.

The Ninth Circuit held that interpreting IDEA "to prohibit categorically reimbursement to students who have not yet received special education and related services runs contrary to" the statute's "express purpose * * * 'to ensure that *all* children with disabilities have available to them a [FAPE].'" Pet. App. 15a (quoting 20 U.S.C. § 1400(d)(1)(A)). The parents in *Arlington* argued, in almost precisely the same terms, that allowing expert fee awards would "further[] the Act's overarching goal of" ensuring that all disabled children have available to them a FAPE. 548 U.S. at 303. This Court rejected that contention. Explaining that "IDEA obviously does not seek to promote" that overarching goal "at the expense of all other considerations, including fiscal considerations," the Court concluded that "[b]ecause the IDEA is not intended in all instances to further [such] broad goals * * * at the expense of fiscal considerations, [those] goals * * * do little to bolster" the parents' construction of the IDEA provision at issue. *Ibid.*

The same rationale governs here. While IDEA of course is intended to serve the goal of ensuring a FAPE for all disabled children, Congress also intended in the 1997 Amendments to cabin the liability of public school districts for private school tuition reimbursement. See *supra* at 20-27; see also U.S. *K.R.* Br. at 9-10, 12-13, 18 (recognizing congressional intent to limit financial obligations of States through other provisions of the 1997 Amendments). Section 1412(a)(10)(C) embodies the balance Congress struck in serving both goals simultaneously, and thus neither to its logical conclusion. By elevating the broad purpose of IDEA

"at the expense of [the] specific provisions" addressing tuition reimbursement, the Ninth Circuit "ignore[d] the complexity of the problems Congress [wa]s called upon to address and the dynamics of legislative action." *Bd. of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986). Put another way, the Ninth Circuit's "[i]nvocation of the 'plain purpose' of [IDEA] at the expense of the terms of the statute," § 1412(a)(10)(C) in particular, "itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.* at 374.

B. The Ninth Circuit's Reliance On *Burlington* Is Unavailing.

The Ninth Circuit also relied on *School Committee of the Town of Burlington* v. *Department of Education*, 471 U.S. 359 (1985), to support its interpretation of IDEA. Pet. App. 12a, 15a. Decided more than a decade before Congress enacted the 1997 Amendments, *Burlington* considered whether IDEA's general remedial provision—which then, as now, provided that "the court shall * * * grant such relief as the court determines is appropriate," 20 U.S.C. § 1415(i)(2)(B)(iii)—allowed tuition reimbursement to parents who unilaterally placed their child in private school when the special education services provided by the public school were found inadequate. 471 U.S. at 361-362. At the time, IDEA was silent on the subject of tuition reimbursement to children unilaterally placed in private school. The Court concluded that, "[a]bsent other reference" in IDEA, "the only possible interpretation" of the general remedial provision was that tuition reimbursement was an "'appropriate'" remedy "in light of the purpose of the Act." *Id.* at 369. The Court reaffirmed

Burlington in another pre-1997 case, *Florence County School District Four* v. *Carter*, 510 U.S. 7, 15 (1993).

Burlington does not advance T.A.'s cause. Unlike T.A., the students in *Burlington* and *Carter* received special education services under the authority of a public agency and were subject to newly proposed IEPs before being unilaterally placed in private school. See *Carter*, 510 U.S. at 10-11; *Burlington*, 471 U.S. at 361-362. As *Carter* recognized, "in *all Burlington* reimbursement cases, the parents' rejection of the school district's proposed IEP is the very reason for the parents' decision to put their child in a private school." 510 U.S. at 13 (emphasis added). Here, by contrast, T.A.'s parents placed him in private school without giving the District the chance to evaluate him for eligibility under IDEA.

Accordingly, this matter does not fit the mold of a "*Burlington* reimbursement case[]," *ibid*., which casts serious doubt on the notion that T.A.'s parents would have received tuition reimbursement under *Burlington*.[2] Conversely, under the District's reading

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[2] Reflecting *Carter*'s description of what constitutes a "*Burlington* reimbursement case[]," most courts prior to the 1997 Amendments "thought it clear that, at a minimum [in order to recover reimbursement for a unilateral placement], the parents had to inform the school district of their concerns about their child's special needs and about the plan proposed *before removing* the child from public school." *Greenland Sch. Dist.* v. *Amy N.*, 358 F.3d 150, 159 (1st Cir. 2004) (emphasis added) (collecting cases); *see also, e.g.*, *Town of Burlington* v. *Dep't of Educ.*, 736 F.2d 773, 799 (1st Cir. 1984) (finding a "reasonable distinction" between "a unilateral parental transfer made after consultation with the school system, yet still an action without the system's agreement, and transfers made truly unilaterally, bereft of any attempt to achieve a negotiated compromise and agreement on a private placement"), *aff'd*, 471 U.S. 359 (1985); *Patricia P.* v. *Bd. of Educ.*, 203 F.3d 462, 468-469 (7th Cir. 2000)

of the 1997 Amendments, the students in *Burlington* and *Carter* would not have been categorically barred from receiving tuition reimbursement under § 1412(a)(10)(C)(ii).

Even if the pre-1997 version of § 1415(i)(2)(B)(iii), as interpreted in *Burlington*, would have permitted tuition reimbursement to T.A.'s parents, the post-1997 version still would not. As noted above, given IDEA's pre-1997 silence regarding tuition reimbursement for a child unilaterally placed in private school, *Burlington* interpreted the general "appropriate" relief provision "[a]bsent other reference" in IDEA clarifying what would be appropriate. 471 U.S. at 369. The 1997 Amendments, however, provided the "other reference" that was missing when the Court decided *Burlington*, expressly defining when reimbursement would be allowed—where the child previously received special education services from the school district, tempered by various factors that allow the court to reduce or deny reimbursement. 20 U.S.C. § 1412(a)(10)(C)(ii)-(iv). Accordingly, as a "relic of the pre-[1997] regime," a general remedial provision like § 1415(i)(2)(B)(iii) cannot provide the reimbursement authority denied by the 1997 Amendments. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992).

("parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement"); *Wise* v. *Ohio Dep't of Educ.*, 80 F.3d 177, 184 (6th Cir. 1996) (reimbursement unavailable where parents fail to first make a formal complaint about their child's educational placement, or request placement in a different facility); *Hunter ex rel. Hunter* v. *Seattle Sch. Dist. No. 1*, 731 P.2d 19, 22 (Wash. Ct. App. 1987) (tuition reimbursement unavailable where district has not evaluated student prior to unilateral placement).

The Ninth Circuit's reliance on *Burlington* suffers from one final shortcoming. Section 1415(i)(2)(B)(iii) provides general remedial authority to "the court," not to a hearing officer. 20 U.S.C. § 1415(i)(2)(B)(iii). Both *Burlington* and *Carter* focus, appropriately, on a *court*'s authority to order tuition reimbursement under that provision. See *Carter*, 510 U.S. at 9-10, 12, 15-16; *Burlington*, 471 U.S. at 369-370, 374. Neither decision states, let alone suggests, that § 1415(i)(2)(B)(iii) vests *hearing officers* with the authority to require tuition reimbursement under any circumstances. Yet the Ninth Circuit relied on *Burlington* to hold that § 1415(i)(2)(B)(iii), which does not mention hearing officers or tuition reimbursement, empowers hearing officers to order tuition reimbursement beyond the scope allowed by § 1412(a)(10)(C). That reliance was badly misplaced.

C. The Ninth Circuit's Reliance On The Department's Interpretation Of IDEA Is Unavailing.

The Ninth Circuit also relied on the Department of Education's commentary accompanying regulations implementing the 1997 Amendments to support its interpretation of IDEA. Pet. App. 14a-15a n.9. The commentary stated that

> hearing officers and courts retain their authority, recognized in *Burlington* and [*Carter*] * * * to award 'appropriate' relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section [1415(i)(2)(B)(iii)] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under [1412](a)(10)(C)(ii) to award reimbursement for private placements of children who previously

> were receiving special education and related services from a public agency.

64 Fed. Reg. 12,406, 12,602 (Mar. 12, 1999); see also 71 Fed. Reg. 46,540, 46,599 (Aug. 14, 2006) (same in commentary accompanying regulations implementing the 2004 Amendments). The Department's commentary is not entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), for three independent reasons.

First, the commentary is contrary to the clear language of IDEA. As shown above, *supra* at 20-27, Congress expressly limited recovery of private school tuition reimbursement in unilateral placement cases to circumstances where children previously received special education services from a public agency, 20 U.S.C. § 1412(a)(10)(C)(ii), and thus has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Given this, the Department's contrary interpretation warrants no deference under either *Chevron*, see *ibid.*, or *Skidmore*, see *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008).

Second, the Department's commentary exceeded the scope of its delegated authority under IDEA. When the commentary was issued in 1997, IDEA authorized the Secretary to issue regulations "*only* to the extent that such regulations are *necessary* to ensure that there is compliance with the *specific* requirements of" IDEA. 20 U.S.C. § 1417(b) (emphasis added), *recodified at* 20 U.S.C. § 1406(a) (2006) (same). As shown above, nothing in IDEA *specifically* requires a school district to provide tuition reimbursement when a child unilaterally placed in private school had not previously received special education services from the district. It follows that the commentary was not "necessary to en-

sure * * * compliance with the specific requirements" of IDEA, and therefore that it falls outside the Department's (relatively narrow) zone of delegated authority. See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). Accordingly, the commentary is not entitled to *Chevron* deference. See *Gonzales* v. *Oregon*, 546 U.S. 243, 258 (2006); *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001); see also *Carcieri* v. *Salazar*, No. 07-526, slip op. at 2 (U.S. Feb. 24, 2009) (Breyer, J., concurring) (agency interpretation not entitled to *Chevron* deference when "Congress did not intend to delegate interpretative authority to the [agency]").

Although agency action outside the agency's delegated authority may still be entitled to *Skidmore* deference, see *Mead*, 533 U.S. at 234-235, none is warranted here. Like the Ninth Circuit's opinion, the Department's commentary rests on the doubly mistaken notion that *Burlington* and *Carter* held that § 1415(i)(2)(B)(iii): (1) authorizes hearing officers (2) to award tuition reimbursement to the parents of children who did not previously receive special education services from a public agency. See 64 Fed. Reg. at 12,602. The Department's misreading of *Burlington* and *Carter*, on top of its more fundamental error in failing to view IDEA through the lens of the Spending Clause, hardly reflects the degree of care warranting deference from this Court. See *Mead*, 533 U.S. at 228 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care * * * and to the persuasiveness of the agency's

position.") (citing cases); see also *Gonzales*, 546 U.S. at 257-258 (agency's interpretation not entitled deference where, as here, its regulations merely "parrot" language of the statute).

Third, even putting aside the foregoing points, the Spending Clause prohibits the Department from interpreting IDEA to impose a tuition reimbursement obligation where a child is unilaterally placed in private school without first having received special education services from the district. Deference to an agency is appropriate where there is more than one permissible way to interpret a statute. There usually is more than one permissible way to interpret an ambiguous statute, but with a Spending Clause statute, ambiguity means that an obligation has not been "set out 'unambiguously,'" which in turn means that the statute may not be interpreted to impose that obligation. *Arlington*, 548 U.S. at 296. As Judge Kozinski explained,

> *Chevron* and the clear statement rule are * * * at loggerheads: If we must rely on the agency to divine the meaning of the statute, the meaning cannot be "plain to any reading" it. And, where Congress has not spoken plainly, it cannot be deemed to have abrogated an important incident of a state's sovereignty.

John v. *United States*, 247 F.3d 1032, 1046 (9th Cir. 2001) (en banc) (per curiam) (Kozinski, J., dissenting); *accord*, *Va. Dep't of Educ.* v. *Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc) (denying deference to EEOC because "[i]t is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies"), *superseded by statute on other grounds*, IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat.

37; *Cal. State Bd. of Optometry* v. *FTC*, 910 F.2d 976, 982 (D.C. Cir. 1990) (denying deference to FTC because "[t]he clear statement doctrine leaves no room for inferences. An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it.").

Gregory v. *Ashcroft*, 501 U.S. 452 (1991), is instructive on this point. The dissent in *Gregory* argued that EEOC's interpretation of an ambiguous statute was entitled to *Chevron* deference and thus overrode a clear statement requirement analogous to that imposed under the Spending Clause. See *id.* at 493 (Blackmun, J., dissenting). The Court disagreed, explaining that "'to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [the Court has] relied to protect states' interests.'" *Id.* at 464 (alterations omitted) (quoting L. Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed. 1988)); see also *Solid Waste Agency* v. *Army Corps of Eng'rs*, 531 U.S. 159, 172-173 (2001) (rejecting notion that *Chevron* deference applied to an agency's interpretation of an allegedly ambiguous statute subject to a clear statement rule, and noting Court's "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority").

These principles make it inappropriate to accord deference to the Department's commentary. Because IDEA is, at best, ambiguous regarding the availability of tuition reimbursement where a child has not received special education services from a public agency, there is but one permissible outcome—no obligation on the States—and thus no room for deference to the agency. To hold otherwise would deprive the Spending Clause's "clear notice" rule of

its intended force, as Congress, able to rely on agencies to fill gaps in ambiguous Spending Clause legislation, would no longer feel compelled to unambiguously set forth the conditions States must satisfy in exchange for federal funds.

D. The Ninth Circuit's Absurdity Rationale Is Unavailing.

Finally, the Ninth Circuit reasoned that the District's interpretation of the 1997 Amendments would "lead to the absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate the special education." Pet. App. 15a-16a. The Ninth Circuit added that "if the school district declined to recognize a student as disabled—as occurred in this case—the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement under § 1412(a)(10)(C)(ii)." *Id*. at 16a. This parade of horribles fails to account for the procedural safeguards parents enjoy under IDEA, fails to acknowledge that the District's interpretation is consistent with the statutory text and structure, and ignores the untenable results that flow from the Ninth Circuit's reading of IDEA.

The Ninth Circuit's suggestion that a child initially denied eligibility under IDEA would never receive special education services from the school district, thus rendering her permanently ineligible for tuition reimbursement under IDEA, is far-fetched. Under the 2004 Amendments, when a school district receives notice of a due process complaint, it has only ten days to respond with an explanation of its decision.

2004 Amendments § 615(c)(2)(B)(i)(I), 118 Stat. at 2718, *codified at* 20 U.S.C. § 1415(c)(2)(B)(i)(I) (2006). Within fifteen days of receiving the complaint, the district must convene a meeting with the child's parents and relevant team members to attempt to resolve the complaint. *Id.* § 615(f)(1)(B), 118 Stat. at 2720-2721, *codified at* 20 U.S.C. § 1415(f)(1)(B) (2006). If the matter is not resolved within thirty days of the district receiving the complaint, a due process hearing must be held, and the hearing officer must issue her final decision within 45 days of the expiration of the initial 30-day period. See 34 C.F.R. §§ 300.510(b)(1)-(2), 300.515(a). Parents dissatisfied with the hearing officer's decision can then bring suit in state or federal court. 2004 Amendments § 615(i)(2), 118 Stat. at 2723-2724, *codified at* 20 U.S.C. § 1415(i)(2) (2006).

Given these tight deadlines, it is highly unlikely that the circumstances hypothesized by the Ninth Circuit, where a child is forced to languish for years in some sort of limbo, would come to pass.[3] Moreover, the Ninth Circuit's assumption that school districts would be "uncooperative" and routinely obstruct children eligible for services under IDEA, Pet. App. 15a, runs contrary to the presumption that public school officials "properly perform[]" their duties under

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[3] In any event, parents and children who ultimately prevail may seek to recover "compensatory education" to allow the child to continue in public education beyond the age of twenty-one to make up for the earlier deprivation. *See Ridgewood Bd. of Educ.* v. *N.E. ex rel. M.E.*, 172 F.3d 238, 249-250 & n.9 (3d Cir. 1999). Moreover, even if the procedural safeguards and remedies in the extreme case hypothesized by the Ninth Circuit prove insufficient, IDEA does not foreclose a remedy under the Americans with Disabilities Act or the Rehabilitation Act. 20 U.S.C. § 1415(*l*); *see Blanchard* v. *Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1447 (2008).

IDEA. *Schaffer*, 546 U.S. at 62-63 (Stevens, J., concurring); see also *Rowley*, 458 U.S. at 207-208; *United States* v. *Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("presumption of regularity" attends review of official acts of public official). Finally, Congress's decision to prohibit tuition reimbursement during certain timeframes for students who unilaterally withdraw from public schools reflects nothing more than the balance it struck between the competing interests at play, and can hardly be deemed absurd.

In fact, it is the Ninth Circuit's interpretation of IDEA that leads to untenable results. To justify its construction of IDEA, the Ninth Circuit concluded that "[f]or students who never received special education and related services, * * * the new provisions of § 1412(a)(10)(C) simply do not apply." Pet. App. 16a. The "new provisions" referenced by the Ninth Circuit include those that guide hearing officers and courts as to when tuition reimbursement may be reduced or denied altogether. 20 U.S.C. § 1412(a)(10)(C)(iii)-(iv).

Thus, the Ninth Circuit's reading of IDEA places a lower burden on parents whose children had never received special education from a public agency—even those who never requested an evaluation or participated in the IEP process—than parents whose children previously received special education from the public agency and were committed to the IEP process. This scheme would create a perverse incentive for parents to preemptively enroll a child in private school, without engaging the district regarding whether and, if so, what type of special education would be available for their child. That cannot possibly be what Congress had in mind when enacting the 1997 Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY ADDENDUM

FEDERAL STATUTES (2000 & SUPP. II 2003)

20 U.S.C. § 1412. STATE ELIGIBILITY

(a) IN GENERAL

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

* * * *

(10) CHILDREN IN PRIVATE SCHOOLS

(A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS

(i) IN GENERAL

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f) of this section:

(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

(ii) CHILD-FIND REQUIREMENT

The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

(B) CHILDREN PLACED IN, OR REFERRED TO, PRIVATE SCHOOLS BY PUBLIC AGENCIES

(i) IN GENERAL

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) STANDARDS

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies.

(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 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.

(iii) LIMITATION ON REIMBURSEMENT

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(7) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) EXCEPTION.

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement may

not be reduced or denied for failure to provide such notice if—

(I) the parent is illiterate and cannot write in English;

(II) compliance with clause (iii)(I) would likely result in physical or serious emotional harm to the child;

(III) the school prevented the parent from providing such notice; or

(IV) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I).

* * * *

(f) BY-PASS FOR CHILDREN IN PRIVATE SCHOOLS

(1) IN GENERAL

If, on December 2, 1983, a State educational agency is prohibited by law from providing for the participation in special programs of children with disabilities enrolled in private elementary and secondary schools as required by subsection (a)(10)(A) of this section, the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements which shall be subject to the requirements of such subsection.

(2) PAYMENTS

(A) DETERMINATION OF AMOUNTS

If the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services for a fiscal year an amount per child

that does not exceed the amount determined by dividing—

(i) the total amount received by the State under this subchapter for such fiscal year; by

(ii) the number of children with disabilities served in the prior year, as reported to the Secretary by the State under section 1418 of this title.

(B) WITHHOLDING OF CERTAIN AMOUNTS

Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of services described in subparagraph (A).

(C) PERIOD OF PAYMENTS

The period under which payments are made under subparagraph (A) shall continue until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(10)(A) of this section.

(3) NOTICE AND HEARING

(A) IN GENERAL

The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) REVIEW OF ACTION

If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of Title 28.

(C) REVIEW OF FINDINGS OF FACT

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) JURISDICTION OF COURT OF APPEALS; REVIEW BY UNITED STATES SUPREME COURT

Upon the filing of a petition under subparagraph (B), the United States court of appeals shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon

certiorari or certification as provided in section 1254 of Title 28.

20 U.S.C. § 1415. PROCEDURAL SAFEGUARDS

(a) ESTABLISHMENT OF PROCEDURES

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) TYPES OF PROCEDURES

The procedures required by this section shall include—

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change;

the identification, evaluation, or educational placement of the child, in accordance with subsection (c) of this section, or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation in accordance with subsection (e) of this section;

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)—

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include—

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) CONTENT OF PRIOR WRITTEN NOTICE

The notice required by subsection (b)(3) of this section shall include—

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter.

(d) PROCEDURAL SAFEGUARDS NOTICE

(1) IN GENERAL

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum—

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6) of this section.

(2) CONTENTS

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) civil actions; and

(M) attorneys' fees.

(e) MEDIATION

(1) IN GENERAL

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) of this section to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k) of this section.

(2) REQUIREMENTS

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of

this section, or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1482 or 1483 of this title; or

(ii) an appropriate alternative dispute resolution entity;

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) IMPARTIAL DUE PROCESS HEARING

(1) IN GENERAL

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such 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.

(2) DISCLOSURE OF EVALUATIONS AND RECOMMENDATIONS

(A) IN GENERAL

At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(B) FAILURE TO DISCLOSE

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) LIMITATION ON CONDUCT OF HEARING

A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) APPEAL

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) SAFEGUARDS

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of

section 1417(c) of this title (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title).

(i) ADMINISTRATIVE PROCEDURES

(1) IN GENERAL

(A) DECISION MADE IN HEARING

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) DECISION MADE AT APPEAL

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) RIGHT TO BRING CIVIL ACTION

(A) IN GENERAL

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision 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.

(B) ADDITIONAL REQUIREMENTS

In any action brought under this paragraph, 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.

(3) JURISDICTION OF DISTRICT COURTS; ATTORNEYS' FEES

(A) IN GENERAL

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) AWARD OF ATTORNEYS' FEES

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(C) DETERMINATION OF AMOUNT OF ATTORNEYS' FEES

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) PROHIBITION OF ATTORNEYS' FEES AND RELATED COSTS FOR CERTAIN SERVICES

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) EXCEPTION TO PROHIBITION ON ATTORNEYS' FEES AND RELATED COSTS

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) REDUCTION IN AMOUNT OF ATTORNEYS' FEES

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7) of this section;

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) EXCEPTION TO REDUCTION IN AMOUNT OF ATTORNEYS' FEES

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) MAINTENANCE OF CURRENT EDUCATIONAL PLACEMENT

Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

* * * *

(l) RULE OF CONSTRUCTION

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.