No. 08-305

IN THE
Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

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

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the Council of the Great City Schools as *amicus curiae* in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

The Council of the Great City Schools ("Council") is a coalition of 67 of the nation's largest urban public school systems.[2] Founded in 1956 and incorporated in 1961, the Council is located in Washington, D.C., where it promotes urban education through legislation, research, media relations, instruction, management, technology, and other special projects. The Council serves as the national voice for urban educators, providing ways to share best practices. For the past decade, the Council's legislative and legal staff has participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997, the Individuals with the Disabilities Education Improvement Act of 2004, and the related regulations promulgated by the United States Department of Education. The

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have filed with the Clerk of the Court a joint letter of consent to briefs of *amicus curiae*.

[2] The Council's membership is set forth in the Appendix.

Council has a vital interest in the outcome of this case as a ruling for Respondent would impose unforeseen burdens on its 67 member school districts and negatively impact the districts' ability to serve all of the children enrolled in their public schools.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Individuals with Disabilities Education Act ("IDEA") to provide a free appropriate *public* education to students with disabilities. Although reimbursement of private school tuition is sometimes available under IDEA, such expenditures detract from the statute's preference for public education and divert taxpayer dollars away from public school students and programs. Well aware that school district budgets are limited and that public money for special education must be spent wisely so that the needs of all students with disabilities can be met appropriately, Congress subjected private school tuition reimbursement under IDEA to careful limitations.

The statutory provision at issue in this case – 20 U.S.C. § 1412(a)(10)(C)(ii) – is one of those limitations. Students to whom a free appropriate public education ("FAPE") has not been made available, and who have been unilaterally placed in private school by their parents, are permitted to seek tuition reimbursement if, *but only if*, they have "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii).

This reading of the provision is compelled by the plain language of the statute. It also is the only

reading consistent with the goals of IDEA. First, as the legislative history demonstrates, the provision was fashioned in direct response to the growing problem of improper diversion of public resources to private schools. Second, the provision screens from the system parents who never intend to enroll their children in public school in the first place, and seek only public subsidization of their preferred private school. And third, the provision advances Congress's preference for public education by providing school districts with the opportunity to implement an appropriate public educational program before becoming responsible for funding a costly private school alternative.

Respondent's contrary interpretation cannot be squared with the statutory text, and would render it superfluous. It also would lead to results completely inconsistent with IDEA. Congress and this Court have both made clear that IDEA gives precedence to public schools as the preferred setting for the fulfillment of the statute's mandates. Yet under Respondent's interpretation of the provision, students who have previously received public special education and related services are treated less favorably than those who have not – an outcome at odds with the statute's goals.

School districts face increasingly high costs resulting from private school tuition reimbursement claims. These costs are exacerbated by a new generation of reimbursement claims – claims, like the instant one, involving expensive private residential facilities for students with behavioral and drug-related problems. Permitting unrestricted reim-

bursement of private school tuition will seriously deplete public education funds and directly impact services to the millions of students with disabilities who do receive the public special education and related services that are the cornerstone of IDEA.

Finally, Spending Clause legislation (such as IDEA) must provide clear notice of the financial burdens it imposes upon the state entities accepting federal funds. The provision here clearly and expressly *declines* to impose on state school districts the financial obligations sought by Respondent. But even if the statute could somehow be deemed ambiguous on the point, that would not be enough under the Spending Clause. There is no plausible reading of the statute that would put districts on unambiguous notice of a duty to fund unilateral private-school placements for students who have not "previously received" public services. Construing this provision to permit tuition reimbursement under such circumstances would force school districts to assume costly burdens they could not have foreseen when they accepted federal funds – a result unacceptable under the Spending Clause.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE "PREVIOUSLY RECEIVED" PROVISION IS CONSISTENT WITH THE PURPOSE OF IDEA.

Congress clearly and directly answered the precise question that is before the Court. Section 1412(a)(10)(C)(ii) of the IDEA directs that a student who has been unilaterally placed by his parents in a

private school may bring a claim for private tuition reimbursement only if that student has "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). This provision furthers the goals of IDEA by maintaining the baseline preference for the education of children with disabilities in *public* schools, while allowing for private tuition reimbursement in limited circumstances.

A. Congress Enacted IDEA To Provide A Free Appropriate *Public* Education To Students With Disabilities.

The cornerstone of IDEA is its guarantee of a "free appropriate *public* education" for "all children with disabilities." *Id.* § 1412 (a)(1)(A) (emphasis added). Congress first made that commitment over thirty years ago in the Education for All Handicapped Children Act of 1975 ("EHA"), the predecessor to IDEA. That statute was passed in response to a growing realization that American children with disabilities were being substantially underserved by their public school systems due to the increasing costs of special education. *See* S. Rep. No. 94-168, at 8 (1975). Acutely aware of the limited local resources available to meet this growing need, Congress acknowledged the "necessity of an expanded Federal fiscal role," *id.* at 5, and promised the much-needed funds to States that complied with the Act's mandate to provide a FAPE to all students with disabilities, *id.* at 2, 13.

Congress's decision to focus federal resources on the guarantee of a *public* education was intentional and meaningful. *See, e.g.*, *Cedar Rapids Cmty. Sch.*

Dist. v. Garret F., 526 U.S. 66, 78 (1999) (in enacting the statute, "Congress intended to open the doors of *public* education to all qualified children") (emphasis added). Before the EHA, students with disabilities were often relegated to private institutions, a reality Congress specifically sought to change with this legislation. *See* S. Rep. No. 94-168, at 9 (recognizing that "[p]roviding educational services will ensure against persons needlessly being forced into institutional settings" and save "billions of dollars" expended on such placements).

By favoring public (as opposed to private) education of children with disabilities, Congress served twin goals: not only did it encourage a better learning environment for the students, but it did so in a manner that was more cost effective for the community. *Id.* Because public schools are open to everyone in a community, they are more likely than private schools to offer opportunities for mainstreaming students with disabilities in the least restrictive environment – a goal made explicit by Congress in the text of the statute. *See* 20 U.S.C. § 1412(a)(5); *see also C.G. ex rel. A.S. v. Five Town Community Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008) ("It is common ground that the IDEA manifests a preference for mainstreaming disabled children."); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996) (IDEA's "strong preference" that students with disabilities be educated in their least restrictive environment "gives rise to a presumption in favor of . . . placement in the public schools").

Moreover, private school tuition for special education students far exceeds the typical public school

per pupil cost. *See, e.g.,* Jay G. Chambers, et al., *What are We Spending on Special Education Services in the United States, 1999-2000?* Special Education Expenditure Project 12 (2004) (showing that annual per-pupil special education expenditure for school-aged programs operated within public schools is $5,709 compared to $26,440 for school-aged programs operated outside public schools, a figure that includes tuition).[3] Congress's decision to make public schools the front line in the effort to provide FAPE to all children with disabilities was not only wise educational policy, but also fiscally sound. Section 1412(a)(10)(C)(ii)'s restrictions on payments for private school tuition serve both those objectives.

B. The Plain Language Of The Provision In Question Limits Reimbursement To Students Who Previously Received Public Special Education.

1. Because IDEA emphasizes public education, the original version of the Act did not explicitly address reimbursement for private school tuition in cases where the parents elect private school without the public school's consent. With little statutory text to guide it, this Court ultimately concluded that parents *could*, at least in some instances, be reimbursed for private school tuition even when the public agency does not consent to the arrangement. *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S.

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[3] While this 2004 study compiling data from the 1999-2000 school represents the most recent formal study available, costs have only continued to rise. *See* Part II, *infra.*

359, 369 (1985). In the absence of any specific statutory provision, the *Burlington* Court grounded its holding in the broad remedial powers IDEA generally vests in the courts. *See id.*; *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993).

In response to *Burlington* and its progeny, Congress amended IDEA in 1997 to clarify the parameters of tuition reimbursement.[4] And it did so with a keen awareness of the financial constraints under which public schools operate. The 1997 amendments, including the provision at issue here, are part of a comprehensive framework that balances the possibility of private school tuition reimbursement with the IDEA's core commitment to public education of students with disabilities.

2. The IDEA provision at issue here is best understood when considered in its full context. At its most general, the 1997 package of amendments reaffirms that tuition reimbursement is disfavored and generally not required under IDEA:

> [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

[4] Congress enacted the 1997 amendments in response to a number of cases that arose out of IDEA's lack of specificity regarding the scope of public schools' obligation to reimburse private school tuition, including *Burlington* and *Carter* and various decisions of the courts of appeals. *See generally* S. Rep. No. 105-17, at 13 (1997); H.R. Rep. 105-95, at 92-93 (1997).

> 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). At the same time, against this baseline expectation that services would be provided in public schools, Congress identified three limited circumstances in which public funding for services in private schools or private school tuition reimbursement may be appropriate.

First, when parents unilaterally choose private school,[5] the student may receive services under the "proportionate share" provision, which states that amounts expended on special education and related services by a local educational agency ("LEA") for private school students "shall be equal to a proportionate amount of Federal funds made available under this part." *Id.* § 1412(a)(10)(A)(i)(I). This provision does not create an individual entitlement to any services from the LEA. 34 C.F.R. § 300.454(a)(1). Rather, it "expressly provide[s] that public school agencies are not required to pay the costs of special education services for a particular child; States are required only to spend proportionate amounts on special education services for this class of students as a whole." *Foley*, 153 F.3d at 865.

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[5] Students may become eligible for services pursuant to the "proportionate share" provision in a variety of ways, including when FAPE has been made available, often because parents choose to send their children to religious schools. *See, e.g.*, *Foley v. Special Sch. Dist.*, 153 F.3d 863, 864 (8th Cir. 1998) (parents seeking services under proportionate share provision stipulated that student had been offered FAPE at public elementary school but had been voluntarily placed in parochial school).

Second, when the public agency and parents agree that the school district is unable to provide FAPE for the student, the school district will refer the student to private school (or another public school district) at no cost to the parents. 20 U.S.C. § 1412(a)(10)(B). This provision is the operative one in cases where there is an *agreement* by the public school districts that a private school or institution is the appropriate placement, as opposed to cases in which parents choose to send the student to private school "without consent of . . . the public agency." *Compare id.* 20 U.S.C §§ 1412(a)(10)(C)(i), (ii).

Third, and finally, Congress added the provision implicated in this case, which provides that students who are unilaterally placed in private school by their parents (*i.e.*, without agreement by the school district that private school is the appropriate placement) *may* be eligible for tuition reimbursement only if certain criteria are met. Specifically:

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

Id. § 1412(a)(10)(C)(ii) (emphasis added).

Notably, this provision is broadly entitled "Payment for education of children enrolled in private school without consent of or referral by the public agency." *Id.* This general heading indicates that Congress meant to cover the whole landscape of private school tuition claims in unilateral placement cases, rather than just a sub-group of those claims – i.e., those who have previously received relevant services, as Respondent submits, *see* Resp.'s Br. in Opp'n at 23-24. The plain language of the section limits reimbursement only to students who have previously received special education services under the authority of a public agency.

Congress was even stricter in setting conditions for private tuition reimbursement. Even students who have previously received public special education and related services may be denied tuition reimbursement, in whole or in part, if the parents (1) fail to inform the student's Individualized Education Program ("IEP") team that they are rejecting the proposed placement, (2) did not give written notice to the public agency ten days prior to removing the student from public school, (3) did not make the student available for an evaluation, or (4) otherwise acted unreasonably (*i.e.*, "upon a judicial finding of unreasonableness with respect to actions taken by the parents"). 20 U.S.C. § 1412(a)(10)(C)(iii).[6]

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[6] The legislative history of this provision confirms the plain language. Congress emphasized that it was adding the new requirement that "[p]reviously, the child must have received special education and related services under the authority of a public agency." S. Rep. No. 105-17, at 13.

Once this "previously received" prerequisite is met, the amendments preserve courts' discretion to determine whether tuition reimbursement is proper under the familiar balancing test used by this Court in *Burlington* and *Carter*. *Id*. § 1412(a)(10)(C)(ii) (stating that courts or hearing officers "*may* require" reimbursement if a student who previously received services in public school has been unilaterally placed in private school) (emphasis added). In cases where a student "previously received" public special education and related services, courts must still determine whether FAPE has been provided, *see id.*, and whether parents have acted reasonably in unilaterally placing the student in private school, *id* § 1420(a)(10)(C)(iii). But in no case may a district be required to reimburse the cost of private school tuition under § 1412 (a)(10)(C)(ii) if the student has not "previously received" public services.

C. The "Previously Received" Provision Furthers The Goals Of IDEA.

Giving the words carefully chosen by Congress their plain meaning and effect does not, as Respondent argues, lead to an absurd result. On the contrary: reading § 1412(a)(10)(C)(ii) according to its text serves three functions that further the central goals of IDEA.

1. First, the legislative history of the 1997 amendments as a whole, and of the "previously received" provision in particular, demonstrate Congress's intent to reduce school districts' costs under IDEA. As Representative Michael Castle explained when the amendment was passed: "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) (statement of Rep. Michael Castle). *See also* 143 Cong. Rec. H2537 (daily ed. May 13, 1997) (statement of Rep. Buck McKeon) (observing that the 1997 amendments "provide more dollars to the classroom, reduce the costs of litigation, and reduce paperwork and process costs").

Indeed, the 1997 amendments were both sought and welcomed by the public schools as a necessary cost-saving measure. One national education organization wrote Congress in support of the legislation, explaining that "[s]everal costly requirements have been removed or modified from current law, such as relief in the area of attorneys fees and reimbursement of unilateral placements by parents." 143 Cong. Rec. H2531 (daily ed. May 13, 1997) (entered into record by Rep. William F. Goodling, chairman of the House Education and the Workforce Committee).

Costs to school districts for private school tuition reimbursements resulting from unilateral placements are already high. If the decision of the court of appeals is not reversed, these costs may quickly become exorbitant for school districts nationwide – a result directly at odds with the purpose behind the 1997 amendments.

2. The provision in question also screens out reimbursement claims from parents who never intend to enroll their children in public school, regardless of the special education services made available. As they are presumed to do, school districts carry out their responsibilities under IDEA in good faith. *See*

Schaffer v. Weast, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring) ("I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute."). The unfortunate reality, however, is that public school districts are frequently saddled with tuition reimbursement in cases where it is evident that the student's parents did not enter the IEP process in good faith and never intended to send their child to a public school. *See* Part II.B, *infra*.

The "previously received" provision mandates that, before they may unilaterally remove their children from public school at a district's expense, parents demonstrate that they are acting in good faith by giving public schools a meaningful opportunity to provide FAPE. The requirement that parents act in good faith and provide schools with this opportunity is further reinforced by § 1412(a)(10)(C)(iii)(III), which provides that even if a student is eligible for private school tuition reimbursement under § 1412(a)(10)(C)(ii), reimbursement may still be reduced or denied "upon a judicial finding of unreasonableness with respect to actions taken by the parents." 20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).

These requirements protect the public fisc and prevent abuse by parents who never intended to use the public schools. *See, e.g.*, *Balt. City Bd. of Sch. Comm'rs v. Taylorch*, 395 F. Supp. 2d 246, 250 (D. Md. 2005) ("Congress has clearly spoken, and, in order to prevent the FAPE process from being converted to a program for funding private tuition for parents who have demonstrated no commitment to

the public school system, it has imposed as a condition for reimbursement the child's initial enrollment in a public school.").

3. Finally, requiring prior receipt of public special education services is consistent with the IDEA goal of promoting public education. A school district must be given an opportunity to implement an appropriate program itself before it is required to fund a private school alternative. And that opportunity is made meaningful only if a program is given a chance to work in practice, while a student attends public school.

Creating a successful IEP for a student with a disability is an evolving process. Everyone, including the hearing officers and courts asked to adjudicate disputes regarding the efficacy of the placement, benefits from the opportunity to assess the placement in practice, rather than on paper. And common sense dictates that if IEPs are given time and opportunity to work (and adjusted, if necessary), disputes over reimbursement between parents and school districts will be reduced. *See Lunn v. Weast*, 2006 WL 1554895, at *7 (D. Md. May 31, 2006) ("The intent is that prior to placing a child in private school, parents must give the public school system an opportunity to provide a FAPE to the child and, where the parent disagrees with the type or level of services provided, to revisit the plan and make adaptations where necessary.").

Compliance with the "previously received" provision is not onerous and would require public school placement for only the relatively short period of time necessary to assess the adequacy of the plan in prac-

tice.[7] As this Court has concluded, when the preferred public school placement can be resolved within a relatively brief period of time, a short delay in achieving an appropriate IEP in the public setting is both tolerable and preferable to private school tuition reimbursement. *Cf. Burlington*, 471 U.S. at 370 (stating that "[i]f the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which" ordering a public school to develop a new IEP would not be preferable to placement in private school).

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[7] While the statute provides only that the parents must act "reasonably" and does not set forth an express time limit for how long a student must have been enrolled to qualify for tuition reimbursement, other sections of the statute and its implementing regulations provide textual guidelines to aid lower courts in explicating those parameters. *See, e.g.*, 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb) (parents must give public agency 10 days' written notice that they are rejecting the proposed placement and "to enroll their child in a private school at public expense"); 34 C.F.R. § 300.508(e) (if parents bring a due process claim against the school district requesting reimbursement, the LEA must respond within 10 days of receipt of the complaint); 20 U.S.C. § 1415(f)(1)(B)(i)) (after a complaint is filed, a resolution meeting between the parents and members of the students' IEP team must be held within 15 days); *id.* § 1415(f)(1)(B)(ii) (LEA must resolve complaint within 30 days of receipt); 34 C.F.R. §§ 300.510(c), 300.515(a) (if complaint is not resolved, the due process timeline begins and a decision must be reached within the ensuing 45 days). Should a dispute arise over this issue in any given case, the lower courts may look to these timing and procedural provisions to help them determine whether a student has a legitimate claim that he or she has "previously received" special education services.

Moreover, Congress provided several statutory mechanisms through which parents can attempt to resolve any concerns about the program offered by the public school short of the drastic step of removing their child from the public school system before it has had a chance to provide services. The statute guarantees parents "an opportunity . . . to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of [FAPE] to such child." 20 U.S.C. § 1415(b)(6). It then provides for a speedy evaluation of their claim – including a right to a preliminary meeting with the school district within 15 days of receiving notice of the parents' complaint, and a due process hearing before a neutral hearing officer within 30 days. *See id.* § 1415(f)(1)(B)(i)(I); *id.* § 1415(f)(1)(B)(ii); *see also id.* § 1415(c)(2)(B)(i)(I) (requiring a response from the local educational agency to the parents' complaint within 10 days); *id.* § 1415(e)(2)(A)(ii) (mandating that the dispute resolution procedures not be used "to deny or delay a parent's right to a due process hearing").[8]

For all of these reasons, compliance with the "previously received" requirement of § 1412(a)(10)(C)(ii) does not leave parents without options when they believe a proposed placement is inappropriate for their child. Far from leading to absurd results as the Court of Appeals concluded, *see Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1087 (9th Cir. 2008), section 1412(a)(10) represents a rea-

[8] Before such a formal "due process hearing" takes place, IDEA also provides parents with a voluntary mediation option that is funded by the state. 20 U.S.C. § 1415(e)(1).

sonable, holistic approach to the provision of special education services in private schools under IDEA, and the "previously received" provision merely ensures that school districts are first given an opportunity to provide those services themselves.[9]

D. The Ninth Circuit's Alternative Interpretation Would Lead To Absurd Results That Conflict With Values Firmly Embedded In IDEA.

The court below rejected the plain import of the "previously received" provision, holding that § 1412 (a)(10)(C)(ii) governs only those tuition reimbursement claims made by the sub-group of students who have "previously received special education." *See Forest Grove*, 523 F.3d at 1087; *see also* Resp.'s Br. in Opp'n at 13. Claims for reimbursement from all other students, the court concluded, are covered by a different section of the statute, the general remedial provision authorizing the award of "appropriate relief" under equitable principles, *see* 20 U.S.C. § 1415(i)(2)(C). That tortured interpretation is not only inconsistent with the text of the "previously re-

[9] Respondent argues that the school district's interpretation leads to absurd results because it would allow students to be denied special education in a public school and then denied reimbursement under § 1412. *See* Resp.'s Br. in Opp'n at 26. That argument misunderstands the statutory structure of IDEA. If a child is determined ineligible for special education services in a public school, the parents' recourse is to challenge that decision; and, as described above, the statute provides many procedural safeguards to assure an evaluation of their claim within weeks. In this case, Respondent's mother agreed with the initial ineligibility determination. *Forest Grove*, 523 F.3d at 1081.

ceived" provision, but also would badly undermine the purpose of Congress's 1997 amendments.

1. As an initial matter, Respondent's construction violates one of this Court's primary interpretive rules: that meaningful effect must be given, where possible, "to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *see FCC v. NextWave Pers. Comms., Inc.*, 537 U.S. 293, 307 (2003) (rejecting statutory interpretation that not only "distort[ed] the text of the provision" but "render[ed] the provision superfluous"). If Respondent's understanding of the statute is correct, then the "previously received" language in § 1412 is meaningless – a result that must be avoided whenever possible.

A similar and familiar maxim is that "when Congress alters the words of a statute, it must intend to change the statute's meaning." *United States v. Wilson*, 503 U.S. 329, 336 (1992). As even the Court of Appeals acknowledged, however, *see Forest Grove*, 523 F.3d at 1087, under Respondent's interpretation, a student unilaterally placed in private school without previously receiving public education services would be treated no differently after the 1997 amendments than before – rendering meaningless the more recent directive. Congress's later mandate on tuition reimbursement should take precedence over its earlier authorization of general equitable relief.

Indeed, the "previously received" provision is not only more recent than § 1415's remedial clause, but also more specific. Only the "previously received" provision specifically and explicitly addresses private

school tuition reimbursement. In fact, it is introduced by a heading that reads "Reimbursement for private school placement." 20 U.S.C. § 1412(a)(10)(C)(ii). By contrast, the clause Respondent relies on is the grant of general remedial power to the district court in IDEA cases. *Id.* § 1415(i)(2)(C)(iii) (the district court "shall grant such relief as the court determines is appropriate"). As this Court recently explained, "normally the specific governs the general." *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2348 (2007); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). It follows that here, § 1412's more recent directive, specific to private tuition reimbursement, trumps § 1415's earlier and broader remedial provision.

2. Finally, Respondent's interpretation of the "previously received" provision would have precisely the opposite effect from the one intended by Congress. As established above, the cornerstone of IDEA is providing appropriate *public* education for children with disabilities. *Schaffer ex rel. Schaffer v. Weast*, -- F.3d --, 2009 WL 205049 (4th Cir. 2009) ("[T]he IDEA's purpose [is to] include[e] disabled students in the *public* education system as quickly as possible.") (emphasis added). Respondent's interpretation of the "previously received" provision defeats this purpose in two important ways.

First, on Respondent's reading, because § 1412(a)(10)(C)(ii) of IDEA governs claims *only* from those students who have previously received public education, *only* those students are subject to the

other restrictions that accompany that section. *See* 20 U.S.C. § 1412(a)(10)(C)(iii). But that would allow parents who have never attempted to address their child's special education needs in public schools to bypass the specific restrictions on reimbursement in § 1412(a)(10)(C), while imposing those restrictions on parents who have given their public school districts a meaningful opportunity to meet their children's needs. Given the objectives of IDEA, Congress could not have intended that counterproductive result.

Second, as shown in the next part, adopting Respondent's interpretation would significantly increase the costs to school districts for private school tuition reimbursement. The 1997 IDEA amendments, however, were specifically designed to have the opposite effect. *See* 143 Cong. Rec. H2536 (daily ed. May 13, 1997) (statement of Rep. Michael Castle) ("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."). The court below erred in rejecting the plain meaning of the "previously received" provision in favor of an atextual reading that is manifestly inconsistent with this congressional purpose.

II. TUITION REIMBURSEMENT IMPOSES HIGH COSTS ON SCHOOL DISTRICTS AND DIVERTS RESOURCES AWAY FROM SPECIAL EDUCATION IN PUBLIC SCHOOLS.

Public schools have diligently undertaken the great responsibilities with which they have been entrusted by IDEA. For decades, they have endeav-

ored to fulfill their statutory mandate to provide FAPE to students with disabilities.

Most public school systems, however, must operate within significant budget constraints. IDEA imposes great costs on these school districts, and private school tuition reimbursement claims by students who have never been "previously enrolled" in public school special education programs would dramatically increase these already-high and often unpredictable costs. Such claims divert resources from their intended and best use: providing IDEA services to public school students who need and want to receive them.

A. Tuition Reimbursement Costs To Individual School Districts Are Already High And Would Only Increase If Respondent's Interpretation Is Adopted.

In one recent school year, public schools spent over 20% of their general operating budgets on special education students. Thomas Parrish et al., Center for Special Education Finance, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* 22 (2004).[10] A significant portion of these costs is at-

[10] The total spent to educate all special education students (both pre-school and school-aged) was over $78 billion. Parrish, *supra*, at 22. Of this, schools spent approximately $50 billion on special education services, $27.2 billion on regular education services for students with disabilities, and $1 billion on other special needs programs for students with disabilities. *Id.* Approximately $36 billion of the $50 billion spent on special edu-

tributable to expenditures for services outside the public schools, including tuition reimbursement. During that same school year, for example, $5.3 billion of the $36 billion spent on special education services for school-aged students funded "students placed in non-public school programs or programs operated by public agencies or institutions other than the public school district . . . includ[ing] tuition" and other expenses. Chambers, *supra*, at 10.

Even more striking is the contrast between the costs associated with public and private special education programs. The average expenditure per school-aged student in public school special education programs was $5,709, while the average special education expenditure per school-aged student in programs operated outside the public schools was $26,440 – nearly five times as much. *See id.* at 12; *see also* Boston Pub. Sch. Tuition Survey (average fiscal year 2007 per-pupil expenditure on special education in public schools was approximately $13,000, while the average per-pupil expenditure on private special education was $59,553).[11]

While the financial impact of private school tuition reimbursement is overwhelming for public school districts in the aggregate, the costs to individual districts of funding special education in private school is even more dramatic. For example, since the 2004 school year, New York City has spent

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cation services was spent on school-aged children. Chambers, *supra*, at 10.

[11] All school district tuition surveys cited herein are on file with the Council of the Great City Schools.

over $237 million in tuition reimbursement and over $7 million in legal fees. New York City Dep't of Education Tuition Survey (2009). A staggering 4,368 (78% percent) of those cases involved unilateral placements and in over half the child had not previously received special education services from the public school system. *Id.* Costs are similarly high in other urban districts. *See, e.g.*, Los Angeles Unified Sch. Dist. Tuition Survey (total tuition and related services expenditures of over $3 million in 2006-2007, and $2.8 million in 2007-2008).

School district data shows that tuition reimbursement costs are even higher in cases involving students who have been unilaterally placed in private schools by their parents. In New York City, "[t]he cost of claims for unilateral placements in private schools is estimated at over forty million dollars per year." New York City Dep't of Educ. Comments on Regulations for the IDEA, 160 PLI/NY 253, 256 (Sept. 2, 2005) ("New York Comments"); *see also* New York City Dep't of Education Tuition Survey (2009) (total spent on unilateral placement cases was over $53 million in 2005-2006, over $57 million in 2006-2007, and over $85 million for 2007-2008). In the last three academic years, the average settlement per-pupil paid by New York City in unilateral placement cases was $13,716.78 (2005-2006), $23,018 (2006-2007), and $22,534.78 (2007-2008). *Id.*; *see also* New York City Dep't of Education Tuition Survey (2007). In Boston, the tuition reimbursement settlement in such cases was similarly high – 38 cases totaling $707,183.48 (with an average of $18,600 each) in the 2006-2007 school year alone. *See* Boston Pub. Schs. Tuition Survey. *See*

also Los Angeles Unified Sch. Dist. Tuition Survey (average claim for tuition reimbursement and services was $17,774 in 2006-2007 and $16,294 in 2007-2008).

These costs will only continue to rise as the cost of private school tuition steadily increases. Costs will rise even more dramatically if the Court of Appeals' interpretation is adopted, and as the number of for-profit schools providing special education increases. One such school in New York City that provides various types of therapy to developmentally disabled students "enrolls more than 300 and collects $21,821 per student from the city each year," and more and more schools like this are opening. Alyssa Katz, *The Autism Clause*, N.Y. Mag., Oct. 30, 2006 at 52 (discussing the recent opening of several such schools in New York, including one with annual tuition of $26,500, an autism-focused school with annual tuition of $72,500, and another autism-focused school[12] that charges $84,000 per year). Indeed, a student in one of these schools brought a reimbursement claim for the 2004-2005 school year seeking more than $230,700 in tuition and related services. *See* New York City Dep't of Educ. Tuition

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[12] This school's program has been described as the "gold standard." Katz, *supra*, at 132. Students at this school routinely receive public funding for their tuition, id., despite the fact that IDEA guarantees only an appropriate education, not the best education possible, *see Bd. of Educ. v. Rowley*, 458 U.S. 176, 197 (1982) (IDEA does not require schools to provide a "potential-maximizing education"); *Doe v. Bd. of Educ.*, 9 F.3d 455, 459-60 (6th Cir. 1993) (IDEA requires only that the district provide "the educational equivalent of a serviceable Chevrolet," not a "Cadillac").

Survey (2007). The founder of some of these schools has stated that he fully expects all parents who enroll their children in his schools to sue the City for tuition reimbursement. *See* Katz, supra, at 52.

The New York City model is unique in that over half of its due process hearing requests involve tuition reimbursement for private unilateral placements, *see* New York Comments, *supra*, at 256, and in almost half of those cases (2,184), the child has never attended public school, *see* New York City Dep't of Educ. Tuition Survey (2007) (data from 2005-2006 school year). Yet this model could well become the rule rather than the exception if the Court of Appeals' interpretation becomes the law of the land. Even if school districts could theoretically win many or most such lawsuits by showing that they could have provided FAPE, the administrative, litigation, and potential settlement costs of these cases are staggering.[13]

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[13] As the New York City experience demonstrates, districts will often agree to settle these cases and pay tuition or some portion of it rather than face litigation. In both the 2006-2007 and 2007-2008 academic years, New York City settled approximately 85% of the requests it received for impartial hearings in unilateral placement cases. *See* New York City Dep't of Educ. Tuition Survey (2009). Average settlement costs in those years were $23,018.84 and $22,534.78, respectively. *Id*. These settlements are most often unrelated to the relative merits of any given case. Rather, they reflect the fact that settlement is often preferable to incurring high litigation costs and is often the only option given that the City has very limited special education attorneys to handle the thousands of impartial hearing requests made in unilateral placement cases each year. *Id*. (showing that New York City received approximately 3,688

B. Tuition Reimbursement In Cases Where Parents Never Intended To Use Public Schools Would Further Drain Resources Needed For Public Special Education.

IDEA was intended to provide public special education, not to use taxpayer money to fund private education. *See* Part I.A, *supra*. Nevertheless, many parents ask public school districts to develop an IEP for their child even when they intend from the outset to reject whatever IEP is developed and unilaterally place their child in their preferred private school, requesting reimbursement under IDEA in the hopes of what amounts to a publicly-financed windfall.[14] *See generally* Cindy L. Skaruppa, et al., *Tuition Reimbursement for Parents' Unilateral Placement of Students in Private Institutions: Justified or Not?*, 114 Educ. L. Rep. 353 (1997).

Of course, such bad faith behavior cannot be attributed to all parents seeking reimbursement under

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such requests in 2006-2007 and approximately 4,368 in 2007-2008).

[14] Parents are often prompted to make these requests by those with a financial interest in private-school placements. Some private schools routinely distribute to all prospective parents a folder titled "Reimbursement for Placement Made By Parents in a Private School" that lists "contact information for five lawyers and basic instructions on how to sue the city of New York." Katz, *supra*, at 52. Private education consultants hired by parents to navigate the special education process also often steer their clients to private schools for which reimbursement is then sought. *See generally* Ylan Q. Mui, *For-Hire Advocates Help Parents Traverse System*, Wash. Post, Oct. 5, 2004, at A17.

IDEA. But even the litigated cases reflect the unfortunate reality that parents who try to game the system are commonplace. *See, e.g.*, *M.M. v. Sch. Bd.*, 437 F.3d 1085, 1090-93 (11th Cir. 2006) (parents participated in IEP process but made clear from the outset that they wanted to continue their child's current private school placement and wanted a particular form of therapy the district did not provide, then proceeded to reject the district's IEP – offering a different but established therapy – and to request reimbursement); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 976 (4th Cir. 1990) (parents presented district with a fully formulated plan of services for their autistic son before even requesting an IEP, rejected the district's proposed IEP, and sought reimbursement when the district agreed to fund only part of the requested plan); *Weast v. Schaffer*, 240 F. Supp. 2d 396, 401 (D. Md. 2002) (observing that ALJ had found "that there was a design by the parents to simply obtain funding from [the public school] for a predetermined decision to have the Child attend private school"), *rev'd on other grounds by* 377 F.3d 449 (4th Cir. 2004), *aff'd Schaffer*, 546 U.S. 49 (2005); *Lunn*, 2006 WL 1554895, at *3-4 (parent did not request an IEP until after she had paid a substantial tuition deposit and signed an enrollment contract obligating her to pay over $36,000 even if her child withdrew at any point before or during the school year).

This diversion of public resources toward payment of private school tuition directly impacts educational outcomes for students who receive special education services in public schools. Every dollar spent on tuition reimbursement is a dollar that can-

not be spent to improve public special education programs.[15] *See* Skaruppa, *supra*, at 357 (observing that funds spent on reimbursement in unilateral placement cases "could be more efficiently and effectively used within the public school setting to educate a greater number of students"). It disproportionately impacts students with the greatest need for public services, namely those whose families cannot afford to seek services outside the public school system.[16] This Court acknowledged that socio-economic

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[15] An example from the attorneys' fees context starkly illustrates the positive educational impact of returning previously diverted resources to public school special education programs. When the attorneys' fee cap in IDEA cases was reinstituted in the District of Columbia in fiscal year 2003, public schools saved $4.4 million. 150 Cong. Rec. S5352 (daily ed. May 12, 2004) (statement of Sen. Hutchison). ("Based on those savings, DCPS was able to create 550 new classroom seats at 50 schools during the 2003-2004 school year to serve children with special needs, including children with autism, children who are hearing or vision impaired, mentally retarded, learning disabled or emotionally disabled, and early childhood education students.").

[16] Private school tuition reimbursement is typically sought by parents who are familiar with the intricacies of IDEA and who have the resources to pay private school tuition out-of-pocket while they are seeking reimbursement. *See* Skaruppa, *supra*, at 354 ("Students of low SES [socio-economic status] parents often do not have the same consideration as their higher SES peers because low income parents do not have the available capital to pay for their child's placement, particularly when they are unaware or uncertain of reimbursement."); Mui, *supra*, at A17 (observing that parents "often spend considerable amounts of money" in hiring educational consultants to navigate special education rules and place students in "therapeutic schools," and that the average family income of one educational consulting firm's clients "is about $75,000 per year"); *see also, e.g.*, *M.M.*, 437 F.3d at 1090 n.3 (noting that student's mother

reality in *Burlington*, noting that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so *at their own financial risk*." 471 U.S. at 373-74 (emphasis added). Adoption of the Court of Appeals' interpretation would only exacerbate this problem, increasing the number of reimbursement cases and thereby diverting still more public resources to private schools – all to the detriment of public school programs, the students and parents who lack the resources to pay for private school, and those who give the public school programs a good-faith chance to succeed.

C. Tuition Reimbursement For Expensive Residential Facilities For Troubled Teens Would Exacerbate The Financial Hardship On Public School Districts And Is Unmoored From The Purpose Of IDEA.

Finally, as the facts of this case suggest, the financial strains imposed on school districts by Respondent's reading of the statute are likely to worsen, not improve, in the future. That result cannot be reconciled with Congress's clear intent to ameliorate the financial burdens imposed by private-school reimbursements under IDEA.

Respondent T.A. was privately diagnosed with attention deficit hyperactivity disorder, depression, math disorder, and substance abuse. *See Forest*

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taught at the private school she attended); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 152 (1st Cir. 2004) (student's mother was a special education teacher).

Grove, 523 F.3d at 1082. To address all of these problems, his parents enrolled him in Mount Bachelor Academy, an expensive residential private school which describes itself as "designed for children who may have academic, behavioral, emotional, or motivational problems." *Id*.

Schools like Mount Bachelor are the next generation of special education for "troubled teens." *See generally* David S. Doty, *A Desperate Grab for Free Rehab: Unilateral Placements Under IDEA For Students With Drug and Alcohol Addictions*, 2004 B.Y.U. Educ. & L.J. 249 (2004). Because many students who use illicit drugs also show emotional disturbances and deficits in school performance, it is common for parents to seek help from an institution specifically designed to address those multi-faceted needs. *See* Los Angeles Unified Sch. Dist. Tuition Survey (noting over 80% of requests for residential programs in Los Angeles include a substance abuse component); Chicago Public Sch. Tuition Survey (citing an enormous increase in court and agency student placement in drug rehabilitative programs due to changes in state law, increasing their expenses by over $1 million in fiscal year 2008).

The problem for IDEA reimbursement purposes, however, lies in determining when placements in such residential schools is needed for educational purposes, and when it is necessitated by medical or social problems. A student with an "emotional disturbance" qualifies as a child with a disability under IDEA. 34 C.F.R. § 300.8(a)(1). But when a child's "emotional disturbance" is accompanied by a drug addiction or other troubled behavior, courts across

the country have struggled with disentangling the two.[17] *Compare N.C. ex rel M.C. v. Bedford Cent. Sch. Dist.*, 473 F. Supp. 2d 532, 544 (S.D.N.Y. 2007) ("a student is not to be classified as emotionally disturbed merely because of bad behavior"); *Ashland Sch. Dist. v. Parents of Student R.J.*, 585 F. Supp. 2d 1208, 1231 (D. Or. 2008) ("The IDEA does not require schools to remove every impediment to learning of any kind and from any cause."); *with Indep. Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769, 776-77 (8th Cir. 2001) ("[A]t least in Congress's judgment, social and emotional problems are not ipso facto separable from the learning process."); *id.* at 775 ("There is a grey area between normal, voluntary conduct and involuntary physiological response and that area is where Congress has chosen to locate behavioral problems [including drug and alcohol abuse] such as [the ones at issue here].").

If school districts are forced to bear the costs of private education offered at expensive residential facilities for troubled youths, the already stretched public dollars for special education will start to disappear. *See, e.g.*, Kathy McGabe, *Special-Ed Costs Taxing Town Budgets*, The Boston Globe, April 10, 2008; Alison Leigh Cowan, *Amid Affluence, a Struggle Over Special Education*, N.Y. Times, April 24, 2005. IDEA was not meant "to create a federal claim

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[17] Eligibility under IDEA requires not only qualification within one of the thirteen disability categories, but also a need for special education and related services. 34 C.F.R. § 300.8(a)(2)(i). Thus, a need for drug abuse counseling, psychological or psychiatric services does not create eligibility in and of itself unless the student also needs special education services.

for every activity or type of conduct which may impede an individual's ability to take advantage of the educational opportunities." *Armstrong ex rel Steffensen v. Alicante Sch.*, 44 F. Supp. 2d 1087, 1089 (E.D. Cal. 1999). At some point, this Court must draw a line and prevent spending under IDEA from becoming completely detached from the purpose of the statute – namely, the provision of a free *public* education.

III. UNDER THE SPENDING CLAUSE, CONGRESS COULD NOT HAVE IMPOSED SUCH A BURDEN WITHOUT PROVIDING CLEAR NOTICE.

As explained in Part I, the plain language of the Act compels the conclusion that students who have never received services from public schools are not eligible for reimbursement for private school tuition. *See also* Pet. Br. 24-34. But even if the Court of Appeals were correct that the statutory language is somehow ambiguous, that conclusion would only confirm the error of its ultimate holding. The Spending Clause independently mandates reversal because the statute provides no clear notice that Congress intended to impose on the states the high costs attendant to the Court of Appeals' interpretation.

This Court repeatedly has held that when Congress enacts legislation placing conditions on the receipt of federal funding pursuant to its Spending Clause power, as it has done here, the intent to impose such conditions must be made unambiguously clear in the text of the statute itself. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condi-

tion on the grant of federal moneys, it must do so unambiguously."); *see also Rowley*, 458 U.S. at 190 n.11 & 204 n.26. The Court emphasized in *Pennhurst* that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." 451 U.S. at 17. Consistent with basic contract law principles, therefore, the terms of the bargain that Congress asks the States to accept when it imposes conditions on federal funding must be unambiguous – if they are not, the States cannot make a knowing, fully informed decision whether to accept the deal they have been offered. *See id.*

The Court made clear in *Arlington Central* that any inquiry into whether IDEA is sufficiently clear as to the conditions placed on federal funding under it must be undertaken "from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." 126 S. Ct. 2455, 2459 (2006). Here, the crucial question is "whether such a state official would clearly understand that one of the obligations of the Act" is to reimburse private school tuition for students who never previously received public school special education and related services, despite the clear statutory language to the contrary. *Id.* The answer is plainly no.

As demonstrated in Part I, the plain language of the statute clearly states that reimbursement is *unavailable* in such circumstances. Even if one refused to accept this plain language and adopted the Court

of Appeals' holding, the "previously received" provision added to IDEA as part of the 1997 Amendments would at least render the reimbursement requirements ambiguous. *See Frank G. v. Bd. of Educ.*, 459 F.3d 356, 370 (2d Cir. 2006) (turning to canons of statutory construction because "the terms of" IDEA "are ambiguous"). But ambiguity may not be read against the recipient of federal funds under the Spending Clause. As discussed above, the costs associated with private school tuition reimbursement are high, *see* Part II, *supra*, and the 1997 Amendments were designed to alleviate the resulting financial pressure felt by school districts. State officials must be afforded clear notice of the full scope of their tuition reimbursement obligations when determining whether to accept conditional federal funding under IDEA. These state officials – aware that Congress intended to lower their costs in 1997 – would be impermissibly blindsided if the opposite reality resulted and their obligations under IDEA instead increased.[18]

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[18] The magnitude of the costs that would be imposed on school districts under Respondent's interpretation far exceeds that of most cases involving the Spending Clause; the costs potentially imposed under the expert witness fees provision at issue in *Arlington Central*, for example, pale by comparison. While every public school district wants to continue to serve all students, including those with disabilities, costs eventually may become prohibitive. Notably, although Congress originally promised to fund 40% of states' costs of compliance with IDEA, 20 U.S.C. § 1411(a)(2); S. Rep. No. 94-168, at 4, Congress now funds only about 18% of total special education spending. Richard N. Apling, Congressional Research Service, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends* 9 tbl. 5 (Feb. 2005). In this context, where districts al-

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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ready bear the brunt of funding compliance with IDEA, the high additional – and unpredictable – costs imposed by Respondent's interpretation would weigh heavily in the calculus of whether to accept federal funds.

APPENDIX

Member school districts of the Council of the Great City Schools include Albuquerque Public Schools, Anchorage School District, Atlanta Public Schools, Austin Independent School District, Baltimore City Public Schools, Birmingham City Schools, Boston Public Schools, Broward County Public Schools, Buffalo City School District, Caddo Parish School District, Charleston County Public Schools, Charlotte-Mecklenburg Schools, Chicago Public Schools, Christina School District, Cincinnati Public Schools, Clark County School District, Cleveland Municipal School District, Columbus Public Schools, Dallas Independent School District, Dayton Public Schools, Denver Public Schools, Des Moines Independent Community School District, Detroit Public Schools, District of Columbia Public Schools, Duval County Public Schools, East Baton Rouge Parish School District, Fort Worth Independent School District, Fresno Unified School District, Guilford County Schools, Hillsborough County School District, Houston Independent School District, Indianapolis Public Schools, Jackson Public School District, Jefferson County Public Schools, Kansas City School District, Little Rock School District, Long Beach Unified School District, Los Angeles Unified School District, Memphis City Public Schools, Metropolitan Nashville Public Schools, Miami-Dade County Public Schools, Milwaukee Public Schools, Minneapolis Public Schools, New Orleans Public Schools, New York City Department of Education, Newark Public Schools, Norfolk Public Schools, Oakland Unified School District, Oklahoma City Public Schools, Omaha Public Schools, Orange County Public

Schools, Palm Beach County Schools, Philadelphia Public Schools, Pittsburgh Public Schools, Portland Public Schools, Providence Public Schools, Richmond Public Schools, Rochester City School District, Sacramento City Unified School District, Salt Lake City School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, St. Louis Public Schools, St. Paul Public Schools, Toledo Public Schools, and Wichita Public Schools.