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 *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, as well as colleges and universities, throughout the United States.[1] Included among NEA's members are over

[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended

200,000 teachers and other education employees in the field of special education. Most of NEA's other members are regular education teachers, whose classrooms frequently include children with disabilities and who, under the IDEA, participate in teams developing Individualized Education Programs for such children. Nearly all of NEA's members in K-12 education, therefore, deal on a regular basis with implementation of the statute at issue in this case, the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*.

Since its inception in 1975 as the Education for All Handicapped Children Act, NEA has been a vigorous supporter of the IDEA and of its goal of providing a free appropriate public education in a least restrictive environment for all children with disabilities. NEA has been an integral member of a coalition of education organizations that have consistently worked to reauthorize and improve the IDEA and to attain its full funding by Congress.

NEA firmly and vigorously supports the IDEA's objective of ensuring that every child with a disability that adversely impacts his or her educational performance have access to a free appropriate public education. NEA submits this brief *amicus curiae* in support of the petitioner school district because it believes that the statutory construction adopted by the court below inhibits rather than furthers the attainment of that objective.

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to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The objective of the IDEA is to make available a free appropriate public education to all children with disabilities, and to that end public agencies are required to bear the cost of the services appropriate to each child's needs, notwithstanding the expense. That is as it should be. But it is also essential to the attainment of the IDEA's objectives that the funds provided under this statute not be misused to subsidize a private school education for children whose parents have chosen that option without regard to the availability of a free appropriate education in the public schools.

It is clear that school districts must bear the cost of private school tuition when, because of the nature of a child's disability, an appropriate education is not available through the school district's facilities. At issue here, however, are not tuition reimbursements for children for whom an appropriate education cannot be provided in the public schools, but rather the payment of private school tuition to parents who choose to place their child in a private school without first giving the public school district the opportunity to meet its statutory obligations.

The 1997 amendment to the IDEA reflects Congress' determination to preclude such "unintended and costly consequences" of allowing private school tuition reimbursement as a remedy for IDEA violations. After that amendment, the IDEA simply cannot fairly be read to allow awards of private school tuition, as the court below believed, *whether or not* 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).

In the alternative, if the Court is unwilling to read § 1412(a)(10)(C)(ii) as categorically excluding tuition reimbursements for children who have never received special education services in the public schools, it should nonetheless reverse the judgment below by holding that it is an abuse of discretion to order private school tuition reimbursement when the parents have failed to make a good-faith attempt to work with the school district, before placing their child in a private school, to determine whether a free appropriate public education can be provided for the child in the public schools.

ARGUMENT

1. Congress enacted the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*., in order "to ensure that all children with disabilities have available to them a free appropriate public education . . . ." 20 U.S.C. § 1400(d)(1)(A). In guaranteeing that right to all children with disabilities, Congress made no exception for children whose unique needs require educational services that are particularly costly. *See, e.g*., 34 C.F.R. § 300.104 (residential placements must be provided where necessary at no cost to parents). Especially in the case of children with severe disabilities, the individualized attention and other special services that may be required are expenses that school districts must and should bear, notwithstanding that they may be well in excess of per-pupil expenditures for non-disabled students. And, in those cases in which the school district is unable to meet a student's particular needs in its own facilities, it is clear that the school district must provide that student with a free appropriate public education by paying the child's tuition to receive that education in a specialized private institu-

tion that is capable of providing the services appropriate to the student's needs. *See* 20 U.S.C. § 1412(a)(10)(B).

But precisely because special education is so costly, it is important to the success of the IDEA and of the public schools generally that the funds made available through the IDEA not be misused. It is a fact of life that the resources available to pay for public education in general, and special education in particular, are not unlimited. And, as the Court has previously remarked, "[t]he IDEA obviously does not seek to promote [its] goals at the expense of all other considerations, including fiscal considerations." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 303 (2006). To the extent the funds necessary for providing a free appropriate public education to children with disabilities must be used to subsidize a private school education for children whose parents have chosen that option without regard to the availability of a free appropriate education in the public schools, the ability of the public schools to provide a free appropriate public education to all children with disabilities – while at the same time providing a quality education to their non-disabled students as well – is not furthered but is in fact impaired.

2. It is important to be clear about what is at issue here. As more fully set forth by petitioner, *see* Brief of Petitioner at 8-13, the parents of T.A. withdrew him from public school in mid-year and placed him in a private residential school without raising any issue with school district officials about whether T.A. was eligible for special education services under the IDEA and, if so, whether the public high school he had been attending was able to provide an appropriate educa-

tion for him.[2] Only after their son was enrolled in private school, and after they had retained an attorney, did T.A.'s parents ask the school district to evaluate their son under the IDEA. Upon conducting that evaluation, the school district concluded that the attention-deficit/hyperactivity disorder ("ADHD") with which T.A. had been diagnosed did not render him eligible for special education services under the IDEA because it did not adversely affect his educational performance.[3] The due process hearing officer subsequently disagreed with the school district's evaluation on that point, and on that basis ordered the school district to pay the $5,200 monthly tuition for the private residential school in which T.A.'s parents had placed him.

The premise for the award of private school tuition thus was not that "there [was] no appropriate public education available" in the public schools – as appears to have been assumed at several points during oral argument of this same issue last Term. Transcript of Oral Argument at 14, *Board of Educ. v. Tom*

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[2] While T.A. had been evaluated for learning disabilities two years previously, the school district, with the concurrence of T.A.'s mother, determined that he was not disabled and was not eligible for special education. T.A.'s parents did not appeal or otherwise contest that determination, and no issue of any disability or of a free appropriate education was on the table between them and the school district at the time they unilaterally placed T.A. in a private school.

[3] Not all children within the disability classification "other health impairment" – which includes ADHD – are eligible for special education services under the IDEA. Rather, such children, like those in most of the other disability classifications, are defined as a "child with a disability" only if the impairment "[a]dversely affects [the] child's educational performance." 34 C.F.R. § 300.8(c)(9).

F., 128 S. Ct. 1 (2007) (No. 06-637) ("*Tom F.* Tr."); *see also id.* at 22 (assuming that "the starting premise of any reimbursement claim is that an appropriate public education is not available"). At the time T.A.'s parents withdrew their son from the public schools, they simply had no way of knowing whether or not the school district would be able to provide T.A. with a free appropriate public education – for they had not asked. And indeed, given the large numbers of students with ADHD who receive special education services in the public schools, it is most unlikely that a disability of this nature would have been one for which the school district would have been unable to provide an appropriate education in its own facilities.

The basis for the tuition reimbursement award was, in short, not a finding that the school district could not or would not make a free appropriate public education available to the child, but rather simply a determination that it had failed to do so – in this instance, by erroneously concluding that T.A. was not eligible for IDEA services.

The distinction is significant. Even if, as must be assumed at this juncture, the school district erred in finding T.A. ineligible – or if (as was the case in Tom F.) the Individualized Education Program ("IEP") drafted by the school district was held not to provide for an "appropriate" education – such mistakes could readily be corrected through "the cooperative process that [the IDEA] establishes between parents and schools," *Schaffer v. Weast*, 546 U.S. 49, 53 (2005), if the parents' objective was indeed to obtain for their child an appropriate education in the public schools, rather than to create a record that would permit an award of private school tuition.

Here, for example, there is no reason to believe that – were T.A. still in the public school system – the school district would not have responded to the hearing officer's determination that he was in fact eligible for special education services by convening an IEP team to prepare an Individualized Education Program that would provide him with a free appropriate public education. At all events, the contrary cannot be presumed. *See Schaffer*, 546 U.S. at 62-63 (Stevens, J., concurring) ("[W]e should presume that public school officials are properly performing their difficult responsibilities under this important statute.").

As this Court has held, there will undoubtedly be some "cases where cooperation fails," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993), and under such circumstances an order to reimburse private school tuition might be an appropriate remedy for the school district's failure to provide a free appropriate public education. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985). But that cannot be the case where, as here, the parents withdraw their child from the public schools without giving the IDEA's "cooperative process" an opportunity to work,[4] and then use the school district's error in making the eligibility or IEP determination to seek reimbursement of their private school tuition.

3. It is, we submit, for this reason that Congress, in reauthorizing the IDEA in 1997, amended the statute

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[4] We do not mean to suggest that T.A.'s parents may not have had good reason, in light of their son's drug abuse and behavioral problems, for deciding on short notice and without prior consultation with public school officials to place him in a private residential facility. But these are not "disabilities" within the meaning of the IDEA.

to clarify that, when parents unilaterally place their child in a private school, an order requiring the school district to pay the tuition charged by that school would be an available remedy under the IDEA *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). As Representative Castle explained during the floor debate in the House, the amendment was intended to remedy the "unintended and costly consequences" of school districts being required to pay private school tuition "in cases where lawyers have gamed the system to the detriment of schools and children."[5] 143 Cong. Rec. H2536 (daily ed. May 13, 1997).

Little would be served were we to attempt here to duplicate the statutory interpretation provided by petitioner in its brief. Petitioner's analysis is, we submit, unassailable – particularly when the statutory language is viewed, as under *Arlington Central* it must be, *see* 548 U.S. at 294-96, through the lens of the Spending Clause's "clear notice" requirement.

Even without any recourse to legislative history, it is apparent from the statutory language itself that

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[5] During oral argument of the *Tom F.* case, Justice Scalia offered the following example of what Congress had in mind in attempting to prevent such "gaming the system": "I thought it was simply Congress figured that there are probably a lot of people in New York City . . . who are going to send their kids to private school, no matter what . . . , but what the heck, if we can get $30,000 from the city to pay for it, that's fine. In other words, [a *Burlington* tuition reimbursement order] was meant to be an option for people who wanted to go to the public schools but couldn't go to the public schools because they couldn't get the [appropriate] services there, but it was never meant to be an option for people who had no desire to go to public schools at all anyway . . . ." *Tom F.* Tr. at 11-12.

Congress' purpose in enacting § 1412(a)(10)(C)(ii) was to codify – *but also to limit* – this Court's holding in *Burlington*, by restricting the tuition reimbursement remedy to those cases in which the child had already received special education services in the public schools. Were it otherwise, the clause "who previously received special education and related services under the authority of a public agency" would be wholly superfluous. On the reading adopted by the court below, the IDEA says exactly the same thing – that tuition reimbursement is a permissible remedy in any case of a school district's failure to provide a free appropriate public education – as it would if that clause had been left out. That cannot be the proper construction of Congress' intent. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:06 (7th ed. 2008) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . . .").

And, as petitioner points out, Brief of Petitioner at 23, 40, the Ninth Circuit's interpretation that tuition reimbursement for students not coming within § 1412(a)(10)(C) can be ordered as a remedy under the pre-existing general remedial provisions of 20 U.S.C. § 1415(i)(2)(C) (which this Court construed in *Burlington*) has the perverse result that the limitations that Congress placed on tuition reimbursement in § 1412(a)(10)(C)(iii) simply do not apply – and the court thus has *greater* latitude in making such awards – in the case of children who have not previously received special education in the public schools.

In short, the statutory language of the IDEA cannot fairly be read – as the Ninth Circuit would have it – as authorizing courts to award private school tui-

tion reimbursement *whether or not* 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). Congress' express limitation of the tuition reimbursement remedy to children who had previously received special education services in the public schools serves to exclude from such – often quite costly – reimbursements those parents who are uninterested in an appropriate education in the public schools, whether it can be made available to their child or not.[6]

4. While we thus urge the Court to answer the question presented by holding that § 1412(a)(10)(C)(ii) categorically excludes the reimbursement of private school tuition as a remedy for an IDEA violation in the case of students who have not previously received special education services in the public schools, the

[6] It should not be surprising that Congress chose to pursue that objective through statutory language that, in codifying the *Burlington* holding, excludes those students who have not previously received special education services in the public schools. That the "fit" between that objective and the statutory language Congress selected may be something less than perfect is not evidence of irrationality but simply of the imperfection of what Congress apparently believed to be the best available objective standard to accomplish its purpose. Thus, even if it should be true, as was suggested at oral argument in the *Tom F.* case, that parents intent on sending their child to private school could avoid the tuition reimbursement limitation of § 1412(a)(10)(C)(ii) simply by placing the child in a public school special education program for eleven days, *see Tom F.* Tr. at 7-8, 9-10, 15, the existence of a potential loophole in the congressional scheme in no way overcomes the clear evidence, both from the statutory language and structure and from the legislative history, about what Congress was attempting to accomplish with this amendment.

judgment below should be reversed even if the Court is unwilling to reach that conclusion.

As petitioner observes, even prior to the 1997 IDEA amendments a number of decisions applying *Burlington* had concluded that tuition reimbursement was appropriate only if, prior to placing their child in a private school, the parents had attempted to work with the school district to determine whether a free appropriate public education could be provided in the public schools. *See* Brief of Petitioner at 31-32 n.2 (citing cases). The First Circuit explained that, "[a]lthough few courts precisely defined the level of cooperation necessary, most thought it clear that, at a minimum, 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) (citing cases); *see also* Pet. App. 21a (Rymer, J., dissenting) ("tuition reimbursement for unilateral private placements is available under principles of equity only when FAPE was at issue before the child was withdrawn from public school and the school district had improperly denied a free and appropriate education").

As an alternative ground for reversal of the decision below, this Court could confirm that emerging consensus of the lower courts and hold that – to the extent a court has discretion to award tuition reimbursement to parents whose children have not previously received special education services in the public schools – it is an abuse of that discretion to make such an award when the parents failed to make a good-faith attempt to work with the school district, before placing their child in a private school, to de-

termine whether a free appropriate public education could be provided for their child in the public schools.

Such a resolution, while in our view less faithful to the statutory language Congress adopted in 1997, would preclude tuition awards in at least most "cases where lawyers have gamed the system to the detriment of schools and children," as Rep. Castle explained Congress' purpose in enacting the 1997 amendment. 143 Cong. Rec. H2536 (daily ed. May 13, 1997). But at the same time it would avoid any possibility of the unlikely scenarios cited by the Ninth Circuit as "absurd result[s]" that could occur if § 1412(a)(10)(C)(ii) were read to exclude categorically all children who had not previously received special education services in the public schools. *See* Pet. App. 15a-16a (suggesting that school districts could permanently preclude reimbursement by declining to recognize the student as disabled); *but see* Brief of Petitioner at 38-40 (explaining why such scenarios are unlikely to occur).

Application of this abuse-of-discretion standard would, in this matter, have the same result as the categorical rule that we contend is inherent in § 1412(a)(10)(C)(ii). Because the parents of T.A. made no attempt, prior to placing him in a private school, to work with the school district to determine whether a free appropriate public education could be provided to T.A. in the public schools – and indeed failed even to give the school district notice that they intended to enroll their son in private school – the tuition reimbursement award was an abuse of discretion.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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