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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

I. THE SPENDING CLAUSE CLEAR NOTICE RULE GOVERNS HERE.

The District demonstrated that IDEA does not, as required by the clear notice rule, unambiguously provide that States may be liable for tuition reimbursement awards where, as here, a child is unilaterally placed in private school without having received special education services from the school district. Pet. Br. 16-27. T.A.'s efforts to avoid application of the clear notice rule are unavailing.[1]

First, T.A. suggests that the District forfeited its Spending Clause argument by not raising it below. T.A. Br. 41-42; see also U.S. Br. 32. This issue was fully vetted in the certiorari papers. Opp. 28; Cert. Reply 7-8. As the District noted there, "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (internal quotation marks omitted). The District's claim throughout these proceedings has been that IDEA prohibits private-school tuition reimbursement awards to students like T.A. Pet. App. 11a-18a, 44a. The District may support that claim here by contending that IDEA should be interpreted through the lens of the Spending Clause clear notice rule. Cert. Reply 8 (collecting cases). Neither T.A. nor the government cites any case where this Court refused

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[1] T.A. maintains in a footnote that the District's "failure to sue [his] parents raises a question of Article III standing." Resp. Br. 10 n.1. The government correctly explains why there is no standing problem. U.S. Br. 7 n.1.

to consider a rule of construction because it had not been raised below.

Indeed, T.A.'s forfeiture argument cannot be reconciled with *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006). In *Arlington*, the school district did not advance a Spending Clause argument in the court of appeals, Br. for Appellant, *Murphy* v. *Arlington Cent. Sch. Dist. Bd.*, 2004 WL 3438190 (2d Cir. May 26, 2004); the court of appeals did not consider whether the clear notice rule should apply, *Murphy* v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332 (2d Cir. 2005); and, unlike here, the district did not raise a Spending Clause argument in its petition for certiorari, Pet. for Cert., *Arlington*, 2005 WL 1551323 (U.S. Jun. 27, 2005). The clear notice rule was first invoked in the government's invitation brief supporting certiorari. Br. of U.S. as *Amicus Curiae* at *12, *Arlington*, 2005 WL 3369167 (U.S. Dec. 9, 2005). Like T.A. here, the parents in *Arlington* argued that the school district's Spending Clause theory "was not raised below and thus is forfeited." Br. of Resp. at *16, *Arlington*, 2006 WL 838890 (U.S. Mar. 28, 2006). The parents' argument found no traction in *Arlington*, not even among the dissenters, as the Court proceeded to apply the clear notice rule to the IDEA provision at issue there. T.A. provides no reason to chart a different course in this case.

Second, T.A. maintains that the clear notice rule is inapplicable here because "tuition reimbursement 'does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe.'" Resp. Br. 42 (quoting *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 534 (2007)); see also U.S. Br. 32-33 (same). This is so, T.A. continues, because tuition reimbursement is

already "inherent in IDEA's core obligation to provide a *free* appropriate education." Resp. Br. 42. T.A.'s contention misreads *Winkelman* and misunderstands the nature of a tuition reimbursement obligation.

Winkelman addressed whether IDEA granted parents an independently enforceable right to seek a free appropriate public education ("FAPE") for their children—and thus to proceed in court unrepresented by counsel. 550 U.S. at 519, 521-522. The Court held that the Spending Clause did not govern that interpretive dispute because "recognizing that some rights repose in both * * * parent[s] and * * * child[ren]" would not "expand[ ]" their "basic measure of monetary recovery." *Id*. at 534.

Here, by contrast, the "basic measure of monetary recovery" *would* be expanded by interpreting IDEA to allow school districts to be held liable for tuition reimbursement to students who are unilaterally placed in private school without first having received special education services from the district. See Council of the Great City Schools ("CGCS") Br. 21-33 (describing costs of tuition reimbursement for unilateral private school placements); City of New York Br. 2-4 (same); National School Boards Association ("NSBA") Br. 23-25 (describing how tuition reimbursement for students like T.A. undermines school districts' ability to accurately budget for and provide special education services). It is nonsensical for T.A. to suggest that private school tuition, which ordinarily pays for far more services than required by FAPE, is the equivalent of FAPE. See *Doe ex rel. Doe* v. *Bd. of Educ.*, 9 F.3d 455, 459-460 (6th Cir. 1992) (private school services may more closely resemble "a Cadillac" than the "educational equivalent of a Chevrolet," which is all a public school is obligated to provide under IDEA).

This case illustrates the point, as the hearing officer ordered the District to reimburse T.A.'s parents for the "costs incurred in sending T.A. to [Mount Bachelor Academy] * * * includ[ing] the initial application and interview fees; linen fee; monthly tuition charges; and 'alumni services' fees." Pet. App. 158a. The District's potential liability for those costs—including a $5200 per month tuition charge, a $1500 interview fee, and a $5200 alumni services fee, *id.* at 153a-154a—greatly outweighs the cost of providing a FAPE in a public school. See CGCS Br. 23 ("average expenditure per school-aged student in public school special education programs was $5,079, 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"). Accordingly, as in *Arlington*, the Spending Clause requires inquiry into whether IDEA "furnishes clear notice regarding the liability at issue in this case." 548 U.S. at 296.

Third, T.A. incorrectly contends that the Spending Clause does not apply because "the remedy of reimbursement is not damages." Resp. Br. 42. *Arlington* asks whether "IDEA furnishes clear notice regarding the liability at issue." 548 U.S. at 296. It does not matter under the Spending Clause whether that liability consists of damages or is equitable in nature. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992) (clear notice rule applies even if monetary remedy is characterized as "equitable relief," given that such relief will "require state entities to pay monetary awards out of their treasuries").

II. IDEA DOES NOT PROVIDE CLEAR NOTICE OF A TUITION REIMBURSEMENT OBLIGATION TO STUDENTS LIKE T.A.

A. The 1997 Amendments Unambiguously Preclude Tuition Reimbursement To Students Like T.A.

1. The District demonstrated that, as amended in 1997, IDEA unambiguously precludes tuition reimbursement for students unilaterally placed in private school without first having received special education services from the school district. Pet. Br. 19-27. T.A. incorrectly asserts (Br. 17) that the District's conclusion rests exclusively on § 1412(a)(10)(C)(ii). To the contrary, the District's interpretation rests on the text and structure of IDEA as a whole. T.A. and the government do not even address, much less rebut, the District's specific arguments.

T.A. and the government repeatedly speak of the "authority" provided by 20 U.S.C. § 1415(i)(2)(B)(iii) (2000 & Supp. II 2003), *currently codified at* 20 U.S.C. § 1415(i)(2)(C)(iii), to grant tuition reimbursement to students like T.A.[2] In so doing, however, they fail to directly confront the fact that § 1415(i)(2)(B)(iii) grants remedial authority only to courts, while § 1412(a)(10)(C)(ii) grants authority—specifically, the authority to award tuition reimbursement where a student is unilaterally placed in private school—to courts *and* hearing officers. Pet. Br. 24-25. T.A. and the government nowhere explain how § 1415(i)(2)(B)(iii) can properly be interpreted to grant hearing officers *any* authority, let alone the authority to award tuition

[2] Unless otherwise noted, all statutory citations are to the 2000 edition and 2003 supplement of the United States Code. *See* Pet. Br. 3 n.1.

reimbursement. That the reimbursement in this case was awarded by the hearing officer, not the district court, makes T.A.'s and the government's silence all the more significant. Pet. App. 6a, 38a-39a, 158a.

Likewise, neither T.A. nor the government address the District's showing that the headings Congress used in § 1412(a)(10)—"PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY" in § 1412(a)(10)(C), and "REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT" in § 1412(a)(10)(C)(ii)—manifest an intention to comprehensively address in those provisions the States' tuition reimbursement obligations for children unilaterally placed in private school. Pet. Br. 24. T.A. elsewhere argues that the headings in § 1412(a)(10) provide a clear indication of congressional intent. Resp. Br. 17. Yet, nowhere does he or the government give any reason why Congress, having deployed the headings it did in § 1412(a)(10)(C), would have intended courts or hearing officers to make tuition reimbursement awards under any other provision.

Finally, T.A. and the government do not confront the District's argument that Congress's failure to provide any standards to guide discretion in awarding tuition reimbursement for children who have not previously received special education services from a public agency—the way it did for children who have received such services, see 20 U.S.C. § 1412(a)(10)(C)(iii)—reveals Congress's intent to foreclose reimbursement in that situation. Pet. Br. 23 (citing *Arlington*, 548 U.S. at 298). Were there a plausible response to that argument, T.A. and the government would have articulated it.

2. Rather than address the District's analysis of IDEA's text and structure, T.A. and the government

myopically focus on § 1412(a)(10)(C)(i). Resp. Br. 17-19; U.S. Br. 16-17. They contend that this provision creates a "safe harbor" for tuition reimbursement where the district provides a FAPE. That "safe harbor," T.A. continues, gives rise to a "logically equivalent contrapositive" that Congress intended to authorize reimbursement in all other cases. Resp. Br. 17-19; see also U.S. Br. 16-17. This interpretation of § 1412(a)(10)(C)(i) fundamentally misreads the statute.

As an initial matter, T.A.'s interpretation is logically flawed. T.A. reasons as follows: subsection (C)(i) states that if the district provides a FAPE, it has no tuition reimbursement obligation; therefore, if the district does not provide a FAPE, it has a tuition reimbursement obligation. T.A.'s syllogism, "if *A* then *B*, so if not *A*, then not *B*," rests on a basic "fallacy of * * * logic." *United States* v. *Newsome*, 439 F.3d 181, 186 (3d Cir. 2006). The contrapositive actually is "if not B, then not A"—in this context, if a district pays for tuition reimbursement, then it did not provide a FAPE. The contrapositive merely confirms that the denial of a FAPE is a necessary condition for reimbursement, without speaking to whether there are any others.

That aside, the "general rule" governing a district's obligations to disabled children in private school is established not by § 1412(a)(10)(C)(i), but by § 1412(a)(10)(A). Section 1412(a)(10)(A) requires States to allocate to disabled children "enrolled by their parents in private * * * schools" a proportionate share of the federal funds the State receives under IDEA. 20 U.S.C. § 1412(a)(10)(A)(i)(I). The provision does not require a State to use its *own* funds to "underwrite for private-school children roughly the same on-site special education services that [they]

provide[ ] for public-school children." Br. of U.S. as *Amicus Curiae* at *9-10, *K.R.* v. *Anderson Cmty. Sch. Corp.*, 1997 WL 3356175 (U.S. Jun. 4, 1997); see also 34 C.F.R. § 300.453 (1999); U.S. Conf. of Mayors Br. 7-8; CGCS Br. 9. This distinction drawn by § 1412(a)(10)(A) between the State's own funds and the federal funds received under IDEA is significant, as federal funds cover only about twenty percent of IDEA's total costs. CGCS Br. 5-7.[3]

Congress carved only two exceptions to the general rule that States need only devote to disabled students in private school a proportionate share of the federal funds received under IDEA. First, § 1412(a)(10)(B) requires States to pay the tuition of students referred by a public agency to a private school. 20 U.S.C. § 1412(a)(10)(B). Second, § 1412(a)(10)(C)(ii) permits a tuition reimbursement award to parents of a child "who previously received special education and related services" from a district, when the district did not make available a FAPE "in a timely manner" prior to student's enrollment in private school. *Id.* § 1412(a)(10)(C)(ii). Subsection (C)(i) carves no further exception to the general rule established by § 1412(a)(10)(A); to the contrary, it expressly limits a district's financial obligations "[s]ubject to sub-paragraph [1412(a)(10)](A)." *Id.* § 1412(a)(10)(C)(i).

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[3] Contrary to the "general rule" argument it advances here, U.S. Br. 11 (contending "'all children with disabilities'—regardless of whether they are enrolled in public or private school—enjoy the right to a [FAPE]"), the United States previously advanced the opposite view: "[T]he IDEA gives school districts no regulatory authority over private schools, *nor does it require school districts to provide a free appropriate education to children enrolled in private or home schools*." Br. of U.S. as *Amicus Curiae* at *20, *Fitzgerald* v. *Camdenton R-III Sch. Dist.*, 2005 WL 5627721 (8th Cir. Oct. 3, 2005) (citing § 1412(a)(10)(C)(i)) (emphasis added).

Moreover, T.A.'s and the government's reliance on § 1412(a)(10)(C)(i) to create a general reimbursement obligation is "at odds with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. ___, 2009 WL 901513, at *8 (Apr. 6, 2009) (internal quotation marks and citation omitted). According to T.A., § 1412(a)(10)(C)(i) makes "payment of private school tuition * * * available * * * in all cases except where the school district makes a FAPE available to the child with a disability." Resp. Br. 21. Such a reading would render subsection (C)(ii) entirely superfluous, for it "would add nothing" to what subsection (C)(i) already provides. *Corley*, 2009 WL 901513, at *8.

Finally, T.A. argues that the District's reading of IDEA conflicts with the principle that only clear congressional intent can limit a court's equitable powers. Resp. Br. 27-29. That principle, whatever its validity in other circumstances, has no application to a Spending Clause statute, where the rule is that courts may impose only those obligations clearly articulated in the statutory text. Were matters otherwise, *Arlington* was wrongly decided, for § 1415(i)(2)(B)(iii) alone would have allowed courts to require school districts to reimburse prevailing parents for their expert fees, irrespective of whether § 1415(i)(3)(B) permitted the same relief.

In any event, § 1415(i)(2)(B)(iii) allows a court the discretion to "grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). The range of "appropriate" relief available under that provision depends not only on traditional notions of equity, but also on other provisions Congress enacted

in IDEA. Here, regardless of whether the clear notice rule applies, the 1997 Amendments plainly provide that tuition reimbursement may not be awarded where students are unilaterally placed in private school without first having received special education services from a public agency. Pet. Br. 19-27. Such reimbursement, therefore, cannot be "appropriate" relief under § 1415(i)(2)(B)(iii).

B. At Most, IDEA Fails To Impose Any Unambiguous Tuition Reimbursement Obligation Under These Circumstances.

Even if the 1997 Amendments did not clearly preclude tuition reimbursement in these circumstances, T.A. and the government fail to show that IDEA unambiguously imposes such an obligation. See Pet. Br. 16-19, 27-28. T.A. and the government studiously avoid the text of § 1415(i)(2)(B)(iii) in arguing that the provision authorizes hearing officers and courts to award reimbursement. Rather, as noted above, they rely on § 1412(a)(10)(C)(i) to contend that IDEA precludes reimbursement only when a district makes a FAPE available. Resp. Br. 17-23; U.S. Br. 17.

Even putting aside the above-noted flaws with T.A.'s reading of subsection (C)(i), the provision fails to provide the unambiguous statement required by the Spending Clause. The Spending Clause clear notice rule, articulated most famously in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), requires the same degree of textual specificity as the plain statement rule set forth a decade later in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). See *id.* at 470 ("The *Pennhurst* rule looks much like the plain statement rule we apply today."). The *Gregory* rule, in turn, requires a "clear statement of what the rule *includes*, not a clear statement of what it *excludes*."

Raygor v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 546 (2002).

It is beyond dispute that while subsection (C)(i) *excludes* a reimbursement obligation under some circumstances, neither it nor any other IDEA provision expressly *includes* a reimbursement obligation for students like T.A. Section 1412(a)(10)(B) speaks to children referred to private school by a district, and states that the district shall pay their tuition. Section 1412(a)(10)(C)(i) addresses children unilaterally placed in private school who were provided a FAPE by a district, and states that the district need not pay their tuition. Sections 1412(a)(10)(C)(ii)-(iv) address children unilaterally placed in private school, who were denied a FAPE by a district, and who previously received special education services from the district, and states that the district may be required to pay their tuition.

No provision specifically addresses children unilaterally placed in private school, who were denied a FAPE by a district, but who did not previously receive special education services from the district. The most that can be said, then, is that IDEA is ambiguous as to the availability of reimbursement in those circumstances. Indeed, that is precisely what the Second and Ninth Circuits said about IDEA—although they then failed to conclude, as the Spending Clause requires, that no reimbursement obligation may be imposed. Pet. App. 14a-15a; *Frank G.* v. *Bd. of Educ.*, 459 F.3d 356, 370 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007).

C. *Burlington* and *Carter* Do Not Provide Clear Notice.

The District demonstrated that *School Committee of the Town of Burlington* v. *Department of*

Education, 471 U.S. 359 (1985), and *Florence County School District Four* v. *Carter*, 510 U.S. 7 (1993), do not provide clear notice of any tuition reimbursement obligation for unilaterally placed children who did not previously receive special education services from the district. Pet. Br. 30-33. *Burlington* interpreted § 1415(i)(2)(B)(iii), which directs "the court" to "grant such relief as [it] determines is appropriate," to permit tuition reimbursement awards for children unilaterally placed in private school. Significantly, the Court premised its holding on the fact that IDEA then included no "other reference" to tuition reimbursement to such children. 471 U.S. at 369. In the 1997 Amendments, Congress provided the "other reference" found absent in *Burlington*, specifically articulating the States' tuition reimbursement obligations toward those children. 20 U.S.C. § 1412(a)(10)(C).

T.A. and the government do not confront *Burlington*'s "[a]bsent other reference" proviso, let alone explain why the 1997 Amendments do not provide the "other reference" that was missing in 1985. Instead, the government contends that the District's position "impliedly repeal[s] part of the authority conferred by" § 1415(i)(2)(B)(iii), as interpreted in *Burlington*. U.S. Br. 18. That contention fails for the reason noted above—*Burlington*'s "[a]bsent other reference" proviso acknowledged that Congress might amend IDEA to expressly address tuition reimbursement for unilaterally placed private school students, which in turn would impact whether reimbursement would continue to be "appropriate" under § 1415(i)(2)(B)(iii).

In any event, the government's contention rests on the incorrect premise that *Burlington* interpreted § 1415(i)(2)(B)(iii) to permit reimbursement to *any*

student unilaterally placed in private school. In fact, *Burlington* and *Carter* addressed reimbursement claims by students who had previously received special education services from the district. Pet. Br. 31. Because § 1412(a)(10)(C)(ii) permits such reimbursement, the 1997 Amendments cannot be said to have repealed, impliedly or otherwise, what *Burlington* and *Carter* held to be the reach of § 1415(i)(2)(B)(iii). See *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

D. The Department's Commentary Does Not Provide Clear Notice, And Is Not Entitled To Deference In Any Event.

The District demonstrated that the Department of Education's commentary concerning the availability of tuition reimbursement to students like T.A. does not provide the clear notice required by the Spending Clause. Pet. Br. 33-38. The reason, explained the District, is that clear notice must be provided by the statutory text enacted by Congress, not an agency's interpretation of a purported textual ambiguity. See *Arlington*, 548 U.S. at 296 ("we must ask whether the IDEA furnishes clear notice"); *Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11 (1982) (no clear notice where Court "unable to find any suggestion from the face of the statute [of] the requirement" in question). This focus on statutory text is a common feature of clear statement rules. See, *e.g.*, *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) (plain statement rule satisfied where the "statute's language [is] unmistakabl[e]"); *Hilton* v. *S.C. Pub. Ry. Comm.*, 502 U.S. 197, 204 (1991) (intent to abrogate sovereign immunity "must be expressed in the text of the statute"); *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) (collecting cases).

Focusing on the statutory text "helps assure that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Raygor*, 534 U.S. at 544. "[B]y refusing to construe ambiguous legislation expansively, the Court can effectively prevent Congress from avoiding hard questions of federal-state relations, and can thus increase the likelihood that Congress will give full attention to the interests of the states." 1 L. Tribe, *American Constitutional Law* 856 (3d ed. 2000). As the Court has recognized, the federal government's structure, in which each of the States is represented in Congress, provides assurance that the States' sovereign interests are taken into consideration when Congress exercises its Article I authority. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-555 (1985).

No comparable assurances accompany agency interpretations of ambiguous congressional enactments. See *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) ("[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States"). Moreover, if an agency's interpretation of an ambiguous text could satisfy the Spending Clause, then application of the clear notice rule would depend on the executive's whim, for an agency could always provide the clarity that Congress, by accident or design, failed to provide in an ambiguous text. Pet. Br. 36-38.

T.A. and the government respond that *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167, 183 (2005), rejected a Spending Clause argument based "in part" on the notice supposedly provided by the Department's regulations. Resp. Br. 43; U.S. Br. 33. That is wrong. The *Jackson* majority explained: "We

do not rely on regulations extending Title IX's protection beyond its statutory limits; indeed, we do not rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition. * * * We reach this result based on the statute's text." 544 U.S. at 178; accord, *Gomez-Perez* v. *Potter*, 128 S. Ct. 1931, 1939 (2008) ("the holding in *Jackson* was based on an interpretation of the 'text of Title IX'") (quoting *Jackson*, 544 U.S. at 173). Accordingly, *Jackson* did not hold that regulations can provide the clear notice demanded by the Spending Clause. Rather, the regulations merely confirmed the clear notice that the Court found in the text.

The other cases cited by T.A., *Pennhurst* and *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), are to the same effect. *Arline*'s "holding [wa]s premised on the plain language of the Act," *id.* at 286 n.15, and *Pennhurst* concluded that the "plain language" of the statute refuted the notion that Congress had provided the requisite notice, 451 U.S. at 23. Here, by contrast, T.A. and the government are compelled to rely on the Department's commentary to remedy a purported ambiguity in the statute. U.S. Br. 10; Resp. Br. 15. This the Spending Clause does not permit.

2. Even if agency interpretations could provide clear notice under the Spending Clause, the Department's interpretation of the 1997 Amendments deserves no deference. Pet. Br. 34-36. No deference is permitted because the Amendments unambiguously prohibit tuition reimbursement to students like T.A. But even if the Amendments were ambiguous, the Department's commentary fails to persuade.

T.A. and the government fail to defend the Department's absurdly counter-textual statement that "*hearing officers* and courts retain their authority" under § 1415(i)(2)(B)(iii)—which, as noted above, grants authority only to courts—to award tuition reimbursement to students like T.A. 64 Fed. Reg. 12,405, 12,602 (Mar. 12, 1999) (codified at 34 C.F.R. § 300.403) (emphasis added). Indeed, other than directly quoting the Department's commentary, T.A. and the government take great pains to avoid suggesting that § 1415(i)(2)(B)(iii) grants tuition reimbursement (or any other) authority to hearing officers. Compare Resp. Br. 13, 16, 23, 30, 42 (noting that § 1415(i)(2)(B)(iii) grants authority to "courts" or "the court"), and U.S. Br. 3, 9, 10, 12, 18, 19, 31 (same), with Resp. Br. 39 (quoting Department's statement that "'*hearing officers* * * * retain their authority'" under § 1415(i)(2)(B)(iii)), and U.S. Br. 30 (same). The fact that T.A. and the government cannot even bring themselves to say that § 1415(i)(2)(B)(iii) grants authority to hearing officers speaks volumes about their confidence in the Department's view that the provision does just that.

The general principles recited by T.A. and the government fare no better. Both cite *Whitman* v. *American Trucking Association*, 531 U.S. 457 (2001), for the proposition that agency preambles categorically deserve *Chevron* deference. U.S. Br. 31; Resp. Br. 41. *Whitman* does not stand for that proposition. Although *Whitman* cites *Chevron* in passing, the Court ultimately rejected the agency's interpretation because it went beyond any statutory ambiguity and contradicted what was "quite clear" in the statute. 531 U.S. at 481. As such, the Court never had to address the level of deference that would have

applied had the agency interpretation been reasonable.

Similarly, T.A. and the government err in relying on *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007), which accorded deference to an "Advisory Memorandum" setting forth the agency's interpretation of its own regulations. U.S. Br. 31; Resp. Br. 41. In *Long Island Care*, (1) the statute at issue was not subject to a clear notice requirement and expressly left "gaps * * * as to the scope and definition" of the terms it used, 127 S. Ct. at 2346; (2) the agency filled those gaps through interpretative regulations that expounded upon the terms in the statute, *id.* at 2346, 2347-2348; and (3) the Memorandum interpreted those freestanding regulations, *id.* at 2349. Here, by contrast, (1) Spending Clause legislation does not leave gaps to fill, and IDEA contains a narrow delegation to the Department, see Pet. Br. 34-35; (2) the relevant regulations do not interpret the statutory terms, but merely "parrot" them word-for-word, *id.* at 36 (citing *Gonzales* v. *Oregon*, 546 U.S. 243, 257-258 (2006)); and (3) as discussed above, the Department's commentary is erroneous on its face.

Additionally, the government and T.A. mistakenly claim that the Department's commentary evidences the formality and consistency necessary to warrant heightened deference. U.S. Br. 31; Resp. Br. 40. The proposed and final rules drew their authority from § 1412(a)(10)(C)(ii) alone. 62 Fed. Reg. 55,026, 55,042 (proposed Oct. 22, 1997); 34 C.F.R. § 300.403 (1999). The commentary itself, though purporting to interpret 34 C.F.R. § 300.403, in fact interprets a different section altogether, § 1415(i)(2)(B)(iii). 64 Fed. Reg. at 12,601-02. The Department, however, never solicited comment on regulations implementing

§ 1415(i)(2)(B)(iii), see 62 Fed. Reg. at 55,046, and never issued a regulation advancing its current interpretation of that provision, see 34 C.F.R. § 300.512(b)(3) (1999). Under the circumstances, the commentary is not sufficiently formal to carry any weight. See *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1200-1201 (2009) (giving no deference to agency preamble that "articulated a sweeping position" upon which "States or other interested parties [were not given] notice or opportunity for comment"); see also *id.* at 1204 (Breyer, J., concurring) (to be accorded deference, position taken in agency's preamble should have been embodied "in lawful specific regulations").

E. The Legislative History Does Not Provide Clear Notice.

T.A. and the government also cite the legislative history of the 1997 Amendments to support their position. Resp. Br. 25-27; U.S. Br. 28-29. Their arguments fail for two reasons.

1. Like agency interpretations, legislative history cannot provide the clear notice demanded by the Spending Clause. *Arlington*, 548 U.S. at 304 ("In 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."); *Rowley*, 458 U.S. at 204 n.26. Applying an analogous plain statement rule in *Dellmuth* v. *Muth*, 491 U.S. 223 (1989), the Court held that the legislative history of IDEA's predecessor was insufficient to abrogate the States' sovereign immunity, explaining that Congress's intent must be "'unmistakably clear in the language of the statute.'" *Id.* at 230; accord, *Hilton*, 502 U.S. at 204. As Justice Marshall noted: "When they apply, such [clear statement] rules foreclose inquiry into extrinsic guides to interpretation * * * ."

EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244, 262-263 (1991) (Marshall, J., dissenting).

2. In any event, the legislative history cited by T.A. and the government do not advance their cause. First, Senator Harkin's floor statement (see Resp. Br. 25) merely describes § 1412(a)(10)(C)(i), saying nothing about what categories of students are eligible for reimbursement.

Second, T.A. points to Senator Jeffords' statement that the 1997 Amendments would ensure that public schools had "an opportunity to offer a [FAPE], *before* the child's parents place the child in a private school and send the school district the bill." 143 Cong. Rec. S4295, S4296 (daily ed. May 12, 1997) (emphasis added), *quoted in* Resp. Br. 25. T.A.'s reliance on that statement is puzzling, as his parents deprived the District of the "opportunity" to offer T.A. a FAPE before he alighted to Mount Bachelor Academy.[4] Although the parents could have requested that T.A. be evaluated under IDEA, 20 U.S.C. § 1414, they failed to do so. Nor did they give the District any other IDEA-compliant notice that they suspected T.A. was disabled and wished to obtain special education services for him. Pet. App. 51a. What is more, T.A.'s

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[4] Although T.A. claims that his 2001 evaluation was deficient, Resp. Br. 5-6, the district court noted that T.A.'s parents did not properly pursue any claims with respect to that evaluation. Pet. App. 51a; *see also* Pet. Br. 13; NSBA Br. 17-18 n.4. And while T.A. implies that the District's 2001 evaluation is somehow part of this case, Resp. Br. 1, the district court held that "[t]he adequacy of the 2001 evaluation was not an appropriate subject for the 2003 due process hearing" at issue here. Pet. App. 39a n.3. T.A.'s parents never invoked their right to request an evaluation or re-evaluation under IDEA until T.A. had been withdrawn from the District. Pet. Br. 13; Pet. App. 51a, 149a; NSBA Br. 17 n.4.

parents failed to do so while concealing from the District (*id.* at 94a) that T.A.'s private therapist—who had experience in conducting disability evaluations for the District, *id.* at 90a—at least twice recommended that T.A. be evaluated for ADHD, *id.* at 91a, and that his primary care physician had queried whether he had ADD, *id.* at 102a. See also J.A. 38 (discussing "work[] up * * * for an ADD evaluation" about which the District also was not apprised).

Finally, T.A. and the government advance a tortured reading of the Committee Reports. As the District noted, both reports explain that section 1412:

> specifies that parents may be reimbursed for the cost of a private education 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*.

Pet. Br. 26 (internal quotation marks omitted). The government and T.A. attempt to explain away the second sentence "as a description of prior law * * * , not the intended future effect of the amendments." U.S. Br. 29; Resp. Br. 27.

That cannot possibly be correct. The second sentence tracks § 1412(a)(10)(C)(ii) nearly word-for-word. See 20 U.S.C. § 1412(a)(10)(C)(ii) ("If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, * * * ."). The

sentence therefore plainly refers to that newly enacted provision, not to prior law. But even if T.A. and the government correctly read the sentence, it would not advance their cause. After all, if Congress believed in 1997 that that "prior law" allowed tuition reimbursement *only* for students who had previously received special education services from a public agency, T.A. could prevail here only if Congress intended to *expand* the States' reimbursement obligations to students who had not previously received such services. Such an understanding cannot be squared with the 1997 Amendments.

F. T.A.'s Interpretation Of IDEA Would Create, Not Prevent, Perverse Results.

1. T.A. and the government interpret IDEA to impose liability that States never could have anticipated. T.A.'s construction allows tuition reimbursement for time periods *before* a school district is made aware: (i) that the parents were dissatisfied with the education their child was receiving; (ii) that the parents would like their child evaluated for special education; and even (iii) that the child had been placed in the private school for which reimbursement was sought. This result is not far-fetched; it is precisely what happened here. Pet. App. 149a, 151a, 153a-154a, 158a.

If T.A.'s view prevails, the States' reimbursement liability will expand dramatically. Any parents who voluntarily choose to enroll their child in private school, irrespective of whether they previously sought IDEA eligibility, would have the incentive to demand an individualized educational program ("IEP"), only to challenge it in the hopes of having a court order tuition reimbursement. Acknowledging this potential, T.A. and the government respond that parents would be discouraged from taking such action

because they would run the "'financial risk'" that the district's proposal will be found to provide a FAPE. Resp. Br. 38; U.S. Br. 13, 16, 27. But that disincentive is hardly a given. Indeed, T.A. admits that his parents "were not aware, before placing [him] at MBA, that the district could be held responsible for paying private school expenses." Resp. Br. 9. Consequently, T.A.'s parents incurred *no risk* by placing T.A. at Mount Bachelor and then litigating against the District. Likewise, any parents who voluntarily place a student in private school would stand only to gain in the form of a subsidy for tuition they otherwise were planning to pay, so long as they could find an attorney willing to work on contingency. See NSBA Br. 28 (discussing the "tuition-reimbursement lottery" likely to ensue).

2. Additionally, T.A. and the government admit that, under their construction of IDEA, the limits on reimbursement set forth in § 1412(a)(10)(c)(iii) govern only those children who previously received special education services from a public agency pursuant to IDEA. Resp. Br. 22; U.S. Br. 4, 17. Yet nowhere do they explain why Congress would divide students eligible for private tuition reimbursement into two categories: (i) students who previously received special education services from the district subject to the limitations of § 1412(a)(10)(C)(iii), and (ii) students who have not received such services subject only to general principles of equity under § 1415(i)(2)(B)(iii). Nor do they attempt to explain why Congress would impose the limitations of § 1412(a)(10)(C)(iii) on parents who in good faith collaborate with districts, and not on parents who, prior to enrolling their child in private school, do not give the district a chance to evaluate their child and provide a FAPE. See Pet. Br. 40; NSBA Br. 7-8;

CGCS Br. 20-21; City of New York Br. 14-15; U.S. Conf. of Mayors Br. 16-17. Any such attempt would be futile, as Congress cannot be understood to have placed a lower burden on parents who preemptively enroll a child in private school without engaging the district regarding whether and, if so, what type of special education would be available.

3. T.A. and the government contend that the District's construction of IDEA will allow school districts to forever disqualify students from obtaining tuition reimbursement by repeatedly declaring them ineligible under IDEA, thereby precluding them from ever obtaining the special education services that (according to the District) is a prerequisite to reimbursement. U.S. Br. 23; Resp. Br. 20, 33-35. This, T.A. and the government warn, would lead to students languishing in deficient public school placements.

Before proceeding, it bears mention that any "languishing" here was caused not by the District, but by T.A.'s parents. Among other things, the parents:

> (1) were repeatedly put on notice by T.A.'s therapist and physician that he should be evaluated for ADHD, ADD, or learning disabilities, Pet. App. 90a-91a;
>
> (2) withheld this information from the District until litigation, *id.* at 94a n.18;
>
> (3) did not invoke any IDEA procedures after the 2001 evaluation, even when expressly told by District personnel that they could do so, *id.* at 27a-28a, 39a n.3; see Mot. to Dismiss Hr'g, Ex. B3a (Or. Superintendent of Pub. Educ. May 21,

2003), *collected in* Transmittal of Record, Separate Packet (D. Or.);[5]

(4) did not provide the District with any notice that they desired an evaluation prior to the unilateral placement, Pet. App. 49a;

(5) did not notify the District of their dissatisfactions for nearly one month after T.A. was enrolled at Mount Bachelor, and only then did so by filing a due process complaint concerning issues about which they provided the District with no prior notice, *id.* at 149a; and

(6) agreed to an alternative, extended time line (see Pet. Br. 39) for resolution of their complaint, Pet. App. 56a-57a (noting continuance); Transmittal of Record at 155, 181, *T.A.* v. *Forest Grove Sch. Dist.*, No. 04-cv-331 (D. Or. Mar. 22, 2004) (notice of bifurcation of hearing and letter reflecting agreement to alternative dispute time line); see also NSBA Br. 17; CGCS Br. 17.

In any event, T.A.'s suggestion that a disabled child "could be denied all access to free special education services for the entire period of protracted litigation over eligibility," Resp. Br. 37, is incorrect. Once a

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[5] This Exhibit refutes T.A.'s claim that "[t]he school district did not respond" to Mrs. A.'s August 30, 2001 email to the District. Resp. Br. 7. The Exhibit shows that Mr. Martin responded via email on September 4, 2001, informing Mrs. A. that the District was willing "to reconsider eligibility during the school year." Mot. to Dismiss Hr'g, Ex. B3a. Moreover, Mr. Martin emailed Mrs. A. the next day, reiterating that the District and T.A. "could revisit consideration of an eligibility [*sic*] for T.A.," and specifically informed her how to avail herself of IDEA's procedures, stating "if parents and/or teachers want to re-refer [T.A.] for consideration of a learning disability and special education services, the process would need to start again with a referral through his guidance counselor." *Ibid.*

hearing officer finds a child eligible under IDEA, the school district must hold "[a] meeting to develop an IEP" within 30 days and provide services under an IEP "[a]s soon as possible" thereafter. See 34 C.F.R. §§ 300.306(c)(2), 300.323(c).

The District complied with its obligations, developing an IEP for T.A. less than four weeks after the hearing officer ruled him eligible under IDEA. See *In re Educ. of T.A.*, No. DP 04-108, slip op. at 1 (Or. Superintendent of Pub. Educ. May 7, 2004) (attached hereto as Addendum at Add.2) (noting IEP was proposed on February 19, 2004). The District's proposed IEP was presumed valid, see *Schaffer* v. *Weast*, 546 U.S. 49, 59 (2005), and T.A.'s parents could have become eligible under § 1412(a)(10)(C)(ii) to bring a tuition reimbursement claim by allowing the District to provide services to T.A. under the IEP. Instead, T.A.'s parents rejected that IEP, without giving it a chance to work, and kept T.A. at Mount Bachelor. See Add.2.

4. T.A. and the government also contend that the District's construction of IDEA would undermine the "Child Find" provisions of 20 U.S.C. § 1412(a)(3) by "deny[ing] such children an appropriate education * * * because the children had not previously received special education services." Resp. Br. 24; U.S. Br. 21 n.2. This argument is meritless.

The Child Find provisions are not a vehicle for tuition reimbursement. They merely impose duties on districts to "identif[y], locate[] and evaluate[]" children potentially eligible for services under IDEA. 20 U.S.C. § 1412(a)(3); see also 34 C.F.R. § 300.111. There is no obligation that parents of a disabled child request services from the district, as they may be perfectly content with the services provided by the private school. Even parents who seek an evaluation

for a child who is then found eligible under IDEA may elect to keep their child enrolled in private school and receive proportionate share services under § 1412(a)(10)(A). For those students, the district must create a "services plan" of special education services. 34 C.F.R. § 300.37; see also 20 U.S.C. § 1412(a)(10)(A)(i). The district must consult with private school representatives and parents in developing the services plan, 20 U.S.C. § 1412(a)(10)(A)(iii) (2006), and when the district is making the final decisions regarding the plan, parents need be provided only an "opportunity to express their views," 34 C.F.R. § 76.652(c), not a full due process hearing, *id*. § 300.140(a).

Parents, of course, may request that the district develop an IEP for children found disabled, and the district's recommended placement may be that the child receive services in public school. But in the end, it is impossible to see how the District's interpretation of IDEA will cause any breach of the Child Find obligation. Only where a child who has not previously received special education services from a public agency rejects a district's proposed IEP, and instead seeks private tuition reimbursement, would any limitation come into play. That limitation, however, has nothing to do with Child Find. It is the same limitation faced by any student who has not previously received special education services from the district, regardless of whether the student came to the district's via Child Find or in some other way.

5. Finally, the government contends that the District's reading of IDEA is absurd because it would disallow tuition reimbursement for preschool students. U.S. Br. 26. That contention, too, is meritless.

IDEA obligates school districts to offer "early intervention services" to all developmentally delayed infants and toddlers until the age of three. 20 U.S.C. §§ 1431-1445. The statute, however, imposes only a limited obligation on States with respect to children aged three through five. *Id.* § 1412(a)(1)(B)(i). Although FAPE may include "an appropriate preschool * * * education," *id.* § 1401(9)(C), there is no obligation to make FAPE available to children aged three through five if it "would be inconsistent with State law or practice," *id.* § 1412(a)(1)(B)(i). Because preschool is rarely public, and hardly ever universal, state law infrequently imposes an obligation to make FAPE available to such children. Indeed, IDEA recognizes as much by giving parents the "right[] * * * to elect to receive [early intervention] services" for their children beyond the age of three until they "enter, or are eligible under State law to enter, kindergarten, or elementary school." *Id.* §§ 1411(e)(7), 1435(c)(2)(A), (E); see also *id.* § 1435(c)(5) (stating that children receiving early intervention services have no entitlement to FAPE).

Accordingly, it is the rare exception that children receive preschool education from the States. Given that no underlying right to a free preschool education exists, it is understandable that Congress did not include in § 1412(a)(10)(C)(ii) a reimbursement obligation for preschool education. Furthermore, because the availability of "intervention services" terminates upon elementary school enrollment, it was perfectly logical for Congress to create the first opportunity for tuition reimbursement at that stage of a disabled child's education.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 21, 2009

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ADDENDUM

BEFORE THE OFFICE OF
ADMINISTRATIVE HEARINGS (OAH)
STATE OF OREGON
for the
SUPERINTENDENT OF PUBLIC INSTRUCTION

Agency Case No. DP 04-108

In the Matter of the Education of TA v.
Forest Grove School District

DISMISSAL ORDER

HISTORY OF THE CASE

On January 28, 2004, T.A.'s parents filed a request for a due process hearing with the State Superintendent of Public Instruction. Attorney at law Mary E. Broadhurst represented the parents. Attorney at Law Richard Cohn-Lee represented the Forest Grove School District (District). Both parties waived the 45 day requirement. A prehearing conference was held on March 23, 2004 with Administrative Law Judge (ALJ) Ella D. Johnson presiding. The due process hearing was scheduled for April 19 and 26 in Forest Grove. T.A. and his parents renewed their request for a Stay-Put Order determining that Mount Bachelor Academy was the stay-put placement. On March 23, 2004, I issued the Interim Order Determining Stay-Put, finding that the current placement for T.A. during the duration of

this dispute was Mount Bachelor Academy. Prior to the hearing, the parties settled the matter.

FINDINGS OF FACT

(1) In their request for a due process hearing, T.A. and his parents identified the following issues for hearing: (1) Is the February 19, 2004 IEP offered by the District reasonably calculated to provide T.A. with educational benefit sufficient enough to allow him to graduate in June of 2004, given that MBA believes he will be able to graduate from its program with a high school diploma in June of 2004; (2) Is the February 19, 2004 placement offered by the District reasonably calculated to provide T.A. with educational benefit sufficient to provide T.A. with educational benefit sufficient enough to allow him to graduate in June of 2004, given that MBA believes he will be able to graduate from its program with a high school diploma in June of 2004; and (3) Is it equitable, in light of the District's failure to provide a free appropriate public education prior to his placement at MBA in March of 2003, to require T.A. to return to the high school after the start of his final semester of high school.

(2) On April 12, 2004, the attorney for T.A. and his parents advised me that the matter had been settled, pending signature of both parties on the settlement document. On May 6, 2004, I received confirmation from the attorney for T.A. and his parents that the matter had been settled and a hearing was no longer required.

(3) Accordingly, a due process hearing is no longer required in this matter, based on the representation by the attorney for T.A. and his parents that a mutual settlement of the issues raised by the hearing request had been achieved.

ORDER

The hearing request of January 28, 2004, having been withdrawn in its entirety, is DISMISSED.

/s/ Jo Ellen Odle
Ella D. Johnson
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 120 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(e)(2). Failure to request review within the time allowed will result in LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.

ENTERED at Salem, Oregon this 7th day of May 2004[.]