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 RESPONDENT

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits an award of private-school tuition reimbursement as "appropriate relief" for a student with a disability who had been enrolled in public school but had not "previously received special education and related services under the authority of a public agency," 20 U.S.C. § 1412(a)(10)(C)(ii), when the reason the student had not previously received such services was that the school district wrongly determined that the student was ineligible for special education services and thus failed to make a free appropriate public education available to the student.

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STATEMENT OF THE CASE

This case arises out of the repeated efforts of T.A.'s parents to obtain special education services for their son, who was then in high school and had been enrolled in public schools since kindergarten. After petitioner twice wrongly determined that T.A. was ineligible for any services under the Individuals with Disabilities Education Act ("IDEA"), the parents sought reimbursement for private school tuition.

Petitioner asserts that because its erroneous eligibility determinations prevented T.A. from receiving any special education services from the public school, it is categorically immune from reimbursing T.A.'s parents for the costs of obtaining those services from a private facility. Under petitioner's theory, it does not matter how diligently and reasonably parents act in seeking services, or how egregiously school districts act in denying all special education services. In all cases, the district's violation of its statutory duties becomes the very source of its immunity from the statutory remedy of reimbursement, which this Court has repeatedly held is inherent in IDEA's essential guarantee of a *free* appropriate public education. Nothing in the text, history, or purposes of IDEA supports such a reading, and established principles of equity preclude it.

A. Statutory Background

Congress enacted IDEA to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education ("FAPE") is "special education and related services," provided at "public expense," tailored to "the unique needs" of

the child with a disability by means of an "individualized educational program" ("IEP"). 20 U.S.C. § 1401(9), (14), (26), (29); *see* 20 U.S.C. § 1414(d) (specifying IEP requirements); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181-82 (1982).

IDEA provides federal grants to states that submit plans to the Department of Education that implement the Act's policies and procedures, including the requirement to make a FAPE "available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A). The Act contains a Child Find requirement that obligates school districts to ensure that "[a]ll children with disabilities residing in the State" are "identified, located, and evaluated." 20 U.S.C. §§ 1412(a)(3)(A) & 1412(a)(10)(A)(ii).

IDEA and its accompanying regulations define thirteen categories of disabilities, including "specific learning disabilities" and "other health impairments" ("OHI") (which includes attention deficit hyperactivity disorder ("ADHD")). 20 U.S.C. § 1401(3)(A)(i); *see* 34 C.F.R. § 300.8. To determine a child's eligibility under the Act, school districts "shall conduct a full and individual evaluation . . . before the initial provision of special education and related services to a child with a disability." 20 U.S.C. § 1414(a)(1)(A).

When a child is first evaluated, the parents must receive a notice of procedural safeguards, which "shall include a full explanation of the procedural safeguards . . . available under [the Act] and under regulations." 20 U.S.C. § 1415(d)(2); 34 C.F.R. § 300.502(b)(1). If parents disagree with an agency's decision regarding their child, they must be given 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 a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). If the parties continue to disagree, the parents have a right to a due process hearing, which an aggrieved party may appeal. 20 U.S.C. §§ 1415(f), (g). In an action challenging the hearing officer's decision, the court "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).

In *Sch. Comm. of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359 (1985), and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), this Court held that the statutory authority to grant "appropriate" relief necessarily includes reimbursement for private special education services where the school district had not offered a child with a disability a FAPE, and the parents had enrolled the child in the private program without the school district's consent. Denying reimbursement, the Court concluded, would defeat IDEA's dual purpose of providing a child with a disability "both an appropriate education and a free one." *Burlington,* 471 U.S. at 372; *see Carter*, 510 U.S. at 15 (Districts "who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice.").

Congress reauthorized and amended IDEA in 1997. Among the additions were provisions specifically addressing the requirements for States in situations—such as *Burlington* and *Carter*—where a school district fails to provide a FAPE and a parent seeks reimbursement as "appropriate" relief. Section

1412(a)(10)(C)(i) provides the "general" rule governing "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). It states that "this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility *if that agency made a free appropriate public education available to the child* and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i) (emphasis added). The next subsection states that a court or hearing officer may require a state agency to reimburse parents for the cost of private school for a child with a disability, "who previously received special education and related services under the authority of a public agency," if "the court or hearing officer finds that the agency had not made a free appropriate public education available to the child." 20 U.S.C. § 1412(a)(10)(C)(ii). Subsection (C)(iii) provides factors that permit, but do not require, a court to reduce or deny the reimbursement described in clause (ii) if the parents failed to cooperate fully in the IEP process. *See* 20 U.S.C. § 1412(a)(10)(C)(iii).

B. Factual Background

The following facts are drawn largely from the decision of the hearing officer, whose factual findings were accepted by the lower courts. Pet. App. 44a.

T.A. attended public school in the district since kindergarten. His teachers repeatedly noted throughout the years that T.A. had trouble paying attention and completing his school work. Pet. App. 58a-59a, 60a-61a ¶¶ 1-2. T.A.'s difficulties increased when he entered Forest Grove High School ("FGHS")

in September 2000. *Id.* at 59a. By that time, Ms. A. was spending at least two hours with him daily, and as much as half a day on weekends, helping him complete homework and uncompleted classwork assignments. *Id.* at 61a-62a ¶ 5. His parents engaged in extensive contacts with their T.A.'s teachers to help him comprehend and keep track of his assignments at home. *Id.* at 64a-65a ¶¶ 12-14.

By December 2000, T.A. was behind in most of his classes. Ms. A. contacted the school counselor, Laurel Kaufman, who recommended that T.A. be evaluated for special education services, and T.A.'s parents agreed. Pet. App. 65a-66a ¶ 15. Notes from school district staff from a Multidisciplinary Team ("MDT") meeting related to T.A.'s evaluation held on January 16, 2001, include "Maybe ADD [attention deficit disorder] / ADHD [attention deficit hyperactivity disorder]?" *Id.* at 66a ¶ 16. MDT notes for February 13, 2001, reiterate school officials' suspicion that T.A. had ADHD. *Id.* at 67a ¶ 16.

In June 2001, the district found that T.A. did not have a "specific learning disability" and accordingly was ineligible for "special education in the area of learning disabled." Pet. App. 72a ¶ 26; J.A. 30. While T.A.'s parents agreed with the conclusion that T.A. did not meet the criteria for learning disabled, J.A. 30, they still desired individualized services for T.A., *see* J.A. 103. They were not informed of the school staff's suspicions that T.A. had ADHD, which would have provided grounds for eligibility under the OHI category. Pet. App. 3a; J.A. 96-97. The parents received a Notice of Procedural Safeguards sometime between December 31, 2000, and June 13, 2001. Pet. App. 76a ¶ 35. The Notice did not discuss substantive categories of disability, *see*

Pet. App. 76a.; J.A. 70-95, and T.A.'s mother had never heard of the OHI disability category before the summer of 2003, *see* 09/25/03 Hearing Tr. 1220.

When the district's evaluation report was completed in September 2001, the MDT noted that T.A. was "[n]ot eligible LD [learning disabled] 6/13/01. Possible 504." J.A. 97 (referring to Section 504 of the Rehabilitation Act). No school official followed up regarding T.A.'s possible qualification under the Rehabilitation Act, and the FGHS school psychologist, Vinny Martin, determined not to evaluate T.A. for ADHD. Pet. App. 70a ¶ 21. While Mr. Martin observed that it was "evident that motivational factors play[ed] a significant role in [T.A.'s] functioning," he concluded that the "reasons" for T.A.'s motivational problems "[were] beyond the scope of this evaluation." J.A. 101. Thus, T.A. was evaluated only for a learning disability. Pet. App. 67a ¶ 18. The district's experts later agreed that T.A. should have been evaluated separately for other health impairments, including ADHD. *Id.* at 70a-71a ¶ 21; *see* 34 C.F.R. § 300.8(c)(9) (defining OHI category).

Notwithstanding the evaluation, T.A.'s parents still actively pursued individualized educational assistance for their son. On August 30, 2001, Ms. A. sent an e-mail to Mr. Martin (the school psychologist), the FGHS learning disability specialist, and a pre-algebra teacher (whose class T.A. had failed the previous semester), imploring the school to find a more effective method to teach T.A. and expressing her belief that T.A.'s current education was not "appropriate for him." J.A. 103; Pet. App. 73a-74a ¶ 29. She again inquired about special education services, noting that Mr. Martin had indicated "that if you just look at [T.A.'s] math scores on [certain] tests he

may have a learning disability and qualify for some special education in math." J.A. 103. She asked that those results be shared with other key faculty at the school, and stated: "We would like to see some individual attention such as tutoring." She also requested that certain of the educators meet "and develop some sort of plan for teaching [T.A.] in the areas the tests show he is low on." *Id.* She closed the request with this emphatic plea: "[T.A.] has been in the [public school district] since Kindergarten and still cannot do the most basic math functions. Surely there must be some method of teaching more appropriate for him. He is intelligent but apparently cannot process information or learn from the teaching methods used thus far." *Id.* at 104. The school did not respond. Pet. App. 74a ¶ 29.

T.A. began his sophomore year in September 2001. His first progress report in math showed that he was not turning in work and that he was failing tests. Pet. App. 77a ¶ 37. Ms. A. again contacted Mr. Martin, but he discouraged her, responding that T.A. could be referred for another evaluation (again, for a learning disability), "but it would be difficult to find him eligible." *Id*. at 77a-78a ¶ 37.

T.A.'s progress report in the fall of 2001 indicated that he was failing most of his classes. Because his mother was unable to provide all the help T.A. needed, his parents hired his older sister in November 2001 to tutor him 10 hours per week, while Ms. A. continued to assist T.A. Pet. App. 78a ¶ 38. Nonetheless, T.A.'s grades plummeted during his years at FGHS, dropping from a GPA of 2.00 at the end of 8th grade to a 1.38 at the end of the first semester of 11th grade. *Id*. at 63a ¶ 10. T.A.'s parents continued to seek help from the school. Again,

they contacted the school counselor, *id.* at 79a ¶ 40, and Ms. A. repeatedly communicated with her son's teachers and FGHS staff to discuss T.A.'s learning problems and to intervene to help T.A. keep up with his school work. *See, e.g., id.* at 80a ¶ 41, 135a & n.28, 153a. As the hearing officer found, T.A. advanced from grade to grade at FGHS only because of the extraordinary efforts of his parents and sister, who "provided him with what was in effect special education at home." *Id.* at 59a; *see also id.* at 135a, 137a-138a.

By fall/winter of 2002, during his junior year, T.A. was still lagging behind in his school work, had become very depressed, and had begun to use marijuana to alleviate his depression. Pet. App. 86a ¶ 53. T.A.'s therapist referred him to Dr. Michael Fulop, a clinical psychologist, for an evaluation for emotional and learning disorders, ADHD, and depression. *Id.* at 95a ¶¶ 73-74. Dr. Fulop evaluated T.A. in January and February 2003, and on March 14, 2003, he diagnosed T.A. with ADHD and a dysthymic disorder, a form of chronic depression. *Id.* at 96a-97a ¶¶ 74, 76. He also diagnosed him with various learning problems, poor organizational skills, difficulties with memory and expression, math disorder, and cannabis abuse. *Id.* at 98a-99a ¶ 77. Dr. Fulop recommended that T.A. attend Mount Bachelor Academy ("MBA") to address his ADHD, depression, and drug issues. *Id.* at 99a-100a ¶ 80. He also recommended that T.A.'s school consider him for special education services based on ADHD, among other disorders, and he proposed specific accommodations for T.A.'s education plan. *Id.* at 100a ¶ 81.

MBA is a residential school approved by the Oregon Department of Health and Human Services to

provide special education programs and services for children with disabilities. Pet. App. 105a-106a ¶ 90. T.A.'s parents followed Dr. Fulop's advice and enrolled their son there on March 24, 2003. *Id.* at 89a ¶ 58. They were not aware, before placing T.A. at MBA, that the district could be responsible for paying private school expenses. *Id.* at 89a-90a ¶ 61. On March 28, 2003, T.A.'s parents hired counsel, *id.*, and on April 18, 2003, requested a hearing seeking an order requiring the district to evaluate T.A. in all areas of suspected disability, including OHI. *Id.* at 113a ¶ 103.

The district again evaluated T.A. and, on July 7, 2003, again found him ineligible for special education services. Pet. App. 123a ¶ 124. While this time the MDT agreed that T.A. had ADHD, it determined that he did not qualify for special education because his disability had no adverse impact on his educational performance. *Id.* Specifically, district authorities focused on whether T.A.'s disability had a "very severe, significant impact" and concluded that the effect was "not severe enough." *Id.* At the eligibility meeting, one of the district's hired experts commented that IDEA was intended to serve only those students who had "tremendously significant disabilities." *Id.* Applicable regulations require only that ADHD or other health impairments "[a]dversly affects a child's educational performance." 34 C.F.R. § 300.8(c)(9)(ii).

Following the completion of the evaluation and eligibility process, the hearing was conducted in September and October 2003. Pet. App. 56a-57a. In January 2004, the hearing officer found that T.A. was a student with an OHI disability; that his

disability had an adverse impact on his educational performance; that T.A. needed special education services; and that in refusing to provide T.A. those services, the district had failed to offer him a FAPE. *Id.* at 59a, 129a; *see also id.* at 133a-138a. The hearing officer further found that MBA was an appropriate placement, *id.* at 150a, and that the three-week delay (from March to April 2003) before T.A.'s parents filed their hearing request was not unreasonable under the circumstances and provided sufficient notice to the district, *id.* at 149a. The hearing officer ordered the district to reimburse T.A.'s parents for their MBA expenses until the district offered T.A. a FAPE. *Id.* at 129a, 151a-154a. The hearing officer concluded that, with respect to T.A.'s ADHD, "FGHS had ample information about T.A.'s struggles in school due to his disability beginning with his first semester at FGHS and his initial evaluation in 2001." *Id.* at 152a. She also noted that the district had received considerable additional information since then about T.A.'s educational difficulties and the effort his family was investing to help him keep track of and complete his class requirements. The district's failure to evaluate T.A. adequately from 2001 to the present, the hearing officer determined, "militate[d] against [its] claim that reimbursement should be denied." *Id.* at 152a-153a.

C. Decisions Below

Petitioner filed an action in the U.S. District Court for the District of Oregon to review the hearing officer's decision.[1] The district court held that

[1] Petitioner sued only T.A. in this action, even though the hearing officer awarded reimbursement to T.A.'s parents. Pet. App. 158a; *see Winkelman v. Parma City Sch. Dist.*, 127 S. Ct.

20 U.S.C. § 1412(a)(10)(C)(ii) barred reimbursement because "[t]he plainest reading of the statute is that *only* children who had previously received special education services from the District are . . . eligible for . . . reimbursement." Pet. App. 48a-49a. Further, the court held, "[e]ven assuming that tuition reimbursement may be ordered in an extreme case" for a student not receiving special education services under 20 U.S.C. § 1415's general equitable principles, the facts here did not "support such an exercise of equity." *Id.* at 53a.

A divided panel of the court of appeals reversed. The court agreed with the Second Circuit's decision in *Frank G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.,* 459 F.3d 356, 367-76 (2d Cir. 2006), *cert. denied,* 128 S. Ct. 436 (2007), that Section 1412(a)(10)(C)(ii)'s reference to students "'who previously received special education and related services' does not create a categorical bar to recovery of private school reimbursement for all other students." Pet. App. 13a. As the court of appeals observed, "the express purpose of the IDEA is 'to ensure that *all* children with disabilities have available to them a free appropriate public education.'" *Id.* at 15a (citations omitted). Interpreting the 1997 IDEA amendments to prohibit reimbursement to students who have not yet received special education and related services, the court reasoned, "runs contrary to this express purpose." *Id*.

1994, 2004-05 (2007). Although not raised below, its failure to sue the parents raises a question of Artile III standing; a victory in this case may not redress petitioner's injury from the order to reimburse the nonparty parents.

In amending IDEA in 1997, the court explained, Congress "chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing officers when deciding whether to award reimbursement to students who previously received special education and related services." Pet. App. 16a. For students such as T.A. who were wrongly denied such services, the provisions of § 1412(a)(10)(C) "simply do not apply." Instead, reimbursement remains available "under principles of equity pursuant to § 1415(i)(2)(C)." *Id*.

The court of appeals likewise rejected the district court's alternative holding that under equitable principles, T.A.'s parents would not be entitled to tuition reimbursement even absent the alleged statutory bar. The court held that the district court had abused its discretion both in incorporating its erroneous statutory construction of Section 1412 into its equitable analysis, Pet. App. 17a-18a, and in applying the wrong legal standard under Section 1415's general equitable principles when it asserted that, at best, "tuition reimbursement may be ordered in an *extreme case* for a student not receiving special education services," *id*. at 18a. Accordingly, the court of appeals remanded for further proceedings, identifying several factors the district court should consider in determining whether to award tuition reimbursement. *Id*. at 18a-20a.

The proceedings on remand in the district court have been stayed pending this Court's decision in this case. J.A. 16 (2/2/2009 Order). In those proceedings, after six years of litigation, the school district still contends that T.A. is not eligible for any special education services under IDEA. *See*

Plaintiff-Appellant's Suppl. Brief at 2-5 (D. Or., No. 04-CV-331, filed Oct. 17, 2008).

SUMMARY OF ARGUMENT

Nothing in the 1997 Amendments to IDEA alters the Act's "central entitlement" of a "free appropriate public education" to *all* children with disabilities. *Winkelman*, 127 S. Ct. at 2004. Nor do the Amendments undermine Section 1415(i)(2)(C)(iii)'s authorization to courts to provide "appropriate" relief, including tuition reimbursement. To the contrary, the Amendments include a "general" rule governing payment of private educational expenses that reflects the very standard for reimbursement announced by this Court in *Sch. Comm. of Burlington, Mass. v. Dept. of Ed. of Mass.*, 471 U.S. 359 (1985), and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). That general rule creates the only express categorical limitation on tuition reimbursement by precluding reimbursement awards where the district "made a free appropriate public education available to the child." 20 U.S.C. § 1412(a)(10)(C)(i).

Petitioner largely ignores this express, but limited, prohibition on reimbursement and instead relies on language in the very next subsection, 1412(a)(10)(C)(ii), which *authorizes* tuition reimbursement to "the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, . . . 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." Petitioner's entire argument is premised on reading into that permissive language a negative inference that Congress intended to bar *all* awards of tuition

reimbursement when the child has not previously received special education services from a public agency, even if the public agency by its own neglect or other wrongful conduct is solely responsible for the denial of such services.

That sweeping negative inference should be rejected because it is contrary to subsection's (C)(i)'s express "safe harbor" provision, which categorically bars tuition reimbursement only where the district has made a FAPE available to the child. Petitioner's reading therefore creates unnecessary tension between subsections (C)(i) and (C)(ii), and is otherwise inconsistent with the structure, purposes, and history of IDEA. It would also force an instrument of equity—reimbursement—into serving the most inequitable of ends, rewarding a district for its unlawful or wrongful acts. *See Burlington*, 471 U.S. at 372 (discussing equitable nature of reimbursement). Congress could not have intended such a result, and every principle of statutory construction confirms that it did not.

Such a reading, moreover, would create absurd results and perverse incentives for public school districts that Congress could not have intended. Under petitioner's construction, the very act of violating its statutory duties and denying T.A. all special education services becomes the source of immunity from any liability for reimbursing T.A.'s parents for the costs of obtaining private special education services. It is difficult to imagine a construction that is more inconsistent with the guarantees and purposes of IDEA, the entire premise of which is that school districts need incentives and accountability to protect against potential denials of a free appropriate education to children with disabilities. It is simply incon-

ceivable that Congress would create by mere inference a regime that actually rewards school officials for failing to comply with statutory duties.

At a minimum, both as a matter of statutory construction and of basic equity, petitioner's asserted negative inference, even if adopted, could not be applied to bar reimbursement where, as here, the school district has wrongly determined the child's eligibility for benefits under the Act and thereby improperly denied him access to *all* public special education services. The text of subsections (C)(ii) and (C)(iii) presupposes that a proper eligibility determination has been made, and longstanding principles of equity would preclude petitioner from claiming immunity based on an asserted statutory condition when its own violation of its statutory duties caused the failure of the condition.

Although petitioner's asserted reading should be rejected as a matter of statutory construction, if any ambiguity existed on the question, the Court should defer to the Department of Education's considered and consistent interpretation of the Act. In 1999 and 2006, the Department issued formal comments accompanying final regulations as part of its notice-and-comment rulemaking implementing IDEA. Those comments explained that the authority to award reimbursement under Section 1415's "appropriate" relief provision is "independent of" the authority to award reimbursement under Section 1412(a)(10)(C)(ii), and that reimbursement is therefore available in the circumstances presented here. That interpretation is entitled to deference.

Petitioner's extensive reliance on this Court's Spending Clause jurisprudence—an argument not raised below—is entirely misplaced. As this Court

held in *Burlington*, reimbursement is not damages but an equitable remedy inherent in the obligation to provide a *free* and appropriate public education. Accordingly, requiring reimbursement here does not implicate Spending Clause notice concerns. In any event, IDEA's language, the Department of Education's consistent formal interpretation, and this Court's precedents have provided recipients of IDEA funds ample notice of the availability of reimbursement in these circumstances.

ARGUMENT

I. IDEA'S PLAIN TERMS PERMIT TUITION REIMBURSEMENT WHERE A DISTRICT FAILS TO MAKE AVAILABLE A FREE APPROPRIATE PUBLIC EDUCATION

IDEA's fundamental guarantee of a free appropriate public education to every child with a disability has long been construed to include the right of parents to seek reimbursement for private school tuition where the school district has failed to make such a free and appropriate education available. Such reimbursement, this Court held in *Burlington*, is a necessary part of the "appropriate" relief available to courts under 20 U.S.C. § 1415(i)(2)(C)(iii), because denying reimbursement would defeat IDEA's dual purpose of providing children with disabilities "both an appropriate education and a free one." 471 U.S. at 372. Similarly, the Court in *Carter* made clear that under IDEA, "public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice." 510 U.S. at 15. But there is no escaping the obliga-

tion of providing a FAPE: "This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims." *Id.*

Contrary to petitioner's arguments, nothing in the 1997 Amendments to IDEA categorically bars tuition reimbursement to any class of children with disabilities that have been denied a FAPE.

A. The Sweeping Negative Inference Petitioner Attempts To Read Into Subsection (C)(ii) Is Directly At Odds With The Plain Meaning Of Subsection (C)(i)

All of petitioner's arguments rest on reading into the permissive language of subsection (C)(ii) a negative inference that Congress intended to bar *all* tuition reimbursement when the child has not previously received special education services from a public agency. According to petitioner, (C)(ii)'s alleged inference applies no matter how poorly the district performed its statutory duties, or how diligently and reasonably parents sought public special education services for their child.

Such a sweeping negative inference directly conflicts with the plain meaning of the prior paragraph—subsection (C)(i)—which, unlike subsection (C)(ii), creates an *express* safe-harbor provision for school districts. By its heading, that provision is the "general" rule governing "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). It states that "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 appropri-*

ate public education 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) (emphasis added). As petitioner concedes (Br. 20), that provision creates an express safe harbor for school districts, but *only* if they have "made a free appropriate public education available to the child."

Two important elements are required to make a FAPE available: first, the district must correctly evaluate and identify a child with a disability, 20 U.S.C. § 1414(a), and second, through the IEP process, it must develop an appropriate education program designed to meet the child's specific needs, *id.*, § 1414(d). Thus, subsection (C)(i) makes clear that a district can lose the benefit of its safe harbor either by failing to correctly identify a child with a qualifying disability (as in this case), or by failing to design an appropriate educational program for such a child. Either failure constitutes a failure to make "a free appropriate public education available to the child" within the meaning of (C)(i).[2]

Congress's inclusion of an *express*, but limited, safe-harbor provision in subsection (C)(i) precludes petitioner's attempt to create a different *implied* safe harbor under (C)(ii). Subsection's (C)(i)'s express prohibition on reimbursement awards is limited to where the district has made a FAPE available. If Congress had wanted to create an additional categorical bar on tuition reimbursement, it naturally would have done so expressly in this provision, not

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[2] Failure at either the eligibility or IEP stage may be challenged through an administrative due process hearing and in court, 20 U.S.C. § 1415(b)(6), and the relief available is the same regardless of the claim. *See* p. 36 below.

by implication in a permissive grant of authority in subsection (C)(ii). *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *U.S. v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

This is reflected in the structure of subsection (C)(i), which uses direct language and a simple logical rule: If a school district makes a FAPE available, then it is not required to pay for the cost of private school education. The logically equivalent contrapositive is that a school district is required to pay for the cost of private school education only when it fails to make a FAPE available. Subsection (C)(ii), in contrast, is considerably less direct. It states permissively that a court or hearing officer *may* award tuition reimbursement if the district failed to make a FAPE available and the child, who previously received special education services—appropriate or not—is later placed in private school without the consent of or referral by the school district. Whether the "previously received" language is intended to be conditional or descriptive is at best unclear, and fails to reflect (C)(i)'s simple and clear structure.

Consistent with those differences, subsection (C)(i) is designated the "general" rule governing payment of private school tuition. Nothing in the text or history of the 1997 Amendments suggests Congress intended (C)(ii) and (C)(iii) to create an ex-

ception to that rule. Thus, as explained in Part I.B. below, (C)(ii) and (C)(iii) are naturally read as governing particular applications of (C)(i)'s general rule.

Rather than attempting to harmonize the provisions, as established canons of construction require, petitioner posits a reading that creates substantial tension between the general rule announced in subsection (C)(i) and its particular application to the circumstances described in subsections (C)(ii) and (C)(iii). *See*, *e.g.*, *Williams v. Taylor,* 529 U.S. 420, 434 (2000) (Kennedy, J.) (adopting statutory construction that "avoid[ed] . . . needless tension" between provisions); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible'. . . .") (citations omitted). Thus, under petitioner's reading of subsection (C)(ii), a school district can effectively grant itself immunity from tuition reimbursement outside the terms of subsection (C)(i)'s express safe harbor, which is based on *compliance* with statutory duties, by wrongly denying a child all special education services. This contradiction renders petitioner's reading internally inconsistent, unworkable, and contrary to both the general rule in (C)(i) and IDEA's other essential requirements.

That is not to say that Section 1412(a)(10)(C) includes no limitations on reimbursement of private school tuition. Subparts (ii) and (iii) identify specific factors that may lead a court or hearing officer to limit or deny reimbursement on a case-by-case basis where parents fail to cooperate in the IEP process. *See* Part I.B. below. But the only categorical limitation on reimbursement is the express limitation of

subsection (C)(i) that reimbursement is unavailable where the district makes a FAPE available.

B. Respondent's Construction Harmonizes And Gives Meaning To All Provisions Of The Act

The substantial internal tensions created by petitioner's reading of the Act are particularly troubling because there is a readily available alternative reading of subsection (C)(ii) that is entirely consistent with the general rule announced in (C)(i) and harmonizes and gives meaning to every provision of the Act. That reading is far superior to petitioner's strained negative inference and should be adopted.

1. Subsections (C)(ii) and (C)(iii) are fully consistent with the general rule of (C)(i)

As explained, subsection (C)(i) provides the general rule governing payment of private school tuition and makes it available, subject to the district court's equitable discretion, in all cases except where the school district makes a FAPE available to the child with a disability. Subsections (C)(ii) and (C)(iii) together govern the particular application of that general rule in the specific context of particular concern to Congress—namely, where the parents and the special education faculty of the public school are already engaged in an ongoing, cooperative relationship concerning the individual educational needs of the child. By referring to children who had previously received special education services, Congress was identifying cases in which the district had properly identified a child with a disability and, working with the parents, had delivered some special education services to the child. Thus, the 1997 Amendments help ensure that where such an ongoing rela-

tionship exists—which had been the dominant fact pattern of the cases decided up to that time—school districts have every incentive to work closely with parents to provide appropriate special education services to the child in a timely manner, and parents have incentives to cooperate fully in the development and provision of those services, to timely share their concerns with public school officials, and to not prematurely halt the collaborative give-and-take between parents and special educators that is the hallmark of the Act's procedural protections.

Accordingly, subsection (C)(ii) has two primary purposes. First, it provides that even where the school district, working in conjunction with the parents, has properly identified the child as having a disability and has delivered special education services to the child through an IEP in the past, the district may still be liable for private tuition reimbursement if at any point it fails to make free, appropriate special education services available in a timely manner. Second, it identifies the class of cases—those with an ongoing, collaborative relationship between parents and public educators—that were of particular concern to Congress, and that would be governed by the specific limiting factors set forth in subsection (C)(iii). Those limiting factors, which all relate to whether parents have cooperated and acted reasonably with regard to the collaborative IEP process, expressly apply *only* to the cases covered by subsection (C)(ii). 20 U.S.C. § 1412(a)(10)(C)(iii).

Subsections (C)(ii) and (C)(iii) therefore encourage parents and school districts to work together to meet the needs of the child and to preserve existing collaborative relationships designed to achieve that

end. If the school district fails to timely respond to parents' legitimate concerns by providing appropriate services, the parents are authorized to recover private tuition reimbursement, even if the school district has correctly determined eligibility and has delivered special education services in the past. If parents short circuit the desired give-and-take of the IEP process by failing to timely share their concerns about the public school placement or their intent to remove the child from the public school, or otherwise act unreasonably, then they may have to bear part or all of the costs of the private school, even if the district's IEP is found wanting.

In all events, however, subsection (C)(ii)'s reference to children "who previously received special education services under authority of a public agency" exists as part of the permissive grant of authority to award tuition reimbursement in such cases and to define the category of cases to which the limiting factors contained in subsection (C)(iii) apply. In no circumstance does the phrase serve as a condition precedent to the ability to recover reimbursement or create a categorical exception to the general rule for the recoverability of private school tuition contained in subsection (C)(i). Where the school district wrongly determines eligibility and fails to make any special education services available to the child, subsection (C)(iii)'s limiting factors are irrelevant to the availability or amount of reimbursement. Reimbursement remains available subject to the equitable discretion of the court under the general rule announced in subsection (C)(i) and the equitable principles governing "appropriate" relief under Section 1415(i)(2)(C)(iii).

2. Respondent's construction is consistent with the structure and purposes of IDEA

Unlike petitioner's reading, respondent's construction is consistent with the structure and purposes of the Act as a whole. IDEA's primary purpose—to ensure that *all* children with disabilities receive a FAPE—remains unchanged since enactment of the predecessor statute, the Education for All Handicapped Children Act ("EAHCA"). 20 U.S.C. § 1400(c) (1975). IDEA achieves this goal by affirmatively obligating school districts in participating states to identify, locate, and evaluate *all* children with disabilities in the state. 20 U.S.C. § 1412(a)(3) (1997); *see* 20 U.S.C. § 1413(a)(4) (1975) (EAHCA's original "Child Find" requirement). This "Child Find" requirement is explicitly invoked in Section 1412(a)(10)(A)(ii) and reaffirmed as applicable to children in private schools. *See also* 20 U.S.C. § 1412(a)(10)(C)(i) (exempting funds owed under subsection (A) from its prohibition on liability).

Accordingly, school districts are required to find and evaluate children with disabilities enrolled in private schools and (if the parents request special education services from the public agency) prepare an IEP for those children. Yet, under petitioner's reading, districts could then deny such children an appropriate education (or as here, all special education services) with impunity, because the children had not previously received special education services. That makes no sense. This Court in *Burlington* looked at the essential components of the Act and concluded that where a school district fails to make available appropriate special education services, it would be inconsistent with the Act's general purposes to deny private school tuition reimburse-

ment. 471 U.S. at 370. IDEA's purposes would be even more poorly served by precluding reimbursement solely because the district denied the child all special education services. Nothing in the language, structure, or purposes of the Act contemplates a result so at odds with the central guarantee of a *free* appropriate education to all children.

In contrast, under respondent's reading of the Amendments, every provision has meaning and works together to fulfill IDEA's essential purpose.

3. Respondent's construction is consistent with the legislative history

Although the legislative history relating to the specific issue of tuition reimbursement is relatively sparse, what history exists supports respondent's reading of the statute. Senator Harkin's floor statement that "the bill *reiterates current policy* that a public agency is not required to pay for special education and related services at a private school *if that agency made a free appropriate education available to the child*" supports respondent's contention that where *no* FAPE is made available to the child because of an erroneous eligibility determination, tuition reimbursement is an available remedy. 143 CONG. REC. S4295-03, S4300 (1997) (emphasis added). So too do statements by Senator Jeffords expressing the common sense approach of the Amendments in giving educators "an opportunity *to offer* a free appropriate public education to a child with a disability, before the child's parents place the child in a private school and send the school district the bill[.]" *Id.* at 4296 (emphasis added).

Nothing in the legislative history supports petitioner's assertion that Congress intended to exclude

an entire class of children from receiving tuition reimbursement because the school has made an erroneous eligibility determination. Nor is there any indication that Congress intended to completely divest the courts of their traditional authority to apply standard principles of equity in providing tuition reimbursement to such students.

Petitioner points to two pieces of legislative history it claims supports the negative inference it reads into Section 1412(a)(10)(C)(ii). Neither does.

The first is a statement by Representative Castle to the effect that the pre-Amendment statute had the "unintended . . . consequence" of "school districts unnecessarily paying expensive private school tuition," and that the proposed Amendment "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). Nothing in that statement, however, suggests that parents who are wrongly denied all special education services under the Act (or even those who are denied appropriate services in an IEP but whose child had not previously received benefits) are barred from obtaining tuition reimbursement. Rather, the statement more likely refers to the limiting factors added in subsection (C)(iii) providing that reimbursement may be reduced or denied where parents fail to cooperate and act reasonably with regard to the IEP process.

The second piece of legislative history on which petitioner relies is a passage from a House Report. The report first describes the impact of the new Section 612 (§ 1412), which it states "specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e.,

when a due process hearing officer or judge determines that a public agency had not made a [FAPE] available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent)." H.R. REP. NO. 105-95, at 93 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. That statement is perfectly consistent with respondent's view of the Amendments and suggests that districts can guarantee against reimbursement liability only by providing a FAPE. The next sentence adds: "Previously, the child must have had received special education and related services under the authority of a public agency." *Id.* That statement is far from clear, but its use of "[p]reviously" at the beginning of the sentence following a description of the Amendments is most naturally read as a reference (albeit a misguided one) to the state of the law previous to those Amendments. While this Court's decisions up to that time did not limit reimbursement to situations in which a child had previously received special education services from a public agency, they all involved that fact pattern. In any event, as the Second Circuit has noted, the Report's "awkward paraphrase . . . does not expressly exclude reimbursement where special education and related services have not been previously provided." *Frank G.*, 459 F. 3d at 373.

C. Petitioner's Asserted Negative Inference Is Insufficient To Divest Federal Courts Of Their Full Equitable Powers

The Court should reject petitioner's proposed negative inference for the additional reason that it conflicts with the rule requiring clear congressional intent to significantly limit the equitable powers of

federal courts. This Court has long held that federal jurisdiction confers on the federal court "*all* the inherent equitable powers . . . available for the proper and *complete* exercise of that jurisdiction," and that the "comprehensiveness" of the court's equitable authority can be limited only by a "clear" legislative command. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (emphases added); *see U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (Only a "clear and valid legislative command" can divest a federal court of equity authority.) (quotations omitted); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.").

As *Porter* makes clear, a mere negative inference from an otherwise permissive list of equitable powers is not sufficient to limit the broad inherent equitable powers of the court. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Porter*, 328 U.S. at 398 (quoting *Brown v. Swann*, 35 U.S. 497, 503 (1836)). Thus, in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 295-296 (1960), the Court held that as part of their general equitable powers under the Fair Labor Standards Act, courts may order reimbursement for lost wages caused by unlawful discrimination. *Id.* at 291-92 ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes."). The presence of a statutory amendment removing courts' authority to award "unpaid minimum wages" to remedy violations of the

minimum wage and overtime provisions of the statute did not change this result. *Id.* at 294-95. There was "no warrant," the Court held, for construing the amendment as "a general repudiation of equitable jurisdiction to order reimbursement to effectuate the policies of the Act." *Id.* at 295-96.

The negative inference petitioner urges cannot satisfy the clear statement required by *Porter*, *Mitchell*, and their progeny. This is particularly true given that, as discussed, Congress's inclusion of an *express* prohibition on reimbursement in subsection (C)(i) is strong evidence it intended no negative inference from (C)(ii)'s permissive language.

D. At A Minimum, No Negative Inference From Subsection (C)(ii) Could Bar Reimbursement Where The District Wrongly Determines Eligibility

Even if subsection (C)(ii) were read to include a negative inference limiting tuition reimbursement, it cannot be read to bar reimbursement where, as here, the school district has wrongly determined the child's eligibility and thereby improperly denied the child *all* special education and related services. That follows both from the statutory text and elemental principles of equity.

1. The text of subsections (C)(ii) and (C)(iii) presupposes eligibility has been determined properly

All of subsection (C)(ii)'s relevant terms presuppose that a school district has identified a child with a disability. That includes its references to a child with a disability having "previously received special education and related services under authority of a public agency"; the placement of that child in private

school without "the consent of or referral by the public agency"; and the failure to make a FAPE available to the child. None of those elements is even relevant until a child has been determined to have a disability qualifying him for benefits under the Act. Absent such a determination of disability, the child cannot receive any special education services, the district cannot consent to or refer the child for a private-school placement under the Act, and the district is under no obligation to provide a FAPE, which is itself defined as special education and related services provided "in conformity with the [IEP]." 20 U.S.C. § 1401(9).

Similarly, subsection (C)(iii)'s limiting factors, which Congress provided should govern reimbursement awarded under subsection (C)(ii), *all* relate to how well the parents cooperated with the IEP process—a process that only applies *after* the child has been determined by the public agency to have a disability. *See* 20 U.S.C. § 1412(a)(10)(C)(iii)(I)-(III). Because there can be no IEP under the Act until a child has been determined to have a qualifying disability, Congress's focus on the parents' actions during the IEP process as the sole ground for limiting or denying reimbursement demonstrates that it did not intend (C)(iii) to govern a district's erroneous determination that a child is ineligible for benefits.

Rather, Congress left wrongful eligibility determinations to be governed by the "general" rule for payment of private school tuition in subsection (C)(i) and the court's discretion to provide "appropriate" relief under Section 1415(i)(2)(C)(iii). Awards of reimbursement in such cases are more straightforward, since there is no need to compare the details of the district's proposed services with those requested

by the parents, and the ongoing, collaborative relationship that is the hallmark of the Act has yet to be formally established. Accordingly, Congress saw no need to articulate specific factors to govern reimbursement awards in eligibility disputes, as it did with the cases governed by subsection (C)(ii).

In all events, therefore, subsection (C)(ii) cannot be read to limit reimbursement where the district has wrongly determined eligibility. Congress's concern over preserving the cooperative relationship between parents and school officials reflected in the IEP process is simply inapplicable where, as here, the school district erroneously denied all special education services to the child.

2. Petitioner is barred by fundamental principles of equity from using its erroneous eligibility determination as a ground for avoiding reimbursement

Petitioner's attempt to benefit from its erroneous eligibility determination is independently barred by settled principles of equity.

This Court made clear in *Burlington* that tuition reimbursement is not damages, but an equitable remedy that "merely requires the [district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." 471 U.S. at 370-71. Because reimbursement is a creature of equity, traditional "equitable considerations are relevant in fashioning relief." *Id.* at 374. Nothing in the 1997 Amendments alters the equitable nature of the reimbursement remedy, and the limiting factors Congress established in Section 1412(a)(10)(C)(iii) are fully consistent with traditional equitable considerations.

Despite these equitable underpinnings, petitioner seeks federal court relief from the hearing officer's award of reimbursement by asserting that the very act of violating its statutory duties in evaluating T.A. grants it immunity from the statutory remedy. That reading violates the fundamental tenet of equity jurisprudence that a party shall not be permitted to benefit from its own misconduct. *See*, *e.g.*, *Diaz v. U.S.*, 223 U.S. 442, 458 (1912) ("Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong."); *Deweese v. Reinhard*, 165 U.S. 386, 390 (1897) ("A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses . . . he will be held remediless in a court of equity."). Such inequity is further confirmation (if any were needed) that Congress did not intend to categorically prohibit reimbursement by subsection (C)(ii)'s permissive language.

Nevertheless, even if prior receipt of special education services were somehow read as a condition precedent to an award of reimbursement, under established principles of equity unaffected by the 1997 Amendments, petitioner's erroneous denial of all special education services would preclude it from relying on that condition as a basis for avoiding reimbursement. *See*, *e.g.*, *R.H. Stearns Co. v. U.S.*, 291 U.S. 54, 61 (1934) (Cardozo, J.) (construing limitations period of Revenue Act of 1928 in light of "fundamental and unquestionable" principle that "[h]e who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned") (citations omitted); *U.S. v. Peck*, 102 U.S. 64, 65 (1880) ("It is a sound principle that he who prevents a thing being done shall not avail him-

self of the non-performance he has occasioned."); 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:6, at 528-29 (2000) ("It is a principle of fundamental justice that if a promisor is personally the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, the promisor cannot take advantage of the failure."); 8 CATHERINE M.A. MCCAULIFF, CORBIN ON CONTRACTS § 40.17, at 580-81 (1999) ("One who unjustly prevents the performance or the happening of a condition . . . thereby eliminates it as a condition. Thus the party cannot escape liability by preventing the happening of the condition . . . .").

Equity simply does not allow petitioner to come to court and claim immunity based on an asserted statutory condition that the child must have previously received special education services from a public agency when its own violation of its statutory duties caused the child's asserted failure of the condition. Any other result would be grossly inequitable, and petitioner can point to no evidence that Congress intended such a result.

E. Petitioner's Reading Would Lead To Absurd Results And Create Perverse Incentives That Congress Did Not Intend

This Court has twice held that reimbursement of private school tuition is essential to enforcing IDEA's requirement that all children with disabilities be provided an education that is both free and appropriate, and that IDEA "should not be interpreted to defeat [that] objective[]." *Burlington*, 471 U.S. at 372; *see Carter*, 510 U.S. at 12-13. Yet, under petitioner's approach, the parents of a child with a disability who has wrongly been denied all special education services are barred from recovering the costs

of private special education services, even where they have acted diligently and reasonably to obtain those services from the public school.

Petitioner's reasoning is far more extreme, and the results far more absurd, than those presented to the Court last Term in *Bd. of Educ. of the City Sch. Dist. of City of New York v. Tom F.*, 128 S. Ct. 1, No. 06-637 (2007). The child in *Tom F.* had been properly determined to have a qualifying disability and the sole dispute was over the appropriateness of the services contained in the proposed IEP. The district argued that Congress's goal in enacting Section 1412(a)(10)(C)(ii) was to require the parents to give the proposed public placement a try before enrolling the child in private school. *See* 06-637 Pet. Br. 22, 37; 06-637 Argument Tr. 15-17. Under that approach, parents would not be denied all opportunities for seeking reimbursement, but they would be required to place the child for some relatively brief period of time in the public placement before moving him to the private school and seeking reimbursement.[3]

Here, in contrast, T.A. was in the public school system until his junior year in high school. Despite his parents' repeated attempts to obtain individualized services, T.A. was denied all access to special education services from the public agency by petitioner's failure to evaluate him under all the categories of suspected disabilities and its erroneous conclusion that his disability is not sufficiently serious

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[3] Respondent disagrees with the arguments of the *Tom F.* petitioner for the reasons explained herein. But it is notable nonetheless how much further petitioner must go in this case in order to prevail.

to warrant services. Unlike the parents in *Tom F.*, who at least had the option of agreeing to the IEP's placement and receiving some (if not entirely appropriate) special education services, T.A.'s parents could do nothing to obtain special education services from the public agency in a timely manner.

The essence of petitioner's argument is that by wrongly denying T.A. *all* rather than merely some special education services, the district effectively granted itself immunity from paying tuition reimbursement. The only rationale the district posits for such a troubling result is that Congress wanted to reduce costs for public school districts. Pet. Br. 29, 40. But to posit, as petitioner does, that Congress wanted to achieve its asserted cost-cutting by denying any effective relief to children with disabilities who suffer the worst form of denial under the Act—not merely a denial of an appropriate level of special education services, but of *all* special education services—is both absurd and creates genuinely perverse incentives.[4]

Under petitioner's view, Congress has categorically foreclosed any opportunity for tuition reimbursement no matter how egregious the school district's wrongful denial of eligibility may be. While it is true, as petitioner asserts, that Congress generally presumes that public officials "properly perform" their duties, Pet. Br. 39-40 (citing, *inter alia*,

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[4] That is not to say Congress was unconcerned with costs. In addition to the factors limiting reimbursement in Section 1412(a)(10)(C)(iii), Congress added provisions to deter excessive litigation by parents and to encourage reasonable settlements. *See* 20 U.S.C. §§ 1415(i)(3)(D), (F). But it did not single out children with disabilities who had wrongly been denied all special education services as a source for cost savings.

Schaffer v. Weast, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring)), that presumption does not amount to blind faith. As IDEA and its numerous protections attest, Congress knows that school officials are not perfect, and that by mistake, neglect, or more serious wrongdoing, school districts are capable of denying children with disabilities the free appropriate education guaranteed by the Act. The entire premise of IDEA is that school districts need incentives and accountability to protect against such denials of FAPE. It is simply inconceivable that Congress would create—by mere inference—a regime that actually rewards school officials for failing to comply with statutory duties.

It is no answer to assert, as petitioner does (Br. 38-40), that parents who have been wrongly denied all special education services for their child still have the procedural protections of the Act to vindicate their rights. The procedural protections to which petitioner refers, including the "tight deadlines" for due process hearings, apply to all disputes under the act, including claims that an IEP does not provide appropriate special education services. *See* 20 U.S.C. § 1415(b)(6) (guaranteeing parents "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"). Yet, Congress was not satisfied to rely solely on procedural protections and instead provided tuition reimbursement when the dispute is the more limited one concerning the appropriate level of special education services in an IEP. It thus makes no sense to assert that Congress intended to rely *solely* on those same procedural protections when the denial is the more egregious one of *all* special education services.

Moreover, petitioner's assertion (Br. 38-39) that it is "far-fetched" and "highly unlikely" that "a child [could be] forced to languish for years in some sort of limbo" as the district and his parents litigate over his eligibility for benefits is truly stunning given the facts of this case. T.A.'s parents initiated the due process hearing to challenge the district's erroneous eligibility determination in 2003—*six years ago*. To this day, petitioner is still challenging the hearing officer's determination that T.A. is a child with a disability entitled to benefits under the Act. After six years of litigation, its position in the district court remains that T.A. is not sufficiently disabled and therefore is not entitled to special education and related services. *See* Plaintiff-Appellant's Suppl. Brief at 2-5 (D. Or., No. 04-CV-331, filed Oct. 17, 2008). Under petitioner's reading of the Act, a child with a disability could be denied all access to free special education services for the entire period of protracted litigation over eligibility, and the parents would still be denied tuition reimbursement when they finally prevailed on the eligibility issue.

Petitioner suggests (Br. 39 n.3) that parents in such circumstances need not worry because Congress has provided that children who ultimately prevail after years of litigation "may seek to recover 'compensatory education' to allow the child to continue in public education beyond the age of twenty-one to make up for the earlier deprivation." That is cold comfort. Its obvious inadequacy (as well as the inadequacy of relying solely on time-consuming procedural protections) is precisely why this Court and Congress determined that tuition reimbursement is a vital and appropriate element of relief available to parents whose child has been denied a free appropriate public education.

Also baffling is petitioner's complaint (Br. 40) that permitting tuition reimbursement where a district has wrongly denied a child all special education services would somehow "create a perverse incentive for parents to preemptively enroll a child in private school, without engaging the district regarding whether and, if so, what type of special education would be available for their child." Parents who unilaterally place their children in private school "do so at their own financial risk," *Carter*, 510 U.S. at 15 (quoting *Burlington*, 471 U.S. at 373-4), and they bear the burden of proving that the school district failed to make a free appropriate education available to their child, *Schaffer*, 546 U.S. at 51. The reimbursement remedy only becomes an issue once parents have satisfied that substantial burden. Moreover, parents' failure to cooperate with public school officials, or to otherwise act unreasonably or in bad faith, may lead to a reduction or denial of reimbursement under Section 1415's general equitable principles. *See Carter*, 510 U.S. at 15-16; *see also*, *e.g.*, *Carmel Cent. Sch. Dist. v. V.P. ex rel G.P.*, 373 F. Supp. 2d 402, 416 (S.D.N.Y. 2005) (rejecting claim for tuition reimbursement where parents "never had the slightest intention of allowing the child to be educated in the public school, and did everything possible . . . [to] frustrate a timely review of [her] condition").

Here, T.A.'s parents acted reasonably and in good faith at each stage of the proceedings. Unlike the parents in *Tom F.*, no one could question their sincerity in seeking special education benefits from the public school. T.A. attended public school through his junior year in high school. And, as the hearing officer found, the parents acted diligently and reasonably in trying to obtain special education

services from the district. Pet. App. 152a-153a. Moreover, any faults petitioner may assert regarding the parents' conduct can be considered on remand as part of the district court's equitable discretion to determine whether reimbursement is appropriate, and if so how much to award under the general equitable principles of Section 1415.

II. THE SECRETARY'S CONSTRUCTION OF THE 1997 AMENDMENTS IS ENTITLED TO DEFERENCE

For all the reasons discussed above, IDEA authorizes tuition reimbursement in the context of this case. If the Court had any doubt as to that conclusion, however, it should defer to the Secretary of Education's considered interpretation of the Amendments at issue. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2531-33 (2007); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984).

The Department of Education ("DOE") explicitly addressed the question presented in commentary published in the Federal Register that accompanied the agency's final regulations implementing the 1997 Amendments. DOE stated that "hearing officers and courts retain their authority recognized in *Burlington* and . . . *Carter*" under § 1415(i)(2)(C)(iii) "to award 'appropriate' relief" in the form of private tuition reimbursement if a public agency has failed to offer a FAPE to a child with a disability in instances in which the child has not yet received special education and related services. 64 Fed. Reg. 12406, 12602 (Mar. 12, 1999). DOE explained that this authority to award reimbursement under Section 1415(i)(2)(C) "is independent of their authority under section

612(a)(10)(C)(ii) [20 U.S.C. § 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency." *Id.* Thus, as early as 1999, the agency tasked with implementing IDEA expressly construed the 1997 Amendments as preserving the availability of reimbursement where a child, such as T.A., has been denied special education and related services.

DOE has consistently maintained that position. It reiterated that view in a published letter stating that "[w]e do not view 612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet enrolled in special education and related services under the authority of a public agency." Letter from DOE to Susan Luger, listed in 65 Fed. Reg. 9178 (Feb. 23, 2000) and quoted in *Application of a Child with a Disability*, Appeal No. 06-021 (Apr. 25, 2006), *available at* http://www.sro.nysed.gov/2006/06-021.htm. DOE also reaffirmed its statutory construction in 2006 in formal comments that were published, following notice-and-comment rulemaking, with the agency's final regulation implementing the 2004 IDEA amendments. 71 Fed. Reg. 46540, 46599 (Aug. 14, 2006). There, the Secretary expressly rejected proposed regulatory language that would have relieved a public agency of its obligation to provide tuition reimbursement if the child had not previously received special education services under the authority of a public agency, stating that the authority to award tuition reimbursement in such cases "is independent of the court's or hearing officer's authority under" Section 1412(a)(10)(C)(ii).

Those statements reflect the considered view of the agency with authority to construe and enforce the Act and are the product of "relatively formal administrative procedure[s] tending to foster . . . fairness and deliberation." *U.S. v. Mead Corp.*, 533 U.S. 218, 230 (2001); *see Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007) (deferring to agency interpretation of its regulations contained in an "Advisory Memorandum," because it "reflect[ed] [the agency's] considered views"); *Whitman v. Am. Trucking Asss'ns*, 531 U.S. 457, 477-482 (2001) (applying *Chevron* to agency statements in explanatory preamble to regulations). Contrary to petitioner's unsupported assertion (Br. 34-35), DOE's statements were made in connection with the Secretary's authority to issue regulations "necessary to ensure that there is compliance with the specific requirements of" IDEA. 20 U.S.C. § 1417(b), *recodified at* 20 U.S.C. § 1406(a) (2006). DOE authoritatively construed the requirements of the Act with regard to tuition reimbursement, and, as explained above, its construction is entirely consistent with the terms of the 1997 Amendments. Accordingly, its considered construction is entitled to deference.

III. PETITIONER'S RELIANCE ON THE SPENDING CLAUSE IS MISPLACED

Petitioner contends (Br. 18-19) for the first time in this Court that it cannot be ordered to reimburse respondent because IDEA was enacted pursuant to Congress's spending authority and it lacked sufficient notice under *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), that it could be liable for reimbursement under the circumstances of this case at the time it accepted funds under the Act. Because petitioner failed to argue spending author-

ity principles below, the Court should decline to consider that argument in the first instance. *U.S. v. United Foods, Inc.,* 533 U.S. 405, 417 (2001).

In any event, petitioner's new-found interest in the Spending Clause (U.S. CONST. art. I, § 8, cl. 1) is misplaced.

First, the remedy of reimbursement is not damages, but "merely requires the [district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP," *Burlington*, 471 U.S. at 370-71. It is therefore inherent in IDEA's core obligation to provide a *free* appropriate public education, which is expressly defined to require districts to provide appropriate special education services "at public expense," 20 U.S.C. § 1401(9)(A), and "at no cost to parents," 20 U.S.C. § 1401(29). Because liability for reimbursement is bound up in IDEA's essential guarantee, Spending Clause notice concerns are not implicated. As with the right of parents to initiate litigation at issue in *Winkelman*, tuition reimbursement "does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe." 127 S. Ct. at 2006.

Second, school districts such as petitioner had clear notice of their potential liability for tuition reimbursement if they failed to provide a free appropriate public education to a child with a disability. As explained, IDEA itself provides such notice. The obligation to provide a FAPE has never changed, nor has the courts' authority to provide "appropriate" relief under Section 1415(i)(2)(C)(iii). Instead, the 1997 Amendments added Section 1412(a)(10)(C)(i), which—consistent with this Court's prior decisions in *Burlington* and *Carter*—creates an *express* prohi-

bition on awards of tuition reimbursement limited solely to where the district has made a FAPE available to the child. Nothing in the permissive language authorizing reimbursement in the cases covered by subsection (C)(ii) and (C)(iii) undermines the clear notice of potential liability provided by (C)(i). *See* Part I.A. above.

Moreover, even apart from the clear statutory notice, states were clearly informed by DOE that the 1997 Amendments did not alter the state's obligation to provide tuition reimbursement in appropriate cases where a FAPE has been denied. As explained above, DOE explicitly addressed the question in 1999 in commentary published in the Federal Register, and it has repeatedly and consistently maintained that position since then.

In assessing whether states have "clear notice," this Court has looked not just to the language in the statute, but also to statements of the agency charged with administering the statute, as well as the interpretations provided in prior case law. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006). Thus, in *Jackson*, this Court concluded that grant recipients were on notice of obligations based in part on administrative regulations promulgated by the DOE in the Title IX context. 544 U.S. at 183-184. Similarly, in *Arlington*, in ruling that IDEA did not provide for the recovery of costs for experts or consultants, the Court implicitly confirmed that the appropriate executive branch agency's statements could provide the required notice. In that case, the Court concluded that a statement by the Government Accountability Office was not relevant to the "clear notice" analysis, in part be-

cause it was made "by an agency not responsible for implementing the IDEA." *Arlington*, 126 S. Ct. at 2463 n.3. In contrast, DOE explicitly resolved the question at issue against petitioner's position long before petitioner accepted funds for the school years at issue. And *Pennhurst* itself acknowledges the value of such clear regulatory statements. *See* 451 U.S. at 23-24 ("Equally telling is the fact that the Secretary has specifically rejected the position of the Solicitor General."); *see also Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 286 n.15 (1987) ("It is evident, however, that our holding is premised on the plain language of the Act, and on the detailed regulations that implement it.").

Thus, DOE's explicit and repeated position that states are not categorically immune from tuition reimbursement unless they have made a free appropriate public education available to the child provides clear and independent notice that defeats any reliance on the Spending Clause in this case. While petitioner may (and does) complain that DOE's position is flawed and therefore not entitled to deference—an argument that fails for the reasons described above—it cannot plausibly assert that it was unaware that DOE claimed to have authoritatively resolved the issue against petitioner's position. Accordingly, when petitioner elected to receive funds under IDEA, it did so with notice of its potential liability. That is all the Spending Clause requires.

This Court's decisions in *Burlington* and *Carter* further confirm that petitioner had ample notice of its potential liability. They also demonstrate why petitioner's substantial reliance on this Court's decision in *Murphy* is misplaced. Under *Burlington* and *Carter*, the law was settled that tuition reimburse-

ment was potentially available in all cases where the school district failed to provide a free appropriate public education. As explained, the 1997 Amendments were enacted against that background and codify a "general" rule in Section 1412(a)(10)(C)(i) that mirrors those holdings.

In contrast, the settled background rule against which the Court in *Murphy* considered whether expert fees were recoverable to a prevailing parent under the Act was that such fees were unavailable absent clear statutory language to the contrary. 126 S. Ct. at 2459-60. Because the legal framework behind the 1997 Amendments made clear that tuition reimbursement in the context of this case was available, *Murphy* is inapposite.

In sum, the States have had clear notice that IDEA imposes the substantive obligation to provide a free appropriate public education to all children with disabilities, including the duty to reimburse parents when the child has been denied all access to special education services from the public school. If petitioner had any doubts, it should have sought clarification from DOE before receiving IDEA funds. *See Bennett v. Kentucky Dept. of Educ.*, 470 U.S. 656, 672 (1985) ("[I]f the State was uncertain on this point, it could have sought clarification from the Office of Education."). But it cannot now complain that it was somehow unaware of its potential liability for reimbursement if it wrongly denied all special education services to a child.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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