

# INCENTIVIZING COOPERATION:

## A SOLUTION TO *FOREST GROVE*'S SUBOPTIMAL OUTCOME

*Christopher L. Tazzi\**

INTRODUCTION .....	423
I. BACKGROUND UNDERSTANDING OF THE SPECIAL EDUCATION MOVEMENT: THE FIGHT CULMINATING IN THE PASSAGE OF THE IDEA .....	425
II. OVERVIEW OF THE IDEA: WHAT IS ITS PURPOSE AND HOW IS IT ACHIEVED? ....	427
III. THE TENSION CREATED BY THE 1997 AMENDMENT TO THE IDEA: DID THE EXPLICIT AUTHORIZATION OF TUITION REIMBURSEMENT AS A REMEDY REDEFINE "APPROPRIATE" RELIEF? .....	430
IV. CERTIORARI GRANTED: WHAT WERE THE ARGUMENTS AND HOW DID THE COURT DECIDE? .....	434
V. THE POLICY TRADEOFFS IN <i>FOREST GROVE</i> AND HOW CONGRESS CAN CREATE A BETTER SYSTEM .....	437
CONCLUSION .....	440

### INTRODUCTION

An appropriate education for every citizen is vitally important to the success of our country, and yet the United States Constitution is interestingly silent on the issue. The Constitution does not explicitly mention education as a right, and the Supreme Court has declined to recognize education as a fundamental right. Due to this, it is clear that the right to a public education is not federally guaranteed.<sup>1</sup> Because the power to regulate education is not a power delegated to the United States, the Tenth Amendment reserves the business and responsibility of education for state governments.<sup>2</sup> Unfortunately, leaving the business of education to the states has had the historical effect of

---

\* Candidate for Juris Doctor, 2011, Notre Dame Law School. I would like to thank Jennifer Tazzi, a special education attorney, and Susan Tazzi, a special education teacher, for providing a sounding board for ideas. I would also like to thank Megan Tazzi and Louis Tazzi for inspiration. Finally, I would like to thank Maria Telsoni for her unending love and support.

1. The absence of constitutional protection for a right to education is particularly interesting in light of the importance with which the American people have traditionally assigned the right. According to Chief Justice Earl Warren, for example, "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Also, Mitchell Yell said, "In our country, public education is viewed as a birthright that leads to an educated electorate without which there would be no viable democracy." MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* 54 (1st ed. 1998).

2. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

marginalizing certain groups, such as disabled students. The Supreme Court's reliance on the concept of equal protection found in the Fourteenth Amendment of the Constitution<sup>3</sup> proved temporarily helpful to disabled students, but results were mixed. Therefore, Congress ultimately intervened on behalf of the rights of students with disabilities in the 1970s. Congressional intervention culminated in 1975 when Congress passed the Education for All Handicapped Children Act of 1975 (EAHCA).<sup>4</sup> A 1990 amendment renamed this statute the Individuals with Disabilities Education Act (IDEA).<sup>5</sup> The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."<sup>6</sup> The Act ensures that states are adequately meeting the educational needs of students with disabilities by providing federal funding to the states conditioned on the states meeting certain requirements.<sup>7</sup>

A 1997 amendment to the IDEA regarding the availability of tuition reimbursement as a remedy created a considerable amount of confusion that was eventually settled by the Supreme Court's recent decision in *Forest Grove School District v. T.A.*<sup>8</sup> In the case, the Supreme Court held that courts could still award tuition reimbursement as an equitable remedy, even in a situation where the disabled student in question had never before received special education services. With this in mind, the Court's decision in *Forest Grove* better ensures that disabled students are provided with a free appropriate public education because it prevents school districts from claiming safe harbor from tuition reimbursement by merely refusing to provide a student with special education services. The decision does so, however, at the expense of incentivizing cooperation between parents and public school districts. Broadly speaking, this Note analyzes the system that *Forest Grove* establishes and proposes a different system that can simultaneously incentivize cooperation among parents and school districts while ensuring that disabled students are provided with a free appropriate public education.

Part I of this Note provides a background understanding of the special education movement and the debate that ultimately culminated in the passage of the IDEA. Part II describes the purpose of the IDEA and details the statutory framework and procedural safeguards that ensure that the overarching purpose of the IDEA is fulfilled. Part III crystallizes the tension that the 1997 amendment presented to the IDEA: Did the explicit authorization of tuition

---

3. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-20 (2006)).

5. Individuals with Disabilities Education Act, Pub. L. No. 91-230, 84 Stat. 175 (codified at 20 U.S.C. §§ 1400-82 (2006)).

6. 20 U.S.C. § 1400(d)(1)(A) (2006).

7. See YELL, *supra* note 1, at 72.

8. 129 S. Ct. 2484 (2009).

reimbursement as a remedy redefine “appropriate” relief? Part IV provides an analysis of the Supreme Court’s decision in *Forest Grove School District v. T.A.*, which resolved the tension posed by the 1997 amendment to the IDEA. Finally, Part V explains why the Court’s decision in *Forest Grove* better ensures that disabled students are provided with a free appropriate public education but at the expense of incentivizing cooperation between parents and public school districts. The Note concludes that Congress should amend the IDEA to structure a system that simultaneously ensures that parents and public school districts will truly engage in honest and good faith bargaining, while still guaranteeing that disabled students are not languishing in the system without an appropriate education—a restructuring that is essentially a middle ground between the two possibilities posed to the Court in *Forest Grove*.

#### I. BACKGROUND UNDERSTANDING OF THE SPECIAL EDUCATION MOVEMENT: THE FIGHT CULMINATING IN THE PASSAGE OF THE IDEA

The United States Constitution does not guarantee a right to public education,<sup>9</sup> and this has unfortunately contributed to the slow recognition of educational rights for students with learning disabilities in America. From the middle of the nineteenth century until the beginning of the twentieth century, every state enacted compulsory attendance laws, but children with disabilities were mostly excluded from schools.<sup>10</sup> Reflecting the misunderstanding of the times, courts willingly sanctioned these practices of the states due to the belief that children with learning disabilities were interfering with the best interests of the school.<sup>11</sup> In *Watson v. City of Cambridge*,<sup>12</sup> for example, the Supreme Judicial Court of Massachusetts upheld the school committee’s decision to expel a child because of “imbecility.”<sup>13</sup> As recently as 1958, in *Department of Public Welfare v. Haas*,<sup>14</sup> the Supreme Court of Illinois upheld state legislation that excluded students who were determined to be incapable of benefitting from public education.<sup>15</sup> Specifically, the court in *Haas* held that Illinois’s compulsory attendance legislation did not necessarily cover students with learning disabilities because the “existing legislation does not require the State to

---

9. YELL, *supra* note 1, at 54. “The Tenth Amendment to the Constitution implies that education is the responsibility of state government.” *Id.*

10. *Id.*

11. *See id.*

12. 32 N.E. 864 (Mass. 1893).

13. *Id.* at 865. The records of the school committee revealed that the student was expelled “because he was too weak-minded to derive profit from instruction.” *Id.* at 864. Furthermore, the records revealed statements by teachers that “he [was] so weak in mind as not to derive any marked benefit from instruction, and, further, that he is troublesome to other children, making unusual noises, pinching others, etc.” *Id.* *See also* Bd. of Educ. v. State *ex rel.* Goldman, 191 N.E. 914, 916 (Ohio Ct. App. 1934) (“As a matter of common sense it is apparent that . . . an idiot or imbecile who is incapable of absorbing knowledge or making progress in the schools, ought to be excluded.”); State *ex rel.* Beattie v. Bd. of Educ., 172 N.W. 153, 155 (Wis. 1919) (dismissing the complaint of an expelled petitioner who had a facial condition causing drooling and speech problems because the expulsion was considered to be in the best interest of the school and the general welfare).

14. 154 N.E.2d 265 (Ill. 1958).

15. *Id.* at 269–70.

provide a free education program . . . for the feeble minded or mentally deficient children who, because of limited intelligence, are unable to receive a good common school education."<sup>16</sup>

Help for children with learning disabilities eventually came from a somewhat unsuspecting place: the civil rights movement.<sup>17</sup> The landmark decision of *Brown v. Board of Education*<sup>18</sup> was decided on the principle of the Fourteenth Amendment, which provides that the states may not deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."<sup>19</sup> Although the United States Constitution does not provide a right to education, if a state makes the decision to provide an education to its citizens – which all states do – a property interest in education is thereby created, and the Fourteenth Amendment requires both that education is provided on equal terms and that the state-granted right is not denied without due process of law.<sup>20</sup> The *Brown* decision was a tremendous impetus for the special education movement because the concept of equal opportunity derived from the Fourteenth Amendment was applicable not only to minorities but also to children with learning disabilities.<sup>21</sup> Sensing that it was only a matter of time until the principles of *Brown* would be extended to students with disabilities, parents of these students formed advocacy groups and pushed for the principles of *Brown* to be extended to their children.<sup>22</sup>

Sixteen years after the Court's decision in *Brown*, the concept of equal opportunity was extended to children with disabilities in two landmark decisions: *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*<sup>23</sup> and *Mills v. Board of Education*.<sup>24</sup> In *PARC*, the court approved a lengthy consent decree requiring that children with mental retardation between the ages of six and twenty-one be provided a free public education and be educated in a program most like the programs provided to students without disabilities.<sup>25</sup> In *Mills*, the United States District Court for the District of Columbia similarly enjoined states from denying education to children with disabilities. The consent decree in *Mills*, however, went even further when it

---

16. *Id.* at 270.

17. YELL, *supra* note 1, at 55.

18. 347 U.S. 483 (1954).

19. U.S. CONST. amend. XIV, § 1.

20. See LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 12–13 (3d ed. 2000); see also CHARLES J. RUSSO & ALLAN G. OSBORNE, JR., ESSENTIAL CONCEPTS & SCHOOL-BASED CASES IN SPECIAL EDUCATION LAW 5 (2008) (noting that Chief Justice Earl Warren "characterized education as the most important function of government" and reasoned that "where the State has undertaken to provide [an education to its citizens, it] is a right that must be made available to all on equal terms" (quoting *Brown*, 347 U.S. at 493)).

21. YELL, *supra* note 1, at 59.

22. *Id.* at 56–59. A number of national advocacy groups eventually formed such as the National Association for Retarded Citizens (now the Arc of the United States), the Council for Exceptional Children (CEC), the American Association for the Education of the Severely/ Profoundly Handicapped (now TASH), the United Cerebral Palsy Association (UCP), the National Association for Down Syndrome (NADS), and the Association for Children with Learning Disabilities (now the Learning Disabilities Association of America). *Id.* at 58.

23. 343 F. Supp. 279 (E.D. Pa. 1972).

24. 348 F. Supp. 866 (D.D.C. 1972).

25. See *PARC*, 343 F. Supp. at 302–16.

ordered the district to provide due process safeguards and provided a framework for exactly what this would entail: procedures for labeling, placement, and inclusion of students with disabilities.<sup>26</sup> The safeguards included the right to a hearing with representation, a record, and an impartial hearing officer, the right to appeal, the right to have access to records, and the requirement of written notice at all stages of the process.<sup>27</sup>

*PARC* and *Mills* laid the foundation for future cases<sup>28</sup> and judicial success for students with disabilities, but ultimate success was stunted because of insufficient funds and uneven results.<sup>29</sup> Understanding that decisions from varying jurisdictions would create too much confusion and disparity and realizing that providing for children with disabilities costs states a large amount of money, Congress intervened in the early 1970s.<sup>30</sup> In 1973, for example, Congress passed the Rehabilitation Act of 1973.<sup>31</sup> Section 504 of the Act states: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his disability, be excluded from the participation in, be denied in the benefits of, or be subject to discrimination under any activity receiving federal financial assistance . . . ."<sup>32</sup> Two years later, Congress passed "the most significant increase in the role of the federal government in special education to date"<sup>33</sup> — the Education for All Handicapped Children Act of 1975 (EAHCA).<sup>34</sup> The 1990 amendment to the Education for All Handicapped Children Act renamed the EAHCA as the IDEA.<sup>35</sup>

## II. OVERVIEW OF THE IDEA: WHAT IS ITS PURPOSE AND HOW IS IT ACHIEVED?

The primary purpose of the IDEA is to ensure, through federal funding, that states can adequately meet the educational needs of students with disabilities.<sup>36</sup> It is important to note, however, that the IDEA is not merely a funding statute, as it creates a substantive right to public education by conditioning funding on state compliance with the Act.<sup>37</sup> Section 1400(d) of the IDEA explicitly states six purposes for the Act, but the most important is the assurance that "all children with disabilities have available to them a free

---

26. See *Mills*, 348 F. Supp. at 878–84.

27. *Id.*

28. See, e.g., *Panitch v. Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976); *Fialkowski v. Shapp*, 405 F. Supp. 946 (E.D. Pa. 1975).

29. See ROTHSTEIN, *supra* note 20, at 13.

30. *Id.*

31. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–96 (2006)).

32. 29 U.S.C. § 794(a) (2006).

33. YELL, *supra* note 1, at 62.

34. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 77 (codified as amended at 20 U.S.C. §§ 1405–19 (2006)).

35. Individuals with Disabilities Education Act, Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C. §§ 1400–82 (2006)).

36. YELL, *supra* note 1, at 72.

37. See *Honig v. Doe*, 484 U.S. 305, 310 (1988) ("Congress did not content itself with passage of a simple funding statute. Rather, the EHA confers upon disabled students an enforceable substantive right to public education in participating States . . . and conditions federal assistance upon a State's compliance with the substantive and procedural goals of the Act.") (citations omitted).

appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>38</sup> To ensure that the goals and purposes of the IDEA are achieved, Congress created an elaborate procedural framework designed to protect the rights of children with learning disabilities.<sup>39</sup> This framework is outlined briefly below.

Either a parent or the school district can trigger the protective framework and ultimately start the IDEA process by requesting an evaluation of a child.<sup>40</sup> The purpose of the evaluation is to determine whether the child is protected under the IDEA by reason of having a qualifying disability.<sup>41</sup> In order to be protected under the Act, a child must be found to have a disability, as defined in § 1401(3), and the disability must require the need for special education and related services.<sup>42</sup> If the evaluation reveals that the child has a qualifying disability, the IDEA requires the production of an Individualized Education Program (IEP) by an “IEP Team.”<sup>43</sup> The IEP is essentially a “comprehensive statement of the educational needs of a [disabled] child and the specially designed instruction and related services to be employed to meet those needs.”<sup>44</sup> Ultimately, the IEP plan must include for the child a “free appropriate public education” (FAPE)<sup>45</sup> in the “least restrictive environment”

38. 20 U.S.C. § 1400(d)(1)(A) (2006). The other five stated purposes of the IDEA are: (1) “to ensure that the rights of children with disabilities and parents of such children are protected;” (2) “to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;” (3) “to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;” (4) “to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services;” and (5) “to assess, and ensure the effectiveness of, efforts to educate children with disabilities.” *Id.* § 1400(d)(1)(B)–(4).

39. YELL, *supra* note 1, at 72.

40. Emily S. Rosenblum, Note, *Interpreting the 1997 Amendment to the IDEA: Did Congress Intend to Limit the Remedy of Private School Tuition Reimbursement for Disabled Children?*, 77 FORDHAM L. REV. 2733, 2739 (2009).

41. See 20 U.S.C. § 1414(a)(1)(C). In evaluating whether a child has a disability, the school district must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent.” *Id.* § 1414(b)(2)(A). The tools and strategies used for assessment must be “valid and reliable” and “administered by trained and knowledgeable personnel.” *Id.* § 1414(b)(3)(A)(iii)–(iv).

42. See 20 U.S.C. § 1401(3). To meet the definition of a “child with a disability” under the IDEA, a child must fall into one of the following descriptions: “mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance[,] . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” *Id.* § 1401(3)(A)(i).

43. *Id.* § 1414(d)(1)(B). An IEP team is a group of individuals including the parent of the child with a disability, a regular education teacher, a special education teacher, and a representative of the school district. See *id.* § 1414(d)(1)(B)(i)–(v).

44. Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 368 (1985). Specifically, the IEP must include a statement of the child’s present performance, a statement of annual goals, a description of how the goals will be measured, and a statement of the special education and related services to be provided. See 20 U.S.C. § 1414(d)(1)(A)(i) (describing in detail the requirements of an IEP).

45. 20 U.S.C. § 1401(9). The term “free appropriate public education” is defined as

special education and related services that . . . (A) have been provided at public

(LRE).<sup>46</sup> Regarding FAPE, a school district's duty to provide a free appropriate education is "not limitless" and requires only services needed to ensure that the child "progress[es] adequately" as opposed to services that "would maximize the child's achievement."<sup>47</sup> As *Board of Education v. Rowley*<sup>48</sup> makes clear, however, even though the placement does not have to maximize the educational achievement of the disabled child, it does have to be "reasonably calculated to enable the child to receive educational benefits."<sup>49</sup> Regarding LRE, a primary goal of the IDEA is "mainstreaming," which is educating disabled children in the regular classroom as much as possible.<sup>50</sup>

Congress "recogniz[ed] that this cooperative approach would not always produce a consensus between the school officials and the parents."<sup>51</sup> With this in mind, Congress created procedural safeguards in the IDEA framework for those parents who believed that the IEP did not provide their child with a free appropriate public education.<sup>52</sup> Such procedural safeguards include a right to mediation,<sup>53</sup> a right to an impartial due process hearing,<sup>54</sup> a right to an administrative appeal of the due process hearing,<sup>55</sup> and a right to further appeal by bringing a civil action in a state or federal court.<sup>56</sup>

---

expense, under public supervision and direction, and without charge; (B) meet the standards of the State education agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the [IEP].

*Id.*

46. 20 U.S.C. § 1412(a)(5). The requirement that children are placed in the "least restrictive environment" means that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." *Id.* § 1412(a)(5)(A). Removal from the regular education environment should occur "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*

47. Terry Jean Seligmann, *An Idea Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 763 (2001).

48. 458 U.S. 176 (1982).

49. *Id.* at 207.

50. ROTHSTEIN, *supra* note 20, at 125.

51. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985).

52. See 20 U.S.C. § 1415(e)-(i) (2006).

53. The mediation must be "voluntary on the part of the parties," cannot be "used to deny or delay a parent's right to a due process hearing," and must be "conducted by a qualified and impartial mediator who is trained in effective mediation techniques." *Id.* § 1415(e)(2)(A).

54. In a due process hearing, an impartial hearing officer hears evidence from both the parents and the school district. *Id.* § 1415(f). The hearing officer cannot be "an employee of the State educational agency or the local educational agency involved in the education or care of the child or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing." *Id.* § 1415(f)(3)(A)(i). Furthermore, the hearing officer must (1) "possess knowledge of, and the ability to understand, the provisions of [the IDEA], Federal and State regulations pertaining to [the IDEA], and legal interpretations of [the IDEA] by Federal and State courts;" (2) "possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice;" and (3) "possess the knowledge and ability to render and write decision in accordance with appropriate, standard legal practice." *Id.* § 1415(f)(3)(A)(ii)-(iv).

55. The administrative appeal is conducted by the relevant State educational agency. See *id.* § 1415(g)(2).

56. *Id.* § 1415(e)-(i).

### III. THE TENSION CREATED BY THE 1997 AMENDMENT TO THE IDEA: DID THE EXPLICIT AUTHORIZATION OF TUITION REIMBURSEMENT AS A REMEDY REDEFINE "APPROPRIATE" RELIEF?

Prior to the 1997 amendment to the IDEA, the Act was silent regarding the availability of tuition reimbursement as a remedy for a school district's failure to provide a free appropriate public education to a disabled student. Rather than any explicit recognition of tuition reimbursement as an available remedy, the IDEA merely stated that a court "basing its decision on the preponderance of the evidence, shall grant such relief as [it] determines is appropriate."<sup>57</sup> In *School Committee of Burlington v. Department of Education*,<sup>58</sup> the Court relied on principles of equity in finding that retroactive tuition reimbursement was an "appropriate" remedy.<sup>59</sup> According to the Court, the ordinary meaning of the phrase "grant such relief as [it] determines is appropriate" found in 20 U.S.C. § 1415(i)(2)(C)(iii) "confers broad discretion on the court."<sup>60</sup> Furthermore, the Court determined that because the IDEA did not specify what "appropriate" means, courts must use their delegated discretion to fashion relief "in light of the purposes of the Act."<sup>61</sup> Noting that the principal purpose of the IDEA is to ensure that disabled students are provided with a free appropriate public education, the Court held that tuition reimbursement is an appropriate remedy because without the availability of reimbursement as a remedy, "the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete."<sup>62</sup>

The Supreme Court's decision in *Burlington* approved of tuition reimbursement as an "appropriate" remedy under the IDEA, but the 1997 amendment to the IDEA created a significant amount of controversy regarding whether the *Burlington* holding still applied to students who had never received special education related services in a public school. The 1997 amendment to the IDEA included a new provision, 20 U.S.C. § 1412(a)(10)(C)(ii), which explicitly addressed the issue of tuition reimbursement as a remedy. The relevant subsection is entitled "Reimbursement for private school placement"

---

57. *Id.* § 1415(i)(2)(C)(iii).

58. 471 U.S. 359 (1985).

59. *Id.* at 370.

60. *Id.* at 369.

61. *Id.*

62. *Id.* at 370 (emphasis omitted). The nature of the review process impacted the Court's decision in determining that tuition reimbursement is an appropriate remedy. *See id.* According to the Court, if the review process could be completed in a short period of time, prospective injunctive relief directing the school district to develop and implement an IEP would almost surely be adequate. *See id.* But because the review process is "ponderous" and often can take years, it would be an "empty victory" for parents and the disabled student if a court years later told them that although they were right, nothing could be done to remedy the fact that the child was deprived of a free appropriate public education other than a prospective injunction. *Id.* "Because Congress undoubtedly did not intend this result," the Court was confident in concluding that tuition reimbursement must be an "appropriate" remedy. *Id.*



and states:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.<sup>63</sup>

There was a significant amount of controversy and uncertainty regarding the effect of this amendment on the holding of *Burlington*. Could a court still provide tuition reimbursement as an appropriate remedy for a student who had not received special education and related services at a public school, or did the provision redefine and narrow “appropriate” so that tuition reimbursement was only an acceptable remedy if a student had already received special education and related services at a public school? This uncertainty over the question led to a circuit split: the First Circuit determined that the provision bars tuition reimbursement as an appropriate remedy for students who had never received special education and related services in a public school, while the Second and Ninth Circuits determined that the provision does not act as a categorical bar.

In 2004, in *Greenland School District v. Amy N.*,<sup>64</sup> the First Circuit reasoned that the plain language meaning of 20 U.S.C. § 1412(a)(10)(C)(ii) categorically bars tuition reimbursement in circumstances where a student has not received special education and related services from a public school.<sup>65</sup> Determining that the 1997 IDEA amendment “limit[ed] the circumstances in which parents who have unilaterally placed their child in a private school are entitled to reimbursement,” the First Circuit described 20 U.S.C. § 1412(a)(10)(C)(ii) as an “affirmative requirement” of obtaining reimbursement—prior receipt of special education and related services from a public agency.<sup>66</sup> Because the disabled student in *Amy N.* did not meet the “threshold” requirement of prior receipt of special education and related services, the First Circuit affirmed the decision to deny tuition reimbursement.<sup>67</sup> According to the court, denying tuition reimbursement in such circumstances would “control government expenditures for students voluntarily placed in private schools by their parents” and “reinforce[] the principle that children should not be removed unnecessarily from regular education environments.”<sup>68</sup>

---

63. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).

64. 358 F.3d 150 (1st Cir. 2004).

65. *Id.* at 152.

66. *Id.* at 157, 159.

67. *Id.* at 159.

68. *Id.* at 152. Although only in an unpublished opinion, the Third Circuit also found the 1997 amendment to the IDEA to limit the circumstances in which parents are entitled to tuition reimbursement. See *Marissa F. v. William Penn Sch. Dist.*, 199 F. App'x 151, 153 (3d Cir. 2006) (noting that the disabled student's claim for tuition reimbursement was barred because “the District

Two years later, in July 2006, the Second Circuit disagreed with the First Circuit and held in *Frank G. v. Board of Education*<sup>69</sup> that the 1997 amendment to the IDEA did not categorically bar tuition reimbursement for a disabled student who had never received special education and related services at a public school.<sup>70</sup> In *Frank G.*, the school district relied on the First Circuit's decision in *Greenland* and argued that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) "implicitly exclud[ed]" tuition reimbursement to parents who unilaterally removed their child from the public school before the child had tried special education and related services through the public school.<sup>71</sup> According to the school district, "The clear implication of the plain language . . . is that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expense arising from a parent's unilateral placement of the child in private school."<sup>72</sup> The Second Circuit disagreed that 20 U.S.C. § 1412(a)(10)(C)(ii) had a plain and unambiguous meaning and pointed to the fact that the plain language of the amendment "does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to

---

had not yet been afforded the opportunity to provide FAPE services to [the disabled student]"). Furthermore, in a published opinion, the Third Circuit noted that the District challenged only the "appropriateness" of the placement as opposed to also arguing that the parents of the disabled child were not entitled to tuition reimbursement by reason of 20 U.S.C. § 1412(a)(10)(C)(ii), which implicitly suggested that the Third Circuit thought that the provision might indeed limit tuition reimbursement to parents with children who never previously received special education services under the IDEA. See *Lauren W. ex. rel. Jean W. v. Deflaminis*, 480 F.3d 259, 276 n.21 (3d Cir. 2007). The District of Maryland similarly reasoned that "the plain language of section 1412(a)(1)(C)(ii) makes it clear that, as a threshold matter, reimbursement is available only in cases where the disabled student was at one time receiving 'special education and related services' from a public agency." See *Balt. City Bd. of Sch. Comm'rs v. Taylorch*, 395 F. Supp. 2d 246, 249 (D. Md. 2005) (citing *Carmel Cent. Sch. Dist. v. V.P. ex. rel. G.P.*, 373 F. Supp. 2d 402, 411 (S.D.N.Y. 2005)). Finding that the disabled student had not received special education and related services at a public school, the United States District Court for the District of Maryland held that "the statutory text commands (and permits) only one result: [the disabled student's] parents are not eligible for tuition reimbursement under the IDEA." *Id.* at 249.

69. 459 F.3d 356 (2d Cir. 2006). More than a year before the Second Circuit, in *Frank G.*, expressed its disapproval of the First Circuit's plain meaning approach, the United States District Court for the Southern District of New York held in *Board of Education v. Tom F.* that the "clear implication of the plain language [of § 1412(a)(10)(C)(ii)] . . . is that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expense arising from a parent's unilateral placement of the child in private school." *Bd. of Educ. v. Tom F.*, No. 01 Civ. 6485(GBD), 2005 WL 22866, at \*3 (S.D.N.Y. Jan. 4, 2005). The holding in *Tom F.* was "effectively abrogated," however, by the Second Circuit's rejection of the plain meaning approach in *Frank G.* *Allan G. Osborne, Jr., Is a Parent Who Places a Child with a Disability in a Private School Entitled to Tuition Reimbursement if the Child Has Never Attended a Public School?* *Board of Education of the City of New York v. Tom F.*, 219 EDUC. L. REP. 887, 896 (2007). In fact, after the Second Circuit's decision in *Frank G.*, the court vacated and remanded *Tom F.* "for further proceedings in light of [*Frank G.*]." *Bd. of Educ. v. Tom F.*, 193 F. App'x 26, 26 (2d Cir. 2006), *aff'd per curiam*, 552 U.S. 1 (2007). The Supreme Court granted certiorari in *Tom F.*, but "Justice Kennedy took no part in the decision of [the] case[.]" the Court issued a one sentence *per curiam* opinion: "The judgment is affirmed by an equally divided Court." *Tom F.*, 552 U.S. 1, 1 (2007) (*per curiam*). The next week, the Court denied certiorari in *Frank G.* *Frank G. v. Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 552 U.S. 985 (2007).

70. 459 F.3d at 372.

71. *Id.* at 368.

72. *Id.* (quoting *Tom F.*, 2005 WL 22866, at \*3).

parents whose child had not previously received special education and related services.”<sup>73</sup> In addition, the court reasoned that the fact that the school district had to rely on an inference from the plain language suggested in and of itself that the provision is in fact ambiguous.<sup>74</sup> Based on its finding of ambiguity, the court relied primarily on the overall purpose of the IDEA—the assurance that all disabled students receive a free appropriate public education that is tailored to their unique needs—in holding that 20 U.S.C. § 1412(a)(10)(C)(ii) does not constrain or limit a court’s general equitable power to award tuition reimbursement under § 1415(i)(2)(C) to disabled students who have not previously received special education and related services at a public school.<sup>75</sup>

About a year later, in April 2008, the Ninth Circuit expressed its approval of the Second Circuit’s position in *Forest Grove School District v. T.A.*<sup>76</sup> Describing the Second Circuit’s holding in *Frank G.* as a “well-reasoned analysis of [the] issue,” the Ninth Circuit found “no reason to disagree.”<sup>77</sup> As the Second Circuit had emphasized, the Ninth Circuit also found that interpreting the 1997 amendment to impose a categorical bar on tuition reimbursement for students who have not yet received special education and related services would defeat the primary purpose of the IDEA—providing a free appropriate public education to students with disabilities.<sup>78</sup> The court, therefore, held that “students who have not ‘previously received special education and related services’ are eligible for reimbursement, to the same extent as before the 1997 amendments, as ‘appropriate’ relief pursuant to § 1415(i)(2)(C). The statutory requirements of § 1412(a)(10)(C) do not apply.”<sup>79</sup>

---

73. *Id.* The court declared that “whether a statute is plain or ambiguous ‘is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Furthermore, the court analogized to interpretation of contracts by referring to a previous holding of the Second Circuit that “[l]anguage is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.” *Id.* (quoting *O’Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 59 (2d Cir. 1994)).

74. *Id.*

75. *Id.* at 372. Because the terms of the statute were not unambiguous, the court “turn[ed] to the ‘traditional canons of statutory construction to resolve the ambiguity.’” *Id.* (quoting *United States v. Peterson*, 394 F.3d 98, 105 (2d Cir. 2005)). The court determined that “[o]ne of the primary ways in which the IDEA seeks to ensure that children with disabilities receive a free appropriate education is by conferring broad discretion on the district court to grant relief it deems appropriate . . . .” *Id.* at 371. The court declined to interpret the IDEA in a way that would defeat the Act’s objectives. *See id.* at 372. Furthermore, the court reasoned that the re-enactment of § 1415(i)(2)(C) without change was “significant” because it implicitly meant that Congress approved of *Burlington’s* construction of the statute—under their equitable powers, the court’s have broad discretion to grant appropriate relief including retroactive tuition reimbursement for disabled students who have not tried special education and related services in the past. *Id.* at 369.

76. 523 F.3d 1078 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 987 (2009).

77. *Id.* at 1087.

78. *Id.*

79. *Id.* at 1087–88 (quoting 20 U.S.C. § 1412(a)(10)(C)(ii)).

#### IV. CERTIORARI GRANTED: WHAT WERE THE ARGUMENTS AND HOW DID THE COURT DECIDE?

On January 16, 2009, the Supreme Court granted the school district's petition for certiorari in *Forest Grove School District v. T.A.*<sup>80</sup> At this point, the battle lines were already drawn during the previous cases that split on the issue. The argument against tuition reimbursement was anchored primarily in *Greenland's* plain meaning argument. The school district argued that the necessary and unambiguous inference from § 1412(a)(10)(C)'s explicit grant of authority to award tuition reimbursement in the specific circumstance of prior receipt of special education services is that reimbursement is not available in other circumstances.<sup>81</sup> Essentially, their argument was that Congress implicitly excluded a circumstance by explicitly including a different circumstance.<sup>82</sup> Furthermore, "insofar as it is relevant," the school district argued that the legislative history of the 1997 amendment confirms the plain meaning of the provision.<sup>83</sup> The Report of the House Committee on Education and the Workforce, for example, states that the "bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities"

---

80. 129 S. Ct. 987 (2009) (granting certiorari). This Note has attempted to devote the primary amount of effort to the general statutory construction arguments that overlay the prominent tuition reimbursement cases rather than detail the factual minutiae of each and every case. For this seminal Supreme Court case, however, a brief description of the facts might prove fruitful and are as follows: T.A. attended public schools in the Forest Grove School District from kindergarten to his junior year of high school. 129 S. Ct. 2484, 2488 (2009). During T.A.'s freshman year of high school, T.A. was evaluated by a school psychologist. *Id.* The psychologist concluded that no further testing would be needed for any learning disabilities or other health impairments. *Id.* The psychologist and two school officials discussed the results with the mother, and all agreed that T.A. did not qualify for special education services. *Id.* After completing his sophomore year, T.A.'s parents sought private professional advice, and a private specialist diagnosed T.A. with ADHD as well as a number of other learning and memory disabilities. *Id.* Pursuant to the private specialist's advice, the parents enrolled T.A. at a private school focusing on educating children with special needs. *Id.* T.A.'s parents then requested an administrative due process hearing regarding T.A.'s eligibility for special education services, but the IEP team concluded that T.A. did not qualify because his ADHD did not sufficiently adversely affect T.A.'s educational performance. *Id.* at 2488–89. Because the school district declined to provide T.A. with an IEP, the parents left him enrolled at the private academy. *Id.* at 2489.

81. Brief for the Petitioner at 21–22, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305).

82. *See id.* For an example where a court makes inferences in this manner, see *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("The most natural reading of § 1681p is that Congress implicitly excluded a general discovery rule by explicitly including a more limited one.") (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

83. Brief for the Petitioner, *supra* note 81, at 25. The school district prefaced its discussion of legislative history with a suggestion that it might not be entirely relevant because the use of legislative history is not accepted by all judges and academics. *See* Marshall J. Breger, *Introductory Remarks at the Eighteenth Annual Administrative Law Issue Conference on Statutory Interpretation: The Role of Legislative History in Judicial Interpretation—A Discussion Between Judge Kenneth W. Starr and Judge Abner J. Mikva*, 1987 DUKE L.J. 362, 367, 369 (1987) (stating that the "mutable nature" of legislative history "has prompted criticism from judges, academicians and legislators alike" and noting that Judge Starr's position is that a statute is "the finished product of the legislature" and the courts should "avoid sorting through preliminary materials"). Most notably, Justice Scalia rejects the use of legislative history because legislative history is not law. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 429–30 & n.85 (1989) ("Judicial reliance on legislative history . . . increases the power of interest groups over the interpretative process at the expense of Congress . . .").

and that Congress attempted to “address the problem of over-identification of children with disabilities” and eliminate “inappropriate financial incentives for referring children to special education.”<sup>84</sup> More to the point, the House Report commented specifically on § 1412:

[Section 1412] specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency has not made a free appropriate public education 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.*<sup>85</sup>

In addition, two Congressmen’s floor comments lend support to a reading of the statute that imposes a categorical bar on tuition reimbursement for students who have not previously received special education through a public school. First, Senator James Jeffords stated on the floor, “Should educators have 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? . . . . [The Amendment] dictates that the answer be yes, but so does common sense.”<sup>86</sup> Furthermore, Representative Michael Castle stated:

This law . . . has had unintended and costly consequences. For example, it has resulted in children being labeled as disabled when they were not. It has resulted in school districts unnecessarily paying expensive private school tuition for children. It has resulted in cases where lawyers have gamed the system to the detriment of schools and children. . . . This bill makes it harder for parents to unilaterally place a child in elite private schools at taxpayer expense, lowering costs to local school districts.<sup>87</sup>

On the other hand, the argument for tuition reimbursement was anchored at least partially in the Second Circuit’s interpretation of the statute in *Frank G.*

84. H.R. REP. NO. 105-95, at 88-90, 92 (1997), *reprinted in* 1997 U.S.C.C.A.N. at 78, 86-87, 90.

85. H.R. REP. NO. 105-95, at 93, *reprinted in* 1997 U.S.C.C.A.N. at 90 (emphasis added). *But see* Brief for Respondent at 27, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305) (arguing that the “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.”); *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 373 (2d Cir. 2006) (finding that the statement was merely an “awkward paraphrase” that “does not expressly exclude reimbursement where special education and related services have not been previously provided”).

86. 143 CONG. REC. S4295 (statement of Sen. Jeffords).

87. 143 CONG. REC. H2536 (statement of Rep. Castle). *But see* Brief for the Respondent, *supra* note 85, at 26 (arguing that “[n]othing in the statement . . . 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.”).

Counsel for T.A. disagreed with the school district's argument that the plain meaning of the statute created a negative inference—an implication that if a child had *not* previously received special education from a public agency then there is no authority to reimburse the tuition expense arising from a parent's unilateral placement of the child in private school.<sup>88</sup> According to the respondent, "such a sweeping negative inference" was inconsistent with the overall structure and purpose of the IDEA.<sup>89</sup> The IDEA's primary purpose is to ensure that *all* children with disabilities receive a free and appropriate public education. Therefore, school districts are obligated to find and evaluate children with learning disabilities.<sup>90</sup> The respondent argued that under the school district's reading of the statute, a district can deny a free and appropriate education to children simply because the child had never received special education services in the past.<sup>91</sup> According to the respondent, this "ma[de] no sense" because a school district could avoid the clear mandate of the IDEA with impunity solely by denying special education services to a child with a disability.<sup>92</sup>

The majority of the Court sided with the respondent and found the Second Circuit's interpretation in *Frank G.* to be most persuasive.<sup>93</sup> The Court noted that the 1997 amendment did not expressly prohibit reimbursement when a child had not received prior special education services.<sup>94</sup> The Court stated that because "the clause [in question] is phrased permissively, stating only that courts 'may require' reimbursement [when a child has previously received services], it does not foreclose reimbursement awards in other circumstances."<sup>95</sup> The Court then held that "[t]he clauses of § 1412(a)(10)(C) are thus best read as

---

88. See Brief for Respondent, *supra* note 85, at 17.

89. *Id.* In addition, counsel for T.A. argued that if the Court has any doubt as to the interpretation of the statute, Chevron analysis should dictate an outcome in favor of tuition reimbursement because the Department of Education had interpreted the 1997 amendment in question in an official regulation. *Id.* at 39 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). During the Department of Education's notice-and-comment rule-making period for the 1997 amendment, a commenter requested an explanation regarding whether § 1412 only applied when the child previously received special education services. Assistance to States for the Education of Children with Disabilities, 64 Fed. Reg. 12,406, 12,602 (Mar. 12, 1999). The Department of Education responded to the comment in its final regulation entitled "Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities," and stated:

[H]earing officers and courts retain their authority . . . to award appropriate relief if a public agency has failed to provide FAPE . . . under [§1415] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under [§ 1412] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

*Id.* at 12,602.

90. See Brief for the Respondent, *supra* note 85, at 24–25.

91. *Id.* at 24.

92. *Id.*

93. The case was decided 6-3 with Justices Souter, Scalia, and Thomas dissenting. See *Forest Grove School District v. T.A.*, 129 S. Ct. 2484, 2484–85 (2009).

94. *Id.* at 2492.

95. *Id.* at 2493.

elucidative rather than exhaustive.”<sup>96</sup> Finally, the Court explained that the 1997 amendment could not possibly impose a categorical bar on tuition reimbursement because to find such a categorical bar would be a direct contradiction with the “general remedial purpose underlying [the] IDEA,”<sup>97</sup> and “[w]ithout the remedy respondent seeks, a ‘child’s right to a free appropriate education . . . would be less than complete.’”<sup>98</sup>

#### V. THE POLICY TRADEOFFS IN *FOREST GROVE* AND HOW CONGRESS CAN CREATE A BETTER SYSTEM

The issue presented to the Supreme Court in *Forest Grove* involved two policy tradeoffs. On one hand, proponents of tuition reimbursement argued that imposing a categorical bar on tuition reimbursement if a student had not previously received special education services directly contradicts the very purpose of the IDEA—to ensure that all children receive a free appropriate public education. The central policy argument is that tuition reimbursement must be allowed in these cases because to find otherwise would lead to an absurd result—school districts could avoid the clear mandate of the IDEA solely by denying special education services to a child with a disability. On the other hand, those advocating against tuition reimbursement argued that allowing reimbursement when the student had not even tried special education services in the past creates perverse incentives for referring children to special education and disincentivizes cooperation among schools and parents. The central policy argument is that educators should at least have 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 force the school district to pay costly private school tuition.

As previously explained, the Court in *Forest Grove* held for tuition reimbursement even in a situation where the disabled student had not received special education services in the past. Although not stated explicitly, the Court essentially prioritized the right of the disabled child over the right of the school district. More specifically, the Court found that it was more important to guarantee that disabled students are not languishing in the system without an appropriate education<sup>99</sup> than to ensure that parents and school districts engage in honest and good faith bargaining in an attempt to reduce the amount that public schools will have to pay for private school tuition. It is important to note that the Court believed the burdensome costs to school districts that would result from prioritizing the child’s right over the school’s right was vastly

---

96. *Id.*

97. *Id.* at 2494.

98. *Id.* at 2494–95 (quoting *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1996)).

99. The dissent argued that there should be no concern that school districts will abuse the system by simply denying special education services, thereby creating safe harbor from tuition reimbursement, because parents of the child can call for a procedural due process hearing when an IEP is denied. *See id.* at 2502–03 (Souter, J., dissenting). The majority disagreed with this argument because due process hearings can often lead to lengthy federal litigation, and without the ability to unilaterally place a child in a private school while retaining the right to tuition reimbursement, students would languish in the system. *See id.* at 2494–95 (majority opinion).

overstated because parents still had to remove their child from the public school at their own risk. In other words, parents would still have at least some incentive to work with the school district because simply placing their child in a private school did not guarantee tuition reimbursement, and the parents would still have to prove that a free appropriate public education was not offered by the public school.

Under the existing system, the Court made the right decision in finding it more important to ensure that all children receive a free appropriate public education in a timely manner than to incentivize greater cooperation between school districts and parents and thereby protect school districts. Changing the statute, however, might make it capable of achieving both policy “tradeoffs” — children can be guaranteed a free appropriate education in a timely matter, but parents can be better encouraged to cooperate with school districts, which would have the worthy effect of reducing the budgetary burdens on school districts. To do so, the reformed statute must distinguish between two separate scenarios. In the first scenario, the school district stonewalls and does not even propose an IEP for the child in question. In the second scenario, however, the school district does recognize that the child needs special services and proposes an IEP that it believes meets the child’s needs, but the parents of the child disagree. These two cases are qualitatively different, and the IDEA should therefore treat them differently.

Starting with the first scenario, by stonewalling and refusing to even offer any IEP, the school district has already shown that it is not willing to engage in any type of bargaining with the parents. A final offer has already been made, and it is clearly at odds with what the parents want for their child. In such a situation, there is no way that Congress could devise a system in an effort to bring the parties together. The two parties are diametrically opposed as the school district is saying no, and the parents of the child are saying yes. In this case, there are not the competing policy concerns of (1) assuring that all children receive a free appropriate public education without languishing in the system and (2) incentivizing the right level of cooperation between the school district and the parents. By refusing to offer any IEP at all, the school district has already evidenced its intent to no longer cooperate. With this in mind, there is no need to worry about whether the system is working to incentivize the right level of cooperation, and because of this, the system should only be concerned with assuring that each child receives a free appropriate public education. In this scenario, therefore, the current IDEA framework that the Supreme Court envisioned in *Forest Grove* is adequate. Because the school district has offered nothing, it seems equitable for the parents to unilaterally remove the child to a private school and retain the remedy of tuition reimbursement, even though the child had not received any services in the past. Requiring a child to have previously received special education services in this case would make no sense because it is impossible for the child to receive the services when the school district is not offering even an arguably inadequate IEP. Although the parents have a right to a due process hearing to challenge the school district’s failure to offer an IEP, this may be too time consuming to ensure that the child’s needs are met.



The second scenario, however, is quite different because the school district has at least shown that it is willing to work with the child. In this case, there is at least partial agreement—that the child qualifies for an IEP and should be offered some level of services. Unlike the first scenario, where the school district is saying no and the parents are saying yes, in this case, both parties are saying yes, but they essentially disagree as to the amount of services needed. There is more room to bargain, and the IDEA framework should encourage the school district and the parents to bargain a little harder. The IDEA framework that the Supreme Court envisioned in *Forest Grove*, however, treats both scenarios as indistinguishable. Even in this situation, the child's parents can unilaterally place their child in a private school and retain their right to reimbursement by arguing that the IEP offered was inadequate. The equities between the two parties, however, are not the same in this case. Unlike the first scenario, where the school district has offered nothing, the school district here has made at least a showing of good faith by offering the student an IEP. Therefore, it seems reasonable to require the parents to at least try the services offered before deciding that the services are inadequate. Doing so will encourage more bargaining between the school district and the parents in a situation where agreement is still possible.

With this in mind, Congress should create a bifurcated IDEA framework. In the first scenario, where the school district stonewalls and does not offer any IEP at all, the parents of the child should be able to unilaterally place their child in a private school and retain their right to tuition reimbursement instead of keeping their child in the public school and challenging the failure to offer an IEP in a due process hearing. The IDEA framework envisioned by the Court in *Forest Grove* already leads to this result. However, by allowing for an unlimited right to tuition reimbursement, even in situations like the second scenario described above, the framework *Forest Grove* espouses goes slightly too far. Therefore, the reformed IDEA framework would treat the second scenario differently. When the school district offers an IEP that the parents believe is inadequate, the parents should be required to at least try the services for a short period of time<sup>100</sup> before taking their child out of the public school. Having this requirement will help the parents better articulate why the proposed IEP is inadequate, and the school district will be able to see firsthand why the IEP is inadequate.<sup>101</sup> After the firsthand experience of trying the services yields this critical information, the school district should be allowed one last opportunity to modify the IEP. If the two sides still cannot come to an agreement after considering this new information, it becomes equitable and reasonable for the parents to then remove their child from the public school and seek tuition reimbursement.

---

100. Depending on what type of system the particular school uses, a quarter or a trimester might be an appropriate time period; it is long enough to produce relevant feedback but short enough to reduce any worry that the child is being forced to jump through meaningless hoops while he or she languishes in the system.

101. This is assuming that the IEP is inadequate. It is also possible that after trying the proposed IEP, the parents might be convinced that the IEP is acceptable even though they originally thought it was inadequate.

## CONCLUSION

Deeply embedded in the consciousness of the American people is the idea that no individual should be deprived of an appropriate education. Education is necessary for a productive society, but despite this consensus among the American people, the United States Constitution is silent on the issue. Although this has unfortunately contributed to the slow recognition of educational rights for students with learning disabilities in America, Congress rightfully intervened in the 1970s to assure that students with disabilities would not be deprived of an appropriate education. The intervention culminated in the passage of the EAHCA, which was later renamed the Individuals with Disabilities Education Act in 1990. A 1997 amendment to the IDEA that concerned the availability of tuition reimbursement as a remedy created significant controversy, which was resolved—at least temporarily—by the Supreme Court's recent opinion in *Forest Grove School District v. T.A.* Although *Forest Grove* rightfully emphasized the important purpose of the IDEA—to assure that all children are provided with a free appropriate public education—the IDEA framework post-*Forest Grove* goes slightly too far.

Under the current framework, parents are given an unquestioning right to remove their child from public school and retain tuition reimbursement as a remedy, even in situations where additional negotiation with the school district might prove fruitful. Because of this, Congress should amend the IDEA to create a new framework that will assure that all children receive a free appropriate public education, while also encouraging cooperation among school districts and parents. This will ensure both that the express purpose of the IDEA is realized and that public school budgets remain reasonable. Congress can do so by creating the bifurcated framework described in Part V. In situations where the school district stonewalls and offers no IEP at all, the parents can remove their child from the school and retain the right to tuition reimbursement. On the other hand, if the school district offers an IEP but the parents believe it is inadequate, the parents should be required to try the services for a short period of time to retain a right to tuition reimbursement. Such a bifurcated framework is more flexible and superior to the current framework: it incentivizes cooperation in situations where agreement is still possible, and it simultaneously ensures that all children may receive a free appropriate public education.