

Recent Development: *Forest Grove School District v. T.A.*

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I. INTRODUCTION

The Individuals with Disabilities Education Act (“IDEA”), the federal special education entitlement, gives children with disabilities access to special education services through their public schools.¹ It requires that public school districts ensure that every student with a qualifying disability receives a “free appropriate public education.”² IDEA contains substantive and procedural protections for children with disabilities and their parents.³ This special education legislation includes specific procedures for identifying students eligible for special education, evaluating their needs, developing an individualized educational plan, and delivering appropriate services and support, as well as procedural safeguards for involving parents in this process.⁴

Money is often at the crux of public debate about special education in the United States.⁵ Because IDEA is a federal entitlement, Congress determined that the federal government should pay forty percent of the additional costs of special education.⁶ However, the federal government has continually underfunded special education, never living up to its funding commitment.⁷ Many criticize the financial burden that special education services for individual children impose on already-strained school district budgets.⁸

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¹ 20 U.S.C. §§ 1400-1482 (2006). In the 2006-2007 school year, 6.69 million students in the United States were served under IDEA. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS: 2008, ch. 2, tbl. 50, http://nces.ed.gov/programs/digest/d08/tables/dt08_050.asp?referrer=report.

² 20 U.S.C. § 1400(d)(1)(A) (2006); 34 C.F.R. § 300.1(a) (2009).

³ 20 U.S.C. §§ 1400-1482 (2006).

⁴ The federal government provides funding to states conditioned on compliance with IDEA and its implementing regulations.

⁵ See Eloise Pasachoff, How the Federal Government Can Improve School Financing Systems (Jan. 2008) (working paper, on file with The Brookings Institution) (“[f]inancial resources have an affect on student achievement”).

⁶ 20 U.S.C. § 1411(a)(2)(A) (2000 & Supp. IV 2004); James M. Jeffords, *Foreword* to RACIAL INEQUITY IN SPECIAL EDUCATION, at x (Daniel J. Losen & Gary Orfeld eds., 2002) (“we agreed that 40 percent of the additional costs of special education would be paid by the federal government”).

⁷ Jeffords, *supra* note 6 (“The chronic underfunding of special education is inexcusable”); see also Erin Phillips, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1824 (noting that federal funding, on average, has been 15%).

⁸ See, e.g., Joseph Berger, *Private Schooling for the Disabled, and the Fight Over Who Pays*, N.Y. TIMES, Mar. 21, 2007, at B7 (discussing concerns that rich parents are “gaming the

In addition, students from wealthier families or in well-resourced schools tend to benefit more from IDEA than low-income students or students in poorly funded school districts.⁹

In *Forest Grove School District v. T.A.*, financial resources were at the core of the Supreme Court's decision. The Supreme Court held that IDEA authorizes parents to be reimbursed for private special education services when a school district denies a child with disabilities a free appropriate public education ("FAPE") and the private placement is appropriate, even if the child has never received special education services through the school district.¹⁰ This case arose after the parents of T.A., a child with disabilities, removed him from the public schools because of his lack of progress and placed him in a residential private school. T.A. had been in the public schools for nearly eleven years, but Forest Grove School District had found him ineligible for special education after failing to evaluate him in all suspected areas of disability.

Media sources have framed this decision as allowing parents who opt out of the public school special education process to still receive public funds to pay for their children's private education.¹¹ Construing the case in this way disregards the Court's criteria for reimbursement. According to the Court, reimbursement is only authorized if: (a) the public placement violated IDEA; (b) the private placement was proper under IDEA; and (c) it is warranted by the court or hearing officer's balancing of the equities (including the parents' collaboration with the school district and the school district's opportunities to evaluate the child).¹²

This Recent Development argues that the Court's decision, which conforms to IDEA's statutory scheme, reemphasizes the responsibility of school districts to identify and evaluate children with disabilities and provide them with FAPE through special education and related services. Failure to do so opens the possibility that a court or hearing officer may order the school

system" by requesting reimbursement for their children's tuition at elite private schools). However, "[m]any disability rights advocates emphasize the economic sensibility of special education programs by stressing that integration and quality education will always be less expensive over time than the forced dependency of disabled people." Phillips, *supra* note 7, at 1807 (citing FRED PELKA, THE ABC-CLIO COMPANION TO THE DISABILITY RIGHTS MOVEMENT 113 (1997)).

⁹ Low-income or extremely low-income parents tend to know less about their children's rights under IDEA and feel less able to intervene on their behalf to ensure that they receive appropriate and adequate services. Phillips, *supra* note 7, at 1836.

¹⁰ *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2496 (2009).

¹¹ See, e.g., Jesse J. Holland, *Court Says Public Must Pay for Private Special Ed*, ABCNEWS.COM, June 22, 2009, <http://abcnews.go.com/Politics/WireStory?id=7897566> ("The Supreme Court . . . [has said] parents can in many instances bypass public school special education programs and be reimbursed for private school tuition instead.").

¹² *Forest Grove*, 129 S. Ct. at 2496 ("Parents 'are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act'" (citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993))).

district to reimburse parents for private school tuition.¹³ In contrast, the dissent's interpretation of IDEA would not authorize reimbursement when a school district fails to provide required special education services, but would authorize reimbursement when a school district offers inadequate special education services. This disjunction would create a perverse incentive for school districts simply to fail to evaluate and identify students eligible for special education and related services. Such a result would be contrary to the fundamental purpose and statutory requirements of IDEA: protecting the rights of all children with disabilities.

The Court's interpretation of IDEA potentially could have positive consequences for children with disabilities from all backgrounds. The issue of private school tuition reimbursement generally affects a narrow slice of students with disabilities: those from families able to afford the out-of-pocket costs of private school tuition, like T.A.'s. At the margins, though, these parents strengthened IDEA for students from families of all income levels. Following this decision, students from families unable to afford private school tuition who attend socioeconomically diverse schools might benefit from school districts more vigilantly identifying and evaluating students with disabilities and providing them with FAPE.¹⁴ Other potential beneficiaries include the small proportion of low-income children in public schools actively served by legal services centers or law school clinics offering representation in special education and related matters.

Nonetheless, families of the majority of low-income students eligible for special education under IDEA will not realistically be able to take advantage of this decision. In general, the remedy of tuition reimbursement remains viable only for those parents who can assume the financial risk of paying for private school tuition as a self-help remedy. Students from families who cannot afford private school tuition must continue to rely on the remedy of compensatory education.¹⁵ Courts can require the provision of compensatory education to make up for a school district's failure to provide appropriate educational services in the past.¹⁶ However, a student loses valuable educational opportunities when she is denied educational services by her school district that are difficult to recover through subsequent compensa-

¹³ *Forest Grove*, 129 S. Ct. at 2495.

¹⁴ This is complicated by the fact that students of color are overrepresented in special education settings, as compared to white peers. Daniel Losen, *New Research on Special Education and Minority Students with Implications for Federal Education Policy and Enforcement*, in *RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM* 263 (Dianne M. Piché, William L. Taylor & Robin A. Reed eds., 2002). See also Martha Minow, *After Brown: What Would Martin Luther King Say?* 12 *LEWIS & CLARK L. REV.* 599, 637 (2008) (reminding that special education assignments in socioeconomically mixed schools can perpetuate racial segregation).

¹⁵ *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1988). See generally CHARLES J. RUSSO & ALLAN G. OSBORNE, JR., *ESSENTIAL CONCEPTS AND SCHOOL-BASED CASES IN SPECIAL EDUCATION LAW* 242-43 (2008).

¹⁶ See, e.g., *Cocores v. Portsmouth, N.H. Sch. Dist.*, 779 F. Supp. 203 (D.N.H. 1991); *Big Beaver Falls Area Sch. Dist. v. Jackson*, 624 A.2d 806 (Pa. Commw. Ct. 1993).

tory services.¹⁷ Thus, although this decision strengthens IDEA overall, it does not significantly improve the special education provided to low-income students.

II. BACKGROUND

A. *The Statute*

Congress enacted IDEA in 1970.¹⁸ The purpose of IDEA is to ensure that all children with disabilities have access to FAPE that “emphasizes special education and related services designed to meet their unique needs.”¹⁹ A child with a disability is a child who has been found to have at least one disability by an evaluation consistent with IDEA and who, because of that disability, “needs special education and related services,” even if the child is progressing from grade to grade.²⁰

A parent of a child, a state agency, or a school district may begin the evaluation process to determine if a child has a qualifying disability,²¹ but parental consent is required before the evaluation can take place.²² IDEA requires that the child be evaluated in all areas of suspected disability.²³ Children found to be eligible must receive FAPE, which entails special education and related services provided through the school district at no cost to the family.²⁴ These services and programs are required to meet the standards of the state educational agency and to be provided in accordance with a written, enforceable individualized education program (“IEP”) developed for the child by a multidisciplinary IEP team with parental involvement.²⁵

Parents who disagree with a school district’s placement or provision of services can request due process hearings and bring civil actions in state and federal court.²⁶ Section 1415(i)(2)(C)(iii) of IDEA authorizes courts to grant appropriate relief.²⁷ In 1997, Congress amended IDEA to include specific language about the “[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency.”²⁸ Thus, if the

¹⁷ For example, unaddressed disabilities can become severe or chronic. David Osher et al., *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in RACIAL INEQUALITY IN SPECIAL EDUCATION 93, 107 (Daniel J. Losen & Gary Orfield eds., 2002).

¹⁸ This legislation was originally enacted as the Education of the Handicapped Act. Pub. L. No. 91-230, Title VI, 84 Stat. 175 (1970). In 1990, it was renamed the Individuals with Disabilities Education Act. Pub. L. No. 101-476, § 901(a)(3), 104 Stat. 1142 (1990).

¹⁹ 20 U.S.C. § 1400(d)(1)(A) (2006).

²⁰ *Id.* §§ 1401(3)(A)(i)-(ii), 1414(c)(1)(B).

²¹ *Id.* § 1414(a)(1)(B).

²² *Id.* § 1414(a)(1)(D).

²³ *Id.* § 1414(a)(3)(B).

²⁴ *Id.* § 1401(9)(A).

²⁵ *Id.* § 1414(d)(1)(A)(i), (B)(i), (B)(iv).

²⁶ *Id.* § 1415(a)-(d).

²⁷ *Id.* § 1415(i)(2)(C)(iii).

²⁸ *Id.* § 1412(a)(10)(C)(i)-(iii).

parents of a child with a disability who had previously received special education and related services from the school district unilaterally place the child in a private school, the court may require the agency to reimburse the parents for the cost of the tuition if the court finds that the district failed to provide FAPE to the child.²⁹ The statute does not specifically address remedies available when the school district fails to provide special education services altogether because it failed to properly identify or evaluate a child.³⁰

B. *The Case Law*

The Supreme Court addressed the issue of private school tuition reimbursement prior to the 1997 Amendments of IDEA in two cases: *School Committee of Burlington v. Department of Education of Massachusetts*³¹ and *Florence County School District Four v. Carter*.³² Both cases involved school districts that had proposed inadequate IEPs for students before their parents unilaterally enrolled them in private education settings. Notably, the Court allowed the remedy of private school tuition reimbursement in these two cases.

In 1985, the Court held in *Burlington* that a court may require a school district to reimburse parents for the cost of private education when a public school provides special education and related services for a child but fails to provide FAPE and the parents place the child in an appropriate private school without the school district's consent.³³ The Court interpreted the broad relief-granting power given to courts, now codified as § 1415(i)(2)(C)(iii), to allow for the equitable remedy of reimbursement of private school tuition when certain conditions are met.³⁴ The Court unanimously upheld this position in *Carter*, which was decided in 1993.³⁵

Circuit courts have rendered divergent decisions when deciding whether the 1997 amendments categorically bar tuition reimbursement for children who have never received special education services from the school district. The First Circuit found in *Greenland School District v. Amy N.* that the statutory language barred reimbursement for parents of students who have not previously received special education services.³⁶ The parents had never requested any evaluation of their daughter and removed her for rea-

²⁹ *Id.* § 1412(a)(10)(C)(ii).

³⁰ MARK C. WEBER ET AL., SPECIAL EDUCATION LAW: CASES AND MATERIALS 362 (2d ed. 2007).

³¹ 471 U.S. 359 (1985).

³² 510 U.S. 7 (1993).

³³ *Burlington*, 471 U.S. at 370.

³⁴ The provision now codified at § 1415(i)(2)(C)(iii) was at that time codified at § 1415(e)(2).

³⁵ 510 U.S. at 13 (holding that reimbursement to parents for a unilateral private school placement may be appropriate even when the parents place the child in a private school that has not been approved by the state).

³⁶ 358 F.3d 150, 159-60 (1st Cir. 2004).

sons unrelated to whether she was receiving FAPE.³⁷ The court emphasized that “there was no notice at all to the school system before [the student’s] removal from [the public school] that there was any issue about whether [the student] was in need of special education.”³⁸

More recently, both the Second Circuit and the Eleventh Circuit issued decisions holding that the added language of § 1412(a)(10)(C)(ii) in the 1997 amendments did not preclude tuition reimbursement for students who had never previously received special education or related services from the school district.³⁹ In *Frank G. v. Board of Education of Hyde Park*, the Second Circuit held that IDEA posed no categorical bar to tuition reimbursement when a student had not previously received special education and related services because his parents enrolled him in private school without first enrolling him in the public school offered in the school district’s proposed IEP, which the parents believed to be inappropriate—and which the school district later conceded would not have provided the student with FAPE.⁴⁰ Key to the court’s reasoning was Justice Rehnquist’s *Burlington* opinion stressing the importance of retroactive reimbursement to fulfilling IDEA’s purpose and the absurdity of disallowing it.⁴¹ The Eleventh Circuit reached the same holding in *M.M. v. School Board of Miami-Dade County, Florida*.⁴²

Following its decision in *Frank G.*, the Second Circuit vacated the district court’s decision in *Board of Education v. Tom F.*, which held that tuition reimbursement was categorically barred when the student had not previously received special education and related services, and remanded the case.⁴³ The Ninth Circuit in *T.A. v. Forest Grove School District* adopted the considerations and conclusions of the Second Circuit in *Tom F.* to hold that IDEA authorized private school tuition reimbursement.⁴⁴

The Supreme Court appeared eager to settle this circuit split. Just two years ago, the Court faced—but was unable to resolve—the issue of tuition reimbursement for students who had not received special education services from the school district in *Tom F.*⁴⁵ However, after Justice Kennedy unexpectedly recused himself, an evenly split Court affirmed the Second Circuit’s

³⁷ *Id.* at 160.

³⁸ *Id.*

³⁹ *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 376 (2d Cir. 2006); *M.M. v. Sch. Bd. of Miami-Dade County, Fla.*, 437 F.3d 1085, 1099 (11th Cir. 2006) (per curiam).

⁴⁰ *Frank G.*, 459 F.3d at 376.

⁴¹ *Id.* at 459 F.3d at 369 (finding it “unreasonable to suggest that Anthony’s parents were legally required to engage in such a useless and potentially counterproductive exercise” when considering whether they should have “enrolled him first in the Smith School as provided in the IEP and then removed him thereafter”).

⁴² 437 F.3d 1085, 1099.

⁴³ *Bd. of Educ. of City Sch. Dist. of City of New York v. Tom F.*, 193 F. App’x 26 (2d Cir. 2006).

⁴⁴ 523 F.3d 1078, 1088 (9th Cir. 2008), cert. granted, 129 S. Ct. 2484 (2009).

⁴⁵ *Bd. of Educ. of City Sch. Dist. of N.Y. v. Tom F.*, 552 U.S. 1 (2007) (per curiam).

decision with a one-sentence per curiam opinion.⁴⁶ This opinion by an “equally divided Court” did not settle the legal issue and offered no precedent for lower courts to follow.⁴⁷ Subsequently, the Court declined to grant certiorari in *Frank G.* after Justice Kennedy again recused himself.⁴⁸ Thus, the question of tuition reimbursement under IDEA’s 1997 Amendments remained.

III. FACTS AND PROCEDURAL HISTORY

T.A. consistently experienced difficulty in school throughout his twelve years in the public schools.⁴⁹ In his elementary and middle school years, teachers noted that T.A. had difficulty completing assignments or staying focused in class.⁵⁰ He was, however, promoted from grade to grade,⁵¹ and his teachers did not refer him for any evaluations.

His problems worsened when he began high school.⁵² During T.A.’s freshman year of high school, his mother contacted the school’s counselor to talk about T.A.’s difficulties with his schoolwork.⁵³ In December 2000, T.A.’s guidance counselor thought that T.A. might have a learning disability.⁵⁴

Staff notes from early 2001 indicated that T.A. exhibited signs of Attention Deficit Hyperactivity Disorder (ADHD): “Maybe ADD/ADHD?” and “suspected ADHD.”⁵⁵ However, T.A.’s parents were not present at the meetings at which ADHD had been mentioned, nor were they ever told that the school district staff’s suspected T.A. might have ADHD.⁵⁶ Thus, T.A.’s parents did not request that T.A. be evaluated for ADHD.

Throughout that spring, school psychologists and educational specialists evaluated T.A. in his first and only evaluation by the school district.⁵⁷ T.A. was evaluated only for a learning disability (which did not include evaluation for ADHD).⁵⁸ The evaluators found unanimously that T.A. did not have a learning disability and was thus ineligible for special education.⁵⁹ T.A.’s mother, who remained unaware of the suspected ADHD, agreed with

⁴⁶ *Id.*

⁴⁷ *Id.* See also *Neil v. Biggers*, 409 U.S. 188, 192 (1972) (holding that while an opinion by an equally divided Court ends the review process for the case at hand, it does not resolve the legal issue or create precedent).

⁴⁸ *Bd. of Educ. of Hyde Park Cent. Sch. Dist. v. Frank G.*, 128 S. Ct. 436 (2007) (denying cert.).

⁴⁹ *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2488 (2009).

⁵⁰ *Id.*

⁵¹ *T.A. v. Forest Grove Sch. Dist.*, 523 F.3d 1078, 1081 (9th Cir. 2008).

⁵² *Forest Grove*, 129 S. Ct. at 2488.

⁵³ *Id.*

⁵⁴ *Forest Grove*, 523 F.3d at 1081.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

the finding at a meeting with a school psychologist and two other school officials.

During his eleventh-grade year, T.A. began using marijuana regularly, exhibited severe personality shifts, and ran away from home.⁶⁰ T.A.'s parents took him to a psychologist and a hospital emergency room.⁶¹ T.A. met with the independent psychologist hired by his parents several times. This psychologist diagnosed T.A. with multiple disabilities, including ADHD and others related to learning and memory.⁶² On his recommendation, T.A.'s parents enrolled him in a structured residential private school that focused on educating children with special needs.⁶³

Shortly thereafter, T.A.'s parents engaged a lawyer to determine their rights and to give the school district written notice that T.A. had been placed in a private setting.⁶⁴ His parents subsequently filed a complaint under IDEA seeking an administrative hearing and an order requiring the school district to evaluate T.A. in all areas of suspected disability to determine his eligibility for special education services.⁶⁵ The district had a school psychologist assist in ascertaining whether T.A. had a disability that interfered with his educational performance. T.A.'s parents cooperated during this evaluation process.⁶⁶ A multidisciplinary team of school officials again found him ineligible for special education in spite of his learning difficulties, ADHD, and depression.⁶⁷ Thus, the school district did not offer an IEP with special education and related services.⁶⁸ T.A.'s parents elected to keep him enrolled at the private school for his senior year.⁶⁹

After a hearing that included the testimony of many experts and consideration of the evidence of all the parties, the hearing officer found "that [T.A.'s] ADHD adversely affected his educational performance and that the School District failed to meet its obligations under IDEA in not identifying [T.A.] as a student eligible for special-education services."⁷⁰ The hearing officer held that the district did not offer T.A. FAPE and that the private school placement was appropriate under IDEA.⁷¹ Thus, the hearing officer ordered that the school district reimburse T.A.'s parents for the costs of the private school tuition.⁷²

⁶⁰ *Id.*

⁶¹ *Id.* at 1081-82.

⁶² *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2488 (2009).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 2488-89.

⁷¹ *Id.* at 2489.

⁷² *Id.*

The school district filed an appeal with the district court challenging the hearing officer's grant of reimbursement for T.A.'s private school tuition.⁷³ The district court accepted the hearing officer's findings of fact but reversed the reimbursement award, holding that, in light of the 1997 amendments, T.A. was statutorily ineligible for reimbursement because he had not "previously received special education and related services" from the school district.⁷⁴

T.A. appealed to the Ninth Circuit Court of Appeals, which reversed and remanded the case for further proceedings.⁷⁵ Considering IDEA's text, purpose, and legislative history, the Ninth Circuit held that T.A. was not barred as a matter of law from receiving reimbursement by the language of § 1412(a)(10)(C).⁷⁶ The court agreed with the Second Circuit's analysis of the issue, holding 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)" because "[t]he statutory requirements of § 1412(a)(10)(C) do not apply."⁷⁷

The school district appealed to the Supreme Court. The Supreme Court granted certiorari to attempt to resolve the circuit split. In *Forest Grove*, the Court again faced the question it had been presented with in *Tom F.*: "Whether the Individuals with Disabilities Education Act permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency."⁷⁸

IV. THE SUPREME COURT DECISION

The Supreme Court affirmed the Ninth Circuit's decision in an opinion written by Justice Stevens and joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito. The Court held that the IDEA amendments of 1997 did not amend the text of § 1415(i)(2)(C) and the addition of § 1412(a)(10)(C) did not alter the meaning of § 1415(i)(2)(C).⁷⁹ Thus, in accordance with the Court's decisions in *Burlington* and *Carter*, it found that IDEA authorizes reimbursement for the cost of private school tuition when a school district fails to provide FAPE and the private school placement is appropriate (even if the child did not previously receive special

⁷³ *Id.*

⁷⁴ *Id.* (quoting 20 U.S.C. § 1412(a)(10)(C)(ii) (2006)).

⁷⁵ *T.A. v. Forest Grove Sch. Dist.*, 523 F.3d 1078, 1089 (9th Cir. 2008).

⁷⁶ *Id.* at 1087.

⁷⁷ *Id.* at 1087-88 (quoting 20 U.S.C. § 1412(a)(10)(C)(ii) (2006)).

⁷⁸ Brief of Petitioner at i, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305), 2009 WL 507022.

⁷⁹ *Forest Grove*, 129 S. Ct. at 2496.

education or related services from the public school).⁸⁰ Additionally, the Court held that when a hearing officer or court determines that a school district denied a student FAPE and the private placement was suitable, it must consider all relevant factors when determining whether reimbursement is an equitable remedy.⁸¹ Justice Souter dissented, joined by Justices Scalia and Thomas.

A. *The Majority*

The Court began by highlighting its unanimous opinion in *Burlington*, and its reaffirmation in *Carter*, as the “pertinent background” for its current analysis in *Forest Grove*.⁸² It recalled that in *Burlington* the Court looked to IDEA’s “broad purpose,” as well as to the impact of administrative inefficiency on the education of children with disabilities, in holding that “the ordinary meaning of [§ 1415(i)(2)(C)(iii)] confers broad discretion on the court” and authorizes a court or hearing officer to order reimbursement for private school tuition when a parent unilaterally enrolls a child in private school because the public school provided an inadequate IEP, thus failing to make FAPE available to the child.⁸³ The Court also emphasized that its decision in *Burlington* reflected the fact that “having mandated that participating States provide a FAPE for every student, Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act.”⁸⁴

The Court acknowledged that *Burlington* and *Carter* involved children for whom the school districts had offered inadequate special education, in contrast to T.A., whom the school district had failed to offer any special education or related services at all.⁸⁵ It emphasized that these differences were “insignificant” because the language and purpose of IDEA, not the particular facts involved, drove the Court’s analysis in *Burlington* and *Carter*.⁸⁶ In addition, the Court articulated its common sense view that “a school district’s failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.”⁸⁷ Having determined that the reasoning underlying the two ear-

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2496.

⁸³ *Id.* at 2490.

⁸⁴ *Id.* at 2491 (citing *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 370 (1985)).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* (citing *Burlington*, 471 U.S. at 370).

lier cases applied here, the Court proceeded to evaluate whether the 1997 amendments “require[d] a different result.”⁸⁸

The Court reviewed the purpose of IDEA and the impact of the 1997 amendments. It first noted that “Congress enacted IDEA in 1970 to ensure all children with disabilities are provided ‘a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.’”⁸⁹ Then, the Court stated that “[t]he 1997 Amendments were intended ‘to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education.’”⁹⁰ The Court looked to the fact that Congress did not change the language of § 1415(i)(2)(C)(iii) in the 1997 amendments or otherwise state an intent to repeal it or the Court’s decisions in *Burlington* and *Carter*, as evidence for continuing to read that provision to authorize the equitable remedy of tuition reimbursement.⁹¹ In light of IDEA and its 1997 amendments’ text, context, purpose, and other provisions, the Court rejected the view of the dissent and the school district that Congress intended § 1412(a)(10)(C)(ii) to set forth the only circumstance in which reimbursement can be ordered: when a school district fails to provide FAPE to a child who has previously received special education and related services through the public school.⁹² Indeed, the Court described the result produced by the school district’s reading as “bordering on the irrational.”⁹³

Finally, the Court addressed the fears of the school district and the dissent that the Court’s decision would impose a significant financial burden on school districts and encourage parents to enroll their children in private schools without attempting any cooperation with the school district. It found these fears to be “unfounded.”⁹⁴ The Court highlighted that courts may order school districts to reimburse parents only if they find that both the public school placement violated IDEA and the private school placement was proper under IDEA.⁹⁵ Moreover, it reiterated that “even then courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant—for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school.”⁹⁶ Courts must also consider the “school district’s opportunities for evaluating the

⁸⁸ *Id.*

⁸⁹ *Id.* (quoting *Burlington*, 471 U.S. at 367).

⁹⁰ *Id.* (quoting S. REP. NO. 105-17, at 3 (1997)).

⁹¹ *Id.* at 2492.

⁹² *Id.* at 2493.

⁹³ *Id.* at 2495.

⁹⁴ *Id.* at 2496.

⁹⁵ *Id.* (citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993)).

⁹⁶ *Id.*

child.”⁹⁷ The Court concluded that, given these criteria, public school districts rarely pay for private school placements.⁹⁸

B. *The Dissent*

Justice Souter filed a dissenting opinion, which was joined by Justices Scalia and Thomas. Justice Souter began by describing the limitation imposed by § 1412(a)(10)(C)(ii) on reimbursement for private school tuition incurred without the consent of the school district.⁹⁹ He noted that the Court’s decision in *Burlington* was based on the fact that IDEA “did not speak specifically to the issue of reimbursement.”¹⁰⁰ He emphasized that Congress explicitly addressed tuition reimbursement for children enrolled in private schools without school district consent through § 1412(a)(10)(C)(i) and (ii), which articulate that reimbursement is generally prohibited if the school made FAPE available and authorized if the school district denied FAPE to a child who previously received special education services from that school district.¹⁰¹

Despite the silence of these provisions regarding reimbursement when a child has been offered neither special education services nor FAPE, Justice Souter described as “overstretching” the majority’s interpretation that, in those cases, reimbursement could still be authorized.¹⁰² Rather, he stated, “[w]hen permissive language covers a special case, the natural sense of it is taken to prohibit what it fails to authorize.”¹⁰³ In order to give full meaning to § 1412(a)(10)(C)(ii) and (iii), Justice Souter stated that § 1412(a)(10)(C)(ii) “must be read to allow reimbursement only for ‘parents of a child with a disability, who previously received special education and related services under the authority of a public agency.’”¹⁰⁴

Justice Souter rejected the majority’s reading of the amendments in favor of reading “the revised statute as a whole” when amendments include language that undermines a previous judicial interpretation.¹⁰⁵ He noted that the Court’s application of § 1415(i)(2)(C)(iii) in *Burlington* and its determination that the reimbursement constituted “appropriate” relief was based on “the absence of a specific rule.”¹⁰⁶ Thus, a determination of “appropriate” relief under the 1997 amendments requires a different result because they imposed “new restrictions on reimbursement.”¹⁰⁷ He emphasized that his

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 2497 (Souter, J., dissenting).

¹⁰⁰ *Id.* at 2498.

¹⁰¹ *Id.*

¹⁰² *Id.* at 2499.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2500 (quoting 20 U.S.C. § 1412(a)(10)(C)(ii) (2006)).

¹⁰⁵ *Id.* at 2501-02.

¹⁰⁶ *Id.* at 2501.

¹⁰⁷ *Id.*

reading of the Amendments is consistent with the Court's holdings in *Burlington* and *Carter* and would not require a different result if reconsidered.¹⁰⁸

In this dissent, Justice Souter also addressed the majority's policy rationales for reading the 1997 amendments to allow reimbursement and its belief that, in his words, "[Justice Souter's] reading would place the school authorities in total control of parents' eligibility for reimbursement."¹⁰⁹ He noted that the majority ignored IDEA's procedural requirements and the significant cost of allowing reimbursement.¹¹⁰ Justice Souter highlighted the cost of special education for public school districts and the corresponding importance of collaboration between parents and public schools to keeping as many children with disabilities as possible in public school placements.¹¹¹ He reminded the Court of the administrative and judicial review available if parents believe that their children need more services for FAPE than the school offers.¹¹²

Justice Souter acknowledged that "the prior services condition qualifies the remedial objective of the statute" and conceded that a child can suffer from inadequate services while schools and parents disagree and the hearing process takes place.¹¹³ He focused on the need to assume that good faith underlies both sides—parents and school districts—and the reality that IDEA will impose burdens on its intended beneficiaries.¹¹⁴ He also noted that his interpretation of the statute required parents to take part in the collaborative process of developing an IEP, which "makes good sense" given the financial burden of private school placement.¹¹⁵ Justice Souter concluded that, while some time and some educational opportunity may be lost as a result of his interpretation, it would demonstrate that "no policy is ever pursued to the ultimate, single-minded limit" and that IDEA does not require its goals to be promoted at the expense of fiscal and other considerations.¹¹⁶

V. IMPACT

Contrary to expectations, *Forest Grove* was decided by an unusual alliance of Justices. The Court's four-four divide in *Tom F.* following Justice Kennedy's recusal suggested that Justice Kennedy would play a key role in deciding this case.¹¹⁷ However, the six-three split of the Justices here shows that at least one Justice changed his or her mind and that Justice Kennedy did

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2502.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2502-03.

¹¹² *Id.* at 2503.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See, e.g., Mark Walsh, *Court is Split on IDEA Private-Placement Case*, EDUC. WK., Oct. 17, 2007, at 18, 22 (stating that "Justice Kennedy would be the focus on the two sides' legal briefs and arguments" if the Court were to grant certiorari in *Frank G.*).

not cast the deciding vote. Although we do not know which Justice switched sides or why, it is clear that a strange union of Justices formed the majority: Chief Justice Roberts and Justices Breyer, Stevens, Ginsburg, Kennedy, and Alito.¹¹⁸

As many have argued in recent articles, the Court's decision accords with IDEA's statutory language and intent.¹¹⁹ It also has important policy implications. The decision reaffirms school districts' responsibility to identify and evaluate children with disabilities and provide them with FAPE through special education and related services. In contrast, the dissent's interpretation of IDEA would create a perverse incentive for school districts contrary to IDEA's goals and statutory requirements. While the Court's interpretation of IDEA potentially could have positive consequences for children with disabilities from all backgrounds, families of the majority of low-income students eligible for special education under IDEA most likely will not be able to take advantage of tuition reimbursement and will be left with the inferior remedy of compensatory education.

A. *The Court's Holding Confirms the Responsibilities of School Districts and Parents Under IDEA and Avoids the Perverse Incentive Created by the Dissent's Interpretation*

In his dissent, Justice Souter expressed concern that the Court's decision would force upon school districts the burden of private school tuition reimbursement for the children of parents who elected not to cooperate with school districts in the IEP development process called for by IDEA.¹²⁰ Indeed, it is these situations—where parents never offer the school district an opportunity to evaluate a child, identify her with disabilities, or provide an IEP—that spark the most debate about the financial impact on school districts of private school tuition for students unilaterally placed there.¹²¹

However, the Court held that IDEA authorized tuition reimbursement only if a court or hearing officer finds that a school district fails to provide

¹¹⁸ Professors Mark Kelman and Gillian Lester note that “policy towards students with learning disabilities unites two ordinarily oppositional political ideological camps.” MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE* 13-14 (1997).

¹¹⁹ See, e.g., Courtney Rachel Baron, *Lessons Learned from Forest Grove School District v. T.A.: How the Supreme Court Can Refine the Approach to Private School Tuition Reimbursement Under the IDEA*, 103 NW. U. L. REV. COLLOQUY 522 (2009), <http://colloquy.law.northwestern.edu/main/2009/05/lessons-learned-from-forest-grove-school-district-v-tahow-the-supreme-court-can-refine-the-approach-.html>; E. Chaney Hall, *Public School Obligations to Pay Private School Tuition: Reinterpreting the I.D.E.A. in Forest Grove School District v. T.A.*, 4 DUKE J. CONST. L. & PUB. POL. 409 (2009); Emily S. Rosenblum, *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 (2009).

¹²⁰ *Forest Grove*, 129 S. Ct. at 2503 (Souter, J., dissenting).

¹²¹ See, e.g., Diana Jean Schemo & Jennifer Medina, *Disabilities Fight Grows as Taxes Pay for Tuition*, N.Y. TIMES, Oct. 27, 2007, at A1.

FAPE and the private placement is appropriate.¹²² This, in keeping with IDEA's goal of promoting collaboration between parents and schools,¹²³ suggests that parents must give the school district the opportunity to provide FAPE before removing their child. Additionally, even if those conditions are both present, the Court found that a court or hearing officer must consider all relevant factors when determining whether any reimbursement is warranted.¹²⁴ These factors include the notice provided by the parents and the school district's opportunities for evaluating the child.¹²⁵ The Court implied through its interpretation of the amendments that parents must attempt collaboration with the school district. In the case of T.A., the school district failed to properly evaluate him and thus denied him FAPE, even though his parents collaborated with the school during the evaluation process.

This kind of IDEA noncompliance is a widespread problem. In 2000, the Department of Education found that every state failed to comply in some way with IDEA and that noncompliance often continued for many years.¹²⁶ The Court's holding creates an additional incentive for school districts to comply with IDEA's requirements that they properly identify, evaluate, and serve children with disabilities.

Justice Souter's interpretation of § 1412(a)(10)(C)(ii)—that it bars reimbursement for unilateral private school tuition—would have created a perverse incentive for school districts.¹²⁷ Under his reading of the statute, a school district could not be ordered to reimburse private school tuition when it failed altogether to identify a child as eligible for special education services or to properly evaluate a child with suspected disabilities. A court or hearing officer could, however, order reimbursement if the child did previously receive special education services from the school. This reading of the statute would create an incentive for school districts to fail to identify students, rather than identify and provide services—and risk being ordered to reimburse the parents for tuition if the services are found to be inadequate. Had Justice Souter's interpretation prevailed, school districts would have been able to choose whether or not to evaluate students. This would have come close to dismantling the federal entitlement to special education guaranteed by IDEA.

¹²² *Forest Grove*, 129 S. Ct. at 2496.

¹²³ See Baron, *supra* note 119, at 531 (“Undeniably, one of the central objectives of the IDEA is to promote cooperation between parents and the school district as a means to ensure that each child in need of special education services receives a free appropriate public education.”).

¹²⁴ *Forest Grove*, 129 S. Ct. at 2496.

¹²⁵ *Id.*

¹²⁶ NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO NO CHILD LEFT BEHIND 7 (2000).

¹²⁷ Eric D. Miller, a U.S. Department of Justice lawyer, stated during oral argument: “There is no basis for reading the statute to create what effectively would be an incentive for districts to stonewall.” Erik W. Robelen, *Reimbursement for Private Placement Again Topic of Supreme Court Scrutiny*, EDUC. WK., May 13, 2009, at 19.

B. The Threat of High-Income Families Seeking to Enforce Their Children's Rights Might Benefit All Children with Disabilities but Low-Income Children Have Only Limited Remedies Available

Justice Souter fears that the Court's decision will be subject to manipulation by wealthy parents. That is, parents with sound financial resources will cost public school districts by forcing them to pay for their children's private school tuition.¹²⁸ It is true that affluent parents enforce their children's rights under IDEA; the system is, in many ways, driven by the needs of wealthy parents. Given the substantial compliance problems, as well as the challenges of requesting administrative hearings and filing in court, it is primarily these parents who hold schools accountable.¹²⁹

The legal structure set up by the majority's holding allows the efforts of wealthier parents to benefit children of parents with less substantial financial resources. In socioeconomically diverse schools or in schools served by free legal services, the Court's decision could have benefits for all children as schools attempt to increase IDEA compliance to avoid possible litigation and private school tuition reimbursement. Of course, school districts might selectively comply with IDEA for children of parents viewed as potential litigants. Additionally, in schools serving predominantly low-income children and families without outside intervention by legal services, students with disabilities might not benefit at all from the incentive created by the decision.

If parents believe that their child's school has failed to properly evaluate or offer services and choose to request a due process hearing, they bear the burden of demonstrating that their child should be eligible for special education services.¹³⁰ While attorney representation is not required at the due process hearing, the process can be very complicated for parents filing pro se. New IDEA regulations disallow non-attorney advocates from representing parents absent specific state law affirmatively authorizing them.¹³¹ Thus, in most states, parents must proceed pro se or hire an attorney. While some free legal assistance is available, the majority of low-income parents will be forced to proceed pro se, if at all. Their children will be more likely to receive inadequate services as a result.

Forest Grove highlights the imbalance between the equitable remedies available to upper-income families with children with disabilities and those that low-income families can access. The majority of low-income children

¹²⁸ See, e.g., *Tom F. v. Bd. of Educ. of City Sch. Dist. of New York*, 193 F. App'x 26 (2005).

¹²⁹ See, e.g., Phillips, *supra* note 7, at 1804-05 (relating anecdote of disabled child with well-educated middle-class parents receiving services after parents advocated on his behalf).

¹³⁰ See *Schaffer v. Weast*, 546 U.S. 49 (2005) (holding that the burden of proof in an administrative proceeding challenging an IEP lies with the party seeking relief, but that this burden may be shifted by operation of state law).

¹³¹ 34 C.F.R. § 300.512(a)(1) (2008).

with disabilities will not be able to take advantage of tuition reimbursement as a remedy. T.A.'s parents noted that they underwent significant financial strain to pay for T.A.'s private schooling, as well as for the attorney they hired. Low-income families are less likely to be able to afford the risk that private school tuition for their children may not be reimbursed, if they are able to pay for it at all. Moreover, they are less likely to be able to afford the private experts (such as psychologists or speech pathologists) who could evaluate their child if the school district has failed to comply with IDEA, or an attorney to bring a case, if it appears that the school district has denied a child FAPE. Thus, while parents pursue the procedural remedies available under IDEA, the child must remain in inappropriate educational programs.¹³²

The children of low- or moderate-income families often only have the remedy of compensatory education when a school district fails to provide them with FAPE. Compensatory education entails future educational services a hearing officer or court can award to a student when a school district has failed to provide FAPE. These services—which attempt to cure the school district's past violations—are provided in addition to the services a child may receive to ensure FAPE. Although neither Congress nor the Supreme Court have specifically addressed compensatory education in contrast to tuition reimbursement,¹³³ it remains the primary equitable remedy ordered by courts and hearing officers under IDEA's broad grant of "appropriate relief."¹³⁴ Courts have noted that without compensatory services awards, rights of students under IDEA would depend on their parents' ability to obtain private services during the due process hearings.¹³⁵

However, the damage done to a child with disabilities who has not received FAPE cannot always be fully rectified by the addition of extra services later.¹³⁶ A parent unable to take the financial risk of a private placement must instead go through the lengthy review process to determine whether the school district has denied FAPE to her child.¹³⁷ During that time, a child not receiving FAPE can suffer setbacks in her educational progress, including academics, behavior, and emotional health.¹³⁸ Those setbacks cannot always be remedied easily through additional future services.¹³⁹

¹³² CHARLES J. RUSSO & ALLAN G. OSBORNE, JR., *ESSENTIAL CONCEPTS AND SCHOOL-BASED CASES IN SPECIAL EDUCATION LAW* 242 (2008).

¹³³ See Perry Zirkel, *Compensatory Education Under the IDEA*, 110 PENN ST. L. REV. 879, 893 (2006). However, Zirkel notes that compensatory education was referenced in the legislative history of the 2004 IDEA amendments. *Id.* at 893-94.

¹³⁴ 20 U.S.C. § 1415(i)(2)(C) (2006).

¹³⁵ *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1988); *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986); *Cremeans v. Fairland Local Sch. Dist. Bd. of Educ.*, 633 N.E.2d 570 (Ohio Ct. App. 1993).

¹³⁶ Osher et al., *supra* note 17, at 107.

¹³⁷ RUSSO & OSBORNE, *supra* note 132, at 242.

¹³⁸ Osher et al., *supra* note 17, at 107.

¹³⁹ *Id.*

VI. CONCLUSION

Forest Grove was rightly decided by the unlikely group of Justices that formed the majority. The majority's decision does not allow a poorly worded, but well intentioned, amendment to disrupt the entire statutory scheme. Rather, the Court interprets the amendment to strengthen IDEA and affirm the responsibilities of schools to identify, evaluate, and educate all children with disabilities. It also highlights the importance of collaboration between parents and schools. Lower courts and hearing officers adjudicating tuition reimbursement claims will likely focus on the criteria enunciated by the Court, both of which emphasized collaboration: notice provided by parents and schools' opportunities to evaluate. Moreover, the school district must have failed to provide FAPE and the private placement must have been appropriate. Media portrayals of the consequences of the decision—allowing wealthy parents to bypass public schools altogether while forcing them to pay—ignore that crucial point.

The Court preserves the statutory mandate of IDEA to provide children with disabilities free appropriate education. In contrast, Justice Souter's interpretation would have allowed school districts to decide which students to evaluate and provide special education services, which would have been contrary to IDEA's overall goal. Thus, broadly speaking, this decision is good for all children with disabilities, regardless of socioeconomic status. However, because the remedy of tuition reimbursement remains available primarily to families with financial resources, the reality is that this case does little to improve special education services provided to low-income students with disabilities. To truly improve the educational services and supports offered to these students, the legislature must intervene.