IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,

v.

T.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the question on which the Court granted certiorari, but was unable to resolve, in *Board of Education* v. *Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam):

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.

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PETITION FOR A WRIT OF CERTIORARI

Forest Grove School District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 523 F.3d 1078. The court's order denying rehearing and rehearing en banc (Pet. App. 160a) is unpublished. The opinion of the district court (Pet. App. 25a-55a) is unreported. The opinion of the hearing officer of the State of Oregon Office of Administrative Hearings (Pet. App. 56a-159a) is unreported.

JURISDICTION

The court of appeals entered judgment on April 28, 2008. Pet. App. 1a. An order denying rehearing and rehearing en banc was entered on June 5, 2008. *Id.* at 160a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix at Pet. App. 161a-169a.

STATEMENT OF THE CASE

The decision below deepens a preexisting circuit split on an important and recurring question on which this Court granted certiorari in *Board of Education* v. *Tom F. ex rel. Gilbert F.*, 127 S. Ct. 1393 (2007). The question is whether the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400

et seq., 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. An equally divided Court was unable to resolve the question. 128 S. Ct. 1 (2007) (per curiam).

In the decision below, a divided Ninth Circuit panel expressly adopted the Second Circuit's view that IDEA permits a tuition reimbursement award under those circumstances. Pet. App. 13a-16a. In so doing, the Ninth Circuit flatly "reject[ed]" the First Circuit's contrary view that the child's prior receipt of special education services from the public agency is a "threshold" requirement for such reimbursement under IDEA. *Id.* at 18a. The need for this Court's review is as great, if not greater, than it was when certiorari was granted in *Tom F.*

I. STATUTORY BACKGROUND.

Enacted pursuant to Congress's spending power, IDEA provides federal funds to assist state and local agencies in educating disabled children, and conditions such funding upon the State's ensuring that a "free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A); see *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 295 (2006). IDEA defines "free and appropriate public education" ("FAPE") as "special education and related services" that are "provided at public expense," meet state regulatory standards, "include an appropriate ... school ... in the State," and conform to IDEA's statutory and regulatory requirements. *Id.* § 1401(9)(A)-(D). The method for ensuring that

disabled children receive a FAPE is the creation and execution of an "individualized education program" ("IEP"), which is a written statement setting forth the disabled child's special needs and a plan to address those needs, arrived at through evaluations by and meetings among school district and disability professionals and the child's parents. See *Sch. Comm. of Town of Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 368 (1985); 20 U.S.C. § 1414(d)(1), (2).

Prior to 1997, IDEA's text was silent on whether and, if so, under what circumstances state or local agencies had to reimburse parents for placing their children in private school. In *Burlington*, this Court held that IDEA's general grant of authority to district courts to award "appropriate" relief, 20 U.S.C. § 1415(i)(2)(C)(iii) (unless otherwise specified, all citations are to the current version of IDEA), gave courts the equitable discretion to order tuition reimbursement for parents who unilaterally placed their children in private school. 471 U.S. at 369-70.

In 1997, Congress amended IDEA to explicitly address reimbursement for the private school placement of disabled children. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 612(a)(10), 111 Stat. 37, 63-64 (codified at 20 U.S.C. § 1412(a)(10)). IDEA now provides that if the state or local education agency places a disabled child in a private school, the placement is made "at no cost to" the parents. 20 U.S.C. § 1412(a)(10)(B)(i). However, if the parents place their child in a private school without the public agency's consent, the following provision governs:

> (ii) Reimbursement for Private School Placement
>
> 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.

Id. § 1412(a)(10)(C)(ii) (emphasis added). The question that has divided the circuits is whether, in light of these 1997 amendments, IDEA permits tuition reimbursement for parents who unilaterally place in private school a child who previously did not receive special education services from a public agency.

II. FACTUAL AND PROCEDURAL BACKGROUND.

1. Respondent T.A. was enrolled in the Forest Grove School District ("District") from kindergarten until the spring of his junior year in high school. During that period, T.A. never received special education and related services from the District or any other public agency.

T.A. experienced various emotional, behavioral, and educational difficulties while attending Forest Grove High School. Pet. App. 26a-27a, 29a-31a. The District attempted to address T.A.'s poor academic performance through a variety of individualized interventions. Ninth Circuit Supp. Excerpts of

Record at 00001 ("SER"). In December 2000, during his freshman year, T.A. was referred for an evaluation to determine whether he had a learning disability that qualified him for services under IDEA. Pet. App. 26a-27a.

The District formed a multidisciplinary team to conduct the evaluation. Pet. App. 27a; SER 00005. Notes from a January 16, 2001 team meeting questioned, "Maybe ADD [Attention Deficit Disorder] ... /ADHD [Attention Deficit Hyperactivity Disorder]?" Pet. App. 27a (internal quotation marks omitted). But a special education teacher observed that in class T.A. was quiet, worked independently, and behaved appropriately. *Ibid.* And in June 2001, a school psychologist concluded, in determining whether T.A. had a learning disability, that the symptoms listed in the referral did not merit an evaluation for ADHD. *Ibid.*

On June 13, 2001, school officials and T.A.'s mother met to review the results of the evaluations. Pet. App. 27a. Everyone present, including T.A.'s mother, agreed that T.A. did not have a learning disability and was not eligible for special education services. *Ibid.*

During the evaluation process, the District provided T.A.'s parents with notice of their procedural safeguards under IDEA. Pet. App. 28a; see 20 U.S.C. §§ 1412(a)(6), 1414(b)(1). Among other things, the District noted that reimbursement for "private school placement" was available "only if ... the child received special education and related services under the authority of a public agency before enrolling in the private school ... and ... [the] parent provided notice" of the placement. Pet. App. 28a. After the June 2001 determination that T.A. was not eligible for special education services, his parents

never requested another special education evaluation while T.A. was enrolled in the District, and nobody from the high school referred him for such an evaluation. *Ibid.*

2. As T.A. progressed from his freshman to junior years, he exhibited behavioral problems at school and home. Pet. App. 29a. In September 2001, he was suspended for bringing a knife to school. *Ibid.* Starting in early 2002, T.A. began using marijuana. *Id.* at 30a. T.A.'s grades improved during the beginning of his junior year, but by November 2002, he started falling behind and experienced mood swings and angry outbursts. *Ibid.* T.A. began using marijuana with increasing frequency, to the point that he was "so drugged" at times that he "could not get out of bed or speak." *Ibid.*

In January 2003, T.A.'s parents took him to meet Dr. Michael J. Fulop, Psy.D., for an initial diagnostic interview concerning his "odd pattern of behavior." SER 00025 (conducting assessment into T.A.'s "depressive ideation, irritability, impulsiveness, and over-dependence on his family"); see Pet. App. 31a. In addition, T.A.'s father arranged with a high school official for T.A. to apply to finish high school through the "Partnership Program" at Portland Community College ("PCC"). Pet. App. 31a. In the meantime, T.A.'s difficulties persisted. T.A. ran away from home on February 11, 2003. *Id.* at 30a. Upon his return by police several days later, T.A. met with his therapist, Dr. Susan Patchin, Psy.D., whom he had seen since approximately April 2000 for school and anger issues, and underwent testing and evaluation by Dr. Fulop. *Id.* at 31a.

On February 27, 2003, T.A.'s father informed the high school's assistant principal that T.A. was undergoing medical testing, was going to enter a

three-week wilderness training program, and would be attending PCC in the spring. Pet. App. 31a. The next day, T.A.'s father told another high school administrator that T.A. was enrolled at PCC, had completed the necessary placement tests, and had met with an advisor there. *Ibid.* On March 10, 2003, T.A.'s father informed the assistant principal that T.A. was "officially disenrolled" from Forest Grove High School and had registered at PCC. *Id.* at 32a. Neither T.A. nor his parents ever expressed to the assistant principal any dissatisfaction with his placement at PCC, and the assistant principal understood that T.A. was attending PCC as of the beginning of the spring quarter. *Ibid.*

Meanwhile, on March 2, 2003, T.A. had begun a three-week program at Catherine Freer Wilderness Therapy Expeditions ("Freer"). Pet. App. 31a-32a. Freer admitted him because of his "substance abuse and oppositional behavior." *Id.* at 31a; see SER 00056. On March 12, Freer recommended to T.A.'s parents that T.A. be placed in a structured out-of-home facility that could address his drug use and depression. Pet. App. 32a.

On March 14, 2003, Dr. Fulop discussed the results of his evaluation with T.A.'s parents. Pet. App. 32a. He diagnosed T.A. with ADHD (combined subtype) and dysthmic disorder (a form of depression characterized by long-term symptoms, such as sadness). *Ibid.* He found that T.A. had several learning problems and academic limitations, as well as "math disorder and cannabis abuse." *Id.* at 32a-33a. Dr. Fulop specifically recommended that T.A. attend a residential treatment program at Mount Bachelor Academy ("the Academy") because he needed an environment that could address his drug

abuse, school difficulties, ADHD, and depression. *Id.* at 33a.

On March 24, 2003, two days after his discharge from Freer, T.A. enrolled in and immediately began a residential program at the Academy. Pet. App. 33a-34a. The Academy states that it provides a "well-rounded academic and emotional growth curriculum that is designed for children who may have academic, behavioral, emotional, or motivational problems." *Id.* at 34a (internal quotation marks omitted); see also Mount Bachelor Acad., *College Placement* (2008), *at* http://www.mtba.com/college.html (noting that the Academy's students have been accepted at Massachusetts Institute of Technology, Duke University, Bryn Mawr College, George Washington University, and New York University). Monthly tuition at the Academy was $5,200. Pet. App. 34a.

3. Four days after T.A. enrolled in the Academy, his parents hired a lawyer to determine their rights and to notify the District in writing of their actions. Pet. App. 34a. On April 18, 2003, they requested that the District conduct a hearing to evaluate T.A. in all areas of suspected disability. *Ibid.* This was the first time high school officials learned that T.A. was not attending PCC. *Id.* at 35a.

Several District officials evaluated T.A. and reviewed his records. Pet. App. 35a-36a. On July 7, 2003, a multidisciplinary team assembled to review the results and to determine T.A.'s eligibility for services under IDEA. *Id.* at 36a-37a. Present at the meeting were T.A.'s parents, Dr. Patchin, and several officials from the District and the high school. *Ibid.* Everyone in attendance except T.A.'s parents and Dr. Patchin concluded that T.A. did not qualify for special education services. *Id.* at 37a. The team determined that T.A.'s ADHD was permanent, but concluded that

it was not a qualifying disability because it did not adversely impact his educational performance. *Ibid.*

4. T.A. requested a due process hearing, which was held in September and October 2003. Pet. App. 38a. The hearing officer concluded that the District had not shown that T.A. received a FAPE, reasoning that his ADHD adversely impacted his educational performance, thus making him eligible for special education services under IDEA. *Id.* at 38a-39a. Further, the officer ordered the District to reimburse T.A.'s parents for the expense of sending him to the Academy. *Id.* at 39a; see *id.* at 56a-159a.

5. Pursuant to 20 U.S.C. § 1415(i)(2), the District appealed the tuition reimbursement award to the U.S. District Court for the District of Oregon. The district court accepted the hearing officer's factual findings, but held that 20 U.S.C. § 1412(a)(10)(C)(ii) barred the reimbursement award because T.A. had not received special education services from a public agency prior to his unilateral placement in private school. Pet. App. 49a-51a. In this regard, the court found it undisputed that T.A.'s parents agreed with the 2001 ineligibility determination; that they never requested another evaluation; that they removed T.A. from the District for reasons (drug abuse and behavioral problems) unrelated to special education and related services; and that T.A. never received special education services from the District. *Id.* at 51a. Accordingly, the district court concluded that, as a matter of law, T.A. was "not within the category of children eligible for tuition reimbursement." *Ibid.*

6. A divided panel of the Ninth Circuit reversed. T.A. conceded on appeal that he did "not meet the statutory requirements under 20 U.S.C. § 1412(a)(10)(C), because he had not 'previously received special education and related services.'" Pet.

App. 11a. The panel concluded, however, that this did not bar T.A. from receiving private school tuition reimbursement. *Id.* at 2a, 14a-15a. In so holding, the Ninth Circuit expressly adopted the Second Circuit's interpretation of IDEA in *Frank G.* v. *Board of Education*, 459 F.3d 356 (2006), *cert. denied*, 128 S. Ct. 436 (2007).

According to the Ninth Circuit, the text of § 1412(a)(10)(C)(ii) is ambiguous and therefore "does not *clearly* create a categorical bar" to tuition reimbursement where the child did not previously receive special education services from a public agency; the textual canon against interpretations that create absurd results counsels against such a categorical bar; and a categorical bar would be inconsistent with an interpretation from the Department of Education. Pet. App. 14a. The court explained that although "Congress chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing officers when deciding whether to award reimbursement to students who previously received special education and related services," "[f]or students who never received" such services, "the new provisions of § 1412(a)(10)(C) simply do not apply." *Id.* at 16a; *id.* at 2a. Rather, students like T.A. who never received special education services "are eligible for reimbursement[] to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to § 1415(i)(2)(C)." *Id.* at 16a. Echoing the Second Circuit, the Ninth Circuit rejected the First Circuit's contrary decision in *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004). Pet. App. 15a.

Judge Rymer dissented, stating that she did not believe the court "should adopt the reasoning of the Second Circuit." Pet. App. 21a. Judge Rymer

concluded that because a "FAPE w[as] *not* at issue and T.A. was *not* receiving special education and related services before withdrawal from public school," he was not authorized to receive tuition reimbursement under IDEA. *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

In *Tom F.*, this Court granted certiorari on, but was unable to resolve, the question whether IDEA permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place a child in private school, where the child had not previously received special education and related services under the authority of a public agency. This case presents an ideal vehicle to answer that question and to finally resolve the circuit split that has persisted and deepened since this Court heard *Tom F.*

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE RECOGNIZED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The Ninth Circuit in this case held that despite Congress's enactment of 20 U.S.C. § 1412(a)(10) as part of the 1997 amendments to IDEA, parents who unilaterally place a child in private school may be awarded tuition reimbursement from a state or local education agency even if the child had not previously received special education services from a public agency. Pet. App. 13a-16a. The Ninth Circuit expressly adopted the Second Circuit's ruling in *Frank G.* that 20 U.S.C. § 1415(i)(2)(B), "as construed by the Supreme Court in *Burlington*, provides an ample basis for the award of" reimbursement under those circumstances, and that "[s]ection 1412(a)(10)(C)(ii) does not prohibit it." *Frank G.*, 459

F.3d at 376. The Eleventh Circuit is in accord with the Second and the Ninth. See *M.M. ex rel. C.M.* v. *Sch. Bd.*, 437 F.3d 1085, 1098-99 (2006) (per curiam) (concluding that § 1412(a)(10)(C)(ii) does not categorically bar tuition reimbursement where a child had not attended public school or received special education services).

These decisions directly conflict with *Greenland School District* v. *Amy N.*, 358 F.3d 150 (1st Cir. 2004). In *Greenland*, the child's parents removed her from public school and unilaterally placed her in private school. *Id.* at 153. Only after sending her to a second private school did the parents notify the school district of an alleged need for special education services and seek tuition reimbursement. *Id.* at 154. The First Circuit held that § 1412(a)(10)(C)(ii) imposes as a "threshold requirement[]" to tuition reimbursement that the child "have previously received 'special education and related services' while in the public school system." *Id.* at 159-60 (footnote omitted). The court concluded that the student did not satisfy this requirement because there was "no dispute that neither Katie's parents nor anyone else requested an evaluation for Katie while she was at Greenland," and because she had not received such services from the school. *Id.* at 160. See also *Lauren W. ex rel. Jean W.* v. *Deflaminis*, 480 F.3d 259, 276 n.21 (3d Cir. 2007) (suggesting, in dicta, that the plain language of § 1412(a)(10)(C)(ii) may confine tuition reimbursement to parents with children who previously received special education services under IDEA).

The grounds for certiorari are stronger now than they were when this Court heard *Tom F.* Not only has the circuit conflict deepened, but the decision below creates a particularly stark split with the First

Circuit's decision in *Greenland*. In both cases, before placing their child in private school, the parents failed to notify the school district of any issue regarding their child's alleged need for special education or that their child was being removed for special education purposes. See Pet. App. 51a, 53a; *Greenland*, 358 F.3d at 160. Yet the courts reached diametrically opposed conclusions as to whether reimbursement was available under those circumstances.

Mirroring the circuit conflict, district courts outside the First, Second, Ninth, and Eleventh Circuits have divided over the question presented here. Some district courts have adopted the First Circuit's rule. See *T.H. ex rel. A.H.* v. *Clinton Twp. Bd. of Educ.*, No. 05-3709, 2006 WL 1128713, at *6 (D.N.J. Apr. 25, 2006) (holding that § 1412(a)(10)(C)(ii) "require[s] a student to have received special education and related services as a prerequisite" to private school tuition reimbursement); *Lunn* v. *Weast*, No. 05-2363, 2006 WL 1554895, at *6 (D. Md. May 31, 2006) (relying on *Greenland* to conclude that "reimbursement is barred where a student has not previously received public special education and related services"); *Balt. City Bd. of Sch. Comm'rs* v. *Taylorch*, 395 F. Supp. 2d 246, 249 (D. Md. 2005).

Other district courts, both before and after this Court heard *Tom F.*, have adopted the rule prevailing in the Second, Ninth, and Eleventh Circuits. See *J.S. ex rel. R.S.* v. *S. Orange/Maplewood Bd. of Educ.*, No. 06-3494 (FSH), 2008 WL 820181, at *6 (D.N.J. Mar. 26, 2008) (holding that § 1412(a)(10)(C)(ii) "does not preclude tuition reimbursement in cases where the child is unilaterally placed in a private institution before the child receives special education," and finding "[t]he reasoning of *Frank G.* applies to the

case at bar"); *D.L. ex rel. J.L.* v. *Springfield Bd. of Educ.*, 536 F. Supp. 2d 534, 541-42 (D.N.J. 2008) (adopting *Frank G.* and rejecting view that reimbursement "is only available to parents whose child had previously received special education and related services from a public agency"); *Justin G. ex rel. Gene R.* v. *Bd. of Educ.*, 148 F. Supp. 2d 576, 587 (D. Md. 2001) (holding that § 1412(a)(10)(C)(ii) is no bar to reimbursement for children who have not received IDEA services).

As commentators have noted, lawsuits seeking "reimbursement for private school tuition [are] one of the most controversial aspects of special education law," Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 Remedial & Special Educ. 350, 350 (2001), and the volume of such litigation has increased "steadily and steeply" over the last twenty years. *Id.* at 355. Moreover, school districts are becoming "increasingly financially strained by ... the increased frequency of tuition reimbursement" lawsuits. *Id.* at 357; see also *id.* at 350 (recognizing that "typical tuition reimbursement disputes" involve "high financial stakes," particularly where, as here, residential program tuition is implicated). Given the circuit conflict and its practical consequences, the Court should grant review to provide uniformity on this important and recurring issue.

II. THE NINTH CIRCUIT'S DECISION MISINTERPRETS IDEA AND CONFLICTS WITH THIS COURT'S SPENDING CLAUSE JURISPRUDENCE.

The Ninth Circuit's decision cannot be reconciled with this Court's Spending Clause jurisprudence. In *Arlington Central School District*, the Court made clear that interpretation of IDEA is "guided by the

fact that Congress enacted the IDEA pursuant to the Spending Clause." 548 U.S. at 295. Thus, in resolving the question presented here, it is necessary to "view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds," and to "ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents" for private school tuition even where their child previously had not received special education services from a public agency. *Id.* at 296.

The decision below turns the Spending Clause on its head. In allowing private school tuition reimbursement, the Ninth Circuit reasoned "that § 1412(a)(10)(C)(ii) is ambiguous because its text dose not *clearly* create a categorical bar" to reimbursement where the child had not previously received special education services from a public agency. Pet. App. 14a (citing *Frank G.*, 459 F.3d at 368-70). But the question under the Spending Clause is not whether the statute clearly *relieves* the State of an obligation; rather, it is whether the statute clearly *imposes* the obligation. Thus, even if (as the Ninth Circuit held) § 1412(a)(10)(C)(ii) were ambiguous, the Spending Clause would require that the ambiguity be resolved in favor of the State, for an ambiguous statute, by definition, cannot provide the "clear notice" demanded by the Spending Clause.

Properly viewed through the lens of the Spending Clause, and given the enactment of § 1412(a)(10) in 1997, IDEA does not permit tuition reimbursement where, as here, parents unilaterally place in private school a child who previously did not receive special education service from a public agency. Section 1412(a)(10) comprehensively addresses private school

placement. Section 1412(a)(10)(B) provides that disabled children in private schools will receive special education and related services, "at no cost to their parents," where the children are placed in, or referred to, the school by the state or local school agency. 20 U.S.C. § 1412(a)(10)(B)(i). However, if the parents unilaterally place their child in a private school without the agency's consent or referral, reimbursement is limited as follows:

> (ii) Reimbursement for Private School Placement
>
> 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.

Id. § 1412(a)(10)(C)(ii) (emphasis added).

The only notice Congress provided state officials concerning tuition reimbursement for unilateral private school placement is that the State may be required to provide reimbursement, if FAPE was not made available, where the child "previously received special education and related services under the authority of a public agency." The statutory text does not provide any notice, let alone clear notice, of any obligation to provide reimbursement where the child did not previously receive special education services from a public agency.

This Court's 1985 decision in *Burlington* does not provide an adequate substitute for the lack of clear notice in the statutory text. *Burlington* interpreted a prior version of the general "appropriate" relief provision in 20 U.S.C. § 1415(i)(2)(C)(iii) to allow courts the discretion to grant tuition reimbursement to parents who unilaterally placed their children in private school. 471 U.S. at 369-70. At the time, however, IDEA was silent on subject of tuition reimbursement. Indeed, the Court expressly noted that it interpreted the general "appropriate" relief provision "[a]bsent other reference" in the statute to what would be "appropriate" under the circumstances. *Id.* at 369.

The 1997 amendments to IDEA provided the "other reference" that was missing when the Court decided *Burlington*. As noted above, the amendments specifically and comprehensively address the subject of private school placement and, in particular, tuition reimbursement. It is a fundamental tenet that "a specific statute" like § 1412(a)(10)(C) "will not be controlled or nullified by a general one" like § 1415(i)(2)(C)(iii), "regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974). This "canon [is] particularly pertinent" where, as here, the general provision "is a relic" of a prior "regime." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). Consequently, with respect to reimbursement for private school tuition, § 1412(a)(10)(C) trumps the general "appropriate" relief provision upon which *Burlington* relied.

The legislative history of the 1997 amendments, insofar as it is relevant, confirms this reading of the statute. The House Committee Report states that the private school provisions "specif[y] that parents may be reimbursed for the cost of a private educational

placement under certain conditions .... *Previously, the child must have had [sic] received special education and related services under the authority of a public agency.*" H.R. Rep. No. 105-95, at 93 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 90 (emphasis added). A proponent of the amendments explained on the floor that "[t]his bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts." 143 Cong. Rec. H2498, H2536 (daily ed. May 13, 1997) (statement of Rep. Castle). Another proponent stated, "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." 143 Cong. Rec. S4295, S4296 (daily ed. May 12, 1997) (statement of Sen. Jeffords).

Against all this, the Ninth Circuit cited a 1999 interpretation offered by the Department of Education, not in a regulation, but in commentary accompanying regulations. Pet. App. 14a & n.9 (citing 64 Fed. Reg. 12,406-01, 12,602 (Mar. 12, 1999)). That agency interpretation, issued years before this Court made clear in *Arlington* that IDEA is a Spending Clause statute, cannot overcome the lack of clear notice in the statutory text, for it is Congress that must supply clear notice of any obligations placed on States. See *Arlington*, 548 U.S. at 303; *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Moreover, for agency interpretations to carry any weight, the statute must be ambiguous. See *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008) (noting that *Skidmore* deference would apply if statute were ambiguous, but not if the

statute is clear); *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). But if the statute is ambiguous, it cannot provide the clear notice required by the Spending Clause.

The Ninth Circuit also claimed that interpreting § 1412(a)(10)(C) to prohibit reimbursement where the child had not yet received special education services from the public agency would run contrary to IDEA's goal "'to ensure that *all* children with disabilities have available to them'" a FAPE. Pet. App. 15a (quoting 20 U.S.C. § 1400(d)(1)(A)). But as this Court explained in *Arlington*, IDEA "obviously does not seek to promote th[is] goal[] at the expense of all other considerations, including fiscal considerations.... [It] is not intended in all instances to further the broad goals ... at the expense of fiscal considerations." 548 U.S. at 303. Indeed, the legislative history of the 1997 amendments confirms that Congress specifically intended to make tuition reimbursement more difficult, a goal that must be balanced with IDEA's other goals and that is embodied in § 1412(a)(10)(C). See *supra* at 17-18.

Finally, the Ninth Circuit reasoned that if tuition reimbursement were not available here, an absurdity would arise because "if the school district declined to recognize a student as disabled—as occurred in this case—the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement." Pet. App. 16a. The Ninth Circuit's argument misreads IDEA. Congress provided parents with numerous procedural avenues, all with tight deadlines for action, to challenge adverse disability determinations and obtain independent review. See, *e.g.*, 20 U.S.C. § 1415(b)(1) (right to seek independent educational evaluation); *id.* § 1415(b)(7) (right to a due process hearing); *id.*

§ 1415(b)(5) (mediation); *id.* § 1415(i)(2) (court review). These provisions obviate any concern that a child may "never receive special education" services if the local education agency makes an initial finding that the child is not disabled.

Indeed, it is the Ninth Circuit's reading of the 1997 amendments that creates the greatest potential for absurdity. Congress amended IDEA to address comprehensively the States' obligations to disabled children placed in private schools and to limit their obligation to provide tuition reimbursement where the placement is unilateral. See 20 U.S.C. § 1412(a)(10)(C). Yet the Ninth Circuit concluded that these new provisions "simply do not apply" to "students who never received special education and related services." Pet. App. 16a; compare *Frank G.*, 459 F.3d at 376 (suggesting that other requirements of § 1412(a)(10)(C) still applied to the parents of students who previously had not received special education services from a public agency). In the Ninth Circuit, then, parents who never place their child in public school are more likely to receive tuition reimbursement than parents who do. That cannot possibly be what Congress had in mind when enacting the 1997 amendments.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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