

## LESSONS LEARNED FROM *FOREST GROVE SCHOOL DISTRICT V. T.A.*: HOW THE SUPREME COURT CAN REFINES THE APPROACH TO PRIVATE SCHOOL TUITION REIMBURSEMENT UNDER THE IDEA

Courtney Rachel Baron\*

### I. INTRODUCTION

On April 28, 2009, the Supreme Court heard oral argument in *Forest Grove School District v. T.A.*,<sup>1</sup> a case that addresses a deeply contested issue in special education litigation. Reviewing the Ninth Circuit's decision in *Forest Grove*, the Court will decide whether the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> entitles parents to reimbursement for their child's private school education if the child has never received special education services provided by a public school.<sup>3</sup> *Forest Grove* represents the latest of many cases to perpetuate the circuit split on this issue. In fact, in 2007, the Supreme Court addressed the same question in *Board of Education v. Tom F.*<sup>4</sup> Just two weeks before the Court heard argument in *Tom F.*, however, Justice Kennedy recused himself,<sup>5</sup> resulting in a 4-4, non-precedential decision affirming the Second Circuit's grant of reimbursement to parents facing circumstances similar to those presented in *Forest Grove*.<sup>6</sup> Currently, the Second,<sup>7</sup> Ninth,<sup>8</sup> and Eleventh Circuits<sup>9</sup> recognize the availa-

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<sup>1</sup> *Forest Grove Sch. Dist. v. T.A.*, cert. granted, 129 S. Ct. 987 (2009) (No. 08-305) (argued Apr. 28, 2009), decision below at *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2008) (link).

<sup>2</sup> 20 U.S.C. §§ 1400-1482 (2006) (link).

<sup>3</sup> It is a settled question that the IDEA entitles parents to reimbursement for their child's private school tuition if the public school cannot or will not provide the child with an appropriate public education. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 369 (1985) (link).

<sup>4</sup> 128 S. Ct. 1 (2007) (mem.) (link).

<sup>5</sup> Tony Mauro, *Will Justice Kennedy Recuse Again?*, LAW.COM, Oct. 21, 2008, <http://www.law.com/jsp/article.jsp?id=1202425400784> (link).

<sup>6</sup> *Id.*; see *Bd. of Educ. v. Tom F. ex rel. Gilbert F.*, 193 Fed. App'x. 26 (2d Cir. 2006).

<sup>7</sup> *Frank G. v. Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006) (link).

<sup>8</sup> *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2008) (link).

<sup>9</sup> *M.M. ex rel. C.M. v. Sch. Bd.*, 437 F.3d 1085 (11th Cir. 2006) (link).

bility of reimbursement, while in contrast, the First Circuit<sup>10</sup> has refused to do so.

Because of the growing divide between the circuits, many parents of children with disabilities face uncertainty about whether they will be reimbursed if they choose to enroll their children in private schools.<sup>11</sup> The Supreme Court should end parents' uncertainty by affirming the Ninth Circuit's decision in *Forest Grove* and holding that parents who enroll their child in private school before that child has received publicly provided special education services are not precluded from tuition reimbursement under the IDEA. The language and intent of the IDEA and the balance of policy considerations support the Ninth Circuit's decision. More importantly, the Court should capitalize on its opportunity to refine the judicial approach to private school reimbursement cases by adopting an analytical framework that encourages parents and schools to cooperate more closely.

## II. BACKGROUND: THE LAW AND FACTS BEHIND *FOREST GROVE SCHOOL DISTRICT v. T.A.*

### A. *Reimbursement for Private School Tuition under the IDEA*

Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. . . ."<sup>12</sup> The IDEA provides comprehensive procedural safeguards<sup>13</sup> and empowers parents as "equal partners with school personnel in the education of their children."<sup>14</sup> Accordingly, the IDEA is structured to encourage parents to collaborate with school districts in developing Individualized Education Plans (IEP) that provide the special education services necessary for their children to receive a free appropriate public education.<sup>15</sup> If parents are not satisfied with the special education services offered to their child, they may file a complaint to initiate an administrative hearing.<sup>16</sup> Parents may appeal

<sup>10</sup> *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (1st Cir. 2004) (link).

<sup>11</sup> Last year, nearly half of the parents who enrolled their children in private schools because they needed special education services did so while facing such uncertainty. Joseph Goldstein, *9 Could Rescue Disabled Pupils: Top Court Takes N.Y. Case on Tuition Reimbursement*, NYSUN.COM, Feb. 27, 2007, <http://www.nysun.com/new-york/9-could-rescue-disabled-pupils/49334/> (link).

<sup>12</sup> 20 U.S.C. § 1400(d)(1)(A) (2006) (link).

<sup>13</sup> See 20 U.S.C. §§ 1412(a)(6) , 1415 (2006) (link to § 1412) (link to § 1415); see also 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 ED. LAW REP. 887, 887 (2007).

<sup>14</sup> Osborne, Jr., *supra* note 13, at 887; see also 20 U.S.C. § 1400(d)(1)(B) (2006) ("The purposes of this chapter are—to ensure that the rights of children with disabilities and parents of such children are protected.").

<sup>15</sup> 20 U.S.C. § 1412(a)(4) (2006).

<sup>16</sup> 20 U.S.C §§ 1415(b)(6), 1415(f) (2006).

final administrative decisions by bringing a civil action in state or federal court.<sup>17</sup>

Because the IDEA did not explicitly address private school tuition reimbursement before 1997, the Supreme Court found the authority to grant such reimbursement in the IDEA's broad "appropriate" relief provision, § 1415(i)(2)(C)(iii).<sup>18</sup> This sweeping provision empowers courts reviewing administrative decisions with the discretion "to grant such relief as the court determines is appropriate."<sup>19</sup> In *School Committee of Burlington v. Department of Education*, the Court interpreted § 1415(i)(2)(C)(iii) to "confer broad discretion"<sup>20</sup> that authorizes private school tuition reimbursement when the school district fails to provide a free appropriate public education.<sup>21</sup> After noting that judicial review under the IDEA is a "ponderous," slow process,<sup>22</sup> the Court in *Burlington* stated:

[T]he parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing the proper IEP, and all of the procedural safeguards would be less than complete.<sup>23</sup>

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<sup>17</sup> 20 U.S.C. § 1415(f)–(i) (2006); *see also* Brief for the United States as Amicus Curiae Supporting Respondent at 3, *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 987 (2009) (No. 08-305), 2005 WL 870018 (link).

<sup>18</sup> *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1085 (9th Cir. 2008); *see* 20 U.S.C. § 1415(i)(2)(C)(iii) (2006).

<sup>19</sup> 20 U.S.C. § 1415(i)(2)(C)(iii) (2006).

<sup>20</sup> *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985) (link).

<sup>21</sup> *Id.* at 370; *see also* *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15–16 (1993) (reaffirming the Court's finding in *Burlington* that the IDEA authorizes private school reimbursement) (link).

Although *Burlington* and *Carter* involved children who had received publicly provided special education services before their parents enrolled them in private school, neither decision holds that receipt of such services constitutes a prerequisite for tuition reimbursement. Moreover, "following *Burlington*, lower courts routinely awarded reimbursement to parents of children who had not previously received public special education." Brief for the United States, *supra* note 17, at 14–15.

<sup>22</sup> *Burlington*, 471 U.S. 359, 370 (1985) ("As this case so vividly demonstrates, . . . the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed.")

<sup>23</sup> *Id.*

This pronouncement underpins the Court's holding in *Burlington* and echoes throughout subsequent decisions that confirm courts' power to grant tuition reimbursement under the IDEA.<sup>24</sup>

In 1997, Congress amended the IDEA to address explicitly private school tuition reimbursement under a new section, entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency."<sup>25</sup> The following provision of this section includes the statutory language at issue in *Forest Grove*:

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>26</sup>

*Forest Grove* presents the question of whether, by adopting the 1997 amendments, Congress barred private school tuition reimbursement for students who have not "previously received special education and related services."<sup>27</sup> Or, do "those students remain eligible for private school reimbursement, as they were before 1997," under the IDEA's broad "appropriate" relief provision, § 1415(i)(2)(C)(iii)?<sup>28</sup> The facts in *Forest Grove* provide context for this difficult question.

### *B. Facts and Procedural History in Forest Grove*

After T.A. attended public school from kindergarten until the spring of his junior year, his parents removed him and placed him in private school.<sup>29</sup> Although T.A. "experienced difficulty paying attention in class," depended on extensive help from his family to complete his schoolwork, and was evaluated by the school district for a disability, he never received special edu-

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<sup>24</sup> See, e.g., *Carter*, 510 U.S. at 12; *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 369 (2d Cir. 2006); *M.M. ex rel. C.M. v. Sch. Bd.*, 437 F.3d 1085, 1098–99 (11th Cir. 2006) (link); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 158 (1st Cir. 2004).

<sup>25</sup> 20 U.S.C. § 1412(a)(10)(C) (2006).

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> *Id.*

<sup>28</sup> *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1086 (9th Cir. 2008).

<sup>29</sup> *Id.* at 1081.

cation services while enrolled in public school.<sup>30</sup> When school staff members evaluated T.A. during internal meetings that did not involve his parents, they considered the possibility that T.A. had Attention Deficit Hyperactivity Disorder (ADHD).<sup>31</sup> Instead of testing him for ADHD, however, T.A. was formally evaluated for a learning disability, and the school's psychologists and educational specialists unanimously concluded that he had no such disability.<sup>32</sup> Accordingly, the school psychologist's report indicated that T.A. was not eligible for special education services under the IDEA, though he may have been eligible for accommodations under § 504 of the Rehabilitation Act of 1973.<sup>33</sup> The school district never followed up on either the suggestion that T.A. had ADHD or that he might be eligible for § 504 accommodations.<sup>34</sup> When T.A. continued to experience difficulty in school, his mother contacted school administrators multiple times expressing her concerns and proposing that the school reevaluate him.<sup>35</sup> The school district told T.A.'s mother that a subsequent evaluation would not likely find T.A. eligible for special education services.<sup>36</sup> The district offered no other assistance.<sup>37</sup>

T.A. continued to fall behind in school and, in 2002, he began using marijuana and "exhibit[ing] noticeable personality changes."<sup>38</sup> In 2003, T.A. ran away from home and ultimately ended up in a hospital emergency room.<sup>39</sup> His parents then hired a psychologist, who "diagnosed T.A. with ADHD, depression, math disorder, and cannabis abuse."<sup>40</sup> Upon the psychologist's advice, in March of 2003 T.A.'s parents removed him from public school and ultimately enrolled him in Mount Bachelor Academy, a private school intended for students with special needs.<sup>41</sup> Four days after placing T.A. in private school, his parents obtained a lawyer who advised

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* Notes from two separate meetings included: Jan. 16, 2001—"Maybe ADD/ADHD?," and Feb. 13, 2001—"suspected ADHD." *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* The Rehabilitation Act of 1973 is a civil rights statute that broadly prohibits discrimination against individuals with disabilities. See 29 U.S.C. § 794(a) (2006) (link). As the IDEA is devoted specifically to students with disabilities, the two statutes provide different, but sometimes overlapping, special education services.

<sup>34</sup> *Forest Grove*, 523 F.3d at 1081

<sup>35</sup> See Appellant's Opening Brief at 37, *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1086 (9th Cir. 2008) (No. 05-35641); Brief for the United States, *supra* note 17, at 5. In her e-mail, T.A.'s mother expressed concern that T.A. "apparently cannot process information or learn from the teaching methods used thus far" and suggested that "there must be some method of teaching more appropriate for him." *Id.* (citation omitted).

<sup>36</sup> Appellant's Opening Brief, *supra* note 35, at 37.

<sup>37</sup> Brief for the United States, *supra* note 17, at 5.

<sup>38</sup> See *Forest Grove*, 523 F.3d at 1081-82.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1082.

<sup>41</sup> *Id.*

them to request a hearing under the IDEA and to seek an order commanding the school to evaluate T.A. for disabilities.<sup>42</sup> The team of specialists assembled to evaluate T.A. “acknowledged T.A.’s learning difficulties, his diagnosis of ADHD, and his depression,”<sup>43</sup> but nonetheless concluded that T.A. did not qualify for special education services under the IDEA “because those diagnoses did not have a severe effect on T.A.’s educational performance.”<sup>44</sup>

Following the school district’s evaluation, an administrative hearing officer concluded that T.A. “was disabled and therefore eligible for special education under the IDEA and [§] 504.”<sup>45</sup> The hearing officer further concluded that the school district had failed to provide T.A. a free appropriate public education, and accordingly was required to reimburse T.A.’s parents for sending him to Mount Bachelor, which cost \$5,200 per month.<sup>46</sup> The District Court reversed, leading T.A.’s parents to appeal to the Ninth Circuit.<sup>47</sup> The Ninth Circuit reversed the District Court’s decision and remanded the case for further consideration consistent with its determination that T.A.’s parents were eligible for private school tuition reimbursement—despite the fact that T.A. never received special education services while enrolled in public school.<sup>48</sup> Both the Ninth Circuit’s reasoning and wider policy implications support its decision.

### III. WHY THE SUPREME COURT SHOULD AFFIRM *FOREST GROVE* AND REFINES THE COURT’S ANALYSIS

#### A. *The Second Circuit Correctly Interpreted the IDEA*

In deciding *Forest Grove*, the Ninth Circuit adopted the Second Circuit’s statutory analysis in *Frank G. v. Board of Education*,<sup>49</sup> a case with similar facts.<sup>50</sup> Because that analysis was sound and firmly rooted in the text, structure, and history of the IDEA, the Supreme Court should affirm *Forest Grove*.

The Second Circuit first determined that § 1412(a)(10)(C)(ii) is ambiguous because the plain language of the provision “does not say that tuition reimbursement is *only* available to parents whose child had previously re-

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1082–83.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1083.

<sup>48</sup> *Id.* at 1088–89.

<sup>49</sup> 459 F.3d 356 (2d Cir. 2006).

<sup>50</sup> *Forest Grove*, 523 F.3d at 1086 (“We agree with and adopt the analysis and conclusion of the Second Circuit.”).

ceived special education and related services from a public agency.”<sup>51</sup> Additionally, the Second Circuit recognized the continuing validity of the *Burlington* Court’s finding that the IDEA’s general “appropriate” relief provision<sup>52</sup> confers “broad discretion” that authorizes private school tuition reimbursement.<sup>53</sup> The Court stated that the re-enactment of this provision in 1997, “without change, is significant because it can be presumed that Congress intended to adopt the construction given to it by the Supreme Court and made that construction part of the enactment.”<sup>54</sup>

Applying “traditional canons of statutory construction,” the Second Circuit explored the broad purpose of the IDEA and found that the statute “was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.”<sup>55</sup> The court then noted that interpreting § 1412(a)(10)(C)(ii) to bar tuition reimbursement for parents whose child had not previously received publicly provided special education services would lead to “absurd results” that involve withholding reimbursement from parents whose children indeed meet the IDEA’s requirements.<sup>56</sup> Finally, the Second Circuit noted that its interpretation converged with both the position of the Department of Education’s Office of Special Education & Rehabilitative Services and the statute’s legislative history.<sup>57</sup>

### B. Policy Considerations Supporting the Ninth Circuit’s Decision

Reversing *Forest Grove* could produce consequences that contravene the IDEA’s purpose and essentially “deprive a child of a free and appropriate education when all the fault lay with the public school.”<sup>58</sup> As the Ninth Circuit recognized, reading § 1412(a)(10)(C)(ii) as a categorical bar would require parents of a child with a disability to preserve their right to reimbursement by accepting publicly provided special education services even if those services are inadequate, and even if the school district fails to coope-

<sup>51</sup> *Frank G.*, 459 F.3d at 368 (emphasis in original).

<sup>52</sup> 20 U.S.C. § 1415(i)(2)(C)(iii) (2006).

<sup>53</sup> *Frank G.*, 459 F.3d at 369–70.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 372 (quoting Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 372 (1985)) (internal quotations omitted); see also *Forest Grove*, 523 F.3d at 1086 (summarizing the Second Circuit’s reasoning in *Frank G.*).

<sup>56</sup> *Frank G.*, 459 F.3d at 372; *Forest Grove*, 523 F.3d at 1086. See *infra* text accompanying notes 58–65 (detailing the absurd results that would follow the reversal of *Forest Grove*).

<sup>57</sup> *Frank G.*, 459 F.3d at 372–73 (“We do not view § 612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency.” (quoting Letter to Susan Luger, listed in 65 Fed.Reg. 9178 (Feb. 23, 2000) and reprinted in 33 I.D.E.L.R. 126 (Mar. 19, 1999)) (internal quotation marks omitted)).

<sup>58</sup> Brief for the United States, *supra* note 17, at 27.

rate with them to formulate an effective IEP.<sup>59</sup> The Forest Grove school district contends that parents should be required merely to “give the IEP a try and send their child to public school,” even for a very short time period.<sup>60</sup> However, requiring enrollment in public school as a prerequisite to tuition reimbursement could disrupt a child’s education and produce psychologically damaging consequences:

Appropriate education during a child’s formative years is critical to a child’s development. Moving a child from one school to another can be highly disruptive to the child, both educationally and psychologically. That is true for any youth; it may be especially true for a child with a disability. It would be absurd to conclude that Congress created a regime whereby parents would have to compound the educational difficulties their children have by subjecting them to inappropriate schools merely to qualify for tuition reimbursement.<sup>61</sup>

Even if a child accepts inadequate services while his parents work with the school district to develop an appropriate IEP, the resulting negotiation process could last indefinitely. All the while, the child must endure insufficient services that deny him the free appropriate education the IDEA promises.<sup>62</sup> The child’s inadequate education may be prolonged still further if the parents’ negotiations with the district fail and the parents initiate an administrative hearing and eventually appeal to federal court.<sup>63</sup>

In addition, “if the school district declined to recognize a student as disabled—as occurred in [*Forest Grove*—the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement . . . .”<sup>64</sup> Most cynically, reversing *Forest Grove* would allow—and even incentivize—school districts to “avoid any obligation to reimburse private-school tuition simply by refusing to provide special education and related services themselves—no matter how much a child needs

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<sup>59</sup> *Forest Grove*, 523 F.3d at 1087; see also *M.M. ex. rel. C.M. v. Sch. Bd.*, 437 F.3d 1085, 1099 (11th Cir. 2006) (stating that “the School Board’s disturbing interpretation would . . . place parents . . . in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to reimbursement” (quoting *Justin G. v. Bd. of Educ.*, 148 F.Supp.2d 576, 587 (D. Md. 2001)) (internal quotation marks omitted)).

<sup>60</sup> Transcript of Oral Argument at 12, *Forest Grove Sch. Dist. v. T.A.*, No. 08-305 (U.S. argued Apr. 28, 2009) (link).

<sup>61</sup> Brief for the United States, *supra* note 17, at 25–26.

<sup>62</sup> See *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985).

<sup>63</sup> During oral argument, Justice Souter seemed especially concerned that litigation could “go on for years” while the student languishes in an improper educational placement. Transcript of Oral Argument, *supra* note 60, at 8.

<sup>64</sup> *Forest Grove*, 523 F.3d at 1087 (emphasis in original).

those services and is entitled to them under IDEA.”<sup>65</sup> During oral argument, Justice Stevens suggested that, under the school district’s approach, by adamantly denying that a student is eligible for special education services, a school district may permanently shield itself from liability for tuition reimbursement.<sup>66</sup>

Some commentators have argued that policy implications in fact militate *against* affirming *Forest Grove*. These commentators fear that *Forest Grove* may increase school districts’ costs because the districts would be required both to defend against increased litigation by parents and to pay for the private school tuition of an increasing number of students.<sup>67</sup> But as Justice O’Connor stated in *Florence County School District Four v. Carter*:

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State’s choice. This is IDEA’s mandate, and school officials who conform to it need not worry about reimbursement claims.<sup>68</sup>

Under the IDEA, a school district is not liable for the cost of private special education services if it affords a child a free appropriate public education.<sup>69</sup> Accordingly, the simplest and cheapest way for school districts to avoid the cost of private school tuition reimbursement is by providing children in need of special education services with a free appropriate education in the first place. However, if school districts fail to do so, parents must be able to turn to effective administrative and judicial procedures to ensure that their child ultimately receives the education that the IDEA guarantees.

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<sup>65</sup> Brief for the United States, *supra* note 17, at 17.

<sup>66</sup> Transcript of Oral Argument, *supra* note 60, at 17–18. Justice Stevens later asked Forest Grove’s lawyer, “Doesn’t your interpretation of the statute create an incentive for the school board to just say, we’ll never provide any kind of . . . special education, we will just tough it out? Because they can’t lose, they can’t be liable if they do that . . .” *Id.* at 19.

<sup>67</sup> See John W. Borkowski, *The 2006–2007 Term of the United States Supreme Court and Its Impact on Public Schools*, 223 ED. LAW REP. 481, 510 (2007) (link).

<sup>68</sup> 510 U.S. 7, 15 (1993) (link).

<sup>69</sup> 20 U.S.C. § 1412(a)(10)(C)(i) (2006).

C. *An Opportunity to Refine the Approach of Lower Courts to Evaluating Parents' Cooperation with the School District*

In addition to realizing Congress's intent and furthering the IDEA's policies, affirming *Forest Grove* would allow the Supreme Court to correct the approach of lower courts to implementing a crucial goal of the IDEA—promoting cooperation between parents and the school district. Careful examination of the facts in previous cases reveals that tuition reimbursement decisions frequently hinge on the level of cooperation between parents and the school district, and as a corollary, the extent to which parents provide notice before placing their child in private school. The more vociferously parents alert the school district before removing their child, the greater the chance that courts will refuse to read § 1412(a)(10)(C)(ii) as a categorical bar to private school tuition reimbursement.<sup>70</sup>

This observation suggests that the Supreme Court may affirm the Ninth Circuit's decision in *Forest Grove* because of T.A.'s parents' persistent communication with the school district. However, while the Supreme Court should indeed affirm *Forest Grove*, it should also refine the analysis that leads to this result. Instead of allowing the parents' cooperation with the school district to implicitly inform courts' interpretations of § 1412(a)(10)(C)(ii), the Supreme Court should instruct lower courts to analyze parental cooperation under the separate provision designed for this purpose—§ 1412(a)(10)(C)(iii). This provision, entitled "Limitation on reimbursement," allows courts to reduce or deny the amount of reimbursement if parents fail to inform the district that they intend to reject its proposed special education services before removing their child from public school.<sup>71</sup> By considering parents' cooperation under this provision, the Court would implement the IDEA's goal of encouraging collaboration between parents and the district, while avoiding the unintended consequences that may accompany a total bar on tuition reimbursement in cases where the child has not first received publicly provided special education services.

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. The First Circuit's pursuit of this objective largely determined its decision to read § 1412(a)(10)(C)(ii) as a bar to reimbursement for parents who never notified the school district before removing their child from public school.<sup>72</sup> According to the First Circuit, the statute "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public educa-

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<sup>70</sup> See, e.g., *Forest Grove*, 523 F.3d 1078; M.M. *ex. rel.* C.M., 437 F.3d 1085 (11th Cir. 2006); *Frank G. v. Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006).

<sup>71</sup> 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) (2006).

<sup>72</sup> *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (2004).

tion can be provided in the public schools.”<sup>73</sup> Some commentators have argued that this interpretation will induce parents to cooperate with school districts rather than prematurely transferring their children to private schools.<sup>74</sup>

Close examination of the facts in each circuit court case demonstrates that courts rely heavily on the level of cooperation between parents and school districts in reaching their decisions. In contrast to the majority of circuit courts, the First Circuit, in *Greenland School District v. Amy N.*, read § 1412(a)(10)(C)(ii) as categorically barring private school tuition reimbursement when a child has never received publicly provided special education services.<sup>75</sup> The *Greenland* court’s anomalous decision, however, may best be explained by distinguishing between the facts of that case and the facts of cases in other circuits. In *Greenland*, the parents transferred their daughter to private school before ever notifying her public school that she needed special education services.<sup>76</sup> The parents first requested that the school district evaluate their daughter for special education services approximately one year after they removed her from public school.<sup>77</sup> Stating that “[t]he point is that there was no notice at all to the school system before Katie’s removal from Greenland that there was any issue about whether Katie was in need of special education services,” the First Circuit denied the parents tuition reimbursement.<sup>78</sup>

In contrast to the First Circuit, the Second, Ninth, and Eleventh Circuits have all read § 1412(a)(10)(C)(ii) to allow tuition reimbursement even if a child has never received public special education services. In the cases addressed by each of those circuits, however, the parents had communicated with the school district about their child’s special education needs in a more active, timely way than had the parents in *Greenland*.<sup>79</sup> Indeed, the Second Circuit explicitly recognized this distinction and noted that unlike the parents in *Greenland*, the parents in *Frank G.* had provided extensive notice

<sup>73</sup> *Id.* at 160.

<sup>74</sup> See Borkowski, *supra* note 67, 510.

<sup>75</sup> *Greenland*, 358 F.3d at 159-60.

<sup>76</sup> *Greenland*, 358 F.3d at 152–53 (“At no point during [the child’s] time at Greenland did her parents or any of her teachers request that she be evaluated for special education services.”) However, arguably, the school district had adequate notice that the child needed special education services as her parents informed the school that she had been diagnosed with ADHD, her second, third, and fourth grade teachers all employed techniques suggested by her psychiatrist to keep her on task, and her mother, a special education teacher, spent a great deal of time helping her daughter with her homework each night. *Id.*

<sup>77</sup> *Id.* At this point, in May of 2001, the school district found the child ineligible for special education services, though the district eventually reversed its determination in November of 2001 after reviewing the diagnosis of the child’s private psychiatrist. *Id.*

<sup>78</sup> *Id.* at 160.

<sup>79</sup> See, e.g., *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2008); *M.M. ex. rel. C.M. v. Sch. Bd.*, 437 F.3d 1085 (11th Cir. 2006); *Frank G. v. Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006).

before removing their child from public school.<sup>80</sup> Similarly, the Eleventh Circuit held that “reliance on the fact that [the child] never attended public school is legally insufficient to deny reimbursement under § 1412(a)(10)(C)(ii)”<sup>81</sup> where his parents had engaged in extensive negotiations with the school district over the child’s IEP both before they removed him from public school and while he attended private school.<sup>82</sup>

T.A.’s parents’ communication with the school district in *Forest Grove* aligns his case with those in which courts have granted tuition reimbursement.<sup>83</sup> In addition, when it remanded *Forest Grove*, the Ninth Circuit appropriately instructed the lower court to consider T.A.’s parents’ notice to the school district as one of the relevant factors used to determine whether to grant reimbursement and how much reimbursement to grant.<sup>84</sup> Consistent with the Ninth Circuit’s instruction, the IDEA directs courts addressing reimbursement cases to evaluate the extent of notice parents provide the school district when they are dissatisfied with their child’s IEP.<sup>85</sup> However, the circuit courts have inappropriately allowed their consideration of parents’ notice, and parents’ general cooperation with school districts, to influence their interpretation of the language in § 1412(a)(10)(C)(ii). When reviewing *Forest Grove*, the Supreme Court should correct this approach by instructing courts to confine their analysis of parental notice to the provision intended by Congress—the limitation on reimbursement in § 1412(a)(10)(C)(iii).

If the Court states definitively that § 1412(a)(10)(C)(ii) does not create a categorical bar to private school tuition reimbursement, lower courts will be left considering parents’ cooperation with school districts under only § 1412(a)(10)(C)(iii). In *Frank G.*, the Second Circuit hinted at this improved analysis when it rejected the *Greenland* court’s interpretation of § 1412(a)(10)(C)(ii) as unnecessary because § 1412(a)(10)(C)(iii) “makes clear Congress’s intent that *before* parents place their child in private school, they must at least give notice to the school that special education is

<sup>80</sup> *Frank G.*, 459 F.3d at 376.

<sup>81</sup> *M.M.*, 437 F.3d 1085, 1098.

<sup>82</sup> *Id.* at 1090–93. Although the Eleventh Circuit decided the legal sufficiency of private school tuition reimbursement for parents whose child never received publicly provided special education services, the court noted that C.M. actually *had* received publicly provided special education services within the meaning of § 1412(a)(10)(C)(ii). *Id.* at 1098. The court ultimately denied reimbursement in this case because the school board had offered the student a free appropriate education, albeit not in the form preferred by C.M.’s parents. *Id.* at 1103.

<sup>83</sup> See *supra* notes 31–37 and accompanying text. In contrast to *Greenland*, where parents with a background in special education waited more than a year to notify the school district, T.A.’s parents provided formal notice to the district within one month of T.A.’s enrollment in the private school, upon hiring a lawyer. See Appellant’s Opening Brief, *supra* note 36, at 45–46.

<sup>84</sup> See *Forest Grove*, 523 F.3d at 1088–89. Other factors suggested by the court include the existence of more appropriate alternative placements, the parents’ effort to secure such placements, and the school district’s level of cooperation. *Id.* at 1089.

<sup>85</sup> 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) (2006).

at issue.”<sup>86</sup> The First Circuit’s alternative, clumsier approach to this policy—reading § 1412(a)(10)(C)(ii) as a categorical bar to tuition reimbursement for parents whose children never received special education services from their school districts—results in the denial of tuition reimbursement to parents whose children indeed meet the IDEA’s requirements.<sup>87</sup>

One might argue that § 1412(a)(10)(C)(ii) provides the threshold criterion for private school tuition reimbursement—previous receipt of publicly provided special education services—and that § 1412(a)(10)(C)(iii) further qualifies the right to reimbursement for parents who satisfy the initial requirement. But this interpretation conflicts with the broader scheme that Congress endorsed and refined when it drafted the 1997 amendments to the IDEA, and it would bring about results that undermine the IDEA’s mandate: to provide a free appropriate public education to all children with disabilities. Most notably, if a school district fails to detect a child’s disability or refuses to provide special education services, that child’s parents could not be reimbursed for the cost of their only practical recourse—private school.<sup>88</sup> The more refined statutory analysis suggested by this Essay avoids such inequitable results and better reflects Congress’s intent. Moreover, this approach improves transparency in judicial decisionmaking by inviting courts to analyze parental cooperation under the statutory provision that plainly anticipates such consideration.

#### IV. CONCLUSION

The Supreme Court’s review of *Forest Grove* presents an important opportunity to advance special education law while resolving the prevailing uncertainty about the availability of tuition reimbursement for children who have never received publicly provided special education services. The intent of the IDEA and weight of the policy implications support the Ninth Circuit’s decision in *Forest Grove*. More importantly, the Court should refine the approach to tuition reimbursement cases by confining courts’ evaluation of parental cooperation to the appropriate, congressionally intended statutory provision. In the last two special education cases it reviewed, *Winkelman v. Parma City School District*<sup>89</sup> and *Board of Education of the City of New York v. Tom F.*,<sup>90</sup> the Court recognized the important role parents play in ensuring that their children receive the free appropriate public

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<sup>86</sup> *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 376 (2d Cir. 2006) (citing *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 160 (1st Cir. 2004)) (emphasis in original) (internal quotations omitted). Although the Second Circuit disagreed with the *Greenland* court’s analysis, it agreed with that court’s result. *Id.* at 375–76.

<sup>87</sup> See *supra* text accompanying notes 58–65.

<sup>88</sup> See *supra* note 64 and accompanying text.

<sup>89</sup> 127 S. Ct. 1994 (2007) (link).

<sup>90</sup> 127 S. Ct. 1393 (2007) (link).

education mandated by the IDEA.<sup>91</sup> When deciding *Forest Grove*, the Court has the opportunity to solidify this interpretation of the IDEA by affirming the Ninth Circuit's decision and advancing a more explicit, transparent approach to evaluating parents' collaboration with the school district.

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<sup>91</sup> For instance, the Court reached its decision in *Winkelman* after searching the overall statutory framework of the IDEA and finding that the statute implicitly grants parents "independent, enforceable rights." 127 S. Ct. at 1999.