No. 08-305

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

RESPONDENT'S BRIEF IN OPPOSITION

MARY E. BROADHURST
MARY E. BROADHURST, P.C.
P.O. Box 11377
Eugene, OR 97440
(541) 686-8530

BONNIE I. ROBIN-VERGEER
Counsel of Record
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Respondent

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QUESTION PRESENTED

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

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RESPONDENT'S BRIEF IN OPPOSITION

Forest Grove School District asks this Court to grant certiorari to address whether the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., as amended in 1997, categorically bars reimbursement for private school tuition if a child with a disability has not "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). The court of appeals found no such categorical bar to a tuition reimbursement award for respondent T.A. in this case and remanded for further proceedings.

Petitioner argues that this Court should grant certiorari to resolve a split in the circuits between the First Circuit, on the one hand, and the Second, Ninth, and Eleventh Circuits, on the other, regarding the construction of § 1412(a)(10)(C)(ii). This case is the wrong vehicle to address the question.

Certiorari is unwarranted here because there is as yet no judgment awarding respondent private tuition reimbursement. The court of appeals reversed both the district court's reading of the statute and its conclusion that the equities did not favor reimbursement, and it remanded for further proceedings. Now, on remand, the parties are arguing over whether T.A. even has a disability—a question the district court has not yet reached—as well as whether, if T.A. has a disability, his parents are entitled to tuition reimbursement under equitable principles. In short, there is no final judgment requiring reimbursement in this case. Granting review when the case is in such an interlocutory posture is contrary to the Court's certiorari practice, and no extraordinary circumstances exist that would justify a departure from that practice.

This case is the wrong vehicle for an additional reason: There is no circuit conflict with respect to the interpretation of § 1412(a)(10)(C)(ii) under the circumstances presented in this case. Here, unlike in *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004)—the lone circuit court ruling upon which petitioner relies—T.A.'s parents requested and were denied special education services for him. Not only did the First Circuit in *Greenland* not preclude reimbursement in these circumstances, but it affirmatively suggested that reimbursement may be appropriate. The facts of this case—where the child with a disability was in public school all along, but the school district never developed an individualized education program for him or offered him special education services—are so unlike those in *Board of Education of City School District of New York v. Tom F. ex rel. Gilbert F.*, 193 Fed. Appx. 26 (2d Cir. 2006), *aff'd by an equally divided Court*, 128 S. Ct. 1 (2007), as to present a different statutory construction question altogether from the one the Court was unable to resolve in *Tom F.*

STATEMENT OF THE CASE

1. IDEA Statutory Scheme

Congress enacted IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A).[1] A free

[1] The numbering of IDEA's provisions has changed over time. Citations are to the current codification.

appropriate public education ("FAPE") means "special education and related services," provided "at public expense," which are tailored to "the unique needs" of the child with a disability by means of an "individualized educational program" ("IEP"). *Id.* § 1401(9), (14), (26), (29) (defining statutory terms); *see also id.* § 1414(d) (specifying IEP requirements); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181–82 (1982).

To accomplish its objectives, IDEA provides federal financial assistance to states that submit plans to the Department of Education ("DOE") implementing the Act's policies and procedures, including the requirement that states make "a free appropriate public education . . . available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A). DOE regulations define thirteen categories of disabilities, including "specific learning disability" and "other health impairment" ("OHI") (which includes attention deficit hyperactivity disorder ("ADHD")). 34 C.F.R. § 300.8. Pursuant to the states' "child find" obligation, "[a]ll children with disabilities residing in the State" must be "identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A). School districts unable to provide a child a FAPE in a public school setting may place the child in a private school or facility—at no cost to the parents—as a means of implementing IDEA's requirements. *Id.* § 1412(a)(10)(B)(i).

IDEA affords procedural protections, including the right to a hearing, to parents dissatisfied with any matter relating to a school district's identification, evaluation, or placement of their child, or with the provision of a FAPE to the child. *Id.* § 1415(b)(6), (f), &

(g). Aggrieved parties may challenge administrative decisions in state or federal court. *Id.* § 1415(i)(2). In any such action, the court "shall grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(C)(iii).

The 1997 IDEA amendments, Pub. L. No. 105-17, 111 Stat. 37, were enacted against the backdrop of key decisions by this Court regarding the power of courts to order private school tuition reimbursement as "appropriate" relief for parents who unilaterally place their child with a disability in private school when the public school district failed to offer the child a FAPE.

In 1985, the Court held in *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985), that the Education of the Handicapped Act (IDEA's predecessor), in a provision identical in substance to the current 20 U.S.C. § 1415(i)(2)(C), "confer[red] broad discretion on the court" to order school authorities to reimburse parents for private school tuition when that private placement, rather than a proposed IEP, was appropriate. 471 U.S. at 369. The Court recognized that because a final decision on an IEP's appropriateness often comes after the school term has ended, "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 an appropriate placement." *Id.* at 370. "If they choose the latter course," as "conscientious parents who have adequate means . . . normally would," *id.*, "it would be an empty victory to have a court 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." Such a result, the Court said, would deny "the child's right to a *free* appropriate public education." *Id.*

In *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), the Court reaffirmed judicial authority to order school officials to reimburse parents for private school expenses if such a placement, rather than a proposed IEP, is proper under the Act. *Id.* at 12–14. It admonished that public school officials wishing to avoid such reimbursement "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." *Id.* at 15.

The 1997 amendments to IDEA did not alter a court's authority to award "such relief as the court determines is appropriate," as construed by this Court in *Burlington* and *Carter*, but recodified that grant of authority. Pub. L. No. 105-17, § 1, 111 Stat. 92 (enacting IDEA § 615(i)(2)(B)(iii)) (now codified at 20 U.S.C. § 1415(i)(2)(C)(iii)). However, Congress added a provision concerning payment for private school education on which petitioner relies to avoid its reimbursement obligation here:

> (C) Payment for education of children enrolled in private schools without consent of or referral by the public agency
>
> (i) In general
>
> Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education

> available to the child and the parents elected to place the child in such private school or facility.
>
> (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.

20 U.S.C. § 1412(a)(10)(C)(i)–(ii) (emphasis added). Conditions that would permit, but not require, a court to reduce or deny the reimbursement described in clause (ii) follow in clause (iii), subject to certain exceptions in clause (iv). *See id.* § 1412(a)(10)(C)(iii)–(iv).

2. Factual Background

This case arises out of the efforts of T.A.'s parents to obtain a FAPE for their son and reimbursement for private school tuition for the latter part of T.A.'s junior year and his full senior year in high school. The Forest Grove School District ("district") never found T.A. eligible for special education services and thus did not develop an IEP or offer him a FAPE. The following facts are drawn largely from the decision of the hearing officer, whose factual findings were accepted by the district court. Pet. App. 44a.

a. T.A. had attended public school in the district since kindergarten. His teachers noted repeatedly throughout the years that T.A. had trouble paying attention and completing his school work. *Id.* at 58a–59a, 60a–61a ¶¶ 1–2. T.A.'s difficulties increased when he entered Forest Grove High School ("FGHS") in September 2000. *Id.* at 59a. By that time, Ms. A. was spending at least two hours with him daily, and three to four hours, even half a day, on weekends, helping him complete homework assignments. *Id.* at 61a–62a ¶ 5. Mr. and Ms. A. engaged in extensive contacts with their son's teachers so that they could help T.A. to comprehend and keep track of his assignments at home. *Id.* at 64a–65a ¶¶ 12–14.

By December 2000, T.A. was behind in most of his classes. Ms. A. contacted the school counselor, Laurel Kaufman, who recommended that T.A. be evaluated for special education services, and T.A.'s parents agreed. *Id.* at 65a–66a ¶ 15. District staff notes from a Multidisciplinary Team ("MDT") meeting on January 16, 2001 include "Maybe ADD [attention deficit disorder] / ADHD [attention deficit hyperactivity disorder]?" *Id.* at 66a ¶ 16. MDT notes for February 13, 2001 reiterate "suspected ADHD." *Id.* at 67a ¶ 16. The FGHS school psychologist, Vinny Martin, however, saw no reason to evaluate T.A. for ADHD, and T.A. was evaluated only for a learning disability. *Id.* at 70a ¶ 21. The district's experts later agreed, however, that T.A. should have been evaluated separately for other health impairment or ADHD (which falls within the OHI disability category). *Id.* at 70a–71a ¶ 21; *see* 34 C.F.R. § 300.8(c)(9) (defining OHI).

In June 2001, the district found that T.A. did not have a learning disability and accordingly was ineligible for special education. Pet. App. 72a ¶ 26. Contrary to the assertions of the district court and the dissent in the court of appeals, T.A.'s mother did not agree with the district's assessment that T.A. was ineligible for special education services. *Id.* at 21a–22a (Rymer, J., dissenting); *id.* at 49a. Instead, Ms. A. agreed that her son did not have a learning disability and that he therefore did not "qualify for special education in the area of Learning Disabled." Appellee's Supplemental Excerpts of Record 14 (9th Cir.). T.A.'s parents were not informed of the school staff's suspicions that T.A. had ADHD. Pet. App. 3a. The Notice of Procedural Safeguards the parents received did not discuss substantive categories of disability, *see* Appellant's Supplemental Excerpts of Record 2–16 (9th Cir.), and T.A.'s mother had not even heard of the "other health impairment" disability category before the summer of 2003, Hearing Tr. 1220; thus, T.A.'s parents did not specifically request that T.A. be evaluated for OHI. Pet. App. 3a.

T.A.'s parents did not remain passive, however, in their efforts to secure educational assistance for their son. On August 30, 2001, Ms. A. sent an e-mail to Mr. Martin (the school psychologist), the FGHS learning disability specialist, and a pre-algebra teacher (whose class T.A. had failed the previous semester), imploring them to find a more effective method to teach T.A. Pet. App. 73a–74a ¶ 29; Due Process Hearing, Exh. B3a. The school did not respond. Pet. App. 74a ¶ 29. T.A. began his sophomore year in September 2001. His first progress report in math showed that he was not turning in work and that he was failing tests. *Id.* at 77a ¶ 37.

Ms. A. again contacted Mr. Martin, but he discouraged her, responding that T.A. could be referred for another evaluation (again, for a learning disability), "but it would be difficult to find him eligible." *Id.* at 77a–78a ¶ 37.

T.A.'s progress report in the fall of 2001 indicated that he was failing most of his classes. Because his mother was unable to provide all the help T.A. needed, his parents hired T.A.'s older sister in November 2001 to tutor him 10 hours per week, while Ms. A. continued to assist T.A. *Id.* at 78a ¶ 38. Nonetheless, T.A.'s grades plummeted during his years at FGHS, dropping from a GPA of 2.00 at the end of 8th grade to a 1.38 at the end of the first semester of 11th grade. *Id.* at 63a ¶ 10. T.A.'s parents continued to seek help from the school. Again, they contacted the school counselor, *id.* at 79a ¶ 40, and Ms. A. repeatedly communicated with her son's teachers and FGHS staff to discuss T.A.'s learning problems and to intervene to help T.A. keep up with his school work. *See, e.g.*, *id.* at 80a ¶ 41, 135a & n.28, 153a. As the hearing officer found, T.A. advanced from grade to grade at FGHS only because of the extraordinary efforts of his parents and sister, who "provided him with what was in effect special education at home." *Id.* at 59a; *see also id.* at 135a, 137a–138a.

By fall/winter of 2002, during his junior year, T.A. was still lagging behind in his school work, had become very depressed, and had begun to use marijuana to alleviate his depression. *Id.* at 86a ¶ 53. T.A.'s therapist referred him to Dr. Michael Fulop, a clinical psychologist, for an evaluation for emotional and learning disorders, ADHD, and depression. *Id.* at 95a ¶¶ 73–74. Dr. Fulop evaluated T.A. in January and February 2003, and on March 14, 2003, he diagnosed

T.A. with ADHD and a dysthymic disorder, a form of depression. *Id.* at 96a–97a ¶¶ 74, 76. He also diagnosed him with various learning problems, poor organizational skills, difficulties with memory and expression, math disorder, and cannabis abuse. *Id.* at 98a–99a ¶ 77. Dr. Fulop recommended that T.A. attend Mount Bachelor Academy ("MBA") to address his ADHD, depression, and drug issues. *Id.* at 99a–100a ¶ 80. He also recommended that T.A.'s school consider him for special education services based on ADHD, among other disorders, and he proposed extensive school accommodations. *Id.* at 100a n.81.

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

The district again evaluated T.A. and again found him ineligible for special education services. *Id.* at 123a ¶ 124. With respect to OHI, the MDT acknowledged that T.A. had ADHD but determined that he did not qualify for special education because his disability had no adverse impact on his educational performance. *Id.* In considering whether T.A.'s disability had such an impact, district authorities spoke in terms of whether it had a "very severe, significant impact" and concluded

that the effect was "not severe enough." *Id.* One of the district's witnesses commented that IDEA was intended to serve only those students who had "tremendously significant disabilities." *Id.*

b. T.A.'s parents requested a due process hearing, which was conducted in September and October 2003. *Id.* at 56a–57a. The hearing officer found in a January 2004 decision that T.A. was a student with an OHI disability; that his disability had an adverse impact on his educational performance; that T.A. needed special education services; and that in refusing to provide T.A. those services, the district had failed to offer him a FAPE. *Id.* at 59a, 129a; *see also id.* at 133a–138a. The hearing officer found that MBA was an appropriate placement, *id.* at 150a, and that the three-week delay (from March to April 2003) before T.A.'s parents filed their hearing request was not unreasonable under the circumstances, *id.* at 149a, and she ordered the district to reimburse T.A.'s parents for their MBA expenses until the district offered T.A. a FAPE. *Id.* at 129a, 151a–154a. The hearing officer concluded that, with respect to T.A.'s ADHD, "FGHS had ample information about T.A.'s struggles in school due to his disability beginning with his first semester at FGHS and his initial evaluation in 2001" and that the district had received considerable additional information since then about T.A.'s educational difficulties and the effort his family was investing to help him keep track of and complete his class requirements. The district's failure to evaluate T.A. adequately from 2001 to the present, the hearing officer determined, "militate[d] against [its] claim that reimbursement should be denied." *Id.* at 152a–153a.

3. Decisions Below

a. Pursuant to 20 U.S.C. § 1415(i)(2), the school district filed an action in the U.S. District Court for the District of Oregon appealing the hearing officer's determination that T.A. was eligible for special education under IDEA and that his parents were entitled to tuition reimbursement. The district court did not address whether T.A. had a disability and was thus entitled to special education services and a FAPE. Instead, the district court held that 20 U.S.C. § 1412(a)(10)(C)(ii) barred reimbursement because "[t]he plainest reading of the statute is that *only* children who had previously received special education services from the District are . . . eligible for such tuition reimbursement." Pet. App. 48a–49a. Further, "[e]ven assuming that tuition reimbursement may be ordered in an extreme case" for a student not receiving special education services, the court held that the facts here did not "support such an exercise of equity." *Id.* at 53a.

b. A divided panel of the court of appeals reversed. The court agreed with the Second Circuit's decision in *Frank G. v. Board of Education of Hyde Park Central School District*, 459 F.3d 356, 367–76 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 436 (2007), that the reference in 20 U.S.C. § 1412(a)(10)(C)(ii) to students "who previously received special education and related services" does "not create a categorical bar to recovery of private school reimbursement for all other students." Pet. App. 13a. As the court of appeals observed, "the express purpose of the IDEA is 'to ensure that *all* children with disabilities have available to them a free appropriate public education.'" *Id.* at 15a (citations omitted). Interpreting the 1997 IDEA amendments to prohibit

reimbursement to students who have not yet received special education and related services, the court reasoned, "runs contrary to this express purpose." *Id.*

In amending IDEA in 1997, the court explained, Congress "chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing officers when deciding whether to award reimbursement to students who previously received special education and related services." *Id.* at 16a. For students such as T.A. who never received such services, the provisions of § 1412(a)(10)(C) "simply do not apply." For those students, the court concluded, reimbursement "may be sought only under principles of equity pursuant to § 1415(i)(2)(C)." *Id.*

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

c. The case is now proceeding on remand in the district court. The parties are currently litigating both whether T.A. had a disability and thus was eligible for special education services in the first place and whether

his parents should be reimbursed for expenses at MBA under equitable principles. Neither of these issues is before this Court, but their determination will affect whether a final judgment will be entered in respondent's favor, awarding tuition reimbursement.

REASONS FOR DENYING THE WRIT

I. This Case Is a Poor Vehicle for Review of the Question Presented Because of Its Interlocutory Posture.

Far from serving as an "ideal vehicle," Pet. 11, for review of the question presented, this case is a particularly poor one. There is no judgment awarding respondent private tuition reimbursement and no extraordinary circumstances that would warrant a grant of certiorari when the case is in this interlocutory posture.

The court of appeals did not affirm an award of private-school tuition reimbursement. The district court had denied reimbursement. Rather, the court of appeals remanded the case to the district court to reconsider whether such an award would be appropriate under general equitable principles. Pet. App. 17a–20a. Proceedings on remand to the district court are now underway. The school district is pressing the district court to overturn the hearing officer's finding that T.A. had a disability and thus was entitled to special education services at all—an issue that the district court had not reached and that was not before the court of appeals. *Id.* at 11a n.8. The district court's resolution of the question of T.A.'s eligibility for special education services could preclude any reimbursement award here.

If the district court determines that T.A. had a disability, then it must decide whether equitable principles favor awarding his parents tuition reimbursement. In reversing the district court's equitable analysis, the court of appeals did not signal that the district court should grant reimbursement. Instead, the court of appeals instructed the district court to "consider all relevant factors in determining whether to grant reimbursement and the amount of reimbursement." *Id.* at 18a.

For example, the court of appeals emphasized that the district court would be "within its discretion to consider notice as a relevant factor in its reimbursement decision," *id.* at 20a, and that T.A.'s parents "did not notify the School District before removing T.A. from public school." *Id.* at 19a. The court noted, however, that even after the district was given "a reasonable opportunity" to evaluate T.A. and make a placement recommendation, it "still failed to recognize T.A. as disabled or to offer him a free appropriate education." *Id.* at 20a. Additionally, the court identified other factors for the district court's consideration, such as "the existence of other, more suitable placements, the effort expended by the parent[s] in securing alternative placements[,] and the general cooperative or uncooperative position of the school district." *Id.* The court stressed that it was "mindful" that the hearing officer found that T.A.'s parents sent him to MBA "not only because of his disabilities, but also for reasons unrelated to his disabilities (i.e., substance abuse and behavioral problems)," and admonished that "the district court would be acting within its discretion to consider that factor as well." *Id.* Although we believe that the equities favor reimbursing T.A.'s tuition expenses, there

is no way to know until proceedings on remand are resolved whether the district court ultimately will agree.

Although this Court has jurisdiction under 28 U.S.C. § 1254 to grant review, it seldom does so when a case is in such an interlocutory posture. "Ordinarily, in the certiorari context, 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.'" Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007) (quoting *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893)); *see also Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (because court of appeals remanded case, "it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916) (writ of certiorari not issued "until final decree" except in "extraordinary cases"). The posture of this case is anything but extraordinary. The court of appeals reversed the judgment of the district court on a legal statutory construction issue and remanded for further proceedings on the merits. On remand, the district court will determine whether to award tuition reimbursement to T.A.'s parents under equitable principles, subject to further review.

This case is an even less appropriate vehicle for immediate review than *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) ("*VMI*"), in which the Fourth Circuit had issued a final decision holding that Virginia's sponsorship of a military college only for men was unconstitutional, but the district court had yet to

rule on an appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy had not yet been selected. *See id.* at 946 (Scalia, J.). The Court recognized that it would have an opportunity to review the decision regarding constitutionality, if necessary, following the remedial phase of the case, as, indeed, it later did. *Id.*; *see United States v. Virginia*, 518 U.S. 515 (1996). In this case, *both* the underlying determination regarding IDEA eligibility and the remedy are still being litigated below.

Respondent believes, of course, that he will prevail on the merits on remand. If he does, petitioner may appeal the district court's final judgment and ultimately petition this Court on the question presented here. *VMI*, 508 U.S. at 946 (Scalia, J.). If the question is as "important and recurring" as petitioner claims, Pet. 14, then there will be any number of future vehicles that will allow the Court to resolve it. Because of this case's interlocutory status, even if the Court were to disagree with our assessment below regarding whether the question presented is worthy of review, the Court should stay its hand and allow the case to run its course.

II. There Is No Split Among the Circuits on the Facts Presented Here, and the Court of Appeals' Decision Was Correct.

Petitioner argues that this Court should grant certiorari to address whether 20 U.S.C. § 1412(a)(10)(C)(ii) categorically bars reimbursement for private school tuition if the child with a disability has not previously received "special education and related services under the authority of a public agency." There

is no split in the circuits regarding that question under the circumstances presented in this case. Here, T.A.'s parents sought special education services from the school district while their child was enrolled in public school. Finding T.A. ineligible for such services, the school district never offered him a free appropriate public education before his parents placed him in a private school. *See supra* pp. 7–11. No circuit has denied the possibility of private-school tuition reimbursement under such circumstances. Indeed, this case differs from every other case construing § 1412(a)(10)(C)(ii)—including *Tom F.*, in which the Court previously granted review—where debate has focused on whether parents were obligated to give the school district's individualized educational program "a try" before unilaterally placing their child in private school if they hoped to recover their tuition expenses.

A. Contrary to petitioner's assertion, Pet. 12–13, the court of appeals' decision in this case does not conflict with that of the First Circuit, the first to construe 20 U.S.C. § 1412(a)(10)(C)(ii), in *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004). Not only did *Greenland* not foreclose reimbursement under the circumstances presented in this case, but it affirmatively suggested just the opposite—that reimbursement may be appropriate here.

In *Greenland*, the First Circuit held that parents who had unilaterally removed their child Katie from public school and placed her in private school without notice to the school district, without raising with school officials the issue of special education services, and without offering school authorities an opportunity to prepare an IEP, were not eligible for tuition

reimbursement. *Greenland*, 358 F.3d at 152–54, 160. Not only did Katie's parents fail to request that their child be evaluated for special education services while she attended public school, but they did not request an evaluation until *seven months after* they had unilaterally placed her in private school, *id.* at 153–54—a failure the court found particularly egregious given that Katie's mother was a special education teacher and administrator herself. *Id.* at 154. The First Circuit construed § 1412(a)(10)(C)(ii) to provide that "tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school system (*or perhaps those who at least timely requested such services while the child is in public school*)." *Id.* at 159–60 (footnotes omitted) (emphasis added); *see also id.* at 160 n.7 (noting that legislative history "suggests that Congress meant to include children who had requested but not yet received special needs services during their period in the public schools").

The First Circuit's interpretation would not foreclose tuition reimbursement for parents who, like T.A.'s, requested, but were denied, special education services while their child was in public school. As *Greenland* reasoned, the provisions of § 1412(a)(10)(C)(iii) "make 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 at issue." 358 F.3d at 160; *id.* at 161 ("The purpose of the notice requirement is to give public school districts the opportunity to provide [a] FAPE before a child leaves public school and enrolls in private school."). Indeed, in emphasizing that there was "no dispute that neither Katie's parents nor anyone else requested an

evaluation for Katie while she was at Greenland" and "also no dispute" that Katie was removed for reasons having "nothing to do" with whether she "was receiving [a] FAPE," *id.* at 160, the First Circuit strongly suggested that, by contrast, where parents requested but were denied special education services for their child with a disability, thus putting the availability of a FAPE in issue, reimbursement *would be* appropriate.

Petitioner's claim that T.A.'s case is like *Greenland* because in both cases "the parents failed to notify the school district of any issue regarding their child's alleged need for special education," Pet. 13, is simply wrong. Here, the district was given ample opportunity to develop an IEP for T.A. and offer him a FAPE: His parents requested an evaluation for special education services in 2001, when T.A. was a freshman. The district evaluated him for the wrong disability, did not develop an IEP, and denied T.A. the special education services he desperately needed. T.A.'s parents continued to contact school counselors, staff, and teachers requesting educational assistance for T.A. Those requests triggered no further evaluation of T.A. by the school, despite the state's "child find" obligation under IDEA, which requires the state to identify and evaluate any child who is merely "suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1). And even when T.A.'s parents formally requested yet *another* special education evaluation just three weeks after T.A. was placed in private school, the district again refused to find him eligible for services, leading the hearing officer to conclude that "it appears that no amount of relevant information would cause the District to acknowledge the

severity of T.A.'s disability and T.A.'s need for special education." Pet. App. 153a.

Greenland, then, does not hold that a child such as T.A., who requested but was denied special education services, must categorically be denied private-school tuition reimbursement under § 1412(a)(10)(C)(ii). The First Circuit's decision is not in conflict with the court of appeals' ruling here. Nor has any other circuit ruled that tuition reimbursement would be unavailable under these circumstances.

The facts of this case differ markedly from those of *Tom F.*, as well. In *Tom F.*, unlike here, the child with a disability, Gilbert F., had never attended public school. His parents placed him in private school when he was in kindergarten. *Bd. of Educ. of City Sch. Dist. of New York v. Tom F. ex rel. Gilbert F.*, No. 01-6845 (GBD), 2005 WL 22866, at *1 (S.D.N.Y. Jan. 4, 2005). The school district—again, unlike here—found that Gilbert had a learning disability and developed an IEP for him, proposing to place him in public school. Nonetheless, Gilbert's father rejected the IEP and continued his son's placement at the private school, requesting tuition reimbursement. *Id.* The district court determined that 20 U.S.C. § 1412(a)(10)(C)(ii) barred tuition reimbursement because the provision "ensure[d] that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate." *Tom F.*, 2005 WL 22866, at *3. And although the Second Circuit rejected that reasoning in *Frank G.*, its discussion likewise focused on whether parents must test a school district's proffered special education plan before seeking reimbursement for their

own unilateral private-school placement. 459 F.3d at 372.[2]

Here, however, the school district found T.A. ineligible for special education services and thus never developed an IEP or offered him a free appropriate public education before his parents placed him in a private school. Thus, in contrast to *Tom F.*, where the issue boiled down to whether the parents were required to give the school district's IEP "a try" before unilaterally placing their child with a disability in private school with the expectation of recovering tuition expenses, T.A. was offered nothing "to try." There is no conflict in the circuits on the question presented in this case, and no reason for the Court to review it.[3]

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[2] Courts that have construed § 1412(a)(10)(C)(ii) since the Second Circuit's decision in *Frank G.*, including the court of appeals here, have agreed with the Second Circuit that the provision does not categorically bar tuition reimbursement when a school district has failed to make a FAPE available to a child with a disability. *See* Pet. App. 12a–17a; *D.L. ex rel. J.L. v. Springfield Bd. of Educ.*, 536 F. Supp. 2d 534, 538–43 (D.N.J. 2008); *J.S. ex rel. R.S. v. South Orange/Maplewood Bd. of Educ.*, No. 06-3494 (FSH), 2008 WL 820181, at *6 (D.N.J. Mar. 26, 2008). The Eleventh Circuit agrees as well. *M.M. ex rel. C.M. v. School Bd. of Miami-Dade County*, 437 F.3d 1085, 1098–99 (11th Cir. 2006). Thus, even in the factual scenario presented in *Tom F.*, where a school district has found a child eligible for services but developed an allegedly inadequate IEP, a consensus has begun to take shape in the lower courts that IDEA does *not* bar courts from exercising their equitable powers under § 1415(i)(2)(C) to award tuition reimbursement in appropriate circumstances, even when a child has not previously received public special education services.

[3] Only after the hearing officer ruled, and long after T.A.'s parents had been forced by the school district's inaction to place T.A. in a private school, did the district belatedly patch together a proposed

B. In any event, the court of appeals' construction of § 1412(a)(10)(C)(ii) in this case is correct. Preserving the possibility of private-school tuition reimbursement where a child's failure to receive special education services from a public agency is attributable to the school district's incorrect eligibility determination is consistent with both the text of the disputed provision and the Act as a whole. As the court recognized, "the express purpose of the IDEA is 'to ensure that *all* children with disabilities have available to them a free appropriate public education.'" Pet. App. 15a (quoting 20 U.S.C. § 1400(d)(1)(A)); *accord Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 2004 (2007) ("free appropriate public education" is "central entitlement provided by IDEA"). Interpreting the 1997 amendments to prohibit reimbursement to students who have not yet received special education services "runs contrary to this express purpose." Pet. App. 15a. Rather than addressing reimbursement in circumstances in which a child with a disability has not previously received special education services, the court explained, "Congress chose to specify in § 1412(a)(10)(C) the requirements and factors to be considered by district courts and hearing officers when deciding whether to award reimbursement to students who previously received special education and related services." Pet. App. 16a. For students who never received such services, reimbursement "may be sought only under principles of equity pursuant to § 1415(i)(2)(C)." *Id.*; *see*

IEP, which relied primarily on placing T.A. in regular classes at FGHS after T.A.'s last semester of high school had already started. The adequacy of that IEP is not at issue in this litigation. In any event, T.A. could not have "tried out" an IEP that had not even been offered at the time his parents enrolled him in private school.

also Frank G., 459 F.3d at 367–76. In other words, the "previously received" language on which petitioner relies is a descriptive phrase, not a conditional one. Congress simply codified the reimbursement remedy in the situation in which that remedy had most commonly been sought (such as in *Burlington*, *Carter*, and their progeny).

Even if the disputed provision is ambiguous (though we believe that it is not), the interpretation by the Department of Education, the federal agency with rulemaking authority under IDEA, 20 U.S.C. § 1406, is entitled to *Chevron* deference. As the court of appeals recognized, DOE explicitly addressed the question presented here in commentary published in the Federal Register that accompanied the agency's final regulations implementing the 1997 amendments. DOE stated that hearing officers and courts retain their authority under § 1415(i)(2)(C)(iii) to award "appropriate" relief in the form of private tuition reimbursement if a public agency has failed to offer a FAPE to a child with a disability in instances in which the child has not yet received special education and related services. Pet. App. 14a–15a n.9 (citing 64 Fed. Reg. 12406, 12602 (1999)). This authority to award reimbursement under § 1415(i)(2)(C), DOE explained, "is independent of their authority under section 612(a)(10)(C)(ii) [20 U.S.C. § 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency." *Id.*

Petitioner belittles DOE's 1999 interpretation because it was issued before this Court decided *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). Pet. 18. But DOE

reaffirmed its statutory construction in 2006—*after Arlington* was decided—in formal comments that were published, following notice-and-comment rulemaking, with the agency's final regulations implementing the 2004 IDEA amendments. 71 Fed. Reg. 46540, 46599 (2006). Petitioner's dismissal of DOE's construction as having been offered "not in a regulation, but in commentary accompanying regulations," Pet. 18, is likewise without merit. As this Court has recognized, official agency interpretations of a statute that are formally adopted pursuant to notice-and-comment rulemaking, formal adjudication, or some other "relatively formal administrative procedure tending to foster . . . fairness and deliberation" are entitled to *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).[4]

Denying any opportunity for tuition reimbursement in the circumstances presented here would be particularly pointless. As explained above, it was the school district's own erroneous failure to find T.A. eligible for special education services that was responsible for T.A.'s not having received a FAPE. Permitting tuition reimbursement in these circumstances does not create an incentive for parents to place children with disabilities in private rather than public school. *See* Pet. 20. Parents who unilaterally place their children in private school "do so at their own financial risk," *Burlington*, 471 U.S. at 373–74, and "are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under

[4] The Solicitor General defended DOE's interpretation of IDEA as amicus curiae supporting respondent in *Tom F.*

the Act." *Carter*, 510 U.S. at 15. Moreover, the availability of reimbursement is governed by equitable considerations. *Id.* at 16. Parents who fail to cooperate with school authorities, make their children available for evaluation, or give a school district the opportunity to offer a FAPE are routinely denied such a remedy. *See, e.g.*, *Berger v. Medina City Sch. Dist.*, 348 F.3d 513 (6th Cir. 2003); *Patricia P. v. Bd. of Educ. of Oak Park*, 203 F.3d 462 (7th Cir. 2000); *M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60 (2d Cir. 2000); *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379 (8th Cir. 1998).

It is *petitioner's* interpretation of the statute that leads to absurd results—which is reason alone to reject it. *See Winkelman*, 127 S. Ct. at 2004 (interpreting IDEA to avoid "incongruous results"). Although petitioner's reading of the statute produces several such results, *see Frank G.*, 459 F.3d at 372, *this case* furnishes the most dramatic illustration of the incongruous consequences of the school district's statutory construction. As the court of appeals recognized, "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 under § 1412(a)(10)(C)(ii)." Pet. App. 16a; *see also J.S.*, 2008 WL 820181, at *6 n.7 (if "parents were barred from bringing suit for tuition until the school district created an IEP, the school district would have no incentive to act at all," thereby "undermin[ing] IDEA's purpose").

It is no answer that IDEA's procedural protections "obviate any concern" that a child may be denied special education services. *See* Pet. 19–20. The review process takes far too long to produce the required special

education services if a school district insists on litigating the issue. The facts here underscore the point. More than five years have elapsed since T.A.'s parents requested a hearing and a second evaluation of T.A. in 2003 and the school district again found T.A. ineligible. One contested hearing and hearing officer order, one district court decision, one court of appeals decision, one petition for certiorari, and proceedings on remand later, and the parties are *still* litigating whether T.A. was disabled and thus eligible for special education services. T.A. has long since graduated from high school, and so his opportunity to obtain special education services from a public agency is over. No matter *what* the outcome of this litigation is, T.A. will *never* be in a position to have "previously received" special education services, and without tuition reimbursement, the school district's denial of a FAPE in this case will go unremedied.

Imagine, though, that T.A. was a kindergartner when his eligibility was denied. It is no stretch to envision that T.A. could go through all of elementary school without the district ever providing him special education services. Even if he eventually prevailed years later and obtained a judgment ordering the school district to provide him special education services, his right to tuition reimbursement, under petitioner's view, would be triggered only *after* he tried out those services years later—and even then, only prospectively. If his parents tired of waiting for special education services and placed him in private school, they simply would be out of luck in securing reimbursement, under petitioner's reading of the Act. Yet nothing in the 1997 amendments or their legislative history demonstrates that Congress intended to overturn *Burlington*'s long-settled construction of courts' broad equitable powers

under the Act or that it meant to gut IDEA's central mission of ensuring that all children with disabilities are provided a FAPE.

III. Petitioner's Spending Clause Argument Is Waived and, in Any Event, Meritless.

Petitioner contends for the first time before this Court that the court of appeals' decision is at odds with the Spending Clause because IDEA was enacted pursuant to Congress's spending power, and, when Congress attaches conditions to a state's acceptance of federal funds, the conditions "must be set out 'unambiguously.'" *Arlington*, 548 U.S. at 296; *see* Pet. 14–20. Because petitioner failed to advance its Spending Clause argument below, and the court of appeals did not address it, the argument is waived. Moreover, there is no split in the circuits on the application of Spending Clause principles to the question presented here; indeed, no circuit has even considered it. This Court should decline to consider it in the first instance. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001).

In any event, petitioner's invocation of the Spending Clause is without merit. The Court's analysis in *Winkelman*, dismissing a similar Spending Clause attack on IDEA's protections, firmly puts the matter to rest. In that case, the school district argued that because IDEA was, at best, ambiguous as to whether it accorded parents independent rights, the Act failed to provide "clear notice" of the condition to the states. 127 S. Ct. at 2006. In rejecting the argument, the Court clarified that the question to be answered is whether IDEA "furnishes clear notice regarding the liability at issue." *Id.* (quoting *Arlington*, 548 U.S. at 296). Although, in *Arlington*, the Court held that the Act did

not furnish such notice because the statute did not "even hint" that a state might be "responsible for reimbursing prevailing parents for services rendered by experts," 548 U.S. at 297, the parental-rights issue in *Winkelman* was different. As the Court explained in *Winkelman*, "[o]ur determination that IDEA grants to parents independent, enforceable rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe." 127 S. Ct. at 2006.

Similarly, here, IDEA clearly imposes on states the *substantive* obligation to provide a free appropriate public education to "all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A). Affording a remedy for the violation of that substantive condition—here, the school district's failure to offer T.A. a FAPE—merely enforces the Spending Clause contract. *See Barnes v. Gorman*, 536 U.S. 181, 189 (2002) ("When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* . . . a third-party beneficiary . . . for the loss caused by that failure.").

The interpretation of IDEA by the Second, Ninth, and Eleventh Circuits—that courts retain power to order a public school district to reimburse parents for private-school tuition where the district has denied their child a FAPE—simply maintains the longstanding interpretation of courts' equitable powers under § 1415(i)(2)(C)(iii) adopted both by this Court and by the federal agency with regulatory authority on the subject. The states have been on clear notice for more than

twenty years that reimbursement of private-school tuition is available when a school district denies a FAPE to a child with a disability. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182–84 (2005) (rejecting Spending Clause challenge when statute, case law, and regulations provided notice to states that Title IX prohibits retaliation). The Spending Clause affords petitioner no escape-hatch to avoid financial responsibility for its failure to fulfill IDEA's cardinal mandate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BONNIE I. ROBIN-VERGEER
Counsel of Record
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

MARY E. BROADHURST
MARY E. BROADHURST, P.C.
P.O. Box 11377
Eugene, OR 97440
(541) 686-8530

Counsel for Respondent

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