No. 06-637

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AND NEW JERSEY SPECIAL EDUCATION PRACTITIONERS SUPPORTING RESPONDENT.

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INTERESTS OF AMICI

Amici are organizations of parents of children with disabilities, their families, their attorneys and advocates, their educational consultants, and people with disabilities, listed below.[1]

The Council of Parent Attorneys and Advocates is an independent, nonprofit organization of attorneys, advocates, and parents in 43 states and the District of Columbia who are routinely involved in special education due process hearings throughout the country.

The New Jersey Special Education Practitioners consists of attorney and non-attorney advocates, in private law firms and public interest advocacy organizations, who represent students with disabilities in special education matters. It meets regularly to discuss issues of importance to the practice of special education law, it engages in systemic advocacy on behalf of students with disabilities, and it has extensive experience in special education law.

Petitioner's proposal would require parents of children with disabilities to go through the motions of first attending a public school's proposed placement – even if it is clearly inappropriate – in order to seek tuition reimbursement. Such a requirement risks damaging the education of the child with

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

a disability, by subjecting him or her to an inappropriate education.

Petitioner's proposal, in effect, requires parents to place their child in an inadequate proposed program as a precondition to proving that the proposal is inadequate. The additional requirement that Petitioner seeks to impose will therefore primarily affect cases in which the school district's proposed placement is clearly inadequate, since, in cases where it is a close call whether a school district's proposal would have provided a free appropriate education ("FAPE"), a court may conclude that parents have not met their burden of establishing that FAPE was not provided. *See Schaffer v. Weast*, 546 U.S. 49, 51 (2005).

Those are the very same cases in which parents are most likely not to subject the child to the deleterious consequences of the school's inadequate program.

Petitioner's proposed new requirement would insulate the school district from any consequences for its violations, even in cases in which the school district *agrees* that its proposal did not provide the child with a free appropriate public education. *See Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 361 (2d Cir. 2006). In *Frank G.*, the school district conceded that the special education program it offered to the child with disabilities was not appropriate. Yet, the school district nonetheless asked the courts to deny

reimbursement – effectively leaving the courts with no viable remedy for the school district's admitted violation of IDEA's requirements.[2]

Petitioner's proposed new requirement would create perverse incentives for school districts, which could offer deficient placements to children with disabilities, protected by the knowledge that if the parent simply acts in the child's best interests and declines to subject the child to the deficient program, the courts would be unable to provide a remedy.

SUMMARY OF ARGUMENT

Petitioners' reliance on the *Pennhurst* rule, which requires "clear notice" of the obligations imposed along with federal funding under the Spending Clause, is misplaced. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981). *See* Brief of Petitioners at 39-42.

1. Although the application of *Pennhurst* to this case is debatable, as discussed below, the clear notice requirement is in any event easily met. States have had "clear notice" that they could be liable for private school tuition, and the Court need not be concerned that States did not "voluntarily and knowingly accept" the obligation. *Pennhurst*, 451 U.S. at 17.

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[2] Other cases in which a school district has conceded its placement was inappropriate include, for example, *Branham v. Gov't of the Dist. Of Columbia*, 427 F.3d 7, 8 (D.C. Cir. 2005); *C.B.* ex rel. *W.B. v. N.Y. City Dep't of Educ.*, No. 02 CV 4620, 2005 U.S. Dist. LEXIS 15215 at *49-50 (E.D.N.Y. June 10, 2005); *Bd. of Educ. v. Gustafson*, No. 00 Civ. 7870, 2002 U.S. Dist. LEXIS 3271 at *8-9 (S.D.N.Y. Feb. 26, 2002); and *Lester H. v. Carroll*, No. 86-6852, 1989 U.S. Dist. LEXIS 13466 (E.D. Pa. Nov. 9, 1989).

In assessing whether States have "clear notice," this Court has looked to the language in the statute, as well as to the background interpretations in the federal courts and statements of the agency charged with administering the statute. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S.Ct. 2455, 2458 (June 26, 2006); *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 183 (2005).

IDEA expressly gives courts broad authority to order an "appropriate" remedy, 20 U.S.C. § 1415(i)(2)(C)(iii), and this Court long ago held that this section authorizes awards of tuition reimbursement in response to a State's failures to meet its obligation to provide FAPE. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985). That remedial provision is broadly and clearly stated.

Although Congress amended the statute in 1997, it did not alter the section setting forth the courts' remedial authority, and it said nothing suggesting it intended to overrule *Burlington, Carter*, or the case law in the lower courts. Against that backdrop, no reasonable state would have believed that school districts were no longer subject to reimbursing tuition as a remedy for their violations.

The Secretary of Education, exercising authority delegated by Congress, eliminated any doubt on this point, and expressly notified states following the 1997 amendments to IDEA that school districts remained liable for private school tuition if they failed to provide FAPE, whether or not the child previously received special education services under the authority of the school district.

In the face of the text of the statute, as interpreted in *Burlington* and *Carter*, as well as the clear statement from the Department of Education, no reasonable school district could have believed that Congress had imposed an additional

requirement on parents and that the school districts would no longer be responsible to reimburse tuition if the child had not previously received special education and related services from the school district.

Indeed, the State of New York and New York school districts understood that the available remedies had not changed after the 1997 amendments. New York State's form notice to parents reflected this understanding. That notice expressly advised parents that they could obtain reimbursement for private tuition if the school district did not provide FAPE. This notice, utilized by all school districts in the State, did not notify parents that they were required to enroll the child in the public schools' inadequate educational program prior to seeking reimbursement, consistent with the statements of the U.S. Department of Education, and contrary to Petitioner's assertions in this case.

Moreover, after 1997, New York State's Review Officers – employees of the State Department of Education who review initial decisions of hearing officers – uniformly held that tuition reimbursement remained available, whether or not the child had previously received special education services from the school district. These decisions reflect the State's understanding that the 1997 amendments to IDEA did not overrule *Burlington* and *Carter*.

2. Although the States and school districts had "clear notice," the *Pennhurst* standard ought not be applied to the issue in this case. Congress cannot be expected to enumerate every detail of a Spending Clause program, or to specify in detail each and every aspect of the available remedies. The circumstances under which a court may order a school district to reimburse private school tuition is a question of the appropriate *equitable remedy* for the State's violation of a clearly stated obligation to provide a free appropriate

public education, and as such is not subject to the "clear notice" rule.

In addition, IDEA was enacted not only in the exercise of Congress' Spending Clause authority, but also pursuant to Congress' authority to enforce the Fourteenth Amendment. *See Smith v. Robinson*, 468 U.S. 992 (1984); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). The concerns underpinning *Pennhurst's* "clear notice" rule have less force where, as here, Congress has chosen to provide financial assistance to States in connection with Congress' enforcement of the Fourteenth Amendment. A strict application of *Pennhurst* would undermine Congress' power to exercise its Fourteenth Amendment authority, as well as its power to combine the exercise of that authority with financial support to states pursuant to the Spending Clause. In order to preserve these authorities, the Court should calibrate its application of *Pennhurst* differently from those instances in which Congress is proceeding purely pursuant to the Spending Clause.

ARGUMENT

I. States Have Received Clear Notice That Courts May Order Them to Reimburse Private School Tuition if They Fail to Offer a Free Appropriate Public Education.

In assessing whether States have "clear notice," this Court looks to the language in the statute, as well as to the background interpretations by the federal courts and statements of the agency charged with administering the statute. In this instance, in the face of IDEA's broad remedial authority, this Court's prior case law, and statements from the U.S. Department of Education, no reasonable school district would have believed it was immune from having to reimburse tuition if it violated

IDEA, simply because the parents did not place the child in the inappropriate program.

A. *The Statute Expressly Provides Broad Remedial Authority, and This Court has Confirmed the Authority to Order Tuition Reimbursement.*

Congress clearly notified States of the broad authority for courts to remedy violations of IDEA. The statute expressly and broadly states that the court "shall grant such relief" as it "determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).

In *Burlington*, 471 U.S. 359, this Court held that, under this provision, parents are entitled to be reimbursed for reasonable costs of a unilateral placement where FAPE is not available in a public school and the parent's placement is ultimately determined to be proper. In reaching this conclusion, the Court noted that the statute

> confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purposes of the Act.

Burlington, 471 U.S. at 369. The Court noted that an injunction directing a school district to develop an appropriate individualized education program ("IEP") is not likely to be effective, Court noted, because a final judicial decision is likely to come "a year or more after the school term covered by that IEP has passed." *Id.* at 370.

The Court has subsequently confirmed this decision in *Carter*, 510 U.S. at 15 (quoting 20 U.S.C. § 1415(e)(2)) ("[O]nce a court holds that the public placement violated IDEA, it is authorized to 'grant such relief as the court

determines is appropriate.'"). This line of authority has stood for over twenty years.

The statutory language, combined with the consistent case law interpreting it as authorizing tuition reimbursement as a remedy for violations, is more than sufficient to establish that States had "clear notice." *See Jackson*, 544 U.S. at 182 (finding that the Board of Education was on notice of its liability based on decisions of the U.S. Supreme Court and federal appellate courts); *see also Arlington*, 126 S.Ct. at 2463 (relying on the Court's prior case law to conclude that States did *not* have clear notice).

B. *The 1997 Amendments to IDEA Did Not Overrule Burlington, and the U.S. Department of Education Advised States and School Districts That They Continued to be Responsible for Tuition Reimbursement if They Failed to Meet Their Obligations*

New York City incorrectly asserts that Congress added a new provision to IDEA in 1997 that effectively overruled *Burlington,* and that those amendments deprived them of "clear notice" that courts could award tuition reimbursements. *See* Brief of Petitioner at 38-41. However, the 1997 amendments must be viewed against the backdrop of this Court's case law and the interpretations of the U.S. Department of Education.

Congress may, of course, overrule or alter the Court's interpretations of statutory language; however, the Court presumes that if Congress "intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *MidAtlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)).

If Congress had intended to repeal the longstanding interpretation of IDEA reflected in *Burlington*, *Carter*, and the lower court cases, it "likely would have flagged that substantial change." *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62 (2004). Congress did not indicate any such intent. Congress did not revise the text of § 1415(i)(2)(C)(iii), which remains unchanged from the language this Court interpreted in *Burlington* and *Carter*. Neither the text nor the legislative history of the 1997 amendments mentions any intent to eliminate the Court's ability to order tuition reimbursement in appropriate cases in which a child had not previously received special education and related services from a school district.

Congress also has commanded that IDEA be interpreted in a manner that preserves the rights that children with disabilities had in 1983. Congress directed the Department of Education's regulations to preserve these protections "except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation." 20 U.S.C. § 1406(b). In the face of this instruction, and since Congress did not specifically indicate an intent to overrule or narrow *Burlington*, this Court should not presume that Congress intended to do so.

In any event, after the 1997 amendments, the U.S. Department of Education expressly considered and rejected the very argument that New York City makes in this case, and told States seeking federal funding that they could continue to be liable for tuition reimbursement. The Department of Education said:

> [H]earing officers and courts retain their authority recognized in *Burlington* and [*Carter*] to award "appropriate" relief if a public agency has failed to provide FAPE, *including reimbursement and compensatory services*, under section

> 615(l)(2)(B)(iii) *in instances in which the child has not yet received special education and related services*. This authority is independent of their authority under section 612(a)(10)(C)(ii) to award reimbursement for private placements to children who previously were receiving special education and related services from a public agency.

64 Fed. Reg. 12,406, 12,602 (March 12, 1999) (emphasis added).

The Department of Education reiterated this view in a published letter stating that "[w]e 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." *See* Letter from the Department of Education to Susan Luger, listed in 65 Fed. Reg. 9178 (Feb. 23, 2000) and quoted in *Application of a Child with a Disability*, Appeal No. 06-021 (Apr. 25, 2006), *available at* http://www.sro.nysed.gov/2006/06-021.htm; *see also Bd. of Educ. of the City Sch. Dist. of N.Y. v. Tom F.*, No. 01 Civ. 6845, 2005 U.S. Dist. LEXIS 49, at *10 (Jan. 4, 2005).

Petitioner simply ignores the Department of Education's interpretation. However, this Court has previously assessed whether States had clear notice based not only on the language of the statute and the interpretations of the courts but also based on the statements of the executive branch agency charged with administering the statute. In *Pennhurst*, this Court observed that the Secretary of Health and Human Services had concluded that "[n]o authority was included in the Act to allow the Department to withhold funds from States on the basis of failure to meet" the enumerated findings that were at issue in that case. 451 U.S. at 23. As this Court said:

> "it strains credulity to argue that participating States should have known of their 'obligations' under Section 6010 when the Secretary of HHS . . . has never understood Section 6010 to impose conditions on participating States."

Id. at 25.

In *Jackson*, 544 U.S. at 182, this Court concluded that grant recipients were on notice of the obligations based in part on the existence of administrative regulations promulgated by the Department of Education in the Title IX context. In *Arlington*, the Court implicitly confirmed that an executive branch agency's statements could provide the required notice. In that case, the Court concluded that a statement by the Government Accountability Office was not relevant to the "clear notice" analysis, in part because it was made "by an agency not responsible for implementing the IDEA." *Arlington*, 126 S.Ct.. at 2463 n.3.

The Court has long recognized that Congress may rely on executive branch agencies to interpret and enforce federal legislation. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984). In this instance, Congress charged the U.S. Department of Education with administering and enforcing IDEA. 20 U.S.C. § 1402(a). The Department of Education quite properly concluded that Congress had not "clearly and unequivocally" indicated its intent to eliminate the courts' ability to remedy violations when a child with disabilities had not previously received special education services from the State, 20 U.S.C. § 1406(b), and announced the applicable requirements in the Federal Register for all States and school districts to see.

As a result, New York was fully on notice that the U.S. Department of Education – the executive branch agency to which Congress delegated authority to implement IDEA, and to which this Court defers in reasonable interpretations of federal statutes – has concluded that courts could continue to remedy school districts' violations of IDEA by ordering the district to reimburse private school tuition.

In the face of the statute's broad remedial provision, this Court's case law interpreting that provision, and the explicit statement by the U.S. Department of Education, a reasonable State and school district would have understood that they would be liable for tuition if they failed to provide FAPE.

C. *New York Understood That Parents Were Entitled to Seek Reimbursement if the School Did Not Offer a Free Appropriate Public Education, Without Requiring That the Child First Attend A Public School.*

Although New York City argues that it did not have "clear notice" that it could be ordered to reimburse tuition if it failed to provide a free appropriate public education, in fact both New York State and New York City well understood they would be liable for tuition reimbursement.

1. *Notices to Parents Did Not Describe Any Requirement to Have Previously Received Special Education Services from the School District.*

New York's Department of Education required all New York school districts to tell all parents, without limitation, that they could seek tuition reimbursement if the school district failed to provide a free appropriate public education. Petitioner's current litigation position thus *contradicts* the understanding reflected in the notices it gave to parents.

Since 1997, IDEA has expressly required States to give parents a "full explanation," "written in an easily understandable manner," 20 U.S.C. § 1415(d), of the "requirements for unilateral placement by parents of children in private school at public expense." *Id.* § 1415(d)(2)(H). School districts must give this notice to parents at least annually, as well as at the time they request a due process hearing. This requirement is codified in federal regulations, see 34 C.F.R. § 300.504(a), as well as in New York's state law, see 8 N.Y.C.R.R. § 200.5(f)(4)(viii).

In compliance with this Congressional command, New York's State Education Department has published a form procedural safeguards notice that must be used by all school districts in New York. *See* 8 N.Y.C.R.R. § 200.5(f)(4); *see also id.* § 200.5(f)(1). New York State's form notice has expressly notified *all* parents, without limitation, that they may seek reimbursement for a private placement.

For example, New York State's 1998 notice stated:

> If you place your child in a private school, you are responsible for the cost unless you can prove at an impartial hearing that the school district did not or is unable to provide your child with an appropriate education and that the school you choose is appropriate to meet your child's educational needs.

New York State Education Department Procedural Safeguards Notice, Rights for Parents of Children with Disabilities, Policy 98-10 (November 1998) (relevant portions attached as Appendix A). The notice then set out certain requirements "[i]f you plan to place your child in a private school and have the school district pay." *Id.* The notice advised that the parents must:

> – inform the school district . . . that you are rejecting the placement proposed by the school district, state your concerns and that you will be placing your child at a private school at public expense, *or*
>
> – provide the school district with written notice 10 business days prior to placing your child in the private school. You must provide the information stated above.

Id.

Policy 98-10 post-dates the 1997 amendments to IDEA, and accordingly reflected New York State's understanding of the circumstances in which it might be liable to reimburse tuition. New York's form notice did not advise parents that they could seek reimbursement only if the child previously received special education services through the school district. Nor did it inform parents that in order to seek reimbursement for private school tuition, they must first place the child in the inadequate public school program, the course that New York City now argues is required.

Even today, New York's notice does not advise parents of the requirement that New York City seeks to impose in this litigation. The current notice states:

> If you place your child in a private school because you and the school district disagree that an appropriate program has been made available for your child, *you have the right to request an impartial hearing to seek reimbursement* for the private school placement.

New York State Education Department Procedural Safeguards Notice, Rights for Parents of Children with Disabilities, Ages 3-21 (effective September 13, 2005) (emphasis added), *available at* http://www.vesid.nysed.gov /specialed/publications/policy/prosafenotice/sept05.htm.

This unambiguous statement is followed by a list of requirements and conditions that apply "[i]f you are the parent of a child who previously received a special education program and/or services through the school district and you place your child in a private school." *Id.* (emphasis added). For example, the notice states that reimbursement may be denied if the parents of such children did not give the school district written notice prior to removing the child from the public school. *Id.*

Although the current notice lists these requirements that apply *if* the child previously received special education services from the school district, it nowhere states that prior receipt of special education services from the school district is itself a requirement in order to receive tuition reimbursement. Indeed, any reasonable parent reading the notice would conclude the contrary.[3]

[3] In addition to demonstrating that New York in fact understood that Courts could order tuition reimbursement, the form notices required to be used by all school districts in New York did not give parents a "full" and "easily understood" explanation specifying the requirement New York City now seeks to impose. *See* 20 U.S.C. § 1415(d). New York City should be estopped from asserting an additional requirement that it did not disclose to parents.

2. *New York State Review Officers Have Consistently Held That School District Continue to be Liable to Reimburse Tuition.*

The New York State Education Department's understanding of the tuition reimbursement remedy is further illustrated by the decisions of the State Review Officers. These Officers are employed by the State Education Department, and provide a state level review of hearing officer decisions before those decisions can be appealed to U.S. District Court. State Review Officers have:

> consistently declined to construe section 1412 of the IDEA as limiting the authority of an impartial hearing officer or state review officer under section 1415 of the IDEA to grant an award of tuition reimbursement to the parents of a child who had not previously received special education or related services under the authority of a public agency.

Application of a Child With a Disability, Appeal No. 06-091 (Oct. 3, 2006), *available at* http://www.sro.nysed.gov/2006/06-091.htm (citing twelve previous decisions extending back to 1998). New York's State Review Officers are aware of and have relied on federal authorities, including *Burlington* and *Carter*. *See*, *e.g.*, *Application of a Child with a Disability*, 04-022 (June 23, 2004), *available at* http://www.sro.nysed.gov/2004/04-022.htm.

These decisions reflect the State's understanding of the remedial authorities under IDEA as expressed in public decisions available to the New York City public schools.

II. *Pennhurst*'s "Clear Notice" Requirement Should Not Be Mechanically Applied to the Issue in This Case.

A. Reimbursement for Tuition is a Remedy for the State's Failure to Comply with the Mandate to Provide FAPE and *Pennhurst's* Clear Notice Requirement Does Not Apply.

Tuition reimbursement is a remedy for a school district's failure to provide FAPE to a child with disabilities with FAPE, as required by IDEA. In applying *Pennhurst*, this Court has distinguished between provisions outlining the key obligations from those setting forth the remedies for the violations.

> 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 the Federal Government or third-party beneficiary . . . for the loss caused by that failure.

Barnes v. Gorman, 536 U.S. 181, 189 (2002) (citations omitted). Additionally,

> a funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant language, but also to those remedies traditionally available in suits for breach of contract.

Id. at 187.

Pennhurst does not require Congress "specifically" to "identify" and "proscrib[e] each condition in [Spending Clause] legislation." *Jackson*, 544 U.S. at 183 (rejecting the contention that *Pennhurst* precluded interpreting Title IX's private cause of action to include retaliation). In particular, *Pennhurst* does not require Congress to delineate all details of the precise circumstances in which a court may order the equitable remedy of tuition reimbursement for IDEA violations. Congress clearly stated the key obligation – to provide a free appropriate public education – and expressly gave the courts broad equitable authority to devise and impose remedies. "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," *Bell v. Hood*, 327 U.S. 678, 684 (1946), and the "existence of a statutory right *implies the existence of all necessary and appropriate remedies*," *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (citations omitted) (emphasis added). Generally,

> absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

Franklin v. Gwinett Co. Pub. Schools, 503 U.S. 60, 70-71 (1992).

Respondent's request for tuition reimbursement is an appropriate remedy for Petitioner's alleged violation of IDEA, and is not subject to *Pennhurst's* "clear notice" requirement.

B. The Court Should Apply the Pennhurst "Clear Notice" Requirement in a Manner that Supports Congress' Authority to Legislate Pursuant to its Enforcement Authority Under the Fourteenth Amendment.

Although IDEA imposes conditions on States' receipt of federal education funds, it is not enacted purely pursuant to the Spending Clause. Rather, Congress exercised its authority, enumerated in Section 5 of the Fourteenth Amendment to the Constitution, to enact legislation to enforce equal educational opportunity for children with disabilities. This Court has recognized that Congress may use more than one constitutional provision as the source of its legislative authority. *See Fullilove v. Klutzinck*, 448 U.S. 448, 473 (1980) ("In enacting the [Minority Business Enterprise] provision [of the Public Works Employment Act], it is clear that Congress employed an amalgam of its specifically delegated powers," including its spending power and its enforcement power). This Court should apply the *Pennhurst* "clear notice" rule in a manner that recognizes and preserves Congress' enumerated power to legislate pursuant to the Fourteenth Amendment.

1. *Congress Enacted IDEA Utilizing Both Its Fourteenth Amendment and Spending Clause Authorities.*

In addition to recognizing that IDEA was enacted pursuant to Congress' authority under the Spending Clause, *see, e.g.*, *Arlington*, 126 S.Ct.. at 2458, this Court has previously recognized that IDEA was also an exercise of Congress' Fourteenth Amendment authority. The Fourteenth Amendment protects individual rights to equal protection of the law against violation by state actors. Section 5 gives

Congress the power to enforce the provisions of the Amendment.[4]

This Court has previously observed that Congress may employ "an amalgam of its specifically delegated powers," *Fullilove,* 448 U.S. at 473, and may impose conditions in connection with the exercise of its spending authority that are within other legislative authorities. *See, e.g.*, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S.Ct.. 1297, 1306 (2006) ("Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power.").

Congress did so in enacting IDEA and its predecessor, the Education of the Handicapped Act ("EHA"). As the Court observed in *Rowley*, "Congress sought 'to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws.'" 458 U.S. at 198 (quoting S. Rep. No. 94-168 at 13 n.22 (1975)). This Court further recognized the Fourteenth Amendment underpinnings of the statute two years later in *Smith*, 468 U.S. at 1009 ("We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an *equal protection claim* to a publicly financed special education.") (emphasis added); *see also Arlington*,

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[4] The Fourteenth Amendment provides in relevant part:

> Section 1 . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.
> *****
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

126 S.Ct.. at 2464 ("IDEA was enacted not only pursuant to Congress' Spending Clause authority, but also pursuant to § 5 of the Fourteenth Amendment.") (Ginsburg, J., concurring). In *Smith*, the Court explained that the EHA was

> an attempt to relieve the fiscal burdens placed on States and localities by their responsibility to provide education for all handicapped children. At the same time, however, *Congress made clear that the EHA is not simply a funding statute. The responsibility for providing the required education remains on the States.* And the Act establishes an enforceable substantive right to a free appropriate public education.

Smith, 468 U.S. at 1010 (citing S. Rep. No. 94-168, at 6 (1975) and *Rowley*, 458 U.S. 176 (1982)) (emphasis added).

Congress' reliance on the Fourteenth Amendment is reflected in the history and text of IDEA. Specifically, Congress found that

> While States, local education agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and *to ensure equal protection of the law.*

20 U.S.C. § 1400(c)(6) (emphasis added); *see also id.* § 1400(c)(7) ("A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an *equal educational opportunity* for all individuals.") (emphasis added).

The legislative history of IDEA also confirms Congress' reliance on the Fourteenth Amendment. Congress was concerned that children with disabilities were not receiving equal educational opportunities. Congress acknowledged that it must

> take a more active role under its responsibility for equal protection of the laws to guarantee that its responsibility for *equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity*.

S. Rep. No. 94-168, at 9 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (emphasis added).

When Congress enacted the statute in 1975, it cited the landmark cases, *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Bd. of Educ. of Dist. of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), which applied the Fourteenth Amendment to require the provision of an appropriate public education to children with disabilities. Prior to the enactment of the EHA, one million children with disabilities were entirely excluded from public schools. 150 Cong. Rec. S. 5250, 5326 (daily ed. May 12, 2004) (statement of Sen. Harkin); *see also* 20 U.S.C. § 1400(c)(2)(B); 150 Cong. Rec. S. 5394, 5408 (daily ed. May 13, 2004) (statement of Sen. Bingaman).

Congress enacted the EHA "in order to assure equal protection of the law." Pub. L. No. 94-142, 89 Stat. 775 (1975). At the time it enacted the EHA, Congress noted that

> This Nation has long embraced a philosophy that *the right to a free appropriate public education is basic to equal opportunity* and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.

S. Rep. No. 94-168, at 9 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (emphasis added).

In discussing the 2004 amendments to IDEA, Senator Bingaman explained that Congress enacted the EHA in response to the use by parents of children with disabilities of the same Fourteenth Amendment equal protection arguments made on behalf of African American children in *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). *See* 150 Cong. Rec. S. 5394, 5408 (daily ed. May 13, 2004). The EHA was a "comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children." *Smith*, 468 U.S. at 1009. More specifically,

> In 1975, Congress wrote IDEA for two reasons. First, we fleshed out the substance and details of what was required to achieve equality for children with disabilities. Congress specified critical protections for parents and children to transform the constitutional requirement into a practical reality throughout the country . . . A second important purpose of IDEA was to help States meet their *constitutional* obligations.

150 Cong. Rec. S. 5250, 5326 (daily ed. May 12, 2004) (statement of Sen. Harkin) (emphasis added).

Congress sought to protect the constitutional rights of children with disabilities, and this goal was achieved with the enactment of IDEA and its predecessor. Although Congress used its spending power to assist States in funding special education services for children with disabilities, it also had an obligation to "continue to hold our States accountable for educational outcomes of our children." 150 Cong. Rec. S 5394, 5408 (daily ed. May 13, 2004) (statement of Sen. Bingaman).

IDEA is "more than simply an education program; it is one of our Nation's most important civil rights programs." 150 Cong. Rec. S. 5394, 5402 (daily ed. May 13, 2004) (statement of Sen. Daschle). As such, "schools have to provide the services even if Congress doesn't provide the funds." 150 Cong. Rec. S. 5394, 5403 (daily ed. May 13, 2004) (statement of Sen. Daschle).

2. *The Pennhurst "Clear Notice" Rule Should Be Applied in a Way That Preserves Congress' Enumerated Authority Under the Fourteenth Amendment.*

The Court should apply the *Pennhurst* "clear notice" doctrine in a manner that will preserve Congress' ability to exercise its Fourteenth Amendment authority. In *Pennhurst*, the Court noted that legislation enacted pursuant to the enforcement power of the 14th Amendment imposes *involuntary* obligations on states. *Pennhurst*, 451 U.S. at 16. In contrast,

> [u]nlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State *voluntarily and knowingly* accepts the terms of the "contract."

Id. at 17 (emphasis added). Here, Congress chose to use its Spending Clause authority to assist in the enforcement of the Fourteenth Amendment.

The Fourteenth Amendment adds an additional essential "layer" to IDEA that is not present in other pure Spending Clause legislation. The Court should not ignore this very important layer in its consideration of IDEA cases, such as this one, and it should not mechanically apply *Pennhurst* in the same manner as it would in cases where the statute at issue was enacted purely pursuant to the congressional spending power.

Where Congress chooses to provide funding to assist States in meeting the requirements of the Fourteenth Amendment, the rationale for *Pennhurst's* clear notice rule is mitigated. Indeed, if the Court were to apply *Pennhurst* strictly, it would unduly constrain Congress' ability to enforce the Fourteenth Amendment and to provide financial assistance to States to assist them in meeting obligations that could have been imposed on them directly.

CONCLUSION

For the foregoing reasons, amici request that this Court affirm the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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