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

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE NATIONAL DISABILITY RIGHTS NETWORK AND THE NEW YORK LAWYERS FOR THE PUBLIC INTEREST AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This case is of particular interest to *amici curiae*, who advocate on behalf of children with disabilities to ensure that they receive the free appropriate education they are guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

Amicus National Disability Rights Network (NDRN), formerly the National Association of Protection and Advocacy Systems, is the membership association of protection and advocacy (P&A) agencies that are located in all 50 States, the District of Columbia, Puerto Rico, and the territories. P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2006, P&As served more than 74,000 persons with disabilities through individual case representation and systemic advocacy.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&A lawyers often represent or assist parents of children with disabilities in the impartial due process hearings authorized under the IDEA and know first-hand that often school districts do not provide appropriate special education and related services, forcing parents to make unilateral placement decisions.

Amicus New York Lawyers for the Public Interest (NYLPI) is one of New York's federally-funded P&A agencies. Founded in 1976 as a partnership between the public and private bars to assist disadvantaged and underrepresented people in New York City, NYLPI

[1] Letters from the parties consenting to the filing of *amicus curiae* briefs 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*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

conducts advocacy and litigation concerning disability rights, access to health care, and environmental justice. Through its Disability Law Center, NYLPI has a long history of advocacy for children with disabilities on educational issues. NYLPI filed an *amicus* brief in the court of appeals in this case urging that court to reverse the judgment of the district court.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires that a State that accepts federal IDEA funds (and its school districts) provide to each child with a disability a free appropriate education tailored to accommodate the child's disability and to achieve educational benefit. If a school district violates this statutory mandate, a court may, after exhaustion of administrative procedures, "grant such relief as the court determines is appropriate" for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by this Court to authorize a court order to a school district to reimburse parents for their reasonable expenditures on private special education for a child if the court ultimately determines that such placement, rather than the school district's proposal, is proper under the IDEA. *See School Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Congress has not repealed that equitable authority.

A. 1. Contrary to the overstated rhetoric of petitioner and its *amici*, a ruling in favor of the parent in this case should not impose a significant burden on school districts. Fewer than 1.5% of children with disabilities have been placed in private school over the past two decades, in order to receive an appropriate special education and related services. Most of those children are placed in private schools with the consent of the public school district and do not implicate the reimbursement remedy at issue in this case. Unilateral placement of

children with disabilities in private schools by their parents because of a public school's failure to offer the appropriate education required by federal law constitutes some very small part of that already narrow slice of children in private placements.

2. The popular press repeatedly quotes disgruntled school officials describing private placements as an epidemic of the "greedy needy" – wealthy parents "gaming the system." The claim is that parents seek reimbursement for private school settings for children with trivial disabilities (sometimes implying that perhaps the children are not experiencing a disability at all but merely seeking an advantage) and for amounts of money far in excess of what would be spent in public school. But this claim is not supported by real data. To the contrary, the facts demonstrate that the IDEA benefits predominantly lower-income children with disabilities, that the children who are most likely to be placed in private schools are those with less common disabilities, and that the cost of private placement is not significantly greater and, in places like New York City, can actually be less than that spent in public school.

3. Petitioner and its *amici* gloss over the fact that the decisions by hearing officers and judges to reimburse parents of children with disabilities placed in private school are based on findings that public school systems did not comply with the IDEA because they did not offer an appropriate education for the children. Compliance and monitoring reports by the United States Department of Education have revealed that in many localities, school districts are not in compliance with federal law. The myriad of cases in which federal and state courts have made similar findings confirms this fact. New York reflects this national reality. New York has been out of compliance with various of the IDEA's requirements for decades.

B. The equitable authority of courts to order reimbursement for those relatively few children who must be placed in private school in order to receive the free

appropriate education provided by the IDEA has not been curtailed by Congress.

1. In *Burlington* and again in *Carter*, this Court held that the IDEA authorizes courts to order reimbursement of reasonable private school tuition if a school district is not offering an education appropriate for a child with disabilities. Contrary to petitioner's argument, 20 U.S.C. § 1412(a)(10)(C), first enacted in 1997, did not create a new categorical limitation on the remedies available for violations of the IDEA. This Court had relied in those leading opinions on two statutory provisions to determine that courts can award tuition reimbursement and Congress has not altered either of them (save for changes in terminology).

2. The IDEA does not include the clear statement that would be necessary for Congress to restrict the remedial authority of courts. If Congress wishes to divest courts of their broad equitable authority, Congress must do so by a "clear and valid legislative command." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). A statute that merely identifies particular equitable remedies that can be awarded does not constitute the necessary clear statement to divest courts of their general authority to award other equitable remedies. *See Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

3. Other basic tools of statutory construction confirm that petitioner's reading of the statute cannot be sustained.

First, reading the statute as petitioner suggests could lead to absurd results. For example, it would apparently deny reimbursement to a child with a disability if the child "received" *no* special education and related services, even if the school district acknowledged in an IEP that the child should be receiving such education and services, while it would permit reimbursement if the child had received *some* special education and related services but enrolled in a private placement that could provide the child *all* the

appropriate education and services. Second, it would encourage parents to place a child with a disability in a placement they believe to be unreasonable and potentially harmful simply to have shown that they "tried it out." Their child with a disability, in the mean time, will lose the educational value of that time – an educational opportunity that cannot be recouped and which may create even further learning difficulties for the child.

Nothing in the legislative history suggests that Congress intended this result or sought to eliminate the equitable authority of courts to provide relief for children who never received special education under the authority of a public agency if the parents can establish that the school district is not offering an appropriate education. To the contrary, to the extent this issue was discussed at all, the legislative history confirms that Section 1412(a)(10)(C) was intended to codify the prevailing case law that notice to the school district of an intent to place a child in private school because of dissatisfaction with the proposed IEP is a relevant factor for a court to consider in exercising its remedial discretion.

ARGUMENT

SECTION 1412(a)(10)(C) OF THE IDEA DOES NOT RESTRICT JUDICIAL AUTHORITY TO AWARD REIMBURSEMENT FOR NEEDED PRIVATE SCHOOL PLACEMENT WHEN A CHILD DID NOT PREVIOUSLY RECEIVE SPECIAL EDUCATION UNDER THE AUTHORITY OF A PUBLIC AGENCY

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., "creates a right, enforceable in federal court, to the free appropriate public education required by the statute." *Smith v. Robinson*, 468 U.S. 992, 1002 n.6 (1984). The IDEA requires that a State that accepts federal IDEA funds (and its school districts) provide each child with a disability with a free appropriate education tailored to accommodate the child's disabilities

and to achieve educational benefit. *See Board of Educ. v. Rowley*, 458 U.S. 176, 209 (1982).[2]

If a school district violates this statutory mandate, a court may, after exhaustion of administrative procedures, "grant such relief as the court determines is appropriate" for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by this Court to authorize a court order to school districts to reimburse parents for their reasonable expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP with a public school placement, is proper under the Act. *See School Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993).

Contrary to petitioner's argument, 20 U.S.C. § 1412(a)(10)(C), first enacted in 1997, did not impose a categorical limitation on the remedies available for violations of the IDEA. Rather, Section 1412(a)(10)(C) identifies factors that a court "may" consider in exercising its remedial discretion in a particular category of cases in which a child who "previously received special education and related services under the authority of a public agency" has been denied the federal right to a free appropriate education and the parents, in the interim, have placed the child in private school.

Congress intended this provision to clarify the nature of the notice and cooperation obligations that parents owe school districts by codifying the consistent body of case law that had developed after *Burlington* and *Carter* to guide a court's remedial discretion in awarding reimbursement. As respondent documents in his brief, that case law held that

[2] The free appropriate education is supposed to be reflected in the particular child's "IEP," the Individualized Education Program developed by a team of teachers, parents, and school administrators to, among other things, describe the regular education, special education and related services, and other accommodations necessary to provide a student with an appropriate education. 20 U.S.C. § 1414(d).

public school districts must normally be given an opportunity to propose an appropriate placement before parents are allowed to seek tuition reimbursement for a unilateral private placement. *See* Resp. Br. 19-20. There is no evidence that Congress intended, by implication, to preclude categorically any judicial reimbursement remedy to parents whose child had not previously received special education and related services under the authority of a public agency.

A. It Is Rare For Parents To Unilaterally Place A Child With Disabilities In A Private School Based On A Public School's Failure To Offer The Appropriate Education Required By Federal Law

Contrary to the overstated rhetoric of petitioner and its *amici*, a ruling in favor of the parent in this case should not pose a significant burden on school districts. By contrast, a ruling in favor of petitioner would eliminate the only form of relief that can provide redress to parents who correctly act on the fact that a school district's proposed educational program for their child with disabilities would not constitute an appropriate education for the child.

1. The incidence of due process complaints seeking reimbursement for private placement is extremely small

Anecdotal stories that allege a trend of soaring private school placements for children with disabilities should not be confused with the facts. The United States Department of Education has tracked private placements for several decades. From a quantitative standpoint, the number of children with disabilities who are placed in private school is low and such placement by parents without the concurrence of the school district is extremely small.

In 2005, only 1.44% of children receiving services under the IDEA were in private placements at public

expense (88,098 children out of 6,110,829 children).[3] Moreover, the percentage of children in publicly funded private placements is not soaring. In fact, it has not changed significantly over the last 21 years, and has actually declined since 2001.[4]

The majority of private placements are "agreed placements," meaning that the school district and parents agree that the private placement is necessary to provide the child with an appropriate education. *See* 20 U.S.C. § 1412(a)(10)(B) (discussing children with disabilities who "are placed in, or referred to" private schools "by the State or appropriate local educational agency as the means of carrying out the requirements of" the IDEA); *Amicus* Br. of Nat'l School Bd. Ass'n, at 20 (acknowledging that the "overwhelming majority of these [private] placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA"). *Amici* are not aware of a study that reports how many of these relatively few private placements were unilateral parent placements for which the school district has been ordered by a hearing officer or court to pay reimbursement, but an examination of the data regarding dispute resolution under the IDEA demonstrates that the actual number of reimbursement cases is miniscule.

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[3] Data Tables for State OSEP Data, IDEA Part B Educational Environment, Tbl. 2-5 (1996 through 2005) (2005), available at https://www.ideadata.org/tables29th/ar_2-5.htm.

[4] Since 1985, an average of 1.47% of all children served each year under the IDEA were in private placements at public expense, ranging from a high of 1.7% in 1986-87 to a low of 1.2% in 1993-94. Data Tables for State OSEP Data, IDEA Part B Educational Environment, Tbl. 2-5 (1996 through 2005) (2005), *available at* https://www.ideadata.org/tables29th/ar_2-5.htm; U.S. Department of Education, *Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, Appendix, Tbl. AB7 (1998) (1986-1996, age group 6-21); U.S. Department of Education, *Nineteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, Appendix, Tbl. AB7 (1997) (1985-1986, age group 6-21).

A school system in New York, just as anywhere else in the country, faces involuntary reimbursement of tuition for a child with disabilities in a private placement only if a due process hearing and any subsequent litigation determines that the public school could not provide the child an appropriate education. (Any other private placement will be an agreed placement, which are not at issue in this case.) It is rare for parent-school disputes to reach a due process hearing. Despite the more than 6 million children with disabilities entitled to the IDEA's protection, only approximately 3000 due process hearings are held nationwide each year.[5]

Disputes regarding private school placement (including requests for due process hearings or mediation, and other formal complaints to state agencies) are extremely rare. Data from the National Association of State Directors of Special Education reveal that of the estimated 25,000 to 27,000 disputes filed annually, private placement was the key issue in only 3.5% of disputes in 1999, 1.5% of disputes in 2000, and 3.3% of disputes in 2001. *See* Judy Schrag & Howard Schrag, National Association of State Directors of Special Education, *National Dispute Resolution Use and Effectiveness Study*, at 18, 24-25 (September 2004).

The Council of the Great City Schools is certainly correct when it notes, in its *amicus* brief in support of petitioner (at 23), that the volume of disputes involving tuition reimbursements in New York City is "unique." Indeed, many things about New York City make it atypical of the way that the IDEA functions nationally.

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[5] *See* General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897), at 12-13 (2003). More than 80% of all due process requests are resolved or dropped before a hearing is held – only 18.7% of due process hearings reach a decision. Judy Schrag & Howard Schrag, National Association of State Directors of Special Education, *National Dispute Resolution Use and Effectiveness Study*, at 29-30 (September 2004) (74.9% are withdrawn and 6.4% are dismissed).

The vast majority of school districts across the country are not experiencing an increase in due process activity. To the contrary, 90% of school districts had no due process hearings at all in 2004-2005, and only 4% of school districts were involved in IDEA litigation of any kind. *See* Ellen Schiller, *et al.*, Abt Associates, Inc., *Marking the Progress of IDEA Implementation*, at 19-20 (April 2006). Nor is there a trend toward more due process proceedings. From 1999 to 2005, the 10% of school districts that had any ongoing formal dispute resolution procedures had a median of only one dispute per year, a rate that did not change over time. *Ibid.* Nationally, the median number of due process hearings per 10,000 students decreased from 2.4 to 1.4 between 1999 and 2005. *See* Ellen Schiller, Abt Associates, Inc., *Volume 1, The SLIIDEA Sourcebook Report (1999-2000, 2002-2003, 2003-2004, and 2004-2005 School Years),* at 102 (April 2006).

By contrast, New York City had 1058 due process hearings proceed to decision in 2004, a total of 9.7 per 10,000 students.[6] Yet, even then, only 102 of those due process decisions involved parent tuition reimbursement.[7]

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[6] *See* New York City Department of Education, *School Based Expenditure Reports School Year 2003-2004 Citywide*, accessed at http://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y2003_2004/function.asp (2003-04 enrollment was 1,086,866); *see also* GAO, *Numbers of Formal Disputes Are Generally Low*, *supra*, at 13-14 (due process hearings are concentrated in a small number of States – California, Maryland, New Jersey, New York, Pennsylvania and the District of Columbia, and, within those States, a small number of primarily urban school districts).

[7] *See* New York State Office of Vocational and Educational Services for Individuals with Disabilities, *New York State Part B Annual Performance Report 2003-2004*, Appendix 18.5 (Distribution of Issues for Decided Impartial Hearing Cases July 1, 2003 – June 30, 2004 Displayed by Upstate and New York City), http://www.vesid.nysed.gov/sedcar/apr/apr0304data/appeigt5.htm.

2. Private placement costs generally are not significantly greater than public special education costs for comparable services and there is no evidence that wealthy parents are gaming the system

The popular press repeatedly quotes disgruntled school officials describing private placements as an epidemic of the "greedy needy." The claim is that wealthy parents are "gaming the system" seeking reimbursement for private school settings for children with trivial disabilities (sometimes implying that perhaps the children are not experiencing a disability at all but merely seeking an advantage) and for amounts of money far in excess of what would be spent in public school.[8] But this claim is not supported by real data. To the contrary, the facts demonstrate that the IDEA benefits predominantly lower-income children with disabilities, that the children who are most likely to be placed in private schools are those with less common disabilities, and that the cost of private placement is not significantly greater and, in places like New York City, can actually be less than that spent in public school.

a. The children who benefit most from IDEA are, by and large, not the children of the wealthy. Rather the IDEA's guarantees benefit most those who cannot afford other educational choices – children who are not only disabled, but also disadvantaged in other ways. Families

[8] Jay P. Greene & Marcus A. Winters, *Debunking a Special Education Myth: Don't Blame Private Options For Rising Costs,* Education Next (Spring 2007) ("Tales of the 'greedy needy' – disabled students who receive unreasonably expensive services – appear regularly in the media."), *available at* http://www.hoover.org/publications/ednext/6018321.html. *See*, *e.g.*, Joseph Berger, *Private Schooling for the Disabled, and the Fight Over Who Pays,* N.Y. Times, March 21, 2007, at B7 (Spokesperson for Council for Great City Schools said, "Many wealthy, well-educated people are gaming the system in New York City and around the country."); Yilu Zhao, *Rich Disabled Pupils Go to Private Schools at Public Expense, Levy Says,* N.Y. Times April 17, 2002, at B7.

of children with disabilities are more often affected by poverty than others. *See* Mary Wagner *et al.*, *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households,* at 28 (2002).

Children with disabilities are twice as likely to live with someone other than a biological parent, and 30 percent of children with disabilities live in foster care. *See* 150 Cong. Rec. S5353 (daily ed. May 12, 2004). Almost 25 percent of children with disabilities are living in poverty, compared with 16 percent of children in the general population. *See SEELS, supra*, at 28. And parents of children with disabilities are twice as likely to be unemployed. *See* Mary Wagner *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2),* at 3-7 (2003). Overall, 68 percent of children with disabilities live in households with incomes less than $50,000, compared to only 53 percent of nondisabled children. *See SEELS, supra*, at 29.

Some parents make extreme financial sacrifices to front the cost of private placement pending hoped-for reimbursement. In New York, a few private schools are willing to enroll a child with a disability whose parents cannot afford to pay, and then wait to see whether the parents can obtain an order under the IDEA for reimbursement or, in some circumstances, prospective authorization for payments. *See*, *e.g.*, *Connors v. Mills*, 34 F. Supp. 2d 795, 804 (N.D.N.Y. 1998). Yet under petitioner's argument, there would be a category of children who would never be entitled to reimbursement. This could affect private schools' decisions regarding the enrollment of children of lesser financial means.

b. Private school placements at public expense are usually provided for children with the types of disabilities for which public schools have shown themselves least able to provide an appropriate education. Almost three-quarters (73%) of all private school placements are children

classified as emotionally disturbed, mentally retarded, multiply-disabled, or autistic.[9] This is so even though such children represent only 22% of all children served under the IDEA. (These same children are also disproportionately likely to request due process hearings. *See National Dispute Resolution Use and Effectiveness Study*, *supra*, at 20-21.)

By contrast, children with learning disabilities and speech/language disabilities account for only 15% of children in private placements, despite representing 70% of children served under the IDEA. This is not because these disabilities are trivial, as often portrayed in the popular press; to the contrary, they often constitute significant impediments to learning. Fortunately, however, school districts have more experience, and greater success, with these higher frequency disabilities. Of course, as noted below, non-compliance with the IDEA is rampant and thus it is disappointing, but not surprising, that school districts are sometimes not able to provide an appropriate education even for children with these more common disabilities, leaving parents no choice but to rely on private placements.

c. Whether educated in public school or private school, it often costs more to educate a child with a disability. Contrary to the views expressed by petitioner's *amici*, however, the cost does not vary significantly between public and private schools.

When educated within the public school system, students who are classified as emotionally disturbed, mentally retarded, multiply-disabled, or autistic have significantly higher per-pupil costs than other children with disabilities. Almost three-quarters of the children

[9] Except as otherwise noted, the facts in this paragraph and the next paragraph are drawn from the U.S. Department of Education's Data Tables for State OSEP Data, IDEA Part B Educational Environment, Tables 1-3 and 2-5 (2005), https://www.ideadata.org/tables29th/ar_1-3.htm and https://www.ideadata.org/tables29th/ar_2-5.htm.

that the Center for Special Education Finance refers to as "high expenditure" students are drawn from children with these disabilities: multiple disabilities (32.3%); autism (17.2%); emotional disturbance (16.2%); and mental retardation (7.1%).[10]

The average cost of educating a "high expenditure student" in public school in 1999-2000 was $39,909 for elementary school, $35,924 for secondary school, and $57,129 in a public school dedicated to special education.[11] Although no similar breakdown is available for private schools, the average expenditure on tuition, fees, and other special services for children with disabilities placed in private schools or other public agencies was $25,580 in 1999.[12]

In New York City, the per-pupil cost of special education in public schools actually exceeds what respondent seeks in reimbursement in this case. For the 1999-2000 school year, New York City reported that the average cost to educate a special education student within the regular public schools was $26,497, and the average per pupil cost to educate a student at a public self-contained special education school was $41,673.[13] These

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[10] *See* Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Characteristics of High-Expenditure Students With Disabilities, 1999-2000, Report 8*, at 21 (May 2004).

[11] *See id.* at 4-5.

[12] *See* Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability, Report 5*, at v, 4-5 (June 2003).

[13] Office of Financial & Management Reporting, New York City Department of Education, *School Based Expenditure Report School Year 1999-2000, Report 5: Expenditures by Function, Student Type and Instruction Level,* http://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y1999_2000/function.asp?R=2. The Special Notes to the School-Based Expenditure Report explain that Related Services costs are understated for special education students, which suggests that the actual special education costs are even higher than those reported. http://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y1999_2000/appendix.asp#_HOW_EXPENDITURES_WERE_3.

numbers are significantly greater than the average settlement paid by New York City in unilateral placement cases from 2003 to 2006, which its *amicus* claims ranged from $13,717 to $18,552. *See Amicus* Br. of Council of Great City Schools, at 22.

3. Private placement costs fall only on school districts who do not provide the appropriate education required by federal law

Many of the objections voiced by petitioner and its *amici* are objections to the cost of special education or court-ordered placements generally. They gloss over the fact that those decisions by hearing officers and judges to reimburse parents of children with disabilities placed in private school are based on findings that public school systems did not comply with the IDEA because they did not offer an appropriate education for the children. Those decisions are not easily reached. In light of this Court's recent decision in *Schaffer v. Weast*, 546 U.S. 49, 59-60 (2005), parents will (absent state law to the contrary) normally bear the burden of proof of showing that the school district's proposal does not comply with the IDEA. Furthermore, the IDEA now makes clear (in a provision enacted after the events at issue in this case) that certain procedural violations of the IDEA are not sufficient to have an IEP declared invalid. *See* 20 U.S.C. § 1415(f)(3).

Compliance and monitoring reports by the United States Department of Education have revealed that in many localities, school districts are not in compliance with federal law. The myriad of cases in which federal and state courts have made similar findings confirms this reality.

The National Council on Disability, an independent federal agency, succinctly summarized the Department of Education's findings: "Every state was out of compliance with the IDEA requirements to some degree; in the sampling of states studied, noncompliance persisted over many years." National Council on Disability, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind,* at 7 (January 25,

2000). Indeed, seven years earlier, the same federal agency reported that the Department of Education had determined that "150 of the 165 local public agencies" surveyed were "in varying degrees of noncompliance with federal and state IEP mandates" and that another Department of Education study of 40 local school districts across 21 States found that almost 10 percent of students with disabilities "either do not have an IEP or have not been properly evaluated" in violation of federal law. National Council on Disability, *Serving the Nation's Students with Disabilities: Progress and Prospects*, at 3, 25 (March 4, 1993).

The United States Commission on Civil Rights likewise reported, based on a Department of Education survey, that tens of thousands of children with disabilities "continue to be excluded from the public schools, and others are placed in inappropriate programs." U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 28 & n.77 (1983).

New York reflects this national reality. New York has been out of compliance with various of the IDEA's requirements for decades. *See* National Council on Disability, *Back to School on Civil Rights*, *supra*, at 142-143. In 1979, a federal court found in a class action lawsuit that New York and New York City had "not made available to the plaintiff class [of children with disabilities] a free appropriate public education in a timely manner, thus violating the requirements of federal law." Judgment, at 6, *Jose P. v. Ambach*, Civ. No. 79-270 (E.D.N.Y. Dec. 14, 1979), available at http://www.advocatesforchildren.org/litigation/litdocs/josepdocs/JosePJudgment_Dec79.pdf.

That lawsuit has documented the continuing failure of petitioner to comply with the IDEA. A recent independent evaluation of the New York City special education program, paid for by the petitioner, noted that "the continued *Jose P.* litigation [has] demonstrated, the NYC Department of Education, like many large urban school districts, has long-standing significant problems in meeting its obligation to provide quality education to its

students with disabilities within federal and state legal requirements." Thomas Hehir *et al.*, *Comprehensive Management Review and Evaluation of Special Education*, at 15-19, 47-49 (September 20, 2005). For example, during the 2004-2005 school year, the percentage of eligible students who did not receive special education placements within 60 days (as required by state regulations) ranged from 54% to 92%, depending on the month. *Id.* at 65. The percentage of special education students entitled to related services who were not receiving them ranged from 10% to 66%, depending on the month and the particular services. *Id.* at 42.

There is also a comprehensive body of state administrative decisions documenting the fact that the New York City Department of Education does not provide the appropriate education required by federal law. *See*, *e.g.*, *Application of Child with a Disability*, Appeal No. 05-010 (March 16, 2005) (finding that the school district had failed to offer an appropriate placement to a child with quadriplegia who had previously thrived in mainstream environment but was offered a classroom where all the students were severely disabled and non-verbal); *Application of a Child with a Disability*, Appeal No. 03-078 (October 30, 2003) (finding that the school district failed to offer an appropriate placement to a tenth grade student with a learning disability who was functioning at a fourth grade level but was offered a placement in the same general education setting with related services in which he had previously failed to advance and, in the following year, was improperly denied any special education services).

School districts in New York sometimes concede during due process hearings that they have failed to offer an appropriate education. In *Application of a Child with a Disability*, Appeal No. 01-108 (March 26, 2002), for example, the school district "failed, by its own admission, to develop a valid IEP and make a timely placement" for an emotionally disturbed child." In another case arising out of Hyde Park, New York that is pending before this Court, the school board is challenging a family's placement of a child in a private school despite the fact that the

school system conceded at the due process hearing that its proposed IEP did not offer an appropriate education for the child with a disability. *Frank G. v. Board of Educ.*, 459 F.3d 356, 361 (2d Cir. 2006), *petition for cert. pending*, No. 06-580.[14]

Even when the school district offers an appropriate education, it often does not deliver the special education and related services described in the IEP – services that, by definition, the school district has itself agreed are necessary to an appropriate education. The facts in *Application of a Child with a Disability*, Appeal No. 99-21 (January 13, 2000), represent a typical scenario. In that case, the services recommended by the State for a child with Erb's Palsy and Tourette's Syndrome were not available at the placement offered by the school district. Accordingly, the state hearing officer found that the school district had failed to provide an appropriate education, noting that "[a] placement which cannot be implemented is not an appropriate placement." *See also X v. New York State Educ. Dep't*, 975 F. Supp. 546 (S.D.N.Y. 1997) (finding that the school district failed to provide an appropriate education to a child with autism where the offered placement did not have the services mandated by the IEP); David Herszenhorn, *New Deputy Says Fixing Special Education is Paramount*, N.Y. Times, March 19, 2004, at B6 (reporting that 9,963 students were awaiting counseling, 15,354 were awaiting speech therapy, 10,533 were awaiting occupational therapy and 4,023 were awaiting physical therapy).

[14] According to the facts as described in the court of appeals' opinion, the child's declining performance at a Catholic school prompted his parents to request an evaluation from the public school. During the evaluation process, an independent neuropsychologist recommended that the child, who had been diagnosed with attention deficit hyperactivity disorder at the age of three, be placed in a small classroom of 12 students with an aide and related services. The school district's IEP nonetheless proposed a classroom of 26-30 students.

B. Congress Did Not Clearly Manifest An Intent To Prohibit Courts From Ordering Reimbursement When A School District Violates Federal Law

The authority of courts to order reimbursement for the relatively few children who must be placed in private school in order to receive the free appropriate education provided by the IDEA has not been curtailed by Congress.

When parents are confronted with a school district that is violating federal law by its failure to propose or provide their child a free appropriate education, as required by the IDEA, they are dependent on the federally-designed administrative "due process" proceedings and ultimately on the courts to vindicate their federal rights. It takes time, however, for this comprehensive process to resolve disputes. In *Burlington*, this Court described the process as "ponderous" and took note of the fact that a "final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." 471 U.S. at 370. Indeed, States (including New York) are often in violation of the IDEA's requirements for how long a due process proceeding may take. *See* National Council on Disability, *Back to School on Civil Rights*, *supra*, at 121 (Department of Education found 36% of States failed to resolve due process hearings within the 45 days required by regulations); Office of Vocational and Educational Services for Individuals with Disabilities, New York State Education Department, *New York State Annual Performance Report for 2005-06*: *IDEA Part B State Performance Plan 2005-2010*, at 73-74 (February 2007) (only 83.4% of due process hearings meet regulatory timelines).

The question here is whether the IDEA leaves parents of children with disabilities only the choice between accepting the school district's proposed IEP for an education that is not appropriate or paying for an appropriate placement on their own dime.

In *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 372 (1985), and again in *Florence County School District v. Carter*, 510 U.S. 7 (1993), this Court held that Congress did not intend to force parents to choose between "an appropriate education and a free one." The Court held that the IDEA authorizes parents to receive reimbursement of reasonable private school tuition if the school district was not offering an appropriate education.

There is no clear statement in the text of the current IDEA that restricts the remedial authority of the courts to order such reimbursement and thus no basis for this Court to overrule those holdings.

1. Congress has not altered the statutory provisions that this Court correctly interpreted in *Burlington* and *Carter* to authorize courts to order reimbursement when federal law has been violated

Petitioner contends that Congress's addition of Section 1412(a)(10)(C) in 1997 eliminated the authority of the courts to award tuition reimbursement as a remedy for violation of federal law when the victim of the federal law violation, the child with a disability, has not "previously received special education and related services under the authority of a public agency." But Congress did not so provide.

This Court relied on two statutory provisions as the basis for its determinations in *Burlington* and *Carter* that courts can award reimbursement. Congress did not alter either of those provisions (save for changes in terminology) in 1997 or by subsequent amendments. First, the Court looked to Section 1400(d)(1), which sets forth the purpose of the IDEA: to ensure that all children with disabilities (formerly described as "handicapped" children) "have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs" and to ensure "that the rights of children with disabilities and parents of such

children are protected." 20 U.S.C. § 1400(d)(1). Second, the Court relied on Congress's grant to federal courts the authority to hear claims by aggrieved parents that their statutory rights were being violated without regard to the amount in controversy and authorized those courts to "grant such relief as the court determines is appropriate" for violations of the statute. *Id*. §§ 1415(i)(2)(A) & (C)(iii).

In *Burlington*, the Court held in a unanimous opinion by Chief Justice Rehnquist that the language used by Congress in that grant of authority to award "appropriate" relief "confers broad discretion on the court." 471 U.S. at 369. The Court concluded that "the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act," which the Court described as "principally to provide handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" The IDEA, the Court noted, contemplates that such an education may be provided in private schools at public expense. *Ibid*.; *see* 20 U.S.C. § 1412(a)(10)(B) (discussing school district's obligations when children with disabilities "are placed in, or referred to" private schools "by the State or appropriate local educational agency as the means of carrying out the requirements of" the IDEA).

The Court explained that, absent an equitable remedy of reimbursement, the parents were faced with the Hobson's choice to accept a school district's proposed placement "to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." 471 U.S. at 370. The Court concluded that "[i]f that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Ibid*. Congress "undoubtedly" could not have intended that result. *Ibid*. This Court was therefore "confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents." *Ibid*.

In *Carter*, the Court unanimously reaffirmed that the "IDEA's grant of equitable authority empowers a court 'to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.' " *Carter*, 510 U.S. at 12. The "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of [the IDEA] to bar reimbursement in the circumstances of this case would defeat this statutory purpose." *Id.* at 13-14 (internal citation omitted). The Court clarified that parents 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 the Act." *Id*. at 15. In addition, courts "fashioning discretionary equitable relief under IDEA must consider all relevant factors," and can reduce or eliminate reimbursement based on "equitable considerations." *Id*. at 16.

The broad statutory grant of authority in Section 1415(i)(2)(C)(iii) to award "appropriate" relief, relied on by the Court in both *Burlington* and *Carter*, has not been amended. Nor have the purposes of the IDEA. Thus, nothing in the text of the IDEA reflects an intent by Congress to constrict the power of the courts to award "appropriate" relief, including reimbursement of tuition, to parents under appropriate circumstances.

Section 1412(a)(10)(C) describes circumstances under which the courts "may" grant or deny reimbursement when a child "previously received special education and related services under the authority of a public agency." But that provision does not prohibit the exercise of a court's equitable authority to award reimbursement to parents in circumstances that fall outside the scope of Section 1412(a)(10)(C). Indeed, as we discuss next, any such repeal of equitable authority would require a clear statement on the part of Congress, something that is lacking in Section 1412(a)(10)(C) because such a repeal

cannot be inferred from a positive grant of authority to provide relief in other cases.

2. Section 1412(a)(10)(C) does not contain a clear statement restricting the courts' previously recognized equitable authority to award reimbursement to remedy a violation of federal law

This Court has consistently recognized that once Congress confers jurisdiction on a federal court over a cause of action, the court possesses "*all* the inherent equitable powers * * * available for the proper and *complete* exercise of that jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The scope of this equitable authority is as broad as the violation warrants because Congress's act of vesting jurisdiction in an equity court must be understood in light of the "historic power of equity to provide complete relief in the light of statutory purposes." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960); *see also Porter*, 328 U.S. at 399; *cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

If Congress wishes to divest federal courts of their broad equitable authority, Congress must do so by a "clear and valid legislative command." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001); *see also Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (holding that federal courts retain their full equitable authority "[a]bsent the clearest command to the contrary from Congress"); *Porter*, 328 U.S. at 398 (providing that the "comprehensiveness" of a court's equitable authority can be limited only by a "clear" legislative command).

Thus, this Court has held that a statute that identifies particular equitable remedies that can be awarded does not contain the needed clear statement to divest courts of their general equitable authority to award other equitable

remedies. *See Porter*, 328 U.S. at 398-399. This is precisely the type of inference that is insufficient to constitute a clear statement by Congress to divest federal courts of authority. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Id*. at 398 (quoting *Brown v. Swann*, 35 U.S. 497, 503 (1836)).

As Justice Frankfurter explained for the Court, "[o]ne thing [that] is clear" is that "[w]here Congress wished to deprive the courts of this historic [equity] power, it knew how to use apt words." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11, 17 (1942). If there is any statutory ambiguity, it thus must be read in favor of the courts retaining their full equitable authority. This is true even if it is clear that Congress intended to impose some limits on the courts' remedial authority. In *Mitchell*, for example, this Court held that a statutory provision denying courts the authority to award "unpaid minimum wages" under the Fair Labor Standards Act as part of restitution did not prohibit a court from awarding unpaid wages incident to a wrongful discharge claim under the same Act. The Court emphasized that there was "no warrant" for construing the provision as "a general repudiation of equitable jurisdiction to order reimbursement to effectuate the policies of the Act." 361 U.S. at 295-296.

Section 1412(a)(10)(C) does not meet the clear statement rule articulated in *Porter*, *Mitchell*, and their progeny. It cannot be read to preclude categorically any reimbursement remedy to parents whose child with a disability has not previously received special education and related services under the authority of a public agency. Instead, as respondent argues, that provision simply identifies factors that a court "may" consider in exercising its discretion. As noted above, those factors reflect the consistent body of case law that developed after *Burlington* and *Carter* to guide the courts' remedial discretion in awarding "appropriate" relief under Section 1415(i)(2)(C)(iii).

3. Petitioner's reading of Section 1412(a)(10)(C) would lead to absurd results and is not supported by legislative history

Other basic tools of statutory construction confirm that petitioner's reading of the statute cannot be sustained to categorically exclude from the equitable remedy of reimbursement children with disabilities who had not "previously received special education and related services under the authority of a public agency" but have established that they have been denied an appropriate education by the public school.

a. Reading the statute as petitioner suggests could lead to absurd results, contrary to a fundamental rule of construction. *See, e.g.*, *United States v. Kirby*, 74 U.S. 482, 486 (1868) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.").

First, it would apparently deny reimbursement to a child with a disability if the child "received" *no* special education and related services, even if the school district acknowledged that the child should be receiving such education and services. For example, if a child is enrolled in public school and the IEP provides that she is to receive special education and related services, but the school district cannot, for whatever reason, provide any of them to the child, then she has not "received" any education or services under the authority of the school district and, under petitioner's view, would apparently not be entitled to a reimbursement remedy if her parents placed her in private school where she could get the services. Instead, the parent's only remedy under petitioner's view of the IDEA would be to seek a due process hearing to challenge the failure to provide the services that the school already has acknowledged are necessary and had promised to provide and to allow their child to remain in public school without receiving services until those proceedings are completed. At the same time, petitioner's reading would apparently permit reimbursement to a child who received

some special education and related services but enrolled in a private placement that could provide *all* the education and services appropriate.

Second, petitioner's reading of the statute would require parents, in order to become eligible for reimbursement, to accede to the child's placement in a clearly inappropriate setting for some undefined period of time simply to have shown that they "tried it out." Meanwhile, that child with a disability will lose the educational value of that time – an educational opportunity that cannot be recouped and which may create even further learning difficulties for the child. Section 1412(a)(10)(C) expressly permits a court to order reimbursement even absent notice in situations in which physical or emotional harm might result from the public school placement. *See* 20 U.S.C. § 1412(a)(10)(C)(iv)(I)(cc) & (II)(bb). Yet petitioner would apparently always preclude reimbursement when such harm would befall a child who had not previously received special education and related services under the authority of the school district.

b. Nothing in the legislative history suggests that Congress intended this result or sought to eliminate the courts' equitable authority to provide relief for children who did not previously receive special education and/or related services under the authority of a public agency, so long as the parents can demonstrate that the school district is not offering an appropriate education.

To the contrary, to the extent this issue was discussed at all, the legislative history confirms that Section 1412(a)(10)(C) was intended to codify the prevailing case law that whether parents provide notice to the school district that they intend to place their child in private school because of dissatisfaction with the proposed IEP is a relevant factor for a court to consider in exercising its remedial discretion.

The small amount of discussion at the hearings regarding the reimbursement issue prior to 1997 reflects only a desire that Congress clarify that notice and

cooperation by parents were appropriate factors that should be considered in determining whether to award reimbursement. There was no suggestion that children who had not previously received special education or related services from a school district should never receive reimbursement, the view currently urged by petitioner.

In a congressional hearing regarding the reauthorization of the IDEA in 1994, the National School Board Association urged Congress to amend the IDEA to expressly provide that "[i]n cases where parents are seeking to place their child in a private school, the school needs to be given adequate advance notice of the services the parents desire." *Hearing on the Reauthorization of the Individuals with Disabilities Education Act: Before the Subcomm. on Select Educ. & Civil Rights of the House Comm. on Educ. and Labor*, 103d Cong., at 43 (1994). It explained that requiring advance notice "is cost efficient and still fully protects the rights of students with disabilities." *Ibid*.

The following year, the General Counsel of the Orange County Department of Education explained to Congress that his office had been working with various national and state education organizations to provide recommendations for changes in the IDEA. He stated that the proposal that had been developed "[w]ith regard to unilateral placement of students in private facilities" was that parents would be required "to notify school districts before placing their child in a private school that they intend to seek tuition reimbursement from the school district." *Hearings on the Individuals with Disabilities Education Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Economic and Educational Opportunities*, 104th Cong., at 279 (1995); *see also id*. at 290 (California School Boards Association urges provision requiring parents "to provide ample notice and opportunity for the districts to provide appropriate services through their own public means" before "unilateral placement of students in non-public schools by parents"); *Hearing on Early Childhood, Youth & Families Staff Draft of the IDEA Improvement Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on*

Economic and Educational Opportunities, 104th Cong., at 10 (1996) (California school district urges that reimbursement be denied unless there is notice and "the parents or guardian have cooperated in good faith with the local education agency to develop an individualized education program for the child or youth prior to seeking the non-public service or placement").

When a predecessor to Section 1412(a)(10)(C) appeared in a version of the bill reported out of the House Committee on Economic and Education Opportunities in 1996, the committee stated that school districts were sometimes "confronted with the very rare situation where parents place a child in private school without notifying the school district" and that the proposed bill "would require such parents to notify, at a minimum, a local education agency of their concerns, and provide the opportunity for the school to evaluate the child and determine if it can meet that child's needs." H.R. Rep. No. 104-614, at 12 (1996). That committee bill passed in the House but no action was taken in the Senate.

The key point is that the intent of the amendments was to evaluate the child and develop and implement an IEP that "meet[s] that child's needs." *Ibid*. If the school district could not meet those needs, it would be inconsistent with the IDEA and bad for the child to be placed on an inappropriate educational program.

In hearings the following year, some witnesses supported what they described as the "written notification" language of what would become Section 1412(a)(10)(C). *See Hearings on H.R. 5, The IDEA Improvement Act of 1997: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Educ. & the Workforce,* 105th Cong., at 12 (1997) (Los Angeles County Office of Education); *id*. at 80-81 (California Special Education Local Plan Area). A few witnesses urged that Congress eliminate any reimbursement remedy for a unilateral placement in private school. *See Reauthorization of the Individuals with Disabilities Education Act: Before the Senate Comm. on Labor & Human Resources*, 105th Cong.,

at 31 (1997) (Chairman of Bedford School Board); *id*. at 106 (Council for Exceptional Children). But there was no suggestion that Congress should eliminate the reimbursement remedy for one category of students (*i.e.*, those who did not previously receive special education and related services under the authority of a public agency) while permitting it for others.

Thus, it is the "notice" concept that is reflected in the Senate and House Committee reports in 1997, both of which describe the provision as providing that if "the parents do not comply with the notice [requirement of the bill] and evaluation requests [of the public agency] or engage in unreasonable actions, hearing officers and courts may reduce or deny reimbursement to parents for unilateral private placements." S. Rep. No. 105-17, at 12 (1997); H.R. Rep. No. 105-95, at 92 (1997).

At the same time, Congress enacted other provisions to deter and sanction frivolous claims by parents and to encourage reasonable settlements. *See* 20 U.S.C. §§ 1415(i)(3)(D) & (F), (i)(3)(B)(i)(II) & (III). These generally applicable provisions further the interests identified by petitioner and its *amici* without absolutely depriving a class of children with disabilities the equitable remedy that this Court has twice recognized as essential to the purposes of the IDEA.

CONCLUSION

For the reasons set forth above and in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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