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 UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits an award of private school tuition reimbursement when a child with a disability has been denied a free appropriate public education but the child has not "previously received special education and related services under the authority of a public agency." 20 U.S.C. 1412(a)(10)(C)(ii).

INTEREST OF THE UNITED STATES

This case concerns whether the parents of a child with a disability who has not "previously received special education and related services under the authority of a public agency" (20 U.S.C. 1412(a)(10)(C)(ii)) are eligible under the Individuals with Disabilities Education Act of 2004 (IDEA or Act) for an award of private school tuition reimbursement when a court determines that the child has been denied a free appropriate public education and that such reimbursement is appropriate. The Department of Education administers IDEA and has authority to promulgate regulations necessary to ensure compliance with the Act. See 20 U.S.C. 1406. The Department has taken the position in commentary accompanying final regulations that IDEA authorizes an award of tuition reimbursement in such circumstances. 71 Fed. Reg. 46,599 (2006); 64 Fed. Reg. 12,602 (1999). The United States therefore has a substantial interest in the question presented.

STATEMENT

1. IDEA provides federal grants to States for assistance in the education of children with disabilities and conditions such funding upon a State's compliance with extensive goals and procedures.[1] The Act requires recipients of federal funding "to ensure that all children with disabilities have available to them a free appropriate public education," 20 U.S.C. 1400(d)(1)(A), including the special-education services necessary to meet the particular needs of each child with a disability. See 20 U.S.C. 1412(a)(4); see also 20 U.S.C. 1412(a)(5); see generally *Board of Educ.* v. *Rowley*, 458 U.S. 176, 200-203 (1982). The Act requires States to provide a free appropriate

[1] Congress reauthorized and amended IDEA in 2004. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (20 U.S.C. 1400 *et seq.*). Unless otherwise indicated, citations are to the statute as amended in 2004.

public education "to all children with disabilities residing in the State between the ages of 3 and 21, inclusive," 20 U.S.C. 1412(a)(1)(A), subject to only two limitations relating to special state rules "respecting the provision of public education to children" ages "3 through 5 and 18 through 21," 20 U.S.C. 1412(a)(1)(B)(i), and to incarcerated persons aged 18 through 21, 20 U.S.C. 1412(a)(1)(B)(ii).

The Act specifies that the special education services must be "provided at public expense," 20 U.S.C. 1401(9)(A), and "at no cost to parents," 20 U.S.C. 1401(29). The Act "contemplates that [special] education will be provided where possible in regular public schools, * * * but * * * in private schools at public expense where this is not possible." *School Comm. of the Town of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985) (*Burlington*). The Act also contains a "[c]hild find" provision that requires States to ensure that "[a]ll children with disabilities residing in the State, including * * * children with disabilities attending private schools," are "identified, located, and evaluated." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii).

The Act specifies that a local school district need not pay the cost of private education of a child with a disability "if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. 1412(a)(10)(C)(i). The Act also states that a court or hearing officer may require a state agency to reimburse parents for the cost of private school for a child with a disability, "who previously received special education and related services under the authority of a public agency," if "the court or hearing officer finds that the agency had not made a free appropriate public education available to the child." 20 U.S.C. 1412(a)(10)(C)(ii). The Act further provides that in an action brought under IDEA a court "shall grant such relief as the court determines is appro-

priate," 20 U.S.C. 1415(i)(2)(C)(iii), including—this Court has held—private school tuition reimbursement in the case of a child with a disability who was denied a free appropriate public education. *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15-16 (1993); *Burlington*, 471 U.S. at 369-371.

IDEA affords parents an array of procedural safeguards. See 20 U.S.C. 1414, 1415; see also *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000-2002 (2007). The Act requires local school systems to develop an individualized education program (IEP) for each child with a disability in consultation with parents and in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4), 1414(d). If parents are not satisfied with an IEP, they may file a complaint with the State or local educational agency "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," 20 U.S.C. 1415(b)(6)(A), and obtain "an impartial due process hearing," 20 U.S.C. 1415(f)(1)(A). Any party aggrieved by a decision at the final administrative stage may "bring a civil action" in federal district court or state court of competent jurisdiction. 20 U.S.C. 1415(i)(1) and (2)(A).

2. This case arises out of a complaint filed under IDEA by respondent Tom F., the father of Gilbert F., a child with a disability, against petitioner, arguing that Gilbert had been denied a free appropriate public education and seeking private school tuition reimbursement. In the fall of 1995, respondent enrolled Gilbert in kindergarten at the Stephen Gaynor School (Gaynor), a private school that specializes in educating children with learning disabilities. Pet. App. A1-A2; J.A. 66a-67a. In 1996, respondent invoked Gilbert's right under IDEA to receive special education services from petitioner by requesting that Gilbert be evaluated and provided with an IEP. Pet. 2. Petitioner evaluated Gilbert and classified him as learning disabled. J.A. 67a. In 1997 and 1998, petitioner en-

tered into two agreements, titled Stipulation of Settlement and Discontinuance, to pay Gilbert's tuition at Gaynor for each of those years. Pet. Br. 7; C.A. App. 5-11, 14-20.

Petitioner scheduled a meeting of the Committee on Special Education (CSE) for May 28, 1999, to review Gilbert's IEP and recommend an appropriate placement for him for the upcoming 1999-2000 school year. J.A. 45a. Because a parent was unable to attend the meeting on that date, it was postponed and reconvened on June 23, 1999. No one from Gaynor was able to attend the rescheduled meeting, including Gilbert's special education teacher. J.A. 46a, 52a, 70a. On July 29, 1999, roughly a month before the beginning of the new school year, petitioner mailed respondent notice that petitioner recommended that Gilbert be placed in a special education classroom in a public school, the New York City Lower Lab School for Gifted Education, for the upcoming school year. J.A. 46a. Respondent disagreed with the proposed placement and kept Gilbert at Gaynor. *Ibid.*

3. Respondent sought administrative review of petitioner's recommendation and reimbursement for Gilbert's tuition at Gaynor for the 1999-2000 school year. J.A. 19a. On April 6, 2001, following hearings, an impartial hearing officer issued a decision granting respondent's request for reimbursement. J.A. 19a-36a. The hearing officer found that petitioner had failed to offer Gilbert an educational program that met his needs, that Gaynor was an appropriate program for Gilbert, and that respondent "did everything asked of him * * * in regard to this matter." J.A. 34a-35a. Petitioner appealed and a state review officer affirmed those findings, concluded that respondent was entitled to tuition reimbursement, and dismissed the appeal. J.A. 66a-76a.

4. Petitioner brought an action in the United States District Court for the Southern District of New York challenging the State's administrative decision. Pet. 9. On January 3,

2005, the district court granted petitioner's motion for summary judgment. Pet. App. A1-A13. Pointing to Section 1412(a)(10)(C)(ii) of IDEA, the district court ruled "that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of a child in private school." *Id.* at A8. Because the district court viewed Section 1412(a)(10)(C)(ii) as a categorical bar to reimbursement, it did not consider the administrative finding that Gilbert was denied a free appropriate public education.

5. On August 9, 2006, the court of appeals vacated the district court's judgment and remanded the case for further proceedings in light of *Frank G.* v. *Board of Educ.*, 459 F.3d 356 (2d Cir.), petition for cert. pending, No. 06-580 (filed Oct. 23, 2006). In *Frank G.*, the Second Circuit held that IDEA does not "establish a threshold requirement that a disabled child must have previously received public special education and related services in order to be eligible for reimbursement" for the cost of private school. J.A. 85a.

The court of appeals explained in *Frank G.* that Section 1412(a)(10)(C)(ii) "does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services." J.A. 97a. The court further reasoned that reading that language into Section 1412(a)(10)(C)(ii) would conflict with other provisions of the Act, including the Act's broad equitable relief provision, J.A. 98a-100a, and lead to the "untenable" result that parents would have "to jeopardize their child's health and education in this manner in order to qualify for * * * reimbursement." J.A. 106a.

SUMMARY OF ARGUMENT

When a child with a disability has been denied a free appropriate public education, IDEA authorizes an award of private school tuition reimbursement regardless of whether the child previously received public special education services.

The centerpiece of IDEA is its guarantee of a free appropriate public education for "all children with disabilities." 20 U.S.C. 1412(a)(1)(A). As this Court has twice unanimously held, IDEA's broad "appropriate" relief provision—which directs a court to "grant such relief as [it] determines is appropriate," 20 U.S.C. 1415(i)(2)(C)(iii)—authorizes a court to award private school tuition reimbursement to the parents of a child with a disability who unilaterally place their child in a private school pending a proceeding in which they prove that a proposed IEP was inadequate. *Carter*, 510 U.S. at 15-16; *Burlington*, 471 U.S. at 369. A contrary conclusion, the Court has explained, would require parents to "go along with the [proposed] IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement," and that, in turn, would deprive parents and children with disabilities of the Act's central guarantee of a "*free* appropriate public education." *Id.* at 370.

Section 1412(a)(10)(C)(ii), which was enacted as part of the 1997 amendments to IDEA, addresses the most common situation in which private school tuition reimbursement is sought —*i.e.*, with respect to children with disabilities who previously received public special education services. The provision, however, neither explicitly nor impliedly eliminates the preexisting reimbursement remedy for parents of a child who, for whatever reason, has not previously received public special education services. To the contrary, the language of Section 1412(a)(10)(C)(ii) is permissive, rather than restrictive, and it does not place any limit on the authority of a court to grant appropriate relief in other circumstances. Moreover, reading

Section 1412(a)(10)(C)(ii) to have that effect would contradict the Act's express guarantee of a free appropriate public education to "*all* children with disabilities"; conflict with other provisions of the Act that confirm that the State's obligation to provide a free appropriate public education is not dependent on a child's previous receipt of public special education services; and produce absurd results.

Reading the permissive language of Section 1412(a)(10)(C)(ii) to eliminate pre-existing equitable authority in other circumstances also would flout the presumption against implied repeals. Petitioner attempts to overcome that presumption by arguing that Section 1412(a)(10)(C)(ii) would be rendered superfluous if the Act's "appropriate" relief provision is read to continue to permit parents in respondent's shoes to seek reimbursement. That effort should be rejected. Section 1412(a)(10)(C)(ii) is not superfluous because it addresses the most common situation in which reimbursement is sought. Moreover, reading Section 1412(a)(10)(C)(ii) to establish a non-exclusive reimbursement remedy is consistent with the immediately preceding subsection (Section 1412(a)(10)(C)(i)), which establishes a general rule that reimbursement is not available when a public agency has made available a free appropriate public education. In addition, that reading is necessary to give effect to other provisions of the Act—including the Act's express guarantee of a free appropriate public education for "all children with disabilities" (20 U.S.C. 1412(a)(1)(A))—and to avoid leaving parents in respondent's shoes without a remedy in the absence of evidence that Congress clearly intended that result.

Taking the Act as a whole and applying settled canons of construction leads to the conclusion that private school tuition reimbursement may be awarded in the circumstances here. However, to the extent that the Court concludes that IDEA is ambiguous on the question presented, it should defer to the

Department's interpretation of the Act. In 1999 and 2006, the Secretary of Education (Secretary), following notice-and-comment rule-making, issued comments accompanying final regulations implementing IDEA providing that the authority to award reimbursement under the Act's "appropriate" relief provision is "independent of" the authority to award reimbursement under Section 1412(a)(10)(C)(ii) and that reimbursement is therefore available in the circumstances here. That interpretation is entitled to deference.

The Spending Clause (U.S. Const. Art. I § 8, Cl.1) does not compel a different conclusion. First, because petitioner did not invoke the Spending Clause below, this Court should not entertain its efforts to do so now. Second, consistent with this Court's recent decision in *Winkelman*, 127 S. Ct. at 2006, a determination that parents are eligible for reimbursement regardless of whether their child has previously received public special education does not require special notice, because such a determination does not expand States' substantive obligations to provide a free appropriate publi c education for "all children with disabilities." 20 U.S.C. 1412(a)(1)(A). Third, and in any event, IDEA, this Court's precedents, and the Secretary's formal interpretation of the 1997 amendments have provided the States with any requisite notice. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 182-184 (2005).

ARGUMENT

PRIVATE SCHOOL TUITION REIMBURSEMENT MAY BE AWARDED TO THE PARENTS OF A CHILD WHO HAS NOT PREVIOUSLY RECEIVED PUBLIC SPECIAL EDUCATION SERVICES WHEN THE CHILD HAS BEEN DENIED A FREE APPROPRIATE PUBLIC EDUCATION

Under IDEA, "all children with disabilities"—regardless of whether they are enrolled in public or private school—enjoy the right to a free appropriate public education.

20 U.S.C. 1412(a)(1)(A). The remedial question presented in this case arises only after a finding has been made that a child with a disability has been denied a free appropriate public education. Petitioner contends that IDEA provides no authority to award private school tuition reimbursement to such a child if the child did not previously receive public special education. That position is contradicted by the text of IDEA, this Court's precedent, and the formal interpretation of the agency charged with implementing IDEA. Although a court has discretion to withhold such an award based on equitable considerations in any given case, Congress has nevertheless authorized the award of private school tuition reimbursement to the parents of a child who has been denied a free appropriate public education, including a child who has not previously received public special education services.[2]

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[2] Although this brief addresses the question presented by petitioner, the government's view is that the factual premise of that question is unsound, because Gilbert has "previously received special education and related services under the authority of a public agency" (20 U.S.C. 1412(a)(10)(C)(ii)). After receiving testing and evaluation services provided by petitioner, Gilbert was enrolled in a school that provides special education services and petitioner agreed to reimburse respondent up to $18,000 for tuition costs to attend that school during the 1997-1998 and 1998-1999 school years, provided that respondent complied with certain conditions. See C.A. App. 5, 14. The Stipulation of Settlement and Discontinuance (¶ 22) governing that arrangement provides that, "[e]xcept with respect to the enforcement of any of the matters stated herein, * * * [the] Stipulation shall not be admissible in, and is not related to, any other proceedings, litigation or settlement negotiations, whether between the parties or otherwise." C.A. App. 10, 19. That provision, however, does not alter the fact that Gilbert has received special education services under the authority of petitioner and subject to conditions imposed by petitioner. Because the premise of the question presented is unsound, the Court may wish to dismiss the writ as improvidently granted. In the alternative, the Court may wish to affirm on the alternative ground that Gilbert did previously receive special education services authorized by petitioner, or permit the courts to consider that issue on remand.

A. IDEA Explicitly Guarantees A Free Appropriate Public Education To "All Children With Disabilities"

IDEA was enacted "to ensure that *all* children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. 1400(d)(1)(A) (emphasis added). To that end, IDEA specifies that a State must make a free appropriate public education available to "all children with disabilities residing in the State between the ages of 3 and 21, inclusive." 20 U.S.C. 1412(a)(1)(A). Congress set out only two "[l]imitation[s]" on that obligation, one relating to children "aged 3 through 5 and 18 through 21" where the obligation would conflict with State law or practice, 20 U.S.C. 1412(a)(1)(B)(i), and the other relating to incarcerated persons, 20 U.S.C. 1412(a)(1)(B)(ii). Neither of those limitations is implicated in this case.

To carry out its mandate, IDEA directs States to identify and evaluate "[a]ll children with disabilities residing in the State, including * * * children with disabilities attending private schools." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii). IDEA also "requires school districts to develop an IEP for each child with a disability," *Winkelman*, 127 S. Ct. at 2000, who seeks a free appropriate public education, including children who currently attend private schools when their parents request an IEP. IDEA contains detailed provisions governing the substantive criteria for an IEP, 20 U.S.C. 1414, as well as procedural safeguards, 20 U.S.C. 1415. IDEA grants parents the right to challenge a school district's proposed IEP in an "impartial due process hearing" before the state or local educational agency, 20 U.S.C. 1415(f)(1), and

to file a civil action in the event of an adverse administrative outcome, 20 U.S.C. 1415(i)(2)(A).[3]

B. As This Court Has Held, IDEA's "Appropriate" Relief Provision Authorizes Tuition Reimbursement For Children Denied A Free Appropriate Public Education

Since its enactment in 1975, IDEA has provided that in a civil action such as this one brought under the Act, a court "shall grant such relief as [it] determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii). Although IDEA has been comprehensively amended on several occasions by Congress over the 30-plus years since its enactment, that language has remained essentially unchanged. This Court has twice unanimously affirmed that the broad scope of that language authorizes 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." *Burlington*, 471 U.S. at 369; see *Carter*, 510 U.S. at 15-16.

In *Burlington*, the parent of a child with disabilities (Michael) unilaterally enrolled Michael in a private school after determining that the Town of Burlington's proposed placement for fourth grade was inappropriate and in light of Mi-

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[3] While all children with disabilities are protected by IDEA, children who are voluntarily enrolled in private school—and who are not seeking a free appropriate public education—have no "individualized right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. 300.454(a). As to those children, a State's obligation to pay for special education services is based on a formula tied to the amount of federal funds the school district receives under IDEA and the number of private school students in the district. 20 U.S.C. 1412(a)(10)(A)(i)(I)-(II); 34 C.F.R. 300.453. But that limitation does not apply to private school children who, like Gilbert, seek a free appropriate public education from a public agency (*i.e.*, a proposed IEP that would permit them to obtain public special education services), or who are placed in private school by a public agency.

chael's poor performance in public school under an IEP for third grade. After an administrative officer and a court had found that the proposed IEP for Michael was inappropriate, the parent obtained reimbursement for Michael's private school tuition. In a unanimous decision written by then-Justice Rehnquist, this Court held that IDEA's "appropriate" relief provision authorized a court to award such tuition reimbursement. *Burlington*, 471 U.S. at 370.

In reaching that result, the Court explained that absent such a remedy, "the child's right to a *free* appropriate public education * * * would be less than complete," *Burlington*, 471 U.S. at 370, and that "Congress undoubtedly did not intend this result," *ibid.* Moreover, the Court emphatically rejected the notion that IDEA posed a cruel choice to parents of children with disabilities of "go[ing] along with the IEP to the detriment of their child if it turns out to be inappropriate or pay[ing] for what they consider to be the appropriate placement." *Ibid.*[4] At the same time, however, the Court stressed that parents who unilaterally place their children in private school during a pending challenge to a proposed IEP "do so at their own financial risk." *Id.* at 373-374.

Eight years later, in *Carter*, *supra*, the Court unanimously reaffirmed *Burlington* and held that "a court may order reimbursement for parents who unilaterally withdraw their child

[4] The Court similarly rejected the Town's contention that the parent waived any right to reimbursement by violating a stay-put provision calling for the child to "remain in the then current educational placement" while administrative proceedings were pending. *Burlington*, 471 U.S. at 371 (citing 20 U.S.C. 1415(e)(3)). The Court explained that applying the stay-put provision under these circumstances would compel parents to "leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement." *Id.* at 372. That is unacceptable because "[t]he Act was intended to give handicapped children *both* an appropriate education and a free one," and the Court refused to read the statute "to defeat one or the other of those objectives." *Ibid.* (emphasis added).

from a public school that provides an inappropriate education under IDEA." *Carter*, 510 U.S. at 9. There, the parents of a disabled child (Shannon) removed Shannon from a public school and enrolled her in private school for the tenth grade because they were dissatisfied with the school district's IEP, which had been implemented when Shannon was in ninth grade for the last month of the school year. See *Carter* v. *Florence County Sch. Dist.*, 950 F.2d 156, 159 (4th Cir. 1991). The Court authorized tuition reimbursement even though the private school where Shannon was enrolled did not meet state education standards, explaining that construing IDEA "to bar reimbursement in the circumstances of this case would defeat th[e] statutory purpose" to "ensure that children with disabilities receive an education that is both appropriate and free." *Carter*, 510 U.S. at 13-14.

The Court dismissed the school district's concerns about the financial burden of allowing reimbursement in these circumstances. *Carter*, 510 U.S. at 15-16. The Court pointed out that the financial burden could be avoided entirely by "giv[ing] the child a free appropriate public education in a public setting, or plac[ing] the child in an appropriate private setting of the State's choice." *Id.* at 15. "This is IDEA's mandate," the Court explained, "and school officials who conform to it need not worry about reimbursement claims." *Ibid.* The Court further observed that parents such as Shannon's who unilaterally change their child's placement "do so at their own financial risk" because they may obtain 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." *Ibid.*

Burlington and *Carter* underscore that IDEA's broad remedial provision (Section 1415(i)(2)(C)(iii))—and its reimbursement component—are integral to ensuring that eligible children receive a public education that is *both* free *and* ap-

propriate. Although *Burlington* and *Carter* both involved children with disabilities who had received some public special education services before their parents became dissatisifed and opted for private school (in *Carter*, the services were for only one month), neither decision suggests that a child's receipt of such services is relevant to the reimbursement determination, much less constitutes a threshold condition for reimbursement. Accordingly, in the wake of *Burlington*, lower courts routinely awarded reimbursement to parents of children who had not previously received public special education services as long as they established that their child was denied a free appropriate public education and that the private placement was appropriate.[5]

C. Section 1412(a)(10)(C)(ii) Does Not Deprive A Court Of Its Authority To Grant Tuition Reimbursement In Circumstances Not Described In That Provision

In 1997, following two years of hearings, Congress amended IDEA. Although Congress—which is presumed to be aware of this Court's decisions—left the Act's "appropriate" relief provision unchanged, it added a new provision (Section 1412(a)(10)(C)) addressing the payment for education of children with disabilities enrolled in private schools. According to petitioner (Br. 21), the "clear meaning of the plain language of [Section] 1412(a)(10)(C)(ii) is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from the parents unilateral placement of the

[5] See, *e.g.*, *Gadsby* v. *Grasmick*, 109 F.3d 940 (4th Cir. 1997); *Seattle Sch. Dist. No. 1* v. *B.S.*, 82 F.3d 1493 (9th Cir. 1996); *Mary P.* v. *Illinois State Bd. of Educ.*, 919 F. Supp. 1173 (N.D. Ill. 1996); *Ivan P.* v. *Westport Bd. of Educ.*, 865 F. Supp. 74 (D. Conn. 1994), aff'd, 101 F.3d 686 (2d Cir. 1996) (Table); *Edwards-White* v. *District of Columbia*, 785 F. Supp. 1022 (D.D.C. 1992); *Shirk* v. *District of Columbia*, 756 F. Supp. 31 (D.D.C. 1991); *Lapides* v. *Coto*, 559 Educ. Handicapped L. Rep. 387 (Jan. 4, 1988).

child in private school." Neither Section 1412(a)(10)(C)(ii) nor the Act as a whole supports that argument.

Petitioner's interpretation is contradicted by the text of Section 1412(a)(10)(C)(ii) and its surrounding provisions. Far from speaking in restrictive terms, Section 1412(a)(10)(C)(ii) is phrased in *permissive* terms. It provides that if "parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child" in private school without the consent or referral by the public agency, "a court or hearing officer *may* require the agency to reimburse the parents for the cost of that enrollment if * * * the agency had not made a free appropriate public education available to the child in a timely manner." (emphasis added). The provision does not say that a court may *only* grant such relief in those circumstances and it does not say that a court may *not* grant such relief in other circumstances. Petitioner's interpretation therefore requires the Court to insert limiting language into Section 1412(a)(10)(C)(ii) that Congress did not. Cf. *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687 (1962) ("[W]e are not at liberty, * * * to add to or alter the words employed to effect a purpose which does not appear on the face of the statute.").[6]

Furthermore, the critical phrase on which petitioner relies—"who previously received special education and related services under the authority of a public agency,"—is a dependent clause that operates in a descriptive rather than

[6] Because Section 1412(a)(10)(C)(ii) does not expressly (or impliedly) limit the authority to grant reimbursement in circumstances other than those described in the section, the "specific governs over the general" canon of construction does not help petitioner. As this Court has explained, that canon operates "as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996). Here, as in *Varity*, giving effect to IDEA's "appropriate" relief provision to a parent in respondent's shoes would not undermine any "limitation" described in Section 1412(a)(10)(C)(ii).

conditional manner. That usage accords with the most plausible explanation for the phrase: Congress was simply codifying the reimbursement remedy in the most common situation in which that remedy had been sought (including in *Burlington* and *Carter*). But the fact that Congress used such descriptive language, especially when coupled with the permissive "may require" language just discussed, refutes petitioner's argument that Congress intended the phrase to divest the pre-existing authority under Section 1415(i)(2)(C)(iii) to grant reimbursement when a child did not previously receive such services.

Especially in light of *Burlington* and the broad statutory authorizations for equitable relief to ensure a free *and* appropriate education, what petitioner's argument needs is not limited language of authorization, such as that in Section 1412(a)(10)(C)(ii), but language that expressly negates the availability of tuition reimbursement in the circumstances of this case. The absence of any relevant limiting language is underscored by the fact that the statute expressly precludes tuition reimbursement in circumstances *not* present here.

The immediately preceding subsection of the statute—titled "In general"—reaffirms (as noted in *Burlington* and *Carter*) that a public agency may not be required to reimburse the cost of private school tuition "of a child with a disability at a private school * * * if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school." 20 U.S.C. 1412(a)(10)(C)(i). That subsection, unlike the one on which petitioner relies, is both expressly limiting and expressly conditional. It underscores that parents who opt for private school bear the risk if an adjudicator determines that the proposed IEP was adequate. Nothing in that subsection remotely suggests that public agencies may also avoid such reimbursement when they have *denied* a child with a disability

a free appropriate public education, as long as the child has not previously received public special education.

It is also noteworthy that despite numerous hearings and debates on the 1997 amendments, there is no concrete evidence in the legislative record that Congress intended to cut back on the Act's "appropriate" relief provision or that Congress disagreed with the rationale of *Burlington* or *Carter*. Cf. *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63 (2004). Indeed, "[n]o one at the time—no Member of Congress, no Department of Education official, no school district or State—expressed th[at] view." *Zuni Pub. Sch. Dist. No. 89* v. *Department of Educ.*, 127 S. Ct. 1534, 1541 (2007). The fact that there is no evidence that Congress sought to eliminate the authority to grant private tuition reimbursement when a child with a disability has been denied an appropriate placement bolsters the conclusion that Congress was simply providing more concrete guidance in the most typical situation in which reimbursement is sought and not, as petitioner contends, scaling back the Act's substantive protections.[7]

D. Petitioner's Reading Works An Implied Repeal

After *Burlington* and *Carter* and before the 1997 amendments to IDEA, it was clear that parents in respondent's circumstances were entitled to reimbursement. The burden of petitioner's argument, therefore, is that Section 1412(a)(10)(C)(ii)'s reference to "parents of a child * * *

[7] Section 1412(a)(10)(C)(iii) does authorize a court to "reduc[e] or den[y]" the "cost of reimbursement described in clause (ii)." But even that provision is phrased in permissive rather than mandatory terms. In addition, while Section 1412(a)(10)(C)(iii) by virtue of its cross-reference to subsection (ii) does not apply to the situation where a parent is seeking reimbursement with respect to a child who has not previously received public special education services, a court would retain the authority to reduce or deny such an award for any equitable reason and presumably would look to Section 1412(a)(10)(C)(iii) in determining what relief was "appropriate." See *Varity*, 516 U.S. at 515.

who previously received" public special education services effectively repealed that pre-existing right to seek tuition reimbursement. This Court has repeatedly held that "'repeals by implication are not favored' and will not be presumed unless the legislature's intention 'to repeal [is] clear and manifest.'" *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2522 (2007) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981)). As this Court has emphasized, "[a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)). Neither of those conditions is satisfied here.

Giving effect to this Court's interpretation of IDEA's "appropriate" relief provision (Section 1415(i)(2)(C)(iii)) creates no "irreconcilable conflict" with Section 1412(a)(10)(C)(ii). As discussed, Section 1412(a)(10)(C)(ii) is phrased in permissive terms and addresses the most common situation in which reimbursement claims have arisen. Recognizing that courts retain their authority under Section 1415(i)(2)(C)(iii) to grant reimbursement to parents in respondent's shoes does not in any way conflict with Section 1412(a)(10)(C)(ii). Likewise, Section 1412(a)(10)(C)(ii) does not "cover[] the whole subject" addressed by the "appropriate" relief provision; by its terms, it addresses only a particular fact pattern. In addition, as discussed in the preceding section, there is no basis for concluding that Section 1412(a)(10)(C)(ii) was intended, much less "clearly intended," to operate as a "substitute" for the Act's "appropriate" relief provision in situations where a child has not previously received public special education services.

Petitioner's argument is essentially that if Section 1412(a)(10)(C)(ii) is not read to work an implied repeal, it will be rendered superfluous. But express grants of authority

that may not be statutorily necessary are commonplace and such belt-and-suspenders provisions are not remotely sufficient to work an implied repeal. Moreover, petitioner overstates its argument in contending that anything but its implied repeal theory would render Section 1412(a)(10)(C)(ii) a "nullity." (Br. 21). As this Court has explained, "[s]tatutory provisions may simply codify existing rights or powers." *Mallard* v. *United States Dist. Ct.*, 490 U.S. 296, 307 (1989). Here, Section 1412(a)(10)(C)(ii) codifies the right to pursue reimbursement for the most common situation, presented in both *Burlington* and *Carter,* in which a reimbursement right arises. Moreover, Congress not only codified that right, but also established criteria that a court "may" consider in deciding whether to reduce or deny reimbursement. 20 U.S.C. 1412(a)(10)(C)(iii). In short, Section 1412(a)(10)(C)(ii) does not "*sub silentio* or by implication bar parents from seeking to vindicate" (*Winkelman,* 127 S. Ct. at 2002) the right to reimbursement embodied in Section 1415(i)(2)(C)(iii). [8]

E. Petitioner's Reading Conflicts With Key Provisions Of IDEA And Its Structure

Petitioner's interpretation of Section 1412(a)(10)(C)(ii) also cannot be squared with other provisions of IDEA. "[A] proper interpretation of [IDEA] requires a consideration of the entire statutory scheme." *Winkelman*, 127 S. Ct. at 2000. Viewed as a whole, IDEA provides for reimbursement of private school tuition incurred by the parent of a disabled child who has been denied a free appropriate public education

[8] To the extent that there is some redundancy between the relief available under Section 1412(a)(10)(C)(ii) and that under Section 1415(i)(2)(C)(iii), that is not problematic or unusual. As this Court has explained, "[r]edundancies across statutes are not unusual events in drafting," and courts should give effect to all provisions absent a "positive repugnancy." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (internal quotation marks omitted).

whether or not the child previously received public special education services.

First, and most fundamentally, petitioner's reading conflicts with IDEA's central guarantee of providing a free appropriate education to "*all* children with disabilities." 20 U.S.C. 1412(a)(1)(A) (emphasis added). That guarantee is subject to only two limitations, see 20 U.S.C. 1412(a)(1)(B), neither of which is implicated here. As this Court recognized in *Burlington*, denying tuition reimbursement to the parents of a child who was unilaterally enrolled in private school because of the parents' concerns over a proposed IEP that they subsequently prove to be inadequate would render "the child's right to a *free* appropriate public education * * * less than complete." *Burlington*, 471 U.S. at 370; see *id.* at 372 (explaining that forcing parents to subject a child with a disability to what they believe is an inappropriate placement or obtaining an appropriate placement only at the expense of "sacrificing any claim for reimbursement" would deny parents the Act's right to "both an appropriate education and a free one").

This Court recently observed that it found "nothing in [IDEA] to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some parents would be able to enforce that mandate." *Winkelman*, 127 S. Ct. at 2005 (quoting 20 U.S.C. 1401(29)). This Court refused to adopt a reading of the statute that would "leave[] some parents without a remedy," *ibid.*, but petitioner's reading of Section 1412(a)(10)(C)(ii) would do just that by depriving one class of parents of a reimbursement remedy (*viz.*, the parents of children who have not previously received public special education services), even though a court has found that their child was denied a free appropriate public education. There is no reason to conclude

that Congress sought to relegate parents in respondent's shoes, or their children, to such a second-class status.[9]

Petitioner's position works a hardship not only on parents of children enrolled in private school (who enjoy the Act's protections), but also on parents of children enrolled in public school. Under petitioner's view, the parents of a child with a disability who is enrolled in public school would forfeit the opportunity to seek tuition reimbursement if they believe that a proposed initial IEP is inadequate and unilaterally place their child in private school to obtain the services that they believe are appropriate pending a successful challenge to the IEP. That is particularly true where, as was the case here, the IEP at issue was proposed over the summer and the parents must make a choice where to enroll their child for the upcoming school year. Moreover, petitioner's position imposes a potential hardship on all children who enter the special education system—whether enrolled in public or private school—because there is always some point at which a child has not previously received public special education services.[10]

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[9] Of course, parents must still comply with other statutory requirements, including those governing the IEP process, before they may seek relief. At no stage of the process, however, is any talismanic significance placed on whether the child previously received public special education services. Petitioner's effort to insert that precondition at the remedy stage, once a violation has been established, is both at odds with the statutory structure and sound policy, which is why it has been rejected by Congress and the Secretary. See Part G, *infra*.

[10] A child may receive "special education" or "related services" covered by the Act whether enrolled in public or private school. 20 U.S.C. 1401(26) and (29). As a result, petitioner's position potentially penalizes all children entering the special education system. IDEA's infants and toddlers program does not eliminate that problem. See 20 U.S.C. 1431 *et seq*. In many cases, children with disabilities are not evaluated, identified, and offered special education and related services until after they begin kindergarten. Moreover, even as to infants and toddlers, petitioner's position requires parents to forfeit reimburse-

Second, petitioner's reading is at odds with IDEA's child-find requirement. The Act does not treat previously unserved students as second-class citizens. To the contrary, the Act obligates States to identify, locate, and evaluate "[a]ll children with disabilities residing in the State, including children with disabilities * * * attending private schools." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii). The purpose of *finding* such previously unserved children is of course to ensure that the State *makes available* to them a free appropriate public education. Petitioner's interpretation would have the States seek such students out, but then deny them, in cases like this, a free appropriate public education by requiring parents to subject their child to demonstrably inadequate public special education services in order to be eligible for tuition reimbursement. In *Burlington*, this Court observed that subjecting parents to such a dilemma contravenes the Act's basic guarantees. 471 U.S. at 370.

Third, and more generally, petitioner's reading conflicts with the elaborate substantive and procedural requirements of IDEA that are geared towards ensuring that all children with disabilities actually receive a free appropriate public education, and that parents who believe that a proposed IEP is inappropriate have an opportunity to challenge that IEP and, when successful, obtain "appropriate" relief. See *Winkelman*, 127 S. Ct. at 2000-2002 (detailing parents rights); see also *Schaeffer* v. *Weast*, 546 U.S. 49, 51-53 (2005). That is because, under petitioner's position, a court may find that a child has been denied a free appropriate public education, but nonetheless lack the authority to grant the relief necessary to provide a free *and* appropriate education.

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ment for tuition-related services if they do not subject their child to public special education, even if a proposed plan is entirely inadequate. Cf. *M.M.* v. *School Bd.*, 437 F.3d 1085 (11th Cir. 2006).

F. Petitioner's Reading Contravenes The Express Purpose Of IDEA And Produces Absurd Results

Adopting petitioner's reading of Section 1412(a)(10)(C)(ii) also would frustrate the express purpose of IDEA—*i.e.*, "to ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. 1400(d)(1)(A). This Court has twice held that the remedy of reimbursement of private school tuition is essential to enforcing IDEA's requirement that all children with disabilities be provided an education that is both free *and* appropriate, and has instructed that IDEA "should not be interpreted to defeat [that] objective[]." *Burlington,* 471 U.S. at 372; see *Carter*, 510 U.S. at 14-15. Yet under petitioner's approach, the parents of a child who has not previously received public special education services are not entitled to tuition reimbursement, even when a proposed placement is inappropriate.

Indeed, when considered in light of IDEA's broader objectives, petitioner's reading of Section 1412(a)(10)(C)(ii) produces absurd results and should be rejected for that reason as well. See, *e.g.*, *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 509-511 (1989); *id.* at 527 (Scalia, J., concurring in the judgment); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); see also *Winkelman*, 127 S. Ct. at 2004 (interpreting IDEA to avoid "incongruous results"). Under petitioner's reading, parents of a child with a disability who believe—correctly—that a proposed IEP is inadequate must subject their child to the inappropriate program to qualify for reimbursement. One district court has suggested that the problem of having to place a disabled child in an inappropriate program could be alleviated by placing the child in that program for "as short a period as one day." *Baltimore City Bd. of Comm'rs* v. *Taylorch*, 395 F. Supp. 2d 246, 250 (D. Md. 2005).

But that holding only highlights the potential absurdities that flow from petitioner's position.[11]

Appropriate education during a child's formative years is absolutely critical to a child's development. Moving a child from one school to another itself can prove highly disruptive to a child on an educational as well as psychological level. That is true for any youth; it may be especially true for a child with a learning disability. It would be absurd to conclude that Congress created a regime whereby any parents, including those in respondent's shoes, would have to subject their child to a program that they believe would be to their child's detriment in order to qualify for tuition reimbursement if they prove that to be true. "The potential for injustice in this result is apparent." *Winkelman*, 127 S. Ct. at 2005.

Petitioner contends that this analysis is at odds with the rule that "an IEP may not be presumed to be invalid until the parent demonstrates otherwise." Br. 23 (citing *Schaffer*, *supra*). That is incorrect. As this Court has stressed, parents who unilaterally enroll their children in private schools pending a challenge to a proposed IEP "do so at their own financial risk." *Burlington*, 471 U.S. at 374; see *Carter*, 510 U.S. at 15. The remedial question presented by this case only arises once a parent has successfully carried his burden of proving that the proposed IEP was in fact inadequate.

Petitioner contends (Br. 34) that his reading is necessary to "control" costs. Congress, however, has made clear its policy of making a free appropriate education available to "all children with disabilities." 20 U.S.C. 1412(a)(1)(A). As this Court admonished in *Carter* in rejecting essentially the same

[11] Petitioner's reading also leads to the absurd result that reimbursement may be denied to parents of children with disabilities seeking public special education services when a State wrongly refuses to identify their child as disabled. See, *e.g.*, *Mary P.*, 919 F. Supp. at 1175, 1181 (ordering school district to reimburse parents of child with disability for cost of private speech therapy where school district "steadfastly denied [child's] eligibility for such services").

argument, "public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice." 510 U.S. at 15. And while Congress has indeed sought to control costs associated with IDEA and related litigation, see *Schaffer*, 546 U.S. at 58-59, there is no evidence that Congress sought to deny a complete remedy to parents who *prevail* in an action alleging the denial of a free appropriate public education.[12]

Petitioner contends (Br. 36) that his reading supports Congress's goal "to educate handicapped children with nonhandicapped children whenever possible." But this "mainstreaming" objective—embodied in the Act's "least restrictive environment" provision (20 U.S.C. 1412(a)(5)(A) (emphasis added))—by its terms applies to "children in public *or* private institutions." In other words, the Act's mainstreaming goal places a preference on educating children with disabilities in "regular classes," *ibid.*, and not on whether those classes take place in a public or private school. Moreover, that preference is not absolute and even petitioner's proposed placement did not call for Gilbert to be "mainstreamed." J.A. 34.

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[12] Petitioner's amici point to the costs of educating children with disabilities in private schools and the number of private placements. Only a tiny fraction (about 1.5%) of children with disabilities are educated in private school at public expense, that number has remained largely consistent since *Burlington* was decided, and the cost of educating those children in private schools constitutes an even tinier fraction (about 0.24%) of the overall costs of public education. See J. Greene and M. Winters, *Debunking a Special Education Myth*, Educ. Next, Spring 2007, at 68-70. Moreover, the "overwhelming majority" of these private placements were made by public agencies themselves. Br. for Nat'l School Boards Ass'n et al. 20. In any event, as discussed, there is no evidence that Congress sought to empower public agencies to "control" costs under IDEA by denying any child a free appropriate public education, including by proposing manifestly inadequate IEPs and thus discouraging parents from availing themselves of their right to a free *and* appropriate education.

Finally, petitioner suggests that parents will seek to manipulate the IEP process. Br. 9, 13. But as discussed, parents who unilaterally place their children in private school "do so at their own financial risk." *Carter*, 510 U.S. at 15 (quoting *Burlington*, 471 U.S. at 347). Moreover, even after a violation of IDEA is established, courts have broad "equitable" discretion in determining what relief is "appropriate," including "the appropriate and reasonable level of reimbursement that should be required" as well as the actions of parents. *Id.* at 15-16; see *Burlington*, 471 U.S. at 374; *id.* at 366-367. The hearing officer in this case found that respondent "did everything asked of him * * * in regard to this matter." J.A. 35.[13]

G. The Formal Position Of The Agency Charged With Implementing IDEA Is Entitled To Deference

For the reasons discussed above, IDEA authorizes tuition reimbursement to a parent in respondent's shoes. To the extent that the Court has any doubt as to that conclusion, however, it should defer to the Department's considered interpretation of the Act. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); *Defenders of Wildlife*, 127 S. Ct. at 2531-2533.

In commentary published in the *Federal Register* that accompanied the Department's final regulations implementing the 1997 Amendments to the Act, the Secretary directly addressed the question presented and stated:

> [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

[13] There is an additional practical check on abusive litigation in this context. As Justice Scalia recently explained, "[a]ctions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe that the FAPE was inadequate." *Winkelman*, 127 S. Ct. at 2011 (concurring in the judgment in part and dissenting in part).

> a [free appropriate public education], including reimbursement and compensatory services under section 615(*l*)(2)(B)(iii) [20 U.S.C. 1415(i)(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) [20 U.S.C. 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

64 Fed. Reg. at 12,602.

Likewise, in formal comments that followed notice-and-comment rule-making and that were published in the *Federal Register* with the Department's final regulations implementing the 2004 amendments to the Act, the Secretary stated:

> [W]e do not believe it is appropriate to include in these regulations a provision relieving a public agency of its obligation to provide tuition reimbursement for a unilateral placement in a private school if the child did not first receive special education and related services from the [local educational agency].
>
> This authority is independent of the court's or hearing officer's authority under section 612(a)(10)(C)(ii) [20 U.S.C. 1412(a)(10)(C)(ii)] of the Act to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

71 Fed. Reg. at 46,599.

That interpretation is entitled to deference. This Court has long recognized that official agency interpretations of a statute formally adopted pursuant to notice-and-comment rule-making, formal adjudication, or some other "relatively formal administrative procedure tending to foster * * * fairness and deliberation" are entitled to *Chevron* def-

erence. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001); see *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (extending deference to agency interpretation of its regulations contained in an "Advisory Memorandum" because the interpretation "reflects [the agency's] considered views"); *Whitman* v. *American Trucking Ass'ns,* 531 U.S. 457, 477-482 (2001) (applying *Chevron* to agency statements in explanatory preamble to final regulations).

In this case, the Secretary's commentary was the product of this formal process and was issued in connection with her authority to "issue regulations * * * that * * * are necessary to ensure that there is compliance with the specific requirements of this chapter." 20 U.S.C. 1406(a). As such, the Secretary's interpretation is entitled to *Chevron* deference so long as it is reasonable. For the reasons discussed above, the agency's interpretation is, at a minimum, reasonable.

H. *Pennhurst* Does Not Assist Petitioner

Petitioner contends for the first time before this Court (Br. 38-41) that it cannot be ordered to reimburse respondent because IDEA was enacted pursuant to Congress's spending authority, which requires Congress set out conditions to a State's acceptance of federal funds "unambiguously." *Pennhurst Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Because petitioner failed to invoke spending authority principles below, the Court should decline to consider that argument in the first instance. *United States* v. *United Foods*, *Inc.*, 533 U.S. 405, 417 (2001) (citation omitted).

In any event, petitioner's new-found interest in the Spending Clause (U.S. Const. Art. I., § 8, Cl. 1) is of no avail. This past Term, in *Winkelman*, the Court rejected the argument that *Pennhurst* principles required Congress to provide clear notice that IDEA conferred on parents independent rights. 127 S. Ct. at 2006. The Court explained that "[o]ur determination that IDEA grants to parents independent, enforceable

rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe." *Ibid.* Similarly here, IDEA unambiguously imposes on States the substantive obligation to provide a free appropriate public education to "all children with disabilities." 20 U.S.C. 1412(a)(1).[14]

Moreover, for the reasons discussed above, the text of IDEA, this Court's precedent, and formal interpretation of the Department published in the *Federal Register* put States on clear notice that reimbursement of private school tuition is available when a school district denies a child with a disability a free appropriate public education, regardless of whether the child previously received public special education services. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 182-184 (2005) (rejecting Spending Clause challenge to cause of action under Title IX where statute, case law, and federal regulations all provided requisite notice). Likewise, States have long been on notice that they can avoid such reimbursement simply by providing a free appropriate public education. What is sought here is not clear notice, but a windfall in the form of an exception to a long-recognized right to reimbursement under IDEA. Nothing in this Court's spending authority principles supports that result.[15]

[14] The appropriate measure of financial burden in this circumstance is the primary one of providing a free appropriate public education. See *Burlington*, 471 U.S. at 370-371 (holding that reimbursement of private school tuition is not "damages" but constitutes "expenses that [the State] should have paid all along and would have borne in the first instance had it developed a proper IEP"); *Carter*, 510 U.S. at 15 (explaining that school districts that "conform to [IDEA's mandate] need not worry about reimbursement claims").

[15] Petitioner's reliance on *Pennhurst* is unavailing for another reason. Under this Court's cases, "a recipient [of federal funding] may be held liable to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute." *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002). When a school district violates IDEA's guarantee of a free appropriate public education, it may thus be held liable to parents for reimbursement for "expenses that

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*, 471 U.S. at 370-371.

APPENDIX

1. 20 U.S.C. 1400 (Supp. IV 2004), provides in pertinent part:

Short title; findings; purposes

* * * * *

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

* * * * *

2. 20 U.S.C. 1401 (Supp. IV 2004), provides in pertinent part:

Definitions

Except as otherwise provided, in this chapter:

* * * * *

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

* * * * *

(26) Related services

(A) In general

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

* * * * *

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

* * * * *

3. 20 U.S.C. 1412 (Supp. IV 2004), provides in pertinent part:

State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children—

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order

of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility—

(I) were not actually identified as being a child with a disability under section 1401 of this title; or

(II) did not have an individualized education program under this subchapter.

* * * * *

(1) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

* * * * *

(10) Children in private schools

(A) Children enrolled in private schools by their parents

* * * * *

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

* * * * *

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school with-

out the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evalua-

tion; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by th

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

* * * * *

4. 20 U.S.C. 1415 (Supp. IV 2004), provides in pertinent part):

Procedural safeguards

* * * * *

(i) Administrative procedures

* * * * *

(2) Right to bring civil action

* * * * *

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * * * *