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## Cut and Run - Tuition Reimbursement and the 1997 IDEA Amendments

Brianna L. Lennon

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## NOTE

# Cut and Run? Tuition Reimbursement and the 1997 IDEA Amendments

*Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009).

BRIANNA L. LENNON\*

### I. INTRODUCTION

Special education advocates in the United States face financial and legal barriers everyday in their quest to uphold the rights of special needs children in public schools. Not until 1975, when Congress overhauled the nation's education law by creating the Education for All Handicapped Children Act (EHA),<sup>1</sup> did the government acknowledge discrimination against special needs students in the classroom. Fifteen years after its initial passage, the EHA was renamed the Individuals with Disabilities Education Act (IDEA) and has since been amended to expand financial and legal opportunities for disabled children.<sup>2</sup> The most significant change to IDEA occurred in 1997, when congressional evaluation of the law found that “[e]ducational achievement for children with disabilities, while improving, is still less than satisfactory.”<sup>3</sup>

This Note addresses the challenges that courts face in balancing the legislative purpose of IDEA with its practical application. At its core, IDEA was enacted to preserve the right of all children to a “free appropriate public education” (FAPE),<sup>4</sup> including special needs students who, under the law, have

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\* B.A., Truman State University, 2007; M.P.P., University of Missouri Truman School of Public Affairs, 2010; J.D. Candidate, University of Missouri School of Law, 2011. I am grateful to Professor Melody Daily, who provided vital feedback on drafts of this Note.

1. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

2. Education of the Handicapped Amendments of 1990, §§ 601(a), 901(a)(1)-(2), 104 Stat. 1103, 1141-42 (1990); S. REP. NO. 105-17, at 2 (1997).

3. S. REP. NO. 105-17, at 2.

4. A “free appropriate public education” is defined in IDEA as: 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

“the right to sit in the same classrooms, to learn the same skills, [and] to dream the same dreams as their fellow Americans.”<sup>5</sup> At the same time, IDEA and its amendments emphasize that “parents [need] a greater voice in their children’s education.”<sup>6</sup> These goals can create a disconnect between what schools *must* provide to special needs students and what parents *wish* schools would provide, and it is often up to the courts to strike a balance between the two.

The last in a series of three landmark decisions,<sup>7</sup> *Forest Grove School District v. T.A.* clearly shows that the U.S. Supreme Court favors the rights of parents of special needs children over the autonomy of schools.<sup>8</sup> Prior to *Forest Grove*, parents could recover tuition for private placements when their local school tried, and failed, to provide adequate services to their child.<sup>9</sup> However, in *Forest Grove*, the Court broadened that right considerably, holding that parents can now request reimbursement for private tuition even when the public school did not previously provide special education services to the student.<sup>10</sup>

Despite the clear win for parents, the Supreme Court did attempt to mollify the schools’ loss, noting that courts still must weigh the equities of a case before making a final determination on the total reimbursement due to the parents.<sup>11</sup> This caveat should – as it did in *Forest Grove* – prevent parents who refuse to cooperate with local school districts from demanding exorbitant tuition payments.<sup>12</sup> The Court’s dicta in support of schools, after a long discussion of parental rights, highlights the delicate balance that the Court faced in interpreting IDEA.

In addition to weighing the interests of schools and parents, IDEA also embraces special needs students’ placement in traditional classrooms. A primary impetus in passing the legislation was to integrate disabled children into

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

20 U.S.C. § 1401(9)(a)-(d) (2006).

5. Press Release, The White House, Office of the Press Sec’y, Remarks by the President at Signing Ceremony for the Individuals with Disabilities Education Act (June 4, 1997), available at <http://www2.ed.gov/policy/speced/leg/idea/speech-1.html>.

6. *Id.*

7. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009); *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993); *Sch. Comm. v. Dep’t. of Educ.*, 471 U.S. 359 (1985).

8. *Forest Grove*, 129 S. Ct. at 2492.

9. *Id.* at 2490-91.

10. *Id.* at 2496.

11. *Id.*

12. *Id.* at 2493; *Forest Grove Sch. Dist. v. T.A.*, 675 F. Supp. 2d 1063, 1068 (D. Or. 2009).

the classroom.<sup>13</sup> However, interpretations like *Forest Grove*, while giving parents greater control over their child's academics, may also promote re-segregation of disabled children by facilitating unilateral parental placements of children into private, special needs schools.<sup>14</sup> In that respect, the *Forest Grove* holding creates a confusing double standard: it prevents public school districts from removing children to special needs schools but allows parents, subsidized by public funds, to enroll their children in private placements without even attempting to avail themselves of their public schools' existing accommodations.

This Note explores the original purpose of IDEA and compares it to the Court's interpretation of the language, which emphasizes specific statutory requirements rather than the broad intent of the law. In addition, this Note reminds readers that even if the Supreme Court properly balances these intentions, the bulk of the authority in deciding parent-district disputes rests in the hands of federal district courts, which may have vastly different opinions about the equities of a case and the purpose of IDEA.

## II. FACTS AND HOLDING

Legal and political battles over public education involve a variety of issues, but none as compelling as special education. Since the passage of IDEA in 1970,<sup>15</sup> litigation has been used to clarify and bolster students' rights in obtaining a FAPE.<sup>16</sup> Though these fights are often between parents and their local schools, it is always the children who are affected by court rulings.

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13. Karen Patterson, *What Classroom Teachers Need to Know about IDEA '97*, 41 KAPPA DELTA PI REC. 62, 65 (2005) (IDEA amendments require that special needs students "be educated with children without disabilities to the maximum extent appropriate, and [they may] be removed to separate classes or schools *only* when the nature or severity of their disabilities is such that they cannot receive an appropriate education" without additional support).

14. Tamar Lewin, *Supreme Court to Address Meeting the Needs of Special-Education Students*, N.Y. TIMES, May 31, 2009, at A14, available at [http://www.nytimes.com/2009/05/31/education/31tuition.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2009/05/31/education/31tuition.html?_r=1&pagewanted=all) ("[I]ncreasingly, thousands of families unilaterally enroll their learning-disabled, emotionally disabled or autistic children in private schools – often with staggeringly high tuitions – and then seek reimbursement.").

15. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1409 (2005) (previously known as the Education for All Handicapped Children Act).

16. See e.g., *Cain v. Yukon Pub. Sch., Dist. I-27*, 775 F.2d 15 (10th Cir. 1985) (parents of mentally disabled student were not entitled to tuition reimbursement under IDEA); *Babb v. Knox County Sch. Sys.*, 965 F.2d 104 (6th Cir. 1992) (parents of a severely handicapped child were not entitled to tuition reimbursement for private placement under IDEA); *Foley v. Special Sch. Dist.*, 927 F. Supp. 1214 (E.D. Mo. 1996) (school district was not required by IDEA to provide services to student unilaterally placed at private school).

In 2009, the U.S. Supreme Court faced the most recent parental challenge to a public school in *Forest Grove School District v. T.A.*<sup>17</sup> T.A., a troubled student, attended school in the Forest Grove School District (the District) from kindergarten to eleventh grade.<sup>18</sup> Throughout his academic career, T.A. exhibited some attention and scholastic difficulties, but nonetheless completed his school work with his parents' assistance.<sup>19</sup> When he entered high school, T.A.'s difficulties worsened, but his level of achievement remained consistently better than a number of his peers.<sup>20</sup> Still, T.A.'s parents arranged for the District to evaluate him for learning disabilities, as his troubles both in the classroom and at home escalated.<sup>21</sup>

T.A.'s school counselor recommended a routine screening for special education, noting on the referral that T.A. had difficulties "missing assignments; not following verbal directions; talking; not following written directions; being easily distracted; having low test scores; not doing work or turning in work late; having a short attention span; and not doing much homework."<sup>22</sup> The multidisciplinary team assigned to T.A.'s referral noted that he possibly had attention deficit hyperactivity disorder (ADHD),<sup>23</sup> but the District's school psychologist, after extensive assessment of T.A., concluded that no further testing was necessary and that T.A. was not in need of special education services.<sup>24</sup> Two of the District's officials and the school psychologist

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17. 129 S. Ct. 2484 (2009).

18. *Id.* at 2488.

19. *Forest Grove Sch. Dist. v. T.A.*, 640 F. Supp. 2d 1320, 1321 (D. Or. 2005), *rev'd*, 523 F.3d 1078 (9th Cir. 2008), *aff'd*, 129 S. Ct. 2484 (2009). Throughout T.A.'s time in elementary and middle school, T.A.'s parents were intensively involved in his school work, helping T.A. complete his assignments every night and on weekends. *Id.* His parents also kept in close contact with his teachers, because they found that T.A. was often disorganized and would not turn in homework assignments. *Id.*

20. *Id.* at 1322. T.A. also began seeing a therapist, who diagnosed him with major depressive disorder. *Id.* at 1323-24.

21. *Forest Grove*, 129 S. Ct. at 2488.

22. *Forest Grove*, 640 F. Supp. 2d at 1322.

23. *Id.*

24. Joint Appendix at \*101-02, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305), 2009 WL 509582; *see also* Brief of Petitioner at \*9, *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (No. 08-305), 2009 WL 507022. The tests done were based on the referral and a medical report that noted only that T.A. required glasses. Brief of Petitioner, *supra*, at \*9. Indeed, after evaluating all of T.A.'s school records, "[t]he school psychologist did not feel that the difficulties indicated on the Referral triggered an evaluation for Attention Deficit Hyperactivity Disorder (ADHD). A formal observation of T.A. by [a] special education teacher . . . in the spring of 2001 showed that T.A. worked quietly and independently . . ." *Forest Grove*, 640 F. Supp. 2d at 1322.

discussed T.A.'s evaluation with his mother before the start of the new academic year, and she agreed that T.A. did not qualify for special education.<sup>25</sup>

T.A. successfully completed his sophomore year, but his parents sought alternative education during his junior year due to his increasingly erratic and drug-fueled behavior.<sup>26</sup> After taking T.A. to a private psychologist,<sup>27</sup> T.A.'s parents made arrangements to enroll him in a wilderness treatment facility for drug rehabilitation.<sup>28</sup> After meeting with the District's staff, T.A.'s parents agreed to register T.A. in a program with a local community college with the District's cooperation.<sup>29</sup> During and after this meeting, T.A.'s parents gave no indication that they disagreed with the District's assessment of T.A. or that they planned to place T.A. in a private school without the consent of the District.<sup>30</sup>

However, upon T.A.'s successful completion of the wilderness program, both the staff at the program and T.A.'s private psychologist recommended that T.A. attend a residential academy so that he could be emotionally and academically supported on a full-time basis.<sup>31</sup> The recommendation was based on the psychologist's finding that T.A. had ADHD, in addition to several other learning and behavioral disabilities.<sup>32</sup> The District was not informed of T.A.'s diagnosis or the new residential school plan and was under the impression that T.A. had been successfully enrolled in its program at the local community college.<sup>33</sup>

25. *Forest Grove*, 129 S. Ct. at 2488.

26. *Id.* T.A. began using marijuana at the end of his sophomore year, and by the fall of his junior year, he "was having angry outbursts and big mood swings at home; he dropped choir and guitar lessons; and he was using marijuana again with increasing frequency." *Forest Grove*, 640 F. Supp. 2d at 1323. The following February, T.A. ran away from home and exhibited severely reclusive behavior, including not being able to get out of bed or speak, making thousands of dollars worth of phone sex calls, and frequently browsing internet pornography. *Id.*

27. *Forest Grove*, 640 F. Supp. 2d at 1323.

28. After the events described in note 26, *supra*, T.A.'s parents sent him to residential rehabilitation treatment program. *Id.* at 1324. The program recommended a "structured, therapeutic, out-of-home placement" and that he attend Mount Bachelor Academy instead of Forest Grove School District. *Id.* at 1324-25.

29. *Id.* at 1324.

30. *Id.*

31. *Id.* at 1324-25.

32. *Id.* at 1324. In addition to ADHD, T.A. was also diagnosed with "dysthymic disorder, a form of depression with relatively long-term symptoms such as sadness, pessimism, very little motivation at times, not a lot of excitement, and often tiredness and feelings of guilt" and "learning problems with auditory memory, auditory discrimination, expressive language, organization, and combinations of the foregoing." *Id.* The counselor also found that T.A. had limited reading speed and spelling abilities, as well as organizational issues, math disorder, and cannabis abuse. *Id.*

33. *Id.* at 1324.

After T.A. began attending the new academy, his parents hired a lawyer and requested an administrative hearing to determine whether the District should have found T.A. eligible for special education services.<sup>34</sup> Upon first hearing of the parents' dissatisfaction with its evaluation of T.A., the District initiated a second review of T.A.'s eligibility for special needs services, employing a multidisciplinary team and two school psychologists to assess T.A.'s academic record and psychological evaluations, including those conducted by his private psychologist.<sup>35</sup> The District again concluded that T.A. did not qualify for special education services because "his ADHD did not have a sufficiently significant adverse impact on his educational performance."<sup>36</sup> Indeed, the multidisciplinary team noted that although T.A. did exhibit ADHD and depression, those disorders, without a severe impact on T.A.'s grades such as failing out of school, did not merit special education services.<sup>37</sup> T.A.'s parents did not agree with the District's determination and continued on with the administrative hearing.<sup>38</sup>

The hearing officer found for T.A. and ordered the District to "reimburse [his] parents for the cost of the private [school tuition]" because the school did not provide a FAPE to T.A., as required by IDEA.<sup>39</sup> On appeal, the United States District Court for the District of Oregon set aside the hearing officer's reimbursement award on the ground that the 1997 amendments to IDEA barred tuition payments to students who had never received special education services from public schools.<sup>40</sup> The U.S. Court of Appeals for the Ninth Circuit reversed, holding that T.A.'s parents could bring suit because "[i]nterpreting the 1997 amendments to prohibit categorically reimbursement to students who have not yet received special education and related services runs contrary to [the] express purpose" of IDEA, which is to provide services to all children with disabilities.<sup>41</sup> The U.S. Supreme Court granted certiorari from the Ninth Circuit to mend a circuit split, since several courts of appeals had reached inconsistent holdings in interpreting the impact of the 1997 IDEA amendments.<sup>42</sup> Siding with the Ninth Circuit, the Court held that

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34. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2488 (2009).

35. *Forest Grove*, 640 F. Supp. 2d at 1326.

36. *Forest Grove*, 129 S. Ct. at 2488-89.

37. *Forest Grove*, 640 F. Supp. 2d at 1327.

38. *Forest Grove*, 129 S. Ct. at 2488-89.

39. *Id.* at 2488, 2496.

40. *Id.* at 2489 (citing 20 U.S.C. § 1412(a)(10)(C)(ii) (2006)).

41. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1087 (9th Cir. 2008) (referring to 20 U.S.C. § 1400(d)(1)(A) and the Second Circuit's interpretation of the 1997 amendments).

42. The First Circuit held that the 1997 amendments do bar parents from bringing suit for private school tuition reimbursement if their child has not received services in the public school first. See *Greenland Sch. Dist. v. Army N.*, 358 F.3d 150, 162 (1st Cir. 2004). The Third Circuit implied a similar result. See *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 276 n.21 (3d Cir. 2007). Several district courts have also required that a student receive special education services in public school

T.A.'s parents were eligible to bring suit even though the District had never provided services to T.A., but remanded the case so that the district court could consider the equities of the case.<sup>43</sup>

### III. LEGAL BACKGROUND

Under IDEA, all students with disabilities are ensured “a free appropriate public education (FAPE) in the least restrictive environment.”<sup>44</sup> In order to accomplish this goal, the law includes “a complex system of due process safeguards to ensure that students with disabilities are properly identified, evaluated, and placed according to the procedures detailed in its provisions.”<sup>45</sup> These safeguards promote parental involvement in students’ education, particularly in the creation of Individualized Education Plans (IEP) that govern students’ specialized services.<sup>46</sup> More importantly, these protections are crucial in resolving disagreements between schools and parents.<sup>47</sup>

#### A. IDEA and Its Amendments

In its original form, IDEA<sup>48</sup> was created by Congress in 1970 in an effort to address the growing number of special needs students in the United States lacking proper educational services at public schools.<sup>49</sup> However, by

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before he or she is eligible for private school tuition. *See* Lunn v. Weast, No. 05-2363, 2006 WL 1554895, at \*6 (D. Md. May 31, 2006); T.H. *ex rel.* A.H. v. Clinton Twp. Bd. of Educ., No. 05-3709, 2006 WL 1128713, at \*6 (D. N.J. Apr. 25, 2006); Balt. City Bd. of Sch. Comm’rs v. Taylorch, 395 F. Supp. 2d 246, 249 (D. Md. 2005).

43. *Forest Grove*, 129 S. Ct. at 2496.

44. Allan G. Osborne, Jr., *Is a Parent Who Places a Child with a Disability in a Private School Entitled to Tuition Reimbursement if the Child has Never Attended a Public School?* Board of Education of the City of New York v. Tom F., 219 EDUC. L. REP. 887, 887 (2007).

45. *Id.*

46. Courtney Rachel Baron, *Lessons Learned From Forest Grove School District v. T.A.: How the Supreme Court Can Refine the Approach to Private School Tuition Reimbursement Under IDEA*, 103 NW. U. L. REV. COLLOQUY 522, 523-24 (2009).

47. Osborne, *supra* note 44, at 888. Such safeguards include an administrative hearing process initiated by the dissatisfied parents, who are free to appeal the hearing officer’s decision to a state or federal court. Baron, *supra* note 46, at 523-24.

48. 20 U.S.C. §§ 1400-1482 (2006).

49. Theresa J. Bryant, *The Death Knell for School Expulsion: The 1997 Amendments to the Individuals with Disabilities Education Act*, 47 AM. U. L. REV. 487, 489-90 (1998). “For example, in 1970, U.S. schools educated only one in five children with disabilities, and many states had laws excluding certain students, including children who were deaf, blind, emotionally disturbed, or mentally retarded.” U.S. OFFICE OF SPECIAL EDUC. PROGRAMS, HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN



1975 Congress recognized the need for revision. Citing Supreme Court decisions that broadened education rights for disabled children,<sup>50</sup> the Senate Committee on Labor and Public Welfare proposed amendments tying states' IDEA compliance to federal financial aid, arguing that "Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity."<sup>51</sup>

After more than twenty years of incremental changes, Congress again significantly revised IDEA in 1997, claiming that the government needs to "place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education [because] [e]ducational achievement for children with disabilities, while improving, is still less than satisfactory."<sup>52</sup> The amendments also encouraged parental involvement in academic decisions and provided procedural safeguards in cases where parents became unsatisfied with the services provided to their children. IDEA did this by, first, modifying the IEP<sup>53</sup> process so that parents and schools could work together in designing student treatment and, second, creating a system of due process so that parents could appeal unfavorable IEP decisions and hold schools accountable "if they fe[lt] their child [was] not receiving an appropriate education."<sup>54</sup>

The IEP, required for special needs students from ages three to twenty-one, serves as the cornerstone for providing education services. Essentially, the IEP is an assessment of a student's disability and its effect on her educational performance, including annual achievement goals, specific services provided to the student, and information about when or why a student will be educated outside the general classroom setting.<sup>55</sup> IEPs are required for all students with disabilities who have mental retardation, physical limitations, autism, or "serious emotional disturbance[s]" that *cause* low educational achievement.<sup>56</sup> Thus, for a child with a disability to qualify for an IEP, the disability must burden her ability to function successfully in the classroom.

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EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 1 (archived), *available at* <http://www2.ed.gov/policy/speced/leg/idea/history.pdf>.

50. S. REP. NO. 94-168 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1430 ("[T]he Federal cases of *Pennsylvania Association for Retarded Children v. Pennsylvania* and *Mills v. Board of Education of District of Columbia* . . . guarantee[d] the right to free publicly-supported education for handicapped children and have resulted in similar court actions . . .").

51. *Id.* at 1433.

52. S. REP. NO. 105-17, at 2 (1997).

53. 20 U.S.C. § 1414(d)(3).

54. Bryant, *supra* note 49, at 490 (citing 20 U.S.C. § 1415(k)(6)(A)(i)-(ii)).

55. 20 U.S.C. § 1414(d)(1)(A).

56. 20 U.S.C. § 1401(3).

The crux of the dispute between the District and T.A.'s parents was whether T.A.'s disability sufficiently burdened his classroom success.<sup>57</sup>

After an administrative disposition in favor of T.A., the District appealed and won in the district court.<sup>58</sup> On appeal from the district court decision, the Ninth Circuit and the U.S. Supreme Court ultimately upheld the parents' ability to bring the suit; but on remand to the district court for consideration of the equities of the case, T.A.'s parents were denied tuition reimbursement, primarily because they failed to cooperate with the District.<sup>59</sup>

*Forest Grove* is not the first case to address the revised IDEA; however, it is the first Supreme Court case to assess whether the 1997 amendments overruled the Court's past interpretation of reimbursement.<sup>60</sup> The First, Second, and Eleventh Circuits had also dealt with tuition reimbursement for parents of children that had not attended their home public district prior to enrolling in private school, but those decisions yielded conflicting results.<sup>61</sup> The First Circuit reasoned that, because historical interpretation of tuition reimbursement under IDEA required collaboration between parents and local education agencies in placing children in private settings, the 1997 amendments intended to codify that cooperation and create a threshold for tuition reimbursement.<sup>62</sup> Accordingly, the First Circuit held that "tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school system."<sup>63</sup>

57. *Forest Grove Sch. Dist. v. T.A.*, 675 F. Supp. 2d 1063, 1067 (D. Or. 2009).

58. *Forest Grove Sch. Dist. v. T.A.*, 640 F. Supp. 2d 1320, 1335 (D. Or. 2005), *rev'd*, 523 F.3d 1078 (9th Cir. 2008), *aff'd*, 129 S. Ct. 2484 (2009).

59. *Forest Grove*, 675 F. Supp. 2d at 1066-68 ("A district court must use general principles of equity and 'consider all relevant factors in determining whether to grant reimbursement and the amount of reimbursement' pursuant to § 1415(i)(2)(C)." (quoting *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1088-89 (9th Cir. 2008))).

60. The question raised in *Forest Grove* – whether a student who has never received special education services in a district is still allowed to recover tuition reimbursement from a private school – was first brought to the U.S. Supreme Court in *Board of Education v. Tom F. ex rel. Gilbert F.*, a case that resulted in a split decision with no nationwide precedent. 552 U.S. 1 (2007) (*per curiam*).

61. *Compare* *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 359 (2d Cir. 2006) (holding that a student need not receive special services to recover tuition reimbursement under IDEA), *and* *M.M. ex rel. C.M. v. Sch. Bd.*, 437 F.3d 1085, 1099 (11th Cir. 2006) (*per curiam*) (holding that the fact that C.M. did not receive services in a public school did not preclude tuition reimbursement under IDEA), *with* *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159 (1st Cir. 2004) (holding that the 1997 IDEA amendments created a threshold that parents needed to meet before they would be eligible for tuition payments from their local education agency, namely that their child previously received special education services in the public school), *abrogated by* *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009).

62. *Greenland Sch. Dist.*, 358 F.3d at 159-60.

63. *Id.* at 159.

The *Forest Grove* Court rejected the First Circuit's construal of the 1997 amendments, agreeing instead with the Second and Eleventh Circuits' reasoning that (1) the amendments did not interfere with the courts' authority imbued under IDEA<sup>64</sup> to grant "appropriate" relief to parents of special needs children, including tuition reimbursement<sup>65</sup> and that (2) requiring children to first receive special services at their public school would "place parents of such children in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to reimbursement."<sup>66</sup>

The Court focused on four major provisions, ultimately deciding that the amendments had no significant impact on precedent.<sup>67</sup> First, section 1415 of IDEA, the original equitable relief provision, allows courts to "grant such relief as the court determines is appropriate,"<sup>68</sup> which has been interpreted to include tuition reimbursement, to parents who bring a successful action against a school district for failing to provide a FAPE to their children.<sup>69</sup> In 1997, Congress elaborated on the available remedies of section 1415 by adopting a section that speaks directly to tuition reimbursement for a child in private schools.<sup>70</sup> The section protects schools by ensuring that parents cannot receive reimbursement if they reject a proposed FAPE and unilaterally place their child in a private setting,<sup>71</sup> but still provides a remedy to parents by permitting reimbursement if they unilaterally remove their child from a local education agency that is found to have failed in making a FAPE "available to the child in a timely manner prior to that enrollment."<sup>72</sup> Additionally, the section provides limitations for reimbursement, including unreasonable parental action and lack of notice to the school that the child will be moved.<sup>73</sup>

These limitations are taken into account at the equities determination for reimbursement that occurs at the district court level.<sup>74</sup> Courts look to the parents' actions in evaluating reimbursement restrictions and may reduce or reject tuition awards if (1) the parents did not inform the school – either at the

64. 20 U.S.C. § 1415(h)(i)(2)(C) (2006).

65. See *Forest Grove*, 129 S. Ct. at 2491-92; *Frank G.*, 459 F.3d at 369-70.

66. *M.M. ex rel. C.M.*, 437 F.3d at 1099; accord *Forest Grove*, 129 S. Ct. at 2496.

67. *Forest Grove*, 129 S. Ct. at 2496.

68. 20 U.S.C. § 1415(i)(2)(C)(iii).

69. *Forest Grove*, 129 S. Ct. at 2489 (citing *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1085, 1087-88 (9<sup>th</sup> Cir. 2009), *aff'd*, 129 S. Ct. 2484).

70. 20 U.S.C. § 1412(a)(10)(C).

71. *Id.* § 1412(a)(10)(C)(i).

72. *Id.* § 1412(a)(10)(C)(ii).

73. *Id.* § 1412(a)(10)(C)(iii). At this point, it is already obvious that the parents in *Forest Grove* had violated these subparts and thus were likely ineligible to receive reimbursement on the merits.

74. For discussion of the factors district courts may consider under IDEA, see *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 71 (3d Cir. 2010); *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1183-86 (9<sup>th</sup> Cir. 2009); *Forest Grove Sch. Dist. v. T.A.*, 675 F. Supp. 2d 1063, 1066 (D. Or. 2009).

last IEP meeting or at least ten business days prior to the removal – that the IEP developed for their child was unacceptable *and* that they would be enrolling their child in private school as a result; (2) the school made an attempt to evaluate a child for services, but the parents did not bring the child in for assessment; or (3) the court found the parents' actions patently unreasonable.<sup>75</sup> This last provision grants a great deal of discretion to the district courts.

The main issue in *Forest Grove* was whether these sections substantially changed parents' ability to obtain reimbursement. The Supreme Court in *Forest Grove* assumed that Congress was "aware of an administrative or judicial interpretation of a statute and . . . adopt[ed] that interpretation when it re-enact[ed] a statute without change."<sup>76</sup> Using that analysis, the Court found that judicial discretion to award reimbursement remained untouched by the 1997 amendments because "[i]t would take more than Congress' failure to comment on the category of cases [like T.A.'s] for [the Court] to conclude that the Amendments" overruled past precedent or limited which children may receive reimbursement.<sup>77</sup>

### B. Special Education Litigation

Like most education law, special education law incurs its fair share of litigation. Contemporary special education law was first interpreted by the U.S. Supreme Court in a 1982 decision, *Board of Education v. Rowley*.<sup>78</sup> As the seminal special education case, *Rowley* interpreted the 1975 Education of the Handicapped Act – the precursor to IDEA – by construing its promise of a FAPE to require that states

provide each child with "specially designed instruction," . . . [and] "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education." . . . [Thus] the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.<sup>79</sup>

Even more important than *Rowley's* clarification of a FAPE was the Court's holding that IDEA imposed only the most basic obligations on public

75. 20 U.S.C. § 1412(a)(10)(C)(iii).

76. *Forest Grove Sch. Dist v. T.A.*, 129 S. Ct. 2484, 2492 (2009) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

77. *Id.* at 2492-94 (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("[A]bsent a clearly expressed congressional intention, repeals by implication are not favored." (citation omitted))).

78. 458 U.S. 176 (1982).

79. *Id.* at 201 (citing 20 U.S.C. § 1401(17) (1976)).

schools.<sup>80</sup> However, this limited view has expanded over time. Beginning in 1985 with *School Committee v. Dep't of Ed. (Burlington)*, subsequent Court cases have increased the responsibilities of schools under IDEA.<sup>81</sup>

In *Burlington*, the Court established that parents who placed their child in a private school were entitled to tuition reimbursement, which IDEA did not expressly offer as a remedy for a public school's failure to provide a FAPE to a child.<sup>82</sup> In that case, the parents of a student who had been receiving special education services were unhappy about the district's IEP evaluation and requested an administrative hearing.<sup>83</sup> While that hearing was pending, the parents unilaterally placed the student in a private school and were then granted tuition reimbursement by the hearing officer.<sup>84</sup> The school district argued that this unilateral move constituted "a waiver of reimbursement" under IDEA.<sup>85</sup> However, the U.S. Supreme Court disagreed with the school, noting that often parents "notice a child's learning difficulties while the child is in a regular public school program" and, as a result, should be able to move their child to a school that meets the child's needs while the review process plays out.<sup>86</sup>

The Supreme Court revisited tuition reimbursement in 1993 in *Florence County School District Four v. Carter*.<sup>87</sup> In *Carter*, the parents placed their child in a private school that did not meet the requirements of IDEA.<sup>88</sup> Therefore, the school district argued that the parents were not entitled to reimbursement.<sup>89</sup> Relying on *Burlington*, the Court held that IDEA does not automatically prevent parents from obtaining tuition reimbursement simply because the parents unilaterally placed their child in a private school that did not meet state education standards.<sup>90</sup>

This collective rationale – that parents may move a child without the agreement of the public school and then receive reimbursement after the fact – is the legal foundation for the *Forest Grove* decision.<sup>91</sup> However, unlike

80. *Id.* (speaking to the "basic floor of opportunity").

81. 471 U.S. 359 (1985).

82. *Id.* at 369.

83. *Id.* at 361-62.

84. *Id.* at 362-63.

85. *Id.* at 372.

86. *Id.* at 372-73.

87. 510 U.S. 7 (1993).

88. *Id.* at 9.

89. *Id.*

90. *Id.* at 13-14. Parents who unilaterally place their children in private schools do not offer their children an education "provided at public expense, under public supervision and direction." *Id.* at 13. Since IDEA was created to "ensure that children with disabilities receive an education that is both appropriate and free, . . . [t]o read the [statutory] provisions . . . to bar reimbursement in the circumstances of [the *Carter*] case would defeat this statutory purpose." *Id.* at 13-14 (internal citations omitted).

91. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2490-96 (2009).

*Burlington* and *Carter*, the Court's reasoning in *Forest Grove* is constrained by the 1997 IDEA amendments, which for the first time explicitly addressed private school reimbursement.<sup>92</sup>

#### IV. INSTANT DECISION

In answering the question of whether the 1997 IDEA amendments proscribe "reimbursement for private-education costs if a child has not 'previously received special education . . . services under the authority of a public agency,'"<sup>93</sup> – the Supreme Court affirmed the Ninth Circuit's decision that T.A.'s parents had the right to bring suit for reimbursement, relying on *Burlington*<sup>94</sup> and *Carter*<sup>95</sup> for guidance.<sup>96</sup> In those cases, the parents of special needs children who had received publicly provided services became dissatisfied with their IEPs and successfully obtained tuition reimbursement from the public schools after enrolling their children in private programs.<sup>97</sup> Resting on the reasoning in *Burlington* and *Carter* – that IDEA and its statutory predecessor did not bar reimbursement for private education tuition – the *Forest Grove* Court focused on whether the 1997 amendments to IDEA require a new understanding of reimbursement.<sup>98</sup>

##### A. The Majority Opinion

The Court based its decision to uphold the parents' right to reimbursement on three lines of reasoning. First, the majority looked to the statutory language of the 1997 amendments to determine whether Congress expressed any desire to change judicial precedent, ultimately finding that the legislature intended to leave the Court's past decisions untouched.<sup>99</sup> Second, the majority found that the states were put on notice by the language of IDEA; indeed, explicit language regarding fees that the states may incur is present in the statute.<sup>100</sup> Lastly, the majority disagreed with the District's and the dissent's assertion that it would place a huge burden on the public school system if parents were allowed to recover tuition costs after they unilaterally enrolled

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92. *Id.* at 2496.

93. *Id.* at 2488 (quoting 20 U.S.C. § 1412(a)(10)(C)(ii) (2006)).

94. 471 U.S. 359 (1985).

95. 510 U.S. 7 (1993).

96. *Forest Grove*, 129 S. Ct. at 2490-91.

97. *Id.*

98. *Id.* at 2491.

99. *Id.* at 2492 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

100. *Id.* at 2495.

their child in a private school when services had not formerly been provided by the public school system.<sup>101</sup>

### 1. Amendment Language

The Court engaged in a step-by-step analysis of four parts of the statute,<sup>102</sup> disagreeing with the District's conclusion that the 1997 amendments categorically bar reimbursement for children who had never received special education services prior to private placement.<sup>103</sup> Believing that Congress did not intend to abrogate *Burlington* and *Carter*, the Court found that IDEA's failure to address cases like T.A.'s, in which the child had never received special education services, did not mean that T.A. was outside the bounds of its statutory remedy.<sup>104</sup>

In particular, the Court focused on section 1412(a)(10)(C), appropriately named "Payment for education of children enrolled in private schools without consent of or referral by the public agency," which addresses unilateral placement of children in private schools.<sup>105</sup> The largest point of contention pertained to part (ii) of the payment section:

If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer *may require* the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.<sup>106</sup>

Disagreeing with the District's position that section 1412(a)(10)(C)(ii) allows reimbursement only for children "who previously received special education and related services,"<sup>107</sup> the Court reasoned that "[b]ecause that clause is phrased permissively, stating only that courts 'may require' reimbursement in those circumstances, it does not foreclose reimbursement

101. *Id.* at 2496.

102. The Court looked to the new section 1412(a)(10)(C)(i)-(iv), concluding that the language in those subsections does not affect relief under section 1415(i)(2)(C)(iii). *Id.* at 2491-95.

103. *Id.* at 2492-93.

104. *Id.* at 2494 (specifically referring to 20 U.S.C. § 1415, which gives the courts discretion in granting relief to parents).

105. *Id.* at 2492.

106. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006) (emphasis added).

107. *Id.*

awards in other circumstances.”<sup>108</sup> The Court therefore found section 1412(a)(10)(C) to be a congressional explanation of section 1415, which grants courts the authority to order reimbursement when school districts provide an insufficient FAPE or none at all.<sup>109</sup>

The Court also found that the District’s argument did not comport with the statutory purpose of IDEA and its amendments.<sup>110</sup> In drafting IDEA, Congress explicitly stated that its purpose was to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.”<sup>111</sup> The Court factored this intention very strongly into its interpretation of the law, asserting that a categorical ban on reimbursement would frustrate a child’s right to education.<sup>112</sup>

## 2. Explicit Notice to the States

Second, the majority rejected the District’s contention that because Congress invoked its authority under the Spending Clause in creating IDEA, “any conditions attached to a State’s acceptance of funds [under IDEA] must be stated unambiguously.”<sup>113</sup> The Court admitted that such reasoning was employed in an earlier IDEA case,<sup>114</sup> but found that case to be distinguishable from *Forest Grove* because it dealt only with fee awards, which were not

108. *Forest Grove*, 129 S. Ct. at 2493.

109. *Id.* at 2493 & n.9 (stating that parts (ii) through (iv) list “factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child’s parents believe those services are inadequate.”). It is also interesting to note that the majority upheld both sections 1412 and 1415 as providing reimbursement, because the holdings of *Burlington* and *Carter* implicitly included language in relation to when reimbursement is allowed and also when placement is proper. *Id.* at 2493 n.9. Because the amendments “did not codify that requirement [of proper private school placement, the Court found that this] further indicates that Congress did not intend that provision to supplant § 1415(i)(2)(C)(iii) as the sole authority on reimbursement awards but rather meant to augment the latter provision and [the Court’s] decisions construing it.” *Id.*

110. *Id.* at 2494-95.

111. *Id.* (citing 20 U.S.C. § 1400(d)(1)(A)). Further, the Senate Report on the 1997 amendments admitted that “[s]ection 612 also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions . . . . Previously, the child must have had received special education and related services under the authority of a public agency.” S. REP. NO. 105-17, at 13 (1997).

112. *Forest Grove*, 129 S. Ct. at 2494-95. The majority also discussed the “child find” provision of IDEA as evidence that Congress’ ultimate goal is to provide a FAPE to all eligible children. *Id.* at 2495.

113. *Id.* at 2495 (referring to *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

114. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006).



included in the statutory language.<sup>115</sup> In *Forest Grove*, the school's duty to provide a FAPE was well articulated in IDEA; therefore, the Court found that the District knew both its responsibility and the possible consequences if it failed to provide a FAPE to students.<sup>116</sup> In addition, the Court noted that the *Burlington* decision put states on notice that they would have to reimburse parents for private tuition.<sup>117</sup>

### 3. Financial Burden on Public Education

Finally, the majority rejected the policy argument that allowing T.A.'s parents to recover would cause a rush of unilateral private school placements and, consequently, a crippling financial burden on public schools.<sup>118</sup> The Court reminded the District that "[p]arents 'are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act.' . . . And even then courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant . . . ."<sup>119</sup> As such, parents undertake a huge financial risk in unilaterally moving their children to expensive placements, thereby discouraging any potential flood of special needs students to private schools.<sup>120</sup> Relying on precedent, the *Forest Grove* Court permitted T.A.'s parents to be reimbursed, absent a district court's finding that such reimbursement would be unreasonable.<sup>121</sup>

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115. *Forest Grove*, 129 S. Ct. at 2495. The *Arlington* case dealt specifically with section 1415(i)(3)(B), which the Court held did "not authorize courts to award expert-services fees to prevailing parents in IDEA actions because the Act does not put States on notice of the possibility of such awards." *Id.* However, IDEA does specifically say states are required to provide a FAPE, so they should be prepared to pay for that FAPE. *Id.*

116. *Id.* at 2491.

117. *Id.* at 2495.

118. *Id.* at 2496.

119. *Id.* (quoting *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15 (1993)). The equities test here should also presume that the public school is fully complying with IDEA. *Id.*

120. *Id.*

121. *Id.* at 2496. Indeed, on remand, the court found T.A. ineligible for reimbursement because the main reason for placing T.A. in a private school was to deal with his drug issues, not his academic abilities. *Forest Grove Sch. Dist. v. T.A.*, 675 F. Supp. 2d 1063, 1067 (D. Or. 2009).

### B. *The Dissent*

Justices Souter, Scalia, and Thomas joined in opposition to the majority's reading of the 1997 IDEA amendments.<sup>122</sup> Interpreting the new section 1412(a)(10)(C), the dissent found that the statute banned reimbursement if the District provided a FAPE.<sup>123</sup> Souter claimed that the only exceptions for reimbursement were (1) if the parents, with the district's cooperation, elected not to utilize the FAPE, or (2) if a student's special education services were found to be inadequate, provided that student had formerly received services.<sup>124</sup> Because T.A.'s parents did not come to an agreement with the District and T.A. did not receive special education services, the dissent argued that T.A. was not eligible for reimbursement.<sup>125</sup>

Like the majority, the dissent parsed the 1997 IDEA amendments, but arrived at a different conclusion. The *Burlington* decision, the dissent stated, was an act of judicial discretion, since IDEA at that time did not address reimbursement.<sup>126</sup> However, in 1997, Congress explicitly spoke to the issue, even creating a section aptly named "Payment for education of children enrolled in private schools without consent of or referral by the public agency."<sup>127</sup> Unfortunately, IDEA remained silent on cases like T.A.'s in which students had never received special education services at the public school.<sup>128</sup> On this point, Souter argued that "the majority 'overstretch[ed]' the law in its interpretation" and he further stated that "natural sense" dictates that anything not explicitly authorized in the act is prohibited.<sup>129</sup> Indeed, if the first clause is taken to mean what the majority believed, sections (ii) and (iii) have no real effect on reimbursement, rendering them worthless.<sup>130</sup>

122. *Forest Grove*, 129 S. Ct. at 2497-503 (Souter, J., dissenting).

123. *Id.* at 2497.

124. *Id.* (citing 20 U.S.C. § 1412(a)(10)(B), (a)(10)(C)(ii) (2006)).

125. *Id.* at 2498-500.

126. *Id.* at 2498 ("In short, we read the general provision for ordering equitable remedies in § 1415(i)(2)(C)(iii) as authorizing a reimbursement order, in large part because Congress had not spoken more specifically to the issue.").

127. 20 U.S.C. § 1412(a)(10)(C).

128. *Forest Grove*, 129 S. Ct. at 2499 (Souter, J., dissenting).

129. *Id.* The dissent likened the congressional act to a mother's permission, stating:

When a mother tells a boy that he may go out and play after his homework is done, he knows what she means. . . . [Indeed, i]f the mother did not mean that the homework had to be done, why did she mention it at all, and if Congress did not mean to restrict reimbursement authority by reference to previous receipt of services, why did it even raise the subject?

*Id.*

130. *Id.* at 2499-500. Such a reading would be incorrect according to the dissent because "[o]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative

Souter next argued that none of the 1997 amendments affected the reasoning employed in *Burlington* because the changes did not affect the provisions interpreted in that case.<sup>131</sup> Thus, no implied repeal took place.<sup>132</sup> The dissent also maintained that the majority was mistaken in its assertion that renewal of a statute implicitly incorporates all prior judicial interpretations.<sup>133</sup> According to Souter, “when a new enactment includes language undermining the prior reading, there is no presumption favoring the old, and the only course open is simply to read the revised statute as a whole.”<sup>134</sup>

Lastly, the dissent addressed the policy concerns that the majority broadly construed to allow tuition reimbursement for T.A.’s parents.<sup>135</sup> Souter rejected the proposition that interpreting the amendments to bar tuition payments would be “at odds with IDEA’s remedial purpose”;<sup>136</sup> instead, he argued that the majority’s position overlooked the procedural safeguards in place under IDEA to protect children.<sup>137</sup> For example, IEPs were mandated to encourage cooperation between the District and parents.<sup>138</sup> In cases where an agreement cannot be reached, parents are then entitled to an immediate due process hearing, as well as other administrative and legal remedies.<sup>139</sup> Admitting that the procedures are not perfect, the dissent reminded the Court that most arguments between parents and school districts are in good faith, thus a reading of the 1997 amendments to promote collaboration is not contrary to the spirit of the law.<sup>140</sup>

Furthermore, the dissent noted that allowing reimbursement in *Forest Grove* would set a precedent that would financially paralyze public schools, requiring them to pay private tuition in addition to their already expensive operating costs.<sup>141</sup>

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or superfluous, void or insignificant . . . .” *Id.* at 2500 (quoting *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009)).

131. *Id.* at 2501.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 2502.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 2502-03; see 20 U.S.C. § 1415(c)(2), (e), (f)(1)(B), (i)(2) (2006); see also 34 C.F.R. § 300.510(b)(1)-(2) (2009).

140. *Forest Grove*, 129 S. Ct. at 2503 (Souter, J. dissenting).

141. *Id.* at 2502. Often, special education costs a district nearly twenty percent of its operating budget. *Id.*

## V. COMMENT

In the face of a circuit split, the U.S. Supreme Court took up T.A.'s IDEA challenge against the Forest Grove School District in order to resolve the question of whether students who had never received special education services in public schools were entitled to tuition reimbursement when those students were unilaterally moved to private placements. After evaluating the effect of the 1997 Amendments on IDEA, the Court held that parents could seek monetary reimbursement in cases like T.A.'s, where the student's home district had never provided special education services; however, it reiterated that the ultimate determination on the equities of the reimbursement is properly decided in the district court.<sup>142</sup> However, the disposition of *Forest Grove* leaves several questions unanswered: (1) how district courts should weigh the equities of a case in determining reduction or allowance of reimbursement; (2) how the conflicting intentions of IDEA – integration versus parental control – are to be balanced; and (3) how the financial burdens of litigation are to be borne by the public schools. These concerns are at best left to the lower courts to parse.

A. *Leaving the Power in the District Courts*

The *Forest Grove* decision will probably not cause a flood of requests for tuition reimbursement, but the Court's holding does place a great deal of unguided power into the hands of the lower courts. The Court is careful to mention that the mere right to recover reimbursement does not guarantee a payout;<sup>143</sup> final determinations on the reimbursements are left to the district courts, and the factors to be considered in those determinations remain unclear. Of course, IDEA includes limiting circumstances that, if present in a case, guide the court in reducing, or even eliminating, a reimbursement award.<sup>144</sup> Unfortunately, IDEA does not provide clear instructions for how much a court may reduce an award or how egregious a parent must act before losing reimbursement.

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142. *Id.* at 2496 (majority opinion).

143. *Id.* 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." *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15 (1993). And even then, courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant – for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school. *Id.* at 15-16. "In considering the equities, courts should generally presume that public-school officials are properly performing their obligations under IDEA." *Forest Grove*, 129 S. Ct. at 2496.

144. *See* 20 U.S.C. § 1412(a)(10)(C)(iii).

Such a dilemma casts doubt on whether the Supreme Court has really clarified the import of IDEA's 1997 amendments on decisions of tuition reimbursement. Parents now have the ability to bring suit against public schools that never provided services to their children, but the *Forest Grove* holding will likely only cement the circuit split that already existed because district courts are given such broad discretion in awarding reimbursement.<sup>145</sup> District courts are guided only by the vague instruction to weigh the relevant factors of a case when deciding the equities, including the reasonableness of the parents' unilateral decision.<sup>146</sup> Therefore, the Supreme Court has granted parents the right to ask for reimbursement in cases like T.A.'s, but has endowed district courts with great latitude in denying reimbursement. A district court need only find that parents were "unreasonable" in moving a student into private school for any number of reasons – reasons defined by the several circuits, not by the Supreme Court.<sup>147</sup>

Those courts that would have denied tuition reimbursement prior to *Forest Grove*, like the First Circuit, may now rely on an equities argument to justify denying tuition to parents. Likewise, those circuits that allowed parents to recover prior to *Forest Grove* can weigh the equities differently to provide reimbursement. In fact, the district court that originally denied reimbursement<sup>148</sup> to T.A.'s parents also refused the award on remand, noting that T.A.'s unilateral placement fell within the limitations of section 1412(10)(c).<sup>149</sup>

The possibilities for elimination or reduction of a tuition reimbursement are endless. The district court could have just as easily cited the fact that T.A.'s private school had been investigated for abuse allegations, rendering his placement in the facility "inappropriate."<sup>150</sup> Indeed, in addition to the equities, *Forest Grove* also notes that parents may recover reimbursement

145. The initial scholarly reaction to *Forest Grove* echoed this concern. See Ralph D. Mawdsley, Commentary, *The Supreme Court's Reassessment of Parental Unilateral Placement Under IDEA: Forest Grove School District v. T.A.*, 251 EDUC. L. REP. 1, 16-17 (2010).

146. *Forest Grove*, 129 S. Ct. at 2496.

147. *Id.* at 2497 app. (citing 20 U.S.C. § 1412(a)(10)(C)(iii)). On remand, the district court of Oregon, for example, relied on factors set out by the Ninth Circuit in determining the equities. *Forest Grove Sch. Dist. v. T.A.*, 675 F. Supp. 2d 1063, 1066 (D. Or. 2009). The Court noted the "[f]actors to be considered [by the district court] include[] the existence of other, more suitable placements, the effort expended by the parent[s] in securing alternative placements[,] and the general cooperative or uncooperative position of the school district." *Id.* (quoting *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1089 (9th Cir. 2008)).

148. *Forest Grove Sch. Dist. v. T.A.*, 640 F. Supp. 2d 1320, 1335 (D. Or. 2005), *rev'd*, 523 F.3d 1078 (9th Cir. 2008), *aff'd*, 129 S. Ct. 2484 (2009).

149. *Forest Grove*, 675 F. Supp. 2d. at 1065.

150. Maia Szalavitz, *An Oregon School for Troubled Teens is Under Scrutiny*, TIME, Apr. 17, 2009, available at <http://www.time.com/time/health/article/0,8599,1891082,00.html>.

“when a school district fails to provide a FAPE and *the private-school placement is appropriate . . .*”<sup>151</sup> This appropriateness requirement, a vestige of *Carter*,<sup>152</sup> is just as undefined as the equities determination and only serves to further promote discrepancies across jurisdictions. This inevitably will lead to forum shopping and inequitable treatment of special needs children based on their parents’ financial ability to challenge school districts in favorable courts.<sup>153</sup>

### B. *Balancing the Integration Intentions of IDEA*

Because special education jurisprudence in the United States is relatively young,<sup>154</sup> courts have little guidance for interpreting statutory provisions and amendments. Congress promises better, more accommodating education for special needs children; however, implementation of these reforms does not always live up to expectations. One intention of IDEA – that special education students be integrated into normal classroom environments<sup>155</sup> – is a difficult aspiration to attain, though admirable. Special needs students finally secured the right to public education thirty years ago,<sup>156</sup> but even that win seems fleeting. Despite Congress’ attempts to keep these students in the public school system, it appears that special needs children may be slowly withdrawing from public schools and moving into separate classrooms or, like in the case of T.A., private schools. Court decisions like *Forest Grove* do little to stem the flow of children with disabilities out of public schools and, in fact, are likely facilitating the trend.

The majority’s interpretation of IDEA will help some students find the support they need in private settings; in a broader sense, it runs contrary to the intention of IDEA to teach all students in a homogenous public setting. The Court in *Burlington* was aware of the isolation that special needs students often face. The majority in that case noted that “at least one purpose of [the

151. *Forest Grove*, 129 S. Ct. at 2496 (emphasis added).

152. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). This appropriateness speaks to the costs of the education. *Id.* There is little guidance for determining appropriateness in other terms, such as appropriate for treatment, appropriate education, etc. *See id.*

153. Debra J. Saunders, *Disability Inc.*, S.F. CHRON., June 28, 2009, at E-6, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/06/28/INPN18CAA3.DTL>.

154. Special education jurisprudence began with the landmark case *Board of Education v. Rowley*, 458 U.S. 176 (1982).

155. U.S. OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 49, at 5 (“The nation has also been concerned, over the last 25 years, with expanding the opportunities for educating children with disabilities in the least restrictive environment . . . [by] integrating children with significant disabilities with their . . . non-disabled classmates at school.”).

156. *See* Barbara Miner, *Vouchers: Special Ed Students Need Not Apply*, RETHINKING SCHOOLS, Winter 2003, available at [http://www.rethinkingschools.org/special\\_reports/voucher\\_report/v\\_vouc182.shtml](http://www.rethinkingschools.org/special_reports/voucher_report/v_vouc182.shtml).

tuition reimbursement clause of IDEA] was to prevent school officials from removing a child from the regular public school classroom over the parents' objection . . . ."<sup>157</sup> The Court explained in *Burlington* and *Rowley* that policy-makers had created IDEA in response to two court decisions that "arose from the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from the public schools."<sup>158</sup>

Congress realized that it needed to do something about the "widespread practice" of placing special needs children in private schools and classes.<sup>159</sup> How ironic, then, that the *Forest Grove* Court would interpret IDEA in a way that could open the door to more parents placing their special needs children in private schools and classes. Removing discretion from the public schools is an injury compounded by the fact that the Court now allows parents to pull their children out of public schools *and* receive tax-subsidized private schooling for their unilateral decisions.

### C. Financial Burden

The financial impact of *Forest Grove* is also substantial. Even after the district court waived tuition reimbursement for T.A.'s parents, the Forest Grove school district was still saddled with an enormous debt from legal fees.<sup>160</sup> By the time the Supreme Court reached its decision against Forest Grove, the District had already spent \$244,000 on the case, with another \$4,400 needed for the trial court disposition.<sup>161</sup> Although that money was pulled from the District's reserve fund,<sup>162</sup> a quarter-million dollar lawsuit is a huge expense for any public entity. Had the district court also sided with T.A.'s parents, the District would also have been liable for another \$65,000 in tuition reimbursement and \$400,000 for the parents' court costs.<sup>163</sup> It is important to note that, while IDEA requires schools to pay for all court costs when parents win, prevailing school districts only receive costs if the parents filed a suit that is "frivolous, unreasonable, or without foundation" or if the

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157. *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 373 (1985).

158. *Id.*; accord *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 & n.2 (1982). The two cases are *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills v. Board of Education*, 348 F. Supp. 866 (D. D.C. 1972).

159. *Sch. Comm.*, 471 U.S. at 373.

160. See Nancy Townsley, *District Can't Recoup Quarter Million Spent on Lawsuit: Expense Forest Grove Officials Poised for District Court Ruling Over Payment to Parents of Former Student*, FOREST GROVE NEWS-TIMES, June 30, 2009, available at [http://www.forestgrovenewstimes.com/news/print\\_story.php?story\\_id=124642825434639200](http://www.forestgrovenewstimes.com/news/print_story.php?story_id=124642825434639200).

161. *Id.*

162. *Id.*

163. *Id.*

suit is “presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.”<sup>164</sup>

The *Forest Grove* Court, however, seemed unconcerned with the financial burden placed on schools,<sup>165</sup> echoing its past judgment in *Carter*.<sup>166</sup> In *Carter*, the school district had urged the Court to allow reimbursement under IDEA only if the parents of a special needs child chose a “state approved private school . . . [because] otherwise States [would] have to reimburse dissatisfied parents for any private school that provides an education that is proper under the Act, no matter how expensive . . . .”<sup>167</sup> The Court agreed that Congress had charged the states with a huge financial burden through IDEA, but reminded schools that they need only provide a FAPE or recommend a reasonable private setting to avoid liability for reimbursement.<sup>168</sup>

The Court in *Forest Grove*, as in *Carter*, also noted that parents who sue for reimbursement when they have unilaterally placed their child in private school are not guaranteed tuition;<sup>169</sup> indeed, courts still weigh the equities of the case, including whether the parents gave adequate notice to the public school before enrolling the child in private school. However, this places a great deal of power in the hands of the district courts, as mentioned above, and may erode the *Forest Grove* decision. Therefore, if lower courts are able to subtly apply their own policy preferences when determining whether a school district or a parent of a special needs student complied with IDEA, the result will be inconsistent rulings and a frustration of the clarity and certainty the *Forest Grove* Court sought to bring to IDEA.

## VI. CONCLUSION

Before the inception of IDEA, states justified isolating special needs children from traditional classrooms by characterizing them as “[w]eak minded,’ ‘difficult to educate,’ and ‘moron[s]’ of a very low type . . . who [are] incapable of absorbing knowledge.”<sup>170</sup> We can laud Congress for recognizing this discrimination and working to correct this injustice by mandating public education for all special needs students. In fact, IDEA itself states that its purpose is to address the “educational needs of millions of [American]

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164. 20 U.S.C. § 1415(i)(3)(B)(i) (2006).

165. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2496 (2009).

166. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15 (1993).

167. *Id.*

168. *Id.*

169. *Forest Grove*, 129 S. Ct. at 2496.

170. Emily S. Rosenblum, Note, *Interpreting the 1997 Amendment to IDEA: Did Congress Intend to Limit the Remedy of Private School Tuition Reimbursement for Disabled Children?*, 77 *FORDHAM L. REV.* 2733, 2733 (2009) (footnotes omitted).



children with disabilities . . . [who] were excluded entirely from the public school system and from being educated with their peers.”<sup>171</sup>

IDEA does not require that all students remain in traditional classrooms, but it does create a continuum that “intends that the degree of ‘inclusion’ be driven by the student’s needs as determined by the IEP team, not by the district’s convenience or the parents’ wishes.”<sup>172</sup> It is impossible to dispute the notion that every child deserves a free appropriate public education, but how this goal should be realized remains a question for school districts, courts, and policymakers. IDEA attempts to solve the quandaries by advocating the “educat[ion] [of] as many students with disabilities as possible in the regular education classroom, while still meeting their unique, individual needs.”<sup>173</sup>

Despite the many reforms to IDEA, parents are still not completely satisfied with the accommodations their children receive in public schools.<sup>174</sup> Indeed, “the volume . . . of published administrative and judicial tuition reimbursement decisions has increased relatively steadily and steeply . . . [from] 1978 to 2000.”<sup>175</sup> Even more surprising, “although they prevailed in more tuition reimbursement disputes than parents, schools did not prevail at an overwhelming rate.”<sup>176</sup> Such findings reveal the consequences that may result from the Court’s holding in *Forest Grove*. Financial strain on public schools may be greater than anticipated, and this realization should prompt judges to consider more seriously the policy implications of their decisions.

Nevertheless, decisions like *Forest Grove* emphasize the Court’s continual expansion of parents’ rights under IDEA. Public school districts especially must be aware of the administrative and budgetary consequences of this jurisprudence and would “be well advised to pursue a negotiated resolution of

171. 20 U.S.C. § 1400(c)(2) (2006).

172. Katie Schultz Stout, *Special Education Inclusion*, WIS. EDUC. ASS’N COUNCIL, Mar. 15, 2007, [http://www.weac.org/Issues\\_Advocacy/Resource\\_Pages\\_On\\_Issues\\_one/Special\\_Education/special\\_education\\_inclusion.aspx](http://www.weac.org/Issues_Advocacy/Resource_Pages_On_Issues_one/Special_Education/special_education_inclusion.aspx) (original written in 2001; periodically updated by Joanne Huston).

173. *Id.*

174. See Nikki Dowling, *Special Needs are Going Unmet in City Schools*, RIVERDALE PRESS, Aug. 26, 2010, available at [http://www.riverdalepress.com/stories/Special-needs-are-going-unmet-in-city-schools,37490?content\\_source=&category\\_id=166&search\\_filter=&event\\_mode=&event\\_ts\\_from=&list\\_type=&order\\_by=&order\\_sort=&content\\_class=&sub\\_type=&town\\_id=](http://www.riverdalepress.com/stories/Special-needs-are-going-unmet-in-city-schools,37490?content_source=&category_id=166&search_filter=&event_mode=&event_ts_from=&list_type=&order_by=&order_sort=&content_class=&sub_type=&town_id=) (“[D]elays, lack of adequate service and bureaucracy are common, according to special education experts, lawyers, local teachers and parents . . .”); Tracie Simer, *Seminar Explains Special Needs Advocacy*, JACKSON SUN, Aug. 16, 2010, available at <http://www.jacksonsun.com/article/20100816/LIFESTYLE/100816004> (“[P]arents are very frustrated and feel like their child is not getting all the help they need.”).

175. Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350, 355 (2001).

176. *Id.*

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their case rather than investing time, money, and emotional capital in the uncertainty of entrusting the matter to a court.”<sup>177</sup>

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177. *Id.* at 357.

