No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawaii State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents over 95,000 of the Nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 49.3 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

The National Association of State Directors of Special Education ("NASDSE") is a not-for-profit

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[1] Pursuant to Sup. Ct. R. 37.6, amici note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.2, counsel further notes that counsel of record for the parties received timely notice of the intent to file this brief and have consented to the filing of this brief.

organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states, the District of Columbia, the Department of Defense Education Agency, the Bureau of Indian Education, federal territories and the Freely Associated States. NASDSE's primary mission is to support students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities.

Amici regularly represent their members' interests before Congress and federal and state courts and have participated as *amicus curiae* in cases before this Court involving the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400 *et seq*. ("IDEA"). *See*, *e.g.*, *Board of Educ.* v. *Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455 (2006); *Schaffer ex rel. Schaffer* v. *Weast*, 126 S. Ct. 528 (2005).

Recognizing that all children with disabilities have a right to be provided with a free appropriate public education, NSBA, AASA and NASDSE have consistently supported the rights of disabled children. At the same time, amici are also fully cognizant of the substantial financial and human resources that public school districts devote each and every year to educating students with disabilities. These resources vastly exceed the partial funding

provided by the federal government under IDEA.[2] The burden on local school districts also is increased by an adversarial conception of IDEA, which exacts an even greater toll on limited educational resources and thus exacerbates the difficulty for school districts in deciding what educational opportunities they can afford to provide for children.

NSBA, AASA and NASDSE, therefore, assign critical importance to the issue presented in this case: whether Congress in IDEA authorized tuition reimbursement for parents who unilaterally place their children in private schools, where those children have never previously received special education services from the public schools.[3] Like the petitioner, amici contend that the Court should grant certiorari in this case to establish that the answer is no.

SUMMARY OF ARGUMENT

As this Court recognized by granting certiorari in *Tom F.*, the courts of appeals are divided over the

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[2] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $55 billion for the last four fiscal years. Ann Lordeman, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, CRS Report for Congress (April 11, 2008).

[3] School districts spend more than $6.7 billion annually on assessments, evaluations, and IEP-related activities alone. *See* Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Special Education Services in the United States, 1999-2000, Rpt. 1* at 13-14 (June 2004), *available at* http://csef.air.org/publications/seep/national/AdvRpt1.pdf.

important question of whether IDEA permits parents to obtain a private school tuition reimbursement award from a public school district when they unilaterally place their child in private school without trying—or as here, without even suggesting the need for—a collaboratively-developed Individualized Education Program ("IEP") offered by the public school district. The Ninth Circuit's decision below not only deepens and clarifies that split—by specifically rejecting the First Circuit's ruling in *Greenland Sch. Dist.* v. *Amy N.*, 358 F.3d 150 (1st Cir. 2004)—it also interprets the IDEA in a way Congress never intended. The Ninth Circuit's conclusion that parents whose children never obtained special education or related services from a public agency need not comply with any of the requirements of § 1412(a)(10)(C) creates a back-door route that would advantage parents who unilaterally place a disabled child in a private school first, and then litigate against the public school district later to obtain tuition reimbursement.

The Ninth Circuit's interpretation of IDEA is contrary to the intent and carefully constructed framework of the statute. IDEA is premised on collaboration between parents and public school districts but the Ninth Circuit's decision flouts that collaborative structure by making it easier for parents to obtain private school tuition reimbursement if their child was never provided public school special education services than if the parents worked with the school district to develop a public school program appropriate for the child's needs and then allowed that program a chance to succeed. The Ninth Circuit's interpretation of IDEA also places school districts at a distinct disadvantage

in any later administrative hearing because they are forced to defend their determination of a student's ineligibility, or to make an evidentiary case in support of an IEP, based on a program that is described on paper but that the child has never had the opportunity to experience. The Ninth Circuit's interpretation of IDEA also compounds the difficulty school districts face in budgeting for special education by allowing parents to obtain tuition reimbursement awards after-the-fact for children the school district did not even know might require special education. The Ninth Circuit's decision below can only be expected to increase the already high costs of special education and the costs of litigation by encouraging parents to send their children to private school first and sue the school district for reimbursement later.

By flatly holding that § 1412(a)(10)(C)(ii) does not apply to parents who have no genuine interest in obtaining a public education for their child, the Ninth Circuit's decision allows those parents to treat the IEP process as a potential lottery ticket to a government-funded private school education. This expansion of school districts' obligations under IDEA is in contravention of the statute and should be reviewed by this Court.

ARGUMENT

I. BY EXEMPTING PARENTS OF CHILDREN WHO NEVER RECEIVE PUBLIC SPECIAL EDUCATION SERVICES FROM THE LAW'S CAREFULLY IMPOSED CONDITIONS ON TUITION REIMBURSEMENT, THE NINTH CIRCUIT DECISION CONTRAVENES THE COLLABORATIVE INTENT AND FRAMEWORK OF IDEA.

As part of its 1997 IDEA amendments, Congress sensibly adopted a threshold requirement for tuition reimbursement claims by parents who unilaterally place their children in private school: tuition reimbursement is only available for children who "previously received special education and related services under the authority" of the public school district. 20 U.S.C. § 1412(a)(10)(C)(ii). The plain language of this provision makes clear that where a child has not previously received special education from a school district, neither a court nor a hearing officer has authority to reimburse tuition expenses arising from a parent's unilateral placement of the child in private school. The amendment simply requires that parents of children with disabilities give public schools a realistic chance to serve their children before unilaterally rejecting what the public school offers—and forcing the school district to fund a private school education.

In addition to the threshold requirement, Congress determined that students who have previously received public special education services may be denied tuition reimbursement, in whole or in part, if the parents (1) failed to inform the student's IEP

team that they were rejecting the proposed placement, (2) did not give written notice to the public agency ten days prior to removing the student from public school, (3) did not make the student available for an evaluation, or (4) otherwise acted unreasonably. 20 U.S.C. § 1412(a)(10)(C)(iii). In *T.A.*, the Ninth Circuit concluded not only that IDEA allows parents to receive tuition reimbursement for a disabled child who never received special education services from a public agency, but also that those parents are not subject to these statutory requirements.

The perverse outcome of this conclusion starkly demonstrates that the Ninth Circuit's interpretation of the law is flawed and inconsistent with the purposes and structure of IDEA. Under the Ninth Circuit's reading of the IDEA, parents who act consistently with IDEA's purpose and structure and in good faith place their disabled children in public school and give the school a chance to provide a free appropriate public education are subject to more procedural hurdles when they determine that the public school is unable to serve their children than are parents who disregard IDEA's purpose and structure and never give the school district a chance. By interpreting the law to favor parents of disabled students who never received special education services from a public school, the Ninth Circuit ignores IDEA's fundamental goal of promoting public education for disabled students, seriously undermines IDEA's collaborative framework and disturbs the balance the Act seeks to strike between the interests of public schools and the interests of disabled students.

A. IDEA's History and Fundamental Requirements Show that Appropriate *Public* School Placements are Preferred.

The principal motivating force behind IDEA and its predecessor was to stop the exclusion of disabled students from *public* schools—not to increase the opportunity for disabled children to attend private schools at public expense. In the 1970s "the majority of disabled children in America 'were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.' " *Schaffer ex rel. Schaffer* v. *Weast*, 126 S. Ct. 528, 531 (2005) (quoting H.R. Rep. No. 94-332, at 2 (1975)). Congress' findings from the 2004 IDEA reauthorization re-emphasize this fact. Before the enactment of IDEA and its precursor, "the educational needs of millions of children with disabilities were not being fully met because * * * the children were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2).

The purpose of IDEA was "to reverse this history of neglect" and bring students with disabilities into the main-stream of the public school community. *Schaffer*, 126 S. Ct. at 531. This purpose is readily apparent: "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the *public education systems* of the States." *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982) (emphasis added).

The Act's "least restrictive environment" ("LRE") mandate, also known as its "mainstreaming"

requirement, further underscores IDEA's goal of promoting public school access for children with disabilities. 20 U.S.C. § 1412(a)(5). Through this requirement, the Act incorporates a strong preference that, whenever possible, children with disabilities attend schools and classes with children who are not disabled—giving rise to a presumption in favor of a child's placement in the public schools. *See*, *e.g.*, *Independent Sch. Dist. No. 283* v. *S.D.*, 88 F.3d 556, 561 (8th Cir. 1996) (hearing officer erred by ignoring IDEA's "strong preference" in favor of public school placement).

Given this presumption, a school district may only resort to use of a private school to educate a child with a disability when "public educational services appropriate for the handicapped child are not available." *Hessler ex rel. Britt* v. *State Bd. of Educ.*, 700 F.2d 134, 138 (4th Cir. 1983). The public school has a duty to provide services to the student and to include the student in the public school community to the maximum extent practicable.

The Ninth Circuit's decision, which advantages parents who never work with the public school district to attempt to include their disabled child in a public school program tailored to their child's needs, is contrary to the well-established preference in the IDEA for public schooling of disabled children wherever possible. Indeed, it eviscerates the LRE mandate by allowing parents to obtain public funding for a private school placement without ever trying the public school program.

B. IDEA Establishes a Collaborative Framework for Parents and Public Schools to Work in Tandem to Ensure Appropriate Educational Programs for Children with Disabilities.

The "core of [IDEA] * * * is the cooperative process that it establishes between parents and schools." *Schaffer*, 126 S. Ct. at 532. *See also Rowley*, 458 U.S. at 205-206 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). The collaborative decision-making process at the heart of IDEA is undermined when parents do not cooperate in good faith with school districts. Congress' decision to require parents at least to attempt to ensure an appropriate public school placement before they are eligible for private school tuition reimbursement fosters just such good-faith collaboration. The Ninth Circuit decision below, however, will encourage parents not to collaborate with public school districts because to do so will disadvantage them if they later seek private-school tuition reimbursement.

As the Court recently stated in *Schaffer*, the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 126 S. Ct. at 532. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. *See* 20 U.S.C. § 1414(d); *Honig* v. *Doe*, 484 U.S. 305, 311 (1988).

Parents are also involved in an ongoing process of evaluating the implementation of the child's educational program and revising IEPs. At least annually the whole IEP team, including the parents, formally reviews whether the plan's goals are being achieved and revises the IEP as needed. The team also considers the results of reevaluations of the child and other new information about the child and his or her needs, including any such information submitted by the parents. 20 U.S.C. § 1414(d)(3-4).

When a child has never received special education services from the public school system, requiring parents to request an evaluation—before placing their child in private school—to determine whether their child is disabled and eligible for services under the IDEA is entirely consistent with the collaborative model established in the IDEA. Likewise, requiring parents at least to try the services recommended by an IEP team before rejecting them in favor of a private placement furthers this collaborative model. Moreover, requiring parents to work in good faith with school staff recognizes that providing a free appropriate public education to any given child may require an ongoing process of adaptation. By contrast, to allow parents to obtain tuition reimbursement when they initially agreed that their child was ineligible for special education, only to later request an evaluation and a due process hearing after removing the child from public school, would belittle both the cooperative approach of IDEA and the complexity of educating disabled students.

IDEA's emphasis on prompt cooperative solutions imposes obligations on school districts and parents alike to ensure their good faith commitment to a

truly collaborative process. The 1997 IDEA amendments, for example, included a number of provisions that made some of the procedural duties of parents quite explicit. Requiring cooperation in these smaller ways would make little sense if the Act entitles parents who abandon public schools before even challenging whether their child was eligible for services, or who reject a proposed placement without trying the services offered by the public school district, to receive tuition reimbursement.

The 1997 amendments, for example, added a provision indicating that reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Therefore, before removing a child from a public school, parents must inform the IEP team that they are rejecting the proposed placement, state their concerns with the proposal, and indicate their intent to enroll their child in a private school at public expense. 34 C.F.R. § 300.148(d). In addition, parents must give the school district written notice of these factors at least ten days prior to removing their child from a public school. *Id.* The reason for this is clear: Without a good faith commitment to the process by all parties, true collaboration in determining the development and implementation of a free appropriate public education would not be possible. *See*, *e.g.*, *M.S. ex rel. M.S.* v. *Mullica Twp. Bd. of Educ.*, No. 06-533, 2007 WL 1096804 (D.N.J. Apr. 12, 2007), *aff'd*, 263 F. App'x. 264 (3d Cir. 2008) (parents' refusal to cooperate prevented creation of appropriate IEP). If rejecting a placement requires timely notice and a list of reasons to ensure a collaborative process, then

not even attempting to secure services under IDEA before removing the child from public school is the antithesis of this collaborative process.

School districts, too, share an obligation under the Act to attempt in good faith to identify and evaluate children in need of special education and to negotiate workable IEPs—and to agree to private placements when they cannot. School districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. In 2005, for example, there were 88,098 students with disabilities educated in private schools at public expense. *See* U.S. Department of Education, IDEA data, Table 2-5: Number of students ages 6 through 21 served under IDEA, Part B, in the U.S. and outlying areas, by disability category and educational environment, Fall 1996 through Fall 2005, *available at* https://www.ideadata.org/ tables29th/ar_2-5.htm [hereinafter IDEA data]. The overwhelming majority of these placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA. School districts thus voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements—which occur when the collaborative process established by the Act is operating as it is intended.

C. IDEA Provides Numerous Procedural Protections to Parents, Students and School Districts in an Effort to Balance the Costs and Benefits of IDEA.

The fundamental goal of IDEA is a "free appropriate public education" in the "least restrictive environment" for all students with disabilities. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(5). IDEA establishes procedural rights and obligations for parents and school districts alike to achieve that goal in a manner that ensures education opportunities for disabled children while recognizing the financial costs entailed. To require school districts to reimburse the cost of private school tuition without first affording the district the opportunity to provide a free appropriate public education ignores the equally important interests of school districts and parents that IDEA seeks to balance through carefully constructed procedural rights and obligations.

The Act imposes numerous procedural obligations on public school districts to ensure prompt resolution of disputes, in the event that the collaborative approach is unsuccessful. Under IDEA, school districts must respond to parents' complaints within a short timeframe. Indeed, since the adoption of Section 1412(a)(10)(C)(ii), Congress has tightened the deadlines for school districts. For example, when a school district receives notice of a due process complaint, it has only 10 days to explain to the parents why it has proposed or refused to take the action at issue. 20 U.S.C. § 1415(c)(2)(B)(i)(I). Within 15 days, the school district must convene a meeting with the parents and relevant IEP team

members, at which the parents and child are given an opportunity to discuss their complaint and try to resolve the dispute amicably. *Id.* § 1415(f)(1)(B). If the complaint is not fully resolved within 30 days, a due process hearing must be scheduled. *Id.* The Act also provides parents and guardians with a right to publicly funded, confidential mediation. *Id.* § 1415(e).

The 1997 IDEA amendments include several provisions that make certain procedural duties of parents quite explicit. For example, the 1997 amendments specify that private school tuition reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. *See* 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d). These procedural safeguards emphasize that school districts should be given an opportunity to provide a free appropriate public education before parents are able to obtain tuition reimbursement for a unilateral private school placement.

The Ninth Circuit's interpretation flouts those safeguards and the balance IDEA seeks to achieve. According to that court, because parents are not statutorily barred from receiving tuition reimbursement where their disabled children never received public special education services, they are not subject to statutory requirements imposed on parents who seek tuition reimbursement for private placement of disabled children who did previously receive special education. The Ninth Circuit's decision can only encourage parents not to work within the framework of IDEA to develop a plan for a

free appropriate public education for their disabled children. Such a message is completely antithetical to Congress' intent.

II. THE NINTH CIRCUIT'S RULING PROVIDES UNFAIR LITIGATION ADVANTAGES TO PARENTS WHO NEVER WORK WITH THE SCHOOL DISTRICT AND CREATES BUDGETING UNCERTAINTY FOR SCHOOL DISTRICTS.

A. School Districts Are Substantially Limited in their Ability to Demonstrate That They Provided FAPE If They Never Have the Opportunity to Provide Special Education Services to a Student.

The advantage provided by the Ninth Circuit's interpretation of IDEA to parents who fail to work within the collaborative structure of the statute goes beyond the fact that those parents need not comply with the statutory requirements imposed by IDEA on those parents whose children have received public special education services. As a practical matter, parents whose children have not received public special education services will also benefit from an advantage in any later administrative proceeding or litigation with the school district.

Under the Ninth Circuit's ruling, because parents do not have to give notice that they intend to place their child in a private school, the school district will sometimes not even have the opportunity to evaluate the child, much less develop an IEP, until after the child is in a private school. The ensuing evaluation and any development of an IEP inevitably will occur

under an adversarial shadow, with the parents' rejection of any determination of ineligibility or offer of an IEP public placement already set and the occurrence of a due process hearing a foregone conclusion. Under such circumstances, a school district knows that any determination the child is ineligible will place it in an extremely weak position should the due process hearing officer disagree. It will not only be found to have denied FAPE by its ineligibility finding but also will not have developed an IEP which can be examined to determine the appropriateness of the placement and services offered.

Where the school district has already determined prior to the parents' unilateral removal that a child is eligible for special education, unilateral refusal by parents to try an IEP means that school officials are never given the opportunity to make (or refuse to make) changes depending on how a child responds to the IEP developed. While there is no guarantee that a proposed IEP will always accommodate every child, the school district should have the opportunity to try less restrictive alternatives than private placements. *See*, *e.g.*, *T.F.* v. *Special Sch. Dist. of St. Louis County,* 449 F.3d 816, 821 (8th Cir. 2006) ("district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement"). And if a problem with the IEP becomes apparent, school districts need to be able to investigate and respond to the problem—before being saddled with tens of thousands of dollars in tuition reimbursement. *See M.C. on behalf of J.C.* v. *Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) (district "may not be able to act immediately to correct an inappropriate

IEP; it may require some time to respond to a complex problem").

When parents unilaterally place their child in a private school without determining whether their child is even eligible for an IEP, or before implementation of a collaboratively developed IEP, school districts are thus denied the ability to litigate the case on an even footing with the parents. For example, where eligibility is contested, the due process hearing officer will be weighing the district's determination of ineligibility, (*i.e.*, its intent to offer no services), against the parents' claim that their child is in need of services as reinforced by evidence of how well the child is doing while receiving the panoply of services available at the private placement. Where eligibility is not at issue, the hearing officer is forced to evaluate in a vacuum whether the IEP would have been appropriate, because the child has no experience with the public school placement. This necessitates an abstract inquiry. Although an IEP is supposed to be judged prospectively as of the time it was developed, in many cases, the parents point precisely to how the child is doing in the private placement as some sort of "proof" of their speculation that the public placement was not sufficient. *See, e.g., Justin G. ex rel. Gene R.* v. *Board of Educ. of Mont. Co.*, 148 F. Supp. 2d 576 (D. Md. 2001). In addition to encouraging improper "Monday morning quarterbacking" of the IEP developed by the public school, the parent's "proof" of private school success is meaningless in the absence of having tried the public placement.

The Ninth Circuit's interpretation of IDEA thus allows, and even encourages, parents and their attorneys to sit back and never even try to obtain an IEP in hopes that the school district members of an IEP team will, in the opinion of a hearing officer, incorrectly conclude their child is not disabled or the IEP is not effective. At a minimum, parents and their attorneys will be more able to convince a hearing officer or administrative law judge that the school district did so, a process made easier by asking the hearing officer to compare the school district's proposed program, or lack thereof, to the private school's actual program. In contrast, for a student who has attended the public schools, has gone through the evaluation process, and has tried the IEP proposed by the school district, the school district will be able to provide evidence at an administrative hearing of its actual efforts with the student, rather than just a written evaluation or IEP on a piece of paper. It cannot be that in amending IDEA to include § 1412(a)(10)(C), Congress intended to provide such an advantage to families who never try to work with the public school system in obtaining public special education services for their children through the IDEA.

B. School Districts Are Unable to Accurately Budget for Special Education Services When They May Be Required to Pay for Unilateral Private Placements for Students who Never Received Special Education Services.

The Ninth Circuit's interpretation of IDEA also places public school districts at a distinct disadvantage in terms of determining their budgets

for special education services. Budgeting for special education services is already a difficult process for public school districts. These costs have been described as the "wild cards in school district budgets," because they are based on particular needs of specific students and can change from year to year. Melanie Asmar, *Special Education Costs Soar; Unpredictable Bill Can Strain Local Districts,* Concord Monitor, Feb. 17, 2008. In addition, the costs of private placements for special education students can be particularly expensive. While the residential program for which respondent sought reimbursement here cost more than $5,000 per month—or approximately $45,000 per year—costs for some private placements can be "as much as $100,000 per year." *Id.* As one superintendent explained, "You really can have just a few very high-cost students come into your district and have a huge impact on your cost per pupil." Meaghan M. McDermott, *Special Ed*, Rochester Democrat and Chronicle, Dec. 2, 2007, at 1A.

The Ninth Circuit's ruling below that § 1412(a)(10)(C) does not apply to a student who never received special education services from a public school district makes an already difficult budgeting process for public school districts even more unpredictable. School districts are simply unable to estimate possible costs associated with private placements where they have no means of determining the number of students who might be eligible for private school reimbursement, and where decisions as to whether or not reimbursement is appropriate are based on indeterminate notions of equity rather than statutory rules and procedures. Rather than having advance notice and an

opportunity to plan ahead in budgeting for a student whom the public school district has attempted to serve, the Ninth Circuit rule means that school districts will be hit after-the-fact with potentially large tuition reimbursement claims for private placements of students who the school district did not even know might require such services.

The budgeting challenges in this case exemplify the problem. How could the school district have suspected in 2001, after T.A.'s mother *agreed* with the district that he was ineligible for special education services, that a few years later he would be in a residential placement costing $45,000 a year for ADHD?

III. PERMITTING REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENTS MADE BEFORE THE CHILD EVER RECEIVES SPECIAL EDUCATION SERVICES FROM A PUBLIC SCHOOL WOULD INCREASE LITIGATION COSTS AND DIVERT RESOURCES FROM EDUCATION.

A. Litigation Costs Under IDEA Are High.

Litigation costs under IDEA are often prohibitive for school districts. In 1999-2000, the average cost of a litigated case was $94,600 for the year. Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000*, *Rpt. 4* at 8 (May 2003), *available at http://csef.air.org/publications/-SEEP/national/Procedural%20Safeguards.pdf* [hereinafter Chambers, Procedural Safeguards]. Congress is aware of this problem and has been

trying to rein in these costs. As a Senate Report from the 1997 amendments makes clear, "[t]he growing body of litigation surrounding IDEA is one of the unintended and costly consequences of this law." S. Rep. No. 104-275, at 85 (1996).

But school districts are pushed to litigate as more and more parents seek reimbursement for expensive private school placements for their children. The costs of reimbursing parents for private school placements, such as respondents seek here, average more than $26,000 per student–more than four times the cost of public placements. U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of IDEA*, I-30 to I-31 (2002). And in roughly the last decade, the number of private placements has increased at more than *twice* the pace that the number of special education students has increased. According to the United States Department of Education, 88,098 students with disabilities were educated in private schools at public expense in 2005. From 1996-2005, while the number of children ages 6-21 who receive special education and related services for all disabilities rose by 17% across the Nation, the number of children in publicly funded private placements rose by over 34%. *See* IDEA data, *supra*, at Table 2-5.

Even if parents and the school district can resolve the conflict prior to litigation, due process hearings and mediations themselves add significant costs to the special education budget. In 1998-1999, more than 6,750 due process hearings and 4,250 mediations were held. *See* Chambers, Procedural Safeguards, *supra*, at 8. And on average, schools spent $8,160-$12,200 for *each* due process hearing or

mediation. *Id*. Given that the average per pupil expenditure for special education services is about $8,000, a due process hearing or mediation effectively doubles a school district's cost to educate a single disabled child. *See id.* at 3; U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-22, I-26 (2002).

School districts do not engage in these expensive disputes to avoid providing appropriate education to special needs students; indeed, more than 55% of resolved due process hearings and litigation cases are decided entirely in favor of the school district, while 65% of due process hearings and 83% of litigation cases result in at least a partial victory for the district. *See* Chambers, Procedural Safeguards, *supra*, at 20. Every dollar a school district spends on private placements and litigation to avoid unnecessary private placements is a dollar less for providing special education and related services to students in the public schools.

B. The Ninth Circuit's Decision Will Encourage Litigation.

The 2004 amendments contain several provisions designed to "[r]estor[e] trust and reduc[e] litigation" under IDEA and to alleviate the "excessive litigation under the Act." H.R. Rep. No. 108-77, at 85, 116 (2003). *See, e.g.*, 20 U.S.C. § 1415(b)(7)(A) (notice requirements for complaints); 20 U.S.C. § 1415(b)(6)(B) (statute of limitations); 20 U.S.C. § 1415(e) (mediation and nonbinding arbitration); 20 U.S.C. § 1415(i)(3)(B) (attorney's fees for frivolous claims); H.R. Rep. No. 108-77, at 85-86 (discussing new provisions). But ruling that *Burlington Sch.*

Comm. v. *Department of Educ.*, 471 U.S. 359 (1985), and *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7 (1993), are not limited by Section 1412(a)(10)(C)(ii) would only result in a continued flood of private school parents seeking to play in a tuition-reimbursement lottery, regardless of their interest (or lack thereof) in securing a public education for their children. It would place school districts nationwide, many of them small and financially strapped, in the untenable position of being forced to choose between an expensive private school placement on the one hand and costly litigation on the other.

The reality is that the Court's holdings in *Burlington* and *Carter* exploded the number of tuition reimbursement cases that school districts must litigate, mediate, or settle. And if parents are free to unilaterally place their children in private schools and then seek reimbursement, without ever trying the public school's program (or in this case, even working with the school to create an individualized program), that number will expand exponentially. IDEA is intended to ensure a free and appropriate *public* education for students with disabilities—resort to a private placement is permissible only in extraordinary circumstances. Allowing private tuition reimbursement in cases where the child has not previously received special education services in the public schools would work against the intent of the Act, forcing school districts into a no-win choice between expensive litigation and expensive private placements and offering windfalls to parents who prefer private schools.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition, amici respectfully request that this Court grant certiorari, and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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