Interpreting the 1997 Amendment to the IDEA: Did Congress Intend to Limit the Remedy of Private School Tuition Reimbursement for Disabled Children?

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Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol77/iss5/19
INTERPRETING THE 1997 AMENDMENT TO THE IDEA: DID CONGRESS INTEND TO LIMIT THE REMEDY OF PRIVATE SCHOOL TUITION REIMBURSEMENT FOR DISABLED CHILDREN?

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The Individuals with Disabilities Education Act (IDEA) requires school districts to fund private school placements for disabled children who cannot be educated appropriately in public school. This Note explores the conflict over whether private school tuition reimbursement should be available under the IDEA to parents who place their disabled children in private school without previously receiving special education from a public agency. The conflict hinges on whether a 1997 amendment to the IDEA foreclosed the equitable considerations previously utilized by the courts to determine whether tuition reimbursement was appropriate and limited the remedy to cases where the child previously received public special education services. This Note argues that the 1997 amendment to the IDEA did not limit the remedy of tuition reimbursement. It suggests that the U.S. Supreme Court uphold the remedy of tuition reimbursement when appropriate, whether or not the disabled child previously received public special education services, when it decides the issue later this Term.

INTRODUCTION

"'Weak minded,'"1 "'difficult to educate,'"2 and "'moron of a very low type... who is incapable of absorbing knowledge"3 are just a few of the justifications given by states attempting to exclude disabled children from public schools in the late nineteenth and early twentieth century.4 Prior to 1975, there were no federal laws requiring states to provide disabled students with special education services.5 Although a minority of states

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* J.D. Candidate, 2010, Fordham University School of Law. I would like to thank Professor Aaron Saiger for his guidance and insight throughout this process. Special thanks to my friends and family, especially my mom and dad, my grandma, and Katie for their unconditional love and support, and to Josh for his patience and encouragement.


2. Id.


4. See RUSSO & OSBORNE, supra note 1, at 4–5.

5. Id. at 4.
independently enacted legislation requiring public schools to educate disabled children, more often, public schools excluded disabled children completely. As a result, public schools across the country did not satisfy the "educational needs of millions of children with disabilities." Many of these children grew up without programs and services that could have helped them manage their disabilities and lead productive, independent lives.

Significant progress has been made since the federal government intervened and passed legislation to protect the educational rights of children with disabilities in 1975. This legislation, now known as the Individuals with Disabilities Education Act (IDEA), has given many disabled children access to public education and led to sweeping reforms in special education policy. In order to receive federal funding for special education programs under the IDEA, public schools are required to provide all disabled children with a "free appropriate public education" (FAPE). The IDEA outlines elaborate procedures for identifying, evaluating, and determining appropriate placements for disabled children. When a school district does not have the resources or capabilities to adequately educate a disabled child in a public school, the district must propose and fund an appropriate private school placement for the child.

6. Id.
7. Id.
8. 20 U.S.C. § 1400(c)(2) (2006); see also Mills v. Bd. of Educ., 348 F. Supp. 866, 868 (D.D.C. 1972) ("The problem of providing special education for 'exceptional' children (mentally retarded, emotionally disturbed, physically handicapped, hyperactive and other children with behavioral problems) is one of major proportions in the District of Columbia."). Even when they were not "excluded entirely" from the public school system, disabled children were often left undiagnosed and denied appropriate services prior to 1975. 20 U.S.C. § 1400(c)(2); see also Terry Jean Seligmann, An Idea Schools Can Use: Lessons from Special Education Legislation, 29 FORDHAM URB. L.J. 759, 769 n.2 (2001) (noting that Congress found that over one million disabled children were entirely excluded from public school, "and that many others had failed in school because their disabilities had never been recognized and appropriately addressed").
9. See 20 U.S.C. § 1400(c)(1) ("Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.").
11. See Alan Gartner & Dorothy Kerzner Lipsky, Beyond Special Education: Toward a Quality System for All Students, 57 HARV. EDUC. REV. 367, 371 (1987) (finding that over 650,000 more disabled children received services in 1985-1986 than in 1974-1975); Seligmann, supra note 8, at 759-60 (stating that over six million children received special education services as of 2001).
13. See id. § 1414.
The IDEA also sets forth a detailed set of procedures for cases where a school district and the parents of a disabled child disagree over whether the public school can offer the child an appropriate educational placement. If the school district proposes a public school placement for a disabled child, but the parents of the child think private school is necessary, the parents can request a due process hearing and eventually appeal to the courts to determine the appropriate placement for their child. This process can often take several months or years and parents sometimes opt to unilaterally place their children in private school—which they believe is the appropriate placement—during the pendency of the administrative hearings or judicial review.

Prior to 1997, parents who unilaterally placed their disabled children in private school were reimbursed by the school district if the court held that private school was, in fact, the proper placement for the child. This remedy of reimbursement was based on a provision in the IDEA authorizing courts to grant "appropriate" relief. In 1997, Congress amended the IDEA and added a specific section on tuition reimbursement for students unilaterally placed in private school.

This Note analyzes the language of the 1997 amendment to the IDEA and addresses whether Congress intended to limit the remedy of tuition reimbursement for parents who unilaterally place their disabled children in private school. Specifically, it discusses whether the remedy of private school tuition reimbursement should be available to a disabled child who never previously received public school special education services.

Part I of this Note provides background information on the history and purpose of the IDEA and discusses the remedies authorized by the statute and the U.S. Supreme Court when a school district does not provide a disabled child with a FAPE. It also examines the legislative history and the administrative agency interpretation of the statute. Part II presents and analyzes the conflicting case law regarding tuition reimbursement after the 1997 amendment to the IDEA. After reviewing the divergent views of the courts on this issue, Part III suggests that, because the plain text of the provision of the IDEA is ambiguous, courts should defer to the

16. Id. § 1415(f).
18. Requests for tuition reimbursement by parents who have unilaterally placed their children in private school have increased in recent years. In New York, reimbursement claims have increased from 1519 in 2002 to 3675 in 2006; the cost of reimbursement payments for the 2006–2007 school year totaled $57 million. David Stout & Jennifer Medina, With Justices Split, City Must Pay Disabled Student's Tuition, N.Y. TIMES, Oct. 11, 2007, at B1.
administrative agency's interpretation of the statute. This interpretation—that the post-1997 IDEA does not create a categorical bar to tuition reimbursement for students who have not previously received special education or related services from a public agency—most accurately fulfills the express purpose and underlying policy considerations of the IDEA. Finally, given the widespread implications and current lack of guidance on the availability of private school tuition reimbursement for unilateral parent placement, Part III proposes that the Supreme Court adopt this interpretation when it addresses the issue later this Term.

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND THE REMEDY OF PRIVATE SCHOOL TUITION REIMBURSEMENT

Part I of this Note introduces the IDEA, the statute that protects the educational rights of disabled children in the United States. Part I.A briefly discusses the rights, or lack thereof, of disabled children before the enactment of the IDEA and how parents and advocates used the civil rights movement to spark the effort to secure equal educational rights for children with disabilities. It then takes a detailed look at the purposes and requirements of the statute. Part I.B examines the remedies authorized by the IDEA when a school fails to provide a disabled child with an appropriate education, including private school tuition reimbursement. This part discusses School Committee of Burlington v. Department of Education, a 1985 Supreme Court case that authorized retroactive private school tuition reimbursement for disabled children who could not be appropriately educated in public school. It also discusses the 1997 revision to the IDEA, which specifically comments on the issue of private school tuition reimbursement. Finally, Part I.C briefly introduces the methods of statutory interpretation that courts have used to interpret the IDEA. It then examines the legislative history of the IDEA and the interpretation of the Department of Education (DOE), the administrative agency that manages federal education policy.

A. An Introduction to the Individuals with Disabilities Education Act

In 1975, Congress passed legislation to protect the rights of disabled children and prevent the states from excluding these children from public schools. This legislation, originally known as the Education for All Handicapped Children Act of 1975, was amended in 1990 and renamed the Individuals with Disabilities Education Act. The 1990 revision made the IDEA permanent legislation rather than temporary legislation that would
expire unless reauthorized. Since it was originally enacted, the IDEA has been amended several times, most recently in 2004. This Note focuses primarily on a provision that was added to the IDEA in 1997, although the implications of the 2004 revisions on private school tuition reimbursement will be discussed briefly in Part III.

1. Moving Toward Equality: Judicial and Legislative Recognition that Disabled Children Deserve Equal Access to Public Education

This section introduces the movement to gain educational rights for disabled children. It discusses how advocates for disabled children used the civil rights movement to advance their cause by bringing lawsuits and lobbying for federal legislation to protect the educational rights of disabled children. Before the passage of the IDEA, disabled children were regularly left undiagnosed and denied access to public schools and the special education services they needed. Until the early 1970s, these practices were often approved and sanctioned by state courts.

The civil rights movement—most significantly, the Supreme Court’s landmark decision striking down racial segregation in public schools in Brown v. Board of Education—unwittingly “laid the foundation” for efforts to secure educational rights for the disabled. In the late 1960s and early 1970s, parents and activists brought a plethora of cases seeking

27. Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. §§ 1400-1482) (amending the IDEA). Although the 2004 revision officially renamed the legislation again, this Note will refer to it as the IDEA. See 20 U.S.C. § 1400(a) (“This chapter may be cited as the ‘Individuals with Disabilities Education Act.’”).
28. See infra note 324 and accompanying text.
29. Russo & Osborne, supra note 1, at 4.
30. Id. at 4–5; see also, e.g., Watson v. City of Cambridge, 32 N.E. 864, 864 (Mass. 1893) (finding the “good faith” decision of a school to exclude a child it considered “so weak in mind as not to derive any marked benefit from instruction” was final and not subject to revision by the court); Bd. of Educ. v. State ex rel. Goldman, 191 N.E. 914, 916 (Ohio Ct. App. 1934) (“As a matter of common sense it is apparent that... an idiot or imbecile who is incapable of absorbing knowledge or making progress in the schools, ought to be excluded.”); State ex rel. Beattie v. Bd. of Educ., 172 N.W. 153, 155 (Wis. 1919) (holding that the school board’s decision to remove a paralyzed child from public school should not be interfered with because the school board did not act illegally or unreasonably and was considering the best interest of the school and the general welfare).
32. See Russo & Osborne, supra note 1, at 5 (noting that Chief Justice Earl Warren “characterized education as the most important function of government” and explained that educational opportunity, “where the State has undertaken to provide it, is a right that must be made available to all on equal terms” (quoting Brown, 347 U.S. at 493)).
educational equality for the poor and minorities, thus driving forward the movement for equal rights for disabled students. These cases—albeit not as groundbreaking as Brown—had important implications for students with disabilities. Advocates for the disabled used these civil rights cases addressing educational equality for minority and impoverished students to advance their cause. They brought suits and lobbied Congress to pass federal laws requiring equal treatment for disabled students, arguing that the “legal principles” behind the civil rights cases applied “regardless of why a particular group of students may be classified as a minority.” The initial success of these advocates was limited to small victories in the district courts. These victories were “considered landmark opinions despite their limited precedential value” because they “provided the impetus for Congress to pass [the] sweeping legislation mandating” that students with disabilities have access to an appropriate public education. The next section describes this legislation.

2. Congressional Efforts to Protect Disabled Children: A Look at the Goals and Requirements of the IDEA

The purposes of the IDEA, the statute enacted to protect the educational rights of disabled children, are stated in 20 U.S.C. § 1400(d) and include ensuring that all disabled children have access to a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” This section takes a detailed look at the framework and specific requirements of the IDEA.

33. Id. at 6–7; see also Lau v. Nichols, 414 U.S. 563, 566 (1974) (finding that a public school’s failure to provide English language instruction to students of Chinese ancestry who did not speak English violated the Civil Rights Act of 1964 because it denied them the meaningful opportunity to participate in public education), abrogated by Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (holding that the curriculum-tracking system used by the city’s public schools was discriminatory toward poor and minority students because the system denied children who were in the lower curriculum tracks educational opportunities).

34. See Russo & Osborne, supra note 1, at 8 (noting that, although these cases were not binding precedent in disputes over educational equality for disabled students, they are persuasive authority and the legal principles remain compelling).

35. Id.

36. Id.


38. Russo & Osborne, supra note 1, at 8.

39. 20 U.S.C. § 1400(d)(1)(A) (2006). The other stated purposes of the IDEA include (1) protecting the rights of disabled children and their parents; (2) assisting public agencies in providing education for all disabled children; (3) assisting the states with “early intervention services for infants and toddlers with disabilities and their families”; (4) “ensur[ing] that educators and parents have the necessary tools to improve educational results for [disabled] children”; and (5) assessing the efforts to serve disabled children and ensuring that such efforts are effective. Id. § 1400(d)(1)(B)–(C).
In order to be covered by the IDEA, a child’s educational performance must be adversely affected by a disability, as it is defined in the IDEA.\footnote{See id. § 1401(3). There are fourteen specific terms that guide who is eligible for a “free appropriate public education” (FAPE). To be categorized as disabled for the purposes of the IDEA, a child must be classified within one of the following categories: (1) autism; (2) deaf-blindness; (3) deafness; (4) developmental delay; (5) emotional disturbance; (6) hearing impairment; (7) mental retardation; (8) multiple disabilities; (9) orthopedic impairment; (10) other health impairments; (11) specific learning disability; (12) speech or language impairment; (13) traumatic brain injury; or (14) visual impairment including blindness. National Dissemination Center for Children with Disabilities, \url{http://www.nichcy.org/Disabilities/Categories/Pages/Default.aspx} (last visited Mar. 10, 2009).}

As of 2004, approximately one in ten public school students receive some special education services.\footnote{Seligmann, \textit{supra} note 8, at 765. “[T]he number of children identified as having disabilities and served under the IDEA has increased from 3.7 million in 1976–77 [(the year after it was enacted)] to 6.1 million in 1999–2000.” \textit{Id.}}

The IDEA process starts when either a parent or the school district requests that a child be evaluated for a disability.\footnote{Id. at 762. Although an evaluation can be requested by the parent or the school, the parent must consent to the evaluation. 20 U.S.C. § 1414(a)(1)(C).} If it is determined that the child has a disability,\footnote{To determine whether a child has a disability, the school district must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent.” 20 U.S.C. § 1414(b)(2)(A). These assessment measures must be “valid and reliable” and “administered by trained and knowledgeable personnel.” \textit{Id.} § 1414(b)(3)(A)(iii)–(iv).} the IDEA mandates the development of an Individualized Education Program (IEP),\footnote{Id. § 1414(d).} a “written statement which serves as a road map for the disabled child’s education.”\footnote{Theresa M. Willard, \textit{Note, Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students}, 31 \textit{IND. L. REV.} 1167, 1170 (1998).} An IEP is supposed to be produced by a team of parents, educators, and administrators working cooperatively to develop a “comprehensive statement of the educational needs of [the disabled] child.”\footnote{Burlington, 471 U.S. at 368.} Congress tried to ensure the “full participation of the parents” in these IEP meetings—and the IDEA process as a whole—by “incorporat[ing] an elaborate set of what it labeled ‘procedural safeguards’” into the statute.\footnote{20 U.S.C. § 1415(b)(1).} The IDEA gives parents the right to “examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child . . . and to obtain an independent educational evaluation of the child.”\footnote{20 U.S.C. § 1415(b)(1).}
Ultimately, to comply with the IDEA, the IEP must outline a plan that includes a FAPE for the disabled child in the least restrictive environment (LRE).\(^4\) To qualify as a FAPE, the services offered must meet certain state and federal standards and must be tailored to the individual needs of each child.\(^5\) The IDEA defines a FAPE as special education and related services that

- have been provided at public expense, under public supervision and direction, and without charge;
- meet the standards of the State educational agency;
- include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- are provided in conformity with the individualized education program required under section 1414(d) of [the IDEA].\(^5\)

The IDEA's mandate that school districts provide disabled children with an appropriate education is "not limitless" and contemplates services needed for the child to "progress adequately."\(^5\) The statute does not require a placement that "would maximize the child's achievement."\(^5\) Although the proposed placement need not be perfect to qualify as a FAPE, it must be "reasonably calculated to enable the child to receive educational benefits."\(^5\)

To meet the IDEA requirement that a disabled child must be educated in the LRE, "[t]o the maximum extent appropriate, children with disabilities . . . [should be] educated with children who are not disabled."\(^5\) Children with disabilities should only be removed from the regular education environment when "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary

\(^{50}\) 20 U.S.C. § 1401(9).
\(^{51}\) Id.
\(^{52}\) Seligmann, supra note 8, at 763.
\(^{53}\) Id.
\(^{55}\) 20 U.S.C. § 1412(a)(5)(A). The goal of inclusion—educating the majority of disabled children in regular education classrooms—is seen by some as "a moral imperative designed to avoid the segregation of children with disabilities into a separate but unequal system." Seligmann, supra note 8, at 776 (citing Jack Pearpoint, Reflections on a Quality Education for All Students, in EDUCATING ALL STUDENTS IN THE MAINSTREAM OF REGULAR EDUCATION 249, 249 (Susan Stainback et al. eds., 1989)). Proponents of inclusion argue that it will "improve education for all children" and allow special education teachers, who have additional training and expertise, to serve both regular and special education students. Id. Opponents of inclusion assert that disabled children were included in regular education classes before the IDEA was passed and they were often neglected and failed to progress academically. Id. at 777. Further, they point out, no matter what reforms are made, regular education will always be inappropriate for some children because of the serious nature of their disabilities. Id. Although the debate over inclusion is still very much alive, the IDEA has "incorporated the central premise of a preference for integration by requiring that children be educated in the least restrictive environment where their educational needs can be appropriately met." Id. at 778.
aids and services cannot be achieved satisfactorily.” While the IDEA expresses a preference for educating disabled children in public schools, it allows for placement in private school if the child’s needs cannot otherwise be met.\textsuperscript{57}

In order to accomplish its goal of providing special education services to all disabled children,\textsuperscript{58} the IDEA also contains a provision known as “Child Find.”\textsuperscript{59} To fulfill their Child Find obligations, states must develop programs to seek out disabled children and determine if they are receiving appropriate services.\textsuperscript{60} The provision states,

All children with disabilities residing in the State, including children with disabilities who are . . . attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.\textsuperscript{61}

In 2004, the Child Find requirements in the IDEA were expanded.\textsuperscript{62} Public school officials must (1) identify children in the districts where they attend school (as opposed to where they live) and (2) “record and report to state education agencies the number of children from private schools who are evaluated, determined to have disabilities, and served.”\textsuperscript{63}

The IDEA sets forth both policy goals and procedural steps for school districts to ensure access to a FAPE for disabled children. However, the IDEA sets out more than these policies and procedures; it lays out a detailed framework for federal and state funding to school districts to enable compliance, which will be described in the next section.

3. The Federal Government’s Commitment to Funding Special Education Programs

Besides the goals, requirements, and procedures described in the previous section, the IDEA is “a funding statute that provides federal funds to states that comply with its conditions.”\textsuperscript{64} Although the federal government is authorized to fund up to 40% of states’ special education costs per year,\textsuperscript{65}

\textsuperscript{57} Seligmann, supra note 8, at 764.
\textsuperscript{58} See supra note 39 and accompanying text.
\textsuperscript{60} Id.; see also IDEA Child Find Project, http://www.childfindidea.org (last visited Mar. 10, 2009) (detailing the requirements of Child Find).
\textsuperscript{62} Russo & Osborne, supra note 1, at 13–14.
\textsuperscript{63} Id. at 14.
\textsuperscript{64} Seligmann, supra note 8, at 762. States must meet specific requirements, such as providing a FAPE to children with disabilities, to receive federal funding under the IDEA. Id. at 762 n.17.
\textsuperscript{65} See id. at 783–84 (explaining the funding formula to determine the amount of money the federal government can provide to a particular state).
recent data shows that it usually contributes far less.\textsuperscript{66} Federal funding of special education almost doubled between 1997 and 2000, from $2.6 million to $4.9 million;\textsuperscript{67} however, percentages of federal funding still vary widely from state to state.\textsuperscript{68} The residual funding for special education services must be provided by state and local sources.\textsuperscript{69} Some school districts have claimed that, due to the lack of federal funding and the increase in special education costs, they have had to reduce other general education services to stay within their budget and fulfill their obligations under the IDEA.\textsuperscript{70}

Congress has identified increased federal funding as "an important step to avoiding inappropriate and unfair funding conflicts between children with and without disabilities thought to arise when public schools divert general resources to fund special education programs."\textsuperscript{71} The most recent revision of the IDEA states that "[a] more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals."\textsuperscript{72}

\textsuperscript{66} See Ann Lorde Man, Cong. Research Serv., Individuals with Disabilities Education Act (IDEA): Current Funding Trends 7 (2008), available at http://assets.opencrs.com/rpts/RL32085_20080411.pdf (finding that, although federal funding is almost five times greater than it was in 1995, the government currently funds less than twenty percent of the cost of educating children with disabilities); Ashley Oliver, Note, Should Special Education Have a Price Tag? A New Reasonableness Standard for Cost, 83 Denv. U. L. Rev. 763, 782 (2006) (noting that, in 2004, the federal government only contributed seventeen percent of special education funding (citing Telephone Interview by Ashley Oliver with Charman Paulmeno, Grants Fiscal Mgmt. Servs. Unit, Colo. Dep’t of Educ., in Denver, Colo. (Dec. 19, 2005))).

\textsuperscript{67} Seligmann, supra note 8, at 783 n.128 (citing 146 Cong. Rec. S9259–60 (daily ed. Sept. 26, 2000) (statement of Sen. Gordon Smith)).


\textsuperscript{69} Willard, supra note 45, at 1179.

\textsuperscript{70} Seligmann, supra note 8, at 784.

\textsuperscript{71} Id. at 783 n.128 (citing 146 Cong. Rec. S9259–60 (daily ed. Sept. 26, 2000) (statement of Sen. Smith)); see also Siobhan Gorman, Why Special Education Could Spark a Veto, 33 Nat’l J. 2482 (reporting Republican Representative Michael Ferguson’s view that "insufficient funding for special education compromises the education of every student").

\textsuperscript{72} 20 U.S.C. § 1400(c)(7) (2006). The IDEA also states, While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

\textit{Id.} § 1400(c)(6); see also Seligmann, supra note 8, at 767 (stating that "full funding of special education at the federal level would loosen the budgetary ties on many school districts, and inure to the benefit of all students").
4. Dispute Resolution Procedures Outlined in the IDEA: Due Process Hearings, Administrative Appeals, and Judicial Review

Although the hope is that parents and school districts will be able to work together to develop an appropriate education plan for each child, the drafters of the IDEA recognized that disagreements between the parties would inevitably occur. This section discusses the specific dispute resolution methods Congress outlined in case "this cooperative approach [does] not ... produce a consensus between the school officials and the parents" regarding an appropriate educational placement for the child.73 Under the IDEA, if a party does not believe the proposed IEP meets the requirements for a FAPE, he or she may initiate mediation, seek administrative appeals, and, if unsuccessful, eventually seek judicial review.74

If mediation and other nonadversarial methods are unsuccessful, a party may appeal an IEP through an impartial due process hearing, which is a formal administrative proceeding where the parties present and refute evidence before an impartial hearing officer (IHO).75 The IHO must not be an employee of the public agency and must not have any personal or professional conflict of interest with the hearing.76

If one or both of the parties are still dissatisfied after the IHO renders a decision, the IDEA allows "any party aggrieved by the findings and

74. 20 U.S.C. § 1415(e)-(g); John E. Theuman, Obligation of Public Educational Agencies, Under Individuals With Disabilities Education Act (20 U.S.C.A. §§ 1400 et seq.), to Pay Tuition Costs for Students Unilaterally Placed in Private Schools—Post-Burlington Cases, 152 A.L.R. Fed. 485 (1999). Parents and school districts are encouraged to resolve disagreements through mediation and nonadversarial means when possible. The 1997 amendment included a requirement that states offer mediation as an alternative to an administrative hearing. 20 U.S.C. § 1415(e). Thirty-nine states already offered mediation before this provision was added and mediation was attempted in sixty percent of cases in which an impartial hearing was ultimately requested. Seligmann, supra note 8, at 782 n.124; see, e.g., OFFICE OF VOCATIONAL & EDUC. SERVS. FOR INDIVIDUALS WITH DISABILITIES SPECIAL EDUC. POLICY UNIT, N.Y. STATE EDUC. DEP'T, IMPARTIAL HEARING PROCESS FOR STUDENTS WITH DISABILITIES 1 (2001) [hereinafter IMPARTIAL HEARING PROCESS], available at http://www.vesid.nysed.gov/specialed/publications/policy/ihprocessguide.htm (according to the New York State Education Department, "[s]chool districts and parents should make every effort to amicably resolve differences over educational programs for students with disabilities"). The Department also provides detailed information regarding mediation options. See IMPARTIAL HEARING PROCESS, supra.
75. 20 U.S.C. § 1415(f); see also, e.g., IMPARTIAL HEARING PROCESS, supra note 74.
76. 20 U.S.C. § 1415(f)(3)(A)(i). In addition, the impartial hearing officer (IHO) must (1) "possess knowledge of, and the ability to understand, the provisions of [the IDEA], Federal and State regulations pertaining to [the IDEA], and legal interpretations of [the IDEA] by Federal and State courts;" (2) "possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice"; and (3) "possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice." Id. § 1415(f)(3)(A)(ii)–(iv).
decision’ made after the due process hearing” to file further administrative appeals and eventually appeals to state or federal court.\textsuperscript{77}

The IDEA is a far-reaching statute designed to prevent school districts from discriminating against children because of their disabilities. The legislation outlines broad policy goals and specific requirements to achieve its ends. Part I.B discusses remedies available to parents of disabled children under the IDEA and the case law interpreting the relevant statutory remedial provisions.

B. Remedies Under the IDEA: From “Appropriate” Relief to Explicitly Authorized Tuition Reimbursement

Part I.A introduced the IDEA and explained the procedures for identifying, evaluating, and determining the appropriate placement for a disabled child. It also discussed the dispute resolution procedures outlined for cases where the parents of a disabled child feel that a placement proposed by a school district does not qualify as a FAPE. This section further examines the remedies authorized by the IDEA upon a determination that a proposed placement for a disabled child does not, in fact, qualify as a FAPE.

1. School Committee of Burlington v. Department of Education: Conferring Broad Discretion to Determine Relief

The IDEA directs a court to “grant such relief as [it] determines is appropriate.”\textsuperscript{78} Although the statute is not more specific on the type of relief authorized, the Supreme Court held that this provision of the IDEA “confers broad discretion on the court”\textsuperscript{79} to determine what is “‘appropriate.’”\textsuperscript{80} Courts have authorized several different types of relief upon finding that a school district failed to provide a disabled student with a FAPE.\textsuperscript{81} Defining the boundaries of “appropriate” relief authorized by the courts’ “broad discretion” has been the source of much of the litigation and controversy surrounding the IDEA. This section discusses Burlington, the Supreme Court’s landmark decision authorizing private school tuition reimbursement as an “appropriate” remedy.

In Burlington, a child with “‘emotional difficulties [which were] secondary to a rather severe learning disorder’” was given an IEP that proposed placing him in a class with six special education students in a

\textsuperscript{78} 20 U.S.C. § 1415(i)(2)(C)(iii).
\textsuperscript{79} Burlington, 471 U.S. at 369.
\textsuperscript{80} Id. (quoting 20 U.S.C. § 1415(i)(2)(C)(iii)).
\textsuperscript{81} See Osborne, supra note 49, at 887. Most commonly, especially in cases where parents do not unilaterally enroll their children in private schools, courts direct school districts to take corrective action and develop a new IEP that provides the child with a FAPE. Id. at 888.
town public school. The child’s father subsequently rejected the IEP and requested an impartial due process hearing. Based on their belief that the town’s proposed placement was not suited to their child’s needs, the parents decided to remove the child from the public school he was attending and unilaterally enroll him in, and pay the tuition for, a private school that had been state-approved for special education services. In January 1980, approximately six months after the parents unilaterally removed their child from public school and enrolled him in private school, the IHO found that the school’s proposed public school placement was inappropriate and the private school that the child was currently attending provided an appropriate LRE to address the child’s educational needs.

The IHO directed the town to pay for the child’s private school tuition for the entire year, including retroactive reimbursement for the parents’ costs during the pendency of the hearing. Although the town eventually agreed to pay for the child’s prospective tuition expenses, it refused to retroactively reimburse the tuition expenses.

The town claimed that the parents “waived any right they otherwise might have to reimbursement” because they did not comply with a provision of the IDEA requiring the child to remain in his or her current educational placement during the IDEA proceedings. The IDEA was silent on the remedy of retroactive private school tuition reimbursement at this time. However, using the “broad discretion” authorized by the IDEA in directing the courts to grant relief they determine to be “appropriate,” the Supreme Court held that “equitable considerations [were] relevant in fashioning relief.” Based on principles of equity, the Court upheld the retroactive tuition reimbursement ordered by the IHO and foreclosed the town’s claim that “a parental violation of [§ 1415(j)] constitutes a waiver of reimbursement.”

82. Burlington, 471 U.S. at 362.
83. Id.
84. Id. In Florence County School District Four v. Carter, 510 U.S. 7 (1993), the U.S. Supreme Court held that a private school placement does not have to be state-approved to be considered appropriate. Id. at 15.
86. Id.
87. Id. at 363–64.
88. Id. at 371.
89. Id. (citing 20 U.S.C. § 1415(j) (2006)) The provision in question states, “Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.
93. Id. at 372.
The Court noted that the provision requiring the student to remain in his or her current educational placement did not mention “financial responsibility, waiver, or parental right to reimbursement.” The Court also stated that prospective relief ordering the school officials to develop a new, appropriate IEP might be sufficient if the administrative and judicial review process “could be completed in a matter of weeks.” However, the IDEA process is “ponderous” and usually continues for at least one year after the school year covered by the IEP.

The Court reasoned that the principal purpose of the IDEA would be thwarted if the statute were interpreted to foreclose the parental right of reimbursement when the parents unilaterally transferred their child to an appropriate placement. Finding that the IDEA was “intended to give handicapped children both an appropriate education and a free one,” the Court held that “it should not be interpreted to defeat one or the other of those objectives.” Under the reading proposed by the town, the parents would theoretically have had to choose between leaving their child in what they believed was an inadequate placement or placing their child in a supposedly appropriate placement and giving up their claim for reimbursement.

Bolstering its finding that “Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case,” the Court referenced legislative history favoring interim placement pending resolution of IDEA appeals. The Congressional Record reflects a statement by Senator Robert T. Stafford, who said,

The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child have been completely protected. We did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious

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94. Id. Although the Court found that the IDEA did not foreclose tuition reimbursement for parents who unilaterally place their children in a private school during administrative or judicial proceedings, the Court did say that parents do so “at their own financial risk.” Id. at 373–74. If the IHO (or the courts in any subsequent appeal) determined that the IEP proposed by the school district was in fact appropriate, the parents would not have been able to obtain reimbursement for the “interim period” when the child was in private school. Id. at 374. A finding that the proposed IEP did not provide a FAPE (and that the private school placement did) is a precondition to relief in the form of tuition reimbursement when a parent unilaterally places their child in private school. Id.; see also Russo & Osborne, supra note 1, at 233–34 (stating that the Supreme Court, in Burlington, affirmed the remedy of tuition reimbursement “as long as the parents’ chosen placement was determined to be the appropriate placement for their child”).


96. Id. School Committee of Burlington v. Department of Education was issued in the spring of 1985, over five years after the parents removed their child from the town’s proposed public school placement and eight years after discussions with the school district over placement began. Id. at 361–62.

97. Id. at 372.

98. Id.

99. Id.

100. Id. at 370.

101. Id. at 371–73.
administrative appeals were being exhausted. Thus the conference adopted a flexible approach to try to meet the needs of both the child and the State.\textsuperscript{102}

The Burlington decision sanctioned the use of equitable considerations and the availability of private school tuition reimbursement for children unilaterally placed in private school by their parents. The 1997 amendment to the IDEA, discussed in the next section, created significant controversy over whether the Burlington holding still applied to children who had never received special education in public school.

2. Private School Tuition Reimbursement in the 1997 Revision to the IDEA

The previous section discussed how courts have granted reimbursement to parents who unilaterally placed their children in private school prior to 1997. It explained the Supreme Court’s decision in Burlington that “equitable considerations are relevant” to determining relief under the IDEA.\textsuperscript{103} This holding was based on § 1415(i)(2)(C), which authorizes courts to “grant such relief as [it] determines is appropriate.”\textsuperscript{104} While this provision was not substantively changed by the 1997 revision,\textsuperscript{105} new provisions were added addressing the remedy of tuition reimbursement.\textsuperscript{106} This section discusses those changes.

When Congress amended the IDEA in 1997, it included § 1412(a)(10)(C)(ii), a new provision that explicitly commented on the issue of reimbursement for private school tuition.\textsuperscript{107} This section states,

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.\textsuperscript{108}

After the 1997 revision, there was uncertainty and controversy over whether Congress intended § 1412(a)(10)(C)(ii) to categorically bar private

\textsuperscript{102} Id. at 373 (quoting 121 CONG. REC. 37,412 (1975) (statement of Sen. Robert T. Stafford)).

\textsuperscript{103} See supra notes 92–93 and accompanying text.


\textsuperscript{105} Prior to the 1997 revision, this provision was located at § 1415(e)(2). Compare Burlington, 471 U.S. at 364, with 20 U.S.C. § 1415(i)(2)(c)(iii).


\textsuperscript{108} Id. § 1412(a)(10)(C)(ii).
school reimbursement for students who have not received public special education services.\(^\text{109}\)

Section 1412(a)(10)(C)(i), which immediately precedes the provision in question, states that a school district is not required "to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility."

This section reaffirms the Court's statement in *Burlington* that parents who unilaterally place their children in private schools do so "at their own financial risk."\(^\text{111}\)

Section 1412(a)(10)(C)(iii), the section immediately following the provision in question, provides limitations on tuition reimbursement and allows the remedy to be "reduced or denied" in a number of instances.\(^\text{112}\) Parents can be denied tuition reimbursement if (1) "at the most recent IEP meeting," they fail to "inform the IEP Team that they [are] rejecting the placement proposed by the public agency to provide a [FAPE] to their child," or fail to inform the team of "their concerns and their intent to enroll their child in a private school at public expense"; or (2) they do not give the school district written notice detailing the information above.\(^\text{113}\) The provision also states that tuition reimbursement can be "reduced or denied" if parents refuse to produce their child for an evaluation by the school district or "upon a judicial finding of unreasonableness with respect to actions taken by the parents."\(^\text{114}\)

These added provisions, which directly addressed the remedy of private school tuition reimbursement in cases of unilateral placement for the first time, created a firestorm of controversy. The statutory interpretation of the IDEA, described in Part I.C, played a major role in the circuit split detailed in Part II.

C. Statutory Interpretation and the IDEA

Parts I.A and I.B introduced the IDEA as a whole and examined the provisions of the IDEA that are relevant to the controversy over private school tuition reimbursement. This part discusses the methods used to interpret the IDEA and delves into the legislative history of the statute and the interpretation of the DOE, the federal administrative agency in charge of education policy.

109. See generally Osborne, *supra* note 49 (describing the controversy and circuit split over the 1997 revision to the IDEA).


111. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 374 (1985); see also *supra* note 94 and accompanying text (discussing the Court's finding in *Burlington* that denial of a FAPE is a precondition to awarding tuition reimbursement).


113. *Id.*

114. *Id.*
Whether the 1997 revision to the IDEA barred private school tuition reimbursement for students who have not previously received special education or related services from a public agency depends primarily on how § 1412(a)(10)(C)(ii) is interpreted. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit stated that, "a statute is 'a command issued by a superior body (the legislature) to a subordinate body (the judiciary)."" In interpreting statutes, the judiciary must "follow the legislative command by applying the statute's language or referring to legislative intent or purpose as discerned through legislative history or canons of construction." The "primary responsibility" of the court in interpreting a statute is to "subordinate [the court's] wishes to the will of Congress because the legislators' collective intention, however discerned, trumps the will of the court."

Thus, statutory interpretation is essentially a search for legislative intent. There are several judicial approaches to statutory interpretation. A court may look at the language of the statute to discern intent of the legislature. If the language is unclear or ambiguous, a court may consider a myriad of other factors—including general rules regarding statutory construction, legislative history, and rules and regulations promulgated by administrative agencies—to interpret the statute.

1. Legislative History

Courts often look at legislative history to interpret an ambiguous statute. This section explores the legislative record of the 1997 revision to the IDEA and discusses how it has been utilized to shed light on Congress's intent in amending the IDEA. Like most methods of statutory


116. Id.

117. Id. at 4–5 (quoting Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Cases in the 1988–89 Term of the United States Supreme Court, 39 Am. U. L. Rev. 277, 281 (1990)).

118. RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 37 (2002). The different approaches to interpreting a statute are not mutually exclusive. "[A] judge must decide which approach or approaches would be most convincing. A judge might start with one and if it fails or proves unsatisfying, may move on to another." Id.

119. See infra notes 195–97 and accompanying text.

120. See infra notes 199–200 and accompanying text.

121. See infra note 123 and accompanying text.

122. See infra notes 139–46 and accompanying text.

123. Legislative history is often reviewed by courts to determine congressional intent when a statute is vague or ambiguous. Justice Stephen Breyer wrote, "[u]sing legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute." MIKVA & LANE, supra note 115, at 29 (citing Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 848 (1992)). Legislative histories consist of the documents produced throughout the legislative process and might include materials such as bills, amendments to bills, committee hearings, transcripts of legislative debates, and committee reports (among
interpretation, the use of legislative history is not universally accepted. Critics point out that legislative history and other extrinsic sources are not law. The legislature voted solely on the language actually contained in the statute. Legislative history is often produced by staff, not the members of Congress and can be vague and arguably "not necessarily reflective of the legislative intent." In response, proponents of using legislative history claim that statutory language is invariably vague and ignoring extrinsic sources often hinders the process of determining the legislature's intent.

Discussing the 1997 amendment to the IDEA, the Report of the House Committee on Education and the Workforce explained that the "bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities." The House report asserts that Congress attempted to "address the problem of over-identification of children with disabilities" and eliminate "inappropriate financial incentives for referring children to special education." The House report also specifically commented on § 1412, stating that,

other things). Id. at 28. The history of a particular statute depends on the legislative steps the statute has been through and how thoroughly each step has been documented. Id.

124. See Marshall J. Breger, Introductory Remarks at the Eighteenth Annual Administrative Law Issue Conference on Statutory Interpretation: The Role of Legislative History in Judicial Interpretation—A Discussion Between Judge Kenneth W. Starr and Judge Abner J. Mikva, 1987 DUKE L. J. 362, 367, 369 (stating that the "mutable nature" of legislative history "has prompted criticism from judges, academicians and legislators alike" and describing Judge Starr's position that a statute is "the finished product of the legislature" and the courts should "avoid sorting through preliminary materials"); Robert H. Jackson, Problems of Statutory Interpretation, 8 F.R.D. 121, 124 (1948) (describing reliance on legislative history as "a badly overdone practice, of dubious help to true interpretation"); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 429–30 & n.85 (1989) (discussing Justice Antonin Scalia’s "considerable doubt" over the use of legislative history, specifically Justice Scalia’s opinion that because legislative history is not law, "[judicial] reliance on legislative history thus increases the power of interest groups over the interpretive process at the expense of Congress itself").

125. BROWN & BROWN, supra note 118, at 49; Sunstein, supra note 124, at 416.

126. BROWN & BROWN, supra note 118, at 49; see also Sunstein, supra note 124, at 416 ("Statutory terms are the enactment of the democratically elected legislature and represent the relevant 'law.' Statutory terms—not legislative history, not legislative purpose, not legislative 'intent'—have gone through the constitutionally specified procedures for the enactment of law.").

127. BROWN & BROWN, supra note 118, at 50; see also Sunstein, supra note 124, at 430 (stating that it is "unlikely that the history will only reflect the views of self-interested private groups" and that "legislative history provides a sense of the context and purpose of a statutory enactment" and can "sometimes reveal what some or many members of the Congress thought about the meaning of an ambiguous term").


129. Id. at 88–90, reprinted in 1997 U.S.C.C.A.N. at 86–87. Discussing the 1997 amendments—although not § 1412 specifically—Representative Michael Castle stated, This law... has had unintended and costly consequences. For example, it has resulted in children being labeled as disabled when they were not. It has resulted in school districts unnecessarily paying expensive private school tuition for children. It has resulted in cases where lawyers have gamed the system to the detriment of schools and children...
[20 U.S.C. § 1412] . . . specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a [FAPE] available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency’s consent). Previously, the child must have had received special education and related services under the authority of a public agency.130

Senator James Jeffords, a proponent of the 1997 revision to the IDEA, stated on the floor, “[s]hould educators have an opportunity to offer a free appropriate public education to a child with a disability, before the child’s parents place the child in a private school and send the school district the bill? . . . [The amendment] dictates that the answer be yes, but so does common sense.”131

This legislative history has been cited to support the position that the 1997 revision to the IDEA intended to bar private school tuition reimbursement for students unilaterally placed in private school.132 However, opponents of this view have stated that the “most pertinent legislative history merely restates the language of the statute and is consequently unhelpful.”133 The U.S. Court of Appeals for the Second Circuit called the House report’s comment on § 1412 an “awkward paraphrase” of the statutory language and held that the legislative history “does not expressly exclude reimbursement where special education and related services have not been previously provided.”134

2. Administrative Agency Interpretation

This section takes a closer look at the DOE and the role of administrative agencies in general. It examines the DOE’s interpretation of the 1997
amendment to the IDEA in both an official regulation and an informal policy letter. Congress established the DOE, a federal administrative agency, on May 4, 1980. The DOE "establishes policy for . . . and coordinates most federal assistance to education," including administering the IDEA. The purpose of the DOE is to help implement the President's education agenda and legislation passed by Congress.

In general, administrative agencies play an increasingly large role in implementing statutory schemes. In many cases, an administrative agency must interpret a statute in order to accomplish its mission. Like the judicial branch, administrative agencies must interpret statutes based on the legislature's intent and "defer to the plain meaning" of the statute. However, when the text of a statute is unclear or ambiguous, the Supreme Court has "long recognized . . . the principle of deference to administrative interpretations." In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court outlined a two-step approach to determine whether a court should give deference to an administrative agency's interpretation. First, a court must determine whether Congress has commented on the exact issue. "If the intent of Congress is clear, that is the end of the matter." However, under the second step outlined in *Chevron*, when the intent of Congress cannot be discerned from the plain language of the statute, federal courts must defer to the administrative agency's "permissible" interpretation. A court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."


137. Id. The overall mission of the U.S. Department of Education (DOE) is "to serve America's students—to ensure that all have equal access to education and to promote excellence in our nation's schools." *Id.*


140. MIKVA & LANE, *supra* note 115, at 46.

141. *Chevron*, 467 U.S. at 844.

142. Id. at 842.

143. Id.

144. Id.

145. Id. at 843.

146. Id. at 844. The Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* held,

When a court reviews an agency's construction of the statute which it administers . . . the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the
During the DOE's notice-and-comment rule-making period following the 1997 amendment to the IDEA, a commenter requested that the Agency explain whether § 1412 only applied in situations where the child received public special education and related services. In other cases (i.e., where the child has not attended public school), the commenter stated that the DOE should clarify that IHOs and courts "still retain broad equitable powers to award relief." In response, the DOE stated in its final regulations for "Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities,”

[H]earing officers and courts retain their authority, recognized in Burlington and [Florence County School District Four v. Carter] to award “appropriate” relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under [§ 1415] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under [§ 1412] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

Essentially, the DOE stated in its official regulation that the 1997 amendment to the IDEA—specifically the addition of § 1412(a)(10)(C)(ii)—did not categorically bar the remedy of private school tuition reimbursement for children who had not received special education or related services from a public agency. Proponents of this view have asserted that the DOE's interpretation of the 1997 amendment to the IDEA—stated in the final official regulation—should be given deference under Chevron. Conversely, those who believe the 1997 revision to the question for the court is whether the agency's answer is based on a permissible construction of the statute. Id. at 842–43. Regulations promulgated by the agency are given controlling weight unless they are "arbitrary, capricious, or manifestly contrary to the statute." Id. at 844.

147. Notice-and-comment rulemaking is a process where a proposed rule is published in the Federal Register and is open to comment by the general public for at least 30 days. Administrative Procedures Act, 5 U.S.C. § 553 (2006). After the notice is given, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

149. Id. at 12,602.
150. Id.
151. Brief for Respondent, supra note 133, at 25–26 & n.15; see also United States v. Mead Corp., 533 U.S. 218, 229 (2001) (stating that—although the degree of deference given to an administrative agency interpretation should vary with the circumstances—"express congressional authorization[] to engage in the process of rulemaking or adjudication that produces regulations or rulings" is a "very good indicator" that Chevron deference should apply).
IDEA should bar reimbursement for children who never received special education and related services from a public agency assert that the DOE's commentary is irrelevant and not entitled to any deference because it fails the first part of the *Chevron* analysis. Under *Chevron*, if the plain language of the statute shows "clear congressional intent" on the "precise question at issue," the statute must be interpreted according to the text, and the court "must reject administrative constructions which are contrary."

In addition to the final official regulation—stating that the addition of § 1412(a)(10)(C)(ii) did not foreclose the remedy of tuition reimbursement as a form of equitable relief authorized by § 1415(i)(2)(C) and recognized by the Supreme Court in *Burlington*—the DOE expressly commented on the issue of private school tuition reimbursement again in response to an inquiry by a special education advocate for parents. The letter from the advocate asked whether parents must place their children in public school to obtain private school tuition reimbursement as a result of the added provision. In a response dated March 19, 1999, the DOE wrote, "[w]e do not view [§ 1412(a)(10)(C)(ii)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency." The letter described tuition reimbursement as "an equitable remedy" that can be ordered by IHOs and courts "in appropriate circumstances."

Although this statement was in the form of an informal policy letter, the Second Circuit has stated that "deference to a policy letter may be appropriate where the statutory language is ambiguous." However, the court did note that the appropriate level of deference "remains unclear."

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152. See *supra* notes 142–44 and accompanying text.
153. See *Reply Brief* at 12, Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007) (No. 06-637) (stating that a court should only look to an administrative agency's interpretation if a statute is silent or ambiguous in relevant respects). The reply brief also states that the DOE's commentary contains "no analysis" of the relevant language, ignores "the plain language of the statute," and is "unreasonable." *Id.*
155. See *supra* notes 92–93 and accompanying text.
156. *See Brief for Respondent, supra* note 133, at 27.
157. Letter from Thomas Hehir, Dir., Office of Special Educ. & Rehabilitative Servs., Dep't of Educ., to Susan Luger, Clinical Social Worker, Educational Consultant & Advocate (Mar. 19, 1999); see also List of Correspondence—Office of Special Education and Rehabilitative Services, 65 Fed. Reg. 9178 (Feb. 23, 2000) (describing the letter "regarding the absence of any provision in Part B of IDEA that makes a child's prior receipt of special education and related services from a public agency a prerequisite to a parent's obtaining tuition reimbursement from a hearing officer or court for the cost of a unilateral private school placement").
The next part of this Note examines the split in the federal courts over whether the 1997 amendment to the IDEA limited the remedy of private school tuition reimbursement to cases where the disabled child previously received special education or related services from a public agency.

II. DIVERGENT INTERPRETATIONS OF THE IDEA AFTER 1997: DEBATING THE SCOPE OF PRIVATE SCHOOL TUITION REIMBURSEMENT

Part I of this Note explored the United States’ history of discriminating against and ignoring the educational needs of disabled children. It introduced the IDEA, which was enacted to prevent these harms, and provided statistics on the increasing number of children identified as disabled and served under the IDEA. Part I also laid out the statutory provisions relevant to understanding the IDEA and the debate over private school tuition reimbursement after the 1997 amendment. Part I.C explained the legislative history of the amendment and the interpretation of the DOE.

This part takes a detailed look at this conflict. Part II.A discusses the decisions of the federal courts of appeals holding that the 1997 amendment is ambiguous and should not be interpreted to foreclose the remedy of tuition reimbursement for disabled children who never previously received special education services from a public agency. Part II.B looks at the conflicting decisions of federal courts of appeals and the U.S. District Court for the District of Maryland, which held that the amendment’s language clearly forecloses the remedy of tuition reimbursement for students who never previously received special education from a public agency.

A. Courts Holding that the Provision in Question Is Ambiguous and Does Not Supersede Equitable Remedies

A number of courts of appeals have held the provision in question to be ambiguous and therefore have upheld the right to equitable remedies under the IDEA. Part I.A introduces and discusses the case law in the U.S. Courts of Appeals for the Second and Ninth Circuits regarding tuition reimbursement under the IDEA. Both circuits assert that the 1997 amendment to the IDEA did not foreclose the equitable considerations authorized by the Supreme Court in Burlington or limit the remedy of tuition reimbursement.

although an opinion letter from an administrative agency does not warrant “Chevron-style deference,” it is “entitled to respect” (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

160. Frank G., 459 F.3d at 373.
1. The Second Circuit

a. Frank G. v. Board of Education

In *Frank G. v. Board of Education*, the Second Circuit held that the IDEA (post-1997 revision) did not preclude tuition reimbursement for a student who never received public special education services. In *Frank G.*, the disabled child, Anthony, was diagnosed with Attention Deficit Hyperactive Disorder (ADHD) when he was three years old. Anthony, who lived with his adoptive parents, Frank and Diane G., attended private school from 1997 to 2001 where he initially "did well." However, Anthony's performance began to deteriorate as his school work became more challenging and his class size increased. As a result, Frank and Diane G. notified the school district Committee on Special Education (CSE) and had Anthony evaluated. Anthony was classified as learning disabled, and an independent neuropsychological evaluation recommended more personalized attention and a smaller class size. The evaluator also recommended occupational therapy, "social skills training," and counseling.

On August 8, 2001, the CSE proposed an IEP placing Anthony in a public school (non-special-education) class of twenty-six to thirty students. The IEP also provided for an individual aide, special help for "math and organizational skills," as well as "counseling, group occupational therapy, [and] a behavior [and testing] modification program." The parents requested an impartial hearing, stating that a class with more than twenty-five students was not "appropriate," "a position consistent with recommendations provided by Anthony's teachers and therapists."

While their request for an impartial hearing was pending, the parents decided to place Anthony in a different private school, where he repeated fourth grade in a class of fourteen students. Although the school district eventually agreed that Anthony's IEP did not meet the requirements for a FAPE, it argued that the school Anthony's parents placed him in was "equally inappropriate" and therefore, it was not required to reimburse the parents for tuition. The IHO agreed that the new private school was not
an appropriate placement, citing Anthony's lack of "academic or social progress." Although he did not order tuition reimbursement, the IHO ordered the school district to provide Anthony with special services, occupational therapy, and an individual aide while he attended private school. Both parties appealed.

After the administrative remedies were exhausted, Anthony's parents appealed to the U.S. District Court for the Southern District of New York, seeking tuition reimbursement for the year during the pendency of the impartial hearing in which they unilaterally enrolled Anthony in the new private school. After a bench trial, Judge Charles Brieant of the Southern District of New York held that the parents' private school placement was appropriate based on "additional evidence of Anthony's . . . social and behavioral development," his academic progress, and his improved emotional state. He stated that there was no reason to "disturb the IHO's finding 'that the equities favored tuition reimbursement' if on appeal it is found that the parent's placement is appropriate." Based on the equitable considerations authorized by the Supreme Court in Burlington, the district court judge decided in favor of the parents and granted their request for tuition reimbursement for $3660, along with attorneys' fees in the amount of $34,567.

On appeal, the school district asserted two principal arguments: (1) that the private school Anthony's parents enrolled him in was an inappropriate placement considering his needs; and (2) even if the private school were considered appropriate, the parents were not entitled to reimbursement because Anthony never received "public special education and related services." The school district termed the second argument its "absolute defense.

the burden of proving both that the proposed school district placement was inappropriate and that the unilateral private school placement is appropriate).

174. Frank G., 459 F.3d at 361. The court in Frank G. v. Board of Education stated that, while "[g]rades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit . . . the totality of the circumstances" should be considered in "determining whether that placement reasonably serves a child's individual needs." Id. at 364.

175. Id. at 361.

176. Id.

177. Id. at 362.

178. Id.

179. Id. Unlike in Board of Education v. Tom F., discussed infra Part II.A.1.b, there is no evidence that the school district asserted 20 U.S.C. § 1412(a)(10)(C)(ii) as a defense at the district court level. The issue was not considered until the case reached the U.S. Court of Appeals for the Second Circuit.

180. See supra notes 92-93 and accompanying text.

181. Frank G., 459 F.3d at 362. Judge Charles Brieant of the U.S. District Court for the Southern District of New York "expressed concern" regarding the litigation expenses considering the "relatively small tuition sum sought and awarded." Id.

182. Id. at 362-63.

183. Id. at 365.
In 2006, the Second Circuit affirmed the district court’s holding and awarded the parents retroactive tuition reimbursement. In response to the school district’s first argument that Anthony’s school was inappropriate, the court stated that Anthony’s private school placement “was reasonably calculated to enable him to receive educational benefits” and provided him with “‘meaningful access’ to education.”

The school district’s latter argument—its “absolute defense”—was based on the 1997 amendment to the IDEA, which it claimed “established a statutory threshold” to obtain tuition reimbursement when unilaterally placing children in private school. The school district asserted that Anthony’s parents were not entitled to tuition reimbursement because Anthony never received special education services from a public agency, even though his private school placement offered him a FAPE while the proposed public school placement did not.

In support of this argument, the school district offered the “plain language” of § 1412(a)(10)(C)(ii), which explicitly states that tuition reimbursement is available when parents of a disabled child “who previously received special education and related services under the authority of a public agency” unilaterally enroll their child in a private school without consent of the agency. The school district argued that this section “implicitly exclud[ed] reimbursement” when the child has not received special education services from a public agency. As in Anthony’s case, this would foreclose reimbursement for parents who enrolled their child in school before the child’s disability, and the need for an IEP and a FAPE, “manifested itself.”

The court in Frank G. disagreed with the school district’s “absolute defense” that under § 1412(a)(10)(C)(ii) a “learning disabled student [must

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184. Id. at 367.
185. Id. at 366.
186. Id. at 364 (quoting Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 133 (1998)). The court conducted a detailed evaluation of Anthony’s private school placement and concluded that his small class size (“which everyone agreed was critical”) and his individualized program led to Anthony’s “significant progress.” Id. at 366–67. The court debunked the claim that Anthony’s progress was “‘mere happenstance.’” Id. at 366 (quoting Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 n.6 (6th Cir. 2003)). As with a proposed placement in an IEP, the parents’ unilateral private school placement does not have to be ideal to be considered appropriate. See supra notes 52–54 and accompanying text. “‘[P]arents need not show that a private placement furnishes every special service necessary to maximize their child’s potential’ in order to qualify for tuition reimbursement. Frank G., 459 U.S. at 365. “They need only demonstrate that the placement provides ‘educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.’” Id. (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 188–89 (1982)).
188. Frank G., 459 F.3d at 367.
189. Id.
191. Frank G., 459 F.3d at 368.
192. Id.
be] enrolled in an inappropriate special education program offered by a public agency [before his parents are free to] unilaterally . . . enroll him at an appropriate private school and seek reimbursement."193 The court held that § 1412(a)(10)(C)(ii) of the IDEA does not limit reimbursement to cases where the disabled child previously received special education services from a public agency.194

The court stated that, "[a]s in all statutory interpretation cases," it would begin its analysis by looking at the plain language of the statute.195 The court's "first task 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'"196 The court found the language in § 1412(a)(10)(C)(ii) was ambiguous because it did not explicitly say that tuition reimbursement was "only" available when a child had previously received public special education services, nor did it explicitly exclude parents whose child had not previously received such services.197 The fact that the school district needed to rely on this "inference to be drawn from the plain language" of the statute "suggests a degree of ambiguity."198

193. Id. at 367.
194. Id. at 367–76.
195. Id. at 368. Most cases of statutory interpretation begin with the actual text of the statute. This approach is called the plain meaning approach. If the language used by Congress is clear and unambiguous, a court will not look to other sources. MIKVA & LANE, supra note 115, at 9–10 The Supreme Court has stated that "courts must presume that a legislature says in a statute what it means and means in a statute what it says." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992). The plain meaning of the text is presumed to convey what the legislature intended, and the court's job is to enforce the statute according to its terms. MIKVA & LANE, supra note 115, at 10. Under the plain meaning approach, the court will often look to the statute as a whole to provide guidance and determine context of the phrase or subject in question. Id. at 20.
196. Frank G., 459 F.3d at 368 (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002)). The court stated that it would have ended its inquiry if it found that the "language of the statute [was] unambiguous and 'the statutory scheme [was] coherent and consistent,' unless the case comes within the context of cases in which the result reached by applying the plain language is sufficiently absurd to override its unambiguous terms." Id. (quoting Barnhart, 534 U.S. at 450). Although those in favor of the plain meaning approach believe that a statute should be interpreted primarily by looking at the text, where rigid application of the plain meaning of a statute would lead to ridiculous or absurd results, the judge may reject the plain meaning of the text and use another approach to interpret the statute. BROWN & BROWN, supra note 118, at 40; see also MIKVA & LANE, supra note 115, at 10 (providing an example of this exception to the plain meaning approach by stating "'virtually no one doubts the correctness of the ancient decision that a statute prohibiting letting blood in the streets did not ban emergency surgery'" (quoting Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L.J. 281, 289 (1989))).
197. Frank G., 459 F.3d at 368. The court held that it determined whether a statute was clear or ambiguous by looking at the plain language, along with the context of the provision and the entire statute. Id. (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). Using contract law as an analogy, the court stated, "we have held that '[l]anguage is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.'" Id. (quoting O'Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc., 37 F.3d 55, 59 (2d Cir. 1994)).
198. Id. Most often, the cases that reach appellate level courts do not deal with statutes that have a plain and clear meaning. MIKVA & LANE, supra note 115, at 19–20. If the
Upon this finding of ambiguity, the court looked to the "traditional canons of statutory construction" to resolve the issue. Specifically, the court focused on the overall context and purpose of the IDEA along with a related canon of statutory construction, which states that "the meaning of an ambiguous statutory provision is 'clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'"

The court reiterated that the "express purpose of the IDEA" is to ensure that all disabled children have access to a FAPE that is tailored to their present and future needs. One of the "primary" vehicles for providing a FAPE under the IDEA is giving the courts "broad discretion . . . to grant relief [they] deem[] appropriate." Although the court noted that the language added by the 1997 amendment may guide "the manner in which the authority is exercised," they found nothing to "suggest that Congress sought to alter prior law in a manner that would constrain the power of a district court judge to award reimbursement for a private placement where a [FAPE] had not been provided [by the public agency]."

The court cited the Burlington holding that the IDEA should not be interpreted to defeat the objectives of providing disabled children with a free and appropriate education. By holding that § 1412(a)(10)(C)(ii) language of the law does not provide clear direction on how to interpret a statute, courts must use other sources to determine legislative intent. See supra Part I.C for a more detailed discussion of statutory interpretation methods.

199. Frank G., 459 F.3d at 370 (quoting United States v. Peterson, 394 F.3d 98, 105 (2d Cir. 2005)). Canons of construction are essentially "judicially crafted maxims" or presumptions created for interpreting statutes. Canons are intended to "limit judicial discretion by rooting interpretive decisions in a system of aged and shared principles." Mikva & Lane, supra note 115, at 23–24. Although canons are frequently used by courts to interpret statutes, they are widely criticized. Id. at 25. Scholars have stated that canons are not a "coherent, shared body of law" that provide courts with the correct interpretation of statutes. Id. Rather, canons are seen as "a grab bag of individual rules, from which a judge can choose to support his or her view of the case." Id.; see also Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401 (1950) ("[T]here are two opposing canons on almost every point."); Richard A. Posner, Statutory Interpretation—In the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 806 (1983) ("You need a canon for choosing between competing canons, and there isn't any."). Despite the widespread criticism, canons continue to be used as "tools of interpretation." Mikva & Lane, supra note 115, at 27.

200. Frank G., 459 F.3d at 370–71. The court cited a canon espoused by Justice Robert H. Jackson, who observed,

[C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

Id. at 371.

201. Id. (quoting United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 217–18 (2001)).

202. Id.

203. Id.

204. Id.

205. Id. at 371–72.

206. Id. at 372.
does not limit the remedy of reimbursement—and that principles of equity can still guide awards of reimbursement under § 1415(i)(2)(C)—the court adopted what it believed to be the “only [construction] that ‘produces a substantive effect that is compatible with the rest of the [IDEA].’”\textsuperscript{207} The court also reasoned that the reenactment of § 1415(i)(2)(C) without any substantive revision was “significant” because it implied that Congress intended to uphold the statutory interpretation of the Supreme Court in \textit{Burlington}—that the courts have “broad discretion” and “shall grant such relief as the court determines is appropriate.”\textsuperscript{208}

The final method of statutory construction considered by the court is the rule that ambiguous statutes are to be construed as to avoid “absurd” results.\textsuperscript{209} The court explained that the school district’s interpretation would produce such results by proffering several hypothetical situations.\textsuperscript{210} For example, it would prevent children whose disabilities manifest themselves before school age from receiving a FAPE if they are given inadequate IEPs, since they never would have received special (or any) education services from a public agency.\textsuperscript{211} The court also hypothesized situations where the parents would have to “temporarily acquiesc[e] to an inappropriate placement” (so that their child technically received services from a public agency) in order to maintain a claim for reimbursement.\textsuperscript{212} The Second Circuit “declin[ed] to interpret [§ 1412(a)(10)(C)(ii)] to require parents to jeopardize their child’s health and education... in order to qualify for the right to seek tuition reimbursement.”\textsuperscript{213}

\textsuperscript{207.} Id. (quoting United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 217–18 (2001)).


\textsuperscript{209.} See supra note 196.

\textsuperscript{210.} \textit{Frank G.}, 459 F.3d at 372.

\textsuperscript{211.} \textit{Id.}

\textsuperscript{212.} Id.

\textsuperscript{213.} Id. Many advocates for disabled children agreed that foreclosing the remedy of tuition reimbursement for students who had not previously received special education or related services from a public agency would lead to “ominous consequences,” stating that,

\begin{quote}
As a practical matter, prohibiting private tuition reimbursement unless a child has attended public school pursuant to the school district’s inadequate individualized education plan, is potentially devastating to the disabled children. To compel a young disabled child to begin his or her schooling in an unsuitable program could result in more than merely a poor education: for some developmentally disabled students, a poor placement could actually cause setbacks in the progress their children have painstakingly accomplished. In addition, compelling parents to have their disabled children begin the school year in public school may hamper the parents’ ability to place the child in an appropriate private school setting, as they may not be able to keep that place available for the child if they must send the child to public school.
\end{quote}

b. Board of Education v. Tom F.

Frank G. was not the Second Circuit's only foray into the interpretation of the IDEA's treatment of unilateral parent placement. Board of Education v. Tom F.,\(^{214}\) another significant Second Circuit case, also originated in the Southern District of New York.\(^{215}\) Since kindergarten, the student in Tom F., Gilbert, was enrolled in a private school in New York called the Stephen Gaynor School.\(^{216}\) After a CSE evaluation, Gilbert received an IEP recommending a special education public school placement with related services.\(^{217}\) As in Frank G.,\(^{218}\) the parents disagreed with the IEP and requested an impartial hearing and reimbursement for tuition.\(^{219}\) The IHO granted the parents' request and ordered the school district to reimburse the parents for the cost of the student's private school tuition.\(^{220}\) The school district appealed, and eventually the district court reversed the holding.\(^{221}\) In an unpublished decision, the court held that the "clear implication of the plain language" of § 1412(a)(10)(C) foreclosed private school tuition reimbursement where a child had "not previously received special education from a public agency."\(^{222}\)

Less than two years later, the Second Circuit heard the appeal of Frank G., holding that § 1412(a)(10)(C)(ii) did not bar private school tuition reimbursement for students who had never received special education services from a public agency.\(^{223}\) This decision "effectively abrogated" the district court's holding in Tom F.\(^{224}\) Several days after their decision in Frank G., the Second Circuit officially vacated and remanded Tom F. "for further proceedings in light of [Frank G.]."\(^{225}\)

\(^{214}\) No. 01 Civ. 6845, 2005 WL 22866 (S.D.N.Y. Jan. 4, 2005), vacated, 193 F. App’x 26 (2d Cir. 2006).

\(^{215}\) Id. This case was cast into the spotlight because the disabled child's father was Tom Freston, the multimillionaire former CEO of Viacom and cofounder of MTV. Although clearly able to afford his son's private school tuition, Freston said he was fighting for the "principle of the matter" and to ensure that the government fulfilled its obligation to provide disabled students with suitable special education programs. See Jen Chung, City Must Pay Private Education of Disabled Students, GOTHAMIST, Oct. 11, 2007, http://gothamist.com/2007/10/11/supreme_court-d.php.

\(^{216}\) Tom F., 2005 WL 22866, at *1.

\(^{217}\) Id.

\(^{218}\) See supra note 177 and accompanying text.

\(^{219}\) Tom F., 2005 WL 22866, at *1.

\(^{220}\) Id. Freston, who left Viacom with $85 million in severance, says he has donated the reimbursement money to tutoring programs for public schools. Stout & Medina, supra note 18.

\(^{221}\) Tom F., 2005 WL 22866, at *3–4.

\(^{222}\) Id. at *3. See supra note 195 for a discussion of the plain meaning approach to statutory interpretation.

\(^{223}\) See supra Part II.A.1.a.

\(^{224}\) See Osborne, supra note 49, at 896.

The school district petitioned the Supreme Court for certiorari, arguing that the Second Circuit's holding split with those of other circuits and conflicted with the provision added to the IDEA.226 The Supreme Court granted the petition for certiorari.227 However, Justice Anthony Kennedy "took no part in the decision of [the] case," and, on October 10, 2007, the Supreme Court issued a per curiam opinion affirming the Second Circuit decision in Tom F. four to four.228 The per curiam opinion was one sentence: "The [Second Circuit] judgment is affirmed by an equally divided Court."229 The following week, the Supreme Court denied certiorari in Frank G., again without the participation of Justice Kennedy.230

Although the Supreme Court's four-four decision in Tom F. upheld the Second Circuit's ruling, it has no precedential value in any other circuit.231 Commentators have noted that this decision—"or lack thereof"—has created a "chasms" between the circuit court decisions and left a "dichotomy in place on this crucial issue."232


In April 2008, the Ninth Circuit addressed the issue of private school tuition reimbursement for unilateral placement in Forest Grove School District v. T. A.,233 which conformed to the Second Circuit precedent. As in the Second Circuit cases—Frank G. and Tom F.—the court in T. A. held that students who had never received public special education services were still eligible for tuition reimbursement under § 1415(i)(2)(C), which authorizes "appropriate" relief based on equitable considerations.234

Although the Ninth Circuit reached the same holding, the underlying facts in T. A. differed significantly from those in the Second Circuit cases. T. A. was enrolled in public school in the Forest Grove School District from kindergarten through the end of his junior year.235 Although he had trouble
paying attention in class and completing his assignments, T. A. "passed from grade to grade" and never received any special education services while he was enrolled in public school. T. A. was evaluated at one point during his public school career. However, the school district determined that he did not have a disability and his mother agreed.

In 2002, T. A. began using drugs and "exhibited noticeable personality changes." T. A.'s parents hired a psychologist, who "diagnosed T. A. with ADHD, depression, math disorder, and cannabis abuse." The psychologist recommended T. A. be placed in a residential program. After enrolling T. A. in a residential private school for "children who may have academic, behavioral, emotional, or motivational problems," his parents hired a lawyer and requested an evaluation and eventually a hearing for tuition reimbursement. The IHO held that T. A. was disabled and that the school district failed to provide him with a FAPE. The school district was ordered to pay T. A.'s $5200 monthly private school tuition.

The school district appealed, alleging that T. A. was not entitled to tuition reimbursement under the IDEA because he never received special education or related services at any time while he was enrolled in public school. Although T. A. conceded that he did not qualify for tuition reimbursement under § 1412(a)(10)(C)(ii), like the parents in the Second Circuit cases, he argued that reimbursement was still available "under general principles of equity pursuant to [§ 1415(i)(2)(C)]."

The Ninth Circuit provided a detailed review of the Second Circuit's opinion in Frank G. and stated that, "[w]e see no reason to disagree with the Second Circuit's well-reasoned analysis of this issue." The court held that "students who have not 'previously received special education and related services' are eligible for reimbursement, to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to § 1415(i)(2)(C). The statutory requirements of § 1412(a)(10)(C) do not apply."

The school district submitted a Petition for a Writ of Certiorari to the Supreme Court on September 3, 2008. The Supreme Court granted the school district's petition on January 16, 2009. If the Supreme Court

236. Id.
237. Id.
238. Id.
239. Id. at 1081–82. For a discussion of disabilities covered by the IDEA, see supra note 40.
240. T. A., 523 F.3d at 1082.
241. Id. (internal quotations omitted).
242. Id. at 1082–83.
243. Id. at 1083.
244. Id.
245. Id. at 1085.
246. Id. at 1087.
248. Petition for Writ of Certiorari, supra note 132.
affirms the decision of the Ninth Circuit, disabled children—regardless of whether they previously received public special education—will be entitled to tuition reimbursement when appropriate under the equitable considerations outlined in § 1415(i)(2)(C) (and authorized by the Court in Burlington). However, several courts have disagreed with the Second and Ninth Circuits and held that the 1997 amendment to the IDEA precludes tuition reimbursement for students who never received public special education services. Part II.B discusses the decisions of these courts.

B. Courts Holding that the Plain Language of § 1412(a)(10)(C)(i) Limits the Remedy of Tuition Reimbursement

The previous section examined the legal reasoning of the Second and Ninth Circuits in deciding that the 1997 amendment to the IDEA did not limit the remedy of tuition reimbursement. This section introduces and discusses the case law in the U.S. Courts of Appeals for the First and Third Circuits, and the Maryland District Court. These courts reached divergent conclusions from the Second and Ninth Circuits and held that the 1997 amendment to the IDEA does limit the remedy of private school tuition reimbursement to cases where the disabled child previously received special education or related services from a public agency.

1. The First Circuit: Greenland School District v. Amy N.

In Greenland School District v. Amy N., the First Circuit held that the IDEA precludes tuition reimbursement for parents of children who have not received special education or related services from a public agency. Katie, the disabled child in Amy N., attended public school from first grade through fourth grade. Although Katie was a “good student,” she had “difficulty focusing” and “was easily distracted.” The summer after first grade, Katie was diagnosed with ADHD by a private psychiatrist. Katie’s second, third, and fourth grade teachers used practical techniques to help Katie with her ADHD, such as providing her with a list of tasks to perform.

250. 358 F.3d 150 (lst Cir. 2004).
251. Id. at 152.
252. Id.
253. Id.
254. Id.

Although Justice Anthony Kennedy recused himself “without explanation” in both the Tom F. case and the denial of certiorari in the Frank G. case, there is no indication that Kennedy did not participate in the decision to grant certiorari. See Adam Liptak, Justices to Hear 2 Cases Brought Against Schools, N.Y. TIMES, Jan. 17, 2009, at A15; Posting of Tony Mauro to The Blog of Legal Times, http://legaltimes.typepad.com/blt/2009/01/supreme-court-agrees-to-decide-issue-that-caused-kennedy-recusal.html (Jan. 16, 2009, 15:32 EST). Although the reasons for Kennedy’s recusals in 2007 have still not been disclosed, commentators are hopeful that “whatever had caused his earlier recusal has now been resolved, and a full court will be able to decide the issue.” Posting of Tony Mauro, supra.
complete and utilizing stickers as incentives for good work and behavior. Katie’s mother, who was a special education teacher, also spent time helping Katie with her work. However, Katie never received, nor was she evaluated for, special education services while she was in public school. After fourth grade, Katie’s parents enrolled her in a private school that did not focus on special education. Less than one year later, the school requested that Katie’s parents withdraw her. Her parents enrolled her in a different private school with approximately thirty students, most of whom had a learning disability or ADHD. At this point, Katie’s parents asked the school district to evaluate her for special education services.

Although the school district found that Katie had ADHD and an anxiety disorder, it decided that these disabilities did not impact her performance in school. It agreed to “offer Katie a plan to address some of her organizational weaknesses,” but did not propose special education services. Her parents wrote the school district a letter stating that they disagreed with the decision to deny special education services. They also had Katie privately evaluated. She was diagnosed with ADHD, and Asperger’s disorder, “a developmental disability on the autism spectrum that is associated with significant misperceptions of otherwise routine elements of daily life.” After her parents informed the school district of this diagnosis, the school district decided to reverse its earlier decision not to offer Katie special education services.

While the school district was developing an IEP for Katie, the parents requested an impartial due process hearing for reimbursement for Katie’s private school tuition. The parents challenged the district’s initial finding that Katie was not eligible for special education services as well as the placement that was eventually proposed in Katie’s IEP.

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255. Id.
256. Id.
257. Id. at 153.
258. Id.
259. The reason for this request was not specified in the record. Id.
260. Id.
261. Id. at 154.
262. Id.; see also supra note 40 and accompanying text (explaining that, even if a child is classified as disabled, the disability must impact their educational performance in order for them to be covered by the IDEA).
263. Amy N., 358 F.3d at 154.
264. Id.
265. Id.
266. Id.
267. Id. at 155. Rather than coding Katie as “autistic,” they coded her as “other health impaired.” Id.
268. Id. Although a special education placement had not yet been proposed by the district, the parents were concerned that the time to request a hearing would expire. Id.
269. Id. at 155–56. The IEP developed by the school district proposed providing Katie with an individual aide, counseling, speech therapy, and “a curriculum to help Katie learn the difference between friendly joking and hurtful teasing.” Id. at 155.
After testimony from sixteen witnesses, the IHO held that the school district erred when it initially declined to provide Katie with an IEP.270 In addition, the IHO held that the IEP that was eventually developed did not provide Katie with a FAPE and the private school placement was appropriate.271 The IHO ordered the school district to reimburse the parents for Katie’s private school tuition.272

On appeal, the district court reversed the IHO’s decision to award tuition reimbursement. The First Circuit affirmed and held that the 1997 IDEA amendments “limit the circumstances in which parents who have unilaterally placed their child in a private school are entitled to reimbursement for that placement.”273 Contrary to the Second and Ninth Circuits, the First Circuit stated that the “affirmative requirement” in § 1412(a)(10)(C)(ii)—that a child must have received special education and related services from a public agency to obtain reimbursement—is not ambiguous.274 The court held that Katie’s parents were “ineligible” for reimbursement because they did not meet the “threshold requirement[ ]” that Katie receive special education services while in the public school system.275

The court also found that “additional limitations on reimbursement,” such as the requirement that parents give the school district notice of their intent to remove their child from public school, “reinforce [the court’s] conclusion” to deny tuition reimbursement.276 This notice requirement “serves the important purpose of giving the school system an opportunity [to] . . . devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools.”277

In denying tuition reimbursement to Katie’s parents, the court stated that it was upholding “[o]ne specific purpose of the amendments,” which was “to control government expenditures for students voluntarily placed in private schools by their parents.”278 The holding also “reinforced the principle that children should not be removed unnecessarily from regular education environments.”279


The First Circuit is not alone in finding the 1997 amendment limited the availability of tuition reimbursement. The Third Circuit has also

270. Id. at 155–56.
271. Id. at 156.
272. Id.
273. Id. at 157 (citing 20 U.S.C. § 1412(a)(10)(C) (2006)).
274. Id. at 159.
275. Id. at 159–60.
276. Id. at 160. See supra notes 112–13 and accompanying text for a discussion of the IDEA’s notice requirement.
277. Amy N., 358 F.3d at 160.
278. Id. at 152.
279. Id. (citing 20 U.S.C. § 1412(a)(5)(A) (2006)); see also supra note 55 and accompanying text.
commented on this issue in an unpublished opinion. In *Marissa F. v. William Penn School District*, Marissa, the disabled child, attended private school from 1996 to 2002. Although there had been some communication with the school district regarding Marissa's disability, she was never formally evaluated and was never enrolled nor provided with special education services at a district school. However, from 1996 to 2001, the school district reimbursed Marissa's parents for transportation expenses to her private school. In 2001, Marissa transferred to a different private school over ten miles outside of the district, and the school district ceased paying for her transportation.

In 1996, Marissa's parents requested a due process hearing because the school district was denying them transportation benefits. They added a claim for tuition reimbursement and consented to the development of an IEP for Marissa. The Third Circuit did not discuss the details of Marissa's IEP in the opinion. However, it upheld the school district's proposed public school services. Although it did not specifically mention § 1412(a)(10)(C)(ii) of the IDEA, the court noted that tuition reimbursement was barred because the district had never been given the opportunity to provide special education services.

### 3. The District of Maryland Weighs In

In 2005, the District of Maryland held, "[t]he plain language of section 1412(a)(1)[0]) (C)(ii) makes it clear that, as a threshold matter, reimbursement is available only in cases where the disabled student was at one time receiving 'special education and related services' from a public agency."

Isobel, the disabled child in this case, had attended private school since kindergarten. In 2003, when Isobel was around eleven years old, her parents moved her to a different private school and contacted the public school district to request that Isobel be evaluated. The school district initially "misplaced the letter" sent by the parents requesting an

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280. 199 F. App’x 151 (3d. Cir. 2006). This opinion does not have precedential value because it is unpublished.
281. *Id.* at 152–53.
282. *Id.*
283. *Id.* at 153.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* at 153–54.
288. *Id.* at 153; see also *Lauren W. ex rel. Jean W. v. Deflaminis*, 480 F.3d 259, 276 n.21 (3d Cir. 2007) (noting, in dicta, that the plain language of § 1412(a)(10)(C)(ii) may limit tuition reimbursement to parents with children who never previously received special education services under IDEA).
290. *Id.* at 247.
291. *Id.*
When the letter was found, the school district contacted the parents to schedule an initial IEP meeting. After the letter was found, the parents briefly withdrew their request for a due process hearing. However, after the school district attempted to schedule an IEP meeting, the parents "refused to participate" and refilled their request for an impartial hearing. The parents asserted that the school district—by misplacing and not initially responding to the parent’s letter—failed to develop an adequate IEP for Isobel and, therefore, denied her a FAPE.

The IHO initially found that Isobel’s parents were entitled to tuition reimbursement for the period after they sent the letter asking the school district to evaluate Isobel. The Maryland District Court agreed that misplacing the parent’s letter resulted in a procedural violation of the IDEA and the denial of a FAPE. However, the court overturned the IHO’s ruling based on § 1412(a)(10)(C)(ii) of the IDEA. After finding that the plain language of the provision was unambiguous and “limit[ed] the circumstances in which reimbursement is available to parents,” the court stated that “the statutory text commands (and permits) only one result: her parents are not eligible for tuition reimbursement under the IDEA.”

The district court quoted the First Circuit in Amy N., stating that one of the purposes of the 1997 amendment was to narrow the remedy of tuition reimbursement and “to control government expenditures for students voluntarily placed in private schools by their parents.” The interpretation of the First and Third Circuits and the District of Maryland is at odds with that of the Second and Ninth Circuits. Because these divergent views would have vastly different consequences for the availability of tuition reimbursement, families of children with disabilities, advocates, and school districts are in need of guidance and a resolution to this circuit split. Part III proposes that the Supreme Court affirm the Ninth Circuit’s decision in T. A. and defer to the interpretation of the DOE.

III. UPHOLDING THE VISION OF THE IDEA: COURTS SHOULD CONTINUE TO AWARD TUITION REIMBURSEMENT TO DISABLED CHILDREN WHO NEVER RECEIVED PUBLIC SPECIAL EDUCATION BASED ON THE EQUITABLE REMEDY AUTHORIZED BY THE IDEA

After the Supreme Court’s false start in Tom F., the confusion and controversy over the availability of private school tuition reimbursement

292. Id.
293. Id. at 247–48.
294. Id. at 248.
295. Id.
296. Id.
297. Id. at 248–49.
298. Id.
299. Id. at 249.
300. Id.
301. Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 152 (1st Cir. 2004).
has only grown. Given the significant implications for both children with disabilities and school districts, this Note advocates that the Supreme Court clearly resolve this issue when it hears T. A. later this Term.

Part I of this Note provided background information on the IDEA, explained the equitable remedy of tuition reimbursement recognized by the Supreme Court in Burlington, and described the 1997 amendment to the IDEA. It also examined the relevant legislative history of the IDEA and the DOE’s interpretation of § 1412(a)(10)(C)(ii) in both an official regulation and an informal policy letter. Part II explored the controversy and conflicting litigation over whether the 1997 amendment to the IDEA—specifically, the addition of § 1412(a)(10)(C)(ii)—constituted a bar on the remedy of tuition reimbursement, except in cases where the disabled child had “previously received special education and related services under the authority of a public agency.” The Second and Ninth Circuits—which held that the equitable remedy of tuition reimbursement for all disabled children unilaterally placed in private school survived the 1997 amendment—reached divergent conclusions from the First and Third Circuits and the Maryland District Court—which held that the 1997 amendment eliminated the remedy of tuition reimbursement for children who had never previously received special education in a public school. The circuit courts split over the impact of the 1997 amendment on tuition reimbursement in part because they disagreed on whether the wording of § 1412(a)(10)(C)(ii) was ambiguous.

Part III of this Note argues that § 1412(a)(10)(C)(ii) of the IDEA is ambiguous and should not be interpreted based on the “plain language” of the provision. Rather, Part III proposes that Congress did not intend § 1412(a)(10)(C)(ii) to bar tuition reimbursement for students who have not previously received public special education services. Finally, Part III advocates that the Supreme Court affirm the Ninth Circuit decision in T. A. The reading of the Ninth (and Second) Circuit is consistent with the remainder of the IDEA (specifically § 1415(i)(2)(C)), the explicitly

303. For a discussion of § 1412(a)(10)(C)(ii), see supra notes 107–09 and accompanying text.
305. See supra Part II.A.
306. See supra Part II.B.
307. See supra note 195 and accompanying text.
309. See supra notes 91–93 (discussing the Supreme Court’s holding in Burlington that 20 U.S.C. § 1415(i)(2)(C) authorizes the court to grant tuition reimbursement based on “principles of equity” when appropriate). This section of the IDEA was substantively unchanged by the 1997 revision to the IDEA, suggesting “that Congress intended to adopt the construction given to it by the Supreme Court [in Burlington] and made that construction part of the enactment.” Frank G. v. Bd. of Educ., 459 F.3d 356, 369–70 (2d Cir. 2006), cert. denied, 128 S. Ct. 436 (2007) (citing Shapira v. United States, 335 U.S. 1, 16 (1948); Johnson v. Manhattan Ry. Co., 289 U.S. 479, 500 (1933)).
stated purpose of the IDEA, and the DOE's official regulation which comments on the issue.

A. Legislative Intent Cannot Be Discerned from the Ambiguous Language of § 1412(a)(10)(C)(ii)

The 1997 amendment to the IDEA is ambiguous, and Congress's intent cannot be discerned from the text of the statute alone. Even under a plain meaning approach to statutory interpretation, the text of § 1412(a)(10)(C)(ii) should be viewed as ambiguous when considered in conjunction with the rest of the IDEA.

Although § 1412(a)(10)(C)(ii) does say that the remedy of tuition reimbursement is available to students who have previously received public special education and related services, it does not explicitly state (or even imply) that this provision is intended to foreclose the remedy of tuition reimbursement for other disabled children. The conclusion that § 1412(a)(10)(C)(ii) was intended as a statutory bar to private school tuition reimbursement requires "an inference to be drawn from the plain language [of the provision], rather than the language itself." The Second Circuit's conclusion that this suggests "a degree of ambiguity" is compelling, especially in light of the context of the provision and stated purpose of the IDEA.

Considering the "Child Find" provision of the IDEA, along with § 1415(i)(2)(C), it is unlikely that the 1997 revision to the IDEA was intended to limit the remedy of tuition reimbursement to children who previously received special education services from a public agency. Although the Child Find provision of the IDEA does not address private school tuition reimbursement—or remedies authorized by the IDEA at all—it is relevant in determining Congress's intent in amending the IDEA in 1997. This provision, which requires states to identify disabled children in public as well as private schools and to determine whether they need special

310. See supra notes 39, 98 and accompanying text for a discussion of the express purpose of the IDEA.
311. See supra notes 148-50 and accompanying text for a discussion of the DOE's official regulation on the remedy of tuition reimbursement under the IDEA.
312. See supra notes 195-96 and accompanying text for a discussion of the plain meaning approach to statutory interpretation.
313. Frank G., 459 F.3d at 368; see also supra note 197 and accompanying text (discussing that whether a statute is clear or ambiguous should be determined by looking at the language and the context of the provision and the statute as a whole).
314. See supra notes 107-08.
315. See supra notes 195-98 and accompanying text (discussing the Second Circuit's holding in Frank G. that the provision was ambiguous because it did not say that tuition reimbursement was only available when a child has previously received public services).
316. Frank G., 459 F.3d at 368.
317. Id.
318. See supra note 104 and accompanying text.
319. See supra notes 91-93 and accompanying text.
education,\(^{320}\) is not consistent with the reading of § 1412(a)(10)(C)(ii) proposed by the First and Third Circuits and the Maryland District Court.\(^{321}\) It is hard to imagine that Congress would place an affirmative obligation on the states to seek out disabled children in private schools, while intending to deny these children a remedy if it turns out that the public school cannot provide them with a FAPE due to the extent of their disability.\(^{322}\)

Section 1412(a)(10)(C)(ii) should be read in context with the Child Find provision, as well as § 1415(i)(2)(C), which states that a court "shall grant such relief as [it] determines is appropriate."\(^{323}\) Although the reenactment of § 1415(i)(2)(C) (in 1997 and 2004) without change is not determinative of congressional intent, it is significant in that it creates "a question to which the IDEA does not provide an unambiguous answer."\(^{324}\)

B. Protecting "All Children with Disabilities": The Expressly Stated Purpose of the IDEA Does Not Comport with Limiting the Remedy of Tuition Reimbursement

The previous section asserted that the language of the 1997 amendment to the IDEA is ambiguous and that the intent of Congress cannot be discerned from the text alone. This section reviews the purpose of the IDEA and argues that limiting the remedy of tuition reimbursement is not consistent with this expressly stated purpose. Finally, this section asserts that it is necessary to look at extrinsic sources to interpret the 1997 amendment to the IDEA.

The IDEA expressly states a goal of making a FAPE available to "all children with disabilities."\(^{325}\) In Burlington, the Supreme Court held that the IDEA should not be interpreted in a way that would undermine the objectives of providing a disabled child with both a free and an appropriate education.\(^{326}\) Although Burlington dealt with retroactive tuition reimbursement under the IDEA as a whole—and not just for children who have not previously received special education services from a public school—the rationale behind the Court's interpretation of § 1415 still

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320. See supra note 61 and accompanying text.
321. See supra Part II.B.
322. It is important to note that, under any reading of the IDEA, a claim for private school tuition reimbursement is predicated on a finding that the school district cannot provide the disabled student with a FAPE. See supra note 94; see also 20 U.S.C. § 1412(a)(10)(C)(i) (2006) (asserting that the state does not have to pay for the cost of private school education if a FAPE was made available to the child in a public school and the parents elected to place the child in private school anyway).
323. 20 U.S.C. § 1415(i)(2)(C); see also supra note 91 and accompanying text.
325. 20 U.S.C. § 1400(d)(1)(A); see also supra note 39 and accompanying text.
applies. The Court in *Burlington* stated that "Congress undoubtedly did not intend" to limit the remedy of retroactive tuition reimbursement to children who are unilaterally placed in private school, leaving those children "less than complete[ly]" protected under the IDEA.\textsuperscript{327} The 1997 amendment to the IDEA should be interpreted under this same framework.\textsuperscript{328}

The plain meaning of § 1412(a)(10)(c)(ii), considered in light of the statutory language, the context of the provision, and the purpose of the IDEA, is ambiguous,\textsuperscript{329} and the intent of Congress cannot be discerned without looking at extrinsic sources, such as administrative agency interpretation.\textsuperscript{330} The next section will review the test established in *Chevron* for deferring to administrative agency’s interpretations, discuss the DOE’s interpretation, and, finally, suggest that the Supreme Court defer to the DOE’s interpretation of the 1997 amendment to the IDEA.

**C. The DOE’s Interpretation Is Reasonable and Should Be Afforded Deference**

As previously discussed, Congress’s intent in amending the IDEA in 1997 cannot be discerned from the ambiguous language of the provision in question. This section urges deference to the statutory interpretation of the DOE, the federal administrative agency responsible for administering the IDEA,\textsuperscript{331} which has explicitly commented on the remedy of tuition reimbursement after the 1997 amendment.\textsuperscript{332}

Under the two-step analysis the Supreme Court proffered in *Chevron*,\textsuperscript{333} the DOE’s interpretation of the IDEA should be accorded deference if (1) intent of the legislature cannot be determined from the plain language of the statute;\textsuperscript{334} and (2) if the interpretation given by the agency is reasonable.\textsuperscript{335} The DOE stated its position both in a final official regulation (in response to a request for clarification during the notice-and-comment rulemaking period)\textsuperscript{336} and in an informal policy letter by the Director of the DOE Office of Special Education and Rehabilitative Services.\textsuperscript{337}

Courts should give the DOE’s interpretation deference because the plain language of § 1412(a)(10)(C)(ii) is ambiguous, does not convey a clear

\textsuperscript{327} *Id.* at 370.

\textsuperscript{328} See *Frank G.*, 459 F.3d at 369–70.

\textsuperscript{329} See *supra* note 197 and accompanying text.

\textsuperscript{330} See *supra* note 197 and accompanying text.

\textsuperscript{331} See *supra* notes 135–36 and accompanying text.

\textsuperscript{332} See *supra* notes 148–50 and accompanying text. The DOE’s interpretation of § 1412(a)(10)(c)(ii) "explicitly rejected the Board’s arguments that (1) enrollment in a public school special education program is a prerequisite for seeking private school tuition reimbursement; and (2) subsection (C)(ii) restricts or limits a court’s equitable powers under § 1415." Brief for Respondent, *supra* note 133, at 25.

\textsuperscript{333} See *supra* note 142 and accompanying text.

\textsuperscript{334} See *supra* notes 143–45 and accompanying text.

\textsuperscript{335} See *supra* notes 145–46 and accompanying text.

\textsuperscript{336} See *supra* notes 148–50 and accompanying text.

\textsuperscript{337} See *supra* notes 157–59 and accompanying text.
legislative intent, and the official regulation—which was promulgated under the power delegated to the DOE by Congress—was a reasonable interpretation of the statute.

The Supreme Court should resolve the controversy over private school tuition reimbursement when it decides the Ninth Circuit case of T. A. later this Term. The Court should give deference to the DOE’s regulation, which explicitly states that the equitable remedy of tuition reimbursement was not eliminated by the 1997 amendment. This finding is consistent with the IDEA’s primary purpose of providing a free and appropriate education to all disabled children—whether or not they previously received special education services from a public agency.

D. Concerns over the Financial Implications of Tuition Reimbursement and Abuse by Parents Do Not Require a Different Interpretation of the Provision

The previous section suggested that the Supreme Court defer to the DOE’s interpretation of the IDEA when it reviews the Ninth Circuit’s decision in T. A. This section addresses and refutes the claim that the legislature intended to limit the remedy of tuition reimbursement in order to control costs and prevent parents from abusing the remedies authorized by the IDEA. Although these issues are significant and are relevant to the interpretation of the statute, neither justification supports a finding that Congress intended § 1412(a)(10)(C)(ii) to limit the remedy of tuition reimbursement available under the IDEA.

1. Concerns over Financial Implications Are Not Compelling

The legislative history indicates that controlling costs was one of Congress’s priorities in amending the IDEA in 1997. However, the history never explicitly states that the remedy of tuition reimbursement should be limited as a method of controlling these costs. Most of the legislative history discussing IDEA expenditures is not related to the provision in question or the issue of retroactive private school tuition reimbursement at all.

338. See U.S. Department of Education, supra note 135 (explaining that, when Congress created the DOE, a cabinet-level agency, it delegated the power to “implement[] laws enacted by Congress”).

339. See supra note 146 and accompanying text.

340. For a discussion of the Supreme Court’s 4-4 split in Tom F., see supra notes 226–32 and accompanying text. The circuit split over the issue of tuition reimbursement for disabled children who never received special education or related services from a public agency was not resolved by the Court’s one-sentence per curiam opinion in Tom F., which is not precedent outside of the Second Circuit.

341. See Forest Grove Sch. Dist. v. T. A., 553 F.3d 1078 (9th Cir. 2008), cert. granted, 129 S. Ct. 987 (2009); see also Posting of Lyle Denniston, supra note 249; supra notes 233–49 (discussing T. A.).

342. See supra notes 128–29 and accompanying text.

343. See supra notes 133–34 and accompanying text.
The goal of controlling government expenditures for special education services—although an important issue that should be addressed—does not support a holding that § 1412(a)(10)(C)(ii) bars tuition reimbursement for all children who never received public special education services. The vague and nonspecific legislative history regarding financial expenditures does not overcome the explicitly stated purpose of the IDEA: that all children with disabilities be provided with a FAPE.

Further, the issue of cost control can be addressed without barring tuition reimbursement for children who never received special education services in public school. The equitable remedy authorized by § 1415(i)(2)(C) does not mandate tuition reimbursement for all students unilaterally placed in private school, even when the public agency cannot provide a FAPE. Rather, it directs IHOs and courts to grant relief they determine “appropriate.”

By maintaining this discretion and flexibility, courts can consider the appropriate educational placement for each individual child, as well as the issues impacting school districts (such as inadequate funding) when determining if a specific private school placement and/or tuition reimbursement is “appropriate” relief under the IDEA. How significantly the cost of a special education program should be considered in a court’s decision—and if it should even be considered at all—has been widely debated. However, most circuits agree that cost cannot be completely ignored when determining whether a placement or reimbursement is appropriate.

2. Safeguards in the IDEA Are Adequate to Protect Against Abuse

Although the fear that some parents might attempt to abuse the system is not completely unwarranted, there are safeguards currently in the IDEA to protect against this. In Tom F., the school district expressed concern that, if § 1412(a)(10)(C)(ii) were interpreted to allow tuition reimbursement for students who had not received public school special education services, parents would be given an incentive to “seek an IEP and later challenge its

344. See supra notes 133–34 and accompanying text.
345. See supra note 39 and accompanying text.
346. See supra note 78 and accompanying text.
347. See Oliver, supra note 66, at 779; Willard, supra note 45, at 1177–78.
348. See Oliver, supra note 66, at 787 (proposing a “reasonableness standard” for cost consideration, that would allow courts to “use tailored judgment for each individual child” and balance the academic benefits of a placement against practical considerations, such as cost). Although Ashley Oliver discusses the cost of a proposed private school placement, rather than the cost of tuition reimbursement for a parent’s unilateral placement, “there is a significant amount of overlap” between the issues. Id. at 789. The broad discretion given by the IDEA should allow the courts to consider practical factors, such as prohibitive costs, when determining whether a placement—and as a result tuition reimbursement for that placement—is reasonable.
adequacy, even though they [had] no intention of placing their child in public school."349

The current "statutory construct [of the IDEA] is a significant deterrent" to these types of abusive and dishonest claims.350 As stated by the Supreme Court in Burlington (and explicitly noted in the IDEA), parents who unilaterally place their children in private school do so at their own peril and "financial risk."351 Further, the parents have the burden of proving the requirements for relief.352 This distribution of risks and burdens of proof—along with the fact that IDEA claims often take several months or years353 and can be extremely expensive—make it unlikely that the parent of a disabled child will enter into this process unless they truly believe that the school district cannot provide their child with a FAPE.

Even if a parent does make an IDEA claim in bad faith, § 1412(a)(10)(C)(iii) explicitly states that tuition reimbursement can be reduced or denied based on a finding of any "unreasonableness with respect to actions taken by the parents."354 This provision, along with the equitable considerations authorized by § 1415(i)(2)(C) and upheld by the Court in Burlington,355 allows IHOs and courts to scrutinize closely parents' behavior when determining whether to award tuition reimbursement in each individual case.

Upholding the equitable remedy authorized in Burlington—even when a child has not previously received special education services from a public agency—will give courts the power to consider all of the circumstances when fashioning relief and to reject claims from parents who act in bad faith. Thus, the Supreme Court should affirm the Ninth Circuit's decision in T. A. and defer to the interpretation of the DOE, giving children with disabilities, parents, and school districts closure and guidance on this issue.

CONCLUSION

This Note explored the conflict over whether private school tuition reimbursement should be available under the IDEA for disabled children who are unilaterally placed in private school by their parents without previously receiving special education or related services from a public agency. In 1997, Congress amended the IDEA and added an ambiguous provision regarding the availability of tuition reimbursement for students

349. Brief for Respondent, supra note 133, at 41 (reviewing and rebutting the school district's concerns regarding parental abuses). The school district claimed that the parents in Tom F. had "predetermined that he was going to reject the public placement by the time it was offered," even if it could provide his son with a FAPE. Brief for Petitioner, supra note 130, at 36.

350. Brief for Respondent, supra note 133, at 41.

351. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373-74 (1985); see also supra notes 94, 111 and accompanying text.

352. See supra note 173 and accompanying text.

353. See supra notes 17, 96 and accompanying text.


355. See id. § 1415(i)(2)(C); Burlington, 471 U.S. at 372.
unilaterally enrolled in private school. Several of the U.S. courts of appeals have reached divergent conclusions on the issue. In 2007, the Supreme Court granted certiorari to resolve the circuit split, but the Justices split four-four and issued a one-sentence opinion, offering no guidance on whether the remedy of tuition reimbursement was limited by the 1997 amendments to the IDEA.

This Note is hopeful that the Supreme Court will resolve the split and provide guidance to both parents of disabled children and school districts by affirming the Ninth Circuit's decision in *T. A.* later this Term. This Note advocates that the Supreme Court defer to the interpretation of the DOE and hold that the 1997 amendment to the IDEA does not foreclose the remedy of tuition reimbursement for children who never previously received special education or related services from a public agency. This interpretation is consistent with prior precedent and the primary purpose of the IDEA: "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."356

Notes & Observations