

## **IDEA, PRIVATE SCHOOLS, TUITION REIMBURSEMENT, AND THE SUPREME COURT: WHO WOULD PAY FOR THAT?**

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### I. INTRODUCTION

Parents have great interest in, and usually strong opinions about, the education of their children. These interests can be even more pronounced when they have children with disabilities. Congress enacted the Individuals with Disabilities Education Act (IDEA) to ensure that children with disabilities have an equal opportunity to receive an education that is appropriate—in other words, reasonably calculated to enable the child to receive educational benefits, at no cost to the parents.<sup>1</sup> Traditionally, public schools fulfill the function of providing free education to all students, regardless of disability, and hopefully at a reasonable cost to taxpayers. However, many parents feel that their children are better served in private school settings.<sup>2</sup> When a child without a disability is enrolled in private school, it is considered a private choice, and the parent bears the obligation of paying the costs of tuition.<sup>3</sup> However, if a child has a disability, the fiscal obligations are not as clear-cut, as will be discussed below. This lack of clarity has resulted in costly litigation

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1. Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1142 (1990) (codified as amended at 20 U.S.C. §§ 1400–1482 (2004)).

2. The basis of these decisions runs the gamut from religious reasons, to a fundamental belief that private schools are better at educating children due to prestige, to lack of trust in public institutions, or any other number of reasons.

3. There are ongoing debates about whether vouchers, or some other mechanism, should facilitate parental choice in educational matters for any child, regardless of disability. While that poses an interesting question, that topic will not be addressed in this article.

which could result in tremendous financial burdens for public schools already trying to manage limited resources.

The U.S. Supreme Court recently granted certiorari on a case that could allow parents to make unilateral decisions that would have devastating financial consequences for public schools.<sup>4</sup> The Ninth Circuit ruled in *Forest Grove School District v. T.A.* that a parent could enroll a special education student in private school placement and be eligible for tuition reimbursement, without having availed the student of the public school system.<sup>5</sup> In other words, a parent could potentially hold a public school accountable for private school tuition without ever giving the public school the opportunity to provide an appropriate education to the student.

The *Forest Grove* decision, which the U.S. Supreme Court will review on April 28, 2009,<sup>6</sup> followed a line of reasoning outlined in a recent Second Circuit decision. In *Bd. of Educ. of N.Y. v. Tom F.*,<sup>7</sup> the Court deadlocked and affirmed, per curiam, a Second Circuit decision that allows parents of special education students who have never availed themselves of the public school system to receive tuition reimbursement.<sup>8</sup> While this decision only binds the Second Circuit, the Ninth Circuit decision, if affirmed by the Supreme Court Justices, could have a lasting national effect.

The Court also recently denied review for a similar case in the same circuit.<sup>9</sup> This means that the court has passed twice on the issue. There is also little in the current record that oddsmakers or legal analysts could use to predict how the court will decide now that this issue has been appealed from another circuit. As will be discussed below, the recent line of cases sends a signal to school districts that they may have to prepare for increased litigation in this area, and to the United States Congress that they may need to clarify the statutory language in order to prevent unintended and crippling financial consequences.

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4. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2008), *cert. granted*, 129 S.Ct. 987 (U.S. Jan 16, 2009) (No. 08-305).

5. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2008).

6. Supreme Court Argument Calendar, [http://www.supremecourtus.gov/oral\\_arguments/argument\\_calendars/MonthlyArgumentCalApril2009.pdf](http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalApril2009.pdf) (last visited March 3, 2009).

7. *Bd. of Educ. of N.Y. v. Tom F.*, 552 U.S. 1 (2007) (per curiam) (4-4 vote, with Justice Kennedy recusing himself).

8. *Id.*

9. *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 128 S.Ct. 436 (Oct. 15, 2007) (No. 06-580).

This article will discuss the facts of both *Tom F.* and *Frank G.* and provide a detailed analysis of the appellate court's rationale in *Frank G.* Next, this article will analyze the facts in *Forest Grove*, their potential differentiation from the facts in *Tom F.* and *Frank G.*, and the potential for the Supreme Court to settle the current circuit split. Finally, this article will provide guidance to public schools to help eliminate, or reduce, the inherent legal and fiscal risks involved in these types of special education fact scenarios, as well as provide a suggestion for a legislative fix to the statutory language from which this issue arises.

## II. ESTABLISHING AND DISTINGUISHING THE FACTS IN *TOM F.* AND *FRANK G.*

In both *Tom F.* and *Frank G.*, parents of special education students asked for tuition reimbursement for a private school education when they had never enrolled their children in public schools, claiming that the public schools could not provide a Free Appropriate Public Education (FAPE).<sup>10</sup> FAPE is described generally in 20 U.S.C. § 1412 and requires schools to provide an education that is appropriate to the needs of the disabled child at no cost to the parents. However, neither of the parents had subjected their children to the public system to test whether the school could provide a FAPE.

### A. *The Facts in Tom F.*

Tom F. had a son, Gilbert F., who was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) when he was a toddler.<sup>11</sup> This diagnosis was the result of a variety of medical tests and was confirmed by evaluations conducted by specialists from the New York City Board of Education.<sup>12</sup> In both the 1997–98 and 1998–99 school years, Tom F. requested an evaluation by the public school and, in both instances, the school developed an Individualized Education Program (IEP) with which Tom F. disagreed.<sup>13</sup> Tom F. subsequently enrolled his son in a private school, the Stephen Gaynor

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10. See Brief of Respondent, Bd. of Educ. of N.Y. v. Tom F., 552 U.S. 1 (2007) (No. 06-637); Brief of Petitioner, *Tom F.*, (No. 06-637); Frank G., 459 F.3d 356 (2d Cir. 2006) (No. 04-4981-CV).

11. Brief of Respondent at 3, *Tom F.* (No. 06-637). See also Brief of Petitioner at 6–9, *Tom F.* (No. 06-637).

12. Brief of Respondent at 3, *Tom F.* (No. 06-637).

13. *Id.* at 3–4.

School, which specializes in special education students, and requested tuition reimbursement from the public school district under the procedure provided in the IDEA.<sup>14</sup> Instead of arguing with Tom F.'s challenge to the adequacy of the IEP, the school elected to settle and pay the tuition rather than engage in litigation.<sup>15</sup>

In anticipation of the 1999–2000 school year, the public school once again evaluated Gilbert, and then developed a new IEP at a meeting in which Tom F. participated.<sup>16</sup> This IEP called for placement in a public school for the talented and gifted. As such, Gilbert would not be eligible for placement in a mainstream class, but would be placed in a self-contained class. That meant that he would not have the advantages of a mainstream placement, such as interaction with non-disabled peers.<sup>17</sup> Tom F. requested an impartial hearing to contest his son's placement.<sup>18</sup>

The impartial hearing lasted three days, after which the hearings officer concluded that the IEP called for an inappropriate placement for Gilbert.<sup>19</sup> The school district filed an administrative appeal, and the state review officer (SRO) affirmed the decision, which rejected the school district's argument that tuition reimbursement should not be available to Tom F. in this circumstance.<sup>20</sup> The school district, having exhausted its administrative remedies, appealed again, this time to the U.S. District Court for the Southern District of New York.<sup>21</sup>

The district court did not evaluate whether the placement was appropriate and ruled that as a matter of law the "clear implication of the plain language [of § 1412(a)(10)(C)(ii)] . . . is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school."<sup>22</sup> Thus, the District Court reversed the SRO and denied tuition reimbursement.

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14. *Id.*

15. *Id.*; Brief of Petitioner at 7, *Tom F.* (No. 06-637).

16. Brief of Respondent at 3–4, *Tom F.* (No. 06-637).

17. *Id.* at 4.

18. *Id.* at 5.

19. *Id.* at 6.

20. *Id.* at 8.

21. *Id.*

22. *Id.* at 9 (quoting *Bd. of Educ. v. Tom F.*, No. 01 Civ. 6845, 2005 WL 22866 (S.D.N.Y. Jan. 4, 2005)).

Tom F. appealed to the Second Circuit.<sup>23</sup> In his appeal, Tom F. argued that the Southern District incorrectly interpreted the law and that reimbursement is not restricted solely to parents whose child has previously received services from a public school.<sup>24</sup> The Second Circuit considered the appellant's argument but vacated and remanded because *Frank G.* had just been decided on the same issue.<sup>25</sup>

*B. The Facts in Frank G.*

Frank G. is the adoptive parent of Anthony, who was born to a crack-addicted mother.<sup>26</sup> Anthony was diagnosed with ADHD when he was 3 years old.<sup>27</sup> Anthony did not attend public schools from kindergarten through fourth grade.<sup>28</sup>

In April 2000, Anthony's parents notified the public school district of his disability, and the district responded in kind by classifying Anthony as learning disabled under the IDEA.<sup>29</sup> During the spring of 2001, Anthony was evaluated by an occupational therapist who noted several deficits in his skills, and by a neuropsychologist who "recommended that Anthony receive 'individualized attention and a relatively small class,'" among other individualized modifications.<sup>30</sup>

The school district developed an IEP for Anthony which included direct consultant teacher services, a behavior modification plan, a full-time individual aide, and other counseling and therapy services, but it called for placing him in a regular education class of 26 to 30 students.<sup>31</sup> Anthony's parents objected and enrolled Anthony in Upton Lake, a private school, and an independent hearing officer held that neither the Upton Lake placement nor the public school's offered placement were appropriate.<sup>32</sup> In fact, the school

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 359 (2d Cir. 2006).

27. *Id.* at 360.

28. *See id.* (Anthony attended all private schools, such as the Randolph School for Kindergarten [1997–1998], then Bishop Dunn from first through fourth grade [1998–2001], and finally Upton Lake in the year for which Frank G. asked for tuition reimbursement.)

29. *Id.* at 360.

30. *Id.*

31. *Id.*

32. *Id.* at 361.

district conceded at the hearing that the offered placement was not appropriate.<sup>33</sup>

Both parties filed an administrative appeal, and the SRO affirmed the hearing officer's decision.<sup>34</sup> Thus, the parents, who were still seeking tuition reimbursement, filed a complaint in federal court, in the Southern District of New York.<sup>35</sup> While the SRO only had evidence such as grades and academic progress through the first semester, the judge presiding over the bench trial in the Southern District was able to evaluate a broader base of evidence, including grades and assessments through the end of the year, which the Judge concluded showed "phenomenal" results.<sup>36</sup> By the end of the year at Upton Academy, Anthony had scored at or above average on all but two subcategories on the Stanford Achievement Test.<sup>37</sup> He also increased his grades in all but one subject, and in two subjects, math and reading, he increased his grades from the sixties to the nineties.<sup>38</sup>

Given this new evidence, the Southern District awarded tuition reimbursement and attorneys' fees to Frank G.<sup>39</sup> The school district appealed to the Second Circuit, arguing that despite Anthony's improvement, "the private school education for which reimbursement was sought was not an appropriate placement."<sup>40</sup> Judge Brieant of the Southern District did note that Upton Lake had also deviated from the IEP developed by the public school, but "he was satisfied that Anthony's teacher . . . had worked with Anthony individually when possible, . . . that 'she also made certain testing and other academic modifications for Anthony to assist him in successfully completing his assignments,'" and that he required less of this individual attention as the school year progressed.<sup>41</sup> The Second Circuit affirmed the judgment of the district court, for reasons that will be discussed below.<sup>42</sup>

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33. *Id.*

34. *Id.*

35. *Id.* at 362

36. *Id.*

37. Anthony completed the test without any accommodations.

38. *Frank G.*, 459 F.3d at 362.

39. *Id.* (The tuition reimbursement award amounted to \$3,660, while the attorneys' fees awarded amounted to \$34,567.)

40. *Id.*

41. *Id.*

42. *Id.* at 362-363.

*C. What Distinguishes These Cases Given that the Supreme Court Passed on Frank G.?*

The main distinguishing feature of these two cases is that in the proceedings of *Frank G.*, the school district conceded that its IEP proposed a placement that was inappropriate,<sup>43</sup> whereas the school district in *Tom F.* did not make this concession.<sup>44</sup> Arguably, a plaintiff would have a stronger case if it were more aligned with the *Frank G.* facts, where a school district clearly does not provide FAPE, and concedes that its placement is inappropriate.

The facts in *Tom F.* are not as clear-cut because the school district did not concede that its proposed placement was inappropriate. However, a cursory examination of the *Tom F.* facts seem to indicate that the placement probably was not appropriate, and the IEP was probably not crafted with as much care as it could have been. In either case, poorly developed IEPs appear to have triggered the initial disputes.

III. EVALUATING THE JUDICIAL ANALYSES IN *FRANK G.* AND *TOM F.*

A full analysis of the current legal situation after *Frank G.* and *Tom F.* requires looking at two separate courts and their independent analyses. *Frank G.* gives insight into the Second Circuit's analysis of IDEA in the context of private school placement and tuition reimbursement. However, the U.S. Supreme Court denied review of *Frank G.*, so transcripts from the *Tom F.* oral arguments give some indications of the major concerns raised by the Supreme Court Justices.

*A. The Frank G. Court Holds that Parents May Make Unilateral Private Placement*

The Second Circuit focused on the issue of whether a parent may unilaterally place his or her child in private school and receive reimbursement, even when the child has not been availed of the public school system first.<sup>45</sup> The court reasoned that, "Ultimately, the

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43. *Id.* at 360.

44. See *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 128 S.Ct. 436 (Oct. 15, 2007) (No. 06-580); Brief of Respondent at 3–4, *Bd. of Educ. of N.Y. v. Tom F.*, 552 U.S. 1 (2007) (No. 06-637); Brief of Petitioner at 7, *Tom F.* (No. 06-637).

45. *Frank G.*, 459 F.3d at 359.

issue turns on whether a placement—public or private—is ‘reasonably calculated to enable the child to receive educational benefits.’”<sup>46</sup> Under this rationale, if the placement was not so reasonably calculated, then it would not be appropriate and would not meet the school district’s requirement to provide a FAPE to the student. However, the school district argued for an “absolute defense,” claiming that the student had to be enrolled in a public school first in order to reach a second level of analysis as to whether the public or private placement is appropriate.<sup>47</sup>

*1. The Second Circuit Held that Anthony’s Private School Placement Was Appropriate*

The court first conducted a FAPE analysis. The district court reasoned that “Anthony ‘did not receive specialized instruction in any of his primary areas of need—written expression, handwriting, and math,’” and it rendered the private school placement inappropriate.<sup>48</sup> However, the circuit court rejected this reasoning, finding that Anthony received direct consultant teacher services and a one-to-one aide.<sup>49</sup>

The appellate court reasoned that while these services were not the equivalent of those proposed in the school district’s IEP, they still came “within the IDEA definition of ‘special education,’ namely, ‘specially designed instruction . . . to meet the unique needs of a child.’”<sup>50</sup> Specifically, the court stated that the parents need only demonstrate that instruction was adapted to Anthony’s needs, and appropriateness of the placement would be supported by Anthony’s social and academic progress, such as his markedly improved grades and standardized test scores.<sup>51</sup>

*2. The Court Rejected the School District’s “Absolute Defense”*

Once the court had determined that the private school placement was appropriate, it addressed the district’s argument for an “absolute

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46. *Id.* at 364 (citing *Bd. of Educ. v. Rowley*, 548 U.S. 176, 207 (1982)).

47. *Id.* at 367. The school district based this argument on its interpretation of the 1997 amendments to the IDEA. *See* 20 U.S.C. § 1412(a)(10)(C)(ii).

48. *Frank G.*, 459 F.3d at 365 (the school district cited *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003) as authority for this position).

49. *Id.* at 365.

50. *Id.* (quoting 20 U.S.C. § 1401(29)).

51. *Id.*



defense.” This argument was based on a plain-language reading of 20 U.S.C. § 1412(a)(10)(C)(ii), which the Court paraphrased:

[The statute] authorize[s] reimbursements to the parents of a disabled child, ‘who previously received special education and related services under the authority of a public agency’ and who enrolled the child in a private elementary or secondary school without the consent or referral of the public agency, ‘if the court or hearing officer finds that the agency had not made a free appropriate education available to the child in a timely manner prior to enrollment.’<sup>52</sup>

The court noted that in deciding *Tom F.*, the Southern District of New York had agreed with this assertion when it stated that “[t]he clear implication of the plain language, however, is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expense arising from a parent’s unilateral placement of the child in private school.”<sup>53</sup> However, in this case, the Second Circuit disagreed with that statutory interpretation.<sup>54</sup>

The court noted here that the plain language of the statute does not restrict tuition reimbursement only to parents whose child had previously received special education services from a public agency, nor does it explicitly state that a parent whose child has not received such services is precluded from reimbursement.<sup>55</sup> Instead, the circuit court reasoned that the district court’s argument required drawing an inference from the plain language, rather than relying on the plain language itself, and noted that other sections of IDEA may speak to the issue of tuition reimbursement.<sup>56</sup>

For instance, the court cited 20 U.S.C. § 1415(i)(2)(C), which “authorizes a district court hearing a challenge to the failure of a local education agency to provide a free appropriate public education to ‘grant such relief as [it] determines is appropriate.’”<sup>57</sup> It looked to the U.S. Supreme Court’s decision in *Sch. Comm. of Burlington v. Dep’t of Educ.*,<sup>58</sup> which held that this relief is not prospective alone, as that

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52. *Id.* at 367.

53. *Id.* at 368 (quoting *Bd. of Educ. v. Tom F.*, 2005 WL 22866, at 3 (S.D.N.Y. Jan. 4, 2005)).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 369.

58. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359 (1985).

would be an insufficient remedy, “because the process of obtaining the relief ‘is ponderous’ and a ‘final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed.’”<sup>59</sup>

In a lengthy conclusion, the circuit court held that it would be unreasonable to require Anthony to be subjected to a public placement that would be “useless and potentially counterproductive.”<sup>60</sup> The court, therefore, declined to “interpret 20 U.S.C. § 1412(a)(10)(C)(ii) to require parents to jeopardize their child’s health and education in this manner in order to qualify for the right to seek tuition reimbursement.”<sup>61</sup> Furthermore, the court noted that the Department of Education’s Office of Special Education & Rehabilitative Services had written an opinion letter which expressed that at the least, the statute did not include “actual receipt of some form of special education and related services from a public agency” as a prerequisite to receiving tuition reimbursement.<sup>62</sup>

Finally, the court examined legislative history in order to conduct its own statutory interpretation. In particular, the court examined a Report of the House Committee on Education and the Workforce that included some commentary on the statutory language; specifically, the court interpreted the statement, “the parents of a child with a disability, who previously received special education and related services under the authority of a public agency.”<sup>63</sup> The *Frank G.* court noted that the *Tom F.* court, in the same appellate circuit, had read this statement as a prerequisite.<sup>64</sup> However, the *Frank G.* Court disagreed and read the context of the statement to imply that the term “previously” referred to the time period before the enactment of this particular section of the statute, rather than to a prerequisite for obtaining tuition reimbursement.<sup>65</sup>

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59. *Frank G.*, 459 F.3d at 369 (citing *Burlington*, 471 U.S. at 370).

60. *Id.* at 372.

61. *Id.*

62. *Id.* at 373 (quoting Letter to Susan Luger, Educational Consultant and Advocate, from the Dep’t of Educ. (March 19, 1999), listed in 65 Fed. Reg. 9178 (Feb. 23, 2000), reprinted in 33 I.D.E.L.R. 126 (March 19, 1999)).

63. *Id.* (citing H.R. REP. No. 105-95, at 92 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 90).

64. *Id.* at 374.

65. *Id.*

*B. The U.S. Supreme Court Considers Tom F. in Oral Arguments*

The Supreme Court's opinion in *Tom F.* gives no indication of the reasoning that might have been applied if there had not been a tie vote. However, the oral arguments do provide a guide to some of the concerns that the Court raised in this case.<sup>66</sup> One should note, though, that due to Justice Kennedy's recusal, there is no way to know how the court would, or might, eventually decide this issue, as the Justices often query on topics that do not necessarily reflect their own analyses of the case. Below are three of the major issues raised by the Justices at oral arguments.

*1. Does the Prerequisite Force Kids into Inappropriate Placements?*

The Justices asked Leonard J. Koerner, counsel for the school district, whether this requirement was arbitrary and forced students to be subjected to inappropriate placements.<sup>67</sup> While Koerner never directly answered this question, he argued that the statute requires it.<sup>68</sup> He also argued that the policy behind the statutory language is to promote cooperation between the parties to at least try the public school placement so that the parents would then articulate the problems with the placement.<sup>69</sup>

This line of questioning was initiated by Justice Alito, but pursued further by other justices.<sup>70</sup> In fact, Justice Scalia stated that he thought,

Congress figured that there are probably a lot of people in New York City, in Manhattan in particular, who are going to send their kids to private school, no matter what, and they can get special services in private school, but what the heck, if we can get \$30,000 from the city to pay for it, that's fine. In other words, this was meant to be an option for people who wanted to go to the public schools but couldn't go to the public schools because they couldn't get the private services there, but it was never meant to be an

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66. See generally Transcript of Oral Argument, *Bd. of Educ. of N.Y. v. Tom F.*, No. 06-637, 552 U.S. \_\_\_\_ (2007), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-637.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-637.pdf) (last visited Jan. 10, 2008).

67. Transcript of Oral Argument, *supra* note 66, at 8–10.

68. *Id.*

69. *Id.*

70. *Id.*

option for people who had no desire to go to public schools at all.<sup>71</sup>

Chief Justice Roberts picked up on this line of reasoning when the respondent's counsel, Paul G. Gardephe, presented his oral argument. The Chief Justice stated, "So when it comes to reimbursement or tuition, the parents who never place their child in the public school are in better shape than the parents who place their child in public school and then want to remove him."<sup>72</sup> Gardephe argued that this was not so, and opined that an individual could place a child in one day of kindergarten then refer back to it several years later to make a private school placement under the petitioner's reading of the statute.<sup>73</sup> However, Justice Scalia disagreed with Gardephe's logic.<sup>74</sup>

While this line of reasoning is not necessarily indicative of how the Justices' analyses would have affected the outcome if there had not been a tie vote, it does indicate that there was some concern about holding the public financially accountable for purely private choices. However, as discussed earlier, Kennedy recused himself from both *Tom F.* and *Frank G.*, without giving a reason for the recusal. This could call into question whether he has personal ties to the issue which may require him to recuse himself again.

## 2. *Would Removal of the Prerequisite only Benefit Wealthy Families?*

The Justices also questioned whether removal of the prerequisite would merely subsidize wealthy families who never had any intention of enrolling their children in public school.<sup>75</sup> As discussed above, Justice Scalia noted that wealthy families that may have never intended to avail themselves of the public school system could have an unintended advantage.<sup>76</sup> The Chief Justice also raised this issue when Respondent presented his oral argument, as noted above.<sup>77</sup>

Justice Scalia did note that this provision "doesn't just apply to the rich person who wants [the school district] to pay 30,000 of his

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71. *Id.* at 11.

72. *Id.* at 33.

73. *Id.* at 34–36.

74. *Id.* at 36–37.

75. Transcript of Oral Argument, *supra* note 66, at 11.

76. *Supra* note 72.

77. *Supra* note 73.

tuition to a private school.”<sup>78</sup> Koerner agreed, and argued that to apply Tom F.’s interpretation of the statute would create an automatic assumption that any IEP offered by the school is insufficient.<sup>79</sup>

*3. Does the Prerequisite Put Too High of a Burden on Parents to Challenge FAPE?*

Another question raised by the Justices was whether, with or without the prerequisite, the system puts too high of a burden on parents to prove that the proposed placement does not meet the requirements of FAPE.<sup>80</sup> In particular, Justice Ginsburg raises this concern in the oral arguments.<sup>81</sup>

Justice Ginsburg noted that current federal law puts the burden on the parent to demonstrate that the public school does not provide an appropriate placement.<sup>82</sup> In fact, she went so far as to describe it as a “heavy burden.”<sup>83</sup> This court previously held that parents bear this burden.<sup>84</sup>

### III. DIFFERENTIATING *FOREST GROVE*

Given the preceding facts and analysis on the *Tom F.* and *Frank G.* cases, one could argue that the facts in *Forest Grove* are clearly distinguishable. Even if the Supreme Court does not differentiate *Forest Grove*, it should rule that allowing parental unilateral private school placement is not an appropriate interpretation of the statutory language. To rule otherwise would allow for a tortured reading of the statute, and would invite further costly litigation at the financial expense of taxpayers, and ultimately of the educational expense of the student. Whatever the Court decides, the legislature would be wise to make the language completely unambiguous in order to prevent unnecessary and costly litigation.

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78. Transcript of Oral Argument, *supra* note 66, at 17.

79. *Id.*

80. *Id.* at 13–14, 23.

81. *Id.*

82. *Id.*

83. *Id.* at 14.

84. *Schaffer v. Weast*, 546 U.S. 49 (2005) (in which Justice Ginsburg filed a dissenting opinion).

A. *The Facts in Forest Grove*

In *Forest Grove*, the court deals with another student who may have had ADHD. T.A. was enrolled at schools in the Forest Grove School District from kindergarten through the spring semester of his junior year of high school.<sup>85</sup> The facts indicate he experienced difficulty paying attention in class and completing schoolwork, but he had passed his classes and had never received special education services.<sup>86</sup> In December 2000, T.A.'s guidance counselor referred him for a special education evaluation based on a suspicion that he may have a learning disability.<sup>87</sup>

The court states that T.A.'s parents never requested an evaluation for ADHD.<sup>88</sup> The court also notes that although the school district only evaluated students for learning disabilities, it did have internal communications about the possibility that T.A. might have ADHD, including notes from one meeting that mention "suspected ADHD."<sup>89</sup> After examination by psychologists and educational specialists, the school district held an eligibility meeting on June 13, 2001, that T.A.'s mother attended.<sup>90</sup> The team of specialists unanimously concluded, and the mother agreed, that T.A. did not have a learning disability and was ineligible for special education services.<sup>91</sup>

In 2002, T.A. began using marijuana and by early 2003 he was a regular user and exhibited noticeable personality changes.<sup>92</sup> He then ran away from home and was brought home by police a few days later, at which point T.A.'s parents took him to a psychologist and then to a hospital emergency room.<sup>93</sup> Dr. Fulop, the psychologist hired by T.A.'s parents, met with T.A. several times and eventually diagnosed him with ADHD, depression, math disorder, and cannabis abuse.<sup>94</sup> Dr. Fulop recommended a residential program for T.A. "because of T.A.'s failure to live up to his potential in school, his

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85. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1081 (9th Cir. 2008).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1082.

difficulties at home, his attitude toward school, his sense of hopelessness, and his drug problem.”<sup>95</sup>

On Feb. 27, 2003, T.A.’s father told the high school assistant principal that T.A. was undergoing medical testing, would enter a three-week wilderness training program, and would attend Portland Community College (PCC) in the spring.<sup>96</sup> The next day, the father told another high school administrator that T.A. was enrolled at PCC, and on March 10, 2003, the father told the assistant principal “that T.A. was ‘officially disenrolled’ from Forest Grove High School and had registered at PCC.”<sup>97</sup> Neither T.A. nor his parents expressed any dissatisfaction with his placement at PCC.<sup>98</sup>

T.A.’s parents then sent him to a three-week program at Catherine Freer Wilderness Therapy Expeditions.<sup>99</sup> When he was discharged from the program, the Freer staff gave T.A. a primary diagnosis of cannabis dependence and a secondary diagnosis of depression.<sup>100</sup> Soon afterward, T.A. was enrolled at Mount Bachelor Academy, “a residential private school that describes itself as ‘designed for children who may have academic, behavioral, emotional, or motivational problems.’”<sup>101</sup> T.A. committed “a number of serious rule violations at Mount Bachelor Academy,” yet graduated in June 2004.<sup>102</sup> The Court noted that T.A. “also would have graduated from public high school in 2004 had he remained there.”<sup>103</sup>

Four days after T.A.’s parents enrolled him at Mount Bachelor Academy they hired a lawyer, and on April 18, 2003, requested a due process hearing seeking an order requiring the school district to evaluate T.A. in all areas of suspected disability.<sup>104</sup> A hearing officer was assigned, but the matter was continued in order to allow the school district to evaluate T.A.<sup>105</sup> The school district had several medical and educational specialists evaluate T.A. and in a July 7,

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95. *Id.*

96. Brief of Petitioner for Writ of Certiorari at 6, *Forest Grove Sch. Dist. v. T.A.*, No. 08-305 (U.S. Sept. 3, 2008).

97. *Id.* at 7.

98. *Id.*

99. *Forest Grove*, 523 F.3d at 1082.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* (The parents requested the hearing pursuant to 20 U.S.C. § 1415(f), the due process procedure prescribed for handling disputes under the IDEA.)

105. *Id.*

2003 eligibility meeting, the team determined that T.A. had some learning difficulties. They acknowledged his ADHD and depression diagnoses, but the “majority found that T.A. did not qualify under the IDEA in the areas of learning disability, ADHD, or depression, because those diagnoses did not have a severe effect on T.A.’s educational performance.”<sup>106</sup> On Aug. 26, 2003, another team met and found that T.A. was also ineligible for services under § 504 of the Rehabilitation Act of 1973.<sup>107</sup>

The due process hearing resumed in September 2003 and both parties submitted evidence, including the history of the case.<sup>108</sup> Another psychologist, Dr. Callum, testified at the hearing that ADHD was not a primary cause of T.A.’s educational difficulties, and she concluded that “T.A. would be able to complete public high school without any services beyond those given to all students.”<sup>109</sup> On Jan. 26, 2004, the hearing officer issued an opinion that T.A. was disabled and therefore eligible for special education under the IDEA and § 504, that the school district failed to provide FAPE, and that the school district was responsible for T.A.’s \$5,200 per month tuition at Mount Bachelor Academy.<sup>110</sup>

The school district appealed to the U.S. District Court of Oregon, arguing that “reimbursement was unwarranted because T.A. unilaterally withdrew from public school without providing prior notice to the School District, he never received special education and related services from the School District, and he withdrew for reasons unrelated to his disability (that is, substance abuse and behavioral problems).”<sup>111</sup> The district court reversed the hearing officer’s grant of reimbursement, holding that T.A. was ineligible for reimbursement under 20 U.S.C. § 1412(a)(10)(C), and that even if reimbursement were appropriately ordered, it would not be supported “under general

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1082–1083. It is debatable whether the Hearing Officer correctly found for eligibility in this case, but that is a topic for another article. However, the opinion does shed light on how the Hearing Officer came to that determination and includes a tremendous volume of additional factual findings which are not relevant to this discussion, but are interesting nonetheless. See *In the Matter of the Education of T.A. v. Forest Grove School District*, OAH Case No. 20031306 (Jan. 26, 2003), available at [http://www.ode.state.or.us/services/disputeresolution/dueprocess/2003orders/dp03\\_113final.pdf](http://www.ode.state.or.us/services/disputeresolution/dueprocess/2003orders/dp03_113final.pdf).

111. *Forest Grove*, 523 F.3d at 1083.



principals of equity.”<sup>112</sup> T.A. appealed to the Ninth Circuit.

*B. The Ninth Follows the Second—with a Twist*

Recognizing that the question of private school reimbursement was currently being litigated in other jurisdictions, the Ninth Circuit first elected to refer the case to mediation while it awaited the results of the Supreme Court’s decision on *Frank G.*, and noted that the Supreme Court had recently deadlocked in *Tom F.*<sup>113</sup> As noted above, though, the Supreme Court denied certiorari in *Frank G.*<sup>114</sup>

Ultimately, the mediation was unsuccessful, and the Ninth Circuit proceeded. Essentially, the court adopted the reasoning of the Second Circuit, stating, “We see no reason to disagree with the 2nd Circuit’s well-reasoned analysis of this issue.”<sup>115</sup> The court agreed with the Second Circuit’s conclusion “that § 1412(a)(10)(C)(ii) is ambiguous because its text does not *clearly* create a categorical bar and because such an interpretation is in tension with the broader context of the statute.”<sup>116</sup> The court also sided with the Second Circuit’s rationale that to interpret the statute in any other way would lead to “absurd results.”<sup>117</sup>

The Ninth Circuit reasoned that when Congress amended the IDEA in 1997, specifically § 1412(a)(10)(C), it focused on factors to be considered when deciding whether tuition reimbursement is available to students who previously received special education services from the school district.<sup>118</sup> Thus, the court held that when determining whether reimbursement is available to a student who did not previously receive special education services from the district, § 1412(a)(10)(C) does not apply, and courts must analyze the case under principles of equity under § 1415(i)(2)(C).<sup>119</sup>

Thus, the Ninth Circuit remanded to the district court to reconsider the case based on equitable principles.<sup>120</sup> The court went

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1087.

116. *Id.* at 1086.

117. *Id.* Recall that the Second Circuit felt that another reading of the statute could force a student to attend public school when it would clearly be an inappropriate placement and would be “useless and potentially counterproductive.” See *supra* text accompanying note 60.

118. *Forest Grove*, 523 F.3d at 1087.

119. *Id.*

120. *Id.* at 1089.

on to offer guidelines as to how it felt those equities ought to be considered.<sup>121</sup>

*C. The Dissent Distinguishes Forest Grove from Tom F. and Frank G. (Without Saying as Much)*

Circuit Judge Rymer wrote the dissent in the *Forest Grove* opinion.<sup>122</sup> Interestingly, he points out the facts that clearly distinguish *Forest Grove* from *Tom F.* and *Frank G.*<sup>123</sup> However, he does not directly assert them as distinguishing. Nonetheless, the dissent correctly concludes this case did not require application of equitable principles because reimbursement was never due.<sup>124</sup>

In both *Frank G.* and *Tom F.*, eligibility was not in dispute and the IEPs were on the table, although rejected by the parents. Although the dissent in *Forest Grove* does not take a firm stance on distinguishing the facts, it does state facts which are clearly differentiable. Specifically, while T.A. was in public school, his mother explicitly agreed that he was not eligible for special education services (unlike the parents in *Frank G.* and *Tom F.*), and there was no requested, proposed, or disputed IEP on the table prior to enrollment at Mount Bachelor Academy.<sup>125</sup>

Thus, the dissent concludes that “unlike ‘all Burlington reimbursement cases,’ where ‘the parents’ rejection of the school district’s proposed IEP is the very reason for the parents’ decision to put their child in a private school,’ . . . T.A.’s parents decided to put him in a private school for reasons of their own.”<sup>126</sup> The dissent argues that, for this reason, “T.A.’s parents have no right to equitable retroactive reimbursement for private placement expenses.”<sup>127</sup>

The dissent opines that this analysis “squares with the statutory scheme as well.”<sup>128</sup> The school district would probably want the

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121. *Id.* at 1088–1089. While this article will not plumb the depths of the equity analysis provided by the Court, the interested reader may agree that when applying the facts found to the equitable considerations provided, the school district could prevail, even if the Supreme Court affirms the Ninth Circuit decision in whole.

122. *Id.* at 1089–1091.

123. *Id.* at 1090–1091.

124. *Id.* at 1091.

125. *Id.* at 1090.

126. *Id.* (citing *Burlington, Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993)).

127. *Id.*

128. *Id.*

Supreme Court to adopt the dissent's clearly stated opinion:

If FAPE were *not* at issue and T.A. was *not* receiving special education and related services before withdrawal from public school, then he was being provided a free appropriate education. A local educational agency that has made a free appropriate public education available has no obligation to pay the cost of education (including special education and related services) of a child with a disability at a private school when the parents elect the private placement. . . . However, if a child *has* previously received special education and related services, costs of a private placement may be reimbursed if a court or hearing officer finds that the school district had not made a free appropriate public education available to the child in a timely manner prior to the private enrollment.<sup>129</sup>

Given this, the dissent does allow that because FAPE was not at issue before T.A. was withdrawn, it “distances this case from *Frank G.*,” where the school district had prepared an IEP.<sup>130</sup> However, Judge Rymer seems to argue that it is not necessary to distinguish the cases because the Ninth Circuit had previously ruled on the issue of reimbursement by “recognizing right to reimbursement after the school district was first asked to provide services and had been given a reasonable opportunity to complete the process of evaluating the child and making a placement recommendation.”<sup>131</sup> The dissent concluded that, even assuming equitable principles should apply, the court should have been able to clearly answer that question in favor of the school district. Judge Rymer stated, “T.A.’s parents assumed the financial risk of their own decisions and that reimbursement is not ‘appropriate.’”<sup>132</sup>

#### IV. AVOIDING THE PITFALLS OF THESE CASES

While there are various ways to address the problem raised by *Tom F.*, *Frank G.*, and *Forest Grove*, some of which will be discussed below, the most obvious solution is to prevent the issue from being raised. The question, then, is how can the average school district implement this type of prevention to reduce the risks of litigation?

As evidenced in the preceding discussion about the facts in *Tom F.* and *Frank G.*, a school district should give great care and

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129. *Id.*

130. *Id.*

131. *Id.* at 1090–1091 (citing *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 589 (9th Cir. 1992)).

132. *Id.* at 1091.

consideration to the development of any IEP. While the facts do not indicate whether this happened, it would be easy to assume, as suggested by Justice Scalia in the *Tom F.* oral arguments, that some parents have already made up their minds that they are going to place their children in private school.<sup>133</sup> Schools cannot afford to make this assumption, and would be better served by assuming that every child for whom an IEP is being developed will be enrolled in the public school.

This serious approach to the IEP could head off some types of disputes examined in *Tom F.* and *Frank G.*, but it still leaves the more difficult problem presented by the facts in *Forest Grove*. When facing a situation directly analogous to *Forest Grove*, where there is suspicion of a particular disability, then it would seem prudent to evaluate for that disability.<sup>134</sup>

The more difficult scenario will be with the child for which there is no obvious sign of disability. School districts would be wise to review “Child Find” procedures to ensure that their own procedures identify children with special educational needs and at least begin documenting attempted educational interventions.<sup>135</sup> However, taking this measure is by no means a cure-all, and until this overarching issue is finally resolved, school districts will face continued risk of getting saddled with expensive reimbursement costs.

Finally, school districts should strive to maintain good communication with parents. This may sound elementary, but the scheme of IDEA recognizes that poor communication is a significant factor in disputes, and allows for mediation at many points in the dispute process.<sup>136</sup>

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133. See *supra* text accompanying note 71.

134. See *supra* text accompanying notes 87–114 (one need not second guess the professional judgment of the specialists in this case, but it does appear that the District had some concerns about the existence of ADHD, yet did not evaluate for it).

135. See generally 20 U.S.C. ch. 33. Under the IDEA, schools are required to have a system for finding and identifying students who may require special education services, known under the statutory scheme as “Child Find.” While the law does not hold a school district strictly liable for missing a child in this process, courts and administrative agencies have generally held that schools must at least make an attempt to notify the public of services that may be available and to request to evaluate children whom they suspect of having a disability which would render them eligible for special education.

136. See 20 U.S.C. § 1415 (2004).

## V. CONCLUSION

However the Supreme Court rules on this issue, the circuit split highlights that Congress may have created a very expensive unintended consequence. Hopefully the factors that motivated Justice Kennedy to recuse himself from hearing the Second Circuit cases are not present in *Forest Grove*, so that the Court can settle the question and give school districts clear guideposts when confronted with these types of issues. Presumably Justice Kennedy does not intend to recuse himself in the *Forest Grove* case or the Court would have had little reason to grant certiorari. However, that presumption is based on pure speculation, and the outcome remains to be seen.

The Supreme Court should side with the school district in *Forest Grove*. The Ninth Circuit held that Congress only addressed reimbursement for students who had previously received special education services in the public school, and that those who have not previously received the service are in a class of their own.<sup>137</sup> They further stated that any other reading of the statute would lead to absurd results.<sup>138</sup> However, the petitioners point out that an obvious absurdity arises if the Ninth Circuit's reasoning is adopted because under that rationale, "parents who never place their child in public school are more likely to receive tuition reimbursement than parents who do."<sup>139</sup> If the Supreme Court sides with T.A. in this case, then this absurdity will be spread to every jurisdiction, compounding the impact on federal dollars spent on special education under the IDEA. Interestingly, the New York and New Jersey legislatures have taken up this issue by drafting new law that shifts the burden of proving that the offered placement was not appropriate away from parents by requiring the school district to prove that its offered placement is appropriate.<sup>140</sup> Only time will tell if the new legislative changes represent a trend toward shifting this burden in jurisdictions across the country. But it may behoove the U.S. Congress to establish a national standard for where this burden should lie, rather than subjecting parents and schools to a patchwork of standards from state to state.

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137. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1086–87 (9th Cir. 2008).

138. *Id.*

139. Brief of Petitioner for Writ of Certiorari at 20, *Forest Grove Sch. Dist. v. T.A.*, No. 08-305 (U.S. Sept. 3, 2008).

140. Christina A. Samuels, *Some States Shift IEP Burden of Proof to School Districts*, EDUCATION WEEK, January 30, 2008, available at <http://www.edweek.org/ew/articles/2008/01/30/21speced.h27.html?print=1>.

Petitioners further argue that this result “cannot possibly be what Congress had in mind when enacting the 1997 amendments [to IDEA].”<sup>141</sup> However, there does not appear to be any material in the congressional record indicating what was intended, and neither party has offered any evidence of Congress’s intent.

Nonetheless, if ambiguity is the problem then Congress can, and should, easily rectify the situation. Congress should rewrite the language in IDEA to remove ambiguity, and should create a record of its intent for the legislation. This author advocates language that would support the reading urged by the *Forest Grove* petitioners. Clearly it is not in the public interest to subsidize private individuals making extremely expensive private decisions, particularly given the limited resources that schools have at their disposal. The school districts should not have to juggle shortages of resources in order to facilitate such subsidies. Until the Court and Congress act, the legal landscape clearly does not favor schools faced with the issues presented in *Tom F.*, *Frank G.*, and *Forest Grove*. At present, schools can only hope for a favorable ruling, and movement in Congress to rectify the inequity. Meanwhile, school districts should take great care to prevent and manage situations which could create disputes involving students seeking reimbursement under IDEA.

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141. *Id.*