REIMBURSING US PARENTS FOR THE COST OF UNILATERAL PLACEMENTS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

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In Forest Grove School District v. T.A., the US Supreme Court in 2009 rendered its third decision in the past twenty-four years on the right of parents, who have unilaterally placed their children in a private school, to be reimbursed under the IDEA for the cost of the private school education. In the first case to reach the Supreme Court, School Committee of Burlington v. Department of Education of Massachusetts, the Court held that reimbursement to parents for the unilateral placement of their children in private schools did not constitute the awarding of damages and was permissible even if the parents had chosen to make their unilateral placement decision while the IDEA's administrative due process was still in its hearing stage. Eight years after Burlington, the Court in, another unanimous decision, Florence County School District Four v. Carter, held that reimbursement could apply even if the private school chosen by the parents was not on the state's approved list of private schools. Both Burlington and Florence County involved parent claims that public school districts had failed to provide their children with IEPs that satisfied the IDEA's assurance of a free appropriate public education. In Forest Grove, the Supreme Court held, this time in a 6-3 decision, that the IDEA did not preclude reimbursement, even though the public school, prior to the parents' private school placement, had never provided a student with an IEP and special education services. The Court's decision in Forest Grove represented, as had the Court's earlier decisions in Burlington and Florence County, a careful parsing of congressional intent in defining the rights and responsibilities of parents and school districts under the IDEA.

The purposes of this article are to discuss the range of issues that arose following the Supreme Court's decisions in Burlington and Florence County and how lower federal courts chose to address them, as well to analyze the changes that Congress in 1997 made to the IDEA affecting parental reimbursement and how those changes have impacted the balance of the respective rights and responsibilities of parties involved. All of these statutory changes and judicial interpretations will be reassessed in light of the Court's most recent interpretive iteration in Forest Grove.

I INTRODUCTION

In *Forest Grove School District v T.A.* (*Forest Grove*),[1] the United States (US) Supreme Court in 2009 rendered its third decision in the past twenty-four years on the right of parents, who have unilaterally placed their children in a private school, to be reimbursed under the Individuals with Disabilities Education Act (IDEA) for the cost of the private school education. In the first case to reach the Supreme Court, *School Committee of Burlington v Department of*

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Education of Massachusetts (*Burlington*),[2] the Court held that reimbursement to parents for the unilateral placement of their children in private schools did not constitute the awarding of damages[3] and was permissible even if the parents had chosen to make their unilateral placement decision while the IDEA's administrative due process was still in its hearing stage. Eight years after Burlington, the Court, in another unanimous decision, *Florence County School District Four v Carter (Florence County)*,[4] held that reimbursement could apply even if the private school chosen by the parents was not on the state's approved list of private schools. Both *Burlington* and *Florence County* involved parent claims that public school districts had failed to provide their children with Individualized Education Plans (IEPs) that satisfied the IDEA's assurance of a free appropriate public education (FAPE).[5] In *Forest Grove*, the Supreme Court held, this time in a 6-3 decision,[6] that the IDEA did not preclude reimbursement, even though the public school, prior to the parents' private school placement, had never provided a student with an IEP and special education services. The Court's decision in *Forest Grove* represented, as had the Court's earlier decisions in *Burlington* and *Florence* County, a careful parsing of congressional intent in defining the rights and responsibilities of parents and school districts under the IDEA.

The purposes of this article are to discuss the range of issues that arose following the Supreme Court's decisions in *Burlington* and *Florence County* and how lower federal courts chose to address them, as well to analyse the changes that Congress in 1997 made to the IDEA affecting parental reimbursement and how those changes have impacted the balance of the respective rights and responsibilities of parties involved. All of these statutory changes and judicial interpretations will be reassessed in light of the Court's most recent interpretive iteration in *Forest Grove*.

The IDEA is a unique US approach to addressing the educational needs of students with disabilities in public schools in that parents are partners with public school personnel in determining the appropriate diagnosis of their disabled children and in proposing the appropriate services to be furnished to the children. While these services generally will be provided on site in public schools, parents may seek, as is indicated in this article, to have them furnished outside the schools, the parents alleging that a public school has failed either to correctly diagnose a child's disability or to furnish appropriate services. Often, the cost of services outside the public school can be more expensive than if they were to be furnished within the school and when parents seek reimbursement for their expense in making unilateral placements outside the public school, courts are called upon to decide whether the public school, in fact, had made both an appropriate diagnosis and services.

A *Burlington and Florence County: Developing the Right to Parent Reimbursement*

1 *Burlington*

In *Burlington*, a student with above average to superior intelligence was diagnosed with specific learning disabilities and, thus, was disabled within the meaning of the IDEA[7] and was entitled to receive at public expense specially designed instruction to meet his unique needs, as well as related transportation.[8] The design of an appropriate IEP for the student was rendered more difficult in this case because 'the Town [school committee][9] believ[ed] the source … of [the student's] learning difficulties … to be emotional and the [plaintiff] parents believ[ed] it to be neurological'.[10] For the academic year at issue in *Burlington* (1979-1980), the school committee proposed an IEP that recommended placement of the student at another public school (Pine Glen School) in a highly structured class of six children with special academic and social needs, based

on the student's emotional needs. The parents rejected this IEP and requested a due process hearing under the IDEA.[11]

However, before the due process hearing was held, the parents

> received the results of the latest expert evaluation of [their child] by specialists at Massachusetts General Hospital, who opined that Michael's 'emotional difficulties are secondary to a rather severe learning disorder characterized by perceptual difficulties' and recommended 'a highly specialized setting for children with learning handicaps ... such as the Carroll School,' a state-approved private school for special education located in Lincoln, Massachusetts. Believing that the Town's proposed placement of [their child] at the Pine Glen School was inappropriate in light of [his] needs, [the parents] enrolled [him] in the Carroll School in mid-August at their own expense, and [he] started there in September.[12]

During the fall of 1979, the hearing officer held several hearings and, in January 1980, ruled 'that the Town's proposed placement at the Pine Glen School was inappropriate and that the Carroll School was "the least restrictive adequate program within the record" for [the student's] educational needs'.[13] The Town refused to comply with the order to reimburse the parents for their placement at the Carroll School, but under pressure from the State of Massachusetts to withhold funds from the Town, it agreed in January 1981 to pay the tuition and to provide related transportation for the 1980-81 school year, but not 1979-80.

The Town appealed the hearing officer decision to a federal district court which, after a four-day trial in August, 1982, found for the Town. The district court reached this conclusion after dividing the burden of proof between the parties, finding that the Town had met its burden of proof that the Pine Glen School placement was appropriate while the parents had not met their burden of proof that placement for the years of 1980-82 at the Carroll School would have been appropriate.[14] The case was then transferred to a second federal district court that rejected the parents' claim that the Carroll School was the 'then current placement'[15] during the term of appeal and ordered the parents to repay the Town for the tuition it had paid to the Carroll School for 1980-81 and 1981-82.[16] The parents then appealed to the First Circuit[17] which, in remanding the case back to the second district court, noted that the parents were not precluded from reimbursement by virtue of their unilateral private school placement before the administrative due process hearing was completed, that the appropriateness of the Town's IEP for 1979-80 was not moot, and that the parents reliance on the hearing officer's decision entitled them to reimbursement for the costs at the Carroll School.[18]

The US Supreme Court granted the Town's petition for a writ of certiorari and upheld the First Circuit. The Court held that the broad grant of authority in the IDEA for a federal court '[to] grant such relief as the court determines is appropriate'[19] included reimbursement.[20] The Court reasoned that it would be 'an empty victory' if 'conscientious parents who have adequate means and who are reasonably confident of their assessment' were informed several years later after the judicial review process that their expenditures could not be reimbursed by the school officials.[21] 'If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete.'[22] The Court characterised reimbursement not as damages but as 'expenses that [the school district] should have paid all along and would have borne in the first instance had it developed a proper IEP'.[23] In rejecting the Town's argument that the parents had waived their claim to reimbursement by unilaterally placing their child in a private school before the end of the

administrative due process hearing, the Court asserted that the IDEA did not impose a Hobson's Choice on parents of either

> leav[ing] the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. The [IDEA] was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.[24]

However, the Court closed with a cautionary note that

> parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk [and] [i]f the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement.… [25]

2 *Florence County*

Having addressed in *Burlington* both the parents' right under the IDEA to unilaterally place their children in a private school and their right to be reimbursed if the public school district had failed to provide FAPE, the Supreme Court in *Florence County* focused on the nature of the parents' private school choice. In *Florence County*, parents rejected a public school's IEP for their child classified as learning disabled, where the IEP provided that the child 'would stay in regular classes except for three periods of individualized instruction per week, and established specific goals in reading and mathematics of four months' progress for the entire school year'.[26] The parents requested an administrative due process hearing, eventually held at both the local and state levels[27] for the public school,[28] but while the hearings were in progress the parents placed their child at the beginning of her tenth year of school in the private Trident Academy, 'a private school specializing in educating children with disabilities'.[29] The student remained in the Trident Academy for three years and graduated.

In holding that the parents were entitled to reimbursement for the expenses associated with placing their child in a private school, the Supreme Court noted that where the public school has failed to design an IEP that provided FAPE, parents were exempt from the requirements imposed on public schools. The Court observed that to apply to private schools the FAPE requirement that education be '"provided at public expense, under public supervision and direction" … would effectively eliminate the right of unilateral withdrawal recognized in *Burlington*'.[30] Regarding the school district's claim that the parents should not be eligible for reimbursement because Trident Academy did not 'meet state education standards' in that it 'employed at least two faculty members who were not state-certified and did not develop IEP's [sic]', the Court succinctly declared that the IDEA's FAPE requirements '[did] not apply to private parental placements … Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.[31]

Finally, the US Supreme Court addressed the public school district's financial concerns that permitting reimbursement where parents have unilaterally chosen a private school represents a hardship for the school district where, if parents are not limited to state-approved private schools, '[s]tates will have to reimburse dissatisfied parents for any private school that provides an education that is proper under the [IDEA], no matter how expensive it may be'.[32] While acknowledging the financial hardship to public school districts, the Court admonished those districts that they can avoid the financial burden of reimbursing parents for unilateral placements by doing one of two

things: 'give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice'.[33]

The Court closed with two cautionary observations that were to provide the basis for subsequent lower court interpretation and the 1997 congressional amendments of the IDEA regarding reimbursement. The Court noted that parents

> are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act. … Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.[34]

II IDEA Amendments Concerning Parent Reimbursement

In the 1997 amendments to the IDEA, Congress imposed some potential limitations on the awarding of reimbursement for parent unilateral private school placements. While neither mandating nor precluding reimbursement for parental unilateral private school placement, Congress followed the lead of the Supreme Court in *Florence County* and enacted the following provisions, authorising the use of judicial discretion in determining whether reimbursement would be appropriate:

> (C) Payment for education of children enrolled in private schools without consent of or referral by the public agency
>
> (i) In general
>
> Subject to subparagraph (A),[35] this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
>
> (ii) Reimbursement for private school placement
>
> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school 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.
>
> (iii) Limitation on reimbursement
>
> The cost of reimbursement described in clause (ii) may be reduced or denied —
>
> (I) if—
>
> (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

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

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3)[36] of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents [37]

Adapting the Supreme Court's concluding recommendations at the end of *Florence County* to legislation remarkably closely, Congress created a sequence for determining whether reimbursement for unilateral parent placement was required:

1. No reimbursement was required if the public school's IEP provided FAPE and the parents, nonetheless, elected to place their child in a private school;
2. Reimbursement could be reduced or denied,
   (1) if parents at the last IEP meeting prior to private school placement did not object to the public school placement or, at least ten days prior to private school placement, did not provide notice to the public school of its intent to place their child in a private school; or,
   (2) if the public school district notified the parents of its intent to evaluate the child and its reasons for doing so and the parents refused to make the child available; or,
   (3) if a court in its discretion determined that the parents had acted unreasonably.

A *Litigation under Burlington, Florence County and the 1997 IDEA Amendments*

The 1997 amendments, as became evident from subsequent litigation, did not serve to provide a clear set of guidelines as much as they legitimised a process for examining the appropriateness of both services under FAPE and placement. Worth noting, however, is that the 1997 amendments became as important for what they did not address as for what they did address: (1) the amendments spoke to the public school's requirement to provide FAPE but not as to which party bore the burden of proof concerning the services necessary to satisfy FAPE;[38] (2) while the public school was required under the IDEA to provide a placement in the least restrictive environment, the amendments were silent as to whether reimbursement would be available if the parents' placement was more restrictive than the public school's (as it generally has tended to be);[39] (3) although the public school district was required to implement services specified under an IEP, the amendments were silent as to whether reimbursement could be denied if the parents' placement was not able to implement some or all of the services designed for the IEP;[40] (4) while the amendments focused on private school placements, it was not clear whether reimbursement was available for additional services purchased by parents even though the child continued in the public school's placement;[41] (5) the amendments were silent as to the issue of cost and, thus, provided no guidelines as to whether reimbursement should be related to the significantly higher cost of a private school or to the failure of parents to provide notice;[42] and (6) the amendments were silent as to whether a parent could recover reimbursement for a child placed in a private

school even though that child had never received special education services, nor ever been placed at all, in the public school.[43]

Litigation during the twenty-four years from *Burlington* in 1985 until *Forest Grove* in 2009 has had two separate and distinct foci. Some cases, particularly the earlier ones, focused almost exclusively on whether the public school district had provided FAPE in a student's IEP, examining such issues as the nature and adequacy of the services, as well as the provision of those services in the least restrictive environment (LRE). Essentially, if the public school services or placement were not working, the parents' private school choice, even if more restrictive, would be upheld if it had a chance of working.[44] Other cases, especially more recent ones, have demonstrated a willingness to consider FAPE compliance for both the public school and the parents' private school choice. Thus, while a public school's failure to provide FAPE could constitute a violation of the IDEA, it did not necessarily entitle parents to be reimbursed if their private school choice could not provide the services required under the student's public school IEP.[45]

III *Forest Grove*: A New Assessment of Reimbursement for Parent Unilateral Placement

Forest Grove[46] addressed a new question before the Court, namely whether, in enacting the 1997 Amendments to IDEA, Congress intended categorically to bar reimbursement of private education tuition if a child had not previously received special education and related services through the public school. At stake was whether, in order to be eligible for tuition reimbursement, parents must give prior notice to a public school that they were intending to place their child in a private school, thus enabling the public school to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools.

The Supreme Court in *Forest Grove* responded to a split in the federal circuit courts as to whether parent notice was a prerequisite to reimbursement. In *Greenland School District v Amy N.* (*Greenland*),[47] the First Circuit had held that parents were not entitled to reimbursement of $32,000 yearly tuition at a private school for learning disabled students in circumstances where, prior to removing their child, the parents had not requested an evaluation and, following the removal, the school had evaluated the student but found that she was not eligible for special education services because 'there was not a gap between her apparent learning ability and her academic performance'.[48] Interpreting the 1997 amendments narrowly, the First Circuit held that notice of unilateral placement in a private school was not enough to qualify parents for reimbursement where the notice did not 'give public school districts the opportunity to provide FAPE before a child [left] public school and enroll[ed] in private school'.[49] Four years after *Greenland*, the Ninth Circuit, in *Forest Grove School District v T.A.* **(***Forest Grove I***)**,[50] reached the opposite conclusion from the First Circuit, holding 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 [20 USC] §1415(i)(2)(C)'.[51] Finding that 'there [were] no statutory requirements for tuition reimbursement for students, like T.A., who never [had] received special education and related services in public school',[52] the Ninth Circuit reasoned that '[i]nterpreting the 1997 amendments to prohibit categorically reimbursement to students who [had] not yet received special education and related services [would] run contrary [to] … the express purpose of the IDEA "to ensure that *all* children with disabilities have available to them a free appropriate public education"'.[53] Furthermore, as the Ninth Circuit observed, 'if the school district declined to recognize a student as disabled — as

occurred in this case — the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement under [20 USC] § 1412(a)(10)(C)(ii)'.[54] On appeal to the Supreme Court, the Court upheld the decision in *Forest Grove I* and abrogated *Greenland*.

Both the majority and dissent in the Supreme Court's *Forest Grove* decision recognised that Congress's 1997 amendments to the IDEA had two different parts; the interpretive challenge was in determining how those two parts interrelated.

(1) the first part provides that a public school district (referred to as a 'local educational agency' [LEA]) does not need to pay for a parent's unilateral placement in a private school 'if that agency made a free appropriate public education available to the child';[55]
(2) the second part provides that as to '*a child with a disability, who previously received special education and related services under the authority of a 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'.[56]

The majority held that the 1997 amendments had made no change in *Burlington* or *Florence County* and, thus, the 'IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school'.[57] In upholding the Ninth Circuit and reversing the federal district court in *Forest Grove*, the Supreme Court remanded with instructions that, where an LEA has failed to provide FAPE and parents have placed their child in a private school, one of the 'relevant factors' that a court can consider 'in determining whether reimbursement for some or all of the cost of the child's private education is warranted', is the notice that was provided by the parents.[58] To reinforce its holding, the Supreme Court emphasised that, regardless whether a public school has provided FAPE, parents 'are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act'.[59]

The dissent[60] in *Forest Grove* parsed the 1997 amendments differently, finding that they 'generally prohibit reimbursement if the school district made a "free appropriate public education" (FAPE) available,[61]and if they are to have any effect, there is no exception except by agreement,[62] or for a student who previously received special education services that were inadequate'.[63] The dissent found Congress's intent clear in the 1997 amendments, reasoning that 'if Congress did not mean to restrict reimbursement authority by reference to previous receipt of services, why did it even raise the subject?'.[64] The facts in *Forest Grove* could be distinguished from those in *Burlington* and *Florence County* in that, '[i]n [*Burlington* and *Florence County*], the school district had agreed that the child was disabled, the parents had cooperated with the district and tried out an IEP' and, thus, the question was whether the parents' placement or the school district's IEP was appropriate under the IDEA.[65] The dissent referenced the 'immensely expensive' costs of the IDEA and emphasised the higher special education bill associated with private placement,[66] thus reinforcing 'the IDEA's mandate of a collaborative process in which an IEP is "developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child"'.[67]

One of the most telling differences between the majority and dissent, though, was the adequacy of the IDEA's due process approach that includes both administrative hearings and appeal to

the judiciary in addressing parent complaints about special education services or placement. 'This scheme of administrative and judicial review' the dissent viewed as an adequate process while the majority viewed this process as 'immuniz[ing] a school district's intransigence, giving it an effective veto on reimbursement for private placement'.[68] Although acknowledging that the IDEA's 'prior services condition' makes getting a satisfactory IEP with acceptable services 'discouraging', the dissent was willing to see children lose 'some time, and some educational opportunity' in order to maintain the integrity of 'the collaborative process of developing an IEP'.[69]

IV Analysis and Implications

The fact that *Forest Grove*, unlike the predecessor cases of *Burlington* and *Florence County*, was not unanimous indicates a difference of opinion as to the purpose and design of the IDEA. Although the majority and dissent in *Forest Grove* spent the bulk of their time sparring over the interpretation of Congress's 1997 amendments, at stake are a number of fundamental issues. Reimbursement is unquestionably an important statutory issue, but it is even more significant as a reference point for basic concerns about the authority of parents as partners in the IEP process, the adequacy of the IDEA's administrative and judicial due process, the cost of special education services, and the good faith diligence of public schools in providing appropriate special education services and placements.

At dispute in *Forest Grove* was the hearing officer's order that the public school district pay $5200 monthly for plaintiff to attend a private residential school on the grounds that the district had incorrectly determined that plaintiff, who had been diagnosed by the district two years earlier as attention deficit hyperactivity disorder (ADHD),[70] needed no services.[71] The financial stakes can be high when tuition reimbursement is concerned and, thus, one must assess the extent to which Congress's language in the 1997 amendments, 'who previously received special education and related services under the authority of a public agency', was intended as a limitation on parental motives. In other words, did Congress intend by that language for courts to determine whether the parents' objective was 'to obtain for their child an appropriate education in the public schools, … [or, in the alternative] to create a record that would permit an award of private school tuition'?[72]

Unfortunately, determining parent motives will always be intertwined with the action or non-action of public schools. After all, the basis for the tuition reimbursement award in *Forest Grove* had not been a finding 'that the school district could not or would not make a free appropriate public education available to the child, but rather simply a determination that it had failed to do so'.[73] Normally, the failure of a school district to provide services the parents consider essential for their children's educational benefit invokes the administrative due process procedures.

Forest Grove does not concern parents who failed to keep in contact with their child's public school counselor and teachers. The plaintiff student in this case had been in the public school since kindergarten but, beginning with enrolment in high school in September 2000, began having considerable difficulty keeping up with homework and understanding course content. In December, 2000, the school district, at the insistence of the parents, evaluated the plaintiff for learning disabilities and, despite suspicion that he might also be ADHD, failed to evaluate him for that disability. In June, 2001, the parents were informed that the plaintiff did not have a learning disability. The plaintiffs' parents kept in constant with their son's teachers and counsellor seeking special classroom help and, during his sophomore year (2001-02), he was able to advance to his

junior year 'only because of the extraordinary efforts of his parents and sister'.[74] In March, 2003, the plaintiff, during his junior year, was diagnosed by a private clinical psychologist with ADHD and the psychologist recommended a private residential school to address the plaintiff's 'ADHD, depression, and drug issues'.[75] On March 23, 2003, the plaintiff's parents placed him in the private school unaware before placing him there 'that the district could be responsible for paying private school expenses'.[76] In April, 2003, the public school district again evaluated the plaintiff and, while acknowledging that the plaintiff had ADHD, refused to provide special education services because it did not have a 'very severe, significant impact' on his educational performance.[77] The parents requested a due process hearing that was held in September and October 2003 with the hearing officer's decision in January, 2004 finding that the '[plaintiff] was a student with an OHI [other health impaired] disability; that his disability had an adverse impact on his educational performance; that [the plaintiff] needed special education services; and that in refusing to provide [the plaintiff] those services, the district had failed to offer him a FAPE'.[78]

In short, one would be hard put to find anywhere more persistent parents who, but for their seeking out an independent evaluation outside the public school, may have never found out that their son had ADHD. The school district's response that it should not have to pay for the private placement because it was not providing special education services when the parents made the placement seems disingenuous at best.

Forest Grove raises three interpretive problems under the IDEA. Does invoking the parents' failure, to use 'the cooperative [IEP] process that [the IDEA] establishes between parents and schools'[79] as a means of correcting a public school's past failure to find eligibility for services, assume a parity that may not exist? While parents are a necessary participant in the IEP process and have a panoply of procedural rights under the IDEA,[80] how many parents, like those in *Forest Grove*, lack understanding of those statutory procedures, such as that of an independent educational evaluation (IEE) at school district expense,[81] or the requirement of notice prior to unilateral placement?[82] The dissent in *Forest Grove* makes much of the claim that when 'cooperative joint action by school and parent' breaks down, parents are entitled to 'quick review in a due process hearing',[83] but how expeditious, in fact, is this hearing process when, as in *Forest Grove*, that process took an entire semester of the plaintiff's junior year in high school? The resolution to these interpretive problems is not easy but will depend on how one views the role of public school personnel in diagnosing and furnishing services for the student in *Forest Grove*. The action of the *Forest Grove* parents in placing their son in a private residential school was neither precipitous nor unwarranted; their son had 2 ½ years of significantly declining student performance and a school that, unknown to the parents at the time, suspected but had failed to evaluate for ADHD in December of his freshman year. The unilateral placement here was not the action of parents who had never had their child in the public schools[84] nor were these parents who failed or refused to work with school personnel.[85] Whatever may be the measure of fault where a school district fails to provide sufficient services, *Forest Grove*, arguably, represents a more fatally flawed set of facts; public school personnel trained to recognise and evaluate for disabilities simply failed to perform at a level commensurate with their knowledge and expertise. Indeed, the set of facts in *Forest Grove* augurs for reimbursement since, if one were to follow the dissent's reasoning in that case, '[we] would produce a rule bordering on the irrational … [by] provid[ing] a remedy … when a school district offers a child inadequate special education services but leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether'.[86]

Both the majority and dissent, as well as the appellate briefs in support of both sides, made much of the relationship between states' acceptance of federal funds and the nature of the conditions that come with that acceptance. The Court's decision in *Forest Grove* that the case be remanded to the federal district court to consider all 'relevant factors' in determining whether the parents are entitled to reimbursement does not seem to affect the 'federally imposed conditions' that 'states agree to comply with', pursuant to *Pennhurst State School and Hospital v Halderman* **(***Pennhurst***),**[87] in accepting federal funds authorised under Congress's spending power.[88] Because state acceptance of federal funds under the spending power is viewed as a contract, *Pennhurst* requires that states accept those conditions 'voluntarily and knowingly' and that any conditions that Congress imposes be done 'unambiguously'.[89]Generally, *Pennhurst* has been applied in situations where the Supreme Court's decision would have broad implications for a state's potential exposure, particularly in situations where an implied private cause of action is at stake.[90]

The IDEA, by contrast, sets out the substantive conditions that the States must fulfill, and expressly provides a private right of action. In contrast to *Pennhurst*, where the Supreme Court addressed a private cause of action under a federal statute for the substantive rights to 'appropriate treatment' in the 'least restrictive' environment of a mentally retarded person confined in a state facility,[91] the reimbursement provision of the IDEA simply does not involve questions of subjecting recipients of federal funds to implied rights of action by private parties or new, previously unaddressed implied rights. [92]

The issue in *Forest Grove*, by contrast, is whether Congress's broad grant of remedies to federal courts to remedy violations of the IDEA[93] includes reimbursement for parent unilateral placements where school districts seek to avoid responsibility for not identifying children with disabilities and providing FAPE. Given the fact that the IDEA's reimbursement remedy under its 1997 amendments deals only with the breadth of application of that remedy, not its creation, the issue, it would seem, involves only a matter of ordinary statutory interpretation. Following this line of reasoning, the majority in *Forest Grove* may be incorrect in its interpretation of what Congress intended in its 1997 amendments to IDEA, but if such is the case, Congress then needs to clarify its intentions with further amendations to that statute.[94] In the absence of congressional clarification, the IDEA should be interpreted in such a way 'so as to avoid absurd results'.[95]

The implications for public school personnel involved with the assessment of students to determine eligibility for special education appear to be five-fold:

1. The Court has sent a clear message that a student does not need to have been receiving special education services in order for the parents to be eligible for private placement reimbursement. What is important is that a child receive FAPE and failure of school personnel to identify students in need of evaluation, or failure to evaluate comprehensively, may make school districts vulnerable for some or all of the expenses at a private school under *Forest Grove*.[96]
2. Failure of parents to provide notice of private placement will require hearing officers and federal courts to engage in a balancing of equities process. One can reasonably expect that hearing officers and judges will not all have the same perspective regarding compliance with the IDEA's notice for reimbursement requirement, leaving school districts with uncertainty as to how the fact-intensive balancing process will be resolved in each dispute. Whether hearing officers and judges will simply make parents' notice of intent to place their child in a private school the condition precedent for any possibility of reimbursement will have to await further litigation.[97]
3. Unilateral parent placement in private schools provides leverage to parents with sufficient

resources to afford private school tuition that may not be available to less affluent parents. Since administrative due process hearings are conducted at the expense of the local school district and the state department of education, school districts, in determining whether to resist claims for reimbursement, may find themselves having to balance the costs of administrative hearings including attorney and witness fees,[98] public school services or placements demanded by affluent parents, and the expenses of parental private school choices, as well as the time invested by school personnel in administrative hearings and court trials.

4. Even if the reimbursement cost for a private school is less than the cost of disputing a parent's placement in that school, public schools may still want to challenge the unilateral placement because of concern about unknown parent challenges in the future. Capitulating to the expenses of parent unilateral placement may encourage other parents to make private school placements.
5. The Supreme Court in *Forest Grove* was clear that providing FAPE applies both to the public and private schools. What is not clear is whether the decision applies as well to LRE. Most of the unilateral private school placements, as in *Forest Grove*, involve schools working only with students with disabilities and, thus, students in those schools are not included with non-disability students. Whether LRE can be one of the 'relevant factors' that hearing officers and judges can take into consideration in addressing requests for reimbursement remains to be seen.

V Conclusion

The Supreme Court's decision in *Forest Grove* joins *Burlington* and *Florence County* in addressing parent unilateral placement in private schools. While the Court has clearly indicated that Congress did not intend to prohibit reimbursement simply because a student had not received special education services in the public school prior to placement, the Court's balancing of equities directive affords little direction. Administrative hearing officers and lower courts will probably not be able mechanically to reject any and all reimbursement every time parents have failed to provide the notice required in the IDEA, but failure to furnish notice may be treated as a presumption for no reimbursement. In order to recover, hearing officers and courts may require parents to produce evidence that the public school had not only failed to provide FAPE, but that the private school choice had, in fact, provided FAPE.

Forest Grove, though, leaves a glaring interpretative hole, namely how to deal with parents who have never placed their children in public schools and then expect the public schools to reimburse for the cost of a private school. Unlike the student in *Forest Grove* who had encountered increasingly greater difficulty in achieving in the public school where the school had failed to evaluate for ADHD and to provide appropriate services, how does a public school prove adequacy of its IEP if a child has never been placed in the public school? If, as in *Forest Grove*, a public school's failure to adequately diagnose and, thus, provide appropriate special education services does not preclude reimbursement for private school placement, would the same result apply even if a student had never attended a public school? Where students are receiving special education services in a private school and are making satisfactory educational progress, should parents be required, under threat of no reimbursement, to place their child in a public school to give a public school's IEP an opportunity to succeed? Are public schools entitled to a 'first bite', even if that 'bite' results in a largely wasted year? [99] Presumably, public schools could request a due

process hearing to challenge a request for reimbursement as to a student who has never attended a public school, but what test should hearing officers and judges use in comparing a public school's possibility of success with that of a private school that has succeeded?[100] The Supreme Court in *Forest Grove* affords no answer.

Keywords: discrimination; disability; evaluation; eligibility; reimbursement; private schools.

Endnotes

1 129 SCt 2484 (2009).

2 471 US 359 [23 *Education Law Reporter* 1189] (1985).

3 See *Long v Dawson*, 197 Fed Appx 427, 432 (6th Cir, 2006) (interpreting *School Committee of Town of Burlington v Department of Education*, 471 US 359 (1985) as suggesting that, while reimbursement is permitted, money awards under IDEA should not be; a section 1983 claim is not permitted since Congress made no provision for damages in IDEA and, at least in the 6th Circuit, section 1983 does not permit federal courts 'to recognize rights that are not specifically provided in federal law'.).

4 510 US 7 [86 *Education Law Reporter* 41] (1993).

5 20 USC § 1401(9). FAPE means special education and related services that —

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

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

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

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

6 Justice Stevens delivered the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer and Alito joined. Justice Souter filed a dissenting opinion, in which Justices Scalia and Thomas joined.

7 20 USC § 1401(1).

8 20 USC §1401(30) (IDEA defines 'specific learning disability' as 'a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations' and includes 'such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia' but excludes 'a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage'; 20 USC § 1401(26) (transportation is included as a 'related service … [that] may be required to assist a child with a disability to benefit from special education').

9 In Massachusetts, school boards are referred to as 'school committees'.

10 *Burlington*, 471 US 359, 362.

11 20 USC § 1415(b)(2) (identifying procedural rights associated with due process hearing).

12 *Burlington*, 471 US 359, 362.

13 Ibid 363.

14 Ibid 364-65.

15 See 20 USC § 1415(j). In what is know as 'stay put', the IDEA provides that,

> 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.

16 *Doe v Anrig***,** 561 F Supp 121 [10 *Education Law Reporter* 1038] (DC Mass, 1983).

17 *Town of Burlington v Dep't of Educ. for Commonwealth of Mass***.** 736 F 2d 773 [18 *Education Law Reporter* 278] (1st Cir, 1984).

18 Ibid 793-801.

19 20 USC § 1415(i)(2)(C)(iii).

20 *Burlington*, 471 US 359, 369.

21 Ibid 370.

22 Ibid (emphasis in original).

23 Ibid 371.

24 Ibid 372.

25 *Id.* 373-74.

26 *Florence County*, 510 US 7, 10.

27 See 20 USC § 1415(g) (1) – IDEA requires a two-tiered administrative review process where a hearing is conducted by local educational agencies; in such case, aggrieved parties must have the opportunity to appeal to the state educational agency (usually, state department of education).

28 *Florence County*, 510 US 7, 10.

29 Ibid.

30 Ibid 13; 20 USC § 1401(9)(A).

31 Ibid 14.

32 Ibid 15.

33 Ibid.

34 Ibid 16 (emphasis in original).

35 20 USC 1412(a)(10)(A). Subparagraph (A) requires that public school districts provide the following services for all children placed by their parents in private schools: child find to locate students who might have a disability, testing to determine eligibility for special education services, the identification of services available for private school students funded on a proportionality basis and provided, at the public school district's discretion, either at the public or private school, and consultative services with private schools and with parents with disabled services to explain the services available and the site where they will be provided.

36 20 USC §1415(b)(3) specifies the content of the notice a public school district is required to provide parents whenever the district seeks to change the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to a child.

37 20 USC §1412(a)(10)(C).

38 See *Burilovich v Board of Education Lincoln Consolidated Schools*, 208 F 3d 560 [143 *Education Law Reporter* 437] (6th Cir, 2000) (rejecting parent reimbursement for cost of Loovas training at home where the parent had failed to carry the burden of proof of showing that public school's IEP was inappropriate). See also, *Jennifer D. v New York City Department of Education*, 550 F Supp 2d 420 [233 *Education Law Reporter* 588] (SDNY, 2008) (holding parents entitled to reimbursement where they had satisfied a two-part burden of proof under *Schaffer v Wuest*, 546 US 49 [203 *Education Law Reporter* 29] (2005) that the public school's IEP was inappropriate because it failed to mainstream a disabled student to the maximum extent appropriate, while the parents' private school choice was appropriate since it provided a lower pupil-teacher ratio).

39 See *Cleveland Heights-University Heights City School District v Boss*, 144 F 3d 391 [126 *Education Law Reporter* 633] (6th Cir, 1998) (holding that parents' placement of disabled child in a private school that admitted only children with disabilities did not prevent reimbursement). The Sixth Circuit observed that:

> It will commonly be the case that parents who have not been treated properly under the IDEA, and who exercise the right of parental placement, will place their child in a school that specializes in teaching children with disabilities and thus will not satisfy the mainstreaming requirement. Adopting such a limitation on parental placements would therefore effectively vitiate that remedy. [at 400, note 7].

40 See *Gagliardo v Arlington Cent. School District*, 489 F 3d 105, 112 [221*Education Law Reporter* 544] (2d Cir, 2007) (holding that parents not entitled to reimbursement for cost of private school where it did not contain a therapeutic setting provided for in the IEP; 'Parents who seek reimbursement bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate'.

41 See *Mora v Dep't of Public Welfare*, 768 A 2d 904 [151*Education Law Reporter* 976] (Pa Commw Ct, 2001) (in a Part C case, upholding reimbursement for a family that had provided private services to supplement inadequate Individualized Family Service Plan (IFSP) services and where the child had made progress toward her goals as a result of the combination of services).

42 See *Richardson Independent School District v Michael Z.*, 561 F Supp 2d 589 [235 *Education Law Reporter* 302] (ND Tex, 2008) (reducing parents request for reimbursement only to $56,000, not beginning from the date that the parents placed their child in the private school, but from the date that the school district had reasonable notice of the parents' intent to place their child in the private school and the date on which the child, and ending on the date that the child was removed from the private school; the total amount of time that was reimbursable was about 3 ½ months).

43 See *Frank G. v Board of Education of Hyde Park*, 459 F 3d 356 [212 *Education Law Reporter* 35] (2d Cir, 2006) (holding that failure to have student in public school did not prevent reimbursement where public school placement would have involved a classroom with too many children).

44 See *Muller v Committee on Special Education*, 145 F 3d 95, 105 [127 *Education Law Reporter* 36] (2d Cir, 1998) (in a case decided under the pre-1997 changes, the Second Circuit upheld reimbursement for parents where the child had failed in the public school and the placement was considered to be appropriate because 'the [School] District [had] erroneously determined that she was ineligible for benefits under the IDEA'.) See also, *W.G. v Board of Trustees of Target Range School District*, 960 F 2d 1479 (9th Cir, 1992) (upholding reimbursement for cost of tutor hired by parent for their child that had been placed in a private school because the public school district had failed to comply with the procedures for preparing an IEP).

45 See *Shapiro v Paradise Valley Unified School District* 317 F 3d 1072 [173 *Education Law Reporter* 421] (9th Cir, 2003) (holding that parents entitled to reimbursement where the school district had failed to have at the IEP meeting a teacher from the child's private school and the child's parents, and the private placement had provided the student with an appropriate educational benefit).

46 129 SCt 2484 (2009).

47 358 F 3d 150 [185 *Education Law Reporter* 73] (1st Cir, 2004).

48 Ibid 153.

49 Ibid 161.

50 523 F 3d 1078 [231 *Education Law Reporter* 657] (9th Cir, 2008).

51 Ibid 1087-88.

52 Ibid 1089.

53 Ibid 1087 (emphasis added). See 20 USC § 1400(d)(1)(A).

54 Id. (emphasis added).

55 § 1412(a)(10)(C)(i).

56 § 1412(a)(10)(C)(ii) (emphasis added).

57 *Forest Grove*, 129 SCt 2484, 2496.

58 Ibid.

59 Ibid (emphasis in original), citing to *Florence County*, 510 US 7, 15.

60 The dissenting opinion was written by Justice Souter, and joined by Justices Scalia and Thomas.

61 § 1412(a)(10)(C)(i).

62 § 1412(a)(10)(B).

63 § 1412(a)(10)(C)(ii). *Forest Grove*, 129 SCt 2484, 2497 (Souter, J, dissenting).

64 *Forest Grove*, 129 SCt 2484, 2499. Justice Souter utilised a somewhat plebian line of reasoning to support his conclusion: 'When a mother tells a boy that he may go out and play after his homework is done, he knows what she means. … If the mother did not mean that the homework had to be done, why did she mention it at all[?]' [Ibid].

65 Ibid 2501.
66 See Brief of the Council of the Great City Schools as Amicus Curiae in Support of Petitioner at 22-23 reporting that in 2004 'public schools spent over 20% of their general operating budgets on special education' and '$5.3 billion of the $36 billion spent on special education services for school-aged students funded students placed in non-public school programs or programs operated by public agencies or institutions other than the public school district including tuition and other expenses'.
67 Ibid 2502.
68 Ibid 2503.
69 Ibid.
70 US Department of Education regulations define thirteen categories of disabilities, including 'specific learning disability' and 'other health impairment' ("OHI") (which includes attention deficit hyperactivity disorder ('ADHD')) [34 CFR § 300.8].
71 Brief Amicus Curiae of the National Education Association in Support of Petitioner (NEA Brief), 2009 WL 583787, 6.
72 Ibid 7.
73 Ibid.
74 Respondent's Brief in Opposition, 2008 WL 5129011, 9.
75 Ibid 10. At the beginning of his junior year, plaintiff began using marijuana to address his depression associated with his failure to succeed in school. Ibid 9.
76 Ibid 10.
77 Ibid.
78 Ibid 11.
79 *Schaffer v Weast*, 546 US 49, 53 [203 *Education Law Reporter* 29] (2005) (holding that, in the absence of contrary language in the IDEA, the burden of proof in an administrative hearing is on the party, seeking relief).
80 See 20 USC § 1415(d) for content of Procedural Safeguards Notice.
81 See 34 C.F.R. § 300. 502(b)(1) (the IEE is at school district expense unless the district 'without unnecessary delay' requests a hearing claiming that its evaluation was appropriate).
82 See *Ashland School District v Parents of Student E.H.***,** 583 F Supp 2d 1220 [239 *Education Law Reporter* 445] (D Or, 2008) (refusing parent request for reimbursement where parents had approved most recent IEP but after unilateral placement in an out-of-state residential facility waited a year before seeking reimbursement).
83 *Forest Grove*, 129 SCt 2484, 2502 (Souter, J, dissenting).
84 See I**,** 459 F 3d 356 [212 *Education Law Reporter* 35] (2d Cir, 2006) (upholding tuition reimbursement for parents even though they had never had their child enrolled in the public schools).
85 See *Schoenbach v District of Columbia***,** 309 F Supp 2d 71 [187 *Education Law Reporter* 81] (DDC, 2004) (refusing to award tuition reimbursement for private placement where parent had failed to object to public school's placement decision at IEP meeting).
86 *Forest Grove*, 129 SCt 2484, 2495.
87 451 US 1, 17 (1981).
88 US Constitution, Art 1, § 8, c1, 1.
89 *Pennhurst*, 451 US 1, 17.
90 See, eg, Jackson v Birmingham Board of Education, 544 US 167 (2005) (whether Title IX's implied private right of action extends to claims of retaliation against individual because he has complained about sex discrimination); Gonzaga University v Doe, 536 US 273 [165 Education Law Reporter 458] (2002) (whether there exists private enforceable rights under § 1983 in federal statute that concerns administrative enforcement and does not confer monetary entitlement on litigant); Davis v Monroe County Board of Education, 526 US 629 [134 Education Law Reporter 477] (1999) (whether Title IX's implied private right of action against funding recipients for their own misconduct extends to encompass liability for student-on-student sexual harassment); Gebser v Lago Vista Independent School District, 524 US 274 [125 Education Law Reporter 1055] (1998) (whether Title IX's implied private right of action can be brought against a school district for teacher-student sexual harassment);

Franklin v Gwinnett County Public School, 503 US 60 [72 Education Law Reporter 32] (1992) (whether Title IX's implied private right of action entitles plaintiffs to money damages).

91 *Pennhurst*, 451 US 1, 18 (holding that nothing in the federal statute or its legislative history suggested that Congress intended to require the States to assume the high cost of providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens).

92 Brief of Amicus Curiae Council of Parent Attorneys and Advocates in Support of Respondent, 2009 WL 906569, 6-9.

93 20 USC § 1415(i)(2)(C)(iii).

94 See Michael J. Tentindo, 'Private School Tuition at the Public's Expense: A Disabled Student's Right to a Free Appropriate Public Education' (2009) 17 *American University Journal of Gender, Social Policy & the Law* 81, 100-102 (arguing that the IDEA does not require a mandatory public school try-out period for parents to obtain a tuition reimbursement for unilateral private school placements).

95 See *Frank G. v Board of Education of Hyde Park*, 459 F 3d 356, 372 [212 *Education Law Reporter* 353] (2d Cir, 2006) (holding that parents' private school placement of their child diagnosed with ADHD was appropriate, even though child had never been enrolled in a public school, where parents' independent evaluation recommended a placement with fewer than 12 students in the child's class and the public school would have placed the child in a class with 25-30).

96 For an excellent discussion of a broad range of issues related to parent decisions to make unilateral placements or to purchase private services while keeping their children in public schools, see generally, Lewis Wasserman, 'Reimbursement to Parents of Tuition and Other Costs Under The Individuals with Disabilities Education Improvement Act of 2004' (2006) 21 *Saint John's Journal of Legal Commentary* 171.

97 See *Ashland School District v Parents of Student E.H.*, 583 F Supp 2d 1220 (D Or, 2008) (holding that while parent failure to furnish notice did not per se deprive parents of reimbursement, but not in this set of facts where the parents had approved the most recent IEP and, even though school personnel knew the parents intended to transfer the student to a private school, they were required to furnish the school with actual notice including stating their concerns regarding their child's special education needs).

98 See Ralph Mawdsley, 'Attorney Fees for Partially Successful IDEA Claimants' (2007) 217 *Education Law Reporter* 769.

99 See *Frank G.*, 459 F.3d 356, 372 (rejecting as an 'erroneous assumption' the notion that parents should have to keep a child in a public school placement until it was clear that their 'speculation' regarding their child's needs 'was borne out by a wasted year of actual failure. Such a 'first bite' at failure is not required by the IDEA.').

100 See Emily S. Rosenblum, 'Interpreting the 1997 Amendment to the Idea: Did Congress Intend to Limit the Remedy of Private School Tuition Reimbursement For Disabled Children?' (2009) 77 *Fordham Law Review* 2733, 2775-76 (arguing that the IDEA administrative due process procedures are adequate to address potential parental abuse in requesting reimbursement for unilateral parent placement).