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Missing the Forest for the Trees: Forest Grove School District v. T.A.

Theresa Kraft
Attorney in Private Practice, Concord, NH

Missing the Forest for the Trees: *Forest Grove School District v. T.A.*

THERESA KRAFT*

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The Individuals with Disabilities Education Act (IDEA)[1] guarantees children who qualify as children with disabilities the right to receive a free appropriate public education (FAPE).[2] There are many points at which parents and school districts may disagree regarding the provision of a FAPE, but as the U.S. Supreme Court has

* B.A., Nova Southeastern University; M.A., Florida Atlantic University; J.D., Nova Southeastern University. The author practices law in Concord, New Hampshire, focusing her practice on the representation of parents of children with disabilities. Thanks to Sarah Redfield for her never-ending encouragement.

1. The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2006), was originally enacted as the Education for All Handicapped Children Act of 1975. *See, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176, 179–80 (1982) (providing a detailed explanation of the history of educating children with disabilities). All references to the Individuals with Disabilities Education Act and its predecessor, the Education for All Handicapped Children Act, will be referred to as "IDEA."

2. 20 U.S.C. § 1400(d)(1)(A) (the purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education . . .").

determined in *Forest Grove School District v. T.A.*,[3] when parents and a school district disagree regarding whether children should be identified as children with disabilities, an appropriate remedy could be tuition reimbursement.[4]

I. INTRODUCTION

IDEA, as with many civil rights laws, was born from litigation. The framework for the legislation that would become IDEA can be found in two cases: *Pennsylvania Ass'n for Retarded Children v. Pennsylvania (PARC)*[5] and *Mills v. Board of Education*.[6] As legislative history shows, one of the reasons for the enactment of IDEA was judicial decisions finding that children with disabilities had a constitutional right to a public education.[7] *PARC* and *Mills* gained the most focus as the consent decrees for each case formed the basis for the language of the statute.[8]

PARC set the standard that children with mental retardation could benefit from education and training and therefore were entitled

3. 129 S. Ct. 2484 (2009).

4. *Id.* at 2495 ("A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.").

5. 334 F. Supp. 1257 (E.D. Pa. 1971).

6. 348 F. Supp. 866 (D.D.C. 1972).

7. *See, e.g.*, NANCY LEE JONES, CONG. RESEARCH SERV., THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: CONGRESSIONAL INTENT (1995), *available at* http://digital.library.unt.edu/ark:/67531/metacrs7997/m1/1/high_res_d/. The main reasons for the enactment of IDEA were:

> (1) an increased awareness of the needs of children with disabilities, (2) judicial decisions that found constitutional requirements for the education of children with disabilities, (3) the inability of states and localities to fund education for children with disabilities, and (4) the theory that educating children with disabilities will result in these children becoming more productive members of society and thus lessening the burden on taxpayers to support nonproductive persons.

Id. at 1–2.

8. Samuel R. Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 121, 121 (Joshua M. Dunn & Martin R. West eds., 2009).

to a public education.[9] In a subsequent case, the *PARC* court noted that there was a "colorable constitutional claim" when a child with disabilities was denied a public education.[10] After *PARC* established public education as a constitutional right, the next major issue for courts to address was whether the denial of education was a denial of constitutional due process. The *Mills* court found that excluding children with disabilities from education without a hearing or a review of the decision was a denial of constitutional due process.[11] In defense of the known denial of an education, the school district simply claimed that there was not enough money to provide educational services to children with disabilities.[12] The *Mills* court stated:

> The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly-supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds.[13]

PARC and *Mills* are representative of the national movement that was underway during the early 1970s to establish that children with disabilities had a constitutional right to a public education, a movement of forty-six cases in twenty-eight states brought in state and federal courts.[14] Viewed in light of the national concern that all

9. *PARC*, 334 F. Supp. at 1259 ("Expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training . . . .").

10. Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 283 (E.D. Pa. 1972).

11. *Mills*, 348 F. Supp. at 871 ("Defendants have admitted in these proceedings that they are under an affirmative duty to provide plaintiffs and their class with publicly supported education suited to each child's needs, including special education and tuition grants, and also, a constitutionally adequate prior hearing and periodic review.").

12. *Id.* at 876.

13. *Id.*; *see also* JONES, *supra* note 7, at 3–4 (discussing the *Mills* decision).

14. JONES, *supra* note 7, at 4 (citing H.R. REP. NO. 94-332, at 3 (1975)).

children had a right to a public education and the fact that children with disabilities excluded from public education were entitled to a hearing or review of the decision, there was a growing concern that the goal of requiring states to provide children with equal educational opportunity was unenforceable.[15] How best could Congress induce states to follow the law? Give the states money! And so to entice states to fulfill the constitutional obligation of providing a public education to children with disabilities, IDEA offered funding to states; a civil rights issue thus became a Spending Clause issue by requiring any state that received federal funding under IDEA to provide a public education to a child with disabilities.[16]

Without expressly defining what an appropriate education would be, Congress required any state educational agency receiving funds through IDEA to establish and maintain procedures to protect the right to a FAPE.[17] Under IDEA, states are obligated to identify, locate, and evaluate all children with disabilities residing within the geographical boundaries of the school district[18] and then provide a FAPE to all children with disabilities.[19] As safeguards, the proce-

15. *Id.* at 4–5 (citing S. REP. NO. 94-168, at 9 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1433).

16. *See* NANCY LEE JONES, CONG. RESEARCH SERV., THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: *SCHAFFER V. WEAST* DETERMINES PARTY SEEKING RELIEF BEARS BURDEN OF PROOF 1 (2005), *available at* http://digital.library.unt.edu/ark:/67531/metacrs8327/m1/1/high_res_d/ ("The Individuals with Disabilities Education Act is both a grants statute and a civil rights statute. It provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education . . . .").

17. As the *Rowley* Court determined, the statutory definition of what constitutes a FAPE is "cryptic." Bd. of Educ. v. Rowley, 458 U.S. 176, 188 (1982). IDEA defines a FAPE as one which:

> (A) . . . [is] provided at public expense . . . ; (B) meet[s] the standards of the State educational agency; (C) include[s] an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) [is] provided in conformity with the individualized education program . . . .

20 U.S.C. § 1401(9) (2006).

18. The duty to identify, locate, and evaluate a child is referred to as Child Find. 34 CFR § 300.111 (2009).

19. 20 U.S.C. § 1412(a)(3)(A).

dures must give parents[20] rights that include the right to review educational records, to obtain an independent educational evaluation at no cost to the parents, to receive prior written notice regarding changes to the child's program that were either proposed or refused by the school district, to have the information regarding their child's education presented in their native language, and to present any complaints regarding the FAPE to the school district.[21] As part of the procedural safeguards, parents are entitled to a due process hearing[22] and to appeal the hearing decision,[23] as well as rights during the hearing process, which include the right to have counsel, present evidence, and to receive a written copy of the proceedings.[24] To ensure that a child continues to receive services, when a request for hearing is made, the last agreed-upon individualized education plan ("IEP") and placement are implemented during the pendency of any administrative or judicial proceedings.[25]

IDEA defines "child with a disability" not in medical terms, but as a child who had been evaluated in accordance with IDEA as having "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services."[26]

Special education is defined by IDEA as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings," as well as physical education.[27] For further clarification, "specially designed instruction" is defined by the regulations implementing IDEA as:

20. Although parents are afforded the rights under IDEA, states are allowed to establish rules that allow the transfer of rights from parents to children when the child reaches the age of majority under state law. *Id.* § 1415(m).
21. *Id.* § 1415(b).
22. *Id.* § 1415(f).
23. *Id.* § 1415(g).
24. *Id.* § 1415(h)(1)–(3).
25. 20 U.S.C. § 1415(j).
26. *Id.* § 1401(3)(A).
27. *Id.* § 1401(29).

> adapting, as appropriate to the needs of an eligible child . . . , the content, methodology, or delivery of instruction [t]o address the unique needs of the child that result from the child's disability; and [t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.[28]

II. THE STATUTE'S DUELING SECTIONS: § 1412(a)(10)(C) AND § 1415(i)(2)(C)(iii)

As originally enacted, IDEA did not specifically address whether parents of a child with a disability could seek tuition reimbursement as a remedy for a school's denial of a FAPE. The U.S. Supreme Court ruled in *School Committee v. Department of Education*[29] that § 1415(i)(2)(C)[30] of IDEA gave courts broad discretion to determine appropriate remedies when a school district had denied a child a FAPE and that tuition reimbursement would be an equitable remedy.[31] Tuition reimbursement was characterized not as an award of damages, but rather as a way of making sure that parents who are forced to take matters into their own hands are not without a remedy.[32] The Court was concerned that allowing only prospective injunctive relief would not be adequate as the administrative and judicial review under IDEA was a ponderous process that could take years.[33] Prospective injunctive relief might be appropriate if the re-

28. 34 C.F.R. § 300.39(b)(3) (2009).

29. 471 U.S. 359 (1985).

30. When *School Committee* was decided in 1985, the broad remedy powers the Court referred to were in § 1415(e)(2). When IDEA was amended in 1997, the section was renumbered to 1415(i)(2)(B). *See* Individuals with Disabilities in Education Act Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 615(i)(2)(B), 111 Stat. 37, 92. In 2004, the section was renumbered to 1415(i)(2)(C). *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 1415(i)(2)(C), 118 Stat. 2647, 2724. However, the text was unchanged by these amendments. For ease of reference, all references to the "broad remedy powers" will be to the current section number.

31. *Sch. Comm.*, 471 U.S. at 369.

32. *Id.* at 370–71.

33. *Id.* at 370.

view process could be completed in a matter of weeks, but as noted in *School Committee*, the review process could span years.[34] The Court reasoned that determining that only prospective injunctive relief was available would require parents who disagreed with an IEP to go along with the IEP to the detriment of their child.[35] Allowing tuition reimbursement as an equitable remedy under the broad powers of § 1415(i)(2)(C)(iii) was appropriate to give parents the option of providing an appropriate education to their child while the review process moved forward.[36] The Court cautioned that the parents who availed themselves of this remedy did so at their own risk; if, after a review of the matter, a court found that the IEP offered by the school district would have been appropriate, then the parents would not be entitled to tuition reimbursement.[37] Any interpretation contrary to the Court's would essentially defeat the purpose of IDEA.[38]

Eight years later, the Court again had the opportunity to interpret § 1415(i)(2)(C)(iii) in *Florence County School District Four v. Carter*.[39] *Carter* raised the issue of whether reimbursement could be granted when the private placement was not an approved special education placement.[40] Reiterating that § 1415(i)(2)(C)(iii) gave courts broad powers to determine appropriate remedies, the Court found that parents could not be held to the same standard as school districts when choosing a private placement.[41] It would be very difficult to hold parents to such a high standard when the information may not be readily available.[42] And while the parents' choice of private schools may be costly, a school district's offer of an appropriate IEP and placement would shield the school district from tuition reimbursement.[43] The Court, following *School Committee*, determined that it would go against the purposes of IDEA to not pro-

34. *Id.*
35. *Id.*
36. *Id.* at 369.
37. *Sch. Comm.*, 471 U.S. at 373–74.
38. *Id.*
39. 510 U.S. 7 (1993).
40. *Id.* at 13.
41. *Id.* at 14.
42. *Id.* at 14–15.
43. *Id.* at 15.

vide tuition reimbursement when parents place a child in an appropriate placement, even if the placement is not approved as a special education placement in the child's home state.[44] To further the purposes of IDEA, tuition reimbursement was an appropriate remedy, but in determining the equitable relief, a court should consider all equitable factors, including the cost of the private placement.[45]

IDEA was reauthorized in 1997 and amended to add language that allowed tuition reimbursement.[46] Many believed that § 1412(a)(10)(C) "explicitly allow[ed] both courts and hearing officers to award reimbursement for a unilateral placement at a private school if the school district failed to offer an appropriate program" and "establishe[d] conditions for reimbursement."[47]

The new language of § 1412(a)(10)(C), first and foremost, provided that a school district would not be responsible for tuition reimbursement when the school district had provided a FAPE.[48] However, if a child who had previously received special education services was enrolled in a private school without the consent of the school district, a court or hearing officer might require the school district to reimburse the parents if there were a finding that the school district had not made a FAPE available to the child in a timely manner.[49] Furthermore, reimbursement may be reduced or denied if parents failed to give notice to the school district of the intent to place the child in a private school and ask for reimbursement, the school district requested the opportunity to evaluate the child and parents refused that request, or there was a finding of unreasonableness.[50]

The statute appeared to give very clear guidance: tuition reimbursement cases would now be analyzed under § 1412(a)(10)(C). If parents enrolled a child who had received special education services

44. *Id.* at 13.
45. *Florence County Sch. Dist. Four*, 510 U.S. at 16.
46. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).
47. Gerald M. Zelin, *Remedies and Defenses under the IDEA*, *in* SPECIAL EDUCATION LAW AND PRACTICE: A MANUAL FOR THE SPECIAL EDUCATION PRACTITIONER 10:8 (Gary M. Ruesch ed., Supp. 2, 1999).
48. 20 U.S.C. § 1412(a)(10)(C)(i).
49. *Id.* § 1412(a)(10)(C)(ii).
50. *Id.* § 1412(a)(10)(C)(iii).

in a private school, a school district may have to reimburse the parents, even if the parents did not provide the district with notice of the intent to hold the district responsible for the private placement.[51] But what if a child had not yet been identified? What if a child had been identified but had never received services? These questions were answered differently across the country.

A. *The First Circuit:* Greenland School District v. Amy N.[52]

In deciding *Greenland*, the court focused on the obligation a school district owed to a child placed in a private school when a FAPE was not at issue compared to a child who was placed in a private school when a FAPE was at issue.[53] The facts of *Greenland* were that the child had not been enrolled in a public school for about eight months when her parents initiated a request for an evaluation and special education.[54] After going through the identification and development of IEP processes, the parents notified the district of the intent to hold the district responsible for the costs of the private school the child was attending and initiated a hearing for reimbursement.[55] The court held that § 1412(a)(10)(C) limited the circumstances in which parents who have unilaterally placed their child in a private school are entitled to reimbursement for that placement to those parents who had provided notice to the school district of the need for special education services before removing the child from public school.[56] Under the facts of *Greenland*, parents who removed their child from school without giving notice to the school district of the need for special education were barred from tuition reimbursement.[57]

51. *Id.*; *see also* Zelin, *supra* note 47, at 10:8 (noting that a "parent's failure to consult with the IEP team before making a unilateral placement was an equitable," not a decisive, factor).
52. 358 F.3d 150 (1st Cir. 2004).
53. *Id.* at 152.
54. *Id.* at 152–54.
55. *Id.* at 155.
56. *Id.* at 160.
57. *Id.* at 159–61.

B. *The Second Circuit:* Frank G. v. Board of Education[58] *and* Board of Education v. Tom F. ex rel. Gilbert F.[59]

In *Frank G.*, the court held that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) did not require a child to have received special education and related services as a prerequisite to an award of tuition reimbursement.[60] Additionally, the court held that even if § 1412(a)(10)(C)(ii) did limit tuition reimbursement to the class of students who had previously received special education, § 1412(a)(10)(C)(ii) was not the only section that allowed for reimbursement.[61] Furthermore, the court held that § 1412(a)(10)(C)(ii) was not the principal section that addressed tuition reimbursement; in order to fully understand a court's ability to award tuition reimbursement, § 1415(i)(2)(C)(iii) had to be considered.[62] Because § 1415(i)(2)(C)(iii) allowed a court or hearing officer to award any appropriate remedy, tuition reimbursement was not barred in cases where the child had not yet received special education.[63] Relying heavily on the purpose of IDEA—to provide an appropriate education to all children with disabilities—the court found it unreasonable to expect parents to enroll their child in a program that would be detrimental to the child's health and education simply to preserve their rights to tuition reimbursement.[64] Recognizing that it was at odds with *Greenland*, the court noted:

> *Greenland*'s discussion of 20 U.S.C. § 1412(a)(10)(C)(ii) arose from its perceived need to deal with the subsection immediately preceding it. Again, this subsection, § 1412(a)(10)(C)(i), says that a local education agency is not required to pay for the cost of education, including special education and related services, "if that agency made a free

58. 459 F.3d 356 (2d Cir. 2006).

59. No. 01 Civ. 6845(GBD), 2005 WL 22866 (S.D.N.Y. Jan. 4, 2005), *vacated and remanded*, 193 F. App'x 26 (2d Cir. 2006), *aff'd mem.*, 552 U.S. 1 (2007).

60. *Frank G.*, 459 F.3d at 368.

61. *Id.* at 368–69.

62. *Id.* at 369.

63. *Id.* at 372–73 (interpreting the statute consistent with the Department of Education's Office of Special Education & Rehabilitative Services' interpretation).

64. *Id.* at 372.

public education available to the child and the parents elected to place the child in such private school or facility." This language troubled the *Greenland* Court, because it implied that parents are entitled to reimbursement if a free appropriate public education was not provided "where, as here [in *Greenland*], the local education agency was never informed while the child was in public school that the child might require special education services." This "seeming ambiguity," according to *Greenland*, "disappears when considered in light of the section's affirmative requirement that 'the parents of a child with a disability, who previously received special education and related services under the authority of a public agency' can receive reimbursement for their unilateral placement of the child in private school only 'if [a] 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.'" *Greenland* continued as follows:

> "These threshold requirements are key to this case: tuition reimbursement is *only* available for children who have previously received 'special education and related services' while in the public school system *(or perhaps those who at least timely requested such services while the child is in public school)*. There is no dispute that neither Katie's parents nor anyone else requested an evaluation for Katie while she was at Greenland. There is also no dispute that she was removed from Greenland for reasons having nothing to do with any issue about whether Katie was receiving [a free appropriate public education]."[65]

In distinguishing *Greenland*, the court stated that it could allow tuition reimbursement when parents timely request special education.[66]

Having recently decided *Frank G.*, the Second Circuit vacated and remanded the district court's[67] finding that receipt of special

65. *Id.* at 375 (alterations in original) (citations omitted).

66. *Frank G.*, 459 F.3d at 376.

education was a prerequisite to an award of tuition reimbursement in *Tom F.*[68] The U.S. Supreme Court granted certiorari in *Tom F.* and, in a split decision, affirmed the Second Circuit's decision to vacate the district court's decision and remand the case for further proceedings.[69]

C. *The Eleventh Circuit:* M.M. v. School Board[70]

In *M.M.*, the Eleventh Circuit relied heavily on the apparent trend of holding a school district responsible for providing a child with a disability a FAPE and concluded that when a school district failed to do so, a child would not be required to spend even one day in an inappropriate placement in order to preserve the right to tuition reimbursement.[71] Before reimbursement could be awarded, parents would have to prove that the school district denied a FAPE to a child with a disability.[72]

III. *FOREST GROVE SCHOOL DISTRICT V. T.A.*

At the time that T.A.'s parents filed a request for a hearing in 2003, T.A. was a junior in high school.[73] The record reflects that T.A. attended public school from kindergarten until the spring of his junior year, when his parents removed him from public school and placed him in a private school.[74] T.A. had difficulty with his education, including paying attention in class and requiring support at home to complete his schoolwork, but he never received special

67. Bd. of Educ. v. Tom F. *ex rel.* Gilbert F., No. 01 Civ. 6845, 2005 WL 22866, at *3 (S.D.N.Y. Jan. 4, 2005), *vacated and remanded*, 193 F. App'x 26 (2d Cir. 2006), *aff'd mem.*, 552 U.S. 1 (2007).

68. 193 F. App'x 26, 26 (2d Cir. 2006), *aff'd mem.*, 552 U.S. 1 (2007).

69. Bd. of Educ. v. Tom F. *ex rel*. Gilbert F., 552 U.S. 1, 2 (2007).

70. 437 F.3d 1085 (11th Cir. 2006).

71. *Id.* at 1099.

72. *Id.* at 1099–1100.

73. Forest Grove Sch. Dist., 40 Individuals with Disabilities Educ. L. Rep. (LRP) 190, at 764, 770 (Or. Dep't of Educ. Jan. 26, 2004), *rev'd*, 640 F. Supp. 2d 1320 (D. Or. 2005), *rev'd*, 523 F.3d 1078 (9th Cir. 2008), *aff'd*, 129 S. Ct. 2484 (2009).

74. *Id.* at 765, 775–76.

education.[75] T.A. was referred for special education evaluation in 2001, and in a meeting without T.A.'s parents, Forest Grove High School staff considered the possibility that T.A. might have ADHD, but the staff ultimately decided to evaluate T.A. for a learning disability.[76] The staff found T.A. not eligible for special education in 2001,[77] and he continued to have educational difficulties.[78] In 2002, T.A. began using marijuana and exhibited noticeable personality changes.[79] In 2003, T.A.'s parents had T.A. evaluated by a private psychologist.[80] While awaiting the results from that evaluation, T.A. ran away from home, which resulted in a visit to the hospital emergency room and enrollment in a short-term residential treatment program to address the substance abuse and oppositional behavior.[81] The private psychologist diagnosed T.A. with ADHD, depression, a math disorder, and cannabis abuse, and recommended a residential setting to address T.A.'s academic and therapeutic needs.[82] Those working with T.A. in the residential treatment program also recommended a residential placement.[83] T.A.'s parents enrolled him in Mount Bachelor Academy and he began attending the school in March 2003.[84]

T.A.'s parents initiated a hearing in April 2003, requesting an order requiring the Forest Grove School District to evaluate T.A. in all areas of suspected disability.[85] The school district conducted the evaluations in June 2003, and in July 2003, held a team meeting under IDEA to determine whether T.A. was a child with a disability under the definition of the Act.[86] Although all acknowledged that T.A. had depression and ADHD, as well as emotional and behavioral issues, the school district staff did not agree that those conditions

75. *Id.* at 765–68.
76. *Id.* at 766–67.
77. *Id.* at 768.
78. *Id.* at 769–71.
79. *Forest Grove*, 40 Individuals with Disabilities Educ. L. Rep. (LRP) at 771.
80. *Id.* at 774.
81. *Id.* at 771–72.
82. *Id.* at 774.
83. *Id.* at 775.
84. *Id.*
85. *Forest Grove*, 40 Individuals with Disabilities Educ. L. Rep. (LRP) at 778.
86. *Id.* at 778–79.

had an adverse impact on his educational performance, citing that the degree to which those conditions may be impacting his educational performance were not "severe" and "significant."[87] Furthermore, it was not uncommon for many students in the high school to fail one or more classes, so T.A.'s failures did not raise any red flags.[88]

In September and October 2003, the hearing resumed and lasted six days.[89] The hearing officer issued a final order finding, among other things, that T.A. met the criteria to be eligible for special education under the identification of Other Health Impaired, that the district had failed to provide a FAPE to T.A., and that until the district offered T.A. a FAPE, the school district is responsible for reimbursing his parents for their necessary expenses to send T.A. to Mount Bachelor Academy.[90] The decision in part notes:

> [T.A.] was able to progress from grade to grade in the regular curriculum in his first five semesters at [Forest Grove High School] because his parents and sister provided him with what was in effect special education at home. It is, however, the responsibility of the District and not the parents to provide a [free appropriate public education] for T.A. Therefore the District is liable for the necessary costs of T.A.'s education at Mt. Bachelor Academy—an appropriate placement—until it offers T.A. at [sic] [free appropriate public education].
> . . .
>
> The fact that it was T.A.'s escalating drug abuse, depression and out of control behavior that caused his parents to remove him (temporarily, they anticipated) from [Forest Grove High School] and the District does not diminish the legal significance of the District's failure to offer T.A. a [free appropriate public education], or the legal right of T.A.'s parents to be reimbursed for providing him with an appropriate education at Mt. Bachelor Academy.[91]

87. *Id.* at 780.
88. *Id.* at 779.
89. *Id.* at 764.
90. *Id.* at 784–85, 789.
91. *Forest Grove*, 40 Individuals with Disabilities L. Rep. (LRP) at 765.

The school district appealed the hearing officer's decision to the U.S. District Court.[92] The court's understanding of the parties' positions was:

> The District contends that 1) tuition reimbursement should be denied because T.A.'s parents unilaterally removed him from public school to a private placement without requesting special education services or providing any notice of their desire that the District pay for private placement; 2) the hearing officer erred in finding T.A. eligible for special education services under IDEA; and 3) the hearing officer erred as a matter of law by making the District responsible for T.A.'s drug abuse treatment.
>
> T.A. contends that 1) the hearing officer correctly determined that the notice provision of the IDEA does not apply because he had not previously received special education and his parents have an equitable right to reimbursement; 2) the hearing officer correctly found that T.A. qualified for services under the IDEA; and 3) the hearing officer correctly found that T.A.'s drug use did not make him ineligible for services under the IDEA.[93]

The court accepted the facts of the case as determined by the hearing officer, but reviewed the legal conclusions.[94] The court focused on the hearing testimony by the school district staff emphasizing that in order to identify a child with a disability, there must be a severe and significant impact on the child's educational performance.[95] Although the court did not rule that the hearing officer erred in determining that T.A. was a child with a disability, the court did state that any issues T.A. was having did not rise to the level of being so obvious to teachers that he required special education.[96] The court stated:

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92. Forest Grove Sch. Dist. v. T.A., 640 F. Supp. 2d 1320, 1321 (D. Or. 2005), *rev'd*, 523 F.3d 1078 (9th Cir. 2008), *aff'd*, 129 S. Ct. 2484 (2009).

93. *Id.* at 1330.

94. *Id.*

95. *Id.* at 1327.

96. *Id.* at 1334.

> Section 1412(a)(10)(C) was enacted subsequent to *Florence* and *Burlington* providing tuition reimbursement for a student who previously received special education services placed in private school without the consent of school authorities. Even assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities and the parents were uninformed or unable to request services, the facts in this case do not support such an exercise of equity.[97]

In explaining why the facts of the case did not fit into the extreme case scenario, the court found:

> The need for special education services was not so obvious in this case that the general exercise of equity would override the statutory requirement for tuition reimbursement. T.A.'s academic performance was not unlike many students at Forest Grove High School. T.A.'s parents withdrew him from public school and enrolled him in a private residential school in order to address his drug use. T.A.'s parents were informed of their rights under the IDEA and were able to request special education services prior to their unilateral decision to withdraw T.A. from public school. Equitable considerations would not support tuition reimbursement in this case.[98]

The court reversed the hearing officer's decision on May 11, 2005, one year after T.A. graduated from Mount Bachelor Academy.[99]

T.A. subsequently appealed the decision to the Ninth Circuit.[100] Although the lower court had not explicitly ruled that T.A. was a child with a disability as defined by IDEA, the Ninth Circuit did not

97. *Id.* (citing Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 n.8 (1st Cir. 2004)).

98. *Forest Grove*, 640 F. Supp. 2d at 1334–35.

99. *Id.* at 1320, 1328.

100. Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078, 1080 (9th Cir. 2008), *aff'd*, 129 S. Ct. 2484 (2009).

decide the issue, as "[t]he Hearing Officer in this case held that T.A. qualified as disabled under the IDEA and that the School District had failed to offer him a free appropriate public education."[101] Therefore, the issue of eligibility was not at issue for the Ninth Circuit.[102]

Rather, the court determined whether tuition reimbursement was available to a child like T.A. who had never received special education services.[103] The court stated:

> In this case, the Hearing Officer and district court found, and neither party challenges, that T.A. never received special education and related services from a public agency. Accordingly, we must decide whether the reference in § 1412(a)(10)(C) to students "who previously received special education and related services" bars private school reimbursement for students who have not "previously received special education and related services," or whether those students remain eligible for private school reimbursement, as they were before 1997, under principles of equity pursuant to § 1415(i)(2)(C). In other words, did Congress revoke, categorically, private school reimbursement for students who have never received special education and related services from a public agency, or did Congress simply legislate concerning students who had previously received special education and related services, leaving discretion in cases such as T.A.'s in the hands of courts applying principles of equity?[104]

In following *Frank G.*, the court reasoned that 20 U.S.C. § 1412(a)(10)(C) was ambiguous because it did not create a categorical bar to reimbursement for a child who had never received special education, and a reading that created a categorical bar against reimbursement would go against the purposes of IDEA, leading to absurd results.[105] Because the school district had never identified T.A. as a child with a disability, T.A. had never received special education,

101. *Id.* at 1085.
102. *Id.*
103. *Id.*
104. *Id.* at 1086.
105. *Id.* (citing Frank G. v. Bd. of Educ., 459 F.3d 356, 370–72 (2d Cir. 2006)).

therefore § 1412(a)(10)(C) did not apply to this case.[106] Whether T.A.'s parents were entitled to reimbursement would require an analysis under the general remedy powers found in 20 U.S.C. § 1415(i)(2)(C).[107] The court held that the lower court erred by considering the statutory requirements in the principles of equity analysis; in particular, the court should not have measured whether the considerations in favor of granting reimbursement outweighed the statutory requirements, because the statutory requirements did not apply.[108] Secondly, the court used the wrong legal standard when deciding that an order of tuition reimbursement is only available in "extreme case[s] for a student not receiving special education services."[109]

The case was remanded to the district court with orders for reconsideration of all factors to determine whether, and if so how much, reimbursement should be awarded.[110] Such factors include notice to the district, "the existence of other, more suitable placements, the effort expended by the parent[s] in securing alternative placements[,] and the general cooperative or uncooperative position of the school district."[111] The Ninth Circuit further advised that it would be in the district court's discretion to consider all the reasons T.A.'s parents moved him to Mount Bachelor Academy in determin-

106. *Forest Grove*, 523 F.3d at 1087.
107. *Id.*
108. *Id.* at 1088.
109. *Id.* (emphasis omitted). The District Court relied heavily on the *Greenland* case in making the determination that even if reimbursement were available for children who had never received special education, it was only available in extreme cases. *Id.* The Ninth Circuit, in this decision, explicitly rejected the *Greenland* analysis in favor of the *Frank G.* analysis. *Id.*
110. *Id.*
111. *Id.* at 1088–89 (alterations in original) (quoting W.G. v. Bd. of Trs., 960 F.2d 1479, 1487 (9th Cir. 1992)). In discussing how to consider notice, the Ninth Circuit recounted that although T.A.'s parents did not give the school district notice before they withdrew T.A. from school and enrolled him in Mount Bachelor Academy, his parents did request an evaluation and special education services for T.A. *Id.* at 1089. In balancing the equities, the lower court was directed to consider the school district's refusal to determine that T.A. was a child with a disability and the district's failure to offer T.A. a FAPE, as part of the notice determination. *Id.*

ing whether an award of reimbursement was appropriate.[112] The Ninth Circuit issued the decision on April 28, 2008, four years after T.A. graduated from Mount Bachelor Academy.[113]

The school district then appealed to the U.S. Supreme Court to answer the specific question, "[w]hether the Individuals with Disabilities Education Act permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency."[114]

It appeared that the issue of whether T.A. was a child with a disability under IDEA was settled, and the only issue the school district continued to argue was that reimbursement was not allowed under IDEA because T.A. had never received special education and related services.[115] In essence, the school district's argument was that, as amended in 1997, IDEA permitted tuition reimbursement in cases

> where the public school district does not provide a FAPE to a disabled child, where the child's parents enroll the child in private school without the district's consent, and where the child previously received special education services from the district. Even when those conditions are satisfied, Congress further provided that reimbursement "may be reduced or denied" under certain circumstances.[116]

The Ninth Circuit, the school district argued, did not acknowledge that IDEA enactment was pursuant to the Spending Clause and that courts could only impose liability under IDEA if the statute unambiguously imposed it.[117]

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112. *Forest Grove*, 523 F.3d at 1089.

113. *Id.* at 1078, 1082.

114. Brief of Petitioner at i, Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484 (2009) (No. 08-305).

115. *See id.*

116. *Id.* at 6–7 (quoting 20 U.S.C. § 1412(a)(10)(C)(iii)–(iv) (2006)).

117. *Id.* at 14 (citing Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006)). Recall the Ninth Circuit's decision following *Frank G.* and finding that § 1412(a)(10)(C) was ambiguous regarding tuition reimbursement awards where a child had not received special education services but that the general rem-

T.A. argued that not allowing reimbursement in cases such as his was in essence sending a clear message to school districts that they could deny the statutory obligations under Child Find, leaving parents with only a court battle as a remedy.[118]

> Under petitioner's theory, it does not matter how diligently and reasonably parents act in seeking services, or how egregiously school districts act in denying all special education services. In all cases, the district's violation of its statutory duties becomes the very source of its immunity from the statutory remedy of reimbursement, which this Court has repeatedly held is inherent in IDEA's essential guarantee of a *free* appropriate public education.[119]

In a 6-3 decision,[120] the U.S. Supreme Court ruled that the 1997 amendments to IDEA specifically addressing tuition reimbursement, and § 1412(a)(10)(C) did not create a categorical bar on reimbursement if a child had not previously received special education and related services.[121] As the Court reasoned, because there were no changes made to § 1415(i)(2)(C)(iii),[122] reading IDEA as a whole, and in light of its purpose of providing a FAPE to all children with disabilities, § 1412(a)(10)(C) must be read as "elucidative rather than exhaustive."[123] In other words, § 1412(a)(10)(C)(i) is the general rule that bars reimbursement only when a FAPE has been "available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child's needs."[124] Clauses

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edy powers of § 1415(i)(2)(C)(iii) would allow reimbursement so as to not contradict the purposes of IDEA. *Forest Grove*, 523 F.3d at 1086.

118. *See* Brief of Respondent at 24–25, *Forest Grove*, 129 S. Ct. 2484 (No. 08-305).

119. *Id.* at 1.

120. *Forest Grove*, 129 S. Ct. at 2487. Justice Stevens delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito. *Id.* Justice Souter filed a dissenting opinion, joined by Justices Scalia and Thomas. *Id.*

121. *Id.* at 2488.

122. This section of IDEA went through renumbering, but the text of the provision remained the same as before the amendments. *Id.* at 2490 n.5; *see also supra* Part II.

123. *Forest Grove*, 129 S. Ct at 2492–93.

124. *Id.* at 2493.

(ii)–(iv) elaborate "on the general rule that courts may" award reimbursement by listing factors that "may affect a reimbursement award in the common situation in which a school district has provided a child with some special education services and the child's parents believe those services are inadequate."[125] The Court concluded that:

> The IDEA Amendments of 1997 did not modify the text of § 1415(i)(2)(C)(iii), and we do not read § 1412(a)(10)(C) to alter that provision's meaning. Consistent with our decisions in *Burlington* and *Carter*, we conclude that 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.
>
> When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted.[126]

The Court remanded the case back to the district court.[127] On remand, the district court heard oral arguments and the parties submitted supplemental briefs to the court.[128] Interestingly enough, the school district argued that T.A. was not a child with a disability, and therefore the Supreme Court's decision should not apply to this case.[129] In the alternative, the school district argued that the equita-

125. *Id.*

126. *Id.* at 2496.

127. *Id.* The Supreme Court issued its decision on June 22, 2009, some six years after the initiation of a hearing on this matter and some five years after T.A. graduated from Mount Bachelor Academy. *Id.* at 2484, 2495.

128. Minutes of Proceedings, Forest Grove Sch. Dist. v. T.A., No. CV 04-331-MO, 2009 WL 4884465 (D. Or. Dec. 8, 2009).

129. Plaintiff-Appellant Forest Grove School District's Supplemental Response Brief on Remand at 1, *Forest Grove*, 2009 WL 4884465 (No. CV 04-331-MO).

ble factors did not justify an award for tuition reimbursement.[130] T.A. argued, now that the Supreme Court ruled that tuition reimbursement was a remedy available to T.A., that the court should take into consideration the district's refusal to identify T.A. as a student with a disability, the length of the litigation, and the emotional and financial costs to T.A.'s family.[131] Additionally, T.A. argued that the school district's attempt to reopen T.A.'s determination of eligibility showed how entrenched the school district was in not providing a FAPE to T.A.—the obstinate behavior should not be rewarded.[132]

On December 8, 2009 the district court issued an order denying T.A.'s request for reimbursement.[133] The district court's role, according to the decision, was to weigh the equities to determine if reimbursement was appropriate.[134] In weighing the equities, the district court, following precedent set by previous decisions regarding T.A., considered all relevant factors, including: the notice given to school district; the existence of other, more suitable placements; the efforts expended by parents in securing alternative placements; the general cooperative (or uncooperative) position of the school district; and the reasons unrelated to the disability for securing the alternative placement.[135] Although the district court weighed each factor separately, the overriding factor in denying the request for reimbursement was the reason T.A.'s parents enrolled him in the private school—specifically because of his drug use and inappropriate behavior.[136] The district court determined that the obligation owed to T.A. under IDEA was "to remedy the learning related symptoms of a disability, not to treat the underlying disability, or to treat other, non-learning related symptoms."[137] Because, according to the district court, the parents enrolled T.A. because of drug use—a medical is-

130. *Id.* at 9.
131. Defendant-Appellee's Supplemental Reply Brief at 2, 10, *Forest Grove*, 2009 WL 4884465 (No. CV 04-331-MO).
132. *Id.* at 20–21.
133. *Forest Grove*, 2009 WL 4884465, at *4.
134. *Id.* at *1.
135. *Id.* at *2.
136. *Id.* at *3.
137. *Id.* at *4.

sue "unrelated to his difficulties focusing in school"—the school district was not required to reimburse the parents.[138]

Perhaps the most telling part of the decision was the discussion regarding the enormous costs to the school district if the parents were entitled to reimbursement. Although not required in the analysis—and technically not allowed[139]—the district court calculated the "potentially devastating real world implications" of requiring the school district to fund T.A.'s private placement by assuming that if T.A. required an out-of-district placement, then all other students with ADHD would require an out-of-district placement, thus requiring the school district to spend 20 to 40 percent of the annual budget to educate 5 to 10 percent of the student population.[140]

The battle is not over. On January 7, 2010 T.A. filed a notice of appeal to the Ninth Circuit.[141] The issue raised on appeal is:

> Whether, in a case in which a school district failed to offer any special education services under the IDEA to an eligible student, the district court abused its discretion by failing to identify and apply the correct legal rule; by mischaracterizing the record; by creating clearly erroneous facts without any support in inferences that may be drawn from the facts in the record; and by resting its decision on illogical reasoning.[142]

IV. CONCLUSION

Forest Grove will likely have the most impact on children who are currently unidentified as a child with a disability. Although the decision is just months old, it is already affecting determinations for tuition reimbursement. In at least two cases so far, the courts have

138. *Id.*

139. "Of course, the IDEA makes no provision for taking into account the proportional impact of this unfunded federal program. Nor did the Ninth Circuit or the Supreme Court indicate that I should take this into account in my analysis and I have not done so." *Forest Grove*, 2009 WL 4884465, at *4.

140. *Id.*

141. *See* Notice of Appeal, *Forest Grove Sch. Dist.*, 2009 WL 4884465 (No. CV 04-331-MO).

142. *Id.* at 4.

applied the analysis of *Forest Grove* to determine whether to award tuition reimbursement.

In *Anchorage School District*,[143] a hearing officer interpreted *Forest Grove* as going "to [great] lengths to explain that the right of reimbursement when [a] FAPE is at issue is a broad one."[144] In *Regional School District No. 9 Board of Education v. Mr. & Mrs. M.*,[145] the District Court of Connecticut cited *Forest Grove* as allowing relief such as reimbursement when the school district failed to provide a FAPE and the private school's education services for the child was appropriate under § 1415(i)(2)(C)(iii), but further explained that the award of reimbursement could be reduced or denied in accordance with § 1412(a)(10)(C)(iii).[146] In *T.M. v. San Francisco Unified School District*,[147] the district court determined that although *Forest Grove* "broadened the scope of *Burlington*, holding that parents could seek reimbursement even when the child had never received special-education services," parents could "not seek general money damages for emotional distress or intangible loss of educational opportunity" under IDEA.[148] Finally, in *Shipler v. Maxwell*,[149] the District Court of Maryland cited *Greenland* to argue that the procedural notice provision served the "important purpose of giving the school system an opportunity, before the child is removed, 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."[150]

The enactment of IDEA occurred, in part, because parents were "forced to rely upon time-consuming judicial action to obtain a public education for their children with disabilities."[151] While it may be little comfort to the parties of *Forest Grove*, litigation is not as

143. 52 Individuals with Disabilities Educ. L. Rep. (LRP) 304 (Alaska Dep't of Educ. & Early Dev. July 22, 2009).
144. *Id.* at 1559.
145. No. 3:07-CV-01484 (WWE), 2009 WL 2514064 (D. Conn. Aug. 7, 2009).
146. *Id.* at *9.
147. No. C 09–01463 CW, 2009 WL 2779341 (N.D. Cal. Sept. 1, 2009).
148. *Id.* at *5.
149. Civil No. JFM 08–2057, 2009 WL 2230026 (D. Md. July 23, 2009).
150. *Id.* at *7 (quoting Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 (1st Cir. 2004)).
151. JONES, *supra* note 7, at 4.

commonplace as expected. Studies have shown that the number of administrative hearings held in the United States are approximately 5 per 10,000 special education students.[152] Of the cases decided at the administrative level (approximately 3,000 and 5,500 per year),[153] only approximately 374 are appealed to a federal court.[154] The transactional costs of judicial review can be massive;[155] the annual expenditure for each open litigation case can amount to $94,600.[156] "Delay is endemic to litigation, and IDEA litigation is no exception. By the time the judicial process concludes, the record may be stale, and the decision may have little relevance for the child's current situation."[157] While judicial review of a case may be an expensive exercise that in the end offers little to the individual child's education, there are indirect effects that shape the actions of educators, students, and parents.[158]

The costs associated with litigation, rather than the concern that a school district is responsible for reimbursement, will likely cause school districts to review their Child Find procedures to ensure that all children suspected of having a disability receive an evaluation in a timely fashion. This may require a renewed understanding of the criteria used to determine eligibility, and a better understanding that providing certain types of services to all children does not negate the

152. Bagenstos, *supra* note 8, at 127 (citing U.S. GEN. ACCOUNTING OFFICE, GAO-03-897, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS (2003)). The National Association of State Directors of Special Education study from 1996 to 2000 estimated that state agencies across the country held approximately five due process hearings for every 10,000 special-education students. *Id.* The Consortium for Appropriate Dispute Resolution in Special Education found there are 7.9 due process hearings for every 10,000 students, but the researchers conducting the study cautioned that mid-study changes in reporting may have skewed the numbers. *Id.*

153. *Id.* (citing U.S. GEN. ACCOUNTING OFFICE, *supra* note 152, at 13).

154. *Id.* at 127–28.

155. *Id.* at 128.

156. *Id.* at 129 (citing JAY G. CHAMBERS ET AL., CTR. FOR SPECIAL EDUC. FIN., REPORT 4, WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999–2000?, at 5, 8 (2003)).

157. *Id.* (citing Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 EDUC. L. REP. 35 (2005)).

158. Bagenstos, *supra* note 8, at 122.

need for specialized instruction or the identification of a child under IDEA.

By the time a *final* decision returns in *Forest Grove*, the Supreme Court's decision may be a hollow victory for T.A. and his parents. Although other school districts may be more aware of the signs of the possible need for special education and, even if based in a desire to avoid litigation, may be more willing to consider a child's eligibility for special education, the facts of this case are that the school district continues to miss the forest for the trees. The hearing officer's decision ordered the school district to reimburse the parents *until the district makes FAPE available*.[159] A less costly strategy to all would have been for the district to develop an appropriate IEP that would provide T.A. with educational benefit. The moment the appropriate IEP was offered, the obligation to continue reimbursing the parents would end. The entrenched stance that T.A. did not qualify as a student with disabilities, likely based on a fear of opening the floodgates of litigation from other students in similar situations, will undoubtedly end up costing Forest Grove millions of dollars for one year's worth of education, regardless of whether they are ever ordered to reimburse the parents.

159. Forest Grove Sch. Dist., 40 Individuals with Disabilities Educ. L. Rep. (LRP) 190, at 789 (Or. Dep't of Educ. Jan. 26, 2004), *rev'd*, 640 F. Supp. 2d 1320 (D. Or. 2005), *rev'd*, 523 F.3d 1078 (9th Cir. 2008), *aff'd*, 129 S. Ct. 2484 (2009).