

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOARD OF EDUCATION OF THE :
4 CITY SCHOOL DISTRICT OF :
5 THE CITY OF NEW YORK, :
6 Petitioner :

7 v. : No. 06-637

8 TOM F., ON BEHALF OF :
9 GILBERT F., A MINOR CHILD.

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11 Washington, D.C.

12 Monday, October 1, 2007

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:55 a.m.

17 APPEARANCES:

18 LEONARD J. KOERNER, ESQ., New York, N.Y.; on behalf of
19 Petitioner.

20 PAUL G. GARDEPHE, ESQ., New York, N.Y.; on behalf of
21 Respondent.

22 GREGORY G. GARRE, ESQ., Deputy Solicitor General,
23 Department of Justice, Washington, D.C.; on
24 behalf of the United States, as amicus curiae,
25 supporting Respondents.

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P R O C E E D I N G S

(10:55 a.m.)

We'll hear argument next in Case 06-637,
Board of Education of the City School District of the
City of New York versus Tom F.

Mr. Koerner.

ORAL ARGUMENT OF LEONARD KOERNER

ON BEHALF OF THE PETITIONER

MR. KOERNER: Mr. Chief Justice, and members
of the Court. In 1985 when this Court decided the
Burlington decision, it based -- it based it based on
the broad remedial clause set forth in 20 U.S.C. 1415,
which allowed an impartial hearing officer, a state
review officer, or the court, itself, to grant relief
where appropriate.

In so doing, it noted that there was no
other substantive section which touched and concerned
the issue before the Court, and that is whether an
individual can voluntarily remove a child and seek
tuition reimbursement before the conclusion of the
administrative and court remedies.

It made a point of noting that it felt it
was gleaning the congressional intent; and, had Congress
known that the administrative and court process would be
protracted, it would have provided a process which would

1 allow the child to be removed.

2 Similarly, in the sequel, the Carter case,
3 the Court made the other -- the same conclusion. It
4 noted that, although the primary responsibilities to
5 educate the child in a public school, least restrictive
6 environment, there would be occasions when you would
7 place that child outside, having been in the school
8 system.

9 1412, which was the eligibility section
10 during this period, was very truncated. It did not
11 provide a lot of conversation concerning the
12 relationship of public and private schools within the
13 IDEA. It provided that you had to provide the child who
14 demanded it a FAPE, a free appropriate education. If
15 you couldn't do that, the public school had to then pay
16 for the tuition. It was silent though on the
17 relationship between the private schools where the child
18 voluntarily removes.

19 In 1997 the IDEA was codified, and for the
20 first time the specific section was inserted dealing
21 with the relationship of children and private schools.
22 Indeed, 20 U.S.C. 1412(a)(10) -- just the beginning,
23 just that paragraph, says "children placed in private
24 schools" and the structure was detailed. Subdivision
25 (A) dealt with the relationship of the private schools

1 with the public system generally and noted that, in that
2 particular case, while the children would be entitled to
3 some small amount of Federal funding, they would not be
4 entitled in private school to a free appropriate public
5 education.

6 We also noted that if a parent was
7 dissatisfied with the service plan, they'd have to seek
8 relief administratively. They would not be entitled to
9 an impartial due process or a court review. It was a
10 recognition that children who are placed in private
11 school were entitled to much lesser services than
12 children placed in public school.

13 Subdivision (B) dealt with the situation
14 when children were not placed in public school but the
15 local district consented that they could not provide a
16 free appropriate public education. As a consequence, in
17 those cases and in only those cases, since the public
18 would then be supervising and directing the private
19 school, they would be responsible for the tuition.

20 Sub (C) is the issue now before this Court.
21 Sub (C) is entitled Children Placed in Private School,
22 Payment and Where the Local Education Agency Did Not
23 Consent. And that particular section is broken down
24 again into three parts. The first part says, if a child
25 is offered FAPE, that is, a child is given a program

1 which is adequate, you cannot get reimbursement if you
2 remove your child during any time but in this case
3 during the pendency of the administrative and the court
4 process.

5 CHIEF JUSTICE ROBERTS: Counsel, do you
6 agree that if we conclude the language is ambiguous, we
7 should defer to the Secretary's interpretation in the
8 comments accompanying the regulations?

9 MR. KOERNER: The answer is no because the
10 Secretary's interpretation on the note in common and the
11 letter submitted to the educational consultant is
12 inconsistent with its own Federal regulation. Its
13 Federal regulation, titled Children Placed in Private
14 Schools When FAPE Is at Issue, also requires that you
15 previously receive --

16 CHIEF JUSTICE ROBERTS: It just mirrors the
17 statute --

18 MR. KOERNER: That's exactly -- it does.

19 CHIEF JUSTICE ROBERTS: Well, then --

20 MR. KOERNER: But the note --

21 CHIEF JUSTICE ROBERTS: Assuming we would
22 think the statutory language is ambiguous, we are likely
23 to think the same language in the regulation is
24 ambiguous.

25 MR. KOERNER: Well, Chief Justice, if it's

1 ambiguous and we ought to at least discuss the nature of
2 the ambiguity, then that ambiguity under the spending
3 clause should redound to the benefit of the local
4 education district as well, for if it does not set forth
5 --

6 CHIEF JUSTICE ROBERTS: Well, which -- which
7 prevails, Chevron deference or spending clause
8 presumption?

9 MR. KOERNER: Well, the Chevron deference
10 requires notes and comments which are persuasive and
11 analyzed. There is absolutely no analysis in the note
12 and comment in this case. All it says conclusively is
13 that the decisions of this Court in Burlington and
14 Carter create an independent obligation separate and
15 distinct from the statute. It doesn't explain why the
16 specific language of the statute should not be
17 incorporated in the Burlington court. And --

18 JUSTICE ALITO: If Gilbert F. had attended
19 the public school for 11 days, would this case come out
20 differently, in your view?

21 MR. KOERNER: I'm sorry.

22 JUSTICE ALITO: If the student here had
23 attended the public school for let's say 11 days before
24 being transferred to the public -- to the private
25 school, would your, would your arguments still fly?

1 MR. KOERNER: No. If the -- if the child
2 attends a public school and receives special education
3 and related services --

4 JUSTICE SCALIA: You've added something to
5 the question, though, didn't you?

6 MR. KOERNER: No, I don't think so.

7 JUSTICE SCALIA: Attending public school and
8 receiving --

9 MR. KOERNER: I -- I thought, I'm sorry --

10 JUSTICE ALITO: Well, that was my
11 assumption. Let's say he attends public school in a
12 special education class for 11 days. His parents think
13 the public -- the placement that's proposed, the IEP
14 that's proposed by the school is inadequate, and they
15 turn out to be correct, and they want to send their
16 child to the private school, but they understand this
17 argument based on the statutory language, so they say
18 all right, we are going to put him in the public school
19 special education class for 11 days, so -- we've already
20 got the placement in the private school all lined up at
21 the end of the 11 days. He goes one day, we give
22 notice; we take him out and we put him in the private
23 school; then they are entitled to reimbursement subject
24 under your argument.

25 MR. KOERNER: That -- that would satisfy the

1 statutory definition, but when it went before the
2 impartial officer, or the State review officer, there
3 would be a very compelling argument that there was a
4 lack of cooperation, because it's not just that you're
5 in the system, but that you articulate the problems that
6 you have with the public placement.

7 CHIEF JUSTICE ROBERTS: Well, it depends on
8 the particular circumstances. I mean, if the parent is
9 able to show look, the school district is being very
10 unreasonable here; it's clear he is going to need more
11 than the services they were going to offer, well that
12 wouldn't have --

13 MR. KOERNER. Yes.

14 CHIEF JUSTICE ROBERTS: -- run afoul of any
15 of the other provisions.

16 MR. KOERNER: My only comment, Chief
17 Justice, was that yes, that would satisfy the statutory
18 section as long as the notice was given in triple I, but
19 we would then have an argument in the individual case
20 that the parent was not cooperating. So for the purpose
21 of this case, where they come into the system even for a
22 minimum period and give the appropriate notice under
23 triple I, yes, that would -- it would be satisfied.

24 JUSTICE ALITO: Well, why would Congress
25 ever have wanted to adopt a scheme like that? What

1 possible purpose is served by simply requiring the
2 student to be in a placement that is by definition not
3 providing a -- not providing FAPE for this very short
4 period of time? It makes no sense whatsoever.

5 MR. KOERNER: The reason Congress wanted to
6 provide it is the reason that this Court discussed in
7 Burlington. The upset of this Court in Burlington was
8 that it was an extremely protracted process. The child
9 there was subject to a very long impartial hearing and
10 State review and court review --

11 JUSTICE GINSBURG: So that enabled the
12 parent to remove the child immediately and risk that --

13 MR. KOERNER: That's correct.

14 JUSTICE GINSBURG: -- the public education
15 would be found inadequate.

16 MR. KOERNER: But the reason --

17 JUSTICE GINSBURG: But all that section does
18 is to repeat the Burlington scenario. It says, it
19 codifies what the Court held. The Court didn't say
20 anything in Burlington about the situation where the
21 child was never in public education.

22 MR. KOERNER: That's correct, but it's a
23 statute of limitations. It says that you must receive
24 special education and related services. There is no --
25 there is no exception to the condition -- if you look at

1 the particular statute when they refer to "may," they
2 are only talking about the relief that a court or
3 impartial hearing officer or State review officer can
4 grant. They are not talking about the predicate, you
5 must be in the system.

6 Now you asked, Justice Alito, why do they
7 have to be in the system, and the reason is Congress
8 thought that if you're in the system and you have a
9 vested interest in the system, that because of all the
10 processes that are there, including mediation, including
11 a modified IEP, that it would increase the numbers of
12 people in terms of cooperation who want to participate
13 in the system.

14 JUSTICE SCALIA: I thought it wasn't that.
15 I thought it was simply Congress figured that there are
16 probably a lot of people in New York City, in Manhattan
17 in particular, who are going to send their kids to
18 private school, no matter what, and they can get special
19 services in private school, but what the heck, if we can
20 get \$30,000 from the city to pay for it, that's fine.

21 In other words, this was meant to be an
22 option for people who wanted to go to the public schools
23 but couldn't go to the public schools because they
24 couldn't get the private services there, but it was
25 never meant to be an option for people who had no desire

1 to go to public schools at all anyway, and --

2 MR. KOERNER: I think --

3 JUSTICE SCALIA: -- and without this
4 condition, somebody, I think the plaintiff here was
5 never in the public school, was he?

6 MR. KOERNER: That's correct. He never had
7 any contact with the public school at all except to
8 request a free appropriate public education.

9 JUSTICE GINSBURG: Are there not children --
10 I think there was a brief on behalf of the Autism
11 Society that says many school systems simply do not have
12 the facilities to attend to the needs of these children?

13 MR. KOERNER: Yes, but you don't know that
14 until you've actually been subjected to the process
15 itself. Indeed in Schaffer, you, this Court said that
16 you had to presume that the officials in the department
17 of education of a local school district are going to do
18 their job. Their job is to try to find an appropriate
19 IEP. If it turns out that it's insufficient, of course
20 you can then litigate.

21 JUSTICE GINSBURG: Are there not cases where
22 school districts have said from day one, look, we don't
23 have facilities to handle this type of disability?

24 MR. KOERNER: But if we don't -- if the
25 public schools district does not have the facilities,

1 then it will consent to a private placement to deal with
2 the particular problem it cannot deal with. We are only
3 talking about cases where the school system believes it
4 can deal with an individual problem and at the very
5 least if the person's child comes into the system, they
6 will have the opportunity to work with the parent and
7 try to work out a situation. In -- as this Court is
8 well aware, the primary obligation is to find a public
9 education for this child, and if from day one you assume
10 that the individual education plan is defective, not
11 only is it inconsistent with Schaffer, it's inconsistent
12 with the whole statutory scheme which is set up to try
13 to work cooperatively. Indeed --

14 JUSTICE GINSBURG: But isn't it true that
15 the parent will never be reimbursed? Let's take the
16 parent that Justice Scalia has hypothesized, will never
17 get one penny of that tuition unless that parent carries
18 the burden -- the parent would have the burden of
19 showing that there was no appropriate public education?

20 MR. KOERNER: The parent in this case can
21 never get reimbursed because they don't meet the
22 predicate which is that their child had to previously --

23 JUSTICE GINSBURG: That's not the question I
24 asked.

25 MR. KOERNER: Oh I'm sorry.

1 JUSTICE GINSBURG: I said that the parent --
2 let's assume that the parent never sends the child to
3 public school, nonetheless seeks reimbursement. In
4 order to get reimbursement that parent would have to
5 show, would have bear the burden of showing that there
6 is no appropriate public education available; is that
7 not true?

8 MR. KOERNER: Yes. You mean assuming the
9 statute does not apply?

10 JUSTICE SCALIA: Yes, but that is -- but the
11 parent would not have to show that the parent would have
12 used that available public remedy --

13 MR. KOERNER: That's correct.

14 JUSTICE SCALIA: -- if it were there?

15 MR. KOERNER: And Congress could have
16 concluded that the parent you're referring to who placed
17 that child immediately in a private school, and who may
18 not have an interest in obtaining a public school
19 education for that child, may not be as cooperative and
20 as collaborative as someone who has a child in the
21 system, to work out an individual education plan because
22 of some of these --

23 JUSTICE GINSBURG: Then the conclusion would
24 be that that parent hasn't met the heavy burden of
25 showing that there is no appropriate public education.

1 MR. KOERNER: But the problem is, if you go
2 to an impartial hearing officer as in this case, and you
3 have a child that's been in a private school for a
4 number of years and is doing very well, and the private
5 school special ed teacher comes in and highlights all
6 the successes of the kid, and then the New York City
7 Department of Education comes in with its profit plan
8 which is based on speculation, because the child has
9 never been in the system, is it so unreasonable for
10 Congress to conclude as a matter of statutory, explicit
11 language that the child should go into the system so
12 that at least with respect to your burden there's at
13 least a participatory program where they try to help the
14 child get an individual education.

15 JUSTICE ALITO: If Congress's purpose really
16 was what you -- what you suggest and what I think
17 Justice Scalia's question suggests, that there was a
18 desire to make parents who really had no interest in the
19 public school system give the public schools a chance,
20 why is it that, even as you read the statute, there's no
21 requirement that the child remain in the public school
22 system for any significant period of time? It's just
23 pro forma.

24 MR. KOERNER: Indeed, Justice Alito.
25 Congress in this case got it completely right because

1 not only did they put in the explicit language, they
2 also put in a time period because they understood that
3 this Court had ruled in a number of cases that its upset
4 was with the protracted period that a family has to have
5 a child in the system. But by having a notice provision
6 and by thereby ensuring a parent that by giving notice
7 and specifically articulating the reason why the plan is
8 deficient and giving the school district an opportunity
9 to cure the problem, everybody would understand 10 days
10 later that they can leave. So the very problem that you
11 highlighted in Burlington and Carter is no longer a
12 problem under the explicit legislation.

13 CHIEF JUSTICE ROBERTS: I think they may --
14 they may well have to stay longer than 10 days to either
15 realize that the program is inadequate or to feel
16 comfortable that they'll be able to establish that on
17 the record. It's pretty hard to say something's not
18 working after only on 10 days.

19 MR. KOERNER: Chief Judge, you're absolutely
20 right. And that is why I say that would be based on an
21 individual determination. All the statute says is come
22 into the system. What happens after that, if you give
23 your notice as was raised in a hypothetical, that would
24 go to whether or not there was the duty to cooperate
25 which was fulfilled, which also is a requirement for

1 this particular section for reimbursement.

2 It's not just that you are in a program and
3 private school is providing appropriate service and then
4 you have an IEP that may not provide the free
5 appropriate public education, but you also have to show
6 you cooperated with the program because the whole
7 primary purpose of the program is to provide a public
8 education.

9 JUSTICE SCALIA: Of course, to be fair, this
10 provision doesn't just apply to the rich person who
11 wants New York City to pay 30,000 of his tuition to a
12 private school. It also applies to somebody who is
13 already in public school, and the program offered by the
14 -- by the city is patently inadequate. You are
15 compelling the parent nonetheless to put the kid in a
16 program that anybody would see will -- will not meet the
17 needs.

18 MR. KOERNER: That is correct, but your --
19 first of all, Congress could weigh the balance between
20 that particular problem and the need to give the school
21 district an opportunity to try to provide a program, but
22 it does run contrary to this Court's discussion in
23 Schaffer which presumes that the school district is
24 going try to accommodate the child, try to provide the
25 needs of the child.

1 In effect, I think all of these questions
2 are based on the assumption that the plan is going to be
3 automatically deficient. I don't believe there's any
4 foundation this Court has indicated there's no
5 foundation. That's why it said in Schaffer that the
6 parent has the ultimate burden of persuasion because it
7 presumed that the plan -- if you accept that principle,
8 which has already been articulated and you accept the
9 fact that specialists on the Board of Education have --
10 are going to try to adjust to this kid's needs, then
11 having the kid in the system even for a short while is
12 something that Congress could determine. And indeed
13 that's what the language says.

14 Now, we recognize that there is an absurd
15 argument, but it was difficult for us to understand how
16 it would be absurd to require this when indeed it would
17 solve the problems of Burlington and Carter because it
18 makes sure that if a parent doesn't want to stay for a
19 protracted period, it doesn't have to stay and then they
20 can litigate later. As Judge Alito noted, it would be
21 as little as 10 days.

22 I mean some arguments -- some of the
23 arguments I should at least mention that the other side
24 has made: The chief -- in the Second Circuit, the
25 argument was that there was an ambiguity because the

1 word "only"0 wasn't used. So if I may use the example
2 that an individual may be eligible for welfare
3 recipients -- welfare benefits if that individual
4 previously received food stamps, the argument would be,
5 well, that's a little ambiguous because you didn't say
6 "only received food stamps." Of course, the condition
7 doesn't have to have "only" and it probably undermines a
8 lot of statutes that Congress has passed. The language
9 is very, very clear.

10 The second argument that is made both by the
11 Solicitor General and Respondent is that there's been an
12 -- implied repeals of this Court's decisions in
13 Burlington and Carter. But an implied repeal is when
14 you have two statutes that are specific and the latest
15 specific statute is inconsistent with the earlier
16 specific statute. These courts' decisions were based on
17 a general remedy provision and, more importantly, this
18 statute encompassed what this Court held because it
19 provided that you can remove your child once in the
20 system and the notice provision provides that you don't
21 have to be in the system very long.

22 JUSTICE ALITO: Is there any suggestion in
23 the reasoning in the Burlington case that it was limited
24 to a situation in which the student had been receiving
25 public school special education?

1 MR. KOERNER: No. But it was a holding
2 where the student was in fact receiving special
3 education. The next case, of course, would have been
4 one where the -- now, a more interesting question would
5 have been raised if you had (iii) and not (ii). If you
6 only had the notice provision where Congress
7 contemplates you have to be in the system to give
8 notice, and I came to this Court and I said, under
9 (iii), Congress has really contemplated you have to at
10 least be in the system for a short amount of time. You
11 didn't have (ii), which clarifies exactly what Congress
12 said, and this Court would have to then consider whether
13 or not (iii), by itself, would be -- would create enough
14 of an ambiguity in its (inaudible) decisions or whether
15 or not (iii) could be enforced without referring to (ii)
16 because why do you give notice?

17 Think about the result in this case. For
18 someone in the system, they have to give notice and an
19 opportunity to cure, and the IEP can be modified. If
20 you're not in the system and you never had any interest
21 in the system and you sought tuition reimbursement, you
22 would have less of a bureaucratic process. There would
23 be a preverse incentive to stay outside the system. You
24 wouldn't have to give notice. You would just have to --

25 CHIEF JUSTICE ROBERTS: Oh, I don't think

1 that's true, because the problem would be you would go
2 to the hearing to see if you were getting the adequate
3 education and you would have -- you would essentially
4 have to make a facial challenge rather than an
5 as-applied one, and the school would say, well, you
6 didn't give us a chance; we were going to do this and we
7 were going to do that. So it would be a heavier burden
8 to carry. The parents would have a heavier burden.

9 MR. KOERNER: But that would --

10 CHIEF JUSTICE ROBERTS: -- if they did --

11 MR. KOERNER: But that would be an
12 individual determination, Chief Judge. What I'm saying
13 though, for everybody in the system, it doesn't depend
14 on an impartial hearing. You have to give notice
15 before you get to the next step. If you're outside the
16 system, you don't have to participate in any process
17 other than to seek at an impartial hearing the right to
18 get reimbursement. So that actually there's less
19 bureaucratic processes outside the system, and there's
20 and incentive (1) not to cooperate and (2) just to
21 marshal all your arguments in the impartial hearing and
22 hopefully you're going to prevail and get the payment
23 for the private education; whereas, if you're in the
24 system --

25 CHIEF JUSTICE ROBERTS: No, my suggestion is

1 still that it would be easier to prevail at the
2 impartial hearing, if you can say, look, we tried, it
3 didn't work, as opposed to saying, we never even tried.

4 MR. KOERNER: Except for --

5 CHIEF JUSTICE ROBERTS: If I were the
6 impartial hearing examiner, I would think that that's a
7 harder burden for the parents to carry if they didn't
8 even try. The school's going to come in and say, here's
9 what we would have done if you'd given us a chance and
10 you didn't give us a chance.

11 MR. KOERNER: But there is a dynamic at
12 these hearings that, if you come in and that you're in a
13 private school and you show that your child is doing
14 well in the private school, and we come in with a
15 theoretical plan that has never been implemented, there
16 is going to be a dynamic with the impartial hearing
17 officer who will tilt towards keeping the child --

18 JUSTICE GINSBURG: What is the basis for
19 saying that, when the one thing that the statute is very
20 clear on is that the starting premise of any
21 reimbursement claim is that an appropriate public
22 education is not available? That wouldn't concentrate,
23 testing that wouldn't concentrate on what the private
24 school is doing but what the public school could do.

25 MR. KOERNER: You're right, Justice

1 Ginsburg. I was only commenting on the dynamic. Of
2 course, we would try to show it, but we can't show it
3 based on -- any actual interaction with the child. We
4 can't show we observed the child in the school and tried
5 to make the following modifications.

6 JUSTICE GINSBURG: But you don't have the
7 burden; the parents do.

8 MR. KOERNER: Yes. That is the technical
9 relationship. That's right. I'm talking more about --

10 JUSTICE SCALIA: The parent would presumably
11 cover themselves, look it, he's getting X,Y -- X, Y, and
12 Z in the private school and you're going to give him Z;
13 Z is not going to be enough. And the burden on you
14 would be upon you to say, oh, we think Z is enough.

15 MR. KOERNER: That's correct. But, of
16 course, what we're saying has no actual practice.

17 But all this is separate and distinct from
18 the language of Congress. And unless that language is
19 observed, it does require that you have to previously
20 receive special education related services.

21 JUSTICE BREYER: What about an exception if,
22 in fact, the school district admits that they can't do
23 anything for this child?

24 MR. KOERNER: Well, then, Your Honor, that
25 comes under Section B of the same section, 20 U.S.C.

1 1412(a)(10)(B), where the school district does not
2 believe it can provide the service, then it will consent
3 to a private school and will give reimbursement because
4 that will be the equivalent of the free appropriate
5 public education. We are just talking about cases where
6 there has not yet been -- where the school believes they
7 can provide it. The parent and the child disagree.

8 Now, there are two other arguments that I
9 want to address. One, recognizing that the language
10 seems to support the petitioner's position. They argue
11 that, in fact, they did get special education and
12 related services because for the years 1997 and 1998 and
13 1998-1999, we settled with them and we did pay the
14 tuition. But Paragraph 17 of each of those agreements
15 specifically provided that the settlement was not to
16 create any admission for future applications.

17 And as this Court is aware, both under the
18 Federal Rules of Evidence in its decisions in *Arizona v.*
19 *Colorado* and the *U.S. First International Building*
20 *Company*, if you settle, it has no probative value. All
21 you do is settle the specific claim. You don't settle
22 the legal issue.

23 The second argument they make is, well, we
24 have got an IEP. An IEP is a proposal of how we would
25 service the child. And that IEP would constitute a

1 special education and related service. But an IEP which
2 the parent rejects could never be a special education
3 related system. You have to be in the system receiving
4 it.

5 And indeed, in Section 1414 of U.S.C., it
6 specifically provides if you reject the IEP, you've
7 waived any right to a free and appropriate public
8 education. So once you do that, it ends the discussion.

9 I have a few minutes and I'm going to
10 reserve that time for a possible reply.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Koerner.

13 Mr. Gardephe.

14 ORAL ARGUMENT OF PAUL G. GARDEPHE,
15 ON BEHALF OF RESPONDENT

16 MR. GARDEPHE: Thank you, Mr. Chief Justice,
17 and may it please the Court.

18 When a child with a learning disability has
19 been denied a free and appropriate public education,
20 which is what happened here, IDEA authorizes an award of
21 private school tuition reimbursement, whether or not the
22 child previously receives special education related
23 services under the authority of a public agency. The
24 Board's argument that it can both deny space and remain
25 not liable for private school tuition reimbursement is

1 not compatible with the statute or with this Court's
2 jurisprudence. 1412(a)(10)(C)(ii) did not overrule
3 Burlington and did not impose the Hobson's choice in
4 that case.

5 JUSTICE SCALIA: What did it do, then? What
6 meaning do you give to it?

7 MR. GARDEPHE: Your Honor, Congress was
8 focused on the public school context. And the language
9 in (C)(ii), which refers to previously received, is
10 intended as a setup for (C)(iii). When you get to
11 (C)(iii), you get the notice requirements. That's what
12 Congress had in mind. That's why the reference is
13 there.

14 JUSTICE SCALIA: I don't understand that.
15 It makes it very clear it is, it is (ii) which
16 authorizes the enrollment in a private school and
17 payment for that. And it is prefaced with a condition:
18 If the parents of a child with a disability who
19 previously received special education and related
20 services under the authority of the public agency,
21 enroll the child in a private -- the implication is if
22 there were parent of a child who was not so enrolled,
23 this provision does not apply. So then you fall back on
24 the fact that the old provision covered in our cases
25 would have applied but that makes this meaningless.

1 I mean if you say that our prior cases
2 overrode that limitation, then what purpose does the
3 limitation serve?

4 MR. GARDEPHE: Your Honor, the first
5 question is whether that is intended to be exclusive.
6 And I don't think it was, because the "only if" language
7 is not there. And the "only if" language is actually
8 used in IDEA in multiple places. And Congress knew how
9 to say only if it intended, if it intended --

10 JUSTICE SCALIA: Where else does it say that
11 the city will pay for the cost of a private education
12 except there? That's the only place it says it. And
13 part of the requirements for getting it is that the
14 child was receiving service at a public institution.

15 MR. GARDEPHE: Your Honor, Congress did not
16 intend that exclusive language. If it had, it would
17 have used the "only if" language.

18 JUSTICE SOUTER: Then why didn't Congress
19 adequately give the equivalent of what you call the
20 "only if" language when it began (iii) by saying the
21 cost of reimbursement described in clause two? The
22 reimbursement described in clause two is described in
23 terms of the clause that Justice Scalia is zeroing in
24 on.

25 MR. GARDEPHE: Because, Your Honor, the

1 context is public school. That is the situation that
2 Congress was seeking to address, and that's why you
3 have --

4 JUSTICE SOUTER: I'm sorry. I'm just not
5 getting this. Can you rephrase that?

6 MR. GARDEPHE: Yes. If you look at
7 (C)(iii), Your Honor, it obviously repeatedly refers to
8 prior to the removal of a child from the public school.
9 So Congress was clearly focused on and it was intending
10 to give guidance to the courts in their equitable -- in
11 exercising their equitable powers. So in the context of
12 a child who was in public school, these are the types of
13 notice and cooperation things the court should take into
14 consideration.

15 The question, Your Honor, is whether they
16 intended this to be the exclusive vehicle by which
17 tuition reimbursement could be obtained? And the answer
18 to that, Your Honor, is no. And the reason why the
19 answer is no is because there is no "only if" language.

20 CHIEF JUSTICE ROBERTS: So you read --
21 hypothesize two statutes: One, the statute before the
22 phrase "who previously received special education" was
23 added and the statute after? You read both of those
24 statutes the same way; right?

25 MR. GARDEPHE: No, Your Honor, I don't.

1 Because the question is, does that language serve any
2 purpose? And my answer to that, the language in
3 (C)(ii), "previously had received," yes, it serves the
4 purpose. The purpose is it gives factual context for
5 what comes in (C)(iii).

6 The other thing I would like to say --

7 CHIEF JUSTICE ROBERTS: I don't understand.
8 You read "who previously received special education
9 services," and you say that includes who previously did
10 not receive special education services.

11 MR. GARDEPHE: No. What I'm saying is that
12 that provides the context for what follows in (C)(iii).
13 The context it provides is --

14 CHIEF JUSTICE ROBERTS: There would be no
15 reason for Congress to put that language in if the same
16 right to reimbursement existed if the child had not
17 previously received special education services.

18 MR. GARDEPHE: No, Your Honor. The point of
19 that language is to provide the backdrop for (C)(iii)
20 where Congress did intend to give guidance to courts in
21 the exercise of the equitable --

22 CHIEF JUSTICE ROBERTS: Because your friend
23 reads that the exact opposite way and says, since
24 (C)(iii) only makes sense if the child is in the public
25 school, that that's a limitation on how you should read

1 (C)(ii).

2 MR. GARDEPHE: I understand that, Your
3 Honor. But the question is whether -- it really boils
4 down to if Congress intends to address the full --

5 CHIEF JUSTICE ROBERTS: In that case, isn't
6 it pertinent that the title to (C)(ii) says
7 "Reimbursement for Private School Placement"? It
8 doesn't say reimbursement for private school placement
9 when the child previously attended public school.

10 MR. GARDEPHE: But, Your Honor, (C)(ii) is
11 not exhaustive. Let me give an example.

12 I'm sure this Court would agree that the
13 requirement, the second requirement in Burlington that
14 the private placement has to be appropriate is the law
15 in this land. And (C)(ii) doesn't set forth that
16 requirement. (C)(ii) does not set forth that
17 requirement. And what that says to me is that (C)(ii)
18 was never intended by Congress to be exhaustive.

19 CHIEF JUSTICE ROBERTS: That just means that
20 (C)(ii) doesn't address the entire universe of issues
21 that might arise. But that doesn't mean that it doesn't
22 address exactly what its title says, "Reimbursement for
23 Private School Placement."

24 MR. GARDEPHE: Your Honor, I believe it's
25 probative on the issue of whether Congress intended

1 (C)(ii) to set forth the requirements for private school
2 tuition reimbursement and all the factual context in
3 which that could be rendered.

4 I do want to address one point, which is
5 that did Congress deal with this issue later? That is
6 to say, in terms of the notice factors that it set forth
7 in (C)(iii), which I have argued to you applied to
8 parents whose children have been in public school. The
9 answer to that question, Your Honor, is, yes, they did.
10 They addressed it in 1415(f)(1)(B), which require the
11 2004 amendments to IDEA.

12 CHIEF JUSTICE ROBERTS: Where is that set
13 forth?

14 MR. GARDEPHE: 1415(f)(1)(B) -- I'm sorry,
15 Your Honor, it's not in the appendix to the solicitor
16 general's brief. But at 1415(f)(1)(B), Your Honor, what
17 that provision requires is that parents, prior to a due
18 process hearing, must meet with the IEP team, they must
19 meet with the school district, they must lay out their
20 complaints about the IEP, and the statute provides give
21 the school district an opportunity to resolve the
22 complaint.

23 So Congress did not deal with the full
24 waterfront in the 1997 amendments. It returned to this
25 issue in 2004 and imposed those notice and cooperation

1 requirements that, as I've argued to you --

2 CHIEF JUSTICE ROBERTS: Were those
3 provisions at issue when this dispute arose? They are
4 the 2004 amendments --

5 MR. GARDEPHE: These were 2004 amendments,
6 Your Honor.

7 JUSTICE STEVENS: You haven't identified the
8 statutory provision that you think provides the
9 authority for the payment in this case.

10 MR. GARDEPHE: Your Honor, I believe it
11 begins with 1400(d)(1)(A) and 1412(A)(1); both of which
12 impose the requirement on school districts to make
13 available the free and appropriate public education for
14 the child. I believe it begins there. It then
15 continues to 1415 (i)(2)(C)(3), which is the provision
16 that grants courts to -- sorry, grants such relief as
17 the court determines is appropriate. There is no
18 evidence either in the 1997 amendments or in its
19 legislative history that there was an intent to appeal
20 or override that remedy.

21 CHIEF JUSTICE ROBERTS: I suppose it's how
22 broadly you read legislative history. I thought there
23 was a statement by Representative Castle that this would
24 limit the payments that school districts had to make.

25 MR. GARDEPHE: Yes, Your Honor, and I think

1 with respect to the children in the public school
2 system, if you read (C)(3) -- and again these are
3 permissive -- but if (C)(3) is applied, then I think
4 Representative Castle's comments make perfect sense
5 because they provide for certain notice obligations.

6 CHIEF JUSTICE ROBERTS: So when it comes to
7 reimbursement of tuition, the parents who never place
8 their child in the public school are in better shape
9 than the parent who place their child in public school
10 and then want to remove him.

11 MR. GARDEPHE: No, Your Honor. And the
12 reason for that is, there was case law preceding the
13 1997 amendments that imposed reasonableness
14 reasonableness and cooperation requirements on parents
15 even before the 1997 amendments came into effect. As I
16 did mention, after 2004 those requirements were now
17 statutory, but the reality is as a matter of case law,
18 it was already very clear in 1997 that if you didn't
19 give notice to the school district, if you didn't
20 cooperate in the formation of an IEP, you were not going
21 to get tuition reimbursement. And of course that flows
22 directly from, in particular, Carter's statement that
23 the reimbursement remedy is subject to equitable
24 considerations.

25 So it has always been the law that if a

1 parent does not cooperate, does not give notice, does
2 not cooperate in the formation of an IEP, that they will
3 not get -- or that the court has the discretion to deny
4 the tuition reimbursement remedy.

5 CHIEF JUSTICE ROBERTS: But cooperation does
6 not require sending the child to the public school.

7 MR. GARDEPHE: No, Your Honor. I think it's
8 clear that Congress never intended, to quote Justice
9 Scalia, that parents would be required to place their
10 child in a patently inappropriate placement in order to
11 qualify for tuition reimbursement, and to address
12 Justice Alito's point, Your Honor, we don't know --
13 whether it's 10 days or 11 days or 1 day -- we don't
14 know. We can draw some guidance, I suppose, from the
15 ten- day requirement in (C)(3), but that's by no means
16 clear. The parents can give notice ten days before the
17 school day begins -- a school year began -- that they
18 find the placement inappropriate. So this --

19 CHIEF JUSTICE ROBERTS: Well in my case they
20 would not have received any benefits, under the terms
21 of the statute.

22 MR. GARDEPHE: But Your Honor, it highlights
23 that if they can place the child in for one day, this is
24 an utterly meaningless provision that Congress never
25 could have intended to require because it serves no

1 purpose. And that's --

2 CHIEF JUSTICE ROBERTS: That's why your
3 friend says it serves the purpose of helping to make
4 clear that the public school is -- whether it is or is
5 not able to provide the appropriate public education. I
6 mean, why would Congress have put the phrase in there --
7 even if it was describing as you say the most common
8 situation -- why would it put the phrase in there if it
9 doesn't serve that purpose at least?

10 MR. GARDEPHE: Let me give an example that
11 highlights my point. I place my child in the
12 kindergarten in public school for one day. I then
13 satisfy the statute, previously have received special
14 education-related services. Five years later I can
15 still rely on that. Ten years later, I can still rely
16 on that. It's a talisman. It can't --

17 CHIEF JUSTICE ROBERTS: What you're saying
18 is it's not a very significant hurdle, but it is going
19 to be a hurdle in some cases.

20 MR. GARDEPHE: It doesn't serve any useful
21 purpose, Your Honor, and if it doesn't serve any useful
22 purpose there is no reason to believe that Congress
23 intended it to have that effect.

24 CHIEF JUSTICE ROBERTS: The useful purpose
25 it serves is allow the school district to show what it

1 can do in ten days, as opposed to a mere theoretical
2 statement, it allows some actual concrete practice to
3 see if the plan that the public school has developed is
4 going to work or not going to work, that the impartial
5 hearing examiner can evaluate in a more concrete
6 setting.

7 MR. GARDEPHE: This Court has addressed that
8 balance in Burlington, and the answer was no, the
9 statute does not require that parents place their child
10 in an inappropriate place.

11 CHIEF JUSTICE ROBERTS: But then the whole
12 point is the statute was then amended after Burlington.
13 So to say what Burlington interpreted, it don't seem to
14 me to be very compelling on the question of what the
15 amended statute provided.

16 MR. GARDEPHE: But again, Your Honor, there
17 is no evidence in that amendment that it was intended to
18 be exclusive or intended to be exhaustive of the
19 circumstances and factual context.

20 JUSTICE SCALIA: I'm not sure I agree -- Im
21 not sure I would agree with you that you could get
22 special services which --in third grade and then come
23 back 10 years later and get private school tuition. I
24 would really read this as saying if the parents of a
25 child who previously received special education under

1 the authority, enroll the child in a public elementary
2 school -- I think that there has to be a temporal
3 connection between the prior receipt and the enrollment.
4 I don't think you can go back 10 years.

5 MR. GARDEPHE: Let me go back --

6 JUSTICE SCALIA: You don't have to read it
7 that way, anyway.

8 MR. GARDEPHE: Let me address that, Your Honor.
9 What that would mean, then, I suppose, is that parents
10 would be required each year to put their child in a
11 public school for some period of time to qualify, and
12 then place their kid in private school if they didn't --
13 and then you're talking about a disruption --

14 JUSTICE SCALIA: Once you're in the private
15 school reimbursement you're in the private school
16 reimbursement, but you can't get into it 10 years later.
17 Anyway, that issue is not -- not before us today.

18 I don't understand you assertion that
19 somehow this would amount to repeal by implication. The
20 provision of 1415 -- what is it, (b), (b)(3) -- it seems
21 to me is just like a provision for, for a court's
22 exercise of its equitable powers. "Shall grant such
23 relief as the court determines is appropriate" -- if a
24 court had granted some equitable relief in one case, and
25 then there is a statute that's passed which renders that

1 equitable relief no longer appropriate, I wouldn't say
2 that that -- that that amounts to a repeal by
3 implication. It's just that what is appropriate depends
4 upon the remainder of the statute, and as it exists at
5 the time that the relief is sought.

6 MR. GARDEPHE: The point we are trying to
7 make, Your Honor, is that in light of Burlington, which
8 obviously Congress had knowledge of when it enacted the
9 1997 amendments, is it credible to believe that they
10 would have restricted, limited, overruled the holding of
11 Burlington, and never said a word about it?

12 JUSTICE BREYER: But they have (b). What
13 about (b)?

14 See look, there are two situations.
15 Situation (a) is that the school district thinks they
16 can give them a good education, adequate. Then he
17 should go and try it out, and if by the way the school
18 district just can't do it, then (b). So what's been
19 wrong with that scheme? Why doesn't that cover the
20 waterfront?

21 MR. GARDEPHE: There is no evidence that
22 Congress intended a tryout period.

23 JUSTICE BREYER: Just the language -- the
24 language.

25 MR. GARDEPHE: It's not just language.

1 JUSTICE BREYER: The language plus the fact
2 that nobody can think of a reason for putting that in
3 there, unless that's the --

4 MR. GARDEPHE: And it's the context that
5 flows from Burlington, where the Congress was aware that
6 this Court --

7 JUSTICE BREYER: But my question was what
8 about (b)? My question was not to argue with you. My
9 question was, why doesn't (b) take care of the examples
10 of absurd situations, law situations that you've
11 mentioned?

12 MR. GARDEPHE: I'm sorry, I'm not
13 understanding B, Your Honor.

14 JUSTICE BREYER: The case where the school
15 district just can't do it.

16 MR. GARDEPHE: Right.

17 JUSTICE BREYER: If they just can't do it
18 then their job is to put the kid in a district --

19 MR. GARDEPHE: Right.

20 JUSTICE BREYER: -- in a place that can do
21 it. And if their argument, which is your case, is it
22 they object to the facility, then have an argument about
23 that, about whether it should be this private school or
24 that private school. That's what it seems to me your
25 case is about, and that's why I think B.

1 MR. GARDEPHE: In a perfect world, Your
2 Honor, school districts who are confronted with a
3 situation would always make the decision to place the
4 child in private schools at public expense, but
5 unfortunately there are disagreements between school
6 districts and parents about what is appropriate, and
7 then sometimes school districts don't do what they are
8 supposed to do under the statute and in fact the city's
9 interpretation here would incentivize school districts
10 not to provide services because if they never provided
11 services they wouldn't be liable for the reimbursement.
12 Again, this can't be what Congress intended.

13 I did want to back up my assertion about the
14 only --

15 JUSTICE BREYER: (b), that's my question,
16 (b). I thought you were right. Until I heard that.
17 Then I suddenly hear no, that don't worry about it,
18 judge, is what I heard, because in the situation where
19 the school district has not provided there is another
20 section of the statute that takes care of the child.
21 That's what I want to hear your response to.

22 MR. GARDEPHE: Your Honor, that relies on
23 the good faith of the school district. (b) relies on,
24 (a)(10)(B) and B relies on the good faith of the school
25 district to make a determination that they can't provide

1 the services. That's not always going to happen. There
2 may be -- there may be a disagreement about whether they
3 can provide the services or not between the school
4 district and the parents.

5 CHIEF JUSTICE ROBERTS: You have review
6 before the impartial hearing examiner about that alleged
7 bad faith, correct?

8 MR. GARDEPHE: Pardon me?

9 CHIEF JUSTICE ROBERTS: You have reviewed
10 before the Hearing Examiner that alleged bad faith on
11 the part of the school district.

12 MR. GARDEPHE: Yes, Your Honor. Obviously,
13 the parents contend both that the plan was not
14 appropriate, and that it wasn't offered in good faith.
15 But I -- I did want to back up my assertion on the "only
16 if" language and -- and recite some statutory
17 references. Because I believe it stems very clearly
18 from the statute when you go through the provisions.

19 "Only if" or "only" are used in many, many
20 places 1415(f) (3)(E)(ii), 1414(a)(1)(C)ii,
21 1411(b)(1)(A), 1401(19)(C), 1415(k)(4)(C) in the '98
22 version of the statute, 1413 --

23 JUSTICE SCALIA: Bingo. You got me on that.

24 MR. GARDEPHE: The point is, Your Honor,
25 that Congress knew how to say "only if." They didn't do

1 that here, because they had no intention of creating an
2 exclusive remedy.

3 And this Court said in Winkelman that courts
4 should be cautious in reading into the statute an
5 implicit limitation, and this limitation goes to what
6 the Court also said in Winkelman is the primary mandate.

7 Finally, Your Honor --

8 CHIEF JUSTICE ROBERTS: And what was that
9 primary mandate?

10 MR. GARDEPHE: The primary mandate was to
11 provide or -- or make available a free and appropriate
12 public education to every child with learning
13 disabilities.

14 CHIEF JUSTICE ROBERTS: There is no issue of
15 mainstreaming in this case at all; right?

16 MR. GARDEPHE: There is not, Your Honor.

17 CHIEF JUSTICE ROBERTS: Neither of the
18 options are mainstream options?

19 MR. GARDEPHE: That's correct, Your Honor,
20 and that's at Second Circuit Appendix 168.

21 The school district here said that the
22 child's disabilities could not be addressed in a
23 mainstream setting, so there is no mainstream issue
24 here.

25 Finally, Your Honors, when Congress here

1 chose to carve out populations of children, it did that
2 in a very, very direct way. It did that in
3 1412(a)(1)(B) where it lays out very limited exceptions
4 for children who do not receive the guarantee with
5 respect to a free and appropriate public education.

6 The limitation is very, very clear. It's
7 very, very limited to certain age groups where it would
8 be inconsistent with state law, or there is an
9 incarcerated child. But there is no other place that
10 Congress carved out populations of children other than
11 in 1412(a)((1)((B), and there is no reason to believe
12 that Congress intended in a backdoor fashion to carve
13 out the populations of children, some of which were
14 mentioned in the argument of my adversary.

15 Congress was aware --

16 CHIEF JUSTICE ROBERTS: You know, it -- I'm
17 sorry.

18 MR. GARDEPHE: Your Honor, my time is up.
19 Thank you very much.

20 CHIEF JUSTICE ROBERTS: So is mine. Thank
21 you, Mr. Gardephe.

22 MR. GARDEPHE: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Garre.

24 ORAL ARGUMENT OF GREGORY G. GARRE,
25 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

1 SUPPORTING RESPONDENT

2 MR. GARRE: Thank you, Mr. Chief Justice,
3 and may it please the Court:

4 Petitioner takes the position that a school
5 district may both refuse to provide a child with a
6 disability with an appropriate public placement and
7 refuse to pay for an appropriate private placement.

8 This Court has twice before considered and
9 twice before unanimously rejected --

10 JUSTICE SCALIA: No, he hasn't -- he hasn't
11 said that.

12 MR. GARRE: I think he does in the sense,
13 Your Honor, Justice Scalia, that the -- the school
14 district can take the position, even if the IET that is
15 proposed is inadequate and it's adjudicated to be
16 inadequate, because the Schaffer presumption that was
17 brought up earlier does not apply in this case. Because
18 we are talking about situations where a parent can prove
19 that the placement was inadequate. In that situation
20 the parent cannot qualify for reimbursement unless it
21 subjects his child to the inappropriate placement.

22 This Court rejected that rationale in clear
23 and unambiguous terms in the Burlington case. Justice
24 Rehnquist put it in that case --

25 JUSTICE SCALIA: Under a different statute.

1 MR. GARRE: Under a different statute but
2 interpreting the fundamental requirement of the statute
3 that all children with disabilities are entitled to a
4 free and appropriate public education. But that
5 requirement didn't change, and this is what Justice
6 Rehnquist --

7 JUSTICE SCALIA: You are interpreting some
8 very general language: "Shall grant such relief as the
9 court determines is appropriate."

10 MR. GARRE: The -- the part of the
11 Burlington case I'm referring to Justice Scalia is the
12 interpretation of the fundamental requirement of
13 providing free and appropriate public education. And
14 what Justice Rehnquist said there -- and the unanimous
15 Court agreed -- is forcing a parent to choose between
16 subjecting his child to inadequate public placement or
17 paying for private placement deprives the parent of his
18 right to a free and appropriate public education.

19 JUSTICE SCALIA: So does the
20 10-business-days notice requirement for people who are
21 in public schools also violate Burlington, because for
22 10 business days they are going to be subject to an
23 inappropriate education?

24 MR. GARRE: The way the 10-business-days
25 requirement works in practice is that all of the IEPs --

1 virtually all of them are proposed towards the end of
2 the school year; and, typically, the parent is submitted
3 the proposed IEP during the summer. And it's at that
4 point that they have to make a decision whether to
5 litigate that, put their child in a private school, or
6 put them into a public school.

7 So the 10 business days in practice is not
8 going to require the child to go into the inadequate
9 placement. That was true in the fact pattern --

10 CHIEF JUSTICE ROBERTS: So in a situation
11 where it's not in the summer, where they say, well,
12 let's see how it works, and then they go to the public
13 school, I would have thought your argument also would
14 say it's not -- they don't have to give notice of 10
15 business days because in Burlington you said you don't
16 -- you have to make available the tuition reimbursement.
17 They passed a statute imposing a limitation on that, 10
18 business days.

19 MR. GARRE: And we don't -- we don't dispute
20 that --

21 CHIEF JUSTICE ROBERTS: You don't dispute
22 that limitation. You dispute the other one, though,
23 which says they have to have previously received
24 special-education services.

25 MR. GARRE: In order -- in order to qualify

1 for reimbursement in that provision which is -- which is
2 followed by the provision describing in more concrete
3 detail the circumstances that courts ought to take into
4 account in determining whether reimbursement is
5 appropriate.

6 And if I can explain the way we read Section
7 1412(a)(10)((C), the first part of that subsection is
8 Subsection (C)(i). That hasn't come up during the
9 argument today. It is barely mentioned in Petitioner's
10 brief. That subsection -- it is on page 5a in the
11 appendix to the Gray brief, lays down the general rule
12 -- the rule that tells school districts when they don't
13 have to worry about paying reimbursement. And that is
14 when they provide a free, a public -- an appropriate
15 public education in the first place.

16 That -- that is consistent with Burlington
17 and Carter, and that lays down the general rule. School
18 districts that provide an appropriate placement don't
19 have to worry about reimbursement.

20 Subsection (C)(ii) then goes on to identify
21 a particular fact pattern which also happens to be the
22 most common situation in which reimbursement claims are
23 presented to the courts. And Congress in that
24 situation, along with Subsections (3) and (4), provided
25 the courts with more concrete guidance in determining

1 how to exercise their discretion in that situation.

2 The legislative history supports that
3 interpretation. On pages 25 to 29 of the National
4 Disability Rights Network brief they explain how
5 Congress in the legislative history indicates that they
6 were focused on case law applying this Court's decision
7 in Burlington and Carter where the students were already
8 enrolled in public school.

9 There is no indication whatsoever at all in
10 the legislative record that anybody had in mind scaling
11 back the fundamental mandate of the statute for school
12 districts to provide a free and appropriate public
13 education for every child.

14 CHIEF JUSTICE ROBERTS: Anywhere? I thought
15 Representative Castle said that this would result on
16 easing the burden on the school districts to pay
17 tuitions.

18 MR. GARRE: And it would, Your Honor,
19 insofar as we are dealing with flushing out the
20 requirements for students enrolled in public school.
21 But there is no indication that Congress meant to scale
22 back this Court's interpretation of the act's
23 fundamental mandate to provide a free and appropriate
24 public education.

25 Petitioner's give-it-a-try rationale just

1 doesn't fit to advance its argument before this Court.
2 It doesn't fit to the extent that Petitioner is
3 suggesting that you have to give public school a try,
4 because it's clear that the -- their interpretation
5 would apply to students in public school, as well as
6 private school. It would apply to all students entering
7 the special education system, including the student
8 who's been enrolled in public school from kindergarten
9 to 11th grade.

10 If he hasn't previously received
11 special-education or related services, then, under
12 Petitioner's view, if he's offered a grossly inadequate
13 plan, he has to be subjected to that plan in order for
14 his parents to qualify. And Petitioner's interpretation
15 doesn't require the parents to give the proposed
16 placement at issue a try. All it requires is that they
17 show that they received previous special-education
18 services at some point in the past.

19 And that's the way it worked in Burlington;
20 that's the way it worked in Carter; and that's the way
21 it works in most of the cases. Students are already in
22 the special education system, and they are proposed an
23 IET at some point typically during the summer. And the
24 parents at that time say this IET is inadequate for my
25 child, and I want to --

1 JUSTICE SCALIA: Well, that's no problem. I
2 mean both sides agree that you can move to a private
3 school if that's so; right?

4 MR. GARRE: If you have previously received
5 special- education services. But my point, Justice
6 Scalia, is under Petitioner's -- the way they read the
7 statute, you don't have to give the proposed placement
8 at issue a try. So to the extent that this Court
9 thinks, or Petitioner is arguing, that Congress wanted
10 to make sure that we could better evaluate whether or
11 not this proposed placement proposed placement is going
12 to work for this child. That doesn't fit with the
13 statutory language because in practice the students --
14 all they have to show is that they received services at
15 some point in the past and if they have they can go into
16 private school and seek reimbursement. It doesn't
17 require a student to be subjected to the inadequate plan
18 unless you happen to be the student who is enrolled in
19 public school or enrolled in private school and you're
20 entering the special education system. At that point
21 then, Petitioner's interpretation requires the parents
22 to enroll their child who has already been determined to
23 have a learning disability in a plan that is inadequate,
24 and we think that is an untenable result.

25 CHIEF JUSTICE ROBERTS: But the whole point

1 is you don't necessarily know it's inadequate until
2 later in time. Right? The school board thinks it is
3 adequate.

4 MR. GARRE: That's true, Your Honor. But
5 two points about that -- first, parents who do enroll
6 their children in private school at their own financial
7 risk. And as Justice Scalia pointed out in his
8 concurring and dissenting opinion in *Winkelman*, there
9 are particular incentives against bringing frivolous
10 reimbursement claims in this context.

11 JUSTICE SCALIA: Except those -- there are a
12 lot of parents who are going to send their parents to
13 private school, no matter what. They are well-heeled
14 and this is just an opportunity to have New York City
15 pay \$30,000 of it.

16 MR. GARRE: And Justice Scalia -- two points
17 on that, first the statute provides in clear and
18 unambiguous terms that all children with disabilities
19 are entitled to a free and appropriate education. The
20 child find requirement, which Section 1412 --

21 JUSTICE SCALIA: Even the child who would
22 turn down the adequate education provided by the public
23 schools. I don't think that was the intent of the
24 statute.

25 MR. GARRE: And I agree with you on that,

1 Justice Scalia, and that's why the way that school
2 districts can avoid reimbursement is to offer an
3 adequate placement in the first place. That's what
4 Section 1412(a)(10)(C)(i) provides. It lays down the
5 general rule. School district today talks about we need
6 to have collaboration, we need to have cooperation
7 during the IEP process. They hold all the cards during
8 that process. And if they want to avoid reimbursement
9 they should do what this Court said in the Carter case,
10 that's provide the student with a free, appropriate
11 public education.

12 JUSTICE SCALIA: If they don't have an
13 adequate placement, they should not have to pay the
14 freight for people who would not be coming to public
15 school any way. That's what this provision prevents.

16 MR. GARRE: I disagree with that, Your
17 Honor. I think that's inconsistent with the statutory
18 mandate to provide a free and appropriate education for
19 all children with disabilities. I would say though, and
20 I want to be clear on this -- even though appearance of
21 students in private school or in public school who
22 haven't previously received special education or related
23 services qualify for reimbursement under our
24 interpretation of the statute. It doesn't mean that
25 they are entitled to reimbursement. In the situations

1 Your Honor may have in mind, where the parents genuinely
2 aren't complying in good faith or genuinely aren't
3 interested in sending their kids to public school, they
4 only want to try to gain the system -- in those
5 hypothetical situations, courts have equitable
6 discretion to deny reimbursement claims, and they have
7 denied those reimbursement claims.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Garre. Mr. Koerner, you have three minutes
10 remaining.

11 REBUTTAL ARGUMENT OF LEONARD J. KOERNER
12 ON BEHALF OF PETITIONER

13 MR. KOERNER: Thank you, Mr. Chief Justice.
14 First, this particular provision, as the Chief Justice
15 noted, is called payment for private school placements
16 where they don't have the consent of the local
17 education. Any reasonable reading of that is that it's
18 all encompassing. And any person who has to apply has
19 to satisfy those provisions. Second, this statute did
20 not overrule Burlington or Carter. In those cases the
21 children were already receiving special services. Now
22 it could be in a future case someone would speak to
23 extend those cases, but Congress has now spoken to make
24 sure that Burlington and Carter go no further than you
25 have previously held. Third, there is an assumption

1 that the program is going to be defective from day one.
2 But that's contrary to this Court's decision in Schaffer
3 which presumes the good faith of the individuals who
4 propose in program. And that is the heart of the entire
5 case. Fourth, let's assume, for example, that someone
6 can create an ambiguity in this case. Citing the
7 Arlington case, in which you placed yourself in the
8 position of the local education officer, when you look
9 at this particular section -- and particularly C double
10 2 -- double i and triple i. Would you, in that
11 position, understand that it doesn't really mean what it
12 says, that previously received special education
13 services was only meant to cover the people already in
14 the system and was not intended to cover people outside
15 the system. That isn't what it says. More importantly,
16 the ambiguity is clearly not obvious. So how would a
17 local officer who has to understand whether or not to
18 place the funds at risk know whether or not in complying
19 with this particular situation, it was explicit or
20 implicit?

21 JUSTICE ALITO: During the period between
22 Burlington and the enactment of this statute, would you
23 have any doubt about your potential obligation to
24 reimburse a parent -- during the period of Burlington
25 and the enactment of the statute, would the school board

1 have had doubt about its potential liability for
2 reimbursement, in a situation like this?

3 MR. KOERNER: I think so. I think, because
4 of Burlington and Carter, where the children were
5 already in the system, this would be the next step.
6 Would we have presented to you the fact that you
7 shouldn't expand it? Probably. Would I know what you
8 would conclude? No, but the statute eliminated that
9 entire discussion. It is clear. But again, there is a
10 very big spending clause -- as I mentioned in my earlier
11 presentation, if it's so ambiguous that you can read out
12 a specific provision, how can that ambiguity not go down
13 to the benefit of the city through it's local education
14 system?

15 JUSTICE GINSBURG: I thought this statute
16 was also premised on Section 5 of the 14th Amendment, in
17 which case it wouldn't have spending clause notice
18 argument.

19 MR. KOERNER: No, the -- this is just a
20 grant provision, Your Honor. It's not premised on any
21 constitutional provision. It's a grant where funds are
22 provided to the local education district, and in return
23 they agree to comply with all the conditions set forth
24 in the IDEA. There are no constitutional limits. Thank
25 you very much.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Koerner. The case is submitted.

3 (Whereupon, at 11:55 a.m. the case in the
4 above-entitled matter was submitted.)

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