

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

1 protracted, it would have provided a process which would  
2 allow the child to be removed.

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

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

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

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

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

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

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

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

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

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

17 CHIEF JUSTICE ROBERTS: It just mirrors the  
18 statutory language --

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

20 CHIEF JUSTICE ROBERTS: Well, then --

21 MR. KOERNER: But the note --

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

1           MR. KOERNER: Well, Chief Justice, if it is  
2 ambiguous and we ought to at least discuss the nature of  
3 the ambiguity, then that ambiguity under the spending  
4 clause should redound to the benefit of the local  
5 education district as well, for if it does not set forth  
6 --

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

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

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

22           MR. KOERNER: I'm sorry.

23           JUSTICE ALITO: If the student here had  
24 attended the public school for let's say 11 days before  
25 being transferred to the public -- to the private

1 school, would your -- would your argument still fly?

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

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

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

8 JUSTICE SCALIA: Well, it's attending public  
9 school and receiving --

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

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



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

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

14           MR. KOERNER. Yes.

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

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

25           JUSTICE ALITO: Well, why would Congress

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

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

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

14 MR. KOERNER: That's correct.

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

17 MR. KOERNER: But the reason --

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

23 MR. KOERNER: That's correct, but it's a  
24 statute of limitations. It says that you must receive  
25 special education and related services. There is no --

1 there is no exception to the condition. If you look at  
2 the particular statute when they refer to "may," they  
3 are only talking about the relief that a court or an  
4 impartial hearing officer or State review officer can  
5 grant. They are not talking about the predicate, you  
6 must be in the system.

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

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

22 In other words, this was meant to be an  
23 option for people who wanted to go to the public schools  
24 but couldn't go to the public schools because they  
25 couldn't get the private services there, but it was

1 never meant to be an option for people who had no desire  
2 to go to public schools at all anyway, and --

3 MR. KOERNER: I think --

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

7 MR. KOERNER: That's correct. He never had  
8 any contact with the public school at all except to  
9 request a free appropriate public education. And I  
10 think there --

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

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

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

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

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

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

25           JUSTICE GINSBURG:  That's not the question I

1 asked.

2 MR. KOERNER: Oh I'm sorry.

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

10 MR. KOERNER: Yes. You mean assuming the  
11 statute does not apply?

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

15 MR. KOERNER: That's correct.

16 JUSTICE SCALIA: -- if it were there?

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

25 JUSTICE GINSBURG: Maybe then the conclusion would

1 be that that parent hasn't met the heavy burden of  
2 showing that there is no appropriate public education.

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

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

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

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

21                   MR. KOERNER:  Chief Judge, you're absolutely  
22  right.  And that is why I say that would be based on an  
23  individual determination.  All the statute says is come  
24  into the system.  What happens after that, if you give  
25  your notice as was raised in a hypothetical, that would



1 go to whether or not there was the duty to cooperate  
2 which was fulfilled, which also is a requirement under  
3 this particular section for reimbursement.

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

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

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

1 going try to accommodate the child, try to provide the  
2 needs of the child.

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

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

24 I mean some of the arguments -- some of the  
25 arguments I should at least mention that the other side

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

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

24 JUSTICE ALITO: Is there any suggestion in  
25 the reasoning in the Burlington case that it was limited

1 to a situation in which the student had been receiving  
2 public school special education?

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

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

1 wouldn't have to give notice. You would just have to --

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

12 MR. KOERNER: But that would --

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

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

1 payment for the private education; whereas, if you're  
2 already in the system --

3 CHIEF JUSTICE ROBERTS: No, my suggestion is  
4 still that it would be easier to prevail at the  
5 impartial hearing, if you can say, look, we tried, it  
6 didn't work, as opposed to saying, we never even tried.

7 MR. KOERNER: Except for --

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

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

21 JUSTICE GINSBURG: What is the basis for  
22 saying that, when the one thing that the statute is very  
23 clear on is that the starting premise of any  
24 reimbursement claim is that an appropriate public  
25 education is not available? That wouldn't

1 concentrate -- testing that wouldn't concentrate on what  
2 the private school is doing but what the public school  
3 could do.

4 MR. KOERNER: You're right, Justice  
5 Ginsburg. I was only commenting on the dynamic. Of  
6 course, we would try to show it, but we can't show it  
7 based on -- any actual interaction with the child. We  
8 can't show we observed the child in the school and tried  
9 to make the following modifications.

10 JUSTICE GINSBURG: But you don't have the  
11 burden; the parents do.

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

14 JUSTICE SCALIA: The parents would  
15 presumably come in to say, look it, he's getting X, Y --  
16 X, Y, and Z in the private school and you're going to  
17 give him Z; Z is not going to be enough. And the burden  
18 on you would be upon you to say, oh, we think Z is  
19 enough.

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

22 But all this is separate and distinct from  
23 the language of Congress. And unless that language is  
24 absurd, it does require that you have to previously  
25 receive special education related services.

1 JUSTICE BREYER: What about an exception if,  
2 in fact, the school district admits that they can't even  
3 do anything for this child?

4 MR. KOERNER: Well, then, Your Honor, that  
5 comes under section B of the same section, 20 U.S.C.  
6 1412(a)(10)(B), where the school district does not  
7 believe it can provide the service, then it will consent  
8 to a private school and will give reimbursement because  
9 that will be the equivalent of the free appropriate  
10 public education. We are just talking about cases where  
11 there has not yet been -- where the school believes they  
12 can provide it. The parent and the child disagree.

13 Now, there are two other arguments that I  
14 want to address. One, recognizing that the language  
15 seems to support the Petitioner's position. They argue  
16 that, in fact, they did get special education and  
17 related services because for the years 1997-1998 and  
18 1998-1999, we settled with them and we did pay the  
19 tuition. But Paragraph 17 of each of those agreements  
20 specifically provided that the settlement was not to  
21 create any admission for future applications.

22 And as this Court is aware, both under the  
23 Federal Rules of Evidence in its decisions in *Arizona v.*  
24 *Colorado* and the *U.S. First International Building*  
25 *Company*, if you settle, it has no probative value. All



1 you do is settle the specific claim. You don't settle  
2 the legal issue.

3 The second argument they make is, well, we  
4 got an IEP. An IEP is a proposal of how we would  
5 service the child. And that IEP would constitute a  
6 special education and related service. But an IEP which  
7 the parent rejects could never be a special education  
8 related service. You have to be in the system receiving  
9 it.

10 And indeed, in section 1414 of U.S.C., it  
11 specifically provides if you reject the IEP, you've  
12 waived any right to a free appropriate public education.  
13 So once you do that, it ends the discussion.

14 I have a few more minutes and I'm going to  
15 reserve that time for a possible reply.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 Mr. Koerner.

18 Mr. Gardephe.

19 ORAL ARGUMENT OF PAUL G. GARDEPHE,  
20 ON BEHALF OF THE RESPONDENT

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

23 When a child with a learning disability has  
24 been denied a free and appropriate public education,  
25 which is what happened here, IDEA authorizes an award of

1 private school tuition reimbursement, whether or not the  
2 child previously receives special education related  
3 services under the authority of a public agency. The  
4 Board's argument that it can both deny FAPE and remain  
5 not liable for private school tuition reimbursement is  
6 not compatible with the statute or with this Court's  
7 jurisprudence. 1412(a)(10)(C)(ii) did not overrule  
8 Burlington and did not impose the Hobson's choice  
9 denounced in that case.

10 JUSTICE SCALIA: What did it do, then? What  
11 meaning do you give to that?

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

19 JUSTICE SCALIA: I don't understand that.  
20 It makes it very clear it is -- it is (ii) which  
21 authorizes the enrollment in a private school and  
22 payment for that. And it is prefaced with a condition:  
23 "If the parents of a child with a disability, who  
24 previously received special education and related  
25 services under the authority of the public agency,

1 enroll the child in a private" -- the implication is if  
2 there are parents of a child who was not so enrolled,  
3 this provision does not apply. So then you fall back on  
4 the fact that the old provision covered in our cases  
5 would have applied but that makes this meaningless.

6 I mean if you say that our prior cases  
7 overrode that limitation, then what purpose does the  
8 limitation serve?

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

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

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

23 JUSTICE SOUTER: Then why didn't Congress  
24 adequately give the equivalent of what you call the  
25 "only if" language when it began (iii) by saying the

1 cost of reimbursement described in clause two? The  
2 reimbursement described in clause two is described in  
3 terms of the clause that Justice Scalia is zeroing in  
4 on.

5 MR. GARDEPHE: Because, Your Honor, the  
6 context is public school. That is the situation that  
7 Congress was seeking to address, and that's why you  
8 have --

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

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

20 The question, Your Honor, is whether they  
21 intended this to be the exclusive vehicle by which  
22 tuition reimbursement could be obtained? And the answer  
23 to that, Your Honor, is no. And the reason why the  
24 answer is no is because there is no "only if" language.

25 CHIEF JUSTICE ROBERTS: So you read --

1 hypothesize two statutes: One, the statute before the  
2 phrase "who previously received special education" was  
3 added and the statute after. You read both of those  
4 statutes the same way; right?

5 MR. GARDEPHE: No, Your Honor, I don't.  
6 Because the question is, does that language serve any  
7 purpose? And my answer to that, the language in  
8 (C)(ii), "previously had received," yes, it serves a  
9 purpose. The purpose is it gives factual context for  
10 what comes in (C)(iii).

11 The other thing I would like to say --

12 CHIEF JUSTICE ROBERTS: I don't understand.  
13 You read "who previously received special education  
14 services," and you say that includes who previously did  
15 not receive special education services.

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

19 CHIEF JUSTICE ROBERTS: There would be no  
20 reason for Congress to put that language in if the same  
21 right to reimbursement existed if the child had not  
22 previously received special education services.

23 MR. GARDEPHE: No, Your Honor. The point of  
24 that language is to provide the backdrop for (C)(iii)  
25 where Congress did intend to give guidance to courts in

1 the exercise of the equitable --

2 CHIEF JUSTICE ROBERTS: Of course, your  
3 friend reads that the exact opposite way and says, since  
4 (C)(iii) only makes sense if the child is in the public  
5 school, that that's a limitation on how you should read  
6 (C)(ii).

7 MR. GARDEPHE: I understand that, Your  
8 Honor. But the question is whether -- it really boils  
9 down to did Congress intend to address the full  
10 waterfront. And my answer to that --

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

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

18 I'm sure this Court would agree that the  
19 requirement, the second requirement in Burlington that  
20 the private placement has to be appropriate is the law  
21 in this land. And (C)(ii) doesn't set forth that  
22 requirement. (C)(ii) does not set forth that  
23 requirement. And what that says to me is that (C)(ii)  
24 was never intended by Congress to be exhaustive.

25 CHIEF JUSTICE ROBERTS: That just means that

1 (C)(ii) doesn't address the entire universe of issues  
2 that might arise. But that doesn't mean it doesn't  
3 address exactly what its title says, "Reimbursement for  
4 Private School Placement."

5 MR. GARDEPHE: Your Honor, I believe it's  
6 probative on the issue of whether Congress intended  
7 (C)(ii) to set forth the requirements for private school  
8 tuition reimbursement and all the factual context in  
9 which that could be rendered.

10 I do want to address one point, which is  
11 that did Congress deal with this issue later? That is  
12 to say, in terms of the notice factors that it set forth  
13 in (C)(iii), which I have argued to you applied to  
14 parents whose children have been in public school. The  
15 answer to that question, Your Honors, is yes, they did.  
16 They addressed it in 1415(f)(1)(B), which require the  
17 2004 amendments to IDEA.

18 CHIEF JUSTICE ROBERTS: Where is that set  
19 forth?

20 MR. GARDEPHE: 1415(f)(1)(B) -- I'm sorry,  
21 Your Honor, it's not reflected in the appendix to the  
22 Solicitor General's brief. But it's 1415(f)(1)(B), and  
23 Your Honors, what that provision requires is that  
24 parents, prior to a due process hearing, must meet with  
25 the IEP team, they must meet with the school district,

1 they must lay out their complaints about the IEP, and  
2 the statute provides give the school district an  
3 opportunity to resolve the complaint.

4 So Congress did not deal with the full  
5 waterfront in the 1997 amendments. It returned to this  
6 issue in 2004 and imposed those notice and cooperation  
7 requirements that, as I've argued to you --

8 CHIEF JUSTICE ROBERTS: Were those  
9 provisions at issue when this dispute arose? They are  
10 the 2004 amendments --

11 MR. GARDEPHE: These were 2004 amendments,  
12 Your Honor. And this dispute actually goes back to the  
13 1999-2000 school year.

14 JUSTICE STEVENS: You haven't identified the  
15 statutory provision that you think provides the  
16 authority for the payment in this case.

17 MR. GARDEPHE: Your Honor, I believe it  
18 begins with 1400(d)(1)(A) and 1412(a)(1); both of which  
19 impose the requirement on school districts to make  
20 available a free and appropriate public education to the  
21 child. So I believe it begins there. It then continues  
22 to 1415(i)(2)(C)(iii), which is the provision that  
23 grants courts to -- sorry, grants such relief as the  
24 court determines is appropriate. There is no evidence  
25 either in the 1997 amendments or in its legislative



1 history that there was an intent to repeal or override  
2 that remedy.

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

7 MR. GARDEPHE: Yes, Your Honor, and I think  
8 with respect to the children in the public school  
9 system, if you read (C)(iii) -- and again these are  
10 permissive -- but if (C)(iii) is applied, then I think  
11 Representative Castle's comments make perfect sense  
12 because they provide for certain notice obligations.

13 CHIEF JUSTICE ROBERTS: So when it comes to  
14 reimbursement of tuition, the parents who never place  
15 their child in the public school are in better shape  
16 than the parents who place their child in public school  
17 and then want to remove him.

18 MR. GARDEPHE: No, Your Honor. And the  
19 reason for that is, there was case law preceding the  
20 1997 amendments that imposed reasonableness and  
21 cooperation requirements on parents even before the 1997  
22 amendments came into effect. As I did mention, after  
23 2004 those requirements are now statutory, but the  
24 reality is as a matter of case law, it was already very  
25 clear in 1997 that if you didn't give notice to the

1 school district, if you didn't cooperate in the  
2 formation of an IEP, you were not going to get tuition  
3 reimbursement. And of course that flows directly from,  
4 in particular, Carter's statement that the reimbursement  
5 remedy is subject to equitable considerations.

6 So it has always been the law that if a  
7 parent does not cooperate, does not give notice, does  
8 not cooperate in the formation of an IEP, that they will  
9 not get -- or that the court has the discretion to deny  
10 the tuition reimbursement remedy.

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

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

25 CHIEF JUSTICE ROBERTS: Well, but in that

1 case, they would not have received any benefits, under  
2 the terms of the statute.

3 MR. GARDEPHE: But Your Honor, it highlights  
4 that if they can place the child in for one day, this is  
5 an utterly meaningless provision that Congress never  
6 could have intended to require because it serves no  
7 purpose. And that's why --

8 CHIEF JUSTICE ROBERTS: Your friend says it  
9 serves the purpose of helping to make clear that the  
10 public school is -- whether it is or is not able to  
11 provide the appropriate public education. Why would  
12 Congress have put the phrase in there -- even if it was  
13 just describing as you say the most common situation --  
14 why would it put the phrase in there if it doesn't serve  
15 that purpose at least?

16 MR. GARDEPHE: Let me give an example that  
17 highlights my point. I place my child in the  
18 kindergarten in public school for one day. I then  
19 satisfy the statute, previously have received special  
20 education related services. Five years later I can  
21 still rely on that. Ten years later, I can still rely  
22 on that. It's a talisman. It can't be what Congress  
23 intended.

24 CHIEF JUSTICE ROBERTS: What you're saying  
25 is it's not a very significant hurdle, but it is going

1 to be a hurdle in some cases.

2 MR. GARDEPHE: It doesn't serve any useful  
3 purpose, Your Honor, and if it doesn't serve any useful  
4 purpose there is no reason to believe that Congress  
5 intended it to have that effect.

6 CHIEF JUSTICE ROBERTS: The useful purpose  
7 it serves is allowing the school district to show what  
8 it can do in ten days, as opposed to a mere theoretical  
9 statement, it allows some actual concrete practice to  
10 see if the plan that the public school has offered is  
11 going to work or is not going to work, that the  
12 impartial hearing examiner can evaluate in a more  
13 concrete setting.

14 MR. GARDEPHE: This Court addressed that  
15 balance in Burlington, and the answer was no, the  
16 statute does not require that parents place their child  
17 in an inappropriate place.

18 CHIEF JUSTICE ROBERTS: Well, but the whole  
19 point is then the statute was amended after Burlington.  
20 So to say what Burlington interpreted, it don't seem to  
21 me to be very compelling on the question of what the  
22 amended statute provided.

23 MR. GARDEPHE: But again, Your Honor, there  
24 is no evidence in that amendment that it was intended to  
25 be exclusive or that it was intended to be exhaustive of

1 the circumstances and factual context.

2 JUSTICE SCALIA: I'm not sure -- I'm not  
3 sure I would agree with you that you could get special  
4 services -- in third grade and then come back 10 years  
5 later and get private school tuition. I would really  
6 read this as saying if the parents of a child who  
7 previously received special education under the  
8 authority, enroll the child in a public elementary  
9 school -- I think that there has to be a temporal  
10 connection between the prior receipt and the enrollment.  
11 I don't think you can go back 10 years.

12 MR. GARDEPHE: Let me address --

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

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

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

25 I don't understand your assertion that

1 somehow this would amount to repeal by implication. The  
2 provision of 1415 -- what is it, (b), (b)(3) -- it seems  
3 to me is just like a provision for, for a court's  
4 exercise of its equitable powers. "Shall grant such  
5 relief as the court determines is appropriate" -- if a  
6 court had granted some equitable relief in one case, and  
7 then there is a statute that's passed which renders that  
8 equitable relief no longer appropriate, I wouldn't say  
9 that that -- that that amounts to a repeal by  
10 implication. It's just that what is appropriate depends  
11 upon the remainder of the statute, and as it exists at  
12 the time that the relief is sought.

13 MR. GARDEPHE: The point we are trying to  
14 make, Your Honor, is that in light of Burlington, which  
15 obviously Congress had knowledge of when it enacted the  
16 1997 amendments, is it credible to believe that they  
17 would have restricted, limited, overruled the holding of  
18 Burlington, and never said a word about it?

19 JUSTICE BREYER: But they have (b). What  
20 about (b)?

21 See look, there are two situations.  
22 Situation (a) is that the school district thinks they  
23 can give them a good education, adequate. Then he  
24 should go and try it out, and if by the way the school  
25 district just can't do it, then (b). So what's wrong

1 with that scheme? Why doesn't that cover the  
2 waterfront?

3 MR. GARDEPHE: There is no evidence that  
4 Congress intended a tryout period. There is no  
5 reference --

6 JUSTICE BREYER: Just the language -- the  
7 language.

8 MR. GARDEPHE: It's not just the language.

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

12 MR. GARDEPHE: And it's the context which  
13 flows from Burlington, where the Congress was aware that  
14 this Court said very, very clearly --

15 JUSTICE BREYER: But my question was what  
16 about (b)? My question was not to argue with you. My  
17 question was, why doesn't (b) take care of the examples  
18 of absurd situations, law situations that you've  
19 mentioned?

20 MR. GARDEPHE: I'm sorry, I'm not  
21 understanding (b), Your Honor.

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

24 MR. GARDEPHE: Right.

25 JUSTICE BREYER: Where they just can't do

1 it then their job is to put the kid in a district --

2 MR. GARDEPHE: Right.

3 JUSTICE BREYER: -- in a place that can do  
4 it. And if their argument, which is like your case, is  
5 it they object to the facility, then have an argument  
6 about that, about whether it should be this private  
7 school or that private school. That's what it seems to  
8 me your case is about, and that's why I think (b).

9 MR. GARDEPHE: In a perfect world, Your  
10 Honor, school districts who are confronted with a  
11 situation would always make the decision to place the  
12 child into private school at public expense, but  
13 unfortunately there are disagreements between school  
14 districts and parents about what is appropriate, and  
15 then sometimes school districts don't do what they are  
16 supposed to do under the statute. And, in fact, the  
17 city's interpretation here would actually incentivize  
18 school districts not to provide services because if they  
19 never provided services they wouldn't be liable for the  
20 reimbursement. Again, this can't be what Congress  
21 intended.

22 I did want to back up my assertion about the  
23 "only if" language in --

24 JUSTICE BREYER: (b), that's my question,  
25 (b). It's not -- I thought you were right, until I



1 heard that. Then I suddenly hear no, that don't worry  
2 about it, judge, is what I heard, because in the  
3 situation where the school district has not provided  
4 there is another section of the statute that takes care  
5 of the child. That's what I want to hear your response  
6 to.

7 MR. GARDEPHE: Your Honor, that relies on  
8 the good faith of the school district. (b) relies on --  
9 (a)(10)(B) relies on the good faith of the school  
10 district to make a determination that they can't provide  
11 the services. That's not always going to happen. There  
12 may be -- there may be a disagreement about whether they  
13 can provide the services or not between the school  
14 district and the parents.

15 CHIEF JUSTICE ROBERTS: You have review  
16 before the impartial hearing examiner about that alleged  
17 bad faith, correct?

18 MR. GARDEPHE: Pardon me?

19 CHIEF JUSTICE ROBERTS: You have review  
20 before the Hearing Examiner of that alleged bad faith on  
21 the part of the school district?

22 MR. GARDEPHE: Yes, Your Honor. Obviously,  
23 the parents contend both that the plan is not  
24 appropriate, and that it wasn't offered in good faith.  
25 But I -- I did want to back up my assertion on the "only

1 if" language and -- and recite some statutory  
2 references. Because I believe it stems very clearly  
3 from the statute when you go through the provisions.

4 "Only if" or "only" is used in many, many  
5 places: 1415(f)(3)(E)(ii), 1414(a)(1)(C)ii,  
6 1411(b)(1)(A), 1401(19)(C), 1415(k)(4)(C) in the '98  
7 version of the statute, 1413 --

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

9 MR. GARDEPHE: The point is, Your Honor,  
10 that Congress knew how to say "only if." They didn't do  
11 that here, because they had no intention of creating an  
12 exclusive remedy.

13 And this Court said in Winkelman that courts  
14 should be cautious in reading into the statute an  
15 implicit limitation, and this limitation goes to what  
16 this Court also said in Winkelman is the primary mandate.

17 Finally, Your Honor --

18 CHIEF JUSTICE ROBERTS: And what was that  
19 primary mandate?

20 MR. GARDEPHE: The primary mandate was to  
21 provide or -- or make available a free and appropriate  
22 public education to every child with learning  
23 disabilities.

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

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

2 CHIEF JUSTICE ROBERTS: Neither of the  
3 options are not mainstream options?

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

6 The school district here said that the  
7 child's disabilities could not be addressed in a  
8 mainstream setting, so there is no mainstreaming issue  
9 here.

10 Finally, Your Honors, when Congress here  
11 chose to carve out populations of children, it did that  
12 in a very, very direct way. It did that in  
13 1412(a)(1)(B) where it lays out very limited exceptions  
14 for children who do not receive the guarantee with  
15 respect to a free and appropriate public education.

16 The limitation is very, very clear. It's  
17 very, very limited to certain age groups where it would  
18 be inconsistent with State law, or there is an  
19 incarcerated child. But there is no other place that  
20 Congress carved out populations of children other than  
21 in 1412(a)(1)(B), and there is no reason to believe  
22 that Congress intended in a backdoor fashion to carve  
23 out the populations of children, some of which were  
24 mentioned in the argument of my adversary.

25 Congress was aware --

1 CHIEF JUSTICE ROBERTS: You know, it -- I'm  
2 sorry.

3 MR. GARDEPHE: Your Honor, my time is up.  
4 Thank you very much.

5 CHIEF JUSTICE ROBERTS: So is mine. Thank  
6 you, Mr. Gardephe.

7 MR. GARDEPHE: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Garre.

9 ORAL ARGUMENT OF GREGORY G. GARRE,

10 ON BEHALF OF THE UNITED STATES,

11 AS AMICUS CURIAE,

12 SUPPORTING THE RESPONDENT

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

15 Petitioner takes the position that a school  
16 district may both refuse to provide a child with a  
17 disability with an appropriate public placement and  
18 refuse to pay for an appropriate private placement.

19 This Court has twice before considered and  
20 twice before unanimously rejected --

21 JUSTICE SCALIA: We didn't -- he hasn't  
22 said that. I don't think so. He hasn't  
23 said that.

24 MR. GARRE: I think he does in the sense,  
25 Your Honor, Justice Scalia, that the -- the school

1 district can take the position, even if the IEP that is  
2 proposed is inadequate and it's adjudicated to be  
3 inadequate, because the Schaffer presumption that was  
4 brought up earlier does not apply in this case. Because  
5 we are talking about situations where a parent can prove  
6 that the placement is inadequate. In that situation  
7 the parent cannot qualify for reimbursement unless it  
8 subjects his child to the inappropriate placement.

9 This Court rejected that rationale in clear  
10 and unambiguous terms in the Burlington case. Justice  
11 Rehnquist put it in that case --

12 JUSTICE SCALIA: Under a different statute.

13 MR. GARRE: Under a different statute but  
14 interpreting the fundamental requirement of the statute  
15 that all children with disabilities are entitled to a  
16 free and appropriate public education. And that  
17 requirement didn't change, and this is what Justice  
18 Rehnquist --

19 JUSTICE SCALIA: You are interpreting some  
20 very general language: "Shall grant such relief as the  
21 court determines is appropriate."

22 MR. GARRE: The -- the part of the  
23 Burlington case I'm referring to Justice Scalia is the  
24 interpretation of the fundamental requirement of  
25 providing a free and appropriate public education. And

1 what Justice Rehnquist said there -- and a unanimous  
2 Court agreed -- is forcing a parent to choose between  
3 subjecting his child to inadequate public placement or  
4 paying for private placement deprives the parent of his  
5 right to a free and appropriate public education.

6 CHIEF JUSTICE ROBERTS: So does the  
7 10-business-days notice requirement for people who are  
8 in public schools also violate Burlington, because for  
9 10 business days they are going to be subject to an  
10 inappropriate education?

11 MR. GARRE: The way the 10-business-days  
12 requirement works in practice is that all of the IEPs  
13 are proposed -- virtually all of them are proposed  
14 towards the end of the school year; and, typically, the  
15 parent is submitted the proposed IEP during the summer.  
16 And it's at that point that they have to make a decision  
17 whether to litigate that, put their child in a private  
18 school, or put them into a public school.

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

22 CHIEF JUSTICE ROBERTS: So in a situation  
23 where it's not in the summer, where they say, well,  
24 let's see how it works, and then they go to the public  
25 school, I would have thought your argument also would

1 say not -- they don't have to give notice of 10  
2 business days because in Burlington you said you don't  
3 -- you have to make available the tuition reimbursement.  
4 They passed a statute imposing a limitation on that, 10  
5 business days.

6 MR. GARRE: And we don't -- we don't dispute  
7 that --

8 CHIEF JUSTICE ROBERTS: You don't dispute  
9 that limitation. You dispute the other one, though,  
10 which says they have to have previously received  
11 special education services.

12 MR. GARRE: In order -- in order to qualify  
13 for reimbursement in that provision which is -- which is  
14 followed by provisions describing in more details the  
15 circumstances that courts ought to take into account in  
16 determining whether reimbursement is appropriate.

17 And if I can explain our -- the way that we  
18 read section 1412(a)(10)(C), the first part of that  
19 subsection is subsection (C)(i). That hasn't come up  
20 during the argument today. It is barely mentioned in  
21 Petitioner's brief. That subsection -- it is on page 5a  
22 of the appendix to the gray brief -- lays down the  
23 general rule -- the rule that tells school districts  
24 when they don't have to worry about paying  
25 reimbursement. And that is when they provide a free, a

1 public -- an appropriate public education in the first  
2 place.

3 That -- that is consistent with Burlington  
4 and Carter, and that lays down the general rule. School  
5 districts that provide an appropriate placement don't  
6 have to worry about reimbursement.

7 Subsection (C)(ii) then goes on to identify  
8 a particular fact pattern which also happens to be the  
9 most common situation in which reimbursement claims are  
10 presented to the courts. And Congress in that  
11 situation, along with subsections (3) and (4), provided  
12 the courts with more concrete guidance in determining  
13 how to exercise their equitable discretion in that  
14 situation.

15 The legislative history supports that  
16 interpretation. At pages 25 to 29 of the National  
17 Disability Rights Network brief they explain how  
18 Congress in the legislative history indicates that they  
19 were focused on case law applying this Court's decision  
20 in Burlington and Carter where the students were already  
21 enrolled in public school.

22 There is no indication whatsoever at all in  
23 the legislative record that anybody had in mind scaling  
24 back the fundamental mandate of the statute for school  
25 districts to provide a free and appropriate public



1 education for every child.

2 CHIEF JUSTICE ROBERTS: Anywhere? I thought  
3 Representative Castle said that this would result in  
4 easing the burden on the school districts to pay  
5 tuitions.

6 MR. GARRE: And it would, Your Honor,  
7 insofar as we are dealing with flushing out the  
8 requirements for students enrolled in public school.  
9 But there is no indication that Congress meant to scale  
10 back this Court's interpretation of the Act's  
11 fundamental mandate to provide a free and appropriate  
12 public education.

13 Petitioner's give-it-a-try rationale just  
14 doesn't fit to advance its argument before this Court.  
15 It doesn't fit to the extent that Petitioner is  
16 suggesting that you have to give public school a try,  
17 because it's clear that the -- their interpretation  
18 would apply to students in public school, as well as  
19 private school. It would apply to all students entering  
20 the special education system, including the student  
21 who's been enrolled in public school from kindergarten  
22 to 11th grade.

23 If he hasn't previously received  
24 special education or related services, then, under  
25 Petitioner's view, if he's offered a grossly inadequate

1 plan, he has to be subjected to that plan in order for  
2 his parents to qualify. And Petitioner's interpretation  
3 doesn't require the parents to give the proposed  
4 placement at issue a try. All it requires is that they  
5 show that they received previous special education  
6 services at some point in the past.

7           And that's the way it worked in Burlington;  
8 that's the way it worked in Carter; and that's the way  
9 it works in most of the cases. Students are already in  
10 the special education system, and they are proposed an  
11 IEP at some point typically during the summer. And the  
12 parents at that time say this IEP is inadequate for my  
13 child, and I want to --

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

17           MR. GARRE: If you have previously received  
18 special education services. But my point, Justice  
19 Scalia, is under Petitioner's -- the way they read the  
20 statute, you don't have to give the proposed placement  
21 at issue a try. So to the extent that this Court  
22 thinks, or Petitioner is arguing, that Congress wanted  
23 to make sure that we could better evaluate whether or  
24 not this proposed placement is going to work for this  
25 child. That doesn't fit with the statutory language

1 because in practice the students -- all they have to  
2 show is that they received services at some point in the  
3 past and if they have they can go into private school  
4 and seek reimbursement. It doesn't require a student to  
5 be subjected to the inadequate plan unless you happen to  
6 be the student who is enrolled in public school or  
7 enrolled in private school and you're entering the  
8 special education system. At that point then,  
9 Petitioner's interpretation requires the parents to  
10 enroll their child who has already been determined to  
11 have a learning disability in a plan that is inadequate,  
12 and we think that that is an untenable result.

13 CHIEF JUSTICE ROBERTS: But the whole point  
14 is you don't necessarily know it's inadequate until  
15 later in time. Right? The school board thinks it is  
16 adequate.

17 MR. GARRE: That's true, Your Honor. But  
18 two points about that -- first, parents who do enroll  
19 their children in private school do so at their own  
20 financial risk. And as Justice Scalia pointed out in  
21 his concurring and dissenting opinion in *Winkelman*,  
22 there are particular incentives against bringing  
23 frivolous reimbursement claims in this context.

24 JUSTICE SCALIA: Except those -- there are a  
25 lot of parents who are going to send their kids to

1 private school, no matter what. They are well-heeled  
2 and this is just an opportunity to have New York City  
3 pay \$30,000 of it.

4 MR. GARRE: And Justice Scalia -- two points  
5 on that, first the statute provides in clear and  
6 unambiguous terms that all children with disabilities  
7 are entitled to a free and appropriate education. The  
8 child find requirement, in section 1412 --

9 JUSTICE SCALIA: Even the child who would  
10 turn down the adequate education provided by the public  
11 schools. I don't think that was the intent of the  
12 statute.

13 MR. GARRE: And I agree with you on that,  
14 Justice Scalia, and that's why the way that school  
15 districts can avoid reimbursement is to offer an  
16 adequate placement in the first place. That's what  
17 section 1412(a)(10)(C)(i) provides. It lays down the  
18 general rule. School district today talks about we need  
19 to have collaboration, we need to have cooperation  
20 during the IEP process. They hold all the cards during  
21 that process. And if they want to avoid reimbursement  
22 they should do what this Court said in the Carter case,  
23 that's provide the student with a free appropriate  
24 public education.

25 JUSTICE SCALIA: If they don't have an

1 adequate placement, they should not have to pay the  
2 freight for people who would not be coming to public  
3 school any way. That's what this provision prevents.

4 MR. GARRE: I disagree with that, Your  
5 Honor. I think that's inconsistent with the statutory  
6 mandate to provide a free and appropriate education for  
7 all children with disabilities. I would say though, and  
8 I want to be clear on this -- even though parents of  
9 students in private school or in public school who  
10 haven't previously received special education or related  
11 services qualify for reimbursement under our  
12 interpretation of the statute. It doesn't mean that  
13 they are entitled to reimbursement. In the situations  
14 Your Honor may have in mind, where the parents genuinely  
15 aren't complying in good faith or genuinely aren't  
16 interested in sending their kids to public school, they  
17 only want to try to gain the system -- in those  
18 hypothetical situations, courts have equitable  
19 discretion to deny reimbursement claims, and they have  
20 denied those reimbursement claims.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 Mr. Garre. Mr. Koerner, you have three minutes  
23 remaining.

24 REBUTTAL ARGUMENT OF LEONARD J. KOERNER  
25 ON BEHALF OF THE PETITIONER

1           MR. KOERNER: Thank you, Mr. Chief Justice.  
2   First, this particular provision, as the Chief Justice  
3   noted, is called payment for private school placements  
4   where they don't have the consent of the local  
5   education. Any reasonable reading of that is that it's  
6   all encompassing. And any person who has to apply has  
7   to satisfy those provisions. Second, this statute did  
8   not overrule Burlington or Carter. In those cases the  
9   children were already receiving special education and  
10  related services. Now it could be in a future case  
11  someone would seek to extend those cases, but Congress  
12  has now spoken to make sure that Burlington and Carter  
13  go no further than you have previously held. Third,  
14  there is an assumption that the program is going to be  
15  defective from day one. But that's contrary to this  
16  Court's decision in Schaffer which presumes the good  
17  faith of the individuals who are proposing the program.  
18  And that is the heart of the entire case. Fourth, let's  
19  assume, for example, that someone can create an  
20  ambiguity in this case. Citing the Arlington case, in  
21  which you placed yourself in the position of the local  
22  education officer, when you look at this particular  
23  section -- and particularly C double 2 -- (ii) and  
24  (iii). Would you, in that position, understand that it  
25  doesn't really mean what it says, that previously

1 received special education services was only meant to  
2 cover the people already in the system and was not  
3 intended to cover people outside the system. That isn't  
4 what it says. More importantly, the ambiguity is  
5 clearly not obvious. So how would a local officer who  
6 has to understand whether or not to place the funds at  
7 risk know whether or not in complying with this  
8 particular situation, it was explicit or implicit?

9 JUSTICE ALITO: During the period between  
10 Burlington and the enactment of this statute, would you  
11 have any doubt about your potential obligation to  
12 reimburse a parent who had --

13 MR. KOENER: I didn't hear the first part.

14 JUSTICE ALITO: During the period between  
15 Burlington and the enactment of the statute, would the  
16 school board have had doubt about its potential  
17 liability for reimbursement, in a situation like this?

18 MR. KOERNER: I think so. I think, because  
19 of Burlington and Carter, where the children were  
20 already in the system, this would be the next step.  
21 Would we have presented to you the fact that you  
22 shouldn't expand it? Probably. Would I know what you  
23 would conclude? No, but the statute eliminated that  
24 entire discussion. It is clear. But again, there is a  
25 very big spending clause -- as I mentioned in my earlier

1 presentation, if it's so ambiguous that you can read out  
2 a specific provision, how can that ambiguity not redound  
3 to the benefit of the city through its local  
4 education --

5 JUSTICE GINSBURG: I thought that this  
6 statute was also premised on section 5 of the 14th  
7 Amendment, in which case it wouldn't have your spending  
8 clause notice argument.

9 MR. KOERNER: No, the -- this is just a  
10 grant provision, Your Honor. It's not premised on any  
11 constitutional provision. It's a grant where funds are  
12 provided to the local education district, and in return  
13 they agree to comply with all the conditions set forth  
14 in the IDEA. There are no constitutional limitations.  
15 Thank you very much.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 Mr. Koerner. The case is submitted.

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

20  
21  
22  
23  
24  
25



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