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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: This morning we will first hear argument in Case 08-305, Forest Grove School District v. T.A.

Mr. Feinerman.

ORAL ARGUMENT OF GARY S. FEINERMAN

ON BEHALF OF THE PETITIONER

MR. FEINERMAN: Thank you, Mr. Chief Justice, and may it please the Court:

The 1997 amendments to IDEA prohibit tuition reimbursement awards for students who are unilaterally placed in private school without first having received special education services from the public school district.

This is so under ordinary principles of statutory construction and particularly so under the Spending Clause clear notice rule.

Prior to 1997, IDEA did not expressly address tuition reimbursement for unilaterally placed students. In 1997, Congress added section 1412(a)(10)(C). In subsection (i), Congress provided that when the school district makes a free appropriate public education available, a FAPE, no reimbursement is allowed. And then in subsections (ii) through (iv),

1 Congress addressed situations where courts and hearing
2 officers may award tuition reimbursement and said that
3 reimbursement may be allowed where the school district
4 does not make a FAPE available to a student who
5 previously received special education services from the
6 public district. Congress said nothing --

7 JUSTICE GINSBURG: Mr. Feinerman, but the --
8 the first provision that you read, sub (i), says that
9 there will be no reimbursement if the agency has made a
10 free appropriate public education available to the child
11 and the parents elected to place the child in private
12 school. But that "if" -- if the agency made a free
13 appropriate public education -- and here, as I
14 understand it, the school district said that this child
15 was ineligible for special education.

16 MR. FEINERMAN: That's correct.

17 JUSTICE GINSBURG: So if the child was
18 entitled to a free appropriate public education and
19 didn't get it, then under this sub (i), wouldn't the
20 parents be entitled to tuition reimbursement?

21 MR. FEINERMAN: No. Subsection (i) covers
22 students who are provided a free appropriate public
23 education. Subsections (ii) through (iv) address the
24 other category of students --

25 JUSTICE GINSBURG: Well, that's your --

1 MR. FEINERMAN: -- those who are not --

2 JUSTICE GINSBURG: That's your construction.

3 But couldn't this be read to say no reimbursement if --

4 the word is "if" -- the agency, not -- so the

5 implication is if the agency did not make a free

6 appropriate public education available, then --

7 MR. FEINERMAN: That -- that might be the

8 implication if there weren't subsection (C)(ii) through

9 (C)(iv). So it's -- it's the T.A.'s argument and the

10 government's argument that (C)(i) sets forth the general

11 rule, but if -- if that were the way that -- that

12 Congress meant the statute to operate, it wouldn't have

13 had any reason to put in (C)(ii) through (C)(iv) because

14 we would already know from (C)(i) that tuition

15 reimbursement was a possibility for students who did not

16 receive -- previously receive special education services

17 from the public district.

18 Congress instead went on in -- in (C)(ii)

19 through (C)(iv) to address very specifically, in the

20 context of a comprehensive statutory scheme, when

21 tuition reimbursement would be available to students who

22 did not previously receive. And Congress specified,

23 after essentially being invited to do so in Burlington,

24 which of those students could get tuition reimbursement.

25 And the --

1 JUSTICE SCALIA: Of course, (ii) through
2 (iv) don't -- don't limit or contradict any explicit
3 requirement of -- of (i).

4 MR. FEINERMAN: Oh, no. It --

5 JUSTICE SCALIA: (i) is only at most a
6 negative implication, which -- which one would not draw
7 in light of (ii) through (iv), is what you are saying.

8 MR. FEINERMAN: Yes, that's exactly what I'm
9 saying. And -- and they deal with different sets of
10 students. In (i), the school district has made a FAPE
11 available; in (ii) through (iv), the school district has
12 not made a FAPE available. And no mention is made of
13 when a FAPE is not made available to a student who had
14 not previously received.

15 And under this Court's decision in
16 Arlington, because those students like T.A. who had not
17 previously received are not mentioned, yet Congress --

18 JUSTICE GINSBURG: Then -- then what happens
19 in a case which I think is like this one, where the
20 child doesn't receive special education because the
21 school has determined that the child is not eligible?
22 So the child isn't getting public education, and in the
23 parents' view, confirmed by experts, the child is in
24 need of special education, can't get it from the public
25 schools, because they declared the child ineligible.

1 What is such a parent to do?

2 MR. FEINERMAN: If -- if it's an incorrect
3 determination by the school district, the problem is
4 remedied rather quickly. There are very tight time
5 frames in IDEA --

6 JUSTICE SCALIA: Of course, the parents here
7 didn't -- didn't run off to a private school only after
8 the school district had found that their child didn't
9 require any special education, did they?

10 MR. FEINERMAN: That's correct.

11 JUSTICE SCALIA: They -- they put him in a
12 private school without even consulting the schools.

13 MR. FEINERMAN: Right. And then only after
14 the fact went to the school district and asked for --

15 JUSTICE SCALIA: Saying by the way, we can
16 get some money. And how much -- how much money are you
17 talking about imposing on the school district here?

18 MR. FEINERMAN: Well, it's -- the tuition is
19 \$5,200 a month.

20 JUSTICE SCALIA: A month?

21 MR. FEINERMAN: Yes, and then there's a
22 \$5,200 alumni services fee, a \$1,500 interview fee. But
23 let's --

24 JUSTICE SOUTER: Mr. Feinerman, can we go
25 back to the time frame again? I've just got a question

1 of fact. I should know this, but I don't. You -- you
2 said that if the -- if the parents and the school
3 district disagree, it can be remedied fairly quickly
4 because there is a fairly tight schedule set for the
5 administrative procedure.

6 What I don't remember, and -- and my
7 question is this: When the administrative steps have
8 been exhausted, if there is still disagreement, is there
9 any limit on the time in which the -- the judicial
10 appeal has to be resolved?

11 MR. FEINERMAN: No, there isn't. So --

12 JUSTICE SOUTER: Isn't that the -- isn't
13 that the kicker here? In other words, I -- I fully
14 understand your -- your textual argument. I -- I can
15 see its soundness as a possibility that is open to us
16 and, perhaps on the face of it, the -- the most likely
17 possibility. But there is a cost, and the cost, it
18 seems to me, is that once you get into the -- once you
19 get into appeals, this thing can go on for years, and
20 you can't wait years when -- when a kid is in this kind
21 of condition.

22 MR. FEINERMAN: That's correct, but there's
23 no need to wait years. Let's assume that parents
24 actually went through the process appropriately, unlike
25 T.A.'s parents.

1 JUSTICE GINSBURG: But if you can explain
2 what the process is --

3 MR. FEINERMAN: Yes.

4 JUSTICE GINSBURG: -- because Justice Scalia
5 said the parents just went away. The school at an
6 earlier point said this child was ineligible for special
7 education; isn't that so? I think --

8 MR. FEINERMAN: That's correct. That was in
9 2001, and the district judge, at --

10 JUSTICE GINSBURG: Yes.

11 MR. FEINERMAN: -- at page 39 of the
12 petition to the -- of the appendix to the petition, page
13 39, note 3, the district judge noted that the 2001
14 evaluation is an appropriate part of this case. But for
15 this -- for the parents who -- who try and get their
16 student -- get their student evaluated, the school
17 district says, "No, the child is ineligible." And then
18 the parents -- at that point, the timing kicks in. The
19 parents can ask for a due process hearing the next day.
20 Under the time periods that were in place when T.A.'s
21 case was going through --

22 JUSTICE GINSBURG: Is that hearing --

23 MR. FEINERMAN: -- the hearing officer --

24 JUSTICE GINSBURG: Is that hearing on
25 eligible or not, or is it on what the IEP should be?

1 MR. FEINERMAN: Well, it's --

2 JUSTICE GINSBURG: When the school said,
3 "not eligible", is there -- is that question resolved
4 first before we ever get to the IEP?

5 MR. FEINERMAN: I think, in a situation
6 where the school district finds the child ineligible and
7 there is an appeal, both the eligibility and the
8 appropriate placement are decided in front of the
9 hearing officer. And there was a 45-day time period at
10 the time T.A.'s case went through for the hearing
11 officer to make a decision. And then after that, it's
12 --

13 JUSTICE GINSBURG: Well, wouldn't the school
14 say, we -- we have no obligation to get up an IEP until
15 the question of eligibility is determined?

16 MR. FEINERMAN: I suppose if the school
17 district were to get a stay of the hearing officer's
18 decision pending appeal to the district court, but
19 that's not what happened here. What happened here is
20 that the hearing officer decided on June -- January 26,
21 2004, that T.A. was eligible. On February 19th, quicker
22 than the 30 days allowed, Forest Grove School District
23 proposed an IEP. That could have started as soon as
24 possible thereafter, as the regulations require.

25 So you are -- you are talking about a very

1 tight -- I understand the situation that you are
2 hypothesizing, Justice Ginsburg, but we are talking
3 about a very tight turnaround in -- in T.A.'s case,
4 75 days, which is a matter of weeks, not a matter of
5 years, as was the case in Burlington.

6 JUSTICE SOUTER: What happens when we get to
7 court?

8 MR. FEINERMAN: Excuse me?

9 JUSTICE SOUTER: What happens when we get to
10 court? Isn't that when it turns into a matter of years?

11 MR. FEINERMAN: It turns into a matter of
12 years, but in the interim the school district, Forest
13 Grove School District, while it was litigating in the
14 district court, Forest Grove School District offered an
15 IEP. And at that point T.A.'s parents could have tried
16 the IEP out, sent the child to receive services in the
17 public school district, and at that point --

18 JUSTICE GINSBURG: The IEP -- they did the
19 IEP after the hearing officer was finished?

20 MR. FEINERMAN: Yes. Less than 4 weeks
21 after the hearing officer was finished, Forest Grove
22 offered an IEP, and that's in the addendum to our reply
23 brief.

24 JUSTICE SOUTER: Okay. But I think we've
25 got to assume that Congress had some concern for the

1 parents who correctly say, this IEP is no good. It just
2 can't be done in the -- the school system, and -- and
3 the kid needs a -- a special school. In -- in that
4 case, maybe -- your answer may be that's the exceptional
5 case, and it shouldn't drive the -- the inferences to be
6 drawn from -- about congressional intent. But in that
7 case, if the -- if the district and the parents are at
8 good faith loggerheads, it can go on for a long, long
9 time, can't it?

10 MR. FEINERMAN: It can't go on for a long,
11 long time if the parents file for a due process hearing,
12 and then it could, if they get a good --

13 JUSTICE SOUTER: No, but they get the due
14 process hearing. The -- the ultimate result is the
15 school proposes an IEP. The parents, based on what
16 their experts tell them, say that isn't going to work,
17 and the parents say the only way, you know, we -- we can
18 educate this kid without his falling behind more is to
19 put him in a private school. At that point with --
20 assuming good faith here, it seems to me you get into
21 court, and it can go on for a long time if we accept
22 your -- your analysis of the text.

23 MR. FEINERMAN: But -- but all the parents
24 have to do in that situation is to give the IEP a try
25 and send their child to public school.

1 JUSTICE SOUTER: Yes, but doesn't that get
2 to the point of -- of something pretty formalistic? I
3 mean somebody in the brief said, you know, give him one
4 day under the IEP and -- and the -- if you win,
5 ultimately the check can be written. And that -- that
6 can't be right.

7 MR. FEINERMAN: I -- I don't think one day
8 could be right. The statute says -- it -- it expressly
9 says "who previously received special" -- "special
10 education services under the authority of a public
11 agency." It doesn't say how long it has to be.

12 JUSTICE SCALIA: Maybe -- I'm sorry.

13 CHIEF JUSTICE ROBERTS: I remember, perhaps
14 incorrectly, from the prior argument here that the
15 period that they had to try out the school plan was ten
16 days.

17 MR. FEINERMAN: That -- that's a
18 discretionary factor that courts and hearing officers
19 can -- it's not a hard and fast rule.

20 CHIEF JUSTICE ROBERTS: Not a hard and fast
21 rule.

22 MR. FEINERMAN: But I think it's probably
23 good as a general benchmark.

24 CHIEF JUSTICE ROBERTS: So is that -- is
25 that a -- a period that your client is prepared to

1 accept?

2 MR. FEINERMAN: Yes, so long as -- in the
3 ordinary case, ten days would -- it's in the statute, so
4 we have that textual indication. And it -- it will
5 provide the school district a chance to provide services
6 under the IEP.

7 And as this Court mentioned in -- in a prior
8 case, IEP's -- it's not an exact science and when you
9 look at it on a piece of paper it's hard to know whether
10 it's going to work or not. The way you find out whether
11 it works is where the rubber hits the road, and it could
12 be that the parents look at IEP and say, you know what?
13 I don't think this is going to work. But until you
14 actually give it a chance to work -- maybe the child
15 goes in and -- and works with the special education
16 teacher or the instructional assistant, and they really
17 hit it off.

18 JUSTICE ALITO: Do you think that's --
19 that's realistic? If the parents are convinced going in
20 that this is an inappropriate IEP and they send the
21 child to school for ten days under the IEP, at the end
22 of the ten days they are going to say, oh, well, we've
23 completely changed our mind; now we think this is a good
24 plan?

25 MR. FEINERMAN: It -- it is certainly

1 plausible in certain circumstances. It -- it may not
2 happen every time. It may not happen half the time.

3 JUSTICE GINSBURG: Isn't it also plausible
4 that the district will say, ten days is not a fair trial
5 for this system; this is a -- a child with severe
6 learning disabilities, and to give this IEP a fair
7 chance we need ten months?

8 MR. FEINERMAN: Well, at that point those
9 arguments can be made under (C)(iii) and (C)(iv) because
10 at that point the child would no -- the parents would no
11 longer be categorically barred from seeking tuition
12 reimbursement. And those are arguments that you can
13 make to the hearing officer.

14 JUSTICE SOUTER: But you are -- you are
15 basically saying that the -- that the only necessary
16 delay in order to satisfy a condition for eligibility,
17 if the parents otherwise prevail, is a ten-day delay.
18 That's -- that's basically your answer.

19 MR. FEINERMAN: I -- I don't think I'm
20 saying that. I'm saying --

21 JUSTICE SOUTER: Okay.

22 JUSTICE SCALIA: This school does not have
23 to come up with an IEP. It could -- it could tough it
24 out and say, we're going to rest on -- on our belief
25 that this child does not need any special education,

1 right? And unless the school proposes an IEP, the
2 parent cannot come within -- within subsection (ii) by
3 sending the kid to -- to get the special services.

4 MR. FEINERMAN: I think that assumes that
5 the school district is not going to abide by the order
6 of the independent hearing officer. And in this -- in
7 our case.

8 JUSTICE KENNEDY: What about before? The
9 whole point is that under the words of the statute as
10 you interpret it, there is a condition predicate that
11 has to be satisfied. So, to say that -- to answer by
12 saying, well, that assumes they won't obey the hearing
13 officer, what about before the hearing even takes place?

14 MR. FEINERMAN: Right. Before the hearing
15 takes place, there is 45 days, and then -- well, the
16 hearing -- there's a request for a due process hearing.
17 The hearing officer has 45 days, and then if the hearing
18 officer says this child is eligible, district, you must
19 propose an IEP, the district has 30 days after that.

20 JUSTICE ALITO: Well, what happens in the
21 case where --

22 JUSTICE SCALIA: Could the district appeal?
23 That's the end of the road? Can't the district say the
24 hearing officer is wrong?

25 MR. FEINERMAN: Absolutely, the district can

1 appeal.

2 JUSTICE SCALIA: And if it does, does it
3 have to take any action in the interim?

4 MR. FEINERMAN: I suppose it -- yes, unless
5 it gets a stay of the hearing officer's ruling.

6 JUSTICE SCALIA: Which is --

7 MR. FEINERMAN: But that didn't happen here,
8 and I am not aware of any cases where it did happen. In
9 this case there were two tracks. The hearing officer
10 said: T.A. is eligible; prepare an IEP. The district
11 said: I disagree; I'm going to appeal to the district
12 court.

13 But in the meantime, within less than 28
14 days, the district prepared an IEP and offered it to
15 T.A. And at that point T.A. could have accepted the
16 services, thus rendering him eligible for tuition
17 reimbursement.

18 JUSTICE STEVENS: I still don't understand
19 your answer to Justice Scalia. What if this -- this --
20 the school board just was -- was adamant that he is not
21 entitled to any special education? It just maintained
22 that position throughout the litigation?

23 MR. FEINERMAN: I think the assumption is
24 that the school district would not abide by a lawful
25 order of a hearing officer.

1 JUSTICE STEVENS: Well, they got a stay, and
2 they wanted to appeal it. And if they did, what
3 happens?

4 MR. FEINERMAN: In that situation there
5 would be no -- and I'm not aware of -- of that situation
6 ever happening.

7 JUSTICE STEVENS: But they don't have a
8 risk. Under your view of the law as I understand it,
9 they could -- they could take that position, and they
10 would never be -- never be liable.

11 MR. FEINERMAN: There would be a delay in --
12 in that situation, but I am not aware of any case where
13 that situation where a school district --

14 JUSTICE STEVENS: Well, but that's -- that's
15 the consequence of your -- your position, as I
16 understand it: That they could do that, and they would
17 not have any risk of liability.

18 MR. FEINERMAN: I -- I think that's a
19 hypothetical risk, because, again, I haven't seen any
20 situations where that's actually occurred.

21 JUSTICE KENNEDY: Well, but it's -- it's not
22 that hypothetical when there are -- when there are two
23 prongs. No. 1, the school has to agree first that the
24 -- with the diagnosis, which in this case they didn't
25 even do that. They -- they had a good faith

1 disagreement. Second, they have to have an adequate
2 IEP. So there -- there are two conditions.

3 MR. FEINERMAN: That's true, and I -- and I
4 think -- I think the answer to the question -- it's --
5 it's -- this is really a legislative question. Perhaps
6 Congress ought to further amend the statute to say in
7 those situations where a school district is being
8 obstreperous in refusing to comply with the hearing
9 officer's order, in those situations there is going to
10 be an exception to the exception. But it's not -- it's
11 not the statute that Congress wrote. Congress wrote --

12 JUSTICE STEVENS: Doesn't your
13 interpretation of the statute create an incentive for
14 the school board to just say, we'll never provide any
15 kind of special education; we will just tough it out?

16 MR. FEINERMAN: If -- if a school board --

17 JUSTICE STEVENS: Because they can't lose.
18 They can't be liable if they do that, if I understand
19 you correctly.

20 MR. FEINERMAN: I -- I suppose
21 hypothetically it does, but in -- in my -- my
22 understanding is that that just doesn't happen. And
23 under -- in Schaffer v. Weast and other cases, the --
24 the assumption --

25 JUSTICE SCALIA: Would you be surprised to

1 find a court decision which says that when the reason
2 that the plaintiff cannot comply with the requirement
3 that -- that he first be in a plan -- when the reason
4 is -- is the district's refusal to abide by an order to
5 -- to prepare a plan, that -- that subsection (ii) does
6 not apply?

7 MR. FEINERMAN: There -- there --

8 JUSTICE SCALIA: You can't profit by your
9 own -- by your own malfeasance.

10 MR. FEINERMAN: That's correct. And I -- I
11 don't think there could be reimbursement under
12 subsection (ii). Perhaps if there were a parallel
13 Rehabilitation Act claim under 504, that might be a
14 vehicle to get relief in a situation where the school
15 district is acting as horribly as being hypothesized,
16 but not under --

17 JUSTICE SCALIA: But you -- you don't think
18 -- you don't think a court could say, the only reason
19 these people could not comply with (ii) is that the
20 school district made it impossible by not complying with
21 the order to provide an IEP; and, therefore, they --
22 they can recover for the private placement?

23 MR. FEINERMAN: It -- it is conceivable that
24 -- that a court could hold that. A court could also --

25 JUSTICE SCALIA: I think it's more than

1 conceivable. I know a lot of courts that would hold
2 that.

3 JUSTICE SOUTER: But your position is that
4 there are basically two situations: One, the situation
5 in which there is an administrative order to do an IEP
6 and the school district says, no, we won't do it.
7 Millions for defense; we are going right into appeal,
8 and we are not going to prepare the IEP. In that
9 situation, as I understand it, you are saying, the
10 parents have no way of getting relief under the statute.

11 In the case in which there is an order for
12 the IEP and the school district prepares the IEP, even
13 though the parents think it will be inadequate, there in
14 fact is a ready remedy subject to two delays: One, the
15 time to prepare the IEP; and, two, ten days to give it a
16 try before the parents take the kid out of school.
17 That's basically the scheme that you are proposing that
18 the statute provides; is -- is that correct?

19 MR. FEINERMAN: That's the scheme that
20 Congress wrote in the statute, yes, under -- under
21 (C)(ii). And it has to work that way, because I think I
22 want to come back to a -- to a point that was aired in
23 the briefs, which is T.A.'s argument and the
24 government's argument rests upon the notion that section
25 1415(i)(2)(B)(iii) gives hearing officers the authority

1 to award tuition reimbursement. That provision doesn't
2 give hearing officers any authority to do anything, let
3 alone to award tuition reimbursement.

4 The only provision in IDEA that gives
5 hearing officers the authority to award tuition
6 reimbursement is 1412(a)(10)(C)(ii). So the -- the
7 statute doesn't work. The statute doesn't work, and the
8 Secretary's interpretation of 1415(i)(2)(B)(iii) is
9 implausible because it accords to hearing officers the
10 authority that it doesn't have.

11 There is another textual clue why the
12 statute works in the way that I am suggesting, and that
13 is in the '97 amendments in subsections (iii) and (iv)
14 Congress gave very explicit guidance to courts and
15 hearing officers as to the factors the court and hearing
16 officer should consider when deciding whether to award
17 tuition reimbursement to a student who previously
18 received special education services.

19 JUSTICE KENNEDY: The -- the problem that
20 the government and the parents have is they have to give
21 some work to (ii). Under -- under their view (ii)
22 doesn't seem to do much work.

23 And the problem with your position is that
24 it seems in a way formalistic and in some cases to
25 encourage intransigence. If we adopted a presumption

1 that the school district's diagnosis was correct and a
2 presumption that it's -- if -- if there was a diagnosis
3 of disability, that its individual education program was
4 adequate, that would, it seems to me, not be all you
5 wanted, but would ameliorate the position of the school
6 district. Would we have authority, do you think, to
7 adopt such a presumption?

8 MR. FEINERMAN: I think the -- the Court
9 already has adopted that presumption in Schaffer versus
10 Weast. School districts are presumed to be acting in
11 good faith.

12 JUSTICE KENNEDY: This -- this would be a
13 clear and convincing evidence presumption that the --
14 that the IEP is -- that the school district design is
15 right, that its diagnosis is right. That's not all you
16 -- that's not all you would be asking for.

17 MR. FEINERMAN: Well --

18 JUSTICE KENNEDY: But would we have
19 authority to do that if we were to reject your
20 interpretation of the statute?

21 MR. FEINERMAN: I suppose you would have the
22 authority to do that.

23 JUSTICE GINSBURG: How have -- how have
24 hearing officers been proceeding? I mean, here we had a
25 case that went to a hearing officer. There is no IEP

1 when the hearing officer begins the process. In the --
2 on the eligibility or not, do hearing officers give
3 deference to the school district and then -- so that's
4 eligibility. At the IEP stage, do they give deference
5 to the student?

6 MR. FEINERMAN: There is some deference
7 given to -- are you talking about the deference that the
8 district court gives to the hearing officer or the
9 hearing officer --

10 JUSTICE GINSBURG: No, the hearing officer.
11 The hearing officer is the first-level decisionmaker.
12 And the school board gives its reasons why it thinks the
13 child is ineligible; the parent, the reasons that the
14 child is eligible. That's the threshold determination.

15 On that threshold determination of
16 eligibility, do hearing officers presume in favor of the
17 school district?

18 MR. FEINERMAN: Not -- not in this case. In
19 this case under Oregon law at the time -- and this was a
20 pre-Schaffer decision -- the hearing officer put the
21 burden of proof on the school --

22 CHIEF JUSTICE ROBERTS: Counsel --

23 MR. FEINERMAN: -- on the question of
24 eligibility.

25 CHIEF JUSTICE ROBERTS: -- why isn't it the

1 case that the school's diagnosis is a related service
2 under the statutory provision? It seems to me to be a
3 very important service to the parents to know what the
4 school's diagnosis is.

5 MR. FEINERMAN: I -- I think that the
6 diagnosis is more in terms of eligibility. It's -- it's
7 under the -- under (b)(6), the hearing officer can
8 decide -- can consider issues of identification,
9 eligibility, and placement.

10 CHIEF JUSTICE ROBERTS: Well, I'm talking
11 about what the parents received. And they receive a
12 diagnosis, and the statute covers -- asks whether they
13 previously received special education and related
14 services. A diagnosis would seem to me to be a service
15 related to special education.

16 MR. FEINERMAN: I -- I don't think that's
17 the way it works. A diagnosis -- a finding of
18 eligibility or not is -- is not a diagnosis. It is just
19 an eligibility finding, and that's something that the
20 parents can take to a -- a due process hearing under
21 1415(f).

22 If there are no further questions, I will
23 reserve the remainder of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Salmons.

1 ORAL ARGUMENT OF DAVID B. SALMONS

2 ON BEHALF OF THE RESPONDENT

3 MR. SALMONS: That you, Mr. Chief Justice,
4 and may it please the Court:

5 The school district in this case improperly
6 denied T.A., a child with a disability who had always
7 been enrolled in public schools, access to all public
8 special education services. It asserts that because its
9 wrong eligibility determinations prevented T.A. from
10 receiving special education services, it is immune from
11 reimbursing T.A.'s parents the cost of obtaining those
12 services from another source.

13 CHIEF JUSTICE ROBERTS: What is wrong with
14 ten days? I mean it's -- it's a big expense you are
15 asking the school district to incur that will take away
16 funds from other programs. And all -- all they are
17 saying is give it a try for ten days, and if it doesn't
18 work out, then you can go.

19 MR. SALMONS: There -- I think there are
20 several problems with that reading of the statute, Your
21 Honor. First of all, the ten-day period that is
22 referenced in subsection (C)(iii) refers to the amount
23 of notice that a district needs to receive before a
24 child is removed from -- from the public school system.

25 CHIEF JUSTICE ROBERTS: Well, yes, the first

1 day -- the first day they say, look, we don't think this
2 is going to work out, so we are notifying you what we
3 are going to do. And they say, well, you've got to do
4 that in ten days, and they said, okay, ten days.

5 MR. SALMONS: But that's -- that's simply
6 not the way these things work as a general matter, and
7 let me just point out a few things about the normal
8 process of developing IEP's. And, again, here the child
9 never even got that far. But, typically, IEPs are
10 developed at the end of the -- of a school year for the
11 following year. And the parents at that point have a
12 period of time in which to decide to go along with that
13 plan or to give notice and then make alternative
14 arrangements.

15 And it's simply the -- I mean -- and that's
16 the way it works, because it's important for parents to
17 be able to get their child in an alternative program if
18 they decide that's what they want to do. And if you
19 wait until the school year has already started, those
20 may not be available. And the ten-day notice
21 requirement --

22 CHIEF JUSTICE ROBERTS: Well, I suppose
23 that's right, but once the law is clarified, schools
24 that specialize in -- in treating these kids would be
25 able -- they -- they would understand as well, and they

1 would understand you've got to -- the people who are
2 going to be sending -- most of the people who will be
3 sending their children to the school have to wait ten
4 days. And it seems to me that the actual practice on
5 the ground would work out pretty easily.

6 MR. SALMONS: But again, Your Honor, if you
7 focus on the terms of the statute, the -- even under
8 Petitioner's reading, the requirement would be to have
9 previously received special education services, not to
10 have tried out a particular plan.

11 It may be the case that the plan for the
12 upcoming year is -- is very different than the plan for
13 the prior year. Perhaps they have had another
14 assessment, and they had substantially changed --

15 CHIEF JUSTICE ROBERTS: Well, which way does
16 that cut? It seems to me that cuts the other way.

17 MR. SALMONS: Well, I --

18 CHIEF JUSTICE ROBERTS: Here's a -- here's a
19 new plan. We've worked on it. Here it is. At least
20 give it ten days -- two school week tries.

21 MR. SALMONS: I -- I think the way that
22 cuts, Your Honor, is -- is that that reading of what you
23 are positing, I guess, in this exchange, what Congress
24 might have had in mind, is not what they said in the
25 statute. They did not require parents to try out a

1 particular plan; just that at some point in time they
2 had previously received special education services.

3 CHIEF JUSTICE ROBERTS: Well, with respect,
4 counsel, what Congress provided is that the child must
5 have previously received special education and related
6 services.

7 MR. SALMONS: That's right.

8 CHIEF JUSTICE ROBERTS: So I think they did
9 provide that you've got to try it out at least for a
10 minimal period.

11 MR. SALMONS: But not the particular plan
12 that is the subject of the IEP, Your Honor. That --
13 that connection does not exist in the statute. And --
14 and we think it's counter to what Congress intended.

15 CHIEF JUSTICE ROBERTS: Okay. So what type
16 of special education services do you think do count as
17 having been previously received?

18 MR. SALMONS: Well -- well, if I -- if I
19 may, the way we read this provision -- and it's set
20 forth on pages 3 and 4 of the addendum to the blue
21 brief, and we think it's important that we read this as
22 a whole and in context -- is that subsection (C)(i)
23 provides the general rule to govern the payment of
24 private school tuition based on a unilateral placement
25 by the parents. And subsection (C)(i) creates the only

1 express limitation on the right to reimbursement, and it
2 does so only in instances where the school district has
3 provided a free and appropriate public education.

4 We think subsection (C)(ii), (C)(iii), and
5 (C)(iv) work together to govern the subset of cases that
6 Congress was most concerned about and that, in fact, are
7 the most common scenario in which these disputes have
8 arised.

9 JUSTICE SCALIA: Except that you are reading
10 (C)(i) to say something that it doesn't say. It -- it
11 just says you don't have to pay if the agency has made a
12 free appropriate public education available.

13 MR. SALMONS: That is what --

14 JUSTICE SCALIA: And you read it to say you
15 must pay whenever it hasn't made, and -- and it -- it
16 just doesn't say that. It -- it's a safe harbor for the
17 school district. It says, so long as you've made an
18 appropriate public education available, you can't be
19 liable for any -- any private school tuition.

20 Now, you want to expand that to say: And
21 whenever that condition doesn't exist, you are liable.
22 But it -- it really doesn't say that. And -- and the
23 later sections suggest that it -- it meant not to say
24 that.

25 MR. SALMONS: Well, that's where we part

1 company, Your Honor, because, in fact, that negative
2 inference that you refer to is precisely what
3 Petitioners attempt to read into subsection (C)(ii).
4 There is nothing in subsection (C)(ii) that provides any
5 restriction on the ability to obtain reimbursement. It
6 was written in permissive language.

7 CHIEF JUSTICE ROBERTS: Well, in reading --
8 in reading it that way, you are reading the phrase "who
9 previously received special education services" to mean
10 also who previously did not receive special education
11 services.

12 MR. SALMONS: No, Your Honor. We are simply
13 not reading that language "who previously received" to
14 be a condition precedent.

15 CHIEF JUSTICE ROBERTS: Yes, so it -- it
16 doesn't matter whether they previously received or not.

17 MR. SALMONS: It does matter, Your Honor,
18 because the provisions that follow in (C)(iii) and
19 (C)(iv) that guide the exercise of discretion in that
20 category of cases that were of concern to Congress only
21 apply to the cases that are defined in subsection
22 (C)(ii). And so in our reading the language "who
23 previously received" still serves an important purpose,
24 but it serves an identifying purpose for the limiting
25 factors provided in (C)(iii) and (C)(iv). It does not

1 serve --

2 CHIEF JUSTICE ROBERTS: So you are saying
3 Congress went to the trouble of spelling out this
4 elaborate provision in (C)(iii) and (ii) and all the
5 other things, but that was not the universe of the
6 situations in which there could be reimbursement. They
7 went to that trouble, but then at the end you want to
8 say, or some other provisions or some other
9 circumstances.

10 MR. SALMONS: Well, that's right. We think
11 that Congress was focused on a particular set of cases
12 where problems had arisen, and that's where you already
13 had a child in the process of receiving special
14 education, and you had parents who removed the child out
15 of that process without giving adequate notice, and
16 thereby short -- excuse me -- short-circuiting an
17 ongoing, collaborative relationship that Congress wanted
18 to preserve.

19 JUSTICE SCALIA: Yes, but -- but if -- if
20 you avoid that collaborative relationship entirely and
21 just run off to a prior -- to a private school right
22 away, you get reimbursement. Why?

23 MR. SALMONS: Well, you don't automatically
24 get reimbursement.

25 JUSTICE SCALIA: Why would Congress --

1 MR. SALMONS: You don't -- you don't
2 automatically get reimbursement, Your Honor. There is
3 just no categorical bar to seeking reimbursement. You
4 still have to show it's an appropriate remedy, which
5 always has been understood to require a showing that the
6 parents acted reasonably and in good faith, and that
7 they were sincere in their efforts to obtain services
8 from the school.

9 JUSTICE BREYER: What about more than that?

10 MR. SALMONS: The alternative --

11 JUSTICE BREYER: Why not -- I mean
12 suppose -- the part I don't understand in this statute,
13 which may not be relevant -- I would appreciate the
14 help. It seems to me that (a)(10)(A) and then (F) have
15 something to do with the parent who never goes to public
16 school. The child just goes to private schools to begin
17 with. And they get something. If they have -- if they
18 have a disability, this program pays them something,
19 right? What does it --

20 MR. SALMONS: Your Honor --

21 JUSTICE SCALIA: I'm not following this. I
22 don't know what section you are referring to.

23 JUSTICE BREYER: It's at the very beginning
24 of the addendum -- the addendum at page 1.

25 MR. SALMONS: This is what's -- Your Honor,

1 this is what's known as the child find provision.

2 JUSTICE BREYER: And what is that?

3 MR. SALMONS: What it provides is that
4 for -- let me just step back for a moment and -- and
5 remind the Court that the obligation on the State is to
6 -- is to ensure that children -- all children with
7 disabilities, regardless of whether they are in public
8 or private school, have the opportunity for a free
9 appropriate public education.

10 With respect to children in private school
11 who are not seeking a free appropriate public education
12 from the public school district, the only requirement
13 under the Act is that you seek them out; you find them;
14 you identify them; and that you report that to the
15 Department of Education; and that you get money for
16 those children. And for those children that are not
17 enrolled in public school, you have to use a percentage
18 of the funds you received from the Federal Government --

19 JUSTICE BREYER: All right. So, in other
20 words --

21 MR. SALMONS: -- to provide benefits that are
22 available to all children.

23 JUSTICE BREYER: -- a parent who has a
24 disabled child who never thinks about the public school
25 system still gets some money, but not as much, for the

1 disabled child?

2 MR. SALMONS: It's -- it's not money to the
3 parents, Your Honor.

4 JUSTICE BREYER: It's money to the school.

5 MR. SALMONS: It funds programs, for
6 example, speech therapy or something like that --

7 JUSTICE BREYER: To the school.

8 MR. SALMONS: -- that they would then allow
9 children in private school to -- to benefit from.

10 JUSTICE BREYER: And so it's money that goes
11 to the school for a program?

12 MR. SALMONS: It's not even necessarily
13 money that goes to the private school.

14 JUSTICE BREYER: All right. Money that the
15 children can get. I get it.

16 MR. SALMONS: It goes to the public schools,
17 and they provide services that they may make available
18 to children regardless of their placement.

19 JUSTICE BREYER: All right. Now, would it
20 then work -- what is -- would this system work under the
21 statute? You say, parents, if you are going to a -- a
22 disabled child, you simply go to a private school. You
23 get the services you just mentioned.

24 Now, if you put -- put the child in a public
25 school and they find a free appropriate public

1 education, fine, that's the end of that. You have to do
2 it. Now, if they don't give you a decent one, you can
3 -- you can send the child to a private school, but it
4 has -- you have to give a shot to the public school
5 system.

6 Now, that's what you don't want the
7 interpretation to be. You don't -- you are against
8 that. But -- but let's amend it a little.

9 MR. SALMONS: That's not -- I would not
10 describe it that way, Your Honor, if I -- I don't mean
11 to interrupt your question.

12 JUSTICE BREYER: Well, now, I am reading the
13 language. You may require the district to pay for
14 someone who has been enrolled in special services --

15 MR. SALMONS: I mean, again, just keep in
16 mind the facts of this case. This is a child who was in
17 the public school system for --

18 JUSTICE BREYER: You haven't heard my
19 amendment.

20 MR. SALMONS: Okay. I'm sorry, Your Honor.
21 Go ahead.

22 JUSTICE BREYER: My amendment is the norm
23 will be give the public school a shot, but there could
24 be circumstances: You are getting the run-around; there
25 is need to put that child in a public school now; in

1 other words, special equitable circumstances that make
2 it reasonable for the parent not to give the school a
3 shot, though that's the norm. And in those unusual
4 circumstances there would remain grounds for equitable
5 relief.

6 What about that as an overall interpretation
7 of the statute, which has several parts to it?

8 MR. SALMONS: I would submit that the way we
9 read the statute, Your Honor, in fact, does precisely
10 that. Because the school district -- just again, take
11 this case --

12 JUSTICE BREYER: You have to be willing to
13 accept that it's an unusual situation, though it may
14 well exist, that the judge is going to reimburse the
15 parent where that parent didn't give the public school a
16 shot. They will have to show there is a good reason for
17 not doing that.

18 MR. SALMONS: The -- the difficulty I
19 have --

20 JUSTICE BREYER: Is that all right with you
21 or not?

22 MR. SALMONS: Well, the difficulty I have
23 with your question, Your Honor, is that the school
24 district always has a shot under the Act. In this case
25 the school district assessed the child in 2001 and again

1 in 2003, and both times it erroneously concluded
2 that the child --

3 JUSTICE BREYER: Well, you are simply saying
4 that it was reasonable for the parent here. I'm not
5 asking that question.

6 MR. SALMONS: No, it is not just that it's
7 reasonable, but that in the process of assessing the
8 child, in developing an individual education plan that
9 is appropriate for that child, that is precisely the
10 shot that the statute gives the public school system to
11 get it right. What the statute does --

12 JUSTICE GINSBURG: Mr. Salmons, I thought
13 that the -- the courts, the district court, will not
14 provide for tuition reimbursement unless at least two
15 things are shown. One is that the school district did
16 not provide an adequate education for this child; and,
17 two, that the private school did. And then there are
18 equitable considerations.

19 MR. SALMONS: That is absolutely correct.

20 JUSTICE GINSBURG: So you must find both,
21 not just that the private school was a good place, but
22 that the school district did not offer an adequate
23 education for the child.

24 MR. SALMONS: That is -- that is correct.
25 That is what this Court held in Carter. That's what the

1 regulations say. I would note that there is nothing in
2 the text of the statute and the provisions that
3 Petitioner relies on, (C)(ii) for example, that makes it
4 a statutory requirement to show that the private
5 placement is reasonable as a -- as a condition precedent
6 to obtain tuition reimbursement. But both sides concede
7 that that's required, even though it's not in the
8 statute.

9 JUSTICE GINSBURG: But procedurally we -- we
10 know that there is a provision addressed to a court for
11 equitable relief. The question was put before: Where
12 does the hearing officer get the authority to order
13 tuition reimbursement? Because the statute on which you
14 rely for the court speaks only to the court's authority.

15 MR. SALMONS: Thank you, Your Honor. I am
16 -- I am happy to answer that question. Petitioner makes
17 this a centerpiece of their reply brief, and I think
18 they just misread the statute. And, again, keep in mind
19 that these amendments in 1997 were written against the
20 backdrop of this longstanding statute and this Court's
21 interpretations of it. The -- the most direct place
22 where the statute provides hearing officers the
23 authority to address reimbursement claims and to award
24 reimbursement -- and this is on page 9 of the addendum
25 in the blue brief -- is 1415(b)(6).

1 This has always been in the statute, and it
2 states that the parents must be provided an opportunity
3 to present complaints with respect to "any matter
4 relating to the identification, evaluation, or
5 educational placement of the child, or the provision of
6 a free appropriate public education to such child."

7 That is -- again, that has always been
8 understood to include the right to seek reimbursement
9 before the hearing officer. And this Court in
10 Burlington cited legislative history from the 1975 Act
11 that noted that hearing officers could award
12 reimbursement and address such claims in concluding that
13 it was part of the appropriate relief that courts ought
14 to be able to have under 1415.

15 JUSTICE SCALIA: Are -- are any of these
16 other procedures -- I took these to be procedures that
17 have to be provided by the school district, not -- not
18 by the hearing officer.

19 MR. SALMONS: These are -- these are
20 required -- this whole section, Your Honor, 1412, is
21 entitled "State Eligibility," and these are all
22 requirements that States have to provide for process in
23 order to obtain funds under the Act. And so it is a
24 requirement that States provide hearing officers that
25 have the ability to award reimbursement --

1 JUSTICE SCALIA: But it doesn't say hearing
2 officers. "An opportunity to present complaints with
3 respect to any matter relating to the identification" --

4 MR. SALMONS: Those complaints --

5 JUSTICE SCALIA: -- to present the complaint
6 to the -- to the principal.

7 MR. SALMONS: No, Your Honor. This is a
8 reference to the due process complaint notice that is
9 referenced elsewhere in the statute. I believe
10 Petitioner would agree with me that that's what this
11 references.

12 JUSTICE SOUTER: Well, but the reference is
13 to a right to be heard on certain subjects. It doesn't
14 say anything about authorizing a particular individual
15 or officer within a school system to award relief. The
16 problem is, it says you can be heard. It doesn't say
17 who will tell you or who will tell the school district
18 to write a check.

19 MR. SALMONS: Right. But keep in mind that
20 the judicial review process that the statute provides --
21 and this is at page 17 of the addendum. The right to
22 file a Federal action is limited to those matters that
23 are raised in the due process complaint notice filed
24 before the hearing officer. This is an exhaustion
25 requirement.

1 JUSTICE SOUTER: But you -- you can raise
2 the -- you can raise the -- the claim to eligibility to
3 a -- a private education here without the hearing
4 officer having the authority to order the school
5 district to provide it.

6 MR. SALMONS: That has not been the
7 interpretation of this Act, Your Honor, and I would
8 refer the Court to 34 CFR 300.148(b), which is a
9 regulation that states that hearing officers can award
10 reimbursement, and that has been around since the mid-
11 1980s. My point is that it is -- the Congress enacted
12 these amendments in 1997 against a subtle understanding
13 of how this Act works. And it has always been
14 understood that hearing officers can award
15 reimbursement. There was no need to provide in the '97
16 amendments that hearing officers can also award relief.

17 And, again, because it's an -- it's an
18 exhaustion requirement and the judicial review provision
19 only relates to the things that you have raised before
20 the hearing officer, it makes no sense to say a court
21 can award reimbursement but you can't get reimbursement
22 from the hearing officer. That's the subject of the
23 review of the Federal court action.

24 JUSTICE SOUTER: No, but it -- it might make
25 senses to say that the hearing officer can determine

1 eligibility. It is then up to the school to pay it, and
2 if the school does not pay it, then you have got to go
3 into court and get an order.

4 MR. SALMONS: In fact, Your Honor, the
5 hearing officers have always been permitted to award
6 reimbursement, as occurred in this case, and then the
7 school district can decide either to pay that or to seek
8 review if they -- if they so choose.

9 JUSTICE SCALIA: And it might make also
10 sense to say that if the hearing officer has no
11 authority to award a certain type of relief, neither
12 does a court, under that general provision that --

13 MR. SALMONS: But, of course, this Court in
14 Burlington held the court did have that authority, and
15 it relied on the fact that it has always been understood
16 that hearing officers have that authority in reaching
17 that conclusion in Burlington.

18 JUSTICE SCALIA: That's right, but -- but
19 with these new provisions, if the hearing officer
20 doesn't have the authority to award the kind of relief
21 that was awarded here, then the court wouldn't, either.

22 MR. SALMONS: Well, I -- with respect, I
23 think there is nothing in the '97 amendments --

24 JUSTICE SCALIA: Well, you agree they go, as
25 we say, in pari passu, that --

1 MR. SALMONS: Well, I do think that it
2 doesn't make sense to say --

3 JUSTICE SCALIA: -- that -- that whatever
4 the hearing officer can do, the court can do.

5 MR. SALMONS: I think generally --

6 JUSTICE SCALIA: And whatever he can't do,
7 the court can't do.

8 MR. SALMONS: I think they ought to be read
9 together, yes, Your Honor. But I think they ought to be
10 read to provide for the authority to provide tuition
11 reimbursement.

12 One statutory point I would like to make,
13 Your Honor, is that under Petitioner's reading of the
14 Act, if you read (C)(ii) to be -- that -- that reference
15 to "who previously received" to be an absolute
16 precondition, then I -- I think it's the case that
17 (C)(i) has no meaning whatsoever. It does no work under
18 the Act at all. Whereas, on our reading of the statute,
19 (C)(ii) still does work. It's not a precondition. It
20 doesn't do the work that Petitioner suggests. It does a
21 more limited -- serve a more limited function. But it
22 still serves that identifying role for the factors
23 Congress wanted applied when it was focused on how to
24 preserve relationships, ongoing collaborative
25 relationships through the IEP process that warrant

1 preservation.

2 One other point I would make, Your Honor --
3 and, Justice Scalia, you made reference to this
4 principle of equity: That you -- you ought not be
5 allowed to prevent something from happening and then
6 come into court and claim, "Ha, ha, they didn't satisfy
7 a condition." And that was a point that was made by
8 Justice Cardozo in the R.H. Stearns case that we rely
9 on, where he said he who prevents a thing from being
10 done may not avail himself of the nonperformance which
11 he himself has occasioned.

12 That's precisely what happened here. As
13 this case comes to this Court, it is established that
14 this is a child who was entitled to receive special
15 education services back in 2001. The only reason he did
16 not receive those services is because the district
17 violated its statutory duties to provide --

18 JUSTICE GINSBURG: I thought in 2001 even
19 the parents agreed that he didn't -- that they didn't
20 want to put him in special education.

21 MR. SALMONS: The parents agreed, Your
22 Honor, that he did not qualify for the learning
23 disabilities that they tested him for. But they had an
24 obligation under the Act -- and this was found by the
25 hearing officer and the -- the complaint that was filed

1 was filed within the two-year limitation to challenge
2 that 2001 determination, and that that was there, and
3 they had an obligation to test him for those other
4 health impairments at that time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. SALMONS: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Miller.

8 ORAL ARGUMENT OF ERIC D. MILLER

9 ON BEHALF OF THE UNITED STATES,

10 AS AMICUS CURIAE,

11 SUPPORTING THE RESPONDENT

12 MR. MILLER: Mr. Chief Justice, and may it
13 please the Court:

14 Had Petitioner provided T.A. a special
15 education that was later determined to be inadequate,
16 there would be no question that the district court would
17 have authority and discretion to determine whether an
18 award of private school tuition reimbursement was
19 appropriate. Petitioner's view is that because it
20 offered no special education at all, it was therefore
21 categorically immune from such an award. That position
22 is not supported by the statute, and it's inconsistent
23 with the reasonable interpretation of the Secretary of
24 Education.

25 There is no basis for reading the statute to

1 create what effectively would be an incentive for
2 districts to stonewall and to say that if they don't --

3 CHIEF JUSTICE ROBERTS: Well, for 10 days,
4 right? Even assuming the bad faith that you are
5 ascribing to the school district, it would only work for
6 10 days, right?

7 MR. MILLER: Well --

8 CHIEF JUSTICE ROBERTS: And then they would
9 have -- then they would have previously received special
10 education services, and they could proceed.

11 MR. MILLER: We were not assuming bad faith.
12 Our -- our point --

13 CHIEF JUSTICE ROBERTS: "Stonewall" sounds
14 to me like bad faith.

15 MR. MILLER: Well, there --

16 CHIEF JUSTICE ROBERTS: That was the word
17 you used.

18 MR. MILLER: I -- Congress -- there is no
19 reason to suppose that Congress would want to create an
20 incentive or to reward districts that do do that. But
21 the 10-day --

22 JUSTICE GINSBURG: But we are talking about
23 two different things, I think. The Chief was talking
24 about putting the child in special education and keeping
25 the child there for 10 days. You are talking about the

1 school district that says, no special education; this
2 child is not eligible.

3 MR. MILLER: That is absolutely right. So
4 in a case like this, there is -- there is nothing to try
5 for 10 days because the district has found him not
6 eligible. They haven't offered any special education or
7 related services. Now, to the extent --

8 CHIEF JUSTICE ROBERTS: Well, let's move to
9 the situation where they have a plan that the parents
10 regard as inadequate.

11 MR. MILLER: In -- in the case --

12 CHIEF JUSTICE ROBERTS: In that situation
13 all they would have to do is to have the child try the
14 plan for 10 days.

15 MR. MILLER: Well, if the -- you know, to
16 the extent that there is an interest in having parents
17 try out the plan, Petitioner's reading of the statute is
18 very poorly tailored to that objective, because it
19 doesn't require that they try the specific plan that's
20 being proposed for 10 days.

21 Even under Petitioner's reading, the statute
22 simply would require that the child at some point have
23 received some special education and related services.
24 It wouldn't have to be under the plan that was being
25 tried. And --

1 JUSTICE SOUTER: But the odds are that it
2 would be under the plan. I mean, what -- what you say
3 is theoretically possible, but in the real world it's
4 probably going to be under the plan, isn't it?

5 MR. MILLER: Well, not necessarily because
6 there's a new plan at least once a year under the
7 statute, and they are typically proposed at the end of a
8 school year for the start of the new school year. So
9 there wouldn't be, on Petitioner's reading, a
10 requirement that you show up for the first 10 days of
11 the new year. You would just have to give notice after
12 the IEP is proposed in May or June. You give your 10
13 days' notice. You receive special education services
14 under the old plan, under the previous year. And under
15 -- on Petitioner's reading, the statute would be no
16 barrier to reimbursement there.

17 Now, of course, the district courts do have
18 considerable equitable discretion, and we're not
19 suggesting that reimbursement would be mandatory in that
20 case or -- or in any case. And --

21 JUSTICE GINSBURG: And the parents -- I
22 think you agree that the parents would have the burden
23 of showing both that the school did not provide an
24 adequate education, an appropriate education, and that
25 the private school does.

1 MR. MILLER: That's -- that's absolutely
2 right. And they would also, in our view, have to show
3 the district court that they had genuinely cooperated
4 with the public school in -- in making their child
5 available for evaluation --

6 JUSTICE KENNEDY: Suppose we thought it were
7 sensible to add to that burden the further rule that the
8 school district is presumed to have made the correct
9 diagnosis; and if there is a plan in that kind of case,
10 that the -- that the plan was adequate; and that the
11 parent would have to show by clear and convincing
12 evidence that this is not so, rather than just inventing
13 it and pulling it out of the sky.

14 Is -- is there some authority in the statute
15 that would give us warrant to do that? Or is there
16 some -- any cases that would give us warrant to
17 establish a presumption of that kind in order to
18 recognize the longstanding expertise of the States in
19 this matter and in order to allow section (ii) to do
20 some work?

21 MR. MILLER: Well, a - a clear and
22 convincing evidence presumption would be difficult to
23 reconcile, I think, with 1415(i)(2)(C)(iii), which says
24 that the district court decision should be based on the
25 preponderance of the evidence. But it is certainly

1 within the district court's discretion and it would be
2 within this Court's discretion, I think, to prescribe
3 principles to -- to guide the exercise of the district
4 courts' equitable discretion.

5 JUSTICE GINSBURG: But the district court
6 doesn't get into the act until the hearing officer is
7 done.

8 MR. MILLER: Right.

9 JUSTICE GINSBURG: And so it would be odd to
10 have a presumption applicable in court that isn't also
11 applicable to the hearing officer, because the court is
12 reviewing a decision by the hearing officer.

13 MR. MILLER: Right. Well, the -- I think
14 that the standard in -- in both stages of the proceeding
15 is by a preponderance of the evidence. And the -- and
16 the parents, as the party challenging what the school
17 has done, have the burden. But at both stages, it would
18 be appropriate to consider whether they were genuinely
19 seeking a free appropriate public education. And I
20 think it would be entirely appropriate and consistent
21 with the preponderance standard for the hearing officer
22 or the court to take due account of the fact that the
23 school district has some expertise and -- and to give
24 some deference to what it has proposed.

25 JUSTICE SCALIA: (i)(2) -- (i)(2)(B) --

1 JUSTICE GINSBURG: Is the department --

2 JUSTICE SCALIA: (i)(2)(B)(iii)?

3 MR. MILLER: Oh, it --

4 JUSTICE SCALIA: It is (i)(2)(B) --

5 MR. MILLER: It's been amended in 2004.

6 There's no change in the language, but it's now --

7 JUSTICE SCALIA: It's now (C)?

8 MR. MILLER: (C).

9 JUSTICE SCALIA: (C)(iii).

10 JUSTICE GINSBURG: Does the -- does the
11 department have a regulation that says the hearing
12 officer may order the private school -- the parents to
13 be reimbursed for private school tuition? Because it's
14 not in the statute.

15 MR. MILLER: 34 C.F.R. 300.148(b) says that
16 disagreements between the parents and a public agency
17 regarding the availability of a program appropriate for
18 the child and the question of financial reimbursement
19 are subject to the due process hearing procedures. So,
20 yes, that regulation gives hearing officers the
21 authority to award reimbursement, as indeed the hearing
22 officer had done Burlington.

23 Burlington was a case where the
24 reimbursement award was made in the first instance by a
25 hearing officer, and, of course, the Court held that

1 that was appropriate. And --

2 CHIEF JUSTICE ROBERTS: Counsel, this is
3 Spending Clause legislation. Do you have any rough idea
4 of how much of the obligation incurred by the States is
5 reimbursed by the Federal Government, what percentage?

6 MR. MILLER: I think of the -- the
7 additional costs of treating special education children
8 above those of -- of educating other children, I think
9 approximately 10 percent, 10 to 12 percent, is
10 reimbursed by the Federal Government.

11 CHIEF JUSTICE ROBERTS: So if this
12 interpretation vastly expands the liability of school
13 districts in that particular area, isn't that a
14 consideration we should consider? Since they accept --
15 the States accept 10 percent of the funds to incur these
16 obligations and then you are expanding the obligation in
17 a way that we may at least find is ambiguous, isn't that
18 a pertinent factor?

19 MR. MILLER: There is no basis for supposing
20 that there would be a vast expansion of liability, and
21 there are some statistics on this in the National
22 Disability Rights Network's amicus brief at pages 13 and
23 14. Of about 6 million children in the United States
24 who are receiving special education, barely 1 percent of
25 those are in private placements, and the vast majority

1 of those are agreed-upon placements between school
2 districts and the parents.

3 So this sort of unilateral private placement
4 is quite rare, because, first, the parents do it at
5 their own financial risk. And so there's a real barrier
6 to parents doing it, because they have to be pretty sure
7 that they are right and that they are going to be able
8 to meet the demanding standards satisfying the district
9 court that an award of tuition reimbursement is
10 appropriate. And if they don't do that --

11 JUSTICE KENNEDY: If the --

12 MR. MILLER: -- they're going to be --

13 JUSTICE KENNEDY: If the parents are
14 entitled and the child is entitled to the special
15 education and the school doesn't give it, and there are
16 two schools, private schools, in the community, A and B.
17 A charges, what is it, \$5,200 a month tuition; the other
18 is considerably less. And they both have adequate
19 programs for the child. Is the hearing examiner
20 entitled to reimburse only for the lower amount, or is
21 the parent entitled to send the child to the -- to the
22 more expensive school?

23 MR. MILLER: No. What this Court said in
24 Carter is that it's appropriate for the hearing officer
25 to take into account whether the cost of the private

1 education was unreasonable. So in a situation where you
2 had two basically equivalent schools, that -- that would
3 certainly be an appropriate thing for the hearing
4 officer to take into account in limiting or denying
5 reimbursement.

6 JUSTICE GINSBURG: Or there could be, I
7 suppose, an order that any tuition in excess of a
8 certain amount would be the parents' responsibility.

9 MR. MILLER: That's right. That -- that
10 would be within the discretion of the hearing officer.

11 In a case like this where you have a
12 residential placement and the residential component of
13 it -- there has been no suggestion that that was -- had
14 some educational purpose or was part of providing an
15 appropriate education, it would also be appropriate for
16 the court to decide to disaggregate that and say, we are
17 only paying for the -- the school district only has to
18 pay for the educational component.

19 JUSTICE SCALIA: Let -- let me be clear. Am
20 I correct that under -- under the theory of the statute
21 that you are supporting, it would be possible for a
22 parent, without first consulting with the school at all,
23 to put the child in a private school and then later to
24 request public school services; and when it is -- when
25 they are denied or they are inadequate, all that public

1 school -- private school tuition would -- would be
2 reimbursable?

3 MR. MILLER: There would be no categorical
4 bar in the statute in that situation, but a district
5 court confronted with those facts would most likely
6 conclude that the parents had not genuinely sought a
7 free appropriate public education and hadn't
8 appropriately cooperated with the school district.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. MILLER: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Feinerman, you
12 have 4 minutes remaining.

13 REBUTTAL ARGUMENT OF GARY S. FEINERMAN

14 ON BEHALF OF THE PETITIONER

15 MR. FEINERMAN: Thank you, Mr. Chief
16 Justice.

17 I would like to address the two provisions
18 that we have heard today for the first time. T.A. and
19 the government are pressing their argument that tuition
20 reimbursement is permitted in the unilateral placement
21 context to students who had not previously received.
22 The regulation 300.148 -- counsel referenced subsection
23 (b), Disagreements about FAPE, and it does say that the
24 hearing officer can consider the question of financial
25 reimbursement. And the very next subsection, (c), is

1 entitled "Reimbursement for Private School Placement,"
2 and that provision speaks only to students who
3 previously received special education and related
4 services under the authority of a public agency.

5 JUSTICE GINSBURG: Where are you reading
6 this?

7 MR. FEINERMAN: This isn't -- this -- this
8 regulation was brought up at argument. It's not in any
9 of the addendums, but I -- I would direct the Court's
10 attention to subsection (c) of 300.148.

11 In terms of the -- the provision that T.A.'s
12 lawyer addressed, 1415(b)(6), no argument -- there's no
13 argument in the briefs that 1415(b)(6) gives hearing
14 officers the authority to grant tuition reimbursement in
15 these circumstances. The Department of Education did
16 not rely on this provision when articulating its
17 commentary that tuition reimbursement is still permitted
18 under these circumstances. The Secretary of Education
19 relied upon the 1415(i)(2)(B)(iii) provision. That, of
20 course, refers only to courts.

21 And even if the argument were properly
22 presented, which it isn't, it would be subject to the
23 same dynamic that's in play with respect to
24 1412(a)(10)(C)(ii). You have a very general provision
25 giving hearing officers authority. Congress got

1 specific in 1997. There's a heading -- enacted a
2 provision under the heading "Reimbursement for Private
3 School Placement." I -- I think that clearly indicates
4 that's where Congress intended to repose the authority
5 of hearing officers to order tuition reimbursement to
6 unilaterally placed children.

7 We also have the -- and -- and it just
8 doesn't work to say that 1415(i)(2)(B)(iii) somehow
9 gives hearing officers authority. Even if it were
10 interpreted that way prior to 1997, in 1997 Congress
11 enacted the statute that expressly referenced hearing
12 officers and courts and allowed both of them to give
13 tuition reimbursement. So even if 1415 were interpreted
14 prior to '97 -- incorrectly, we would submit -- to give
15 hearing officers that authority, after 1997 where
16 Congress actually went to the trouble of saying hearing
17 officers and courts can give tuition reimbursement in
18 certain circumstances, that -- that prior
19 interpretation, whatever its merits back then, no longer
20 is valid.

21 JUSTICE BREYER: Well, what happens if the
22 -- what happens if the hearing officer can't, but why
23 couldn't the court? I mean, they see an unusual
24 situation. The parents were justified, and it doesn't
25 say there are no circumstances other than -- where you

1 couldn't -- where they may not pay. So the judge says,
2 I think this is a situation where it is -- it is
3 equitable to pay the -- the reimbursement.

4 MR. FEINERMAN: That's correct, but --

5 JUSTICE BREYER: Why not? What -- what says
6 you can't do that, other than your basic point about the
7 "may require"?

8 MR. FEINERMAN: The Spending Clause, the
9 headings that Congress used --

10 JUSTICE BREYER: The Spending Clause. But,
11 anyway, the regs don't say anything about that.

12 MR. FEINERMAN: At any rate -- and it's --
13 it's a system that doesn't make any sense, because for
14 children who did previously receive and go to the
15 hearing officer to challenge either an eligibility
16 determination or an improper IEP, the hearing officer
17 could award tuition reimbursement. But for children who
18 didn't previously receive and then they went in front of
19 the hearing officer, they would have to -- I don't know
20 what the word would be -- appeal to the district court
21 in order to get tuition reimbursement. Is it
22 conceivable that that -- that could be the system --

23 JUSTICE BREYER: You are saying the statute
24 says the hearing officer can't do that, no matter what.
25 That's a separate argument.

1 MR. FEINERMAN: That's correct, but I'm
2 saying if --

3 JUSTICE BREYER: All right.

4 MR. FEINERMAN: -- if T.A. is right, that
5 would be the system.

6 Thank you very much.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 11:16 a.m., the case in the
10 above-entitled matter was submitted.)

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