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IDEA, Private Schools, Tuition Reimbursement, and the Supreme Court: Who Would Pay for That?

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By Shawn C. Swisher

I. INTRODUCTION

The U.S. Supreme Court recently granted certiorari on a case that could allow parents to make unilateral decisions that would have devastating financial consequences for public schools. The 9th Circuit ruled in Forest Grove School District v. T.A. that a parent could enroll a special education student in private school placement and be eligible for tuition reimbursement, without having availed the student to the public school system.

The Forest Grove decision, which is will be heard by the U.S. Supreme Court later this spring followed a line of reasoning outlined in a recent 2nd Circuit decision. In Bd. of Educ. of N.Y. v. Tom F., the Court deadlocked and affirmed, per curiam, a 2nd Circuit decision that allows parents of special education students who have never availed themselves to the public school system to receive tuition reimbursement. While this decision only binds the 2nd Circuit, the 9th Circuit decision, if taken on by the Supreme Court Justices, could have a lasting national effect.

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1 Staff Attorney for High Desert Education Service District in Redmond, Ore. The author thanks his wife for her endless support and encouragement. The author also thanks Prof. Ana Otero and Prof. Tom Kleven at Thurgood Marshall School of Law for their inspiration and encouragement, and for exhibiting to a young lawyer the importance of rigorous scholarship to the improvement of the legal profession. Finally, the author expresses respect for fellow Staff Attorneys John Witty and Greg Colvin for their inspirational dedication to public service.


3 Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078 (9th Cir. 2008).

The Court also recently denied review for another case in the same circuit. This means that the court has passed twice on the issue. There is also little in the current record that odds-makers, legal analysts, could use to predict how the court will decide in now that this issue has been appealed from another circuit. As will be discussed below, the debate does send a signal to school districts that they may have to prepare for increased litigation in this area, and to the Federal Congress that they may need to clarify the statutory language in this area in order to prevent unintended and crippling consequences.

This article will discuss the facts of both Tom F. and Frank G. and will provide a detailed analysis of the Appeals Court’s rational in Frank G. Next, this article will analyze the facts in Forest Grove and its potential differentiation from Tom F. and Frank G., as well as the potential for the Supreme Court to settle a current circuit split. Finally, this article will provide guidance for public schools to help eliminate, or reduce, the inherent legal and fiscal risks involved in these types of special education fact scenarios, as well as provide a suggestion for a legislative fix to the statutory language that this issue arises from.

II. Establishing and Distinguishing the Facts in Tom F. and Frank G.

In both Tom F. and Frank G., parents of special education students were asking for tuition reimbursement for private school education when they had never enrolled their children in public schools, claiming that the public schools could not provide a Free Appropriate Public Education (FAPE). However, neither of the parents had subjected their children to the public system to test whether the school could provide FAPE.

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A. *The Facts in Tom F.*

Tom F. had a son, Gilbert F., who was diagnosed by the time he was a toddler as having Attention Deficit Hyperactivity Disorder (ADHD). This diagnosis was made by a variety of medical tests and was confirmed by evaluations conducted by specialists from the New York City Board of Education. In both the 1997-1998 and 1998-1999 school years, Tom F. requested an evaluation by the public school and, in both instances, the school developed an IEP that Tom F. disagreed with. Tom F. subsequently enrolled his son in a private school, the Stephen Gaynor School, which specializes in special education students, and requested tuition reimbursement from the public school district. Instead of arguing with Tom F.’s challenge to the adequacy of the IEP, the school elected to settle and pay the tuition rather than engage in litigation.

In anticipation of the 1999-2000 school year, the public school once again evaluated Gilbert, then developed a new IEP in a meeting which Tom F. attended and participated in. This IEP called for placement in a public school which was identified as a school for the talented and gifted, and as such, Gilbert would not be eligible for mainstream placement, but would be placed in a self-contained class. Tom F. requested an impartial hearing.

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8 *Id.* at 3-4.

9 *Id.*


11 *Id.*

12 *Id.* at 4.

13 *Id.* at 5.
The impartial hearing lasted three days, after which the hearings officer concluded that the IEP called for an inappropriate placement for Gilbert. The school district filed an administrative appeal, and the State Review Officer (SRO) affirmed the decision, which rejected the schools district’s argument that tuition reimbursement should not be available to Tom F. in this circumstance. The school district, having exhausted its administrative remedies, appealed again, this time to the U.S. District Court for the Southern District of New York.

The district court did not evaluate whether the placement was appropriate and ruled that as a matter of law the “clear implication of the plain language [of § 1412(a)(10)(C)(ii)] … is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent’s unilateral placement of the child in private school.” Thus, the District Court reversed the SRO and denied tuition reimbursement.

Tom F. the appealed to the Second Circuit. In his appeal, Tom F. argued that the Southern District incorrectly interpreted the law and that reimbursement is not restricted solely to parents whose child has previously received services from a public school. The Second Circuit considered the appellants argument but vacated and remanded because Frank G. had just been decided on the same issue.

B. The Facts in Frank G.

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14 Id. at 6.
15 Id. at 8.
16 Id.
19 Id.
20 Id.
Frank G. is the adoptive parent of Anthony who was born to a crack-addicted mother. Anthony has been diagnosed with ADHD since he was 3 years old. Anthony had never attended public schools from Kindergarten through Fourth Grade.

In April 2000, Anthony’s parents notified the public school district of his disability, and the district responded in kind by classifying Anthony as learning disabled under the Individuals with Disabilities Education Act (IDEA). During the spring of 2001, Anthony was evaluated by an occupational therapist who noted several deficits in his skills, and by a neuropsychologist who “recommended that Anthony receive ‘individualized attention and a relatively small class’,” among other individualized modifications.

The school district developed an independent education plan (IEP) for Anthony which included direct consultant teacher services, a behavior modification plan, a full-time individual aide, and other counseling and therapy services, but it called for placing him in a regular education class of 26 to 30 students. Anthony’s parents objected and enrolled Anthony in Upton Lake, a private school, and an independent hearing officer held that neither the Upton Lake placement nor public school’s offered placement were appropriate. In fact, the school district conceded at the hearing that the offered placement was not appropriate.

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21 Frank G., 459 F.3d at 359.
22 Id. at 360.
23 See id. (Anthony attended all private schools, such as the Randolph School for Kindergarten [1997-1998], then Bishop Dunn from first through fourth grade [1998-2001], and finally Upton Lake in the year for which Frank G. asked for tuition reimbursement.)
24 Id. at 360.
25 Id.
26 Id.
27 Id. at 361.
28 Id.
Both parties filed an administrative appeal, and the SRO affirmed the hearing officer’s decision. Thus, the parents, who were still seeking tuition reimbursement, filed a complaint in federal court, in the Southern District of New York. While the SRO only had evidence, such as grades and academic progress through the first semester, the Judge presiding over the bench trial in the Southern District was able to evaluate a broader base of evidence, including grades and assessments through the end of the year, which the Judge concluded showed “phenomenal” results. By the end of the year at Upton Academy, Anthony had scored at, or above, average on all but two subcategories on the Stanford Achievement Test and had increased his grades in all but one subject, and in two subjects, math and reading, he increased his grades from the sixties to the nineties.

Given this new evidence, the Southern District awarded tuition reimbursement and attorneys’ fees to Frank G. The school district appealed to the Second Circuit, arguing that despite Anthony’s improvement, “the private school education for which reimbursement was sought was not an appropriate placement.” Judge Brieant of the Southern District did note that Upton Lake had also deviated from the IEP developed by the public school, but the judge said, “he was satisfied that Anthony’s teacher … had worked with Anthony individually when possible, and that ‘she also made certain testing and other academic modifications for Anthony to assist him in successfully completing

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29 Id.
30 Id. at 362
31 Id.
32 Anthony completed the test without any accommodations.
33 Frank G., 459 F.3d at 362.
34 Id. (The tuition reimbursement award amounted to $3,660, while the attorneys’ fees awarded amounted to $34,567.)
35 Frank G., 459 F.3d at 362.
his assignments” and that he required less of this individual attention as the school year progressed.\textsuperscript{36}

The School district appealed to the Second Circuit Federal Court of Appeals, which affirmed the judgment of the District Court.\textsuperscript{37}

C. How do we distinguish these cases when the Supreme Court passed on Frank G.?

The main distinguishing feature of these two cases is that in the proceedings of Frank G., the school district conceded that its IEP proposed a placement that was inappropriate,\textsuperscript{38} whereas the school district in Tom F. did not make this concession.\textsuperscript{39}

Arguably, a plaintiff would have a stronger case if it were more aligned with the Frank G. facts, where a school district clearly does not provide FAPE, and concedes that its placement is inappropriate.

The facts in Tom F. would not appear to be as clear cut, as the school district did not concede that its proposed placement was inappropriate. However, a cursory examination of the Tom F. facts seem to indicate that the placement probably was not appropriate, and the IEP was probably not crafted with as much care as it could have been. In either case, poorly developed IEPs appear to have triggered the initial disputes.

III. Evaluating the Judicial Analyses in Frank G. and Tom F.

A full analysis of the current legal situation after Frank G. and Tom F. requires looking at two separate judiciaries, and their independent analyses. Frank G. gives insight into the 2nd Circuit’s analysis of IDEA in this context. However, the U.S. Supreme Court denied review of Frank G., so transcripts from the Tom F. oral arguments

\textsuperscript{36} Id.
\textsuperscript{37} Frank G., 459 F.3d at 362-363.
\textsuperscript{38} See supra note 28.
\textsuperscript{39} See supra notes 10 and notes 15-18.
give some indications of some of the major concerns raised by the Supreme Court Justices.

A. The Frank G. Court holds that parents may make unilateral private placement.

The 2nd Circuit focused on the issue of whether a parent may unilaterally place his or her child in private school and receive reimbursement, even when the child has not been availed to the public school system first.\(^{40}\) The Court reasoned that, “Ultimately, the issue turns on whether a placement – public or private – is ‘reasonably calculated to enable the child to receive educational benefits.’”\(^{41}\) However, the school district argued for an “absolute defense”, claiming that the student had to be enrolled in a public school first in order to reach a second level of analysis as to whether placement is appropriate – either public or private.\(^{42}\)

1. The Court held that Anthony’s private school placement was appropriate.

The Court first conducted a Free and Appropriate Public Education (FAPE) analysis. The District argued that “Anthony ‘did not receive specialized instruction in any of his primary areas of need – written expression, handwriting, and math,’” and that it rendered the private school placement inappropriate.\(^{43}\) However, the Court rejected this argument. The Court found that Anthony was receiving direct consultant teacher services and a one-to-one aide.\(^{44}\)

The Court reasoned that while these services were not the equivalent of those proposed in the District’s IEP, they still came “within the IDEA definition of ‘special

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\(^{40}\) Frank G., 459 F.3d at 359.
\(^{41}\) Frank G., 459 F.3d at 364 (citing Bd. of Educ. v. Rowley, 548 U.S. 176, 207 (1982)).
\(^{42}\) Frank G., 459 F.3d at 367 (the district based this argument on its interpretation of the 1997 amendments to the IDEA, 20 U.S.C. § 1412(a)(10)(C)(ii)).
\(^{43}\) Frank G., 459 F.3d at 365 (the District cited Berger v. Medina City Sch. Dist., 348 F.3d 513, 523 (6th Cir. 2003) as authority for this position).
\(^{44}\) Frank G., 459 F.3d at 365.
education,’ namely, ‘specially designed instruction … to meet the unique needs of a child.’”

Specifically, the Court stated that the parents need only demonstrate that instruction was adapted to Anthony’s needs, and appropriateness of the placement would be supported by Anthony’s social and academic progress, such as his markedly improved grades and standardized test scores.46

2. The Court rejected the District’s “Absolute Defense”.

Once the Court had determined that the private school placement was appropriate, it addressed the District’s argument for an “Absolute Defense”. This argument was based on a plain-language reading of 20 U.S.C. § 1412(a)(10)(C)(ii), which the Court paraphrased:

[W]hich authorized reimbursements to the parents of a disabled child, ‘who previously received special education and related services under the authority of a public agency’ and who enrolled the child in a private elementary of secondary school without the consent or referral of the public agency, ‘if the court or hearing officer finds that the agency had not made a free appropriate education available to the child in a timely manner prior to enrollment.”47

The Court noted that in deciding Tom F., the Southern District of New York had agreed with this assertion when it stated that, “The clear implication of the plain language, however, is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expense arising from a

45 Frank G., 459 F.3d at 365 (the court made the determination by looking to the statutory language, which it quoted here, in 20 U.S.C. § 1401(29)).
46 Frank G., 459 F.3d at 365.
47 Frank G., 459 F.3d at 367.
parent’s unilateral placement of the child in private school.”48 However, in this case, the 2nd Circuit disagreed with that statutory interpretation.49

The Court noted here that the plain language of the statute does not restrict tuition reimbursement only to parents whose child had previously received special education services from a public agency, and that it does not explicitly state that a parent in that situation would not have reimbursement available to them.50 Instead, the Court reasoned that the District’s argument required drawing an inference from the plain language, rather than relying on the plain language itself, and noted that other sections of IDEA may speak to this issue.51

For instance, the Court cited 20 U.S.C. § 1415(i)(2)(C), which “authorizes a district court hearing a challenge to the failure of a local education agency to provide a free appropriate public education to ‘grant such relief as [it] determines is appropriate.’”52 It looked to the U.S. Supreme Court’s decision in Sch. Comm. of Burlington v. Dep’t of Educ.,53 which held that this relief is not prospective alone as that would be an insufficient remedy, “because the process of obtaining the relief ‘is ponderous’ and a ‘final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed.’”54

In a lengthy conclusion, the Court held that it would be unreasonable to require Anthony to be subjected to a public placement that would be “useless and potentially

49 Frank G., 459 F.3d at 368.
50 Id.
51 Id.
52 Id. at 369.
54 Frank G., 459 F.3d at 369 (citing Burlington, 471 U.S. at 370).
counterproductive.” The Court, therefore, declined to “interpret 20 U.S.C. § 1412(a)(10)(C)(ii) to require parents to jeopardize their child’s health and education in this manner in order to qualify for the right to seek tuition reimbursement.”

Furthermore, the Court noted that the Department of Education’s Office of Special Education & Rehabilitative Services had written an opinion letter which expressed that at the least, the statute did not include “actual receipt of some form of special education and related services from a public agency” as a prerequisite to receiving tuition reimbursement.

Finally, the Court examined statutory history in order to conduct its own statutory interpretation. In particular, the Court examined a Report of the House Committee on Education and the Workforce which included some commentary on the statutory language, specifically the interpretation of the statement, “the parents of a child with a disability, who previously received special education and related services under the authority of a public agency.” The Frank G. Court noted that the Tom F. Court, in the same appellate circuit, had read this statement as a prerequisite. However, the Frank G. Court disagreed and read the context of the statement to imply that the term “previously” referred to the time-period before the enactment of this particular piece of the statute, rather than to a prerequisite for obtaining tuition reimbursement.

B. The U.S. Supreme Court considers Tom F. in oral arguments.

55 Frank G., 459 F.3d at 372.
56 Id.
57 Id. at 373 (quoting and citing Letter to Susan Luger, listed in 65 Fed. Reg. 9178 (Feb. 23, 2000) and reprinted in 33 I.D.E.L.R. 126 (March 19, 1999)).
59 Frank G., 459 F.3d at 374.
60 Id.
The Supreme Court did not publish an opinion in *Tom F.* that gives any indication of the reasoning the might have been applied if there had not been a tie-vote. However, the oral arguments do provide a guide to some the concerns that the Court raised in this case.\(^{61}\) One should note, though, that due to Justice Kennedy’s recusal, there is no way to know how the court would, or could, eventually decide this issue, as justices often query on topics that do not necessarily reflect their own analyses of the case.\(^{62}\) Below are three of the major issues raised by the Justices.

1. Does the pre-requisite force kids into inappropriate placements?

One question that the Justices submitted to Leonard J. Koerner, counsel for the School District, was whether this requirement was arbitrary, forcing students to be subjected to inappropriate placements. While Koerner never directly answered this question, he argued that the statute requires it. He also argued that the policy reasoning behind the statutory language would be to promote cooperation between the parties to at least try the public school placement so that the parents would then at least articulate the problems with the placement.\(^{63}\)

This line of questioning was initiated by Justice Alito, but other justices pursued this line of reasoning.\(^{64}\) In fact, Justice Scalia stated that he thought,

Congress figured that there are probably a lot of people in New York City, in Manhattan in particular, who are going to send their kids to private school, no matter what, and they can get special services in private school,


\(^{62}\) *See supra* note 4.


\(^{64}\) *Id.*
but what the heck, if we can get $30,000 from the city to pay for it, that's fine. In other words, this was meant to be an option for people who wanted to go to the public schools but couldn't go to the public schools because they couldn't get the private services there, but it was never meant to be an option for people who had no desire to go to public schools at all.\(^{65}\)

Chief Justice Roberts picked up on this line of reasoning when the Respondent’s counsel, Paul G. Gardephe, presented his oral argument. The Chief Justice stated, “So when it comes to reimbursement or tuition, the parents who never place their child in the public school are in better shape than the parent who place their child in public school and then want to remove him.”\(^{66}\) Gardephe argued that this was not so, and opined that an individual could place a child in one day of kindergarten then refer back to it several years later to make a private school placement under the Petitioner’s reading of the statute.\(^{67}\) However, Justice Scalia noted his disagreement with Gardephe’s logic.\(^{68}\)

While this line of reasoning is not necessarily indicative of complete integration of these Justices analysis, it does provide an indication that there was some concern about holding the public financially accountable for purely private choices. However, as discussed earlier, Kennedy recused himself from both Tom F. and Frank G.,\(^{69}\) which tends to support the notion that the recusal was not based on his personal relationships


\(^{69}\) Supra note 4.
with any of the parties, and could mean a recusal from any future case with similar facts and issues.

2. Would removal of the pre-requisite only benefit wealthy families?

Another question posed by the Justices was whether removal of the pre-requisite would merely subsidize wealthy families who never had any intention of enrolling their children in public school. As discussed above, Justice Scalia noted that wealthy families that may have never intended to avail themselves to the public school system could have an unintended advantage.\(^{70}\) The Chief Justice also raised this issue when Respondent presented his oral argument, as noted above.\(^{71}\)

3. Does the pre-requisite put too high of a burden on parents to challenge FAPE?

Another question raised by the Justices was whether, with or without the prerequisite, the system puts too high of a burden on parents to prove that the proposed placement does not meet the requirements of FAPE. In particular, Justice Ginsberg raises this concern in the oral arguments.\(^{72}\)

Justice Ginsburg noted that current Federal law puts the burden on the parent to demonstrate that the public school does not provide an appropriate placement.\(^{73}\) In fact

\(^{70}\) Supra note 65.
\(^{71}\) Supra note 67.
she went as far as to describe it as a “heavy burden.” However, this court previously did hold that parents bear this burden.

Interestingly, the New York and New Jersey legislatures have taken up this issue by drafting new law that shifts the burden of proving that the offered placement was not appropriate away from parents by redirecting it to the school district to prove that its offered placement is appropriate. Only time will tell if the new legislative changes represent a trend toward shifting this burden in jurisdictions across the country.

IV. DIFFERENTIATING FOREST GROVE

Given the preceding facts and analysis on the Tom F. and Frank G. cases, one could argue that the facts in Forest Grove are clearly differentiable. Even if the Supreme Court does not differentiate Forest Grove, it should rule that allowing parental unilateral private school placement is not an appropriate interpretation of the statutory language. In any event, the legislature would be wise to render the language completely unambiguous.

A. The Facts in Forest Grove.

In Forest Grove, we see another student who may have had ADHD. T.A. was enrolled in the Forest Grove School District from kindergarten through the spring semester of his junior year of high school. The facts indicate that he experienced difficulty paying attention in class and completing schoolwork, but he had passed his

75 Schaffer v. Weast, No. 04-698, 546 U.S. ___ (2005) (Justice O’Connor delivered the majority opinion, however Justice Ginsburg filed a dissenting opinion).
77 Forest Grove, 523 F.3d at 1081.
classes and had never received special education services.\textsuperscript{78} In December 2000, T.A.’s guidance counselor referred him for a special education evaluation based on a suspicion that he may have a learning disability.\textsuperscript{79}

The Court states that T.A.’s parents never requested an evaluation for ADHD.\textsuperscript{80} The Court also noted that although the District only evaluated for learning disabilities it did have internal communications about the potential for ADHD and notes from one meeting mention “suspected ADHD.”\textsuperscript{81} After examination by psychologists and educational specialists, the District held an eligibility meeting on June 13, 2001 that the mother attended.\textsuperscript{82} The team of specialists unanimously concluded, and the mother agreed, that T.A. did not have a learning disability and was ineligible for special education services.\textsuperscript{83}

In 2002, T.A. began using marijuana and by early 2003 he was a regular user and exhibited noticeable personality changes.\textsuperscript{84} He then ran away from home and was brought home by police a few days later, at which point T.A.’s parents took him to a psychologist and then to a hospital emergency room.\textsuperscript{85} Dr. Fulop, the psychologist hired by T.A.’s parents, met with T.A. several times and eventually diagnosed him with ADHD, depression, math disorder, and cannabis abuse.\textsuperscript{86} Dr. Fulop recommended a residential program for T.A. “because of T.A.’s failure to live up to his potential in

\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Forest Grove, 523 F.3d at 1082.
school, his difficulties at home, his attitude toward school, his sense of hopelessness, and his drug problem." 87

On Feb. 27, 2003, T.A.’s father told the District’s high school assistant principal that T.A. was undergoing medical testing, would enter a three-week wilderness training program, and would attend Portland Community College (PCC) in the spring. 88 The next day, the father told another high school administrator that T.A. was enrolled at PCC, and on March 10, 2003, the father told the assistant principal “that T.A. was ‘officially disenrolled’ from Forest Grove High School and had registered at PCC.” 89 Neither T.A. nor his parents expressed any dissatisfaction with his placement at PCC. 90

T.A.’s parents then sent him to a three-week program at Catherine Freer Wilderness Therapy Expeditions. 91 When he was discharged from the program, the Freer staff gave T.A. a primary diagnosis as cannabis dependence and a secondary diagnosis as depression. 92 Soon afterward, T.A. was enrolled at Mount Bachelor Academy, “a residential private school that describes itself as ‘designed for children who may have academic, behavioral, emotional, or motivational problems.” 93 T.A. committed “a number of serious rule violations at Mount Bachelor Academy,” yet graduated in June 2004. 94 The Court noted that T.A. “also would have graduated from public high school in 2004 had he remained there.” 95

87 Id.
89 Id. at 7.
90 Id.
91 Forest Grove, 523 F.3d at 1082.
92 Id.
93 Id.
94 Id.
95 Id.
Four days after T.A.’s parents enrolled him at Mount Bachelor Academy they hired a lawyer, and on April 18, 2003 requested a due process hearing seeking an order requiring the District to evaluate T.A. in all areas of suspected disability. A hearings officer was assigned, but the matter was continued in order to allow the District to evaluate T.A. The District had several medical and educational specialists evaluate T.A. and in a July 7, 2003 eligibility meeting, the team determined that T.A. had some learning difficulties, and acknowledged his ADHD and depression diagnosis, but the “majority found that T.A. did not qualify under the IDEA in the areas of learning disability, ADHD, or depression, because those diagnoses did not have a severe effect on T.A.’s educational performance.” On Aug. 26, 2003, another team met and found that T.A. was also ineligible for services under § 504 of the Rehabilitation Act of 1973.

The due process hearing resumed in September 2003 and both parties submitted evidence, including the history of the case. Another psychologist, Dr. Callum testified at the hearing that the ADHD was not a primary cause of his educational difficulties, and she concluded that “T.A. would be able to complete public high school without any services beyond shoe given to all students.” On Jan. 26, 2004, the Hearing Officer issued an opinion that T.A. was disabled and therefore eligible for special education under the IDEA and § 504, that the District failed to provide FAPE, and that the District was responsible for T.A.’s $5,200 per month tuition at Mount Bachelor Academy.

96 Id. (The parents requested the hearing pursuant to 20 U.S.C. § 1415(f), the due process procedure prescribed for handling disputes under the IDEA).
97 Forest Grove, 523 F.3d at 1082.
98 Id.
99 Id.
100 Id.
101 Id. at 1082-1083 (It is debatable whether the Hearing Officer correctly found for eligibility in this case, but that is a topic for another article. However, the opinion does shed light on how the Hearing Officer came to that determination and includes a tremendous volume of additional factual findings which are not
The School District appealed to the U.S. District Court arguing that “reimbursement was unwarranted because T.A. unilaterally withdrew from public school without providing prior notice to the School District, he never received special education and related services from the School District, and he withdrew for reasons unrelated to his disability (that is, substance abuse and behavioral problems).”102 The District Court reversed the Hearing Officer’s grant of reimbursement, holding that T.A. was ineligible for reimbursement under 20 U.S.C. § 1412(a)(10)(C), and that even if reimbursement were appropriately ordered, it would not be supported “under general principals of equity.”103 T.A. appealed to the 9th Circuit.

B. The 9th follows the 2nd with a twist.

Recognizing that the question of private school reimbursement was currently being litigated in other jurisdictions, the 9th Circuit first elected to refer the case to mediation while it awaited the results of the Supreme Court’s decision on Frank G. and noted that the Supreme Court had recently deadlocked in Tom F.104 As noted above, though, the Supreme Court denied certiorari in Frank G.105

Ultimately, the mediation was unsuccessful, and the 9th Circuit proceeded. Essentially, the Court adopted the reasoning of the 2nd Circuit, stating, “We see no reason to disagree with the 2nd Circuit’s well-reasoned analysis of this issue.”106 The Court agreed with the 2nd Circuit’s conclusion “that § 1412(a)(10)(C)(ii) is ambiguous because its text does not clearly create a categorical bar and because such an

relevant to this discussion, but are interesting nonetheless. See In the Matter of the Education of T.A. v. Forest Grove School District, OAH Case No. 20031306 (Jan. 26, 2004) (available at http://www.ode.state.or.us/services/disputeresolution/dueprocess/2003orders/dp03_113final.pdf)).

102 Forest Grove, 523 F.3d at 1083.
103 Id.
104 Id.
105 Id.
106 Id. at 1087.
interpretation is in tension with the broader context of the statute.” 107 The Court also sided with the 2nd Circuit, opining that to interpret the statute in any other way would lead to “absurd results.” 108

The 9th Circuit reasoned that when Congress amended the IDEA in 1997, specifically § 1412(a)(10)(C), it chose to focus on factors to be considered when deciding whether tuition reimbursement is available to students who previously received special education services from the District. 109 Thus, the Court held that when determining whether reimbursement is available to a student who never previously received special education services from the district, that § 1412(a)(10)(C) does not apply and that courts must analyze the case under principals of equity under § 1415(i)(2)(C). 110

Thus, the 9th Circuit remanded to the District Court to reconsider based on equitable principles. The Court went on to offer guidelines as to how it felt those equities ought to be considered. 111

C. The Dissent distinguishes Forest Grove from Tom F. and Frank G. (without saying as much).

Circuit Judge Rymer wrote the dissent in the Forest Grove opinion. Interestingly, he points out the facts that clearly distinguish Forest Grove from Tom F. and Frank G. However, he does not directly assert them as distinguishing. Nonetheless, the dissent

107 Id. at 1086 (emphasis in original).
108 Id. (remember that the 2d Circuit felt that schools could be forcing a student to attend public school when it would clearly be an inappropriate placement would be absurd and “useless and potentially counterproductive. See supra note 55).
109 Forest Grove, 523 F.3d at 1087.
110 Id.
111 Forest Grove, 523 F.3d at 1088-1089 (while this article will not plumb the depths of the equity analysis provided by the Court, the interested reader may agree that when applying the facts found to the equitable considerations provided, the District could likely prevail, even if the Supreme Court affirms the 9th Circuit decision in whole).
correctly analyzes this case as not involving application of equitable principals because reimbursement was never due.

Remember that in both *Frank G.* and *Tom F.*, eligibility was not in dispute and the IEP’s were on the table, yet rejected by the parents. Although the dissent does not take a firm stance on distinguishing, it does state facts which are clearly differentiable in Forest Grove. Specifically, while T.A. was in public school, his mother explicitly agreed that he was not eligible for special education services, and there was no requested, proposed, or disputed IEP on the table prior to enrollment at Mount Bachelor Academy.112

Thus, the dissent concludes that “unlike ‘all Burlington reimbursement cases,’ where ‘the parents’ rejection of the school district’s proposed IEP is the very reason for the parent’s decision to put their child in a private school,’ …, T.A.’s parents decided to put him in a private school for reasons of their own.”113 The Dissent argues that, for this reason, “T.A.’s parents have no right to equitable retroactive reimbursement for private placement expenses.”114

The Dissent opines that this analysis “squares with the statutory scheme as well.”115 The Dissent clearly states the opinion that the School District should hope the Supreme Court will adopt:

If FAPE were *not* at issue and T.A. was *not* receiving special education and related services before withdrawal from public school, then he was being provided a free appropriate education. A local educational agency that has made a free appropriate public education available has no

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112 *Forest Grove*, 523 F.3d at 1090.
113 *Id.* at 1090 (citing *Burlington, Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993)).
114 *Forest Grove*, 523 F.3d at 1090.
115 *Id.*
obligation to pay the cost of education (including special education and related services) of a child with a disability at a private school when the parents elect the private placement. … However, if a child has previously received special education and related services, costs of a private placement may be reimbursed if a court or hearing officer finds that the school district had not made a free appropriate public education available to the child in a timely manner prior to the private enrollment.\textsuperscript{116}

Given this, the Dissent does allow that because FAPE was not at issue before T.A. was withdrawn, it “distances this case from Frank G.,” where the District in that case had prepared an IEP. However, Judge Rymer seems to argue that it is not necessary to distinguish the cases because the 9th Circuit had previously ruled on the issue of reimbursement by “recognizing right to reimbursement after the school district was first asked to provide services and had been given a reasonable opportunity to complete the process of evaluating the child and making a placement recommendation.”\textsuperscript{117} The Dissent concluded that even assuming that equitable principals should apply, that the Court should have been able to clearly answer that question in favor of the District, and that “T.A.’s parents assumed the financial risk of their own decisions and that reimbursement is not ‘appropriate.’”\textsuperscript{118}

V. AVOIDING THE PITFALLS OF THESE CASES

While there are various ways to address the problem raised by Tom F., Frank G., or Forest Grove some of which will be discussed below, the most obvious solution is to

\textsuperscript{116} Id.
\textsuperscript{117} Forest Grove, 523 F.3d at 1090-1091 (citing and commenting on Ash v. Lake Oswego Sch. Dist., 980 F.2d 585, 589 (9th Cir. 1992)).
\textsuperscript{118} Forest Grove, 523 F.3d at 1091.
prevent the issue from being raised, if possible. The question, then, is how can the average school district implement this type of prevention to reduce the risks of litigation?

As evidenced in the preceding discussion about the facts in Tom F. and Frank G., a school district should give great care and consideration to the development of any IEP. While the facts do not indicate whether this happened, it would be easy to assume, as suggested by Justice Alito in the Tom F. Oral Arguments, that some parents have already made up their minds that they are going to place their children in private school.119 Schools cannot afford to make this assumption, and would be better served by assuming that every child for whom an IEP is being developed will be enrolled in the public school.

This serious approach to the IEP could head off some of the types of disputes examined in Tom F. and Frank G., but it still leaves the more difficult problem of the facts presented in Forest Grove. When facing a directly analogous situation, where there is suspicion of a particular disability, then it would seem prudent to evaluate for that disability.120

The more difficult scenario will be with the child for which there is no obvious sign of disability. Districts would be wise to review Child Find procedures to ensure that their procedures capture children and at least begin documenting attempted educational interventions.121 However, taking this measure is by no means a cure-all, and until this

119 Supra note 65.
120 See supra note 81 (one need not second guess the professional judgment of the specialists in this case, but it does appear that the District had some concerns about the existence of ADHD, but did not evaluate for it).
121 See generally 20 U.S.C. Chapter 33 (under IDEA schools are required to have a system for finding and identifying students who may require special education services. While the law does not hold a district strictly liable for missing a child in this process, courts and administrative agencies have generally held that schools must at least make an attempt to notify the public of services that may be available and to request to evaluate children whom they suspect of having a disability which would render them eligible for special education).
overarching issue is finally resolved, Districts will face continued risk of getting saddled with expensive reimbursement costs.

Finally, Districts should strive to maintain good communication with parents. This may sound elementary, but the scheme of IDEA even allows that poor communication is a significant factor in disputes by allowing for mediation at many points in the dispute process.\(^\text{122}\)

VI. CONCLUSION

Despite how the Supreme Court rules on this issue, the debate highlights that Congress may have created a very expensive unintended consequence. Hopefully, whatever factors motivated Justice Kennedy to recuse himself from hearing the 2nd Circuit cases, are not present here so the Court can settle the question and give School Districts clear guideposts when confronted with these types of issues. Presumably, Justice Kennedy does not face those factors in the *Forest Grove* case or the Court would have little reason to grant certiorari. However, that presumption is based on pure speculation, and the outcome remains to be seen.

The Supreme Court should side with the District in the *Forest Grove*. The 9th Circuit held that Congress only addressed reimbursement for students who had previously received special education services in the public school, and that those who have not previously received the service are in a class of their own.\(^\text{123}\) They further stated that any other reading of the statute would lead to absurd results.\(^\text{124}\) However, the Petitioners point out that an obvious absurdity arises if the 9th Circuit reasoning is adopted because

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\(^{123}\) *Supra* notes 109 and 110.

\(^{124}\) *Supra* note 108.
under that rationale, “parents who never place their child in public school are more likely to receive tuition reimbursement than parents who do.”

Petitioners further argue that this result “cannot possibly be what Congress had in mind when enacting the 1997 amendments [to IDEA].” However, there does not appear to be any material in the Congressional Record indicating what was intended, and neither party has offered any evidence of Congress’s intent.

Nonetheless, if ambiguity is the problem then Congress can, and should, easily rectify the situation. Congress should rewrite the language in IDEA to remove ambiguity, and should create a record of its intent for the legislation. This author supports language that would support the reading that the Forest Grove Petitioners urge. Clearly, it is not in the public interest to subsidize private individuals making extremely expensive private decisions, particularly given the limited resources that schools have at their disposal. The general school populous should not have to juggle shortages of resources in order to facilitate such subsidies.

Until the Court and Congress act, the landscape clearly does not favor schools, particularly when faced with the issues presented in Tom F., Frank G., and Forest Grove. At present, schools can only hope for a favorable ruling, and movement in Congress to rectify the inequity. Meanwhile, districts should take great care to prevent, and manage these types of situations.


126 Id.