1   IN THE SUPREME COURT OF THE UNITED STATES

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3   BOARD OF EDUCATION OF THE   :

4   CITY SCHOOL DISTRICT OF   :

5   THE CITY OF NEW YORK,   :

6   Petitioner   :

7   v.   :   No. 06-637

8   TOM F., ON BEHALF OF   :

9   GILBERT F., A MINOR CHILD.

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11   Washington, D.C.

12   Monday, October 1, 2007

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14   The above-entitled matter came on for oral

15   argument before the Supreme Court of the United States

16   at 10:55 a.m.

17   APPEARANCES:

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

19   Petitioner.

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

21   Respondent.

22   GREGORY G. GARRE, ESQ., Deputy Solicitor General,

23   Department of Justice, Washington, D.C.; on

24   behalf of the United States, as amicus curiae,

25   supporting Respondents.

1   C O N T E N T S

2 ORAL ARGUMENT OF   PAGE

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1   P R O C E E D I N G S

2   (10:55 a.m.)

3   We'll hear argument next in Case 06-637,

4   Board of Education of the City School District of the

5   City of New York versus Tom F.

6   Mr. Koerner.

7   ORAL ARGUMENT OF LEONARD KOERNER

8   ON BEHALF OF THE PETITIONER

9   MR. KOERNER: Mr. Chief Justice, and members

10   of the Court. In 1985 when this Court decided the

11   Burlington decision, it based -- it based it based on

12   the broad remedial clause set forth in 20 U.S.C. 1415,

13   which allowed an impartial hearing officer, a state

14   review officer, or the court, itself, to grant relief

15   where appropriate.

16   In so doing, it noted that there was no

17   other substantive section which touched and concerned

18   the issue before the Court, and that is whether an

19   individual can voluntarily remove a child and seek

20   tuition reimbursement before the conclusion of the

21   administrative and court remedies.

22   It made a point of noting that it felt it

23   was gleaning the congressional intent; and, had Congress

24   known that the administrative and court process would be

25   protracted, it would have provided a process which would

1   allow the child to be removed.

2   Similarly, in the sequel, the Carter case,

3   the Court made the other -- the same conclusion. It

4   noted that, although the primary responsibilities to

5   educate the child in a public school, least restrictive

6   environment, there would be occasions when you would

7   place that child outside, having been in the school

8   system.

9   1412, which was the eligibility section

10   during this period, was very truncated. It did not

11   provide a lot of conversation concerning the

12   relationship of public and private schools within the

13   IDEA. It provided that you had to provide the child who

14   demanded it a FAPE, a free appropriate education. If

15   you couldn't do that, the public school had to then pay

16   for the tuition. It was silent though on the

17   relationship between the private schools where the child

18   voluntary removes.

19   In 1997 the IDEA was codified, and for the

20   first time the specific section was inserted dealing

21   with the relationship of children and private schools.

22   Indeed, 20 U.S.C. 1412(a)(10) -- just the beginning,

23   just that paragraph, says "children placed in private

24   schools" and the structure was detailed. Subdivision

25   (A) dealt with the relationshiop of the private schools

1   with the public system generally and noted that, in that

2   particular case, while the children would be entitled to

3   some small amount of Federal funding, they would not be

4   entitled in private school to a free appropriate public

5   education.

6   We also noted that if a parent was

7   dissatisfied with the service plan, they'd have to seek

8   relief administratively. They would not be entitled to

9   an impartial due process or a court review. It was a

10   recognition that children who are placed in private

11   school were entitled to much lesser services than

12   children placed in public school.

13   Subdivision (B) dealt with the situation

14   when children were not placed in public school but the

15   local district consented that they could not provide a

16   free appropriate public education. As a consequence, in

17   those cases and in only those cases, since the public

18   would then be supervising and directing the private

19   school, they would be responsible for the tuition.

20   Sub (C) is the issue now before this Court.

21   Sub (C) is entitled Children Placed in Private School,

22   Payment and Where the Local Education Aagency Did Not

23   Consent. And that particular section is broken down

24   again into three parts. The first part says, if a child

25   is offered FAPE, that is, a child is given a program

1   which is adequate, you cannot get reimbursement if you

2   remove your child during any time but in this case

3   during the pendency of the administrative and the court

4   process.

5   CHIEF JUSTICE ROBERTS: Counsel, do you

6   agree that if we conclude the language is ambiguous, we

7   should defer to the Secretary's interpretation in the

8   comments accompanying the regulations?

9   MR. KOERNER: The answer is no because the

10   Secretary's interpretation on the note in common and the

11   letter submitted to the educational consultant is

12   inconsistent with its own Federal regulation. Its

13   Federal reguation, titled Children Placed in Private

14   Schools When FAPE Is at Issue, also requires that you

15   previously receive --

16   CHIEF JUSTICE ROBERTS: It just mirrors the

17   statute --

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

19   CHIEF JUSTICE ROBERTS: Well, then --

20   MR. KOERNER: But the note --

21   CHIEF JUSTICE ROBERTS: Assuming we would

22   think the statutory language is ambiguous, we are likely

23   to think the same language in the regulation is

24   ambiguous.

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

1   ambiguous and we ought to at least discuss the nature of

2   the ambiguity, then that ambiguity under the spending

3   clause should redound to the benefit of the local

4   education district as well, for if it does not set forth

5   --

6   CHIEF JUSTICE ROBERTS: Well, which -- which

7   prevails, Chevron deference or spending clause

8   presumption?

9   MR. KOERNER: Well, the Chevron deference

10   requires notes and comments which are persuasive and

11   analyzed. There is absolutely no analysis in the note

12   and comment in this case. All it says conclusively is

13   that the decisions of this Court in Burlington and

14   Carter create an independent obligation separate and

15   distinct from the statute. It doesn't explain why the

16   specific language of the statute should not be

17   incorporated in the Burlington court. And --

18   JUSTICE ALITO: If Gilbert F. had attended

19   the public school for 11 days, would this case come out

20   differently, in your view?

21   MR. KOERNER: I'm sorry.

22   JUSTICE ALITO: If the student here had

23   attended the public school for let's say 11 days before

24   being transferred to the public -- to the private

25   school, would your, would your arguments still fly?

1   MR. KOERNER: No. If the -- if the child

2   attends a public school and receives special education

3   and related services --

4   JUSTICE SCALIA: You've added something to

5   the question, though, didn't you?

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

7   JUSTICE SCALIA: Attending public school and

8   receiving --

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

10   JUSTICE ALITO: Well, that was my

11   assumption. Let's say he attends public school in a

12   special education class for 11 days. His parents think

13   the public -- the placement that's proposed, the IEP

14   that's proposed by the school is inadequate, and they

15   turn out to be correct, and they want to send their

16   child to the private school, but they understand this

17   argument based on the statutory language, so they say

18   all right, we are going to put him in the public school

19   special education class for 11 days, so -- we've already

20   got the placement in the private school all lined up at

21   the end of the 11 days. He goes one day, we give

22   notice; we take him out and we put him in the private

23   school; then they are entitled to reimbursement subject

24   under your argument.

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

1   statutory definition, but when it went before the

2   impartial officer, or the State review officer, there

3   would be a very compelling argument that there was a

4   lack of cooperation, because it's not just that you're

5   in the system, but that you articulate the problems that

6   you have with the public placement.

7   CHIEF JUSTICE ROBERTS: Well, it depends on

8   the particular circumstances. I mean, if the parent is

9   able to show look, the school district is being very

10   unreasonable here; it's clear he is going to need more

11   than the services they were going to offer, well that

12   wouldn't have --

13   MR. KOERNER. Yes.

14   CHIEF JUSTICE ROBERTS: -- run afoul of any

15   of the other provisions.

16   MR. KOERNER: My only comment, Chief

17   Justice, was that yes, that would satisfy the statutory

18   section as long as the notice was given in triple I, but

19   we would then have an argument in the individual case

20   that the parent was not cooperating. So for the purpose

21   of this case, where they come into the system even for a

22   minimum period and give the appropriate notice under

23   triple I, yes, that would -- it would be satisfied.

24   JUSTICE ALITO: Well, why would Congress

25   ever have wanted to adopt a scheme like that? What

1   possible purpose is served by simply requiring the

2   student to be in a placement that is by definition not

3   providing a -- not providing FAPE for this very short

4   period of time? It makes no sense whatsoever.

5   MR. KOERNER: The reason Congress wanted to

6   provide it is the reason that this Court discussed in

7   Burlington. The upset of this Court in Burlington was

8   that it was an extremely protracted process. The child

9   there was subject to a very long impartial hearing and

10   State review and court review --

11   JUSTICE GINSBURG: So that enabled the

12   parent to remove the child immediately and risk that --

13   MR. KOERNER: That's correct.

14   JUSTICE GINSBURG: -- the public education

15   would be found inadequate.

16   MR. KOERNER: But the reason --

17   JUSTICE GINSBURG: But all that section does

18   is to repeat the Burlington scenario. It says, it

19   codifies what the Court held. The Court didn't say

20   anything in Burlington about the situation where the

21   child was never in public education.

22   MR. KOERNER: That's correct, but it's a

23   statute of limitations. It says that you must receive

24   special education and related services. There is no --

25   there is no exception to the condition -- if you look at

1   the particular statute when they refer to "may," they

2   are only talking about the relief that a court or

3   impartial hearing officer or State review officer can

4   grant. They are not talking about the predicate, you

5   must be in the system.

6   Now you asked, Justice Alito, why do they

7   have to be in the system, and the reason is Congress

8   thought that if you're in the system and you have a

9   vested interest in the system, that because of all the

10   processes that are there, including mediation, including

11   a modified IEP, that it would increase the numbers of

12   people in terms of cooperation who want to participate

13   in the system.

14   JUSTICE SCALIA: I thought it wasn't that.

15   I thought it was simply Congress figured that there are

16   probably a lot of people in New York City, in Manhattan

17   in particular, who are going to send their kids to

18   private school, no matter what, and they can get special

19   services in private school, but what the heck, if we can

20   get $30,000 from the city to pay for it, that's fine.

21   In other words, this was meant to be an

22   option for people who wanted to go to the public schools

23   but couldn't go to the public schools because they

24   couldn't get the private services there, but it was

25   never meant to be an option for people who had no desire

11

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

2   MR. KOERNER: I think --

3   JUSTICE SCALIA: -- and without this

4   condition, somebody, I think the plaintiff here was

5   never in the public school, was he?

6   MR. KOERNER: That's correct. He never had

7   any contact with the public school at all except to

8   request a free appropriate public education.

9   JUSTICE GINSBURG: Are there not children --

10   I think there was a brief on behalf of the Autism

11   Society that says many school systems simply do not have

12   the facilities to attend to the needs of these children?

13   MR. KOERNER: Yes, but you don't know that

14   until you've actually been subjected to the process

15   itself. Indeed in Schaffer, you, this Court said that

16   you had to presume that the officials in the department

17   of education of a local school district are going to do

18   their job. Their job is to try to find an appropriate

19   IEP. If it turns out that it's insufficient, of course

20   you can then litigate.

21   JUSTICE GINSBURG: Are there not cases where

22   school districts have said from day one, look, we don't

23   have facilities to handle this type of disability?

24   MR. KOERNER: But if we don't -- if the

25   public schools district does not have the facilities,

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1   then it will consent to a private placement to deal with

2   the particular problem it cannot deal with. We are only

3   talking about cases where the school system believes it

4   can deal with an individual problem and at the very

5   least if the person's child comes into the system, they

6   will have the opportunity to work with the parent and

7   try to work out a situation. In -- as this Court is

8   well aware, the primary obligation is to find a public

9   education for this child, and if from day one you assume

10   that the individual education plan is defective, not

11   only is it inconsistent with Schaffer, it's inconsistent

12   with the whole statutory scheme which is set up to try

13   to work cooperatively. Indeed --

14   JUSTICE GINSBURG: But isn't it true that

15   the parent will never be reimbursed? Let's take the

16   parent that Justice Scalia has hypothesized, will never

17   get one penny of that tuition unless that parent carries

18   the burden -- the parent would have the burden of

19   showing that there was no appropriate public education?

20   MR. KOERNER: The parent in this case can

21   never get reimbursed because they don't meet the

22   predicate which is that their child had to previously --

23   JUSTICE GINSBURG: That's not the question I

24   asked.

25   MR. KOERNER: Oh I'm sorry.

1   JUSTICE GINSBURG: I said that the parent --

2   let's assume that the parent never sends the child to

3   public school, nonetheless seeks reimbursement. In

4   order to get reimbursement that parent would have to

5   show, would have bear the burden of showing that there

6   is no appropriate public education available; is that

7   not true?

8   MR. KOERNER: Yes. You mean assuming the

9   statute does not apply?

10   JUSTICE SCALIA: Yes, but that is -- but the

11   parent would not have to show that the parent would have

12   used that available public remedy --

13   MR. KOERNER: That's correct.

14   JUSTICE SCALIA: -- if it were there?

15   MR. KOERNER: And Congress could have

16   concluded that the parent you're referring to who placed

17   that child immediately in a private school, and who may

18   not have an interest in obtaining a public school

19   education for that child, may not be as cooperative and

20   as collaborative as someone who has a child in the

21   system, to work out an individual education plan because

22   of some of these --

23   JUSTICE GINSBURG: Then the conclusion would

24   be that that parent hasn't met the heavy burden of

25   showing that there is no appropriate public education.

1   MR. KOERNER: But the problem is, if you go

2   to an impartial hearing officer as in this case, and you

3   have a child that's been in a private school for a

4   number of years and is doing very well, and the private

5   school special ed teacher comes in and highlights all

6   the successes of the kid, and then the New York City

7   Department of Education comes in with is profit plan

8   which is based on speculation, because the child has

9   never been in the system, is it so unreasonable for

10   Congress to conclude as a matter of statutory, explicit

11   language that the child should go into the system so

12   that at least with respect to your burden there's at

13   least a participatory program where they try to help the

14   child get an individual education.

15   JUSTICE ALITO: If Congress's purpose really

16   was what you -- what you suggest and what I think

17   Justice Scalia's question suggests, that there was a

18   desire to make parents who really had no interest in the

19   public school system give the public schools a chance,

20   why is it that, even as you read the statute, there's no

21   requirement that the child remain in the public school

22   system for any significant period of time? It's just

23   pro forma.

24   MR. KOERNER: Indeed, Justice Alito.

25   Congress in this case got it completely right because

1   not only did they put in the explicit language, they

2   also put in a time period because they understood that

3   this Court had ruled in a number of cases that its upset

4   was with the protracted period that a family has to have

5   a child in the system. But by having a notice provision

6   and by thereby ensuring a parent that by giving notice

7   and specifically articulating the reason why the plan is

8   deficient and giving the school district an opportunity

9   to cure the problem, everybody would understand 10 days

10   later that they can leave. So the very problem that you

11   highlighted in Burlington and Carter is no longer a

12   problem under the explicit legislation.

13   CHIEF JUSTICE ROBERTS: I think they may --

14   they may well have to stay longer than 10 days to either

15   realize that the program is inadequate or to feel

16   comfortable that they'll be able to establish that on

17   the record. It's pretty hard to say something's not

18   working after only on 10 days.

19   MR. KOERNER: Chief Judge, you're absolutely

20   right. And that is why I say that would be based on an

21   individual determination. All the statute says is come

22   into the system. What happens after that, if you give

23   your notice as was raised in a hypothetical, that would

24   go to whether or not there was the duty to cooperate

25   which was fulfilled, which also is a requirement for

16

1   this particular section for reimbursement.

2   It's not just that you are in a program and

3   private school is providing appropriate service and then

4   you have an IEP that may not provide the free

5   appropriate public education, but you also have to show

6   you cooperated with the program because the whole

7   primary purpose of the program is to provide a public

8   education.

9   JUSTICE SCALIA: Of course, to be fair, this

10   provision doesn't just apply to the rich person who

11   wants New York City to pay 30,000 of his tuition to a

12   private school. It also applies to somebody who is

13   already in public school, and the program offered by the

14   -- by the city is patently inadequate. You are

15   compelling the parent nonethe less to put the kid in a

16   program that anybody would see will -- will not meet the

17   needs.

18   MR. KOERNER: That is correct, but your --

19   first of all, Congress could weigh the balance between

20   that particular problem and the need to give the school

21   district an opportunity to try to provide a program, but

22   it does run contrary to this Court's discussion in

23   Schaffer which presumes that the school district is

24   going try to accommodate the child, try to provide the

25   needs of the child.

17

1   In effect, I think all of these questions

2   are based on the assumption that the plan is going to be

3   automatically deficient. I don't believe there's any

4   foundation this Court has indicated there's no

5   foundation. That's why it said in Schaffer that the

6   parent has the ultimate burden of persuasion because it

7   presumed that the plan -- if you accept that principle,

8   which has already been articulated and you accept the

9   fact that specialists on the Board of Education have --

10   are going to try to adjust to this kid's needs, then

11   having the kid in the system even for a short while is

12   something that Congress could determine. And indeed

13   that's what the language says.

14   Now, we recognize that there is an absurd

15   argument, but it was difficult for us to understand how

16   it would be absurd to require this when indeed it would

17   solve the problems of Burlington and Carter because it

18   makes sure that if a parent doesn't want to stay for a

19   protracted period, it doesn't have to stay and then they

20   can litigate later. As Judge Alito noted, it would be

21   as little as 10 days.

22   I mean some arguments -- some of the

23   arguments I should at least mention that the other side

24   has made: The chief -- in the Second Circuit, the

25   argument was that there was an ambiguity because the

1   word "only"0 wasn't used. So if I may use the example

2   that an individual may be eligible for welfare

3   recipients -- welfare benefits if that individual

4   previously received food stamps, the argument would be,

5   well, that's a little ambiguous because you didn't say

6   "only received food stamps." Of course, the condition

7   doesn't have to have "only" and it probably undermines a

8   lot of statutes that Congress has passed. The language

9   is very, very clear.

10   The second argument that is made both by the

11   Solicitor General and Respondent is that there's been an

12   -- implied repeals of this Court's decisions in

13   Burlington and Carter. But an implied repeal is when

14   you have two statutes that are specific and the latest

15   specific statute is inconsistent with the earlier

16   specific statute. These courts' decisions were based on

17   a general remedy provision and, more importantly, this

18   statute encompassed what this Court held because it

19   provided that you can remove your child once in the

20   system and the notice provision provides that you don't

21   have to be in the system very long.

22   JUSTICE ALITO: Is there any suggestion in

23   the reasoning in the Burlington case that it was limited

24   to a situation in which the student had been receiving

25   public school special education?

19

1   MR. KOERNER: No. But it was a holding

2   where the student was in fact receiving special

3   education. The next case, of course, would have been

4   one where the -- now, a more interesting question would

5   have been raised if you had (iii) and not (ii). If you

6   only had the notice provision where Congress

7   contemplates you have to be in the system to give

8   notice, and I came to this Court and I said, under

9   (iii), Congress has really contemplated you have to at

10   least be in the system for a short amount of time. You

11   didn't have (ii), which clarifies exactly what Congress

12   said, and this Court would have to then consider whether

13   or not (iii), by itself, would be -- would create enough

14   of an ambiguity in its (inaudible) decisions or whether

15   or not (iii) could be enforced without referring to (ii)

16   because why do you give notice?

17   Think about the result in this case. For

18   someone in the system, they have to give notice and an

19   opportunity to cure, and the IEP can be modified. If

20   you're not in the system and you never had any interest

21   in the system and you sought tuition reimbursement, you

22   would have less of a bureaucratic process. There would

23   be a preverse incentive to stay outside the system. You

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

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

1   that's true, because the problem would be you would go

2   to the hearing to see if you were getting the adequate

3   education and you would have -- you would essentially

4   have to make a facial challenge rather than an

5   as-applied one, and the school would say, well, you

6   didn't give us a chance; we were going to do this and we

7   were going to do that. So it would be a heavier burden

8   to carry. The parents would have a heavier burden.

9   MR. KOERNER: But that would --

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

11   MR. KOERNER: But that would be an

12   individual determination, Chief Judge. What I'm saying

13   though, for everybody in the system, it doesn't depend

14   on an impartial hearing. You have to give notice

15   before you get to the next step. If you're outside the

16   system, you don't have to participate in any process

17   other than to seek at an impartial hearing the right to

18   get reimbursement. So that actually there's less

19   bureaucratic processes outside the system, and there's

20   and incentive (1) not to cooperate and (2) just to

21   marshal all your arguments in the impartial hearing and

22   hopefullyl you're going to prevail and get the payment

23   for the private education; whereas, if you're in the

24   system --

25   CHIEF JUSTICE ROBERTS: No, my suggestion is

1   still that it would be easier to prevail at the

2   impartial hearing, if you can say, look, we tried, it

3   didn't work, as opposed to saying, we never even tried.

4   MR. KOERNER: Except for --

5   CHIEF JUSTICE ROBERTS: If I were the

6   impartial hearing examiner, I would think that that's a

7   harder burden for the parents to carry if they didn't

8   even try. The school's going to come in and say, here's

9   what we would have done if you'd given us a chance and

10   you didn't give us a chance.

11   MR. KOERNER: But there is a dynamic at

12   these hearings that, if you come in and that you're in a

13   private school and you show that your child is doing

14   well in the private school, and we come in with a

15   theoretical plan that has never been implemented, there

16   is going to be a dynamic with the impartial hearing

17   officer who will tilt towards keeping the child --

18   JUSTICE GINSBURG: What is the basis for

19   saying that, when the one thing that the statute is very

20   clear on is that the starting premise of any

21   reimbursement claim is that an appropriate public

22   education is not available? That wouldn't concentrate,

23   testing that wouldn't concentrate on what the private

24   school is doing but what the public school could do.

25   MR. KOERNER: You're right, Justice

1　Ginsburg. I was only commenting on the dynamic. Of

2　course, we would try to show it, but we can't show it

3　based on -- any actual interaction with the child. We

4　can't show we observed the child in the school and tried

5　to make the following modifications.

6　　　　　　　JUSTICE GINSBURG: But you don't have the

7　burden; the parents do.

8　　　　　　　MR. KOERNER: Yes. That is the technical

9　relationship. That's right. I'm talking more about --

10　　　　　　　JUSTICE SCALIA: The parent would presumably

11　cover themselves, look it, he's getting X,Y -- X, Y, and

12　Z in the private school and you're going to give him Z;

13　Z is not going to be enough. And the burden on you

14　would be upon you to say, oh, we think Z is enough.

15　　　　　　　MR. KOERNER: That's correct. But, of

16　course, what we're saying has no actual practice.

17　　　　　　　But all this is separate and distinct from

18　the language of Congress. And unless that language is

19　observed, it does require that you have to previously

20　receive special education related services.

21　　　　　　　JUSTICE BREYER: What about an exception if,

22　in fact, the school district admits that they can't do

23　anything for this child?

24　　　　　　　MR. KOERNER: Well, then, Your Honor, that

25　comes under Section B of the same section, 20 U.S.C.

1   1412(a)(10)(B), where the school district does not

2   believe it can provide the service, then it will consent

3   to a private school and will give reimbursement because

4   that will be the equivalent of the free appropriate

5   public education. We are just talking about cases where

6   there has not yet been -- where the school believes they

7   can provide it. The parent and the child disagree.

8   Now, there are two other arguments that I

9   want to address. One, recognizing that the language

10   seems to support the petitioner's position. They argue

11   that, in fact, they did get special education and

12   related services because for the years 1997 and 1998 and

13   1998-1999, we settled with them and we did pay the

14   tuition. But Paragraph 17 of each of those agreements

15   specifically provided that the settlement was not to

16   create any admission for future applications.

17   And as this Court is aware, both under the

18   Federal Rules of Evidence in its decisions in Arizona v.

19   Colorado and the U.S. First International Building

20   Company, if you settle, it has no probative value. All

21   you do is settle the specific claim. You don't settle

22   the legal issue.

23   The second argument they make is, well, we

24   have got an IEP. An IEP is a proposal of how we would

25   service the child. And that IEP would constitute a

1   special education and related service. But an IEP which

2   the parent rejects could never be a special education

3   related system. You have to be in the system receiving

4   it.

5   And indeed, in Section 1414 of U.S.C., it

6   specifically provides if you reject the IEP, you've

7   waived any right to a free and appropriate public

8   education. So once you do that, it ends the discussion.

9   I have a few minutes and I'm going to

10   reserve that time for a possible reply.

11   CHIEF JUSTICE ROBERTS: Thank you,

12   Mr. Koerner.

13   Mr. Gardephe.

14   ORAL ARGUMENT OF PAUL G. GARDEPHE,

15   ON BEHALF OF RESPONDENT

16   MR. GARDEPHE: Thank you, Mr. Chief Justice,

17   and may it please the Court.

18   When a child with a learning disability has

19   been denied a free and appropriate public education,

20   which is what happened here, IDEA authorizes an award of

21   private school tuition reimbursement, whether or not the

22   child previously receives special education related

23   services under the authority of a public agency. The

24   Board's argument that it can both deny space and remain

25   not liable for private school tuition reimbursement is

1   not compatible with the statute or with this Court's

2   jurisprudence. 1412(a)(10)(C)(ii) did not overrule

3   Burlington and did not impose the Hobson's choice in

4   that case.

5   JUSTICE SCALIA: What did it do, then? What

6   meaning do you give to it?

7   MR. GARDEPHE: Your Honor, Congress was

8   focused on the public school context. And the language

9   in (C)(ii), which refers to previously received, is

10   intended as a setup for (C)(iii). When you get to

11   (C)(iii), you get the notice requirements. That's what

12   Congress had in mind. That's why the reference is

13   there.

14   JUSTICE SCALIA: I don't understand that.

15   It makes it very clear it is, it is (ii) which

16   authorizes the enrollment in a private school and

17   payment for that. And it is prefaced with a condition:

18   If the parents of a child with a disability who

19   previously received special education and related

20   services under the authority of the public agency,

21   enroll the child in a private -- the implication is if

22   there were parent of a child who was not so enrolled,

23   this provision does not apply. So then you fall back on

24   the fact that the old provision covered in our cases

25   would have applied but that makes this meaningless.

1   I mean if you say that our prior cases

2   overrode that limitation, then what purpose does the

3   limitation serve?

4   MR. GARDEPHE: Your Honor, the first

5   question is whether that is intended to be exclusive.

6   And I don't think it was, because the "only if" language

7   is not there. And the "only if" language is actually

8   used in IDEA in multiple places. And Congress knew how

9   to say only if it intended, if it intended --

10   JUSTICE SCALIA: Where else does it say that

11   the city will pay for the cost of a private education

12   except there? That's the only place it says it. And

13   part of the requirements for getting it is that the

14   child was receiving service at a public institution.

15   MR. GARDEPHE: Your Honor, Congress did not

16   intend that exclusive language. If it had, it would

17   have used the "only if" language.

18   JUSTICE SOUTER: Then why didn't Congress

19   adequately give the equivalent of what you call the

20   "only if" language when it began (iii) by saying the

21   cost of reimbursement described in clause two? The

22   reimbursement described in clause two is described in

23   terms of the clause that Justice Scalia is zeroing in

24   on.

25   MR. GARDEPHE: Because, Your Honor, the

27

1   context is public school. That is the situation that

2   Congress was seeking to address, and that's why you

3   have --

4   JUSTICE SOUTER: I'm sorry. I'm just not

5   getting this. Can you rephrase that?

6   MR. GARDEPHE: Yes. If you look at

7   (C)(iii), Your Honor, it obviously repeatedly refers to

8   prior to the removal of a child from the public school.

9   So Congress was clearly focused on and it was intending

10   to give guidance to the courts in their equitable -- in

11   exercising their equitable powers. So in the context of

12   a child who was in public school, these are the types of

13   notice and cooperation things the court should take into

14   consideration.

15   The question, Your Honor, is whether they

16   intended this to be the exclusive vehicle by which

17   tuition reimbursement could be obtained? And the answer

18   to that, Your Honor, is no. And the reason why the

19   answer is no is because there is no "only if" language.

20   CHIEF JUSTICE ROBERTS: So you read --

21   hypothesize two statutes: One, the statute before the

22   phrase "who previously received special education" was

23   added and the statute after? You read both of those

24   statutes the same way; right?

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

28

1 Because the question is, does that language serve any

2 purpose? And my answer to that, the language in

3 (C)(ii), "previously had received," yes, it serves the

4 purpose. The purpose is it gives factual context for

5 what comes in (C)(iii).

6   The other thing I would like to say --

7   CHIEF JUSTICE ROBERTS: I don't understand.

8 You read "who previously received special education

9 services," and you say that includes who previously did

10 not receive special education services.

11   MR. GARDEPHE: No. What I'm saying is that

12 that provides the context for what follows in (C)(iii).

13 The context it provides is --

14   CHIEF JUSTICE ROBERTS: There would be no

15 reason for Congress to put that language in if the same

16 right to reimbursement existed if the child had not

17 previously received special education services.

18   MR. GARDEPHE: No, Your Honor. The point of

19 that language is to provide the backdrop for (C)(iii)

20 where Congress did intend to give guidance to courts in

21 the exercise of the equitable --

22   CHIEF JUSTICE ROBERTS: Because your friend

23 reads that the exact opposite way and says, since

24 (C)(iii) only makes sense if the child is in the public

25 school, that that's a limitation on how you should read

29

 1   (C)(ii).

 2   MR. GARDEPHE: I understand that, Your

 3   Honor. But the question is whether -- it really boils

 4   down to if Congress intends to address the full --

 5   CHIEF JUSTICE ROBERTS: In that case, isn't

 6   it pertinent that the title to (C)(ii) says

 7   "Reimbursement for Private School Placement"? It

 8   doesn't say reimbursement for private school placement

 9   when the child previously attended public school.

10   MR. GARDEPHE: But, Your Honor, (C)(ii) is

11   not exhaustive. Let me give an example.

12   I'm sure this Court would agree that the

13   requirement, the second requirement in Burlington that

14   the private placement has to be appropriate is the law

15   in this land. And (C)(ii) doesn't set forth that

16   requirement. (C)(ii) does not set forth that

17   requirement. And what that says to me is that (C)(ii)

18   was never intended by Congress to be exhaustive.

19   CHIEF JUSTICE ROBERTS: That just means that

20   (C)(ii) doesn't address the entire universe of issues

21   that might arise. But that doesn't mean that it doesn't

22   address exactly what its title says, "Reimbursement for

23   Private School Placement."

24   MR. GARDEPHE: Your Honor, I believe it's

25   probative on the issue of whether Congress intended

30

1   (C)(ii) to set forth the requirements for private school

2   tuition reimbursement and all the factual context in

3   which that could be rendered.

4   I do want to address one point, which is

5   that did Congress deal with this issue later? That is

6   to say, in terms of the notice factors that it set forth

7   in (C)(iii), which I have argued to you applied to

8   parents whose children have been in public school. The

9   answer to that question, Your Honor, is, yes, they did.

10   They addressed it in 1415(f)(1)(B), which require the

11   2004 amendments to IDEA.

12   CHIEF JUSTICE ROBERTS: Where is that set

13   forth?

14   MR. GARDEPHE: 1415(f)(1)(B) -- I'm sorry,

15   Your Honor, it's not in the appendix to the solicitor

16   general's brief. But at 1415(f)(1)(B), Your Honor, what

17   that provision requires is that parents, prior to a due

18   process hearing, must meet with the IEP team, they must

19   meet with the school district, they must lay out their

20   complaints about the IEP, and the statute provides give

21   the school district an opportunity to resolve the

22   complaint.

23   So Congress did not deal with the full

24   waterfront in the 1997 amendments. It returned to this

25   issue in 2004 and imposed those notice and cooperation

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

2   CHIEF JUSTICE ROBERTS: Were those

3   provisions at issue when this dispute arose? They are

4   the 2004 amendments --

5   MR. GARDEPHE: These were 2004 amendments,

6   Your Honor.

7   JUSTICE STEVENS: You haven't identified the

8   statutory provision that you think provides the

9   authority for the payment in this case.

10   MR. GARDEPHE: Your Honor, I believe it

11   begins with 1400(d)(1)(A) and 1412(A)(1); both of which

12   impose the requirement on school districts to make

13   available the free and appropriate public education for

14   the child. I believe it begins there. It then

15   continues to 1415 (i)(2)(C)(3), which is the provision

16   that grants courts to -- sorry, grants such relief as

17   the court determines is appropriate. There is no

18   evidence either in the 1997 amendments or in its

19   legislative history that there was an intent to appeal

20   or override that remedy.

21   CHIEF JUSTICE ROBERTS: I suppose it's how

22   broadly you read legislative history. I thought there

23   was a statement by Representative Castle that this would

24   limit the payments that school districts had to make.

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

32

1 with respect to the children in the public school

2 system, if you read (C)(3) -- and again these are

3 permissive -- but if (C)(3) is applied, then I think

4 Representative Castle's comments make perfect sense

5 because they provide for certain notice obligations.

6   CHIEF JUSTICE ROBERTS: So when it comes to

7 reimbursement of tuition, the parents who never place

8 their child in the public school are in better shape

9 than the parent who place their child in public school

10 and then want to remove him.

11   MR. GARDEPHE: No, Your Honor. And the

12 reason for that is, there was case law preceding the

13 1997 amendments that imposed reasonableness

14 reasonableness and cooperation requirements on parents

15 even before the 1997 amendments came into effect. As I

16 did mention, after 2004 those requirements were now

17 statutory, but the reality is as a matter of case law,

18 it was already very clear in 1997 that if you didn't

19 give notice to the school district, if you didn't

20 cooperate in the formation of an IEP, you were not going

21 to get tuition reimbursement. And of course that flows

22 directly from, in particular, Carter's statement that

23 the reimbursement remedy is subject to equitable

24 considerations.

25   So it has always been the law that if a

1 parent does not cooperate, does not give notice, does

2 not cooperate in the formation of an IEP, that they will

3 not get -- or that the court has the discretion to deny

4 the tuition reimbursement remedy.

5   CHIEF JUSTICE ROBERTS: But cooperation does

6 not require sending the child to the public school.

7   MR. GARDEPHE: No, Your Honor. I think it's

8 clear that Congress never intended, to quote Justice

9 Scalia, that parents would be required to place their

10 child in a patently inappropriate placement in order to

11 qualify for tuition reimbursement, and to address

12 Justice Alito's point, Your Honor, we don't know --

13 whether it's 10 days or 11 days or 1 day -- we don't

14 know. We can draw some guidance, I suppose, from the

15 ten- day requirement in (C)(3), but that's by no means

16 clear. The parents can give notice ten days before the

17 school day begins -- a school year began -- that they

18 find the placement inappropriate. So this --

19   CHIEF JUSTICE ROBERTS: Well in my case they

20 would note have received any benefits, under the terms

21 of the statute.

22   MR. GARDEPHE: But Your Honor, it highlights

23 that if they can place the child in for one day, this is

24 an utterly meaningless provision that Congress never

25 could have intended to require because it serves no

34

1   purpose. And that's --

2   CHIEF JUSTICE ROBERTS: That's why your

3   friend says it serves the purpose of helping to make

4   clear that the public school is -- whether it is or is

5   not able to provide the appropriate public education. I

6   mean, why would Congress have put the phrase in there --

7   even if it was describing as you say the most common

8   situation -- why would it put the phrase in there if it

9   doesn't serve that purpose at least?

10   MR. GARDEPHE: Let me give an example that

11 highlights my point. I place my child in the

12 kindergarten in public school for one day. I then

13 satisfy the statute, previously have received special

14 education-related services. Five years later I can

15 still rely on that. Ten years later, I can still rely

16 on that. It's a talisman. It can't --

17   CHIEF JUSTICE ROBERTS: What you're saying

18 is it's not a very significant hurdle, but it is going

19 to be a hurdle in some cases.

20   MR. GARDEPHE: It doesn't serve any useful

21 purpose, Your Honor, and if it doesn't serve any useful

22 purpose there is no reason to believe that Congress

23 intended it to have that effect.

24   CHIEF JUSTICE ROBERTS: The useful purpose

25 it serves is allow the school district to show what it

35

1 can do in ten days, as opposed to a mere theoretical

2 statement, it allows some actual concrete practice to

3 see if the plan that the public school has developed is

4 going to work or not going to work, that the impartial

5 hearing examiner can evaluate in a more concrete

6 setting.

7   MR. GARDEPHE: This Court has addressed that

8 balance in Burlington, and the answer was no, the

9 statute does not require that parents place their child

10 in an inappropriate place.

11   CHIEF JUSTICE ROBERTS: But then the whole

12 point is the statute was then amended after Burlington.

13 So to say what Burlington interpreted, it don't seem to

14 me to be very compelling on the question of what the

15 amended statute provided.

16   MR. GARDEPHE: But again, Your Honor, there

17 is no evidence in that amendment that it was intended to

18 be exclusive or intended to be exhaustive of the

19 circumstances and factual context.

20   JUSTICE SCALIA: I'm not sure I agree -- Im

21 not sure I would agree with you that you could get

22 special services which --in third grade and then come

23 back 10 years later and get private school tuition. I

24 would really read this as saying if the parents of a

25 child who previously received special education under

1   the authority, enroll the child in a public elementary

2   school -- I think that there has to be a temporal

3   connection between the prior receipt and the enrollment.

4   I don't think you can go back 10 years.

5   MR. GARDEPHE: Let me go back --

6   JUSTICE SCALIA: You don't have to read it

7   that way, anyway.

8   MR. GARDEPHE: Let me address that, Your Honor.

9   What that would mean, then, I suppose, is that parents

10   would be required each year to put their child in a

11   public school for some period of time to qualify, and

12   then place their kid in private school if they didn't --

13   and then you're talking about a disruption --

14   JUSTICE SCALIA: Once you're in the private

15   school reimbursement you're in the private school

16   reimbursement, but you can't get into it 10 years later.

17   Anyway, that issue is not -- not before us today.

18   I don't understand you assertion that

19   somehow this would amount to repeal by implication. The

20   provision of 1415 -- what is it, (b), (b)(3) -- it seems

21   to me is just like a provision for, for a court's

22   exercise of its equitable powers. "Shall grant such

23   relief as the court determines is appropriate" -- if a

24   court had granted some equitable relief in one case, and

25   then there is a statute that's passed which renders that

1   equitable relief no longer appropriate, I wouldn't say

2   that that -- that that amounts to a repeal by

3   implication. It's just that what is appropriate depends

4   upon the remainder of the statue, and as it exists at

5   the time that the relief is sought.

6   MR. GARDEPHE: The point we are trying to

7   make, Your Honor, is that in light of Burlington, which

8   obviously Congress had knowledge of when it enacted the

9   1997 amendments, is it credible to believe that they

10   would have restricted, limited, overruled the holding of

11   Burlington, and never said a word about it?

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

13   about (b)?

14   See look, there are two situations.

15   Situation (a) is that the school district thinks they

16   can give them a good education, adequate. Then he

17   should go and try it out, and if by the way the school

18   district just can't do it, then (b). So what's been

19   wrong with that scheme? Why doesn't that cover the

20   waterfront?

21   MR. GARDEPHE: There is no evidence that

22   Congress intended a tryout period.

23   JUSTICE BREYER: Just the language -- the

24   language.

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

1   JUSTICE BREYER: The language plus the fact

2   that nobody can think of a reason for putting that in

3   there, unless that's the --

4   MR. GARDEPHE: And it's the context that

5   flows from Burlington, where the Congress was aware that

6   this Court --

7   JUSTICE BREYER: But my question was what

8   about (b)? My question was not to argue with you. My

9   question was, why doesn't (b) take care of the examples

10   of absurd situations, law situations that you've

11   mentioned?

12   MR. GARDEPHE: I'm sorry, I'm not

13   understanding B, Your Honor.

14   JUSTICE BREYER: The case where the school

15   district just can't do it.

16   MR. GARDEPHE: Right.

17   JUSTICE BREYER: If they just can't do it

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

19   MR. GARDEPHE: Right.

20   JUSTICE BREYER: -- in a place that can do

21   it. And if their argument, which is your case, is it

22   they object to the facility, then have an argument about

23   that, about whether it should be this private school or

24   that private school. That's what it seems to me your

25   case is about, and that's why I think B.

1   MR. GARDEPHE: In a perfect world, Your

2   Honor, school districts who are confronted with a

3   situation would always make the decision to place the

4   child in private schools at public expense, but

5   unfortunately there are disagreements between school

6   districts and parents about what is appropriate, and

7   then sometimes school districts don't do what they are

8   supposed to do under the statute and in fact the city's

9   interpretation here would incentivize school districts

10   not to provide services because if they never provided

11   services they wouldn't be liable for the reimbursement.

12   Again, this can't be what Congress intended.

13   I did want to back up my assertion about the

14   only --

15   JUSTICE BREYER: (b), that's my question,

16   (b). I thought you were right. Until I heard that.

17   Then I suddenly hear no, that don't worry about it,

18   judge, is what I heard, because in the situation where

19   the school district has not provided there is another

20   section of the statute that takes care of the child.

21   That's what I want to hear your response to.

22   MR. GARDEPHE: Your Honor, that relies on

23   the good faith of the school district. (b) relies on,

24   (a)(10)(B) and B relies on the good faith of the school

25   district to make a determination that they can't provide

1   the services. That's not always going to happen. There

2   may be -- there may be a disagreement about whether they

3   can provide the services or not between the school

4   district and the parents.

5   CHIEF JUSTICE ROBERTS: You have review

6   before the impartial hearing examiner about that alleged

7   bad faith, correct?

8   MR. GARDEPHE: Pardon me?

9   CHIEF JUSTICE ROBERTS: You have reviewed

10   before the Hearing Examiner that alleged bad faith on

11   the part of the school district.

12   MR. GARDEPHE: Yes, Your Honor. Obviously,

13   the parents contend both that the plan was not

14   appropriate, and that it wasn't offered in good faith.

15   But I -- I did want to back up my assertion on the "only

16   if" language and -- and recite some statutory

17   references. Because I believe it stems very clearly

18   from the statute when you go through the provisions.

19   "Only if" or "only" are used in many, many

20   places 1415(f) (3)(E)(ii), 1414(a)(1)(C)ii,

21   1411(b)(1)(A), 1401(19)(C), 1415(k)(4)(C) in the '98

22   version of the statute, 1413 --

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

24   MR. GARDEPHE: The point is, Your Honor,

25   that Congress knew how to say "only if." They didn't do

1   that here, because they had no intention of creating an

2   exclusive remedy.

3   And this Court said in Winkelman that courts

4   should be cautious in reading into the statute an

5   implicit limitation, and this limitation goes to what

6   the Court also said in Winkelman is the primary mandate.

7   Finally, Your Honor --

8   CHIEF JUSTICE ROBERTS: And what was that

9   primary mandate?

10   MR. GARDEPHE: The primary mandate was to

11   provide or -- or make available a free and appropriate

12   public education to every child with learning

13   disabilities.

14   CHIEF JUSTICE ROBERTS: There is no issue of

15   mainstreaming in this case at all; right?

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

17   CHIEF JUSTICE ROBERTS: Neither of the

18   options are mainstream options?

19   MR. GARDEPHE: That's correct, Your Honor,

20   and that's at Second Circuit Appendix 168.

21   The school district here said tnat the

22   child's disabilities could not be addressed in a

23   mainstream setting, so there is no mainstream issue

24   here.

25   Finally, Your Honors, when Congress here

1   chose to carve out populations of children, it did that

2   in a very, very direct way. It did that in

3   1412(a)(1)(B) where it lays out very limited exceptions

4   for children who do not receive the guarantee with

5   respect to a free and appropriate public education.

6   The limitation is very, very clear. It's

7   very, very limited to certain age groups where it would

8   be inconsistent with state law, or there is an

9   incarcerated child. But there is no other place that

10   Congress carved out populations of children other than

11   in 1412(a)((1)((B), and there is no reason to believe

12   that Congress intended in a backdoor fashion to carve

13   out the populations of children, some of which were

14   mentioned in the argument of my adversary.

15   Congress was aware --

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

17   sorry.

18   MR. GARDEPHE: Your Honor, my time is up.

19   Thank you very much.

20   CHIEF JUSTICE ROBERTS: So is mine. Thank

21   you, Mr. Gardephe.

22   MR. GARDEPHE: Thank you.

23   CHIEF JUSTICE ROBERTS: Mr. Garre.

24   ORAL ARGUMENT OF GREGORY G. GARRE,

25   ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

1   SUPPORTING RESPONDENT

2   MR. GARRE: Thank you, Mr. Chief Justice,

3   and may it please the Court:

4   Petitioner takes the position that a school

5   district may both refuse to provide a child with a

6   disability with an appropriate public placement and

7   refuse to pay for an appropriate private placement.

8   This Court has twice before considered and

9   twice before unanimously rejected --

10   JUSTICE SCALIA: No, he hasn't -- he hasn't

11   said that.

12   MR. GARRE: I think he does in the sense,

13   Your Honor, Justice Scalia, that the -- the school

14   district can take the position, even if the IET that is

15   proposed is inadequate and it's adjudicated to be

16   inadequate, because the Schaffer presumption that was

17   brought up earlier does not apply in this case. Because

18   we are talking about situations where a parent can prove

19   that the placement was inadequate. In that situation

20   the parent cannot qualify for reimbursement unless it

21   subjects his child to the inappropriate placement.

22   This Court rejected that rationale in clear

23   and unambiguous terms in the Burlington case. Justice

24   Rehnquist put it in that case --

25   JUSTICE SCALIA: Under a different statute.

1   MR. GARRE: Under a different statute but

2   interpreting the fundamental requirement of the statute

3   that all children with disabilities are entitled to a

4   free and appropriate public education. But that

5   requirement didn't change, and this is what Justice

6   Rehnquist --

7   JUSTICE SCALIA: You are interpreting some

8   very general language: "Shall grant such relief as the

9   court determines is appropriate."

10   MR. GARRE: The -- the part of the

11   Burlington case I'm referring to Justice Scalia is the

12   interpretation of the fundamental requirement of

13   providing free and appropriate public education. And

14   what Justice Rehnquist said there -- and the unanimous

15   Court agreed -- is forcing a parent to choose between

16   subjecting his child to inadequate public placement or

17   paying for private placement deprives the parent of his

18   right to a free and appropriate public education.

19   JUSTICE SCALIA: So does the

20   10-business-days notice requirement for people who are

21   in public schools also violate Burlington, because for

22   10 business days they are going to be subject to an

23   inappropriate education?

24   MR. GARRE: The way the 10-business-days

25   requirement works in practice is that all of the IEPs --

1   virtually all of them are proposed towards the end of

2   the school year; and, typically, the parent is submitted

3   the proposed IEP during the summer. And it's at that

4   point that they have to make a decision whether to

5   litigate that, put their child in a private school, or

6   put them into a public school.

7   So the 10 business days in practice is not

8   going to require the child to go into the inadequate

9   placement. That was true in the fact pattern --

10   CHIEF JUSTICE ROBERTS: So in a situation

11   where it's not in the summer, where they say, well,

12   let's see how it works, and then they go to the public

13   school, I would have thought your argument also would

14   say it's not -- they don't have to give notice of 10

15   business days because in Burlington you said you don't

16   -- you have to make available the tuition reimbursement.

17   They passed a statute imposing a limitation on that, 10

18   business days.

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

20   that --

21   CHIEF JUSTICE ROBERTS: You don't dispute

22   that limitation. You dispute the other one, though,

23   which says they have to have previously received

24   special-education services.

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

1   for reimbursment in that provision which is -- which is

2   followed by the provision describing in more concrete

3   detail the circumstances that courts ought to take into

4   account in determining whether reimbursement is

5   appropriate.

6   And if I can explain the way we read Section

7   1412(a)(10)((C), the first part of that subsection is

8   Subsection (C)(i). That hasn't come up during the

9   argument today. It is barely mentioned in Petitioner's

10   brief. That subsection -- it is on page 5a in the

11   appendix to the Gray brief, lays down the general rule

12   -- the rule that tells school districts when they don't

13   have to worry about paying reimbursement. And that is

14   when they provide a free, a public -- an appropriate

15   public education in the first place.

16   That -- that is consistent with Burlington

17   and Carter, and that lays down the general rule. School

18   districts that provide an appropriate placement don't

19   have to worry about reimbursement.

20   Subsection (C)(ii) then goes on to identify

21   a particular fact pattern which also happens to be the

22   most common situation in which reimbursement claims are

23   presented to the courts. And Congress in that

24   situation, along with Subsections (3) and (4), provided

25   the courts with more concrete guidance in determining

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1   how to exercise their discretion in that situation.

2   The legislative history supports that

3   interpretation. On   pages 25 to 29 of the National

4   Disability Rights Network brief they explain how

5   Congress in the legislative history indicates that they

6   were focused on case law applying this Court's decision

7   in Burlington and Carter where the students were already

8   enrolled in public school.

9   There is no indication whatsoever at all in

10   the legislative record that anybody had in mind scaling

11   back the fundamental mandate of the statute for school

12   districts to provide a free and appropriate public

13   education for every child.

14   CHIEF JUSTICE ROBERTS: Anywhere? I thought

15   Representative Castle said that this would result on

16   easing the burden on the school districts to pay

17   tuitions.

18   MR. GARRE: And it would, Your Honor,

19   insofar as we are dealing with flushing out the

20   requirements for students enrolled in public school.

21   But there is no indication that Congress meant to scale

22   back this Court's interpretation of the act's

23   fundamental mandate to provide a free and appropriate

24   public education.

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

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1   doesn't fit to advance its argument before this Court.

2   It doesn't fit to the extent that Petitioner is

3   suggesting that you have to give public school a try,

4   because it's clear that the -- their interpretation

5   would apply to students in public school, as well as

6   private school. It would apply to all students entering

7   the special education system, including the student

8   who's been enrolled in public school from kindergarten

9   to 11th grade.

10   If he hasn't previously received

11   special-education or related services, then, under

12   Petitioner's view, if he's offered a grossly inadequate

13   plan, he has to be subjected to that plan in order for

14   his parents to qualify. And Petitioner's interpretation

15   doesn't require the parents to give the proposed

16   placement at issue a try. All it requires is that they

17   show that they received previous special-education

18   services at some point in the past.

19   And that's the way it worked in Burlington;

20   that's the way it worked in Carter; and that's the way

21   it works in most of the cases. Students are already in

22   the special education system, and they are proposed an

23   IET at some point typically during the summer. And the

24   parents at that time say this IET is inadequate for my

25   child, and I want to --

1   JUSTICE SCALIA: Well, that's no problem. I

2   mean both sides agree that you can move to a private

3   school if that's so; right?

4   MR. GARRE: If you have previously received

5   special- education services. But my point, Justice

6   Scalia, is under Petitioner's -- the way they read the

7   statute, you don't have to give the proposed placement

8   at issue a try. So to the extent that this Court

9   thinks, or Petitioner is arguing, that Congress wanted

10   to make sure that we could better evaluate whether or

11   not this proposed placement proposed placement is going

12   to work for this child. That doesn't fit with the

13   statutory language because in practice the students --

14   all they have to show is that they received services at

15   some point in the past and if they have they can go into

16   private school and seek reimbursement. It doesn't

17   require a student to be subjected to the inadequate plan

18   unless you happen to be the student who is enrolled in

19   public school or enrolled in private school and you're

20   entering the special education system. At that point

21   then, Petitioner's interpretation requires the parents

22   to enroll their child who has already been determined to

23   have a learning disability in a plan that is inadequate,

24   and we think that is an untenable result.

25   CHIEF JUSTICE ROBERTS: But the whole point

1   is you don't necessarily know it's inadequate until

2   later in time. Right? The school board thinks it is

3   adequate.

4   MR. GARRE: That's true, Your Honor. But

5   two points about that -- first, parents who do enroll

6   their children in private school at their own financial

7   risk. And as Justice Scalia pointed out in his

8   concurring and dissenting opinion in Winkelman, there

9   are particular incentives against bringing frivolous

10   reimbursement claims in this context.

11   JUSTICE SCALIA: Except those -- there are a

12   lot of parents who are going to send their parents to

13   private school, no matter what. They are well-heeled

14   and this is just an opportunity to have New York City

15   pay $30,000 of it.

16   MR. GARRE: And Justice Scalia -- two points

17   on that, first the statute provides in clear and

18   unambiguous terms that all children with disabilities

19   are entitled to a free and appropriate education. The

20   child find requirement, which Section 1412 --

21   JUSTICE SCALIA: Even the child who would

22   turn down the adequate education provided by the public

23   schools. I don't think that was the intent of the

24   statute.

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

1   Justice Scalia, and that's why the way that school

2   districts can avoid reimbursement is to offer an

3   adequate placement in the first place. That's what

4   Section 1412(a)(10)(C)(i) provides. It lays down the

5   general rule. School district today talks about we need

6   to have collaboration, we need to have cooperation

7   during the IEP process. They hold all the cards during

8   that process. And if they want to avoid reimbursement

9   they should do what this Court said in the Carter case,

10   that's provide the student with a free, appropriate

11   public education.

12   JUSTICE SCALIA: If they don't have an

13   adequate placement, they should not have to pay the

14   freight for people who would not be coming to public

15   school any way. That's what this provision prevents.

16   MR. GARRE: I disagree with that, Your

17   Honor. I think that's inconsistent with the statutory

18   mandate to provide a free and appropriate education for

19   all children with disabilities. I would say though, and

20   I want to be clear on this -- even though appearance of

21   students in private school or in public school who

22   haven't previously received special education or related

23   services qualify for reimbursement under our

24   interpretation of the statute. It doesn't mean that

25   they are entitled to reimbursement. In the situations

1   Your Honor may have in mind, where the parents genuinely

2   aren't complying in good faith or genuinely aren't

3   interested in sending their kids to public school, they

4   only want to try to gain the system -- in those

5   hypothetical situations, courts have equitable

6   discretion to deny reimbursement claims, and they have

7   denied those reimbursement claims.

8   CHIEF JUSTICE ROBERTS: Thank you,

9   Mr. Garre. Mr. Koerner, you have three minutes

10 remaining.

11   REBUTTAL ARGUMENT OF LEONARD J. KOERNER

12   ON BEHALF OF PETITIONER

13   MR. KOERNER: Thank you, Mr. Chief Justice.

14 First, this particular provision, as the Chief Justice

15 noted, is called payment for private school placements

16 where they don't have the consent of the local

17 education. Any reasonable reading of that is that it's

18 all encompassing. And any person who has to apply has

19 to satisfy those provisions. Second, this statute did

20 not overrule Burlington or Carter. In those cases the

21 children were already receiving special services. Now

22 it could be in a future case someone would speak to

23 extend those cases, but Congress has now spoken to make

24 sure that Burlington and Carter go no further than you

25 have previously held. Third, there is an assumption

1   that the program is going to be defective from day one.

2   But that's contrary to this Court's decision in Schaffer

3   which presumes the good faith of the individuals who

4   propose in program. And that is the heart of the entire

5   case. Fourth, let's assume, for example, that someone

6   can create an ambiguity in this case. Citing the

7   Arlington case, in which you placed yourself in the

8   position of the local education officer, when you look

9   at this particular section -- and particularly C double

10   2 -- double i and triple i. Would you, in that

11   position, understand that it doesn't really mean what it

12   says, that previously received special education

13   services was only meant to cover the people already in

14   the system and was not intended to cover people outside

15   the system. That isn't what it says. More importantly,

16   the ambiguity is clearly not obvious. So how would a

17   local officer who has to understand whether or not to

18   place the funds at risk know whether or not in complying

19   with this particular situation, it was explicit or

20   implicit?

21   JUSTICE ALITO: During the period between

22   Burlington and the enactment of this statute, would you

23   have any doubt about your potential obligation to

24   reimburse a parent -- during the period of Burlington

25   and the enactment of the statute, would the school board

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1   have had doubt about its potential liability for

2   reimbursement, in a situation like this?

3   MR. KOERNER: I think so. I think, because

4   of Burlington and Carter, where the children were

5   already in the system, this would be the next step.

6   Would we have presented to you the fact that you

7   shouldn't expand it? Probably. Would I know what you

8   would conclude? No, but the statute eliminated that

9   entire discussion. It is clear. But again, there is a

10   very big spending clause -- as I mentioned in my earlier

11   presentation, if it's so ambiguous that you can read out

12   a specific provision, how can that ambiguity not go down

13   to the benefit of the city through it's local education

14   system?

15   JUSTICE GINSBURG: I thought this statute

16   was also premised on Section 5 of the 14th Amendment, in

17   which case it wouldn't have spending clause notice

18   argument.

19   MR. KOERNER: No, the -- this is just a

20   grant provision, Your Honor. It's not premised on any

21   constitutional provision. It's a grant where funds are

22   provided to the local education district, and in return

23   they agree to comply with all the conditions set forth

24   in the IDEA. There are no constitutional limits. Thank

25   you very much.

1   CHIEF JUSTICE ROBERTS: Thank you,

2   Mr. Koerner. The case is submitted.

3   (Whereupon, at 11:55 a.m. the case in the

4   above-entitled matter was submitted.)

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