No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

v.

T.A.,

.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawaii State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents over 95,000 of the Nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 49.3 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

The National Association of State Directors of Special Education ("NASDSE") is a not-for-profit

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[1] Pursuant to Sup. Ct. R. 37.6, amici note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.2, counsel further notes that counsel of record for the parties received timely notice of the intent to file this brief and have consented to the filing of this brief.

organization established in 1938 to promote and support education programs and related services for

provided by the federal government under IDEA.[2] The burden on local school districts also is increased by an adversarial conception of IDEA, which exacts an even greater toll on limited educational resources and thus exacerbates the difficulty for school districts in deciding what educational opportunities they can afford to provide for children.

NSBA, AASA and NASDSE, therefore, assign critical importance to the issue presented in this case: whether Congress in IDEA authorized tuition reimbursement for parents who unilaterally place their children in private schools, where those children have never previously received special education services from the public schools.[3] Like the petitioner, amici contend that the Court should grant certiorari in this case to establish that the answer is no.

SUMMARY OF ARGUMENT

As this Court recognized by granting certiorari in , the courts of appeals are divided over the

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[2] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $55 billion for the last four fiscal years. Ann Lordeman,

important question of whether IDEA permits parents to obtain a private school tuition reimbursement award from a public school district when they unilaterally place their child in private school without trying—or as here, without even suggesting the need for—a collaboratively-developed Individualized Education Program ("IEP") offered by the public school district. The Ninth Circuit's decision below not only deepens and clarifies that split—by specifically rejecting the First Circuit's ruling in v. , 358 F.3d 150 (1st Cir. 2004)—it also interprets the IDEA in a way Congress never intended. The Ninth Circuit's conclusion that parents whose children never obtained special education or related services from a public agency need not comply with any of the requirements of § 1412(a)(10)(C) creates a back-door route that would advantage parents who unilaterally place a disabled child in a private school first, and then litigate against the public school district later to obtain tuition reimbursement.

The Ninth Circuit's interpretation of IDEA is contrary to the intent and carefully constructed framework of the statute. IDEA is premised on collaboration between parents and public school districts but the Ninth Circuit's decision flouts that collaborative structure by making it easier for parents to obtain private school tuition reimbursement if their child was never provided public school special education services than if the parents worked with the school district to develop a public school program appropriate for the child's needs and then allowed that program a chance to succeed. The Ninth Circuit's interpretation of IDEA also places school districts at a distinct disadvantage

ARGUMENT

I. BY EXEMPTING PARENTS OF CHILDREN WHO NEVER RECEIVE PUBLIC SPECIAL EDUCATION SERVICES FROM THE LAW'S CAREFULLY IMPOSED CONDITIONS ON TUITION REIMBURSEMENT, THE NINTH CIRCUIT DECISION CONTRAVENES THE COLLABORATIVE INTENT AND FRAMEWORK OF IDEA.

As part of its 1997 IDEA amendments, Congress sensibly adopted a threshold requirement for tuition reimbursement claims by parents who unilaterally place their children in private school: tuition reimbursement is only available for children who "previously received special education and related services under the authority" of the public school district. 20 U.S.C. § 1412(a)(10)(C)(ii). The plain language of this provision makes clear that where a child has not previously received special education from a school district, neither a court nor a hearing officer has authority to reimburse tuition expenses arising from a parent's unilateral placement of the child in private school. The amendment simply requires that parents of children with disabilities give public schools a realistic chance to serve their children before unilaterally rejecting what the public school offers—and forcing the school district to fund a private school education.

In addition to the threshold requirement, Congress determined that students who have previously received public special education services may be denied tuition reimbursement, in whole or in part, if the parents (1) failed to inform the student's IEP

A. IDEA's History and Fundamental Requirements Show that Appropriate *Public* School Placements are Preferred.

The principal motivating force behind IDEA and its predecessor was to stop the exclusion of disabled students from schools—not to increase the opportunity for disabled children to attend private schools at public expense. In the 1970s "the majority of disabled children in America 'were either totally excluded from schools or sitting idly in regular

requirement, further underscores IDEA's goal of promoting public school access for children with disabilities. 20 U.S.C. § 1412(a)(5). Through this requirement, the Act incorporates a strong preference that, whenever possible, children with disabilities attend schools and classes with children who are not disabled—giving rise to a presumption in favor of a child's placement in the public schools. , , v. , 88 F.3d 556, 561 (8th Cir. 1996) (hearing officer erred by ignoring IDEA's "strong preference" in favor of public school placement).

Given this presumption, a school district may only resort to use of a private school to educate a child with a disability when "public educational services appropriate for the handicapped child are not available." v. , 700 F.2d 134, 138 (4th Cir. 1983). The public school has a duty to provide services to the student and to include the student in the public school community to the maximum extent practicable.

The Ninth Circuit's decision, which advantages parents who never work with the public school district to attempt to include their disabled child in a public school program tailored to their child's needs, is contrary to the well-established preference in the IDEA for public schooling of disabled children wherever possible. Indeed, it eviscerates the LRE mandate by allowing parents to obtain public funding for a private school placement without ever trying the public school program.

B. IDEA Establishes a Collaborative Framework for Parents and Public Schools to Work in Tandem to Ensure Appropriate Educational Programs for Children with Disabilities.

The "core of [IDEA] * * * is the cooperative process that it establishes between parents and schools." , 126 S. Ct. at 532. , 458 U.S. at 205-206 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). The collaborative decision-making process at the heart of IDEA is undermined when parents do not cooperate in good faith with school districts. Congress' decision to require parents at least to attempt to ensure an appropriate public school placement before they are eligible for private school tuition reimbursement fosters just such good-faith collaboration. The Ninth Circuit decision below, however, will encourage parents not to collaborate with public school districts because to do so will disadvantage them if they later seek private-school tuition reimbursement.

As the Court recently stated in , the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 126 S. Ct. at 532. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. 20 U.S.C. § 1414(d); v. , 484 U.S. 305, 311 (1988).

truly collaborative process. The 1997 IDEA amendments, for example, included a number of provisions that made some of the procedural duties of parents quite explicit. Requiring cooperation in these smaller ways would make little sense if the Act entitles parents who abandon public schools before even challenging whether their child was eligible for services, or who reject a proposed placement without trying the services offered by the public school district, to receive tuition reimbursement.

The 1997 amendments, for example, added a provision indicating that reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Therefore, before removing a child from a public school, parents must inform the IEP team that they are rejecting the proposed placement, state their concerns with the proposal, and indicate their intent to enroll their child in a private school at public expense. 34 C.F.R. § 300.148(d). In addition, parents must give the school district written notice of these factors at least ten days prior to removing their child from a public school. The reason for this is clear: Without a good faith commitment to the process by all parties, true collaboration in determining the development and implementation of a free appropriate public education would not be possible. , ,

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not even attempting to secure services under IDEA before removing the child from public school is the antithesis of this collaborative process.

School districts, too, share an obligation under the Act to attempt in good faith to identify and evaluate children in need of special education and to negotiate workable IEPs—and to agree to private placements when they cannot. School districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. In 2005, for example, there were 88,098 students with disabilities educated in private schools at public expense. U.S. Department of Education, IDEA data, Table 2-5: Number of students ages 6 through 21 served under IDEA, Part B, in the U.S. and outlying areas, by disability category and educational environment, Fall 1996 through Fall 2005, https://www.ideadata.org/ tables29th/ar_2-5.htm [hereinafter IDEA data]. The overwhelming majority of these placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA. School districts thus voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements—which occur when the collaborative process established by the Act is operating as it is intended.

C. IDEA Provides Numerous Procedural Protections to Parents, Students and School Districts in an Effort to Balance the Costs and Benefits of IDEA.

The fundamental goal of IDEA is a "free appropriate public education" in the "least restrictive environment" for all students with disabilities. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(5). IDEA establishes procedural rights and obligations for parents and school districts alike to achieve that goal in a manner that ensures education opportunities for disabled children while recognizing the financial costs entailed. To require school districts to reimburse the cost of private school tuition without first affording the district the opportunity to provide a free appropriate public education ignores the equally important interests of school districts and parents that IDEA seeks to balance through carefully constructed procedural rights and

free appropriate public education for their disabled children. Such a message is completely antithetical

under an adversarial shadow, with the parents' rejection of any determination of ineligibility or offer of an IEP public placement already set and the occurrence of a due process hearing a foregone conclusion. Under such circumstances, a school district knows that any determination the child is ineligible will place it in an extremely weak position should the due process hearing officer disagree. It will not only be found to have denied FAPE by its ineligibility finding but also will not have developed an IEP which can be examined to determine the appropriateness of the placement and services offered.

Where the school district has already determined prior to the parents' unilateral removal that a child is eligible for special education, unilateral refusal by parents to try an IEP means that school officials are never given the opportunity to make (or refuse to make) changes depending on how a child responds to the IEP developed. While there is no guarantee that a proposed IEP will always accommodate every child, the school district should have the opportunity to try less restrictive alternatives than private placements. , , v. 449 F.3d 816, 821 (8th Cir. 2006) ("district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement"). And if a problem with the IEP becomes apparent, school districts need to be able to investigate and respond to the problem—before being saddled with tens of thousands of dollars in tuition reimbursement. v. , 81 F.3d 389, 397 (3d Cir. 1996) (district "may not be able to act immediately to correct an inappropriate

IEP; it may require some time to respond to a complex problem").

When parents unilaterally place their child in a private school without determining whether their child is even eligible for an IEP, or before implementation of a collaboratively developed IEP, school districts are thus denied the ability to litigate the case on an even footing with the parents. For example, where eligibility is contested, the due process hearing officer will be weighing the district's determination of ineligibility, (, its intent to offer no services), against the parents' claim that their child is in need of services as reinforced by evidence of how well the child is doing while receiving the panoply of services available at the private placement. Where eligibility is not at issue, the hearing officer is forced to evaluate in a vacuum whether the IEP would have been appropriate, because the child has no experience with the public school placement. This necessitates an abstract inquiry. Although an IEP is supposed to be judged prospectively as of the time it was developed, in many cases, the parents point precisely to how the child is doing in the private placement as some sort of "proof" of their speculation that the public placement was not sufficient.

v. , 148 F. Supp. 2d 576 (D. Md. 2001). In addition to encouraging improper "Monday morning quarterbacking" of the IEP developed by the public school, the parent's "proof" of private school success is meaningless in the absence of having tried the public placement.

The Ninth Circuit's interpretation of IDEA thus allows, and even encourages, parents and their

for special education services. Budgeting for special education services is already a difficult process for public school districts. These costs have been described as the "wild cards in school district budgets," because they are based on particular needs of specific students and can change from year to year. Melanie Asmar,

Concord Monitor, Feb. 17, 2008. In addition, the costs of private placements for special education students can be particularly expensive. While the residential program for which respondent sought

opportunity to plan ahead in budgeting for a student whom the public school district has attempted to serve, the Ninth Circuit rule means that school districts will be hit after-the-fact with potentially large tuition reimbursement claims for private placements of students who the school district did not even know might require such services.

The budgeting challenges in this case exemplify the problem. How could the school district have suspected in 2001, after T.A.'s mother with

mediation. . Given that the average per pupil expenditure for special education services is about $8,000, a due process hearing or mediation effectively doubles a school district's cost to educate a single disabled child. at 3; U.S. Dep't of Educ., , I-22, I-26 (2002).

School districts do not engage in these expensive disputes to avoid providing appropriate education to special needs students; indeed, more than 55% of resolved due process hearings and litigation cases are decided entirely in favor of the school district, while 65% of due process hearings and 83% of litigation cases result in at least a partial victory for the district. Chambers, Procedural Safeguards, , at 20. Every dollar a school district spends on private placements and litigation to avoid unnecessary private placements is a dollar less for providing special education and related services to students in the public schools.

B. The Ninth Circuit's Decision Will Encourage Litigation.

The 2004 amendments contain several provisions designed to "[r]estor[e] trust and reduc[e] litigation" under IDEA and to alleviate the "excessive litigation under the Act." H.R. Rep. No. 108-77, at 85, 116 (2003). , 20 U.S.C. § 1415(b)(7)(A) (notice requirements for complaints); 20 U.S.C. § 1415(b)(6)(B) (statute of limitations); 20 U.S.C. § 1415(e) (mediation and nonbinding arbitration); 20 U.S.C. § 1415(i)(3)(B) (attorney's fees for frivolous claims); H.R. Rep. No. 108-77, at 85-86 (discussing new provisions). But ruling that

v. , 471 U.S. 359 (1985), and v. , 510 U.S. 7 (1993), are not limited by Section 1412(a)(10)(C)(ii) would only result in a continued flood of private school parents seeking to play in a tuition-reimbursement lottery, regardless of their interest (or lack thereof) in securing a public education for their children. It would place school districts nationwide, many of them small and financially strapped, in the untenable position of being forced to choose between an expensive private school placement on the one hand and costly litigation on the other.

The reality is that the Court's holdings in and exploded the number of tuition reimbursement cases that school districts must litigate, mediate, or settle. And if parents are free to unilaterally place their children in private schools and then seek reimbursement, without ever trying the public school's program (or in this case, even working with the school to create an individualized program), that number will expand exponentially. IDEA is intended to ensure a free and appropriate education for students with disabilities—resort to a private placement is permissible only in extraordinary circumstances. Allowing private tuition reimbursement in cases where the child has not previously received special education services in the public schools would work against the intent of the Act, forcing school districts into a no-win choice between expensive litigation and expensive private placements and offering windfalls to parents who prefer private schools.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition, amici respectfully request that this Court grant certiorari, and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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