EDUCATING SPECIAL EDUCATION STUDENTS WHO HAVE ONLY ATTENDED PRIVATE SCHOOLS: AFTER *TOM F.*, WHO IS LEFT WITH THE BILL?

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Until 1975, American public schools educated one out of every five children with disabilities between the ages of three and twenty-one.[1] That means that, during this period, public school districts around the nation turned away two million disabled students from their classrooms. Of those lucky handicapped students who were admitted, it is estimated that 2.5 million received ineffective education.[2] Prompted by these findings and in response to two highly publicized federal judicial opinions, Congress statutorily decreed the right of disabled children to receive a free appropriate public education. The 1975 Education for All Handicapped Children Act (EHA) funded state education programs that adhered to this new right and opened their school doors to handicapped children.[3] In 1990, the Act morphed into the Individuals with Disabilities Education Act (IDEA), recognizing more types of disabilities as "handicaps" and strengthening the protections for the discriminated group.[4]

Between 1976 and 2002, the number of identified learning disabled students increased three hundred percent.[5] In fact, the majority of today's primary and secondary schoolchildren between the ages of three and twenty-one are special education students, a recognized "handicapped" group under the IDEA.[6] Naturally, with this increase of special education students comes a growing demand for special education services. However, many already financially strapped public school districts are unable to offer these needed additional services. Many parents therefore turn to private schools that offer individualized attention and teachers experienced in educating disabled

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1. United States Department of Education, Thirty Years of Progress in Educating Children With Disabilities Through IDEA, http://www.ed.gov/policy/speced/leg/idea/history30.html (last visited Feb. 24, 2009).

2. 143 CONG. REC. E972-01, E972 (1997).

3. *Id.*

4. *Id.*

5. Krista Kafer, Special Education 101, WebMemo #169 (Nov. 5, 2002), *available at* http://www.heritage.org/research/education/wm169.cfm.

6. Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity under the IDEA*, 58 HASTINGS L.J. 1147, 1149 (2007).

students.[7] However, what should happen when these parents cannot afford to pay the private school tuition? Circuit courts have grappled for decades with whether the IDEA's mandate of a free appropriate public education for all children with disabilities guarantees private school tuition reimbursement.

This decades-long debate has recently focused on parents who unilaterally enroll their children in private school, bypassing the public school system entirely. Circuit courts disagree on whether public districts are required to pay for a disabled student's private school placement if his or her parents refused to initially use the educational services already offered by the public school. Facing a circuit split, school districts and parents around the nation awaited a definitive United States Supreme Court decision in 2007. Despite these hopes for an answer, the Supreme Court's recent *Board of Education v. Tom F.* plurality decision failed to end the debate. Thus, the question still remains as to whether a parent who enrolls his or her special education child in private school prior to placing the child in public school should receive private school tuition reimbursement under the Individuals with Disabilities Education Act.

This Note argues that the United States Supreme Court should rehear this issue and affirm the notion that, since the American education system's goal is to prepare the nation's youth to succeed in adult life, all children must receive appropriate educational services. If appropriate instruction can only be offered in a private school, the IDEA's free public education mandate requires public districts to pay for the private education, without forcing the student to first enroll in the inadequate public program. The current circuit court split not only harms students, but also financially cripples public school districts. Current IDEA case law grants parents substantial input in determining what constitutes an appropriate education for their special needs child.[8] However, broad IDEA eligibility and influential parental input advocating for private placement drains public resources.[9] Without judicial guidance, school districts and parents spend, and will continue to spend, millions of dollars litigating over whether it is appropriate to use public resources to fund private school placements. Such uncertainty not only wastes money on litigation, which could be used to create special education programs in public schools, but also saddles special education students with an uncertain school placement and potentially inappropriate education. The nation's public

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7. *Id.*; Erin Bradley, *Chalk Talk: Enforcement of the Individuals with Disabilities Education Act: Should States be Required to Pay for Private Education?*, 35 J.L. & EDUC. 405, 408 (2006).

8. Robert F. Rich, Christopher T. Erb & Rebecca A. Rich, *Critical Legal and Policy Issues for People with Disabilities*, 6 DEPAUL J. HEALTH CARE L. 1, 39 (2002).

9. *Id.* at 40.

school systems, and more importantly the schoolchildren themselves, can no longer afford to operate and drift through classes in this judicially uncertain environment. The United States Supreme Court should rehear this crucial issue to resolve the dispute.

Part I of this Note describes the IDEA's historical background and the statute's impact on American students. This Part focuses on the EHA's statutory provisions, Congress' intent in amending the statute and renaming it the IDEA, and the subsequent 1997 Amendment to the IDEA. Part II discusses the judicial path from the IDEA, and its predecessor, the EHA, to the current circuit court split. Part III examines the current national circuit divide over tuition reimbursement for unilaterally placed children. Part IV follows the evolution of *Board of Education v. Tom F.* from the district court to the United States Supreme Court's unhelpful plurality decision. Part V emphasizes that the Supreme Court's judicial dodge simply perpetuates the national dispute, leaving public school districts in fiscal and legal uncertainty. This Part examines the fiscal pressure on school districts arising from having to pay for the private school tuition of disabled students who never attended its public schools. This Part also addresses the psychological and developmental impact that inappropriate educational placement can have on special education students.

I. FROM THE SIDEWALK TO THE FRONT ROW—STUDENTS WITH DISABILITIES ARE WELCOMED INTO THE CLASSROOM

A. The State of the Union's Education System

Early 1970s America greeted rising numbers of special education students with locked classroom doors. Appalled by the state of American public special education, two federal courts in 1971 and 1972 declared the right to an adequate and free public education for all special education children.[10] Following the federal courts' lead, Congress passed the Education for All Handicapped Children's Act (EHA), which recognized the right of disabled children to receive a free appropriate public education and allocated federal funds to help state and local agencies finance the mandate.[11] The Act's stated

10. Pa. Ass'n, for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) (requiring that "each child . . . receive access to a free public program of education and training appropriate to his learning capacities"); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972) (prohibiting children, otherwise entitled to a public education, from being "excluded from a regular school assignment").

11. Office of Special Education and Rehabilitation Services, United States Department of

purposes included: "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . . [and] to assist States and localities to provide for the education of all handicapped children."[12]

Fifteen years later, Congress renamed the Act the Individuals with Disabilities Education Act (IDEA). In renaming the Act, Congress proclaimed that improving disabled children's educational success is crucial to the national objective of "equality of opportunity, full participation, independent living and economic self-sufficiency" for those with disabilities.[13] To that end, the new IDEA ensures that all children with disabilities have access to a free appropriate public education that "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . ."[14] The IDEA strengthens the EHA's protections for students whose disabilities require special education services and expands the definition of "disabled," now including students with autism and traumatic brain injury.[15]

B. The Individuals with Disabilities Education Act Breaks the Chains on the Classroom Door

The IDEA achieves its goals by guaranteeing students with disabilities between the ages of three and twenty-one a free appropriate public education (FAPE) in the least restrictive environment.[16] To ensure a FAPE, school officials meet with the student's parents[17] to determine the student's educational needs, develop annual goals, and identify other needed services.[18]

Education, http://www.ed.gov/about/offices/list/osers/osep/index.html (last visited Feb. 24, 2009).

12. Education for All Handicapped Children's Act of 1975, Pub. L. No. 94-142, Sec. 3(c), § 1401, 89 Stat. 773 (1975).

13. 20 U.S.C. § 1400(c)(1) (2006).

14. *Id.* at § 1400(d)(1)(A).

15. M.M. *ex rel.* C.M. v. Sch. Bd., 437 F.3d 1085, 1094 (11th Cir. 2006).

16. *Id.*

17. The Department of Education's 1999 regulations interpreting the 1997 Amendment to the IDEA defined "parent" to include adoptive parents, guardians, and a person "acting in the place of a parent." State law may prohibit a foster parent from being considered a "parent." Sandra J. Altshuler & Sandra Kopels, *Advocating in Schools for Children with Disabilities: What's New with IDEA?*, 48 SOC. WORK 320, 325 (2003).

18. *Id.* In developing an IEP, the committee must consider: academic achievement and learning characteristics, social development, physical development, and behavioral needs. Frank G. v. Bd. of Educ., 459 F.3d 356, 363 (2d Cir. 2006).

An individualized education plan (IEP) summarizes the resulting recommendations, which the public school district must implement either in a public or private school.[19] Pursuant to the "least restrictive environment" requirement, the child should remain in the public school system if the school has the necessary resources to execute the IEP.[20] Disabled and non-disabled students must be educated together unless regular public school classes, even with the aid of additional services, deprive the disabled student of an appropriate education.[21]

Congress' subsequent 1997 and 2004 Amendments to the IDEA further strengthened this "least restrictive environment" requirement.[22] The Amendments emphasized the importance of children with disabilities participating in mainstream classrooms.[23] As one congressman stated during the debate over the 1997 bill, "the strong presumption . . . [is] that children with disabilities should be educated with children without disabilities in the general education classroom. This is surely the . . . best way to guarantee equal education opportunity for all children."[24] The Amendments thus presume that a student may not be removed as long as the child's educational needs can be appropriately addressed in the current placement.[25]

If the public school board determines that it cannot provide an appropriate education for a disabled student, the school board may agree to fund a private school placement.[26] However, if the school board and the parents disagree about whether the IEP can appropriately be implemented in the public school system, the parents can withdraw their child from the public school, place the child in the private school of their choice, and challenge the IEP's recommended public placement as inappropriate under the IDEA.[27] Parents may be reimbursed by the public school district for private school tuition when "a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a

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19. Altshuler & Kopels, *supra* note 17, at 320, 321.

20. *Id.*

21. 20 U.S.C. § 1412(a)(5)(A) (2006).

22. The 1997 and 2004 Amendments also extended coverage to students suffering from attention deficit hyperactivity disorder and attention deficit order. Pub. L. No. 105-17, 111 Stat. 37 (codified as amended at 20 U.S.C. § 1451 (2006)).

23. 143 CONG. REC. E951-01 (1997).

24. 143 CONG. REC. E972-01, E972 (1997).

25. 143 CONG. REC. E951-01 (1997).

26. Timothy M. Huskey, *Teaching the Children "Appropriately": Publicly Financed Private Education under the Individuals with Disabilities Education Act*, 60 MO. L. REV. 167, 174 (1995).

27. *Id.*

timely manner, prior to the parents enrolling the child in that placement without the public agency's consent."[28] However, parents must give notice about their concerns regarding the IEP, either at the IEP meeting or ten days before transferring their child to private school.[29] Parental noncompliance permits hearing officers and courts to reduce or deny reimbursement.[30]

The question behind *Board of Education v. Tom F.* and similar cases is who must pay for the tuition if parents place their children in private school without first enrolling them in public school, as recommended by the student's IEP. The debate centers around § 1412(a)(10)(C)(ii) of the IDEA. The provision, entitled "[r]eimbursement for private school placement," states:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court . . . may require the agency to reimburse the parents for the cost of that enrollment if the court . . . finds that the agency had not made a free appropriate education available to the child in a timely manner prior to that enrollment.[31]

The debate surrounding § 1412(a)(10)(C)(ii) intensifies each year as the number of students affected by the provision's meaning increases. In the 1990–1991 school year, the first school year affected by the IDEA, the statute benefited 4,710,089 disabled students.[32] The 2005–2006 school year saw that number rise to 6,712,605, totaling 13.8% of the total public school enrollment of three- to twenty-one-year-olds in 2004.[33] With millions of educations at stake, case law slowly began to form a guiding interpretive patchwork.

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28. H.R. REP. NO. 105-95, at 93 (1997).

29. *Id.* at 91–92.

30. *Id.* at 92.

31. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).

32. NAT'L CTR. FOR EDUC. STATISTICS, NUMBER AND PERCENTAGE OF CHILDREN SERVED UNDER IDEA, PART B, BY AGE GROUP AND STATE OR JURISDICTION, http://nces.ed.gov/programs/digest/d06/tables/dt06_050.asp (last visited Feb. 24, 2009).

33. *Id.*; *see* Kafer, *supra* note 5.

II. THE FIGHT BEGINS OVER WHAT A FREE APPROPRIATE PUBLIC EDUCATION REQUIRES[34]

A. Public Education for All Transforms From a Theory to a Reality: Board of Education v. Rowley

In the first major test of the Education for all Handicapped Children Act, the United States Supreme Court announced in *Board of Education v. Rowley*[35] that the EHA establishes the "basic floor of opportunity," guaranteeing equal access to those special education services specifically designed to benefit disabled children.[36] The Court concluded that Congress intended to guarantee public education to all handicapped children at the state's expense rather than guarantee a particular substantive level of education.[37]

While the Court determined that a free appropriate public education requires public schools to provide the necessary services for the student to "benefit from the instruction," the necessary services do not have to "maximize each child's potential commensurate with the opportunity provided other children."[38] After recognizing the difficulty in identifying when a student "sufficiently benefits," the Court concluded that states satisfy the FAPE requirement "by providing personalized instruction with sufficient support services . . . such instruction and services must be provided at public expense . . . [and] must comport with the child's IEP . . . therefore the personalized instruction should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[39]

B. The Court Declares Retroactive Reimbursement a Possible Remedy: Burlington v. Department of Education

Building upon its equal access mandate, the Supreme Court in *Burlington v. Department of Education*[40] focused on the financial responsibility for school

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34. This Note discusses landmark cases brought under both the EHA and IDEA because the IDEA did not significantly revise the relevant provisions involved in the issue of tuition reimbursement for private placements.

35. 458 U.S. 176 (1982).

36. *Id.* at 201.

37. *Id.* at 192.

38. *Id.* at 189, 198.

39. *Id.* at 203.

40. 471 U.S. 359 (1985).

placement during the pendency of an IEP review proceeding.[41] The Court first declared that district courts may require public school districts to retroactively reimburse parents for private school tuition pursuant to the court's power under the EHA to "grant such relief as it determines is appropriate."[42] The Court reiterated that the EHA provides "handicapped children with a free appropriate public education which emphasizes special education and related services designed to meet their unique needs."[43] As it often takes years for a hearing officer to issue a final decision on a contested IEP, parents must decide early in the proceeding whether to follow a potentially inappropriate IEP, thus risking their child's educational success, or pay private school tuition.[44] Denying reimbursement when a court subsequently finds the IEP to be inappropriate is an "empty victory" for parents and contradicts the right to a free education.[45]

The Court then held that a parent does not waive this reimbursement right if he or she takes the child out of public school during the IEP review proceeding. The EHA's "stay-put" clause, § 1415(e)(3), requires that "during the pendency of any proceeding . . . unless the State or local education agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement . . . ."[46] The Court determined that, "[t]he provision says nothing about financial responsibility, waiver, or parental right to reimbursement at the conclusion of judicial proceedings."[47] While the Court did not want to force parents to keep their children in a potentially inappropriate placement just to retain their reimbursement right, the Justices emphasized that parents withdraw their children during an IEP review proceeding at their own financial risk.[48] If the court ultimately finds the proposed IEP appropriate, parents will not be reimbursed for the period during the proceeding in which the child's placement violated § 1415(e)(3).[49] As long as the court finds both that the IEP is inappropriate and the parents' chosen placement is appropriate for the child, parents retain the remedy of tuition reimbursement during the pendency of the IEP review proceeding.[50]

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41. *Id.* at 369.
42. *Id.*
43. *Id.*
44. *Id.* at 370.
45. *Id.*
46. Burlington v. Dept. of Educ., 471 U.S. 359, 371 (1985).
47. *Id.* at 372.
48. *Id.* at 373–74.
49. *Id.*
50. *Id.*

C. Paving the Road for All Parents to Enjoy the Freedom of Public Education: Florence County v. Carter

Eight years later, in *Florence County v. Carter*,[51] the Court declared that under the newly promulgated IDEA, parents who withdraw their child from public school without the school district's consent do not waive their right to reimbursement, even though the private school fails the Act's definition of a free appropriate public education.[52] This ruling expanded the Court's *Burlington* holding, which limited retroactive reimbursement under the EHA to parents who place their children in state-approved private schools.[53] To preserve this new expanded right, a court must ultimately find that the IEP's recommended public placement violates the IDEA and that the private placement is otherwise proper under the Act.[54]

Section 1401(a)(18)(A) of the IDEA defines a free appropriate public education as "special education and related services that have been provided at public expense, under public supervision and direction, and without charge . . . ."[55] The Court concluded that this provision does not apply to private parental placement.[56] If parents choose to send their child to private school over the school district's objection, the placement would not be under "public supervision and directions," thus violating § 1401(a)(18)(A). However, the Court determined that it conflicted with the IDEA's goals to "forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place."[57] Thus, the only requirement that the private school placement must satisfy under the IDEA is the "appropriateness" standard articulated in *Rowley*.[58]

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51. 510 U.S. 7 (1993).
52. *Id.* at 9, 13.
53. *See* Huskey, *supra* note 26, at 178.
54. *Carter*, 510 U.S. at 15.
55. *Id.* at 13.
56. *Id.*
57. *Id.* at 14.
58. The placement must be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Bd. of Educ. v. Rowley, 458 U.S. 176, 203–04 (1982).

III. THE CIRCUIT COURTS SQUABBLE OVER THE REACH OF "FREE" IN THE FREE APPROPRIATE PUBLIC EDUCATION MANDATE

The nation's circuit courts recently began grappling with whether to allow reimbursement for unilateral[59] private placement. Unfortunately for school districts and parents, the circuits have disagreed greatly. This Part reviews several circuit court decisions and highlights the different approaches taken and the resulting tension between the sister circuits.

A. The Sixth Circuit Initiates the Discussion: Berger v. Medina City School District

In 2003, the Court of Appeals for the Sixth Circuit denied plaintiff parents' reimbursement in *Berger v. Medina City School District*,[60] finding that a unilateral parental placement does not satisfy the IDEA when it "does not, at a minimum, provide some element of special education services in which the public school placement was deficient."[61] In the case, plaintiffs withdrew their son Travis from public school after disagreeing with the IEP's recommendation to keep him in the regular classroom.[62] Travis enrolled in a private school that did not provide him with any of the special education services identified in his IEP.[63] Even without these services, Travis earned higher grades at the private school than he had at public school.[64]

Despite reiterating *Burlington*'s holding that retroactive reimbursement is available when the public school fails to provide a free appropriate public education to the disabled student, the court added that the private school placement must also "offer the disabled child an education otherwise proper under the IDEA."[65] The student's academic success in the private school is one factor favoring a finding that the placement was reasonably calculated to provide educational benefits, but that alone is not enough.[66] Since reimbursement is meant to remedy the public schools' failure to provide a fair

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59. "Unilateral placement" means that parents initially enroll their children in private schools, without first sending their children to public school and using the special educational services already offered by the public school.

60. 348 F.3d 513 (6th Cir. 2003).

61. *Id.* at 523.

62. *Id.* at 516.

63. *Id.* at 523.

64. *Id.* at 522.

65. Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 (6th Cir. 2003).

66. *Id.*

and appropriate public education to the student, parents will not receive tuition reimbursement unless their chosen private school provides some of the special education services that the public school failed to provide.[67]

B. The Guarantee of "Free" Education for All Does Not Apply to All: Greenland School District v. Amy N.

One year later, in 2004, the Court of Appeals for the First Circuit weighed in on the issue in *Greenland School District v. Amy N.*[68] The court held that § 1412(a)(10)(C)(ii), amended in 1997, limits tuition reimbursement to children who previously received special education services from a public agency.[69] In the case, appellants unilaterally removed their daughter from public school without first requesting that she be evaluated for special education services.[70] The chosen private school did not focus on special education students and appellants stated that they did not choose the private school based on its special education instruction.[71] Only after enrolling their daughter in private school did the appellants, for the first time, notify the public school district that their child might require special education services.[72]

In its analysis, the *Greenland* court focused on the reimbursement limit listed in the 1997 Amendment—that reimbursement may be denied or reduced if parents fail to give the school district notice of their intent to remove their child from public school before doing so.[73] The court emphasized that the limit "make[s] clear Congress' intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue."[74] This interpretation requires previous enrollment in public school to qualify for reimbursement. Requiring the child to have received special education services from a public agency allows school districts an opportunity, before the child is removed, to determine whether the public school is able to provide a free appropriate public education.[75] Notice

67. *Id.* at 523.
68. 358 F.3d 150 (1st Cir. 2004).
69. *Id.* at 159.
70. *Id.* at 153.
71. *Id.*
72. *Id.* at 153–54.
73. *Id.* at 160.
74. Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 (1st Cir. 2004) (emphasis in original).
75. *Id.*

after a unilateral removal does not allow the districts such an opportunity, and therefore bars parents from reimbursement.[76]

C. The Guarantee of "Free" Education for All in Fact Does Apply to All: M.M. ex rel. C.M. v. School Board of Miami-Dade County

In 2006, in *M.M. ex rel. C.M. v. School Board of Miami-Dade County*,[77] the Court of Appeals for the Eleventh Circuit held that parents are not always required to follow an inadequate IEP by first enrolling their child in public school in order to preserve their right to reimbursement.[78] Disagreeing with the Court of Appeals for the First Circuit, the court announced that previously attending public school is not a condition for reimbursement under § 1412(a)(10)(C)(ii).[79] Private school tuition reimbursement remains available if the public school failed to offer an appropriate public education through the IEP, even if the child never attended the public school.[80]

In justifying its statutory construction, the court explained that any other "construction of the [provision] would produce the absurd result of barring children from receiving a FAPE because their disabilities were detected before they reached school age."[81] An opposite reading would also place parents in the position of adhering to an inappropriate placement just to protect their reimbursement right.[82] However, the court explained that once the public school district offers a free appropriate public education, subsequent parental placement in private school is a voluntary decision that does not guarantee reimbursement.[83] For example, parents who enroll their child in a private school because they prefer the private program are not entitled to tuition reimbursement.[84] This judicial limit protects school boards from suits brought by dissatisfied parents of students who are in fact receiving appropriate, though not ideal, educations.[85]

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76. *Id.* at 162.
77. 437 F.3d 1085 (11th Cir. 2006).
78. *Id.*
79. *Id.* at 1098.
80. *Id.* at 1099.
81. *Id.*
82. *Id.*
83. M.M. *ex rel.* C.M. v. Sch. Bd., 437 F.3d 1085, 1101 (11th Cir. 2006).
84. Justin H. Kelly, *Eleventh Circuit: Survey of Recent Decisions 2006–2007*, 37 CUMB. L. REV. 359, 369 (2007).
85. *Id.*

IV. *BOARD OF EDUCATION V. TOM F.* BRINGS THE PROSPECT OF FINALITY

With each year bringing conflicting circuit court opinions, a United States Supreme Court intervention seemed imminent. Two New York cases, *Board of Education v. Tom F. ex rel. Gilbert F.*[86] and *Frank G. v. Board of Education of Hyde Park*,[87] handed the Supreme Court its opportunity. In 2005, the district court of the Southern District of New York denied private school tuition reimbursement for unilateral parental placement in *Tom F.*[88] The Court of Appeals for the Second Circuit ruled the opposite way just one year later in *Frank G.*,[89] leaving two contradictory decisions to guide New York schools and parents.

A. A Disabled Student's Education May Not Necessarily Be Both Free and Appropriate

On January 4, 2005, the district court of the Southern District of New York in *Board of Education v. Tom F.*[90] denied tuition reimbursement because the parents failed to satisfy *Greenland*'s threshold requirements.[91] Gilbert, defendant Tom F.'s son, had attended private school since kindergarten.[92] Following a yearly school placement review, the public school board identified Gilbert as learning disabled and the IEP recommended that he attend public school.[93] Tom F. contested the IEP and sought tuition reimbursement, refusing to move Gilbert from his private school.[94] At the administrative hearing, the Impartial Hearing Officer awarded reimbursement to Tom. F.[95] The school district appealed to the district court, arguing that parents such as Tom F. may not be reimbursed when their child had never received special education services from a public agency.[96]

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86. 2005 WL 22866 (S.D.N.Y. 2005).
87. 459 F.3d 356 (2d Cir. 2006).
88. 2005 WL 22866, at *1 (S.D.N.Y. 2005).
89. 459 F.3d 356, 359 (2d Cir. 2006).
90. 2005 WL 22866, at *1 (S.D.N.Y. 2005).
91. *Id.* at *3. The *Greenland* Court conditioned reimbursement eligibility on the student having previously received special education services while in the public school system or at least having requested these services while attending public school. Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 159–60 (1st Cir. 2004).
92. *Tom F.*, 2005 WL 22866, at *1.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

In its opinion, the district court emphasized that Congress amended the provision at issue, § 1412(a)(10)(C)(ii), twelve years after the Supreme Court's *Burlington* decision.[97] With *Burlington* providing outdated guidance, the judge relied on the Court of Appeals for the First Circuit's *Greenland* interpretation of the disputed provision.[98] The court highlighted the factual similarities between the two cases, particularly that neither child had ever received special education services in public school.[99] Quoting the Court of Appeals for the First Circuit, the district court found that, "the amended provision limits tuition reimbursement to children who have previously received special education and related services while in the public school."[100] This interpretation forces parents to be certain that the public school placement is inappropriate before rejecting it, thus saving the school district from paying for unnecessary private placements.[101] Tom F. appealed to the Court of Appeals for the Second Circuit, but the circuit court staved off its decision until it rendered *Frank G. v. Board of Education of Hyde Park*.

B. The Second Circuit's Statutory Interpretation Supports the IDEA's Focus on Children

The Court of Appeals for the Second Circuit disagreed with *Tom F.*'s reliance on *Greenland* only one year later in *Frank G. v. Board of Education of Hyde Park*.[102] In *Frank G.*, three-year old Anthony was diagnosed with ADHD and attended kindergarten at a private school.[103] At the end of the fourth grade, the public school board categorized him as learning disabled under the IDEA and recommended placement at a public school.[104] Anthony's

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97. *Tom F.*, 2005 WL 22866, at *2 (Congress amended § 1412(a)(10)(C)(ii) in the 1997 Amendment to the IDEA).

98. *Id.* at *3. The provision reads,

> [i]f the parents of a child with a disability, who previously received special education . . . under the authority of a public agency, enroll the child in a private [school], without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment. . . .

20 U.S.C. § 1412(a)(10)(C)(ii) (2006).

99. *Tom F.*, 2005 WL 22866, at *1, *3.

100. *Id.* at *3 (quoting *Greenland*, 358 F.3d at 159–60).

101. *Id.*

102. 459 F.3d 356 (2d Cir. 2006).

103. *Id.* at 359–60.

104. *Id.* at 360.

mother requested an IEP review hearing and asked that the public school district pay for the recommended services at Anthony's private school.[105]

Although the court in *Tom F.* had, only one year earlier, held that a child must first receive special education services from a public agency before a parent is eligible for private tuition reimbursement, the Court of Appeals for the Second Circuit declared that:

> The plain language [of § 1412(a)(10)(C)(ii)] does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services.[106]

The court interpreted § 1412(a)(10)(C)(ii) as not automatically barring reimbursement when a child had not previously received publicly financed services; the provision "only provides a basis for the argument that Congress implicitly excluded reimbursement in these circumstances."[107] The court stated that the *Greenland* court added the word "only" to § 1412(a)(10)(C)(ii) when it held that parents must at least give the school notice that special education is at issue and that they disagree with the IEP recommendations.[108] Absent the judicial addition of the word "only," the provision as written does not condition reimbursement on previously receiving special education services at a public agency.[109]

C. The United States Supreme Court's Two-Line Resolution

After rendering *Frank G.*, the Court of Appeals for the Second Circuit turned to the pending *Tom F.* appeal. The court vacated and remanded the case for reconsideration in light of its *Frank G.* decision.[110] Bypassing the appellate ladder, the school district filed a Petition for Writ of Certiorari arguing that the clear meaning of § 1412(a)(10)(C)(ii) strips courts of the authority to reimburse private tuition payments when the child had not previously received special education services from a public agency.[111] The school district

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105. *Id.* at 360–61.

106. *Id.* at 368 (emphasis in original).

107. *Id.* at 373.

108. Frank G. v. Bd. of Educ., 459 F.3d 356, 375–76 (2d Cir. 2006).

109. *Id.* at 373.

110. Bd. of Educ. v. Tom F., 193 F. App'x 26 (2d Cir. 2006).

111. Petition for Writ of Certiorari at *17, Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007) (No. 06-637), 2006 WL 3244041.

requested the United States Supreme Court's resolution because the Court of Appeals for the Second Circuit's holding created "unnecessary confusion among public school districts as well as parents of children who need special education and related services."[112] The United States Supreme Court granted certiorari of *Tom F.*,[113] but denied certiorari to also hear arguments for *Frank G.*[114]

During the oral argument, Justice Alito asked the school board's attorney, "What possible purpose is served by simply requiring the student to be in a placement that is by definition not providing a free appropriate public education for [a] very short period of time [for example, eleven days]?"[115] Attorney Mr. Koerner replied that the only situations at issue are those in which the school system believes that it can provide the disabled student with an appropriate education.[116] As such, the child should at least come into the public school system so that the district has the opportunity to work with the parents and arrive at a resolution.[117] When asked why there is no express statutory requirement that the child remain in public school if Congress intended for parents to give the public school a chance, Mr. Koerner simply answered that the statute does state that children should "come into the [public] system."[118]

Following Mr. Koerner's allotted time, Tom F.'s attorney argued that the statute expressly grants courts discretion to deny tuition reimbursement if the parent does not cooperate in IEP meetings or does not give the school district notice of his or her dissatisfaction.[119] However, no statutory language conditions the discretion on enrolling the child first in public school.[120] The attorney also emphasized that the IDEA's overall statutory purpose supports this interpretation. It is a well-established canon of statutory construction that Congress does not promulgate a provision contrary to the statute's broader purpose. However, placing a child in an inappropriate public placement for even one day in order to retain the reimbursement right contradicts the

112. *Id.*

113. Bd. of Educ. v. Tom F., 127 S. Ct. 1393 (2007).

114. Bd. of Educ. v. Frank G., 128 S. Ct. 436 (2007).

115. Transcript of Oral Argument at *9–10, Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007) (No. 06-637), 2007 WL 2827407.

116. *Id.* at 13.

117. *Id.*

118. *Id.* at 16.

119. *Id.* at 33–34.

120. *Id.* at 34.

statute's goal of providing an appropriate public education.[121] Therefore, the attorney argued, Congress could not have intended the initial receipt of public special education services to be a prerequisite to parental reimbursement.[122]

The Supreme Court rendered its long-awaited verdict on October 19, 2007. The two-line opinion read: "The judgment is affirmed by an equally divided court. Justice Kennedy took no part in the decision of this case."[123] Rather than guiding all circuit courts with a definitive decision, the plurality affirmed a decision that has no precedential value outside of the Second Circuit.

V. JUDICIAL UNCERTAINTY EXHAUSTS SCHOOL BUDGETS AND GRADUATES UNDER-PREPARED STUDENTS

A. Equality Is Not Synonymous with Bankruptcy

The passage of the Individuals with Disabilities Education Act ignited not only debates over the meaning of the states' educational mandate but also over the mandate's fiscal burden. Ensuring each child with disabilities a free appropriate public education is a worthy ideal, but finding the necessary funds to finance the ideal often proves difficult. Prior to 1991, school districts squabbled annually over how to spend their budgets. After the IDEA's passage, however, school districts vehemently complained that the added burden of paying for private educations for disabled students who never attended their public schools was absurd.

As the critics' voices grew louder, courts began addressing the balance between school districts' financial responsibility and children's right to a free appropriate education. The United States Supreme Court attempted to silence reimbursement complaints in 1993 with its *Carter* decision. The Court recognized that although the IDEA imposed a heavy financial burden, school boards could protect themselves from reimbursement suits by simply adhering to the statute—namely, either by providing the student with a free appropriate public education in its public school or by placing the child in an appropriate private school.[124] As the Court had pointed out earlier in *Burlington*, "[r]eimbursement merely requires the school district to belatedly pay expenses

121. Transcript of Oral Argument, *supra* note 115, at 34–35.
122. *Id.*
123. Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007).
124. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993).

that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[125]

Many of today's critics emphasize, however, that simply adhering to the IDEA may not necessarily insulate school boards from reimbursement claims.[126] For example, the mere opportunity for reimbursement increases the likelihood that parents will take their chances and challenge IEPs, thus still subjecting school boards to large litigation expenses.[127] This feared possibility is currently a reality in New York City. The city voluntarily pays the private school tuitions of 7000 severely handicapped children.[128] Requests for reimbursement solely from parents who unilaterally enrolled their children in private school jumped from 1519 in 2002 to 3675 in 2006.[129] Satisfying these requests cost the city school board more than fifty-seven million dollars during the 2006–2007 school year.[130] With the Supreme Court plurality affirming a decision that has no precedential value outside of the Second Circuit, school districts around the nation worry that parents will follow Manhattan parents' lead and take their chances at trial, further risking the nation's already delicate public education budgets.[131]

Congress attempted to alleviate the financial onus by allocating federal funds to participating state educational agencies.[132] However, school districts argue that the federal funding is inadequate in large part because of the Act's least restrictive environment requirements.[133] With a federal directive to educate non-disabled students with their disabled counterparts, school districts must pay both the regular education costs plus the extra expenses for individualized special education services.[134] However, when the federal government allocates funding per special education pupil, it often assumes that the particular public school already has a special education program in place.[135] The funding therefore does not include enough money for the school

125. Burlington v. Dept. of Educ., 471 U.S. 359, 370–71 (1985).

126. Huskey, *supra* note 26, at 193.

127. *Id.*

128. Diana Jean Schemo & Jennifer Medina, *Disabilities Fight Grows as Taxes Pay for Tuition*, N.Y. TIMES, Oct. 27, 2007, at A1.

129. David Stout & Jennifer Medina, *With Justices Split, City Must Pay Disabled Student's Tuition*, N.Y. TIMES, Oct. 11, 2007, at B1.

130. *Id.*

131. Schemo & Medina, *supra* note 128.

132. Mei-lan E. Wong, *The Implications of School Choice for Children with Disabilities*, 103 YALE L.J. 827, 846–47 (1993).

133. *Id.*

134. *Id.*

135. *Id.* at 849.

to establish such a program.[136] In reality, special education programs rarely exist in public schools because there is no guarantee that there will be a steady number of students with similar disabilities annually enrolling in the school; funding a special education program in a cash-strapped public school therefore could be seen as fiscally risky.[137]

Despite the school districts' bleak forecast, the IDEA's financial burdens are not as dire as asserted. The students most likely requesting private tuition reimbursement are those few whose disabilities are least common among schoolchildren in general. These children request a private school placement because public schools have less experience working with these particular disabilities and are therefore less prepared to properly educate such disabled students.[138] Children with learning, speech, and language disabilities constitute only fifteen percent of private school enrollees despite representing seventy percent of those served under the IDEA.[139] In contrast, seventy-three percent of those disabled children enrolled in private school are "emotionally disturbed, mentally retarded, multiple-disabled or autistic."[140]

In addition, reimbursement awards are not automatic even if a child suffers from a less common disability. A court must first find that the public school violated the IDEA by offering an inappropriate education and that the private school placement is appropriate.[141] Judges cautiously hand down such opinions, relying on the parents to satisfy their high burden of proving that the school district's proposed IEP falls short of the IDEA requirements.[142]

B. The Nation's Concerns Have Shifted from Appropriate Placement to Financial Comfort

The current circuit court split has fostered a conversation among academics and commentators that focuses primarily on the financial effects of the national educational mandate. The United States Supreme Court should re-enter the debate and refocus the discussion to what most would agree is the fundamental purpose of education—to prepare American children, all

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136. *Id.*

137. *Id.* at 848.

138. Brief for National Disability Rights Network & the New York Lawyers for the Public Interest as Amici Curiae Supporting Respondents at 11–12, Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007) (No. 06-637).

139. *Id.* at 13.

140. *Id.* at 12.

141. *Id.* at 15.

142. *Id.*

children, to function successfully in the adult world. With psychologists in agreement that the educational experiences of children significantly affect their overall wellbeing,[143] school placement must be recognized as a crucial issue that has a significant impact on a child's development. As such, the path to identifying the appropriate placement for a student with disabilities should be free from judicial confusion.

Many students with disabilities struggle to meet daily academic demands, whether in an appropriate or inappropriate placement.[144] Teachers tend to blame the students' low effort level for their academic failure.[145] Several psychology academics attribute this low effort level among students with disabilities to negative views of themselves as bad students.[146] Feelings of social isolation and loneliness tend to influence these views, leading them to often believe it is not worth it to exert the necessary effort in a challenging academic environment.[147] These bleak school-related outlooks develop early, especially for children with disabilities, and often remain unchanged throughout high school.[148] As a result, an average of thirty-eight percent of students with disabilities drop out of high school compared to twenty-five percent of high school students without disabilities.[149]

Changing disabled students' low "self-concept"[150] can positively affect their views of academic accomplishment. Self-concept is often affected by comparing oneself to those around him or her.[151] School district supporters argue that students with disabilities enrolled in public school have higher self-concepts because they are not physically segregated from their mainstream counterparts.[152] Integration validates these students by confirming that they are not "different." Therefore, disabled students have a more positive view of their academic abilities and are more likely to succeed in school. However,

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143. Altshuler & Kopels, *supra* note 17, at 320.

144. Timothy D. Lackaye & Malka Margalit, *Comparisons of Achievement, Effort, and Self-Perceptions Among Students with Learning Disabilities and Their Peers from Different Achievement Groups*, J. LEARNING DISABILITIES 432, 433 (2006).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 434.

149. Donald D. Deshler, B. Keith Lenz, Janis Bulgren, Jean B. Schumaker, Betsy Davis, Bonnie Grossen & Janet Marquis, *Adolescents with Disabilities in High School Setting: Student Characteristics and Setting Dynamics*, LEARNING DISABILITIES: A CONTEMP. J. 2(2), 30, 30 (2004).

150. Sharon Vaughn, Batya Elbaum & Alison Gould Boardman, *The Social Functioning of Students with Learning Disabilities: Implications for Inclusion*, 9 EXCEPTIONALITY 47, 56 (2001).

151. *Id.*

152. *Id.*

many academics argue that such a blanket assertion cannot be supported. For some disabled students, private placement may in fact boost their self-concept. When students in private school compare themselves with their fellow disabled classmates, their views of self-worth increase with the realization that they in fact have equivalent academic abilities.[153]

Additionally, academics argue that inappropriately placing children with disabilities in mainstream classes may add to their feelings of isolation, leading to feelings of low self-concept and behavioral problems. Mainstream classes provide children with disabilities with the opportunity to befriend their mainstream counterparts and view themselves as part of the regular school community.[154] However, because middle school and high school students tend to associate with those similar to themselves, merely placing disabled children in the regular classroom will not positively affect their feelings of isolation and low self-worth.[155] Inappropriate school placement, therefore, may maintain rather than improve the behavioral and academic futures of children with disabilities.[156] This is not an issue that can be left to a circuit split. The IDEA's promise of a free public education is empty and meaningless if it is not appropriate for the individual disabled child. The Supreme Court should remind the nation that appropriateness, not just finances, should be the driving force behind awarding reimbursement for unilateral placements.

VI. CONCLUSION

In October 2007, the nation expected the United States Supreme Court to render a decision that would help guide America's school districts and parents in how to finance appropriate educational placements for special education students. Instead, the Justices deemed the circuit courts' contradictory decisions as the guiding authority. However, given the importance of the social, behavioral, and educational impact that an appropriate placement, whether public or private, has on a child, the United States Supreme Court should rehear the issue of private school tuition reimbursement for unilateral placements. Congress promulgated the IDEA to guarantee the opportunity of educational success to all of America's schoolchildren. To now leave reimbursement for unilateral private placements, a major avenue for achieving that success, in complete judicial disarray hurts both school districts' budgets

153. *Id.*
154. *Id.* at 59.
155. *Id.*
156. *Id.*

and disabled students' opportunities for a non-disruptive and appropriate educational experience.