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P R O C E E D I N G S

(10:14 a.m.)

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

Mr. Feinerman.

ORAL ARGUMENT OF GARY S. FEINERMAN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

16 MR. FEINERMAN: That's correct.

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

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

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

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

2 JUSTICE GINSBURG: That's your construction.

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

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

5 implication is if the agency did not make a free

6 appropriate public education available, then --

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

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

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

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

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

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

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

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

15 reimbursement was a possibility for students who did not

16 receive -- previously receive special education services

17 from the public district.

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

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

20 a comprehensive statutory scheme, when tuition

21 reimbursement would be available to students who did not

22 previously receive. And Congress specified, after

23 essentially being invited to do so in Burlington, which

24 of those students could get tuition reimbursement. And

25 the --

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

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

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

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

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

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

1 What is such a parent to do?

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

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

10 MR. FEINERMAN: That's correct.

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

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

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

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

20 JUSTICE SCALIA: A month?

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

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

1 of fact. I should know this, but I don't. You said  
2 that if the -- if the parents and the school district  
3 disagree, it can be remedied fairly quickly because  
4 there's a fairly tight schedule set for the  
5 administrative procedure. What I don't remember, and my  
6 question is this: When the administrative steps have  
7 been exhausted, if there is still disagreement, is there  
8 any limit on the time in which the -- the judicial  
9 appeal has to be resolved?

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

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

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

25 JUSTICE GINSBURG: But if you can explain

1 what the process is --

2 MR. FEINERMAN: Yes.

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

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

9 JUSTICE GINSBURG: Yes.

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

21 JUSTICE GINSBURG: Is that hearing --

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

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

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

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

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

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

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

24 So you are talking about a very tight -- I  
25 understand the situation that you are hypothesizing,

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

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

7 MR. FEINERMAN: Excuse me?

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

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

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

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

23 JUSTICE SOUTER: Okay. But I think we've  
24 got to assume that Congress has some concern for the  
25 parents who correctly say, this IEP is no good, it just

1 can't be done in the school system, and the kid needs a  
2 special school. In that case, maybe -- your answer may  
3 be that's the exceptional case and it shouldn't drive  
4 the -- the inferences to be drawn about congressional  
5 intent. But in that case, if the district and the  
6 parents are at good faith loggerheads it can go on for a  
7 long, long time, can't it?

8 MR. FEINERMAN: It can go on for a long,  
9 long time if the parents file for a due process hearing,  
10 and that it can --

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

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

24 JUSTICE SOUTER: Yes, but doesn't that get  
25 to the point of something pretty formalistic? I mean,

1 somebody in the brief said, given one day under the IEP  
2 and the -- if you win, ultimately the check can be  
3 written. That can't be right.

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

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

10 CHIEF JUSTICE ROBERTS: I remember, perhaps  
11 incorrectly, from the prior argument here that the  
12 period that they had to try out the school plan was ten  
13 days?

14 MR. FEINERMAN: That -- that's a  
15 discretionary factor that courts and hearing officers  
16 can -- it's not a hard and fast rule.

17 CHIEF JUSTICE ROBERTS: Not a hard and fast  
18 rule.

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

21 CHIEF JUSTICE ROBERTS: So is that -- is  
22 that a period that your client's prepared to accept?

23 MR. FEINERMAN: Yes, so long as -- in the  
24 ordinary case, ten days would -- it's in the statute, so  
25 we have that textual indication. And it will provide

1 the school district a chance to provide services under  
2 the IEP.

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

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

20           MR. FEINERMAN: It's certainly plausible  
21 under certain circumstances. It -- it may not happen  
22 every time. And it may not happen half the time.

23           JUSTICE GINSBURG: Isn't it also plausible  
24 that the district will say, ten days is not a fair trial  
25 for this system, this is a child with severe learning

1 disabilities and to give this IEP a fair chance we need  
2 ten months?

3 MR. FEINERMAN: At that point those  
4 arguments can be made under (C)(iii) and (C)(iv) because  
5 at that point the child would no -- the parents would no  
6 longer be categorically barred from seeking tuition  
7 reimbursement and those are arguments that you can make  
8 to the hearing officer.

9 JUSTICE SOUTER: But you are basically  
10 saying that the -- that the only necessary delay in  
11 order to satisfy a condition for eligibility, if the  
12 parents otherwise prevail, is a ten-day delay. That's  
13 basically your answer?

14 MR. FEINERMAN: I -- I don't think I'm  
15 saying that. I'm saying --

16 JUSTICE SOUTER: Okay.

17 JUSTICE SCALIA: This school does not have  
18 to come up with an IEP. It could tough it out and say,  
19 we're going to rest on our belief that this child does  
20 not need any special education, right? And unless the  
21 school proposes an IEP, the parent cannot come within  
22 subsection (2) by sending the kid to get the special  
23 services.

24 MR. FEINERMAN: I think that assumes that  
25 the school district is not going to abide by the order

1 of the independent hearing officer. And in this -- in  
2 our case.

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

9 MR. FEINERMAN: Right. Before the hearing  
10 takes place, there is 45 days, and then well, the  
11 hearing -- there's a request for a due process hearing,  
12 the hearing officer has 45 days, and then if the hearing  
13 officer says this child is eligible, district, you must  
14 propose an IEP, the district has 30 days after that.

15 JUSTICE ALITO: Well, what happens in the  
16 case where --

17 JUSTICE SCALIA: Could the district appeal?  
18 That's the end of the road? Can't the district say the  
19 hearing officer is wrong?

20 MR. FEINERMAN: Absolutely, the district can  
21 appeal.

22 JUSTICE SCALIA: And if it does, does it  
23 have to take any action in the interim.

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

1 JUSTICE SCALIA: Which is --

2 MR. FEINERMAN: But that didn't happen here  
3 and I am not aware of any cases which it did happen. In  
4 this case there are two tracks. The hearing officer  
5 said: T.A. is eligible; prepare an IEP. The district  
6 said: I disagree; I'm going to appeal to the district  
7 court.

8 But in t mean time, within less than 28  
9 days, t district prepared an IEP and offered it to T.A.  
10 And at that point T.A. could have accepted the services,  
11 thus rendering him eligible for tuition reimbursement.

12 JUSTICE STEVENS: I still don't understand  
13 your answer to Justice Scalia. What if the school board  
14 just was adamant that he is not entitled to any special  
15 education? It just maintained that position throughout  
16 the litigation?

17 MR. FEINERMAN: I think the assumption is  
18 that the school district would not abide by a lawful  
19 order of a hearing officer.

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

22 MR. FEINERMAN: In that situation there  
23 would be no -- and I'm not aware of that situation ever  
24 happening --

25 JUSTICE STEVENS: But they don't have a risk

1 under your view of the law as I understand it. They  
2 could take that position and they would never be  
3 liable -- never be liable.

4 MR. FEINERMAN: There would be a delay in  
5 that situation, but I'm not aware of any case where that  
6 situation -- where a school district.

7 JUSTICE STEVENS: But that's the consequence  
8 of your position as I understand it, that they could do  
9 that and they would not have any risk of liability.

10 MR. FEINERMAN: I think that's a  
11 hypothetical risk, because again I haven't seen any  
12 situations where that actually has occurred.

13 JUSTICE KENNEDY: Well, but it's not that  
14 hypothetical when -- there are two prongs. Number one,  
15 the school has to agree first with the diagnosis, which  
16 in this case they didn't even do that. They had a good  
17 faith disagreement. Second, they have to have an  
18 adequate IEP. So there are two conditions.

19 MR. FEINERMAN: That's true, and I think --  
20 I think the answer to the question -- it's really, this  
21 is really a legislative question. Perhaps Congress  
22 ought to further amend the statute to say in those  
23 situations where a school district is being obstreperous  
24 in refusing to comply with the hearing officer's order,  
25 in those situations there is going to be an exception to

1 the exception. But it's not -- it's not the statute  
2 that Congress wrote. Congress wrote --

3 JUSTICE STEVENS: Doesn't your  
4 interpretation of the statute create an incentive for  
5 the school board to just say, we'll never provide any  
6 kind of education, special education, we will just tough  
7 it out? Because they can't lose, they can't be liable  
8 if they do that, if I understand you correctly.

9 MR. FEINERMAN: I -- I suppose  
10 hypothetically it does, but my understanding is that  
11 that just doesn't happen. In Schaffer v. Weast and  
12 other cases, the assumption --

13 JUSTICE SCALIA: Would you be surprised to  
14 find a court decision which says that when the reason  
15 that the plaintiff cannot comply with the requirement  
16 that he first be in a plan, when the reason is -- is the  
17 district's refusal to abide by an order to prepare a  
18 plan, that subsection (2) does not apply?

19 MR. FEINERMAN: Your --

20 JUSTICE SCALIA: You can't profit by your  
21 own malfeasance.

22 MR. FEINERMAN: That's correct. And I -- I  
23 don't think there could be reimbursement under  
24 subsection (ii). Perhaps if there were a parallel  
25 Rehabilitation Act claim under 504, that might be a

1 vehicle to get relief in a situation where the school  
2 district is acting as horribly as being hypothesized,  
3 but not under --

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

10 MR. FEINERMAN: It's conceivable that --  
11 that a court could hold that. A court could also --

12 JUSTICE SCALIA: I think it's more than  
13 conceivable. I know a lot of courts that would hold  
14 that.

15 JUSTICE SOUTER: But your position is that  
16 there are basically two situations: One, the situation  
17 in which there is an administrative order to do an IEP  
18 and the school district says, no, we won't do it.  
19 Millions for defense; we are going right into appeal,  
20 and we are not going to prepare the IEP. In that  
21 situation, as I understand it, you are saying, the  
22 parents have no way of getting relief under the statute.

23 In the case in which there is an order for  
24 the IEP and the school district prepares the IEP, even  
25 though the parents think it will be inadequate, there in

1 fact is a ready remedy subject to two delays: One, the  
2 time to prepare the IEP; and, two, ten days to give it a  
3 try before the parents take the kid out of school.  
4 That's basically the scheme that you are proposing that  
5 the statute provides; is -- is that correct?

6 MR. FEINERMAN: That's the scheme that  
7 Congress wrote in the statute, yes, under -- under  
8 (C)(ii). And it has to work that way, because -- I want  
9 to come back to a -- to a point that was aired in the  
10 briefs, which is T.A.'s argument and the government's  
11 argument rests upon the notion that section  
12 1415(i)(2)(B)(iii) gives hearing officers the authority  
13 to award tuition reimbursement. That provision doesn't  
14 give hearing officers any authority to do anything, let  
15 alone to award tuition reimbursement.

16 The only provision in IDEA that gives  
17 hearing officers the authority to award tuition  
18 reimbursement is 1412(a)(10)(C)(ii). So if the statute  
19 doesn't work -- the statute doesn't work, and the  
20 Secretary's interpretation of 1415(i)(2)(B)(iii) is  
21 implausible because it accords to hearing officers the  
22 authority that it doesn't have.

23 There is another textual clue why the  
24 statute works in the way that I am suggesting, and that  
25 is in the '97 amendments in subsections (iii) and (iv)

1 Congress gave very explicit guidance to courts and  
2 hearing officers as to the factors the court and hearing  
3 officer should consider when deciding whether to award  
4 tuition reimbursement to a student who previously  
5 received special education services.

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

10 And the problem with your position is that  
11 it seems in a way formalistic and in some cases to  
12 encourage intransigence. If we adopted a presumption  
13 that the school district's diagnosis was correct and a  
14 presumption that it's -- if -- if there was a diagnosis  
15 of disability, that its individual education program was  
16 adequate, that would, it seems to me, not be all you  
17 wanted, but would ameliorate the position of the school  
18 district. Would we have authority, do you think, to  
19 adopt such a presumption?

20 MR. FEINERMAN: I think the -- the Court  
21 already has adopted that presumption in Schaffer v.  
22 Weast. School districts are presumed to be acting in  
23 good faith.

24 JUSTICE KENNEDY: Well, this -- this would  
25 be a clear and convincing evidence presumption that the

1 -- that the IEP is -- that the school district designs  
2 is right, that its diagnosis is right. That's not all  
3 you -- that's not all you would be asking for.

4 MR. FEINERMAN: Well --

5 JUSTICE KENNEDY: But would we have  
6 authority to do that if we were to reject your  
7 interpretation of the statute?

8 MR. FEINERMAN: I suppose you would have the  
9 authority to do that.

10 JUSTICE GINSBURG: How have -- how have  
11 hearing officers been proceeding? I mean, here we had a  
12 case that went to a hearing officer. There is no IEP  
13 when the hearing officer begins the process. In the --  
14 on the eligibility or not, do hearing officers give  
15 deference to the school district and then -- so that's  
16 eligibility. At the IEP stage, do they give deference  
17 to the student?

18 MR. FEINERMAN: There is some deference  
19 given to -- are you talking about the deference that the  
20 district court gives to the hearing officer?

21 JUSTICE GINSBURG: No, the hearing officer.  
22 The hearing officer is the first-level decisionmaker.  
23 And the school board gives its reasons why it thinks the  
24 child is ineligible; the parent, the reasons that the  
25 child is eligible. That's the threshold determination.

1                   On that threshold determination of  
2                   eligibility, do hearing officers presume in favor of the  
3                   school district?

4                   MR. FEINERMAN:   Not -- not in this case.  In  
5                   this case under Oregon law at the time -- and this was a  
6                   pre-Schaffer decision -- the hearing officer put the  
7                   burden of proof on the school --

8                   CHIEF JUSTICE ROBERTS:  Counsel --

9                   MR. FEINERMAN:  -- on the question of  
10                  eligibility.

11                  CHIEF JUSTICE ROBERTS:  -- why isn't it the  
12                  case that the school's diagnosis is a related service  
13                  under the statutory provision?  It seems to me to be  
14                  very important service to the parents to know what the  
15                  school's diagnosis is.

16                  MR. FEINERMAN:  I -- I think that the  
17                  diagnosis is more in terms of eligibility.  It's  
18                  under -- under (b)(6), the hearing officer can decide --  
19                  can consider issues of identification, eligibility, and  
20                  placement.

21                  CHIEF JUSTICE ROBERTS:  No, I'm talking  
22                  about what the parents received.  And they receive a  
23                  diagnosis, and the statute covers -- asks whether they  
24                  previously received special education and related  
25                  services.  Diagnosis would seem to me to be a service

1 related to special education.

2 MR. FEINERMAN: I -- I don't think that's  
3 the way it works. A diagnosis -- a finding of  
4 eligibility or not is not a diagnosis. It is just an  
5 eligibility finding, and that's something that the  
6 parents can take to a -- a due process hearing under  
7 1415(f).

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
11 Mr. Salmons.

12 ORAL ARGUMENT OF DAVID B. SALMONS

13 ON BEHALF OF THE RESPONDENT

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

16 The school district in this case improperly  
17 denied T.A., a child with a disability who had always  
18 been enrolled in public schools, access to all public  
19 special education services. It asserts that because its  
20 wrong eligibility determinations prevented T.A. from  
21 receiving special education services, it is immune from  
22 reimbursing T.A.'s parents the cost of obtaining those  
23 services from another source.

24 CHIEF JUSTICE ROBERTS: What is wrong with  
25 ten days? I mean it's -- it's a big expense you are

1 asking the school district to incur, that will take away  
2 funds from other programs. And all -- all they are  
3 saying is give it a try for ten days, and if it doesn't  
4 work out, then you can go?

5 MR. SALMONS: I think there are several  
6 problems with that reading of the statute, Your Honor.  
7 First of all, the ten-day period that is referenced in  
8 subsection (C)(iii) refers to the amount of notice that  
9 a district needs to receive before a child is removed  
10 from the public school system.

11 CHIEF JUSTICE ROBERTS: Oh, yes, the first  
12 day -- the first day they say, look, we don't think this  
13 is going to work out, so we are notifying you what we  
14 are going to do. And they say, well, you've got to do  
15 that in ten days, and they said, okay, ten days.

16 MR. SALMONS: But that's -- that's simply  
17 not the way these things work as a general matter, and  
18 let me just point out a few things about the normal  
19 process of developing IEP's. And, again, here the child  
20 never even got that far. But, typically, IEP's are  
21 developed at the end of the -- of a school year for the  
22 following year. And the parents at that point have a  
23 period of time in which to decide to go along with that  
24 plan or to give notice and then make alternative  
25 arrangements.

1           And it's simply the -- I mean -- and that's  
2 the way it works, because it's important for parents to  
3 be able to get their child in an alternative program if  
4 they decide that's what they want to do. And if you  
5 wait until the school year has already started, those  
6 may not be available. And the ten-day notice  
7 requirement --

8           CHIEF JUSTICE ROBERTS: Well, I suppose  
9 that's right, but once the law is clarified, schools  
10 that specialize in -- in treating these kids would be  
11 able -- they would understand as well, and they would  
12 understand you've got to -- the people who are going to  
13 be sending -- most of the people who will be sending  
14 their children to the school have to wait ten days. And  
15 it seems to me that the actual practice on the ground  
16 would work out pretty easily.

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

22           It may be the case that the plan for the  
23 upcoming year is -- is very different than the plan for  
24 the prior year. Perhaps they have had another  
25 assessment, and they had substantially changed --

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

3 MR. SALMONS: Well, I --

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

7 MR. SALMONS: I think the way that cuts,  
8 Your Honor, is -- is that that reading of what you are  
9 positing, I guess, in this exchange what Congress might  
10 have had in mind, is not what they said in the statute.  
11 They did not require parents to try out a particular  
12 plan; just that at some point in time they had  
13 previously received special education services.

14 CHIEF JUSTICE ROBERTS: With respect,  
15 counsel, what Congress provided is that the child must  
16 have previously received special education and related  
17 services.

18 MR. SALMONS: That's right.

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

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

1 CHIEF JUSTICE ROBERTS: Okay. So what type  
2 of special education services do you think do count as  
3 having been previously received?

4 MR. SALMONS: Well -- well, if I -- if I  
5 may, the way we read this provision, and it's set forth  
6 on pages 3 and 4 on the addendum to the blue brief, and  
7 we think it's important that we read this as a whole and  
8 in context, is that subsection (C)(i) provides the  
9 general rule to govern the payment of private school  
10 tuition based on a unilateral placement by the parents.  
11 And subsection (C)(i) creates the only expressed  
12 limitation on the right to reimbursement, and it does so  
13 only in instances where the school district has provided  
14 a free and appropriate public education.

15 We think subsection (C)(ii), (C)(iii), and  
16 (C)(iv) work together to govern the subset of cases that  
17 is Congress was most concerned about and that, in fact,  
18 are the most common scenario in which these disputes  
19 have arised.

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

24 MR. SALMONS: That is what --

25 JUSTICE SCALIA: And you read it to say you

1 must pay whenever it hasn't made, and it just doesn't  
2 say that. It -- it's a safe harbor for the school  
3 district. It says, so long as you've made an  
4 appropriate public education available, you can't be  
5 liable for any -- any private school tuition.

6 Now, you want to expand that to say, and  
7 whenever that condition doesn't exist, you are liable.  
8 But it really doesn't say that. And -- and the later  
9 sections suggest that it meant not to say that.

10 MR. SALMONS: Well, that's where we part  
11 company, Your Honor, because, in fact, that negative  
12 inference that you refer to is precisely what  
13 Petitioners attempt to read into subsection (C)(ii).  
14 There is nothing in subsection (C)(ii) that provides any  
15 restriction on the ability to obtain reimbursement. It  
16 was written in permissive language.

17 CHIEF JUSTICE ROBERTS: In reading -- in  
18 reading it that way, you are reading the phrase "who  
19 previously received special education services" to mean  
20 also who previously did not receive special education  
21 services.

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

25 CHIEF JUSTICE ROBERTS: Yeah, so it doesn't

1 matter whether they previously received or not.

2 MR. SALMONS: It does matter, Your Honor,  
3 because the provisions that follow in (C)(iii) and  
4 (C)(iv) that guide the exercise of discretion, in that  
5 category of cases that were of concern to Congress, only  
6 apply to the cases that are defined in subsection  
7 (C)(ii). So in our reading the language "who previously  
8 received" still serves an important purpose, but it  
9 serves an identifying purpose for the limiting factors  
10 provided in (C)(iii) and (C)(iv). It does not serve --

11 CHIEF JUSTICE ROBERTS: So you are saying  
12 Congress went to the trouble of spelling out this  
13 elaborate provision in (C)(iii) and (ii) and all the  
14 other things, but that was not the universe of the  
15 situations in which there could be reimbursement? They  
16 went to that trouble, but then -- at the end you want to  
17 say or some other provisions or some other  
18 circumstances?

19 MR. SALMONS: Well, that's right. We think  
20 that Congress was focused on a particular set of cases  
21 where problems had arisen, and that's where you already  
22 had a child in the process of receiving special  
23 education and you had parents who removed the child out  
24 of that process without giving adequate notice, and  
25 thereby short -- excuse me -- short-circuiting an

1 ongoing collaborative relationship that Congress wanted  
2 to preserve.

3 JUSTICE SCALIA: Yes, but if -- if you avoid  
4 that collaborative relationship entirely and just run  
5 off to a prior -- to a private school right away, you  
6 get reimbursement. Why?

7 MR. SALMONS: Well you don't automatically  
8 get reimbursement.

9 JUSTICE SCALIA: Why would Congress -- huh?

10 MR. SALMONS: You don't -- you don't  
11 automatically get reimbursement, Your Honor. There is  
12 just no categorical bar to seeking reimbursement. You  
13 still have to show it's an appropriate remedy, which  
14 always has been understood to require a showing that the  
15 parents acted reasonably and in good faith, and that  
16 they were sincere in their efforts to obtain services  
17 from the school.

18 JUSTICE BREYER: What about more than that?

19 MR. SALMONS: The alternative --

20 JUSTICE BREYER: Why not -- I mean,  
21 suppose -- the part I don't understand in this statute,  
22 which may not be relevant -- I would appreciate the  
23 help. It seems to me that (a)(10) large (A) and then  
24 (F) have something to do with the parent who never goes  
25 to public school, the child just goes to private schools

1 to begin with, and they get something. If they have --  
2 if they have a disability, this program pays them  
3 something, right.

4 MR. SALMONS: Your Honor --

5 JUSTICE SCALIA: I'm not following this. I  
6 don't know what section.

7 JUSTICE BREYER: It's at the very beginning,  
8 at the end of addendum page 1.

9 MR. SALMONS: This is what's -- Your Honor,  
10 this is what's known as the child find provision.

11 JUSTICE BREYER: What is that?

12 MR. SALMONS: What it provides is that  
13 for -- let me just step back for a moment and remind the  
14 Court that the obligation on the State is to ensure that  
15 children, all children with disabilities, regardless of  
16 whether they are in public or private school, have the  
17 opportunity for a free appropriate public education.

18 With respect to children in private school  
19 who are not seeking a free appropriate public school  
20 education from the public school district, the only  
21 requirement under the Act is that you seek them out, you  
22 find them, you identify them, and that you report that  
23 to the Department of Education, and that you get money  
24 for those children. And for those children who are not  
25 enrolled in public school, you have to use a percentage

1 of the funds you receive from the Federal Government --

2 JUSTICE BREYER: All right. So in other  
3 words --

4 MR. SALMONS: -- to provide benefits that are  
5 available to all children.

6 JUSTICE BREYER: -- a parent who has a  
7 disabled child who never thinks about the public school  
8 system still gets some money, but not as much, for the  
9 disabled child?

10 MR. SALMONS: It's not money to the parents,  
11 Your Honor.

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

13 MR. SALMONS: It funds programs, for example  
14 speech therapy or something like that.

15 JUSTICE BREYER: To the school.

16 MR. SALMONS: That they would then allow  
17 children in private school to -- to benefit from.

18 JUSTICE BREYER: And so, it's money that  
19 goes to the school for a program?

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

22 JUSTICE BREYER: Money that the children can  
23 get. I get it.

24 MR. SALMONS: It goes to the public schools,  
25 that they provide services that they may make available

1 to children regardless of their placement.

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

7 Now, if you put in -- put the child in a  
8 public school, and they find a free appropriate public  
9 education, fine, that's the end of that, you have to do  
10 it. Now, if they don't give you a decent one, you can,  
11 you can send the child to a private school, but it  
12 has -- you have to give it a shot to the public school  
13 system.

14 Now, that's what you don't want the  
15 interpretation to be? You don't -- you are against  
16 that. But -- but let's amend it a little.

17 MR. SALMONS: That's not -- I would not  
18 describe it that way, Your Honor, if I -- I don't mean  
19 to --

20 JUSTICE BREYER: I am reading the language.  
21 You may require the district to pay for someone who has  
22 been enrolled in special services --

23 MR. SALMONS: I mean, again, just keep in  
24 mind the facts of this case. This is a child who was in  
25 the public school system --

1 JUSTICE BREYER: You haven't heard my  
2 amendment.

3 MR. SALMONS: Okay. I'm sorry, Your Honor.  
4 Go ahead.

5 JUSTICE BREYER: My amendment is the norm  
6 will be give the public school a shot, but there could  
7 be circumstances, you're getting the run-around, there  
8 is need to put that child in a public school now. In  
9 other words, special equitable circumstances that make  
10 it reasonable for the parent not to give the school a  
11 shot, though that's the norm. And in those unusual  
12 circumstances, there would remain grounds for equitable  
13 relief.

14 What about that as an overall interpretation  
15 of the statute which has several parts to it?

16 MR. SALMONS: I would submit that the way we  
17 read the statute, Your Honor, in fact, does precisely  
18 that. Because, the school district -- just again, take  
19 this --

20 JUSTICE BREYER: But you have to be willing  
21 to accept that it's an unusual situation, though it may  
22 well exist, that the judge is going to reimburse the  
23 parent where that parent didn't give the public school a  
24 shot. They will have to show there is a good reason for  
25 not doing that.

1 MR. SALMONS: The -- the difficulty I  
2 have --

3 JUSTICE BREYER: Is that all right with you  
4 or not?

5 MR. SALMONS: Well, the difficulty I have  
6 with your question, Your Honor, is that the school  
7 district always has a shot under the Act. In this case,  
8 the school district assessed the child in 2001 and again  
9 in 2003, and both times it erroneously concluded  
10 that the child --

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

14 MR. SALMONS: No, not just that it's  
15 reasonable, but in the process of assessing the child,  
16 in developing an individual education plan that is  
17 appropriate for that child, that is precisely the shot  
18 that the statute gives the public school system to get  
19 it right. What the statute does --

20 JUSTICE GINSBURG: Mr. Salmons, I thought  
21 that the -- the courts, the district court, will not  
22 provide for tuition reimbursement, unless at least two  
23 things are shown. One is that the school district did  
24 not provide an adequate education for this child. And  
25 two, that the private school did, and then there are

1 equitable considerations.

2 MR. SALMONS: That is absolutely correct.

3 JUSTICE GINSBURG: So you must find both,  
4 not just that the private school was a good place, but  
5 that the school district did not offer an adequate  
6 education for the child.

7 MR. SALMONS: That is -- that is correct.  
8 That is what this Court held in Carter. That's what the  
9 regulations say. I would note that there is nothing in  
10 the text of the statute and the provisions that  
11 Petitioner relies on, (C)(ii) for example, that makes it  
12 a statutory requirement to show that the private  
13 placement is reasonable as a -- as a condition precedent  
14 to obtain tuition reimbursement. But both sides concede  
15 that that's required, even though it's not in the  
16 statute.

17 JUSTICE GINSBURG: But procedurally we -- we  
18 know that there is a provision addressed to a court for  
19 equitable relief. The question was put before: Where  
20 does the hearing officer get the authority to order  
21 tuition reimbursement? Because the statute on which you  
22 rely for the court speaks only to the court's authority.

23 MR. SALMONS: Thank you, Your Honor. I am  
24 happy to answer that question. But Petitioner makes  
25 this a centerpiece of their reply brief and I think they

1 just misread the statute. And again, keep in mind that  
2 these amendments in 1997 were written against a backdrop  
3 of this longstanding statute and this Court's  
4 interpretations of it. The most direct place where the  
5 statute provides hearing officers the authority to hear  
6 address reimbursement claims and to award  
7 reimbursement -- and this is on page 9 of the addendum  
8 in the blue brief -- is 1415(b)(6). This has always  
9 been in the statute and it states that the parents must  
10 be provided an opportunity to present complaints with  
11 respect to "any matter relating to the identification,  
12 evaluation, or educational placement of the child, or  
13 the provision of a free appropriate public education to  
14 such child."

15           That is -- again, that has always been  
16 understood to include the right to seek reimbursement  
17 before the hearing officer. And this Court in  
18 Burlington cited legislative history from the 1975 Act  
19 that noted that hearing officers could award  
20 reimbursement and address such claims in concluding that  
21 it was part of the appropriate relief that courts ought  
22 to be able to have under 1415.

23           JUSTICE SCALIA: Are any of these other  
24 procedures -- I took these to be procedures that have to  
25 be provided by the school district, not -- not by the

1 hearing officer.

2 MR. SALMONS: These are -- these are  
3 required -- this whole section, Your Honor, 1412, is  
4 entitled "State Eligibility," and these are all  
5 requirements that States have to provide for process in  
6 order to obtain funds under the Act, and so it is a  
7 requirement that States provide hearing officers that  
8 have the ability to award reimbursement --

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

12 MR. SALMONS: Those complaints --

13 JUSTICE SCALIA: -- to present the complaint  
14 to the principal.

15 MR. SALMONS: No, Your Honor. This is a  
16 reference to the due process complaint notice that is  
17 referenced elsewhere in the statute. I believe  
18 Petitioner would agree with me that that's what this  
19 references.

20 JUSTICE SOUTER: No, but the reference is to  
21 a right to be heard on certain subjects. It doesn't say  
22 anything about authorizing a particular individual or  
23 officer within a school system to award relief. The  
24 problem is, it says you can be heard. It doesn't say  
25 who will tell you or who will tell the school district

1 to write a check.

2 MR. SALMONS: Right. But keep in mind that  
3 the judicial review process that the statute provides --  
4 and this is at page 17 of the addendum. The right to  
5 file a Federal action is limited to those matters that  
6 are raised in the due process complaint notice filed  
7 before the hearing officer. This is an exhaustion  
8 requirement.

9 JUSTICE SOUTER: But can you raise the --  
10 you can raise the claim to eligibility to a -- a private  
11 education here without the hearing officer having the  
12 authority to order the school district to provide it.

13 MR. SALMONS: That has not been the  
14 interpretation of this Act, Your Honor, and I would  
15 refer the Court to 34 CFR 300.148(b), which is a  
16 regulation that states that hearing officers can award  
17 reimbursement and that has been around since the mid-  
18 1980s. My point is that is -- the Congress enacted  
19 these amendments in 1997 against a subtle understanding  
20 of how this Act works. And it's always been understood  
21 that hearing officers can award reimbursement. There  
22 was no need to provide in the '97 amendments that  
23 hearing officers can also award relief.

24 And again because it's an -- it's an  
25 exhaustion requirement and the judicial review provision

1 only relates to the things that you have raised before  
2 the hearing officer, it makes no sense to say a court  
3 can award reimbursement but you can't get reimbursement  
4 from the hearing officer. That's the subject of the  
5 review of the Federal court action.

6 JUSTICE SOUTER: No, but it might make  
7 senses to say that the hearing officer can determine  
8 eligibility; it is then up to the school to pay it; and  
9 if the school does not pay it, then you have got to go  
10 into court and get an award.

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

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

20 MR. SALMONS: But of course this Court in  
21 Burlington held the court did have that authority and it  
22 relied on the fact that it has always been understood  
23 that hearing officers have that authority in reaching  
24 that conclusion in Burlington.

25 JUSTICE SCALIA: That's right, but -- but

1 with these new provisions, if the hearing officer  
2 doesn't have the authority to award the kind of relief  
3 that was awarded here, then the court wouldn't either.

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

6 JUSTICE SCALIA: Well, you agree they go, as  
7 we say, in pari passu --

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

10 JUSTICE SCALIA: -- that -- that whatever  
11 the hearing officer can do, the court can do.

12 MR. SALMONS: I think generally --

13 JUSTICE SCALIA: -- and whatever he can't  
14 do, the court can't do.

15 MR. SALMONS: I think they ought to be read  
16 together, yes, Your Honor. But I think they ought to be  
17 read to provide for the authority to provide tuition  
18 reimbursement.

19 One statutory point I would like to make,  
20 Your Honor, is that under Petitioner's reading of the  
21 Act, if you read (C)(ii) to be -- that reference to "who  
22 previously received" to be an absolute precondition,  
23 then I think it's the case that (C)(i) has no meaning  
24 whatsoever. It does not work under the Act at all.  
25 Whereas on our reading of the statute, (C)(ii) still

1 does work. It's not a precondition; it doesn't do the  
2 work that Petitioner suggests; it does a more limited --  
3 serve a more limited function, but it still serves that  
4 identifying role for the factors Congress wanted applied  
5 when it was focused on how to preserve relationships,  
6 ongoing collaborative relationships through the IEP  
7 process that warrant preservation.

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

17           That's precisely what happened here. As  
18 this case to this Court, it is established that is a  
19 child who was entitled to receive special education  
20 services back in 2001. The only reason he did not  
21 receive those services is because the district violated  
22 its statutory duties --

23           JUSTICE GINSBURG: I thought in 2001 even  
24 the parents agreed that he didn't -- that they didn't  
25 want to put him in special education?

1 MR. SALMONS: The parents agreed, Your  
2 Honor, that he did not qualify for the learning  
3 disabilities they tested him for, but they had an  
4 obligation under the Act -- and this was found by the  
5 hearing officer and the complaint that was filed was  
6 filed within the two-year limitation to challenge that  
7 2001 determination, and that that was there, they had an  
8 obligation to test him for those other health  
9 impairments at that time.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. SALMONS: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Miller.

13 ORAL ARGUMENT OF ERIC D. MILLER

14 ON BEHALF OF THE UNITED STATES,

15 AS AMICUS CURIAE,

16 SUPPORTING THE RESPONDENT

17 MR. MILLER: Mr. Chief Justice, and may it  
18 please the Court:

19 Had Petitioner provided T.A. a special  
20 education that was later determined to be inadequate,  
21 there would be no question that the district court would  
22 have authority and discretion to determine whether an  
23 award of private school tuition reimbursement was  
24 appropriate. Petitioner's view is that because it  
25 offered no special education at all, it was therefore

1 categorically immune from such an award. That position  
2 is not supported by the statute and it's inconsistent  
3 with the reasonable interpretation of the Secretary of  
4 Education.

5                   There is no basis for reading the statute to  
6 create what effectively would be an incentive for  
7 districts to stonewall and to say that if they don't --

8                   CHIEF JUSTICE ROBERTS: Well, for 10 days,  
9 right? Even assuming the bad faith that you are  
10 ascribing to the school district, it would only work for  
11 10 days, right?

12                   MR. MILLER: Well --

13                   CHIEF JUSTICE ROBERTS: And then they would  
14 have -- then they would have previously received special  
15 education services, and they could proceed.

16                   MR. MILLER: We were not assuming bad faith.  
17 Or --

18                   CHIEF JUSTICE ROBERTS: "Stonewall" sounds  
19 to me like bad faith.

20                   MR. MILLER: Well there --

21                   CHIEF JUSTICE ROBERTS: That was the word  
22 you used.

23                   MR. MILLER: I -- Congress -- there is no  
24 reason to suppose that Congress wanted to create an  
25 incentive or to reward districts that do do that.

1 JUSTICE GINSBURG: But we are talking about  
2 two different things. I think the Chief was talking  
3 about putting the child in special education, and  
4 keeping the child there for 10 days. You are talking  
5 about the school district that says "no special  
6 education; this child is not eligible."

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

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

15 MR. MILLER: In the case --

16 CHIEF JUSTICE ROBERTS: In that situation  
17 all they would have to do is to have the child try the  
18 plan for 10 days.

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

25 Even under Petitioner's reading the statute

1 simply would require that the child at some point have  
2 received some special education and related services.  
3 It wouldn't have to be under the plan that was being  
4 tried. And --

5 JUSTICE SOUTER: But the odds are that it  
6 would be under the plan. I mean, what you say is  
7 theoretically possible, but in the real world it's  
8 probably going to be under the plan, isn't it?

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

21 Now, of course, the district courts do have  
22 considerable equitable discretion, and we're not  
23 suggesting that reimbursement would be mandatory in that  
24 case or in any case. And --

25 JUSTICE GINSBURG: And the parents -- I

1 think you agree that the parents would have the burden  
2 of showing both that the school did not provide an  
3 adequate education, an appropriate education, and that  
4 the private school does?

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

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

18 Is -- is there some authority in the statute  
19 that would give us warrant to do that? Or is there  
20 some -- any cases that would give us warrant to -- to  
21 establish a presumption of that kind in order to  
22 recognize the long-standing expertise of the States in  
23 this matter and in order to allow section (ii) to do  
24 some work?

25 MR. MILLER: Well, a clear and convincing

1 evidence presumption would be difficult to reconcile, I  
2 think, with 1415(i)(2)(C)(iii), which says that the  
3 district court decision should be based on the  
4 preponderance of the evidence, but it is certainly  
5 within the district court's discretion and it would be  
6 within this Court's discretion, I think, to prescribe  
7 principles to guide the exercise of the district courts'  
8 equitable discretion --

9 JUSTICE GINSBURG: The district court  
10 doesn't get into the act until the hearing officer is  
11 done.

12 MR. MILLER: Right.

13 JUSTICE GINSBURG: And so it would be odd to  
14 have a presumption applicable in court that isn't also  
15 applicable to the hearing officer, because the court is  
16 reviewing a decision by the hearing officer.

17 MR. MILLER: Right. Well, the -- the  
18 standard in both stages of the proceeding is by a  
19 preponderance of the evidence, and the parents, as the  
20 party challenging what the school has done, have the  
21 burden. But at both stages, it would be appropriate to  
22 consider whether they were genuinely seeking a free  
23 appropriate public education, and I think it would be  
24 entirely appropriate and consistent with the  
25 preponderance standard for the hearing officer or the

1 court to take due account of the fact that the school  
2 district has some expertise and to give some deference  
3 to what it has proposed.

4 JUSTICE SCALIA: (i)(2)(B)(iii) --

5 JUSTICE GINSBURG: Is the department --

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

7 MR. MILLER: Oh, it's (i)(2)(B) -- it's been  
8 amended in 2004. There's no change in the language,  
9 but it's now --

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

11 MR. MILLER: (C).

12 JUSTICE SCALIA: (C)(iii).

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

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

1 where the reimbursement award was made in the first  
2 instance by a hearing officer, and, of course, the Court  
3 held that that was appropriate. And --

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

8 MR. MILLER: I think of the additional costs  
9 of treating special education children, above those of  
10 educating other children, I think approximately  
11 10 percent, 10 to 12 percent, is reimbursed by the  
12 Federal Government.

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

21 MR. MILLER: There's no basis for supposing  
22 that there would be a vast expansion of liability, and  
23 there are some statistics on this in the National  
24 Disability Rights Network's amicus brief at pages 13 and  
25 14. Of about 6 million children in the United States

1 who are receiving special education, barely 1 percent of  
2 those are in private placements, and the vast majority  
3 of those are agreed-upon placements between school  
4 districts and the parents. So this sort of unilateral  
5 private placement is quite rare, because, first, the  
6 parents do it at their own financial risk, and so  
7 there's a real barrier to parents doing it, because they  
8 have to be pretty sure that they are right and that they  
9 are going to be able to meet the demanding standards of  
10 -- satisfying the district court that an award of  
11 tuition reimbursement is appropriate, and if they don't  
12 do that --

13 JUSTICE KENNEDY: If the --

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

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

25 MR. MILLER: No. What this Court said in

1 Carter is that it's appropriate for the hearing officer  
2 to take into account whether the cost of the private  
3 education was unreasonable. So in a situation where you  
4 had two basically equivalent schools, that would  
5 certainly be an appropriate thing for the hearing  
6 officer to take into account in limiting or denying  
7 reimbursement.

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

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

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

21 JUSTICE SCALIA: Let me be clear. Am I  
22 correct that under -- under the theory of the statute  
23 that you are supporting, it would be possible for a  
24 parent, without first consulting with the school at all,  
25 to put the child in a private school and then later to

1 request public school services, and when it is -- when  
2 they are denied or they are inadequate, all that public  
3 school -- private school tuition would be reimbursable?

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. MILLER: Thank you.

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

14 REBUTTAL ARGUMENT OF GARY S. FEINERMAN

15 ON BEHALF OF THE PETITIONER

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

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

1 reimbursement. And the very next subsection, (c), is  
2 entitled Reimbursement for Private School Placement, and  
3 that provision speaks only to students who previously  
4 received special education and related services under  
5 the authority of a public agency.

6 JUSTICE GINSBURG: Where are you reading  
7 this?

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

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

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

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

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

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

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

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

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

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

11 JUSTICE BREYER: All right. But anyway, the  
12 regs don't say anything about that.

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

24 JUSTICE BREYER: You're saying the statute  
25 says the hearing officer can't do that no matter what.

1 That's a separate argument.

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

4 JUSTICE BREYER: All right.

5 MR. FEINERMAN: If T.A. is right, that would  
6 be the system.

7 Thank you very much.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

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

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