

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: FLORENCE COUNTY SCHOOL DISTRICT FOUR, ET  
AL., Petitioners v. SHANNON CARTER, A MINOR BY  
AND THROUGH HER FATHER AND NEXT FRIEND,  
EMORY D. CARTER

CASE NO: 91-1523

PLACE: Washington, D.C.

DATE: Wednesday, October 6, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FLORENCE COUNTY SCHOOL :

4 DISTRICT FOUR, ET AL., :

5 Petitioners :

6 v. : No. 91-1523

7 SHANNON CARTER, A MINOR :

8 BY AND THROUGH HER FATHER AND :

9 NEXT FRIEND, EMORY D. CARTER :

10 - - - - -X

11 Washington, D.C.

12 Wednesday, October 6, 1993

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States at  
15 10:01 a.m.

16 APPEARANCES:

17 DONALD B. AYER, ESQ., Washington, D.C.; on behalf of  
18 the Petitioners.

19 PETER W. D. WRIGHT, ESQ., Richmond, Virginia; on  
20 behalf of the Respondent.

21 AMY L. WAX, ESQ., Assistant to the Solicitor General,  
22 Department of Justice, Washington, D.C.; on behalf of  
23 the United States as amicus curiae supporting  
24 Respondent.

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

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 91-1523, the Florence County School District  
5 Four v. Shannon Carter, et al. Mr. Ayer.

6 ORAL ARGUMENT OF DONALD B. AYER

7 ON BEHALF OF THE PETITIONERS

8 MR. AYER: Thank you, Your Honor. Mr. Chief  
9 Justice and may it please the Court:

10 In the Burlington decision, this Court  
11 recognized that one of the judicial remedies available for  
12 a school district's failure to provide an education  
13 meeting the requirements of the Individuals with  
14 Disabilities Education Act is reimbursement of the child's  
15 parents for the cost of removing their child from the  
16 public school and putting he or she into a private school  
17 that provides an education that is proper under the act.

18 The Court in Burlington explained that  
19 conclusion in part on the ground that where parents select  
20 a private school placement that is found to be "proper  
21 under the act" the award of such reimbursement does  
22 nothing more than pay the parents the cost that should  
23 have been paid initially by the public school for the  
24 placement that should have been provided in the first  
25 place.



1           The issue presented in this case is whether, as  
2   the court below held, this right to reimbursement under  
3   Burlington arises wherever the private placement selected  
4   by the parents ultimately proves to be beneficial to the  
5   child, or rather, whether such placements are constrained,  
6   as are all other placements under the Individuals with  
7   Disabilities Education Act by the obligation to provide a  
8   free appropriate public education, which is defined  
9   precisely and specifically in the act.

10           QUESTION: Well, Mr. Ayers, the -- it's defined,  
11   I guess, in section 1401?

12           MR. AYER: 1401(a)(18), Your Honor.

13           QUESTION: Do you think that that provision is  
14   applicable at all to private placements? It seems to --

15           MR. AYER: Well, Your Honor --

16           QUESTION: -- cover, really, State placements --

17           MR. AYER: I think the place --

18           QUESTION: -- or State provision of --

19           MR. AYER: The place to begin in thinking about  
20   it is with the initial section of the act, which states  
21   the purpose of the act, and it states that purpose very  
22   explicitly in terms of assuring that all children with  
23   disabilities will have available to them a free,  
24   appropriate public education.

25           That is the overriding, the primary purpose.

1 The Court recognized that in Burlington.

2 QUESTION: Well, okay. I recognize that, and  
3 I'd like you to tell us, if you will, where in the statute  
4 specifically it covers private placement, or whether this  
5 is just something by way of a remedy that the courts have  
6 developed under the act.

7 MR. AYER: Well, the statute does not explicitly  
8 provide for the Burlington remedy, either, and so the fact  
9 that there is a remedy there is something that is  
10 recognized as necessary to accomplish the purposes of the  
11 act, so I can't point to something specifically that  
12 limits a remedy that is not explicitly dealt with in the  
13 statute. What I think I can do --

14 QUESTION: -- than that. If you insist upon  
15 free, appropriate public education, there's no private  
16 placement.

17 MR. AYER: Well, I would disagree with that.

18 QUESTION: The only thing you can do is to send  
19 the person to a public school. Wouldn't that have to be  
20 your position?

21 MR. AYER: Well, the public aspect I think has  
22 two parts within the definition, one is that it be a  
23 public expense, and that is certainly possible, and the  
24 other -- well, there's three, I guess. The other is that  
25 it -- one other is that it meets State standards. That's

1 at dispute in this case. And then the third is that it be  
2 under public supervision.

3 QUESTION: Well, you're willing to acknowledge  
4 that it doesn't have to be under public supervision, that  
5 that's not --

6 MR. AYER: Well, I --

7 QUESTION: -- what free appropriate -- what an  
8 appropriate public education means, right?

9 MR. AYER: Justice Scalia, I think it depends  
10 how you define public supervision. I think the act  
11 plainly contemplates and placements go forward I think on  
12 a regular basis in private schools where the public school  
13 authorities nonetheless are involved in that process.  
14 They're involved in helping to prepare an individual  
15 education program, and that I think fairly satisfies the  
16 requirement of public supervision.

17 QUESTION: Mr. Ayer, you made, I think, a very  
18 helpful and candid concession in your reply brief in which  
19 you say there are situations that would be an exception to  
20 this strict Burlington requirement that it must be a place  
21 that is approved by the district, and I'd like to call  
22 your attention to page 9 of your reply brief where you  
23 said, in the second full paragraph, that the Court should  
24 not allow FAPE's educational standards and IEP requirement  
25 to foreclose unreasonably the pursuit of educational

1 opportunity through the unilateral parent placement  
2 process recognized in Burlington.

3 So you seem in that passage to be recognizing  
4 that there are cases where there can be deviations from  
5 both the IEP requirement, the FAPE educational standards,  
6 so doesn't this controversy, then, boil down to whether  
7 this case fits that description?

8 MR. AYER: Correct, Your Honor.

9 QUESTION: And in this case there was no list  
10 supplied by the public school authorities as there was in  
11 Burlington, so why isn't that enough to make it  
12 exceptional?

13 MR. AYER: Well --

14 QUESTION: Why shouldn't there be a burden on  
15 the public system to say to the parents, here is a list of  
16 approved private facilities?

17 MR. AYER: Your Honor, there's certainly nothing  
18 in the statute that dictates in what manner the public  
19 school authorities are required to be cooperative with the  
20 parents. It might be that they have a list prepared. In  
21 some States they do. If they have such a list, in all  
22 likelihood, it's going to be necessary for the parents to  
23 go to somebody and ask for it.

24 If there is no list, it is in the same way  
25 necessary for the parents to go to someone, perhaps, and



1 ask the question, here's what I'd like to do under my  
2 Burlington rights, I want to put the child in a private  
3 school, can you tell me whether this facility meets  
4 standards?

5 We would have a different case here if what had  
6 happened was the parents had done that and been given  
7 either no answer, or been given an answer which is, we  
8 won't cooperate with you, we won't help you. That might  
9 be a case where you could say that the realization of the  
10 free appropriate public education simply couldn't  
11 realistically be accomplished here even though the parents  
12 tried to do it.

13 The fundamental --

14 QUESTION: So it comes down to who has the  
15 burden of inquiry, or it's a question of whether the  
16 public authority has to supply either a list or a  
17 procedure, and you say no, the parent has to ask, and if  
18 the parent doesn't ask, then there is effectively no  
19 recourse for the parent even though the very first step in  
20 this case is a given -- that is, the public authority has  
21 not been able to provide the education that the statute  
22 requires.

23 MR. AYER: Well, Justice Ginsburg, I'd like to  
24 take a couple of steps back, because I think you only get  
25 to the issue that you are raising, which is whether or not

1 it is essentially not possible to accomplish, not possible  
2 for the parents and the private school to accomplish the  
3 objective of the statute.

4 You only get to that point after you impose an  
5 initial requirement, presumptively at least, that a free  
6 appropriate public education is an objective to which the  
7 parents must make some efforts to achieve, and I want to  
8 just talk briefly to this question of how the statute  
9 operates, and the fact, first of all, what I mentioned  
10 earlier, that this is a statute that, perhaps unusually,  
11 has as its stated primary purpose not the elevation of  
12 educational quality for disabled students, not some  
13 general objective like that, the primary purpose of this  
14 statute, as it states in its own language, is the  
15 assurance that all children with disabilities will have  
16 available a free, appropriate public education. What  
17 is --

18 QUESTION: May I just interrupt you there?  
19 Isn't the point that the statute or the conditions that  
20 we're concerned with here are all conditions which are  
21 intended to be for the benefit of the students. It's to  
22 make sure that the kids with disabilities do not get stuck  
23 down in some -- some second-rate status, and if the  
24 purpose of the various conditions that are in question  
25 here are for the benefit of the students, then under

1 Burlington, isn't it at least possible for the students,  
2 or the parents of the students, to waive those or to, you  
3 might say, ignore them so that that waiver or ignoring of  
4 them would not be a per se disqualification to  
5 reimbursement.

6 MR. AYER: Well, I have not heard -- I have not  
7 seen or heard of that notion in the cases, Justice Souter.  
8 It is the case, I think, that parents can take their child  
9 out of the public system and pay for a private school  
10 education on their own.

11 QUESTION: Let me -- if I may interrupt you, do  
12 you claim that either of the conditions in question here  
13 are that the requirement of IEP, or the requirement of  
14 teacher certification, is for the benefit of anyone other  
15 than the students?

16 MR. AYER: No. I think it is for the benefit of  
17 the students. It is --

18 QUESTION: So that if, then, the students or  
19 their parents say well, we'll waive those so long as we  
20 can get, in fact, an adequate education elsewhere, why  
21 shouldn't they be allowed to waive them and why should  
22 their waiver be a bar to reimbursement?

23 MR. AYER: Well, I think this goes directly to  
24 the question of whether State educational authorities were  
25 intended under the act to be left in the primary role with

1 regard to the making of educational policy.

2 QUESTION: Exactly. Exactly, or to put it  
3 differently, whether the IEP and the FAPE requirements  
4 were put there out of mistrust of the parents, or out of  
5 mistrust of school authorities. It seems to me they were  
6 put there to make sure that the school authorities did not  
7 give the disabled child second-rate treatment. You really  
8 think Congress was worried about the parents giving their  
9 disabled child second-rate treatment, putting him in a  
10 private placement that would be no good for him?

11 MR. AYER: Your Honor, I think that what  
12 Congress intended to do was to create a mechanism that  
13 relied on essentially three different factors to assure  
14 the quality of education, and I don't think that they  
15 assumed that parents were in many -- in most instances the  
16 best judges of what would be a quality education.

17 QUESTION: Ah, the best judge is going to be the  
18 judge in a contested case for reimbursement afterwards, or  
19 if not the best judge, an adequate judge. I mean, the  
20 scheme that the other side is claiming does not leave them  
21 in the unreviewable driver's seat.

22 MR. AYER: Well, it -- the standard that is  
23 applied, as I was saying just now, there are three  
24 elements, essentially that the statute puts in place, and  
25 I would submit they work like the legs of a stool to



1     elevate together the quality of education. One of them is  
2     the requirement that State educational standards be met in  
3     the educations provided to disabled students, and I think  
4     that's very important, because what was happening before  
5     was that disabled students were in many instances simply  
6     being pushed aside or being given a clearly inferior  
7     education, so the notion is not that we're going to tell  
8     the States what policies to put in place, but that we're  
9     going to require that they treat disabled students no less  
10    favorably than they treat nondisabled students.

11           The second is the IEP process, which in this  
12    statute was very explicitly spelled out. This is not, if  
13    you read through the language of it, a general reference  
14    to the notion that, and there should be some sort of  
15    discussion between the parents and the school officials.  
16    This is a very explicit set of requirements which Congress  
17    believed was necessary in conjunction with the other  
18    factors that it was putting into the statute in order to  
19    accomplish the result.

20           QUESTION: Are you contending that the -- that  
21    what went on at this Trident School -- it wasn't an IEP,  
22    but there were, what was it, goal-settings, and I think  
23    more frequent reviews -- that that wasn't a reasonable  
24    substitute? Is the IEP so much more intense?

25           MR. AYER: Well, Your Honor, I think -- I think

1 it is perfectly clear from the court of appeals decision  
2 that the court of appeals did not view what went on at  
3 Trident as complying with the act, because it says  
4 explicitly that.

5 QUESTION: It wasn't an IEP, but --

6 MR. AYER: It wasn't an IEP.

7 QUESTION: -- there was a setting of goals for  
8 this student to achieve, and an evaluation whether the  
9 student -- of the student's progress periodically, was  
10 there not?

11 MR. AYER: That's correct.

12 QUESTION: And I'm asking you, in terms of  
13 quality, was it substantially less effective in measuring  
14 the child's progress than the IEP?

15 MR. AYER: Well, what is missing from that, from  
16 what you've described, and I think, Your Honor, you have  
17 accurately described what is in the decisions in terms of  
18 what kind of process there is. There is absolutely no  
19 discussion of the critical part of the IEP process, which  
20 is a cooperative interaction, a give-and-take between the  
21 parents and the school. There is no discussion of a  
22 written statement of the services to be provided.

23 QUESTION: Mr. Ayer, what does a parent -- what  
24 is a parent supposed to do when a school district such as  
25 your client has failed to provide the IEP, the FAPE, and

1 what the statute requires, but there happens to be no  
2 alternative school around that works via an IEP, and the  
3 parent finds the best school available, saying, you know,  
4 the school district has failed me, has violated the  
5 statute, I'm going to do the best I can for my kid --

6 MR. AYER: Well --

7 QUESTION: -- and there happens to be no private  
8 school who is willing to go through all of the folderol of  
9 an IEP, or they think an IEP is really not the best way to  
10 do it? That parent has no remedy.

11 MR. AYER: No, I don't think that's necessarily  
12 the case, Your Honor. I think -- I think that this raises  
13 the question of, in what kind of circumstances might an  
14 exception be made to the free appropriate public education  
15 requirement.

16 QUESTION: Mr. Ayer, did I take it that your  
17 answer to the question I asked you before was that if  
18 these parents had inquired, if they had only inquired,  
19 tell us a school, and they got no answer, then you would  
20 say, yes, then they would be entitled to reimbursement?

21 MR. AYER: Well --

22 QUESTION: So does the whole thing come down to  
23 whether the State has to provide them with a list, or a  
24 process, to find out what would be an acceptable school,  
25 or whether the parents have to initiate the inquiry in the

1 first place?

2 MR. AYER: I don't think it comes down to that,  
3 Your Honor, I think the first issue must be whether the  
4 holding of the court of appeals decision, which is that  
5 the free appropriate public education requirement is  
6 entirely inapplicable in the Burlington context, with the  
7 one exception of the requirement that the education  
8 provide educational benefit.

9 QUESTION: Well, let me ask you the question in  
10 a different way, and if I -- this is the way I see it, and  
11 if I'm wrong please tell me. The school system has not  
12 been able to provide the child with an education that the  
13 statute requires. That's a given. What is the remedy for  
14 the parent?

15 MR. AYER: In this case? In any cases?

16 QUESTION: In this case. The school system has  
17 not done what the statute requires. The parents then have  
18 a child in need of an education. What is the remedy --

19 MR. AYER: Well --

20 QUESTION: -- for the default on the part of the  
21 public school system?

22 MR. AYER: The parents have the right to remove  
23 the child, as was indicated from -- in Burlington, to  
24 remove the child from the public school and find an  
25 alternative placement. The issue here --



1 QUESTION: And that's what these parents did.

2 MR. AYER: The issue here is whether the  
3 parents, in doing so, the parents nonetheless are governed  
4 by the requirement of the act and the primary purpose of  
5 the act, which was to -- is to achieve a free appropriate  
6 public education.

7 QUESTION: Well, let's go back to the purpose  
8 again, because I don't think you've answered one of the  
9 questions that we keep asking, and that is, for whose  
10 benefit are these conditions which collectively make up  
11 the purpose? The benefit of the stay-put provision in  
12 Burlington was supposedly, or was treated as being -- the  
13 object of the stay-put provision was being to serve the  
14 children so that they did not get side-tracked into some  
15 inappropriate class while the fight was going on about  
16 what to do.

17 Isn't the benefit of the -- the object, rather,  
18 of the two provisions that you were most concerned with in  
19 making up the collective purpose of this statute also to  
20 benefit the children?

21 MR. AYER: It is primarily to benefit the  
22 children.

23 QUESTION: Isn't that a relevant fact, then, in  
24 deciding to what extent those conditions may be waived and  
25 to what extent they may be waived consistently with the

1 purpose of the statute?

2 MR. AYER: It is a relevant fact, Your Honor, I  
3 think first with regard to the requirement of meeting  
4 State standards, that whereas the primary purpose is to  
5 benefit the children, a secondary purpose which is made  
6 explicit in the statute and which this court has  
7 recognized is to leave State authorities as the primary  
8 authorities in determining educational standards. That  
9 purpose is frustrated by the result that's been reached  
10 here.

11 QUESTION: What if you can't satisfy each of  
12 them? Which purpose wins out?

13 MR. AYER: I don't think -- I think that's a  
14 false hypothesis, Your Honor. I don't -- I --

15 QUESTION: Well, it is -- it is if you are  
16 correct that the conditions are in effect enforceable  
17 conditions without any possibility of waiver.

18 MR. AYER: That -- well, I --

19 QUESTION: But that in effect assumes the answer  
20 to the question that is before the Court.

21 MR. AYER: I think on the IEP requirement that  
22 the statute -- any fair reading of the statute does not  
23 contemplate that in a usual setting in a public school  
24 that if the parents and the teachers sit down and parents  
25 and the school authorities sit down and they say, well,

1 now, we're going to be funding this under the IDEA, but  
2 you'd just as soon not do an IEP, wouldn't you?

3 We'd just as soon not write one, you'd just as  
4 soon not have one, let's just forget about it, and we'll  
5 go ahead and fund this with Federal money without  
6 complying with the requirements of the statute. I do not  
7 believe that that's consistent with what the authors of  
8 the statute had in mind. I --

9 QUESTION: Mr. Ayer, a little while ago you  
10 told -- started to tell us about a three-legged stool.

11 MR. AYER: Yes.

12 QUESTION: You told us what the first two legs  
13 are --

14 MR. AYER: Well, I --

15 QUESTION: -- but you never got to the third.

16 MR. AYER: Well, the --

17 QUESTION: Would you tell me what it is?

18 MR. AYER: Yes. The third leg is the standard  
19 of what constitutes an appropriate education, as the word  
20 is used in the act, and in Rowley --

21 QUESTION: I forgot the first two already. What  
22 were the first two?

23 (Laughter.)

24 MR. AYER: The first two legs, Your Honor, were  
25 the requirement that the education meet State educational

1 standards, the second was that it be provided in  
2 compliance with the IEP requirement, and the third is that  
3 it be "appropriate."

4 Now, this Court in Rowley, in considering what  
5 constitutes an appropriate education, focused on the fact  
6 that there are other procedural and other requirements  
7 under the act and adopted a standard which I think by any  
8 fair reading is a fairly low level standard. That is to  
9 say, it is simply a question of whether the education was  
10 capable or calculated to provide educational benefit.  
11 That in itself I think plainly is not an effective support  
12 to a statute that is trying to elevate the quality of  
13 disabled children's education.

14 The statute has in mind something else. The  
15 statute has in mind these things working together. It has  
16 in mind, under the educational standard requirement,  
17 essentially a nondiscrimination provision that says, you  
18 can't treat the disabled children worse than you treat the  
19 other children. If you have teachers certified in the  
20 areas they're teaching for other children, you've got to  
21 have similar kinds of certification.

22 And that's -- the certification point which is  
23 at issue here is a very significant part of the statute.  
24 It's addressed specifically in the regulations and in the  
25 statute, indicating at one point in the statute -- I think



1 it's -- 1413(a)(14) talks about with regard to disabled  
2 children, if you are not hiring teachers in accordance  
3 with the highest standards in the State, number 1 you're  
4 supposed to do that for disabled children, and if you're  
5 not, you've got to give an explanation as to what you're  
6 doing to get up to that standard.

7 QUESTION: Of course, you're -- go on.

8 QUESTION: I'm sorry.

9 QUESTION: Go -- go, go. I took the last one.

10 QUESTION: You're arguing -- if Burlington  
11 hadn't been decided, you'd be making essentially the same  
12 argument with respect to the stay-put provision, wouldn't  
13 you? Wouldn't that be essential to, for example, the  
14 maintenance of control over public education and assuring  
15 that the public educational authorities would see that the  
16 kid did not get sidetracked into a second-rate classroom  
17 while they were fighting over what to do? I mean, you'd  
18 be making the same argument.

19 MR. AYER: You mean, before Burlington was  
20 decided?

21 QUESTION: Yeah.

22 MR. AYER: I can't tell you what I would be -- I  
23 wasn't involved in that case, and I don't know what I'd be  
24 arguing. It's not the same case as this case.

25 QUESTION: Isn't the logic essentially the same,

1 and I mean, I don't see how you can argue in the face of  
2 Burlington consistently with the Burlington logic that  
3 these provisions are so obviously nonwaivable, or  
4 nonmalleable, and as Justice Ginsburg pointed out, I  
5 thought in your reply brief you were conceding as much.

6 MR. AYER: Well, I would just again ask the  
7 question, do we believe that they are waivable in the  
8 context of a public school placement?

9 QUESTION: You told me that if -- that this  
10 would be a different case if these parents had inquired of  
11 the school system, is there a place that satisfies your  
12 requirement where we can put our child, and you said that  
13 what the case comes down to is that the parents failed to  
14 make that inquiry.

15 MR. AYER: Your Honor, I did not mean to say it  
16 would come out a different way. It would be a different  
17 case, because it would have triggered a different process.

18 QUESTION: Does this school district have either  
19 a list of approved places or, does it have a procedure  
20 that parents can use to find out?

21 MR. AYER: It doesn't have a list, and whether  
22 or not it has a procedure in terms of a way that parents  
23 could get that information, we don't know, and the reason  
24 we don't know is that any effort was -- no effort was  
25 taken. The procedure would be to pick up the phone --

1 QUESTION: Why shouldn't it be --

2 MR. AYER: -- and ask the question.

3 QUESTION: -- if the school district is in  
4 default because it has not provided the required  
5 education, why shouldn't it be incumbent on the school  
6 system to show that indeed it has a procedure? Rather  
7 than putting the burden on the family that has not gotten  
8 what the statute entitles it to, why shouldn't it be the  
9 school system's responsibility to say, either we maintain  
10 a list, or we maintain a procedure so that the parents  
11 will have an effective remedy?

12 MR. AYER: Well, I think -- this is a case where  
13 what occurred was that, while the review process under the  
14 statute was going forward, the parents, completely on  
15 their own and without any conversation with the school,  
16 and without telling the school district authorities that  
17 they were doing it before they did it, they took the --  
18 they applied to the Trident School, they took the child  
19 out of the school, and they put her into the Trident  
20 School, so that this is not a situation where the --

21 QUESTION: They took a big risk in doing that.  
22 I mean, it may well be that when they came to apply for  
23 reimbursement and the school district resisted it, a court  
24 would have found, well, the Trident School is really not a  
25 very good school, and since you didn't provide

1 substantially what the act wanted, we're not going to  
2 allow -- that's a big risk for the parents. Why isn't  
3 that risk enough?

4 Once the school district has failed to meet its  
5 obligation, the parent has the right, if the parent wants  
6 to take the chance, to send the kid to any school at all.  
7 If the school doesn't meet up to fulfill the obligation  
8 substantially of the act, the parent gets no  
9 reimbursement. That's a substantial sanction, but I don't  
10 know why the parent has to --

11 MR. AYER: Well --

12 QUESTION: You know, the school board had its  
13 chance, decided not to provide these services, and it  
14 seems to me it falls back into the lap of the parent.

15 MR. AYER: Your Honor, I think that's -- I think  
16 it's a bit of an oversimplification to say that they  
17 decided not to provide the services. The bottom line is,  
18 there's been a finding that what they offered wasn't  
19 meeting the standards under the act. The one answer I  
20 would give goes back to what is the explicit purpose of  
21 the act, and Congress must have had something in mind when  
22 it said that it wants to assure a free, appropriate public  
23 education to all children, meaning --

24 QUESTION: Well, Mr. Ayer, we take this case on  
25 the assumption that the public school failed to provide



1 the free appropriate public school education. I mean, we  
2 take that as a given.

3 MR. AYER: That's correct.

4 QUESTION: And in those circumstances, does it  
5 boil down, in effect, to whether the courts below abused  
6 their discretion in ordering the remedy they did? Is that  
7 what we're really looking at here?

8 MR. AYER: Well, you can case it as an abuse of  
9 discretion. I think the key point is, is the rule  
10 announced by the court of appeals consistent with the  
11 objectives and language -- the purpose, explicitly stated,  
12 and language of the act -- and I would submit that  
13 inasmuch as the purpose, as stated, is to create this, as  
14 I described it, three-legged stool to elevate the quality  
15 of education, what we have created here with this rule,  
16 not simply in this case, but with the rule amounts, simply  
17 saying, all you have to do is show that you've found an  
18 education that is going to provide educational benefit, we  
19 are going to have a lot of placements that are publicly  
20 funded, federally funded under the act in part and State-  
21 funded to a significant degree.

22 QUESTION: Well, it could well be that there is  
23 language under the opinion that goes further than perhaps  
24 you think it should, but at bottom you have a judgment in  
25 favor of reimbursement of these parents, and do we review

1 that on an abuse of discretion standard?

2 MR. AYER: I -- it is ultimately a question of  
3 whether discretion has been abused.

4 QUESTION: Well, Mr. Ayer, I thought your  
5 position was that if the school in which the child is  
6 placed does not meet the State standard, there's no  
7 reimbursement, period. I thought that was your position.  
8 Am I wrong, that if --

9 MR. AYER: The general rule is that the  
10 education that's going to be publicly funded must meet the  
11 standards of a free appropriate --

12 QUESTION: If it doesn't, there's no  
13 reimbursement to the parents. I thought that was  
14 your position.

15 MR. AYER: That's the general rule, and the only  
16 exception to that, I think, is going to be --

17 QUESTION: Well, not only the general rule,  
18 that's the rule you say the statute requires, as I  
19 understand it, in all cases.

20 QUESTION: I believe you did recognize an  
21 exception in your reply brief, that there could be  
22 extraordinary cases, and the question was whether this was  
23 one.

24 MR. AYER: Well, I think we do recognize the  
25 possibility that where there's -- as in Honig, where

1     there's a substantial showing that accomplishing the  
2     purposes of the act is not going to be possible, or has  
3     been prevented --

4             QUESTION: Well, do you think this case would be  
5     any different if before making the placement the parents  
6     had gone to the school authorities and said, we propose to  
7     put the child in this particular school, and they said,  
8     well, you know, there are two teachers there that aren't  
9     certified, and we, of course, have put some of our  
10    placements there, but we want you to know that there are  
11    two uncertified teachers? Would that make the case any  
12    different?

13            MR. AYER: It might well. I think -- because  
14    what that would do would be to initiate a process where  
15    the school authorities could address that issue, and it  
16    might produce something else. The point is here, the  
17    parents walked away, and there has not been a cooperative  
18    process.

19            QUESTION: The school's position was that the  
20    program at its school was sufficient. They weren't  
21    arguing about where to place the child.

22            MR. AYER: But they also -- they also  
23    understood, Justice Stevens, that they have obligations  
24    under Burlington, that there are Burlington rights, and I  
25    think it's really unreasonable to think that school

1 districts are simply going to ignore the fact that parents  
2 have these rights.

3 If it's possible, Your Honor, I'd like to  
4 reserve any time I have left for rebuttal.

5 QUESTION: Very well, Mr. Ayer. Mr. Wright.

6 ORAL ARGUMENT OF PETER W. D. WRIGHT

7 ON BEHALF OF THE RESPONDENT

8 MR. WRIGHT: Mr. Chief Justice and may it please  
9 the Court:

10 Before we get into the issues, I'd like to take  
11 a moment to review some of the factual questions that are  
12 important in responding to Mr. Ayers. In 1983, when  
13 Shannon was 13 years old, she entered the seventh grade at  
14 Timmonsville School. Her mother told the school officials  
15 that Shannon could not read and requested that she be  
16 evaluated. The school system evaluated her, concluded  
17 that she was lazy, unmotivated, a slow learner who needed  
18 to be pressured harder to work.

19 Relying upon that, the parents pressured their  
20 daughter. By February of 1985, she was 16, functionally  
21 illiterate, had become suicidal, and was severely  
22 depressed. Her parents obtained counseling for her. The  
23 counselor recommended that Shannon receive a complete  
24 psychological evaluation.

25 The results found that Shannon had a severe



1 learning disability and intense educational services were  
2 recommended. Following this, the school did evaluate  
3 Shannon and concurred that Shannon had a severe learning  
4 disability and was average to above average in  
5 intelligence.

6 At a conference with parents and school  
7 personnel, an individualized educational program was  
8 presented to the parents that proposed a resource program  
9 for Shannon. This resource class would be one where  
10 Shannon was going to be placed with emotionally disturbed  
11 and mentally retarded children. The parents said that was  
12 not appropriate for Shannon.

13 The school then offered an itinerant program.  
14 This program consisted of 3 hours of special education a  
15 week, and after a year in the tenth grade as a 17-year-  
16 old, her reading still would have remained at the fifth  
17 grade level, and she would have fallen further and further  
18 behind her peer group. The parents contended that this --

19 QUESTION: You say, would have. That was what  
20 they projected the results of this would be.

21 MR. WRIGHT: Absolutely. That's correct.

22 QUESTION: What the school board projected?

23 MR. WRIGHT: The school board said, we will have  
24 you reading half -- 5 months more, after a year's worth of  
25 intense special education program.

1           The parents said that was not -- inadequate, and  
2   based upon the advice of the evaluators that were working  
3   with the family and with Shannon, requested at that time a  
4   self-contained learning disabled program such as the one  
5   that was offered right down the road in Florence County  
6   School District One.

7           Now, Florence County has multiple school  
8   districts, and this is a case against District Four, not  
9   against Florence County itself.

10          District Four refused to consider placing  
11   Shannon in any public or private self-contained program.  
12   The parents then requested a special education due process  
13   hearing. At the August 20 due process hearing, the  
14   Carters requested funding for either two neighboring  
15   schools or Trident Academy, a special educational school  
16   accredited by the Southern -- excuse me, Southern  
17   Association of Colleges and Schools.

18          The issue at the special education due process  
19   hearing and before the district court judge was whether or  
20   not District Four's itinerant program was appropriate.  
21   The trial court not only found that District Four's  
22   program was inadequate, but also found that Trident  
23   Academy provided Shannon with an excellent education.  
24   She --

25          QUESTION: The petitioner argues that there was

1 a unilateral withdrawal and that the parents walked away  
2 from the process.

3 Was there any pleading in the lower court or  
4 ever an attempt to show in this case that if the parents  
5 had consulted with the school district somewhat longer  
6 there would have been a likelihood of an IEP program being  
7 drafted? Was that ever contended by the --

8 MR. WRIGHT: It was not an issue at either the  
9 due process hearing or the U.S. district court. The issue  
10 was simply, our itinerant program 3 hours a week is  
11 appropriate and adequate.

12 QUESTION: But that contention was never made  
13 below by the State in the trial court?

14 MR. WRIGHT: About -- the issue of Trident not  
15 being --

16 QUESTION: That there would have been a  
17 likelihood, a realistic likelihood that an IEP would have  
18 been developed if the parents had remained in the process?

19 MR. WRIGHT: No, sir. No, sir. It was --

20 QUESTION: That was never contended.

21 MR. WRIGHT: It was never contended. It was  
22 simply, our 3 hours a week are appropriate, and  
23 therefore -- and if they proved that, if they had proved  
24 that 3 hours a week was appropriate, then of course, the  
25 parents had no remedy under Burlington, and so that was

1 the issue of the case. Thus you'll see the record is  
2 fairly incomplete on a number of the other issues dealing  
3 with information about Trident.

4 QUESTION: Mr. Wright, in view of the expense to  
5 the State, and it is quite expensive -- what was the --  
6 how much per year, 30 -- over \$30,000, was it?

7 MR. WRIGHT: Over 3 years it was \$30,000.  
8 Actually, it was about -- the actual tuition was about  
9 \$6,000 or \$7,000, only \$2,000 or \$3,000 more than it would  
10 have cost the public school themselves.

11 QUESTION: In any event, it is an expense for  
12 the State we multiply many times if you prevail. Why  
13 isn't it equitable to require the parents in this  
14 situation to say to the school system, we are at  
15 loggerheads about the adequacy of what you are offering,  
16 and we're going to take the risk to send our child  
17 elsewhere, tell us what schools you regard as adequate.  
18 Why shouldn't there be that burden of inquiry, as Mr. Ayer  
19 suggested?

20 MR. WRIGHT: I think that's a proper burden.

21 QUESTION: There parents didn't do that. They  
22 simply went off and unilaterally chose Trident. They  
23 didn't ask -- they didn't ask Florence County, what  
24 institutions would you consider adequate?

25 MR. WRIGHT: The record at the administrative



1 due process hearing -- not in the court of appeals, not in  
2 the joint appendix, but in the due process hearing, will  
3 show the parents said, "Can our daughter go to Hartsville,  
4 down the road, District 1, Darlington, or Trident?"

5 That was the issue at the due process hearing.  
6 The itinerant program is not good enough for our daughter,  
7 we want her to read at the twelfth grade level when she  
8 graduates. That was what the battle was all about, so her  
9 parents -- and that was August 20, before school had even  
10 started, and Shannon had not been placed anywhere. If  
11 public --

12 QUESTION: What was the State's response?

13 MR. WRIGHT: Three hours a week is appropriate,  
14 1/2-a-year's gain over a year is appropriate. The  
15 parents -- reasonable parents, what else could they do?

16 QUESTION: So you say that the inquiry that  
17 Mr. Ayer said might have made this case different, in fact  
18 happened?

19 MR. WRIGHT: Absolutely.

20 QUESTION: As in the record of the  
21 administrative --

22 MR. WRIGHT: The due process hearing, the  
23 trial -- the actual testimony before the administrative  
24 hearing officer.

25 QUESTION: Is that record part of our record?

1 MR. WRIGHT: It's -- it was a part, of course,  
2 of the trial court's record, the U.S. district court  
3 judge, and parts of the due process testimony are within  
4 the court of appeals joint appendix. I don't recall  
5 whether the three schools -- Darlington, Hartsville and  
6 Trident Academy are clearly in the court of appeals  
7 appendix or not, but that's -- I represent to the Court  
8 that it is clearly in the due process transcript,  
9 absolutely. I say that without a doubt.

10 QUESTION: What is it that's in the transcript,  
11 that they told them they were going to place the child at  
12 Trident?

13 MR. WRIGHT: No, sir. At the due process  
14 hearing, August 20, the parents said --

15 QUESTION: They asked whether these three  
16 schools might be proper placement.

17 MR. WRIGHT: -- we want self-contained, 3 hours  
18 a week are not adequate, our daughter needs total  
19 immersion. The school system said, our program is  
20 appropriate. Three hours a week is all that your daughter  
21 needs. The parents did not want to send their daughter  
22 down to Charleston, or Mount Pleasant, South Carolina.  
23 They wanted down the street, next school district.

24 Florence County includes a major city and rural  
25 counties, and then there are school districts as a part of

1 each one, and District 1 -- this is in the record.  
2 District 1 had other self-contained programs, and the  
3 trial judge referenced that the school system had that  
4 available, in effect, and the record is --

5 QUESTION: Well, what is the major city,  
6 Mr. Wright?

7 MR. WRIGHT: I believe it would be Florence,  
8 South Carolina.

9 QUESTION: But in fairness, Mr. Wright, at that  
10 hearing the issue between the school board and these  
11 parents was still whether 3 hours a week is enough or not,  
12 whether you need a self-contained program, or whether 3  
13 hours a week would be enough. The issue was not, well,  
14 assuming you have to go somewhere else and out of this  
15 public school, what other schools would you recommend.  
16 That was not the issue at the hearing. The issue was  
17 whether 3 hours is enough.

18 MR. WRIGHT: Well, no, it did go beyond that.  
19 The parents -- the school system's position was 3 hours  
20 was enough. The parents said, no.

21 QUESTION: But the school district said, none of  
22 these schools is any good, not because the schools are not  
23 qualified, but simply because we insist that 3 hours a  
24 week is enough. You don't need a self-contained program.  
25 Wasn't that their position?

1 MR. WRIGHT: That's correct. That's correct.

2 QUESTION: Okay.

3 MR. WRIGHT: In other words, they put blinders  
4 on to anything beyond 3 hours a week.

5 QUESTION: So there was never really put to the  
6 school district the question, assuming -- assuming that I  
7 don't believe you, what other schools would you recommend?  
8 I mean, if the parents would be willing --

9 MR. WRIGHT: That's correct.

10 QUESTION: -- to accept the recommendations of  
11 people who already thought that 3 hours a week for this  
12 child was enough. What other schools would you recommend?  
13 that question was never put to them.

14 MR. WRIGHT: Not in quite those words, but why  
15 can't daughter go down the road to District 1 and why  
16 can't you simply pay District 1, what you --

17 QUESTION: The response to that was, she doesn't  
18 need any more than 3 hours a week.

19 MR. WRIGHT: Exactly. Exactly.

20 QUESTION: Mr. --

21 QUESTION: Now, I --

22 QUESTION: Are you through?

23 Mr. Wright, if we had a situation where the  
24 school district or the State had an approved list of  
25 private schools to which private placements could be made



1 that met State standards, do you think the parents have an  
2 obligation under this statutory scheme to make a placement  
3 if they want reimbursement in one of the listed private  
4 facilities?

5 MR. WRIGHT: I think they would, given the  
6 assumption, as a part of your question, that the school  
7 system said here is our list of approved schools.

8 QUESTION: Well, and should the parents have an  
9 obligation to inquire, do you have a list?

10 MR. WRIGHT: Yes. Yes, parents, certainly, if a  
11 public school says, we are offering resource or itinerant,  
12 we know you want self-contained daily, or self-contained  
13 private, we don't agree with you but here is a list, I  
14 would submit that the parents would be obligated to  
15 evaluate the list and go back to the school system and see  
16 if they can negotiate it. It's supposed to be a  
17 cooperative type of a venture with --

18 QUESTION: Now --

19 QUESTION: Obligated to consult the list, or  
20 absolutely obligated to remain within the schools in the  
21 list in choosing the placement they wanted?

22 MR. WRIGHT: Well, needless to say, those aren't  
23 the facts in this case, and there is a --

24 QUESTION: Well, I understood -- and maybe -- I  
25 don't want to unduly complicate it. I thought your answer

1 to Justice O'Connor was that they would be obligated, in  
2 effect, to look at the list first, but they would not  
3 necessarily be obligated to send the child to one of those  
4 schools.

5 If they concluded that the school -- none of the  
6 schools on the list was adequate, and they turned out  
7 after the fact on judicial review to be correct, your  
8 position would be the same, representing those parents,  
9 that it is representing these, wouldn't it be?

10 MR. WRIGHT: That's a difficult question, as  
11 you're perhaps aware, the Second Circuit has wrestled  
12 with, the Fifth Circuit has wrestled with, and if this  
13 preexisting list in fact is not appropriate as a matter of  
14 true fact, what do parents do? New York State, they get  
15 appropriate educations, but it's not free. They pay for  
16 it out of pocket, or they get a free appropriation, it's  
17 not appropriate, but I'm not going to ask you today as a  
18 part of the Carter case to go beyond that.

19 QUESTION: Well, you don't ask me, but I was  
20 asking you --

21 (Laughter.)

22 MR. WRIGHT: Yes, sir.

23 QUESTION: -- whether your position would be the  
24 same, and I thought you were going to tell me that it  
25 would be.

1 MR. WRIGHT: Well, Your Honor, I think that in  
2 one of the friend-of-the-court briefs that was filed by  
3 the Maryland Disability Law Center, they synthesized what  
4 the problems were with, for example, there's a case, Jack  
5 Strothy, where there was -- the schools on the list were  
6 obviously absolutely inappropriate, and the trial district  
7 court judge said, my hands are tied. I cannot reimburse  
8 you. You received an appropriate education. I'm real  
9 sorry it was not free, and the --

10 QUESTION: Well, doesn't the principle that you  
11 contend for today untie his hands? If in fact they've  
12 consulted the list, and if in fact, a) they have concluded  
13 that the schools are inappropriate for whatever the need  
14 is, and on subsequent judicial review and a reimbursement  
15 action the trial court likewise concludes, isn't the  
16 principle that you contend for today a principle that  
17 would say they are entitled to reimbursement?

18 MR. WRIGHT: I can only respond -- I can't  
19 respond any better than perhaps the Carrington court did  
20 and Alamo Heights, saying that you have to balance on a  
21 case-by-case basis the cooperativeness of the parents,  
22 whether or not the school system truly defaulted under  
23 their obligations --

24 QUESTION: Where does that leave the school  
25 district if you have to balance in every single case

1 the -- there would be no certainty as to what anyone's  
2 obligations were.

3 MR. WRIGHT: There would be problems with it,  
4 absolutely, and hopefully what that would then result  
5 would be school systems back, for example, with Shannon  
6 Carter in '83, when they have a learning disabled child  
7 doing good quality work at that point, making a finding,  
8 saving dollars by providing appropriate education then, or  
9 in '85 when the parents requested a more comprehensive --

10 QUESTION: Well, that's not going to obviate the  
11 need for some sort of certainty, if those early trials  
12 wont work out.

13 MR. WRIGHT: Yes, sir, it's created --

14 QUESTION: Mr. Wright, are you saying, at least  
15 in -- there was no list, there was no process disclosed to  
16 you, so in the absence of those, this case doesn't have to  
17 go to the further question suppose there had been a list  
18 and it wasn't adequate?

19 MR. WRIGHT: That's exactly what I'm saying  
20 here. No list, the parents had no knowledge of one, and  
21 in fact the State did not have a list, doesn't even have a  
22 process where a private school can apply to the State to  
23 see what it takes to get on this list, because it is a  
24 nonexistent list.

25 QUESTION: But you didn't even ask. I mean, you



1 could have asked someone, couldn't you, come in and asked?  
2 I don't know of any list posted, but as your colleague  
3 pointed out, even if there was a list, you'd have to ask  
4 somebody for the list, wouldn't you?

5 MR. WRIGHT: Parents, I don't believe -- the  
6 answer's no.

7 QUESTION: But you didn't ask anybody for  
8 anything. You didn't say, you know, give us a list of  
9 schools, we are not going to accept your 3-hour-a-week  
10 thing, we want an intensive program, give us a list of  
11 schools. You didn't do that.

12 MR. WRIGHT: The parents did not do that. The  
13 parents said, we want Trident or two other programs. The  
14 public school, I submit to you --

15 QUESTION: What's the magic difference between a  
16 list or no list? The fact is, you didn't ask.

17 MR. WRIGHT: The burden would be to the school  
18 system, when they knew parents were seeking Trident, to  
19 say, well, if you want approval for Trident, here is the  
20 procedure that has to be followed, here are the  
21 requirements. I would submit this, parents are not under  
22 a burden to inquire about a list that they would have no  
23 knowledge -- they're not going to know the technical  
24 requirements of the special ed act. Certainly, educators  
25 would be in a better position to do that, and can say, we

1 don't agree, but we can agree to disagree, here is the  
2 remedy that you have to follow. It did not happen in  
3 this --

4 QUESTION: But the burden of coming forward  
5 should be on the one who has the evidence, that's  
6 essentially your position --

7 MR. WRIGHT: Not the one who has the evidence,  
8 the one who is in the better position.

9 QUESTION: Right.

10 MR. WRIGHT: The one who's educated.

11 QUESTION: Right.

12 MR. WRIGHT: That would be my position.

13 QUESTION: Even though you're still taking the  
14 position that you don't have a right to go to any school,  
15 you expect them to come forward -- you don't have a right  
16 to any other school because 3 hours enough. On the other  
17 hand, if you want to go to another school, here's a --

18 MR. WRIGHT: It becomes a --

19 QUESTION: This is contrary to human nature.  
20 They're not going to give you a list while they're still  
21 contesting the substance of whether you have a right to go  
22 anywhere else.

23 MR. WRIGHT: And if they don't give a list and  
24 parents then obtain a placement that later is determined  
25 to be appropriate, and the public school's program is

1 inadequate, the school is a master of their own destiny,  
2 they saw fit not to provide this list, then the parents  
3 should not be held accountable for that. Parents should  
4 still be able to receive an appropriate education that is  
5 also free.

6 QUESTION: I think once you concede that you're  
7 bound by a list that the schools posts your case becomes a  
8 lot weaker. I don't see a whole lot of difference between  
9 a school district with a list and a school district  
10 without a list.

11 MR. WRIGHT: I'm not here today arguing against  
12 lists per se.

13 QUESTION: I know that. That's my point.

14 MR. WRIGHT: But I think that's a difficult part  
15 of the entire case. If the school system already had a  
16 list in existence and had already furnished a list to the  
17 parents and provided them with procedures to seek approval  
18 for Trident, this would be a different case, absolutely no  
19 question at all about that.

20 QUESTION: Isn't there -- just refresh my  
21 recollection about one aspect of the facts. Didn't --  
22 wasn't Trident used by the school districts and other  
23 parts of the State as a place to send their children?

24 MR. WRIGHT: That's correct. Trident Academy  
25 had three other South Carolina youngsters that were placed

1 there by South Carolina School System and paid for.  
2 Approval in South Carolina is case by case, and you will  
3 also see this issue of certified teachers. If you look at  
4 the South Carolina regs, the last page of the petitioner's  
5 appendix, allows for noncertified teachers to teach  
6 special ed, exactly what they're complaining and  
7 condemning Trident for.

8 In essence, when Shannon graduated, she was  
9 reading at the twelfth grade level. The education was  
10 appropriate. It's not been free at this point, and we ask  
11 that you provide Shannon with a free appropriation also.

12 Thank you.

13 QUESTION: Thank you, Mr. Wright. Ms. Wax,  
14 we'll hear from you.

15 ORAL ARGUMENT OF AMY L. WAX

16 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

17 SUPPORTING THE RESPONDENT

18 MS. WAX: Mr. Chief Justice and may it please  
19 the Court:

20 Under the broad remedial provision of this  
21 statute, a judge is allowed to award any remedy that he  
22 deems appropriate, and as this Court said in the  
23 Burlington case, appropriate means appropriate in light of  
24 the purpose of this statute.

25 We think that the answer to this case and the



1 answer to many of the questions that the justices have  
2 posed today comes in asking the right question, and that  
3 question is, what is the purpose of this statute? What is  
4 its aim? Why did Congress enact the IDEA?

5 Congress enacted IDEA to provide a basic floor  
6 of educational opportunity for disabled children, to  
7 ensure that those children received an education that was  
8 calculated to enable them to receive benefit, and in  
9 deciding what remedies are appropriate, we believe that  
10 basic equitable principles dictate that the legal standard  
11 should be no more onerous and no more complicated than are  
12 absolutely necessary to effectuate the statutory purpose.

13 Now, with respect to the questions that Justice  
14 Ginsburg have raised about whether parents have to make  
15 reasonable inquiries or reasonable efforts to comply with  
16 the particulars of section 1401, or whether they have to  
17 choose a school from a list, the position of the United  
18 States is that no such per se requirements should be  
19 imposed as a rigid matter.

20 There should be no requirement as such that  
21 parents make inquiries, and the reason for this, first of  
22 all, is that the statute contains no such requirement.  
23 There is no explicit mandate that parents make inquiries,  
24 seek information, confer and consult endlessly before they  
25 may challenge the IEP proposed and received a remedy.

1 QUESTION: Of course, they always have an  
2 incentive to ask for a list anyway, or to select a school  
3 from a list that is provided, a very considerable  
4 incentive, don't they? That is to say, if the school  
5 district has provided a list, you know that you can get  
6 reimbursement so long as you pick one of those schools.

7 MS. WAX: Well, it certainly increases your  
8 chances of getting reimbursement, Justice Scalia, but part  
9 of our point is that just because you choose a school from  
10 a list doesn't mean you satisfy the substantive showing  
11 that it's appropriate for your child.

12 QUESTION: Who would contest it? Certainly the  
13 school district wouldn't be able to contest it, if the  
14 school was on the list.

15 MS. WAX: On the contrary, Your Honor, I think  
16 they very well could contest it, because they don't want  
17 to provide reimbursement, and just because it's on the  
18 list, although it satisfies the particulars of the  
19 definition of a FAPE, it might not meet the substantive  
20 standard under Rowley for --

21 QUESTION: I see, they would still contest the  
22 IEP --

23 MS. WAX: Exactly.

24 QUESTION: -- and all of that, but they  
25 certainly couldn't come forward and say, this is a no-

1 good school.

2 MS. WAX: They couldn't come forward and say, it  
3 doesn't come forward and comply with the procedural and  
4 formal requirements, but under Rowley they could certainly  
5 try and come forward and say, this school is inappropriate  
6 in that it doesn't provide the sort of education that your  
7 child needs.

8 QUESTION: Well, they could continue to contest  
9 their own inadequacy.

10 MS. WAX: Correct, and they could contest that,  
11 too, and those are the two elements of the inquiry.

12 Now, it's important to realize that every time  
13 you set up a requirement like, the parent has to make  
14 inquiries, the parent has to look at a list, that  
15 requirement comes at a cost. It comes at a cost to the  
16 parents and the children seeking a remedy, and that's  
17 because although it may seem simple to ask parents to pick  
18 up the phone and call the school district, as this Court  
19 recognized in Burlington, the reply that they're likely to  
20 get is, we'll get back to you, we'll look into it, call  
21 back next week, when the right person is here, and that  
22 produces delay.

23 And when there's delay, the parents are in a  
24 quandary, because each day that the child is in an  
25 inappropriate and unsatisfactory setting, is a day that's

1 lost to the education of that child, and it also produces  
2 uncertainty, because the parents ask themselves, how much  
3 of an effort is enough, how much of an official response  
4 is sufficient, when can we cut our losses and move our  
5 child, and all of those uncertainties get played out at  
6 the remedial phase of the statute, when the judge is asked  
7 to consider how much effort is enough, whether what the  
8 school district did is equitably sufficient.

9 QUESTION: Ms. Wax, we're going back now to the  
10 setting in the school system and not when we're in court  
11 talking about the parents' choice. In the school system,  
12 isn't the thrust of the act that the parents and the  
13 school authority should be trying to work with each other  
14 to the maximum extent possible, rather than an incentive  
15 for the parents to pull that child out of the public  
16 school system quickly and put it in some superior private  
17 school?

18 MS. WAX: Your Honor, that overstates the  
19 statutory interest in having parents and school districts  
20 consult and confer. That interest in mutual cooperation  
21 is fully exhausted by coming together to try and formulate  
22 an IEP in the first instance.

23 Once that proposal is signed and sealed and  
24 proposed, then under the statute parents have no open-  
25 ended obligation to consult and confer without end, and in



1 fact as this Court recognized in Burlington, to  
2 incorporate such a requirement would be very much to the  
3 disadvantage of parents, because the school district  
4 always has the upper hand in this situation.

5 On the contrary, under section 1415 of the act,  
6 the parents have an immediate right to challenge the  
7 adequacy of the IEP, to challenge any aspect of the school  
8 district's proposal at the administrative level, first by  
9 directing the challenge to the school district itself,  
10 then with appeal to the State, and finally, judicial  
11 review. So I think petitioners vastly overstate the  
12 statutory interest in consultation and cooperation, and if  
13 their proposal was adopted, it would work to the detriment  
14 of the parents and the children.

15 So the point is that the requirement that  
16 parents choose from a list, which vastly reduces their  
17 options for providing their child's education, and that  
18 they inquire of the school district, creates tremendous  
19 obstacles and complications to their receiving relief, and  
20 the question is, the equitable question is, do those added  
21 complications come at some benefit to the effectuation of  
22 the statutory purpose, and the answer has to be no.

23 The statutory purpose is fully effectuated when  
24 a judge determines whether in a particular case the  
25 education that the child received in the parent's chosen

1 institution was an appropriate education within the  
2 meaning of Rowley. That is, it accomplished the purpose  
3 of the act, which was to provide a basic floor of  
4 educational opportunity.

5 And if the education lives up to that standard,  
6 then consideration of whether the school's on a list, or  
7 whether inquiries were made, or whether certain  
8 formalities were complied with, really becomes  
9 superfluous. They become beside the point, and in that  
10 case it would effectuate the statutory purpose to allow  
11 reimbursement, and it certainly would defeat the statutory  
12 purpose to deny reimbursement.

13 QUESTION: So you are, in effect, asking us to  
14 disapprove -- what was it, the Second Circuit? Which was  
15 the decision that said --

16 MS. WAX: Tucker.

17 QUESTION: -- you have to pick from the list?

18 MS. WAX: Yes, we are, Your Honor. We think  
19 that as a hard and fast, rigid requirement, it doesn't  
20 hold water. It may come in at the very end of the inquiry  
21 of whether the education is appropriate.

22 It could be a factor in a case where the child  
23 didn't clearly benefit from the education, where the child  
24 didn't make educational progress, and then the judge is  
25 thrown back on certain indicators of educational quality

1 with respect to the private school that was chosen, and  
2 then the judge might look at things such as how well-  
3 trained were the teachers, how does this school compare to  
4 other schools, did the parents have ready at hand an  
5 alternative which looks like it might have been better  
6 than the alternative which was chosen?

7 None of those considerations would come in in  
8 this case, because here there was clear benefit to the  
9 child, and we think that when the child clearly benefits,  
10 that's really essentially all the judge needs to know,  
11 because --

12 QUESTION: Well, now, Ms. Wax, do you think  
13 there's no limit at all here? Suppose you're in a  
14 community where there are a number of private schools that  
15 could do the job, and one of them has an annual tuition of  
16 \$30,000 a year, it's really a Cadillac situation, and  
17 another school that maybe could do the job has a tuition  
18 of \$10,000 a year.

19 Now, the parent is entirely free to choose the  
20 most expensive and the school district has to pick up the  
21 cost?

22 MS. WAX: Well, we don't agree --

23 QUESTION: That's your view? There are --

24 MS. WAX: No.

25 QUESTION: -- no cautionary concerns here at

1 all?

2 MS. WAX: We would distinguish between the  
3 availability of some reimbursement, okay, which we think  
4 should not be affected by the alternatives that might be  
5 available but should only be determined by whether this  
6 school that the parents chose meets the appropriate  
7 standard. The amount --

8 QUESTION: Well, do you think under the  
9 statutory scheme a court could deny full reimbursement?

10 MS. WAX: No, we do not. We think the court  
11 could limit the amount of reimbursement.

12 QUESTION: Well, that's what I'm asking you.  
13 You do? How? On what authority?

14 MS. WAX: On equitable grounds because, it  
15 considering that the substantive standard of  
16 appropriateness is really a standard that sets a floor,  
17 and that therefore the court could say, well, since that  
18 floor is abided by, we can limit the amount to what the  
19 floor would cost.

20 QUESTION: Thank you, Ms. Wax. Mr. Ayer, you  
21 saved 1 minute.

22 (Laughter.)

23 REBUTTAL ARGUMENT OF DONALD B. AYER

24 ON BEHALF OF THE PETITIONERS

25 MR. AYER: Thank you, Your Honor.



1 QUESTION: Mr. Ayer, I hate to take part of it,  
2 but it's an important point to me. This list that you  
3 would make up and submit to the parents is just a list as  
4 to schools that meet the State educational standards. It  
5 isn't a list of those schools that don't charge more than  
6 you're willing to pay, is it?

7 MR. AYER: Well, we weren't proposing to make up  
8 a list, Your Honor --

9 QUESTION: I didn't --

10 MR. AYER: -- but if someone were to make a list  
11 that reflected State standards, it would only reflect  
12 State standards.

13 QUESTION: Not cost.

14 MR. AYER: Well, that list would not, and you  
15 could have another list that would.

16 But three points I'd like to make very quickly,  
17 and one is that I must take exception to the proposition  
18 that the purpose of the act is to provide an appropriate  
19 education as that word is defined in Rowley. The purpose  
20 of the act is to provide a FAPE, a free appropriate public  
21 education, which is, I think, a good bit more than an  
22 appropriate education, which is one that simply confers  
23 some benefit.

24 Second, I would also disagree with the  
25 proposition that the obligation and the intention of the

1 statute that their be cooperation ends as soon as the IEP  
2 is signed. Indeed, it's a continuing process that's  
3 intended to go on into the future, and I --

4 CHIEF JUSTICE REHNQUIST: Your time --

5 MR. AYER: Thank you, Your Honor.

6 CHIEF JUSTICE REHNQUIST: Your time has expired,  
7 Mr. Ayer. The case is submitted.

8 (Whereupon, at 10:59 a.m., the case in the  
9 above-captioned matter was submitted.)  
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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

FLORENCE COUNTY SCHOOL DISTRICT FOUR,

EMORY D. CARTER

SHANNON CARTER, A MINOR BY AND THROUGH HER FARTHER AND NEXT FRIEND,

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Am. Mani Federico

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