

PRIVATE SCHOOL TUITION AT THE PUBLIC’S EXPENSE: A DISABLED STUDENT’S RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION

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I. INTRODUCTION

On September 5, 2006, Tom Freston resigned as the President and Chief Executive Officer of the entertainment company Viacom Inc., and was awarded an \$85 million severance package.¹ A year later, on October 1, 2007, Mr. Freston's attorneys successfully argued before the United States Supreme Court that the New York City Department of Education had to pay \$21,819 for his disabled son's private school education.²

In *Board of Education of New York v. Tom F.*, the Court, in a one sentence 4-4 split per curiam decision, affirmed the Second Circuit's decision, and held that Mr. Freston could collect a tuition reimbursement from New York City despite unilaterally placing his disabled son in private school before his son received any special education or related services from the city's public schools.³ However, while Mr. Freston was awarded a tuition reimbursement, the decision did not establish precedent on this important issue because the Court failed to reach a majority opinion.⁴

Interestingly, despite failing to reach a majority opinion in *Tom F.*, the Court denied certiorari on a similar case, *Frank G. ex rel. Anthony G. v. Board of Education of Hyde Park*.⁵ If the Court had granted certiorari in

1. See David Lieberman, *Viacom CEO Freston Out, Dauman Takes Leadership Post; Dooley Named to New Position of Chief Administrative Officer*, USA TODAY, Sept. 6, 2006, at 1B (stating that Freston is a cable television pioneer who Viacom pushed aside, in a startling move, as a result of falling stock prices); David Lieberman & Laura Petrecca, *What Split Freston, Viacom?; Company Seen Slow in Evolving*, USA TODAY, Sept. 6, 2006, at 4B (noting that Freston worked at Viacom for twenty-six years and appeared to be a skillful marketing executive); see also Tim Arango, *Rifts in Family and Companies Hang Over Redstone's Legacy*, N.Y. TIMES, Apr. 7, 2008, at C1 (explaining that as part of Freston's \$85 million deal with Viacom, he was prohibited from discussing the severance package publicly).

2. See *Bd. of Educ. v. Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1, 1 (2007); John Hechinger, *Special Education: When Should Taxes Pay Private Tuition?*, WALL ST. J., Oct. 1, 2007, at B1 (recognizing that while serving as a top Viacom executive, Freston filed suit against the New York City Board of Education on principle and promised to donate any tuition reimbursement to charity).

3. See *Tom F.*, 128 S. Ct. at 1 (affirming the Second Circuit by an evenly divided court).

4. See Robert Barnes, *Court Is Split, Won't Hear Special-Education Case*, WASH. POST, Oct. 11, 2007, at A08 (explaining the significance of the Court's failure to create precedent: although only a small number of students are affected by the Individuals with Disabilities Education Act, the number of students receiving private school tuition is rapidly increasing); see also Mark Fass, *City Loses Round on Tuition Payback Policy for Disabled*, 238 N.Y.L.J. 1, 4 (2007) (stating that Justice Kennedy left the courtroom during oral arguments and, in accordance with Court protocol, did not reveal the reason for his recusal).

5. 128 S. Ct. 436 (2007) (denying certiorari on a Second Circuit case finding that parents are entitled to a tuition reimbursement under § 1412(a)(10)(C)(ii) of the Individuals with Disabilities Education Act (IDEA) even when they place their disabled child in a private school without first trying a public school program, only where the public school program was inappropriate and the parents provided timely notice). *But see* *Greenland Sch. Dist. v. Amy N. ex rel. Katie C.*, 358 F.3d 150, 159 (1st Cir. 2004) (stating that as a threshold requirement under § 1412(a)(10)(ii), tuition

Frank G. and reached a precedent-making decision it might have clarified the issue of whether parents can obtain a tuition reimbursement under the Individuals with Disabilities Education Act (IDEA) after unilaterally placing their disabled student in private school without first attending a public school special education program.⁶ The issue, however, remains unresolved.⁷

This Comment argues that although the Supreme Court ruled in favor of Mr. Freston in *Tom F.*, the Court should establish binding precedent and interpret the IDEA as allowing requesting parents to obtain a tuition reimbursement when they place their disabled child in a private school even if their child never obtained special education services from a public agency. Part II explains the statutory requirements of the IDEA pertaining to tuition reimbursements and provides a detailed summary of Supreme Court and lower court precedents involving tuition reimbursements under the IDEA. Part III argues that the Second Circuit correctly interpreted § 1412(a)(10)(C)(ii) of the IDEA to allow parents tuition reimbursements despite their decision not to use the special education services in public schools for their child, particularly in light of the statutory purpose of the IDEA: to provide a free appropriate public education to all disabled students. Additionally, Part III explains that sufficient statutory safeguards and judicial precedent exist to ensure that parents will not abuse § 1412(a)(10)(C)(ii) to obtain a tuition reimbursement without a good faith claim. Finally, this Comment concludes by arguing that because § 1412(a)(10)(C)(ii) implicitly allows for retroactive tuition reimbursements for parents such as Mr. Freston and that sufficient statutory safeguards exist to protect school boards against bad faith claims, the Court should adopt the Second Circuit's interpretation of § 1412(a)(10)(C)(ii), thereby providing parents with a tuition reimbursement for appropriate private school placement of their disabled child.

reimbursement is only available for children who have previously received or requested special education and related services while in public school).

6. See 20 U.S.C. § 1412(a)(10)(C)(ii) (2005); Gary Mayerson, *Supreme Court Autism Education Ruling Upholds Parents' Right to "Day in Court,"* JURIST, Oct. 18, 2007, available at <http://jurist.law.pitt.edu/hotline/2007/10/parents-right-to-day-in-court-upheld-in.php> (describing *Frank G.* as a companion case to *Tom F.* and stating that Justice Kennedy again recused himself from the decision to deny certiorari). Note that although § 1412(a)(10)(C)(ii) refers to parents, the definition of parents under the Act also encompasses single parents. See 20 U.S.C. § 1401(23)(A)-(D) (2005). Accordingly, this Comment uses "parents" rather than "parent" when referring to any parental conduct concerning tuition reimbursements under the IDEA. Furthermore, a parent includes a natural parent, an adoptive parent, an individual acting in place of natural or adoptive parents (including a grandparent, stepparent, or other relative) with whom the child lives, an individual legally responsible for the child's welfare, and in certain cases, a foster parent or an individual assigned to be a surrogate parent. See *id.*

7. See Mayerson, *supra* note 6 (noting that *Tom F.* does provide relief for families residing within the Second Circuit).

II. BACKGROUND

A. The IDEA and Tuition Reimbursement: A Disabled Student's Right to a Free Appropriate Public Education

Under a 1997 Amendment, the IDEA mandates that schools must provide disabled children with a “free appropriate public education” (FAPE) developed through an “individualized education program” (IEP).⁸ If parents feel that a public school deprived their child of a FAPE, the IDEA allows them to bring their grievances to an impartial hearing and, if necessary, the courts.⁹ Under the IDEA, if a FAPE is not provided, courts have the power to grant appropriate relief, including tuition reimbursements to the parents of a disabled child who previously obtained special education and related services from or under the authority of a public agency.¹⁰ Thus, if parents send their disabled child from a public school to a private school, both the IDEA and judicial precedent recognize their parental right to obtain a tuition reimbursement if (1) the school board fails to offer an appropriate IEP; (2) the child's private school placement was proper under the IDEA's requirements; and, (3) equitable considerations support granting relief.¹¹ Therefore, as evidenced in *Tom F.*, the issue concerning tuition reimbursements under the IDEA emerges when parents unilaterally place their disabled child in private school without the child ever receiving special education services from a public agency.¹²

B. The Supreme Court's Recognition of the Implicit Parental Right to

8. See Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(5) (2005) (establishing that a FAPE must be obtained in the least restrictive environment); see also Allan G. Osborne, Jr., *Is a Parent Who Places a Child With a Disability in a Private School Entitled to Tuition Reimbursement if the Child Has Never Attended a Public School?* Board of Education of the City of New York v. Tom F., 219 EDUC. L. REP. 887, 889 (2007) (citing Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359 (1985)) (detailing that it is the purpose of the IDEA to provide all children with the opportunity to obtain a FAPE).

9. See Osborne, *supra* note 8, at 888 (noting that while the IDEA mandates that parents and educators develop the IEP, Congress recognized that disagreements may occur).

10. See 20 U.S.C. § 1412(a)(10)(C)(ii) (stating that parents need not have the agency's consent or a referral to place their child in private school and receive tuition reimbursement so long as that agency failed to offer a FAPE); see also Osborne, *supra* note 8, at 888 (claiming that courts typically grant relief through court orders mandating corrective action).

11. See § 1412(a)(10)(C)(ii) (noting that a FAPE must be made available to the student in a timely and appropriate manner); see also Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 374 (1985) (establishing that courts also consider equitable factors pertaining to the reasonableness of parental conduct).

12. See Osborne, *supra* note 8, at 895 (stating that although Mr. Freston successfully argued at an impartial administrative hearing that the IEP was inappropriate for his son, Gilbert, Mr. Freston was denied a tuition reimbursement by the trial court because Gilbert never attended public school).

Tuition Reimbursement

Prior to enactment of § 1412(a)(10)(C)(ii) in 1997, the Supreme Court decided two important cases regarding tuition reimbursements for private school placement of disabled students.¹³ In *Burlington School Committee v. Department of Education*, the Court held that the IDEA implicitly allows tuition reimbursements for unilateral private school placement when a child receives inappropriate special education services from a public school.¹⁴ The Court asserted that the IDEA permits tuition reimbursements so long as the child's private school placement was appropriate and the public school system did not offer the child a FAPE.¹⁵ The Court reasoned that if parents lacked the remedy of reimbursement, they would be forced to accept a flawed IEP to the detriment of their child, a result directly contrary to both the IDEA's purpose of providing a FAPE to all disabled children and the parental right to fully participate in developing their child's IEP.¹⁶ Still, the Court reaffirmed that tuition reimbursements are not available if the school system can prove that it proposed and could implement an appropriate IEP.¹⁷

In *Florence County School District Four v. Carter*, the Supreme Court held that parents need not place their child in a state-approved private school to obtain a tuition reimbursement.¹⁸ Again, the Court reasoned that denial of tuition reimbursements in such circumstances would be against the IDEA's statutory purpose of providing a FAPE to all qualified disabled students.¹⁹

13. See *id.* at 889 (suggesting that the 1997 amendments to the IDEA were merely an incorporation of prior case law into the IDEA).

14. 471 U.S. at 370-73 (affirming that the IDEA allows for a tuition reimbursement, even if a disabled student's parents removed him from public school before the IEP was ruled inappropriate, to prevent parents from being forced to leave their child in what may turn out to be an inappropriate educational placement); see also Osborne, *supra* note 8, at 895 (noting that the trial court denied Mr. Freston a tuition reimbursement because the child in *Tom F.* never attended public school, unlike the child in *Burlington*).

15. See *Burlington*, 471 U.S. at 370 (reasoning that because Congress empowered the judiciary to grant appropriate relief, it is clear from the IDEA that retroactive tuition reimbursement qualifies as appropriate relief).

16. See *id.* (stating further that if the Court were to deny reimbursement to parents, then the procedural safeguards in the IDEA would be incomplete); see also Osborne, *supra* note 8, at 890 (recognizing that the Court also determined that reimbursement merely required the school system to pay expenses they would have had to pay if they had initially developed a proper IEP, and that parental violations of the IDEA status quo provisions do not constitute a waiver of their right to reimbursement).

17. See *Burlington*, 471 U.S. at 373 (establishing that parents who place their child into a private school from public school do so at their own financial risk because if a court eventually finds that an IEP was appropriate, reimbursement must be denied).

18. 510 U.S. 7, 13 (1993) (affirming that the allowance of tuition reimbursements for parents does not place an unreasonable burden on school systems because the school system has the initial ability to offer an appropriate IEP within a public or private setting).

19. See *id.* at 12 (citing *Burlington*, 471 U.S. at 370) (stating that Congress

C. Limitations on the Parental Right to Tuition Reimbursement

After Congress passed the 1997 amendments to the IDEA, the Supreme Court developed the “presumption of competence” as a procedural safeguard to protect school districts against false claims by parents seeking retroactive reimbursement.²⁰ This presumption, created by the Court in *Schaffer ex rel. Schaffer v. Weast*, places the burden of persuasion on a child’s parents to prove that the school district’s offered IEP was inappropriate.²¹ Thus, when parents seek to challenge an IEP offered by a school district, the school district’s IEP is presumed to be appropriate and the parents have the burden to prove otherwise.²²

While the Supreme Court willingly granted tuition reimbursements to the parents in *Burlington* and *Carter*, lower courts have denied retroactive reimbursement when parents move their child from public to private school without providing notice of such private school placement.²³ Courts have held that school officials must have notice of any parental disagreement with an IEP and must be given the opportunity to modify an IEP voluntarily before parents may remove their child and obtain a tuition reimbursement.²⁴ This notice requirement is now codified in the IDEA, which requires parents to provide school officials with written notification of their desire to place their child in a private school at the public’s expense.²⁵ Furthermore, based on prior court decisions, the IDEA allows

intended to allow for retroactive reimbursement to parents when the school system failed to eventually offer an appropriate IEP).

20. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (holding that the burden of proof is on the party challenging the IEP); see also Mayerson, *supra* note 6 (stating that while the Court had already developed the “presumption of competence” in *Schaffer*, the Justices discussed this topic at great length during the oral arguments in *Tom F.*); Kelly D. Thomason, Note, *The Costs of “Free” Education: The Impact of Schaffer v. Weast and Arlington v. Murphy on Litigation Under the IDEA*, 57 DUKE L.J. 457, 460 (2007) (arguing that while the Court’s decision in *Schaffer* is justified, when considered with other Court precedent, it creates a significant burden on parents and ignores the realities of the IDEA litigation process).

21. See 546 U.S. at 62 (noting that because the party challenging the IEP has the burden of proof, in rare instances that party could be the school district rather than the child’s parents).

22. See Mayerson, *supra* note 6 (explaining that in *Tom F.* at least four Justices concluded that Congress did not intend for this presumption to be irrebuttable).

23. See Osborne, *supra* note 8, at 891 (noting that the right to notice was established before the 1997 amendments, and that refusal to provide notice will result in a denial of a reimbursement award).

24. See *Greenland Sch. Dist. v. Amy N. ex rel. Katie C.*, 358 F.3d 150, 161 (1st Cir. 2004) (holding that due to the parents’ failure to provide proper notice, reimbursement must be denied because the purpose of the notice requirement is to give public schools the opportunity to provide a FAPE before a child enrolls in private school); *Evans ex rel. Evans v. Dist. No. 17*, 841 F.2d 824, 832 (8th Cir. 1988) (arguing that when there is no reason to believe that school officials would refuse changes to an IEP, notice is required to permit the school district the opportunity to make appropriate changes).

25. See 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) (2005) (stating that courts can deny or reduce tuition reimbursements if, at the most recent IEP team meeting the parents

for a reduction or denial of retroactive tuition reimbursement if parents fail to cooperate with school officials in the evaluation process.²⁶ Additionally, reimbursement can be reduced or denied if a court finds that a child's parent acted unreasonably.²⁷ Therefore, parents must provide the school system with notice and a reasonable opportunity to evaluate their child, or risk forfeiting any claim to a tuition reimbursement.²⁸

D. *The Courts of Appeals' Circuit Split*

Both the Supreme Court and the IDEA expressly allow for retroactive tuition reimbursement when parents provide proper notice and a reasonable opportunity for evaluation before removing their child from a public to a private school.²⁹ However, the federal circuit courts of appeal are split as to whether parents can unilaterally place their child in a private school and still obtain a tuition reimbursement when the child never attended a public school special education program.³⁰ Therefore, as a result of the Supreme Court's failure to create a precedent in *Tom F.*, the circuit split remains unresolved.³¹

attended prior to removal of the child to private school, the parents neither informed school officials that they were rejecting the proposed placement of their child, nor provided the IEP team with a statement of parental concerns and their intent to enroll their child in private school); *id.* § 1412(a)(10)(C)(iii)(I)(bb) (establishing that notice must be provided within at least ten business days prior to removal of the child from public school).

26. *See* § 1412(a)(10)(C)(iii)(II) (maintaining that even if the school system is properly notified, reimbursement may be reduced or denied if parents refuse to make the student available for evaluation).

27. *See id.* § 1412(a)(10)(C)(iii)(III) (2005) (establishing that when determining whether a parent acted unreasonably, a reviewing court must specifically examine the actions taken by the requesting parents); *see also* Tucker *ex rel.* Tucker v. Calloway County Bd. of Educ., 136 F.3d 495, 499 (6th Cir. 1998) (affirming the district court's denial of tuition reimbursement because the parents acted unreasonably by making a unilateral decision to get the "world's best" program for their child and had not given the school district an opportunity to develop an appropriate IEP).

28. *See* Osborne, *supra* note 8, at 891 (explaining that notice violations constitute the primary example of how tuition reimbursements are reduced or denied under both case law and the IDEA).

29. *See* Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 372 (1985) (establishing that the school board's restrictive interpretation of the IDEA would defeat the statutory purpose of the IDEA to provide a FAPE).

30. *See* Osborne *supra* note 8, at 892-97 (noting the differences between the First and Second Circuits' approaches to this issue, and stating that the Court's decision in *Tom F.* should resolve this dispute).

31. *Compare* Frank G. *ex rel.* Anthony G. v. Bd. of Educ., 459 F.3d 356, 375 (2d Cir. 2006) (claiming that the First Circuit's strict interpretation of § 1412(a)(10)(C)(ii) in *Greenland* is not dispositive because the First Circuit decided the case based on a notice violation, and the statute is hardly plain and unambiguous), *cert. denied*, 128 S. Ct. 436 (2007), *with* Greenland Sch. Dist. v. Amy N. *ex rel.* Katie C., 358 F.3d 150, 161 (1st Cir. 2004) (reasoning that because the disabled child did not receive special education services at her public school and her parents did not request a special education evaluation prior to her private school enrollment, tuition reimbursement for her subsequent placement in a private school is not allowed under the IDEA). *But see* Brief for the Respondent, Bd. of Educ. v. Tom F. *ex rel.* Gilbert F., 128 S. Ct. 1 (2007)

In *Greenland School District v. Amy N.*, the First Circuit held that the IDEA does not enable parents of disabled students to obtain tuition reimbursements when they unilaterally place their child in private school without first enrolling their child in a public school special education program.³² In *Greenland*, Katie's parents placed her in a private school for children with learning disabilities without requesting a special education evaluation from the public school system.³³ Eventually, her parents requested that Katie be evaluated for a disability, but subsequently rejected the school board's IEP which called for Katie to attend public school.³⁴ Based on their rejection of the IEP, Katie's parents petitioned the court for a tuition reimbursement for her private school placement.³⁵

The First Circuit barred retroactive reimbursement, reasoning that based on the plain language of § 1412(a)(10)(C)(ii), tuition reimbursement is unavailable to parents who unilaterally place their child in private school when their child did not first enroll in a public school special education program.³⁶ Therefore, if a parent requests a tuition reimbursement for private school placement of their disabled student, the First Circuit has created a statutory threshold requirement mandating that students first receive special education services from a public school.³⁷

(No. 06-637), 2007 WL 2088641, at *15 (arguing that because the court in *Greenland* denied reimbursement due to a failure to provide notice, its strict interpretation of § 1412(a)(10)(C)(ii) constitutes dicta, thus, its interpretation should not be considered relevant when reviewing reimbursement cases such as *Tom F.*).

32. 358 F.3d at 159-60 (justifying a strict interpretation of § 1412(a)(10)(C)(ii) because the 1997 amendments to the IDEA sought to control government spending for students whose parents unilaterally placed them in private school).

33. *See id.* at 153 (explaining that after leaving public school Katie was also asked to withdraw from one private school before being placed in a private school for special education); *see also* Osborne, *supra* note 8, at 892 (noting that while Katie, the student in *Greenland*, attended public schools before her private school enrollment, she never received special education services in the public school system).

34. *See Greenland*, 358 F.3d at 155-56 (stating that the school system questioned whether Katie had a learning disability).

35. *See id.* at 156 (noting that a hearing officer determined that the IEP offered by the public school system was inappropriate for Katie's learning disabilities and awarded Katie's parents \$48,000 for private school tuition reimbursement). This ruling, however, was reversed by the district court, which held that Katie's parents were not entitled to reimbursement under the IDEA due to the statute's failure to recognize tuition reimbursement in such circumstances. *Id.*

36. *See id.* at 159-60 (holding that because Katie's parents refused to provide adequate notice, retroactive reimbursement must be denied); *see also* Frank G. *ex rel.* Anthony G. v. Bd. of Educ., 459 F.3d 356, 376 (2d Cir. 2006) (stating that although the First Circuit in *Greenland* inappropriately denied tuition reimbursement because the IDEA does not require such a statutory threshold requirement, it reached the appropriate result because notice was not given to school officials, unlike in *Frank G.*, where ample notice was provided), *cert. denied*, 128 S. Ct. 436 (2007).

37. *See Greenland*, 358 F.3d at 160 n.7 (acknowledging, however, that there is some legislative history suggesting that Congress meant to include children who requested but did not receive special education services from a public agency during their time in the public school system); Ms. M. *ex rel.* K.M. v. Portland Sch. Comm., 360 F.3d 267, 271-73 (1st Cir. 2004) (affirming the *Greenland* approach and stating

In stark contrast to the First Circuit's approach, the Second Circuit recognized the importance of granting tuition reimbursements to provide all children with a FAPE.³⁸ The Second Circuit's approach, exemplified in *Frank G. ex rel. Anthony G. v. Board of Education of Hyde Park*, asserts that because the statutory purpose of the IDEA is to provide all disabled students with a FAPE, retroactive tuition reimbursement must be implicitly allowed under § 1412(a)(10)(C)(ii) despite the student never having obtained special education services from a public agency.³⁹ In *Frank G.*, the court reasoned that while the disabled student never attended public school—because the IEP offered by the public school system was inappropriate and private school placement enabled the child to obtain a FAPE—the IDEA implicitly allowed for tuition reimbursements for private school placement.⁴⁰

Similar to the Second Circuit's approach in *Frank G.*, the Eleventh Circuit also determined that § 1412(a)(10)(C)(ii) does not require disabled students to first attend special education programs at a public school to allow their parents to obtain a tuition reimbursement for their private school placement.⁴¹ In *M.M. ex rel. C.M. v. School Board of Miami-Dade County*, the Eleventh Circuit reasoned that reimbursement would still be a suitable remedy even if a child had not received special education services from a public agency based on the broad equitable powers of a reviewing court as developed in *Burlington*.⁴²

Thus, while the Second Circuit's approach garnered the support of the Eleventh Circuit and was affirmed by the Supreme Court in *Tom F.*, due to the Court's inability to reach a majority opinion in *Tom F.*, the split between the First and Second Circuits remains unresolved.⁴³

that the 1997 amendments restricted the circumstances in which reimbursement is permissible).

38. See *Frank G.*, 459 F.3d at 370 (expressing that denying tuition reimbursements because of a child's failure to obtain special education services from a public agency directly hinders the purpose of the IDEA to provide all children with a FAPE).

39. See *id.* (interpreting § 1412(a)(10)(C)(ii) as ambiguous and, therefore, finding that retroactive tuition reimbursement is an acceptable remedy so long as the procedural safeguards of the IDEA are satisfied and equitable considerations justify relief).

40. See *id.* at 376 (noting that unlike in *Greenland*, the parents in *Frank G.* provided school officials with the requisite notice, therefore tuition reimbursement was mandatory).

41. See *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1098 (11th Cir. 2006) (denying reimbursement because a FAPE was offered to the child, but stating that tuition reimbursement would have otherwise been an acceptable remedy).

42. See *id.* (holding that the disabled child, who suffered from significant hearing problems, had in fact received special education services from a public agency when she attended the county's early intervention program before she turned three-years-old).

43. See *id.* (asserting that the IDEA does not bar tuition reimbursements when a disabled child never received special education services from a public agency because

III. ANALYSIS

In both *Frank G.* and *Tom F.*, the Second Circuit appropriately interpreted § 1412(a)(10)(C)(ii) of the IDEA because the language of the statute is not plain and unambiguous, and its interpretation is consistent with the statutory purpose of the IDEA to provide a FAPE to all disabled students.⁴⁴ Additionally, unlike the First Circuit's opinion in *Greenland*, the Second Circuit's approach correctly recognizes that sufficient statutory safeguards and prior court precedent exist to ensure that parents will not abuse tuition reimbursement under the IDEA.⁴⁵

A. The Second Circuit Appropriately Interpreted § 1412(a)(10)(C)(ii) of the IDEA in Frank G. and Tom F.

IDEA § 1412(a)(10)(C)(ii) allows parents of disabled children to receive tuition reimbursements when their child has previously received special education and related services from a public agency.⁴⁶ Upon first glance, this provision might suggest that for parents to receive a tuition reimbursement after a failed IEP, they must first send their child to public school.⁴⁷ However, as the Second Circuit in *Frank G.* appropriately recognized, the meaning of this provision is hardly clear.⁴⁸ Therefore, for § 1412(a)(10)(C)(ii) to be consistent with the purpose of the IDEA,

such a holding would cause absurd results: it would contradict the purpose of the IDEA to provide a FAPE and force parents to place their disabled child in an inappropriate IEP to preserve their right to reimbursement); *see also* Mayerson, *supra* note 6 (predicting that future Supreme Court action regarding the issue is inevitable).

44. *See Frank G.*, 459 F.3d at 368 (stating that because § 1412(a)(10)(C)(ii) is ambiguous, further interpretation of the statute is warranted).

45. *See Osborne*, *supra* note 8, at 887 (asserting that the IDEA consists of a complex system of due process safeguards, which a parent must follow or risk a loss or deduction in a reimbursement award).

46. 20 U.S.C. § 1412(a)(10)(C)(ii) (2005). The statute states:

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

Id.

47. *See Greenland Sch. Dist. v. Amy N. ex rel. Katie C.*, 358 F.3d 150, 159 (1st Cir. 2004) (stating that inherent in § 1412(a)(10)(C)(ii) is a threshold requirement that tuition reimbursement is only available for children who have previously received special education services in a public school setting); *Balt. City Bd. of Sch. Comm'rs v. Taylorch*, 395 F. Supp. 2d 246, 249 (D. Md. 2005) (holding that § 1412(a)(10)(C)(ii) permits only one result: parents whose child never attended special education services in a public setting are not eligible for reimbursement).

48. *See Frank G.*, 459 F.3d at 376 (holding that § 1412(a)(10)(C)(ii) is inherently unclear because it is subject to numerous interpretations, which the First Circuit did not recognize).

unilateral private school placement must be implicitly allowed under the statute.⁴⁹

1. IDEA § 1412(a)(10)(C)(ii) Does Not Require Mandatory Public School Attendance for Disabled Students as a Prerequisite for Tuition Reimbursement

When interpreting the meaning of a statute, a court must first examine its plain language to determine whether the statute has a plain and unambiguous meaning.⁵⁰ Whether a statute is plain and unambiguous is determined by referring to the language of the provision itself, the specific context in which the language is used, and the broader context of the statute in its entirety.⁵¹ Based on these three rules of statutory interpretation, as the Second Circuit correctly held, § 1412(a)(10)(C)(ii) is not plain and unambiguous.⁵²

a. The Statutory Language of § 1412(a)(10)(C)(ii) Does Not Exclude Parental Tuition Reimbursement After Unilateral Placement of a Disabled Child in a Private School

In *Greenland*, the First Circuit held that the plain language of § 1412(a)(10)(C)(ii) creates a statutory threshold requirement that retroactive reimbursement is only available for children who previously received special education and related services while in public school.⁵³ However, because no limitations are explicitly mentioned in § 1412(a)(10)(C)(ii), the First Circuit's approach incorrectly inserts a statutory threshold requirement where none is required.⁵⁴

As the Second Circuit correctly held, § 1412(a)(10)(C)(ii) does not

49. *See id.* at 368 (reasoning that because the statutory language of § 1412(a)(10)(C)(ii) is consistent with *Burlington*, to provide disabled students with a FAPE the IDEA must enable their parents to receive tuition reimbursements if an IEP is inappropriate and private school placement is appropriate).

50. *See id.* (asserting that if the statute is unambiguous and the statutory scheme is coherent and consistent, then no further inquiry into the meaning of the statute is required).

51. *See id.* (noting that language is ambiguous if it is capable of multiple meanings when viewed objectively by a reasonable observer after a full review of the statute).

52. *See id.* at 370 (stating that it is hardly clear that § 1412(a)(10)(C)(ii) allows retroactive reimbursement in one circumstance, while excluding reimbursement in others).

53. *See Greenland Sch. Dist. v. Amy N. ex rel. Katie C.*, 358 F.3d 150, 159 (1st Cir. 2004) (establishing that a threshold requirement exists within § 1412(a)(10)(C)(ii), which prohibits parents from obtaining a tuition reimbursement under the IDEA if they unilaterally place their child in private school, and fail to give notice of that placement).

54. *See Frank G.*, 459 F.3d at 369, 375 (distinguishing *Greenland*, which held that tuition reimbursement is "only" available to parents whose child had previously received special education and related services from a public agency, by asserting that the IDEA allows for tuition reimbursement regardless of whether the child ever attended special education programs at a public school).

mention any specific limitations to the remedies available under the IDEA.⁵⁵ Section 1412(a)(10)(C)(ii) does not explicitly say tuition reimbursements are *only* available to parents whose disabled child previously received special education and related services from a public school.⁵⁶ Nor does § 1412(a)(10)(C)(ii) specifically state that reimbursements are unavailable to parents whose disabled child has not previously received special education services in the public school system.⁵⁷ Additionally, § 1412(a)(10)(C)(ii) does not require a mandatory public school try-out period for a disabled student, nor does it explicitly mandate that the student receive special education services while in a public school setting.⁵⁸

Since § 1412(a)(10)(C)(ii) does not specifically refer to any statutory limitations, none should implicitly be required.⁵⁹ Furthermore, the presence of numerous possible interpretations suggests that § 1412(a)(10)(C)(ii) is hardly plain and unambiguous.⁶⁰

b. The Specific Context of § 1412(a)(10)(C)(ii) Does Not Exclude Parental Tuition Reimbursement After Unilateral Placement of a Disabled Child in a Private School

When interpreting a statutory provision, a court must also examine the specific context in which the provision was used.⁶¹ Under this analysis, the

55. *See id.* at 375-76 (stating that *Greenland* resolved the issue of ambiguity by amending the language of the statute itself and by assuming that the ambiguous language of § 1412(a)(10)(C)(ii) becomes clear by adding the word “only” to the subsection, despite the word “only” not appearing in the provision).

56. *See id.* at 368 (asserting that multiple interpretations are possible because the word “only” can not be read into the statute and thus, § 1412(a)(10)(C)(ii) does not create a threshold requirement).

57. *See id.* (maintaining that retroactive reimbursement is necessary to comply with the statutory purpose of the IDEA because a failure to allow for such reimbursement would deny children a FAPE); *see also* Brief for the Respondent, *supra* note 31, at *15 (asserting further that § 1412(a)(10)(C)(ii) does not limit the remedies available under the IDEA and case law). *But see Greenland*, 358 F.3d at 159 (establishing that tuition reimbursements are not available to parents whose disabled child has not attended a public school special education program).

58. *See* Brief for the Respondent, *supra* note 31, at *15 (establishing that a try-out period would be directly contrary to the statutory purpose of the IDEA because it would deny a FAPE to children who otherwise would be eligible for private school placement under the IDEA). *But see Greenland*, 358 F.3d at 159 (requiring as a threshold requirement that disabled children attend a public school special education program before obtaining a tuition reimbursement based on a strict interpretation of § 1412(a)(10)(C)(ii)).

59. *See* Brief for the Respondent, *supra* note 31, at *15 (rejecting the argument that § 1412(a)(10)(C)(ii) *sub silentio*, or by implication, bars parents from obtaining tuition reimbursement under the IDEA).

60. *See Frank G.*, 459 F.3d at 370-71 (noting that language is ambiguous when it is capable of more than one meaning when viewed by a reasonably intelligent objective observer).

61. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-42 (1997) (holding that “employee” can be interpreted to mean “former employees”).

First Circuit's interpretation of § 1412(a)(10)(C)(ii) would be inconsistent with the clear implication of § 1412(a)(10)(C)(i).⁶² Section 1412(a)(10)(C)(i) asserts that a state which makes a FAPE available to a disabled student need not pay for the child's education if the child's parents elect to place the student in a private school.⁶³

Since § 1412(a)(10)(C)(i) does not refer to any other specific limitations on tuition reimbursements, the clear implication of this provision is that reimbursement is available in all circumstances, including when the child has only attended private school, so long as the agency failed to offer the student a FAPE.⁶⁴ Based on this interpretation, § 1412(a)(10)(C)(i) directly contradicts the First Circuit's interpretation of § 1412(a)(10)(C)(ii) because the First Circuit's interpretation denies a tuition reimbursement to parents whose disabled child, despite never attending a public school special education program, was denied a FAPE by a reviewing school board.⁶⁵ Therefore, because § 1412(a)(10)(C)(i) allows for reimbursement for unilateral private school placement in all circumstances so long as a FAPE has not been offered, § 1412(a)(10)(C)(ii) should not be interpreted as limiting the availability of tuition reimbursement as a remedy for such private school placement.⁶⁶

c. Prohibiting Unilateral Placement of Disabled Students in Private Schools Would Be Inconsistent with the Broader Context of the IDEA

Finally, when interpreting the plain language of a statute, a court must also examine the broader context of the statute as a whole.⁶⁷ The IDEA, in

62. See Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(10)(C)(i) (2005) (establishing that if a FAPE is offered by the state, a parent may not receive a tuition reimbursement after placing a child in private school).

63. See *id.* § 1412(a)(10)(C)(i) (distinguishing itself from § 1412(a)(10)(C)(ii), where a FAPE is not offered to the student); see also *Frank G.*, 459 F.3d at 370 (noting that § 1412(a)(10)(C)(i) when read alone suggests that if a school district fails to offer a FAPE, parents can obtain a tuition reimbursement despite unilateral placement of their child in a private school, notwithstanding their failure to have their child attend special education programs under the authority of a public agency).

64. See *Frank G.*, 459 F.3d at 370-71 (holding that § 1412(a)(10)(C)(ii) is hardly unambiguous because it clearly can be subject to numerous possible interpretations, thus, a reviewing court must further analyze the provision to determine the true intent of Congress).

65. See *Greenland Sch. Dist. v. Amy N. ex rel. Katie C.*, 358 F.3d 150, 159 (1st Cir. 2004) (prohibiting parents from unilaterally placing their disabled child in private school if the child did not first receive special education programs from a public agency).

66. See *Frank G.*, 459 F.3d at 370-71 (holding that because § 1412(a)(10)(C)(ii) is ambiguous, further interpretation is needed to determine the requirements for tuition reimbursements under the IDEA).

67. See *id.* at 368, 370-71 (stating that "language is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent observer who has analyzed the context" of the statute in its entirety).

§ 1415(i)(2)(C)(iii), authorizes reviewing courts to use broad discretion when determining available remedies under the statute.⁶⁸ Under this provision, a reviewing court hearing a FAPE challenge has the authority to provide relief as it deems appropriate.⁶⁹

The Supreme Court also interpreted this statute as authorizing broad discretion to reviewing courts when granting remedies under the IDEA.⁷⁰ Specifically, a reviewing court has broad discretion where the form of relief is not specified in the provision, as is the case with § 1412(a)(10)(C)(ii).⁷¹ Therefore, under the IDEA, a court can use its broad discretion to grant appropriate relief so long as the relief is consistent with the statutory purpose of the IDEA.⁷² If the Court had denied Mr. Freston a tuition reimbursement, the denial would have been directly inconsistent with § 1415(i)(2)(C) because tuition reimbursements for private school placement have in the past been considered both appropriate relief and true to the statutory purpose of the IDEA.⁷³ Also, because § 1412(a)(10)(C)(ii) does not explicitly state any limitations concerning available remedies, a court should have broad discretion in determining which remedies are available.⁷⁴ Thus, the Second Circuit correctly held that § 1412(a)(10)(C)(ii) is not plain and unambiguous because it does not specifically prohibit tuition reimbursements for unilateral private school placement under any circumstances and such tuition reimbursements are an appropriate remedy under the IDEA. Therefore, further court interpretation is needed to determine the actual meaning of § 1412(a)(10)(C)(ii).⁷⁵

68. See 20 U.S.C. § 1415(i)(2)(C)(iii) (2005) (allowing for courts to authorize any remedy deemed appropriate so long as it is within the statutory purpose of the IDEA).

69. See *id.* § 1415(i)(2)(C)(iii) (establishing that any decision must be based on a preponderance of the evidence); see also *Frank G.*, 459 F.3d at 369 (noting that in *Burlington*, the Court interpreted the identically worded 1984 predecessor to § 1415(i)(2)(C) to allow, as appropriate relief, private school placement while the parents and the school litigated their issues).

70. See *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 369-70 (1985) (stating that the ordinary meaning of the identically worded predecessor to § 1415(i)(2)(C) grants broad discretion to a reviewing court in determining remedies, as long as the type of relief is appropriate in light of the statutory purpose of the IDEA).

71. See *id.* (noting that no type of relief is specified in the IDEA, other than that the relief must be appropriate).

72. See *Frank G.*, 459 F.3d at 368-69 (asserting that § 1412(a)(10)(C)(ii) is not the only section of the IDEA that speaks to the remedy that a court may award).

73. See *Burlington*, 471 F.3d at 369-70 (arguing that because a mandatory try-out period would disadvantage disabled students, it is directly contrary to the statutory purpose of the IDEA: to provide all disabled students with a FAPE).

74. See *Frank G.*, 459 F.3d at 369-70 (stating that when no limitations are explicitly provided in a statutory provision, the court has broad discretion in granting relief, including reimbursements to parents for any type of unilateral placement).

75. See *id.* at 370 (explaining that when statutory terms are ambiguous, the court must review that statute based on the traditional canons of statutory construction to resolve any ambiguity).

2. *The Statutory Purpose of the IDEA Evidences the Appropriateness of the Second Circuit's Approach*

Once a statutory provision is determined to be ambiguous, a court will focus on the primary purpose of the statute to determine the meaning of its ambiguous provision.⁷⁶ The statutory purpose of the IDEA is to provide each disabled student with a FAPE.⁷⁷ The Second Circuit's approach correctly realizes that retroactive tuition reimbursement, including when parents unilaterally place their disabled child in private school without first having their child enroll in a public school special education program, is necessary to achieve a FAPE.⁷⁸

a. *The Remedy of Retroactive Tuition Reimbursement Complies with the Statutory Purpose of the IDEA to Provide All Disabled Students with a FAPE*

The central tenet of the IDEA is that all children with disabilities have the right to a FAPE.⁷⁹ To effectuate this purpose, a state that receives funds under the IDEA must provide assurances to the federal government that a FAPE is available to each resident disabled student.⁸⁰ This requirement ensures that the educational mission of the IDEA is preserved.⁸¹

If the Supreme Court denied Mr. Freston a tuition reimbursement after complying with all the procedural safeguards of the IDEA, then New York would have denied a FAPE to a disabled student in direct contradiction to the statutory purpose of the IDEA.⁸² Therefore, the First Circuit's

76. *See id.* at 370-71 (asserting that although there are numerous canons of statutory interpretation a court may use, certain canons of statutory interpretation, such as examining the purpose and context of the statute, are particularly helpful when analyzing a provision such as § 1412(a)(10)(C)(ii)).

77. *See* 20 U.S.C. § 1412(a)(1) (2005) (noting further that the child of a requesting parent must also be disabled and offered an IEP). *But see* Balt. City Bd. of Sch. Comm'rs v. Taylorch, 395 F. Supp. 2d 246, 249 (D. Md. 2005) (claiming that one purpose of the 1997 amendments to the IDEA was to narrowly restrict the circumstances in which reimbursement is available to control government expenditures for disabled students unilaterally placed in private school by their parents).

78. *See Frank G.*, 459 F.3d at 372 (holding that a strict interpretation of § 1412(a)(10)(C)(ii) would deny a disabled student a FAPE).

79. *See* Brief for the Respondent, *supra* note 31, at *18 (stating that the school board's argument that a FAPE must be denied to Mr. Freston's son is inconsistent with the core principal of the IDEA).

80. *See* 20 U.S.C. § 1412(a)(1)(A) (detailing that a FAPE must be offered to all disabled children within a state between the ages of three and twenty-one, including those children with disabilities who have been suspended or expelled from school).

81. *See* 20 U.S.C.A. § 1400(c)(1) (West 2008) (stating that Congress enacted the FAPE requirement because it determined that improving educational programs and academic results for disabled students must be an essential aspect of national policy).

82. *See* Brief for the Respondent, *supra* note 31, at *7-8 (arguing that in *Tom F.* there was no question that Gilbert was denied a FAPE because the impartial hearing officer specifically found that the Board of Education had not offered an appropriate IEP, and this determination was upheld upon appeal).

interpretation that a FAPE must be denied to students who have not first received special education and related services from a public school is directly at odds with the central purpose of the IDEA.⁸³ As the Supreme Court has consistently held, any interpretation of the IDEA that undermines a student's ability to obtain a FAPE must be defeated.⁸⁴ Thus, as the Second Circuit correctly recognizes, if a public school cannot offer a disabled student a FAPE, placement in private school at the public's expense is appropriate to satisfy the statutory purpose of the IDEA.⁸⁵

b. Adoption of the First Circuit's Interpretation Would Lead to Absurd Results and Nullify the Effectiveness of the IDEA

Adoption of the approach developed in *Greenland* would result in two harmful consequences directly inconsistent with the statutory purpose of the IDEA.⁸⁶ First, the First Circuit's approach would leave many disabled children, who have been denied a FAPE, without an effective remedy.⁸⁷ This interpretation would especially harm disabled students appropriately placed in special education-based private schools whose families can no longer afford the school's cost of tuition.⁸⁸ If tuition reimbursement is denied to these parents, their child would be unable to continue with the

83. *See id.* (asserting that denying Mr. Freston's request for a tuition reimbursement would render the IEP process essentially meaningless because even if an IEP that does not provide a FAPE is offered, parents would be required to have their child try the improper program to obtain a reimbursement).

84. *See Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 368 (1985) (holding that the IDEA is intended to give disabled students an education that is both free and appropriate, and the statute should not be interpreted to defeat any one of those objectives).

85. *See id.* at 369-70 (stating that tuition reimbursements for unilateral private school placement is warranted because the public school system inevitably would have had to pay for such a program because it is an appropriate IEP).

86. *See Frank G. ex rel. Anthony G. v. Bd. of Educ.*, 459 F.3d 356, 372 (2d Cir. 2006) (mandating that an ambiguous statute must be interpreted to avoid absurd results), *cert. denied*, 128 S. Ct. 436 (2007); *see also* Brief for the Respondent, *supra* note 31, at *38 (stating that the First Circuit's interpretation would also cause uncertainty and hardship for parents, children, and school districts).

87. *See* Brief for the Respondent, *supra* note 31, at *38 (arguing that both children in public and private school settings could lack an effective remedy under a strict interpretation of § 1412(a)(10)(C)(ii) because such students would include: (1) public school students whose disabilities were only recently diagnosed but whose proposed IEP does not provide for a FAPE; (2) public school students who were promised certain services under an IEP but who have not received such services in a timely manner; and (3) children entering public school for the first time but who have not been identified under the "child find" program of the IDEA).

88. *See id.* (stating that the Board's interpretation of § 1412(a)(10)(C)(ii) would deny retroactive tuition reimbursement remedy to all parents, even those who provided notice and followed all other statutory safeguards of the IDEA). *But see* Brief for U.S. Conference of Mayors et al. as Amici Curiae Supporting Petitioners, *Bd. of Educ. v. Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (No. 06-637), 2007 WL 1453288, at *8 (claiming that children without a remedy do not exist because all disabled preschoolers receive special preschool education under § 1419 of the IDEA and, therefore, will have had previously received special education from a public agency).

appropriate educational program for his or her disability, and the statutory purpose of the IDEA to provide a FAPE to all disabled children would not be satisfied.⁸⁹

Second, the threshold requirement described in *Greenland* creates a mandatory try-out period in which disabled students are forced to endure enrollment in a potentially inappropriate public school special education program at the expense of their education and development so that their parents may remain eligible for a tuition reimbursement.⁹⁰ An inappropriate educational setting for children with severe disabilities, such as autism, can have significant negative consequences on their development and academic progress.⁹¹ Furthermore, as evidenced by the duration of the litigation in *Tom F.*, a mandatory try-out period would likely last for a considerable length of time.⁹² As a result, this try-out period accomplishes nothing toward the development of the student, but rather the disabled student's development and academic progress inevitably suffer.⁹³ Thus, as exemplified by these negative consequences of the First Circuit's approach, tuition reimbursement for parents whose children have not enrolled in special education programs in a public school setting is an appropriate remedy under the IDEA.⁹⁴

3. The Second Circuit's Interpretation Is Consistent with Burlington and § 1412(a)(10)(C)(ii) Should Not Bar a Subclass of Disabled Children from Receiving a FAPE

Rather than have a child endure an inappropriate education program in a public school setting, the Supreme Court has clearly held that the IDEA

89. See Brief for the Respondent, *supra* note 31, at *39 (stating that the Board failed to realize that a FAPE is not an aspiration but a requirement that must be met in order to satisfy the statutory purpose of the IDEA).

90. See *id.* (arguing that a statutory threshold requirement has no textual support in the IDEA and is not what Congress intended when passing the statute); see also Gina Green, *Early Behavioral Intervention for Autism: What Does Research Tell Us?*, in BEHAVIORAL INTERVENTION FOR YOUNG CHILDREN WITH AUTISM: A MANUAL FOR PARENTS AND YOUNG PROFESSIONALS 29, 38 (Catherine Maurice et al. eds., 1996) (finding that over the last two decades virtually all studies have concluded that early and intensive intervention in cases of autism is the most effective and appropriate intervention, and can produce large, comprehensive, enduring, and meaningful improvements in the lives of children suffering from autism).

91. See Green, *supra* note 90, at 42 (stating that early intervention and education actually constitutes the primary treatment for autistic students).

92. See *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985) (explaining that a final judicial decision on the merits of an IEP usually comes a year or more after the academic term covered by that IEP has ended).

93. See *Susan N. ex rel. M.N. v. Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995) (asserting that children are not static individuals, and neither their disabilities nor academic development wait for the resolution of litigation).

94. See *Frank G. ex rel. Anthony G. v. Bd. of Educ.*, 459 F.3d 356, 369 (2d Cir. 2006) (noting that the IDEA grants a reviewing court broad discretion when determining an appropriate remedy), *cert. denied*, 128 S. Ct. 436 (2007).

enables parents to unilaterally place their disabled child in private school and still obtain a tuition reimbursement for such placement.⁹⁵ Based on this interpretation of the IDEA, the Court should also hold that parents may receive a tuition reimbursement even if their child never received special education or related services under the authority of a public agency.⁹⁶

In *Burlington*, the Court specifically created a two-prong test concerning the appropriateness of tuition reimbursements for private school placement, but implicitly added a third prong: "equitable considerations [relating to the reasonableness of the action taken by the parents] are [also] relevant in fashioning relief."⁹⁷ Therefore, the *Burlington* Court created three threshold requirements that must be satisfied before a reviewing court grants relief: (1) an IEP is inappropriate, (2) the private school placement is appropriate, and (3) if equitable considerations favor granting relief.⁹⁸ Additionally, the Court held that the IDEA was intended to provide disabled students with a FAPE, and the IDEA should not be interpreted to defeat or contradict this objective.⁹⁹ Finally, the Court asserted that parents should not have to choose between an inappropriate educational setting for their child and forfeiting their claim to tuition reimbursement.¹⁰⁰

Therefore, because the IEP offered to Mr. Freston's son was inappropriate and private school placement was proper, the tuition reimbursement awarded to Mr. Freston was consistent with *Burlington* because a denial of the equitable remedy of tuition reimbursement would be directly inconsistent with providing his son a FAPE.¹⁰¹ Furthermore, because § 1412(a)(10)(C)(ii) codified *Burlington*, this interpretation is consistent with the modern IDEA.¹⁰² Thus, since the Supreme Court

95. See *Burlington*, 471 U.S. at 370 (stating that Congress did not intend to deny retroactive reimbursement, therefore, it is an appropriate remedy under the IDEA); see also Osborne, *supra* note 8, at 898 (asserting that it is clear that both the IDEA and case law allow parents to receive tuition reimbursements for unilateral placement from public school to private school so long as notice is provided to the school district).

96. See Brief for the Respondent, *supra* note 31, at *18-19 (arguing that the Second Circuit's interpretation clearly follows from *Burlington* because it is consistent with the central purpose of the IDEA to provide a FAPE).

97. See *Frank G.*, 459 F.3d at 363-64 (citing *Burlington*, 471 U.S. at 374).

98. See *Burlington*, 471 U.S. at 369-70, 374 (granting further relief only under this test without reference to a fourth prong calling for a mandatory try-out period); see also *Frank G.*, 459 F.3d at 363-64 (citing *Burlington*, 471 U.S. at 374).

99. See *Burlington*, 471 U.S. at 372 (asserting that the Act mandates that a FAPE be provided and that a contrary interpretation is directly inconsistent with the IDEA).

100. See *id.* at 369 (stating that to remain consistent with the statutory purpose of the IDEA, a reviewing court should be granted broad discretion when deciding on appropriate remedies).

101. See *id.* at 372 (allowing reimbursement because the town's interpretation of the Act forced parents to leave a child in what may turn out to be an inappropriate education program or risk sacrificing their claim to a tuition reimbursement, a result which is directly inconsistent with the statutory purpose of the IDEA to provide a FAPE).

102. See Brief for the Respondent, *supra* note 31, at *19-20 (arguing that because

previously upheld reimbursement in similar factual circumstances, courts should remain consistent and not create a subclass of disabled children by establishing clear precedent granting tuition reimbursements to parents whose disabled child failed to obtain special education services from a public agency before their unilateral placement in private school.¹⁰³

4. The Legislative History Shows that the IDEA Does Not Require a Mandatory Public School Try-Out Period for Parents to Obtain a Tuition Reimbursement for Unilateral Private School Placement

Although the Supreme Court is often reluctant to analyze the legislative history surrounding the IDEA, the statute's legislative history supports the interpretation of § 1412(a)(10)(C)(ii) developed by the Second Circuit.¹⁰⁴ The legislative history prior to the 1997 amendments to the IDEA indicates that Congress did not desire any unnecessary delay in a child's placement or change of placement that might be caused by a lengthy administrative process.¹⁰⁵ Rather, Congress desired a flexible approach designed to meet both the needs of the child and the state.¹⁰⁶ In direct contrast to such congressional intent, the First Circuit's approach requires parents to place their disabled child in public school under an inappropriate IEP, unnecessarily delaying appropriate placement while the administrative process is exhausted.¹⁰⁷

Furthermore, the legislative history surrounding § 1412(a)(10)(C)(ii) also suggests that tuition reimbursement in factual circumstances like those in *Tom F.* is an acceptable remedy under the IDEA.¹⁰⁸ Most importantly, the legislative history does not expressly deny the availability of tuition

§ 1412(a)(10)(C)(ii) directly tracks the facts and holding of *Burlington*, it should be viewed as a codification of Supreme Court precedent that existed before the 1997 amendments to the IDEA, and noting that nowhere in the IDEA did Congress disapprove of or intend to restrict the holding of *Burlington*).

103. See *Burlington*, 471 U.S. at 372 (explaining that if a provision is interpreted to cut off parents' right to reimbursement, the principal purpose of the IDEA would be defeated as if tuition reimbursements were never made available to parents).

104. See Osborne, *supra* note 8, at 897 (noting that in recent IDEA interpretation cases, the Court has been more likely to analyze the plain meaning of the text or statute rather than analyze the legislative history to ascertain congressional intent in the formation and passage of the law).

105. See 121 CONG. REC. 37,412 (1975) (arguing that administrative appeals can be long and tedious and that the placement of a child should not be delayed unnecessarily while the administrative process is exhausted).

106. See *Burlington*, 471 U.S. at 373 (holding that the legislative history of the IDEA supports the interpretation that unilateral private school placement of a child can be appropriate under the IDEA).

107. See *id.* at 372 (claiming that unnecessary delay caused by denying unilateral private school placement is in contrast with congressional intent).

108. See Brief for the Respondent, *supra* note 31, at *15-16 (acknowledging that the legislative history surrounding § 1412(a)(10)(C)(ii) is sparse, but what does exist does not support a strict interpretation of § 1412(a)(10)(C)(ii)).

reimbursements when a student has never obtained special education services in a public school setting.¹⁰⁹ Rather, the legislative history gives no indication that Congress desired to amend the IDEA's provisions regarding tuition reimbursement.¹¹⁰ Additionally, the legislative history does not reveal any attempt by Congress to limit the vast discretion of reviewing courts to grant tuition reimbursements.¹¹¹

Because Congress failed to mention or refer to any threshold requirements before the enactment of § 1412(a)(10)(C)(ii), the legislative history, albeit not entirely decisive, contains no support for the First Circuit's interpretation of a mandatory try-out period.¹¹² Even the First Circuit acknowledges that the legislative history suggests that Congress desired to include children who requested, but had not yet received, special education services during their time in public school as being eligible for a tuition reimbursement.¹¹³ Accordingly, the strict interpretation approach developed by the First Circuit is inherently flawed because the First Circuit acknowledges that the legislative history supports tuition reimbursement in certain circumstances not expressly stated in § 1412(a)(10)(C)(ii).¹¹⁴ Therefore, based on the legislative history surrounding the IDEA, and in particular § 1412(a)(10)(C)(ii), it seems likely that Congress intended § 1412(a)(10)(C)(ii) to provide tuition reimbursements for parents such as Mr. Freston.¹¹⁵

109. See *Frank G. ex rel. Anthony G. v. Bd. of Educ.*, 459 F.3d 356, 373-74 (2d Cir. 2006) (stating that because the legislative history of § 1412(a)(10)(C)(ii) does not expressly restrict the remedy of tuition reimbursements, it may not be interpreted as denying tuition reimbursements when a child has never obtained special education services in a public school setting), *cert. denied*, 128 S. Ct. 436 (2007).

110. See *id.* (asserting that Congress intended for parents to be reimbursed for the cost of private school educational placement without the public agency's consent under certain conditions, such as when a due process hearing officer or judge determines that a FAPE has not been offered in a timely manner).

111. See *id.* at 374 (arguing that the House report is significant for what it does not say, especially because it does not reveal any intention of Congress to limit the discretionary powers of a reviewing court that were developed in *Burlington*).

112. See Brief for the Respondent, *supra* note 31, at *15 (arguing that the creation of a mandatory try-out period is a new and significant prerequisite and, because Congress failed to refer to such a threshold requirement, a strict interpretation of § 1412(a)(10)(C)(ii) is implausible).

113. See *Greenland Sch. Dist. v. Amy N. ex rel. Katie C.*, 358 F.3d 150, 159-60 (1st Cir. 2004) (refusing to discuss this issue further because Katie's parents did not provide the school district with notice as required under the IDEA); see also H.R. REP. NO. 105-95, at 91-93 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 89-90 (neglecting to specifically state that children who never attended or received special education or related services from a public agency should be denied tuition reimbursements for private school placement once a FAPE has been denied).

114. See *Frank G.*, 459 F.3d at 375-76 (explaining that the problem with *Greenland* is that it believes that § 1412(a)(10)(C)(ii) is clear, but fails to recognize that it is hardly plain and unambiguous).

115. See 143 CONG. REC. S4,297-4,301 (1997) (statement of Sen. Harkin) (stating only that the bill supports current IDEA policy that a public agency is not required to pay a tuition reimbursement for private school placement if that agency made a FAPE).

5. *The Department of Education Rejected the Interpretation Developed by the First Circuit in Greenland*

The Department of Education's Office of Special Education and Rehabilitative Services has also expressly rejected the interpretation developed by the First Circuit.¹¹⁶ Specifically, the Department of Education has stated that reimbursement serves as an equitable remedy that courts may order when appropriate.¹¹⁷ Therefore, the agency held that courts retained their broad authority, as recognized in *Burlington* and *Carter*, to award appropriate relief if a public agency failed to offer a FAPE.¹¹⁸

Since this interpretation was formulated in notice and comment rulemaking and constitutes a reasonable interpretation of the statute, it should be entitled to deference by a reviewing court.¹¹⁹ Nonetheless, the Department of Education's stance is further evidence that the Second Circuit's holdings in *Frank G.* and *Tom F.* constitute the correct interpretation of § 1412(a)(10)(C)(ii).¹²⁰

6. *The Eleventh Circuit Has Similarly Adopted the Second Circuit's Approach and Recognized the Importance of Offering All Disabled*

available to the student).

116. See List of Correspondence from January 4, 1999 through March 31, 1999, 65 Fed. Reg. 9,178, 9,178 (Dep't of Educ. Feb. 23, 2000) (arguing that tuition reimbursements should not be denied if a child has not received special education services from a public agency); see also *Frank G.*, 459 F.3d at 373 (stating that while the agency's interpretation comes in the form of an informal letter, deference to a policy letter can be appropriate when the statutory language of a provision is ambiguous and not plain).

117. See 34 C.F.R. § 300.403 (1999) (asserting that equitable considerations mandate that receipt of public school special education services is not a prerequisite to tuition reimbursement under the IDEA, and that the only relevant considerations of a court are whether a FAPE has been provided and if tuition reimbursement is a necessary remedy).

118. See 34 C.F.R. § 300.403 (stating that a mandatory try-out period is against the statutory purpose of the IDEA to provide a FAPE); see also *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 369 (1985) (holding that the IDEA grants a reviewing court significant discretion when fashioning an appropriate remedy); *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15-16 (1993) (reaffirming the Court's decision in *Burlington*, and granting reviewing courts significant discretion when issuing remedies under the IDEA).

119. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (holding that when a statute is ambiguous, and under the subject matter of a particular federal agency, that agency's official interpretation of the statute is entitled to deference by a reviewing court as long as the interpretation is reasonable); see also *United States v. Mead Corp.*, 533 U.S. 218, 235, 237 (2001) (stating that the Court has noted numerous indicators to recognize when *Chevron* deference would be appropriate, including an agency's power to participate in notice and comment rulemaking).

120. See Brief for the Respondent, *supra* note 31, at *25-27 (asserting that a policy letter written by the director of the Department of Education's Office of Special Education Programs serves as conclusive evidence that the government supports the statutory interpretation developed by the Second Circuit).

Students a FAPE

Finally, similar to the Second Circuit's holdings in *Frank G.* and *Tom F.*, the Eleventh Circuit has also determined that § 1412(a)(10)(C)(ii) does not mandate disabled students to first attend public school special education programs as a threshold requirement for their parents to obtain a tuition reimbursement for their private school placement.¹²¹ The Eleventh Circuit's holding that reimbursement is a suitable remedy under *Burlington* and that not allowing reimbursement would force parents into the untenable position of accepting an inadequate IEP to preserve their right to reimbursement serves as further evidence of the appropriateness of the Second Circuit's approach.¹²² Thus, because the Second Circuit's interpretation of § 1412(a)(10)(C)(ii) in *Frank G.* and *Tom F.* is also supported by significant circuit court precedent, this approach should be adopted by the Supreme Court as precedent.¹²³

*B. The Second Circuit's Approach Correctly Recognizes that Sufficient
Statutory Safeguards and Court Precedent Exist to Ensure that Parents
Will Not Abuse § 1412(a)(10)(C)(ii)*

A common apprehension regarding the adoption of the approach developed by the Second Circuit is that parents could easily abuse § 1412(a)(10)(C)(ii) and unfairly obtain a tuition reimbursement for private school placement of their child.¹²⁴ However, this fear is unwarranted because sufficient statutory safeguards and judicial precedent exist to ensure that parents seeking tuition reimbursement for unilateral private school placement without ever having their child obtain special education in a public school setting will not abuse § 1412(a)(10)(C)(ii) of the IDEA.¹²⁵

121. See *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1098 (11th Cir. 2006) (denying reimbursement because a FAPE was offered to the child, but also holding that despite a parent's failure to have their child attend public school, reimbursement is still an acceptable remedy).

122. See *id.* at 1099 (noting further that a contrary interpretation would cause the absurd result of barring children from obtaining a FAPE because their disabilities were detected before they reached school age).

123. See Brief for the Respondent, *supra* note 31, at *29-30 (arguing that *M.M.* evidences that there is no support in the IDEA, legislative history, Department of Education interpretations, or case law which would support the interpretation developed by the First Circuit).

124. See Brief for the Petitioner, *Bd. of Educ. v. Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (No. 06-637), 2007 WL 1434945, at *41 (asserting that the Second Circuit's interpretation would have a devastating economic impact on school systems due to the potential for abuse).

125. See Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(1)(B)(ii)(I) (2005) (establishing the initial statutory safeguard that a parent whose child was not actually identified as being a child with a disability under § 1401 of the IDEA is not eligible for a tuition reimbursement); see also *Frank G. ex rel. Anthony G. v. Bd. of Educ.*, 459 F.3d 356, 363 (2d Cir. 2006) (noting that states, such

1. The Three Threshold Requirements Created by the Court and Codified in the IDEA Ensure that Parents Seeking Reimbursement Will Not Abuse § 1412(a)(10)(C)(ii)

In *Burlington*, the Court created a two-prong test and implied a third element to determine whether parents are entitled to a tuition reimbursement for private school placement.¹²⁶ First, the IEP proposed by the school district must be inappropriate.¹²⁷ Second, the private school placement of the disabled student must be appropriate in relation to the student's needs.¹²⁸ In addition to these two requirements, because the IDEA provides a reviewing court with significant discretion when granting reimbursements, equitable considerations must also be made by a reviewing court.¹²⁹ Furthermore, as established in *Schaffer*, parents have the burden to prove all three of these requirements, and a presumption of competence exists in favor of the school board's IEP.¹³⁰

These requirements ensure that parents will not easily abuse § 1412(a)(10)(C)(ii) because, under the two-prong test developed in *Burlington*, parents have a significant burden in showing both that the IEP offered to their child was inappropriate and that their placement of their child in private school was necessary to meet their child's educational needs.¹³¹ Additionally, the parental burden of having to prove both the

as New York, have established regulations to meet the goals of the IDEA and that these regulations closely follow the IDEA's requirements), *cert. denied*, 128 S. Ct. 436 (2007); Brief for the Respondent, *supra* note 31, at *41 (arguing that both the IDEA and case law have created significant safeguards against parents who seek to abuse the system).

126. See *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985) (noting that retroactive tuition reimbursements are an acceptable remedy because the lengthy administrative and judicial review process serves to limit potential abuse); *supra* Part III.A(3) for a discussion of the implied third element of *Burlington*.

127. See *Frank G.*, 459 F.3d at 363 (stating that the IEP, as the key element of the IDEA, must be developed for each handicapped child and include a comprehensive statement of the educational needs for the disabled student with specific instructions and services on how to meet those needs).

128. See *id.* (maintaining that requesting parents must satisfy both elements of the *Burlington* two-part test and thus, once the public school's IEP is determined to be inappropriate, the subsequent placement of the child into a private school must be deemed appropriate).

129. See *id.* at 363-64 (noting that the equitable considerations examined must relate to the reasonableness of the action taken by the parents).

130. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 59-60 (2005) (placing the burden on the party seeking relief to prove that an IEP is inappropriate); see also Mayerson, *supra* note 6 (discussing the Court's adoption of a "presumption of competence" to protect the school districts when it rendered its decision in *Schaffer*).

131. See *Frank G.*, 459 F.3d at 356, 364 (stating that the test for the parent to prove the inappropriateness of an IEP and the appropriateness of private school placement is the same: whether the IEP or private school placement is "reasonably calculated to enable the . . . [disabled student] to receive educational benefits," and the IEP or placement must be "likely to result in progress [in the student's growth], not regression").

reasonableness of their actions and that a tuition reimbursement is appropriate as an equitable remedy further ensures that their claims are made in good faith.¹³²

Also, as evidenced by *Tom F.*, the process to prove both the inappropriateness of an IEP and the appropriateness of private school placement is exhaustive and time-consuming.¹³³ In *Tom F.*, Mr. Freston successfully argued before an impartial hearing officer and a state reviewing officer before being denied reimbursement by a federal trial court, while eventually being granted a tuition reimbursement by the Second Circuit.¹³⁴ Thus, because parents seeking tuition reimbursement must successfully argue in numerous administrative and judicial proceedings before being granted tuition reimbursement for private school placement, claims lacking good faith are likely to fail.¹³⁵

Furthermore, while tuition reimbursement is an equitable remedy, it is not the only remedy available to the courts.¹³⁶ Also, because tuition reimbursement is an equitable remedy, the IDEA authorizes courts to consider the merit of the claim or the intentions of a party when granting relief.¹³⁷

Therefore, as evidenced by the statutory safeguards and the requirements created by the Court, parents cannot easily abuse § 1412(a)(10)(C)(ii) because they have the significant burden of proving that the IEP is

132. *See id.* at 363-64 (arguing that tuition reimbursement is an equitable remedy that is acceptable under the IDEA because both the Supreme Court and the IDEA itself grant courts broad discretion when fashioning remedies for parents of disabled children).

133. *See Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985) (explaining that retroactive tuition reimbursement is an acceptable remedy because the review process for granting such relief is ponderous, and decisions on the merits usually take over a year); *see also Osborne*, *supra* note 8, at 888 (asserting that IDEA due process reviews can take several months or years to complete).

134. *See Brief for the Respondent*, *supra* note 31, at *6-9 (noting that Mr. Freston's initial hearing before the impartial hearing officer took three days and included testimony from seven witnesses, including school board education evaluators, school psychologists, several teachers, and a special education teacher).

135. *See Osborne*, *supra* note 8, at 888 (stating that while this exhaustive process is completed, a student must remain in his or her current educational setting or be placed in a private school at the parents' expense, where reimbursement is dependent on the success of the case).

136. *See id.* (claiming that courts usually order prospective relief in the form of a court order mandating that the school board take corrective action).

137. *See 20 U.S.C. § 1412(a)(10)(C)(iii)(III)* (2005) (establishing that a parent who acts unreasonably could be denied reimbursement or have their reimbursement award reduced due to their inappropriate conduct); *see also Carmel Cent. Sch. Dist. v. V.P.*, 373 F. Supp. 2d 402, 418 (S.D.N.Y. 2005) (holding that reimbursement is not allowed when parents did not have any intent of sending their child to public school and consistently and deliberately interfered with the evaluator's ability to review their child's disability); *Brief for the Respondent*, *supra* note 31, at *42 (arguing that as an equitable remedy, tuition reimbursements can be denied to parents who intend to cheat the system).

inappropriate, private school placement is appropriate, and a tuition reimbursement is a necessary equitable remedy.¹³⁸ Also, in contrast to the significant burden placed on parents by the Court, the IDEA merely mandates that a school board offer an appropriate IEP.¹³⁹ Accordingly, if an appropriate IEP is offered and a FAPE has been provided, a tuition reimbursement will not be granted to parents who unilaterally place their child in private school without first having their child obtain special education and related services from a public agency.

2. The Statutory Requirements of Notice, Reasonableness, and Cooperation Also Ensure that Parents Will Not Abuse § 1412(a)(10)(C)(ii)

In addition to the three threshold requirements for relief, the IDEA mandates that a parent seeking to reject an IEP must provide notice of both their intent to reject the school board's IEP and their intent to send their child to private school.¹⁴⁰ Furthermore, parents must act reasonably and grant the school board access to the child to perform evaluations of the child for disabilities, or risk having their reimbursement award reduced or denied.¹⁴¹

This notice requirement serves the important function of preventing abuse by allowing the school board to form an IEP team, evaluate the child, create an appropriate plan, and determine whether a FAPE can be provided in the public school system.¹⁴² If notice is not provided, courts have denied granting tuition reimbursements even if the IEP offered is inappropriate, private school placement is appropriate, and equitable considerations favor

138. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61 (2005) (establishing that the requesting party, which is usually the disabled child's parents, has the burden of establishing all requirements that must be met for relief).

139. See *Florence County Sch. Dist. Four v. Carter, ex rel. Carter*, 510 U.S. 7, 13 (1993) (arguing that reimbursement is not necessary if a FAPE is offered to the student, even if it is based on an IEP that orders the student's return to public school, so long as the offered IEP is appropriate as determined by the student's needs); see also Brief for the Respondent, *supra* note 31, at *44 (stating that it is the mandate of the IDEA to provide a FAPE to all disabled students, and if school officials either offer a FAPE in a public school setting or place a child in an appropriate private school setting, they need not worry about reimbursement claims).

140. See 20 U.S.C. § 1412(a)(10)(C)(iii)(aa) (2005) (establishing that notice must be made at the most recent IEP team meeting, where parents must inform those present that they are rejecting the proposed placement of the student in favor of private school placement).

141. See § 1412(a)(10)(C)(iii)(III) (stating that a determination whether a parent acted unreasonably can be made by the court when deciding upon appropriate relief); § 1412(a)(10)(C)(iii)(II) (establishing that prior to the removal of the child from public school, school officials must inform the child's parents of their intent to evaluate the student, providing the parents with a statement of the purpose of the evaluation).

142. See *Frank G. ex rel. Anthony G. v. Bd. of Educ.*, 459 F.3d 356, 375 (2d Cir. 2006) (stating that providing notice to the school district before a child is placed in private school is an essential aspect of the IDEA's reimbursement policy), *cert. denied*, 128 S. Ct. 436 (2007).

reimbursement.¹⁴³ The notice requirement allows the school board to create and offer a disabled student an appropriate IEP, and, therefore, serves as an important safeguard against reimbursement claims that lack good faith or merit.¹⁴⁴

Furthermore, the requirements that parents act reasonably and not interfere with the school board's ability to evaluate their child also guarantee that parents with claims lacking merit or good faith will not be granted reimbursement.¹⁴⁵ Similar to the notice requirement, courts have routinely denied tuition reimbursements when parents unreasonably restrict the school board's access to a child or inappropriately interfere with the school board's ability to offer an appropriate IEP.¹⁴⁶ These statutory requirements also serve to ensure that only parents who fully cooperate with the school board and file their reimbursement claim in good faith receive a tuition reimbursement under § 1412(a)(10)(C)(ii).¹⁴⁷ Thus, as a result of the statutory requirements to provide notice, act reasonably, and cooperate, it is difficult for parents with claims lacking good faith or merit to obtain a tuition reimbursement.¹⁴⁸

143. See *Greenland Sch. Dist. v. Amy N. ex rel. Katie C.*, 358 F.3d 150, 161 (1st Cir. 2004) (holding that due to the parent's failure to provide proper notice, reimbursement must be denied because the school district did not have the opportunity to provide a FAPE); *Frank G.*, 459 F.3d at 375-76 (agreeing with the result reached in *Greenland* due to the lack of notice provided to the school district, and holding that courts have uniformly held that reimbursement must be denied when parents unilaterally place their child in private school without notifying the school board of their dissatisfaction with an offered IEP).

144. See *Greenland*, 358 F.3d at 161 (arguing that the notice requirement is essential for the school board in their development of an appropriate IEP).

145. See *Patricia P. ex rel. Jacob P. v. Bd. of Educ.*, 203 F.3d 462, 468 (7th Cir. 2000) (asserting that without minimal cooperation, a school district cannot evaluate a disabled student; thus, if a parent fails to sufficiently cooperate, they must be denied reimbursement).

146. See *id.* at 469 (holding that reimbursement under the IDEA is subject to parties cooperating with the school board, and because the school board had no opportunity to evaluate the disabled student, reimbursement is inappropriate and forfeited); *P.S. v. Brookfield Bd. of Educ.*, 353 F. Supp. 2d 306, 315 (D. Conn. 2005) (finding that because the school board was entitled to an evaluation of the student and the parents failed to cooperate by not making their child available for the evaluation, the child's parents lost their right to reimbursement), *aff'd*, 186 Fed. App'x 79 (2d Cir. 2006); see also *Osborne*, *supra* note 8, at 891 (noting that courts routinely deny reimbursements based on equitable principles, and reasoning that equity prevents reimbursement awards because school officials did not have the opportunity to evaluate the student and make recommendations regarding appropriate placement).

147. See 20 U.S.C. § 1412(a)(10)(C)(iii) (2005) (establishing that if the statutory requirements are not met by a requesting parent, reimbursement may be reduced or denied).

148. See Brief for the Respondent, *supra* note 31, at *41 (noting that sufficient procedural safeguards exist to ensure that parents are not able to cheat the system and obtain tuition reimbursements on a claim based on bad faith).

3. Parents Seeking Tuition Reimbursement Also Bear the Financial Risk when Attempting to Prove that Reimbursement Is Necessary

In *Burlington*, the Court held that parents who unilaterally place their child in private school do so at their own peril, and this risk serves as a significant deterrent against claims for reimbursement which lack good faith or merit.¹⁴⁹ A petitioning parent bears the financial risk of private school placement, the cost of legal expenses, the burden of proving the appropriateness of tuition reimbursement, along with the uncertainty and lengthy duration of the administrative and judicial due process proceedings.¹⁵⁰ Therefore, unless a parent strongly believes that an IEP is inappropriate and private school placement is best suited for their child's needs, they are unlikely to request reimbursement due to the considerable expenses they would incur when attempting to overcome the significant burden in favor of the school district.¹⁵¹

4. Opponents of the Second Circuit's Approach Overestimate the Economic Impact of Tuition Reimbursement Claims on School Districts

Opponents of the Second Circuit's interpretation of § 1412(a)(10)(C)(ii) in *Frank G. and Tom F.* fear those decisions will lead to significant fraudulent reimbursement claims which will in turn result in a serious economic drain on local school systems.¹⁵² However, these opponents fail

149. See *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 373-74 (1985) (asserting that allowing tuition reimbursements for parents who unilaterally place their disabled child in private school is an acceptable remedy because these parents bear the financial risk of obtaining a tuition reimbursement); see also Brief for the Respondent, *supra* note 31, at *41 (arguing that placing the financial burden on requesting parents is another safeguard developed by the Court to ensure that parents will not abuse the system).

150. See Thomason, *supra* note 20, at 485 (explaining that overwhelming burdens on parents exist in IDEA litigation, and these burdens ignore the realities of the IDEA litigation process); see also Brief for the Respondent, *supra* note 31, at *41 (stating that the financial risk construct is now codified in the IDEA and serves as a significant deterrent against claims that are false or too speculative).

151. See *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2011 (2007) (Scalia, J., dissenting) (asserting that actions seeking reimbursement are less likely to be frivolous because parents are not likely to pay for litigation over a tuition reimbursement without a strong belief that the IEP offered is not appropriate); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297-98 (2006) (holding that a parent who prevails and retains a tuition reimbursement for unilateral private school placement may recover reasonable attorneys' fees as part of their costs, but these costs do not include any fees resulting from the services of expert witnesses); see also Thomason, *supra* note 20, at 472, 484-85 (noting that "only five out of every ten thousand children who receive special education services request IDEA due process hearings," and that although reasonable attorneys' fees are reimbursed to successful parents, any reimbursement of attorneys' fees does not significantly ease the financial burden placed on parents by the Court because requesting parents must rely on expert witnesses to overcome the burden of persuasion established in *Schaffer*).

152. See Julie Rawe, *Who Pays for Special Ed.*, TIME, Sept. 25, 2006, at 62 (arguing that many education specialists believe that special education costs threaten to drain budgets for school endeavors, such as athletics or programs for gifted or talented

to recognize that the Second Circuit's interpretation will likely have no substantive economic impact on public school systems.¹⁵³

In fact, only 1.48% of all disabled children receive their education from a private school at the public's expense, a percentage that has been consistent over the years.¹⁵⁴ Furthermore, on an annual basis, money spent by public schools for private school placement of disabled students amounted only to 0.24% of the entire national education budget of \$382 billion.¹⁵⁵

Also, these opponents fail to understand that the First Circuit's interpretation could result in a greater financial burden on public school systems, as school districts would have to allocate more resources, such as teachers and classroom space, for every disabled student attending a public school.¹⁵⁶ Therefore, due to the small amount of students obtaining private school special education at the public's expense, and because of the significant statutory safeguards and judicial precedent which ensure that parents will not abuse § 1412(a)(10)(C)(ii) of the IDEA, the Second Circuit's approach will not result in a significant economic drain on public school systems.¹⁵⁷

IV. CONCLUSION

Since the Supreme Court failed to reach binding precedent in *Tom F.*, the issue of whether parents can unilaterally place their disabled child in

students).

153. See Jay P. Greene & Marcus A. Winters, *Debunking a Special Education Myth: Don't Blame Private Options for Rising Costs*, EDUC. NEXT, Spring 2007, at 69-70, available at <http://www.hoover.org/publications/ednext/5895486.html> (explaining that while some private school placement can be expensive to the public, the overall cost of such placement nationally constitutes a very small portion of public school spending).

154. See *id.* at 68 (asserting that private school placement is extremely rare because out of 5,963,129 total disabled students nationwide, there are a total of 88,156 students with disabilities enrolled in private school at the public's expense, and these students only amount to 0.18% of the 47,917,774 students enrolled in public school education nationally); see also Brief for the Respondent, *supra* note 31, at *42 (referencing Green & Winters, *supra* note 153, and noting further that most of these children were placed in private school by a public authority, and usually they are not placed in the private school unilaterally by their parents).

155. See Greene & Winters, *supra* note 153, at 69-70 (claiming that the 0.24% of the total national budget equates to \$922 million).

156. See Brief for the Respondent, *supra* note 31, at *48 (arguing that school districts would have to allocate resources such as teachers, physical space, salaries, books and supplies, school lunches, athletic programs, and social programs if every disabled student in a locale had to first try-out the public schools for their parents to obtain a tuition reimbursement).

157. See Greene & Winters, *supra* note 153, at 68 (stating that there has been "no surge in the proportion of special education students in private settings" and that private placement of disabled children at the parents' request is more rare than the already rare private placement of disabled children upon the school's initiative); cf. Rawe, *supra* note 152, at 68 (quoting an attorney who argues that going up against the school district as a parent equates to David going up against Goliath).

private school without first having their child obtain special education services from a public agency remains unresolved.¹⁵⁸ When this issue arises again, the Court should uphold the Second Circuit's approach because § 1412(a)(10)(C)(ii) is not plain and unambiguous, and tuition reimbursements for unilateral private school placement under all factual circumstances that meet the statutory requirements of the IDEA, constitute an equitable remedy that affords all disabled students a FAPE.¹⁵⁹ Furthermore, a contrary interpretation would cause disturbing results: forcing parents to place their disabled child in harmful educational settings at the detriment of their child's academic and social development.¹⁶⁰ Finally, the Supreme Court should recognize that sufficient procedural safeguards and judicial precedent exist to ensure that parents lacking a good faith claim will not be successful in their attempt to obtain a tuition reimbursement for private school placement.¹⁶¹ Therefore, so long as a reviewing court has determined that an appropriate IEP for a disabled child has not been offered and private school placement is appropriate, parents such as Mr. Freston should not be denied tuition reimbursement for their disabled child's unilateral placement in private school.¹⁶²

158. See Mayerson, *supra* note 6 (arguing that because the issue remains unresolved, future Supreme Court action regarding tuition reimbursements and the IDEA is likely).

159. See Frank G. *ex rel.* Anthony G. v. Bd. of Educ., 459 F.3d 356, 368-71, 375 (2d Cir. 2006) (explaining that because § 1412(a)(10)(C)(ii) has numerous interpretations, it is inherently unclear), *cert. denied*, 128 S. Ct. 436 (2007).

160. See M.M. *ex rel.* C.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1098-99 (11th Cir. 2006) (arguing that the IDEA does not bar tuition reimbursement when a child has never attended public school because such a holding would cause absurd results and force parents to place their child in inappropriate IEP's to preserve their right to reimbursement, which is in direct contradiction to the purpose of the IDEA to provide for a FAPE).

161. See Brief for the Respondent, *supra* note 31, at *41 (asserting that both the IDEA and case law have created significant safeguards to protect against parents intending to cheat the public school system).

162. See Frank G., 459 F.3d at 363-64 (noting that equitable considerations are the third requirement which must be met before tuition reimbursements are to be provided to a requesting parent, and would also have to be satisfied before a parent receives a tuition reimbursement for unilateral private school placement of their disabled child).