NORTH CAROLINA ORANGE COUNTY	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
OM (by his parents, NM and AM), NM, and AM, *Petitioners*, *v.* Orange County Board of Education, *Respondent.*	Action No. 08—EDC—2969

PETITIONERS' ARGUMENT SUPPORTING THE HONORABLE MELISSA LASSITER'S FINAL ORDER

THE NATURE OF THE REVIEW

The matter before the State Review Officer (SRO) is the appeal of the Orange County Board of Education (the "Board") of Judge Melissa Lassiter's Final Order ruling in favor of OM and his parents and against the Board on all issues. The underlying case was brought by OM, a high-functioning child with autism, and his parents, AM and NM (the "Parents"). OM and his Parents initiated the case by filing a petition for a due process hearing under the Individuals with Disabilities Education Act (IDEA) with the Clerk of the North Carolina Office of Administrative Hearings.

In this appeal, the Board carries the extraordinary burden of establishing that all six of Judge Lassiter's dispositive conclusions are "clearly contrary" to the evidence and unsupported by governing law. Because the Board can do neither, the Board's appeal must fail.

Judge Lassiter's Final Order is factually-rich and heavily documented. The Order concludes that OM and his parents carried their burden of proving by a preponderance of the evidence that the Board's IEP deprived them of their right to a Free Appropriate Public Education (FAPE) under the IDEA (in no less than four independently adequate ways). Next, the Order concludes that OM's private placement was appropriate. Finally, as a result of those conclusions, Judge Lassiter awarded reimbursement for the expenses OM's parents incurred in providing OM with a private placement, including, for example, the cost of tuition, specialized instruction, and related services during the 2008-2009 school year and other equitable remedies tailored to address the specific deprivations that were established by the evidence in this case.

QUESTIONS PRESENTED

I. Can the Board establish that ***all four*** of the independently adequate grounds supporting Judge Lassiter's conclusion that the Board deprived OM of a Free Appropriate Public Education were all contrary to the evidence or the governing law? (Argument § I(A)-(D))

Specifically:

(A) Does the evidence in the record or the governing law contradict Judge Lassiter's conclusion that the Board deprived OM of a FAPE by failing to propose an IEP that would educate OM in the Least Restrictive Environment? (Argument § I(A))

(B) Does the evidence in the record or the governing law contradict Judge Lassiter's conclusion that the Board deprived OM of a FAPE by failing to offer an IEP that was reasonably calculated to provide OM with meaningful educational benefit? (Argument § I(B))

(C) Does the evidence in the record or the governing law contradict Judge Lassiter's conclusion that the Board deprived OM of a FAPE by failing to deliver *any of the specialized instruction and related services* to OM that the Board included in its IEP? (Argument § I(C)).

(D) Does the evidence in the record or the governing law contradict Judge Lassiter's conclusion that the Board deprived OM of a FAPE by delegated to outsiders to the IEP Team the authority to determine the appropriate educational plan for OM? (Argument § I(D))

II. Is Judge Lassiter's determination that OM's private placement was appropriate contrary to the evidence or the governing law, where suggested otherwise and every witness agreed that OM made "significant" or "remarkable" progress in the less restrictive private placement? (Argument § II).

III. Is Judge Lassiter's determination that OM and his Parents are therefore entitled to the remedies that the IDEA guarantees to parents who privately educate their disabled child because the public schools failed to offer their child Free Appropriate Public Education? (Argument § III).

STATEMENT OF THE CASE

The Petition asserted that the Orange County Board of Education deprived OM and his parents of rights guaranteed by the Individuals with Disabilities Education Act and parallel state law provisions. To redress the County's violations, the Petition demanded reimbursement of tuition and other educational costs that OM's parents incurred in providing OM with a Free Appropriate Public Education at their own expense, compensatory education, and other equitable remedies made available to aggrieved parties under the IDEA. The issues OM raised for Judge Lassiter's resolution were the same issues identified in the Questions Presented above, and are tracked in the same way in the analysis below.

The hearing of the contested case was conducted by an Administrative Law Judge, the Honorable Melissa Lassiter, who was properly designated by the North Carolina Office of Administrative Hearings to adjudicate the matter. Judge Lassiter conducted eight days of testimony. Based on that exhaustive testimony, hundreds of pages of exhibits, and the written argument of counsel for the Board and counsel for OM, Judge Lassiter ruled in favor of OM on every issue.

Judge Lassiter's ruling is notable for its thoroughness and for its heavy reliance upon the facts adduced at the hearing and Judge Lassiter's credibility determinations with respect to the witnesses. Judge Lassiter, as the fact finder, was uniquely positioned to make those credibility determinations and they are not subject to review in this appeal. All of Judge Lassiter's factual findings are supported by the record; nearly all of them are supported by multiple, independently adequate sources of evidence. Judge Lassiter's conclusions of law are supported by well settled precedents of the Fourth Circuit and the United States Supreme Court.

Moreover, days after Judge Lassiter issued the Final Order in this case, the United States Supreme Court handed down its 6-3 decision in *Forest Grove Sch. Dist. v. T.A.*, __ U.S. __ (June 22, 2009) (Slip Op. annexed hereto as Exhibit 1). Among other things, *Forest Grove* held that the IDEA authorizes reimbursement for private special-education services when a public school fails to provide a FAPE and the private school placement is appropriate, regardless of whether the child previously received special-education services through the public school.

Id., 6–17. In so holding, the Supreme Court not only confirmed the correctness of Judge Lassiter's ruling, but also explicitly rejected the the primary argument that the Board advanced in this case.

STANDARD OF REVIEW

In this, the Board's appeal of Judge Lassiter's Final Order, the Board is faced with the heavy burden of establishing that Judge Lassiter's factual findings are contrary to the evidence and the governing law.[1]A State Review Officer (SRO) must adopt the decision of the administrative law judge unless it is established that the decision of the administrative law judge is clearly contrary to the preponderance of the admissible evidence in the record or the governing law. N.C. Gen. Stat. § 150B-36.

The mechanics of the SRO's review of a Final Order are well settled. First, the ALJ's findings of fact are presumed correct. *Id.* The SRO may not reject any factual finding "unless the finding is clearly contrary to the preponderance of the admissible evidence." Id. In determining whether a finding is clearly contrary to the evidence, the SRO must "giv[e] due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses." *Id.* To properly reject a finding made by the ALJ, the SRO must not only state the reasons for concluding the finding was made in error, but also document the evidence in the record that establishes that the finding is clearly contrary to the preponderance of the evidence in the record. *Id.* All findings of fact not properly rejected by the Review Officer are deemed accepted for purposes of judicial review. *Id.* The Review Officer may not make new findings of fact, unless the new finding is supported by a preponderance of the evidence contained in the official record, which the SRO must document separately and in detail. *Id.*

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[1] At the fact-finding stage of an action challenging an IEP under IDEA, the burden of proof is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (U.S. 2005). In the proceedings below, that party was the Petitioners, and Judge Lassiter correctly placed the burden of proof on the Petitioner. *See, e.g.,* Order, Conclusions of Law ¶39. Judge Lassiter was also correct to conclude that Petitioners amply carried their burden of establishing their claims by a preponderance of the evidence. *See id.*

The "dual purpose" of these statutory requirements is "to safeguard against arbitrary decisions and facilitate meaningful appellate review." Failure to adhere to them in rejecting the findings of an ALJ or adding new findings requires reversal. *See, e.g., Mission Hosps., Inc. v. N.C. HHS,* 189 N.C. App. 263, 275 (2008).

The IDEA's Review Standards Prevail in All Conflicts

Moreover, in IDEA cases, state law review standards that suggest an ALJ must meet heightened particularity requirements to support findings of fact or conclusions of law must yield to Fourth Circuit rulings to the contrary. In the Fourth Circuit, "the case law has never suggested that any particular level of detail is required in the hearing officer's decision. If anything, our case law suggests that the level of detail required of a hearing officer is relatively low." *J.P. ex rel. Peterson v. County School Bd. of Hanover County, Va.* 516 F.3d 254; see also, *County Sch. Bd. v. Z.P.,* 399 F.3d 298, 306 (4th Cir. 2005) (explaining that the Fourth Circuit "requires the *district court* to explain its reasons for rejecting the findings of the hearing officer; it does not require the *hearing officer* to explain in detail its reasons for accepting the testimony of one witness over that of another.").

Under the IDEA, so long as the ALJ's factual findings "regularly made," failing to treat those findings as "presumptively correct" on review is reversible error. *County School Bd. of Henrico County, Virginia v. Z.P. ex rel. R.P.,* 399 F.3d 298, 309 (quoting *Doyle,* 953 F.2d at 105). When determining whether a hearing officer's findings were regularly made, our cases have typically focused on the *process* through which the findings were made: "Factual findings are not regularly made if they are reached through a process that is far from the accepted norm of a fact-finding process." *Z.P.,* 399 F.3d at 305 (internal quotation marks omitted); *see also Doyle,* 953 F.2d at 105 ("[I]n deciding what is the due weight to be given an administrative decision under *Rowley,* we think a reviewing court should examine the way in which the state administrative authorities have arrived at their administrative decision and the methods employed.")

Furthermore, where "it is apparent that the hearing officer in fact found [evidence] more persuasive," such "implicit credibility assessments 'are as entitled to deference under *Doyle* as explicit findings.'" *J.P.,* 516 F.3d at 262 (quoting *Z.P.,* 399 F.3d at 307).

ARGUMENT

Judge Lassiter's conclusions of law can be categorized into the three essential legal conclusions required to establish the County's liability under the IDEA. First, Judge Lassiter concluded that OCPS deprived OM and his parents of their right to a free appropriate public education ("FAPE"). Judge Lassiter reached that conclusion by way of *no less than four* separate theories, each of which provides an independent and adequate basis to support the conclusion. Second, Judge Lassiter concluded that OM's alternative private educational placement was (and remains) appropriate. Third, Judge Lassiter concluded that the evidence plainly showed that OM's parents are entitled to reimbursement of private educational costs and other specific equitable remedies authorized by the IDEA.

Pertinent to this review, as documented below, none of Judge Lassiter's conclusions are "clearly contradicted" by evidence in the record and Judge Lassiter's legal conclusions are supported by the governing law. Indeed, as documented in the Final Order itself, Judge Lassiter's Final Order is supported by overwhelming evidence in the record and the clearly established law of this Circuit, as it has been developed by the Fourth Circuit and the United States Supreme Court over the course of nearly three decades. Indeed, only days after Judge Lassiter issued the Final Order in this case, the United States Supreme Court issued its decision in *Forest Grove*. As explained in Part III, below, in *Forest Grove*, the Supreme Court not only ratified Judge Lassiter award of reimbursement in this case, but also squarely rejected the only arguably non-frivolous legal basis the Board has advanced in this litigation.

I. THE FOUR GROUNDS JUDGE LASSITER RELIED ON TO CONCLUDE THAT THE BOARD DEPRIVED OM AND HIS PARENTS OF A FAPE ARE NOT "CLEARLY CONTRARY" TO THE EVIDENCE OR OR THE GOVERNING LAW.

(A) IT IS NOT CLEARLY CONTRARY TO THE EVIDENCE OR THE GOVERNING LAW TO CONCLUDE THAT THE BOARD DEPRIVED OM OF A FAPE BY REFUSING OR NEGLECTING TO DELIVER ANY OF THE INSTRUCTION OR RELATED SERVICES THAT THE BOARD DEEMED NECESSARY TO PROVIDE OM WITH A FAPE.

Judge Lassiter was correct to conclude that OM and his parents established by a preponderance of the evidence that the County deprived OM of a FAPE on the grounds that "the County failed to implement 'substantial or significant; provisions of OM's IEP" throughout the period "beginning on the first day of classes in the 2008-09 school year until Respondent began providing services on October 28, 2008." Conclusions of Law, ¶ 14. Further, Judge Lassiter found that "[d]uring that period, OM's IEP called for specific specialized instruction and related services to be provided to OM" that the Board failed to provide at all. *Id.*; Pet Ex 1. These findings and conclusions are not "clearly contrary" to the evidence in the record or the governing law.

1. Judge Lassiter's Conclusion is Supported by and Consistent With the Governing Law

The law is plain: an LEA's failure to implement the IEP that the LEA prescribes for the child is a deprivation of the child's right to a Free Appropriate Public Education. *See, e.g., Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d 341, 349 (5th Cir.2000). To prevail on a "failure to implement" claim, a petitioner must show that the school district failed to implement "substantial or significant provisions" of the IEP. *See id. at 349.* It is not enough for a petitioner "to show a mere *de minimis* failure to implement some minor provision of an IEP." *Id.* Instead, a petitioner must establish that the failure to implement some element of a child's IEP caused the deprivation of "a meaningful educational benefit." *Id.*

Liability for failure to implement an IEP is grounded in the IDEA's requirement that the Local Educational Agency is accountable

for "confer[ring] some educational benefit upon the handicapped child." *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir.2000) (citing *Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034). Therefore, it is axiomatic that, when an LEA offers an IEP to a child with a disability and calls it a FAPE, the LEA's complete failure to implement any of the IEP's services or instruction constitutes a denial of FAPE. *See, e.g., District of Columbia v. Ramirez,* 377 F.Supp.2d 63, 69 (D.D.C., 2005) (holding LEA's failure to provide transportation aide to a disabled child who could not board the LEA's offered transportation without an aide constituted a failure to implement "substantial and significant" provisions of the child's IEP, and, as such, the LEA deprived the child of his right to a FAPE).

Petitioners have established by far more than a mere preponderance of the evidence that the County failed to implement "substantial or significant" provisions of OM's IEP, beginning on the first day of classes in the 2008-09 school year until the County began providing services on October 28, 2008. During that period, OM's IEP called for specific specialized instruction and related services to be provided to OM, including occupational therapy and specialized instruction to enable OM to meet his IEP goals and objectives. *See,* Ex. P.1 (IEP dated July 30, 2009). Respondent's witnesses acknowledged that the County was required to provide OM with the services identified in OM's IEP. *See, e.g.,* Tr., Vol. 7, 1211:15-1214:12 (testimony of Lisa Combs)). Respondent's witnesses also acknowledged that Respondent failed to implement the services called for in OM's IEP until October 28, 2008, when the County directed its personnel to deliver the services to OM where he was enrolled at Playhouse. Tr. Vol. 5, 853:24-854:5 (March 27, 2009) (Testimony of Milinda Grenard); Id., Vol. 6 1163:9-12 (April 2, 2009) (testimony Lisa Combs).

2. Judge Lassiter's Conclusion is Not "Clearly Contrary" to the Evidence in the Record.

The record is equally clear: The Board was obliged to provide OM with the services identified in OM's IEP and the Board failed to do so. The Board's designated LEA Representative on the IEP Team acknowledged that the County was required to provide OM with the services identified in OM's IEP, and, further, that the Board consciously refused to do until October 28, 2008. *See, e.g.* Tr. 1211:15—

1214:12 (Testimony of the Board's LEA Representative in OM's IEP Team); see also, Tr. Vol. 5, 853:24—854:5 (March 27, 2009 Testimony of Milinda Grenard); id., Vol. 6 1163:9-12 (April 2, 2009 Testimony of Lisa Combs).

Judge Lassiter concluded that the services prescribed in OM's IEP were necessary to provide OM with a FAPE, and relied in part on the fact that none of the Board's witness testified otherwise. Conclusions of Law, ¶ 17. Nor could they: "After all both the July 30 and October 13 IEPs were the LEA's educational plan." Id. *(*citing Tr. Vol. 6, 1146:14-1147:2 (April 2. 2009 Testimony of Lisa Combs)); *see also,* Tr. Vol. 5-8 (testimony of every one of Respondent's witnesses asserting that the services the Board's IEP Team members proposed were appropriate because "that's what OM needed" to derive benefit from the curriculum).

Sadly, the record is rife with evidence that the Board deliberately refused to provide services to OM, in callous disregarded OM's right to receive those services. This was not lost on Judge Lassiter, who made several well-supported factual findings to support the conclusion. For example, Judge Lassiter found that "[i]n a sequence of 5 emails, NM beseeched Ms. Combs the Board's LEA Representative to provide NM and AM with some information regarding the logistics of providing the offered IEP services" to OM in his private school placement." Conclusions of Law, ¶ 19 (citing Pet Ex 47, P 338-350). NM testified that her emails were never returned—throughout the final weeks of the summer, as the school year approached. But overshadowing that disturbing fact was the Board's explanation for why NM's emails were never returned. The Orange County official with policymaking authority over the implementation of OM's educational plan directed the Board's employees not to respond to NM's inquiries regarding the delivery of the proposed services to OM in his private setting. Judge Lassiter relied on NM's emails as further proof that NM never refused to consent to the Board's providing its proposed services. *Id*. ¶ 19.

3. The Board abandoned its suggestion that OM's parents refused to give consent to provide the IEP services.

The Board argued that it was not required to provide the services prescribed in OM's IEP, contending that OM's parents did not consent to the Board's provision of services to OM. The Board's contention misstates the facts and misapplies the law.

Judge Lassiter correctly observed that the onus is not on the parents to affirmatively give consent: "[t]he law is plain that the LEA is obliged to utilize best efforts to obtain parents written consent or written refusal to consent to the provision of services." Conclusions of Law, ¶ 16 (citing 20 U.S.C.A. 1414(a)(1)(D); 34 CFR §300.300(b)(2); NC Policies Governing Children with Disabilities, § 1S03-1(b); and Pet. Exh. 79 at p.1 (The Board's own Handbook on Parent's Rights). The audio recordings of the IEP meetings revealed that the Board's LEA was laboring under the incorrect assumption that OM's parents' refusal to agree that the IEP was appropriate operated as a refusal of services altogether; however, Judge Lassiter correctly held that the LEA's obligation to utilize best efforts to obtain consent "is not discharged by the parent's disagreement with the sufficiency of the services offered." *Id.* Indeed, the Board's official with policymaking authority over compliance with the IDEA, Melinda Grenard, admitted in testimony that Ms. Colms assumption was wrong, and that the Board had no evidence that OM's parents ever refused services for OM. Findings, ¶ 90(a)-(b) ("Combs' inference is not supported by either the statements made by OM's parents during the July 30th IEP meeting or by the law).

The Board's failure to provide OM with educational services at all from the beginning of the academic year until October 28, 2008, constitutes a clear deprivation of OM's right to a FAPE. OM's "failure to implement" claim, standing alone, is sufficient to establish the first element of OM's claim of entitlement to reimbursement and other equitable remedies under the IDEA. Thus, the review of the first element of OM's reimbursement claim need go no further: OM has met his burden.

(B) IT IS NOT "CLEARLY CONTRARY" TO THE EVIDENCE OR THE GOVERNING LAW FOR JUDGE LASSITER TO CONCLUDE THAT THE BOARD'S IEP WOULD NOT EDUCATE OM IN THE LEAST RESTRICTIVE ENVIRONMENT.

OM and his parents contended that the County deprived them of a Free Appropriate Public Education ("FAPE") by proposing an IEP that would not educate OM in the Least Restrictive Environment ("LRE"). Judge Lassiter agreed, concluding that the preponderance of the evidence adduced at the hearing showed that the County deprived OM and his parents of a FAPE by failing to propose an IEP in the Least Restrictive Environment ("LRE"). As is self-evident from Judge Lassiter's well-documented Order, Judge Lassiter's conclusion of law is consistent with and supported by federal and state law, and the factual findings Jude Lassiter made to support it are not "clearly contrary" to the evidence in the record.

The IDEA requires schools to place disabled students in the least restrictive environment ("LRE"). A school's failure or refusal to educate a disabled child in the LRE--standing alone--constitutes a denial of FAPE. Thus, to establish a deprivation of a FAPE, OM and his parents needed to show that the Board violated one of the two complementary components of the LRE mandate. Both of them are expressed in the text of the statute:

> *(5) Least restrictive environment—*
>
> *(A) In General—To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.*

20 U.S.C.A. § 1412(a)(5)(A) (emphasis supplied). Thus, Judge Lassiter correctly concluded that the LRE mandate required the County to propose an IEP that ensured two things: First, that OM would be "educated with children who are not disabled [t]o the maximum extent appropriate," and, second, that any "special classes, separate schooling,

or other removal of [om] from the regular educational environment occurs only where the nature or severity of [OM'S] disability … is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A).

Consistent with Judge Lassiter's conclusion, this Circuit has repeatedly observed (for over two decades) that "[m]ainstreaming of handicapped children into regular school programs ... is not only a laudable goal but is also ***a requirement of the Act.***" *M.S. ex rel. Simchick v. Fairfax County School Bd.,* 553 F.3d 315, 327 (4th Cir. 2009) (emphasis added)(citing, *DeVries v. Fairfax County Sch. Bd.,* 882 F.2d 876, 878 (4th Cir.1989)).

Thus, Judge Lassiters conclusions of law are consistent with the governing law. Likewise, as explained below, Judge Lassiter's findings of fact are not "clearly contrary" to the evidence in the record.

1. Judge Lassiter's Factual Findings Are Not "Clearly Contrary" to the Evidence in the Record.

Applying those principles to this case, Judge Lassiter found that the IEP Team did not engage in the LRE process described above (or any process resembling it) during any of the IEP meetings. Three of the four IEP meetings at issue are recorded, and none of them contain any evidence of a discussion, much less the deductive process by which various placements on the continuum were eliminated pursuant to the LRE standard. Ex P 9, 10, 11, P71/R2, P37/R4, R29, R33 (the collection of audio recordings and minutes of the IEP meetings).

Based on this (and much other) evidence, Judge Lassiter correctly concluded that no meaningful LRE discussion whatsoever took place at the only unrecorded meeting by crediting the unequivocal testimony of OM's witnesses who participated in that IEP meeting, all of whom unequivocally asserted that no LRE discussion or deductive process took place. Further, while the County's witnesses obfuscated the questioning or their answers on this point, none of them testified to the contrary. And consistent with Judge Lassiter's findings, the minutes of that IEP meeting do not memorialize any exchange of ideas

with respect to less restrictive placements or any form of deductive LRE analysis.

Judge Lassiter found that, instead of considering any less restrictive placements for OM than the Pathways Playgroup for children with disabilities, Lisa Combs (the Board's LEA Representative) simply declared—without entertaining any discussion or input from the Team—that OM's placement would be Pathways and that OM's entire educational plan would be implemented in two 90-minute sessions per week. Judge Lassiter also found it significant that the Board's IEP Team representatives were incapable of justifying their uniform and unwavering determination that Pathways was the least restrictive placement in which OM could be educated satisfactorily. See discussion, *infra*, at §I(C)(4) ("The Board's Employee–Experts' Suffer From Judge Lassiter's Credibility Findings on this Issue").

The audio recordings of the IEP meetings also make clear that Petitioners strenuously objected to the decision to educate OM in the Pathways Playgroup; and, further, that Petitioners and their advocates made repeated requests for an explanation or justification for the restrictive setting the County proposed. Ex P.10 (Audio of July 30 Beginning at : 17:15-19:35). Judge Lassiter found that the Board did not present any testimony contradicting Petitioner's evidence that the IEP Team never justified its more restrictive placement decision. Order, Findings of Fact, ¶115, at 28. Based in part on that finding, and upon the direct testimony of OM's witnesses, Judge Lassiter concluded that the County failed to apply the LRE standard or engage in the deductive process it requires when making OM's placement decision. Id., Conclusions of Law ¶42, at 39. In fact, nothing in the record pinpoints exactly when or how the decision was made. As discussed below, the record is clear with respect to *who* made the placement decisions for OM.

Judge Lassiter found that, at the time the IEP was decided, the evidence that OM could be satisfactorily educated in a regular education setting with appropriate supports and services was overwhelming. Order, Conclusions of Law ¶43, at 39; *see also, id.* 42-49, at 39-41. OM was educated satisfactorily in a regular education classroom where the teacher was trained in special education. *See, id.* (citing Tr. Vol. 2, 171:11-20 (Testimony of NM relating to OM's

enrollment in a school for six weeks after he was diagnosed); Tr. Vol 1, 47:4-24 (Testimony of AM).)

Furthermore, several of the County's representatives on OM's IEP Team enthusiastically supported OM's placement in a regular education setting (so long as AM and NM paid for it privately). For example, Lisa Combs enthusiastically supported OM's parents' effort to obtain a private preschool placement for OM and agreed (at the time) that the County could effectively provide OM their offered services in any private regular preschool setting OM's parents could obtain. (Audio Ex. P10 at 12:225 " That's up in the air. We can do that at our service provider location, which is Pathways, we can do it, if he gets accepted in a playgroup or preschool, we can go there."). Other County representatives on the team readily agreed and expressed no concerns about whether OM could be educated satisfactorily at a *private* preschool (at the time, it appears to the Court that they believed such a placement would be paid for by OM's parents). For example, Mabel Tyberg stated "We don't disagree with the preschool setting," *Id*. at 20:20, and Lisa Combs plainly stated that the County believed OM could be satisfactorily educated in a regular preschool. Ms. Combs, however, asserted that the County was not obliged to provide preschool educational services to OM. See, *id*., at 28:40; *id*. at 29:11 "If he was in a preschool we would go there."

The audio recordings reveal that OM's IEP Team was, in fact, in agreement that they believed OM could be educated satisfactorily in a regular education preschool setting; the disagreement on the County's part was over whether it was required to offer OM preschool services. Their statements reflect their position that they believed they had no obligation to provide preschool education generally, and therefore the County had no obligation to educate OM in a regular education environment. *See id*. at 29-31 For example, Mabel Tyberg stated that the County was required only to provide OM with "the specially designed instruction" which "is the part that is at no cost, and it would be at no cost wherever he is." Ex. P10 at 30:01. Ms. Tyberg was not alone in this position; the County's LEA Representative at the July 30 IEP meeting also contended (incorrectly) during the Team meetings that the County had no obligation to offer OM enrollment in one of the regular preschool settings administered by the County. For example, Ms. Combs made the following statement at the July 30 IEP Team meeting:

> *We do not have 3 year old preschool classrooms. We have a classroom that serves 3 year olds at Pathways. It's our most severe children….We are only allowed to have 4 year old classrooms in our schools. There are some head start 3 year olds. Now they're dispersed around the county, I don't know where they are. Because, I mean, I don't have any jurisdiction over Head Start….School systems do not provide daycare or preschool services for children. We provide the specialized instruction based on the IEP*

Id. at 15:40-17. As discussed below, Ms. Tyberg's position is unsupportable in light of the goals that the IEP Team had agreed upon for OM (which required a classroom environment that included typically developing peers). For purposes of this discussion, however, Ms. Tyberg's and Ms. Combs statements evince an incorrect application of the law that applied to the County in providing OM with a FAPE. Specifically, the IDEA requires that States who have a policy of offering preschool education to non-disabled children must make preschool education available to children with disabilities, and, further, the IDEA requires those states to do so consistent with the FAPE and LRE requirements applicable to children enrolled in grades K through 12. 34 CFR 300.114-120, see e.g. "In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must…" 34 CFR 300.116

There is no question that this state has adopted a policy of educating preschool aged children; and the testimony revealed that the County, in fact, provides preschool education to non-disabled children. *See, e.g.,* Tr. vol 5, 835:10-836:14 (March 26, 2009) (Milinda Grenard described a number of regular education preschool placements throughout the County and conceded that there is such a preschool classroom in Pathways Elementary itself). The Court notes that the testimony about the availability of regular education preschool classes offered by the County was not conveyed to NM, AM, or their advocates during the recorded IEP meetings; in fact, it might appear from those recordings alone that the County did not have any such placements available. There is no dispute that the County never offered any of their regular education preschool classes were ever offered to OM as a placement by the County.

a. The County failed to consider whether OM could be educated satisfactorily in an environment that was less restrictive than the highly restrictive Pathways Playgroup.

Judge Lassiter correctly observed the IDEA demands that, before proposing to educate a child with a disability outside of the regular education environment, the school must justify its restrictiveness. Specifically, the IDEA requires an IEP Team to arrive at such a conclusion deductively, through the process of eliminating less restrictive alternatives on the continuum of educational placements. 34 CFR §300.114-120.[2] That deductive process is required by the LRE mandate. *See*, 34 CFR §114. To comply with the LRE mandate, the threshold question relating to the placement of any child with a disability that the IEP Team must answer is whether the child could be educated "in regular classes with the use of supplementary aids and services [could] not be achieved satisfactorily." 20 U.S.C.A. § 1412(a)(5)(A). If the child can be satisfactorily educated in a regular education setting with the use of supplementary aids and services, he must be educated in that setting. *Id*. Judge Lassiter correctly identified these governing principles, expressly stating them in the Final Order.

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[2] 34 CFR § 300.116(a)(2), entitled "Placements," requires that "[i]n determining the educational placement of a child with a disability, *including a preschool child with a disability*, each public agency must ensure that— The placement decision—is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118." The "LRE Provisions," in turn, recite the statutory requirement that (2) Each public agency must ensure that—"(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §114 (emphasis added).

b. The IEP Required No Modifications When the County Eventually Decided to Implement OM's IEP in his Private, Regular Education Setting.

Judge Lassiter also relied upon the fact that, when the County initiated OM's services in late October, the IEP Team was not reconvened to modify OM's IEP to account for a very different setting than the Pathways Playgroup. This is powerful circumstantial evidence of the Board's conduct from which Judge Lassiter correctly used as additional support for her conclusion that the Board's IEP Team members did not seriously doubt that OM could be educated satisfactorily in a regular education setting. If doubts existed, the team would have reconvened to at least consider whether additional supports or specialized instruction would be required to educate OM satisfactorily in the regular education environment. There was no IEP Team meeting to discuss the radically different placement in which the services would be delivered. There was no alteration of the IEP itself to address delivery in a regular classroom. There was simply no discussion as a Team about the need for modifications of the proposed services in light of the dramatic switch from delivery in the most restrictive environment on the continuum to delivery of the same services in the least restrictive environment on the continuum. The evidence shows that the special education providers assigned to OM were simply released by Milinda Grenard to start serving OM in his private preschool, and they began serving OM there. Tr., Vol. 7, 1207:19-1208:14 (April 3, 2009) (Testimony of Lisa Combs). As will be discussed below, they did so with uniform success. The absence of any significant alteration, modification, or even a rethinking of the delivery of services is compelling evidence that, when they developed the IEP, OM's IEP Team believed that OM could be satisfactorily educated in a regular education setting.

While it is clear that the County was steadfast in refusing to offer OM a placement in one of the County's regular education preschool classrooms (e.g., one of the regular education preschool classes also housed in Pathways), it is not clear why. OM's parents and advocates repeatedly made direct inquiries about what regular education placements the County offered. Ex. P10 at 13:50; (July 30 IEP Meeting)). Uniformly, the County's IEP Team members uniformly failed or refused to reveal to OM's parents and advocates that there

were many regular education preschool placements in the County. (Id. at 15:40-19;).

Judge Lassiter noted that a very different picture emerged at the hearing, however. Order, Conclusions of Law ¶47, at 40. Judge Lassiter noted, by way of example, that Melinda Grenard revealed in testimony that, at the time OM's IEP was being developed, the County had preschool EC placements at Pathways and "More at Four and Head Start classrooms were there ." Tr. 835:10-836:14 (Testimony of Melinda Grenard); but they also other Title I rooms and placed children at Developmental Day Centers. *Id.* at 874:13-875:11. Other Board witnesses confirmed this during their testimony; in fact Ms. Combs admitted OM could have been placed in Title I and Head Start Classrooms. (Tr., Vol., 6, 1130:6-11; 137:6-1139:25 (Testimony of Lisa Combs). The County's failure to reveal the existence of regular education preschool classrooms caused the IEP Team was a pretense employed to bypass the LRE methodology required under the Act. (It was not well understood, presumably, that the pretense, even if true, would not excuse the Board's failure to educate OM in the Least Restrictive Environment).

The testimony of witnesses clearly corroborates these findings: even the Board's witnesses conceded explained that discussion went directly from the IEP's goals and objectives to the amount of time required to implement the IEP – there was no discussion of the services required to make that happen or the appropriate setting in which to do so. Tr. vol . 7, 1324:8-20 (April 3, 2009) (Testimony of Kristin Seawell); see also, Tr. 718:17-719:23 (Testimony of Casey Palmer (testifying that there was "no conversation amongst the group about how OM would be able to—what would be necessary to enable OM to make progress towards these specific goals and objectives. Judge Lassiter expressly relied on this and other evidence to support her conclusion that the Board failed to consider less restrictive alternatives to the highly restrictive Pathways Playgroup, Order, Findings of Fact, ¶¶37-50, at 14-16.

Thus, the Board's representatives on OM's IEP Team simply avoided the question whether "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," 20 U.S.C.A. § 1412(a)(5)(A). Instead, they unilaterally asserted that the

Board would only offer an IEP that removed OM from the regular education setting completely, and that the offer was final. Order, Conclusions of Law ¶36, at 38.

Judge Lassiter's findings and conclusions in this regard are supported by overwhelming evidence in the record, and they are consistent with the governing law.

c. The audio recordings of the IEP Meetings Provide Additional, Compelling Evidence to Support Judge Lassiter's Findings

The audio recording of the IEP meetings also reveals that the County's Team members determined OM's placement by standing the LRE requirement on its head. Ex. P10. And, when OM's parents as advocates pressed them on the point, the County's Team members turned the requirement inside out, contending that, by educating OM, they are "taking him out" of his "natural environment." (See, e.g., Tr. Vol 5, 834:25-835:6 (March 27, 2009) (Testimony of Milinda Grenard)); id 923:1-23 (Testimony of Milinda Grenard); s*ee also* Tr. Vol. 7, 1372:21-1373:11 (April 3, 2009) (Testimony of Mabel Tyberg); Tr. Vol. 8, 1460:18-25 (April 6, 2009) (Testimony of Whitney Griffin) Tr. Vol 7, 1305:30-1307:9 (April 3, 2009) (Testimony of Kristin Seawell).

d. At the hearing, the Board's Witnesses Continued to Engage in Obfuscation on the Issue.

During the testimony in this matter, Respondent's witness exhibited a nearly uniform resistance to articulating their understanding of the LRE standard. Some appeared bewildered when they were given two hypothetical placements and asked to identify which was more restrictive environment than the other. See, e.g., Id (Testimony of Whitey Griffin). Others, simply insisted that they could not understand the question, no matter how many times Petitioners' counsel rephrased the question. See, e.g., Tr. Vol 7, 1304:4-20 (April 3, 2009) (Testimony of Kristin Seawell) (Ms. Seawell was confounded to the point she claimed not to understand the question when she was asked: "Is there a difference between the phrase "least restrictive environment" and "least restrictive appropriate environment" in your view?"). The same "confusion" persisted throughout the testimony of the Board's other witnesses. *See, e.g.,* Tr.,1465:14-1472:12 (April 6,

2009) (Testimony of Whitney Griffin). In this particular instance the answers became so convoluted that the Court interjected, incredulously asking if the witness really could not understand the question:

> *THE COURT: Ms. Griffin, do you understand his question, but you don't know the answer or you don't understand his question?"*
>
> *THE WITNESS: I don't understand what else he is asking for me to answer.*
>
> *THE COURT: So you understand the question, but you don't know the answer or you don't understand the question?*

Id.1471:7-14.

e. The Board's own correspondence belies the its attempts at the hearing to suggest a different LRE standard applies to preschool children with disabilities.

All of the Board's witnesses obfuscation appears to be directed toward an (albeit clumsy) attempt by the Board to confuse the issue by suggesting there is a different LRE standard for preschool children with disabilities than the standard that applies to all other children with disabilities. However, documents prepared by the Board prior to the impasse that gave rise to this case make it plainly obvious that no such difference exists, and the Board's employees plainly stated that in correspondence to NM.

For example, Nadine Kubiak, then director of EC services, clearly articulated the standard to be applied in her email to NM. Exh. P.15 (Ms. Kubiak wrote, "[i]n terms of an actual special education preschool class, IDEA requires that children with identified delays be supported in the least restrictive setting in which they can be successful. A special education preschool classroom is considered the most restrictive setting and includes only children with identified delays."); *see id.* ("There is a continuum of service delivery to children who do qualify for special education and related services which includes supporting children in community childcare or preschool settings, coming to us for therapies or participation in a playgroup, and center based options. These will be discussed as we complete our observations, etc. and determine eligibility.") Thus, the Board is plainly not confused

about the fact that the same LRE standard that applies to "K-12" children also applies to preschool children. Judge Lassiter, of course, declined the Board's invitation to carve out an such novel standard to apply to preschoolers.

***

The evidence is overwhelming that Judge Lassiter correctly concluded that OM and his parents proved, by preponderance of the evidence that the County's IEP deprived OM of his right to a FAPE by failing to offer an IEP that proposed to educate OM the Least Restrictive Environment. The review need go no further on this element of OM's reimbursement claim; this well-supported conclusion—standing alone—is sufficient to establish that OM met his burden of proving a deprivation of his right to a FAPE.

(C) IT WAS NOT CLEARLY CONTRARY TO THE EVIDENCE OR THE GOVERNING LAW FOR JUDGE LASSITER TO CONCLUDE THAT THE BOARD FAILED TO OFFER AN IEP THAT WAS REASONABLY CALCULATED TO PROVIDE OM WITH MEANINGFUL EDUCATIONAL BENEFIT.

Judge Lassiter agreed with OM and his parents in concluding that the Board "failed to provide OM with a free appropriate public education through an IEP that was reasonably calculated to provide OM with educational benefit." Order, Final Decision ¶1(a)-(b). This conclusion was supported by the governing law and not "clearly contrary" to the evidence in the record.

1. Judge Lassiter's Legal Conclusions Are Consistent with the Governing Law.

Judge Lassiter concluded that Petitioner's had carried their burden of proving their substantive deficiency claim by a preponderance of the evidence. Order, Conclusions of Law ¶20, at 36 ("a preponderance of the evidence showed that Respondent's IEP deprived OM of a FAPE. because it was substantively deficient."

In reaching this conclusion, Judge Lassiter explicitly acknowledged that the legal standard for establishing an IEP's substantive deficiency is a difficult one. Judge Lassiter correctly noted that to establish a substantive deficiency claim, "a petitioner must show

that the IEP offered by the LEA is not 'reasonably calculated to enable the child to meet the child's needs.'" Id. (quoting *Bd.* of *Educ. v. Rowley.* 458 U.S. 176, 207 (1982)). At the same time, Judge Lassiter correctly observed that, in this Circuit, the Rowley standard requires more than token benefits:

> *Our Circuit has sharply declined repeated invitations by the schools read the Rowley standard as requiring token or nominal academic advancement. Id. ¶21 at 36 (citing Carter v. Florence County Sch. Dist. Four, 950 F.2d 156, 160 (4th Cir. 1991), aff'd, Florence County Sch. Dist. Four v. Carter by and through Carter, 510 U.S. 7, 11 (1993) (quoting Hall ex reI. Hall v. Vance County Bd. of Educ., 774 F.2d 529, 536 (4th Cir. 1985) ("Cearly, Congress did not intend that a school system could discharge its duty under the Act by providing a program that produces some minimal academic advancement. no matter how trivial.").*

Id. ¶21, at 36; *see id*, ¶¶22-28, at 36-37 (analyzing the claim under all of the foregoing *Rowley* principles).

Judge Lassiter correctly set the analytical approach to the claim, focusing on OM's educational needs. "To determine whether an IEP is reasonably calculated to meet a child 's needs, this Circuit's analysis requires the Court to, first, identify the child's educational needs, and, second, determine whether the array of services and placement offered were -reasonably calculated" to meet OM's needs." *Id.* ¶22, at 36. Judge Lassiter correctly identified OM's educational "needs" in the IEP Goals and Objectives. Id. ¶23, at 36. This was particularly appropriate because "the parents and Respondent worked on and eventually agreed upon the set of goals and objectives memorialized in OM's IEP." Id. ¶23, at 36. Based upon this correct analytical framework, Judge Lassiter concluded that the "array of services and placement offered were not reasonably calculated to enable OM to meet those needs," id ¶¶24-28, at 36-37. As documented in the Final Order and summarized below, Judge Lassiter's conclusion was not "clearly contrary" to the evidence in the record.

2. Judge Lassiter's Findings are Not "Clearly Contrary" to the Evidence in the Record.

The record is replete with evidence supporting Judge Lassiter's conclusion that OM and his parents had carried their burden of proof on their substantive deficiency claim. For example, Judge Lassiter credited the testimony of OM's witnesses (and not those offered by the Board), and also relied on the text of O.M.'s IEP itself.

With respect to the text of the IEP itself, Judge Lassiter found that the Goals and Objectives to which the Board agreed in OM's IEP required more specialized instruction, related services, immersion with typical peers, and a school day long enough to give OM enough opportunities to generalize the skills he was to learn through the specialized instruction. For example, Judge Lassiter found that:

> *The statements of OM's goals and objectives is notable for its focus on OM's learning how to successfully engage in a regular classroom routine, to make transitions from activity to activity successfully and without experiencing the extreme frustration, outbursts and meltdowns that marked many of his days at St. John's School.*
>
> *In addition. OM's goals and objectives require OM to learn to respond appropriately to appropriate, spontaneous activities and interactions with peers. The overriding import of these goals and objectives is that, to make any progress on them at all, OM would need to be in a setting that provided an significant number of transitions. The setting would have to include a significant number of peers whose classroom routine he would learn to join, and who would also engage in a significant number of spontaneous (appropriate) interactions and activities. In addition, OM would need to be present in that setting on a consistent "regular" basis.*

Order, Findings of Fact ¶ 25, at 36.

Further, Judge Lassiter explained that OM's IEP Goals and Objectives, by their nature, required the Board to provide OM far more time in an educational environment than the IEP offered.

> *In light of these goals and objectives, and in order for OM to make any progress at all In developing his peer interaction skills, socialization skills, and pragmatic language skills, OM require[d] specialized instruction and related services designed to (1) extinguish OM's maladaptive behaviors, and then (2) replace them with adaptive behaviors. Specifically, to make any progress in that domain require[d] specialized instruction designed to (1) teach OM the adaptive replacement behaviors and adaptive socialization skills; (2) facilitate OM's integration of those behaviors and skills; and then (3) to teach OM how to generalize those behaviors and skills across multiple settings and in varied circumstances. As a result, the IEP's statement of OM's educational needs demands a significant level of specialized instruction in those areas.*

Id. ¶26, at 36.

The last requirement of OM's Goals and Objectives—that OM learn to "generalize those behaviors and skills across multiple setting and in varied circumstances" requires extended time in the educational environment for purposes of specialized instruction; instead, it was time *in addition to and apart from the direct instruction.* The IEP required it because "so many of OM's goals [were] directed at his impairments and delays in socialization skills and pragmatic language. *Id.* (citing the IEP itself, Pet Ex 1).Having found those facts in reliance upon the IEP itself and the testimony of OM's witnesses, Judge Lassiter concluded that

> *a preponderance of the evidence showed that OM's IEP did not provide sufficient provision tor the specialized instruction that was necessary to enable OM to make progress on those goals. The IEP provides only for two, 90-minute sessions per week with 30 minutes of each session devoted to providing OM with Occupational Therapy services intended to enable OM La make progress on goals unrelated to the socialization and pragmatic language skills that dominate OM's IEP's statement of needs.*

Id. ¶27, at 36-37.

These conclusions were not only based upon the agreed-upon IEP goals and objectives (although that is a more than sufficient basis to support them). The conclusions were also based upon Judge Lassiter's express credibility determinations as to the witnesses who testified on these points. Judge Lassiter found, for example that "Petitioners' witnesses offered compelling testimony relating to the insufficiency of the services offered in OM's IEP." *Id.* ¶28, at 37 (citing Tr. 743:1-746:12 (Testimony of Casey Palmer); Tr. 514:11-517:3 (Testimony of Dorothy Hoyle; Tr, vol. 4, 590:14-592:10 (Testimony of Elizabeth Fouts). Thus, Judge Lassiter found OM's witnesses (and not the Board's) "to be credible and persuasive." Judge Lassiter noted that Dorothy Hoyle's testimony in particular was "persuasive given that she worked with OM in the socialization and behavioral domain more than any other professional." *Id.*

3. The Board's Argument to Judge Lassiter on this Issue Only Invited Attention to Other Glaring Problems With the Board's Case

In its argument at the close of the case, the Board trumpeted the only expert the Board actually produced who was not an employee of the Board: Dr. Sally Flagler. The Board insisted that Judge Lassiter look carefully at Dr. Flagler's testimony. See Closing Brief for the Board, at 2. The Board encouraged Judge Lassiter to give "[p]articular weight … to the testimony of Dr. Sally Flagler, who was by far the most experienced and knowledgeable witness in the hearing and is not an employee of the Respondent."

Judge Lassiter plainly looked hard at Dr. Flagler's testimony. But the evidence Judge Lassiter found there impugned the Board's argument. It appears that the Board failed to fully appreciate the evidence elicited on OM's cross-examination of Dr. Flagler. Judge Lassiter assessed Dr. Flager's testimony and concluded that Dr. Flagler's testimony "undermined Flagler undermined the IEP team members' testimony regarding the basis for the uniform decision to offer OM 3 hours per week of special education services" at Pathways. Order, Findings of Fact ¶114, at 26. Judge Lassiter supports this findings by an extensive discussion of the testimony OM elicited from Dr. Flagler on cross-examination. The testimony related to an important chapter Dr. Flagler authoried in an important book. Judge Lassiter summarized Dr. Flagler's testimony, and explained how Dr.

Flagler, in fact, undermined the rest of the Board's witnesses on the question of whether the Board's proposed placement was appropriate. Judge Lassiter explained:

> *[O]n cross-examination, Dr. Flagler admitted that the basis of her opinion was limited to her review of the documents and materials Respondent provided to her. Dr. Flagler never reviewed, and thus, never considered any of the recent evaluations of OMM, recent progress notes by OMM's providers, or Petitioners' experts' opinions in forming her opinions. Without hearing both sides of these issues, Flagler was prevented from being able to assess completely and properly ,appropriateness of Respondent's proposed IEP placement and services as the law requires.*
>
> *Dr. Flagler acknowledged that she had never worked with OMM or observed him in any setting, including an educational one. Dr. Flagler had advised Respondent that she was willing to observe OMM. but Respondent declined her invitation.*
>
> *Also on cross-examination, Dr. Flagler explained how she, Lee Marcus, and Susan Robinson co-authored a chapter in an important treatise entitled Psychological and Developmental Assessment of Children with Disabilities, Dr. Flagler's chapter was devoted to the evaluation, assessment, and testing of children with autism. Specifically, the chapter Dr. Flagler authored was devoted exclusively to the testing and evaluation of children on the autism spectrum.*
>
> *Dr Flagler's chapter opened with a discussion of a child she called "Tommy." Dr. Flagler agreed that the purpose of the chapter's discussion of "Tommy'" was to highlight one recurring problem schools face in evaluating children who are on the "high functioning"' end of the autism spectrum. Tommy was extremely bright, and his very high cognitive abilities masked the very serious features of Tommy's autism.*
>
> *Through their focused discussion of "Tommy," Dr. Flagler and her coauthors explained the frequent failure of educators to assess accurately the*

> *existence and severity of autistic symptoms in children who are high functioning.*
>
> *Dr. Flagler confirmed that in her opinion, OMM was very much like "Tommy" as he, too, was an "extremely bright," high-functioning child on the autism spectrum. Specifically, Dr. Flagler opined that the difficulties experienced by a highly intelligent child with Autism, like OMM, are not likely to be observed, much less assessed if a child like Tommy is observed for only a brief interval, in one setting.*
>
> *Further, in practice, the challenges of accurately assessing the educational needs of high-functioning autistic children is compounded when the brief observations are conducted in a "structured environment." Dr. Flagler confirmed that the Pathways playgroup where OMM was observed [observations heavily relied upon by the Board's IEP Team members], qualified as such a "structured environment."*
>
> *Dr. Flagler further explained that "comprehensive observations conducted in varied and unstructured situations are required to assess properly the areas of need for high-functioning autistic children like "Tommy" and OMM. Such observations "may pinpoint the areas of difficulty that affect child's performance." "Quick observations [a]re not only inadequate tools for assessing the needs of a high functioning autistic child like OMM, they are often counter-productive, because the evaluation design will often mask the characteristics (or existence) of a high-functioning child's autistic characteristics.*
>
> ***Based on such testimony, Dr. Flagler undermined the IEP team members' testimony regarding the basis for the uniform decision to offer OM 3 hours per week of special education services***.

Order, Conclusions of Law ¶¶108-114, at 26-27.

Therefore, the one witness that the Board trumpeted as the most persuasive and most "knowledgeable" served only to "undermine" the testimony of the Board's other witnesses. As explained above, the Board's other non-employee witness, Dr. Naftel, was adopted by OM

after the Board received Dr. Naftel's report of her testing of OM in the midst of the proceedings. The Board's remaining expert witness (presumably on the subject of the appropriateness of the Board's IEP) was scheduled to testify on the last day the Board would present evidence, but the expert did not show.

4. The Board's Employee–Experts' Suffer From Judge Lassiter's Credibility Findings on this Issue.

The Board argued that Judge Lassiter should resolve all conflicting testimony between the Board's witnesses and OM's in favor of the Board's witnesses because, the Board contended, the Board's witnesses were more credible. But Judge Lassiter concluded precisely the opposite, finding OM's witnesses more credible than the Boards. These credibility findings were both implicit credibility determinations and explicit credibility determinations. Judge Lassiter's Final Order documents her findings well enough to easily identify both the implicit and explicit credibility determinations. While there is no requirement in IDEA cases for an ALJ to explain the basis of credibility determinations, Judge Lassiter makes the basis of many of the credibility determinations plain.

To take one important example, Judge Lassiter expressly found that, on the issue of the propriety of the Board's IEP, the Board's IEP Team representatives gave the same, canned response when asked to explain their reasoning for offering only three hours in the Pathways Playgroup. Leaving aside the non-persuasiveness of their responses, Judge Lassiter correctly identified that, implausibly, they all gave the same response to an open-ended, rather complex question. Each of the Board's witnesses responded by asserting that the Board's IEP was appropriate for OM because "OM was bright" "a quick learner," and some of OM's goals "were overlapping" and/or "could be worked on simultaneously." The following excerpts illuminate the disconcerting trend in the testimony of the Board's witnesses (who were subject to Judge Lassiter's Order sequestering them from the proceedings):

> *Q. Tell me how you calculated that that level of service was going to meet all of those goals.*

> *A Based on O.'s strengths--you know, he has got good memory. He's a quick learner. He doesn't require tons of hours because of that. The goals overlap and can be worked on simultaneously …*

Tr. 1315 (Testimony of Kristin Seawell).

> *Q: And how did the team arrive at the decision that three hours was appropriate?*
>
> *A: We looked at the goals. A lot of the goals were overlapping. A lot of the goals could be worked on simultaneously, and we had information just how bright OM was and that he was a very quick learner. …*
>
> *Q: How did you arrive at three hours?*
>
> *A The information we had--and again, O.--we had information that O. is a bright, quick learner, and if you look closely at those goals and objectives, a lot of them are overlapping.*

Tr. 1121; 1150 (Testimony of Lisa Combs)

> *Q: And why did you think that three hours--that OM's goals could be implemented in three hours?*
>
> *A: I think that there was a range of goals, some of them were overlapping, and that he's a fast learner and he's high functioning. So I thought that three hours was going to be enough …*

Tr. 1357 (Testimony of Mabel Tyberg)

Perhaps more revealing is the testimony elicited from these witnesses when they were asked to explain what they mean by "overlapping goals" or to identify examples, but the foregoing is enough to illuminate just one of the reasons Judge Lassiter identified in making credibility determinations in favor of OM's witnesses and adverse to the Board's.

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Therefore, Judge Lassiter's conclusion that a preponderance of the evidence showed that the Board's IEP was substantively deficient is consistent with the governing law and is not "clearly contrary" to the evidence in the record.

(D) IT WAS NOT CLEARLY CONTRARY TO THE EVIDENCE OR THE GOVERNING LAW TO CONCLUDE THAT BOARD DEPRIVED OM OF A FAPE BY DELEGATING TO OUTSIDERS TO OM'S IEP TEAM THE FINAL AUTHORITY TO DETERMINE THE APPROPRIATE PLACEMENT AND SERVICES FOR OM.

Judge Lassiter concluded that the Board deprived OM of a FAPE by delegating to an outsider to OM's IEP Team the authority to unilaterally determine what placement and level of services would be appropriate for OM. *See* Order, Conclusions of Law ¶ 35-37, at 38-39. This conclusion involves two findings: First, that the Board violated a procedural requirement of the IDEA, and, second, that the procedural violation caused the deprivation of OM's parents' right to participate in the development of their child's IEP. *See, id.* As explained below, these conclusions are not "clearly contrary" to the evidence in the record and they are supported by the law of this Circuit.

1. Judge Lassiter's Conclusion of Law Are Plainly Consistent with the Governing Law.

To support her legal conclusion, Judge Lassiter explicitly recognized that the IDEA provides "procedural safeguards to insure the full participation of the parents and proper resolution of substantive disagreements." Id. ¶37, at 35 (quoting *School Com. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985) (internal quotation marks omitted) ("*Burlington*"). "Congress placed every bit as much emphasis on compliance with procedures giving parents ... a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard." Id. (quoting *Rowley*, 458 U.S. at 205-06, 102 S.Ct. 3034). This reflects, as the Supreme Court has long recognized, that "[t]he core of the statute ... is the cooperative process that it establishes between parents and schools." Schaffer, 546 U.S. at 53, 126 S.Ct. 528 (citing Rowley, 458 U.S. at 205-06, 102 S.Ct. 3034).

The IDEA authorizes hearing officers and courts to award equitable remedies for violations of its procedural requirements where those amount to a deprivation of the right to a free appropriate public education. *Fitzgerald v. Fairfax Co. Sch. Bd.*, 556 F.Supp.2d 543, 552 (E.D.Va. 2008). It is clear that the showing of a procedural violation of the IDEA, standing alone, is not sufficient to show a school failed to provide a child with a FAPE. *Id.* It follows that a "presumably correct finding" concerning a child with a disability will not be overturned simply because the IDEA's procedural requirements were not strictly followed. *DiBuo v. Bd. of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir.2002) (emphasis in original).

Thus, in the event that a court finds a procedural violation of the IDEA, the court must then determine caused a loss or deprivation; specifically, the court must determine whether the procedural violation either (1) resulted in the loss of an educational opportunity for the disabled child, or (2) deprived the child's parents of the right to meaningfully participate in the development of the child's IEP. *M.M. ex rel. D.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 533 (4th Cir.2002); *see*, 20 U.S.C. §1415(f)(3)(E)(ii); *Fitzgerald*, 556 F.Supp.2d 543, 552 (quoting *Farrin v. Maine Sch. Admin. Dist.* No. 59, 165 F.Supp.2d 37, 43-44 (D.Me.2001) ("When the crux of an appeal is a procedural blunder in applying the IDEA, a harmless error standard applies.")). Judge Lassiter identified all of these governing principles, citing to all of the foregoing cases, in her Final Order (Conclusions of Law ¶32-33, at 38). These principles are the governing law (they are clearly not contrary to it), and Judge Lassiter correctly applied them to the facts that she found.

2. Judge Lassiter's Findings are Not "Clearly Contrary" to the Evidence in the Record.

Judge Lassiter found that the Board did, in fact, violate the IDEA's procedural requirements in a manner that resulted in the deprivations of educational opportunities for OM or the deprivation of AM and NM's right to participate in the development of OM's IEP. Conclusions of Law ¶32-35, at 38. Judge Lassiter documents many of the evidentiary sources in the record that support this conclusion; to be sure, it is not "clearly contrary" to the evidence in the record.

OM and his parents established a preponderance of the evidence that the County improperly delegated the authority to make the final decision with respect to its proposed IEP to an outsider to the IEP Team. Id. ¶35, at 38. Petitioner's theory presented the factual question of whether the Team members were exercising their own independent thought and judgment in offering and then refusing to modify the July 30 IEP for OM, or, on the other hand, whether the Team members were essentially following a directive made by someone who did not participate as a member of the IEP Team. Id, ¶34, at 38. This is a question of the intent and motivations of the County's representatives on the IEP Team, and, like any question of intent, it is not susceptible to direct proof. *Id.*

Thus, Judge Lassiter correctly inferred this conclusion from the relevant facts and circumstance established by the evidence. *See, e.g., id.* ¶¶34-38, at 38. And Judge Lassiter correctly concluded that the preponderance of the evidence establishes that an outsider to the IEP Team determined the placement and services would be offered in OM's IEP. Judge Lassiter's conclusion is not "clearly contrary" to the evidence in the record. As explained below, in reaching the conclusion Judge Lassiter relied upon multiple sources of evidence, including, for example, overt admissions made by the Board's witnesses, the credibility of OM's IEP Team members who testified at the hearing, and the audio recordings of the IEP meetings.

a. Judge Lassiter Identified the Outsider Who Directed the IEP Team's Decisions.

Judge Lassiter found that Melinda Grenard was the outsider to the IEP Team who directed the Board's Team members to offer only two 90-minute sessions at the Pathways Playgroup. Findings of Fact ¶35, at 38. Indeed, Judge Lassiter found that this was not Ms. Grenard's only improper directive. Id. Judge Lassiter also found, for example, that:

> *Ms. Grenard is also Respondent's representative who directed Ms. Combs [the Board's LEA] not to respond to NM's repeated written requests for information to assist her in coordinating delivery of services to OM in a private setting. And. It was Ms. Grenard also. who instructed Ms. Combs not to*

> *advise NM that she had been instructed not to respond [to NM's requests for information].*

Id. While there was some evidence suggesting that Ms. Grenard instructed by the Board's counsel to make some or all of her improper directives, Judge Lassiter correctly concluded that the question need not be resolved, as both were outsiders to the IEP Team at all relevant times. Id. ("While additional testimony revealed that Ms Grenard herself was subject to instruction by Respondent's counsel, the Court need not resolve that factual issue. Both Ms. Grenard and the County's counsel were outsiders to the IEP Team at the time the County's final offer of services was made to Petitioners on July 30, 2008.").

b. Judge Lassiter Conclusions are Supported by Admissions Made by the Board's Witnesses

Judge Lassiter relied, in part, upon disturbing admissions made by the Board's witnesses that much of the Board representative's conduct with respect to their offer of services and placement were manipulated by the Board's Director of Exceptional Children's Services, Melinda Grenard. For example, as Judge Lassiter explicitly observed:

> *[A]t the hearing, the Board's LEA Representative, Lisa Combs, admitted that she deliberately did not respond in any way to NM's emails [requesting an explanation of the reasons for offering only three hours per week and only in Pathways] and requesting guidance on how Respondent would deliver the offered IEP services to OM in a private regular preschool setting. Instead, Ms. Combs acknowledged that her superior, Milinda Grenard. directed Combs not to respond to any of NM's inquiries. Ms. Grenard also directed Combs not to advise NM that she was not going to respond to NM's email requests.*

Order, Findings of Fact, ¶70, at 20. (citing Tr. 1156:25-1159:12 (Testimony of Lisa Combs). Ms. Grenard was the "official with policymaking authority regarding the provision of Exceptional Children's services to children in Orange county." Id. Judge Lassiter also relied upon the fact that Ms. Grenard admitted that she directed the Board's LEA not to respond at all to NM's foregoing emails, and not to advise NM that Combs had been directed not respond to NM's

requests for an explanation of how the Board's Team members arrived at their final offer of two 90-minute sessions at the Pathways playgroup per week. Id. (citing Tr. Vol. 5, 829:18-830:13; 851 ;14-854:17 (Testimony of Melinda Grenard), and Pet. Exh. 11 (Audio recording of the Oct. 13, 2008 IEP Meeting, beginning 105:15; 1:10:50).

Grenard explained that that she was acting on the advice of counsel when she instructed Ms. Combs not to respond to NM's emails. She stated:

> *Q: And let's be clear. Was it you or your attomey who instructed you give the instruction not to respond to Mrs. M.'s [e-mail] requests for information … Was that you or was that somebody else?*
>
> *A: I was acting on advice of the attorney when I—*
>
> *Q: But aren't you the expert?*
>
> *A: Yes, I am, but I'm not an attorney.*

Id. ¶72, at 20 (quoting Tr. Vol. 5, 89:1-89:8). Judge Lassiter excerpted this remarkable exchange in her Final Order, and properly relied upon it and the foregoing evidence to conclude that Melinda Grenard—an outsider to the IEP Team—directed her subordinates on the IEP team to offer OM only two 90-minute sessions in the Pathways playgroup. That would be ample evidence to establish that Judge Lassiter's findings are not "clearly contrary" to the evidence, but there is more.

c. The Board's IEP Team Members Uniformly and Unilaterally Declared the Appropriate Placement and Level of Services—With No Discussion At All.

Judge Lassiter also concluded that "[a] preponderance of the evidence showed that after that. the team's discussion immediately moved from the goals and objectives to the time required to implement" them. Order, 14. Judge Lassiter based her conclusion upon, among other things, the testimony of Casey Palmer, and an admission made by Kristin Seawell, one of the Board's representatives on OM's IEP Team.

Specifically, Judge Lassiter credited Casey Palmer's testimony that "there was no conversation amongst the group about how OM

would be able to—what would be necessary to enable OM—to make progress towards these specific goals and objectives" that had just been established; "in other words. the team did not discuss how long it would take to work on these goals or the appropriate location." Id. ¶37(a)-(b). Judge Lassiter noted that this testimony was significant in light of "the stress given by the goals regarding 'typically developing peers' and a 'daily routine.' " *Id*. (citing Tr., 716:7-717:17). "Without this routine, Palmer did not believe that OM was receiving an early intensive education" which is necessary for children on the autism spectrum, and without which OM would not be able to generalize learned behaviors across multiple settings. *Id.* (citing Tr. 711:14-713:5) (Testimony of Casey Palmer). Judge Lassiter accepted the veracity of Ms. Palmer's testimony, and citied the relevant portions of the transcript. *Id*. (citing Tr. Vol. 4, 716:17-719:23 (March 26, 2009) (Testimony of Casey Palmer).

Judge Lassiter also relied upon the admission of Kristin Seawell in concluding that the determination of placement and services was delegated to an outsider to the IEP Team. Ms. Seawell admitted "that there was no other discussion between the discussion of development of OM's goals and the discussion of the amount of time (hours) OM would receive in the Pathways playgroup to implement those goals." Findings of Fact ¶37(c), at 14; see also *id.* ¶37(a)-(c). Judge Lassiter excerpted the following from Ms. Seawell's testimony:

> *Ms. Seawell: We wrote behavior goals—to address his behaviors.*
>
> *Q: Right. And did you talk about the services that would be required in your view for [OM] to make progress on those goals?*
>
> *A: Yes, the amount of hours.*
>
> *Q: Right. You talked about time?*
>
> *A: Uh-huh.*
>
> *Q: So you looked at the goals, talked about time?*
>
> *A: Yes.*
>
> *Q: Nothing in the middle?*
>
> *A: Not that I can recall.*

Id. (citing Tr. Vol. 7, 1324:8-20 (April 3, 2009) (Testimony of Kristin Seawell).

d. None of the Board's IEP Team Members Could Explain How They Arrived at or Justified Their Unilateral, Uniform Conclusion that Two 90-Minute Sessions at The Restrictive Pathways Playgroup was appropriate.

Judge Lassiter also credited the evidence in testimony and the audio recordings of the IEP meetings showing that the Board's team members simply had no real explanation for their uniform and unwavering position that the appropriate placement for OM was two 90-minute sessions in the highly restrictive Pathways playgroup. Specifically, Judge Lassiter noted:

> *Petitioners and their advocates repeatedly requested that Respondents team members provide an explanation or justification for the proposed number of hours of special education and the proposed placement at Pathways playgroup. Petitioners asked how Respondent's learn members arrived at three hours per week of special education services, who was teaching the playgroup class, and what were the staffs' experience.*

Findings of Fact ¶52. This finding is based upon extensive evidence in the record, most notably the audio recordings of the IEP meetings, which Judge Lassiter concluded was the best evidence of what transpired in the IEP meetings. Order, Findings of Fact, ¶ 28(a), at 12. (finding that the audio recordings (Pet. Exhs. 9 and 10) "are the best evidence of what occurred during those meetings.") Based upon those audio recordings and the credibility determinations in favor of OM's witnesses on conflicting testimony, Judge Lassiter concluded:

> *A preponderance of the evidence established that Respondent's team members never provided Petitioners with sufficient justification explaining how it determined three hours per week of special education services per week would help OM meet his IEP goals … [and] their answers to Petitioners specific questions on this specific issue were vague and not individualized to OM and his IEP goals.*

Id. ¶54, at 17. Based upon all of the foregoing, Judge Lassiter concluded that the Board's IEP Team members had no justification for their placement decisions. This conclusion was based upon direct evidence in the record (i.e., the audio recordings of the IEP meetings themselves) as well as Judge Lassiter's implicit and explicit credibility determinations.

Judge Lassiter observed that, in absence of any discussion of the services that OM would require to make progress toward his goals, it is difficult to explain how it was that the team members arrived at the same conclusion (two 90-minute sessions), particularly when there is no evidence that any other amount of time was suggested by any of the County's representatives on the IEP Team. Order, Conclusions of Law ¶36, at 39. Judge Lassiter found that the audio recordings were the most reliable evidence of what occurred during the IEP Meetings, and relied upon them in drawing the inference that all of the Board's Team members took the (exact) same position on placement and services and entertained no discussion of any less restrictive alternatives because OM's placement and level of services had been predetermined by Melinda Grenard's directive. *Id.*

Judge Lassiter found that complete absence of any suggestion of an alternative amount of time from the County's representatives, particularly when the question of what services the goals will require, combined with all of the foregoing is substantial evidence from which the Court draws the inference that the decisions regarding placement and services were not made by the IEP Team in these IEP meetings. The Court finds that Petitioners have established by a preponderance of the evidence that the decisions were made outside of the context of an IEP meeting by individuals who were outsiders to the IEP Team.

IDEA plainly requires that the determinations of placement and services are solely the province of the members of the IEP Team, and that parents have a right to meaningfully participate in those decisions as members of their child's IEP Team. 34 CFR § 300.501. As such, an LEA may not delegate decision-making authority with respect to a child's placement or services to anyone who is not a member of a child's IEP Team. In doing so here, the County violated that procedural requirement of the IDEA. Judge Lassiter found that this procedural violation was no "technical failure" and it was neither trivial or inconsequential. To the contrary, the Judge found that one

consequence of the County's improper delegation of decision making authority over OM's services and placement, was the deprivation of OM's parents' right to participate meaningfully in the decision-making process with respect to OM's IEP placement and services. Judge Lassiter correctly relied on the Fourth Circuit's holdings that a procedural violation of the IDEA is transforms into a deprivation of a FAPE when the procedural violation deprives parents of their right to participate meaningfully in decisions relating to their child's IEP.

***

Therefore, Judge Lassiter's conclusion that OM and his parents established a procedural violation of the IDEA that caused the deprivation of OM's parents' right to participate in developing OM's IEP was consistent with the governing law.

II. JUDGE LASSITER'S CONCLUSION THAT OM'S PRIVATE PLACEMENT WAS APPROPRIATE IS NEITHER "CLEARLY CONTRARY" TO THE EVIDENCE NOR INCONSISTENT WITH THE GOVERNING LAW.

Having concluded that the Board denied OM a Free Appropriate Public Education in at least four ways, Judge Lassiter correctly turned to the issue of whether OM and his parents carried their burden on the second issue: i.e., whether OM's private placement was appropriate. Judge Lassiter concluded that it was. Conclusions of Law, ¶ 50-64). Judge Lassiter specifically concluded that the "private placement at Our Playhouse … was appropriate at the time that Petitioners enrolled OM there on September 2, 2008, and continued to be an appropriate placement for OM at the time of the hearing" *Id*. at 43, ¶ 64. As documented below, this conclusion was not "clearly contrary" to the evidence in the record or the governing law.

(E) JUDGE LASSITER'S CONCLUSION OF LAW ARE CONSISTENT WITH THE GOVERNING LAW.

The standard for evaluating the appropriateness of a private placement under the IDEA is generally a prospective one, assessed at the time of enrollment in the private placement. *See County Sch. Bd. of Henrico v. R.T.,* 433 F. Supp. 2d 657, 675 (E.D. Va. 2006). However, the actual educational progress a child makes in the private placement is relevant in making the final determination of appropriateness under

the IDEA. *See id.*; *compare Adams v. Oregon,* 195 F.3d 1141, 1149 (9th Cir. 1999), *with M.M.,* 303 F.3d at 532. Actual educational progress or the lack thereof is not a dispositive factor, but it is an important factor to be considered in determining the appropriateness of an educational program under the IDEA. *M.M.,* 303 F.3d at 532; *see also Rowley*, 458 U.S. at 207, fn28 ("achievement of passing marks and advancement from grade to grade" are "important factor[s]"). To determine whether a private placement is appropriate for purposes of reimbursement under the IDEA, courts must employ a factor analysis. The Fourth Circuit has clearly identified several factors that are relevant to determining whether a private placement is appropriate for purposes of the IDEA's reimbursement remedy. Those factors include (1) evidence of a child's actual progress in the private setting; (2) evidence of a child's advancement toward IEP goals and objectives; (3) evidence of a child's lack of progress or advancement toward IEP goals; and (4) the restrictive nature of the private school environment. [Citation] Judge Lassiter correctly identified and correctly applied these factors in determining that OM's private placement was appropriate for purposes of reimbursement under the IDEA. *See* Order at 40-43.

(F) JUDGE LASSITER'S FINDINGS ARE NOT "CLEARLY CONTRARY" TO THE EVIDENCE IN THE RECORD.

1. The "Most Convincing Evidence" Establishing the Appropriateness of OM's Private Placement Was the Testimony of the Board's Own Expert Witness.

Judge Lassiter explicitly found that that the Board's own expert witness provided the most compelling evidence regarding the propriety of OM's private placement at Our Playhouse. Judge Lassiter eloquently and thoroughly explained the very good reasons for that finding:

> *[T]he most convincing evidence regarding the appropriateness of [OM's private] placement … came from Dr. Naftel. Dr. Naftel was Originally identified by Respondents as their expert witness on OM's diagnosis and the appropriateness of Respondent's educational plan. Respondent had demanded, by way of a counterclaim. that Petitioners allow Dr. Naftel to conduct*

comprehensive psycho-educational testing on OM. On the first day of hearing, Petitioners consented to the evaluation. On February 10 and 13, 2009, Petitioners presented OM for testing by Dr. Naftel. OM's parents retained no decision-making authority over who conducted the tests or what tests were conducted by Respondent. Respondent retained the CDL and its designated expert, Dr. Naftel, to conduct the testing on OM. Based upon her comprehensive evaluation of OM, Dr. Naftel issued a full report of her findings and recommendations. In her report, Dr. Naftel found:

- *OM continues to be diagnosed with high-functioning autism;*

- *A regular education classroom is likely the most appropriate least restrictive environment for him at this time.*

- *OM struggles with play skills, peer interactions, flexibility, and self-help skills. Thus, within the regular education classroom, OM will likely benefit from and require special education services to function appropriately in this setting;*

- *Specifically, a special educator may be helpful in modifying tasks so that they are geared to his learning style (such as presenting tasks in a visual rather than auditory format), provide him with individualized instruction, provide strategies/accommodations to assist with behavioral issues that may impede learning, and help facilitate peer interactions and play skills.*

- *Based on information from his family, public educators, and private educators, OM currently seems to be making appropriate progress towards his IEP goals. Thus, the present level of services seems adequate with regard to meeting OM's educational needs at this time.*

- *OM benefitted from the use of a schedule during the evaluation to let him know what was expected. Thus, a schedule with pictures*

> *and simple words is recommended for use with OM at home and at school.*
>
> • *It is recommended that [OM} work in several shorter work sessions interspersed with brief breaks, rather than one long work session to increase his ability to stay on task.*
>
> • *When teaching, it will be important to incorporate challenging items with easier items to prevent [OM] from shutting down. A social story that emphasizes that it is okay to make mistakes and take guesses may also be helpful to OM.*

Findings of Fact, ¶124 (citing Tr. 244:17-22; 247:5-8 and Pet. Exh. 74 at 16 (Dr. Naftel's Testimony and Report of Dr. Naftel's Psycho-Educational Testing)). *See also,* Tr. 218-264 (direct and cross examinations of Dr. Naftel).

Dr. Naftel was retained originally by the Board to serve in two crucial capacities in this case: First, the Board retained Dr. Naftel to testify as a designated expert witness in this case, and, second, the Board retained Dr. Naftel to conduct the unlimited psycho-educational testing of OM that his parents authorized in the midst of these proceedings. Judge Lassiter found it noteworthy (to say the least) that, "[a]fter receiving Dr. Naftel's report, Respondent abandoned Dr. Naftel as their designated expert on autism and the education of children with autism" and that " OM's parents offered Dr. Naftel as their own expert witness. Findings of Fact, ¶ 127.

It was not lost on Judge Lassiter why the Board jettisoned Dr. Naftel as their expert witness in the case after Dr. Naftel conducted the comprehensive psycho-educational testing of OM. Judge Lassiter noted those conclusions in Dr. Naftel's report that flatly contradicted the Board's central contentions in the case, identifying the Board's dilemma:

> *Based upon the testing she conducted at the CDL, Dr. Naftel concluded that OM had made significant progress under the Petitioners' educational plan at Our Play House preschool … [and Dr. Naftel] noted in her report [that] OM currently seems to be making appropriate progress towards his IEP goals. Thus, the present level of*

services seems adequate in regard to meeting OM's educational needs at this time.

Findings of Fact, ¶ 124 (citing Tr. 244:17-22; 247:5-8 (March 23, 2009 Testimony of Dr. Naftel) and Pet. Exh. 74 at 16 (Report of Dr. Naftel's February 2009 Psycho-Educational Testing)).

In addition to Dr. Naftel's report, Judge Lassiter relied upon Dr. Naftel's testimony at the hearing, which the Judge clearly found to be crucial. For example, during OM's direct examination of Dr. Naftel, Judge Lassiter, *sua sponte*, engaged Dr. Naftel in an important inquiry about Dr. Naftel's findings. Tr. 235:14-236. Judge Lassiter asked Dr. Naftel to provide an example of the "rigidity" that Dr. Naftel observed in OM's behavior during her two day testing of OM (rigidity is one dimension of OM's autism):

THE COURT: Can you give me an example?

DR. NAFTEL: Sure. So on the preacademic testing, I was—he actually--there's a number of examples during the cognitive and the preacademic. Sort of the easiest example to think of is I was asking him to identify letters in the alphabet, and this is clearly something that is very easy for him that he's been doing for quite a while. But the letters that I was reading to him were out of order, so for example, I might have said "H" and then gone to "A" and then "T." OM just melted down with that. I had to list the letters in order. So I had to modify my testing and say, "A, B, C, D," and then he would point to the "D." And then I had to start over, "A, B, C, D, E, F, G, H," so he had to do them in order. He could not--he would not do them out of order. Some of those difficulties with what he had in his mind for the order of things, he was not able to veer from that.

THE COURT: So when you asked him a letter out of order, what was his reaction?

DR. NAFTEL: He refused. He crawled under the table. He cried. He got out of his seat. There was other points in the evaluation where I was--where he was asked to make patterns with blocks, and if he could not get the exact pattern that he was supposed to get, he threw the blocks. He again crawled under the table, cried. He was teary-eyed

during portions of this evaluation. During other drawing activities, he crumpled the paper, threw things.

Tr. 235:14-236. Notably, none of the Board's witnesses identified even this dimension of OM's autism in their makeshift 90-minute "observation reports" or at the hearing when directly asked to describe OM's disabilities

Judge Lassiter made this explicit credibility determination in favor of the Board's former expert witness, and Judge Lassiter's conclusion that OM's educational placement was appropriate. While Judge Lassiter had no obligation to explain her rationale for making that credibility determination, both her Final Order and the record are replete with similarly vivid explanations and judicial inquiries as those described above. In addition to the foregoing, Judge Lassiter's credibility determination was also grounded in Dr. Naftel's impressive credentials, specific expertise, and deep experience in evaluating children with autism. Judge Lassiter's thorough methodology, evident both at the hearing and in her Final Order, far exceeds what the Fourth Circuit has consistently held to be the limits of what may be required of a hearing officer in adjudicating a proceeding brought under the IDEA. *J.P. ex rel. Peterson v. County School Bd. of Hanover County, Va.,* 516 F.3d 254, 259 (4th Cir. 2008) ("When determining whether a hearing officer's findings were regularly made, our cases have typically focused on the *process* through which the findings were made: 'Factual findings are not regularly made if they are reached through a process that is far from the accepted norm of a fact-finding process.'" (citing *County Sch. Bd. v. Z.P.,* 399 F.3d 298, 305 (4th Cir.2005) (internal quotation marks omitted).

a. The Evidence Showed that OM Made "Remarkable" Actual Progress in the Private Placement

Judge Lassiter was correct to evaluate whether OM had made "actual progress" in the private placement. *See, M.S. ex rel. Simchick v. Fairfax County School Bd.*, 553 F.3d 315, 327 (4th Cir. 2009) (holding that "the district court's decision to consider M.S.'s actual progress as a factor in determining whether the [private] placement was proper" and "correctly followed precedent" in this Circuit). The cases reveal that this factor does not often support the propriety of a private placement.

See, e.g., *id*. However, in this case, as Judge Lassiter found, the record is replete with evidence of OM's progress in the private placement. The progress has been described in testimony as "remarkable" and "significant." Ex P16, Tr. Vol. 3, 503:10-25, (March, 24, 2009) (Testimony of Dotty Hoyle). The progress towards OM's IEP goals was described as "near mastery" and "mastery." Ex P. 33, P. 34. OM's progress is detailed in regular progress reports, most of which were prepared by the Board's own witnesses. *See, e.g.,* Ex. P43, P 69, R 226, R 227,, R 228, R 235, and R 236. In fact, Judge Lassiter correctly observed that, throughout the eight days of testimony, not a single witness even suggested that OM regressed—in any way—while enrolled in his private placement.

b. OM quickly demonstrated that he could be successfully educated in a far less restrictive environment than the placement offered by the Board.

Judge Lassiter correctly concluded that it was both relevant and significant that OM had made "remarkable" progress towards his IEP goals, and that he did so in the least restrictive setting on the continuum. Order, Conclusions of Law ¶54, at 41 ("Respondent failed to rebut the evidence of OM's. progress. In fact, Respondent's witnesses were uniformly unwavering in their conclusion that OM was making 'remarkable' progress at Our Playhouse.) It is beyond dispute that Our Playhouse was far less restrictive than Pathways; at Our Playhouse, OM was the only child identified as such in his class of 16 preschoolers at Our Playhouse. In stark contrast, the Proposed 90-minute playgroup at Pathways enrolled 2 to 5 children, all of whom had speech and language disabilities. These findings were supported by ample evidence in the record. See, e.g., Tr. Vol. 4, 649:6-16 (March 26, 2009) (Testimony of Sadie Bauer); Tr. Vol. 3, 503:21-25 (March 24, 2009) (Testimony of Dorothy Hoyle).

There can be no question that OM's private placement was less restrictive than the Board's proposed placement in the Pathways Playgroup. The "least restrictive environment" is the educational environment is the environment most similar to the public school environment in which non-disabled children are educated that is suitable for a disabled child. *County Sch. Bd. Of Henrico,* 433 F. Supp. 2d at 660 (citing 20 U.S.C. 1412); *School Bd. v. Malone*, 762 F.2d 1210,

1213 (4th Cir. 1985). This Circuit has held that the least restrictive environment requirement of the IDEA, 20 U.S.C. ß 1412(5)(A), does not apply to parental placements. *See, e.g., Carter,* 950 F.2d at 160; *Morgan v. Greenbrier County Bd. of Educ.,* 83 Fed. Appx. 566, 568 (4th Cir. 2003). The Fourth Circuit has explained, "the Act's preference for mainstreaming was aimed at preventing *schools* from segregating handicapped students from the general student body." *Carter,* 950 F.2d at 160 (emphasis in original). Furthermore, other Circuits addressing the issue have held that the least restrictive environment requirement does not apply with the same force to parental placements as it does to placements advocated by school districts. *See M.S. ex rel. S.S.,* 231 F.3d at 105 (stating that mainstreaming "remains a consideration" but noting that parents "may not be subject to the same mainstreaming requirements"); *Cleveland Heights-University Heights Sch. Dist. v. Boss, 144 F.3d 391, 399-400 (6th Cir. 1998)* (failure to meet mainstreaming requirements does not bar reimbursement).

While it is clear that the least restrictive environment requirement does not apply to the a parent's private placement for purposes of this analysis, this Circuit does consider relevant in determining whether the a private placement is "appropriate" for purposes of the equitably reimbursement analysis. *M.S. ex rel. S.S.,* 231 F.3d at 105. This is based upon the Act's strong policy preference for mainstreaming, and that policy consideration "bears upon the parents' choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate. *Id.* Here, of course, the policy considerations underwriting the Least Restrictive Environment mandate (however loosely) offer powerful support for Judge Lassiter's conclusion that OM's private placement was appropriate.

Consistent with this Circuit's precedent, Judge Lassiter considered the non-restrictive nature of Playhouse in its determination that the parent's private placement was appropriate. Judge Lassiter made explicit that the Order of reimbursement in this case is not based upon the relative restrictiveness of the two competing placements. Instead, Judge Lassiter's discussion of the non-restrictive nature of the private placement—coupled with OM's "remarkable" success in it—is but one factor that supports the conclusion that OM's private placement was appropriate. To further support this conclusion, Judge Lassiter documented the evidence showing that the private placement (unlike

the Board's placement) provided OM with multiple, regular, and meaningful opportunities to work on the agreed-upon goal of that OM would generalize across multiple settings the skills that were to be taught through the direct specialized instruction and related services. Judge Lassiter emphasized that OM's goals required significant time in a classroom setting, with a routine, regular transitions, and exposure to typical peers he could model.

Thus, the non-restrictive environment at Playhouse is one factor supporting the appropriateness of that placement under the IDEA, particularly when coupled with the fact that OM's progress in that preferred environment was "tremendous," "remarkable," "good." See e.g. Tr., 1487:1-1485:2 (Testimony of Whitney Griffin); Ex. P16 (The November 17 Progress Report from Ms. Hoyle).

Judge Lassiter found that OM's private placement "offers a striking contrast to the [Board's] proposed placement in a highly restrictive, highly controlled, and limited environment at Pathways." . Order, Conclusions of Law ¶62, at 41. Judge Lassiter that the Board's offered placement is one in which OM "simply has no room to grow and mature," whereas OM's private placement did. Under this Circuit's precedent, that is an ample basis for reimbursement, standing alone. See, e.g., *M.S. v. Fairfax County School Bd.* 2007 WL 1378545 (E.D.Va.,2007. Dist. Ct. Order, *overruled on other grounds*, *M.S. ex rel. S.S.,* 231 F.3d). OM's placement is rich with precisely the kind of spontaneous peer interaction, group teaching, and behavioral training that the Board's own IEP's Goals and Objectives for OM expressly contemplate. Accordingly, while OM's parents were not required to provide a private program in the "least restrictive environment," Judge Lassiter's findings that OM's private placement was far less restrictive with the Board's placement, coupled with OM's remarkable success in it, provides additional powerful support for her conclusion that OM's private placement was "appropriate" under the IDEA.

> *The parent's placement is rich with precisely the kind of spontaneous peer interaction. Only with the specialized instruction and related services provided and paid for by OM's parents, the parents' placement provides group teaching, and behavioral training that the IEP's goals expressly contemplate. Accordingly, while the parents were not required to provide a private program in the*

> *"least restrictive environment," the fully non-restrictive nature of Petitioners program at Our Pathways bolsters this Court's conclusion that the parents' private placement was "appropriate" under the IDEA.*

Order, Conclusions of Law ¶62, at 43. This evidence and analysis—standing alone—is sufficient to show Judge Lassiter's conclusion that OM's private placement was appropriate is not "clearly contrary" to the evidence in the record or the governing law.

c. The Board offered scant (if any) evidence tending to show that Petitioners' private placement was not appropriate.

The Board presented no evidence tending to show that the Petitioners' alternative placement was not an appropriate placement. Instead, several of Respondent's providers testified that they believed OM's current placement was appropriate, as they all admitted he had made great progress, was close to mastery of his goals, and yet they had not called IEP meetings. Tr., 1029:22-1031:13 (April 2, 2009 Testimony of Catherine Alguire; *id*, 1501:11-1502:2 (April 6, 2009) (Testimony of Whitney Griffin) Id. 1495:15-22 (Testimony of Whitney Griffin). Similarly all of his providers took notes on their work with OM in Playhouse, and nowhere in these notes do the comment on the inappropriateness of the setting, but instead in at least the case of Ms. Alguire shows reference to communication with his teachers on the implementation of actions. See P33 (Whitney Griffin's Progress report); P43 (Petitioner's Correspondence with Ms. Griffin); P64/R216 (p.2) (Kristin Seawell Notes) and P65/R215 (Notes of M.s Alguire) .In fact Respondent's own designated expert, Dr. Naftel, who later testified for the Petitioners, wrote in a report that OM was making "appropriate progress towards meeting his IEP goals. Thus, the present level of services seems adequate in regard to meeting [OM]'s educational needs at this time." (P. 74 p. 16); See Also Tr. vol. 2, 245:20-246:2 (March 23, 2009) (Testimony of Dr. Naftel).

Universally, Respondents' witnesses—particularly the providers—testified that OM has made significant progress towards every one of his IEP goals this year, and had nearly mastered several of them at the time of the hearing. Importantly, the providers testified that OM had not completely mastered certain goals because he had not yet "generalized" them across various settings. It is undeniable (and

Respondents do not appear to dispute) that OM's progress this year has been "remarkable." *See, e.g.,* Tr.vol 6, 1030:17-1031:4 (April 2, 2009) (Testimony of Catherine Alguire; Tr., 1487:1-1485:2 (April 6, 2009) (testimony of Whitney Griffin regarding the obvious progress OM has made and the need to work with him to extrapolate from social stories.); Ex. P16 (noting "tremendous" progress); Ex. P 33 (chart of progress toward goals showing either significant progress, near mastery or mastery of each goal by Whitney Griffin); Tr., 1030:14-1036:3 (April 3, 2009) (Testimony of Catherine Alguire in which she discuss how OM had mastered all goals but one, but she did not call a new IEP meeting as the Petitioners informed her of litigation).

Therefore, Judge Lassiter's conclusion that that OM's private placement at Our Playhouse was appropriate at the time OM was enrolled there on September 2, 2009, and continued to be an appropriate placement for OM at the time of the hearing was thoroughly supported by the evidence in the record and consistent with the governing law.

III. JUDGE LASSITER'S CONCLUSION THAT OM AND HIS PARENTS ARE ENTITLED TO THE IDEA'S EQUITABLE REMEDIES IS NOT "CLEARLY CONTRARY" TO THE EVIDENCE OR THE GOVERNING LAW.

Judge Lassiter found that OM's parents are entitled to the equitable remedy of reimbursement of the costs OM's parents incurred In educating OM, including: (1) the private tuition costs for OM's enrollment in Our Play House; (2) the costs of all private special education services provided by New Hope ASD Consulting for the period from July 31, 2008 until October 28. 2008, and, for the period of October 28, 2008 until the end of Respondent's 2008-2009 school year; (5) the cost of private speech and language instruction, and private occupational therapy incurred for the entire 2008-2009 school year beginning on August 25, 2008. Order, 44 ¶5(a)-(d). Judge Lassiter also concluded that these expenses were reasonable and necessary to provide OM with an appropriate private educational placement. Order, 44 ¶6. These findings are not "clearly contrary" to the evidence in the record; to the contrary, the actual costs ordered to be reimbursed were established through documentary evidence, (*e.g.,* Pet Ex. 81), and accompanying testimonial evidence, (*e.g.,* Tr. Vol. 4, 675-689 (Testimony

of AM)). Moreover, the Board offered no evidence tending to contradict the evidence establishing these costs or their reasonableness.

Judge Lassiter excluded consultants' costs associated with the preparation for or attendance at IEP meetings. Order, 44, ¶6. Petitioners do not take exception to that finding. Judge Lassiter also found that OM and his parents were not seeking reimbursement for the verbal behavioral therapy services that OM's parents privately funded as the IEP was being developed in the summer of 2008. *Id*.

Judge Lassiter also awarded Petitioners all additional, equitable remedies tailored to address the specific deprivations that were established by the evidence in the case, thereby retaining jurisdiction over any remedial issues that cannot be resolved between the parties based upon the Final Order. *Id*.

(G) THE UNITED STATES SUPREME COURT HAS SQUARELY REJECTED THE ONLY ARGUABLY NON-FRIVOLOUS LEGAL ARGUMENT ADVANCED BY THE BOARD TO DENY OM OF THE IDEA'S EQUITABLE REMEDIES

The Board argued OM and his parents were "ineligible for reimbursement" because, it contended, OM had not received any special-education services through the public school. Brief Supporting Proposed Order, at 13. At step one, overlooked the obvious fact that the Board did provide special education and related services to OM in the two 90-minute Pathways observations conducted by the school. Nevertheless, to support its contention, the Board relied upon two district court cases from Maryland, which the Board suggested were sufficient override the Supreme Court's decades-old precedent that there is no such pre-requisite. Id. These district court cases (and the Board's argument) appear to overlook the glaring fact that (as the Supreme Court would soon hold in Forest Grove) *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7, (originally a Fourth Circuit case) controls this issue, holding that §1415(i)(2)(C)(iii) authorizes courts to reimburse parents for the cost of private-school tuition when a school district fails to provide a child a FAPE and the private-school placement is appropriate. Id.

The Board was correct, however, in noting that, at the time arguments were submitted in this case to Judge Lassiter, the Board's arguments had been briefed and argued before the United States

Supreme Court. *Brief in Support of Proposed Order*, at 13. Judge Lassiter rightly declined the Board's invitation to predict that the United States Supreme Court would soon hold that a 1997 Amendment to the IDEA somehow abrogated the Court's seminal decisions clarifying on the IDEA's remedial scheme. *See,* Order, Findings of Fact ¶¶79-81, at 21-22. Within days of Judge Lassiter's Final Order, the Supreme Court decided *Forest Grove,* in which a six-justice majority confirmed the correctness of Judge Lassiter's Order in several respects, but also squarely and emphatically rejected the Board's argument.

The Forest Grove majority held, contrary to the Board's contention (and the Maryland cases it cited), "[t]he IDEA Amendments of 1997 did not modify the text of §1415(i)(2)(C)(iii), and we do not read §1412(a)(10)(C) to alter that provision's meaning." *Id.* at *16. Next, the Court completely dispensed with the inapposite (and inappropriate) "public policy" arguments that the Board urged upon Judge Lassiter in this case, holding instead that "[c]onsistent with our decisions in *Burlington* and *Carter*, we conclude that IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private-school placement is appropriate, *regardless of whether the child previously received special education or related services through the public school*." *Id.* (emphasis supplied).

Thus, the Board's hope that the Supreme Court might save it was plainly misplaced.

CONCLUSION

The Board simply cannot carry the heavy burden it bears in this appeal; it cannot upset one, much less all six of Judge Lassiter's dispositive conclusions. Judge Lassiter's findings and conclusions cannot be disturbed in light of the record in this case and the clarity of the governing legal principles. In initiating this appeal, the Board identified no specific exceptions to Judge Lassiter's findings of fact or conclusions of law, nor could it. As the foregoing plainly establishes, Judge Lassiter's fact-rich, well documented findings are not "clearly contrary" to the evidence in the record, and Judge Lassiter's conclusions of law are all consistent with the governing law.

Indeed, it is the Board's "public policy arguments and similarly inapposite factual contentions—not Judge Lassiter's findings and conclusion—that are "clearly contrary" to the evidence in the record and completely inconsistent with the *governing* law. The Board's arguments at the trial level in this case would have the Review Officer turn the record inside out, and stand the law on its head. Judge Lassiter correctly declined that invitation, and there is no basis to disturb findings and conclusions in this review.

Dated: August 11, 2009

Respectfully submitted by:

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EXHIBIT 1

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Petitioners' Written Argument in Support of the Final Order

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FOREST GROVE SCHOOL DISTRICT *v.* T. A.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08–305. Argued April 28, 2009—Decided June 22, 2009

After a private specialist diagnosed respondent with learning disabilities, his parents unilaterally removed him from petitioner public school district (School District), enrolled him in a private academy, and requested an administrative hearing on his eligibility for special-education services under the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. §1400 *et seq.* The School District found respondent ineligible for such services and declined to offer him an individualized education program (IEP). Concluding that the School District had failed to provide respondent a "free appropriate public education" as required by IDEA, §1412(a)(1)(A), and that respondent's private-school placement was appropriate, the hearing officer ordered the School District to reimburse his parents for his private-school tuition. The District Court set aside the award, holding that the IDEA Amendments of 1997 (Amendments) categorically bar reimbursement unless a child has "previously received special education or related services under the [school's] authority." §1412(a)(10)(C)(ii). Reversing, the Ninth Circuit concluded that the Amendments did not diminish the authority of courts to grant reimbursement as "appropriate" relief pursuant to §1415(i)(2)(C)(iii). See *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359, 370.

Held: IDEA authorizes reimbursement for private special-education services when a public school fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special-education services through the public school. Pp. 6–17.

(a) This Court held in *Burlington* and *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7, that §1415(i)(2)(C)(iii) authorizes courts

Syllabus

to reimburse parents for the cost of private-school tuition when a school district fails to provide a child a FAPE and the private-school placement is appropriate. That *Burlington* and *Carter* involved the deficiency of a proposed IEP does not distinguish this case, nor does the fact that the children in *Burlington* and *Carter* had previously received special-education services; the Court's decision in those cases depended on the Act's language and purpose rather than the particular facts involved. Thus, the reasoning of *Burlington* and *Carter* applies unless the 1997 Amendments require a different result. Pp. 6–8.

(b) The 1997 Amendments do not impose a categorical bar to reimbursement. The Amendments made no change to the central purpose of IDEA or the text of §1415(i)(2)(C)(iii). Because Congress is presumed to be aware of, and to adopt, a judicial interpretation of a statute when it reenacts that law without change, *Lorillard* v. *Pons*, 434 U. S. 575, 580, this Court will continue to read §1415(i)(2)(C)(iii) to authorize reimbursement absent a clear indication that Congress intended to repeal the provision or abrogate *Burlington* and *Carter*. The School District's argument that §1412(a)(10)(C)(ii) limits reimbursement to children who have previously received public special-education services is unpersuasive for several reasons: It is not supported by IDEA's text, as the 1997 Amendments do not expressly prohibit reimbursement in this case and the School District offers no evidence that Congress intended to supersede *Burlington* and *Carter;* it is at odds with IDEA's remedial purpose of "ensur[ing] that all children with disabilities have available to them a [FAPE] that emphasizes special education . . . designed to meet their unique needs," §1400(d)(1)(A); and it would produce a rule bordering on the irrational by providing a remedy when a school offers a child inadequate special-education services but leaving parents remediless when the school unreasonably denies access to such services altogether. Pp. 8–15.

(c) The School District's argument that any conditions on accepting IDEA funds must be stated unambiguously is clearly satisfied here, as States have been on notice at least since *Burlington* that IDEA authorizes courts to order reimbursement. The School District's claims that respondent's reading will impose a heavy financial burden on public schools and encourage parents to enroll their children in private school without first trying to cooperate with public-school authorities are also unpersuasive in light of the restrictions on reimbursement awards identified in *Burlington* and the fact that parents unilaterally change their child's placement at their own financial risk. See*, e.g., Carter*, 510 U. S., at 15. Pp. 15–16.

523 F. 3d 1078, affirmed.

Syllabus

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 08–305

FOREST GROVE SCHOOL DISTRICT, PETITIONER
v. T. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2009]

JUSTICE STEVENS delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U. S. C. §1400 *et seq.,* requires States receiving federal funding to make a "free appropriate public education" (FAPE) available to all children with disabilities residing in the State, §1412(a)(1)(A). We have previously held that when a public school fails to provide a FAPE and a child's parents place the child in an appropriate private school without the school district's consent, a court may require the district to reimburse the parents for the cost of the private education. See *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359, 370 (1985). The question presented in this case is whether the IDEA Amendments of 1997 (Amendments), 111 Stat. 37, categorically prohibit reimbursement for private-education costs if a child has not "previously received special education and related services under the authority of a public agency." §1412(a)(10)(C)(ii). We hold that the Amendments impose no such categorical bar.

I

Respondent T. A. attended public schools in the Forest Grove School District (School District or District) from the time he was in kindergarten through the winter of his junior year of high school. From kindergarten through eighth grade, respondent's teachers observed that he had trouble paying attention in class and completing his assignments. When respondent entered high school, his difficulties increased.

In December 2000, during respondent's freshman year, his mother contacted the school counselor to discuss respondent's problems with his schoolwork. At the end of the school year, respondent was evaluated by a school psychologist. After interviewing him, examining his school records, and administering cognitive ability tests, the psychologist concluded that respondent did not need further testing for any learning disabilities or other health impairments, including attention deficit hyperactivity disorder (ADHD). The psychologist and two other school officials discussed the evaluation results with respondent's mother in June 2001, and all agreed that respondent did not qualify for special-education services. Respondent's parents did not seek review of that decision, although the hearing examiner later found that the School District's evaluation was legally inadequate because it failed to address all areas of suspected disability, including ADHD.

With extensive help from his family, respondent completed his sophomore year at Forest Grove High School, but his problems worsened during his junior year. In February 2003, respondent's parents discussed with the School District the possibility of respondent completing high school through a partnership program with the local community college. They also sought private professional advice, and in March 2003 respondent was diagnosed with ADHD and a number of disabilities related to learning and memory. Advised by the private specialist that respon-

dent would do best in a structured, residential learning environment, respondent's parents enrolled him at a private academy that focuses on educating children with special needs.

Four days after enrolling him in private school, respondent's parents hired a lawyer to ascertain their rights and to give the School District written notice of respondent's private placement. A few weeks later, in April 2003, respondent's parents requested an administrative due process hearing regarding respondent's eligibility for special-education services. In June 2003, the District engaged a school psychologist to assist in determining whether respondent had a disability that significantly interfered with his educational performance. Respondent's parents cooperated with the District during the evaluation process. In July 2003, a multidisciplinary team met to discuss whether respondent satisfied IDEA's disability criteria and concluded that he did not because his ADHD did not have a sufficiently significant adverse impact on his educational performance. Because the School District maintained that respondent was not eligible for special-education services and therefore declined to provide an individualized education program (IEP),[1] respondent's parents left him enrolled at the private academy for his senior year.

The administrative review process resumed in September 2003. After considering the parties' evidence, including the testimony of numerous experts, the hearing officer issued a decision in January 2004 finding that respondent's ADHD adversely affected his educational performance and that the School District failed to meet its obliga-

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[1] An IEP is an education plan tailored to a child's unique needs that is designed by the school district in consultation with the child's parents after the child is identified as eligible for special-education services. See 20 U. S. C. §§1412(a)(4), 1414(d).

tions under IDEA in not identifying respondent as a student eligible for special-education services. Because the District did not offer respondent a FAPE and his private-school placement was appropriate under IDEA, the hearing officer ordered the District to reimburse respondent's parents for the cost of the private-school tuition.[2]

The School District sought judicial review pursuant to §1415(i)(2), arguing that the hearing officer erred in granting reimbursement. The District Court accepted the hearing officer's findings of fact but set aside the reimbursement award after finding that the 1997 Amendments categorically bar reimbursement of private-school tuition for students who have not "previously received special education and related services under the authority of a public agency." §612(a)(10)(C)(ii), 111 Stat. 63, 20 U. S. C. §1412(a)(10)(C)(ii). The District Court further held that, "[e]ven assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities," the facts of this case do not support equitable relief. App. to Pet. for Cert. 53a.

The Court of Appeals for the Ninth Circuit reversed and remanded for further proceedings. The court first noted that, prior to the 1997 Amendments, "IDEA was silent on the subject of private school reimbursement, but courts had granted such reimbursement as 'appropriate' relief under principles of equity pursuant to 20 U. S. C. §1415(i)(2)(C)." 523 F. 3d 1078, 1085 (2008) (citing *Burlington*, 471 U. S., at 370). It then held that the Amendments do not impose a categorical bar to reimbursement

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[2]Although it was respondent's parents who initially sought reimbursement, when respondent reached the age of majority in 2003 his parents' rights under IDEA transferred to him pursuant to Ore. Admin. Rule 581–015–2325(1) (2008).

when a parent unilaterally places in private school a child who has not previously received special-education services through the public school. Rather, such students "are eligible for reimbursement, to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to §1415(i)(2)(C)." 523 F. 3d, at 1087–1088.

The Court of Appeals also rejected the District Court's analysis of the equities as resting on two legal errors. First, because it found that §1412(a)(10)(C)(ii) generally bars relief in these circumstances, the District Court wrongly stated that relief was appropriate only if the equities were sufficient to "'override'" that statutory limitation. The District Court also erred in asserting that reimbursement is limited to "'extreme'" cases. *Id.*, at 1088 (emphasis deleted). The Court of Appeals therefore remanded with instructions to reexamine the equities, including the failure of respondent's parents to notify the School District before removing respondent from public school. In dissent, Judge Rymer stated her view that reimbursement is not available as an equitable remedy in this case because respondent's parents did not request an IEP before removing him from public school and respondent's right to a FAPE was therefore not at issue.

Because the Courts of Appeals that have considered this question have reached inconsistent results,[3] we granted certiorari to determine whether §1412(a)(10)(C) establishes a categorical bar to tuition reimbursement for students who have not previously received special-education services under the authority of a public education agency.

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[3] Compare *Frank G.* v. *Board of Ed. of Hyde Park*, 459 F. 3d 356, 376 (CA2 2006) (holding that §1412(a)(10)(C)(ii) does not bar reimbursement for students who have not previously received public special-education services), and *M. M.* v. *School Bd. of Miami-Dade Cty., Fla.*, 437 F. 3d 1085, 1099 (CA11 2006) *(per curiam)* (same), with *Greenland School Dist.* v. *Amy N.*, 358 F. 3d 150, 159–160 (CA1 2004) (finding reimbursement barred in those circumstances).

555 U. S. ___ (2009).[4]

II

Justice Rehnquist's opinion for a unanimous Court in *Burlington* provides the pertinent background for our analysis of the question presented. In that case, respondent challenged the appropriateness of the IEP developed for his child by public-school officials. The child had previously received special-education services through the public school. While administrative review was pending, private specialists advised respondent that the child would do best in a specialized private educational setting, and respondent enrolled the child in private school without the school district's consent. The hearing officer concluded that the IEP was not adequate to meet the child's educational needs and that the school district therefore failed to provide the child a FAPE. Finding also that the private-school placement was appropriate under IDEA, the hearing officer ordered the school district to reimburse respondent for the cost of the private-school tuition.

We granted certiorari in *Burlington* to determine whether IDEA authorizes reimbursement for the cost of private education when a parent or guardian unilaterally enrolls a child in private school because the public school has proposed an inadequate IEP and thus failed to provide a FAPE. The Act at that time made no express reference to the possibility of reimbursement, but it authorized a court to "grant such relief as the court determines is appropriate." §1415(i)(2)(C)(iii).[5] In determining the scope

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[4] We previously granted certiorari to address this question in *Board of Ed. of City School Dist. of New York* v. *Tom F.*, 552 U. S. 1 (2007), in which we affirmed without opinion the judgment of the Court of Appeals for the Second Circuit by an equally divided vote.

[5] At the time we decided *Burlington*, that provision was codified at §1415(e)(2). The 1997 Amendments renumbered the provision but did not alter its text. For ease of reference, we refer to the provision by its current section number, §1415(i)(2)(C)(iii).

of the relief authorized, we noted that "the ordinary meaning of these words confers broad discretion on the court" and that, absent any indication to the contrary, what relief is "appropriate" must be determined in light of the Act's broad purpose of providing children with disabilities a FAPE, including through publicly funded private-school placements when necessary. 471 U. S., at 369. Accordingly, we held that the provision's grant of authority includes "the power to order school authorities to reimburse parents for their expenditures on private special-education services if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Ibid.*

Our decision rested in part on the fact that administrative and judicial review of a parent's complaint often takes years. We concluded that, having mandated that participating States provide a FAPE for every student, Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act. *Id.,* at 370. Eight years later, we unanimously reaffirmed the availability of reimbursement in *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7 (1993) (holding that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the State).

The dispute giving rise to the present litigation differs from those in *Burlington* and *Carter* in that it concerns not the adequacy of a proposed IEP but the School District's failure to provide an IEP at all. And, unlike respondent, the children in those cases had previously received public special-education services. These differences are insignificant, however, because our analysis in the earlier cases depended on the language and purpose of the Act and not the particular facts involved. Moreover, when a child

requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP. It is thus clear that the reasoning of *Burlington* and *Carter* applies equally to this case. The only question is whether the 1997 Amendments require a different result.

III

Congress enacted IDEA in 1970[6] to ensure that all children with disabilities are provided "'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.'" *Burlington*, 471 U. S., at 367 (quoting 20 U. S. C. §1400(c) (1982 ed.), now codified as amended at §§1400(d)(1)(A), (B)). After examining the States' progress under IDEA, Congress found in 1997 that substantial gains had been made in the area of special education but that more needed to be done to guarantee children with disabilities adequate access to appropriate services. See S. Rep. No. 105–17, p. 5 (1997). The 1997 Amendments were intended "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Id.*, at 3.

Consistent with that goal, the Amendments preserved the Act's purpose of providing a FAPE to all children with disabilities. And they did not change the text of the provision we considered in *Burlington*, §1415(i)(2)(C)(iii), which gives courts broad authority to grant "appropriate" relief, including reimbursement for the cost of private special

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[6]The legislation was enacted as the Education of the Handicapped Act, title VI of Pub. L. 91–230, 84 Stat. 175, and was renamed the Individuals with Disabilities Education Act in 1990, see §901(a)(3), Pub. L. 101–476, 104 Stat. 1142.

education when a school district fails to provide a FAPE. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978). Accordingly, absent a clear expression elsewhere in the Amendments of Congress' intent to repeal some portion of that provision or to abrogate our decisions in *Burlington* and *Carter*, we will continue to read §1415(i)(2)(C)(iii) to authorize the relief respondent seeks.

The School District and the dissent argue that one of the provisions enacted by the Amendments, §1412(a)(10)(C), effects such a repeal. Section 1412(a)(10)(C) is entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency," and it sets forth a number of principles applicable to public reimbursement for the costs of unilateral private-school placements. Section 1412(a)(10)(C)(i) states that IDEA "does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child" and his parents nevertheless elected to place him in a private school. Section 1412(a)(10)(C)(ii) then provides that a "court or hearing officer may require [a public] agency to reimburse the parents for the cost of [private-school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available" and the child has "previously received special education and related services under the authority of [the] agency." Finally, §1412(a)(10)(C)(iii) discusses circumstances under which the "cost of reimbursement described in clause (ii) may be reduced or denied," as when a parent fails to give 10 days' notice before removing a child from public school or refuses to make a child available for evaluation, and §1412(a)(10)(C)(iv) lists circumstances in

which a parent's failure to give notice may or must be excused.[7]

Looking primarily to clauses (i) and (ii), the School District argues that Congress intended §1412(a)(10)(C) to provide the exclusive source of authority for courts to order reimbursement when parents unilaterally enroll a child in private school. According to the District, clause (i) provides a safe harbor for school districts that provide a FAPE by foreclosing reimbursement in those circumstances. Clause (ii) then sets forth the circumstance in which reimbursement is appropriate—namely, when a school district fails to provide a FAPE to a child who has previously received special-education services through the public school. The District contends that because §1412(a)(10)(C) only discusses reimbursement for children who have previously received special-education services through the public school, IDEA only authorizes reimbursement in that circumstance. The dissent agrees.

For several reasons, we find this argument unpersuasive. First, the School District's reading of the Act is not supported by its text and context, as the 1997 Amendments do not expressly prohibit reimbursement under the circumstances of this case, and the District offers no evidence that Congress intended to supersede our decisions in *Burlington* and *Carter*. Clause (i)'s safe harbor explicitly bars reimbursement only when a school district makes a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child's needs. The clause says nothing about the availability of reimbursement when a school district fails to provide a FAPE. Indeed, its statement that reimbursement *is not* authorized when a school district provides a FAPE could be read to indicate that reimbursement *is* authorized

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[7]The full text of §1412(a)(10)(C) is set forth in the Appendix, *infra*, at 18.

when a school district does not fulfill that obligation.

Clause (ii) likewise does not support the District's position. Because that clause is phrased permissively, stating only that courts "may require" reimbursement in those circumstances, it does not foreclose reimbursement awards in other circumstances. Together with clauses (iii) and (iv), clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services are inadequate. Referring as they do to students who have previously received special-education services through a public school, clauses (ii) through (iv) are premised on a history of cooperation and together encourage school districts and parents to continue to cooperate in developing and implementing an appropriate IEP before resorting to a unilateral private placement.[8] The clauses of §1412(a)(10)(C) are thus best read as elucidative rather than exhaustive. Cf. *United*

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[8]The dissent asserts that, under this reading of the Act, "Congress has called for reducing reimbursement only for the most deserving . . . but provided no mechanism to reduce reimbursement to the least deserving." *Post*, at 6 (opinion of SOUTER, J.). In addition to making unsubstantiated generalizations about the desert of parents whose children have been denied public special-education services, the dissent grossly mischaracterizes our view of §1412(a)(10)(C). The fact that clause (iii) *permits* a court to reduce a reimbursement award when a parent whose child has previously received special-education services fails to give the school adequate notice of an intended private placement does not mean that it *prohibits* courts from similarly reducing the amount of reimbursement when a parent whose child has not previously received services fails to give such notice. Like clause (ii), clause (iii) provides guidance regarding the appropriateness of relief in a common factual scenario, and its instructions should not be understood to preclude courts and hearing officers from considering similar factors in other scenarios.

States v. *Atlantic Research Corp.*, 551 U. S. 128, 137 (2007) (noting that statutory language may "perfor[m] a significant function simply by clarifying" a provision's meaning).[9]

This reading of §1412(a)(10)(C) is necessary to avoid the conclusion that Congress abrogated *sub silentio* our decisions in *Burlington* and *Carter*. In those cases, we construed §1415(i)(2)(C)(iii) to authorize reimbursement when a school district fails to provide a FAPE and a child's private-school placement is appropriate, without regard to the child's prior receipt of services.[10] It would take more than Congress' failure to comment on the category of cases in which a child has not previously received special-education services for us to conclude that the Amendments substantially superseded our decisions and in large part

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[9] In arguing that §1412(a)(10)(C) is the exclusive source of authority for granting reimbursement awards to parents who unilaterally place a child in private school, the dissent neglects to explain that provision's failure to limit the type of private-school placements for which parents may be reimbursed. *School Comm. of Burlington* v. *Department of Ed. of Mass.* held that courts may grant reimbursement under §1415(i)(2)(C)(iii) only when a school district fails to provide a FAPE *and* the private-school placement is appropriate. See 471 U. S. 359, 369 (1985); see *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7, 12–13 (1993). The latter requirement is essential to ensuring that reimbursement awards are granted only when such relief furthers the purposes of the Act. See *Burlington*, 471 U. S., at 369. That §1412(a)(10)(C) did not codify that requirement further indicates that Congress did not intend that provision to supplant §1415(i)(2)(C)(iii) as the sole authority on reimbursement awards but rather meant to augment the latter provision and our decisions construing it.

[10] As discussed above, although the children in *Burlington* and *Carter* had previously received special-education services in public school, our decisions in no way depended on their prior receipt of services. Those holdings rested instead on the breadth of the authority conferred by §1415(i)(2)(C)(iii), the interest in providing relief consistent with the Act's purpose, and the injustice that a contrary reading would produce, see *Burlington*, 471 U. S., at 369–370; see also *Carter*, 510 U. S., at 12–14—considerations that were not altered by the 1997 Amendments.

repealed §1415(i)(2)(C)(iii). See *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) ("[A]bsent a clearly expressed congressional intention, repeals by implication are not favored" (internal quotation marks and citation omitted)).[11] We accordingly adopt the reading of §1412(a)(10)(C) that is consistent with those decisions.[12]

The School District's reading of §1412(a)(10)(C) is also at odds with the general remedial purpose underlying IDEA and the 1997 Amendments. The express purpose of the Act is to "ensure that all children with disabilities have available to them a free appropriate public education

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[11] For the same reason, we reject the District's argument that because §1412(a)(10)(C)(ii) authorizes "a court or a hearing officer" to award reimbursement for private-school tuition, whereas §1415(i)(2)(C)(iii) only provides a general grant of remedial authority to "court[s]," the latter section cannot be read to authorize hearing officers to award reimbursement. That argument ignores our decision in *Burlington*, 471 U. S., at 363, 370, which interpreted §1415(i)(2)(C)(iii) to authorize hearing officers as well as courts to award reimbursement notwithstanding the provision's silence with regard to hearing officers. When Congress amended IDEA without altering the text of §1415(i)(2)(C)(iii), it implicitly adopted that construction of the statute. See *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978).

[12] Looking to the Amendments' legislative history for support, the School District cites two House and Senate Reports that essentially restate the text of §1412(a)(10)(C)(ii), H. R. Rep. No. 105–95, pp. 92–93 (1997); S. Rep. No. 105–17, p. 13 (1997), and a floor statement by Representative Mike Castle, 143 Cong. Rec. 8013 (1997) (stating that the "bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts"). Those ambiguous references do not undermine the meaning that we discern from the statute's language and context.

Notably, the agency charged with implementing IDEA has adopted respondent's reading of the statute. In commentary to regulations implementing the 1997 Amendments, the Department of Education stated that "hearing officers and courts retain their authority, recognized in *Burlington* . . . to award 'appropriate' relief if a public agency has failed to provide FAPE, including reimbursement . . . in instances in which the child has not yet received special education and related services." 64 Fed. Reg. 12602 (1999); see 71 Fed. Reg. 46599 (2006).

that emphasizes special education and related services designed to meet their unique needs," §1400(d)(1)(A)—a factor we took into account in construing the scope of §1415(i)(2)(C)(iii), see *Burlington*, 471 U. S., at 369. Without the remedy respondent seeks, a "child's right to a *free* appropriate education . . . would be less than complete." *Id.*, at 370. The District's position similarly conflicts with IDEA's "child find" requirement, pursuant to which States are obligated to "identif[y], locat[e], and evaluat[e]" "[a]ll children with disabilities residing in the State" to ensure that they receive needed special-education services. §1412(a)(3)(A); see §1412(a)(10)(A)(ii). A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.

Indeed, by immunizing a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need, the School District's interpretation of §1412(a)(10)(C) would produce a rule bordering on the irrational. It would be particularly strange for the Act to provide a remedy, as all agree it does, when a school district offers a child inadequate special-education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether. That IDEA affords parents substantial procedural safeguards, including the right to challenge a school district's eligibility determination and obtain prospective relief, see *post*, at 11, is no answer. We roundly rejected that argument in *Burlington*, observing that the "review process is ponderous" and therefore inadequate to ensure that a school's failure to provide a FAPE is remedied with the speed necessary to avoid detriment to the child's education. 471 U. S., at 370. Like *Burlington*, see *ibid.*, this

case vividly demonstrates the problem of delay, as respondent's parents first sought a due process hearing in April 2003, and the District Court issued its decision in May 2005—almost a year after respondent graduated from high school. The dissent all but ignores these shortcomings of IDEA's procedural safeguards.

IV

The School District advances two additional arguments for reading the Act to foreclose reimbursement in this case. First, the District contends that because IDEA was an exercise of Congress' authority under the Spending Clause, U. S. Const., Art. I, §8, cl. 1, any conditions attached to a State's acceptance of funds must be stated unambiguously. See *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). Applying that principle, we held in *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 304 (2006), that IDEA's fee-shifting provision, §1415(i)(3)(B), does not authorize courts to award expert-services fees to prevailing parents in IDEA actions because the Act does not put States on notice of the possibility of such awards. But *Arlington* is readily distinguishable from this case. In accepting IDEA funding, States expressly agree to provide a FAPE to all children with disabilities. See §1412(a)(1)(A). An order awarding reimbursement of private-education costs when a school district fails to provide a FAPE merely requires the district "to belatedly pay expenses that it should have paid all along." *Burlington*, 471 U. S., at 370–371. And States have in any event been on notice at least since our decision in *Burlington* that IDEA authorizes courts to order reimbursement of the costs of private special-education services in appropriate circumstances. *Pennhurst*'s notice requirement is thus clearly satisfied.

Finally, the District urges that respondent's reading of the Act will impose a substantial financial burden on

public school districts and encourage parents to immediately enroll their children in private school without first endeavoring to cooperate with the school district. The dissent echoes this concern. See *post*, at 10. For several reasons, those fears are unfounded. Parents "are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act." *Carter*, 510 U. S., at 15. And even then courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant—for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school. In considering the equities, courts should generally presume that public-school officials are properly performing their obligations under IDEA. See *Schaffer* v. *Weast*, 546 U. S. 49, 62–63 (2005) (STEVENS, J., concurring). As a result of these criteria and the fact that parents who "'unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk,'" *Carter*, 510 U. S., at 15 (quoting *Burlington*, 471 U. S., at 373–374), the incidence of private-school placement at public expense is quite small, see Brief for National Disability Rights Network et al. as *Amici Curiae* 13–14.

V

The IDEA Amendments of 1997 did not modify the text of §1415(i)(2)(C)(iii), and we do not read §1412(a)(10)(C) to alter that provision's meaning. Consistent with our decisions in *Burlington* and *Carter*, we conclude that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.

When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted. As the Court of Appeals noted, the District Court did not properly consider the equities in this case and will need to undertake that analysis on remand. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

APPENDIX

Title 20 U. S. C. §1412(a)(10)(C) provides:

"(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

"(i) In general

"Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

"(ii) Reimbursement for private school placement

"If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary 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.

"(iii) Limitation on reimbursement

"The cost of reimbursement described in clause (ii) may be reduced or denied—

"(I) if—

"(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their

child in a private school at public expense; or

"(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

"(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

"(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents."

SUPREME COURT OF THE UNITED STATES

No. 08–305

FOREST GROVE SCHOOL DISTRICT, PETITIONER
v. T. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2009]

JUSTICE SOUTER, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

I respectfully dissent.

School Comm. of Burlington v. *Department of Ed. of Mass.*, 471 U. S. 359 (1985), held that the Education of the Handicapped Act, 84 Stat. 175, now known as the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. §1400 *et seq.,* authorized a district court to order reimbursement of private school tuition and expenses to parents who took their disabled child from public school because the school's special education services did not meet the child's needs. We said that, for want of any specific limitation, this remedy was within the general authorization for courts to award "such relief as [they] determin[e] is appropriate." §1415(e)(2) (1982 ed.) (now codified at §1415(i)(2)(C)(iii) (2006 ed.)). In 1997, however, Congress amended the IDEA with a number of provisions explicitly addressing the issue of "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." §1412(a)(10)(C). These amendments generally prohibit reimbursement if the school district made a "free appropriate public education" (FAPE) available, §1412(a)(10)(C)(i), and if they are to have any effect, there is no exception except by agreement, §1412(a)(10)(B), or for a student who previously received

special education services that were inadequate, §1412(a)(10)(C)(ii).

The majority says otherwise and holds that §1412(a)(10)(C)(ii) places no limit on reimbursements for private tuition. The Court does not find the provision clear enough to affect the rule in *Burlington*, and it does not believe Congress meant to limit public reimbursement for unilaterally incurred private school tuition. But there is no authority for a heightened standard before Congress can alter a prior judicial interpretation of a statute, and the assessment of congressional policy aims falls short of trumping what seems to me to be the clear limitation imposed by §1412(a)(10)(C)(ii).

I

In *Burlington*, parents of a child with a learning disability tried for over eight years to work out a satisfactory individualized education plan (IEP) for their son. 471 U. S., at 361–362. They eventually gave up and sent the boy to a private school for disabled children, *id.*, at 362, and we took the ensuing case to decide whether the Education of the Handicapped Act authorized courts to order reimbursement for private special education "if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act," *id.*, at 369. After noting various sections that "emphasiz[e] the participation of the parents in developing the child's [public] educational program," *id.*, at 368, we inferred that the Act authorized reimbursement by providing that a district court shall "'grant such relief as [it] determines is appropriate,'" *id.*, at 369 (quoting what is now §1415(i)(2)(C)(iii); alteration in original). We emphasized that the Act did not speak specifically to the issue of reimbursement, and held that "[a]bsent other reference," reimbursement for private tuition and expenses would be an "'appropriate'" remedy

in light of the purposes of the Act. *Id.*, at 369–370. In short, we read the general provision for ordering equitable remedies in §1415(i)(2)(C)(iii) as authorizing a reimbursement order, in large part because Congress had not spoken more specifically to the issue.

But Congress did speak explicitly when it amended the IDEA in 1997. It first said that whenever the State or a local educational agency refers a student to private special education, the bill is a public expense. See 20 U. S. C. §1412(a)(10)(B). It then included several clauses addressing "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." §1412(a)(10)(C). The first contrasts with the provision covering an agency referral:

> "(i) In general
>
> ". . . this subchapter does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." §1412(a)(10)(C).

The second clause covers the case in which the school authority failed to make a FAPE available in its schools. It does not, however, provide simply that the authority must pay in this case, no matter what. Instead it provides this:

> "(ii) Reimbursement for private school placement
>
> "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary 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." §1412(a)(10)(C).

Two additional clauses spell out in some detail various facts upon which the reimbursement described in clause (ii) may be "reduced or denied." See §§1412(a)(10)(C)(iii) and (iv).

As a purely semantic matter, these provisions are ambiguous in their silence about the case with no previous special education services and no FAPE available. As the majority suggests, *ante*, at 10–11, clause (i) could theoretically be understood to imply that reimbursement may be ordered whenever a school district fails to provide a FAPE, and clause (ii) could be read as merely taking care to mention one of a variety of circumstances in which such reimbursement is permitted. But this is overstretching. When permissive language covers a special case, the natural sense of it is taken to prohibit what it fails to authorize. When a mother tells a boy that he may go out and play after his homework is done, he knows what she means.

So does anyone who reads the authorization of a reimbursement order in the case of "a child with a disability, who previously received special education and related services under the authority of a public agency." §1412(a)(10)(C)(ii).[1] If the mother did not mean that the

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[1] Likewise, no one is unsure whether this Court's Rule 18.6, which states, "Within 30 days after the case is placed on this Court's docket, the appellee may file a motion to dismiss . . . ," allows for a motion to dismiss after 30 days. See also *Carlisle* v. *United States*, 517 U. S. 416, 431–32 (1996) (listing numerous examples of permissive statements, such as then Federal Rule of Criminal Procedure 17(d)'s statement that a subpoena "may be served" by a person "who is not less than 18 years of age," that plainly carry a restrictive meaning).

homework had to be done, why did she mention it at all, and if Congress did not mean to restrict reimbursement authority by reference to previous receipt of services, why did it even raise the subject? "[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Corley* v. *United States*, 556 U. S. ___, ___ (2009) (slip op., at 9) (internal quotation marks omitted). But not on the Court's reading, under which clause (ii) does nothing but describe a particular subset of cases subject to remedial authority already given to courts by §1415(i)(2)(C)(iii) and recognized in *Burlington:* a court may order reimbursement for a child who previously received special education related services, but it may do this for any other child, too.[2] But this is just not plausible, the notion that Congress added a new provision to the IDEA entitled "Reimbursement for private school placement" that had no effect whatsoever on reimbursement for private school placement. I would read clause (i) as written on the assumption that the school authorities can be expected to honor their obligations and as stating the general rule that unilateral placement cannot be reimbursed. See §1412(a)(10)(C)(i) ("In general . . . "). And I would read clause (ii) as imposing a receipt of prior ser-

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[2]The majority says that "clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services are inadequate." *Ante*, at 11. But this is just another way of reading the provision off the books. On the majority's reading, clause (ii) states only that a court may award reimbursement when (1) there is a previous receipt of special education services and (2) a failure to provide a FAPE. Such a description of the most common subset of a category already described may be called elaboration, but it still has no effect on the statutory scheme.

vices limit on any exceptions to that general rule when school officials fall short of providing a FAPE. See §1412(a)(10)(C)(ii) ("Reimbursement for private school placement . . . ").

This reading can claim the virtue of avoiding a further anomaly. Section 1412(a)(10)(C)(iii), which limits otherwise available reimbursement, is expressly directed to "[t]he cost of reimbursement described in clause (ii)." This makes perfect sense under my reading. Since clause (ii) is now the exclusive source of authority to order reimbursement, it is natural to refer to it in the clause setting out the conditions for reducing or even denying reimbursement otherwise authorized. Yet, as T. A. and the Government concede, Brief for Respondent 22; Brief for United States as *Amicus Curiae* 4, 17, under the majority's reading, Congress has called for reducing reimbursement only for the most deserving (parents described in clause (ii) who consult with the school district and give public special education services a try before demanding payment for private education), but provided no mechanism to reduce reimbursement to the least deserving (parents who have not given public placement a chance).

The Court responds to this point by doubling down. According to the majority, the criteria listed in clause (iii) can justify a reduction not only of "reimbursement described in clause (ii)," §1412(a)(10)(C)(iii), but can also do so for a reimbursement order authorized elsewhere as well, *ante*, at 11 n. 8. That is, the majority avoids ascribing perverse motives to Congress by concluding that in both clause (ii) and clause (iii), Congress meant to add nothing to the statutory scheme. This simply leads back to the question of why Congress in §1412(a)(10)(C) would have been so concerned with cases in which children had not previously received special education services when, on the majority's reading, the prior receipt of services has no relevance whatsoever to the subject of that provision.

Because any other interpretation would render clause (ii) pointless and clause (iii) either pointless or perverse, §1412(a)(10)(C)(ii) must be read to allow reimbursement only for "parents of a child with a disability, who previously received special education and related services under the authority of a public agency."

II

Neither the majority's clear statement rule nor its policy considerations prevail over the better view of the 1997 Amendments.

A

The majority says that, because of our previous interpretation of the Act as authorizing reimbursement for unilateral private placement, Congress was obliged to speak with added clarity to alter the statute as so understood. *Ante*, at 8–12. The majority refers to two distinct principles for support: first, statutes are to be read with a presumption against implied repeals, *e.g., ante*, at 12–13 (citing *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) (plurality opinion)), and second, congressional reenactment of statutory text without change is deemed to ratify a prior judicial interpretation of it, *e.g., ante,* at 8–9 (citing *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978)). I think neither principle is up to the task.

Section 1412(a)(10)(C) in no way repealed the provision we considered in *Burlington*.[3] The relief that "is appropriate" under §1415(i)(2)(C)(iii) depends on the substantive provisions of the IDEA as surely as if the provision author-

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[3]The presumption against implied repeals would not justify reading the later provision as useless even if it applied since, when two provisions are irreconcilable, the presumption against implied repeals gives way to the later enactment. See *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) (plurality opinion).

ized equitable relief "consistent with the provisions of this statute."[4] When we applied §1415(i)(2)(C)(iii) in *Burlington*, we expressly referred to those provisions and concluded that, in the absence of a specific rule, "appropriate" relief included the reimbursement sought. By introducing new restrictions on reimbursement, the 1997 Amendments produce a different conclusion about what relief is "appropriate." But §1415(i)(2)(C)(iii) remains in effect, just as it would remain in effect if Congress had explicitly amended the IDEA to prohibit reimbursement absent prior receipt of services.

As for the rule that reenactment incorporates prior interpretation, the Court's reliance on it to preserve *Burlington*'s reading of §1415(i)(2)(C)(iii) faces two hurdles. First, so far as I can tell, this maxim has never been used to impose a clear statement rule. If Congress does not suggest otherwise, reenacted statutory language retains its old meaning; but when a new enactment includes language undermining the prior reading, there is no presumption favoring the old, and the only course open is simply to read the revised statute as a whole. This is so because there is no reason to distinguish between amendments that occur in a single clause (as if Congress had placed all the changes in §1415(i)(2)(C)(iii)), and those that take the form of a separate section (here, §1412(a)(10)(C)). If Congress had added a caveat within §1415(i)(2)(C)(iii), or in an immediately neighboring provision, I assume the majority would not approach it with skepticism on the ground that it purported to modify a prior judicial interpretation.

Second, nothing in my reading of §1412(a)(10)(C)(ii) is

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[4] No one, for example, would suggest that a court could grant reimbursement under §1415(i)(2)(C)(iii) to parents of a nondisabled child, but this is obvious only because we assume §1415(i)(2)(C)(iii) is to be read in light of the substantive provisions of the statute.

inconsistent with the holdings of *Burlington* and the other prior decision on the subject, *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7 (1993). Our opinion in *Burlington* was expressly premised on there being no "other reference" that would govern reimbursement for private tuition, 471 U. S., at 369, and this all but invited Congress to provide one. Congress's provision of such a reference in 1997 is, to say the very least, no reason for skepticism that Congress wished to alter the law on reimbursement. The 1997 legislation, read my way, would not, however, alter the result in either *Burlington* or *Carter*. In each case, the school district had agreed that the child was disabled, the parents had cooperated with the district and tried out an IEP, and the only question was whether parents who later resorted to a private school could be reimbursed "'if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.'" *Carter*, *supra*, at 12 (quoting *Burlington*, *supra*, at 369). In ordering reimbursement, the Court in both *Burlington* and *Carter* emphasized that the parents took part in devising an IEP, 471 U. S., at 368; 510 U. S., at 12, and expressed concern for parents who had sought an IEP before placing their child in private school, but received one that was inadequate, 471 U. S., at 370; 510 U. S., at 12. The result in each case would have been the same under my reading of the amended Act, both sets of parents being "parents of a child with a disability, who previously received special education and related services under the authority of a public agency." §1412(a)(10)(C)(ii). It is therefore too much to suggest that my reading of §1412(a)(10)(C)(ii) would "abrogat[e] *sub silentio* our decisions in *Burlington* and *Carter*," *ante*, at 12.

The majority argues that the policy concerns vindicated in *Burlington* and *Carter* justify reading those cases to authorize a reimbursement authority going beyond their facts, *ante,* at 7–8, and would hold reimbursement possible

even for parents who, like those here, unilaterally resort to a private school without first establishing at the administrative or appellate level that the child is disabled, or engaging in a collaborative process with the school officials. But how broadly one should read *Burlington* and *Carter* is beside the point, Congress having explicitly addressed the subject with statutory language that precludes the Court's result today.

B

The Court also rejects the natural sense of §1412(a)(10)(C) as an interpretation that would be "at odds with the general remedial purpose underlying IDEA and the 1997 Amendments." *Ante*, at 13. The majority thinks my reading would place the school authorities in total control of parents' eligibility for reimbursement: just refuse any request for special education or services in the public school, and the prior service condition for eligibility under clause (ii) can never be satisfied. Thus, as the majority puts it, it would "borde[r] on the irrational" to "immuniz[e] a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need." *Ibid.* I agree that any such scheme would be pretty absurd, but there is no absurdity here. The majority's suggestion overlooks the terms of the IDEA process, the substantial procedures protecting a child's substantive rights under the IDEA, and the significant costs of its rule.

To start with the costs, special education can be immensely expensive, amounting to tens of billions of dollars annually and as much as 20% of public schools' general operating budgets. See Brief for Council of the Great City Schools as *Amicus Curiae* 22–23. The more private placement there is, the higher the special education bill, a fact that lends urgency to the IDEA's mandate of a collaborative process in which an IEP is "developed jointly by

a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child." *Burlington*, *supra*, at 368.

The Act's repeated emphasis on the need for cooperative joint action by school and parent does not, however, leave the school in control if officials should wish to block effective (and expensive) action for the child's benefit, for if the collaborative approach breaks down, the IDEA provides for quick review in a "due process hearing" of the parents' claim that more services are needed to provide a FAPE than the school is willing to give. See §1415(c)(2) (district must respond to due process hearing complaint within 10 days and hearing officer must assess facial validity of complaint within 5 days); §1415(e) (mediation is available, provided it does not delay due process hearing); §1415(f)(1)(B) (district must convene a meeting with parents within 15 days to attempt to resolve complaint); 34 CFR §§300.510(b)(1)–(2) (2008) (if complaint is not resolved, a hearing must be held within 30 days of complaint and a decision must be issued within 75 days of complaint). Parents who remain dissatisfied after these first two levels of process may have a right of appeal to the state educational agency and in any case may bring a court action in federal district court. See 20 U. S. C. §1415(i)(2). This scheme of administrative and judicial review is the answer to the Court's claim that reading the prior services condition as restrictive, not illustrative, immunizes a school district's intransigence, giving it an effective veto on reimbursement for private placement.[5]

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[5]The majority argues that we already rejected this process as inadequate in *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359 (1985). *Ante*, at 14. That was before the enactment of §1412(a)(10)(C)(ii). The question in *Burlington* was whether the reimbursement there was an "appropriate" remedy under §1415(i)(2)(C)(iii). See 471 U. S., at 370. With no statement to the contrary from Congress, the Court expressed concern over the possible

That said, the Court of course has a fair point that the prior services condition qualifies the remedial objective of the statute, and pursuing appeals to get a satisfactory IEP with special services worth accepting could be discouraging. The child who needs help does not stop needing it, or stop growing, while schools and parents argue back and forth. But we have to decide this case on the premise that most such arguments will be carried on in good faith, and even on the assumption that disagreements about the adequacy of IEPs will impose some burdens on the Act's intended beneficiaries, there is still a persuasive reason for Congress to have written the statute to mandate just what my interpretation requires. Given the burden of private school placement, it makes good sense to require parents to try to devise a satisfactory alternative within the public schools, by taking part in the collaborative process of developing an IEP that is the "*modus operandi*" of the IDEA. *Burlington*, 471 U. S., at 368. And if some time, and some educational opportunity, is lost in consequence, this only shows what we have realized before, that no policy is ever pursued to the ultimate, single-minded limit, and that "[t]he IDEA obviously does not seek to promote [its] goals at the expense of all considerations, including fiscal considerations," *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 303 (2006).[6]

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length of the IDEA review process and surmised that Congress would have intended for reimbursement to be authorized. *Ibid.* But Congress provided a statement to the contrary in 1997; the only reading that gives effect to §1412(a)(10)(C)(ii) is that reimbursement is not permitted absent prior placement, and the only question for the Court now is whether Congress could have meant what it said.

[6] See 143 Cong. Rec. 8013 (1997) (statement of Rep. Castle) ("This law . . . has had unintended and costly consequences. . . . It has resulted in school districts unnecessarily paying expensive private school tuition for children. It has resulted in cases where lawyers have gamed the system to the detriment of schools and children." "This bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts").

Syllabus

to reimburse parents for the cost of private-school tuition when a school district fails to provide a child a FAPE and the private-school placement is appropriate. That *Burlington* and *Carter* involved the deficiency of a proposed IEP does not distinguish this case, nor does the fact that the children in *Burlington* and *Carter* had previously received special-education services; the Court's decision in those cases depended on the Act's language and purpose rather than the particular facts involved. Thus, the reasoning of *Burlington* and *Carter* applies unless the 1997 Amendments require a different result. Pp. 6–8.

(b) The 1997 Amendments do not impose a categorical bar to reimbursement. The Amendments made no change to the central purpose of IDEA or the text of §1415(i)(2)(C)(iii). Because Congress is presumed to be aware of, and to adopt, a judicial interpretation of a statute when it reenacts that law without change, *Lorillard* v. *Pons*, 434 U. S. 575, 580, this Court will continue to read §1415(i)(2)(C)(iii) to authorize reimbursement absent a clear indication that Congress intended to repeal the provision or abrogate *Burlington* and *Carter*. The School District's argument that §1412(a)(10)(C)(ii) limits reimbursement to children who have previously received public special-education services is unpersuasive for several reasons: It is not supported by IDEA's text, as the 1997 Amendments do not expressly prohibit reimbursement in this case and the School District offers no evidence that Congress intended to supersede *Burlington* and *Carter;* it is at odds with IDEA's remedial purpose of "ensur[ing] that all children with disabilities have available to them a [FAPE] that emphasizes special education . . . designed to meet their unique needs," §1400(d)(1)(A); and it would produce a rule bordering on the irrational by providing a remedy when a school offers a child inadequate special-education services but leaving parents remediless when the school unreasonably denies access to such services altogether. Pp. 8–15.

(c) The School District's argument that any conditions on accepting IDEA funds must be stated unambiguously is clearly satisfied here, as States have been on notice at least since *Burlington* that IDEA authorizes courts to order reimbursement. The School District's claims that respondent's reading will impose a heavy financial burden on public schools and encourage parents to enroll their children in private school without first trying to cooperate with public-school authorities are also unpersuasive in light of the restrictions on reimbursement awards identified in *Burlington* and the fact that parents unilaterally change their child's placement at their own financial risk. See*, e.g., Carter*, 510 U. S., at 15. Pp. 15–16.

523 F. 3d 1078, affirmed.

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STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.