which could result in tremendous financial burdens for public schools already trying to manage limited resources.

The U.S. Supreme Court recently granted certiorari on a case that could allow parents to make unilateral decisions that would have devastating financial consequences for public schools.[4] The Ninth Circuit ruled in *Forest Grove School District v. T.A.* that a parent could enroll a special education student in private school placement and be eligible for tuition reimbursement, without having availed the student of the public school system.[5] In other words, a parent could potentially hold a public school accountable for private school tuition without ever giving the public school the opportunity to provide an appropriate education to the student.

The *Forest Grove* decision, which the U.S. Supreme Court will review on April 28, 2009,[6] followed a line of reasoning outlined in a recent Second Circuit decision. In *Bd. of Educ. of N.Y. v. Tom F.*,[7] the Court deadlocked and affirmed, per curiam, a Second Circuit decision that allows parents of special education students who have never availed themselves of the public school system to receive tuition reimbursement.[8] While this decision only binds the Second Circuit, the Ninth Circuit decision, if affirmed by the Supreme Court Justices, could have a lasting national effect.

The Court also recently denied review for a similar case in the same circuit.[9] This means that the court has passed twice on the issue. There is also little in the current record that oddsmakers or legal analysts could use to predict how the court will decide now that this issue has been appealed from another circuit. As will be discussed below, the recent line of cases sends a signal to school districts that they may have to prepare for increased litigation in this area, and to the United States Congress that they may need to clarify the statutory language in order to prevent unintended and crippling financial consequences.

4. Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078 (9th Cir. 2008), *cert. granted*, 129 S.Ct. 987 (U.S. Jan 16, 2009) (No. 08-305).

5. Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078 (9th Cir. 2008).

6. Supreme Court Argument Calendar, http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalApril2009.pdf (last visited March 3, 2009).

7. Bd. of Educ. of N.Y. v. Tom F., 552 U.S. 1 (2007) (per curiam) (4-4 vote, with Justice Kennedy recusing himself).

8. *Id.*

9. Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 128 S.Ct. 436 (Oct. 15, 2007) (No. 06-580).

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Tom F. appealed to the Second Circuit.[23] In his appeal, Tom F. argued that the Southern District incorrectly interpreted the law and that reimbursement is not restricted solely to parents whose child has previously received services from a public school.[24] The Second Circuit considered the appellant's argument but vacated and remanded because *Frank G.* had just been decided on the same issue.[25]

B. The Facts in Frank G.

Frank G. is the adoptive parent of Anthony, who was born to a crack-addicted mother.[26] Anthony was diagnosed with ADHD when he was 3 years old.[27] Anthony did not attend public schools from kindergarten through fourth grade.[28]

In April 2000, Anthony's parents notified the public school district of his disability, and the district responded in kind by classifying Anthony as learning disabled under the IDEA.[29] During the spring of 2001, Anthony was evaluated by an occupational therapist who noted several deficits in his skills, and by a neuropsychologist who "recommended that Anthony receive 'individualized attention and a relatively small class,'" among other individualized modifications.[30]

The school district developed an IEP for Anthony which included direct consultant teacher services, a behavior modification plan, a full-time individual aide, and other counseling and therapy services, but it called for placing him in a regular education class of 26 to 30 students.[31] Anthony's parents objected and enrolled Anthony in Upton Lake, a private school, and an independent hearing officer held that neither the Upton Lake placement nor the public school's offered placement were appropriate.[32] In fact, the school

23. *Id.*

24. *Id.*

25. *Id.*

26. Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 359 (2d Cir. 2006).

27. *Id.* at 360.

28. *See id*. (Anthony attended all private schools, such as the Randolph School for Kindergarten [1997–1998], then Bishop Dunn from first through fourth grade [1998–2001], and finally Upton Lake in the year for which Frank G. asked for tuition reimbursement.)

29. *Id.* at 360.

30. *Id.*

31. *Id.*

32. *Id.* at 361.

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> option for people who had no desire to go to public schools at all.[71]

Chief Justice Roberts picked up on this line of reasoning when the respondent's counsel, Paul G. Gardephe, presented his oral argument. The Chief Justice stated, "So when it comes to reimbursement or tuition, the parents who never place their child in the public school are in better shape than the parents who place their child in public school and then want to remove him."[72]

tuition to a private school."[78] Koerner agreed, and argued that to apply Tom F.'s interpretation of the statute would create an automatic assumption that any IEP offered by the school is insufficient.[79]

3. Does the Prerequisite Put Too High of a Burden on Parents to Challenge FAPE?

Another question raised by the Justices was whether, with or without the prerequisite, the system puts too high of a burden on parents to prove that the proposed placement does not meet the requirements of FAPE.[80] In particular, Justice Ginsburg raises this concern in the oral arguments.[81]

Justice Ginsburg noted that current federal law puts the burden on the parent to demonstrate that the public school does not provide an appropriate placement.[82] In fact, she went so far as to describe it as a "heavy burden."[83] This court previously held that parents bear this burden.[84]

III. DIFFERENTIATING *FOREST GROVE*

Given the preceding facts and analysis on the *Tom F.* and *Frank G.* cases, one could argue that the facts in *Forest Grove* are clearly distinguishable. Even if the Supreme Court does not differentiate *Forest Grove*, it should rule that allowing parental unilateral private school placement is not an appropriate interpretation of the statutory language. To rule otherwise would allow for a tortured reading of the statute, and would invite further costly litigation at the financial expense of taxpayers, and ultimately of the educational expense of the student. Whatever the Court decides, the legislature would be wise to make the language completely unambiguous in order to prevent unnecessary and costly litigation.

78. Transcript of Oral Argument, *supra* note 66, at 17.

79. *Id.*

80. *Id.* at 13–14, 23.

81. *Id.*

82. *Id.*

83. *Id.* at 14.

84. Schaffer v. Weast, 546 U.S. 49 (2005) (in which Justice Ginsburg filed a dissenting opinion).

A. The Facts in Forest Grove

In *Forest Grove*, the court deals with another student who may have had ADHD. T.A. was enrolled at schools in the Forest Grove School District from kindergarten through the spring semester of his junior year of high school.[85] The facts indicate he experienced difficulty paying attention in class and completing schoolwork, but he had passed his classes and had never received special education services.[86] In December 2000, T.A.'s guidance counselor referred him for a special education evaluation based on a suspicion that he may have a learning disability.[87]

The court states that T.A.'s parents never requested an evaluation for ADHD.[88] The court also notes that although the school district only evaluated students for learning disabilities, it did have internal communications about the possibility that T.A. might have ADHD, including notes from one meeting that mention "suspected ADHD."[89] After examination by psychologists and educational specialists, the school district held an eligibility meeting on June 13, 2001, that T.A.'s mother attended.[90] The team of specialists unanimously concluded, and the mother agreed, that T.A. did not have a learning disability and was ineligible for special education services.[91]

In 2002, T.A. began using marijuana and by early 2003 he was a regular user and exhibited noticeable personality changes.[92] He then ran away from home and was brought home by police a few days later, at which point T.A.'s parents took him to a psychologist and then to a hospital emergency room.[93] Dr. Fulop, the psychologist hired by T.A.'s parents, met with T.A. several times and eventually diagnosed him with ADHD, depression, math disorder, and cannabis abuse.[94] Dr. Fulop recommended a residential program for T.A. "because of T.A.'s failure to live up to his potential in school, his

85. Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078, 1081 (9th Cir. 2008).
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1082.

difficulties at home, his attitude toward school, his sense of hopelessness, and his drug problem."[95]

On Feb. 27, 2003, T.A.'s father told the high school assistant principal that T.A. was undergoing medical testing, would enter a three-week wilderness training program, and would attend Portland Community College (PCC) in the spring.[96] The next day, the father told another high school administrator that T.A. was enrolled at PCC, and on March 10, 2003, the father told the assistant principal "that T.A. was 'officially disenrolled' from Forest Grove High School and had registered at PCC."[97] Neither T.A. nor his parents expressed any dissatisfaction with his placement at PCC.[98]

T.A.'s parents then sent him to a three-week program at Catherine Freer Wilderness Therapy Expeditions.[99] When he was discharged from the program, the Freer staff gave T.A. a primary diagnosis of cannabis dependence and a secondary diagnosis of depression.[100] Soon afterward, T.A. was enrolled at Mount Bachelor Academy, "a residential private school that describes itself as 'designed for children who may have academic, behavioral,

2003 eligibility meeting, the team determined that T.A. had some learning difficulties. They acknowledged his ADHD and depression diagnoses, but the "majority found that T.A. did not qualify under the IDEA in the areas of learning disability, ADHD, or depression, because those diagnoses did not have a severe effect on T.A.'s educational performance."[106] On Aug. 26, 2003, another team met and found that T.A. was also ineligible for services under § 504 of the Rehabilitation Act of 1973.[107]

The due process hearing resumed in September 2003 and both parties submitted evidence, including the history of the case.[108] Another psychologist, Dr. Callum, testified at the hearing that ADHD was not a primary cause of T.A.'s educational difficulties, and she concluded that "T.A. would be able to complete public high school without any services beyond those given to all students."[109] On Jan. 26, 2004, the hearing officer issued an opinion that T.A. was disabled and therefore eligible for special education under the IDEA and § 504, that the school district failed to provide FAPE, and that the school district was responsible for T.A.'s $5,200 per month tuition at Mount Bachelor Academy.[110]

The school district appealed to the U.S. District Court of Oregon, arguing that "reimbursement was unwarranted because T.A. unilaterally withdrew from public school without providing prior school district was responsible

principals of equity."[112] T.A. appealed to the Ninth Circuit.

B. The Ninth Follows the Second—with a Twist

Recognizing that the question of private school reimbursement was currently being litigated in other jurisdictions, the Ninth Circuit first elected to refer the case to mediation while it awaited the results of the Supreme Court's decision on *Frank G.*, and noted that the Supreme Court had recently deadlocked in *Tom F.*[113] As noted above, though, the Supreme Court denied certiorari in *Frank G.*[114]

Ultimately, the mediation was unsuccessful, and the Ninth Circuit proceeded. Essentially, the court adopted the reasoning of the Second Circuit, stating, "We see no reason to disagree with the 2nd Circuit's well-reasoned analysis of this issue."[115] The court agreed with the Second Circuit's conclusion "that § 1412(a)(10)(C)(ii) is ambiguous because its text does not *clearly* create a categorical bar and because such an interpretation is in tension with the broader context of the statute."[116] The court also sided with the Second Circuit's rationale that to interpret the statute in any other way would lead to "absurd results."[117]

The Ninth Circuit reasoned that when Congress amended the IDEA in 1997, specifically § 1412(a)(10)(C), it focused on factors to be considered when deciding whether tuition reimbursement is available to students who previously received special education services from the school district.[118] Thus, the court held that when determining whether reimbursement is available to a student who did not previously receive special education services from the district, § 1412(a)(10)(C) does not apply, and courts must analyze the case under principles of equity under § 1415(i)(2)(C).[119]

Thus, the Ninth Circuit remanded to the district court to reconsider the case based on equitable principles.[120] The court went

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1087.

116. *Id.* at 1086.

117. *Id.* Recall that the Second Circuit felt that another reading of the statute could force a student to attend public school when it would clearly be an inappropriate placement and would be "useless and potentially counterproductive." *See supra* text accompanying note 60.

118. *Forest Grove*, 523 F.3d at 1087.

119. *Id.*

120. *Id.* at 1089.

on to offer guidelines as to how it felt those equities ought to be considered.[121]

C. The Dissent Distinguishes Forest Grove *from* Tom F. *and* Frank G. *(Without Saying as Much)*

Circuit Judge Rymer 7 00.00301 Tc 10.240