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DIMINISHED RIGHTS OF PARENTS TO SEEK REIMBURSEMENT UNDER THE IDEA FOR UNILATERAL PLACEMENT OF THEIR CHILDREN IN PRIVATE SCHOOLS

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I. INTRODUCTION

Forest Grove School District v. T.A.[1] has served to reframe the discussion of whether or not parents are entitled to reimbursement under the Individuals with Disabilities Act (IDEA) for unilaterally placing their children in private schools.[2] In *Forest Grove*, parents sought reimbursement for the expense of placing their child in a private school, even though the child had not been receiving special education services prior to the placement. In landmark decisions in *School Committee of Burlington v. Department of Education of Massachusetts*[3] and *Florence County School District Four v. Carter*,[4] the Supreme Court had determined that such reimbursement was permissible under the IDEA since it was not to be considered a damages award. Both *Burlington* and *Florence County* ruled on behalf of parents by focusing on the failure of the public school districts to provide appropriate services. As discussed later in this Article, four years after *Florence County*, Congress amended the IDEA to impose notice requirements on parents seeking reimbursement for their children's private school placements.

Forest Grove has served to tighten the analysis as to whether parents are entitled to reimbursement, and, in effect,

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1. Forest Grove Sch. Dist. v. T.A., 640 F. Supp. 2d 1320 (D. Or. 2005), *rev'd and remanded*, 523 F.3d 1078 (9th Cir. 2008), *aff'd*, 557 U.S. 230 (2009), *remanded to* 675 F. Supp. 2d 1063 (D. Or. 2009), *aff'd*, 638 F.3d 1234 (9th Cir. 2011).

2. The term "unilateral parent placement" does not appear directly in the IDEA but is a concept derived from the federal statute, which refers to parents having "enroll[ed] a child in a private elementary school or secondary school without the consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C)(ii) (2012).

3. Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359 (1985).

4. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993).

to make such reimbursement more difficult to obtain. The Supreme Court decision in *Forest Grove* introduced a balancing-of-equities approach for examining the appropriateness of parental reimbursement—an approach that has served to broaden the scope of judicial inquiry beyond a public school district's compliance with the IDEA and focus, as well, on the responsibilities of parents. Some of the issues that are now given prominence in the balancing process include the following: whether the parents have provided notice to the school district of their intention to place their child in a private school, whether the private school was equipped to address the child's disability, and whether the primary responsibility for balancing equities rests with federal district courts.

Guarded optimism after *Forest Grove* that parental reimbursement for private school placement might be more readily available has not been realized,[5] as reflected in post-*Forest Grove* court of appeals decisions. The *Forest Grove* Supreme Court's affirmation of a balancing-of-equities process has suggested that the federal district courts will have an enhanced role in managing the process.

In the most recent of the *Forest Grove* decisions, the Ninth Circuit affirmed a federal district court decision that parents, after six years of litigation, were not entitled to reimbursement for placement of their child in a private school. This Article will address the following: (1) the pre-*Forest Grove* early ground rules from *Burlington* and *Florence County* regarding parental reimbursement, (2) Congress' post-*Burlington* and -*Florence County* IDEA amendments affecting reimbursement, (3) the effect of the balancing of equities on parental reimbursement, (4) the efforts by federal circuits to furnish definition and meaning to the balancing-of-equities process, and (5) the role of federal district courts in managing the balancing process.

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5. *Cf.* Brianna L. Lennon, *Cut And Run? Tuition Reimbursement and the 1997 IDEA Amendments*, 75 MO. L. REV. 1297, 1298 (2010) ("*Forest Grove School District v. T.A.* clearly shows that the U.S. Supreme Court favors the rights of parents of special needs children over the autonomy of schools.") *with* Perry Zirkel, *Legal Currency in Special Education Law: Top Ten for School Leaders*, 262 ED. LAW REP. 1, 4 n.30 (2011) ("[*Forest Grove*] received considerable media attention, generally being hailed as a major victory for parents of children with disabilities. However, the issue was a narrow and relatively rare one, and the decision was inconclusive in terms of the ultimate outcome. Indeed, in this specific case, the parents ultimately lost on remand.").

II. BURLINGTON AND FLORENCE COUNTY: THE EARLY REIMBURSEMENT GROUND RULES

A. School Committee of Burlington v. Department of Education of Massachusetts

In *Burlington*, parents and the school district differed as to the nature of a child's disability and his appropriate placement.[6] The school district designed an Individualized Education Program (IEP)[7] for the student that set a goal for improvement in math and reading at only four months for the entire school year and provided only three hours of individualized instruction per week. The parents placed their child in a private school from which he graduated three years later. In ruling on behalf of the parents and upholding their right to reimbursement for the expenses associated with their private school placement, the Supreme Court determined that the broad grant of authority in the IDEA for a federal court to "grant such relief as the court determines is appropriate"[8] included reimbursement.[9] The Court reasoned that it would be "an empty victory" if "conscientious parents who have adequate means and who are reasonably confident of their assessment" were informed several years after the judicial review process that their expenditures could not be reimbursed by school officials.[10] "If that were the case, the child's right to a *free* appropriate public education [FAPE], the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete."[11] The Court characterized reimbursement not as damages but as "expenses that [the school district] should have paid all along

6. *See Burlington*, 471 U.S. at 362 ("the Town [school committee] believ[ed] the source [of the student's learning difficulties] . . . to be emotional and the [plaintiff] parents believ[ed] it to be neurological.").

7. 20 U.S.C. §1401(14) (2012) ("The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.").

8. *Id.* § 1415(i)(2)(C)(iii).

9. *Burlington*, 471 U.S. at 369.

10. *Id.* at 370.

11. *Id.*

and would have borne in the first instance had it developed a proper IEP."[12] In rejecting the district's argument that the parents had waived their claim to reimbursement by unilaterally placing their child in a private school before the end of the administrative due process hearing, the Court asserted that the IDEA did not impose a Hobson's Choice[13] on parents either to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. The [IDEA] was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.[14]

However, the Court closed with a cautionary note:

> 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. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement . . . .[15]

B. Florence County School District Four v. Carter

The Supreme Court's *Florence County* decision reinforced the Court's position in *Burlington* that parents have a right under the IDEA to unilaterally place their children in a private school and a right to be reimbursed if the public school district failed to provide a FAPE.[16] In *Florence County*, parents rejected a public school's IEP for their child classified as learning disabled, where the IEP provided that the child "would stay in regular classes except for three periods of

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12. *Id.* at 371.

13. OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The option of taking the one thing offered or nothing.").

14. *Burlington*, 471 U.S. at 372.

15. *Id.* at 373-74.

16. 20 U.S.C. § 1401(9) (2012). "The term '[FAPE]' means special education and related services that— (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title."

individualized instruction per week, and established specific goals in reading and mathematics of four months' progress for the entire school year."[17] The parents requested an administrative due process hearing, which was eventually held at both the local and state levels[18] for the public school.[19] While the hearings were in progress, the parents placed their child at the beginning of her tenth year of school in Trident Academy, "a private school specializing in educating children with disabilities."[20] The student remained there for three years and graduated.

In holding that the parents were entitled to reimbursement for the expenses associated with placing their child in a private school, the Supreme Court noted that a parent's choice of a private school was not subject to the same FAPE requirements imposed on public schools. The Court observed that to apply to parents the FAPE requirement that education in private schools be "'provided at public expense, under public supervision and direction' . . . would effectively eliminate the right of unilateral withdrawal recognized in *Burlington*."[21] Regarding the school district's claim that the parents should not be eligible for reimbursement because Trident Academy did not "meet state education standards" in that it "employed at least two faculty members who were not state-certified and . . . did not develop IEP's [sic]," the Court succinctly declared that the IDEA's FAPE requirements "[did] not apply to private parental placements. . . . Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."[22]

Finally, the Supreme Court addressed the public school district's financial concerns that permitting reimbursement where parents have unilaterally chosen a private school represents a hardship for the school district where, if parents

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17. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 10 (1993).

18. *See* 20 U.S.C. § 1415(g)(1) (2012) (IDEA requires a two-tiered administrative review process by which a hearing is conducted by local educational agencies; in such case, aggrieved parties must have the opportunity to appeal to the state educational agency (usually, the state department of education)).

19. *Florence Cnty.*, 510 U.S. at 10.

20. *Id.*

21. *Id.* at 13 (quoting 20 U.S.C. § 1401(9)(A) (1993)).

22. *Id.* at 14.

are not limited to state-approved private schools, "States will have to reimburse dissatisfied parents for any private school that provides an education that is proper under the [IDEA], no matter how expensive it may be."[23] While acknowledging the financial hardship to public school districts, the Court admonished those districts that they can avoid the financial burden of reimbursing parents for unilateral placements by doing one of two things: "giv[ing] the child a [FAPE] in a public setting, or plac[ing] the child in an appropriate private setting of the State's choice."[24]

The Court closed with two cautionary observations that were to provide the basis for subsequent lower court interpretations and the 1997 congressional amendments of the IDEA regarding reimbursement. The Court noted:

> [parents] are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the [IDEA]. . . . Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.[25]

Thus, while the Court in *Florence County* directed its attention primarily at the failure of the public school district to provide a FAPE, it also laid the groundwork for examining the appropriateness of the parents' choice of private school. Also in its *Florence County* decision, the Court grasped the policy implications for public school districts if parents' private school choices were not also required to address the issue of appropriateness.

III. CONGRESSIONAL AMENDMENTS TO THE IDEA CONCERNING REIMBURSEMENT

Four years after *Florence County*, Congress intervened in the private placement debate and amended the IDEA,

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23. *Id.* at 15.

24. *Id.*

25. *Florence Cnty.*, 510 U.S. at 16.

declaring that parents had certain responsibilities to fulfill towards the public school districts if they expected the school districts to reimburse them for the cost of unilateral placements. Congress' directions regarding parental requirements involved both a requirement to furnish notice and a warning of possible non-reimbursement if the notice was not provided:

> (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 [FAPE] 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 [FAPE] 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).[26]

Although the 1997 amendments were somewhat lacking in the forcefulness of their warnings to parents, they did legitimize a standard and a process for examining the appropriateness of services and placement decisions of a FAPE. Nonetheless, the 1997 amendments have become as important for what they do not address as for what they do:

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26. 20 U.S.C. §§ 1412(a)(10)(C)(ii), (iii) (2012).

(1) the amendments speak to the public school's requirement to provide a FAPE, but not to which party bears the burden of proof regarding the services necessary to satisfy a FAPE;[27]

(2) while the public school is required under the IDEA to provide a placement in the least restrictive environment,[28] the amendments are silent as to whether reimbursement is available if the parents' placement is more restrictive than the public school's (as it generally has tended to be);[29]

(3) although the public school district is required to implement services specified under an IEP, the amendments are silent as to whether reimbursement could be denied if the parents' placement was not able to implement some or all of the services designed for the IEP;[30]

(4) because the amendments focused on private school placements, it is not clear whether reimbursement is available for additional services purchased by parents if the child

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27. *See* Burilovich v. Bd. of Educ. of Lincoln Consol. Schs., 208 F.3d 560 (6th Cir. 2000) (rejecting parent reimbursement for cost of Loovas training at home where the parent had failed to carry the burden of proof of showing that public school's IEP was inappropriate). *But see* Jennifer D. v. N.Y.C. Dep't of Educ., 550 F. Supp. 2d 420 (S.D.N.Y. 2008) (holding parents entitled to reimbursement where they had satisfied a two-part burden of proof under Schaffer v. Wuest, 546 U.S. 49 (2005), that the public school's IEP was inappropriate because it failed to mainstream a disabled student to the maximum extent appropriate, while the parents' private school choice was appropriate since it provided a lower pupil-teacher ratio); Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840 (6th Cir. 2004) (in upholding reimbursement for parents' providing home-based Loovas instruction, the Sixth Circuit held that "[p]arents are entitled to retroactive reimbursement if the school district failed to provide the student with a FAPE and if the private placement chosen by the parents was reasonably calculated to enable the child to receive educational benefits."). *Id.* at 866.

28. *See* 20 U.S.C. § 1412(a)(5) (2012).

29. *See* Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss, 144 F.3d 391 (6th Cir. 1998) (holding that parents' placement of disabled child in a private school that admitted only children with disabilities did not prevent reimbursement. The Sixth Circuit observed, "It will commonly be the case that parents who have not been treated properly under the IDEA, and who exercise the right of parental placement, will place their child in a school that specializes in teaching children with disabilities and thus will not satisfy the mainstreaming requirement. Adopting such a limitation on parental placements would therefore effectively vitiate that remedy."). *Id.* at 400 n.7.

30. *See* Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112 (2d Cir. 2007) (holding that parents were not entitled to reimbursement for cost of private school where it did not contain a therapeutic setting provided for in the IEP; "[p]arents who seek reimbursement bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate.").

continues in the public school's placement;[31]

(5) the amendments are silent as to the issues of cost of residential placements, the failure of parents to provide notice, and the adequacy of the private facility in providing a meaningful educational benefit;[32] and

(6) the amendments are silent as to whether a parent could recover reimbursement for a child placed in a private school even though that child had never received special education services.[33]

IV. *FOREST GROVE*'S INFLUENCE ON ADDRESSING PARENTAL REIMBURSEMENT

A. First Ninth Circuit Decision

Despite—and perhaps because of—Congress' rather ambivalent directive in its 1997 IDEA amendments, the Ninth Circuit's *Forest Grove* decisions have asserted judicial, as opposed to administrative,[34] control over the balancing-of-equities process. In the first Ninth Circuit decision, the court reversed a federal district court decision that parents of a child with Attention Deficit Hyperactivity Disorder (ADHD) were precluded from reimbursement for parental unilateral private school placement where the child had not "previously received

31. *See* Mora v. Dep't of Pub. Welfare, 768 A.2d 904 (Pa. Commw. Ct. 2001) (a Part C case upholding reimbursement for a family that had "provided private services to supplement inadequate [Individualized Family Service Plan] services and the child [had made] progress toward her goals as a result of the combination of services"). *Id.* at 908.

32. *See* Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286 (5th Cir. 2009) (reversing federal district court $56,000 reimbursement to parents calculated from the date that the school district had reasonable notice of the parents' intent to place their child in the private school and ending on the date that the child was removed from the private residential school and remanding to district court to determine whether, even though the child's treatment at private residential facility was necessary to receive a meaningful educational benefit, the facility chosen by the parents was primarily oriented toward enabling her to receive a meaningful educational benefit).

33. *See* Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356 (2d Cir. 2006) (holding that failure to have student in public school did not prevent reimbursement where public school placement would have involved a classroom with too many children).

34. The IDEA requires that claimants exhaust administrative remedies before seeking judicial remedies. Administrative rulings by hearing officers are subject to judicial review. *See* 20 U.S.C. §§ 1415(f), (g), (l) (2012).

special education and related services under the authority of a public agency."[35] The Ninth Circuit found that the district court's interpretation would not only have the effect of reversing Congress' and the Supreme Court's clear expression "that *all* children with disabilities have available to them a [FAPE],"[36] but would lead to the absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate the special education.[37]

In place of a rigid interpretation of the IDEA, the Ninth Circuit substituted a balancing-of-equities analysis whereby the district court could consider various factors, such as "the existence of other, more suitable placements, the effort expended by the parents in securing alternative placements, and the general cooperative or uncooperative position of the school district,"[38] on remand to address whether the parents were entitled to reimbursement. The court went further and, in its parting comment, observed that the district court was free to consider the hearing officer's finding that T.A.'s parents had sent him to their private placement, Mount Bachelor Academy, "not only because of his disabilities, but also for reasons unrelated to his disabilities (i.e., substance abuse and behavioral problems)."[39] In effect, the Ninth Circuit implied that the balancing-of-equities approach could result in parents not being reimbursed, even though a school district failed to provide FAPE. Thus, if a hearing officer found that the primary reasons for private placement were a child's behavioral problems not considered to be the result of a disability, the parents might not be entitled to reimbursement.

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35. *Id.* § 1412(a)(10)(C)(ii).

36. *Id.* § 1400(d)(1)(A) (emphasis added); *see also* Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369-70 (1985).

37. Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078, 1087 (9th Cir. 2008), *aff'd*, 557 U.S. 230 (2009), *remanded to* 675 F. Supp. 2d 1063 (D. Or. 2009), *aff'd*, 638 F.3d 1234 (9th Cir. 2011).

38. *Id.* at 1089 (citing W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1486 (9th Cir. 1992)).

39. *Id.*

B. Supreme Court Decision

Prior to the remand to the district court, the Supreme Court reinforced the Ninth Circuit's balancing-of-equities directive, noting in response to the school district's concern about the financial consequences of unilateral private placements that "courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant."[40] Because parents who place their children in private settings pending review proceedings do so "at their own financial risk,"[41] the Supreme Court concluded that "the incidence of private-school placement at public expense is quite small."[42]

C. Federal District Court Decision on Remand

On remand, the federal district court rejected the parents' claim that, in the absence of abuse by a hearing officer, the court was required to defer to the due process hearing officer's decision, which, in this case, had directed reimbursement for the parents. The district court determined that, in interpreting the IDEA, while it must accept the facts as found by the hearing officer, it could "exercise . . . independent judgment based on a preponderance of the evidence as to whether the legal conclusions reached by the hearing officer [were] supported by the facts."[43] This district court assertion over the balancing-of-equities process was confirmed on the second appeal to the Ninth Circuit, where the court of appeals noted that it could "reverse a district court's decision under an abuse of discretion standard only if the district court's decision was

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40. *Forest Grove*, 557 U.S. at 247.

41. *Id.* (quoting Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1998)) (quotation marks omitted).

42. *Id. See* Brief for Nat'l Disability Rights Network et al. as Amici Curiae Supporting Respondent, *Forest Grove*, 523 F.3d 1078, 2009 WL 906567, at *13-14 ("The percentage of children receiving services under the IDEA in publicly funded private placements has not changed significantly over the last 23 years. Since 1985, an average of 1.44% of all children served each year under the IDEA were in private placements at public expense. For the past two years for which national data are available, in 2006 only 0.97% of children with disabilities were in private placements at public expense (57,078 out of 5,888,227 children), and in 2007 the percentage was only 1.13% of children (66,648 children out of 5,882,835 children).").

43. Forest Grove Sch. Dist. v. T.A., 675 F. Supp. 2d 1063, 1066 (D. Or. 2009), *aff'd*, 638 F.3d 1234 (9th Cir. 2011).

'[1] illogical, [2] implausible, or [3] without support in inferences that may be drawn from the facts in the record.'"[44]

In effect, the Ninth Circuit's approach to the balancing of equities suggests that the primary decision-making body in that process is the federal district court. During their second review of the facts in *Forest Grove*, both the federal district and Ninth Circuit courts weighed the facts against reimbursing the parents. While the public school district's failure in *Forest Grove* to follow up on T.A.'s suspected ADHD under "other health impairments"[45] weighed in favor of the parents, both courts found determinative the parents' decision to send T.A. to the private school "after he admitted to using marijuana on a fairly regular basis, was occasionally so drugged that he could not get out of bed or speak, made over $1,000 worth of telephone calls to sex talk lines, scanned Internet pornography sites, and ran away from home."[46] As the district court pointedly observed, "ADHD and trouble with schoolwork were not among the reasons listed."[47]

In its conclusion that "[t]he equities do not favor requiring the District to reimburse T.A.'s parents for a decision to send T.A. to a school because of his drug abuse and behavioral problems that are unrelated to his difficulties focusing in school," the federal district court also reflected on the parents' and school district's responsibilities under the IDEA:

> it is important to note that the District's responsibility under the IDEA is to remedy the learning related symptoms of a disability, not to treat the underlying disability, or to treat other, non-learning related symptoms. The District certainly cannot begin treating a student's underlying medical

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44. *Forest Grove*, 638 F.3d at 1238 (quoting United States v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)).

45. 20 U.S.C. § 1401(3)(A)(i) (2012). "Other Health Impairment" is defined in the Oregon Administrative Regulations to mean "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that: (A) Is due to chronic or acute health problems (e.g. a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, attention deficit disorder, attention deficit hyperactivity disorder, leukemia, Tourette's syndrome or diabetes); and (B) Adversely affects a child's educational performance." OR. ADMIN. R. 581-015-2000(4)(h) (2012).

46. *Forest Grove*, 675 F. Supp. 2d at 1067.

47. *Id.*

> disability, whether it be ADHD or some other mental or physical disability. That responsibility rests with the parents and medical professionals.[48]

In addition, the district court wove into the balancing of equities the cost of the parents' private choice, especially in light of the parents' failure to investigate other options.[49] As the district court noted, the parents' private school choice cost $5,200 per month, which, if one were to consider the school psychologist's estimation of five to ten percent of the students in the Forest Grove School District suffering from ADHD, would cost "$1,428,000 to $2,964,000 a month, or $12,852,000 to $26,676,000 a year, assuming a nine month school year."[50]

D. Second Ninth Circuit Decision

In its review of the second federal district court decision in *Forest Grove*, the Ninth Circuit affirmed the district court's decision on behalf of the school district, reflecting on the broad discretion accorded federal district courts in reimbursement cases to determine the appropriate weight to be given to the evidence. Thus, the mere fact that parents may have had an equity factor in their favor does not require a district court, under a preponderance of the evidence standard, to rule on behalf of the parents.[51] As the Ninth Circuit so succinctly expressed, the balancing of equities meant that "the district court was *not* required to award reimbursement to T.A. simply because T.A.'s enrollment in private school was motivated *in part* by his disabilities."[52] Thus, since T.A.'s private school enrollment was "motivated by reasons both related and unrelated to his disabilities, the [district] court could have held the non-disability reasons so outweighed the disability reasons

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48. *Id.* at 1068.

49. *Id.* at 1067. ("T.A.'s parents do not appear to have done significant research into schools specializing in dealing with children with ADHD and depression to determine the best placement for T.A. Instead they chose the first school mentioned by [T.A.'s independent psychologist] and enrolled T.A. without even visiting [it].").

50. *Id.* at 1068.

51. *See* 20 U.S.C. § 1415(i)(2)(C)(iii) (2012) (in an appeal from a hearing officer's decision to a court, the court, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.").

52. Forest Grove Sch. Dist. v. T.A., 638 F.3d 1234, 1239 (9th Cir. 2011).

as to make reimbursement inequitable."[53]

What is apparent from the Ninth Circuit's second *Forest Grove* decision is that federal district courts have the authority pursuant to balancing equities to select the facts that are to be given greater or lesser emphasis for purposes of reimbursement. As a result, the Ninth Circuit found reasonable the district court's placement of greater emphasis on the parents' response of "inappropriate and oppositional behavior and drug use"[54] to an application question about the specific event for selecting the private school, even though the parents had also referenced elsewhere in the application "T.A.'s academic difficulties and ADHD."[55] The Ninth Circuit sought to assuage the sensitivities of parents who may feel punished if they seek private placements that "address 'all of their child's needs'"[56] by observing that "*in this case* the district court's determination that T.A. enrolled at [the private school] due to his behavior and drug problems was not illogical, implausible, or without support in inferences which may be drawn from facts in the record."[57]

V. POST-*FOREST GROVE* FEDERAL COURT DECISIONS: WHAT DOES "BALANCING OF EQUITIES" MEAN?

The Ninth Circuit in *Forest Grove* accorded to federal district courts within its circuit broad latitude in drawing legal conclusions regarding the facts as long as those conclusions were not "[1] illogical, [2] implausible, or [3] without support in inferences."[58] However, the extent to which federal district courts have as much latitude in determining parental reimbursement as suggested by the Ninth Circuit in *Forest Grove* is not clear. Although the Supreme Court in *Forest Grove* endorsed the balancing-of-equities approach to addressing parent reimbursement disputes, the Court did not determine how federal district courts and courts of appeals are to interpret FAPE in the balancing process. Perhaps reflecting

53. *Id.*
54. *Id.* at 1240 (quotation marks omitted).
55. *Id.*
56. *Id.*
57. *Id.* at 1241.
58. *Forest Grove*, 638 F.3d at 1238.

the relative newness of this balancing-of-equities process, federal circuits have not necessarily been in agreement as to how much discretion to accord federal district courts.

In *C.B. v. Special School District No. 1*,[59] a federal district court in the Eighth Circuit reversed a hearing officer's decision that parents were entitled to be reimbursed for unilaterally placing their child in a private school, even though the district court agreed with the parents that the school district had failed to provide a FAPE for four-and-a-half years.[60] However, finding that "[n]inety percent of the students at [the parents' choice of private school had] IEPs and the remaining students had some learning or attention issues,"[61] the district court held that the private school was "not an appropriate placement for [the student] because it [did] not offer him an education in the least restrictive environment."[62] Notwithstanding four-and-a-half years of failing to provide a FAPE, the parent placement[63] was found inappropriate because "the record [did] not show that the nature and severity of [the student's] learning disability could not be adequately addressed in the less restrictive public school setting."[64]

On appeal, the Eighth Circuit reversed the district court decision and ordered reimbursement for the parents for one year of private school placement. The Eighth Circuit found that the mainstreaming preference of the IDEA did not make the parents' private school choice an inappropriate private placement under the circumstances because the statute calls for educating children with disabilities together "with children who are not disabled to the maximum extent *possible*."[65] In a sweeping statement, the Eighth Circuit declared that the parents in this case had a "right of unilateral withdrawal"[66] and a right to reimbursement for private tuition, so long as the

59. C.B. v. Special Sch. Dist. No. 1, 636 F.3d 981 (8th Cir. 2011), *rev'g* 641 F. Supp. 2d 850 (D. Minn. 2009).

60. *C.B.*, 641 F. Supp. 2d 850.

61. *Id.* at 856.

62. *Id.*

63. The parents furnished the school district with the notice required under the IDEA. *See C.B.*, 636 F.3d at 986.

64. *C.B.*, 641 F. Supp. 2d at 856.

65. *Id.* (emphasis added) (quoting 20 U.S.C. § 1412(a)(5)(A) (2009)).

66. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 13 (1993).

placement was "proper under the [IDEA],"[67]and the award "further[ed] the purposes of the [IDEA]."[68] Paying little attention to the district court's factfinding and legal conclusions, the Eighth Circuit held that "[r]eimbursement for the costs of enrollment in a private school is authorized if the hearing officer finds that the District 'had not made a [FAPE] available to the child *in a timely manner* prior to that enrollment.'"[69] For the benefit of future federal district court decisions concerning parental reimbursement in the Eighth Circuit, the court of appeals aligned itself with "the Third and Sixth Circuits in concluding that a private placement need not satisfy a least-restrictive environment requirement to be 'proper' under the [IDEA]."[70] In effect, the Eighth Circuit altered the balancing of equities by eliminating one of the factors—the least restrictive environment—from the balancing process.

The result of a balancing-of-equities process where a public school district has not furnished a FAPE could be expected to change where the school district has furnished a FAPE. In *P.P. ex rel. Michael P. v. West Chester Area School District*,[71] the Third Circuit upheld a federal district court decision (affirming a hearing officer and appeals panel) finding that, where a public school district had made available a FAPE to a student, the parents were not entitled to reimbursement.[72] The Third Circuit upheld the district court's balancing of equities that included among the complex facts of the case, a child who had never attended the public school,[73] a disputed written parent

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67. Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U. S. 359, 369 (1985).

68. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 242 n.9 (2009).

69. C.B. v. Special Sch. Dist. No. 1, 636 F.3d 981, 991 (8th Cir. 2011) (citing 20 U.S.C. § 1412(a)(10)(C)(ii) (2011) (emphasis added)).

70. *Id. See* Warren G. v. Cumberland Cnty. Sch. Dist., 190 F.3d 80, 83-84 (3d Cir.1999); Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss, 144 F.3d 391, 399-400 (6th Cir.1998).

71. P.P. *ex rel.* Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009).

72. *Id.* at 739. However, the hearing officer had awarded 102 hours of compensatory damages because of the school district delay in evaluation, an award that was reversed by the appeals panel and upheld by the federal district court and the Third Circuit. *Id.* at 737.

73. *See id.* at 730 ("During the 2001-2005 school years, when he was in

notice to evaluate their child,[74] and a disputed IEP that contained most but not all of the evaluations requested in an Independent Educational Evaluation.[75] The most damaging factor in the balancing process against the parents, though, was the district court and Third Circuit's finding that the motivation for the parents' placement of their child in a private school was not due to his disabilities, but their having sent, in June 2005,

> a tuition deposit to Benchmark[, the private school, and having] financed the Benchmark tuition through AMS, a program that fronts the entire year's tuition to a private school and requires that parents repay the bank on a monthly basis, with limited opportunity for parents to opt out of full payment if their child does not attend the private school.[76]

Thus, while the student in *P.P.*, unlike the student in *Forest Grove*, had "never enrolled in the [School] District in the first place,"[77] the difference has no relevance where the school district in *P.P.* not only had provided a FAPE, but the parents' motivation in pursuing a private placement had been impugned.

Forest Grove, *C.B.*, and *P.P.* suggest that the judiciary's equitable authority will fall on the side of school districts where they have furnished a FAPE. However, parents face other equitable trip wires in their claim for reimbursement besides the issue of FAPE. The Third Circuit, in *C.H. v. Cape Henlopen School District*, ruled that parents who have failed to provide

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kindergarten through third grade, Patrick went to a parochial school, St. Maximillian Kolbe . . . . During the summer of 2005, and in the 2005-2006 school year, when he was in fourth grade, he attended the Benchmark School . . . , a private school for children with disabilities.").

74. *Id.* at 737 (the Third Circuit found "not credible" the parents' claim that they had sent written notice in January 2003, determining instead that a November 22, 2004 date which was the first one for which the parents had documentation of their demand).

75. *Id.* at 732. The school district's refusal to provide a math evaluation was upheld where the child was performing at an average level and refusal to conduct assessments of their son's social and emotional function where the parents' report stated that their son was happy, social, and responsible, the evaluators found that the student was "pleasant, joyful, and engaging[, and his] teachers described him as positive and motivated." *Id.* at n.1.

76. *Id.* at 732.

77. *P.P.*, 585 F.3d at 739 n.4.

school districts with notice that they intend to place their children in private schools, as specified in the IDEA, may not be entitled to any reimbursement, even if the school has failed to furnish a FAPE.[78] The 1997 amendments to the IDEA, as referenced above, allowed for reduction or denial of reimbursement for unilateral parental placement in a private school if the parents failed to provide notice of such placement "at the most recent IEP meeting that the parents attended prior to removal of the child from the public school."[79] Citing *Forest Grove*, the Third Circuit in *C.H.* noted that "courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant."[80] Even though the Supreme Court's *Forest Grove* decision had not been handed down until after the district court decision in *C.H.*, the Third Circuit, applying the equities to the facts, found the equities favored the school district's side where

> the Parents unilaterally withdrew C.H. from the District without any prior notice to the District[,] . . . [and where] delaying the continuation of the IEP meeting and cancelling the speech and language evaluation substantially precluded any possibility that the District could timely develop an appropriate IEP for C.H. and provide the necessary services to him, [so] that the parties could resolve this dispute without resort to litigation.[81]

Giving full equitable force to the IDEA's parental notice requirement, the Third Circuit declared that "[t]he IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations."[82]

However, even though the *Forest Grove* balancing-of-equities standard can present challenges for parents seeking reimbursement for having placed children in private schools, the breadth of the discretion granted to federal courts can work to the parents' advantage, as well. In *Ferren C. v. School District of Philadelphia*, the Third Circuit interpreted *Forest*

78. C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59 (3d Cir. 2010).

79. 20 U.S.C. § 1412(a)(10)(C)(iii) (2012).

80. *C.H.*, 606 F.3d at 71 (quotation marks omitted).

81. *Id.*

82. *Id.* at 72.

Grove as asserting that "the Supreme Court declined to limit courts' discretion in granting equitable relief under the IDEA."[83] In *Ferren*, the Third Circuit, in the shadow of *Forest Grove*, addressed the authority of federal courts to apply an equitable remedy under compensatory education. In a somewhat complex set of facts, the student in *Ferren* had attended a private school from 2004 to 2007 with the costs being paid from a trust fund established by the school district.[84] In 2007, the student turned twenty-one. The private school which she attended did not usually educate students past the age of twenty-one; however, it agreed to continue educating the student so long as the school district agreed to continue funding the student's education, which it agreed to do through 2010.[85]

However, after the student turned twenty-one, the school district stated that it intended to graduate the student at the end of the 2007 school year since it had no further obligations under the IDEA once a student with disabilities turned twenty-one.[86]

The school district's decision presented two problems for the private school: (1) it could not graduate the student unless the school district notified it that public school obligations under compensatory education had been satisfied, a notification that the school district did not (and, presumably would not) furnish to the private school; and (2) the school district, while willing to continue to pay the private school tuition from the trust fund, would no longer provide IEPs or serve as the local education authority (LEA).[87] Both the hearing officer and the administrative appeals panel found for the school district, ruling "that the School District was not required to provide Ferren with an IEP during the three-year compensatory education period."[88] A federal district court reversed the

83. Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010), *aff'g* 595 F. Supp. 2d 566 (E.D. Pa. 2009).

84. *Id.* at 715.

85. *Id.*

86. *Id.* at 715-16.

87. *Id.* at 715 (while the private school can prepare an IEP without the involvement of a public school district, it required that a student's home school district sign the IEP and serve as the student's LEA).

88. *Id.* at 716.

administrative decisions and "ordered the School District for the duration of her three years of compensatory education to annually reevaluate Ferren, provide her with annual IEPs, and serve as her LEA."[89] The Third Circuit reviewed the district court's equitable remedy under an abuse of discretion standard.[90] The court of appeals opined that, although compensatory education is "a judicially created remedy" not found in the IDEA, it falls within the equitable power accorded to courts under the IDEA.[91] Thus, while the IDEA limits a school district's obligation to provide a FAPE only to students under the age of twenty-one,[92] an individual over that age is still eligible for compensatory education for a school district's failure to provide a FAPE prior to the student turning twenty-one.[93] To allow the school district in *Ferren* to fulfill its obligation to make up for past failures only paying for private school tuition would frustrate the very purpose of setting up the trust fund because "Ferren could not remain at [the private school] without the School District providing IEPs and serving as Ferren's LEA."[94] The Third Circuit concluded that the equitable relief granted by the district court was "appropriate" under the IDEA because the District Court had weighed "the interests of finality, efficiency, and use of the School District's resources with the compelling needs of Ferren and her family."[95] The court of appeals concluded that, based on the specific facts of this case, the equitable award was appropriate to further the purposes of the IDEA because it will "ensure that Ferren's educational rights under the IDEA are enforced and that she receives the education to which she was statutorily entitled."[96]

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89. *Ferren*, 612 F.3d at 716.

90. *Id.*

91. *Id.* at 717.

92. 20 U.S.C. § 1412(a)(1)(A) (2012).

93. *See also* Reid v. Dist. of Columbia, 401 F.3d 516 (D.C. Cir. 2005).

94. *Ferren*, 612 F.3d at 719.

95. *Id.* at 718 (quoting Ferren C. v. Sch. Dist. of Phila, 595 F. Supp. 2d 566, 578 (E.D. Pa. 2009)) (quotation marks omitted).

96. *Id.* at 719.

A. Analysis and Implications

Forest Grove sends a less-than-clear message to parents concerning reimbursement for unilateral placement in private schools. What is also unclear is how the Supreme Court's balancing-of-equities approach in addressing reimbursement cases will affect the relationships between hearing officers and federal district courts and between district courts and courts of appeals. Whether the Supreme Court's *Forest Grove* decision enhances the role of federal district courts as the guardians of public school district funds and their expenditure for unilateral parental placement in private schools remains to be seen.

The balancing-of-equities process requires hearing officers and courts to determine two separate issues. First, a school district's failure to provide a FAPE must be balanced against the appropriateness (or inappropriateness) of the parents' placement decision. In effect, reimbursement cases under a balancing process have a substantive aspect and a school district's failure to furnish a FAPE may not be, in itself, sufficient justification for reimbursement.

Second, courts of appeals must decide what deference, if any, is due the decisions of the various administrative and judicial decision-makers that are part of the review process. Questions such as the relationship between procedural and substantive violations of the IDEA, whether parents have complied with the IDEA's notice requirements before placing their child in a private placement, and the appropriateness of the private school placement present both factual and legal issues. Defining the deference that a federal circuit court of appeals should provide to hearing-level and lower court decisions in post-*Forest Grove* reimbursement cases is far from clear.

In *Richardson Independent School District v. Michael Z.*,[97] two months after *Forest Grove*, the Fifth Circuit reversed a hearing officer's $56,000 reimbursement award to parents plus an additional $54,714.40 reimbursement and $36,768.20 in attorneys' fees and costs by the district court. With only a passing reference to *Forest Grove*, the Fifth Circuit applied the de novo standard of review for questions of law and a "clear

97. Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 (5th Cir. 2009).

error" standard for questions of fact.[98] In remanding to the district court, the Fifth Circuit instructed the court that, even though a school district had failed to furnish an IEP providing a FAPE, which resulted in the child's failed progress, the Fifth Circuit would not uphold the parents' residential placement unless they could prove not only that their placement was "essential in order for the disabled child to receive a meaningful educational benefit, [but also that it was] primarily oriented toward enabling the child to obtain an education."[99] The Fifth Circuit observed that "[the] IDEA . . . does not require school districts to bear the costs of private residential placements" that are not essential for a disabled child to receive an education;[100] balancing of equities requires that parents produce evidence that their child's treatment at their placement choice is "primarily oriented towards [i.e., primarily designed for and directed to] enabling the child to receive a meaningful educational benefit."[101] Thus, while the Supreme Court's balancing of equities in *Forest Grove* has affected a parent's burden of proof, *Richardson* suggests no change by courts of appeals in according a standard of review less than de novo.

Approximately five-and-a-half months after *Forest Grove*, the Ninth Circuit, in *Ashland School District v. Parents of Student R.J.*,[102] reflected on the appellate trip wires affecting parents seeking reimbursement. In *Ashland*, the court of appeals set out a balance between an administrative hearing officer and a federal district court in making findings of fact. A state hearing officer found that the school district had violated various procedural requirements of the IDEA between 2003 and 2005 (one of which was holding an IEP meeting without a parent present, thereby failing to make a FAPE available to the student) and accordingly held that the parents were

98. *Id.* at 291. *See* Teague Indep. Sch. Dist. v. Todd L., 999 F.2d 127, 131 (5th Cir. 1993) (citing Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1289 (5th Cir. 1991)).

99. *Richardson*, 580 F.3d at 299.

100. *Id.*

101. *Id.* at 301.

102. Ashland Sch. Dist. v. Parents of Student R.J., 588 F.3d 1004 (9th Cir. 2009), *aff'g* 585 F. Supp. 2d 1208 (D. Or. 2008).

entitled to reimbursement.[103] The IDEA provides that a procedural violation (such as a school district's failure to furnish notice to parents of an IEP meeting) can constitute denial of a FAPE only where such violation has "caused a deprivation of educational benefits to the child"[104] or "significantly impeded the parents' opportunity to participate in the decisionmaking process."[105] The hearing officer in *Ashland* allowed the parents reimbursement for only one of their two placements, reasoning that placement in the non-reimbursable residential facility "stemmed from issues apart from the learning process, which manifested themselves away from school grounds."[106] In effect, the hearing officer determined that one of the placements had not related to a FAPE violation because it had conferred no educational benefit on the student. The school district appealed to a federal district court, which reversed the hearing officer's finding of failure to provide a FAPE, in effect denying the parents any reimbursement at all.[107] The parents believed that the district court's decision was based on a too-narrow interpretation of "special education" and "related services."[108] The parents appealed, and the Ninth Circuit upheld the district court, determining that the IDEA provision authorizing federal courts to "grant such relief as the court determines is appropriate"[109] requires district courts to conduct a "de novo review of the state hearing officer's findings and conclusions."[110] The court of appeals then applied the same de novo and clear error standards of review as used in *Richardson* to find that the federal district court "[had] not clearly err[ed]" in finding that the parents were not entitled to any reimbursement at all for placement of their child at either school.[111] In light of evidence in the record concerning the child in *Ashland* and her

103. *Id.* at 1008.

104. 20 U.S.C. § 1415(f)(3)(E)(ii)(II) (2012).

105. *Id.* §§ 1415(f)(3)(E)(ii)(III).

106. *Ashland*, 588 F.3d at 1008.

107. *Id.* (quotation marks omitted).

108. *Id.* at 1009 (referencing 34 C.F.R. § 300.104 (2009)).

109. *Id.* at 1008 (quoting 20 U.S.C. 1415(e)(2) (2009)).

110. *Id.*

111. *Id.* at 1010. The circuit court did, however, review the district court's interpretation of the disputed IDEA provisions de novo. *Id.* at 1009-10.

emotional issues and choice of friends,[112] the Ninth Circuit upheld the district court in its finding that placement in a residential facility was not "necessary to meet [the student's] *educational* needs."[113] Thus, as in *Richardson*, the Ninth Circuit in *Ashland* applied the *Forest Grove* standard without altering the deference given to district court decisions.

Almost two years after *Forest Grove*, the Ninth Circuit in *C.B. ex rel. Baquerizo v. Garden Grove Unified School District*, again used the de novo (applied to legal interpretations of the IDEA) and clear error (regarding the adequacy of interpretation of the facts of the case) standards to uphold a federal district court's reversal of a hearing officer's decision.[114] Applying its clear error test, the Ninth Circuit upheld the awarding of full reimbursement for the parents, observing that "[o]ur focus is on the district court's decision, not the [hearing officer's] decision."[115]

The Ninth Circuit decisions in *Ashland* and *C.B.* upholding federal district court decisions limiting reimbursement (*Ashland*) and awarding full reimbursement (*C.B.*) present interesting possibilities as to whether the court of appeals would have reached the same results if the district courts had decided differently. Would the Ninth Circuit in *Ashland* have upheld a district court's order for full reimbursement, accepting the district court's reasoning that the child's emotional conduct outside of school affected the child's academic performance in school? Similarly, would the Ninth Circuit in *C.B.* have upheld a district court decision denying all reimbursement where the parents' placement was not able to meet all of the child's educational needs? Once a court of appeals finds no clear error

112. *Ashland*, 588 F.3d at 1007. The student's mother described her daughter's emotional issues as follows: "I just think that there are some serious emotional issues that are going on here that are affecting her interaction with peers and her interaction with parents and her interaction with teachers. Going behind people's backs, not being trustworthy. Lying about things that are supposed to be done and not done or whatever . . . . She lies about things that have happened to her and gets kids in trouble . . . . And I really am worried about her. She's expressed some really risky, risky behaviors. Extremely risky behaviors including [her interactions with] the custodian."

113. *Id.* at 1008 (quotation marks omitted).

114. C.B. *ex rel.* Baquerizo v. Garden Grove Unified Sch. Dist., 635 F.3d 1155 (9th Cir. 2011).

115. *Id.* at 1159 n.1.

in a district court's findings of fact (e.g., the identification of the student's disability, the conduct of the student, the student's performance in school, and recommended services), a circuit court's de novo review of the district court's placement decision still does not rule out a decision at odds with the district court.

Other federal circuits have pursued their own interpretations of a de novo standard in a manner similar to *Forest Grove*. In a pre-*Forest Grove* decision, *Muller v. Committee on Special Education of the East Islip Union Free School District*,[116] the Second Circuit, agreeing with a federal district court that a student plaintiff should have been evaluated as having a serious emotional disturbance instead of the conduct disorder diagnosed by the school district, upheld reimbursement for the parents.[117] Even though the parents' placement was more restrictive than the public school offering, the Second Circuit agreed that the district court had correctly determined that the student should be allowed to continue in the private placement.[118] Although not using the words "abuse of discretion" in assessing the district court's conclusion, the focus of the Second Circuit was clearly and solely on the district court. The *Muller* result has been followed in other pre- and post-*Forest Grove* decisions, with the Second Circuit holding that a federal district court, in a parental reimbursement case, is not required to grant any deference to administrative hearing officer rulings where "the district court is presented with the threshold question of a child's statutory eligibility for special education services."[119]

However, to further complicate the task for parents, not all federal circuits follow the Ninth and Second Circuits' de novo approach for reviewing state administrative hearing officer or federal district court decisions. In *Mary T. v. School District of*

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116. Muller v. Comm. on Special Educ. of the E. Islip Union Free Sch. Dist., 145 F.3d 95 (2d Cir. 1998).

117. *Id.* at 103.

118. *Id.* at 105.

119. C.B. *ex rel.* Z.G. v. Dep't of Educ. of City of N.Y., 322 F. App'x 20, 21 (2d Cir. 2009). *See also* P.S. *ex rel.* J.S. v. Brookfield Bd. of Educ., 186 F. App'x 79, 80-81 (2d Cir. 2006) (finding that district court had granted appropriate deference to administrative finding that rejected parents' claim for reimbursement and citing to *Muller* for the principle that "[d]istrict courts are to employ a preponderance of the evidence standard in evaluating IDEA petitions.").

Philadelphia, the Third Circuit reversed a federal district court's granting of partial reimbursement after a state hearing panel had ruled that the parent plaintiffs were not entitled to any reimbursement.[120] In reversing the district court, the court of appeals reasoned that the Third Circuit mandated a "due weight" standard requiring federal district courts to consider the "[f]actual findings from the administrative proceedings . . . prima facie correct," and if they fail to adopt those findings, the courts must explain their reasons for departing from them.[121]

Unfortunately, most of the federal circuits have yet to interpret *Forest Grove*'s "equitable principles"[122] in IDEA parental reimbursement cases or to determine the appropriate standard for reviewing federal district court decisions. In both *Ferren C.* and *Ashland*, where federal district courts reversed hearing officer decisions (in favor of the school district and the parents, respectively), the Third and Ninth Circuits upheld the district courts. In *Richardson*, where the Fifth Circuit remanded a district court decision and vacated an order favorable to the parents, it did so not on the merits, but solely to enable the district court to address the question of whether the parents' placement was necessary for their child's educational benefit.

The "equitable principles" or "balancing of equities" advocated by the Supreme Court in *Forest Grove* furnish no direction as to what the equities are and who is to have the role of interpreting and applying them. Thus far, case law furnishes little direction for public schools and parents. The cases suggest that although parents may not be successful in some of the cases, it is too early for school districts to have some measure of comfort that the Court's equitable principles are a way of raising the bar for reimbursement.

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120. Mary T. v. Sch. Dist. of Phila., 575 F.3d 235 (3d Cir. 2009).

121. *Id.* at 241 (quoting Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199 (3d Cir. 2004) (alteration in original) (holding that federal district court failed to use a "due weight" standard to provide substantial reasons for refusing to credit the witnesses upon whom the hearing officer relied and failed to acknowledge weaknesses in the testimony of school district's witness who failed to explain how school's disciplinary system could have dealt satisfactorily with a campaign of harassment)).

122. C.B. *ex rel.* Baquerizo v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1159 n.1 (9th Cir. 2011).

VI. CONCLUSION

Parental reimbursement is unique among IDEA-related cases because both Congress and the Supreme Court have established guidelines for addressing the issue. Congress' attempt to limit reimbursement for parental placements only to students receiving special education services has been circumvented. Even though parents whose children have not received IEPs would still have a remedy of a due process hearing under the IDEA, the Supreme Court in *Forest Grove* recognizes and reinforces the right of parents to make decisions for their children.

More significantly, *Forest Grove* leaves in place a high-stakes system for remediation of parent-school disputes that is based on the economic status of parents. Tuition charges (and residential charges, as well, in many cases) at private schools for students with disabilities often run into the tens of thousands of dollars per year. The Supreme Court failed to take the opportunity to reinforce the structure in place under the IDEA through the administrative due process hearing to address parent concerns. Parents who have the resources to pay for private placements have little in the *Forest Grove* decision to deter them from pursuing relief, and public schools that are struggling with financial budgets for special education face the possibility of lengthy litigation to resolve placement decisions.

Despite some guarded optimism that parental reimbursement for unilateral placement might be forthcoming following the Supreme Court's *Forest Grove* decision,[123] the opposite result appears to have occurred. While it is much too early to draw broad conclusions, federal courts of appeals decisions thus far have set high benchmarks for parental reimbursement. The cost to public school districts of private placements, especially those that are residential,[124] can be substantial, and the Supreme Court's balancing-of-equities

123. *See, e.g.*, Ralph Mawdsley, *The Supreme Court's Reassessment of Parental Placement Under the IDEA:* Forest Grove School District v. T.A., 251 ED. LAW REP. 1, 8-11 (2010).

124. *See generally* Ralph Mawdsley, *Applying the Forest Grove Balancing Test to Parent Reimbursement for Placement in Residential Medical Facilities*, 253 ED. LAW REP. 521 (2010).

standard could become a convenient means of ensuring that public funds are not disbursed except according to carefully crafted criteria. Thus, parents may find that proving that an IEP has not furnished a FAPE to their child will be scrutinized more heavily than in *Burlington* and *Florence County*. If the parents are unable to produce convincing evidence that their private placement choice is able to furnish the level and kind of services alleged to be deficient in the public school's IEP, the equities thus far seem to weigh in favor of the public school. Likewise, parents may find their request for reimbursement thwarted where they have failed to provide the notice required by the IDEA.

Equally important, though, is the notion that a balancing of equities is a judicial concept, and federal district courts will be given broad latitude in deciding how that balancing is to take place. While administrative hearing officers will continue to have the responsibility of gathering the facts, the limited number of federal court of appeals decisions thus far suggests that, in the arena of parental reimbursement, federal district courts will have the primary role of determining how and where the facts fit within the balancing process. What this role of the federal district courts may mean for future litigation remains to be seen, but one may argue that, based on the post-*Forest Grove* circuit court decisions thus far, parents are now less likely to be reimbursed for the cost of placing their disabled children in private schools.