I. STATEMENT OF THE CASE

A. OVERVIEW

In September, 1985, Joseph James began attending Upper Arlington Public Schools. He has dyslexia. In November, 1989, his parents removed him from the public school's special education program because he has not been taught to read by the school district. Joe was placed by his parents into a private special education school. After several months in the private program, Joe began learning how to read. In 1990, the parents attempted to return Joe to the public school with the expectation that the school would teach Joe how to read. The school district refused to offer an IEP until after Joe left the private school and returned to public school.

The parents could not gamble with their son's education. In 1994, the parents again approached the Director of Special Education seeking Joe's return. She told them, "Don't bring him back." In 1996, pursuant to the Individuals with Disabilities Education Act, the parents requested a due process hearing seeking reimbursement for their son's past educational expenses and an IEP for the present and future.

The school district refused to offer an IEP until Joe was enrolled. The district asserted that the parents were not entitled to any reimbursement because they did not initiate a request for a due process hearing before Joe's removal in November, 1989.

The Sixth Circuit held that the school district should have offered an IEP to Joe James in 1994 when the parents attempted to return him to public school. The school district argues that this ruling creates a split among circuits and requests this Court to grant a writ of certiorari. The ruling does not create a split.

Upper Arlington is attempting to create law which would require disabled children who have been removed from an inappropriate educational placement, must return to that inappropriate placement before a school district is responsible for presenting the parents and child with an IEP.

B. FACTS AND COURSE OF PROCEEDINGS

Joseph James is a very bright child with dyslexia.[1] (JA 70, 100, 104) In September, 1985, beginning with Kindergarten until November, 1989 of his fourth grade year, Joseph attended school in the Upper Arlington school district. (JA 46-53) Although Joe received special education for several years, he was not taught to read. (JA 18) Upper Arlington School District unsuccessfully used the commercialized Reading Recovery® program[2] with Joe. (JA 11-16)

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[1] (JA #) refers to the Joint Appendix on file with the U. S. Court of Appeals for the Sixth Circuit.

[2] At that time, Reading Recovery® was an experimental "whole language" program to "recover" children from reading problems. Reading Recovery® was initiated in New Zealand, and first tested in the United States in the Upper Arlington / Columbus, Ohio school districts. Reading Recovery® is now engaged in a commercial joint venture with Upper Arlington

In June, 1987, Upper Arlington convened an IEP meeting to develop an IEP for the following school year. At this June, 1987 meeting, Mrs. James:

> . . . described in great detail the type of method we thought Joe needed. It should be a multi-sensory, intense, systematic, phonetic approach . . . They suggested that if you tried to teach Joe the parts he would just become more confused and frustrated . . . Instead of the team focusing on why Reading Recovery had failed Joe, the focus was on why Joe had failed Reading Recovery . . . None of the (educators) ever challenged the appropriateness of using Reading Recovery with our dyslexic child. (Exhibit D, attached to Complaint.) (JA 7, 10, 37, 40)

In October, 1989, when Joe was in fourth grade, his mother attended a meeting with school staff. Joe's reading skills were below the first grade level. The parents were told to accept that Joe would never learn to read. (JA 52) The parents did not accept this assertion. In November, 1989, the parents withdrew Joe from Barrington Elementary School and enrolled him into Marburn Academy, a private special education school. Joe began to learn how to read. (JA 52-54).

School District and Ohio State University. (JA 12-14, 22-23, 25-26, 38-41, 47-50, 58-59)

In March 5, 1990, and April 6, 1990 (JA 97), four months later, the parents wrote to the public school and said that they "planned to re-enroll Joe in Barrington for the 1990-1991 school year." (JA 53-54) There were meetings and letters between the parents and school staff. The school principal told the parents that the public school "would not develop an IEP for Joe until we withdrew him from Marburn Academy and enrolled (Joe) at Barrington School." The principal added that any such program would be based "upon district service guidelines and available resources." (JA 96, 98) Joe's father stated in the subsequent affidavit[3] filed with the special education due process hearing officer and with the U. S. District Court, that

> 97. On April 9, 1990, Mr. Oakley wrote that Upper Arlington would not develop an IEP for Joe until we withdrew him from Marburn Academy and enrolled (Joe) at Barrington School. Since Barrington refused to meet with us to develop an IEP, we were denied information as to what special education services Joe would receive if we enrolled him back in Barrington.
>
> . . .
>
> 99. As parents, we needed to know what services Barrington were going to provide before enrolling him back into

[3] At no stage in these proceedings has the school district filed a cross-affidavit denying the truth of the affidavit.

> their program. When they refused to meet with us to develop an IEP for Joe, we realized that we had no viable choice other than to have Joe continue at Marburn where he had made progress.
>
> 100. ... Ms. Ford (School Psychologist) did not believe in reading remediation or having Joe receive intense instruction so that he would learn to read. She felt we were wrong in our approach.
>
> 101. It was our understanding that our only option was to return Joe to the Upper Arlington School District where Joe would have to learn from sources other than reading. We learned that Upper Arlington School District would not teach Joe how to read. If we wanted Joe to learn how to read, it was our understanding from all of the staff within the Upper Arlington School District that Joe would have to be educated elsewhere. (JA 54-55)

Mr. James explained that:

> Joe started Marburn Academy in November (1989). At the end of the school year Paula Ford, the Upper Arlington psychologist went to Marburn and tested Joe. During his five months at Marburn Joe experienced a

> year's growth in reading. To me this meant Joe was on the right course for the first time since he started school. It meant that Paula Ford might be wrong about Joe having to learn there are other ways to get information besides reading. Joe could learn to read when he received an appropriate education.(JA 43)

The parents were expected to place their son back into the setting that had failed him.

Later, the parents placed Joe into Kildonan School, a specialized boarding school for children with severe dyslexia.[4] At Kildonan, Joe received intensive instruction in reading and written language. (JA 44)

In 1994, four years after Joe left the public school program, his parents again approached Upper Arlington about returning their son to the public school program. The school had a policy that a child had to be removed from the private school, enrolled in and attend Upper Arlington schools before an IEP would be written. The parents met with Ms. Meadows, the new Director of Special Education, and discussed Joe's return home so that he could enroll in and attend Upper Arlington public schools. Later, on

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[4] Kildonan School is discussed extensively in *Evans v. Board of Educ. of Rhinebeck Cent. Sch. Dist*., 930 F.Supp. 83 (S.D. N.Y. 1996). The opinion contains an excellent discussion about dyslexia, how dyslexics have to be taught in order to learn, and the measurement of educational benefit.

Wednesday, April 6, 1994, in a continuing attempt to bring their son home from boarding school, Mr. and Mrs. James took Ms. Meadows to dinner at the "55 Grill" to discuss Joe's return to Upper Arlington.

She advised the parents that Upper Arlington did not have a program that was appropriate for Joe. She said, "Don't bring him back now, give me a couple of years to get someone trained." (JA 56) Upper Arlington School District has never refuted the truth of this statement.

1. Request for Special Education Due Process Hearing

On May 13, 1996, Joe James' parents requested a special education due process hearing to recover the costs of their son's education at Kildonan School. (JA 37) Consistent with their position, Upper Arlington School District refused to offer an IEP to Joe unless he returned to the Upper Arlington School District. (Joe has since graduated from Kildonan School.)

On July 22, 1996, Upper Arlington Public Schools filed a "Motion to Dismiss, or in the Alternative, for Summary Judgment" with the Administrative Hearing Officer (AO).(JA 106)

Upper Arlington School District asserted that the parents' request for reimbursement should be denied and the due process hearing should be dismissed because the parents failed to comply with the "stay-put" provision of the Individuals with Disabilities

Education Act. That was the primary issue of this case. Parents made a unilateral removal of their child from the public school program without first requesting a special education due process hearing against the school district.

A reply brief, which included the August 20, 1996 Affidavit from Mr. James, was filed on behalf of Joseph James. (JA 46, 106) The Affidavit later became an Exhibit attached to the Complaint that was filed with the U. S. District Court, and incorporated into the District Court pleadings, by reference.

The AO reported that:

> The Upper Arlington School District contends that the Request for Impartial Due Process hearing filed by Cameron James on May 13, 1996 must be dismissed due to the unilateral withdrawal of Joseph James from the Upper Arlington School District in November 1989 without first exhausting the grievance procedures set forth in 20 U.S.C.A. §1415. The school district relies upon *Wise v. Ohio Dept. of Education*, 80 F.3d 177 (6th Cir. 1996), hereinafter referred to as *Wise.* (JA 112)

The AO then noted that:

> Cameron and Nancy James concede that they unilaterally removed Joseph James

> from the Upper Arlington School District without first exhausting the grievance procedures set forth in 20 U.S.C.A. § 1415, but argue that the door to the courthouse should not be slammed in the face of parents who are carried there on the horns of a dilemma. Parents, they argue should not be forced to choose between two equally untenable positions. Parents can leave their child in an educationally damaging environment and protect their right to tuition reimbursement, or they can protect their child by unilaterally moving the child to an educationally appropriate environment, and lose their right to tuition reimbursement. Similar arguments were rejected by the Court in *Wise*. (JA 113)

2. Due Process Decision

The Administrative Hearing Officer accepted the arguments of law proffered by Upper Arlington and granted the school district's Motion to Dismiss. (JA 105-116)

3. Review Officer Decision

The parents appealed the Hearing Officer's decision. On December 31, 1996, the Review Officer upheld the dismissal. (JA 119-126) He stated:

> 3. Plaintiff's Request for Reimbursement for Retroactive and Prospective Tuition is barred by Plaintiff's unilateral removal of their child from the Upper Arlington City School District without first exhausting the grievance procedures set forth in 20 U.S.C.A. section 1415.
>
> 4. This matter having been resolved as set forth above, the question of whether Plaintiffs' Request for Reimbursement for Retroactive and Prospective Tuition is barred by the Statute of Limitations is moot, and need not be ruled upon. (JA 121-122)

Whether Joseph James had or had not **enrolled** in the Upper Arlington School District in 1994 when the parents sought to return him to public school was not an issue in the case at that time, nor was it addressed in any depth in the affidavits. The issue was simply the statute of limitations and the parents' failure to request a special education due process hearing before removing Joe from Barrington School. The issues in this case changed between the final District Court Order and the Sixth Circuit briefing.

In *James v. Upper Arlington School District*, a due process hearing was never held. There has been no testimony. There is no "Administrative Record" of either testimony or trial exhibits. The Due Process and Review Hearings were decided on an issue of

caselaw, i.e., *Wise v. Ohio Dept. of Educ.*, 80 F. 3d 177 (6th Cir. 1996).

4. U. S. District Court

On February 12, 1997, a Complaint was filed by Joseph James and his parents in the U. S. District Court, effectively appealing the decision of the Review Officer. (JA 7) Since no evidence had been heard or testimony received, the Complaint was detailed and very factual.

On December 15, 1997, the Honorable Edmund A. Sargus, Jr. granted the school district's Motion to Dismiss. (Pet. 15a-33a) (JA 211-226) The essence of the Court's ruling was that:

> Having unilaterally changed their children's education placement, without initiating the administrative due process procedures, the parents are not entitled to have their son educated at public expense. Florence County, 510 U.S. at 15; Burlington, 471 U.S. at 373-374, Wise, 80 F. 3d at 184. (Pet. 32a) (JA 224)

From the initial due process hearing through the District Court, the primary issue was the parent's failure to request a special education due process hearing prior to removing Joseph James from Barrington Elementary School.

In footnote nine of that Order, the Court added:

> The Court notes that after Joseph was removed from the Upper Arlington School District in November of 1989, he has at no time returned to the district for further education. Since the School District has the obligation to educate students residing within its territory, it continues to owe such obligation to Joseph. Had Joseph returned to the School District as a student after November, 1989, or if he were re-enrolled in the future, such re-entry into the public school system could require a new IEP and the potential for future due process hearing, as well as potential appeals. (Pet. 29a) (JA 11) (Emphasis added by the Court.)

The Court added an additional requirement and condition that had to be met. The child must be returned to the public school that failed the child before an IEP was required.

On January 7, 1998, this Respondent filed a Motion and Memorandum to Reconsider with the District Court arguing that:

> This Court has dismissed the parents' claim for retroactive tuition reimbursement that were either two or four years prior to May 13, 1996. Still pending is their request for tuition

> reimbursement beginning on either May 13, 1994 or May 13, 1992 through the present. They requested a special education due process hearing. The Complaint in this Court is a continuation and exhaustion of those proceedings. It is respectfully asserted that the Court's ruling in regard to the Statute of Limitations should not deprive the parent's of their right to pursue reimbursement from May 13, 1992 through the present. (page 5)

The Court dismissed the Motion for Reconsideration explaining: (JA 145)

> Further, the Court notes that the plaintiffs have mischaracterized the effect of the Order of Dismissal in this case. On page 9 of the Order, the Court explained in footnote 9 that at no time has the child returned to the district for further education. While the district may have a continuing legal obligation to educate the child, the Opinion specifically notes that claims arising after November of 1989 could only escape the applicable statute of limitations upon a reenrollment of the child in the defendant's school system.

The District Court established that the child's enrollment in the public school was a condition

precedent to the school district being required to offer an IEP to a child.

The parents filed an appeal with the Sixth Circuit.

5. U. S. Court of Appeals for the Sixth Circuit

Unknown to the District Court or counsel, two days before the District Court's final ruling, in another IDEA case, the Sixth Circuit affirmed the essence of respondent's arguments.[5] Several months later, the Sixth Circuit issued another IDEA ruling, noting that federal law required school districts to develop an IEP for a child, even if the child was enrolled in a private school.[6]

In *Doe* and *Boss*, before *James* was briefed and argued, the Sixth Circuit clarified *Wise,* noting that a parent did not have to request a special education due process hearing prior to a unilateral placement, and the child did not have to be enrolled in a public school as a condition of being offered an IEP.

Previously, Upper Arlington School District presented two theories of their case. The first was a statute of limitations defense. The second was that the parent had to request a due process hearing before making a unilateral placement. Affidavits focused on

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[5] See *Doe v. Metropolitan Nashville Public Schools*, 133 F. 3rd 384 (6th Cir. 1998)

[6] See *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss*, 144 F.3d 391 (6th Cir. 1998)

these issues and not the meetings in 1994. While continuing with the statute of limitations defense, in light of *Doe* and *Boss*, Upper Arlington needed a different theme. Footnote nine in the District Court's Order provided the "enrollment before IEP" strategy.

On September 28, 2000, the United States Court of Appeals issued their decision in *James, et. al. v. Upper Arlington School District, et. al,*. A child with a disability did not have to be enrolled in public school as a condition to being offered an IEP. This holding clarified the dicta in *Boss*. The school district filed a petition for rehearing. On November 20, 2000, the Court entered an Order stating that the petition was circulated "not only to the original panel members but also to all other active judges of the court, and no judge of this court . . . requested a vote on the suggestion for rehearing en banc . . . (and) Accordingly, the petition is denied." (Pet. 34a-35a)

The Sixth Circuit synthesized the facts of the lower proceedings noting that:

> The Administrative Officer never reached the merits of whether Joseph had an appropriate individual education plan, nor was there an evidentiary hearing, because the AO accepted the school district's argument that the Jameses had not followed proper procedures, and therefore granted the district's motion to dismiss. A state level review officer affirmed the

AO's decision, based on the grounds that the parents had unilaterally withdrawn their son without first pursuing the appropriate administrative remedies.

The district court granted judgment on the pleadings to the school district in a December 15, 1997 order, holding that the statute of limitations had begun to run in November 1989 when Joseph was removed from the school district and had expired no more than four years later, long before the current action began. The district court noted that the Jameses had known of their right to initiate a due process hearing in 1989, but had failed to do so until 1996. Because they failed to pursue administrative relief before removing their son from public school, and because the statute of limitations has run, the district court concluded that the Jameses are no longer entitled to an education at public expense. We disagree with the district court that the Jameses did not give the school district an adequate opportunity to correct Joseph's educational program. Although we affirm the judgment of the district court with regard to Joseph's 1989 removal and the 1990 rebuffed request for an IEP on statute of limitations

> grounds, we **remand** the case for further proceedings on the separate subsequent cause of action that arose in 1994 and may have been timely pursued in 1996. (Pet. 3a-4a) (Emphasis added.)

The Court was familiar with the negotiations and meetings between the parents and school staff in early 1990. The parents wanted to return Joe to Barrington Elementary School, but wanted assurance that the school officials would try to teach Joe how to read, without using Reading Recovery®.

Joe was learning how to read at Marburn; he gained one year of reading skills in five months. (JA 43) Upper Arlington "did not believe in reading remediation or having Joe receive intense instruction so that he would learn to read." (JA 54-55) Before returning Joe to Barrington Elementary and the Upper Arlington Public Schools, the parents needed to see the IEP. The school's position then, and in 1994, and throughout the pleadings filed in this case, was that Joe had to be re-enrolled before the school district had an obligation to offer an IEP.

While the Court upheld the statute of limitations defense, the Court noted that:

> The Jameses' 1994 interaction with the school district suggests that a new cause of action arose prior to their 1996 request for a due process hearing. Taking all the well-pleaded facts as true,

as we must on a motion to dismiss, the Jameses made contact with the school system about returning their son in 1994 and having a new IEP done, but were essentially rebuffed. Although Joseph was never enrolled, and the school district never refused to enroll him or to do a *post*-enrollment IEP, the district did discourage the Jameses from re-enrolling Joseph. Furthermore, the district told the Jameses that their child would have to be re-enrolled before the school district would be obligated to do a new IEP for him. (Pet. 5a-6a)

. . .

The excusable state of affairs apparently came to an end in 1994 when the parents specifically approached the school district about re-enrollment and obtaining a new IEP, even though the Jameses did not request a due process hearing at that point in time. If the Jameses' rights were in any way violated at that point, a cause of action arose at that time separate from any that arose in 1989. **We hold that refusing to do an IEP pre-enrollment constitutes such a violation.** See *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 393 (6th Cir. 1998) (noting in passing that federal law required development of an IEP for a child still enrolled in a private school). To hold

otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or, worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights. Neither action seems to be compelled by the statutory scheme or the case law. Nor does the failure to request a due process hearing in 1994 vitiate the cause of action that accrued in 1994. Rather, the request for a hearing made in 1996 preserved the earlier claim as well as the claim relating to the 1996-1997 school year. (Pet. 6a-7a) (Emphasis added.)

. . .

(T)hey did approach the school district in 1994 and were denied an IEP. That latter circumstance gives them a cause of action, even though their earlier action does not. Under the circumstances presented to the court, we hold that the plaintiffs cannot recover their expenses retroactively between 1989-94, but can pursue a claim regarding tuition after the Jameses approached the school district in 1994 and were rebuffed.

> For the above reasons we AFFIRM the judgment of the district court in part, REVERSE it in part, and remand the case to the district court for further proceedings consistent with this opinion. (Pet. 10a)

II. SUMMARY OF ARGUMENT

The Sixth Circuit's ruling in *James* has not created a split with any Circuit. Neither *James*, nor the caselaw cited by the Petitioners, concerns private school services for disabled children. The *"Carter"* Amendment of IDEA is clear and the Courts of Appeal do not need guidance.

III. ARGUMENT

The Petitioner's argue that a child must be re-enrolled in the school district that harmed the child before the district has an obligation to convene an IEP meeting.

The Petitioner's argument does not deny that the parents met with the Director of Special Education in 1994 and were told "don't bring him back." Query - How can parents enroll a child into a school district that says "Don't bring him back"?

Public schools are required to provide a free appropriate public education to children with disabilities. When it is determined that the program provided is damaging the child, and the parent removes the child from the program, parents often

place the child into a special education private school that specializes in providing an appropriate education to children.[7] Upper Arlington told the parents that Joe would "have to learn from sources other than reading. We learned that Upper Arlington School District would not teach Joe how to read. If we wanted Joe to learn how to read, it was our understanding from all of the staff within the Upper Arlington School District that Joe would have to be educated elsewhere." (JA 54-55)

Upper Arlington School District argues that they did not have sufficient facts to know that the parents were dissatisfied in 1994. Yet they stated, "Don't bring him back." The Petitioner's Statement of Facts omits voluminous information about the parents' numerous meetings with the school staff in 1990 and again in 1994, when they attempted to secure an appropriate education for their son.

The parents acted as reasonable conscientious parents should. They did not return Joe to the public school. They asked for an IEP that addressed Joe's need to acquire reading skills. An IEP was never written.

A. The Circuits are not Split

Upper Arlington School District represents that there is a "split among circuits," in an attempt to encourage this Court to grant certiorari. Petitioners incorrectly

[7] See *Burlington School Comm. v. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District IV v. Shannon Carter*, 510 U. S. 7 (1993).

assert that the decision below conflicts with the decisions of other circuits. To the contrary, every case they cite is easily distinguishable. The Circuits have not split concerning issues of "enrollment before IEP," "due process before unilateral removal," the newly enacted *Carter* amendment, or any of the legal issues in *James*. There is no split among circuits.

For example, Upper Arlington argues that *James* conflicts with the Third Circuit ruling in *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 21 IDELR 1097 (3rd Cir. 1994). In their brief, the School District stated that:

> If the Sixth Circuit's opinion is allowed to stand, any time a parent even discusses the possibility of returning their child from a private placement, a school district will have to prepare an IEP for the child even though the parents have never asked for one and may have no real intention of returning their child to the public school. (Pet. 22, see also page 8)

In *Bernardsville* , the Court awarded reimbursement to the parents for their child's unilateral placement. Like *James*, the public school was aware of the parent's dissatisfaction with their program.

> The fact that the school district was notified of the parents' dissatisfaction, albeit not through the initiation of

> official proceedings, from the very first summer that J.H. attended Landmark, that the parents did request a new placement for J.H., and that there was continued contact between the school district and J.H. for the duration of J.H.'s enrollment at Landmark support Mr. and Mrs. H's argument. **There is no evidence whatsoever that J.H.'s parents acted in bad faith,** and given the apparent severe deficiencies in the IEPs developed for J.H. at Bernardsville, it is clear that J.H.'s parents acted reasonably in securing an appropriate education for their son outside the district. (At IDELR 1101) (Emphasis added.)

In *Bernardsville*, although the school district was on "notice" of the parent's dissatisfaction, a special education due process hearing was not requested for two years, a year beyond the statute of limitations. Like *James*, a clear obligation arose to offer an IEP from the date of the request.

> **We, of course, recognize that the school district has the duty in the first instance to provide an appropriate IEP**, and moreover, to demonstrate by a preponderance at a due process hearing that the IEP it offered was indeed appropriate. (At IDELR 1101)

In 1994, when the parents sought to return Joe to public school, they were rebuffed. Unlike *Bernardsville*, an IEP was never offered. The Third Circuit noted:

> Under the facts of this case in light of all the equities, recognizing the operative policies of the IDEA and acknowledging all relevant statutes and regulations, we believe that J.H.'s parents adequately placed in issue their dissatisfaction with J.H.'s IEP for purposes of reimbursement at the time they requested an administrative hearing in September of 1989. (At IDELR 1102)

Upper Arlington knew that the Jameses were dissatisfied with their son's education at Barrington. There is no split between *James* and *Bernardsville*.

Relying upon *M.C. v. Voluntown Board of Education*, 226 F.3d 60, 33 IDELR 91 (2d Cir. 2000) Upper Arlington School District asserts that the "Sixth Circuit has placed itself at odds with the Second Circuit." (Pet. 10) In *M.C.*, the parents sued the school district for private school tuition reimbursement and the costs of psychological counseling received during the 1995-1996 school year. On February 8, 1996, the IEP team convened and recommended that M.C. be placed on homebound instruction while new placements were explored. The parents did not voice dissatisfaction with the homebound placement nor did they request reimbursement for the counseling at

that meeting, or at a subsequent June 17, 1996, IEP meeting. When they requested the special education due process hearing, the parents did not request reimbursement for the private counseling.

Nearly one year later, "while the due process proceedings were pending, . . . **for the first time**, M.C.'s parents requested reimbursement for the services of Dr. Sheldon Gardner, a private psychologist . . ." (At 68) (Emphasis added.) The parents changed the issues and raised the stakes of the ongoing litigation. The Hearing Officer denied reimbursement. The Court of Appeals agreed, stating that equitable considerations barred the parents because they never notified "the school board of their dissatisfaction with their child's IEP." (*M.C.* at 68)

In *James*, the parents did not change the issues of the case nor did they raise the stakes. The Second Circuit's holding in *M.C.* is not in conflict with *James.*

Upper Arlington argues that *James* conflicts with the Eighth Circuit's ruling in *Schoenfeld v. Parkway Sch. Dist*., 138 F.3d 379 (8th Cir. 1998). (Pet. 10) Scott Schoenfeld had not been found eligible for services under IDEA and had never had an IEP, either before or when the parents removed Scott from public school. Against the advice of Scott's private psychologist, his parents removed him from public school after the first day of the new school year. In *James*, there was no question that Joe had dyslexia and needed to be taught how to read, which Upper Arlington was either unable or unwilling to do.

Upper Arlington cites *Ash v. Lake Oswego Sch. Dist. No. 7J*, 980 F.2d 585, 19 IDELR 482 (9th Cir. 1992) as being in conflict with *James*. Christopher Ash attended a Montessori School for several years before he was placed in a private residential special education school by his parents in 1985. In 1989, the parents contacted the public school system to seek retroactive reimbursement for their son's education and prospective tuition. Christopher Ash had never attended public school. The District Court and Court of Appeals awarded prospective tuition for the residential placement but did not award retroactive tuition since the school district was unaware that they child existed. The facts in *Ash* are different from *James* and do not represent a split among circuits. The Court explained that September, 1989 was the first time that "LOSD had been asked to provide services to Christopher." (At IDELR 484)

After *Ash*, Upper Arlington School District argued that the Fourth Circuit's 1994 decision in *Combs* conflicts with *James*. *Combs* is simply an attorney fee case where the school district modified their program after the parents requested a special education due process hearing. The Court noted that "The School Board was not informed of Jeffory's difficulties until March of 1989, after Combs had initiated the administrative process . . . Thus, school officials had no notice of any problems nor any opportunity to address Combs' concerns before the administrative process." *Combs v. School Bd. of Rockingham County*, 15

F.3d 357, 20 IDELR 1246, 1249 (4th Cir. 1994) *Combs* is quite unlike *James.*

Upper Arlington School District argues that a split is created with the First Circuit in *Amann v. Stow Sch. Sys.*, 982 F. 2d 644, 19 IDELR 1024 (1st Cir. 1992). Upper Arlington implies that *James*, in conflict with *Amann*, requires "a school district to write IEPs for all special education children residing in the district regardless of where they go to school." (Pet. 17)

This was not the issue in *James,* nor was it the issue in *Amann.* In September 1987, the parent unilaterally removed Christopher from the public school program and placed him in the Carroll School. In 1989 the parents asked Stow to pay for Christopher's education at Carroll School. Stow declined, but did convene an IEP which the parents never accepted or rejected. The Court commented that the parents "postponed their decision until after Christopher had been evaluated, at Stow's expense, at Children's Hospital in Boston. In the meantime, Christopher finished fifth grade and entered sixth grade at Carroll School." (At 620)

Unlike Upper Arlington, the Town of Stow evaluated Christopher and convened an IEP meeting while Christopher was still enrolled in Carroll School. These facts are in direct contrast to the facts in *James.*

B. *James* Does Not Apply to Private School Children

The Petitioners have attempted to interject other issues about the special education rights of disabled children enrolled in private schools, who are not seeking to return to public school or receive tuition reimbursement. This was not an issue in *James* and was not an issue in the Courts of Appeal cases that allegedly "split" with *James.*

C. Ten Day Rule / "*Carter*" Amendment

Petitioner acknowledges that Congress amended the IDEA in 1997 and therefore the impact of this case only applies to cases begun before the 1997 amendment. The critical provision, nicknamed the "*Carter*" amendment, contains six elements. The parents (1) must give school districts advance notice that they (2) are rejecting the "placement proposed" by the school system. The "notice" (3) must include a statement of concerns and (4) intent to enroll their child in a private school (5) at public expense. The "notice" (6) must be given either "at the most recent IEP meeting that the parents attended prior to removal of the child from the public school," or "10 business days . . . prior to the removal of the child from the public school . . ." (20 U. S. C. § 1412(a)(10)(C))

Upper Arlington School District complains that "The amendment gives no guidance to the issues presented in *James.* The amendment only applies prospectively

and so does not address the plethora of pre-1997 cases currently pending in the courts about tuition reimbursement" (Pet. 14)

Upper Arlington School District fails to provide the citations to the "plethora of pre-1997 cases" because there is no "plethora." Indeed, the handful of cases that might be affected by a Supreme Court ruling in this case is shrinking by the day. This Court would be better advised to apply its limited resources to an issue of broader impact, one to which Congress has not already spoken.

While a number of courts have cited the statute as authority for awarding or denying reimbursement, none have had difficulty, confusion, or different interpretations about the statute. It is highly unlikely that the United States Courts of Appeal will need guidance interpreting the "*Carter*" amendment.

IV. CONCLUSION

After Joe was withdrawn from Upper Arlington public schools, the school district refused to develop an IEP unless the parents re-enrolled Joe. The Sixth Circuit explained that: "To hold otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or, worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights. Neither

action seems to be compelled by the statutory scheme or the case law." (Pet. 7a)

The theme of the Petition by Upper Arlington School District is that a split has been created among the circuits and that the Sixth Circuit made an incorrect factual inference about the refusal to offer an IEP in 1994. The Court correctly found that Joe's parents wanted to return their son to the public school, while he continued to receive special education services, i.e., an IEP.

The Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

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