OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: **FLORENCE COUNTY SCHOOL DISTRICT FOUR, ET.AL., Petitioners v. SHANNON CARTER, A MINOR BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY D. CARTER**

CASE NO: **91-1523**

PLACE: **Washington, D.C.**

DATE: **Wednesday, October 6, 1993**

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IN THE SUPREME COURT OF THE UNITED STATES

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ET. AL., Petitioners	:	
v.	:	**No. 91-1523**
SHANNON CARTER, A MINOR BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY D. CARTER	:	

Washington, D.C.

Wednesday, October 6, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

DONALD B. AYER, ESQ., Washington, D.C.; on behalf of the Petitioners.

PETER W. D. WRIGHT, ESQ., Richmond, Virginia; on behalf of the Respondent.

AMY L. WAX, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C., on behalf of the United States as amicus curiae supporting Respondent.

PROCEEDINGS

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 91-1523, the Florence County School District Four v. Shannon Carter, et al. Mr. Ayer.

ORAL ARGUMENT OF DONALD B. AYER ON BEHALF OF THE PETITIONERS

MR. AYER: Thank you, Your Honor. Mr. Chief Justice and may it please the Court:

In the *Burlington* decision, this Court recognized that one of the judicial remedies available for a school district's failure to provide an education meeting the requirements of the Individuals with Disabilities Education Act is reimbursement of the child's parents for the cost of removing their child from the public school and putting he or she into a private school that provides an education that is proper under the act.

The Court in *Burlington* explained that conclusion in part on the ground that where parents select a private school placement that is found to be "proper under the act" the award of such reimbursement does nothing more than pay the parents the cost that should have been paid initially by the public school for the placement that should have been provided in the first place.

The issue presented in this case is whether, as the court below held, this right to reimbursement under *Burlington* arises wherever the private placement selected by the parents ultimately proves to be beneficial to the child, or rather, whether such placements are constrained, as are all other placements under the Individuals with Disabilities Education Act by the obligation to provide a free appropriate public education, which is defined precisely and specifically in the act.

QUESTION: Well, Mr. Ayers, the -- it's defined, I guess, in section 1401?

MR. AYER: 1401(a)(l8), Your Honor.

QUESTION: Do you think that that provision is applicable at all to private placements? It seems to --

MR. AYER: Well, Your Honor –

QUESTION: -- cover, really, State placements --

MR. AYER: I think the place –

QUESTION: or State provision of –

MR. AYER: The place to begin in thinking about it is with the initial section of the act, which states the purpose of the act, and it states that purpose very explicitly in terms of assuring that all children with disabilities will have available to them a free, appropriate public education.

That is the overriding, the primary purpose. The Court recognized that in *Burlington*.

QUESTION: Well, okay. I recognize that, and I'd like you to tell us, if you will, where in the statute specifically it covers private placement, or whether this is just something by way of a remedy that the courts have developed under the act.

MR. AYER: Well, the statute does not explicitly provide for the Burlington remedy, either, and so the fact that there is a remedy there is something that is recognized as necessary to accomplish the purposes of the act, so I can't point to something specifically that limits a remedy that is not explicitly dealt with in the statute. What I think I can do –-

QUESTION: -- than that. If you insist upon free, appropriate public education, there's no private placement.

MR. AYER: Well, I would disagree with that.

QUESTION: The only thing you can do is to send the person to public school. Wouldn't that have to be your position?

MR AYER: Well, the public aspect I think has two parts within the definition, one is that it be a public expense, and that is certainly possible, and the other -- well, there's three, I guess. The other is that it -- one other is that it meets State standards. That's at dispute in this case. And then the third is that it be under public supervision.

QUESTION: Well, you're willing to acknowledge that it doesn't have to be under public supervision, that that's not --

MR. AYER: Well, I --

QUESTION: -- what free appropriate -- what an appropriate public education means, right?

MR. AYER: Justice Scalia, I think it depends how you define public supervision. I think the act plainly contemplates and placements go forward I think on a regular basis in private schools where the public school authorities nonetheless are involved in that process. They're involved in helping to prepare an individual education program, and that I think fairly satisfies the requirement of public supervision.

QUESTION: Mr. Ayer, you made, I think, a very helpful and candid concession in your reply brief in which you say there are situations that would be an exception to this strict Burlington requirement that it must be a place that is approved by the district, and I'd like to call your attention to page 9 of your reply brief where you said, in the second full paragraph, that the Court should not allow FAPE's educational standards and IEP requirement to foreclose unreasonably the pursuit of educational opportunity through the unilateral parent placement process recognized in *Burlington*.

So you seem in that passage to be recognizing that there are cases where there can be deviations from both the IEP requirement, the FAPE educational standards, so doesn't this controversy, then, boil down to whether this case fits that description?

MR. AYER: Correct, Your Honor.

QUESTION: And in this case there was no list supplied by the public school authorities as there was in *Burlington*, so why isn't that enough to make it exceptional?

MR. AYER: Well --

QUESTION: Why shouldn't there be a burden on the public system to say to the parents, here is a list of approved private facilities?

MR. AYER: Your Honor, there' s certainly nothing in the statute that dictates in what manner the public school authorities are required to be cooperative with the parents. It might be that they have a list prepared. In some States they do. If they have such a list, in all likelihood, it's going to be necessary for the parents to go to somebody and ask for it.

If there is no list, it is in the same way necessary for the parents to go to someone, perhaps, and ask the question, here's what I'd like to do under my *Burlington* rights, I want to put the child in a private school, can you tell me whether this facility meets standards?

We would have a different case here if what had happened was the parents had done that and been given either no answer, or been given an answer which is, we won't cooperate with you, we won't help you. That might be a case where you could say that the realization of the free appropriate public education simply couldn't realistically be accomplished here even though the parents tried to do it.

The fundamental --

QUESTION: So it comes down to who has the burden of inquiry, or it's a question of whether the public authority has to supply either a list or a procedure, and you say no, the parent has to ask, and if the parent doesn't ask, then there is effectively no recourse for the parent even though the very first step in this case is a given -- that is, the public authority has not been able to provide the education that the statute requires.

MR. AYER: Well, Justice Ginsburg, I'd like to take a couple of steps back, because I think you only get to the issue that you are raising, which is whether or not it is essentially not possible to accomplish, not possible for the parents and the private school to accomplish the objective of the statute.

You only get to that point after you impose an initial requirement, presumptively at least, that a free appropriate public education is an objective to which the parents must make some efforts to achieve, and I want to just talk briefly to this question of how the statute operates, and the fact, first of all, what I mentioned earlier, that this is a statute that, perhaps unusually, has as its stated primary purpose not the elevation of educational quality for disabled students, not some general objective like that, the primary purpose of this statute, as it states in its own language, is the assurance that all children with disabilities will have available a free, appropriate public education. What is --

QUESTION: May I just interrupt you there? Isn't the point that the statute or the conditions that we're concerned with here are all conditions which are intended to be for the benefit of the students. It's to make sure that the kids with disabilities do not get stuck down in some -- some second-rate status, and if the purpose of the various conditions that are in question here are for the benefit of the students, then under Burlington, isn't it at least possible for the students, or the parents of the students, to waive those or to, you might say**,** ignore them so that that waiver or ignoring of them would not be a per se disqualification to reimbursement.

MR. AYER: Well, I have not heard -- I have not seen or heard of that notion in the cases, Justice Souter. It is the case, I think, that parents can take their child out of the public system and pay for a private school education on their own.

QUESTION: Let me -- if I may interrupt you, do you claim that either of the conditions in question here are that the requirement of IEP, or the requirement of teacher certification, is for the benefit of anyone other than the students?

MR. AYER: No. I think it is for the benefit of the students. It is --

QUESTION: So that if, then, the students or their parents say well, we'll waive those so long as we can get, in fact, an adequate education elsewhere, why shouldn't they be allowed to waive them and why should their waiver be a bar to reimbursement?

MR. AYER: Well, I think this goes directly to the question of whether State educational authorities were intended under the act to be left in the primary role with regard to the making of educational policy.

QUESTION: Exactly. Exactly, or to put it differently, whether the IEP and the FAPE requirements were put there out of mistrust of the parents, or out of mistrust of school authorities. It seems to me they were put there to make sure that the school authorities did not give the disabled child second-rate treatment. You really think Congress was worried about the

parents giving their disabled child second-rate treatment, putting him in a private placement that would be no good for him?

MR. AYER: Your Honor, I think that what Congress intended to do was to create a mechanism that relied on essentially three different factors to assure the quality of education, and I don't think that they assumed that parents were in many -- in most instances the best judges of what would be a quality education.

QUESTION: Ah, the best judge is going to be the judge in a contested case for reimbursement afterwards, or if not the best judge, an adequate judge. I mean, the scheme that the other side is claiming does not leave them in the unreviewable driver's seat.

MR. AYER: Well, it -- the standard that is applied, as I was saying just now, there are three elements, essentially that the statute puts in place, and I would submit they work like the legs of a stool to elevate together the quality of education. One of them is the requirement that State educational standards be met in the educations provided to disabled students, and I think that's very important, because what was happening before was that disabled students were in many instances simply being pushed aside or being given a clearly inferior education, so the notion is not that we're going to tell the States what policies to put in place, but that we're going to require that they treat disabled students no less favorably than they treat nondisabled students.

The second is the IEP process, which in this statute was very explicitly spelled out. This is not, if you read through the language of it, a general reference to the notion that, and there should be some sort of discussion between the parents and the school officials. This is a very explicit set of requirements which Congress believed was necessary in conjunction with the other factors that it was putting into the statute in order to accomplish the result.

QUESTION: Are you contending that the -- that what went on at this Trident School -- it wasn't an IEP, but there were, what was it, goal-settings, and I think more frequent reviews -- that that wasn't a reasonable substitute? Is the IEP so much more intense?

MR. AYER: Well, Your Honor, I think -- I think it is perfectly clear from the court of appeals decision that the court of appeals did not view what went on at Trident as complying with the act, because it says explicitly that.

QUESTION: It wasn't an IEP, but --

MR. AYER: It wasn't an IEP.

QUESTION: -- there was a setting of goals for this student to achieve, and an evaluation whether the student -- of the student's progress periodically, was there not?

MR. AYER: That's correct. -

QUESTION: And I'm asking you, in terms of quality, was it substantially less effective in measuring the child's progress than the IEP?

MR. AYER: Well, what is missing from that, from what you've described, and I think, Your Honor, you have accurately described what is in the decisions in terms of what kind of process there is. There is absolutely no discussion of the critical part of the IEP process, which is a cooperative interaction, a give-and-take between the parents and the school. There is no discussion of a written statement of the services to be provided.

QUESTION: Mr. Ayer, what does a parent -- what is a parent supposed to do when a school district such as your client has failed to provide the IEP, the FAPE, and what the statute requires, but there happens to be no alternative school around that works via an IEP, and the parent finds the best school available, saying, you know, the school district has failed me, has violated the statute, I'm going to do the best I can for my kid --

MR. AYER: Well --

QUESTION: -and there happens to be no private school who is willing to go through all of the folderol of an IEP, or they think an IEP is really not the best way to do it? That parent has no remedy.

MR. AYER: No, I don't think that's necessarily the case, Your Honor. I think -- I think that this raises the question of, in what kind of circumstances might an exception be made to the free appropriate public education requirement.

QUESTION: Mr. Ayer, did I take it that your answer to the question I asked you before was that if these parents had inquired, if they had only inquired, tell us a school, and they got no answer, then you would say, yes, then they would be entitled to reimbursement?

MR. AYER: Well --

QUESTION: So does the whole thing come down to whether the State has to provide them with a list, or a process, to find out what would be an acceptable school, or whether the parents have to initiate the inquiry in the first place.

MR. AYER: I don't think it comes down to that, Your Honor, I think the first issue must be whether the holding of the court of appeals decision, which is that the free appropriate public education requirement is entirely inapplicable in the Burlington context, with the one exception of the requirement that the education provide educational benefit.

QUESTION: Well, let me ask you the question in a different way, and if I -- this is the way I see it, and if I'm wrong please tell me. The school system has not been able to provide the child with an education that the statute requires. That's a given. What is the remedy for the parent?

MR. AYER: In this case? In any cases?

QUESTION: In this case. The school system has not done what the statute requires. The parents then have a child in need of an education. What is the remedy --

MR. AYER: Well --

QUESTION: -- for the default on the part of the public school system?

MR. AYER: The parents have the right to remove the child, as was indicated from -- in Burlington, to remove the child from the public school and find an alternative placement. The issue here --

QUESTION: And that's what these parents did.

MR. AYER: The issue here is whether the parents, in. doing so, the parents nonetheless are governed by the requirement of the act and the primary purpose of the act, which was to -- is to achieve a free appropriate public education.

QUESTION: Well, let's go back to the purpose again, because I don't think you've answered one of the questions that we keep asking, and that is, for whose benefit are these conditions which collectively make up the purpose?

The benefit of the stay-put provision in Burlington was supposedly, or was treated as being -- the object of the stay-put provision was being to serve the children so that they did not get side-tracked into some inappropriate class while the fight was going on about what to do.

Isn't the benefit of the -- the object, rather, of the two provisions that you were most concerned with in making up the collective purpose of this statute also to benefit the children?

MR. AYER: It is primarily to benefit the children.

QUESTION: Isn't that a relevant fact, then, in deciding to what extent those conditions may be waived and to what extent they may be waived consistently with the purpose of the statute?

MR. AYER.: It is a relevant fact, Your Honor, I think first with regard to the requirement of meeting State standards, that whereas the primary purpose is to benefit the children, a secondary purpose which is made explicit in the statute and which this court has recognized is to leave State authorities as the primary authorities in determining educational standards. That purpose is frustrated by the result that's been reached here.

QUESTION: What if you can't satisfy each of them? Which purpose wins out?

MR. AYER: I don't think -- I think that's a false hypothesis, Your Honor. I don't -- I --

QUESTION: Well, it. is -- it is if you are correct that the conditions are in effect enforceable conditions without any possibility of waiver.

MR. AYER: That -- well, I --

QUESTION: But that in effect assumes the answer to the question that is before the Court.

MR. AYER: I think on the IEP requirement that the statute -- any fair reading of the statute does not contemplate that in a usual setting in a public school that if the parents and the teachers sit down and parents and the school authorities sit down and they say, well, now, we're going to be funding this under the IDEA, but you'd just as soon not do an IEP wouldn't you?

We'd just as soon not write one, you'd just as soon not have one, let's just forget about it, and we'll go ahead and fund this with Federal money without complying with the requirements of the statute. I do not believe that that's consistent with what the authors of the statute had in mind. I --

QUESTION: Mr. Ayer, a little while ago you tell us about a three-legged stool.

MR. AYER: Yes.

QUESTION: You told us what the first two legs are –

MR. AYER: Well, the --

QUESTION: -- but you never got to the third.

MR. AYER: Well, I --

QUESTION: Would you tell me what it is?

MR. AYER: Yes. The third leg is the standard of what constitutes an appropriate education, as the word is used in the act, and in Rowley --

QUESTION: I forgot the first two already. What were the first two?

(Laughter.)

MR. AYER: The first two legs, Your Honor, were the requirement that the education meet State educational standards, the second was the it be provided in compliance with the IEP requirement, and the third is that it be "appropriate."

Now, this Court in *Rowley*, in considering what constitutes an appropriate education, focused on the fact that there are other procedural and other requirements under the act and adopted a standard which I think by any fair reading is a fairly low level standard.

That is to say, it is simply a question of whether the education was capable or calculated to provide educational benefit. That in itself I think plainly is not an effective support to a statute that is trying to elevate the quality of disabled children's education.

The statute has in mind something else. The statute has in mind these things working together. It has in mind, under the educational standard requirement, essentially a nondiscrimination provision that says, you can't treat the disabled children worse than you treat the other children. If you have teachers certified in the areas they're teaching for other children, you've got to have similar kinds of certification.

And that's -- the certification point which is at issue here is a very significant part of the statute. It's addressed specifically in the regulations and in the statute, indicating at one point in the statute -- I think it's -- 1413 (a)(14) talks about with regard to disabled children, if you are not hiring teachers in accordance with the e highest standards in the State, number 1 you're supposed to do that for disabled children, and if you're not, you've got to give an explanation as to what you're doing to get up to that standard.

QUESTION: Of course, you're -- go on.

QUESTION: I'm sorry.

QUESTION: Go -- go, go. I took the last one.

QUESTION: You're arguing -- if *Burlington* hadn't been decided, you'd be making essentially the same argument with respect to the stay-put provision, wouldn't you? Wouldn't that be essential to, for example, the maintenance of control over public education and assuring that the public educational authorities would see that the kid did not get sidetracked into a second-rate classroom while they were fighting over what to do? I mean, you'd be making the same argument.

MR. AYER: You mean, before *Burlington* was decided?

QUESTION: Yeah.

MR. AYER: I can't tell you what I would be -- I wasn't involved in that case, and I don't know what I'd be arguing. It's not the same case as this case.

QUESTION: Isn't the logic essentially the same, and I mean, I don't see how you can argue in the face of *Burlington* consistently with the *Burlington* logic that these provisions are so obviously nonwaivable, or nonmalleable, and as Justice Ginsburg pointed out, I thought in your reply brief you were conceding as much.

MR. AYER: Well, I would just again ask the question, do we believe that they are waivable in the context of a public school placement?

QUESTION: You told me that if -- that this would be a different case if these parents had inquired of the school system, is there a place that satisfies your requirement where we can put our child, and you said that what the case comes down to is that the parents failed to make that inquiry.

MR. AYER: Your Honor, I did not mean to say it would come out a different way. It would be a different case, because it would have triggered a different process.

QUESTION: Does this school district have either a list of approved places or, does it have a procedure that parents can use to find out?

MR. AYER: It doesn't have a list, and whether or not it has a procedure in terms of a way that parents could get that information, we don't know, and the reason we don't know is that any effort was -- no effort was taken. The procedure would be to pick up the phone --

QUESTION: Why shouldn't it be --

MR. AYER: -- and ask the question.

QUESTION: -- if the school district is in default because it. has not provided the required education, why shouldn't it be incumbent on the school system to show that indeed it has a procedure? Rather than putting the burden on the family that has not gotten what the statute entitles it to, why shouldn't it be the school system's responsibility to say, either we maintain a list, or we maintain a procedure so that the parents will have an effective remedy?

MR. AYER: Well, I think -- this is a case where what occurred was that, while the review process under the statute was going forward, the parents, completely on their own and without any conversation with the school, and without telling the school district authorities that they were doing it before they did it, they took the --they applied to the Trident School, they took the child out of the school, and they put her into the Trident School, so that this is not a situation where the --

QUESTION: They took a big risk in doing that. I mean, it may well be that when they came to apply for reimbursement and the school district resisted it, a court would have found, well, the Trident School is really not a very good school, and since you didn't provide substantially what the act wanted, we're not going to allow -- that's a big risk for the parents. Why isn't that risk enough?

Once the school district has failed to meet its obligation, the parent has the right, if the parent wants to take the chance, to send the kid to any school at all. If the school doesn't meet up

to fulfill the obligation substantially of the act, the parent gets no reimbursement. That's a substantial sanction, but I don't know why the parent has to - -

MR. AYER: Well --

QUESTION: You know, the school board had its chance, decided not to provide these services, and it seems to me it falls back into the lap of the parent.

MR. AYER: Your Honor, I think that's -- I think it's a bit of an oversimplification to say that they decided not to provide the services. The bottom line is, there's been a finding that what they offered wasn't meeting the standards under the act. The one answer I would give goes back to what is the explicit purpose of the act, and Congress must have had something in mind when it said that it wants to assure a free, appropriate public education to all children, meaning--

QUESTION: Well, Mr. Ayer, we take this case on the assumption that the public school failed to provide the free appropriate public school education. I mean, we take that as a given.

MR.. AYER: That's correct.

QUESTION: And in those circumstances, does it boil down, in effect, to whether the courts below abused their discretion in ordering the remedy they did? Is that what we're really looking at here?

MR. AYER: Well, you can case it as an abuse of discretion. I think the key point is, is the rule announced by the court of appeals consistent with the objectives and language -- the purpose, explicitly stated, and language of the act -- and I would submit that inasmuch as the purpose, as stated, is to create this, as I described it, three-legged stool to elevate the quality of education, what we have created here with this rule, not simply in this case, but with the rule amounts, simply saying, all you have to do is show that you've found an education that is going to provide educational benefit, we are going to have a lot of placements that are publicly funded, federally funded under the act in part and State-funded to a significant degree.

QUESTION: Well, it could well be that there is language under the opinion that goes further than perhaps you think it should, but at bottom you have a judgment in favor of reimbursement of these parents, and do we review that on an abuse of discretion standard?

MR. AYER: I – it is ultimately a question of whether discretion has been abused.

QUESTION: Well, Mr. Ayer, I thought your position was that if the school in which the child is placed does not meet the State standard, there's no reimbursement, period. I thought that was your position. Am I wrong, that if --

MR. AYER: The general rule is that the education that's going to be publicly funded must meet the standards of a free appropriate --

QUESTION: If it doesn't, there's no reimbursement to the parents. I thought that was your position.

MR. AYER: That's the general rule, and the only exception to that, I think, is going to be --

QUESTION: Well, not only the general rule, that's the rule you say the statute requires, as I understand it, in all cases.

QUESTION: I believe you did recognize an exception in your reply brief, that there could be extraordinary cases, and the question was whether this was one.

MR. AYER: Well, I think we do recognize the possibility that where there's – as in *Honig*, where there's a substantial showing that accomplishing the purposes of the act is not going to be possible, or has been prevented --

QUESTION: Well, do you think this case would be any different if before making the placement the parents had gone to the school authorities and said, we propose to put the child in this particular school, and they said, well, you know, there are two teachers there that aren't certified, and we, of course, have put some of our placements there, but we want you to know that there are two uncertified teachers? Would that make the case any different?

MR. AYER: It might well. I think -- because what that would do would be to initiate a process where the school authorities could address that issue, and it might produce something else. The point is here, the parents walked away, and there has not been a cooperative process.

QUESTION: The school's position was that the program at its school was sufficient. They weren't arguing about where to place the child.

MR. AYER: But they also -- they also understood, Justice Stevens, that they have obligations under *Burlington*, that there are *Burlington* rights, and I think it's really unreasonable to think that school districts are simply going to ignore the fact that parents have these rights.

If it's possible, Your Honor, I'd like to reserve any time I have left for rebuttal.

QUESTION: Very well, Mr. Ayer. Mr. Wright.

ORAL ARGUMENT OF PETER W. D. WRIGHT
ON BEHALF OF THE RESPONDENT

MR. WRIGHT: Mr. Chief Justice and may it please the Court:

Before we get into the issues, I'd like to take a moment to review some of the factual questions that are important in responding to Mr. Ayers. In 1953, when Shannon was 13 years old, she entered the seventh grade at Timmonsville School. Her mother told the school officials

that Shannon could not read and requested that she be evaluated. The school system evaluated her, concluded that she was lazy, unmotivated, a slow learner who needed to be pressured harder to work.

Relying upon that, the parents pressured their daughter. By February of 1985, she was 16, functionally illiterate, had become suicidal, and was severely depressed. Her parents obtained counseling for her. The counselor recommended that Shannon receive a complete psychological evaluation.

The results found that Shannon had a severe leaning disability and intense educational services were recommended. Following this, the school did evaluate Shannon and concurred that Shannon had a severe leaning disability and was average to above average in intelligence.

At a conference with parents and school personnel, an individualized educational program was presented to the parents that proposed a resource program for Shannon. This resource class would be one where Shannon was going to be placed with emotionally disturbed and mentally retarded children. The parents said that was not appropriate for Shannon.

The school then offered an itinerant program. This program consisted of 3 hours of special education a week, and after a year in the tenth grade as a 17-year-old, her reading still would have remained at the fifth grade level, and she would have fallen further and further behind her peer group. The parents contended that this --

QUESTION: You say, would have. That was what they projected the results of this would be.

MR. WRIGHT: Absolutely. That's correct.

QUESTION: What the school board projected?

MR. WRIGHT: The school board said, we will have you reading half -- six months more, after a year's worth of intense special education program.

The parents said that was not -- inadequate, and based upon the advice of the evaluators that were working with the family and with Shannon, requested at that time a self-contained leaning disabled program such as the one that was offered right down the road in Florence County School District One.

Now, Florence County has multiple school districts, and this is a case against District Four, not against Florence County itself.

District Four refused to consider placing Shannon in any public or private self-contained program. The parents then requested a special education due process hearing. At the August 20 due process hearing, the Carters requested funding for either two neighboring schools or Trident

Academy, a special educational school accredited by the Southern - - excuse me, Southern Association of Colleges and Schools.

The issue at the special education due process hearing and before the district court judge was whether or not District Four's itinerant program was appropriate. The trial court not only found that District Four's program was inadequate, but also found that Trident Academy provided Shannon with an excellent education. She --

QUESTION: The petitioner argues that there was a unilateral withdrawal and that the parents walked away from the process.

Was there any pleading in the lower court or ever an attempt to show in this case that if the parents had consulted with the school district somewhat longer there would have been a likelihood of an IEP program being drafted? Was that ever contended by the --

MR. WRIGHT: It was not an issue at either the due process hearing or the U. S. district court. The issue was simply, our itinerant program 3 hours a week is appropriate and adequate.

QUESTION: But that contention was never made below by the State in the trial court?

MR. WRIGHT: About -- the issue of Trident not being --

QUESTION: That there would have been a likelihood, a realistic likelihood that an IEP would have been developed if the parents had remained in the process?

MR. WRIGHT: No, sir. No, sir. It was --

QUESTION: That was never contended.

MR. WRIGHT: It was never contended. It was simply, our 3 hours a week are appropriate, and therefore -- and if they proved that, if they had proved that 3 hours a week was appropriate, then of course, the parents had no remedy under Burlington, and so that was fairly incomplete on a number of the other issues dealing with information about Trident.

QUESTION: Mr. Wright, in view of the expense to the State, and it is quite expensive -- what was the --how much per year, 30 -- over $30,000, was it?

MR. WRIGHT: Over 3 years it. was $30,000. Actually, it was about -- the actual tuition was about $6,000 or $7,000, only $2,000 or $3,000 more than it would have cost the public school themselves.

QUESTION: In any event, it is an expense for the State we multiply many times if you prevail. Why isn't it equitable to require the parents in this situation to say to the school system, we are at loggerheads about the adequacy of what you are offering, and we're going to take the

risk to send our child elsewhere, tell us what schools you regard as adequate. Why shouldn't there be that burden of inquiry, as Mr. Ayer suggested?

MR. WRIGHT: I think that's a proper burden.

QUESTION: There parents didn't do that. They simply went off and unilaterally chose Trident. They didn't ask -- they didn't ask Florence County, what institutions would you consider adequate?

MR. WRIGHT: The record at the administrative due process hearing -- not in the court of appeals, not in the joint appendix, but in the due process hearing, will show the parents said, "Can our daughter go to Hartsville, down the road, District 1, Darlington, or Trident?"

That was the issue at the due process hearing. The itinerant program is not good enough for our daughter, we want her to read at the twelfth grade level when she graduates. That was what the battle was all about, so her parents -- and that was August 20, before school had even started, and Shannon had not been placed anywhere. If public --

QUESTION: What was the State's response?

MR. WRIGHT: Three hours a week is appropriate, 1/2-a-year's gain over a year is appropriate. The parents --reasonable parents, what: else could they do?

QUESTION: So you say that the inquiry that Mr. Ayer said might have made this case different, in fact happened?

MR. WRIGHT: Absolutely.

QUESTION: As in the record of the administrative --

MR. WRIGHT: The due process hearing, the trial -- the actual testimony before the administrative hearing officer.

QUESTION: Is that record part of our record?

MR. WRIGHT: It's -- it was a part, of course, of the trial court's record, the U.S. district court judge, and parts of the due process testimony are within the court of appeals joint appendix. I don't recall whether the three schools -- Darlington, Hartsville and Trident Academy are clearly in the court of appeals appendix or not, but that's -- I represent to the Court that it is clearly in the due process transcript, absolutely. I say that without a doubt.

QUESTION: What is it that's in the transcript, that they told them they were going to place the child at Trident?

MR. WRIGHT: No, sir. At the due process hearing, August 20, the parents said --

QUESTION. They asked whether these three schools might be proper placement.

MR. WRIGHT: -- we want self-contained, 3 hours a week are not adequate, our daughter needs total immersion. The school system said, our program is appropriate. Three hours a week is all that your daughter needs. The parents did not want to send their daughter down to Charleston, or Mount Pleasant, South Carolina. They wanted down the street, next school district.

Florence County includes a major city and rural counties, and then there are school districts as a part of each one, and District 1 -- this is in the record. District 1 had other self-contained programs, and the trial judge referenced that the school system had that available, in effect, and the record is --

QUESTION: Well, what is the major city, Mr. Wright?

MR. WRIGHT: I believe it would be Florence, South Carolina.

QUESTION: But in fairness, Mr. Wright, at that hearing the issue between the school board and these parents was still whether 3 hours a week is enough or not, whether you need a self-contained program, or whether 3 hours a week would be enough. The issue was not, well, assuming you have to go somewhere else and out of this public school, what other schools would you recommend. That was not the issue at the hearing. The issue was whether 3 hours is enough.

MR. WRIGHT: Well, no, it did go beyond that. The parents -- the school system's position was 3 hours was enough. The parents said, no.

QUESTION: But the school district said, none of these schools is any good, not because the schools are not qualified, but simply because we insist that 3 hours a week is enough. You don't need a self-contained program. Wasn't that their position?

MR. WRIGHT: That's correct. That's correct.

QUESTION: Okay.

MR. WRIGHT: In other words, they put blinders on to anything beyond 3 hours a week.

QUESTION: So there was never really put to the school district the question, assuming -- assuming that I don't believe you, what other schools would you recommend? I mean, if the parents would be willing --

MR. WRIGHT: That's correct.

QUESTION: -- to accept the recommendations of people who already thought that 3 hours a week for this child was enough. What other schools would you recommend? that question was never put to them.

MR. WRIGHT: Not in quite those words, but why can't daughter go down the road to District 1 and why can't you simply pay District 1, what you --

QUESTION: The response to that was, she doesn't need any more than 3 hours a week.

MR. WRIGHT: Exactly. Exactly.

QUESTION: Mr. --

QUESTION: Now, I --

QUESTION: Are you through?

Mr. Wright, if we had a situation where the school district or the State had an approved list of private schools to which private placements could be made that met State standards, do you think the parents have an obligation under this statutory scheme to make a placement if they want. reimbursement in one of the listed private facilities?

MR. WRIGHT: I think they would, given the assumption, as a part of your question, that the school system said here is our list of approved schools.

QUESTION: Well, and should the parents have an obligation to inquire, do you have a list?

MR. WRIGHT: Yes. Yes, parents, certainly, if a public school says, we are offering resource or itinerant, we know you want self-contained daily, or self-contained private, we don't agree with you but here is a list, I would submit that the parents would be obligated to evaluate the list and go back to the school system and see if they can negotiate it. It's supposed to be a cooperative type of a venture with - -.

QUESTION: Now --

QUESTION: Obligated to consult the list, or absolutely obligated to remain within the schools in the list in choosing the placement they wanted?

MR. WRIGHT: Well, needless to say, those aren't the facts in this case, and there is a --

QUESTION: Well, I understood -- and maybe -- I don't want to unduly complicate it. I thought your answer to Justice O'Connor was that they would be obligated, in effect, to look at the list first, but they would not necessarily be obligated to send the child to one of those schools..

If they concluded that the school -- none of the schools on the list was adequate, and they turned out after the fact on judicial review to be correct, your position would be the same, representing those parents, that it is representing these, wouldn't it be?

MR. WRIGHT: That's a difficult question, as you're perhaps aware, the Second Circuit has wrestled with, the Fifth Circuit has wrestled with, and if this preexisting list in fact is not appropriate as a matter of true fact, what do parents do?

In New York State, they get an appropriate education, but it's not free. They pay for it out of pocket, or they get a free education, it's not appropriate, but I'm not going to ask you today as a part of the Carter case to go beyond that.

QUESTION: Well, you don't ask me, but I was asking you --

(Laughter.)

MR. WRIGHT: Yes, sir.

QUESTION: -- whether your position would be the same, and I thought you were going to tell me that it would be.

MR. WRIGHT: Well, Your Honor, I think that in one of the friend-of-the-court briefs that was filed by the Maryland Disability Law Center, they synthesized what the problems were with, for example, there's a case, Jack Straube, where there was -- the schools on the list were obviously absolutely inappropriate, arid the trial district court judge said, my hands are tied. I cannot reimburse you. You received an appropriate education. I'm real sorry it was not free, and the --

QUESTION: Well, doesn't the principle that you contend for today untie his hands? If in fact they've consulted the list, and if in fact, a) they have concluded that the schools are inappropriate for whatever the need is, and on subsequent judicial review and a reimbursement action the trial court likewise concludes, isn't; the principle that you contend for today a principle that would say they are entitled to reimbursement?

MR. WRIGHT: I can only respond -- I can't respond any better than perhaps the Carrington court did and Alamo Heights, saying that you have to balance on a case-by-case basis the cooperativeness of the parents, whether or not the school system truly defaulted under their obligations - -

QUESTION: Where does that leave the school district if you have to balance in every single case – there would be not certainty as to what anyone's obligations were.

MR. WRIGHT: There would be problems with it, absolutely, and hopefully what that would then result would be school systems back, for example, with Shannon Carter in '83, when

they have a leaning disabled child doing good quality work at that point, making a finding, saving dollars by providing appropriate education then, or in '85 when the parents requested a more comprehensive --

QUESTION: Well, that's not going to obviate the need for some sort of certainty, if those early trials wont work out.

MR. WRIGHT: Yes, sir, it's created --

QUESTION: Mr. Wright, are you saying, at least in -- there was no list, there was no process disclosed to you, so in the absence of those, this case doesn't have to go to the further question suppose there had been a list and it wasn't adequate?

MR. WRIGHT: That's exactly what I'm saying here. No list, the parents had no knowledge of one, and in fact the State did not have a list, doesn't even have a process where a private school can apply to the State to see what it takes to get on this list, because it is a nonexistent list.

QUESTION: But you didn't even ask. I mean, you could have asked someone, couldn't you, come in and asked? I don't know of any list posted, but as your colleague pointed out, even if there was a list, you'd have to ask somebody for the list, wouldn't you?

MR. WRIGHT: Parents, I don't believe -- the answer's no.

QUESTION: But you didn't ask anybody for anything. You didn't say, you know, give us a list of schools, we are not going to accept your 3-hour-a-week thing, we want an intensive program, give us a list of schools. You didn't do that.

MR. WRIGHT: The parents did not do that. The parents said, we want Trident or two other programs. The public school, I submit to you --

QUESTION: What's the magic difference between a list or no list? The fact is, you didn't ask.

MR. WRIGHT: The burden would be to the school system, when they knew parents were seeking Trident, to say, well, if you want approval for Trident, here is the procedure that has to be followed, here are the requirements.

I would submit this, parents are not under a burden to inquire about a list that they would have no knowledge -- they' re not going to know the technical requirements of the special. ed act. Certainly, educators would be in a better position to do that, and can say, we don't agree, but we can agree to disagree, here is the remedy that you have to follow. It did not happen in this --

QUESTION: But the burden of coming forward should be on the one who has the evidence, that's essentially your position - -

MR. WRIGHT: Not the one who has the evidence, the one who is in the better position.

QUESTION: Right.

MR. WRIGHT: The one who's educated.

QUESTION: Right.

MR. WRIGHT: That would be my position.

QUESTION: Even though you're still taking the position that you don't have a right to go to any school, you expect them to come forward - - you don' t have a right to any other school because 3 hours enough. On the other hand, if you want to go to another school, here's a --

MR. WRIGHT: It becomes a --

QUESTION: This is contrary to human nature. They're not going to give you a list while they're still contesting the substance of whether you have a right to go anywhere else.

MR. WRIGHT: And if they don't give a list and parents then obtain a placement that later is determined to be appropriate, and the public school's program is inadequate, the school is a master of their own destiny, they saw fit not to provide this list, then the parents should not be held accountable for that. Parents should still be able to receive an appropriate education that is also free.

QUESTION: I think once you concede that you're bound by a list that the schools post your case becomes a lot weaker. I don't see a whole lot of difference between a school district with a list and a school district without a list.

MR. WRIGHT: I'm not here today arguing against lists per se.

QUESTION: I know that. That' s my point.

MR. WRIGHT: But I think that's a difficult part of the entire case. If the school system already had a list in existence and had already furnished a list to the parents and provided them with procedures to seek approval for Trident, this would be a different case, absolutely no question at all about that.

QUESTION: Isn't there -- just refresh my recollection about one aspect of the facts. Didn't --wasn't Trident used by the school districts and other parts of the State as a place to send their children?

MR. WRIGHT: That's correct. Trident Academy had three other South Carolina youngsters that were placed there by South Carolina School System and paid for. Approval in

South Carolina is case by case, and you will also see this issue of certified teachers. If you look at the South Carolina regs, the last page of the petitioner's appendix, allows for noncertified teachers to teach special ed, exactly what they're complaining and condemning Trident for.

In essence, when Shannon graduated, she was reading at the twelfth grade level. The education was appropriate. It's not been free at this point, and we ask that you provide Shannon with a free appropriate education also.

Thank you.

QUESTION: Thank you, Mr. Wright. Ms. Wax, we'll hear from you.

ORAL ARGUMENT OF ANY L. WAX
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
SUPPORTING THE RESPONDENT

MS. WAX: Mr. Chief Justice and may it please the Court:

Under the broad remedial provision of this statute, a judge is allowed to award any remedy that he deems appropriate, and as this Court said in the Burlington case, appropriate means appropriate in light of the purpose of this statute.

We think that the answer to this case and the answer to many of the questions that the justices have posed today comes in asking the right question, and that question is, what is the purpose of this statute? What is its aim? Why did Congress enact the IDEA?

Congress enacted IDEA to provide a basic floor of educational opportunity for disabled children, to ensure that those children received an education that was calculated to enable them to receive benefit, and in deciding what remedies are appropriate, we believe that basic equitable principles dictate that the legal standard should be no more onerous and no more complicated than are absolutely necessary to effectuate the statutory purpose.

Now, with respect to the questions that Justice Ginsburg have raised about whether parents have to make reasonable inquiries or reasonable efforts to comply with the particulars of section 1401, or whether they have to choose a school from a list, the position of the United States is that no such per se requirements should be imposed as a rigid matter.

There should be no requirement as such that parents make inquiries, and the reason for this, first of all, is that the statute contains no such requirement. There is no explicit mandate that parents make inquiries, seek information, confer and consult endlessly before they may challenge the IEP proposed and received a remedy.

QUESTION: Of course, they always have an incentive to ask for a list anyway, or to select a school from a list that is provided, a very considerable incentive, don't they? That is to

say, if the school district has provided a list, you know. that you can get reimbursement so long as you pick one of those schools.

MS. WAX: Well, it certainly increases your chances of getting reimbursement, Justice Scalia, but part of our point is that just because you choose a school from a list doesn't mean you satisfy the substantive showing that it's appropriate for your child.

QUESTION: Who would contest it? Certainly the school district wouldn't be able to contest it, if the school was on the list.

MS. WAX: On the contrary, Your Honor, I think they very well could contest it, because they don't want to provide reimbursement, and just because it's on the list, although it satisfies the particulars of the definition of a PAPE, it might not meet the substantive standard under Rowley for - -

QUESTION: I see, they would still contest the IEP--

MS. WAX: Exactly.

QUESTION: -- and all of that, but they certainly couldn't come forward and say, this is a no-good school.

MS. WAX: They couldn't come forward and say, it doesn't come forward and comply with the procedural and formal requirements, but under Rowley they could certainly try and come forward and say, this school is inappropriate in that it doesn't provide the sort of education that your child needs.

QUESTION: Well, they could continue to contest their own inadequacy.

MS. WAX: Correct, and they could contest that, too, and those are the two elements of the inquiry.

Now, it's important to realize that every time you set up a requirement like, the parent has to make inquiries, the parent has to look at a list, that requirement comes at a cost. It comes at a cost to the parents and the children seeking a remedy, and that's because although it may seem simple to ask parents to pick up the phone and call the school district, as this Court recognized in Burlington, the reply that they're likely to get is, we'll get back to you, we'll look into it, call back next week, when the right person is here, and that produces delay.

And when there's delay, the parents are in a quandary, because each day that the child is in an inappropriate and unsatisfactory setting, is a day that's lost to the education of that child, and it also produces uncertainty, because the parents ask themselves, how much of an effort is enough, how much of an official response is sufficient, when can we cut our losses and move our child, and all of those uncertainties get played out at the remedial phase of the statute, when the

judge is asked to consider how much effort is enough, whether what the school district did is equitably sufficient.

QUESTION: Ms. Wax, we're going back now to the setting in the school system and not when we're in court talking about the parents' choice. In the school system, isn't the thrust of the act that the parents and the school authority should be trying to work with each other to the maximum extent possible, rather than an incentive for the parents to pull that child out of the public school system quickly and put it in some superior private school?

MS. WAX: Your Honor, that overstates the statutory interest in having parents and school districts consult and confer. That interest in mutual cooperation is fully exhausted by coming together to try and formulate an IEP in the first instance.

Once that proposal is signed and sealed and proposed, then under the statute parents have no open-ended obligation to consult and confer without end, and in fact as this Court recognized in Burlington, to incorporate such a requirement would be very much to the disadvantage of parents, because the school district always has the upper hand in this situation.

On the contrary, under section 1415 of the act, the parents have an immediate right to challenge the adequacy of the IEP, to challenge any aspect of the school district's proposal at the administrative level, first by directing the challenge to the school district itself, then with appeal to the State, and finally, judicial review. So I think petitioners vastly overstate the statutory interest in consultation and cooperation, and if their proposal was adopted, it would work to the detriment of the parents and the children.

So the point is that the requirement that parents choose from a list, which vastly reduces their options for providing their child's education, and that they inquire of the school district, creates tremendous obstacles and complications to their receiving relief, and the question is. the equitable question is, do those added complications come at some benefit to the effectuation of the statutory purpose, and the answer has to be no.

The statutory purpose is fully effectuated when a judge determines whether in a particular case the education that the child received in the parent's chosen institution was an appropriate education within the meaning of Rowley. That is, it accomplished the purpose of' the act, which was to provide a basic floor of educational opportunity.

And if the education lives up to that standard, then consideration of whether the school's on a list, or whether inquiries were made, or whether certain formalities were complied with, really becomes superfluous. They become beside the point, and in that case it would effectuate the Statutory purpose to allow reimbursement, and it certainly would defeat the statutory purpose to deny reimbursement.

QUESTION: So you are, in effect, asking us to disapprove -- what was it, the Second Circuit? Which was the decision that said --

MS. WAX: Tucker.

QUESTION: -- you have to pick from the list?

MS. WAX: Yes, we are, Your Honor, We think that as a hard and fast, rigid requirement, it doesn't hold water. It may come in at the very end of the inquiry of whether the education is appropriate.

It could be a factor in a case where the child didn't clearly benefit front the education, where the child didn't make educational progress, and then the judge is thrown back on certain indicators of educational quality with respect to the school that was chosen, and then the judge might look at things such as how well-trained were the teachers, how does this school compare to other schools, did the parents have ready at hand an alternative which looks like it might have been better than the alternative which was chosen?

None of those considerations would come in this case, because here there was clear benefit to the child, and we think that when the child clearly benefits, that's really essentially all the judge needs to know, because - -

QUESTION: Well, now, Ms. Wax, do you think there's no limit at all here? Suppose you're in a community where there are a number of private schools that could do the job, and one of them has an annual tuition of $30,000 a year, it's really a Cadillac situation, and another school that maybe could do the job has a tuition of $10,000 a year.

Now, the parent is entirely free to choose the most expensive and the school district has to pick up the cost?

MS. WAX: Well, we don't agree --

QUESTION: That's your view? There are --

MS. WAX: No.

QUESTION: - no cautionary concerns here at all?

MS. WAX: We would distinguish between the availability of some reimbursement, okay, which we think should not be affected by the alternatives that might be available but should only be determined by whether this school that the parents chose meets the appropriate standard. The amount --

QUESTION: Well, do you think under the statutory scheme a court could deny full reimbursement?

MS. WAX: No, we do not. We think the court could limit the amount of reimbursement.

QUESTION: Well, that's what I'm asking you. You do? How? On what authority?

MS. WAX: On equitable grounds because, in considering that the substantive standard of appropriateness is really a standard that sets a floor, and that therefore the court could say, well, since that floor is abided by, we can limit the amount to what the floor would cost.

QUESTION: Thank you, Ms. Wax. Mr. Ayer, you saved 1 minute.

(Laughter.)

REBUTTAL ARGUMENT OF DONALD B. AYER ON BEHALF OF THE PETITIONERS

MR. AYER: Thank you, Your Honor.

QUESTION: Mr. Ayer, I hate to take part of it, but it's an important point to me. This list that you would make up and submit to the parents is just a list as to schools that meet the State educational standards. It isn't a list of those schools that don't charge more than you're willing to pay, is it?

MR. AYER: Well, we weren't proposing to make up a list, Your Honor --

QUESTION: I didn't --

MR. AYER: -- but if someone were to make a list that reflected State standards, it would only reflect State standards.

QUESTION: Not cost.

MR. AYER: Well, that list would not, and you could have another list that would.

But three points I'd like to make very quickly, and one is that I must take exception to the proposition that the purpose of the act is to provide an appropriate education as that word is defined in Rowley. The purpose of the act is to provide a FAPE, a free appropriate public education, which is, I think, a good bit more than an appropriate education, which is one that simply confers some benefit.

Second, I would also disagree with the proposition that the obligation and the intention of the statute that their be cooperation ends as soon as the IEP is signed. Indeed, it's a continuing process that's intended to go on into the future, and I --

CHIEF JUSTICE REHNQUIST: Your time --

MR. AYER: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Ayer. The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-captioned matter was submitted.)

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