IN THE SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD.

Respondent.

No. 06-637

Washington, D.C. Monday, October 1, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:55 a.m.

APPEARANCES:

LEONARD J. KOERNER, ESQ., New York, N.Y.; on behalf of Petitioner.
PAUL G. GARDEPHE, ESQ., New York, N.Y.; on behalf of Respondent.
GREGORY G. GARRE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondents.

P R O C E E D I N G S

We'll hear argument next in Case 06-637, *Board of Education of the City School District of the City of New York versus Tom F*.

Mr. Koerner.

ORAL ARGUMENT OF LEONARD KOERNER ON BEHALF OF THE PETITIONER

MR. KOERNER: Mr. Chief Justice, and members of the Court. In 1985 when this Court decided the *Burlington* decision, it based -- it based it based on the broad remedial clause set forth in 20 U.S.C. 1415, which allowed an impartial hearing officer, a state review officer, or the court, itself, to grant relief where appropriate.

In so doing, it noted that there was no other substantive section which touched and concerned the issue before the Court, and that is whether an individual can voluntarily remove a child and seek tuition reimbursement before the conclusion of the administrative and court remedies.

It made a point of noting that it felt it was gleaning the congressional intent; and, had Congress known that the administrative and court process would be protracted, it would have provided a process which would allow the child to be removed.

Similarly, in the sequel, the *Carter* case, the Court made the other -- the same conclusion. It noted that, although the primary responsibilities to educate the child in a public school, least restrictive environment, there would be occasions when you would place that child outside, having been in the school system.

1412, which was the eligibility section during this period, was very truncated. It did not provide a lot of conversation concerning the relationship of public and private schools within the IDEA. It provided that you had to provide the child who demanded it a FAPE, a free appropriate education. If you couldn't do that, the public school had to then pay for the tuition. It was silent though on the relationship between the private schools where the child voluntary removes.

In 1997 the IDEA was codified, and for the first time the specific section was inserted dealing with the relationship of children and private schools. Indeed, 20 U.S.C. 1412(a)(10) -- just the beginning, just that paragraph, says "children

placed in private schools" and the structure was detailed. Subdivision (A) dealt with the relationshiop of the private schools with the public system generally and noted that, in that particular case, while the children would be entitled to some small amount of Federal funding, they would not be entitled in private school to a free appropriate public education.

We also noted that if a parent was dissatisfied with the service plan, they'd have to seek relief administratively. They would not be entitled to an impartial due process or a court review. It was a recognition that children who are placed in private school were entitled to much lesser services than children placed in public school.

Subdivision (B) dealt with the situation when children were not placed in public school but the local district consented that they could not provide a free appropriate public education. As a consequence, in those cases and in only those cases, since the public would then be supervising and directing the private school, they would be responsible for the tuition.

Sub (C) is the issue now before this Court.

Sub (C) is entitled Children Placed in Private School, Payment and Where the Local Education Aagency Did Not Consent. And that particular section is broken down again into three parts. The first part says, if a child is offered FAPE, that is, a child is given a program which is adequate, you cannot get reimbursement if you remove your child during any time but in this case during the pendency of the administrative and the court process.

CHIEF JUSTICE ROBERTS: Counsel, do you agree that if we conclude the language is ambiguous, we should defer to the Secretary's interpretation in the comments accompanying the regulations?

MR. KOERNER: The answer is no because the Secretary's interpretation on the note in common and the letter submitted to the educational consultant is inconsistent with its own Federal regulation. Its Federal reguation, titled Children Placed in Private Schools When FAPE Is at Issue, also requires that you previously receive -

CHIEF JUSTICE ROBERTS: It just mirrors the statute -

MR. KOERNER: That's exactly -- it does.

CHIEF JUSTICE ROBERTS: Well, then -

MR. KOERNER: But the note -

CHIEF JUSTICE ROBERTS: Assuming we would think the statutory language is ambiguous, we are likely to think the same language in the regulation is ambiguous.

MR. KOERNER: Well, Chief Justice, if it's ambiguous and we ought to at least discuss the nature of the ambiguity, then that ambiguity under the spending clause should redound to the benefit of the local education district as well, for if it does not set forth

CHIEF JUSTICE ROBERTS: Well, which -- which prevails, Chevron deference or spending clause presumption?

MR. KOERNER: Well, the Chevron deference requires notes and comments which are persuasive and analyzed. There is absolutely no analysis in the note and comment in this case. All it says conclusively is that the decisions of this Court in *Burlington* and *Carter* create an independent obligation separate and distinct from the statute. It doesn't explain why the specific language of the statute should not be incorporated in the *Burlington* court. And -

JUSTICE ALITO: If Gilbert F. had attended the public school for 11 days, would this case come out differently, in your view?

MR. KOERNER: I'm sorry.

JUSTICE ALITO: If the student here had attended the public school for let's say 11 days before being transferred to the public -- to the private school, would your, would your arguments still fly?

MR. KOERNER: No. If the -- if the child attends a public school and receives special education and related services -

JUSTICE SCALIA: You've added something to the question, though, didn't you?

MR. KOERNER: No, I don't think so.

JUSTICE SCALIA: Attending public school and receiving -

MR. KOERNER: I -- I thought, I'm sorry -

JUSTICE ALITO: Well, that was my assumption. Let's say he attends public school in a special education class for 11 days. His parents think the public -- the placement that's proposed, the IEP that's proposed by the school is inadequate, and they turn out to be correct, and they want to send their child to the private school, but they understand this argument based on the statutory language, so they say all right, we are going to put him in the public school special education class for 11 days, so -- we've already got the placement in the private school all lined up at the end of the 11 days. He goes one day, we give notice; we take him out and we put him in the private school; then they are entitled to reimbursement subject under your argument.

MR. KOERNER: That -- that would satisfy the statutory definition, but when it went before the impartial officer, or the State review officer, there would be a very compelling argument that there was a lack of cooperation, because it's not just that you're in the system, but that you articulate the problems that you have with the public placement.

CHIEF JUSTICE ROBERTS: Well, it depends on the particular circumstances. I mean, if the parent is able to show look, the school district is being very unreasonable here; it's clear he is going to need more than the services they were going to offer, well that wouldn't have -

MR. KOERNER. Yes.

CHIEF JUSTICE ROBERTS: -- run afoul of any of the other provisions.

MR. KOERNER: My only comment, Chief Justice, was that yes, that would satisfy the statutory section as long as the notice was given in triple I, but we would then have an argument in the individual case that the parent was not cooperating. So for the purpose of this case, where they come into the system even for a minimum period and give the appropriate notice under triple I, yes, that would -- it would be satisfied.

JUSTICE ALITO: Well, why would Congress ever have wanted to adopt a scheme like that? What possible purpose is served by simply requiring the student to be in a placement that is by definition not providing a -- not providing FAPE for this very short period of time? It makes no sense whatsoever.

MR. KOERNER: The reason Congress wanted to provide it is the reason that this Court discussed in *Burlington*. The upset of this Court in *Burlington* was that it was an extremely protracted process. The child there was subject to a very long impartial hearing and State review and court review -

JUSTICE GINSBURG: So that enabled the parent to remove the child immediately and risk that -

MR. KOERNER: That's correct.

JUSTICE GINSBURG: -- the public education would be found inadequate.

MR. KOERNER: But the reason -

JUSTICE GINSBURG: But all that section does is to repeat the *Burlington* scenario. It says, it codifies what the Court held. The Court didn't say anything in *Burlington* about the situation where the child was never in public education.

MR. KOERNER: That's correct, but it's a statute of limitations. It says that you must receive special education and related services. There is no -there is no exception to the condition -- if you look at the particular statute when they refer to "may," they are only talking about the relief that a court or impartial hearing officer or State review officer can grant. They are not talking about the predicate, you must be in the system.

Now you asked, Justice Alito, why do they have to be in the system, and the reason is Congress thought that if you're in the system and you have a vested interest in the system, that because of all the processes that are there, including mediation, including a modified IEP, that it would increase the numbers of people in terms of cooperation who want to participate in the system.

JUSTICE SCALIA: I thought it wasn't that. I thought it was simply Congress figured that there are probably a lot of people in New York City, in Manhattan in particular, who are going to send their kids to private school, no matter what, and they can get special services in private school, but what the heck, if we can get $30,000 from the city to pay for it, that's fine.

In other words, this was meant to be an option for people who wanted to go to the public schools but couldn't go to the public schools because they couldn't get the private services there, but it was never meant to be an option for people who had no desire to go to public schools at all anyway, and -

MR. KOERNER: I think -

JUSTICE SCALIA: -- and without this condition, somebody, I think the plaintiff here was never in the public school, was he?

MR. KOERNER: That's correct. He never had any contact with the public school at all except to request a free appropriate public education.

JUSTICE GINSBURG: Are there not children -I think there was a brief on behalf of the Autism Society that says many school systems simply do not have the facilities to attend to the needs of these children?

MR. KOERNER: Yes, but you don't know that until you've actually been subjected to the process itself. Indeed in *Schaffer*, you, this Court said that you had to presume that the officials in the department of education of a local school district are going to do their job. Their job is to try to find an appropriate IEP. If it turns out that it's insufficient, of course you can then litigate.

JUSTICE GINSBURG: Are there not cases where school districts have said from day one, look, we don't have facilities to handle this type of disability?

MR. KOERNER: But if we don't -- if the public schools district does not have the facilities, then it will consent to a private placement to deal with the particular problem it cannot deal with. We are only talking about cases where the school system believes it can deal with an individual problem and at the very least if the person's child comes into the system, they will have the opportunity to work with the parent and try to work out a situation. In -- as this Court is well aware, the primary obligation is to find a public education for this child, and if from day one you assume that the individual education plan is defective, not only is it inconsistent with *Schaffer*, it's inconsistent with the whole statutory scheme which is set up to try to work cooperatively. Indeed -

JUSTICE GINSBURG: But isn't it true that the parent will never be reimbursed? Let's take the parent that Justice Scalia has hypothesized, will never get one penny of that tuition unless that parent carries the burden -- the parent would have the burden of showing that there was no appropriate public education?

MR. KOERNER: The parent in this case can never get reimbursed because they don't meet the predicate which is that their child had to previously -

JUSTICE GINSBURG: That's not the question I asked.

MR. KOERNER: Oh I'm sorry.

JUSTICE GINSBURG: I said that the parent - let's assume that the parent never sends the child to public school, nonetheless seeks reimbursement. In order to get reimbursement that parent would have to show, would have bear the burden of showing that there is no appropriate public education available; is that not true?

MR. KOERNER: Yes. You mean assuming the statute does not apply?

JUSTICE SCALIA: Yes, but that is -- but the parent would not have to show that the parent would have used that available public remedy -

MR. KOERNER: That's correct.

JUSTICE SCALIA: --if it were there?

MR. KOERNER: And Congress could have concluded that the parent you're referring to who placed that child immediately in a private school, and who may not have an interest in obtaining a public school education for that child, may not be as cooperative and as collaborative as someone who has a child in the system, to work out an individual education plan because of some of these -

JUSTICE GINSBURG: Then the conclusion would be that that parent hasn't met the heavy burden of showing that there is no appropriate public education.

MR. KOERNER: But the problem is, if you go to an impartial hearing officer as in this case, and you have a child that's been in a private school for a number of years and is doing very well, and the private school special ed teacher comes in and highlights all the successes of the kid, and then the New York City Department of Education comes in with is profit plan which is based on speculation, because the child has never been in the system, is it so unreasonable for Congress to conclude as a matter of statutory, explicit language that the child should go into the system so that at least with respect to your burden there's at least a participatory program where they try to help the child get an individual education.

JUSTICE ALITO: If Congress's purpose really was what you -- what you suggest and what I think Justice Scalia's question suggests, that there was a desire to make parents who really had no interest in the public school system give the public schools a chance, why is it that, even as you read the statute, there's no requirement that the child remain in the public school system for any significant period of time? It's just pro forma.

MR. KOERNER: Indeed, Justice Alito. Congress in this case got it completely right because not only did they put in the explicit language, they also put in a time period because they understood that this Court had ruled in a number of cases that its upset was with the protracted period that a family has to have a child in the system. But by having a notice provision and by thereby ensuring a parent that by giving notice and specifically articulating the reason why the plan is deficient and giving the school district an opportunity to cure the problem, everybody would understand 10 days later that they can leave. So the very problem that you highlighted in *Burlington* and *Carter* is no longer a problem under the explicit legislation.

CHIEF JUSTICE ROBERTS: I think they may -they may well have to stay longer than 10 days to either realize that the program is inadequate or to feel comfortable that they'll be able to establish that on the record. It's pretty hard to say something's not working after only on 10 days.

MR. KOERNER: Chief Judge, you're absolutely right. And that is why I say that would be based on an individual determination. All the statute says is come into the system. What happens after that, if you give your notice as was raised in a hypothetical, that would go to whether or not there was the duty to cooperate which was fulfilled, which also is a requirement for this particular section for reimbursement.

It's not just that you are in a program and private school is providing appropriate service and then you have an IEP that may not provide the free appropriate public education, but you also have to show you cooperated with the program because the whole primary purpose of the program is to provide a public education.

JUSTICE SCALIA: Of course, to be fair, this provision doesn't just apply to the rich person who wants New York City to pay 30,000 of his tuition to a private school. It also applies to somebody who is already in public school, and the program offered by the -- by the city is patently inadequate. You are compelling the parent nonethe less to put the kid in a program that anybody would see will -- will not meet the needs.

MR. KOERNER: That is correct, but your -first of all, Congress could weigh the balance between that particular problem and the need to give the school district an opportunity to try to provide a program, but it does run contrary to this Court's discussion in *Schaffer* which presumes that the school district is going try to accommodate the child, try to provide the needs of the child. In effect, I think all of these questions are based on the assumption that the plan is going

to be automatically deficient. I don't believe there's any foundation this Court has indicated there's no foundation. That's why it said in *Schaffer* that the parent has the ultimate burden of persuasion because it presumed that the plan -- if you accept that principle, which has already been articulated and you accept the fact that specialists on the Board of Education have -are going to try to adjust to this kid's needs, then having the kid in the system even for a short while is something that Congress could determine. And indeed that's what the language says.

Now, we recognize that there is an absurd argument, but it was difficult for us to understand how it would be absurd to require this when indeed it would solve the problems of *Burlington* and *Carter* because it makes sure that if a parent doesn't want to stay for a protracted period, it doesn't have to stay and then they can litigate later. As Judge Alito noted, it would be as little as 10 days.

I mean some arguments -- some of the arguments I should at least mention that the other side has made: The chief -- in the Second Circuit, the argument was that there was an ambiguity because the word "only" wasn't used. So if I may use the example that an individual may be eligible for welfare recipients -- welfare benefits if that individual previously received food stamps, the argument would be, well, that's a little ambiguous because you didn't say "only received food stamps." Of course, the condition doesn't have to have "only" and it probably undermines a lot of statutes that Congress has passed. The language is very, very clear.

The second argument that is made both by the Solicitor General and Respondent is that there's been an -- implied repeals of this Court's decisions in *Burlington* and *Carter*. But an implied repeal is when you have two statutes that are specific and the latest specific statute is inconsistent with the earlier specific statute. These courts' decisions were based on a general remedy provision and, more importantly, this statute encompassed what this Court held because it provided that you can remove your child once in the system and the notice provision provides that you don't have to be in the system very long.

JUSTICE ALITO: Is there any suggestion in the reasoning in the *Burlington* case that it was limited to a situation in which the student had been receiving public school special education?

MR. KOERNER: No. But it was a holding where the student was in fact receiving special education. The next case, of course, would have been one where the -- now, a more interesting question would have been raised if you had (iii) and not (ii). If you only had the notice provision where Congress contemplates you have to be in the system to give notice, and I came to this Court and I said, under (iii), Congress has really contemplated you have to at least be in the system for a short amount of time. You didn't have (ii), which clarifies exactly what Congress said, and this Court would have to then consider whether or not (iii), by itself, would be -- would create enough of an ambiguity in its (inaudible) decisions or whether or not (iii) could be enforced without referring to (ii) because why do you give notice?

Think about the result in this case. For someone in the system, they have to give notice and an opportunity to cure, and the IEP can be modified. If you're not in the system and you never had any interest in the system and you sought tuition reimbursement, you would have less of a bureaucratic process. There would be a preverse incentive to stay outside the system. You wouldn't have to give notice. You would just have to -

CHIEF JUSTICE ROBERTS: Oh, I don't think that's true, because the problem would be you would go to the hearing to see if you were getting the adequate education and you would have -- you would essentially have to make a facial challenge rather than an as-applied one, and the school would say, well, you didn't give us a chance; we were going to do this and we were going to do that. So it would be a heavier burden to carry. The parents would have a heavier burden.

MR. KOERNER: But that would -

CHIEF JUSTICE ROBERTS: -- if they did -

MR. KOERNER: But that would be an individual determination, Chief Judge. What I'm saying though, for everybody in the system, it doesn't depend on an impartial hearing. You have to give notice before you get to the next step. If you're outside the system, you don't have to participate in any process other than to seek at an impartial hearing the right to get reimbursement. So that actually there's less bureaucratic processes outside the system, and there's and incentive (1) not to cooperate and (2) just to marshal all your arguments in the impartial hearing and hopefullyl you're going to prevail and get the payment for the private education; whereas, if you're in the system -

CHIEF JUSTICE ROBERTS: No, my suggestion is still that it would be easier to prevail at the impartial hearing, if you can say, look, we tried, it didn't work, as opposed to saying, we never even tried.

MR. KOERNER: Except for -

CHIEF JUSTICE ROBERTS: If I were the impartial hearing examiner, I would think that that's a harder burden for the parents to carry if they didn't even try. The school's going to come in and say, here's what we would have done if you'd given us a chance and you didn't give us a chance.

MR. KOERNER: But there is a dynamic at these hearings that, if you come in and that you're in a private school and you show that your child is doing well in the private school, and we come in with a theoretical plan that has never been implemented, there is going to be a dynamic with the impartial hearing officer who will tilt towards keeping the child -

JUSTICE GINSBURG: What is the basis for saying that, when the one thing that the statute is very clear on is that the starting premise of any reimbursement claim is that an appropriate public education is not available? That wouldn't concentrate, testing that wouldn't concentrate on what the private school is doing but what the public school could do.

MR. KOERNER: You're right, Justice Ginsburg. I was only commenting on the dynamic. Of course, we would try to show it, but we can't show it based on -- any actual interaction with the child. We can't show we observed the child in the school and tried to make the following modifications.

JUSTICE GINSBURG: But you don't have the burden; the parents do.

MR. KOERNER: Yes. That is the technical relationship. That's right. I'm talking more about -

JUSTICE SCALIA: The parent would presumably cover themselves, look it, he's getting X,Y -- X, Y, and Z in the private school and you're going to give him Z; Z is not going to be enough. And the burden on you would be upon you to say, oh, we think Z is enough.

MR. KOERNER: That's correct. But, of course, what we're saying has no actual practice.

But all this is separate and distinct from the language of Congress. And unless that language is observed, it does require that you have to previously receive special education related services.

JUSTICE BREYER: What about an exception if, in fact, the school district admits that they can't do anything for this child?

MR. KOERNER: Well, then, Your Honor, that comes under Section B of the same section, 20 U.S.C. 1412(a)(10)(B), where the school district does not believe it can provide the service, then it will consent to a private school and will give reimbursement because that will be the equivalent of the free appropriate public education. We are just talking about cases where there has not yet been -- where the school believes they can provide it. The parent and the child disagree.

Now, there are two other arguments that I want to address. One, recognizing that the language seems to support the petitioner's position. They argue that, in fact, they did get special education and related services because for the years 1997 and 1998 and 1998-1999, we settled with them and we did pay the tuition. But Paragraph 17 of each of those agreements specifically provided that the settlement was not to create any admission for future applications.

And as this Court is aware, both under the Federal Rules of Evidence in its decisions in *Arizona v. Colorado* and the *U.S. First International Building Company*, if you settle, it has no probative value. All you do is settle the specific claim. You don't settle the legal issue.

The second argument they make is, well, we have got an IEP. An IEP is a proposal of how we would service the child. And that IEP would constitute a special education and related service. But an IEP which the parent rejects could never be a special education related system. You have to be in the system receiving it.

And indeed, in Section 1414 of U.S.C., it specifically provides if you reject the IEP, you've waived any right to a free and appropriate public education. So once you do that, it ends the discussion.

I have a few minutes and I'm going to reserve that time for a possible reply.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Koerner.

Mr. Gardephe.

ORAL ARGUMENT OF PAUL G. GARDEPHE, ON BEHALF OF RESPONDENT

MR. GARDEPHE: Thank you, Mr. Chief Justice, and may it please the Court.

When a child with a learning disability has been denied a free and appropriate public education, which is what happened here, IDEA authorizes an award of private school tuition reimbursement, whether or not the child previously receives special education related services under the authority of a public agency. The Board's argument that it can both deny space and remain not liable for private school tuition reimbursement is not compatible with the statute or with this Court's jurisprudence. 1412(a)(10)(C)(ii) did not overrule *Burlington* and did not impose the Hobson's choice in that case.

JUSTICE SCALIA: What did it do, then? What meaning do you give to it?

MR. GARDEPHE: Your Honor, Congress was focused on the public school context. And the language in (C)(ii), which refers to previously received, is intended as a setup for (C)(iii). When you get to (C)(iii), you get the notice requirements. That's what Congress had in mind. That's why the reference is there.

JUSTICE SCALIA: I don't understand that. It makes it very clear it is, it is (ii) which authorizes the enrollment in a private school and payment for that. And it is prefaced with a condition: If the parents of a child with a disability who previously received special education and related services under the authority of the public agency, enroll the child in a private -- the implication is if there were parent of a child who was not so enrolled, this provision does not apply. So then you fall back on the fact that the old provision covered in our cases would have applied but that makes this meaningless. I mean if you say that our prior cases overrode that limitation, then what purpose does the limitation serve?

MR. GARDEPHE: Your Honor, the first question is whether that is intended to be exclusive. And I don't think it was, because the "only if" language is not there. And the "only if" language is actually used in IDEA in multiple places. And Congress knew how to say only if it intended, if it intended -

JUSTICE SCALIA: Where else does it say that the city will pay for the cost of a private education except there? That's the only place it says it. And part of the requirements for getting it is that the child was receiving service at a public institution.

MR. GARDEPHE: Your Honor, Congress did not intend that exclusive language. If it had, it would have used the "only if" language.

JUSTICE SOUTER: Then why didn't Congress adequately give the equivalent of what you call the "only if" language when it began (iii) by saying the cost of reimbursement described in clause two? The reimbursement described in clause two is described in terms of the clause that Justice Scalia is zeroing in on.

MR. GARDEPHE: Because, Your Honor, the context is public school. That is the situation that Congress was seeking to address, and that's why you have -

JUSTICE SOUTER: I'm sorry. I'm just not getting this. Can you rephrase that?

MR. GARDEPHE: Yes. If you look at (C)(iii), Your Honor, it obviously repeatedly refers to prior to the removal of a child from the public school. So Congress was clearly focused on and it was intending to give guidance to the courts in their equitable -- in exercising their equitable powers. So in the context of a child who was in public school, these are the types of notice and cooperation things the court should take into consideration.

The question, Your Honor, is whether they intended this to be the exclusive vehicle by which tuition reimbursement could be obtained? And the answer to that, Your Honor, is no. And the reason why the answer is no is because there is no "only if" language.

CHIEF JUSTICE ROBERTS: So you read - hypothesize two statutes: One, the statute before the phrase "who previously received special education" was added and the statute after? You read both of those statutes the same way; right?

MR. GARDEPHE: No, Your Honor, I don't. Because the question is, does that language serve any purpose? And my answer to that, the language in (C)(ii), "previously had received," yes, it serves the purpose. The purpose is it gives factual context for what comes in (C)(iii).

The other thing I would like to say -

CHIEF JUSTICE ROBERTS: I don't understand. You read "who previously received special education services," and you say that includes who previously did not receive special education services.

MR. GARDEPHE: No. What I'm saying is that that provides the context for what follows in (C)(iii). The context it provides is -

CHIEF JUSTICE ROBERTS: There would be no reason for Congress to put that language in if the same right to reimbursement existed if the child had not previously received special education services.

MR. GARDEPHE: No, Your Honor. The point of that language is to provide the backdrop for (C)(iii) where Congress did intend to give guidance to courts in the exercise of the equitable -

CHIEF JUSTICE ROBERTS: Because your friend reads that the exact opposite way and says, since (C)(iii) only makes sense if the child is in the public school, that that's a limitation on how you should read (C)(ii).

MR. GARDEPHE: I understand that, Your Honor. But the question is whether -- it really boils down to if Congress intends to address the full -

CHIEF JUSTICE ROBERTS: In that case, isn't it pertinent that the title to (C)(ii) says "Reimbursement for Private School Placement"? It doesn't say reimbursement for private school placement when the child previously attended public school.

MR. GARDEPHE: But, Your Honor, (C)(ii) is not exhaustive. Let me give an example.

I'm sure this Court would agree that the requirement, the second requirement in *Burlington* that the private placement has to be appropriate is the law in this land. And (C)(ii) doesn't set forth that requirement. (C)(ii) does not set forth that requirement. And what that says to me is that (C)(ii) was never intended by Congress to be exhaustive.

CHIEF JUSTICE ROBERTS: That just means that (C)(ii) doesn't address the entire universe of issues that might arise. But that doesn't mean that it doesn't address exactly what its title says, "Reimbursement for Private School Placement."

MR. GARDEPHE: Your Honor, I believe it's probative on the issue of whether Congress intended (C)(ii) to set forth the requirements for private school tuition reimbursement and all the factual context in which that could be rendered.

I do want to address one point, which is that did Congress deal with this issue later? That is to say, in terms of the notice factors that it set forth in (C)(iii), which I have argued to you applied to parents whose children have been in public school. The answer to that question, Your Honor, is, yes, they did. They addressed it in 1415(f)(1)(B), which require the 2004 amendments to IDEA.

CHIEF JUSTICE ROBERTS: Where is that set forth?

MR. GARDEPHE: 1415(f)(1)(B) -- I'm sorry, Your Honor, it's not in the appendix to the solicitor general's brief. But at 1415(f)(1)(B), Your Honor, what that provision requires is that parents, prior to a due process hearing, must meet

with the IEP team, they must meet with the school district, they must lay out their complaints about the IEP, and the statute provides give the school district an opportunity to resolve the complaint.

So Congress did not deal with the full waterfront in the 1997 amendments. It returned to this issue in 2004 and imposed those notice and cooperation requirements that, as I've argued to you -

CHIEF JUSTICE ROBERTS: Were those provisions at issue when this dispute arose? They are the 2004 amendments -

MR. GARDEPHE: These were 2004 amendments, Your Honor.

JUSTICE STEVENS: You haven't identified the statutory provision that you think provides the authority for the payment in this case.

MR. GARDEPHE: Your Honor, I believe it begins with 1400(d)(1)(A) and 1412(A)(1); both of which impose the requirement on school districts to make available the free and appropriate public education for the child. I believe it begins there. It then continues to 1415(i)(2)(C)(3), which is the provision that grants courts to -- sorry, grants such relief as the court determines is appropriate. There is no evidence either in the 1997 amendments or in its legislative history that there was an intent to appeal or override that remedy.

CHIEF JUSTICE ROBERTS: I suppose it's how broadly you read legislative history. I thought there was a statement by Representative Castle that this would limit the payments that school districts had to make.

MR. GARDEPHE: Yes, Your Honor, and I think with respect to the children in the public school system, if you read (C)(3) -- and again these are permissive -- but if (C)(3) is applied, then I think Representative Castle's comments make perfect sense because they provide for certain notice obligations.

CHIEF JUSTICE ROBERTS: So when it comes to reimbursement of tuition, the parents who never place their child in the public school are in better shape than the parent who place their child in public school and then want to remove him.

MR. GARDEPHE: No, Your Honor. And the reason for that is, there was case law preceding the 1997 amendments that imposed reasonableness, reasonableness and cooperation requirements on parents even before the 1997 amendments came into effect. As I did mention, after 2004 those requirements were now statutory, but the reality is as a matter of case law, it was already very clear in 1997 that if you didn't give notice to the school district, if you didn't cooperate in the formation of an IEP, you were not going to get tuition reimbursement. And of course that flows directly from, in particular, *Carter*'s statement that the reimbursement remedy is subject to equitable considerations.

So it has always been the law that if a parent does not cooperate, does not give notice, does not cooperate in the formation of an IEP, that they will not get -- or that the court has the discretion to deny the tuition reimbursement remedy.

CHIEF JUSTICE ROBERTS: But cooperation does not require sending the child to the public school.

MR. GARDEPHE: No, Your Honor. I think it's clear that Congress never intended, to quote Justice Scalia, that parents would be required to place their child in a patently inappropriate placement in order to qualify for tuition reimbursement, and to address Justice Alito's point, Your Honor, we don't know -whether it's 10 days or 11 days or 1 day -- we don't know. We can draw some guidance, I suppose, from the ten- day requirement in (C)(3), but that's by no means clear. The parents can give notice ten days before the school day begins -- a school year began -- that they find the placement inappropriate. So this -

CHIEF JUSTICE ROBERTS: Well in my case they would not have received any benefits, under the terms of the statute.

MR. GARDEPHE: But Your Honor, it highlights that if they can place the child in for one day, this is an utterly meaningless provision that Congress never could have intended to require because it serves no purpose. And that's -

CHIEF JUSTICE ROBERTS: That's why your friend says it serves the purpose of helping to make clear that the public school is -- whether it is or is not able to provide the appropriate public education. I mean, why would Congress have

put the phrase in there -even if it was describing as you say the most common situation -- why would it put the phrase in there if it doesn't serve that purpose at least?

MR. GARDEPHE: Let me give an example that highlights my point. I place my child in the kindergarten in public school for one day. I then satisfy the statute, previously have received special education-related services. Five years later I can still rely on that. Ten years later, I can still rely on that. It's a talisman. It can't -

CHIEF JUSTICE ROBERTS: What you're saying is it's not a very significant hurdle, but it is going to be a hurdle in some cases.

MR. GARDEPHE: It doesn't serve any useful purpose, Your Honor, and if it doesn't serve any useful purpose there is no reason to believe that Congress intended it to have that effect.

CHIEF JUSTICE ROBERTS: The useful purpose it serves is allow the school district to show what it can do in ten days, as opposed to a mere theoretical statement, it allows some actual concrete practice to see if the plan that the public school has developed is going to work or not going to work, that the impartial hearing examiner can evaluate in a more concrete setting.

MR. GARDEPHE: This Court has addressed that balance in *Burlington*, and the answer was no, the statute does not require that parents place their child in an inappropriate place.

CHIEF JUSTICE ROBERTS: But then the whole point is the statute was then amended after *Burlington*. So to say what *Burlington* interpreted, it don't seem to me to be very compelling on the question of what the amended statute provided.

MR. GARDEPHE: But again, Your Honor, there is no evidence in that amendment that it was intended to be exclusive or intended to be exhaustive of the circumstances and factual context.

JUSTICE SCALIA: I'm not sure I agree – I'm not sure I would agree with you that you could get special services which --in third grade and then come back 10 years later and get private school tuition. I would really read this as saying if the parents of a child who previously received special education under the authority, enroll the child in a public elementary school -- I think that there has to be a temporal connection between the prior receipt and the enrollment. I don't think you can go back 10 years.

MR. GARDEPHE: Let me go back -

JUSTICE SCALIA: You don't have to read it that way, anyway.

MR. GARDEPHE: Let me address that, Your Honor. What that would mean, then, I suppose, is that parents would be required each year to put their child in a public school for some period of time to qualify, and then place their kid in private school if they didn't -and then you're talking about a disruption -

JUSTICE SCALIA: Once you're in the private school reimbursement you're in the private school reimbursement, but you can't get into it 10 years later. Anyway, that issue is not -- not before us today.

I don't understand your assertion that somehow this would amount to repeal by implication. The provision of 1415 -- what is it, (b), (b)(3) -- it seems to me is just like a provision for, for a court's exercise of its equitable powers. "Shall grant such relief as the court determines is appropriate" -- if a court had granted some equitable relief in one case, and then there is a statute that's passed which renders that equitable relief no longer appropriate, I wouldn't say that that -- that that amounts to a repeal by implication. It's just that what is appropriate depends upon the remainder of the statue, and as it exists at the time that the relief is sought.

MR. GARDEPHE: The point we are trying to make, Your Honor, is that in light of *Burlington*, which obviously Congress had knowledge of when it enacted the 1997 amendments, is it credible to believe that they would have restricted, limited, overruled the holding of *Burlington*, and never said a word about it?

JUSTICE BREYER: But they have (b). What about (b)?

See look, there are two situations. Situation (a) is that the school district thinks they can give them a good education, adequate. Then he should go and try it out, and if by the way the school district just can't do it, then (b). So what's been wrong with that scheme? Why doesn't that cover the waterfront?

MR. GARDEPHE: There is no evidence that Congress intended a tryout period.

JUSTICE BREYER: Just the language -- the language.

MR. GARDEPHE: It's not just language.

JUSTICE BREYER: The language plus the fact that nobody can think of a reason for putting that in there, unless that's the -

MR. GARDEPHE: And it's the context that flows from *Burlington*, where the Congress was aware that this Court -

JUSTICE BREYER: But my question was what about (b)? My question was not to argue with you. My question was, why doesn't (b) take care of the examples of absurd situations, law situations that you've mentioned?

MR. GARDEPHE: I'm sorry, I'm not understanding B, Your Honor.

JUSTICE BREYER: The case where the school district just can't do it.

MR. GARDEPHE: Right.

JUSTICE BREYER: If they just can't do it then their job is to put the kid in a district -

MR. GARDEPHE: Right.

JUSTICE BREYER: -- in a place that can do it. And if their argument, which is your case, is it they object to the facility, then have an argument about that, about whether it should be this private school or that private school. That's what it seems to me your case is about, and that's why I think B.

MR. GARDEPHE: In a perfect world, Your Honor, school districts who are confronted with a situation would always make the decision to place the child in private schools at public expense, but unfortunately there are disagreements between school districts and parents about what is appropriate, and then sometimes school districts don't do what they are supposed to do under the statute and in fact the city's interpretation here would incentivize school districts not to provide services because if they never provided services they wouldn't be liable for the reimbursement. Again, this can't be what Congress intended.

I did want to back up my assertion about the only -

JUSTICE BREYER: (b), that's my question, (b). I thought you were right. Until I heard that. Then I suddenly hear no, that don't worry about it, judge, is what I heard, because in the situation where the school district has not provided there is another section of the statute that takes care of the child. That's what I want to hear your response to.

MR. GARDEPHE: Your Honor, that relies on the good faith of the school district. (b) relies on, (a)(10)(B) and B relies on the good faith of the school district to make a determination that they can't provide the services. That's not always going to happen. There may be -- there may be a disagreement about whether they can provide the services or not between the school district and the parents.

CHIEF JUSTICE ROBERTS: You have review before the impartial hearing examiner about that alleged bad faith, correct?

MR. GARDEPHE: Pardon me?

CHIEF JUSTICE ROBERTS: You have reviewed before the Hearing Examiner that alleged bad faith on the part of the school district.

MR. GARDEPHE: Yes, Your Honor. Obviously, the parents contend both that the plan was not appropriate, and that it wasn't offered in good faith. But I -- I did want to back up my assertion on the "only if" language and -- and recite some statutory references. Because I believe it stems very clearly from the statute when you go through the provisions.

"Only if" or "only" are used in many, many places 1415(f) (3)(E)(ii), 1414(a)(1)(C)ii, 1411(b)(1)(A), 1401(19)(C), 1415(k)(4)(C) in the '98 version of the statute, 1413 -

JUSTICE SCALIA: Bingo. You got me on that.

MR. GARDEPHE: The point is, Your Honor, that Congress knew how to say "only if." They didn't do that here, because they had no intention of creating an exclusive remedy.

And this Court said in *Winkelman* that courts should be cautious in reading into the statute an implicit limitation, and this limitation goes to what the Court also said in *Winkelman* is the primary mandate.

Finally, Your Honor -

CHIEF JUSTICE ROBERTS: And what was that primary mandate?

MR. GARDEPHE: The primary mandate was to provide or -- or make available a free and appropriate public education to every child with learning disabilities.

CHIEF JUSTICE ROBERTS: There is no issue of mainstreaming in this case at all; right?

MR. GARDEPHE: There is not, Your Honor.

CHIEF JUSTICE ROBERTS: Neither of the options are mainstream options?

MR. GARDEPHE: That's correct, Your Honor, and that's at Second Circuit Appendix 168.

The school district here said tnat the child's disabilities could not be addressed in a mainstream setting, so there is no mainstream issue here.

Finally, Your Honors, when Congress here chose to carve out populations of children, it did that in a very, very direct way. It did that in 1412(a)(1)(B) where it lays out very limited exceptions for children who do not receive the guarantee with respect to a free and appropriate public education.

The limitation is very, very clear. It's very, very limited to certain age groups where it would be inconsistent with state law, or there is an incarcerated child. But there is no other place that Congress carved out populations of children other than in 1412(a)((1)((B), and there is no reason to believe that Congress intended in a backdoor fashion to carve out the populations of children, some of which were mentioned in the argument of my adversary.

Congress was aware -

CHIEF JUSTICE ROBERTS: You know, it -- I'm sorry.

MR. GARDEPHE: Your Honor, my time is up. Thank you very much.

CHIEF JUSTICE ROBERTS: So is mine. Thank you, Mr. Gardephe.

MR. GARDEPHE: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE, ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

Petitioner takes the position that a school district may both refuse to provide a child with a disability with an appropriate public placement and refuse to pay for an appropriate private placement.

This Court has twice before considered and twice before unanimously rejected -

JUSTICE SCALIA: No, he hasn't -- he hasn't said that.

MR. GARRE: I think he does in the sense, Your Honor, Justice Scalia, that the -- the school district can take the position, even if the IEP that is proposed is inadequate and it's adjudicated to be inadequate, because the *Schaffer* presumption that was brought up earlier does not apply in this case. Because we are talking about situations where a parent can prove that the placement was inadequate. In that situation the parent cannot qualify for reimbursement unless it subjects his child to the inappropriate placement.

This Court rejected that rationale in clear and unambiguous terms in the *Burlington* case. Justice Rehnquist put it in that case -

JUSTICE SCALIA: Under a different statute.

MR. GARRE: Under a different statute but interpreting the fundamental requirement of the statute that all children with disabilities are entitled to a free and appropriate public education. But that requirement didn't change, and this is what Justice Rehnquist -

JUSTICE SCALIA: You are interpreting some very general language: "Shall grant such relief as the court determines is appropriate."

MR. GARRE: The -- the part of the *Burlington* case I'm referring to Justice Scalia is the interpretation of the fundamental requirement of providing free and appropriate public education. And what Justice Rehnquist said there -- and the unanimous Court agreed -- is forcing a parent to choose between subjecting his child to inadequate public placement or paying for private placement deprives the parent of his right to a free and appropriate public education.

JUSTICE SCALIA: So does the 10-business-days notice requirement for people who are in public schools also violate *Burlington*, because for 10 business days they are going to be subject to an inappropriate education?

MR. GARRE: The way the 10-business-days requirement works in practice is that all of the IEPs - virtually all of them are proposed towards the end of the school year; and, typically, the parent is submitted the proposed IEP during the summer. And it's at that point that they have to make a decision whether to litigate that, put their child in a private school, or put them into a public school.

So the 10 business days in practice is not going to require the child to go into the inadequate placement. That was true in the fact pattern -

CHIEF JUSTICE ROBERTS: So in a situation where it's not in the summer, where they say, well, let's see how it works, and then they go to the public school, I would have thought your argument also would say it's not -- they don't have to give notice of 10 business days because in *Burlington* you said you don't -- you have to make available the tuition reimbursement. They passed a statute imposing a limitation on that, 10 business days.

MR. GARRE: And we don't -- we don't dispute that -

CHIEF JUSTICE ROBERTS: You don't dispute that limitation. You dispute the other one, though, which says they have to have previously received special-education services.

MR. GARRE: In order -- in order to qualify for reimbursment in that provision which is -- which is followed by the provision describing in more concrete detail the circumstances that courts ought to take into account in determining whether reimbursement is appropriate.

And if I can explain the way we read Section 1412(a)(10)((C), the first part of that subsection is Subsection (C)(i). That hasn't come up during the argument today. It is barely mentioned in Petitioner's brief. That subsection -- it is on page 5a

in the appendix to the Gray brief, lays down the general rule -- the rule that tells school districts when they don't have to worry about paying reimbursement. And that is when they provide a free, a public -- an appropriate public education in the first place.

That -- that is consistent with *Burlington* and *Carter*, and that lays down the general rule. School districts that provide an appropriate placement don't have to worry about reimbursement.

Subsection (C)(ii) then goes on to identify a particular fact pattern which also happens to be the most common situation in which reimbursement claims are presented to the courts. And Congress in that situation, along with Subsections (3) and (4), provided the courts with more concrete guidance in determining how to exercise their discretion in that situation.

The legislative history supports that interpretation. On pages 25 to 29 of the National Disability Rights Network brief they explain how Congress in the legislative history indicates that they were focused on case law applying this Court's decision in *Burlington* and *Carter* where the students were already enrolled in public school.

There is no indication whatsoever at all in the legislative record that anybody had in mind scaling back the fundamental mandate of the statute for school districts to provide a free and appropriate public education for every child.

CHIEF JUSTICE ROBERTS: Anywhere? I thought Representative Castle said that this would result on easing the burden on the school districts to pay tuitions.

MR. GARRE: And it would, Your Honor, insofar as we are dealing with flushing out the requirements for students enrolled in public school. But there is no indication that Congress meant to scale back this Court's interpretation of the act's fundamental mandate to provide a free and appropriate public education.

Petitioner's give-it-a-try rationale just doesn't fit to advance its argument before this Court. It doesn't fit to the extent that Petitioner is suggesting that you have to give public school a try, because it's clear that the -- their interpretation would apply to students in public school, as well as private school. It would apply to all students entering the special education system, including the student who's been enrolled in public school from kindergarten to 11th grade.

If he hasn't previously received special-education or related services, then, under Petitioner's view, if he's offered a grossly inadequate plan, he has to be subjected to that plan in order for his parents to qualify. And Petitioner's interpretation doesn't require the parents to give the proposed placement at issue a try. All it requires is that they show that they received previous special-education services at some point in the past.

And that's the way it worked in *Burlington*; that's the way it worked in *Carter*; and that's the way it works in most of the cases. Students are already in the special education system, and they are proposed an IEP at some point typically during the summer. And the parents at that time say this IEP is inadequate for my child, and I want to –

JUSTICE SCALIA: Well, that's no problem. I mean both sides agree that you can move to a private school if that's so; right?

MR. GARRE: If you have previously received special- education services. But my point, Justice Scalia, is under Petitioner's -- the way they read the statute, you don't have to give the proposed placement at issue a try. So to the extent that this Court thinks, or Petitioner is arguing, that Congress wanted to make sure that we could better evaluate whether or not this proposed placement proposed placement is going to work for this child. That doesn't fit with the statutory language because in practice the students -all they have to show is that they received services at some point in the past and if they have they can go into private school and seek reimbursement. It doesn't require a student to be subjected to the inadequate plan unless you happen to be the student who is enrolled in public school or enrolled in private school and you're entering the special education system. At that point then, Petitioner's interpretation requires the parents to enroll their child who has already been determined to have a learning disability in a plan that is inadequate, and we think that is an untenable result.

CHIEF JUSTICE ROBERTS: But the whole point is you don't necessarily know it's inadequate until later in time. Right? The school board thinks it is adequate.

MR. GARRE: That's true, Your Honor. But two points about that -- first, parents who do enroll their children in private school at their own financial risk. And as Justice Scalia pointed out in his concurring and dissenting opinion in *Winkelman*, there are particular incentives against bringing frivolous reimbursement claims in this context.

JUSTICE SCALIA: Except those -- there are a lot of parents who are going to send their parents to private school, no matter what. They are well-heeled and this is just an opportunity to have New York City pay $30,000 of it.

MR. GARRE: And Justice Scalia -- two points on that, first the statute provides in clear and unambiguous terms that all children with disabilities are entitled to a free and appropriate education. The child find requirement, which Section 1412 -

JUSTICE SCALIA: Even the child who would turn down the adequate education provided by the public schools. I don't think that was the intent of the statute.

MR. GARRE: And I agree with you on that, Justice Scalia, and that's why the way that school districts can avoid reimbursement is to offer an adequate placement in the first place. That's what Section 1412(a)(10)(C)(i) provides. It lays down the general rule. School district today talks about we need to have collaboration, we need to have cooperation during the IEP process. They hold all the cards during that process. And if they want to avoid reimbursement they should do what this Court said in the *Carter* case, that's provide the student with a free, appropriate public education.

JUSTICE SCALIA: If they don't have an adequate placement, they should not have to pay the freight for people who would not be coming to public school any way. That's what this provision prevents.

MR. GARRE: I disagree with that, Your Honor. I think that's inconsistent with the statutory mandate to provide a free and appropriate education for all children with disabilities. I would say though, and I want to be clear on this -- even though appearance of students in private school or in public school who haven't previously received special education or related services qualify for reimbursement under our interpretation of the statute. It doesn't mean that they are entitled to reimbursement. In the situations Your Honor may have in mind, where the parents genuinely aren't complying in good faith or genuinely aren't interested in sending their kids to public school, they only want to try to gain the system -- in those hypothetical situations, courts have equitable discretion to deny reimbursement claims, and they have denied those reimbursement claims.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Garre.

Mr. Koerner, you have three minutes remaining.

REBUTTAL ARGUMENT OF LEONARD J. KOERNER ON BEHALF OF PETITIONER

MR. KOERNER: Thank you, Mr. Chief Justice. First, this particular provision, as the Chief Justice noted, is called payment for private school placements where they don't have the consent of the local education.

Any reasonable reading of that is that it's all encompassing. And any person who has to apply has to satisfy those provisions. Second, this statute did not overrule *Burlington* or *Carter*. In those cases the children were already receiving special services. Now it could be in a future case someone would speak to extend those cases, but Congress has now spoken to make sure that *Burlington* and *Carter* go no further than you have previously held. Third, there is an assumption that the program is going to be defective from day one. But that's contrary to this Court's decision in *Schaffer* which presumes the good faith of the individuals who propose in program. And that is the heart of the entire case. Fourth, let's assume, for example, that someone can create an ambiguity in this case. Citing the *Arlington* case, in which you placed yourself in the position of the local education officer, when you look at this particular section -- and particularly C double 2 -- double i and triple i. Would you, in that position, understand that it doesn't really mean what it says, that previously received special education services was only meant to cover the people already in the system and was not intended to cover people outside the system. That isn't what it says. More importantly, the ambiguity is clearly not obvious. So how would a local officer who has to understand whether or not to place the funds at risk know whether or not in complying with this particular situation, it was explicit or implicit?

JUSTICE ALITO: During the period between *Burlington* and the enactment of this statute, would you have any doubt about your potential obligation to reimburse a parent -- during the period of *Burlington* and the enactment of the statute, would the school board have had doubt about its potential liability for reimbursement, in a situation like this?

MR. KOERNER: I think so. I think, because of *Burlington* and *Carter*, where the children were already in the system, this would be the next step. Would we have presented to you the fact that you shouldn't expand it? Probably. Would I know what you would conclude? No, but the statute eliminated that entire discussion. It is clear. But again, there is a very big spending clause -- as I mentioned in my earlier presentation, if it's so ambiguous that you can read out a specific provision, how can that ambiguity not go down to the benefit of the city through it's local education system?

JUSTICE GINSBURG: I thought this statute was also premised on Section 5 of the 14th Amendment, in which case it wouldn't have spending clause notice argument.

MR. KOERNER: No, the -- this is just a grant provision, Your Honor. It's not premised on any constitutional provision. It's a grant where funds are provided to the local education district, and in return they agree to comply with all the conditions set forth in the IDEA. There are no constitutional limits.

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Koerner.

The case is submitted.

(Whereupon, at 11:55 a.m. the case in the above-entitled matter was submitted.)

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Wrightslaw Note:

Pete Wright reformatted this version of the Oral Argument Transcript so it is shorter and easier to read. He also corrected several typographical and obvious transcription errors, such as "IET" for "IEP."

The Official Transcript (68 pages, pdf) in *NYC Bd of Education v. Tom F.* is available on the website of the U. S. Supreme Court at:
http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-637.pdf

Supreme Court to Hear Oral Argument in NYC Bd of Education v. Tom F. includes a history of the case, background information, question presented and links to briefs.
URL: http://www.wrightslaw.com/news/07/nyc.tomf.history.htm

Oral Argument in *Board of Education of City of New York v. Tom F.* by Wayne Steedman, Esq., attended the Oral Argument on October 1, 2007. Mr. Steedman describes the Justices' questions and the attorneys' responses, then summarizes his impressions
http://www.wrightslaw.com/law/art/oa.nyc.tomf.htm

Pleadings: You will find briefs in this and other recent Supreme Court cases on the Harbor House Law Press website at: http://www.harborhouselaw.com/law/plead/