NO. 07-541

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ALEXANDRIA CITY SCHOOL B

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Rule 37.2(a). Petitioner has consented to the filing of the brief, and Respondents have declined consent.

2. The National School Boards Association is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 55 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

3. The American Association of School Administrators, founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

4. The National Association of State Directors of Special Education is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states. NASDSE's primary mission is to serve students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities. NASDSE provides important resources to educators that help improve and enhance the quality of special education services

and related curricula provided to students with disabilities. NASDSE's members are accountable for the proper implementation of the Individuals with Disabilities Education Act ("IDEA") and have responsibility under the law for general supervision of local school district implementation of the IDEA, which includes ensuring that Individualized Education Programs ("IEPs") are written within specific timeframes and include specific information and that services described in an IEP are delivered as prescribed in that document.

6. In light of *amici*'s longstanding involvement with special education issues, including advocacy before this Court and Congress, and the special expertise their members bring to bear on these issues, *amici* are well qualified to advise the Court of the importance of accepting this case for review given the Fourth Circuit's departure from the weight of precedent, regulatory interpretation and the collaborative intent of the law. In addition, *amici* are uniquely positioned to inform this Court of the negative impact the Fourth Circuit's decision, if allowed to stand, will have on the delivery of special education and related services to children with disabilities. This Court itself has recognized that under the (IDEA), 20 U.S.C. § 1400 *et seq.*, school officials, in light of their educational expertise, have special responsibility in carrying out the law.

For these reasons, NSBA, AASA and NASDSE respectfully urge this Court to allow them to provide additional information that will assist the Court in determining the need to review this case,

Respectfully submitted,

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INTEREST OF

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 55 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their

The National Association of State Directors

as well as the services that the school would be expected to provide to the child. An IEP that is not tied to one specific school recognizes the realities of this process. Naming a particular school that ultimately does not accept the child or ultimately does not work out for other reasons would necessarily require reconvening an IEP meeting in every such case to rewrite the IEP, thereby draining the time and resources of the school district and requiring parents to attend more meetings to repeat the IEP process, possibly numerous times.

In the *A.K.* case, as is typical in thousands of IEP team meetings conducted in school districts each and every week, the team determined that A.K. would be best served in a "private day school" setting (J.A. 379, 1103-04, 1108). The words "private day school" appearing in A.K.'s IEP, in turn, were described by the District Court as "a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 676, n.1 (4th Cir. 2007), App. 16a, n.1. Yet as is typical in situations where one or more schools were deemed potential matches for the child, the IEP did not include the precise name of the school at which the child would be assigned, thereby giving the parents a choice of at least two therapeutic private day schools, both of which the school district staff believed could implement the IEP. (JA 620, 635).

Indeed, the hearing examiner who initially heard the instant case as well as the U.S. District Court concluded that both placements proposed by the IEP team were capable of meeting A.K.'s needs. The parents, however, rejected both proposed schools based upon their subjective belief that neither was appropriate (JA 1186) and refused to cooperate in the interview process, instead choosing to place A.K. unilaterally in a private residential school located in another state, with a substantially higher cost to the school district.

The Fourth Circuit opinion concedes that the IEP team, which included the child's parents, identified at least two local area private schools deemed capable of meeting A.K.'s needs, finding fault only with the failure of the team to put the name of a specific school into the IEP. Based solely upon that alleged procedural default, the count asserts the novel proposition that "the offer of an unspecified 'private day school' was essentially no offer at all," and thus deprived A.K. of the free appropriate public education ("FAPE") to which the IDEA entitles him. 484 F.3d at 682, App. 15a. With seemingly little regard for the severe impact its decision could have on the thousands of school districts that develop IEPs in a similar manner, the Fourth Circuit gave cold comfort, stating "we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided." *Id.* The Fourth Circuit's rationale that there was a denial of FAPE here because "the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes," *id.*, simply

invites parents to not participate meaningfully in the required interview process for private schools—exactly as occurred here—to create a claimed denial of FAPE that they could pursue through the due process procedures that the IDEA makes available to parents who do not agree with their child's proposed IEP.[5] Under the Fourth Circuit's decision, the parents would no longer, as this Court ruled in *Schaffer v. Weast*, 546 U.S. 49 (2005), bear the burden of proving that the IEP failed to provide FAPE and school officials would no longer be entitled to the presumption that they are "properly performing their difficult responsibilities under this important statute." *Id.* at 63 (Stevens, J., concurring). Instead, it would be a foregone conclusion that the district failed to provide FAPE whenever the parents expressed doubt that the IEP goals could be met at any school suggested by the district.

Thus, the Fourth Circuit's opinion now subjects thousands of IEPs to the risk of being found materially flawed if they fail to include the name of a specific private school. If, as in this case, an IEP team suggests that more than one private school may be able to provide services to a child with a disability who requires placement in a private school, parents who have in mind another school for their child have no incentive to cooperate with the admissions and interview process, knowing that instead they could unilaterally place their child in a private school and then initiate a due process hearing request in which a hearing officer would

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[5] 20 U.S.C. § 1415 (2005).

likely feel compelled under the Fourth Circuit's decision to rule in their favor. Besides discouraging meaningful collaboration, the Fourth Circuit's ruling forces school districts to rush to place into the IEP the name of a school that may or may not be a true match for the child, simply to avoid being accused of making "no offer at all." *Id.* This practice exalts form over substance and does not ultimately serve the interests of the child.

It was out of concern for this anticipated result that Judge Roger Gregory strongly dissented from both the majority opinion and the decision of the other Fourth Circuit judges denying rehearing *en banc*:

> It is difficult to understand how A.K. could have lost educational opportunity on account of the omission of the schools' names from his IEP when his parents understood both [local private] schools were under consideration and had already expressed that neither was appropriate for their son.

A.K., 484 F.3d at 686. The prospect of the majority decision becoming the law of the land would present additional burdens for school districts attempting in good faith to offer appropriate educational opportunities for children with disabilities:

> Under our present jurisprudence, public school districts are vulnerable to those who could use the unclear state of the law to their advantage. In

> particular I worry that public schools could be liable for large sums because of errors that, as here, have no adverse impact on the quality of the educational program made available to the student. Regrettably, our public schools today face greater social challenges than before with ever shrinking financial resources; and we should be careful not to expose them to a greater burden than Congress intended them to bear.

A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 497 F.3d 409 *reh'g denied*, (4th Cir. 2007) (Gregory, J., dissenting from denial of rehearing en banc).

What the Fourth Circuit failed to appreciate is that the IDEA is purposely designed to foster the development of IEPs through a collaborative process that includes the child's parents and encourages resolution of disputes through non-adversarial means such as mediation and resolution hearings.

contemplate—as the Fourth Circuit's ruling appears to allow through its narrow and erroneous interpretation of one provision—that parents can simply refuse to cooperate in good faith in the IEP process and ultimately obtain at public expense their preferred placement for their child without any burden of proof whats

needs of the child and the services prescribed under that child's IEP, and potentially resulting in placing a greater number of children in schools far from their home.

II. The Fourth Circuit ignores the U.S. Department of Education's interpretation of "location" upon which school officials have properly relied in developing IEPs.

Under the IDEA an IEP must include "the projected date for the beginning of the services and modifications . . . and the anticipated frequency, location, and duration of those services and

apply this interpretation to the word "location," in recognition of the not infrequent reassignment of students during the life of their IEP for such reasons as: 1) the transfer of an educational program from one classroom or even one school building to another; 2) the departure of a teacher assigned to a particular special education class, requiring the school district to reassign the students elsewhere; 3) the relocation of pull-out services (such as speech-language or physical therapy) from the child's classroom to another location in the school or even to an after-school facility deemed more suitable for delivering those services; 4) a child's "graduation" from elementary to middle school, or from middle to high school;[8] 5) the transfer of children from a classroom led by a teacher deemed not to be "highly qualified" under the No Child Left Behind Act ("NCLB")[9] to a classroom (or school) where the teacher meets that requirement of the law; 6) the transfer of children from a school that has consistently failed to make

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[8] *See, e.g., John M. v. Board of Educ. of Evanston Twp. High Sch. Dist. 202,* 502 F.3d 708 (7th Cir. 2007) (reviewing authority from various circuits in interpreting '"educational placement' to incorporate enough flexibility to 'encompass [the child's] experience" and that "[w]hen a child progresses from

annual yearly progress,[10] or is deemed to be "persistently dangerous;"[11] and 7) the transfer of a program due to renovations or other activities in the school that interfere with the program's success.[12]

The Fourth Circuit's rejection of the administrative agency's interpretation of the ambiguous word "location" found in the statute flies in the face of this Court's longstanding

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[10] 20 U.S.C. § 6316(b)(1)(E) (2002). This provision of the NCLB offers students "the option to transfer to another public school served by the local educational agency, which may include a public charter school, [where the home] school has been identified for school improvement . . . " *See also* 20 U.S.C. § 6316(b)(1)(F) (2002) ("Students who use the option to transfer under subparagraph (E) . . . shall be enrolled in classes and other activities in the public school to which the students transfer in the same manner as all other children at the public school."). This reflects the need to insure replication of educational opportunities, services, and treatment, regardless of the individual location of the school that a child attends. This same guarantee—of replicated services wherever a child attends—was all Congress intended in its reference to "location" in the IDEA. The Fourth Circuit opinion gives this term too narrow a reading and utterly ignores the adjective "anticipated" that describes the word "location" in the statute. This Court has long held that no words contained in a statute are to be presumed to be superfluous. *See, e.g., Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 126 S.Ct. 2455 (2006). For more discussion, see section III. *infra* at 16.

[11] 20 U.S.C. § 7912 (2002). Imagine the absurdity of requiring affirmative approval by the IEP team convened for the sole purpose of honoring a parent's statutory right to insist that his or her child be relocated to an identical educational program from a school deemed to be "persistently dangerous" under this provision of the NCLB. The Fourth Circuit's majority's reasoning in *A.K.* would necessitate this needless practice under these circumstances.

[12] 20 U.S.C. § 1401(10)(A), (B) (2005).

jurisprudence. *See, e.g.*,

being launched to literally hundreds of thousands of IEPs that fail to identify specific school locations. It is manifestly unfair to charge well-meaning, highly knowledgeable educators who serve on IEP teams

Secondary Educ., 931 F.2d 1069 (5th Cir. 1991), *cert. denied* 502 U.S. 910 (1991) (transfer of child to another school was not a change in "educational placement"). The Fifth Circuit in *White* thus reasoned that, contrary to the parents' position, the IDEA's requirement "that parents must be involved in determining 'educational placement' does not necessarily mean they must be involved in site selection." *White*, 343 F.3d at 379.

Explaining further its decision that the "location" of services is an administrative decision separate and apart from the determination of "educational placement," the Fifth Circuit in *White* relied upon similar reasoning expressed by the United States Department of Education's Office of Special Education Programs to the effect that "[a]dministrative agency interpretations of the regulations confirm that the school has significant authority to select the school site, as long as it is educationally appropriate." *Id*. at 382. To that end, the Fifth Circuit noted as follows:

> The Office of Special Education Programs (OSEP), the Department of Education branch charged with monitoring and enforcing the IDEA and its implementing regulations, has explained:
>
> [I]f a public agency . . . has two or more equally appropriate locations that meet the child's special education and related services needs, the assignment of a particular school . . . may be an administrative

> determination, provided that the determination is consistent with the placement team's decision. *Letter from Office of Special Education Programs to Paul Veazey* (26 Nov. 2001). *See also, e.g., Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (it is permissible for a student with a disability to be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individual needs of the student); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (citing policy letter indicating that assignment of a particular location is an administrative decision).

343 F.3d at 382. *Accord Weil*, 931 F.2d at 1072 (concluding that a "change of schools . . . was not a change in 'educational placement'"); *Christopher P. v. Marcus*, 915 F.2d 794, 796 n.1 (2d Cir. 1990), *cert. denied*, 498 U.S. 1123 (1991) (noting that "[t]he regulations implementing the Act interpret the term 'placement' to mean only the child's general progra

today.

Id. at 811-812, *citing DiBuo v. Board of Educ.*, 309 F.3d 184, 190 (4th Cir. 2002); *T.S. v. Independent Sch. Dist. No. 54,* 265 F.3d 1090, 1095 (10th Cir. 2001); *Knable v. Bexley City Sch. Dist.,* 238 F.3d 755, 765 (6th Cir. 2001); *W.G. v. Board of Trustees,* 960 F.2d 1479, 1484 (9th Cir. 1992).

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C.J.N. v. Minneapolis Pub. Sch., 323 F.3d 630 (8th Cir. 2002);