No. 09-1319 No. 09-2499

# In the United States Court of Appeals For the Seventh Circuit

MARSHALL JOINT SCHOOL DISTRICT NO. 2, PLAINTIFF – APPELLANT,

٧.

C.D., BY AND THROUGH HIS PARENTS, BRIAN AND TRACI D., DEFENDANTS—A PPELLEE.

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TRACI AND BRIAN D., ASPARENTS OF AND ON BEHALF OF THEIR MINOR CHILD, C.D., PLAINTIFFS, APPELLEE

٧.

MARSHALL JOINT SCHOOL DISTRICT NO. 2, DEFENDANT—APPELLANT

On Appeal from the United States District Court for the Western District of Wisconsin

Case No. 08-cv-00187-bbc Case No. 08-cv-00189-bbc The Honorable Barbara B. Crabb

BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION AND WISCONSIN ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF APPELLANT'S REQUEST FOR REVERSAL

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#### **Disclosure Pursuant to Circuit Rule 26.1**

The undersigned, counsel of record for Amici Curiae National School Boards

Association and Wisconsin Association of School Boards, furnishes the following list in

compliance with Circuit Rule 26.1:

- (1) The full name of every party or amicus the attorney represents in the case: National School Boards Association Wisconsin Association of School Boards
- (2) If such party or amicus is a corporation:
  - (i) It's parent corporation, if any; and N/A
  - (ii) A list of stockholders which are publically held companies owning 10% or more of the stock in the party or amicus:N/ A
- (3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

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Dated this 21st day of August 2009.

**ABACDAA** 

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#### STATEMENT OF INTEREST OF AMICI

The National School Boards Association (NSBA) is a federation of state associations of school boards from throughout the United States, as well as the Hawai'i State Board of Education, and the board of education of the U.S. Virgin Islands. NSBA and the state associations together represent over 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 49.3 million public school students, approximately 90 percent of the Nation's elementary and secondary students.

The Wisconsin Association of School Boards is a membership organization of public school boards governing public school districts in the State of Wisconsin. The purposes of the Wisconsin Association of School Boards are to aid and assist public school boards and public school agencies in the State of Wisconsin in the performance of their lawful functions and to otherwise support, promote, and advance the interests of public education in the State of Wisconsin.

Amici regularly represent their members' interests before Congress and federal and state courts and have participated as amicus curiae in many cases involving the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400 et seq. (IDEA). Recognizing that all children with disabilities have a right to be provided with a free appropriate public education, amici have consistently supported the rights of disabled children. At the same time, amici are also fully cognizant of the substantial financial and human resources that public school districts devote each and every year to

educating students with disabilities. As these resources are increasingly strained, amici are mindful of the importance of ensuring that they are focused on meeting the needs of students who otherwise could not receive a meaningful education.

This brief is presented on motion for leave to file under Federal Rule of Appellate Procedure 29(a) and (b).

#### **SUMMARY OF THE ARGUMENT**

At issue in this case is whether an elementary student, C.D., is eligible for special education services under the Individuals with Disabilities Education Act (IDEA) where, despite physical disabilities and Attention Deficit Hyperactivity Disorder (ADHD), he performs at grade level. C.D. had received special education services but, upon reevaluation, was found by his Individualized Educational Program (IEP) team no longer to require such services. Rejecting the IEP team's conclusion, the Administrative Law Judge (ALJ) and the U.S. District Court determined that C.D. was eligible for special education services under the IDEA category of eligibility for "other health impairment" (OHI) that "adversely affects" the student's educational performance at school.

This was reversible error. Although neither IDEA's statutory text nor its implementing regulations elaborate on this category of eligibility, federal education law repeatedly evinces a Congressional intent to focus scarce special education resources and services on those who could not otherwise access the general education program and to minimize the extent to which students with health conditions and disabilities receive their education differently from their peers:

- The IDEA seeks to avoid the over-identification of children as requiring special education services;
- 2) Consistent with its "least restrictive environment mandate," the IDEA contemplates re-evaluation of students receiving special education services and, where appropriate, their exit from special education; and
- 3) In many situations, the needs of students with disabilities can be addressed in the regular classroom appropriately through teacher-selected modifications or accommodations provided under Section 504 of the Rehabilitation Act and do not require a formalized IEP under the IDEA.

In its expansive reading of IDEA's OHI provision, the District Court ignored these Congressional points of emphasis—points that form the policy context that must inform this Court's decision as to the statutory interpretation question presented here.

Moreover, in relying heavily on the testimony of C.D.'s medical witnesses, the District Court discounted the considered professional judgment of the highly trained and conscientious members of C.D.'s IEP team as to the most appropriate educational measures for meeting C.D.'s needs. This is akin to relying heavily on a teacher's testimony in a medical malpractice case.

Accordingly, the National School Boards Association and the Wisconsin

Association of School Boards respectfully request that the Court consider this amicus curiae brief in support of the Appellant School District.

#### ARGUMENT

The main issue in this case is whether C.D. continues to qualify for special education services under the IDEA. A student is entitled to special education under the IDEA if (1) he or she suffers from a disability, and (2) the impairment is to such a degree that it necessitates special education. 20 U.S.C. § 1401(3)(A). There are several categories of disabilities that will qualify a student under the first prong, such as mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (SED), orthopedic impairments, autistic-like behaviors, specific learning disabilities (SLD), and "other health impairments" (OHI). 20 U.S.C. § 1401(3)(A)(i). C.D. had previously been classified as a student with an OHI.

Federal law defines OHI as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—¶(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome;¹ and ¶ (ii) Adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(9) (emphasis added). Neither the IDEA nor the federal regulations define

<sup>&</sup>lt;sup>1</sup> This list is not exhaustive. Other disorders or conditions that may, in combination with other factors, qualify a child for services under IDEA, include fetal alcohol syndrome (FAS), bipolar disorders, dysphagia, and other organic neurological disorders. 71 Fed. Reg. 46550 (Aug. 14, 2006).

"adversely affects." SæJD. ex rd. JD. v. Pawlet Sch. Dist., 224 F.3d 60, 66 (2nd Cir. 2000) (federal regulations do not define the phrase "adverse effect on educational performance." Instead, "each State [gives] substance to these terms."). Some states define the phrase explicitly in their administrative regulations. Sæ, e.g., 511 Ind.

Admin. Code § 7-32-5 (Ind. State Bd. of Educ. 2009) (student's disability has a "consistent and significant negative impact" on academic achievement and functional performance); Admin R. of Mt. § 10.16.3008 (Supt. of Pub. Inst. 2008) ("pattern of educational, developmental, or functional attainment. . .below the student's age or grade level. . .that can. . . be attributed to the disabling condition"). Other states, like Wisconsin, do not specifically define the phrase but provide guidance documents to help educators determine whether a student meets the federal definition of "other health impairment."

After completing the state's OHI guidance documents to re-evaluate C.D., his teachers and other school staff believed that C.D.'s disabilities did not adversely affect his educational performance in such a manner as to require specialized instruction beyond classroom modifications and reasonable accommodations in the school program. Based on working with and observing C.D. at school on a daily basis, they proposed to address his educational needs in a regular education classroom with differentiated instruction. C.D.'s outside medical experts, non-educators who had never evaluated his classroom performance, testified otherwise. The District Court, s"each State [gives]

impairments adversely affect his educational performance.

The District Court's interpretation moves far beyond the purpose of the IDEA, which is to ensure that a school district provides services sufficient to enable a child with disabilities to derive some benefit from the educational program. Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 199-200 (1982). Whether a student's disability "adversely affects" his "educational performance" should, therefore, focus on the student's ability to perform in a regular classroom. If a student is able to learn and perform in the regular classroom without specialized instruction, taking into account his particular learning style, the fact that his health impairment may have some minimal adverse effect does not render him automatically eligible for special education services.

Certain policies that underlie the IDEA support this more limited reading of the law. These fundamental principles reflected in statutory language include: avoiding over-identification of children as needing special education, "mainstreaming" students who are identified as needing special education in the least restrictive environment, periodically re-evaluating a student's need for special education, and the critical role given to educators in each of these arenas. Together these policies should compel courts to accord a high degree of deference to the judgment of professional educators with respect to the educational services needed by a particular student. In addition, the growing emphasis on meeting students' individual learning needs through improved dassroom instruction also supports the school district's actions in this case.

# I. The IDEA Encourages School Districts to Avoid Over-identifying Children as in Need of Special Education

The IDEA is intended to ensure that children with disabilities receive a free appropriate public education, but it is also averse to over-identification of children as needing special education. The act contains provisions that support school district efforts, like those of the Marshall School Joint School District here, to ensure that children are receiving education appropriate to their changing developmental and educational needs. The IDEA contemplates that the classification of a child as in need of special education will be made initially and retained thereafter only when other services in the regular classroom environment fail to address adequately these needs. When it amended the IDEA in 2004, Congress specifically stated that the 30 years of research that had taken place since the law's first enactment had found that addressing the behavioral and learning needs of children with disabilities is more effective when there are incentives for whole-school approaches, early reading programs, positive behavioral interventions and supports and early intervening services to reduce the need to label children as disabled. 20 U.S.C. § 1400(c)(5)(F).<sup>2</sup> See also Madison Metropolitan Sch. Dist. v. P.R. ex rd. Teresa R., 598 F.Supp.2d 938, 952 (W.D. Wis. 2009).

To that end the IDEA provides support for school district efforts to ensure that children are not inappropriately identified as in need of special education in the first place. The IDEA permits districts to use up to 15% of federal IDEA funds for "early

<sup>&</sup>lt;sup>2</sup> The IDEA also expresses concern about the over-identification of African American students and students with limited English proficiency as in need of special education. 20 U.S.C. §1400(c)(11)(B), (12)(C).

situation could be ameliorated in part by ensuring that schools intervene as early as possible with at-risk children to teach them effective learning strategies that would prevent them from developing educational deficits that might later result in their being misidentified as needing special education. As of January 1, 2009, at least 39 states had plans in place allowing districts to use RTI as part of their efforts to identify students as in need of special education only after other interventions have been tried and deemed insufficient to address the student's learning deficits. B. Rodick, N. Krent & S. Jones, Response to Intervention: the Legal Ups and Downs of Implementation, Appendix B (N SBA Council of School Attorneys, 2009).4

Misidentification of children as needing special education has also emerged as a problem when schools and parents mistakenly use a child's medical condition alone as the key factor in determining whether the child should receive services under the IDEA. The National Center for Education Statistics reports that in the 2006-2007 school year, roughly nine percent of the 6.7 million students who received services under the IDEA were classified under the OHI category. <a href="http://nces.ed.gov/programs/digest/d08/tables/dt08\_052.asp?referrer=list">http://nces.ed.gov/programs/digest/d08/tables/dt08\_052.asp?referrer=list</a>. Significantly, this number more than doubled from 1999 to 2007. This growth may be due, in part, to the increased pressure that schools face from parents to identify children under the IDEA in order that they may receive modifications or accommodations, such as changes to year-end tests. There are reports that some school officials may inappropriately use the OHI category to "placate parents or to provide special education services to students who do not qualify under

<sup>&</sup>lt;sup>4</sup> This publication is available upon request from Amicus National School Boards Association.

1412(a)(5). In the precursor to the IDEA, Congress specifically mandated that "to the maximum extent appropriate, States will 'mainstream' disabled children, i.e., that they will educate them with children who are not disabled, and that they will segregate or otherwise remove such children from the regular classroom setting 'only when the nature or severity of the handicap is such that education in regular classes ... cannot be achieved satisfactorily." Honig v. Doe, 484 U.S. 305, 311 (1988), quoting Education of the Handicapped Act, former 20 U.S.C. § 1412(5).

The requirement that students with disabilities be educated in the "least restrictive environment" continues to be a central tenet of the law. This mandate necessarily contemplates a spectrum of placements and services depending on the educational needs of the child. Because this requirement is a continuous one to which a school district must adhere each time it evaluates and places a child with disabilities, the logical end of that spectrum for some students who previously received special education services may be a determination that they no longer require specialized instruction and instead are able to access the regular education program with some modifications and adaptations, a form of mainstreaming outside the auspices of the IDEA.

Decisions, like the one made in this case, to "exit" students from eligibility for special education services under the IDEA are clearly contemplated by the law. Several sections of the law with respect to re-evaluations<sup>5</sup> of a child specifically state that one of the determinations the Individualized Education Program (IEP) team must make after

<sup>5</sup> Re-evaluations must be conducted at least every three years. 20 U.S.C. § 1414(a)(2)(B)(ii).

reviewing existing and new information is "w

needs of gifted and talented children, differentiated instruction is currently gaining ground in the regular classroom to respond to the increasingly diverse learning needs of students attending public schools. See, e.g., S. Bravmann, Two, Four, Six, Eight, Let's all Differentiate-Differential Education: Yesterday, Today, and Tomorrow (New Horizons for Learning, Dec. 2004),

http://www.newhorizons.org/strategies/differentiated/bravmann.htm.

Differentiated instruction simply means the goals of all students are the same, but the instructional methods, tools and strategies used to achieve these goals vary according to students' different learning needs. For example, some students learn better by audio learning, some by visual learning, some by sitting closer to the teacher.

Differentiated instruction maximizes learning for all students, regardless of skill level or background by taking into account students' varying academic abilities, learning styles, personalities, interests, background knowledge and experiences, and levels of motivation for learning. When a teacher differentiates instruction, he or she uses the best teaching practices and strategies to create different pathways that respond to the needs of diverse learners. Tomlinson, Carol A., How To Differentiate Instruction In Mixed-Ability Classrooms

part of their efforts to ensure that all students receive meaningful instruction and that students identified as "at risk" are provided the targeted support necessary to their educational success. These services may also be provided under an individualized "Section 504 plan." Whereas the IDEA establishes affirmative duties on school districts that receive IDEA funding to educate students with qualifying disabilities, Section 504 of the Rehabilitation Act of 1974, 29 U.S.C. § 794, more generally prohibits discrimination against disabled persons in federal programs, including public schools that receive federal funds. Under this provision school districts must provide services to a student who has a physical or mental impairment<sup>6</sup> which substantially limits<sup>7</sup> his or her ability to learn or another major life activity.<sup>8</sup> If a child meets this definition,

<sup>&</sup>lt;sup>6</sup>The Section 504 regulatory provision at 34 C.F.R. 104.3(j)(2)(I) defines a physical or mental impairment

impairment through the IDEA.

# IV. Education Experts Are In the Best Position to Determine What Educational Plan is Best for Student Achievement

Among the bedrock principles of the IDEA is its presumption that school district officials are the experts in educational matters, and their judgment in such matters is due deference by the courts. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 59 (2005) ("IDEA relies heavily upon the expertise of school districts to meet its goals"). Under the IDEA, school personnel are obligated to identify children in need of special education and to lead the IEP teams responsible for developing the individualized education programs for each child with a disability. In addition to the child's parents, the IEP team must consist of at least one special education teacher, one general education teacher, one local agency representative who must be knowledgeable concerning "local resources," and another member to interpret evaluation results. 20 U.S.C. § 1414(d)(1)(B). The IDEA additionally requires that a regular education teacher of the student, as a member of the IEP Team, shall help determine "appropriate positive" behavioral interventions and supports, and other strategies, and "supplementary aids and services, program modifications, and support for school personnel." 20 U.S.C. § 1414(d)(3)(C). And, important to this case, the regular education teacher must "participate in the review and revision of the IEP of the child." 20 U.S.C. § 1414(d)(4)(B). Courts should "presume that public school officials are properly performing their difficult responsibilities under this important statute." Schaffer, 546 U.S. at 62-63 (Stevens, J, concurring). Here this means that the school district's determination that

C.D. was no longer ineligible for special education services was presumptively done in good faith, following the extensive procedural requirements of the IDEA and applying the best professional judgment of highly qualified educators.

Judicial regard for this professional judgment is warranted, particularly when it is considered that teachers, especially in the lower grades, spend many, many hours on a regular basis with their students. As time goes on, these teachers, like C.D.'s teachers here, learn the students' behaviors, and how they best function in the classroom. Medical providers, academically trained psychologists, and other specialists may be able to offer valuable input in helping educators understand a student's unique conditions that may, in turn, affect his or her ability to benefit from a particular educational program. Ultimately, however, the professional educators are the ones with the training and expertise in instructional methodology and effective teaching practices required to judge whether a student is in need of special education services or whether providing differentiated instruction tailored to the educational needs of that child will ensure the student receives a meaningful education. When educators bring their instructional expertise and their intimate knowledge of a child's educational needs to the re-evaluation process, their decisions made in close compliance with the law's procedural requirements are entitled to a high degree of judicial deference.

In addition to teachers, the IDEA also recognizes that school administrators, such as special education directors, who have knowledge of the availability of school district resources play a role in making determinations about the placement and services to be provided to children with disabilities. 20 U.S.C. § 1414(d)(1)(B)(iv). These IEP team

members have the difficult task of balancing the obligation of ensuring that students receive educational benefit in compliance with the law with the reality of the district's financial and human resource limitations.

#### CONCLUSION

The principles embodied in the IDEA and detailed in this brief—focusing limited resources on children who unambiguously require special education services and relying on the professional judgment of educators—are made all the more convincing and compelling by the choices Congress has made as to funding. While the federal government does provide some IDEA funding to state and local education agencies, it has never even come close to providing the 40 percent of the cost per pupil for special education that Congress promised when it first enacted the predecessor statute to IDEA in 1974. It currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than \$55 billion for the last four fiscal years. Ann Lordeman, Individuals with Disabilities Education Act (IDEA): Current Funding Trends, CRS Report for Congress (April 11, 2008). Even with the additional temporary funding to be provided under the American Recovery and Reinvestment Act of 2009, the gap will remain substantial.

Arguably, Congress's "woefully inadequate" funding of special education is strong evidence that it did not intend such an expansive reading of the services required under the IDEA as that adopted by the District Court in this case. Cf. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 24 (1981) ("The fact that Congress granted. . .a sum woefully inadequate to meet the enormous financial burden

of providing 'appropriate' treatment in th

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## **CIRCUIT RULE 31(e) CERTIFICATION**

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), the Amici Curiae brief and Motion in a non-scanned PDF format.

Dated this 21st day of August 2009.

#### **CERTIFICATE OF SERVICE**

The undersigned, counsel for the Amici Curiae National School Boards Association and Wisconsin Association of School Boards, hereby certifies that on August 21, 2009, two copies of the Amici Curiae Brief and Motion for Leave to File were deposited in the United States mail, first class postage pre-paid, addressed to the following:

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