No. 11-2041

In the United States Court of Appeals
For the Fourth Circuit

D.L., BY AND THROUGH HIS PARENTS AND GUARDIANS, K.L. AND S.L.; K.L.; S.L., IN THEIR OWN RIGHT,
PLAINTIFFS-APPELLANTS,

v.

BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,
DEFENDANT-APPELLEE,

and

BALTIMORE CITY PUBLIC SCHOOLS,
DEFENDANT.

On Appeal From the United States District Court for the
District of Maryland-Baltimore Division

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, MARYLAND ASSOCIATION OF BOARDS OF EDUCATION AND VIRGINIA SCHOOL BOARDS ASSOCIATION

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Brief Supporting Appellee and Defendant for Affirmance of Decision of U.S. District Court for Maryland-Baltimore Division

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
April 9, 2012
Case Number 11-2041
D.L., by and through his Parents and Guardians, K.L. and S.L.;
K. L.; S.L., in their own right v. Baltimore City Board of School Commissioners
and Baltimore City Public Schools

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1, the National School Boards Association, the Maryland Association of Boards of Education, and the Virginia School Boards Association as Amici Curiae, make the following disclosures:

1. Is party a publicly held corporation or other publicly held entity?
( ) YES (X) NO

2. Does party have any parent corporations?

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STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The National School Boards Association (NSBA) is a nonprofit organization representing state associations of school boards, as well as the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students.

s before Congress and federal and state courts and has participated as amicus curiaein many cases involving the impact of federal anti-discrimination laws on public school districts.

The Maryland Association of Boards of Education (MABE) is a private, non-profit organization to which all twenty-four (24) local boards of education in Maryland voluntarily belong. Founded in 1957, MABE is recognized across the State as an advocate for public schools and their governing bodies, representing their interests in legislative and other governmental matters and in relations with the State and Federal education authorities. MABE is also active with programs to

members do in furtherance of public education.

For those students whose parents elect to enroll them in public school, Section 504 establishes a collaborative process whereby a team of school professionals can develop an integrated plan for serving each student with

disjointed grab-bag of services from which parents, and/or private schools, could select on an ad hoc

ARGUMENT

Factual Background Relevant to the Argument of the *Amici Curiae*

The Student is a high-school student who has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Anxiety Disorder. Joint Appendix J.A. 9. He lives in Baltimore, Maryland.

Pursuant to the appropriate processes under the IDEA, the Student was evaluated by the Baltimore City Public Schools (BCPS School D , and determined not to require a formal plan of special education pursuant to an individualized education program (IEP). J.A. 175. Subsequently, however, he was evaluated by the school district and found eligible for a TBTu0a[twever,

Conservatively estimated, then, there are more than a half-million other private school students with ADHD alone, and approaching a million students with some type of disability.

As this Court assesses argument that would significantly expand the number of students (i.e., private school students) required to be provided educational and therapy services, public school districts are dealing with critical shortages of both funding and exactly the kinds of specialized personnel whom the Parents insist must serve not only the public school students, but now private school students as well. For example:

> The ratio of students to school counselors (457:1) is almost twice the recommended ratio (250:1).
>
> In the most recent American Speech and Hearing Association Schools Survey (2010), 55% reported shortages in schools. Respondents indicated that the greatest impact of the shortage was increased caseload/workload (81%), followed by decreased opportunities for appropriate service delivery (52%). Reported shortages in the Mid-Atlantic region were 36.7%.
>
> The ratio of students to audiologists (71,555:1) is more than seven times the recommended number (10,000:1).
>
> Forty-eight states and the District of Columbia identified special education teaching and/or at least one of the related service provider categories as an -2012 school year.
>
> There will be a shortage of almost 9,000 school psychologists in the U.S. by 2010, with a cumulative shortage of almost 15,000 by 2020.

NATIONAL COALITION ON PERSONNEL SHORTAGES IN SPECIAL EDUCATION AND RELATED SERVICES, PERSONNEL SHORTAGES PERVADE OUR NATION S SCHOOLS (June 2, 2011), available at http://www.specialedshortages.org/2011DataFactSheet.pdf (last visited Apr. 8, 2012). The ability to retain related services personnel such as therapists is a particular concern. See, e.g., The Critical Shortage of Speech-Language

statutory provisions expressly require that the child find process utilized by public schools be designed to ensure the equitable participation of parentally-placed private school students. 20 U.S.C. § 1412(a)(10)(A)(ii)(II) (2012). They also contain a specific formula for the limited amount of resources (known as the proportionate expenditure requirement), which schools must spend on providing services to this group of students. 20 U.S.C. § 1412(a)(10)(A)(i)(I) (2012). IDEA specifies a procedure that is required for determining the specific type of special education services that will be offered, which students will be served, and where the services will be provided. 20 U.S.C. § 1412(a)(10)(A)(iii)(IV) (2012). The statute also expressly provides that the identified services may, but need not, be provided at the private school. 20 U.S.C. § 1412(a)(10)(A)(i)(I) (2012).

Inherent in these express statutory requirements of the IDEA is the clear recognition that not all parentally-placed private school students with disabilities will receive special education services from the public schools once their parents decide to place them in private schools. Nor will those privately-placed students who do receive some special education or related services from the public schools be able to receive all the services that they would were they enrolled in the public school system. This is formally acknowledged by the U.S. Department of

[n]o parentally-

a right to complete participation under Section 504. Most importantly, under the i -eligible private school students would now have an individual right to services, and the ability to enforce that right in a due process hearing, in direct contradiction of current IDEA regulations. 34 C.F.R. § 300.137(a) (2012). If Congress believed, as the Parents assert, that Section 504 already mandates the provision of special education services to all parentally-placed private school students with disabilities, there would have been no need for them to draft detailed limitations on the degree to which these services are required under IDEA.

The facts in this case illustrate the point and the concern clearly. The s

applicable under Section 504. That being the case, it would be highly anomalous if by meeting a demonstrably lower threshold, the student had a right to receive precisely all those services (including

services; speech-language services/psychological services addressing social skills; tutoring in various subjects; teaching and re-enforcement of organizational skills) for which he was ineligible under the more demanding provisions of IDEA.

D. Though the Parents attempt to limit the potential consequences of their position by arguing that they are requesting only services at the public school location, their rationale is in no way limited to that.

The Parents attempt to limit the reach of their interpretation of Section 504 by arguing that they seek only services to be provided after school at the public school location, rather than services to be provided on the premises of the private school and/or payment for those services. Appellants Br. at 19-20. There is,

1994) (back pay). The authority for reimbursement, and for an equitable remedy such as the provision of services, is in this context the same: Monetary reimbursement is simply an alternative way for the school division to discharge its obligation to provide required services, where it failed to do so at the time it should have. Cf. Burlington Sch. Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359, 369-70 (1985)

power be required to pro

in private school, would now nonetheless be able to demand Section 504 special education and related services from the public school district, for which the school district would receive little or no federal funding.

1. Students qualifying under IDEA necessarily also qualify under Section 504.

language therapy at public school); Swanson v. Guthrie Indep. Sch. Dist. No. I-1, 942 F. Supp. 511, 515 (W.D. Okla. 1996) (Oklahoma law does not create right to ; Jones v. West Virginia State Bd. of Educ., 218 W.Va. 52, 59-60, 622 S.E.2d 289, 296-97 (2005) (do not contribute to the average daily attendance or enrollment numbers of the public schools, thus no funds are expended to the county boards in consideration of those children. To then require counties to spend these limited funds on non-public). Still others, such as Virginia, make the part-time admission of private school students a matter of local school district discretion, but provide only partial state funding. Virginia, for example, has a specific statute that allows schools to count home-schooled students who are enrolled on a part-time basis in their Average Daily Membership (ADM) calculation, but only up to a total of half of a student and only if the student actually attends school for at least two and a half hours per week. Va. Code § 22.1-253.13:2(N) (2012). Under this formula, a public school district in Virginia would receive no state funding to provide services to a student such as D.L.

It should be left to the legislative discretion of individual states to determine whether providing private school students the opportunity to access supportive services from local school districts is a sufficiently important legislative priority to permit local school districts to provide those services, or even to mandate that they

J.A. 201.

Section 504 plans were designed to be an integrated plan cooperatively developed by a knowledgeable group of school staff members working together in a school program. The Parents argument, however, would render them an a la carte menu from which the parents of private school students could choose some isolated services, and ignore the rest. This was not intended, nor is it required, by Section 504.

III. Interpretation of Section 504 Regulations is Inconsistent with the Statute Itself.

A. Section 504 is intended to prohibit discrimination solely on the basis of disability in federally-funded programs.

sdely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving f . § 794 (2012) (emphasis added). The statute is about access to equitable opportunities for participation in the program receiving federal funding, i.e., the public schoo(u)4(i)oFo.(,)-5(c)

failed to receive certain accommodations and/or services that he would receive in public school solely because his Parents have elected to enroll him in a private school instead. This does not constitute discrimination by the School District or the Board on the basis of disability.

Indeed, that the Student should be allowed to receive benefits to which as a private school student he would not otherwise be entitled, i.e., accommodations, therapy, tutoring and other services, solely because he has a disability. There is no dispute that any similarly situated non-disabled student enrolled by his parents in private school would not be entitled to receive such educational and related services and accommodations on a part-time basis from the public schools in Maryland (or the many other states that have not adopted dual or partial enrollment for private school students, or that have

which the Parents raise here.

The Court first acknowledged,

Id. at 405 (internal citations omitted). Section 504, the Court

Therefore, both decision in

his chosen private school. 930 F.2d at 365. Parents relied in part upon an EHA administrative regulation, the applicable portion of which is similar to that upon which Parents rely here. Specifically, that regulation, former 34 C.F.R. § 300.452,

> Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency

That language is materially the same as the portion of the current Section 504 regulation upon which the Parents rely for their argument that the school district here must provide

> students are enrolled in private or public school.

34 C.F.R. § 104.33(a) (2012).[3]

This Court rejected the argument that the above regulatory language mandated services to all students in private as well as public school. Instead, this Court

> local school district need not pay for a child's related services when the s

930 F.2d at 367.[4] Likewise here,

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[3] 34 C.F.R. § 104.33(a) (2012) (a) General.A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the *recipient's* jurisdiction, regardless of the nature or severity of the s (emphasis added).

[4] Goodall that providing an interpreter on the grounds of a parochial school would pose an Establishment Clause problem, 930 F.2d at 370 Zobrest

this Court should reject the Parents simplistically literal argument that Section

decided not to provide any services to particular categories of students). As that

[whether or] not to accept public education in favor of their parental private school

Id. at *4.

Applying Section Free Appropriate Public Education ( ) requirements in this fashion ensures that parents have full information regarding their child

schools so that parents can make informed decisions when they opt for private school. The difference in scope between the two requirements is not at all inconsistent.

E. Insofar as the administrative regulation at issue could be interpreted as requiring that public school districts provide services to disabled students not otherwise attending public school, where nondisabled private school students do not have that entitlement, it would be inconsistent with Section 504 itself, and therefore invalid

itself. Ragsdale v. Wolverine World Wide, 535 U.S. 81, 92 (2002). In cases where a regulation is contrary to the statutory mandate, it will be struck down. Id.; United States v. *O'*Hagan, 521 U.S. 642, 673 (1997); Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

Indeed, with respect to another Section 504 regulation, the Supreme Court in

(2012) were applied in the manner urged by the Parents, it would be subject to invalidation.

CONCLUSION

For the foregoing reasons and those arguments mad , Amici Curiae, urge this Court to affirm the decision below.

Respectfully submitted,
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CERTIFICATE OF FILING AND SERVICE

I certify that on this 9th day of April 2012, I caused this Brief of Amici Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following CM/ECF users:

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I further certify that on this 9th day of April 2012, I caused the required number of bound copies of the foregoing Brief of Amici Curiae to be mailed first class postage prepaid to the Clerk of this Court at 1100 East Main Street, Suite 501, Richmond, VA 23219.

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