

12-1610

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

C.L., Individually, G.W., Individually, and on behalf of C.L.,
a child with a disability
Plaintiffs-Appellants

- against -

Scarsdale Union Free School District
Defendant-Appellee

On Appeal from the United States District Court
For the Southern District of New York

BRIEF AMICI CURIAE
NEW YORK STATE SCHOOL BOARDS ASSOCIATION , INC., AND
NATIONAL SCHOOL BOARDS ASSOCIATION
In Support of Defendant-Appellee and Affirmance

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INTEREST OF THE AMICI CURIAE¹

The New York State School Boards Association, Inc. (“NYSSBA”) is a not-for-profit membership organization incorporated under the laws of the State of New York. Its membership consists of approximately six hundred and seventy (667) or ninetyone percent (91%) of all public school districts in New York State. Pursuant to Section 1618 of New York’s Education Law, NYSSBA has the responsibility of devising practical ways and means for obtaining greater economy and efficiency in the administration of the affairs and projects of New York’s public school districts. NYSSBA often appears *amicus curiae* before both federal and state court proceedings involving constitutional and statutory issues affecting public schools, and indeed has done so previously before this Court.

The National School Boards Association (“NSBA”) is a not-for-profit organization representing state associations of school boards and 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.

¹ This brief was not authored in any part by counsel for either party, and no person or entity other than the Amici, their members or counsel made a monetary contribution to the preparation or submission of this brief.

NSBA regularly represents its members' interests before Congress and federal and state courts.

In accordance with Rule 29 of the Federal Rules of Appellate Procedure, NYSSBA and NSBA submit this *amicus curiae* brief with the consent of the parties to the action, and in support of affirmance of the decision of the court below in favor of defendant-appellee Scarsdale Union Free Central School District ("the School District").

NYSSBA and NSBA fully support the rights of all children with disabilities to receive a free appropriate public education that addresses their unique educational needs. However, NYSSBA and NSBA have a significant interest in ensuring that their members are not subjected to legal obligations and liability that exceed federal statutory requirements. The issues before this court are of statewide importance to all school districts throughout New York and others throughout the nation. Thus, in this *amicus curiae* brief NYSSBA and NSBA invite this court's attention to law and arguments that ~~will~~ of special assistance to the court.

STATEMENT OF THE ISSUE

ARGUMENT

THE COURT BELOW PROPERLY DETERMINED THAT PLAINTIFFS -APPELLANTS ARE NOT ENTITLED TO AN AWARD OF TUITION REIMBURSEMENT IN THE PRESENT CASE.

The immediate issue before this court is whether the ~~court~~ properly determined that the plaintiffs-appellants are not entitled to the award of tuition reimbursement they requested in this case under the Individuals with Disabilities Education Act (“IDEA” or “the Act”) (20 U.S.C. §1400 et seq). In resolving that issue this court necessarily will review the grounds upon which the court below reached that conclusion. Applicable statutory and regulatory provisions, U.S. Supreme Court precedent, and prior decisions from this court inform the appropriate framework

§300.148; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Florence County Sch. Dist. Four v. Carter*; *Sch. Comm. of Town of Burlington v. Dep't of Educ.*; *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105 (2nd Cir. 2007). The School District does not contest that its failure to identify C.L. as a student eligible for special education services ~~and~~ the IDEA violated his FAPE rights under the Act. Instead, the instant appeal relates to the appropriateness of the placement chosen by the plaintiffsappellants. *C.L. v. Scarsdale Union Free Sch. Dist.*, 2012 WL 983371 (S.D.N.Y. Mar. 22, 2012).

As this court has explained, the appropriateness of a parents' unilateral choice of placement in an IDEA tuition reimbursement case "turns on whether

this court nonetheless has determined that the IDEA's least restrictive environment (LRE) mainstreaming provisions "remain a consideration that bears upon a parent's choice of... placement" and the appropriateness of that placement (*M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of York*, 231 F.3d 96 (2nd Cir. 2000), cert. denied 532 U.S. 942 (2001)). At the crux of the instant appeal are the conclusions reached by the court below when assessing the appropriateness of the plaintiffs-appellants' unilateral placement in light of the IDEA's LRE requirements.

For the reasons that follow this court should affirm the decision of the court below.

a. The plaintiffs-appellants misapprehend the nature of the

According to plaintiffs-appellants, the court below disregarded evidence which, in their view, supported a conclusion that their choice of placement is the least restrictive environment. *envi4re3396ffae/c2v 0 0 1 76s298.62 272.26 Tm 4.78 Tc[()] TJ ET Association and the National School->374(Boards)-73(Association,)-77(as)] TJ ET B*

education *envi4re3396ff* inverted the "'general' nature" of that *envi4re3396* into a

setting that “was not the least restrictive environment...appropriate for C.L.” (Plaintiffs-Appellants’ Brief at p. 40). The amici curiae respectfully submit that in so arguing, the plaintiffs-appellants misapprehend the nature of the IDEA’s LRE requirements.

Those requirements provide that “[t]o the maximum extent appropriate”, children with disabilities must be “educated with children who are not disabled.” Often referred to as the Act’s “mainstreaming” requirements, the LRE mandate contemplates the need for adaptations within a regular school environment. It expressly requires that children with disabilities not be

an [IDEA] eligible child..., the content, methodology, or delivery of instruction...”

(34 C.F.R. §300.39(b)(3)).

In this regard, it is important also to remember that the IDEA was initially

necessarily the case. There may be times when parental unilateral placement indeed can be comparable to the one proposed by a school district. That certainly could be the case, for example, when a school district determines that a child needs to be removed from the general education environment in order to obtain educational benefit (see *P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2nd Cir. 2008)).

The ultimate inquiry in assessing the appropriateness of any particular placement in light of LRE requirements is whether the restrictiveness of that setting is necessary for the child to obtain educational benefit, whether it is possible for the child to obtain such benefit in a mainstream environment with the help of supplementary aids and services. This analytical framework is consistent with the underlying premise in tuition reimbursement cases involving unilateral parental placements in residential facilities (*Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114 (2nd Cir. 1997); see also *Jefferson County Sch. Dist. R1 v. Elizabeth E.*, 702 F.3d 1227 (10th Cir. 2012); *Clovis Unified Sch. Dist. v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990); *Krueger v. New Castle County Sch. Dist.*

In the present case, the court below reached its conclusion that the plaintiffs appellants' unilateral placement for C.L. was not appropriate under LRE considerations based on the totality of the evidence before it, rather than the intrinsic nature of that placement. That evidence showed that with the aid of support services provided by the School District, albeit not pursuant to the IDEA, C.L. had made "meaningful" progress in the regular school environment and "benefitted from interaction with his nondisabled peers" (C.L. v. Scarsdale Union Free Sch. Dist. 2012 WL 983371 *12). More importantly, in assessing the restrictiveness of the plaintiffs appellants' unilateral placement the court below reached its conclusions not only with reference to the IDEA's LRE requirements, but also properly in relation to the nature of C.L.'s condition and unique needs (see P. v. Newington Bd. of Ed., 546 F.3d at 120).

Care must be taken in IDEA tuition reimbursement cases to safeguard the right of parents to unilaterally remove their child from a public school system in their pursuit of an appropriate education for the child. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7; Sch Comm of the Town of Burlington v. Dep't of Educ, 471 US. 359. The decision of the court below does not violate that tenet. The central twopart inquiry in IDEA reimbursement cases already requires an assessment of the appropriateness of a unilateral parental placement. The restrictiveness of such a placement is just a part of that assessment. Moreover,

exempting a private placement from LRE requirements would fundamentally alter one of the central purposes of the IDEA. It may be argued that the IDEA does not require a private placement to be made in the least restrictive environment, but this is not the case. The IDEA requires that a child with a disability be educated to the maximum extent appropriate with children who are not disabled. This requirement is fundamental to the IDEA and is not subject to waiver. Exempting a private placement from LRE requirements would fundamentally alter one of the central purposes of the IDEA. It may be argued that the IDEA does not require a private placement to be made in the least restrictive environment, but this is not the case. The IDEA requires that a child with a disability be educated to the maximum extent appropriate with children who are not disabled. This requirement is fundamental to the IDEA and is not subject to waiver.

restrictiveness of a private placement “remain[s] a consideration” when assessing the appropriateness of a unilateral parental placement. *See* (v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F.3d 96).

As discussed above, the court below did not determine that the plaintiffs-appellants’ unilateral placement was inappropriate solely because it was more restrictive than a mainstream regular school environment. Instead, the court below properly based its conclusion that their placement was not the least restrictive environment for C.L. on evidence related to his condition and unique needs (see

as discussed above, but was also consistent with prior pronouncements from this court.

Also relevant to an assessment of the restrictiveness of a unilateral parental placement would be the child's performance history within the regular school environment prior to his or her removal from there. That history is important to determine the child's ability to obtain educational benefit from an educational placement within a regular school environment that is less restrictive than the unilateral placement. This is relevant because, as this court has indicated when determining the appropriateness of a unilateral parental placement based on whether it offers the type of educational services needed to address the child's unique needs, a denial of an IDEA tuition reimbursement claim should not be disturbed when "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not" (*Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d at 115). This principle should be applied equally when assessing the restrictiveness of a unilateral parental placement for purposes of determining its appropriateness.

Appearing as amicus curiae represented by the U.S. Department of Education, the Department of Justice Civil Rights Division and the U.S. Attorney, the United States urges reversal of the decision of the lower court based on its own proposal for assessing the restrictiveness of a unilateral parental placement.

According to the United States, such placements should be compared to other less restrictive private placement options available to parents at the time they make their choice. Tuition reimbursement would be properly denied on LRE grounds only when parents reject for insufficient educational reasons a less restrictive available option. (Brief for the United States as Amicus Curiae pp 11, 22).

This court could consider affording deference to that recommendation if it deems it to be interpretive rather than legislative. It would be the latter if it “intends to create new law, rights or duties” (see *Metropolitan Sch. Dist. of Wayne Township v. Davila*, 926 F.2d 485 (7th Cir. 1992)). But even if deemed interpretative, the recommendation would not be entitled to deference if it is inconsistent with the IDEA (see *B.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 939 (9th Cir. 2007)). For reasons similar to those discussed above, the United States’ recommendation finds no support in either the text or the history of the IDEA, or judicial precedent.

In comparison, the decision of the court below is supported by the text and legislative history of the IDEA and precedent from this court as discussed above. Moreover, the restrictiveness of a placement is not assessed by comparing one setting against another, as the United States suggests, but rather by examining its level of restrictiveness in relation to the needs of a student. (*M.H.* and *E.K. v. New*

York City Dep't of Educ., 685 F.3d at 224 (quoting *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d at 122).

In addition, the United States' suggestion that a school district bears the burden of identifying alternative less restrictive private placement options available to a parent in an IDEA tuition reimbursement case (Brief for the United States as Amicus Curiae p. 23) is inconsistent with the U.S. Supreme Court's ruling in *Schaffer v. Weast*, 546 U.S. 49 (2005), that a party seeking relief under the IDEA bears the burden of persuasion with respect to the essential elements of its claim. (546 U.S. 49 (2005)) Under the two-part inquiry applicable in tuition reimbursement cases a school district bears the burden of establishing that it has provided a free appropriate public education. If the school district succeeds there is no need for further inquiry. However, if the school district fails in meeting its burden, the parents seeking tuition reimbursement still must establish the appropriateness of the unilateral placement. That certainly is the case in New York pursuant to New York Education Law §4404(1)(c).

For all the above reasons, this court should affirm the decision of the court below.

CONCLUSION

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Rule 32(a)