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 CURIAE*[1]

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 ninety-one 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 as *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 sate 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 *amici 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 to others throughout the nation. Thus, in this *amici curiae* brief NYSSBA and NSBA invite this court's attention to law and arguments that will be of special assistance to the court.

STATEMENT OF THE ISSUE

I. Whether the court below properly determined that plaintiffs-appellants are not entitled to an award of tuition reimbursement in the present case?

The *amici curiae* respectfully submit the answer is yes.

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 below 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 for conducting such review.

Although equitable considerations (see *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471U.S. 359 (1985)), and other conditions (see 20 U.S.C. §1412(a)(10)(C)(ii); 34 C.F.R. §300.148) also come into play, IDEA tuition reimbursement claims generally are resolved based on the results of a two-part factual inquiry as to whether the school district responsible for educating the child failed to provide the child a free appropriate public education ("FAPE") under the Act, and the parents' choice of placement was appropriate (20 U.S.C. §1412(a)(10)(C)(ii); 34 C.F.R.

§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 under the IDEA violated his FAPE rights under the Act. Instead, the instant appeal relates to the appropriateness of the placement chosen by the plaintiffs-appellants. (*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 [the] placement is 'reasonably calculated to enable the child to receive educational benefits'…No one factor is necessarily dispositive" in determining whether that is indeed the case. Instead, any such determination must "consider the totality of the circumstances…" However, in order to prevail parents must "demonstrate that the placement provides educational instruction specially designed to meet the unique needs of [their] child, supported by such services as are necessary to permit the child to benefit from instruction" (*Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d at 112).

Furthermore, although noting that "parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board",

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 Yonkers*, 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 IDEA's least restrictive environment requirements.

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 for C.L. The New York State School Boards Association and the National School Boards Association, as *amici curiae* defer to the School District's Brief and its response to this contention.

The plaintiffs-appellants also argue, however, that the court below should have considered that the interventions needed for C.L. to remain in a general education environment converted the "'general' nature" of that environment 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 placed in "special classes, separate schooling, or [otherwise] remov[ed] from the regular educational environment" unless "the nature and the severity of [their] disability…is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" (20 U.S.C. §1412(a)(5)(A)). Supplementary aids and services include "aids, services and other supports…provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate…(20 U.S.C. §1401(33)). Moreover, special education under the IDEA refers to specially designed instruction (20 U.S.C. §1401(29), which federal regulations implementing the IDEA define to mean "adapting, as appropriate to the needs of

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 enacted to address Congressional concerns over "the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes" (*Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. at 373), with millions "totally excluded from schools" (*Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 191-92 (1982)).

Although other factors addressed in the School District's brief contributed to the determination of the court below that the plaintiffs-appellants' unilateral placement for C.L. was not appropriate, the focus of plaintiffs-appellants' arguments before this court concern whether the lower court properly concluded that their unilateral placement was not appropriate in light of the IDEA's LRE requirements. In this context, it is important to note that the plaintiffs-appellants acknowledge the restrictiveness of a unilateral parental placement may be considered as a factor when determining the appropriateness of such a placement in an IDEA tuition reimbursement case (Plaintiffs-Appellants' Brief at p.39).

There is no question that, by their nature, unilateral parental placements generally provide educational services to children with disabilities in a setting that is more restrictive than a general education environment. But that is not always

necessarily the case. There may be times when a 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, or 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 (see *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114 (2nd Cir. 1997); see also *Jefferson County Sch. Dist. R-1 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); *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3rd Cir. 1981); *cf. Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009); *Dale M. ex rel. Alice M. v. Bd. of Educ.*, 237 F.3d 813 (7th Cir. 2001)).

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 Educ.*, 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 U.S. 359). The decision of the court below does not violate that tenet. The central two-part 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 possible for a child to obtain an appropriate education in a private placement that does not meet state educational standards (*Florence County Sch. Dist. Four v. Carter*), if the instruction it provides meets the unique needs of the child supported by services necessary to enable the child to benefit from instruction (*Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105). But when factual evidence shows that a child's condition and unique needs do not impede the ability of the child to progress "meaningfully" in a regular school environment, the placement of the child in a more restrictive unilateral placement would negate the express language and history of the IDEA's LRE mandate and its underpinnings.

Giving effect to the plaintiffs-appellants' argument would be inconsistent with both the language and legislative history of the IDEA. It also would expose school districts to liability on grounds that are not supported by either the Act's text or history.

b. The court below employed the correct analysis when assessing the restrictiveness of plaintiffs-appellants' unilateral placement for purposes of determining the appropriateness of that placement.

There is no U.S. Supreme Court decision that addresses the underlying issue before this court. Nonetheless, this court itself has determined that the

restrictiveness of a private placement "remain[s] a consideration" when assessing the appropriateness of a unilateral parental placement (*M.S. 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 *M.H. and E.K. v. New York City Dep't of Educ.*, 685 F.3d 217, 224 (2nd Cir. 2012) (quoting *Walczak v. Fla. Union Free Sch. Dist.* 142 F.3d 119 at 122 (2nd Cir. 1998) ("education must be provided in the 'least restrictive setting consistent with a child's needs'"). In this regard, it is important to note that the New York State Review Officer (SRO), whose decision the court below affirmed in the case herein, also had reached the same conclusion based on a similar analysis. In affirming the SRO's decision, the court below found the SROs conclusions to be "amply" supported by the evidence (*C.L. v. Scarsdale Union Free Sch. Dist.*, 2012 WL 983371), and as such also entitled to due deference (see *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 188-89 (2nd Cir. 2012)). Thus, the lower court's analytical framework not only gave effect to the language and history of the IDEA

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 *R.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 ruling in *Schaffer v. Weast* that a party seeking relief under the IDEA bears the burden of persuasion with respect to the essential elements of its claims (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 their 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

For all the foregoing reasons, the *amici curiae* respectfully request and urge this court to affirm the decision and judgment of the district court below.

Dated: January 15, 2013
Albany, New York

Respectfully Submitted,

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(s) Jay Worona

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Dated: March 15, 2013