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

FRANCISCO M. NEGRÓN, JR.*
General Counsel
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

*Counsel of Record
Counsel for *Amici Curiae*

JOHN F. CAFFERKY
ANDREA D. GEMIGNANI
BLANKINGSHIP & KEITH, PC
4020 University Drive
Suite 300
Fairfax, VA 22030
(703) 691-1235

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?
   ( ) YES (X) NO

3. Is 10% or more of a party's stock owned by a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ( ) YES (X) NO
   If yes, identify entity and nature of interest:

5. Is party a trade association?
   ( ) YES (X) NO
   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a party's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors committee: N/A

/S/ Francisco M. Negrón, Jr. — Signature
April 9, 2012 — Date

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

REGULATIONS:

OTHER AUTHORITIES:

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. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in 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 enhance the quality of the work that Maryland's boards of education and board members do in furtherance of public education.

The Virginia School Boards Association (VSBA) is a private, voluntary non-partisan organization representing every local school board in Virginia. VSBA's primary mission is the advancement of education through local control of the

public schools. VSBA's members are the local school districts responsible for teaching students.

All local school districts are subject to the mandates of Section 504 of the Rehabilitation Act of 1973 ("Section 504"). As public entities, school districts strive to comply with federal anti-discrimination laws that apply to students who attend their public schools to ensure that public schools are able to fulfill their educational mission efficiently and effectively.

All parties to this appeal consented to the filing of this brief.

No party's counsel authored this brief in whole or in part. No party, nor their counsel, contributed money that was intended to fund preparing or submitting this brief. No person or entity other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

This case concerns provisions of Section 504, codified at 29 U.S.C. §§ 794, *et seq.*(2012). Plaintiffs-Appellants (the "Parents") argue that Defendant-Appellee Baltimore City Board of School Commissioners (the "Board") has discriminated against their child (the "Student" or "D.L.") because of his disability, in violation of his federal rights under Section 504. Specifically, the Parents contend that although they have voluntarily decided to enroll the Student in a private parochial

school, the Board was obligated to provide the Student with an extensive array of counseling, tutoring, therapy and other educational services. *See* Appellant's Br. at 10-11. This Court should reject the Parents' attempt to rewrite fundamentally the requirements of Section 504.

Reading Section 504 to require public school districts to provide special education and related services to all disabled students, private and public, would directly conflict with the more specific, and carefully-crafted limitations upon school districts' obligations to private school students that have been adopted as part of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, *et seq*. (2012). As a practical matter, it would render those limitations meaningless, as they could be bypassed by resorting to Section 504 in every case.

In addition, the position of the Parents would result in significant practical and educational consequences for the thousands of local school districts responsible primarily for serving public school students. Local school districts receive no federal funding under Section 504, and little or no state funding, to provide services to private school students. Equally important, the effect of the Parents' position would be further to overtax public school districts' therapists, counselors, psychologists, special education teachers, and other specialized personnel, who are already in critically short supply.

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 disabilities. Following the Parents' position would turn such a plan into a disjointed grab-bag of services from which parents, and/or private schools, could select on an *ad hoc* basis. This would be to the detriment of the student, and certainly was not envisioned by Congress when it enacted Section 504.

Section 504 is an access statute, which prohibits discrimination solely on the basis of disability. Not permitting a student – whether disabled or nondisabled – whose parents have elected not to enroll him in the public schools to receive the special education, therapy, and other educational services that he would receive if he were enrolled in public school in no way constitutes discrimination solely on the basis of disability. Indeed, requiring the public school system to serve the private school student in that situation would be the kind of affirmative step that Section 504 has been uniformly held not to require. Section 504's administrative regulations, properly read, do not require it either; were they read in the manner that the Parents suggest, they would be in conflict with Section 504 itself.

Amici therefore respectfully request on behalf of all public school boards within this Circuit that this Court reject the Parents' request for special treatment and instead uphold the well-reasoned decision of the District Court below.

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" or the "School District"), 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 plan of accommodations and services under Section 504. *Id*.

While the actual services plan developed by BCPS was not a part of the record, the services to which the Parents contend the Student is entitled under Section 504 are extensive. They state:

> [D.L.] needs the following related special education services: counseling services; speech language services/psychological services addressing social skills; tutoring in various subjects; teaching and re-enforcement of organizational skills; and counseling specifically directed at dealing with proper executive functioning.

J.A. 9.

D.L. does not, however, actually attend school within BCPS. Instead, his parents decided to place him in a private religious school in the Baltimore area.

J.A. 9. As a result, he has not been able to avail himself of the educational and therapeutic services that BCPS would provide were he enrolled in the public school system. *Id*. Maryland, like many other states, does not permit private school students to engage in "dual" or "partial" enrollment for the purpose of accessing some services through the public schools. *Thomas v. Allegany County Bd. of Educ.*, 51 Md. App. 312, 443 A.2d 622 (1982).

I. Adoption of the Parents' Argument has Significant Legal Implications for Every School District in the Nation.

A. The Parents' argument, if adopted, would significantly expand the pool of private school students with disabilities entitled to services from public schools.

The Parents' Section 504 argument apparently has not been the subject of a reported decision in the federal courts, likely because it presents an unreasonably broad reading of the statute and its implementing regulations. This case, however, raises an issue of nationwide significance.

Section 504 applies to each one of the approximately 13,800 local school districts that receive federal financial assistance, and the approximately 49.4 million students they serve. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, PUBLIC ELEMENTARY AND SECONDARY SCHOOL STUDENT ENROLLMENT AND STAFF COUNTS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2009–10 3 (2011), *available at*

http://nces.ed.gov/pubs2011/2011347.pdf (last visited Apr. 8, 2012). Furthermore, the scope of the Parents' argument would encompass the over 5.9 million students who attend private elementary or secondary schools. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, 2010 TABLES AND FIGURES, *available at* http://nces.ed.gov/programs/digest/d10/tables/dt10_062.asp) (last visited Apr. 8, 2012). Under the Parents' reading of Section 504, any or all of those private school students who have disabilities would have the absolute right to obtain all necessary special education, accommodations and therapy services from the public school district, even if the student remained enrolled in private school.

While reliable statistics on the prevalence of private school students with disabilities, who would be entitled to services under Section 504, were they enrolled in public school are not readily available, clearly the number is substantial. In the public schools, for example, the percentage of students eligible under either IDEA or Section 504 exceeds 15%. PARENT ADVOCATE BRIEF FROM NATIONAL CENTER FOR LEARNING DISABILITIES, UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT, *available at* http://www.ldame.org/docs/UnderstandingADAAA-Section504.pdf; NATIONAL CENTER FOR EDUCATIONAL STATISTICS, Table 47, Number and percentage of children served under Individuals with Disabilities Education Act, Part B, by age group and state or jurisdiction: Selected years, 1990–91 through 2008–09 (2010)

available at http://nces.ed.gov/programs/digest/d10/tables/dt10_047.asp (last visited Apr. 3, 2012).[1]

Furthermore, as an example of just one condition, the Student at issue in this case, D.L., is eligible for services under Section 504 in part on the basis of ADHD. J.A. 9. The U.S. Centers for Disease Control has recently stated, "ADHD is the most commonly diagnosed neurobehavioral disorder of childhood." CENTERS FOR DISEASE CONTROL AND PREVENTION, INCREASING PREVALENCE OF PARENT-REPORTED ATTENTION-DEFICIT/HYPERACTIVITY DISORDER AMONG CHILDREN --- UNITED STATES, 2003 AND 2007 (Nov. 12, 2010), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5944a3.htm?s_cid=mm5944a3w (last visited Apr. 8, 2012). In 2007 alone, "the estimated prevalence of parent-reported ADHD (ever) among children aged 4-17 years was 9.5%, representing 5.4 million children." *Id*. That figure represented a 21.8% increase in a four-year period alone. *Id*.

[1] Even this estimate is low, as it does not take into consideration the 2008 amendments to the Americans with Disabilities Act and Section 504, which significantly broadened the definition of disability. Department of Education Issues ADA Amendments Act Dear Colleague Letter to Provide Guidance Under Amended Legal Standards (2012) http://www.ed.gov/news/press-releases/department-education-issues-ada-amendments-act-dear-colleague-letter-provide-gui (last visited Apr. 3, 2012).

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 the Parents' 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 official "shortage area" for the 2011-2012 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 Pathologists in the Public School Setting: Features of the Work Environment That Affect Recruitment and Retention*, 38 LANGUAGE, SPEECH, AND HEARING SERVICES IN SCHOOLS 31-46 (Jan. 2007). Yet these are exactly the personnel who would be needed to provide services to public school students, *plus* D.L. and other private school students, according to the Parents' construction of Section 504.

B. The 1997 Amendments to IDEA created a carefully-crafted set of limitations on the provision of services to parentally-placed private school students.

Beginning in 1997 and continuing in the current amendments, IDEA has included detailed provisions regarding the limited special education and related services that must be provided to parentally-placed private school students (*i.e.*, all eligible students with disabilities who are voluntarily placed by their parents in private schools when there is no dispute over the appropriateness of the special education services offered by the public school). 20 U.S.C. § 1412(a)(10)(A) (2012) (governing children enrolled in private schools by their parents). These

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 Education regulations, which provide that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special

education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a) (2012).

C. Allowing all students eligible under Section 504 to receive all services called for under a 504 plan would significantly undercut IDEA's limitations on the provision of services to privately-placed students.

The impact of adopting the interpretation of Section 504 urged by the Parents in this appeal would be to render the provisions – and limitations – of IDEA regarding services for parentally-placed private school students meaningless. Local school districts would be obliged not only to consult with private schools as a whole and to spend a proportionate amount on the class of private school students in the aggregate, as now required by 20 U.S.C. §§ 1412(a)(10)(A)(i)(I) and (iii)(IV) (2012), but also to supply any and all amounts necessary to provide services set forth in a Section 504 plan for any IDEA-eligible private school student who requested it.[2] Such students would have a right not only to some "equitable participation" under 20 U.S.C. § 1412(a)(10)(A)(i)(II) (2012), but rather

[2] This concern is by no means an idle worry. Counsel for the Parents, who also represented the parents in *Lower Merion School District v. Doe*, 593 Pa. 437, 931 A.2d 640 (2007), recognized this expansive result. An article discussing the decision on counsel's website explains that because IDEA-eligible students are necessarily protected by Section 504 as well, a "significant increase in dual enrollment of private school students protected by IDEA who will then be eligible under the Rehabilitation Act for services provided by the public schools" can be expected. Catherine Merino Reisman, *Supreme Court Affirms Rights of Privately Placed Special Ed. Students*, THE LEGAL INTELLIGENCER, Oct. 19, 2007, *available at* http://www.reismancarolla.com/PDFs/supremecourtaffirms.pdf.

a right to *complete* participation under Section 504. Most importantly, under the Parents' interpretation of Section 504's regulation, IDEA-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 student here was first evaluated and found *ineligible* for an IEP and services under IDEA. J.A. 41. Even had he been found eligible under IDEA, there is no dispute that under the above provisions applicable to parentally-placed private school students, he would have no *individual entitlement* to services from the school district. Nor, if the school district did determine that it could provide some services, would he be entitled to the full range of services offered via a public school IEP. Instead, the type and duration of services, if any, would be within IDEA's limitations.

In this case, after being found ineligible under IDEA, the student was nonetheless found to qualify for services under the lesser standard of eligibility

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 "special education services: counseling 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, however, no reasoned basis for these suggested distinctions.

The authority for all remedies under Section 504 is 29 U.S.C. § 794a(a)(2), which simply incorporates all the remedies available under Title VI of the Civil Rights Act of 1964. That remedial provision is not limited only to equitable rather than legal remedies. Accordingly, it has been held that Section 504 authorizes both injunctive relief, *e.g.*, *Lloyd v. Regional Transp. Auth.,* 548 F.2d 1277 (7th Cir. 1977), and monetary reimbursement, *e.g., Sands v. Runyon,* 28 F.3d 1323 (2d Cir.

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) (under IDEA's statutory predecessor, school district that failed to provide necessary educational services could under the Court's equitable remedial power be required to provide reimbursement for them). While at this point these Parents may want to maintain that a decision in their favor would not open the door to future demands for monetary reimbursement, and/or the provision of services at the private school, there is no legal basis to maintain those distinctions.

In sum, insofar as the Parents' position here rests on the notion that Section 504 can be read to limit a school district's obligation to provide only services, rather than payment for those services, that position does not hold water.

II. Adoption of the Parents' position would have substantial practical consequences for public schools.

A. The Parents' proposed expansion of Section 504 coverage would impose significant financial burdens upon schools.

The Parents' preferred interpretation of Section 504 would impose significant and unintended financial burdens on public schools. *Inter alia*, it would mean that any IDEA-eligible student, whose parents had elected to put him or her

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.

Currently, parents of students with disabilities, who are voluntarily placed in private school, are as a result, responsible for any related expenses such as therapy or counseling that the student may receive. If this Court were to adopt the Parents' position, however, the parents of these private school students would have a significant – and understandable – incentive to shift the cost of related and/or ancillary services from themselves, and/or the private school, to the public school district.

The effect of such a transfer of practical and financial responsibility would be significant, as all students who are eligible for special education services under IDEA are also protected from discrimination by Section 504. *See, e.g., Letter to Williams*, 21 IDELR 73 (OSEP 1994) (OSEP and OCR agreed that it is not possible for a student to be eligible under IDEA and not also covered by Section 504); *Letter to McKethan*, 25 IDELR 295 (OCR 1996) (Students eligible under IDEA are also entitled to protections of Section 504). Unlike IDEA, however, Section 504 provides no additional federal funding for implementation of its

mandates. This Court should not lightly embark on creating what would amount to another significant unfunded mandate to burden public schools.

2. Neither federal nor many state laws require, or provide funding for, these additional obligations.

There is no dispute that Section 504 provides no federal funding to support the significant expansion of services that public school systems would be required to provide were the Parents' position sustained. Furthermore, in most states, local school districts would not receive even generally-available state funding for private school students who seek services from public schools when they do not attend any classes there.

Some states, such as Pennsylvania, have decided as a matter of state law that local school districts must allow private school students the opportunity for partial or dual enrollment in public school for the purposes of accessing select public school services. *Lower Merion Sch. Dist. v. Doe*, 593 Pa. 437, 931 A.2d 640 (2007) (relying upon 22 Pa. Code §§ 15.1-15.11). Many other states, such as Maryland, Montana, New Jersey, Oklahoma, and West Virginia, do not require or permit such dual enrollment for the purposes of allowing private or non-public school students to participate in public school activities. *See, e.g., Thomas v. Allegany County Bd. of Educ.*, 51 Md. App. 312, 443 A.2d 622 (1982); *Kaptein v. Conrad Sch. Dist.*, 931 P.2d 1311 (Mont. 1997); *Forstrom v. Byrne*, 775 A.2d 65 (N.J. App. Div. 2001) (home schooled student had no right to receive speech-

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 "free part time public education"); *Jones v. West Virginia State Bd. of Educ.*, 218 W.Va. 52, 59-60, 622 S.E.2d 289, 296-97 (2005) (non public school students "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 students "would create a financial burden."). 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

do so. This involves a balancing of educational issues – including, importantly, the availability of scarce economic and personnel resources. It has, and will, vary from state to state. It should not be imposed as a matter of federal law, particularly without providing any attendant funding to local school districts to carry out that mandate.

B. The Parents' proposed expansion of Section 504 coverage to allow private school students with disabilities effectively to choose certain public school services would fragment services designed to be provided as an integrated whole, and render it infeasible for schools to provide all such requested services to private school students.

In addition to imposing unreasonable financial and administrative burdens on schools, allowing the parents of students eligible under IDEA, but enrolled by their parents in private schools, to choose particular services from a school district under Section 504 is not a practical or feasible resolution. Some of the kinds of accommodations frequently included on students' Section 504 plans are ones that cannot feasibly be provided by the public school staff on an after-school or part-time basis. Instead, they must be provided while the student is in school, in "real time." For example, "refocusing" a student with subtle redirection is a frequent accommodation – particularly for students who, like D.L. here, have ADHD. Likewise, extended time for assignments is a frequently employed accommodation. Yet these are obviously not strategies that public school staff can meaningfully provide on their own during an after-school visit. Other accommodations, such as

consultation between teachers, cannot be provided unilaterally by public school staff either, when the student's teachers are not part of the public school staff, and may or may not be accessible or cooperative.

In this situation, it would be detrimental to the educational interests of the child to separate the educational program (which takes place at the private school) from the related services that might be available under 504. The two are intended to operate together to effectively meet the child's educational needs. Public school staff would be forced to provide "related services" to an educational program over which they have no control and about which they are likely to be uninformed. There is no mechanism in the regulations for communication between a private and public school about the child's educational program because the regulations do not contemplate this untenable arrangement. In this scenario, the supposed "related" services become discrete and in fact, "unrelated" to the other aspects of the child's educational program.

The District Court here well understood that problem, observing:

> A Section 504 plan should be a blueprint to help a student in need of educational and related services. Hence, a plan might include tutoring, psychological counseling, preferential classroom consideration, special consideration for homework, extra time for test taking, etc. There would be, or should be, interaction between the student's teachers and the other professionals who provide the Section 504 services. It would appear difficult, if not infeasible, to have a Section 504 plan in which the education components are provided at a private school and the related services are provided by the public school system.

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. The Parents' Interpretation of Section 504's Administrative 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.

Section 504 provides that "No otherwise qualified individual with a disability…, shall, *solely 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 federal financial assistance…." 29 U.S.C. § 794 (2012) (emphasis added). The statute is about access to equitable opportunities for participation in the program receiving federal funding, *i.e.*, the public schools. Its purpose is not to guarantee an optimal educational program to each student on an individual basis.

In the present case, the Student has not been excluded from any public program or activity based solely on his disability. To the contrary, the Student has

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 – "solely" or otherwise – on the basis of the Student's disability.

Indeed, the Parents' position is 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 left the decision to local school divisions). Section 504, by its own unambiguous statutory terms, does not require the relief requested.

B. The seminal U.S. Supreme Court decision interpreting Section 504, *Southeastern Community College v. Davis*, makes clear that while Section 504 prohibits discrimination, it does not impose additional affirmative obligations upon federally-funded programs.

In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the U.S. Supreme Court reviewed and considered the express terms of Section 504, as well as its history and purpose. The Supreme Court made several holdings that are

directly applicable to this Court's disposition of the issues which the Parents raise here.

The Court first acknowledged, "the starting point in every case involving construction of a statute is the language itself." *Id.* at 405 (internal citations omitted). Based on the Court's review of the express language of Section 504, the Court held that it "requires only that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reasons of his handicap,' indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." *Id*. At the same time, the Supreme Court held, "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." *Id.* at 411. Since the decision in *Davis*, this Court has repeatedly reaffirmed that "the purpose of the Rehabilitation Act is to prevent discrimination against the handicapped; it is not intended to impose an affirmative obligation on all recipients of federal funds." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 984 (4th Cir. 1990); *Barnett v. Fairfax County Sch. Bd*., 895 F.2d 973, 984 (4th Cir. 1991) (denying claims under Section 504 on grounds that it prohibits discrimination, but does not require substantial modifications to the offered program).

Therefore, both the Supreme Court's decision in *Davis*, and this Court's subsequent decisions following that precedent, make clear that Section 504 prohibits exclusion of disabled individuals from federally funded programs, rather than demanding extensive affirmative action by public schools. As demonstrated above, it *would* create an extensive, and burdensome, new affirmative obligation were public school districts now to be made responsible for providing educational and therapeutic services not only to students attending the public schools, but also students attending private schools as well. Neither *Davis* nor Section 504 requires that type of expensive and burdensome affirmative step.

C. The text of the Section 504 regulation at issue does not require provision of services to private school students.

The language of the Section 504 regulation upon which the Parents rely has not previously been construed in a reported decision of this Court. Nevertheless, this Court has previously applied similar language in a former IDEA administrative regulation, denying a claim that a public school district was required to provide services to a private school student with disabilities. *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991).

In *Goodall*, the parents of a hearing impaired student unilaterally placed him in a private parochial school. They claimed that the Education of All Handicapped Children Act ("EHA", 20 U.S.C. §§ 1400 *et seq*.) (IDEA's direct statutory predecessor) required the school district to provide an interpreter to the student at

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, provided that, "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*." (emphasis added). 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 services to all students "in the recipient's jurisdiction," regardless of whether those 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 held that, "We find that Sec. 300.452 can only be interpreted to mean that a local school district need not pay for a child's related services when the child's parents choose to place her in a private school." 930 F.2d at 367.[4] Likewise here,

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[3] 34 C.F.R. § 104.33(a) (2012) provides: "(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 person's handicap." (emphasis added).

[4] This Court's further holding in *Goodall* that providing an interpreter on the grounds of a parochial school would pose an Establishment Clause problem, 930 F.2d at 370, has been superseded by the U.S. Supreme Court's decision in *Zobrest*

this Court should reject the Parents' simplistically literal argument that Section 504's similar regulation requires a school district to provide services to all students within its jurisdiction irrespective of whether those students are attending public school.

D. Nothing in Section 504's regulatory scheme is inconsistent with requiring school districts to identify students with disabilities, but not requiring them to provide services to those students whose parents decide nonetheless to place them in private school.

The Parents suggest that there is no reason to require schools to search for unidentified students with disabilities within their jurisdiction unless the school will be required to deliver services. Appellants' Br. at 19-20. That is not the case.

On the contrary, identifying a student as having a disability allows parents to make a choice as to whether to enroll their child in public school in order to obtain those services, or instead forgo those services if they decide – for other reasons – to enroll their child in a private school of their choice. Similarly, in the IDEA context, the U.S. Department of Education has explained the benefits of having a broad child find policy even with a more limited requirement for providing services. *See, e.g.*, *Memorandum to Chief State School Officers*, 34 IDELR 263 at Questions 1, 5 (OSEP May 4, 2000) (directing that local school divisions are required to conduct child find for all private school students, even if they have

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v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), but that holding is not at issue here.

decided not to provide any services to particular categories of students). As that Memorandum notes, once a child is identified as eligible, "Parents can choose [whether or] not to accept public education in favor of their parental private school placement." *Id*. at *4.

Applying Section 504's child find and Free Appropriate Public Education ("FAPE") requirements in this fashion ensures that parents have full information regarding their child's educational needs and the resources available in the public 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.

The Parents' Section 504 argument here is based almost entirely upon the text of an administrative regulation written by the U.S. Department of Education in an effort to implement Section 504 in the school context. 34 C.F.R. § 104.33 (2012). The Parents' brief (at 18-24) parses the regulation as though it were the text of the statute itself. It is not.

It has long been recognized that an administrative regulation cannot go further, or demand more, than the authority provided in the underlying statute

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 *Southeastern Community College v. Davis* recognized that, "[a]lthough an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.'" 442 U.S. at 411 (internal citations omitted). Applying this well-established principle to Section 504, the Supreme Court held that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if [the U.S. Department of Health, Education, and Welfare] has attempted to create such an obligation itself, it lacks the authority to do so." *Id*.

Similarly here, the Parents cannot by regulation impose upon the school district an affirmative obligation to serve disabled students in private schools, when it is not required to serve nondisabled private school students, and when such a mandate is not imposed by Section 504 itself. Hence, if 34 C.F.R. § 104.33

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

CONCLUSION

For the foregoing reasons and those arguments made in Appellee's brief, *Amici Curiae*, urge this Court to affirm the decision below.

Respectfully submitted,
/S/ Francisco M. Negrón, Jr.

Francisco M. Negrón, Jr.*
General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722
*Counsel of Record

John F. Cafferky, VSB No. 26179
(jcafferky@bklawva.com)
Andrea D. Gemignani, VSB No. 46889
(agemignani@bklawva.com)
BLANKINGSHIP & KEITH, P. C.
4020 University Drive, Suite 300
Fairfax, Virginia 22030
(703) 691-1235 (telephone)
(703) 691-3913 (facsimile)

Counsel for Amici Curiae

April 9, 2012

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Dated: April 9, 2012

/S/ Francisco M. Negrón, Jr.
Amici Curiae

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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:

David G. C. Arnold
Law Office of David Arnold
920 Matsonford Road, Suite 106
West Conshohocken, PA 19428.
(610) 397-0722
Davidgcarnold@aol.com

Katharine Allen Linzer
Linzer Law, LLC
4 Reservoir Circle, Suite 107
Towson, MD 21204
(443) 904-4546
katharinelinzer@yahoo.com

Leslie Robert Stellman, Esq.
HODES, PESSIN & KATZ, P.A.
901 Dulaney Valley Road, Suite 400
Towson, Maryland 21204
(410) 938-8800:
lstellman@hpklegal.com

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.

/S/ Francisco M. Negrón, Jr.
Counsel for *Amici Curiae*