No. 08-35057

In the United States Court of Appeals For the Ninth Circuit

DISABILITY LAW CENTER OF ALASKA, PLAINTIFF-APPELLANT

v.

ANCHORAGE SCHOOL DISTRICT,
DEFENDANT-RESPONDENT

On Appeal from the United States District Court for the District of Alaska
Civil Action No. CV-07-00131-RRB

Brief of *Amici Curiae* National School Boards Association, Association of Alaska School Boards, Arizona School Boards Association, California School Boards Association, Idaho School Boards Association, and Montana School Boards Association In Support of Defendant-Respondent

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[ON MOTION FOR LEAVE TO FILE]

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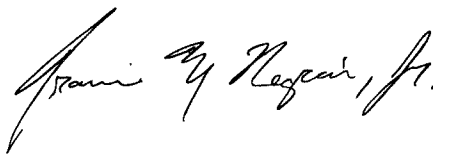

Francisco M. Negrón, Jr.

Dated: October 6, 2008

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The National School Boards Association represents the over 95,000 school board members who govern our nation's local school districts. The Alaska Association of School Boards, Arizona School Boards Association, California School Boards Association, Idaho School Boards Association, and Montana School Boards Association comprise the governing boards of school districts in states located in this Circuit. As representatives of school boards, *amici* believe this case presents issues of statewide and national significance, meriting resolution by this Court and submits this brief on motion for leave to file.

School districts in this and other circuits have received requests for student records from disability protection and advocacy ("P&A") groups, demanding access to student records under federal laws authorizing them to investigate abuse and neglect of individuals with disabilities in non-school settings. Schools have denied these requests based on federal laws protecting the privacy of student records. However, the repetitious press for records by P&A groups results in disruption of educational activities and a drain on limited resources. This Court's ruling will affect the ability of school districts to safeguard the confidentiality of student information in accordance with federal education privacy laws and help settle which federal laws control.

Because the request for records in this case suggests that what the Disability Law Center ("DLC") deems "abuse" and "neglect" could be based on the provision of special education services provided, *amici* are concerned that this request represents an unauthorized attempt to oversee special education services to students. *Amici* believe that federal and state laws specific to special education place this authority squarely and unambiguously in education agencies and that federal and state laws governing confidentiality of student records prohibit P&A groups from gaining access to this information through pretextual recourse to broad P&A statutes crafted with non-educational settings in mind.

SUMMARY OF THE ARGUMENT

The insistence by P&A groups like the DLC that they, unlike a wide array of other regulatory agencies, are entitled to wide access to confidential student records, is contradicted by the unambiguous provisions of federal education laws, the Family Educational Rights and Privacy Act ("FERPA")[1] and the Individuals with Disabilities Education Improvement Act ("IDEA 2004"), that were enacted to protect the confidentiality of student education records.[2] The provisions of these acts are directed specifically at the educational arena, are more specific as to

[1] 20 U.S.C. §§ 1232g.
[2] 20 U.S.C. § 1412(a)(8); 20 U.S.C. § 1417(c).

student records than are the general provisions of the "P&A statutes,"[3] and have been neither expressly nor implicitly overridden by the P&A statutes. Nothing in the P&A statutes suffices to overcome the clear language of FERPA and IDEA 2004, their legislative histories, and their implementing regulations. Neither do regulations implementing the P&A statutes nor one *amicus* brief submitted by federal agencies purportedly to the contrary.

The interpretation of the P&A statutes as "trumping" the education statutes, apart from its implausibility as a legal matter, is both unnecessary to protect the interests of children with disabilities and harmful in the cost and distraction it portends for school districts that may be subject to investigatory "fishing expeditions." Virtually no other societal institution is already subject to as intense regulatory oversight as are the public schools, particularly when it comes to the interests of children with disabilities. P&A groups have many options for investigating allegations where they may be raised, without special powers not afforded other agencies.

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[3] The Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 15041, *et seq.* ("DD Act"), the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801, *et seq.*, ("PAIMI") (originally entitled the Protection and Advocacy for Mentally Ill Individuals Act of 1986), and the Protection and Advocacy for Individual Rights Act of 1992, 29 U.S.C. § 794e, et seq. ("PAIR").

ARGUMENT

When it comes to the rights of the disabled, public schools are among of the most intensely regulated environments in the country. Unlike any other agencies of government, public schools are required not only to accommodate the disabled, but as a condition of receiving federal education funding, also are required to provide individually tailored programs of specially designed instruction to qualifying students. Schools provide these services subject to extensive and exhaustive laws and regulations that ensure students get the education to which they are entitled, in an appropriate environment that is free from discrimination, and in a manner that preserves their privacy interests.

In this case, DLC maintains that its need for information "trumps" clear and unambiguous statutory requirements to which schools are already subject. However, given that the education and treatment of students with disabilities is already so heavily regulated in the public school setting, the position urged by the DLC in this case, and by other P&A groups in this and other cases, does not meaningfully increase the protections afforded the disabled in the school context. What the protection and advocacy groups' interpretation of the various statutes does do is add ambiguity and confusion to the already complex network of laws, regulations, and oversight applicable to the education of children with disabilities, further impairing the ability of schools to comply. Schools need to know what

they can and cannot release to third parties from students' educational records. Schools should not be expected to guess what novel interpretations contrary to the plain and express meaning of the applicable statutes may be urged or accepted.

I. Release of the Requested Information Without the Express Consent of the Parents or Guardians of the Affected Students Would Violate Important Privacy Protections Afforded to Special Education Students under FERPA and IDEA 2004.

FERPA deals comprehensively and exclusively with privacy of student records in education institutions that receive federal funds. Congress first enacted FERPA in 1974 for two reasons: "to assure parents of students access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." Joint Statement in Explanation of the Buckley/Pell Amendment, 120 Cong. Rec. 39,858, 39,862 (Dec. 13, 1974). FERPA broadly mandates that schools, as a condition of receiving federal funding, must maintain the confidentiality of "personally identifiable information" contained in "education records." 20 U.S.C. § 1232g(b)(1). Unless an exception to FERPA applies, schools may not disclose personally identifiable information contained in education records to third parties without parental consent. *Id.*

Part of the impetus for the enactment of FERPA came from the findings and conclusions of a conference sponsored in 1969 by the Russell Sage Foundation to

examine school record keeping practices and to develop guidelines for the collection, maintenance, and dissemination of student records. A description of the conference's finding in the Congressional Record reveals, among many other problems, that third parties—many of them public entities pursuing their statutory duties—enjoyed wide access to student records. "When a halt was called to the routine release of student information in New York City several years ago, no fewer than 28 separate and distinct categories of outsiders called the board of education to complain that their usual sources of information about students had been cut off." 121 Cong. Rec. 13,990 (May 13, 1975). "[These categories] included FBI agents, military intelligence officers, welfare workers, policemen, probation officers, Selective Service board representatives, district attorneys, health department workers, and civil service commission officers." 120 Cong. Rec. 36,530 (Nov. 19, 1974). Senator Buckley, the principal sponsor of FERPA, stated that "the recommendations of the Conference in large part formed the basis of my amendment." 121 Cong. Rec. 13,990.

In short, one of the primary reasons FERPA was enacted was to stop the free-for-all of revealing student information to outside organizations—however well-meaning—without the consent of students or their parents. FERPA recognizes that a school's primary function is to educate students, and that records created about each student's education belong to the school, the student, and his or

her parents. Of course, other outside persons and organizations are interested in student educational records—from the police to the local newspaper to P&A groups to other parents in the school—for reasons both legitimate and nefarious, depending on the circumstances. But revealing student records simply because persons or organizations intend to use the records for an ostensibly benign or beneficent purpose was not the policy judgment call that Congress made in FERPA. Instead, Congress chose to protect all personally identifiable information contained in education records from release absent consent, except under specifically enumerated and limited exceptions—exceptions into which, as discussed below, the P&A groups do not fall.

While FERPA protects the privacy rights of all students with respect to personally identifiable information contained in their education records, students with disabilities who are eligible for special education have additional privacy rights under the confidentiality provisions of IDEA 2004. IDEA 2004 regulations, 34 C.F.R. §§ 300.610-627, require that the confidentiality of personally identifiable information be protected at all stages of record maintenance, including collection, storage, disclosure, and destruction. The regulations even limit disclosure to the state departments of education or the U.S. Department of Education ("ED"), unless disclosure is specifically authorized by FERPA and its implementing regulations. 34 C.F.R. § 300.622. Furthermore, IDEA 2004 regulations require education

agencies that monitor IDEA 2004 implementation to develop stringent policies to protect the confidentiality of student records and to provide all school personnel collecting or using personally identifiable information with training regarding the policies and FERPA requirements. 34 C.F.R. §§ 300.623 and .626. Yet, under the reading of the statutes proposed by DLC, disclosure to an agency governed by the Department of Health and Human Services ("HHS") would be permissible without any of the required protections.

II. FERPA Does Not Include an Express Exception for P&A Groups to Obtain the Contact Information for Parents of Special Education Students without Their Prior Consent.

Congress expressly included narrow exceptions defining when disclosure without parental consent is permitted. These exceptions include, *inter alia*, disclosure to teachers and school officials with a legitimate educational interest in the information, to juvenile justice systems, to some federal officials, to accrediting organizations, for health and safety emergencies, and in response to subpoenas. 20 U.S.C. §1232g(b)(1). "Directory information"[4] may be disclosed without parental

[4] Under FERPA, "directory information" is defined as follows:

> For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. §1232g(a)(5)(A). This section does not classify any information about parents or guardians, including their identities, as "directory information," and 34

consent, so long as parents are provided with the advance opportunity to "opt out" of such disclosure.

Significantly, while Congress considered what circumstances would justify nonconsensual disclosure, it did *not* include in FERPA any exception for P&A organizations or investigations. In the face of such conscious congressional decision-making in the exceptions to FERPA itself, DLC's argument that Congress intended to create additional exceptions by overriding FERPA strictures through the P&A statutes—at best only tenuously connected to special education services provided by public schools—is untenable.

Over the decades since FERPA was enacted and subsequent to adoption of the P&A statutes, Congress has made specific changes to the Act to allow certain people and organizations access to information without parental consent. For example, the USA PATRIOT Act of 2001 amended FERPA to allow the U.S. Attorney General to seek an *ex parte* order requiring an educational agency to allow the Attorney General to collect education records without the consent or knowledge of the student or parent, provided information in the records is relevant to an investigation or prosecution of particular terrorist offenses.[5] Likewise, the

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C.F.R. § 99.3(b) and (c) expressly include this type of information as "personally identifiable information" that cannot be disclosed under 20 U.S.C. §1232g(b)(1) without parental consent.

[5] P.L. 107-56, Oct. 26, 2001 § 507, encoded at 20 U.S.C. § 1232g (j).

No Child Left Behind Act of 2001 requires—rather than permits—the disclosure of students' names, addresses, and phone numbers to military recruiters, but also requires the school district to provide students and parents with notice of this policy and an opportunity to opt out of such disclosure.[6] In the eight times FERPA has been amended since the 1975 enactment of the DD Act, in the six times FERPA has been amended since the 1986 enactment of PAIMI, and in the four times FERPA has been amended since the 1992 enactment of PAIR—or, for that matter, in the subsequent legislative amendments to the P&A statutes themselves—Congress was free to create an explicit FERPA exception for P&A groups. It has not done so.[7]

DLC's argument also fails given the detailed regulatory requirements to which schools must adhere in responding to third-party requests for student information. Under FERPA regulations, school districts or individual schools that receive a request for student records may not disclose any information unless they determine that prior parental consent exists or that an exception applies.[8] 34

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[6] http://www.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html.

[7] The regulatory exceptions to FERPA's parental consent exceptions have paralleled the statutory changes, and like the statutory changes, none has included an exception for the release of information to P&A groups. 53 Fed. Reg. 11,943 (1988); 53 Fed. Reg. 19,368 (1988), as amended at 58 Fed. Reg. 3,189 (1993); 61 Fed. Reg. 59,292, 59,296 (1996); 65 Fed. Reg. 41,852, 41,853 (2000).

[8] It should be noted that FERPA does not require a school to disclose information even if parental consent has been obtained. Schools may, as a matter of state law or

C.F.R. § 99.30 and .31. The consent must specify the records to be disclosed, the purpose of the disclosure, and the party or class of parties to whom the disclosure may be made. 34 C.F.R. § 99.30(b). If no such consent has been provided, the district has no obligation to seek parental consent on behalf of the requester. In the absence of consent, the district may only disclose the requested information by first determining that one or more of the enumerated exceptions applies.[9] The district must keep a log of each request for access; if personally identifiable information is released, the log must identify the "legitimate interests" of the party obtaining the information. 34 C.F.R. §99.32(a).

Were this Court to accept DLC's position, P&A groups would be given a special right to circumvent these regulatory requirements, even though no statutory language clearly authorizes this legal bypass. In light of the extensive process the FERPA regulations impose on disclosure of student information, it is difficult to sustain the notion that Congress provided unfettered access to personally

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local policy, have more stringent disclosure criteria than established by FERPA. Thus, DLC's reading of P&A statutes would also implicitly impose on schools a duty under federal law to disclose student information even if the schools' own policy or practice or state law prohibited disclosure.

[9] This step can prove especially difficult and time consuming for school support staff who often handle third party requests for student information and must ensure that they are complying with FERPA requirements and properly applying the statutory exceptions. In addition, school administrators frequently become involved in the decision whether or not to disclose and commonly seek legal

identifiable information from education records by P&A groups through statutes that do not even purport to relate to education records.

Although the process for releasing records under FERPA is extensive and burdensome to schools, they recognize that FERPA imposes a serious responsibility on them to safeguard student privacy. Any misstep may result in harm to students and families as well as loss of federal funds. 20 U.S.C. §1232g(b)(1). While the loss of federal funds is unlikely, and parents cannot sue school districts for money damages under FERPA, parents have an expectation that school districts will comply with FERPA. If school districts fail to do so, parents can bring a complaint against the district with the Family Policy Compliance Office ("FPCO") of ED. FPCO can seek an injunction against the school district, but perhaps much more importantly, a FPCO investigation may generate negative publicity for the school district, particularly if the district is located in a smaller community. Here, the Anchorage School District refused to reveal the names and contact information of parents in order to protect family privacy as required by FERPA. DLC's argument here presupposes that because it will use the information to investigate allegations of abuse and neglect, the parents it contacts

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advice on particularly troublesome requests that require complex interpretation of the exceptions.

will agree that DLC is acting in their children's best interests and so accept the incursion on their privacy.

DLC and its *amici* contend that without an implied exception to FERPA, DLC would be prevented from carrying out its asserted mission of protecting students and their families from abuse and neglect at the hands of schools and their personnel. But DLC's claim that it would be deprived of any ability to find and contact parents rings hollow. Where DLC has received a complaint from a parent/guardian of a student with disabilities, the complaining parent might know the desired information or be able to find it out by asking his or her child or at any one of the myriad of school events such as open houses, parent teacher association meetings, parent teacher conferences, etc. For that matter, DLC could have attempted to find other concerned parents through a notice in the newspaper, a posting on its website, through the assistance of other disability partners in the community who work with families of children with disabilities, or distribution of informational flyers in public locations. DLC could also use legal process to collect the information by requesting the issuance of a subpoena. Noteworthy in this regard is the fact that, as noted above, Congress required even the U.S. Attorney General to obtain an *ex parte* order to obtain student records without

consent, even in the context of a terrorism investigation.[10] While these methods might be more time-consuming and less comprehensive in identifying all parents of children with disabilities, they would require no unauthorized disclosure of education records by the school district.

III. IDEA 2004 Reinforces FERPA's Confidentiality Provisions and Provides Extensive Substantive and Procedural Protections to Students Eligible for Special Education.

IDEA 2004 reinforces the protection of the privacy interests of special education students and their parents. 20 U.S.C. §1412(a)(8). The regulations implementing IDEA 2004 set forth specific requirements, in addition to those set forth under FERPA, for disclosure of educational records of special education students. 34 C.F.R. §§ 300.610-627. The reason for the added protections afforded students with disabilities is readily apparent—their records often contain confidential and sensitive medical, psychological, and therapeutic information, the disclosure of which without consent would be viewed by most families as a substantial invasion of privacy. Moreover, students with disabilities in school settings may face a history of stigma and discrimination, such that unauthorized disclosure of their eligibility for special education could result in exclusionary treatment or harassment. Nothing in IDEA 2004 or its implementing regulations

[10] *Supra*, at n. 3.

gives P&A groups access to personally identifiable information from educational records, such as the information sought by DLC in this case.

The IDEA has elaborate, detailed and extensive procedural and substantive protections for special education students. These procedures help parents serve as the primary advocates for their children and require the appointment of a qualified surrogate if the child's parent is unknown or unavailable. 20 U.S.C. § 1415(b)(2). The procedural safeguards available under IDEA 2004 also include the right to examine records, the right to an impartial hearing (including the right to conduct discovery), the right of appeal to state or federal court, the right to file a complaint with ED, and more. 20 U.S.C. §§ 1415. ED has implemented an extensive network of regulations to enforce the IDEA. 34 C.F.R. Part 300. These regulations include detailed procedural protections. 34 C.F.R. § 300.500, *et seq.* Special education students are also protected under state statutes and implementing regulations. *E.g.,* Alaska Stat. Chapter 47.80. Also available to parents, students over the age of 18, and organizations such as DLC, are the complaint procedures and remedies set forth under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12141 *et seq.*, and the Rehabilitation Act of 1973, 20 U.S.C. §§ 706-8 and 794-794b, and their respective implementing regulations.

There is no evidence as to whether DLC or any parents of special education students at Lake Otis Elementary School have availed themselves of any of these

numerous protections. More importantly, there could well be families who *have* pursued remedies under these statutes, thereby addressing whatever concerns they may have had, *while at the same time preserving their privacy interests in educational records.* Giving DLC access to confidential educational and special education records in the context of this elaborate system of protections is completely unnecessary, and would violate the privacy rights ensured by IDEA 2004 and FERPA. The balance of interests clearly favors preservation of the right to privacy in educational records.

P&A organizations can certainly advocate for children with disabilities, if the P&A group is retained by parents to provide legal representation in a due process hearing. Under such circumstances, the P&A group could easily secure consent to access the education records of their clients. Apart from direct representation, however, nothing in IDEA 2004 suggests that P&A groups have sweeping authority to investigate the adequacy of educational services provided in public schools. If Congress had wanted to give P&A groups access to specific information about students with disabilities for the purpose of conducting such investigations, Congress could have done so, but it did not.

Instead, under IDEA 2004, the responsibility to monitor compliance by local school systems is placed on ED and the state departments of education. The focus of federal and state monitoring activities is to improve the educational results and

functional outcomes for all children with disabilities. States are required to submit to ED annual compliance reports that measure performance of local districts as to the provision of free appropriate education to children with disabilities, the effectiveness of their methods of identifying children with disabilities, the use of dispute resolution procedures, and the disproportionate representation of racial and ethnic groups in special education. States must also make this information public. 20 U.S.C. § 1416. Contrary to DLC's argument in this case, students with disabilities are amply protected under IDEA 2004, without violating their rights to privacy in their educational records.

IV. Neither FERPA nor IDEA 2004 Is Overridden by the P&A Statutes.

In their *amicus* brief, the National Disabilities Rights Network, *et al.*, concede there is no conflict between FERPA/IDEA 2004 and the P&A statutes. Indeed, the two acts can easily be read together: Nothing in FERPA or IDEA 2004 prohibits P&A groups from investigating complaints and advocating for the disabled in schools, and nothing in the P&A statutes authorizes these groups to obtain information in violation of FERPA. DLC essentially attempts to create a false conflict, which it then argues has to be harmonized, by asserting that it cannot investigate without release of information in contravention of FERPA. This argument should be rejected.

The only apparent conflict presented in this case is between *ultra vires* regulations (42 C.F.R. § 51.43 (PAIMI) and/or 45 C.F.R. § 1386.22(i) (DD)), which purport to require an agency to provide guardian contact information when a request for information is denied, and the clear, express provisions of FERPA and IDEA 2004. The P&A statutes and FERPA/IDEA 2004 can be read together without creating exceptions to the educational privacy provisions out of thin air.

In any event, DLC's interpretation of the P&A statutes is unsupported by the statutes themselves or their legislative history and intent. Moreover, the P&A statutes, which were enacted after FERPA and more generally address the rights of the disabled, do not override the more specific confidentiality requirements of FERPA and IDEA 2004 with respect to the educational records of special education students.

A. FERPA and IDEA 2004 Specifically Address Educational Records and Personally Identifiable Information About Special Education Students.

There is little question that FERPA and IDEA 2004 are the more specific statutes when it comes to educational records of special education students and their personally identifiable information. FERPA specifically protects the privacy rights of all students regarding personally identifiable information contained in education records, while IDEA 2004 strengthens the privacy rights already

accorded by FERPA. It is apparent that IDEA 2004 and FERPA provisions were intended to control lawful disclosure of student records.

Allowing generalized P&A statutes to control over specific education records statutes would supercede express congressional intent, contradicting established principles of statutory interpretation. "Even where there are two statutes on the same subject, the earlier being special and the later being general, the special act controls as effective and all matters coming within the scope of the special statute are governed by its provisions." *Glover Const. Co. v. Andrus*, 591 F.2d 554 (10th Cir. 1979). *See also NLRB v. A-Plus Roofing*, 39 F.3d 1410, 1415 (9th Cir. 1994); *Markair, Inc. v. CAB*, 744 F.2d 1383, 1385 (9th Cir. 1984) ("It is a well-settled canon of statutory interpretation that specific provisions prevail over general provisions.").

B. The Plain Language of the P&A Statutes Does Not Support P&A Groups' Access to Student Records.

The statutory language in the laws allowing P&A groups access to facilities and records make it patently clear that they were never intended to apply to special education and related services a child receives under IDEA 2004 at a public school. The services and facilities subject to investigatory requests for information from designated advocacy organizations under P&A statutes are generally facilities or programs monitored by HHS. 45 C.F.R. § 1386.19. None of these acts contain

any references to public schools as covered facilities, nor do they define educational services to include "special education" and "related services," the terms Congress has used since the 1970s to describe services received through special education programs.

The DD Act indicates its purpose is:

> to assure that individuals with developmental disabilities and their families participate in the design of and have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs authorized under this subchapter.

42 U.S.C. §15001(b).

The policy provisions of the DD Act include the following:

> It is the policy of the United States that all programs, projects, and activities receiving assistance under this subchapter shall be carried out in a manner consistent with the principles that— ******
> (10) families of children with developmental disabilities need to have access to and use of safe and appropriate child care and before-school and after-school programs, in the most integrated settings, in order to enrich the participation of the children in community life;

42 U.S.C. §15001(c)(10).

The plain language of the DD Act belies the suggestion that this act, while referencing community services, individual supports, child care, and before-and-after-school programs, but not referencing public school programs in any way,

intended to cover the latter. Similarly, there is no reference to public schools, special education, or related services in either PAIMI or PAIR. The reason is obvious. The laws allowing the protection and advocacy service in a state access to facilities and records never were intended to apply to special education and the related services a child receives under IDEA at a public school. The principle is well established that the plain meaning of a statute controls its interpretation. *See U.S. v. Turkette*, 452 U.S. 576, 580 (1981); *Singh v. Gonzales,* 499 F.3d 969, 977 (9th Cir. 2007). In this case, the statutory language is clear and unambiguous: public school special education services are not included.

Despite the clear omission of special education services from the coverage of P&A statutes, the request for student information in this case, premised on allegations of "abuse" and "neglect," involves nothing more than an attempt to impermissibly control the level of services provided to children with disabilities in school programs by gaining access to confidential student records. Not only does DLC lack statutory authority for its investigatory foray, but to permit access to student records based on a naked averment of neglect and abuse would undermine the IDEA 2004 process, where decisions are made by a team of professionals and the student's parents after considering all of the information and special circumstances required under 20 U.S.C. § 1414(d). Absent express statutory authority, bare claims of neglect or abuse cannot override the comprehensive

scheme Congress created under IDEA 2004 to ensure children with disabilities receive a free appropriate public education.

C. The Legislative History of the P&A Statutes Does Not Support P&A Groups' Access to Student Records.

The legislative history of the P&A statutes, the understanding of the agencies that administer the statutes, and the fact that FERPA addresses educational records quite specifically, clearly establish that schools cannot make records available to P&A systems in violation of FERPA's privacy provisions.

The history and policy behind the statutes and regulations cited by DLC do not support its claimed authority to access information from school districts. The DD Act was enacted by Congress in reaction to the "inhumane and despicable conditions" discovered at Willowbrook, an institution for persons with developmental disabilities. *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.,* 97 F.3d 492, 494 (11th Cir. 1996); *Wisconsin Coalition for Advocacy v. Czaplewski,* 131 F. Supp.2d 1039, 1045 (E.D.Wis. 2001); *Iowa Protection and Advocacy Services v. Gerard Treatment Programs, L.L.C.,* 152 F. Supp.2d 1150, 1157 (N.D. Iowa 2001). In 1986 PAIMI was enacted after Congress held hearings to examine the care and treatment of institutionalized mentally disabled persons. The hearings specifically focused on "abhorrent

conditions and instances of gross abuse and neglect at [a psychiatric institution]." *Robbins v. Budke*, 739 F. Supp. 1479, 1481 (D.N.M. 1990).

With a genesis in the discovery of deplorable conditions in institutions *housing* and *treating* persons with developmental disabilities, these Acts have provided P&A systems with the authority to protect this vulnerable population. However, there is no legislation giving P&A systems authority over public schools, which neither house nor treat individuals with disabilities. Against this historical backdrop, DLC has not sufficiently established that it has any statutory authority over school districts that do not house or treat individuals with disabilities.

Furthermore, as noted by the Anchorage School District in its brief, during the comment period for the DD Act regulations, implementation of a regulation giving the DD Act precedence over other federal statutes, including FERPA, was rejected as being beyond the authority of the statute and the regulations: Developmental Disabilities Program, 61 Fed. Reg. 51,142 (1996) (codified at 45 C.F.R. part 1385). Thus, it is clear that neither Congress, in enacting the DD Act, nor the Developmental Disabilities Program, in its rule making process, intended for the records provisions of the DD Act to take precedence over FERPA. The fact that the DD Act was enacted later than FERPA, *and the fact that the agency that administers the DD Act specifically rejected its application to educational records*,

is dispositive in this case. The scope of the DD Act, while broad, does not override the requirements of FERPA.

D. The P&A Statutes Do Not Authorize Access to Students' Guardian Information.

DLC has argued that if access to student information is denied because it has failed to secure authorization for the release of records, school districts must nevertheless provide at least the names and contact information for the guardians of students with disabilities under 42 C.F.R. § 51.43 (PAIMI) and/or 45 C.F.R. § 1386.22(i) (the DD Act). DLC contends this is true even where there is no probable cause, simply because the records were being withheld because of lack of authorization. This argument fails because the agencies at issue in this case exceeded their authority when they promulgated 42 C.F.R. § 51.43 and 45 C.F.R. § 1386.22(i), and these regulations should be deemed *ultra vires*.

To determine whether an agency has over extended its authority, the act must be viewed as a "symmetrical and coherent regulatory scheme." *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 86 (2002). "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative scheme that Congress enacted into law." *Id.* at 91.

There is no provision whatsoever in either the PAIMI or the DD Act for the release of *guardian* information to P&As. The statutes' central provisions permit P&As to access their own clients' records, individuals for whom they have received a complaint and those individuals' records, and individuals for whom they have probable cause and those individuals' records. 42 U.S.C. § 10805(a)(4); 42 U.S.C. § 15043(i). However, the subject regulations purport to provide P&As access to guardian information any time access is denied because of lack of authorization, even without probable cause. Given the statutory language, the regulation upon which DLC relies in this case was beyond the scope of the agencies involved here, insofar as the regulation purports to require the production of *any* information without probable cause and/or the production of guardian information.

V. The Creative Interpretation of the P&A Statutes as Authorizing Oversight of Public Schools by P&A Groups and Trumping the Privacy Safeguards of FERPA and IDEA 2004 Has Caused Wasteful Litigation in This and Other Circuits.

Given the strict privacy requirements of FERPA and IDEA 2004, their careful enumeration of specific exceptions, and their complete silence as to the P&A statutes and groups, it should come as no surprise that the assertion that P&A groups have the authority to demand access to confidential records has resulted in school districts being dragged unnecessarily into court—including this one. In *Washington Protection and Advocacy System, Inc. v. Evergreen School District*,

C03-5062 FDB (W. Wash. 2003), *aff'd,* 71 Fed. Appx. 654 (9th Cir. 2003), the district court denied the state P&A group's request for a preliminary injunction seeking student names, parent names, and contact information for those participating in a special education program operated by the school district. As here, the Washington P&A system claimed it had probable cause to suspect abuse or neglect in the program based on complaints about a student's special education program, specifically that students were required to collect garbage as part of a work program for which they received credit.

The district court denied the requested injunction in a thoughtful opinion noting, among other things, that the court "is not sufficiently satisfied that the [P&A statutes] override FERPA and IDEA." *Id.* at p. 4. The district court relied in part on the comments noted above to proposed regulations in which HHS specifically recognized that the DD Act did *not* give it the authority to override other federal laws in general, and FERPA in particular. The court ruled the P&A statutes did not override FERPA and IDEA and concluded that the information sought could not be characterized as "directory information" that the district could otherwise release under FERPA. *Evergreen*, C03-5062 FDB at 5-7, n.1.

Other circuits faced with questions about the access of P&A groups to student information have reached varying results. In *Disability Rights Wisconsin v. State of Wisconsin Department of Public Instruction*, 463 F.3d 719 (7th Cir. 2006),

the court held that an advocacy group was entitled to access to unredacted copies of the state education agency's investigatory records relating to the use of a seclusion room as a disciplinary tool. In reaching its conclusion, the Seventh Circuit found that while students' privacy interests should not be ignored where implicated, there was no harm to the students or their parents in this case in permitting the P&A agency to have access.

In *State of Connecticut Office of Protection and Advocacy v. Hartford Board of Education*, 355 F. Supp. 2d 649 (D. Conn. 2005), the district court concluded the P&A group was entitled to access to a transitional learning academy and to parental contact information for certain students. On appeal, the Second Circuit acknowledged the issue of access to students' parent/guardian contact information, but declined to address it simply because the school district had abandoned its argument on appeal after HHS and ED jointly filed an *amicus* brief taking a position on the issue. *Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.,* 464 F.3d 229, 233, 237-38 (2d Cir. 2006).

In contrast, in *Unified School District No. 259 v. Disability Rights Center of Kansas*, 491 F.3d 1143, (10th Cir. 2007), the P&A group voluntarily withdrew its records request after the school district filed a declaratory judgment action asking the district court to rule on the FERPA question. For this reason, the Tenth Circuit held that the case was moot, leaving the FERPA issue unresolved.

The resort to litigation, rather than the legislative process, to attempt to create a broad investigatory exception to FERPA and IDEA 2004 privacy safeguards exacts a toll in time, attention, and money, at the expense of education and service to children.

VI. The Interpretation of FERPA Articulated in the ED/HHS *Amicus* Brief in the *Hartford* Case, Upon Which Appellant Relies, Should Be Rejected.

ED/HHS's *amicus* brief submitted in *Hartford* is contrary to directives from ED's own office tasked with enforcing FERPA, FPCO. That office has steadfastly held that schools cannot release "directory information" about students if it is linked to "non-directory information." Recently the agency stated:

> Please note that, under FERPA, a school may not disclose the names, addresses, and other "directory information" that is linked to non-directory information. For instance, a school may not disclose "directory information" on all students who are receiving services under IDEA or, like in the case before us, all children in the deaf education program.

Letter to Austin Independent School District, March 2, 2005.[11]

Not only is ED/HHS's position in its *amicus* brief in the *Hartford* case contrary to ED's previous interpretations of FERPA, it is also contrary to FERPA itself. No deference is due to an administrative agency's interpretation of a statute when the interpretation patently contradicts the statute. The judiciary is the final

[11] http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/tx030205.html

authority on issues of statutory construction and must reject administrative constructions that are contrary to clear congressional intent. *See, e. g.*, *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Webster v. Luther*, 163 U.S. 331, 342 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the question at issue, that intention is the law and must be given effect. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

As noted above, there is no exception to the parental consent requirement in FERPA for the release of personally identifiable information in an education record to a P&A group. In the *Hartford* case, ED and HHS argued that where the statutes are in conflict, the DD Act is "properly understood as a limited override of FERPA's generally applicable non-disclosure requirements." However, also as noted above, there is no conflict between the statutes. Statutes governing public schools pose no obstacle to the P&A groups in their core missions, and if they wish

to extend their investigatory scope to school settings, they have plenty of avenues by which they can do so within the legal framework that applies to this setting.

Moreover, the position taken by ED and HHS in the *Hartford* case is tantamount to rule-making by *amicus* brief and should not be considered authoritative. Significantly, pending changes to the regulations implementing FERPA include no P&A exception, notwithstanding ongoing litigation on this question in various jurisictions. *See* 73 Fed. Reg. 15,574. In addition, the regulations implementing IDEA 2004 specifically and expressly require that state complaint procedures be widely disseminated to, among other groups, "protection and advocacy agencies,"[12] suggesting not only that ED has already considered that the role of P&A groups in the special education arena is to participate in and/or file complaints under these state complaint procedures, but also that the department can, when it chooses provide for P&A participation through appropriate rule-making procedures. ED and HHS cannot now create a FERPA exception out of whole cloth, without the statutory authority to do so, and without following applicable rule-making procedures.

CONCLUSION

Public policy considerations favor not permitting P&A groups to access records governed by FERPA and IDEA 2004, unless the P&A group has parental

consent to do so or the request falls into one of FERPA's express exceptions. The balance of privacy and protection has already been established by Congress. Adoption of DLC's interpretation of the P&A statutes would disrupt this balance and essentially eviserate FERPA's and IDEA 2004's privacy provisions. If all a P&A group had to do to get confidential information protected by FERPA and/or IDEA 2004 is to request it under the auspices of conducting an investigation of alleged abuse and neglect, FERPA's and IDEA 2004's privacy provisions would be meaningless.

Moreover, because no express, statutory exception exists for disclosure of *any* information to P&A groups, if ED, HHS, and/or the courts are willing to create exceptions to FERPA and IDEA 2004 out of whole cloth and without statutory, or even regulatory exceptions, schools will have no way of knowing what information to disclose to P&A groups. Schools would be acting at their peril in determining whether or not to disclose information to P&As, and they will continue to be subjected to wasteful litigation on this point.

In light of the exhaustive protections already afforded students with disabilities in public schools, in light of the many existing options P&A groups already enjoy for soliciting information from parents where they suspect something untoward is occuring, and in light of the significant costs and distraction entailed

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[12] 34 C.F.R. 300.151(a)(2).

by the kind of wide and speculative net-casting the P&A groups contemplate by demanding routine and unfettered access to confidential information that Congress has chosen, through FERPA and IDEA 2004, to deny to a wide range of public agencies, this Court should affirm the District Court.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6701 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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Dated: October 6, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October 2008, I filed with the Clerk's Office of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, CA 94103, by first class mail, the required number of this Brief of *Amici Curiae* in support of Appellee. I further certify that the required number of copies were deposited in the United States mail, first class postage pre-paid, addressed to the following:

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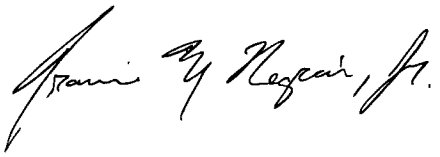

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