Advocates for Children of New York
Protecting every child's right to learn

February 13, 2013

Hon. Dennis Jacobs, Chief Judge
Hon. Susan L. Carney
Hon. Amalya L. Kearse
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *E.M. v. New York City Dep't of Education*
11-1427

Dear Judges Jacobs, Kearse, and Carney,

At the oral argument in the above captioned appeal, the Panel requested that the parties submit supplemental letters briefing the issue of whether Appellant had standing to seek tuition payment from Respondent, New York City Department of Education. Because this issue of standing has significant implications for our clients, we respectfully request that the Court consider the arguments set forth in this letter brief submitted by the below *amici curiae*. The parties to this appeal have consented to the filing of this letter brief. Fed. R. App. P. 29(a).

Advocates for Children of New York ("AFC") is a legal services organization that represents children and families in proceedings under the Individuals with Disabilities Education Act ("IDEA"). For over forty years, AFC has worked with low-income families to secure quality and equal public education services for children. AFC provides a range of direct services, including free individual case advocacy, and also works on institutional reform of educational policies and practices through advocacy and litigation.

The mission of Legal Services NYC Bronx ("LSNY-Bronx") is to advance society's promise to its most vulnerable members that they will have equal access to our legal system. LSNY-Bronx is the largest provider of free civil legal services in New York City and serves Bronx residents on a wide range of legal matters including public school education, focusing on advocacy for students with disabilities to ensure their receipt of appropriate special-education services.

The mission of Manhattan Legal Services ("MLS") is to seek equal justice for low-income residents of Manhattan through the provision of free legal representation, systemic advocacy and community education. MLS has a long and successful history

of working collaboratively with community-based organizations in the low-income communities of Manhattan including Chinatown, the Lower East Side, Harlem, and Washington Heights/Inwood to address the multiple legal needs of clients, including education, housing and public assistance, and filing for an order of protection while seeking custody. In addition to individual representation, MLS seeks to improve the systems that impact the lives of its low income clients. Thus, MLS works with community partners to address systemic problems such as education, the treatment of mentally ill people by the welfare system, affordable housing, and language access for disabled and immigrant victims of domestic violence.

New York Lawyers for the Public Interest ("NYLPI") is New York City's federally-funded Protection and Advocacy agency with a mandate to serve people with disabilities, including children in the education system to ensure they receive the free appropriate education guaranteed under the IDEA. Employing a community lawyering model, NYLPI's attorneys and advocates offer a combination of direct representation, community outreach, and varied methods of systemic advocacy.

Queens Legal Services ("QLS") is a non-profit, community-based legal services program serving low-income residents of Queens County since 1967. The QLS Education Rights Project works with school-aged children throughout New York City on a broad spectrum of education law issues, including the rights of disabled students to a free appropriate public education. The organization also provides assistance in the areas of housing, disability, immigration and government benefits.

South Brooklyn Legal Services ("SBLS") has provided free civil legal services to low-income Brooklyn residents since 1968. In addition to representing parents of disabled students seeking appropriate special education services, SBLS provides a broad range of advocacy in the areas of housing, consumer, employment, unemployment, disability and HIV, income tax, pension, family law, domestic violence, and foreclosure law. Its staff also has a long and productive history of working collaboratively with community-based organizations in the neighborhoods it serves.

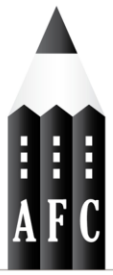
Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this letter brief in whole or in part, and that no party or person other than *amici* and their counsel contributed money towards the preparation or filing of this brief. *Amici curiae* are not owned by a parent corporation, and no publicly held corporation owns more than ten percent of stock in *amici.*

A Parent's Standing to Seek Redress for Her Child's Denial of FAPE is not Dependent on Her Own Financial Liability to the Private School.

This Court should let stand the ruling by the District Court that "Plaintiff has standing to pursue her claim for direct tuition reimbursement under IDEA." *E.M. v. New York City Dep't of Educ.*, 2011 WL 1044905 at *6 (S.D.N.Y. 2011). The decision by the State Review Officer ("SRO") that a parent does not have standing to seek tuition payment from a school district if the parent has not made any payments to the private school—even if the school district had denied the student free appropriate public education ("FAPE")—will create a two class system under the IDEA: children with disabilities from families with means will attend appropriate private schools pending the IDEA due process hearing but low income children with disabilities will be stuck in inappropriate placements until after the hearing officer rules in the parents' favor and any appeals (at which point the school year likely will be concluded).

The United States Supreme Court has recognized that a school district's failure to provide a FAPE is an injury itself that can be redressed under the IDEA. In *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), the Supreme Court held that parents may assert rights under the IDEA on their own behalf as well as on behalf of their children. The Court emphasized that "[t]he statute requires, in express terms, that States provide a child with a free appropriate public education 'at public expense.'" *Id.* at 533. As the Court concluded, "[t]hese rights, *which are not limited to certain procedural and reimbursement-related matters*, encompass the entitlement to a free appropriate public education for the parents' child." *Id.* (emphasis added).

In *S.W. v. New York City Dep't of Educ.*, 646 F. Supp.2d 346 (S.D.N.Y. 2009), the United States District Court for the Southern District of New York rejected the argument that the plaintiffs had not suffered an injury under the IDEA and therefore did not have standing to seek direct payment to the private school. *S.W.*, 646 F. Supp.2d at 356, 359. As in this case, by the time the parent's request for direct payment of tuition reached federal court, the student had already received the full year of education at the private school. In addition, the court held that the school contract imposed no financial obligation on the parent. *Id*. at 358. Judge Koeltl found that these two facts were not dispositive of standing. *Id.* at 358-59. Instead, the parent had suffered a redressable injury because the student's "education was not provided at public expense" and "[t]he IDEA requires school districts to provide disabled children with a FAPE." *Id.* at 359. As both *Winkelman* and *S.W.* make clear, a parent will suffer a harm recognized under the IDEA as a result of a school district's failure to provide an appropriate education at "public expense," without



regard to financial obligation or the fact that the student has already received education for the year at issue.

In *D.A. v. New York City Dep't of Educ.*, 769 F. Supp.2d 403 (S.D.N.Y. 2011), the New York City Department of Education argued that the plaintiff parent did not have standing to request that retrospective tuition payment be made to the school under the IDEA. The District Court disagreed, citing *S.W.* and holding that "a child's access to a FAPE cannot be made to depend on his or her family's financial ability to 'front' the costs of private school tuition." *D.A.*, 769 F. Supp.2d at 427. The District Court explained that the same three-prong *Burlington* test applicable to a reimbursement request applies to a request for retroactive direct tuition payment, and "parents who satisfy the *Burlington* factors have a right to retroactive tuition payment relief," irrespective of their ability to pay private school tuition costs. *Id.* at 428; *see also P.K. ex rel. S.K. v. New York City Dep't of Educ*., 819 F. Supp.2d 90, 99 (E.D.N.Y. 2011) (finding that the DOE should pay tuition costs even though parents had made no tuition payments); *Dep't of Educ., State of Haw. v. M.F. ex rel. R.F*., 840 F. Supp.2d 1214, 1237 (D. Hi. 2011)(district should pay tuition costs even though parents had made no tuition payments). *Accord E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist.*, No. 11-5510, 2012 WL 5936537, at *12 (S.D.N.Y. 2012) (explaining that parents have a right to seek tuition reimbursement for a unilateral private school placement).

Low-income parents are at risk of a real injury should the Court determine that direct payment to the school for tuition is not available under the IDEA. Tuition payment is an available remedy under the IDEA only when a school district already has failed to provide an appropriate education in a public school. *See Florence City Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Sch. Comm. of Burlington v. Dep't of Educ*., 471 U.S. 359, 369-70 (1985). Low-income parents—unlike parents with more resources—cannot afford to pay for tuition at an appropriate private school and seek reimbursement later. Because impartial hearing officers have recognized the availability of a direct tuition payment remedy, some private schools are willing to allow low-income students to begin attending without an advanced tuition payment while the students' parents pursue their due process remedies. If a holding by the Circuit were to remove direct payment as a remedy under the IDEA, these low-income parents would be forced to keep their children in inappropriate educational placements while they seek a remedy through the "ponderous" due process review process – the very situation the Supreme Court rejected in *Burlington* and the District Court rejected in *S.W.* and *D.A.* *See* 471 U.S. at 370; 646 F. Supp.2d at 359; 769 F. Supp.2d at 428. Such a holding would create two unequal sets of rights under the IDEA, depending on the parents' financial status, and impose an intolerable injury upon low-income parents and their children.

Amici therefore respectfully request that the Court affirm the District Court's ruling that parents of students with disabilities have standing to assert denials of FAPE and seek direct tuition payment to the school even when the parents have not yet paid any money to the school.

Respectfully,

/s/

Rebecca C. Shore
On behalf of *amici curiae* Advocates for Children of New York, Legal Services NYC Bronx, Manhattan Legal Services, New York Lawyers for the Public Interest, Queens Legal Services, and South Brooklyn Legal Services

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