08-3527-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

T.Y., K.Y., on behalf of T.Y.,

Plaintiffs-Appellants,

—against—

NEW YORK CITY DEPARTMENT OF EDUCATION, REGION 4,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

AMICUS BRIEF IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

None of the *amici* is owned by a parent corporation, and no publicly held corporation owns more than ten percent of stock in any *amicus*.

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INTEREST OF AMICI CURIAE

Amici curiae are legal service organizations that represent children and families in proceedings under the IDEA. A detailed description of the interest of each *amicus* is set forth at the conclusion of this brief. *Amici* submit this brief in support of the plaintiffs-appellants' petition for panel rehearing or rehearing en banc. The parties to this appeal have consented to the filing of this brief. *Amici* also submitted a motion dated October 23, 2009 seeking leave to file.

ARGUMENT

The panel's decision in *T.Y. v. New York City Department of Education*, No. 08-3527-cv (2d Cir. Oct. 9, 2009), held that "an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA." Op. at 11-12. Despite this holding, the panel's decision contains language that could be misread to suggest that a school district need not provide timely notice of an appropriate school placement, or provide an appropriate school placement at all, if the individualized education program ("IEP") recommends an appropriate program without identifying a school. Likewise, the panel's suggestion that T.Y.'s parents should have waited for appellee to propose a third school placement option before plaintiffs-appellants placed T.Y. in an appropriate setting can be read to mean that there is no limitation on when or how school placement recommendations should be made before a parent can seek redress pursuant to the IDEA.

Such dicta – if taken out of context – run contrary to clear United States Supreme Court and Second Circuit precedent that all children with disabilities should receive a free and appropriate public education that meets their unique needs. *See Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2491 (2009); *Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356, 363 (2d Cir. 2006).

These dicta are especially troublesome in New York City, where the school district's practice is to *not* identify a school on the IEP and the school district is obligated by court order and its own written policies to provide timely notice of a student's school assignment and to discuss school placement options with the parent in advance of making a placement offer. Accordingly, *amici* respectfully request that the Court amend its opinion to avoid any confusion or misinterpretation of its holding that would deny students with disabilities an appropriate education.

I. SUPREME COURT LAW AND THE LAW OF THIS CIRCUIT REQUIRE THE SCHOOL DISTRICT TO PROVIDE A TIMELY AND APPROPRIATE PLACEMENT, NOT MERELY A PROGRAM ON AN IEP.

Both the written IEP, detailing the student's educational program, and the school placement where the program will be carried out, must be substantively appropriate to ensure that the child is provided a free appropriate public education ("FAPE"). *See Muller v. Comm. on Special Educ. of the East Islip Union Free Sch. Dist*., 145 F.3d 95, 105 (2d Cir. 1998); *see also Forest Grove*, 129 S. Ct. at

2495 (observing that "the Act … provide[s] a remedy … when a school district offers a child inadequate special-education services"). Under the federal regulations that implement the IDEA, the appropriateness of the IEP is measured with regard to the actual school placement itself, not merely the written program. *See* 34 C.F.R. § 300.116(b)(2) ("In determining the educational placement of a child with a disability, … each public agency must ensure that … [t]he child's placement … [i]s based on the child's IEP."). The IDEA itself makes plain that a parent may bring a claim based either on the IEP program or the education that the student receives at a particular school placement. *See* 20 U.S.C. § 1415(b)(6)(A) (the procedural safeguards under the IDEA include the "opportunity for any party to present a complaint … with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child").

Supreme Court and Second Circuit case law also makes clear that in determining whether a district must reimburse a parent for a private placement, a court must analyze, among other things, "whether the school district's *placement pursuant to its IEP* is inappropriate." *Muller*, 145 F.3d at 105 (citing *School Comm. of the Town of Burlington v. Department of Educ.*, 471 U.S. 359, 369 (1985)) (emphasis added). Indeed, FAPE is not provided merely through a written IEP with a theoretical program, but instead is provided primarily through the actual

school placement where the student receives the education.[1] And, when the school district delays the student's appropriate school placement, the IDEA furnishes a remedy. *Forest Grove*, 129 S. Ct. at 2495 (recognizing viability of parent's claim for reimbursement that "vividly demonstrates the problem of delay."). As it must, courts' determinations of whether a school district provided a FAPE often include consideration of the students' actual assigned school settings.[2]

As the panel recognized in its opinion, the DOE's practice is to not recommend a specific school location on a student's IEP. Op. at 9. Instead, under the DOE policy and as required by court order, the DOE must recommend a

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[1] *Concerned Parents & Citizens v. N.Y. City Bd. Of Educ.*, 629 F.2d 751, 753 (2d Cir. 1980), does not alter these requirements. That case involved a unique situation in which a school building was shut down mid-year, and the classes had to be moved to new buildings. The court addressed only "the narrow question … whether the transfer of handicapped children in special classes at one school to substantially similar classes at other schools within the same school district constitutes a change in 'placement' sufficient to trigger the Act's prior notice and hearing requirements." The court went on to point out that while parents were not entitled to prior notice, they still retained the right to challenge the appropriateness of the actual school placements in due process hearings. *Id*. at 756-57.

Recognizing that *Concerned Parents* addressed a narrow question, courts in other contexts have held that FAPE requires both appropriate educational services and an appropriate school placement. *See, e.g.*, *Board of Educ. v. Illinois State Bd. of Educ.*, 103 F.3d 545, 548 (7th Cir. 1996); *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22 (D.D.C. 2004).

[2] *See, e.g., R.R. v. Scarsdale Sch. Dist*., No. 08 Civ. 247, 2009 WL 1360980, at *9 (S.D.N.Y. May 15, 2009); *Jennifer D. v. N.Y. C. Dep't of Educ*., 550 F. Supp. 2d 420, 431 (S.D.N.Y. 2008); *Thies v. New York City Bd. of Educ*., No. 07 Civ. 2000, 2008 WL 344728, at *3 (S.D.N.Y. Feb. 4, 2008); *Wall v. Mattituck-Cutchogue Sch. Dist*., 945 F.Supp. 501, 511 (E.D.N.Y. 1996).

specific and appropriate school placement by June 15 for students beginning kindergarten, and by August 15 for students in other grades. [3]

But the DOE often does not provide students with disabilities with timely recommendations for placements at actual school locations. According to a 2008 State Comptroller Report, "[i]n each of the past four years, more than two thirds of the cases [in New York City] were in the placement process—and thus were not receiving recommended services—for more than 60 [school] days."[4] Thus, even if the recommended school placement is appropriate when ultimately received, many students are stuck for nearly half a school year or more in a school that is not providing the appropriate education to which they are entitled.

Moreover, the recommended school placements – even if timely – are sometimes not appropriate. For example, *amici* have represented students whose psychiatric conditions make them highly fragile, but who were nonetheless inappropriately placed in classes with students who are aggressive because both types of students can be classified as emotionally disturbed. Likewise, *amici* have

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[3] In New York City these timelines are set out in both the DOE's Procedures Manual and in a stipulation in *Jose P. v. Sobol*. *See* New York City Department of Education, *Standard Operating Procedures Manual: The Referral, Evaluation and Placement of School-Age Students with Disabilities* (Feb. 2009) ("SOPM"), *available at* http://schools.nyc.gov/NR/rdonlyres/5F3A5562-563C-4870-871F-BB9156EEE60B/0/03062009SOPM.pdf; Stipulation at ¶ 30(d), *Jose P. v. Sobol*, 79 C. 270(L) (E.D.N.Y. 1988) ("*Jose P.*, 1988 Stip.").

[4] *See* Office of the State Comptroller, Waiting for Special Education (June 2008), at 7, *available at* http://www.osc.state.ny.us/osdc/rpt3-2009.pdf.

represented students with agoraphobia who have been placed in schools with large student populations, as well as students who have been placed inappropriately in classes with too broad an age range. *See* 8 N.Y.C.R.R. § 200.6(h)(5). *Amici* have also represented students who were given placements in schools that do not have the programs described on their IEPs or that do not have available seats for the students. In each case, it is possible that the program described on the IEP was appropriate, but the DOE did not comply with the IDEA when it failed to offer an appropriate school placement for the student.

Amici understand that the panel's definition of "[e]ducational placement," Op. at 10, and "location," Op. at 11, refer solely to the procedural adequacy of the IEP, and do not excuse a school district from its obligation to provide each student with a disability a timely placement at an actual school location that is appropriate. Nevertheless, the DOE has used the same or similar reasoning to claim that the IDEA requires a school district to provide merely an appropriate program on the IEP, and that once that program is on the IEP, the DOE has complied with the IDEA, *even when the DOE did not provide a school placement*.[5] As discussed above, however, FAPE requires both an appropriate program on the IEP and a school placement that actually provides the appropriate education, and any

[5] *See* Def. Br. In Support of Summary Judgment, *M.P.G. v. New York City Dep't of Educ.*, No. 08 Civ. 8051, Dkt. No. 40 (S.D.N.Y. May 22, 2009), at 11-12.

interpretation to the contrary would violate clearly established Supreme Court and Second Circuit precedent and delay students' receipt of FAPE.

Amici therefore respectfully request that the Court amend the panel's opinion to clarify that, although the failure to identify a specific school on the IEP may not be a *per se* procedural IDEA violation, the IDEA still requires the school district to timely identify a specific and appropriate school for the student to attend.

II. THE COURT'S LANGUAGE COULD BE MISCONSTRUED TO MEAN THAT THE DOE HAS UNLIMITED OPPORTUNITIES TO OFFER A SCHOOL PLACEMENT TO THE PARENT.

In *dicta*, the panel observed that, after receiving two placements from the DOE, "The parents then enrolled their child into the Rebecca School without allowing the NYCDOE an opportunity to offer yet another school. The parents' actions suggest that they seek a 'veto' over school choice, rather than 'input' – a power the IDEA clearly does not grant them." Op. at 12. The panel's suggestion that the parents of T.Y. should have waited for a third placement offer could result in parents of children with special education needs being improperly excluded from the placement process and leaving them unable to seek meaningful redress even where they were not offered an appropriate placement before the start of the school year or in compliance with mandated timelines.

The IDEA identifies parents as required members of the team that makes placement decisions for the student. 20 U.S.C. § 1414(e); 34 C.F.R. § 300.327. In

New York City, both the stipulation in *Jose P.* and the SOPM detail how parents should be included in the selection of the actual placement for implementation of the IEP. *See Jose P.*, 1988 Stip. ¶ 30(d); *see, e.g.*, SOPM at 108-109, 114-117.

Jose P. requires that a placement officer meet with the parent at the conclusion of an IEP meeting to discuss possible placement sites and provide the parent with information concerning the age range and functional levels of the students in the particular classes as well as information on how to visit placement sites under consideration. *Jose P.*, 1988 Stip. ¶ 26. Similarly, the DOE's 2009 SOPM requires that a discussion about the student's placement and school options take place at the IEP meeting. SOPM at 108-109. The SOPM reiterates throughout that a parent has a right to visit a school placement to determine if it is appropriate before accepting the offer. *Id*. at 89, 109, 114, 116, 117.

Despite these mandates for discussion, the DOE in most cases does not discuss the school at the IEP meeting and instead merely mails New York City parents the name of a school sometimes months after the IEP meeting. With so little information given, parents typically must visit the proposed placement and question school officials to determine whether a proposed school site can comply with the mandates of their child's IEP and meet their child's academic, social, and emotional needs.

If the parent notifies the DOE that the proposed school placement is inappropriate, the DOE then has an opportunity to respond to the parent's concerns. The process is not intended to be endless, however, and the DOE does not have infinite time or opportunity to repeatedly recommend inappropriate placements while the student places his or her education on hold. *See Burlington*, 471 U.S. at 372 ("Congress did not intend to force parents to leave the child in what may turn out to be an inappropriate educational placement.").

A parent's remedy for an inappropriate placement is to seek redress through an impartial hearing, as the parents of T.Y. did here. Such a parent is not seeking "veto" power over placement decisions; rather, the parent is playing the role Congress envisioned for him or her in being an active participant in the process. *See Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516, 527 (2007) ("[T]he [IDEA] does not *sub silentio* or by implication bar parents from seeking to vindicate the rights accorded to them once the time comes to file a civil action. Through its provisions for expansive review and extensive parental involvement, the statute leads to just the opposite result.").

The panel's suggestion that the parents should have waited for a third placement offer even after they rejected the first two, *see* Op. at 12, would render this process meaningless. Such language poses the risk that, rather than being able to seek redress upon receipt of an inappropriate placement offer, parents would be

forced to wait indefinitely for multiple placement offers, while their child waits in an inappropriate setting without appropriate educational services.

Accordingly, *amici* respectfully request that the Court amend the panel's opinion to make clear that parents are not obligated to wait for continued placement offers before seeking redress through an impartial hearing.

CONCLUSION

For the reasons set forth above, *amici* respectfully request that the Court grant plaintiffs-appellants' petition for panel rehearing or rehearing en banc.

Dated October 27, 2009
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This 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 this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

2. Pursuant to Fed. R. App. P. 29(d), this *amicus* brief in support of plaintiffs-appellants' petition for panel rehearing or rehearing en banc is to be no longer than seven-and-one-half pages. *Amici* moved this Court on October 23, 2009 for leave to file an oversized brief of no longer than ten pages. This brief is not longer than ten pages.

Dated October 27, 2009
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DESCRIPTION OF AMICI CURIAE

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For over thirty-seven 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.

LEGAL SERVICES NYC – BRONX

Legal Services NYC – Bronx ("LS NYC – Bronx") is a not-for-profit law firm dedicated to assisting low-income residents of the Bronx protect their legal rights. The firm's lawyers, legal assistants, and support staff have years of experience providing Bronx residents representation in various civil legal matters including education law. LS NYC – Bronx provides direct representation to dozens of low income students each year to ensure children with disabilities receive the free appropriate education guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400-1450.

NEW YORK LAWYERS FOR THE PUBLIC INTEREST

New York Lawyers for the Public Interest ("NYLPI") is New York City's federally-funded Protection and Advocacy agency, with a mandate to serve, among other groups, children with disabilities in the education system in New York City

to ensure they receive the free appropriate education guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400-1450. NYLPI recently intervened at the Supreme Court as amicus curiae jointly with National Disabilities Rights Network (NDRN) in *Board of Education of City School District of New York v. Tom F*., 552 U.S. 1 (2007), and in *Forest Grove School District v. T.A.*, 129S. Ct. 2484 (2009), cases concerning the educational rights of children with disabilities.

CERTIFICATE OF SERVICE

2008-3527-cv T.Y. v. New York City Department of Education

I hereby certify that two copies of this Amicus Brief In Support Of Petition For Panel Rehearing Or Rehearing En Banc were sent by Hand delivery to:

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ANTI-VIRUS CERTIFICATION

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I, Jacqueline Gordon, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 10/27/2009) and found to be VIRUS FREE.

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