18-3157

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

LEJEUNE G., individually and on behalf of T.T.,

Plaintiff-Appellant,

—v.—

KHEPERA CHARTER SCHOOL; PENNSYLVANIA SECRETARY OF EDUCATION;
COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA DEPARTMENT OF EDUCATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. AND THE EDUCATION LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates

The Education Law Center

1. No amici is a publicly held corporation or other publicly held entity;
2. No amici has parent corporations; and
3. No amici has 10% or more of stock owned by a corporation.

By: */s/ Catherine Merino Reisman*
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STATEMENT OF INTEREST OF THE AMICI CURIAE[1]

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy. To that end, COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties.

COPAA provides resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400 *et seq*.[2] COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983),

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[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* state that: (A) there is no party, or counsel for a party in the pending appeal who authored the amici brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amici* and their members.

[2] "Improving educational results for children with disabilities is an essential element of [the U.S.] national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. (ADA).

Accordingly, COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under IDEA and other educational policies. Indeed, the core of IDEA is codified in its goal that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . ." 20 U.S.C. § 1400(d)(1)(A).

COPAA has long been interested in the rights of students with disabilities who attend charter schools. Most recently, COPAA, under agreement from the National Council on Disability (NCD)[3] and in cooperation with the Center for Law and Education, conducted research and prepared a report entitled *Charter Schools, Implications for Children with Disabilities, available at* http://bit.ly/ncdcharters.

[3] NCD is an independent federal agency mandated with the responsibility of providing the President and Congress policy recommendations that promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into society for people with disabilities. On November 15, 2018, NCD transmitted the charter schools report to the President and Congress.

The Education Law Center-PA (ELC) is a non-profit legal advocacy organization dedicated to ensuring access to a quality public education for all children in Pennsylvania. For over 40 years, ELC has advocated on behalf of the most at-risk students — children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English language learners, LGBT students, and children experiencing homelessness. Our priority areas include ensuring that all students with disabilities have equal access to the full range of educational opportunities and receive the free, appropriate, public education to which they are legally entitled under federal and state law. We work to eliminate systemic inequalities that lead to disparate educational outcomes based on race, poverty, and disability status, among other categories. For many years, ELC has advocated on behalf of children with disabilities to ensure equal access to charter schools and that they receive the services and supports they need. ELC has also challenged the state's special education funding scheme applicable to charter schools which incentives these schools from educating children with more significant disabilities.[4]

Because of their work involving education of students with disabilities,

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[4] *See ELC Analysis: Inequities in Pennsylvania's Charter Sector: Segregation by Disability* (February 2017) available at https://www.elc-pa.org/wp-content/uploads/2017/02/ELC-Analysis-Inequities-in-PA-Charter-Schools-Segregation-by-Disability.pdf

Amici's interest in this case lies in their deep commitment to ensuring that all children with disabilities obtain needed special education services.

Amici adopts the Statement of the Case in Appellant's Brief at 4-17 and the Statement of the Issues in Appellant's Brief at 3.

Amici received consent from Appellants and Appellee Pennsylvania Department of Education (PDE) for the filing of this brief.

SUMMARY OF ARGUMENT

IDEA ensures the rights of a child with disabilities to appropriate educational programming and supports through development of an Individual Education Program (IEP) that is "appropriately ambitious" to enable him to make progress in light of his unique circumstances. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). *Endrew F.* explained that children with disabilities are to be challenged to reach their potential progress just as their non-disabled peers are, regardless of the severity of their disabilities. Moreover, the IEP must also describe the "special education and related services . . . that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum." 20 U.S.C. §1414(d)(1)(A)(i)(IV)).

To that end, IDEA contains numerous procedural safeguards requiring that parents play a central role in the education decision-making process, in order to ensure that students get the free appropriate public education (FAPE) promised by

IDEA. *See* 20 U.S.C. § 1415. "These procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances." *Endrew F.*, 137 S. Ct. at 994.

Importantly, IDEA places ultimate responsibility for ensuring that students get FAPE on the states, which are responsible for having in effect policies and procedures that make FAPE available to all children with disabilities between the ages of 3 and 21. 20 U.S.C. § 1412(a)(1). States are responsible for general supervision of educational programs in the state. 20 U.S.C. § 1411. States may provide for charter schools to be free-standing Local Educational Agencies (LEAs) or for charter schools to be operated by Local Educational Agencies. *See* 20 U.S.C. § 1401(19) (defining Local Educational Agency).

In this case, Pennsylvania has provided for charter schools to be free-standing LEAs. Because Khepera Charter School (Khepera)was not able to provide T.T. with FAPE, his parent pursued procedural remedies and initiated due process proceedings pursuant to 20 U.S.C. § 1415(f).

Congress specifically required parents to participate in a resolution session with the goal of resolving the dispute prior to the hearing. 20 U.S.C. § 1415(1)(B). Written agreements obtained at resolution sessions are legally binding agreements. 20 U.S.C. § 1415(1)(B)(iii). Here, Khepera and the parent entered into a resolution agreement that provided for the charter school to place T.T. at a private school for children with disabilities, the Y.A.L.E. School (Y.A.L.E.) for the 2015-2016 school

year.

Amici are concerned that the decision below deprives students of FAPE by allowing a state to evade its responsibility for supervising charter schools by making resolution agreements reached with charter schools that provide for tuition reimbursement unenforceable when charter schools in difficult financial straits do not comply with resolution agreements. Further, *Amici* believe that if the decision below stands, it will have a disparate impact on students of limited economic means.

ARGUMENT

I. CONGRESS PASSED IDEA TO ENSURE AN APPROPRIATE EDUCATION FOR *ALL* CHILDREN WITH DISABILITIES

In the 1970s, Congress held hearings investigating the quality of educational instruction provided to children with disabilities. These hearings established that public school districts throughout the county had wholly excluded millions of children with a multitude of disabilities or placed those children in programs where they received no educational benefit. *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare,* 93d Cong., 1st Sess. (1973-74). At that time, statistics showed that "only 55 percent of the school-aged handicapped children and 22 percent of the pre-school-aged handicapped children [were] receiving special educational services." Senator Randolph, *Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public*

Welfare, 94th Cong., 1st Sess., 1 (1975). Parents and educators discussed the widespread failure of states to provide the extent of supportive services necessary to meet the needs of children with varying degrees and forms of disabilities. Statistics compiled for Congress by the Office of Education at that time revealed that lack of access to appropriate education harmed children of all ages and with a range of disabilities. For example, pupils excluded or receiving inappropriate education included 82% of "emotionally disturbed" children; 82% of "hard-of-hearing" children; 67% of "deaf-blind" and "other multi-handicapped" children; and 88% of those classified "learning disabled." S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975) reprinted in 1976 U.S. C.C.A.N., 1425, 1429-32; H.R. Rep. No. 332, 94th Cong., 1st Sess. 11-12 (1975).

In light of these gross disparities regarding access to educational programming for students with disabilities, Congress enacted Public Law 94-142, the Education for All Handicapped Children Act in 1975, which, following various amendments, is now known as IDEA. IDEA requires that state and local public education agencies enact policies and procedures to ensure that all students with disabilities receive a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). In enacting these laws, Congress did not merely require access, but Congress mandated that states provide children with disabilities with a free appropriate public education (FAPE) in

order to receive federal funds. 20 U.S.C. § 1412(a)(1).

II. THE DECISION BELOW IMPROPERLY ABSOLVES THE STATE OF ITS RESPONSIBILITY TO ENSURE THAT STUDENTS IN CHARTER SCHOOLS OBTAIN FAPE

Although IDEA places primary responsibility for direct provision of services upon the LEA, "the State Educational Agency (SEA) is responsible for general supervision and implementation of the IDEA in the state." *Lejeune G. v. Khepera Charter Sch.*, 327 F. Supp. 3d 785, 789 (E.D. Pa. 2018) (citing 20 U.S.C. § 1412(a)(11)); *see also Kruelle v. New Castle Cty. Sch. Dist.*, 642 F.2d 687, 696 (3d Cir. 1981) (IDEA centralized primary responsibility to provide FAPE with SEA). When an LEA is unable to deliver FAPE, the SEA must provide special education and related services directly to children with disabilities." *Id.* (citing 20 U.S.C. § 1413(g)). There is no dispute that Khepera was the LEA responsible for T.T.'s education. *See id.* at 789 n.3; 34 C.F.R. § 300.7; *see also* 22 Pa. Code § 711.3.

Pennsylvania made the choice to allow charter schools to exist as independent LEAs within the Commonwealth.[5] When, as a consequence of

[5] State law governs the "creation, oversight, legal status, and governance of charter schools." Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. Rev. 654, 706 (2012), available at http://bit.ly/gardacultureclash. This creates a risk that charter schools will be unable to meet their obligations under IDEA. Garda, 90 N.C. L. Rev. at 694 ("Every major study conducted on charter schools . . . concludes that charter schools that are linked with a special education infrastructure better serve disabled students")

this structure, a charter school cannot meet its students' IDEA needs, PDE is responsible to the students. Thus, when Khepera became unable to to fund T.T.'s placement at Y.A.L.E. pursuant to a binding resolution agreement, PDE became responsible for those obligations.

Unfortunately, the district court went astray in interpreting 20 U.S.C. § 1413(g)(2)[6] to confer unlimited authority upon PDE to ignore the binding commitments that Khepera made in the resolution agreement with T.T.'s parent. Notwithstanding the fact that PDE was "required to step in to the breach," *Lejeune G.*, 327 F. Supp. 3d at 800, when Khepera could not comply with its obligations, the district court refused to require PDE to fund T.T.'s placement at Y.A.L.E.

The district court's conclusion that T.T. received a FAPE because Y.A.L.E. provided services without payment ignores the fact that FAPE is defined as "special education and related services that '(A) *have been provided at public expense* . . .' (B) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved, and (D) are provided in conformity with the [IEP]." *Id.* at 789 (quoting 20 U.S.C. § 1401(9))

[6] This clause provides that a SEA "may provide special education and related services . . . in such manner and at such locations . . . as the State educational agency considers appropriate." 20 U.S.C. § 1413(g)(2).

(emphasis supplied). T.T. did not receive services at Y.A.L.E. at public expense; he received those services at private expense with the anticipation that the state would ensure payment of the funds would pursuant to T.T.'s rights under IDEA. Accordingly, Y.A.L.E., a private entity, absorbed the costs that the SEA was obligated to fund.

The district court's ruling runs afoul of the plain language of the statute, which requires an appropriate education "at *public* expense." In addition, as discussed in the next section, if the decision below stands, private schools will be unwilling to serve low income students who have strong IDEA claims for tuition reimbursement from charter schools.

III. THE DISTRICT COURT'S DECISION WILL HAVE A DISPARATE IMPACT ON CHILDREN OF LIMITED ECONOMIC MEANS WHO ATTEND CHARTER SCHOOLS

Pennsylvania's most heavily chartered communities – Philadelphia, Pittsburgh, Chester-Upland, York City, and Erie City – all have large populations of limited economic means. *See ELC Analysis: Inequities in Pennsylvania's Charter Sector: Segregation by Disability* (February 2017) available at https://www.elc-pa.org/wp-content/uploads/2017/02/ELC-Analysis-Inequities-in-PA-Charter-Schools-Segregation-by-Disability.pdf. Thus, this ruling will detrimentally affect the neediest of Pennsylvania's students by undermining their access to tuition reimbursement.

Nothing in IDEA indicates "that when Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some

parents would be able to enforce that mandate." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007). The statute instead took pains to ensure that *all* children and their parents are able to enforce special education rights of students with disabilities. *Id.* (citing 20 U.S.C. § 1400(d)(1)(B)).

Indeed, Congress has repeatedly amended IDEA to "make the system of private enforcement more accessible to low-income families." Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413, 1424 (2011), *available at* http://scholarship.law.georgetown.edu/facpub/691. With the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415), Congress added fee-shifting provisions. Such legislation is "thought to level the playing field for individuals without financial resources, as they are designed encourage attorneys to take up the meritorious cases of plaintiffs, especially those who would otherwise not be able to afford legal fees." *Pasachoff*, 86 Notre Dame L. Rev. at 1425. Congress also required creation of a mediation option for disputes, "designed in part to make the enforcement system friendlier to low-income families, on the theory that a less adversarial process would reduce the need for an attorney." *Id.* Additionally, the legislature modified the state complaint system in 1992 and in 1999 in an effort "to improve low-income children's access to this mechanism as well as the mechanism's utility." *Id.* Indeed, the resolution process itself also includes certain safeguards designed to support parents who cannot afford an attorney. *See, e.g.*,34 C.F.R. § 300.510(a)(ii) (resolution

session "[m]ay not include an attorney of the LEA unless the parent is accompanied by an attorney.").

Notwithstanding these efforts, many commentators have rightfully observed that the tuition reimbursement "mechanism for parental enforcement of the IDEA, while well intentioned, has resulted in socioeconomic and racial disparities in the access to quality special education." Nicholas Gumas, *Socioeconomic and Racial Disparities in Public Special Education: Alleviating Decades of Unequal Enforcement of the Individuals with Disabilities Education Act in New York City, 4 Col. J. Race and L.* 398, 402 (2018), *available at* http://bit.ly/gumascjrl; *see also* Jennifer Rosen Valverde, *A Poor IDEA: Statute of Limitations Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 Fordham Urb. L.J. 599, 627 (2013) (for children without means, tuition reimbursement remains an elusive remedy), *available at* http://bit.ly/jrvfordham; Pasachoff, 86 Notre Dame L. Rev. at 1426-1427 (detailing anecdotal as well as more concrete empirical evidence of wealth-based disparity in use of IDEA's private enforcement mechanisms); Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 Cornell J.L. & Pub. Pol'y 171, 172-73 (2005), *available at* http://bit.ly/cjlppcaruso; Elisa Hyman, Dean Rivkin & Stephen Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education, 20 Am. U. J. of Gender, Social Pol'y and the Law* 107, 122-23 (2011) (framing remedy in terms of reimbursement draws "into question whether

families who cannot afford to pay up front and seek reimbursement may use this self-help remedy"), *available at* http://bit.ly/auideafails.

The district court did not dispute plaintiffs' claim that PDE's refusal to honor the binding commitment in the resolution agreement "would disadvantage low-income children because only children whose parents could afford tuition would be able to seek the direct payment remedy." *Lejeune G.*, 327 F. Supp. 3d at 802. In fact, the district court acknowledged that other courts have held that a direct payment remedy for retroactive tuition may be appropriate,[7] but simply held that such a remedy would not be available where the parents settled the case at the resolution session rather than litigating the case to decision. *Id.*

Again, this holding disadvantages families of limited economic means by discouraging settlements with charter schools and requiring litigation to secure a binding promise to fund a private placement. In order to encourage early settlement, IDEA provides that written agreements entered into at resolution sessions are legally binding agreements, enforceable in federal district court. 20 U.S.C. § 1415(1)(B)(iii)(II). Further, IDEA strongly encourages parents to accept settlement offers by prohibiting attorneys' fees for services performed subsequent to a written

[7] *See Mr. and Mrs. A. ex rel. D.A. v. New York City Bd. of Educ.*, 769 F. Supp. 403, 428 (S.D.N.Y. 2011) (limiting tuition reimbursement to families with financial means to pay the costs of private school tuition in the first instance is "entirely antithetical to IDEA's universal guarantee of a 'free appropriate public education' to all children with disabilities, regardless of means") (cited in *Lejeune G.*, 327 F. Supp. 3d at 802).

offer of settlement unless the parent obtains more favorable relief or is substantially justified in rejecting the settlement offer. 20 U.S.C. § 1415(i)(3)(D)(i).

A family of limited economic means presented with a resolution agreement in which a charter school is obligated to fund private school tuition faces an untenable choice. The decision below requires litigation to create an obligation enforceable against PDE if the charter school becomes unable to fund the placement. While hindsight is always 20/20, parents and their attorneys lack the clairvoyance needed to know in advance whether a charter school will eventually default on its obligations. At the same time, the fact that a charter school might be unable to meet its obligations at a future date is unlikely to serve as a substantial justification for rejecting a settlement offer. Accordingly, fees for continued litigation against the charter school would not be compensable if the school had offered the placement in a resolution agreement, notwithstanding the fact that the resolution agreement would be meaningless if the charter school ultimately could not comply with the agreement. The decision below places parents in an impossible position when presented, in a resolution session, with a reasonable settlement offer by a charter school. In this manner, the decision below discourages students in charter schools from settling their claims and also discourages private attorneys from representing children of limited economic means against charter schools. Importantly, this is an issue which will continue to arise for low-income parents of children with disabilities in the charter school context. The median poverty rate for children attending traditional charter

schools like Khepera in Philadelphia is 70.9%[8] and many parents simply cannot afford to pay private school tuition. Moreover, an adverse ruling here will provide yet another disincentive for charter schools to refuse to serve students with more significant disabilities. Data analysis discloses that students with significant disabilities are disproportionately served by local school districts rather than charter schools. This is due in part to a disparity rooted in the charter school law which provides charters the same amount of funding for any student receiving special education, regardless of the severity of the student's disability or the cost of the services the student requires. This creates a perverse incentive for charter schools to refuse to enroll students with more severe disabilities.[9] For example, charter schools in Philadelphia currently serve 7.1% of students with autism compared to 14% districtwide and only four traditional charter schools serve as many students with autism based on the District average. Similarly, charter schools serve only 2.23% of student with Intellectual Disability compared to the District average of 12.2%.[10]

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[8] See charter school data source on economic disadvantage available at https://futurereadypa.org/#.

[9] See, e.g., Bruce Baker, *The Commonwealth Triple-Screw: Special Education Funding & Charter School Payments in Pennsylvania*, School Finance 101 (June 5, 2012), http://schoolfinance101.wordpress.com/2012/06/05/the-commonwealth-triple-screw-specialeducation-funding-charter-school-payments-in-pennsylvania.

[10] See charter school data source on disability categories available at: https://penndata.hbg.psu.edu/penndata/documents/BSEReports/Data%20Preview/2017_2018/PDF_Documents/Speced_Quick_Report_SD463_Final.pdf

Advocates are working to ensure equal access to all public schools for children with disabilities and it is critical to ensure that their needs will be met in the charter school context.

CONCLUSION

For the reasons stated above and in appellants' brief, *Amici* respectfully requests that this Court reverse the decision below denying summary judgment against PDE for T.T.'s claim for tuition at Y.A.L.E. for the 2015-2016 school year.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

s/ Catherine Merino Reisman
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COMBINED CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,696 words.

I certify that this document complies with the typeface and type-style requirements of the Federal Rules of Appellate Procedure because the document is in a proportionately spaced typeface, Times New Roman, 14-point, using Microsoft Word for Mac.

I also certify, pursuant to Third Circuit Local Appellate Rules, that the text of the brief filed with the Court via CM/ECF is identical to the text of the paper copies, and further that our virus protection program, Bitdefender Virus Scanner Plus, has been run on the electronic version of the brief and no virus was detected.

s/ Catherine Merino Reisman
Catherine Merino Reisman

CERTIFICATE OF SERVICE

I, Catherine Merino Reisman, hereby certify that on January 16, 2019, I electronically filed the foregoing Brief with the Clerk of Court by using the appellate CM/ECF system and will cause seven paper copies to be served on the Court within five days of filing. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Catherine Merino Reisman
Catherine Merino Reisman