Nos. 09-CO-1391 & 10-CO-122

Case Nos. CF3-24783-08 & CF1-18464-08

IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

MARCEL A. JOHNSON,
Appellant,

v.

UNITED STATES,
Appellee.

On Appeal
From the Superior Court of the District of Columbia

BRIEF OF *AMICI CURIAE* NATIONAL DISABILITY RIGHTS NETWORK, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, D.C. PRISONERS' PROJECT OF THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, EDUCATION LAW CENTER, NEW JERSEY SPECIAL EDUCATION PRACTITIONERS, and UNIVERSITY LEGAL SERVICES

INTEREST OF *AMICI CURIAE*

The **National Disability Rights Network** ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 States, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services to, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities.

The P&A's across the country have advocated on behalf of students with disabilities and their families on education issues for over thirty years. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. Throughout its history NDRN has an extensive history as *amicus curiae.* Recent examples include participation as *amicus curiae* in education cases before the United States Supreme Court in *Forest Grove Sch. Dist.v. T.A.*, 129 S.Ct. 2484 (2009); *Board of Educ. of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); and *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2006). Amicus **University Legal Services** is the designated P&A agency for the District of Columbia.

The **Council of Parent Attorneys and Advocates** ("COPAA") is an independent, nationwide non-profit organization of attorneys, non-attorney advocates, and parents in 43 states and the District of Columbia who are routinely involved in special education due process hearings throughout the country. COPAA's primary goal is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our 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). COPAA has been *amicus curiae* in United States Supreme Court in *Forest Grove Sch. District v. T.A.*, 129 S.Ct. 2484 (2009); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Arlington Central School District Board of Education v. Murphy et al.*, 548 U.S.

291 (2006); *Board of Education of New York v. Tom F.* , 552 U.S. __, 128 S.Ct. 1 (2007); *Winkelman v. Parma City School District*, 550 U.S. __ , 127 S.Ct. 1994 (2006), and in numerous cases in the United States Courts of Appeal.

The **D.C. Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs** ("the Prisoners' Project"), is part of a non-profit public interest organization that has sought to eradicate discrimination and fully enforce the nation's civil rights laws for over 40 years. Since the Prisoners' Project was founded in 1989, it has engaged in broad-based litigation on behalf of prisoners to improve medical and mental health services, reduce overcrowding, and improve educational and programming opportunities, and overall conditions at correctional facilities wherever District of Columbia inmates are held. Individuals serving felony sentences under the D.C. Code are held under the supervision of the federal Bureau of Prisons (BOP), which can house D.C. prisoners in any of 137 different BOP facilities and in any number of state prisons with which the BOP has cooperative arrangements. The Project is engaged in litigation and advocacy on behalf of hundreds of DC prisoners in the BOP and in local DC jail facilities.

The **Education Law Center** ("ELC") is a non-profit law firm in New Jersey specializing in education law. Since its founding in 1973, ELC has acted on behalf of disadvantaged students and students with disabilities to achieve education reform, school improvement and protection of individual rights. ELC seeks to accomplish these goals through research, public education, technical assistance, advocacy and legal representation. ELC provides a full range of direct legal services to parents involved in

disputes with public school officials, and serves approximately 600 individual clients each year, primarily in the area of special education law.

New Jersey Special Education Practitioners ("NJSEP") is an association of attorneys and non-attorney advocates who represent parents and students in matters related to special education and the rights of individuals with disabilities in New Jersey. NJSEP has appeared as *amicus curiae* in numerous cases, including including *J.T. v. Dumont Public Schools* (D.N.J. 2011); *Abbott v. Burke* (N.J. Supreme Court 2010); *L.J. v. Audubon Bd. of Educ.* (3d Cir. 2009); *Bd. of Educ. of New York v. Tom F.* (U.S. 2007); *A.R. v. Freehold Regional High Sch. Bd. of Educ.* (D.N.J. 2006).

ARGUMENT

Amici submit this brief in support of Appellant's Petition for Re-hearing. Amici agree with Appellant's argument that the word "shall" in the District of Columbia sentencing statute means "shall," and not "may." With this brief, Amici seek to emphasize that (1) Congress, in drafting the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* ("IDEA"), unequivocally established that *all* individuals, including those ages 18 to 21 incarcerated in adult prisons, are entitled to receive special education; and (2) Because available scientific evidence establishes that the brain continues to develop through the early 20's, the provision of appropriate services, as required by his Individualized Education Program ("IEP"), could prove life-changing for Appellant Marcel Johnson ("Marcel").

There is no dispute that Marcel is entitled to extensive special education and related services pursuant to IDEA. He is a child with multiple disabilities, including emotional disturbance and a specific learning disability. Prior to his incarceration, pursuant to an IEP, Marcel was supposed to be receiving intensive reading instruction for four hours per day, one-on-one behavioral supports for seven hours per day, a case manager for six hours per week, specialized instruction by a special educator for nine hours per week, speech and language therapy for two hours per week, and counseling by a clinical social worker for four hours per week. 44a-52a. As evidenced by the attached Hearing Officer Decision, Marcel did not receive the services mandated in his IEP and is therefore entitled to compensatory education.

In conjunction with the IEP, Marcel had an IDEA Behavior Intervention Plan targeting the following behaviors: increased self-control, acceptance of responsibility for

actions and feelings, poor impulse coordination and improved decision making skills. 53a. To address these behaviors, the plan included behavior management support in the classroom and individual therapy focusing on resolution of past trauma and anger management skills. *Id.*

Judge Weisberg sentenced Marcel to a Bureau of Prisons ("BOP") facility. However, *Amici* are not aware of a single DC prisoner who is receiving or who has received special education services in the BOP, despite the presence of many DC prisoners who come to the BOP with prior IEPs. Review of the BOP policy statements (http://www.bop.gov/DataSource/execute/dsPolicyLoc), which contain no discussion of special education, bears this out. Further, there are no policies in place establishing a hearing procedure for IDEA disputes for an individual in BOP custody.[1]

A. IDEA Requires That Marcel Receive Appropriate Services While Incarcerated

As this court has recognized, while incarcerated in an adult prison, Marcel remains entitled to services under IDEA through his 22nd birthday. *Op.* at 3 (citing 20 U.S.C. § 1412(a)(1)(B)(iii)).[2] Further, the legislative history of the 1997 amendments to IDEA specifically emphasized that eligible individuals incarcerated in adult prisons retained their entitlement to special education services:

> The section retains the provision in current law requiring that the SEA [(State Educational Agency)] have general supervisory authority over educational programs for children with disabilities, but provides that the

[1] *Amici* are aware of no authority that would allow a prisoner to sue BOP in court for the denial of special education required by IDEA.

[2] After the age of 22, Marcel will be entitled to compensatory education for services required by his IEP but never delivered. *See e.g. Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, 618 (5th Cir. 2003) ("compensatory education is an available remedy for individuals over the age of 21 who were denied a FAPE when they were covered by the IDEA"); *Lester H. v. Gilhool*, 916 F.2d 865, 872-873 (3d Cir. 1990)(same). Thus, this case will not become moot on Marcel's 22nd birthday.

> Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the [IDEA] part B requirements are met with respect to children with disabilities who are convicted as adults under State law and are incarcerated in adult prisons . . . **These changes, however, do not affect the student's eligibility for services under IDEA.** Neither do they affect students who are in juvenile facilities.

House Rep. No. 105-95, IDEA Amendments of 1997 (May 13, 1997) at 122 (emphasis added).

Specific provisions of the IDEA clearly demonstrate that Congress contemplated that individuals, just like Marcel, who are IDEA-eligible may be incarcerated in adult facilities. The statute makes clear which individuals in this situation will remain eligible for special education services. A state can exclude from IDEA eligibility children aged 18-21 who have never been identified as IDEA-eligible and never had an IEP prior to adult incarceration. However, the state cannot exclude a child aged 18-21 who is incarcerated in an adult facility if the child ever had an IEP; this rule applies even if the student dropped out of school. 34 C.F.R. § 300.102(a)(2)(i). Thus, a student identified as having a disability, who had an IEP in place prior to incarceration, falls within the statute's provision for services in adult prison. Marcel is just such a student.

Congress further considered the balance between the state's legitimate safety and penological interests and the individual's educational interests by inserting a specific provision that states: "If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement . . . if the State has demonstrated a *bona fide* security or compelling penological interest that cannot otherwise be accommodated." 20 U.S.C. 1414(d)(7)(B).

Thus, the IEP Team, and *only* the IEP Team, may modify the IEP. No entity, including the IEP Team, has the authority to eliminate or disregard the IEP.

The provision securing Marcel's continued right to an appropriate education furthers the central purpose of the IDEA (originally enacted in 1975 as the Education for All Handicapped Children Act) "to ensure 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). In *Timothy W. v. Rochester, New Hampshire Sch. Dist.*, 875 F.2d 954 (1st Cir.), *cert. denied*, 493 U.S. 983 (1989), the court recognized that the express purpose of IDEA was to stop the exclusion of scores of individuals with disabilities from public education. 875 F.2d at 963. Thus, with the IDEA, Congress specifically aimed to put an end to a chapter of history "in which we were silent while young children were shut away and condemned to a life without hope." *Id.* (*citing Education for all Handicapped Children, 1973-74: Hearings on S6 before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973-1974) ("Senate Hearings") at 241 (remarks of Sen. Kennedy, co-sponsor)). The legislative history is replete with references to a purpose of ensuring that ***all*** individuals with disabilities receive appropriate educational and related services through the age of 21. *Id.* at 964 & n. 4, 5.

B. Available Scientific Evidence Establishes the Potential Efficacy of Appropriate Services for Marcel

In sentencing Marcel, Judge Weisberg noted that he was "simultaneously, one of the most damaged and one of the most dangerous individuals [he had] encountered in a long career of encountering both damaged and dangerous individuals." *Op.* at 4. This

observation must be read in tandem with the scientific evidence on brain development discussed in this section. It is significant that Marcel was convicted for acts committed while he was under 18. The scientific evidence establishes that, at Marcel's age when he committed these acts, the brain is still relatively immature.

As the Court observed in *Graham v. Florida*, 130 S. Ct. 2011 (2010):

> No recent data provide reason to reconsider the Court's observations in *Roper* [*v. Simmons*, 543 U.S. 551 (2003)] about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence (citations omitted). Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults.

Id. at 2026 (citing *Roper*, 543 U.S. at 570).

Marcel's IEP unequivocally establishes that he needs behavioral supports in precisely the areas that are still developing: self-control, acceptance of responsibility, impulse coordination and decision-making skills. By sentencing Marcel to an institution where his IEP cannot be implemented, the court is depriving him of services at precisely the time when they would still be effective. Indeed, not only would those services be effective now, the harm resulting from the denial of services will likely be greatly magnified because of Marcel's current condition.

Marcel's age is "far more than a chronological fact." *J.D.B. v. North Carolina*, 131 S. Ct. 2364, 2403 (2010) (citation omitted). It is a fact that generates conclusions, applicable generally to children as a class, about behavior and perceptions. *Id.* According to the Supreme Court, there are three important differences between juveniles and adults: first, juveniles display less maturity and responsibility than adults, second, "juveniles are

more vulnerable or susceptible to negative influences and outside pressure," and finally, their personality traits are "more transitory, less fixed." *Roper v. Simmons,* 543 U.S. 551, 569-70 (2003); *see also J.D.B.*, 131 S. Ct. at 2403. Thus, two justifications for punishment – retribution and deterrence – apply differently to juveniles given their diminished culpability. *Roper*, 543 U.S. at 571-72.[3]

The dismissal of Marcel's potential to be an educated, law-abiding member of society because he is "damaged" is the same type of stereotyped denial of access to education that the *Timothy W.* court condemned. Moreover, it ignores the scientific evidence that, at Marcel's age, the provision of appropriate educational services and behavioral supports could effect real and lasting change as his brain continues to mature. Denying Marcel the services necessary to a free, appropriate public education while he remains eligible for special education services would cause irreparable harm. *See Mark H. v. Hamamoto,* 620 F.3d 1090, 1095 (9th Cir. 2010) (failure to provide timely special education services to children with autism caused irreparable harm); *D.D. v. N.Y. City Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006) (delay in the provision of mandated educational services constitutes irreparable harm).

CONCLUSION

Marcel should continue to receive appropriate educational services and supports while in an adult prison because IDEA contemplates that <u>*all*</u> students with disabilities will receive an appropriate education. Further, scientific evidence establishes

[3] The Court's findings on the scientific evidence regarding brain development and the differences between children and adults in *J.D.B., Graham* and *Roper* are "legislative facts" relevant to this case. Legislative facts are scientific facts found by a court "that transcend the individual case but determine, sometimes conclusively, how the case shall be decided." *Dean v. District of Columbia*, 653 A.2d 307, 322 (D.C. App. 1995) (Ferren, J., concurring in part and dissenting in part, *abrogated and superseded by statute as stated in Jackson v. D.C. Bd. of Elections and Ethics*, 999 A.2d 89 (D.C. App. 2010).

unequivocally that continued receipt of supports – especially behavioral supports – is critical for Marcel at this time. This court should not shut Marcel away and condemn him to a life without hope by sentencing him to a facility where he will not receive necessary, and potentially life-altering, educational and behavioral supports required by his IEP.

Respectfully submitted,

Philip Fornaci (DC Bar No. 434824)
Washington Lawyer's Committee
for Civil Rights and Urban Affairs
11 Dupont Circle, N.W.
Suite 400
Washington, D.C. 20036
Phone: 202-319-1000
Fax 202-319-1010
Philip_fornaci@washlaw.org