No. 11-5033

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BETH PETIT ET AL.,

Appellants,

vs.

U.S. DEPARTMENT OF EDUCATION ET AL.,

Appellees.

On Appeal From the United States District Court
for the District of Columbia
The Honorable Ricardo M. Urbina, Judge Presiding
(Case No. 07-cv-01583-RMU)

BRIEF FOR AMICUS CURIAE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF APPELLANTS AND URGING REVERSAL

Seth M. Galanter
Mark H. Shawhan
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 887-6947

Attorney for *Amicus Curiae*
Council of Parent Attorneys and Advocates

July 1, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus* Council of Parent Attorneys and Advocates hereby certifies as follows:

A. Parties and *amicus curiae*

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

C. Related Cases

Amicus is not aware of any related cases as defined in Circuit Rule 28(a)(1)(c).

CORPORATE DISCLOSURE STATEMENT

(a) The Council of Parent Attorneys and Advocates, Inc. (COPAA) has no parent company and no publicly-held company holds a 10% or greater ownership interest in COPAA.

(b) COPAA is an independent, nonprofit organization of attorneys, advocates, and parents in 47 states and the District of Columbia who work to secure high quality educational services for children with disabilities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

GLOSSARY

IDEA Individuals with Disabilities Education Act

IEP Individualized education program

INTEREST OF AMICUS CURIAE[1]

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent nonprofit organization whose members work to protect special education rights and secure excellence in education on behalf of the 7.1 million children with disabilities in America.

COPAA is committed to creating a level playing field to ensure children with disabilities receive the high-quality education to which all children are entitled. As part of its efforts on behalf of children with disabilities, COPAA advocates for the education rights of children with cochlear implants and their families.

COPAA is concerned that the Secretary of Education, in promulgating the regulation at issue in this case, has overstepped the authority granted by Congress and impermissibly diminished the rights of these children to receive "related services" under the Individuals with Disabilities Education Act (IDEA).

[1] All parties have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I.

The Secretary of Education's regulation excluding "mapping" of cochlear implants from the scope of "related services" is contrary to the IDEA's unambiguous definition of "related services."

Proper mapping of cochlear implants is required to allow children with implants to hear a full range of sounds. Speech and language therapy for children with cochlear implants is premised on oral communication, and thus requires the children to be able to hear sounds properly, which in turn is dependent on mapping.

The text of the IDEA defines "related services" broadly. The statute provides that all services that are "developmental, corrective, or . . . supportive," including audiology services, are "related," so long as such services are required to assist a child with a disability to benefit from special education and are not performed by a physician (except when performed for diagnostic or evaluation purposes). Mapping supports a child's ability to develop an understanding of language, and is required for the child to meaningfully learn, thus bringing mapping within the statutory scope of "related services."

Mapping's status as a related service was not altered by Congress's addition in 2004 of a new exception for surgically-implanted medical devices. Congress, in considering that exclusion, affirmatively rejected broader language that would have expressly included mapping. This drafting history demonstrates congressional intent not to alter the status quo, under which mapping was unambiguously a related service.

II.

The Secretary's regulation is also invalid even if one assumes the statute to be ambiguous with respect to related services. Under the IDEA, the Secretary may issue implementing regulations only to the extent "necessary" to ensure compliance with specific IDEA requirements. The Secretary's regulations are not necessary; nor are they even a reasonable construction of the statute.

The Secretary conceded, in the explanation accompanying the final version of the regulation, that a cochlear implant must be properly functioning to allow a child meaningful access to special education and that children with cochlear implants are entitled to related services associated with those implants.

Notwithstanding this concession, the Secretary offered several possible reasons why mapping alone should be excluded from the scope of "related services," such as the timing and location of mapping, the level of expertise required to perform mapping, and congressional intent in enacting the surgically-

implanted devices exception. Yet the Secretary, in advancing these claims, did not attempt to explain how such rationales show that mapping is not required for a child to benefit from special education, how mapping is sufficiently "device-like" to come within the exception for surgically-implanted "medical devices," or why mapping, alone of all the services associated with cochlear implants, should be excluded from the scope of "related services."

The reasons given by the Secretary for excluding mapping, untethered as they are from the text of the IDEA, are not necessary to ensure compliance with statutory requirements, nor a reasonable construction of the statutory definition of "related services." The Secretary's regulation excluding mapping from being considered a related service must therefore be vacated as contrary to law.

ARGUMENT

I. THE TEXT OF THE IDEA UNAMBIGUOUSLY INCLUDES MAPPING AS A RELATED SERVICE

The text of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, expressly defines the term "related services," and does so expansively. "Related services" has been defined since the statute's enactment in 1975 to mean "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a [child with a disability] to benefit from special education." Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 4(a)(4), 89 Stat. 773, 775 (1975) (codified at 20 U.S.C. § 1401(26)(A)). The IDEA only contains two express exceptions to this definition. Since 1975, it has excluded "medical services" that are not diagnostic or evaluative. *Id.* And, since 2004, the IDEA has provided that the term "related services" "does not include a medical device that is surgically implanted, or the replacement of such device." Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, tit. I, § 602(26)(B), 118 Stat. 2647, 2657 (2004) (codified at 20 U.S.C. § 1401(26)(B)).

In 2006, the Secretary of Education promulgated a regulation that excludes "mapping" of cochlear implants from the definition of "related services." *See* 34 C.F.R. § 300.34(b)(1). Under *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984), this Court must consider first whether Congress has unambiguously spoken

to the question at issue and, if not, whether the Secretary's regulation is a permissible resolution of the statute's ambiguity.

Here, congressional intent, as expressed in the IDEA, unambiguously forecloses the challenged regulations. The Secretary is wrong that mapping of cochlear implants can *never* be a related service as that term was defined by Congress. Mapping has been and continues to be a developmental, corrective, or supportive service that may be required to assist some children with disabilities to benefit from special education. Mapping does not fall within either of the express statutory exclusions. The Secretary has no authority to create additional exclusions.

A. For Some Children With Disabilities, Mapping Is A Developmental, Corrective, Or Supportive Service Required To Benefit From Their Special Education

As of 2009, approximately 25,500 children in the United States had received cochlear implants. United States Gov't Accountability Office, *Deaf and Hard of Hearing Children* 4 (2011). In determining that mapping could not be a related service, the Secretary necessarily had to find that mapping was not a developmental, corrective, or supportive service required to assist any of these children to benefit from his or her special education. That is simply untrue. The mapping of a cochlear implant can be required to assist a child with a cochlear implant to developing language and learning.

Cochlear implants function by converting sound waves into electrical stimuli on the brain's auditory nerve, which are then perceived as sounds by the implantee. *See, e.g.*, George Alexiades et al., "Cochlear Implants for Infants and Children," *in Pediatric Audiology: Diagnosis, Technology, and Management* 183, 184 (Jane R. Madell & Carol Flexer, eds. 2008). For an implant to serve its function, its "speech processor" must be programmed, or "mapped," to ensure that it provides the proper stimuli, based on the particular characteristics of the implantee. *Id*. at 188. Thus, a few weeks after surgery, a speech processor program (or map) is created that includes threshold levels (the lowest amount of electrical stimulation needed to induce an auditory sensation) and maximum levels (the amount of electrical stimulation that is perceived as loud). *Id*. "'Fine tuning'" of the map is necessary to address different acoustic environments. *Id*. "For example, programs may be set with increasing loudness or for use with an FM system, music, or noisy situations." *Id*.

Without regular mapping, a child with a cochlear implant cannot meaningfully hear and begin to understand sounds. ***Id.*** As the Secretary conceded in promulgating the challenged regulation, mapping is "necessary to make the cochlear implant work properly," 71 Fed. Reg. at 46,570, such that "the cochlear implant must be properly mapped in order for the child to hear well in school," *id*. at 46,569.

The ability to hear can be significant for the speech and language development of children. *See, e.g.*, American Speech-Language Hearing Association, "Effects of Hearing Loss on Development," http://www.asha.org/public/hearing/Effects-of-Hearing-Loss-on-Development. Services that allow a child to hear sounds can, for many children, be required to assist them in receiving their special education. Cochlear implants allow or enhance the development of oral speech and language. *See, e.g.*, Patricia Elizabeth Spencer & Marc Marschark, *Evidence-Based Practice in Educating Deaf and Hard-of-Hearing Students* 55-57 (2010); Ann Geers, "Spoken Language in Children With Cochlear Implants," *in Advances in the Spoken Language Development of Deaf and Hard-of-Hearing Children* 244, 244-249 (Patricia Elizabeth Spencer & Marc Marschark, eds. 2006); *see also* Carol Flexer, "Communication Approaches for Managing Hearing Loss in Infants and Children," *in Pediatric Audiology*, *supra,* at 205, 205-206.

The standard speech/language therapies for children with cochlear implants, designed to help these children develop the language skills on which education is based, are partly or wholly premised on a child hearing through the implant. *See, e.g.*, Spencer & Marschark, *supra,* at 59-66; Geers, *supra*, at 255-263. Indeed, an important element of such therapies is assessing the quality of the map of a given implant, so that audiologists can adjust it as needed. *See Board of Educ. of*

Paxton-Buckley-Loda Unit Sch. Dist. No. 10 v. Jeff S., 184 F. Supp. 2d 790, 793 (C.D. Ill. 2002). Researchers have found that the quality of the implant map materially affects the development of speech perception in children. *See, e.g.*, Ann Geers et al., "Factors Associated with Development of Speech Perception Skills in Children Implanted by Age Five," 24 *Ear and Hearing* 24S (2003).

Furthermore, in addition to teaching children how to speak orally and understand oral language, services that allow a child to hear can allow a child to learn portions of the curriculum orally, rather than through sign language or lip reading. Yet children with cochlear implants, to learn the substance of the curriculum through oral communication, obviously need the ability to hear. *See, e.g.*, Alexiades, *supra*, at 189. A child experiencing an unmapped or improperly mapped implant will suffer additional and unnecessary impairment to his or her ability to learn through oral communication, and to his or her overall education.

Mapping thus supports the child's ability to hear and to learn, helps to correct the loss or absence of hearing that necessitated the implant in the first place, and aids in the child's development of language and speech. It therefore falls squarely within the scope of the statutory definition of related services.

B. The Broad Statutory Definition of "Related Services" Unambiguously Includes Mapping

1. The ordinary meanings of the words Congress used to define the term "related services" in Section 1401(26)(A) are quite broad. The dictionary definition of "developmental" is "relating to, or constituting development"; "development" refers to a "gradual advance or growth through progressive changes." *Webster's Third New International Dictionary* 618 (1993). "Corrective" is defined as "tending to correct," while "correct" is defined as "to make or set right," *id.* at 511; and "supportive" is "furnishing support," which in turn means "to provide means, force, or strength; to back up," *id.* at 2297. And the statute, for its part, defines the "special education" that a related service must assist as "specially designed instruction, at no cost to parents, *to meet the unique needs of a child with a disability*, including instruction conducted in the classroom [and] in the home." 20 U.S.C. § 1401(29) (emphasis added).

Consistent with the broad ordinary meaning of the terms comprising the definition of "related services," Section 1401(26)(A) also sets out 14 illustrative examples, including audiology; interpreting; psychological; recreational; counseling; and social work services, as well as physical, occupational, and language therapies. As plaintiffs-appellants show (Opening Br. at 23-24, 49-53), mapping cochlear implants falls squarely within the plain meaning of the term "audiology services," as well as within the Secretary's definition of "audiology."

Even if it did not, the statutory list itself is preceded by the term "including," which reflects Congress's intent that the examples not be exclusive. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9 (1985); 34 C.F.R. § 300.20 ("*Include* means that the items named are not all of the possible items that are covered, whether like or unlike the ones named."). As the Department of Education has consistently explained, "[i]t would be impractical to list every service that could be a related service" and "the list of services . . . is not exhaustive and may include other developmental, corrective, or supportive services if they are required to assist a child with a disability to benefit from special education." 71 Fed. Reg. at 46,569 (Aug. 14, 2006); *see also* 42 Fed. Reg. 42,474, 42,480 (Aug. 23, 1977) ("The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.").

Courts have thus held that local school districts must pay for the costs of a wide swathe of activities under the "related services" umbrella, including continuous one-on-one nursing care for a quadriplegic student, *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999); room and board at a private school for blind children, *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1478-80 (9th Cir. 1993); and tuition, room and board, and individualized

speech/language and audiological services at a private residential school for deaf children, *Board of Educ. of Chicago v. Illinois Bd. of Educ.*, No. 06-3078, 2006 WL 2989289 (N.D. Ill. Oct. 18, 2006). Indeed, the Department of Education previously concluded that providing devices to students could, in some instances, be a required related service. *See* Letter to P. Seiler, 20 IDELR 1216 (OSEP Nov. 19, 1993) (discussing when school district had to provide hearing aids to students); 64 Fed. Reg. 12,406, 12,540 (Mar. 12, 1999) (same).

This historically broad understanding is consistent with the role the definition of "related services" plays in the statute. The IDEA requires that parents and educational experts come together to develop an Individualized Education Program (IEP) for each child. *See* 20 U.S.C. §§ 1414(d)(1)(B), (d)(3), (d)(4). That IEP Team must identify the special education and related services to be provided to the child to advance appropriately toward attaining his or her goals. *See id.* § 1414(d)(1)(A)(IV). Thus, the definition of related services was not intended to identify services that any particular child would receive. Instead, it was intended to identify the broad universe of services that are available to an IEP Team to prescribe if required to assist a particular child with a disability to benefit from special education. *See* 71 Fed. Reg. at 46,569.

In *Garret F.* and *Irving Independent School District v. Tatro*, 468 U.S. 883, 890-891 (1984), the Supreme Court held that "related services" included any

services that "enable a disabled child to remain in school during the day." 526 U.S. at 73. However, the scope of "related services" is not confined solely to services that allow a child with a disability safe access to the classroom in the first place. "Related services" also include all those services that are "required to assist [that child] to benefit from [the] special education" to which they have access, 20 U.S.C. § 1401(26)(A), including services such as audiology that are not related to safety. Thus, the relevant question in the individual case is whether the service "is critical to [a student's] ability to learn," creating a meaningful "link between the supportive service . . . and the child's learning needs." *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693, 694 (3d Cir. 1981).

That many kinds of services fit under the related services umbrella as "developmental, corrective, and . . . supportive" does not, however, render the scope of related services ambiguous for *Chevron* purposes. As the Supreme Court has repeatedly emphasized, statutory breadth is not equivalent to ambiguity. *See, e.g., Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-212 (1998). Thus broad statutory language does not alone trigger deference to an agency. *See Massachusetts v. EPA*, 549 U.S. 497, 528-529 & n.26 (2007) (rejecting agency interpretation of "sweeping" statutory definition as contrary to the "unambiguous" meaning of the text); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298-299 (D.C. Cir. 2003) (broad language was unambiguous).

2. Given the importance of mapping for children with cochlear implants to benefit from special education, *see supra* Part I.A., and the breadth of the definition of "related services," it is unsurprising that courts and hearing officers interpreting Section 1401(26)(A) and its predecessors consistently concluded that mapping was a related service that was appropriate for some children with disabilities receiving special education.

In *Stratham School District v. Beth P.*, No. 02-135, 2003 WL 260728 (D.N.H. Feb. 5, 2003), for example, the district court held that the child's "cochlear implant must be mapped for him to benefit from the instruction provided by the District," and that since the child's "IEP is based on . . . communication through his cochlear implant. . . . the mapping services necessary for the use of [his] cochlear implant are 'related services' within the meaning of the IDEA." *Id.* at *5. Similarly, in *Jeff S.*, 184 F. Supp. 2d at 793, 803-804, the district court held that a school district was required to reimburse the costs, as a related service, of privately obtained speech and language therapy for a child with a cochlear implant, which expressly included mapping as a necessary component.

Administrative hearing officers from around the country reached the same conclusion. *See Avon Sch. Dist*, SE-1212-2002 (Ohio Mar. 13, 2003) (hearing officer), http://webapp2.ode.state.oh.us/exceptional_children/data/SE-1212-2002%20Avon%20Local.pdf; *Branford Bd. of Educ.*, 01-320 (Conn. Dec. 28,

2001) (hearing officer), http://www.sde.ct.gov/sde/lib/sde/PDF/DEPS/Special/Hearing_Decisions/2001/01_320.pdf; *see also ECI LifePath Systems, Inc.*, 40 IDELR 195 (Tex. Jan. 9, 2004) (hearing officer) (relying in part on 20 U.S.C. § 1401(26) in holding that parents of a two year-old child must be reimbursed for the costs of mapping the child's cochlear implant under the cognate terms of 20 U.S.C. § 1432(4)).

C. Neither Of The Two Statutory Exceptions From The Definition Of Related Services, Including The 2004 Amendment, Exclude Mapping

As noted above, there are two statutory exceptions to the broad definition of "related services." But mapping does not fall within either of them.

1. The statute excludes "medical services" that are not diagnostic or evaluative. 20 U.S.C. § 1401(26)(A). The Supreme Court has twice held that the "medical services" exclusion excludes only services that are actually provided to the child by a physician. *Garret F.*, 526 U.S. at 73-74; *Tatro*, 468 U.S. at 892-893. The federal government has acknowledged that Congress has expressly ratified this interpretation. *See* United States Br. as *Amicus Curiae*, *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, No. 96-1793 (U.S. Supreme Court), at 21 (Aug. 1998) (arguing that Congress ratified the Secretary's regulatory definition of "medical services" to "exclude only physician-provided services"), available at www.justice.gov/osg/briefs/1997/3mer/1ami/96-1793.ami.mer.aa.pdf.

Unlike the implant surgery itself, mapping need not be done by a physician. *See* 71 Fed. Reg. at 46,571 (acknowledging that mapping can be done by "physician or an individual with specialized technical expertise"). Instead, mapping can be performed by audiologists or other non-physician professionals. A.R. ED-000331, 000341, 003321; *see also* 42 C.F.R. § 440.110(c)(3) (defining a "qualified audiologist" for purposes of Medicaid as a person "with a master's or doctoral degree in audiology" who has passed certain tests). This is why the Secretary has never contended this exception is applicable.

2. The second exception, added in 2004, excludes "a medical device that is surgically implanted, or the replacement of such device." 20 U.S.C. § 1401(26)(B). But mapping the cochlear implant is not providing or replacing the implant, just as tuning a car engine is different than replacing the engine. Indeed, the drafting history shows Congress was aware of the difference and elected not to exclude mapping even as it was excluding the device itself.

As the plaintiffs-appellants explain (Opening Br. at 8-10), the 2004 IDEA bill reported out of the Senate Health, Education, Labor, and Pensions Committee would have altered the definition of "related services" to exclude "a medical device that is surgically implanted, *or the post-surgical maintenance, programming*, or replacement of such device"—i.e., mapping. S. Rep. No. 108-185, at 107 (2003) (emphasis added). During Senate floor debate, the Senate

managers of the bill introduced a managers' amendment making a number of substantive and technical changes to the bill. That amendment, approved by voice vote on the floor, struck the words "or post-surgical maintenance, [and] programming," leaving only the surrounding words "a medical device that is surgically implanted, or the replacement of such device." 150 Cong. Rec. S5394 (May 13, 2004). The version of the bill with this narrower exclusion was passed by the Senate. In Conference Committee, the House (which did not propose any exclusions) acceded to the Senate version of the "related services" definition (i.e., excluding only medical *devices* and their replacement), s*ee* H.R. Rep. No. 108-779 at 172-173 (2004), and that version of the definition was enacted into law.

Thus, Congress chose to exclude surgically-implanted "medical devices" and their replacement from the definition of "related services" only after affirmatively rejecting an additional exclusion for the mapping of such devices. The district court below concluded that this drafting history does not unambiguously demonstrate congressional intent to include "mapping" within "related services." *Petit v. United States Dep't of Educ.*, 578 F. Supp. 2d 145, 157-159 (D.D.C. 2008). Whatever the merits of that conclusion, it is surely the case

that the history of this provision does not evince an intent to introduce a *new* exclusion for mapping in 2004.[2]

As the Eleventh Circuit recognized prior to the promulgation of the Secretary's 2006 regulation, the status of mapping as a related service was not altered by the 2004 IDEA amendments. *See M.M. ex rel. C.M. v. School Bd. of Miami-Dade Cty.*, 437 F.3d 1085, 1100-1101 (11th Cir. 2006) ("Related services, for the purposes of this case [a child with a cochlear implant], would include . . . mapping (programming) for C.M.'s cochlear implant . . . ."); *see also City of Chicago Sch. Dist. #299*, No. 00416, 108 LRP 38133 (Ill. Feb. 5, 2006) (hearing officer) (holding that the failure of a school district to provide mapping for a child with a cochlear implant was a factor supporting reimbursement for private residential placement), *aff'd on other grounds, Board of Educ. of Chicago*, 2006 WL 2989289.

---

[2] Indeed, the administrative record of the rulemaking contains a letter from Senator Judd Gregg, who was Chair of the Senate Health, Education, Labor, and Pensions Committee and the floor manager for the bill, explaining that the purpose of the change was to prevent the exclusion of mapping. *See* Letter from Senator Judd Gregg to Secretary of Dep't of Educ. Margaret Spellings, June 24, 2005, A.R. ED-000786-000787. The administrative record of the rulemaking also contains a letter from one of Senator Gregg's constituents (who was counsel for the children in the *Beth P*. litigation that had held that mapping was a related service, *see supra* p. 14) explaining how he had met with the Senator, after the Senate Committee had issued its reported bill, to lobby for precisely this change. *See* Letter from Peter Smith to Troy R. Justesen, Sept. 3, 2005, A.R. ED-000924-000927. The district court declined to consider this evidence, but it is useful to the extent it confirms the most obvious inference to be drawn from the face of the drafting history.

Because mapping continues to unambiguously fall within the scope of "related services," 34 C.F.R. § 300.34(b)(1) exceeds the scope of the Secretary's authority.

II. THE SECRETARY'S REGULATION IS NOT A REASONABLE CONSTRUCTION OF THE IDEA BECAUSE IT IS NOT NECESSARY TO ENSURE COMPLIANCE WITH THE SURGICALLY-IMPLANTED MEDICAL DEVICE EXCLUSION

Even assuming that "related services" is ambiguous, the regulation at issue, by placing mapping outside the scope of "related services," is an unnecessary and unreasonable interpretation of the IDEA. It is thus impermissible under *Chevron*'s second step, particularly in light of the limits Congress placed on the Secretary's rulemaking authority. The regulation invents a new categorical exception to the definition of related services that is untethered to the statutory text, and without justification treats mapping differently from all other cochlear implant services.

A. The IDEA Does Not Grant The Secretary The Authority To Promulgate Regulations Unless They Are Necessary To Ensure Compliance With A Specific Provision

Unlike other statutes, the IDEA does not grant the Secretary any authority to create exceptions or make classifications not reflected in the IDEA itself. To the contrary, Congress has continually restricted the authority of the Secretary to narrow the broad scope of the IDEA.

Initially, Congress authorized the Secretary to issue "such rules and regulations as may be necessary" in carrying out the provisions of the IDEA. Pub.

L. No. 94-142, § 5(a), 89 Stat. at 791. But when President Reagan's Secretary of Education proposed amending the IDEA regulation's definition of "related services" to exclude certain services (a proposal later withdrawn), Congress in 1983 enacted what is now Section 1406(b)(2) to prohibit any lessening of the services provided to children with disabilities. *See* U.S. Br. as *Amicus Curiae*, *Garret F*., at 21-24 (tracing legislative history).[3]

Later, in response to concerns that the Secretary was still misusing the regulatory authority, *see* H.R. Rep. No. 104-614, at 9 (1996), Congress further narrowed that authority so that the Secretary was authorized to issue regulations "*only* to the extent that [they] *are necessary* to ensure that there is compliance with the *specific requirements* of this [chapter]." Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105–17, title I, § 101, 111 Stat. 37, 100 (1997) (emphasis added) (currently codified at 20 U.S.C. § 1406(a)).

Most recently in 2004, in the same Act in which Congress adopted the surgically-implanted medical device exclusion, Congress again demonstrated its distrust of the Secretary's exercise of rulemaking authority. Congress expressly

[3] Notably, that proposal would have amended the IDEA regulations to state that schools never need provide "[i]ndividually prescribed devices (such as eyeglasses, orthopedic equipment, and hearing aids)" as "related services" and would have eliminated the requirement (currently codified at 34 C.F.R. § 300.113(a)) that schools ensure proper functioning of hearing aids. 47 Fed. Reg. 33,836, 33,840, 33,846 (Aug. 4, 1982).

provided that the Secretary cannot promulgate a regulation that "violates or contradicts any provision of this [chapter]." Pub. L. No. 108-446, tit. I, § 607(b)(1), 118 Stat. at 2660 (codified at 20 U.S.C. § 1406(b)(1)). The House Committee explained that this amendment was needed because the Secretary's "implementing regulations for the current Act have caused confusion where the Act is clear." H.R. Rep. No. 108-77, at 87-88 (2003).

Unfortunately, the Secretary's mapping regulation shares that same problem. The Act clearly excludes only surgically-implanted medical devices, but the regulations confuse mapping the device with the device itself.

B. The Secretary's Justifications For Excluding Mapping From The Scope Of Related Services Cannot Sustain The Regulation

The Secretary failed in the Federal Register rulemaking notice to identify sufficient grounds why mapping, alone of all the services associated with a cochlear implant, should be categorically excluded from consideration as a related service.

1. The Secretary improperly focused on access to education rather than benefit to the child.

The Secretary asserted that mapping is "incidental to a particular course of treatment chosen by the child's parents to maximize the child's functioning, and [is] not necessary to ensure that the child is provided access to education,

regardless of the child's disability." 71 Fed. Reg. at 46,570. This assertion is both untrue and irrelevant.

It is untrue because the Secretary acknowledged in the Federal Register that proper mapping is required "in order for the child to hear well in school," 71 Fed. Reg. at 46,569, and that "[t]o allow a child to sit in a classroom when the child's . . . cochlear implant is not functioning is to effectively exclude the child from receiving an appropriate education," *id.* at 46,571. The Secretary did not explain why it is any less an effective exclusion to allow a child to sit in a classroom with a cochlear implant that is functioning poorly or not at all because it has not been properly mapped.

It is irrelevant because it departs from the statutory text, which is not limited to provision of services required to provide a child *access* to special education. The statute, instead, defines a related services as a service that "may be required to assist a child with a disability to *benefit* from special education." 20 U.S.C. § 1401(26)(A) (emphasis added). More generally, IDEA requires that schools must take children as they are. Schools are not relieved of responsibility to provide for supportive services required to assist a child to benefit from special education if that need is the result of a particular course of treatment (even if that treatment is undertaken to maximize the child's functioning). For example, if a child who is blind receives surgery that gives him some low vision, the school cannot continue

to treat him as if he were blind and refuse to provide large print books on the ground that it would not have had to pay for the surgery. Rather, the question is always whether a given service is required, under the particular circumstances faced by an individual child, for that child to benefit from special education.

This justification is further flawed because it is inconsistent with the regulation actually adopted. The Secretary concluded that even though the statute *excludes* both internal and external components of a cochlear implant from being themselves "related services,"[4] the statute *includes* all services required to meet the needs of children with cochlear implants, except mapping. *See* 34 C.F.R. § 300.34(b)(2)(iii) (regulation does not exclude "the routine checking of an external component of a surgically implanted device to make sure it is functioning properly"); 71 Fed. Reg. at 46,570, 46,571 (schools are responsible for providing those services, such as "speech and language services," that are necessary for a child with an implant to benefit from special education, for providing devices to assist the functioning of cochlear implants, such as "FM amplification system[s],"

[4] Although the external speech processor is not surgically implanted, the Secretary concluded that the statutory "exclusion applicable to a medical device that is surgically implanted includes both the implanted component of the device, as well as its external components." 71 Fed. Reg. at 46,547; *see also id.* at 46,570 (cochlear implant "has two parts, one that is surgically implanted and attached to the skull and . . . an externally worn speech processor").

and more generally for monitoring those implants to ensure that they are working properly).

2. The Secretary improperly relied on the time and place mapping occurs.

The other justifications provided by the Secretary for excluding mapping and only mapping from the scope of "related services" are no more persuasive. The Secretary asserted, for example, that "[a]lthough the cochlear implant must be properly mapped in order for the child to hear well in school, the mapping does not have to be done in school or during the school day in order for it to be effective." 71 Fed. Reg. at 46,569. This assertion is only partially true, and irrelevant to the extent that it is true.

First, by stating that mapping is done outside the school, the Secretary implies that mapping is not tailored to the school setting. But that is wrong. As the Secretary acknowledged, "FM amplification system[s]" in classrooms may be required to assist children with cochlear implants in hearing. 71 Fed. Reg. at 46,571. An "FM amplification system" consists of a wireless microphone placed near the teacher's mouth that transmits by FM radio to a receiver that is attached to the listener's cochlear implant speech processor. Joseph Smaldino & Carol Flexer, "Classroom Acoustics: Personal and Soundfield FM and IR Systems," *in* Madell & Flexer, *supra*, at 192, 196-197. Such a system (which is also essential for many children with hearing loss) creates a listening situation that eliminates background

noise and reverberation. *Id*. Yet such a classroom FM system will only work properly for a child with a cochlear implant if that child's speech processor is mapped so as to work in conjunction with the system. "Several parameters of sound processor programming may significantly influence performance with a personal FM system, including audio-mixing ratio, input dynamic range (IDR) and sensitivity." Jace Wolfe and Erin C. Schafer, *Programming Cochlear Implants* 121 (2010) (describing needed settings on different brands of equipment). Thus, the cochlear implant must be mapped to the particular FM system used in the child's classroom. *Id*. at 123-124.

Furthermore, to the extent the Secretary suggests that services provided outside school grounds and after school hours cannot be related, the Secretary is again mistaken. To repeat, the statutory test for "related services" is whether or not the service at issue is "required to assist a child with a disability to benefit from special education," 20 U.S.C. § 1401(26)(A). The timing and location of service provision is material *only* if and when it affects whether the service is required for the child to benefit from education. Certain health-related services, for example, might be "required" during school hours to "enable a disabled child to remain in school during the day," *Garret F.*, 520 U.S. at 73, but not otherwise required for education.

Where timing and location do not affect whether the service is required for the child to benefit from special education, however, they are not relevant related services criteria. Many services that are indisputably related, such as speech, occupational, and physical therapies, *see* 20 U.S.C. § 1401(26)(A), do not "have to be done in school or during the school day . . . to be effective." 71 Fed. Reg. at 46,569. The issue is so obvious that it is rarely litigated, and courts regularly consider services provided off school grounds or out of school hours to be related because they are educationally required. *See, e.g.*, *R.K. ex rel. R.K. v. New York City Dep't of Educ.*, No. 09-4478, 2011 WL 1131522 (E.D.N.Y. March 28, 2011) (requiring reimbursement for speech and occupational therapy provided outside of school, and home-based behavioral therapy, for child with autism); *DeKalb Cnty. Sch. Dist. v. M.T.V. by C.E.V.*, 413 F. Supp. 2d 1322 (N.D. Ga. 2005), *aff'd per curiam*, 164 F. App'x 900 (11th Cir. 2006) (requiring reimbursement for vision therapy provided off school grounds); *Jeff S.*, 184 F. Supp. 2d at 793 (requiring reimbursement for privately provided speech/language therapy for a child with a cochlear implant); *T.H. v. Board of Educ. of Palatine Cmty. Consol. Sch. Dist. No. 15*, 55 F. Supp. 2d 80 (N.D. Ill. 1999) (requiring reimbursement for home-based behavioral therapy for child with autism).

Indeed, a district court recently required reimbursement of the costs of a *residential placement* (including the provision of related services) for a child with

a cochlear implant, where the child's school system was unable properly to provide the required implant-associated services. *Board of Educ. of Chicago*, 2006 WL 2989289; *see* 34 C.F.R. § 300 ("If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.").

To be sure, Section 1401(26)(B) does expressly exclude surgically-implanted medical devices from the scope of related services. It is difficult, however, to see how the timing and location of service provision has anything to do with whether the service is more or less "device-like" for purposes of the scope of the device exclusion. The Secretary does not explain or justify treating the location and timing of mapping as significant.

3. The Secretary improperly relied on the expertise required to map.

The Secretary also asserted that the "distinguishing factor" that excludes mapping as a related service is "the level of expertise required." 71 Fed. Reg. at 46,571. That assertion is similarly flawed.

To begin with, the Secretary conceded in the rulemaking that non-medical services "necessary to provide access to education by maintaining the health or the safety of the child while in school" must be provided "even if those services require specialized training." 71 Fed. Reg. at 46,571. The Secretary provides no

reason for distinguishing between services required to provide access to education and services such as mapping that are required to allow children to benefit from the education to which they have access. Certainly there is no basis for such a distinction in the statutory text. The statutory examples of "related services" include many services that require specialized training, including audiology services, psychological counseling, nursing services, and physical therapy. *See* 20 U.S.C. § 1401(26)(A).

That a service may be beyond the capacity or expertise of a school district to provide itself does not mean that the service is not "related" for IDEA purposes. Rather, where a non-physician service is required for a child's special education but is beyond the skill or capacity of school staff to provide, IDEA requires that the school hire the relevant personnel or pay the costs required for the parent to obtain that service from a private provider. "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.'" *Tatro*, 468 U.S. at 893 (quoting S. Rep. No. 94-168, at 33 (1975)); *see School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359 (1985).

Moreover, the Secretary provided no explanation for why "specialized training," 71 Fed. Reg. at 46,571, should affect whether a particular service is more

or less like a surgically-implanted medical device. Nor does the Secretary attempt to justify treating mapping differently from all other services required for children with cochlear implants, many of which require specialized training as well. *See, e.g.*, 71 Fed. Reg. at 46,570 (referring to speech and language therapy designed for children with cochlear implants as a related service).

4. The Secretary improperly relied on the legislative history describing proposed statutory language that was not adopted by the Senate or the Congress and made no relevant findings as to cost.

Finally, the Secretary stated that "the exclusion of mapping from the definition of *related services* reflects the language in . . . S. Rep. 108-185" that explained the Senate Committee's choice to expressly exclude mapping from "related services." 71 Fed. Reg. at 46,569-46,570. But, as discussed above, *see supra* pp. 16-17, the Senate Committee's express exclusion of mapping was struck from the final version of the bill. The Senate Committee Report thus cannot provide support for the regulations as a necessary and reasonable interpretation of the statute *as actually enacted*.

Recognizing this weakness, the government in the district court attempted to claim that this section of the rulemaking was actually about the level of expenditure required for schools to provide mapping. Such an interpretation of this section of the rulemaking is unpersuasive at best. The Secretary nowhere in the Federal Register stated that mapping and its associated costs would be too

expensive for school districts to provide. The government cannot advance grounds for the validity of the regulations at issue that the Secretary did not rely on when promulgating those regulations in 2006. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

Further, any reliance placed on cost would be flawed in several respects. The Secretary did not cite to any evidence regarding costs to support the mapping exclusion. Nor did the Secretary compare the costs for mapping to the costs for related services that are concededly covered (such as the one-on-one nursing at issue in *Garret F.*). The Secretary did not even compare the costs of mapping to the costs of other services that concededly must be provided to children with cochlear implants, such as educational interpreters. *See* 71 Fed. Reg. at 46,570. Additionally, the Secretary provided no argument as to *how* costs are relevant in determining whether a given service is or is not "a medical device that is surgically implanted." 20 U.S.C. § 1401(26)(B). In the context of the medical services exclusion, for example, that certain procedures might be more costly does not itself make them more "medical." *See Garret F.*, 526 U.S. at 76. Here, the cost of a service indicates nothing about whether it is more or less "device-like" for purposes of the surgically-implanted medical device exclusion.

* * * * *

It is clear that in 2006, the Secretary was of the view that schools should never have to treat mapping cochlear implants as a related service under the IDEA. Yet the statute unambiguously includes such services. Even if it did not, the Secretary failed to show that the mapping regulation is "necessary" to ensure compliance with the specific requirement of Section 1401(26)(B). As a result, the Secretary has failed to meet the standard required by the IDEA for promulgating this regulation. *See* 20 U.S.C. § 1406(a).

CONCLUSION

The district court's grant of summary judgment to defendants on plaintiffs' claims should be reversed and the case remanded with instructions to vacate 34 C.F.R. § 300.34(b)(1).

Respectfully submitted,

Dated: July 1, 2011

MORRISON & FOERSTER LLP
SETH M. GALANTER
MARK H. SHAWHAN

By: /s/ Seth M. Galanter
Seth M. Galanter

Attorney for *Amicus Curiae*
COUNCIL OF PARENT
ATTORNEYS AND ADVOCATES

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a) and Circuit Rule 32(a), I hereby certify that this Brief has been prepared in proportionally-spaced Times New Roman 14-point typeface, and contains 6931 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

/s/ Seth M. Galanter
Seth M. Galanter

ADDENDUM: RELEVANT STATUTES AND REGULATIONS

Except for the following, all applicable statutes and regulations are contained in the Brief for Plaintiffs-Appellants:

20 U.S.C. § 1406: REQUIREMENTS FOR PRESCRIBING REGULATIONS

(a) IN GENERAL.--In carrying out the provisions of this chapter, the Secretary shall issue regulations under this chapter only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter.

(b) PROTECTIONS PROVIDED TO CHILDREN.--The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter that—

(1) violates or contradicts any provision of this chapter; or

(2) procedurally or substantively lessens the protections provided to children with disabilities under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on July 1, 2011. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Seth M. Galanter
Seth M. Galanter