UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3747

C.G., et al,

Plaintiffs-Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION, et al,

Defendants-Appellees

On Appeal from the Final Order of the U.S. District Court
for the Western District of Pennsylvania, 1-06-01523,
Entered on August 23, 2012

BRIEF OF AMICUS CURIAE PENNSYLVANIA STATE CONFERENCE OF NAACP BRANCHES AND PUBLIC INTEREST LAW CENTER OF PHILADELPHIA

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TABLE OF CONTENTS

Cases

Statutes

Miscellaneous

STATEMENT OF INTEREST

The Pennsylvania State Conference of NAACP Branches ("the PaNAACP) is an organization of 15,000 members in Pennsylvania in 46 branches, including a chapter in Chester, Pa. Pa-NAACP is dedicated to ensuring that all students have equal access to high quality public education. Towards that end it was an intervenor-plaintiff in the case of *Chester Upland School District v. Commonwealth of Pennsylvania,* No. 2:12-cv-00132 (E.D. Pa.) where it saw the harmful effects that underfunded special education programs have on students and the impact of a special education funding formula which is not based on the actual number of students needing special education services, but instead is based on an artificial, and arbitrary, percentage of students.

The Public Interest Law Center of Philadelphia (the Law Center) is one of the original affiliates of the Lawyers' Committee for Civil Rights Under Law, and has a long history of representing children with disabilities to ensure their rights to education, including advocating for equal financial funding of special education services. The Law Center was counsel in the landmark decision of *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa 1972) which lead to the Congressional passage of the initial version of the current Individuals with Disabilities Education Act, (hereafter, "IDEA") 20 U.S.C. §1400, et seq. The Law Center remains a vigorous advocate

for children with disabilities in Southeastern Pennsylvania and throughout the Third Circuit. Most recently, the Law Center has devoted substantial resources to protecting the rights of children with disabilities, especially poor children, as class counsel in *Chester Upland School District v. Commonwealth of Pennsylvania*, 284 F.R.D. 305; 2012 U.S. Dist. LEXIS 115607 (E.D. Pa 2012), a lawsuit that, in part, challenged Pennsylvania's special education formula and its adverse impact on children living in impoverished districts. Both through advocacy and litigation, the Law Center helps to ensure that children with disabilities receive critical funding for special education services. The Court's opinion in this case, if upheld, will adversely impact thousands of children with disabilities, including children in the Chester Upland School District.

PRELIMINARY STATEMENT

The Court below determined that the Commonwealth of Pennsylvania (hereafter, the "State") provides less Special Education Funding (SEF) to special education students in districts with higher concentrations of students with disabilities than it provides to students in districts with lower concentrations of students with disabilities, with the per student aid reducing as the percentage of students with disabilities increases. *C.G. v. Commonwealth of Pennsylvania*, Memorandum and Order dated August 23, 2012, 2012 U.S. Dist. LEXIS 119615, Findings of Fact ¶¶63-65 (hereafter, "FF¶"). On average, the State provides $781

dollars less per student for special education to the class members. FF ¶62. The Court certified a class consisting of 56 school districts which meet the qualification of having 17% or more enrolled special-education students, and includes districts throughout Pennsylvania, including, Reading, Lancaster, York, Allentown, Harrisburg, and Chester Upland School District. *C.G. v. Commonwealth of Pennsylvania*, 2009 U.S. Dist. LEXIS 90028, Memorandum and Order dated September 29, 2009, Granting Class Certification, and see FF¶ 11, FF ¶¶67-69. The Court below determined that the disparity in the State's aid explained at least some of the disparities in educational opportunities and outcomes that Appellants proved at trial. FF ¶¶61-101. More students on IEPs in the class districts scored below basic on the Pennsylvania System of School Assessment ("PSSA") than their counterparts in non-class districts which had more funding. FF ¶¶71-81. Students on IEPs in the class districts had lower graduation rates than their counterparts in non-class districts. FF ¶¶94 – 108.) The Court below nonetheless sanctioned this statutory financial discrimination against children with disabilities in poor districts concluding that the Special Education Funding formula did not deny children the "free appropriate public education" to which they are entitled under the IDEA. Memorandum and Order dated August 23, 2012, at 25-29. Appellants did not appeal the IDEA claim but did appeal the Court's ADA/504

discrimination decision. *Amici* strongly object to the District Court's completely flawed conclusion and its alarming consequences.

INTRODUCTION

The Individuals with Disabilities Education Act does not eviscerate all other rights of children with disabilities, including their rights to be free from discrimination under Section 504/ADA. See, e.g. *Payne v. Peninsula School District*, 653 F. 3d 863 (9th Cir. 2011), cert. denied, 2012 U.S. LEXIS 1492 (holding that nothing in the IDEA protects a school from non-IDEA liability if the school's conduct constituted a violation of laws other than the IDEA). Indeed, this Court has continuously recognized that children with disabilities have separate and distinct rights under Section 504/ADA to be treated in a non-discriminatory manner by those responsible for their schooling. *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 250 (3d Cir. 1999). The decision below essentially vitiates that requirement, and approves a state funding formula that is discriminatory on its face against children with disabilities who live in districts with a higher concentration of children with disabilities. Notably, from very early cases considered under Section 504, courts have held that states cannot discriminate against individuals with disabilities based upon the type or severity of their disability. *Messier v. Southbury Training Sch*., 916 F. Supp. 133 (D. Conn. 1996) (noting that both 504 and the ADA clearly prohibit discrimination based upon

severity of disability); *Mark H. v. Lemahieu*, 513 F. 3d 922 (9th Cir. 2008) (evidence that appropriate services were provided to some disabled individuals does not demonstrate that others were not denied meaningful access solely on the basis of their disability); *Nelson v. Milwaukee*, 2006 U.S. Dist. LEXIS 7513, *6 (E.D. Wis. 2006) (relying on *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598-603, (1999)); but cf., *Cohon v. State Dep't. of Health*, 646 F. 3d 717 (10th Cir. 2011) (individual challenging "average" Medicaid waiver amount who was granted an excess allotment due to severity was not victim of discrimination).

Here, the Court concludes that it is acceptable to provide children with disabilities in one school district less funding because of numerosity or frequency of disability. That is, there are simply more children with disabilities and because of that the State's Special Education Funding formula provides less money to those children ($781 per year), than it does to children with disabilities in a different district simply because there are fewer children with disabilities. Just as the amount of disability in the form of "severity of disability" has been soundly found by the Courts to be contrary to the ADA and 504, so too should the amount of disability in the form of "numerosity or frequency" which leads essentially to the same type of discriminatory impact, here lower state test scores and lower graduation rates for children with disabilities who live in poor districts.

ARGUMENT

I. The Court's Holding is Contrary to Law.

The purpose of Section 504, the Americans with Disabilities Act and the Americans with Disabilities Act as Amended is to prevent discrimination. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598-603 (1999). This is a separate and distinct purpose different from the IDEA, the purpose of which is to ensure the provision of special education and related services on an individually determined basis to each child with a disability. *Bd. of Education v. Rowley*, 458 U.S. 176 (1982). To hold, as this Court has, that because a student cannot prove a denial of FAPE, he cannot also prove discrimination is simply wrong.

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Section 504 of the Rehabilitation Act contains similar language but applies only to entities receiving federal funding. Pursuant to the ADA and Section 504, the Attorney General has issued regulations including 28 C.F.R. 35.130. The section of the regulation relevant in this case is 35.130(b)(1) which states that a public entity cannot provide a qualified individual with a disability with a benefit not equal to that afforded to others. Here, the students simply argue that because of the State's Special

Education Funding formula, if they live in a poor district which has a large number of students with disabilities, they receive less funding for their services to the tune of $781 per student per year. Financial disparities that adversely impact individuals with disabilities can constitute discrimination. *Robinson v. Kansas*, 117 F. Supp. 2d 1124, (D. Kan. 2000), affirmed 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003) (finding that state's disbursement of funds was to detriment of students with disabilities); *Nelson v. Milwaukee*, 2006 U.S. Dist. LEXIS 7513 (E.D. Wis. 2006) (finding that plaintiffs challenge to county's method of distribution of Medicaid assistance to severely impaired individuals as compared to less impaired individuals could survive a motion to dismiss.)

Here, the Court cited the requisite elements of a 504/ADA claim but made no independent legal determination of each of the factors necessary to prove discrimination. It was undisputed that the children were disabled as defined by the laws. It was also undisputed that the children were otherwise qualified to participate in school activities. It was undisputed that the school districts received federal financial aid for purposes of 504, an element not required to prove discrimination under the Americans with Disabilities Act. Thus, the only element that the parties disputed was whether the children with disabilities were excluded from participation in, denied the benefits of, or subjected to discrimination at school. *Ridgewood*, 172 F. 3d at 253. But the Court made no legal analysis of the

denial of benefit despite factually finding that children with disabilities in the class districts were denied certain benefits available to their counterparts in the non-class districts, i.e. the resources and benefits that come with increased per capita funding. The Court also concluded that this discrimination in access to programs and services hurt students and caused them to suffer real consequences. The Court concluded that at least "some" of the disparities in educational outcomes of graduation and academic proficiency were due to the Special Education Formula. Based on those findings it should have concluded the children had been harmed because of the discriminatory distribution of Special Education funding in violation of 504/ADA.

Just a few weeks before the lower Court's opinion, a court in the Eastern District of Pennsylvania ruled in the *Chester Upland* litigation that staffing cuts because of financial woes in that district had a "particular impact on students with functional behavioral assessments and individualized accommodations under Section 504." *Chester Upland School Dist. v. Commonwealth*, 284 F.R.D. 305, 2012 U.S. Dist. LEXIS 115607, (E.D. August 15, 2012), at 11. The Court also concluded that "at least some services required by the Students' IEPs were not provided in the 2011-2012 school year as a result of the District's financial troubles" although it stopped short of assigning the financial problems solely to the State's Special Education Funding. *Id*. at 13. The Court also reported testimony

that Chester had 22% of its students entitled to Special Education services but received the same amount of funding as if it had only 16% of its students enrolled in special education, a reduction of 37.5% on a per capita basis from what the average district in the state was receiving solely because of its higher concentration of students with disabilities. The total dollar loss was $1.9 million. Since there was a factual finding of reduced *benefits* to the children, the Court should have granted summary judgment on the 504/ADA claim for the class, particularly where evidence was presented that the discriminatory funding caused children with disabilities in the class districts to obtain less success from the program.

The Supreme Court has explained that in determining discrimination under 504 and the Americans with Disabilities Act, courts are to provide a "comprehensive view of the concept of discrimination advanced in the Act." *Olmstead*, at 557. This Circuit has agreed, noting that both 504 and the ADA are remedial statutes designed to end discrimination against individuals with disabilities. *Doe v. County of Centre, PA,* 242 F.3d 437, 446 (3d Cir. 2001); *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transp. Authority,* 635 F. 3d 87, 91, 94 (3d Cir. 2011).

The Court acknowledged that Section 504 regulations adopt the IDEA's "free appropriate public education" requirements, and that Section 504, and the ADA, prohibit entities from denying a "free appropriate public education" to

qualified individuals. Memorandum and Opinion at 29, citing to *P.P. v. West Chester Area Sch. Dist*., 585 F.3d 727, 735 (3d Cir. 2009), and A*ndrew M. v. Del. Cnty. Office of Mental Health & Mental Retardation*, 490 F. 3d 337, 350 (3d Cir. 2007). But the Court then ignores the gravamen of the complaint in this matter – that it is not the issue of an individual determination of a denial of FAPE, but an arbitrary statutory determination of how much funding the State will provide to the district of a student with disability to fund the Free Appropriate Public Education.

When it enacted the earlier version of the IDEA, the so-called Education for All Handicapped Children Act, Congress adopted the view that all children with disabilities would be served and that "each handicapped child would be treated as an individual with unique strengths and weaknesses *and not as a member of a category of children all presumed to have the same needs*." *Timothy W. v. Rochester School District*, 875 F. 2d 954, 964 (1st Cir. 1989) (citing to Senate Hearings at 342) (rejecting contention that child who was severely impaired was not entitled to special education services). Thus, where, as here, the State Special Education Funding formula is less simply because there are more children with disabilities in certain districts, that funding formula is wrongly dependent upon a category and contrary to the individuality requirement.

Further, unlike Section 504, the Americans with Disabilities Act does not impose a "solely by reason" of standard of disability. Courts have found that

discrimination can occur under the ADA when at least part of the reason for the discrimination is disability based. *Baird v. Rose*, 192 F. 3d 462 (4th C. 1999); *McNely v. Ocala Star-Banner Corp*., 99 F. 3d 1068, 1073-77 (11th C. 1996). Where, as here, the Court concluded that at least part of the disparities in education were related to the Special Education Formula, the Court should have found in favor of the class on the 504/ADA claim.

II. Parental Blame for Acquiescence

The Court notes that "none of the class plaintiffs" availed themselves of the due process procedures, suggesting that plaintiffs have some duty to bring such claims. But this is a false premise, particularly for children who live in poor districts.

A large majority of children with disabilities live below the poverty line or close, and have less access to attorneys or advocates to help them navigate and insist upon the rights available to them under the Individuals with Disabilities Education Act. Hyman, Elisa, Dean Hill Rivkin, and Stephen A. Rosenbaum, "How IDEA Fails Families without Means: Causes and Corrections From the Frontlines of Special Education" American University Journal of Gender Social Policy and Law 20, no. 1 (2011): 107-162. It is therefore distressing to see scattered throughout the Court's opinion the suggestion that the Court believed "all was well" despite indicators of lack of some special education services simply because none of the named plaintiffs' parents brought individual IDEA claims and

others who complained settled them. *Id*. at 79; and s*ee*, FF¶ 153 and ¶154 (Reading School District had insufficient speech services but complaints resolved); FF¶ 173 (In Lancaster, two hearings requested but complaints resolved); FF¶¶ 215-216 (In York, the district had two mediated disputes); FF ¶262 (In Harrisburg, no due process hearing requests known by one teacher); individual plaintiffs did not request a special education hearing, FF ¶¶ 288, 311, 326, 342, 353, and 368. The Court's premise is simply incorrect. Parents, particularly parents without means, do not always file complaints or request special education due process hearings even when denials of a Free Appropriate Public Education are apparent. In *Chester Upland School District v. Commonwealth,* the State of Pennsylvania stressed the lack of individual complaints even while it acknowledged that it was conducting an investigation into the denial of a Free Appropriate Public Education by the District. *Chester Upland School District v. Commonwealth*, 284 F. R.D. 305 (E.D. 2012). In its final approval of a settlement, the Court found that the children in the district had been denied a free appropriate public education, at least in part. *Id.* at 321. But, the Court mused about the lack of individual complaints noting that the testimony showed that many parents did not have a full understanding of their rights under federal law, which might well account for the lack of complaints. *Id*. at 352. Indeed, one of the key elements of the *Chester Upland* settlement was

development of a Parent's Council by which parents of children would become better informed about their rights. *Id*. at App. A.

This Court should reject any notion that there is any parental responsibility to ensure that a child receives a Free Appropriate Public Education. The Third Circuit along with its sister circuits has simply never conditioned the provision of a Free Appropriate Public Education on the shoulders of the parents and indeed has consistently held otherwise. *M.C. v. Regional School District,* 81 F. 3d 389, 397 (3rd Cir. 1996) (child's entitlement to special education should not depend upon the vigilance of the parents who many not be sufficiently sophisticated to comprehend the problem; rather, it is the responsibility of the child's teachers, therapists and administrators to ascertain and respond to the child's needs); *Anchorage School District v. M.P.*, 689 F. 3d 1047 (9th Cir. 2012) (noting that nothing in the statute makes the school's duty to provide special education contingent on parental cooperation and concluding that schools cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents.) To the extent the Court relied on this false premise in its view that no discrimination was occurring because it found that no IDEA claim existed, the Court must reverse.

CONCLUSION

The Court should reverse the judgment in favor of the Defendant based on Section 504 and the ADA.

Respectfully submitted this 19th day of February, 2013.

Respectfully submitted,

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COMBINED CERTIFICATIONS

Under 28 U.S.C. §1746, Sonja D. Kerr certifies, under penalty of perjury that the following is true:

Bar Membership

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

Word Count

Under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that according to the Word Count feature of the Microsoft Office Word 2007, this brief contains 3121 words and therefore is in compliance with the type-column limitations set forth in Local Rule 32(a)(7)(B).

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I certify that on February 19, 2013, I caused ten copies of this brief to be served with the United States Court of Appeals for the Third Circuit, by personal service, addressed as follows:

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