No. 09-1319
No. 09-2499

In the United States Court of Appeals
For the Seventh Circuit

MARSHALL JOINT SCHOOL DISTRICT NO. 2,
PLAINTIFF – APPELLANT,

v.

C.D., BY AND THROUGH HIS PARENTS, BRIAN AND TRACI D.,
DEFENDANTS – APPELLEE.

TRACI AND BRIAN D., AS PARENTS OF AND ON BEHALF OF THEIR MINOR CHILD, C.D.,
PLAINTIFFS, APPELLEE
v.

MARSHALL JOINT SCHOOL DISTRICT NO. 2,
DEFENDANT– APPELLANT

On Appeal from the United States District Court for the
Western District of Wisconsin
Case No. 08-cv-00187-bbc
Case No. 08-cv-00189-bbc
The Honorable Barbara B. Crabb

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND WISCONSIN ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF APPELLANT'S REQUEST FOR REVERSAL

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Disclosure Pursuant to Circuit Rule 26.1

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(1) The full name of every party or amicus the attorney represents in the case:

National School Boards Association

Wisconsin Association of School Boards

(2) If such party or amicus is a corporation:

(i) It's parent corporation, if any; and

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(ii) A list of stockholders which are publically held companies owning 10% or more of the stock in the party or amicus:

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Dated this 21st day of August 2009. ABACDAA

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STATEMENT OF INTEREST OF *AMICI*

The National School Boards Association (NSBA) is a federation of state associations of school boards from throughout the United States, as well as the Hawai'i State Board of Education, and the board of education of the U.S. Virgin Islands. NSBA and the state associations together represent over 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 49.3 million public school students, approximately 90 percent of the Nation's elementary and secondary students.

The Wisconsin Association of School Boards is a membership organization of public school boards governing public school districts in the State of Wisconsin. The purposes of the Wisconsin Association of School Boards are to aid and assist public school boards and public school agencies in the State of Wisconsin in the performance of their lawful functions and to otherwise support, promote, and advance the interests of public education in the State of Wisconsin.

Amici regularly represent their members' interests before Congress and federal and state courts and have participated as *amicus curiae* in many cases involving the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400 *et seq.* (IDEA). Recognizing that all children with disabilities have a right to be provided with a free appropriate public education, *amici* have consistently supported the rights of disabled children. At the same time, *amici* are also fully cognizant of the substantial financial and human resources that public school districts devote each and every year to

educating students with disabilities. As these resources are increasingly strained, *amici* are mindful of the importance of ensuring that they are focused on meeting the needs of students who otherwise could not receive a meaningful education.

This brief is presented on motion for leave to file under Federal Rule of Appellate Procedure 29(a) and (b).

SUMMARY OF THE ARGUMENT

At issue in this case is whether an elementary student, C.D., is eligible for special education services under the Individuals with Disabilities Education Act (IDEA) where, despite physical disabilities and Attention Deficit Hyperactivity Disorder (ADHD), he performs at grade level. C.D. had received special education services but, upon reevaluation, was found by his Individualized Educational Program (IEP) team no longer to require such services. Rejecting the IEP team's conclusion, the Administrative Law Judge (ALJ) and the U.S. District Court determined that C.D. was eligible for special education services under the IDEA category of eligibility for "other health impairment" (OHI) that "adversely affects" the student's educational performance at school.

This was reversible error. Although neither IDEA's statutory text nor its implementing regulations elaborate on this category of eligibility, federal education law repeatedly evinces a Congressional intent to focus scarce special education resources and services on those who could not otherwise access the general education program and to minimize the extent to which students with health conditions and disabilities receive their education differently from their peers:

1) The IDEA seeks to avoid the over-identification of children as requiring special education services;
2) Consistent with its "least restrictive environment mandate," the IDEA contemplates re-evaluation of students receiving special education services and, where appropriate, their exit from special education; and
3) In many situations, the needs of students with disabilities can be addressed in the regular classroom appropriately through teacher-selected modifications or accommodations provided under Section 504 of the Rehabilitation Act and do not require a formalized IEP under the IDEA.

In its expansive reading of IDEA's OHI provision, the District Court ignored these Congressional points of emphasis—points that form the policy context that must inform this Court's decision as to the statutory interpretation question presented here.

Moreover, in relying heavily on the testimony of C.D.'s medical witnesses, the District Court discounted the considered professional judgment of the highly trained and conscientious members of C.D.'s IEP team as to the most appropriate *educational* measures for meeting C.D.'s needs. This is akin to relying heavily on a teacher's testimony in a medical malpractice case.

Accordingly, the National School Boards Association and the Wisconsin Association of School Boards respectfully request that the Court consider this *amicus curiae* brief in support of the Appellant School District.

ARGUMENT

The main issue in this case is whether C.D. continues to qualify for special education services under the IDEA. A student is entitled to special education under the IDEA if (1) he or she suffers from a disability, and (2) the impairment is to such a degree that it necessitates special education. 20 U.S.C. § 1401(3)(A). There are several categories of disabilities that will qualify a student under the first prong, such as mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (SED), orthopedic impairments, autistic-like behaviors, specific learning disabilities (SLD), and "other health impairments"(OHI). 20 U.S.C. § 1401(3)(A)(i). C.D. had previously been classified as a student with an OHI.

Federal law defines OHI as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—¶(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome;[1] and ¶ (ii) *Adversely affects* a child's educational performance." 34 C.F.R. § 300.8(c)(9) (emphasis added). Neither the IDEA nor the federal regulations define

[1] This list is not exhaustive. Other disorders or conditions that may, in combination with other factors, qualify a child for services under IDEA, include fetal alcohol syndrome (FAS), bipolar disorders, dysphagia, and other organic neurological disorders. 71 Fed. Reg. 46550 (Aug. 14, 2006).

"adversely affects." *See J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 (2nd Cir. 2000) (federal regulations do not define the phrase "adverse effect on educational performance." Instead, "each State [gives] substance to these terms."). Some states define the phrase explicitly in their administrative regulations. *See, e.g.*, 511 Ind. Admin. Code § 7-32-5 (Ind. State Bd. of Educ. 2009) (student's disability has a "consistent and significant negative impact" on academic achievement and functional performance); Admin R. of Mt. § 10.16.3008 (Supt. of Pub. Inst. 2008) ("pattern of educational, developmental, or functional attainment. . .below the student's age or grade level. . .that can. . . be attributed to the disabling condition"). Other states, like Wisconsin, do not specifically define the phrase but provide guidance documents to help educators determine whether a student meets the federal definition of "other health impairment."

After completing the state's OHI guidance documents to re-evaluate C.D., his teachers and other school staff believed that C.D.'s disabilities did not adversely affect his educational performance in such a manner as to require specialized instruction beyond classroom modifications and reasonable accommodations in the school program. Based on working with and observing C.D. at school on a daily basis, they proposed to address his educational needs in a regular education classroom with differentiated instruction. C.D.'s outside medical experts, non-educators who had never evaluated his classroom performance, testified otherwise. The District Court, adopting an expansive interpretation of the federal regulatory language and giving greater weight to the testimony of these medical experts, determined that C.D.'s health

impairments adversely affect his educational performance.

The District Court's interpretation moves far beyond the purpose of the IDEA, which is to ensure that a school district provides services sufficient to enable a child with disabilities to derive some benefit from the educational program. *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 199-200 (1982). Whether a student's disability "adversely affects" his "educational performance" should, therefore, focus on the student's ability to perform in a regular classroom. If a student is able to learn and perform in the regular classroom without specialized instruction, taking into account his particular learning style, the fact that his health impairment may have some minimal adverse effect does not render him automatically eligible for special education services.

Certain policies that underlie the IDEA support this more limited reading of the law. These fundamental principles reflected in statutory language include: avoiding over-identification of children as needing special education, "mainstreaming" students who are identified as needing special education in the least restrictive environment, periodically re-evaluating a student's need for special education, and the critical role given to educators in each of these arenas. Together these policies should compel courts to accord a high degree of deference to the judgment of professional educators with respect to the educational services needed by a particular student. In addition, the growing emphasis on meeting students' individual learning needs through improved classroom instruction also supports the school district's actions in this case.

I. The IDEA Encourages School Districts to Avoid Over-identifying Children as in Need of Special Education

The IDEA is intended to ensure that children with disabilities receive a free appropriate public education, but it is also averse to over-identification of children as needing special education. The act contains provisions that support school district efforts, like those of the Marshall School Joint School District here, to ensure that children are receiving education appropriate to their changing developmental and educational needs. The IDEA contemplates that the classification of a child as in need of special education will be made initially and retained thereafter only when other services in the regular classroom environment fail to address adequately these needs. When it amended the IDEA in 2004, Congress specifically stated that the 30 years of research that had taken place since the law's first enactment had found that addressing the behavioral and learning needs of children with disabilities is more effective when there are incentives for whole-school approaches, early reading programs, positive behavioral interventions and supports and early intervening services to *reduce* the need to label children as disabled. 20 U.S.C. § 1400(c)(5)(F).[2] *See also Madison Metropolitan Sch. Dist. v. P.R. ex rel. Teresa R.*, 598 F.Supp.2d 938, 952 (W.D. Wis. 2009).

To that end the IDEA provides support for school district efforts to ensure that children are not inappropriately identified as in need of special education in the first place. The IDEA permits districts to use up to 15% of federal IDEA funds for "early

[2] The IDEA also expresses concern about the over-identification of African American students and students with limited English proficiency as in need of special education. 20 U.S.C. §1400(c)(11)(B), (12)(C).

intervening services" to avert, where possible, the need to refer students for special education. *See* 20 U.S.C. § 1413(a)(4)(A)(ii) and (f); H.R. Rep. No. 108-77 at 108 (April 29, 2003) ("The eligibility for special education services would focus on the children who, even with these services, are not able to be successful."). These are services "for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment." 20 U.S.C. § 1413(f)(1).

The IDEA's focus on early intervention is also reflected in 2004 amendments that require states to allow school districts to use a Response to Intervention (RTI)[3] system for identifying students who may have a specific learning disability (the largest disability category assigned to students served under the IDEA). 20 U.S.C. § 1414(b)(6). In 2002, the President's Commission on Excellence in Special Education recommended that RTI, although not intended as a special education instructional model, be incorporated as an assessment standard into the IDEA. The Commission made the recommendation after finding that the number of children identified as having a specific learning disability had increased 300% since the inception of the IDEA in 1975 and that thousands of these students were actually misidentified. President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education For Children And Their Families* (July 2002). In the Commission's view, this

[3] RTI is generally described as an individual, comprehensive, student-centered process utilizing high quality classroom instruction and scientifically based techniques to help at risk students catch up to and achieve with their peers.

situation could be ameliorated in part by ensuring that schools intervene as early as possible with at-risk children to teach them effective learning strategies that would prevent them from developing educational deficits that might later result in their being misidentified as needing special education. As of January 1, 2009, at least 39 states had plans in place allowing districts to use RTI as part of their efforts to identify students as in need of special education only after other interventions have been tried and deemed insufficient to address the student's learning deficits. B. Rodick, N. Krent & S. Jones, *Response to Intervention: the Legal Ups and Downs of Implementation*, Appendix B (NSBA Council of School Attorneys, 2009).[4]

Misidentification of children as needing special education has also emerged as a problem when schools and parents mistakenly use a child's medical condition alone as the key factor in determining whether the child should receive services under the IDEA. The National Center for Education Statistics reports that in the 2006-2007 school year, roughly nine percent of the 6.7 million students who received services under the IDEA were classified under the OHI category. http://nces.ed.gov/programs/digest/d08/tables/dt08_052.asp?referrer=list . Significantly, this number more than doubled from 1999 to 2007. This growth may be due, in part, to the increased pressure that schools face from parents to identify children under the IDEA in order that they may receive modifications or accommodations, such as changes to year-end tests. There are reports that some school officials may inappropriately use the OHI category to "placate parents or to provide special education services to students who do not qualify under

[4] This publication is available upon request from *Amicus* National School Boards Association.

the IDEA, even though they have a diagnosed medical condition." K. Grice, *Eligibility under IDEA for Other Health Impaired Children* (Institute of Government, 2002). http://www.sog.unc.edu/pubs/electronicversion/slb/slbsum02/article2.pdf

This Court has recognized that the IDEA is not intended to address conditions that are primarily medical, rather than educational, in nature. For example, in *Butler v. Evans*, 225 F.3d 887, 894-95 (7th Cir. 2000), the Court found that a student's hospitalization was "not an attempt to give her meaningful access to public education or to address her special educational needs within her regular school environment." The Court explained that when a "placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process" and his special education needs, then it is not an educational placement for purposes of the IDEA. *Id.* at 893-94 (analyzing a student's need for residential placement) (internal citation omitted). The IDEA does not require the school district to be responsible for such a placement. *Id.* at 894; *See also State of Wis. ex rel. In re Support of Robert H.*, 257 Wis. 2d 57, 653 N.W.2d 503 (Wis. 2002). Particularly, where, as here, other interventions may be employed to meet the child's needs, the law discourages automatically resorting to special education services.

II. Consistent with Its Least Restrictive Environment Mandate, the IDEA Requires Re-evaluation of Students with Disabilities and Contemplates Changes in Their Eligibility Status

When a child does need specialized instruction to access the education program offered by the school district, the IDEA requires that the child receive such services in the least restrictive environment, a concept known as "mainstreaming." 20 U.S.C. §

1412(a)(5). In the precursor to the IDEA, Congress specifically mandated that "to the maximum extent appropriate, States will 'mainstream' disabled children, i.e., that they will educate them with children who are not disabled, and that they will segregate or otherwise remove such children from the regular classroom setting 'only when the nature or severity of the handicap is such that education in regular classes ... cannot be achieved satisfactorily.'" *Honig v. Doe*, 484 U.S. 305, 311 (1988), quoting Education of the Handicapped Act, former 20 U.S.C. § 1412(5).

The requirement that students with disabilities be educated in the "least restrictive environment" continues to be a central tenet of the law. This mandate necessarily contemplates a spectrum of placements and services depending on the educational needs of the child. Because this requirement is a continuous one to which a school district must adhere each time it evaluates and places a child with disabilities, the logical end of that spectrum for some students who previously received special education services may be a determination that they no longer require specialized instruction and instead are able to access the regular education program with some modifications and adaptations, a form of mainstreaming outside the auspices of the IDEA.

Decisions, like the one made in this case, to "exit" students from eligibility for special education services under the IDEA are clearly contemplated by the law. Several sections of the law with respect to re-evaluations[5] of a child specifically state that one of the determinations the Individualized Education Program (IEP) team must make after

[5] Re-evaluations must be conducted at least every three years. 20 U.S.C. § 1414(a)(2)(B)(ii).

reviewing existing and new information is "whether the child continues to need special education and related services." 20 U.S.C. § 1414(c)(1)(B)(iii). A subsequent section requires school districts "to evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability." 20 U.S.C. § 1414(c)(5).

C.D.'s parents contend that C.D. continues to need special education services, although he has been functioning at grade level with some modifications and instructional strategies provided by his teachers. The school district believes that C.D. would be better served in a regular education classroom with some accommodations to help aid in his success. That view is consistent with the congressional mandate imposed upon the schools, to mainstream children with disabilities to the greatest extent possible.

III. Schools Use Various Instructional Approaches, Including 504 Plans, to Address Students' Educational Challenges When Students Are Not Eligible for IDEA Services.

Where a student, like C.D., has a mental or physical impairment or other learning challenge but does not qualify for special education under the IDEA, many schools still make concerted efforts to ensure that a student benefits from the educational program by modifying the regular classroom instruction according to the child's individualized needs. One instructional model that encourages this approach— and that was employed with demonstrable success in this case— is known as "differentiated instruction." Originally developed nearly 50 years ago to address the

needs of gifted and talented children, differentiated instruction is currently gaining ground in the regular classroom to respond to the increasingly diverse learning needs of students attending public schools. *See, e.g.*, S. Bravmann, *Two, Four, Six, Eight, Let's all Differentiate--Differential Education: Yesterday, Today, and Tomorrow* (New Horizons for Learning, Dec. 2004), http://www.newhorizons.org/strategies/differentiated/bravmann.htm.

Differentiated instruction simply means the goals of all students are the same, but the instructional methods, tools and strategies used to achieve these goals vary according to students' different learning needs. For example, some students learn better by audio learning, some by visual learning, some by sitting closer to the teacher. Differentiated instruction maximizes learning for *all* students, regardless of skill level or background by taking into account students' varying academic abilities, learning styles, personalities, interests, background knowledge and experiences, and levels of motivation for learning. When a teacher differentiates instruction, he or she uses the best teaching practices and strategies to create different pathways that respond to the needs of diverse learners. Tomlinson, Carol A., *How To Differentiate Instruction In Mixed-Ability Classrooms*, 2nd ed. New Jersey: Pearson Education, Inc., 2005.

Because C.D.'s teachers were already using differentiated instruction in this case, he was the beneficiary of teaching techniques available to all general education students, but tailored to his specific needs. This "differentiated" instruction has been successful, according to C.D.'s teachers.

Many school districts encourage teachers to provide these services routinely as

part of their efforts to ensure that all students receive meaningful instruction and that students identified as "at risk" are provided the targeted support necessary to their educational success. These services may also be provided under an individualized "Section 504 plan." Whereas the IDEA establishes affirmative duties on school districts that receive IDEA funding to educate students with qualifying disabilities, Section 504 of the Rehabilitation Act of 1974, 29 U.S.C. § 794, more generally prohibits discrimination against disabled persons in federal programs, including public schools that receive federal funds. Under this provision school districts must provide services to a student who has a physical or mental impairment[6] which substantially limits[7] his or her ability to learn or another major life activity.[8] If a child meets this definition,

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[6]The Section 504 regulatory provision at 34 C.F.R. 104.3(j)(2)(I) defines a *physical or mental impairment* as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory; urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotion or mental illness, and specific learning disabilities. The regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

[7]There is no single formula or scale that measures substantial limitation. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. Like the IDEA, Section 504 regulations require that a group of knowledgeable persons draw upon information from a variety of resources to make the determination. 34 C.F.R. 104.35(c). A physician's medical diagnosis may be considered to determine whether a student has an impairment which substantially limits a major life activity. Medical information may play a more significant role in disability determinations under Section 504 than under the IDEA. In addition to medical diagnoses, schools may also consider aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior.

[8]*Major life activities*, as defined in the Section 504 regulations include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reading, concentrating, thinking, and working. 34 C.F.R. 104.3(j)(2)(ii). This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. Also, the

Section 504 requires the school district to make an individualized determination of the child's need for regular or special education and related services. Some of these students will ultimately be entitled to special education under the IDEA. However, a student who is ineligible for special education services under the IDEA may still qualify for accommodations, *including adjustments in the regular classroom*, under Section 504.

Certainly this would be true for some students who previously received services under the IDEA but are subsequently determined no longer to be eligible. In this case, after finding C.D. was no longer eligible for special education, the school district did consider whether he was qualified for a section 504 plan but at that time determined that he was not "substantially limited." Since that determination, amendments to the Americans with Disabilities Act, Pub. L. 110-325, 122 Stat. 3553 (Sept. 25, 2008), to which Section 504 conforms, have broadened the definition of individuals covered by both laws, reduced the standard for determining substantial limitation, and discounted the effect of mitigating measures on the covered disability determination.

The recently expanded scope of Section 504's coverage opens the possibility that C.D. may now be entitled to a Section 504 plan that could formalize the modifications and adjustments the school district is currently providing to C.D. in his physical education and regular classes. Schools that can successfully accommodate the special needs of children either through a Section 504 plan or simply through advanced education practices are not automatically required to serve every child with an

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definition of "major bodily functions" includes functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

impairment through the IDEA.

IV. Education Experts Are In the Best Position to Determine What Educational Plan is Best for Student Achievement

Among the bedrock principles of the IDEA is its presumption that school district officials are the experts in educational matters, and their judgment in such matters is due deference by the courts. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 59 (2005) ("IDEA relies heavily upon the expertise of school districts to meet its goals"). Under the IDEA, school personnel are obligated to identify children in need of special education and to lead the IEP teams responsible for developing the individualized education programs for each child with a disability. In addition to the child's parents, the IEP team must consist of at least one special education teacher, one general education teacher, one local agency representative who must be knowledgeable concerning "local resources," and another member to interpret evaluation results. 20 U.S.C. § 1414(d)(1)(B). The IDEA additionally requires that a regular education teacher of the student, as a member of the IEP Team, shall help determine "appropriate positive behavioral interventions and supports, and other strategies, and "supplementary aids and services, program modifications, and support for school personnel." 20 U.S.C. § 1414(d)(3)(C). And, important to this case, the regular education teacher must "participate in the review and revision of the IEP of the child." 20 U.S.C. § 1414(d)(4)(B). Courts should "presume that public school officials are properly performing their difficult responsibilities under this important statute." *Schaffer*, 546 U.S. at 62-63 (Stevens, J., concurring). Here this means that the school district's determination that

C.D. was no longer ineligible for special education services was presumptively done in good faith, following the extensive procedural requirements of the IDEA and applying the best professional judgment of highly qualified educators.

Judicial regard for this professional judgment is warranted, particularly when it is considered that teachers, especially in the lower grades, spend many, many hours on a regular basis with their students. As time goes on, these teachers, like C.D.'s teachers here, learn the students' behaviors, and how they best function in the classroom. Medical providers, academically trained psychologists, and other specialists may be able to offer valuable input in helping educators understand a student's unique conditions that may, in turn, affect his or her ability to benefit from a particular educational program. Ultimately, however, the professional educators are the ones with the training and expertise in instructional methodology and effective teaching practices required to judge whether a student is in need of special education services or whether providing differentiated instruction tailored to the educational needs of that child will ensure the student receives a meaningful education. When educators bring their instructional expertise and their intimate knowledge of a child's educational needs to the re-evaluation process, their decisions made in close compliance with the law's procedural requirements are entitled to a high degree of judicial deference.

In addition to teachers, the IDEA also recognizes that school administrators, such as special education directors, who have knowledge of the availability of school district resources play a role in making determinations about the placement and services to be provided to children with disabilities. 20 U.S.C. § 1414(d)(1)(B)(iv). These IEP team

members have the difficult task of balancing the obligation of ensuring that students receive educational benefit in compliance with the law with the reality of the district's financial and human resource limitations.

CONCLUSION

The principles embodied in the IDEA and detailed in this brief—focusing limited resources on children who unambiguously require special education services and relying on the professional judgment of educators—are made all the more convincing and compelling by the choices Congress has made as to funding. While the federal government does provide some IDEA funding to state and local education agencies, it has never even come close to providing the 40 percent of the cost per pupil for special education that Congress promised when it first enacted the predecessor statute to IDEA in 1974. It currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $55 billion for the last four fiscal years. Ann Lordeman, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, CRS Report for Congress (April 11, 2008). Even with the additional temporary funding to be provided under the American Recovery and Reinvestment Act of 2009, the gap will remain substantial.

Arguably, Congress's "woefully inadequate" funding of special education is strong evidence that it did not intend such an expansive reading of the services required under the IDEA as that adopted by the District Court in this case. *Cf. Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 24 (1981) ("The fact that Congress granted. . .a sum woefully inadequate to meet the enormous financial burden

of providing 'appropriate' treatment in the 'least restrictive environment' setting, confirms that Congress must have had a limited purpose in enacting 42 U.S.C. § 6010").

Amici respectfully submit that the District Court's interpretation is a strained one in light of these principles and realities. It should be reversed.

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,851 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in font size 12 of Book Antiqua.

Dated this 21st day of August, 2009.

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), the Amici Curiae brief and Motion in a non-scanned PDF format.

Dated this 21st day of August 2009.

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CERTIFICATE OF SERVICE

The undersigned, counsel for the *Amici Curiae* National School Boards Association and Wisconsin Association of School Boards, hereby certifies that on August 21, 2009, two copies of the Amici Curiae Brief and Motion for Leave to File were deposited in the United States mail, first class postage pre-paid, addressed to the following:

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