Case No. 13-6514

IN THE UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOONE COUNTY BOARD OF EDUCATION, *et al.*
PETITIONERS-APPELLANTS;

-v-

N.W., *et al.*
DEFENDANTS-APPELLEES

On Appeal from the United State District Court
Eastern District of Kentucky at Covington

BRIEF OF *AMICI CURIAE* OF KENTUCKY SCHOOL BOARDS ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, KENTUCKY ASSOCIATION OF SCHOOL ADMINISTRATORS, GREEN RIVER REGIONAL EDUCATIONAL COOPERATIVE, NORTHERN KENTUCKY COOPERATIVE FOR EDUCATIONAL SERVICES and OHIO VALLEY EDUCATIONAL COOPERATIVE IN SUPPORT OF PETITIONERS-APPELLANTS

Respectfully submitted,

/s/ Mary Suzanne Cassidy
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STATEMENT OF INTEREST

The primary issue in this appeal has drawn the interest of multiple, public school district organizations, including Kentucky School Boards Association (KSBA), National School Boards Association (NSBA), Kentucky Association of School Administrators (KASA), Green River Region Educational Cooperative (GRREC), Northern Kentucky Cooperative for Educational Services (NKECS), and Ohio Valley Educational Cooperative (OVEC).

KSBA is a nonprofit association serving 173 elementary and secondary public boards of education in Kentucky. It is the leading advocate and resource for public school boards in Kentucky. Its mission is to enhance school board leadership to maximize student achievement through superior support and services. Among its goals are support of legislation and other state and national actions that strengthen public education, promote student achievement and protect local control. In particular as applies to this case, KSBA supports ensuring that local school districts and parents both adhere to the mandates and protections applicable to all the providers and recipients of special education services in public school systems in the Commonwealth of Kentucky.

NSBA is a non-profit organization representing through its state associations of school boards, the school board members governing over 13,800 local school districts serving

approximately 50 million public school students. NSBA believes this case implicates the legal position of school districts nationwide, as it addresses the interplay between two provisions of the Individuals with Disabilities Act (IDEA) - "stay put" and tuition reimbursement for private placements. It is critical that the Sixth Circuit decides this case in a manner that preserve's IDEA's collaborative framework. Under that framework, parents and schools are to work cooperatively to develop an appropriate and individualized education program for a child with disabilities and to resolve differences quickly and informally. If the Sixth Circuit affirms the decision of the Kentucky district court, its decision would increase the obligation of school districts in Michigan, Ohio, Kentucky and Tennessee to fund expensive, unilateral placements for students with disabilities regardless of whether the districts have offered a free appropriate public education (FAPE). This result will be inevitable as the district court's ruling allows parents to obtain reimbursement for unilateral placements simply by initiating and prolonging due process and court proceedings. In *Amicus* NSBA's view, neither of these results is in keeping with Congress's intent, and both ultimately disserve the interests of public schools and the children with disabilities they seek to educate.

The members of GRRCC, NKCES and OVEC consist of 67 public school districts, two public universities, and one community college, representing 70 providers of public education in Kentucky. They joined this appeal as *amici* in order to fulfill their respective missions to provide support to their member agencies in providing quality programming and leadership within public education efforts in Kentucky. Their concerns about the issue raised on appeal in this matter is the educational and financial impact it will have on public school districts in meeting their mission to educate students for college/career readiness.

STATEMENT PURSUANT TO FRAP 29(c)(5)

The brief was not authored by counsel for the parties in this case. No party nor any counsel for party contributed money to fund the preparation or submission of this brief. No person, other than the *Amici Curiae*, contributed money that was intended to fund the preparation of or submission of this brief.

STATEMENT OF FACTS

This matter involves a dispute between the parents of N.W. and the Boone County Board of Education regarding the appropriate educational program for N.W., a student with apraxia and autism.

By agreement, the parents and the School District placed N.W. at St. Rita's School for the Deaf beginning in pre-school, due to the student's need for special services to address his apraxia diagnosis. At an Admission and Release Committee (ARC) meeting in June of 2010, the members noted that N.W. made "tremendous growth . . . in academics and also in behavior." Despite this progress, that same month N.W.'s parents unilaterally enrolled him in Applied

Behavioral Services School (ABS), another private school, so that N.W. could attend a program addressing his educational needs resulting from an autism diagnosis. The parents also filed a due process complaint, seeking reimbursement for the costs of educating their son at ABS.

At a subsequent ARC meeting, the parties could not reach an agreement as to the proper educational placement for the student. In November of 2010, the parties entered into a mediated agreement to resolve the due process complaint. In the agreement, the School District committed to pay for one year's tuition and other costs at ABS. Additionally, the parties agreed to reconvene an ARC in the Spring of 2011 to develop a transition plan to enroll N.W. in the School District for the 2011-2012 school year. At the next several ARC meetings held in 2011 prior to the beginning of the school year, the parents and the District could not agree on a transition plan to facilitate the transfer. These efforts ceased when the parents abruptly stopped participating in the ARC meetings shortly before the beginning of the school year. N.W. remained enrolled at ABS over the District's objection, and his parents filed a second due process request in October of 2011, seeking among other relief, the continued enrollment of N.W. at ABS at the School District's expense.

A due process hearing was convened in March of 2012. At its conclusion, the Hearing Officer (HO) found that the District had not denied N.W. a free appropriate public education; rather the District had established that it could provide a FAPE. However, the HO also found that N.W.'s "stay-put" placement was ABS, the school unilaterally chosen by the parents. Both parties appealed this decision to the Exceptional Children's Appeal Board (ECAB). It upheld the HO's decision regarding the School District's ability to provide FAPE, but reversed the "stay-put" finding, denying N.W. compensatory education, attorney's fees and reimbursement

for expenses at ABS.

N.W. appealed this decision to the U.S. District Court, which decided the dispute on the administrative record without additional evidence. On November 4, 2013, the Court agreed that the School District could provide N.W. a FAPE, as both the HO and ECAB previously held, but reversed the ECAB and reinstated the HO's decision on the "stay put" issue. The School District filed a timely appeal. N.W. did not appeal the district court's finding that the District could provide the student a FAPE.

ARGUMENT

A. GRANTING TUITION REIMBURSEMENT TO PARENTS WHO UNILATERALLY PLACE THEIR CHILD IN A PRIVATE SCHOOL WHEN THE LOCAL PUBLIC SCHOOL HAS PROVIDED FAPE EXTENDS A PUBLIC SCHOOL SYSTEM'S OBLIGATIONS BEYOND IDEA.

One of the primary purposes of IDEA (or the Act) when it was first enacted was "to reverse the history of neglect" wrought by public school districts, and bring students with disabilities into the mainstream of public schools. *Schaeffer ex rel. Schaeffer v. Weast*, 546 U.S. 49, 52 (2005). The statute "evinces a congressional intent to bring previously excluded handicapped children into the public education system of the States." *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982). Prior to the enactment of the statutory precursor to IDEA, parents often had to pay for costly private schools in order for their children to receive an appropriate education. In other words, Congress sought to ensure that public schools provide a free appropriate public education to children with disabilities in public schools. The district court's decision, however, creates an incongruous rule of law under which public school districts must provide a disabled student with a free, appropriate public education, but also must pay the cost of tuition if the parents unilaterally opt to send the child to

a private school instead and file for due process.

To provide FAPE, public schools must educate students with disabilities in the "least restrictive environment" (LRE). 20 U.S.C. §1412(a)(5). Also known as "mainstreaming," the Act requires that children with disabilities attend school with non-disabled children whenever possible. *T.F. v. Special Sch. Dist. of St. Louis County*, 449 F.3d 816, 819-820 (8th Cir. 2006); *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). Consequently, a public school district may only place a disabled child in a private school when its own services are not appropriate and available for the disabled student. *Hessler by Britt v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 138 (4th Cir. 1983). Under the procedures outlined in IDEA, a private school placement is appropriate only when both the public school district and the parents agree. 20 U.S.C. § 1412(a)(10)(C)(i). If the district court's decision below is affirmed, this will no longer be true: parents in every state in the Circuit will be able unilaterally to enroll their child in a private school of their choice, file for a due process hearing, and earn "stay-put" status for the private school placement, with private school tuition paid for by the public school district. Other circuits have not rewarded this parental conduct. *Loren F. Ex rel. Fisher v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312-13 (11th Cir. 2003).

Granting parents unilateral power over the educational placement for which public schools must bear the cost is contrary to the carefully crafted collaborative process put in place by IDEA. The IDEA requires public school districts to include parents in the decision-making process regarding placement and services for their child. 20 U.S.C. 1415(a). The Act provides parents guaranteed participation as part of a multi-disciplinary team that develops an IEP that meets the unique needs of the child. 20 U.S.C. §1414(b)(4); 20 U.S.C. § 1414(d)(1)(B). Parents

have the right to attend and actively participate in all IEP team meetings and to see all documents relevant to the identification and evaluation of their child's needs. 20 U.S.C. § 1415 (b)(1). They also have the right to seek an independent evaluation that must be considered by the IEP team in determining the educational placement and related services to be provided the student. *Id.*

The IDEA provides other extensive rights to parents including the right to raise concerns about their child's educational placement and services at any time. The Act contemplates that schools and parents will work cooperatively to resolve differences as expeditiously as possible to ensure that children with disabilities are receiving the educational services they need. If parents and schools are unable to come to agreement informally, several mechanisms are included in the statutory scheme to achieve that end, including a dispute resolution meeting, mediation, and if necessary due process and court hearings. 20 U.S.C. §1415(e)(2)(F); 20 U.S.C. §1415(f)(1)(A) and (B); 20 U.S.C. §1415(i)(2).

This system presumes and requires good faith participation by all parties involved. It provides a framework for collaborative decision-making among all interested parties, most especially the providers of educational services and the student's parents. Under the district court's decision, parents need not participate in good faith and in fact, have an incentive to prolong proceedings, even where they have no intention of allowing their child to attend a public school placement regardless of whether it provides FAPE. The longer the legal proceedings last, the longer the school district is obligated to pay for the private placement. The district court's decision therefore rewards parental recalcitrance by requiring the school district to pay for the private placement despite having fully met its obligations under IDEA.

This is contrary to long-established Sixth Circuit precedent that a school district that has developed and is willing to implement or has implemented an appropriate educational plan for a child with disabilities is not required to reimburse the costs of a unilateral private placement selected by the parents. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 519-20 (6th Cir. 2003); *Tucker by Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 504 (6th Cir. 1998). This result is particularly untenable in cases like the one here, in which the child has never been enrolled in the public school, meaning the parents' decision to reject that placement is without a basis in fact for assessing their child's potential educational progress in the public school.

In the case at bar, the district court specifically found that the school district made FAPE available to the child. Because the school district made FAPE available, IDEA prohibits a court from ordering it to pay for the education which the parents unilaterally chose over the FAPE provided by the school district. 34 C.F.R. § 300.148(a); 34 C.F.R. § 300.148(c). Pursuant to IDEA and legal precedent, the parents rightly are responsible for the costs of the private school education they prefer for their child. 20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 374 (1985); *Doe By & Through Doe v. Board of Educ. of Tullahoma City Sch.*, 9 F.3d 455, 460-61 (6th Cir. 1993).

If the district court's decision is affirmed, every parent desirous of sending his or her disabled child to a private school at public expense would need merely to enroll the child in the private school regardless of the public school's offering of FAPE. They could file for due

process to contest the FAPE offer, and obtain "stay-put" status during the entire period of time any review and appeal of the decision they choose to make. Such an outcome is contrary to the underlying reason for stay-put provisions in IDEA. *Monticello Sch. Dist. No. 5 v. George L. on Behalf of Brock L.*, 102 F.3d 895, 905 (7th Cir. 1996). Simultaneously, the decision creates an unlimited obligation on school districts. Under every relevant interpretation of a school district's IDEA obligation, a school district is entitled to rely on the conclusion that it fulfills its IDEA responsibilities when it offers FAPE.

Under this decision, this is no longer true, because offering FAPE does not safeguard a district from tuition responsibilities. The decision thus raises a crucial and unanswered question: when is a school district's obligation under IDEA satisfied? *Amici* assert, consistent with the law, that it ends when it provides FAPE for a disabled student, either through an agreement with the student's parents or a judicial finding of compliance. They ask this Court to concur.

B. GRANTING TUITION REIMBURSEMENT TO PARENTS WHO UNILATERALLY PLACE THEIR CHILD IN A PRIVATE SCHOOL WHEN THE LOCAL PUBLIC SCHOOL PROVIDED FAPE FOR THE CHILD SUBVERTS THE PURPOSE OF IDEA'S STAY-PUT PROVISION, AND PROVIDES PARENTS AN UNJUSTIFIED WINDFALL.

The stay-put provision for any student is triggered when an educational placement is included in an approved IEP that is implemented by the District. *Cordrey v. Euckert*, 917 F.2d 1460, 1468 (6th Cir. 1990) (school district did not violate stay-put provision when it refused to maintain student in private summer program engaged by parents that had not been included in IEP). But under the district court's decision in this case parents have the ability unilaterally to

designate their child's stay-put placement and expect payment from the school district for as long as the dispute is reviewed in administrative and court proceedings. Even where they ultimately lose, they can shrug their shoulders after obtaining several years of the private education at public expense for their child. In fact, parents could continue to enroll their child in a private school over the objections of the local school district on a year-to-year basis, file a subsequent due process request each year, and obtain payment of tuition until each appeal ends. Eventually, a disabled student will age out of the school system, having received a private education entirely at public expense. The potential cost to public schools in the Sixth Circuit is incalculable. There is nothing in IDEA or legal precedent that sanctions this result.[1]

Such a result was not contemplated by Congress in enacting IDEA, including "stay-put" protections for disabled students.

In a 1994 congressional hearing to amend the IDEA, it was noted that "[t]he stay-put provision…established a mechanism to place students in an educational program ***within the school system***." Senator Gorton (WA), "Improving America's Schools Act of 1994, Amendments," Congressional Record 140:101 (July 28, 1994), available at http://www.gpo.gov/fdsys/pkg/CREC-1994-07-28/html/CREC-1994-07-28-pt1-PgS26.htm (emphasis added). In a letter responding to an attorney

[1]This issue has been addressed but not resolved in other similar disputes. *Doe v. Brookline Sch. Comm.*, 722 F.2d 910 (1st Cir. 1983); *Casey K. ex rel. Norman K. v. St. Anne Community High Sch. Dist. No. 302*, 400 F.3d 508 (7th Cir. 2005); *Bd. of Educ. of Oak Park & River Forest High School District 200 v. Illinois State Bd. of Educ*, 79 F.3d 654 (7th Cir. 1996).

inquiry, the Department of Education's Office of Special Education Programs, stated that a child's current placement is "the last ***agreed-upon*** placement" before the hearings. Available at www2.ed.gov/policy/speced/guid/ idea/memosdcltrs/12-002172r-ny-goldstein-pendency-10-18-12.doc (emphasis added). Thus, the key in determining a child's current placement is the agreement and the program, and not the specific location. Department of Education Regulations, 64 Fed. Reg. 12406, 12615 (March 12, 1999). See also, *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003). These legislative and executive branch interpretations indicate that a child's current placement for stay-put purposes is the last one mutually agreed upon by the parents and the school district, not the parents' unilateral private school selection despite the school district's attempts to provide a FAPE "within its system."

The IDEA implementing regulations clearly state that the stay-put provision "***does not*** require an LEA to pay for the cost of education…if that agency made FAPE available to the child and the ***parents elected to place the child*** in a private school or facility." 34 C.F.R. § 300.148(a) (emphasis added). Thus, if the parents unilaterally put the child in a private school rather than following the plan submitted by the school district, the school district is not required to pay for the private schooling. In fact, a court or hearing officer can only require

reimbursement after finding "that the agency ***had not made FAPE available*** to the child in a timely manner prior to that enrollment ***and*** that the private placement is appropriate." 34 C.F.R. § 300.148(c) (emphasis added).

The regulatory history supports this reading of the regulations. When responding to a comment about the parents' ability to change their child's placement unilaterally, the Department noted "[t]here is also no need to address the parents' ability to change the child's placement unilaterally ***at their own expense*** since this issue is addressed in § 300.403." Department of Education Regulations, 64 Fed. Reg. 12406, 12616 (March 12, 1999) (emphasis added). The pertinent part of section 300.403, that is cited in the preceding quote and deals with "Placement of Children by Parents if FAPE is at Issue," was recodified as current section 300.148, cited above. Department of Education Regulation, 70 Fed. Reg. 35782, 35831 (June 21, 2005). The Department also clarified that "[w]hile the placement may not be changed unilaterally by the public agency, this does not preclude the parent from changing the placement ***at their own expense*** and risk." Department of Education Regulations, 64 Fed. Reg. 12406, 12615 (March 12, 1999) (emphasis added). This regulation made clear that when a parent unilaterally changes the child's placement without school district consent, a school district can only be required to pay the costs of education if it is determined that the parent's placement

was appropriate. *Id.* The focus of these requirements is ensuring that a child with disabilities is receiving FAPE during the pendency of any legal proceedings.

These clear cut guidelines and directives were not followed when the district court found that Boone County School District could provide N.W. a FAPE, that his attendance at ABS was the result of a unilateral placement by his parents, and then also ordered the District to pay the private school tuition for N.W. because it was his "stay-put" placement. The law, applicable regulations and the record do not support this outcome, and it should not be affirmed by this Court.

The Second Circuit addressed a case with analogous facts to those in the case at bar, *Zvi D. by Shirley D. v. Ambach*, 694 F.2d 904 (2nd Cir. 1982). In that case, a parent unilaterally enrolled her child in a private school, and filed two due process hearings seeking reimbursement of tuition from the local school district. After the first due process hearing, the parent and the school district entered into a mediated agreement in which the district agreed to pay the cost of the private school for a limited period of time. But, as in this case, when the time to enroll the child in the public school arrived, the parent refused to enroll him, filed a second due process request, and kept him at the private school. The parent also sought a ruling that the private school was his stay-put placement. The Second Circuit easily rejected this argument, basing its finding on the fact that no administrative or judicial body had found that the parent's private placement was appropriate, thus the private school was not the stay-put education placement. *Id.*, at 908. As that Court noted, the parent was free to keep her son in the private school, but it would be at her cost, not the school district's. *Id.*

The same conclusion should be reached here. Both levels of administrative review at the state level, as well as the district court determined that the School District could provide N.W. with FAPE. His parents can disagree with this decision, and keep their son enrolled at ABS. But consistent with the IDEA regulations, they must bear the cost, unless and until they can establish that Boone Co. Schools cannot provide their son FAPE, and that ABS (or their next private school of choice) can do so.[2] It was error to find otherwise.

Furthermore, if the district court's decision in this case is allowed to stand, it distinguishes Sixth Circuit jurisprudence from that of other circuits, in addition to the Second Circuit, that have addressed this issue. In *K.D. ex rel. C.L. v. Dep't of Educ., Hawaii*, 665 F3d. 1110 (9th Cir. 2011), the circuit court held that the unilateral private placement of K.D. by his parent was not the "stay-put" placement because the local school district had never agreed to this placement for the school year in question. *Id*. at 1120-21. Consequently, the parent was deemed responsible for the cost of tuition at the private school. *Id*. Similar results were ordered in *Gregory K. v. Longview Sch. Dist*., 811 F.2d 1307, 1315 (9th Cir. 1987) and *Rowe v. Henry Cnty. Sch. Bd.*, 718 F.2d 115, 119 (4th Cir. 1983) (allowing parents to transfer child to private school during pendency of due process proceedings creates incentives contrary to purpose of IDEA).

Rather than distinguish the relevant Sixth Circuit precedent, the district court relied on a Seventh Circuit ruling to support its stay-put decision. The facts of that case, *Casey K. ex rel. Norman K. v. St. Anne Community High Sch. Dist. No. 302*, 400 F.3d 508 (7th Cir. 2005), differ so significantly from those in the case at bar as to render reliance on that decision inapplicable.

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[2] This outcome is consistent with Sixth Circuit precedent as well. *See* Appellant's Brief, Doc. 006111941669, at 26 - 27, n. 88.

The Seventh Circuit relied on the terms of the parties mediated agreement to determine that the private school was the stay put placement, as it provided that the child would remain in that school until he turned 15.[3] If *Casey K.* is applicable at all to the case at bar, it supports a finding that any stay-put obligation of Boone County Schools ended consistent with the legally binding terms of the mediated agreement. 20 U.S.C. § 1415(e)(2)(F). Significantly, the mediated agreement did not provide for N.W.'s attendance at ABS for the 2011 - 2012 school year.

If the district court's decision stands, efforts to resolve placement disputes through the mediation process are rendered meaningless, because the lower court sanctioned parents reneging on their agreement without any consequence. Parents will be able to wrest concessions from a school district under the guise of resolving a dispute, ignore the commitments they made in reaching an agreement, and then also obtain the relief they desired in the first place. A school district could rightly determine that it is not an efficient utilization of its limited resources to attempt mediation if a court could impose obligations in it greater than what it bargained for during the mediation process. An important aspect of the collaborative framework would be completely undermined in the process.

Just as there was no agreement between the parties that the private school constituted an

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[3]The Court did not find it meaningful that the elementary school that entered into the settlement agreement with the parents and the high school that would be receiving him were in different districts under Illinois' organization of its public school districts. *Casey K.*, 400 F.3d at 511. The high school conceded that it was the feeder school for the elementary school, and that if it had been in the same district, the mediated agreement would be binding on it. *Id*. Apparently, the high did not argue that a settlement agreement does not create an educational placement as contemplated by IDEA. *Id*. at 512. Boone County School District does make that argument, and the Seventh Circuit acknowledged that it was not deciding that issue in *Casey K*. *Id*. The decision has no bearing on the outcome in this matter.

appropriate placement, no administrative review or court of law determined that ABS was the appropriate placement for N.W. during any school year. Under IDEA and years of interpreting the Acts, this finding is critical to trigger a local school district's obligation to reimburse parents who chose a private school placement. The parents must prove both that the local school district did not provide or offer FAPE, and that the private school could meet their child's educational needs. *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851, 864 (7th Cir. 2011). At all levels of review in the case at bar, the parents were not able to establish either of these prongs. Rightly, they are not entitled to tuition reimbursement for their continued enrollment of their son in private school. The lower court's decision to the contrary must be reversed by this Court.

CONCLUSION

In this case, the parents did not prove either of the prerequisites for private school reimbursement, namely, that Boone County School District could not provide FAPE and that their private school of choice could. If this Court permits them to prevail on their tuition reimbursement claim, despite losing on the substantive FAPE question, the financial implications for public school districts in the Sixth Circuit will be vast. Consistent with the statute, its implementing regulations and years of caselaw, a public school district is not required to subsidize a private school education unless it is unable to provide FAPE in a public school setting.

Likewise, the carefully crafted, collaborative process memorialized in IDEA, in which education professionals and parents, working in good faith together to develop an appropriate educational plan for a disabled child, would be meaningless. IDEA's collaborative framework is

designed to allow public schools to provide FAPE to students with disabilities in a public school setting where possible. If parents can freely ignore an ARC team decision and reject a carefully crafted IEP that provides FAPE for a disabled student, what is the purpose of IDEA's framework?

Where administrative and court review concluded that a school district has offered FAPE to a child with disabilities, the school district should not be penalized financially because the parents disagree, and unilaterally choose to enroll their child in a private school of their choice. The district court's holding to the contrary must be reversed if the spirit and requirements of IDEA are to be preserved for the benefit of all disabled children and the public schools striving to educate them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2014, I served a true and

correct copy of the foregoing pleading by electronic mail via the Court's ECF to all counsel of record.

/s/ Mary Suzanne Cassidy
Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7), I certify that this document contains 4681 words using Word Perfect's word count program, exclusive of the portions of the brief exempted by Fed. R. App. P. 31(a)(7)(R)(iii).

/s/ Mary Suzanne Cassidy
Counsel of Record