Case No. 15-1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

M.L., a minor, by his parents and next friends Akiva and Shani Leiman; AKIVA LEIMAN; SHANI LEIMAN,

Plaintiffs-Appellants

v.

LARRY A. BOWERS, in his official capacity as Interim Superintendent; MONTGOMERY COUNTY BOARD OF EDUCATION/ MONTGOMERY COUNTY PUBLIC SCHOOLS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT GREENBELT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND MARYLAND ASSOCIATION OF BOARDS OF EDUCATION IN SUPPORT OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1977 Caption: M.L. v. Bowers

Pursuant to FRAP 26.1 and Local Rule 26.1,

National School Boards Association and Maryland Association of Boards of Education
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Francisco M. Negrón, Jr. Date: April 5, 2016

Counsel for: Amicus Curiae

CERTIFICATE OF SERVICE

****

I certify that on April 5, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTERESTS OF *AMICI CURIAE*[1]

The **National School Boards Association** ("NSBA"), founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students, including approximately 6.4 million students with disabilities.

The **Maryland Association of Boards of Education** ("MABE"), founded in 1957, is a private, non-profit organization, to which all twenty-four Maryland school boards belong. MABE sponsors professional development activities for school board members and other school system employees throughout the State, and represents the school boards' point of view before the Maryland State Board of Education, the Maryland General Assembly and the United States Congress. The MABE Legal Services Association offers regular seminars on legal issues to Maryland school boards, their superintendents, and educators, and files *amicus curiae* briefs on behalf of Maryland school boards in education cases of statewide importance, such as the case now pending in this Honorable Court.

[1] This brief is filed with the consent of both parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

Amici recognize that all eligible children with disabilities are entitled under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* (2016), to receive a free appropriate public education ("FAPE"). At the same time, *Amici* have urged courts to interpret the statute consistent with the Congressional intent to provide such children with access to the general education program offered by public schools and to avoid construing the statute to impose obligations on school districts to address every need that a child with disabilities may have.

The issue presented in this case – whether a child's individualized education program ("IEP") must provide instruction in the child's religious and cultural symbols, customs, and practices in order to satisfy the IDEA's FAPE requirement – is of manifest importance to school boards. Appellants' position that such instruction must be included to provide FAPE is contrary to Congressional intent, poses innumerable difficulties, and amounts to a clear violation of the Establishment Clause. U.S. CONST., amend. I, *McCollum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948).

SUMMARY OF ARGUMENT

The parents in this case seek public funding of the private religious education they have determined their child with disabilities needs. In order to prevail in this matter, they must persuade this Court that the FAPE requirement in the IDEA includes providing religious instruction to children with disabilities who need it to

function in their faith communities. *Amici* agree with the arguments put forth by Montgomery County Public Schools ("MCPS") that the IDEA itself contains no such requirement and further assert that such a mandate would place school districts in the untenable position of either having to become religious experts themselves or paying religious persons or institutions to indoctrinate children with sectarian beliefs and practices. This unmanageable proposition not only would require the expenditure of vast sums of money in a way not contemplated by the IDEA but also would plainly run afoul of the Establishment Clause. The extensive religious instruction sought by the parents as part of the district's FAPE obligation reaches far beyond the limited entitlement to services that the IDEA accords to children unilaterally placed by their parents in private schools and is readily distinguishable from the provision of secular services to children in sectarian schools deemed constitutionally acceptable in *Agostini v. Felton*, 521 U.S. 203 (1997), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). Requiring parents to remain responsible for such religious instruction when the district has made a FAPE available and is willing to make reasonable adjustments to its general curriculum to accommodate the family's religious beliefs does not violate their rights under the Free Exercise Clause of the U.S. Constitution. *Braunfield v. Brown*, 366 U.S. 599 (1961); *D.L. ex rel. K.L. v. Baltimore City Bd. of Sch. Comm'rs*, 706 F.3d 256 (4th Cir. 2013).

ARGUMENT

I. THE IDEA IS NOT INTENDED TO ADDRESS EVERY NEED OF A CHILD WITH QUALIFYING DISABILITIES BUT INSTEAD IS DESIGNED TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION THROUGH SPECIAL EDUCATION AND RELATED SERVICES.

A. The IDEA Is Focused On Providing Access To The General Curriculum To Prepare A Child With Disabilities For Future Education, Employment And Independent Living.

The express purpose of the IDEA, as identified in its preamble, is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(a) (2016). The FAPE requirement has been interpreted by the U.S. Supreme Court to obligate public schools to provide special education services calculated to enable a student to obtain some educational benefit. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). This benefit must be "more than minimal or trivial," *O.S. v. Fairfax County Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015), and must enable a child to access the state-determined general education curriculum, *Marshall Jt. Sch. Dist. No. 2 v. C.D. ex rel. Brian D.*, 616 F.3d 632, 640 (7th Cir. 2010), and to generalize skills learned in school in the "everyday world." *C.M. ex rel. J.M. v. Board of Educ. of Henderson Cnty.*, 85 F. Supp. 2d 574, 585 (W.D.N.C. 1999).

Central to providing FAPE for a disabled student is the development of an IEP. 20 U.S.C. § 1414(d) (2016). The IEP is developed through a team process—that includes the parents—that takes into account the child's present educational level, special education, and other related services he might need in order to receive an adequate education, and the goals and objectives that educators and parents jointly believe the child should achieve in order to make adequate educational progress. *School Bd. of the City of Suffolk v. Rose*, __ F. Supp. 3d __, No. 2:15cv18, 2015 WL 5601944 (E.D. Va. Sept. 22, 2015). Included in the IEP are those related services necessary for the child to be able to access the general education program. *See, e.g., Cedar Rapids Comm. Sch. Dist. v. Garrett F.*, 526 U.S. 66 (1999) (requiring schools to provide costly nursing services if necessary for a child to attend school). Other services that may be required by the statute include physical, occupational, and speech and language therapy, counseling and psychological services, transportation, and assistive technology. 20 U.S.C. § 1401(26) (2016).

B. The IDEA Does Not Require School Districts To Address Every Need Of A Child With Disabilities, Including The Need To Be Indoctrinated With The Religious Beliefs And Practices Of The Particular Faith Community In Which He Resides.

Although a school district may have to provide many services under the IDEA, it does not require that school districts provide all the services, *Rowley,* 458 U.S. at 198, or the placement that the parents view as optimal for their child or to address every aspect of a child's well-being or development that may be affected by

his or her disabilities. *Schaffer v. Weast*, 546 U.S. 49, 59-60 (2005). Such a proposition would be an unsustainable burden on the already limited federal and state financial resources that school districts receive to meet their IDEA obligations. The IDEA contains explicit statutory and regulatory exclusions, reflecting the Act's specific educational purpose; and court cases have interpreted these provisions to set definite limits on school district responsibilities.

For example, the IDEA plainly excludes medical services provided by a physician from the ambit of school responsibility. *Cedar Rapids*, 526 U.S. at 73-75. Courts have consistently reaffirmed the exclusion even as they have wrestled with its application to mental health treatment. *See, e.g.*, *Mary T. v. School Dist. of Philadelphia*, 575 F.3d 235, 246-47 (3d Cir. 2009). Courts have also said that the IDEA does not have to address a child's social deficits where those needs do not adversely affect his educational performance in the general curriculum. *E.g.*, *Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659, 666 (4th Cir. 1998) (holding that a child who was socially maladjusted was not entitled to special education because evidence did not indicate the child had a "serious emotional disturbance" that adversely impacted his educational performance). These limitations are consistent with the purpose of the IDEA to ensure that children with disabilities have access to a public education, not to address every need present in the life of a child with disabilities.

Here Appellants, deeply religious parents, contend that their child's IEP must be tailored to meet his unique religious and cultural needs in order to satisfy FAPE requirements, even if meeting those needs requires the IEP to include what is effectively religious instruction. The parents argue that because their child, M.L., is "not capable of generalizing what he learns at school to home and vice-versa," his IEP fails to provide him FAPE unless it is tailored to prepare him "for life in his Orthodox Jewish community." *M.L. v. Starr*, 121 F. Supp. 2d 466, 471 (D. Md. 2015). In other words, life skills for M.L. do not constitute merely reading, writing, math, and activities of daily life, but must include customs and practices capable of allowing him to function fully in his unique religious community and culture. This includes Hebrew literacy, identification of kosher symbols, and even recognizing the proper prayer to match each life function or occasion, as prescribed by Orthodox Jewish law.

Both the administrative law judge as well as the District Court rejected this demand, concluding that the IDEA requires only that local educational agencies provide disabled children "access to the public school curriculum," rather than acculturation into their religious community. *Id*. at 473. The District Court was correct, and *Amici* urge this Court to affirm its ruling. Although an IEP must be "calculated to confer some educational benefit on a disabled child," *M.M. v. School Dist. of Greenville Cnty.*, 303 F.3d 523, 526 (4th Cir. 2002) (citations omitted), it

need not include specialized instruction or practices that are only meaningful to members of a particular religious or cultural community.[2] Instead, the goal of the nation's special education laws is to enable children to someday participate in the daily life of the nation and the community at large. *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446 (D. Md. 1999) (emphasizing the functional life skills the student's IEP was intended to provide, thus enabling the student to negotiate life in modern American society); *see also J.H. ex rel. J.D. v. Henrico Cnty. Sch. Bd.*, 326 F.3d 560 (4th Cir. 2003) (addressing need for extended school year services in order to avoid regression by a student in "critical life skills").

[2]Appellants and their supporting *amici* misinterpret the intent and purpose of regulations promulgated by Maryland's state board of education which encourage local school districts to provide curricula and instruction that are multicultural. *See* Code of Md. Reg. 13A.04.05.01 *et seq.* ("Education That Is Multicultural"). These regulations are solely intended to enable students to "recognize[e] our common ground as a nation," thus affording them the ability to "demonstrate knowledge, understanding, and appreciation of cultural groups in the State, nation, and world." *Id*. at 13A.05.01(A). The cited regulations by no means encourage, much less compel, religious instruction or practices as part of an IEP.

Appellants' *amici* omit any reference to the immediately preceding regulation, however, which is entitled "Religious Education Not the Province of Public Schools." This more relevant regulation specifically states that "the State Board of Education believes it would be inexpedient to introduce the subject of religious education as a part of the school curriculum of the State." *Id*. at 13A.04.01(D).

C. The IDEA Clearly Limits The Obligations Of School Districts To Children With Disabilities Who Are Unilaterally Enrolled By Parents In Private Institutions.

The parents' entreaties to this Court to expand the FAPE requirements to include religious instruction are a continuation of their efforts to circumvent a very clear limitation in the IDEA on the obligation of school districts to pay the cost of tuition for a private school in which the parents have unilaterally enrolled their disabled child. To justify the public funding of a private placement, parents must show that: (1) the IEP prepared by school district is incapable of providing the child with FAPE; and (2) the parents' unilateral placement is appropriate and in substantial compliance with IDEA's substantive requirements. *Florence Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7 (1993); *School Comm'rs of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359 (1985).

The parents here cannot meet these conditions absent a determination that FAPE includes preparation of the child for life in his faith community. Instead their decision to enroll M.L. in a sectarian school subjects them to well-established limits on the obligations school districts have toward students with disabilities attending private schools. The U.S. Department of Education's regulations interpreting IDEA compliance requirements with respect to parentally placed students provide as follows:

> (a) *No individual right to special education and related services*. No parentally-placed private school child with a disability has an

> individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

34 C.F.R. § 300.137 (2016); *see also Foley v. Special Sch. Dist. of St. Louis Cnty.*, 153 F.3d 863 (8th Cir. 1998); *K.R. by M.R. v. Anderson Cmty. Sch. Corp.*, 125 F.3d 1017 (7th Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998) (private school students are not guaranteed "comparable" special education services as those provided to public school children). Thus, private school students, such as M.L., although entitled to special education services under the IDEA, are not guaranteed the identical level of services as compared to students receiving special education in the public schools.[3]

That Congress intended these services to be substantially limited is reflected in the 1997 amendment to the IDEA that clarified that states have to allocate only a proportionate amount of funds received from the federal government to eligible students in private schools. 20 U.S.C. §1412(a)(10)(A)(i) (2016). No legal authority expands this relatively modest "proportionate share" obligation to require public schools to provide or pay for religious instruction offered to students enrolled in private parochial schools.

[3] Many of the 5 million students in the U.S. who attend private schools (approximately 80 percent are religiously affiliated), Council for American Private Education, http://www.capenet.org/facts.html (last accessed March 23, 2016), have special needs that entitle them to these limited services.

D. Appellants' demands would impose on school districts unworkable burdens not supported by the purpose, intent, or statutory requirements of the IDEA.

Setting aside the substantial First Amendment concerns, were this Court to adopt the parents' position, school districts would encounter severe problems in carrying out their responsibilities to address the religious and cultural needs of children with disabilities. Such a ruling could invite demands from families who espouse a wide array of sectarian beliefs and customs or cultural traditions that their children's IEPs be tailored to incorporate religious instruction in order to prepare them for life in their particular faith communities. One need only consider the wide variations in religious practices among Orthodox Jews, let alone Reform or Conservative Jews, to understand the unmanageable breadth of Appellants' view that would apply to *every* religious faith and cultural tradition.

As in this case, school districts do not have staff trained or qualified to determine what precise religious customs, beliefs and traditions should be included in a child's IEP, to deliver the religious instruction in the classroom, or to assess a child's progress in meeting any such religious goals. This would require public schools to choose among several untenable options: 1) train special educators to become knowledgeable about an extensive array of cultures and religious practices, to integrate those practices into IEPs, to provide religious instruction and to assess student progress on religious IEP goals. Assuming that school districts could find

educators willing to undergo such specialized training, they would incur additional unfunded costs not contemplated by Congress in enacting and reauthorizing the IDEA;[4] 2) defer at every stage to the parents' religious experts to make these determinations and employ religious educators to deliver the instruction—a concept at odds with the IDEA's collaborative approach to developing educational plans, with IDEA regulations forbidding the use of federal funds to pay for religious instruction[5] and with the ultimate responsibility of school districts to ensure that the child receives an adequate education; or 3) subsidize the child's religious education at a private institution equipped to provide sectarian special education whenever a parent asserts that their disabled child requires religious instruction to prepare for his or her future life. This would entail substantial expenditure of public funds for private religious education. None of these options is consistent with the intent, purpose and statutory requirements of the IDEA.

[4] The U.S. Supreme Court has noted that it is reasonable to conclude that Congress intended to exclude certain services from the ambit of the IDEA "to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 888 (1984).

[5] 34 C.F.R. § 76.532 (a)(1) (2016).

II. APPELLANTS' INTERPRETATION OF THE IDEA IS FRAUGHT WITH CONSTITUTIONAL PERIL THAT THIS COURT SHOULD AVOID.

It is a well-established principle of statutory interpretation that courts should construe statutes in a manner that eschews constitutional problems. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). However, the parents' position engenders unavoidable constitutional infirmities. Although *Amici* agree that MCPS should prevail even absent a ruling on the constitutional issues presented by Appellants, to the extent the Court views it necessary to address constitutional concerns, *Amici* contend that the following considerations still would yield a decision in favor of MCPS.

A. The Parents' Position Raises Substantial First Amendment Concerns

For nearly 50 years, the Supreme Court has clearly held that it violates the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion. *Epperson v. Arkansas*, 393 U.S. 97 (1968). Yet what the parents here seek — either that MCPS reimburse the costs of their child's attendance at a private religious school or pay for the preparation and implementation by public school employees of an IEP that includes instruction on religious rules and customs — would contravene this constitutional principle.

1. The parents' position would force school employees to become entangled in religious matters in a manner that presents Establishment Clause and Free Exercise obstacles.

Although expressing some concern about the enduring vitality of the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court has continued to apply it, including the examination of whether a challenged government practice or policy fosters "excessive entanglement" between government and religion. *See Lambeth v. Board of Comm'rs of Davidson Cnty.*, 407 F.3d 266 (4th Cir. 2005); *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999). Extending religious "accommodations" to the degree demanded by the parents would place public school employees in the constitutionally tenuous position of parsing which religious tenets are appropriately included in a child's IEP aimed at preparation for life in a particular faith community as well as imparting the religious instruction. This type of entanglement far exceeds the role of the deaf interpreter who worked with a student with special needs in a religious school in *Zobrest* "in order to facilitate his education." 509 U.S. at 13. In finding that provision of such an interpreter did not run afoul of the Establishment Clause, the Court in *Zobrest* carefully distinguished the role of an interpreter – who merely translates, word for word, what is said during the school day – from teachers whose duty it is to deliver religious instruction to the student.

To require public school employees to craft, implement and monitor an IEP that contains a significant number of religious elements, including the contents of prayers for various occasions, could be deemed a violation of an objecting employee's right to free exercise of religion. For example, to require non-Jewish public school educators to conduct the necessary religious research into Orthodox Jewish customs and practices so as to complete and carry out the IEP demanded by the parents potentially could result in free exercise of religion or religious discrimination claims[6] by school employees charged with insubordination for failing to fulfill these responsibilities. *See, e.g.*, *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (refusing unemployment benefits to employee fired for refusing to work on his Sabbath is unconstitutional burden on free exercise of religion).

2. The parents' position forces school districts to pay for religious instruction in violation of First Amendment neutrality principles.

To carry out their IDEA responsibilities under the parents' position, schools would be forced to violate the principle of neutrality, requiring that the government

[6] The need to accommodate the religious sensibilities of individual applicants and employees in a workplace context was recently reinforced by the U.S. Supreme Court in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (holding that a job applicant need show only that his need for a religious accommodation was a motivating factor in the employer's adverse decision, not that the employer had knowledge of his need, to prevail in a Title VII disparate treatment claim).

"effect no favoritism among sects or between religion and non-religion." *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963). The Supreme Court in *Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, observed that "[t]he attitude of government toward religion must, as this Court has frequently observed, be one of neutrality." 392 U.S. 236, 249 (1968). Government neutrality toward religion is offended whether the school district incorporates religious instruction into a child's IEP and implements it in a public school setting or whether it pays a private institution to carry out these functions because it lacks the expertise to do so itself.

In its landmark ruling in *Board of Educ. of Kiryas Joel v. Grumet*, the Supreme Court struck down a New York statute creating a special school district for a religious enclave of one sect of Orthodox Jews, ruling that the establishment of the school district was unconstitutionally driven by religious considerations, and amounted to a forbidden "fusion of governmental and religious functions." 512 U.S. 687, 702 (1994) (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982)). In other words, the Court found that the statute creating the Kiryas Joel school district lacked religious neutrality, in clear violation of the Establishment Clause. *Id*. at 705. The Court was particularly concerned that the State of New York effectively "singled out a particular religious sect for special treatment." *Id*. at 706. Here, as in *Kiryas Joel*, acceding to the parents' demands for publicly funded religious education would "cross the line from permissible accommodation to impermissible

establishment," *id*. at 710, and amount to an unconstitutional fusion of governmental and religious functions.

B. Schools Are Willing to Make Reasonable Accommodations of Students' Religious Beliefs That Avoid First Amendment Concerns.

Amici recognize that "government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause," *Id.* at 705-06 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45) (1987)). In fact, school districts are experienced and well-positioned to make determinations about the reasonableness of requested religious accommodations. These decisions involve educational judgments about whether the accommodation assists the student in achieving instructional goals while taking into consideration expressed religious concern. Like the accommodations undertaken by MCPS here (Appellees' Brief at 10-13), school districts regularly seek to accommodate religious practices in ways that do not violate the Establishment Clause. *See, e.g.*, *Accommodating Sincerely Held Religious Beliefs*, Rule No 323.1, Whitefish Bay Schools, http://www.wfbschools.com/post.pdf; *Guidelines for Religious Activities for Students*, Fairfax County Public Schools, http://www.fcps.edu/hr/eer/relcal/guidelines.shtml.

III. REQUIRING THE APPELLANTS TO REMAIN RESPONSIBLE FOR THEIR CHILD'S RELIGIOUS EDUCATION DOES NOT INFRINGE UPON THEIR FREE EXERCISE RIGHTS.

The parents' *amici* maintain that requiring the family to incur the additional cost and burden of educating their child in religious customs and practices, rather than compelling MCPS to do so, impacts their right to the free exercise of their religion. In essence, they contend that denying special education services that incorporate a child's religious customs and practices to a child who has been enrolled in a private parochial school impermissibly creates an undue burden on a parents' education-related decision-making for their child, contravening the free exercise rights of those parents under the First and Fourteenth Amendments. In support of this notion, the parents' *amici* cite *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), which struck down a state-wide compulsory education law that prohibited religious school alternatives to public schools, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which parents successfully challenged a state-wide compulsory education law that interfered with a religious community's right to remove their children from school at a certain age.

The state laws at issue in both *Pierce* and *Yoder* violated the First Amendment's Free Exercise Clause by threatening parents with criminal consequences for making religious decisions about their children's education. Those

cases articulated the constitutional principle of parental choice, which was explained by the Supreme Court as follows:

> The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court. . . . In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children.

Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (plurality opinion).

Courts have applied these principles to reject asserted constitutional violations based on school districts' refusal to subsidize various services parents requested for the children with disabilities who were unilaterally enrolled in private religious schools. In *McCarthy v. Hornbeck*, a challenge to the State's refusal to fully fund transportation of students to parochial schools was turned down based upon the following reasoning:

> In essence, plaintiffs are here seeking a state subsidization of a part of the cost of sending their children to private, church-related schools. The Supreme Court has consistently held that a statute does not impinge on a constitutional right merely because it does not subsidize that right. In []*Harris v. McRae*, 448 U.S. 297 (1980), [ ] the Supreme Court in an opinion by Justice Stewart noted that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." 448 U.S. at 317, n.19. The Court explained in *McRae* that "although the liberty protected by the Due Process Clause affords protection against unwanted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.* at 317-318. . . .

> Subsidization by the State of Maryland of plaintiffs' constitutional right to send their children to church-related schools is not mandated by the First Amendment. Plaintiffs' claim that Maryland's school transportation system places an impermissible burden on their First Amendment rights is therefore without merit.

590 F. Supp. 936, 944-45 (D. Md. 1984).

A similar result was reached in *Gary S. and Sylvie S. v. Manchester Sch. Dist.*, where the parents of a child enrolled in a private religious school insisted that the school district's refusal to offer them "the panoply of services available to disabled public school students under the rubric of free and appropriate public education (FAPE)" violated their Free Exercise rights under the First Amendment. 374 F.3d 15, 17 (1st Cir. 2004). Rejecting this argument, the First Circuit held:

> Given the traditional pattern that has so far prevailed of financing public education via the public schools, it would be unreasonable and inconsistent to premise a free exercise violation upon Congress's mere failure to provide to disabled children attending private religious schools the identical financial and other benefits it confers upon those attending public schools. Unlike unemployment benefits that are equally available to all, private school parents can have no legitimate expectancy that they or their children's schools will receive the same federal or state financial benefits provided to public schools. Thus, the non-receipt of equal funding and programmatic benefits cannot be said to impose any cognizable "burden" upon the religion of those choosing to attend such schools. Persons opting to attend private schools, religious or otherwise, must accept the disadvantages as well as any benefits offered by those schools. They cannot insist, as a matter of constitutional right, that the disadvantages be cured by the provision of public funding. It follows that denying the benefits here, to which appellants have no cognizable entitlement, do not burden their free exercise rights.

> Indeed, if we were to find a burden here on appellants' right of free exercise, it would follow logically that we should find free exercise violations whenever a state, city or town refuses to fund programs of other types at religious schools, at least insofar as the absence of funding adversely affects students with parents who believe their faith requires attendance at a religious school. Yet, as noted *supra*, it is clear there is no federal constitutional requirement that private schools be permitted to share with public schools in state largesse on an equal basis. *See, e.g.*, *Norwood v. Harrison*, 413 U.S. [455,] at 462 [1973]; *Harris v. McRae*, 448 U.S. 297, 317-18 (1980); *Maher v. Roe*, 432 U.S. 464, 477 (1977); *see also Locke* [*v. Davey*, 124 S. Ct. [1307,] at 1315 [2004]; *Strout v. Albanese*, 178 F.3d 57, 66 (1st Cir. 1999) ("fundamental right [to direct child's upbringing and education] does not require the state to directly pay for a sectarian education").

Id. at 20-21 (footnotes omitted); *see also Nieuwenhuis v. Delvan-Darien Sch. Dist. Bd. of Educ*., 996 F. Supp. 855 (E.D. Wis. 1998).

These cases confirm that the Constitution does not require MCPS to provide special education services to a student parentally-enrolled in a private religious school. Just as parents may opt for the expense of a private education for their children – an expense which a local board is not obligated to pay or reimburse – the parents may secure additional educational resources or extracurricular activities for their children at their own expense. Any increased cost incurred solely as a result of the parents' choice does not run afoul of their constitutional rights. *Braunfield v. Brown*, 366 U.S. 599 (1961). Here, as in *Gary S.*, 374 F.3d 15, requiring parents to fund the additional cost of religious instruction which, in their opinion, is necessary to enable their child to participate in their unique religious community

would not force them to surrender their religious beliefs or their right to control their child's education.[7]

In *Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995), this Court rejected the demand of parents of a hearing impaired child that the school district provide that child with a "cued speech transliterator" in his private sectarian school. Citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983), *Rust v. Sullivan,* 500 U.S. 173 (1991), and *Harris v. McRae,* 448 U.S. 297 (1980), this Court did not accept the contention that "having to pay for their own transliterator constituted a substantial burden on their free exercise of religion." 60 F.3d at 168. This Court observed that "[t]he Supreme Court has consistently held that a statute does not impinge on a constitutional right merely because it does not subsidize that right." *Id*. at 172. Here, as in *Goodall*, denying M.L. a religious component to his IEP has not resulted in the parents either being "compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take." *Id*. at 172-73.

In contrast to the punitive consequences facing the families in *Pierce* and *Yoder* had they chosen to follow their religious beliefs in raising and educating their

[7] For a detailed discussion and collection of cases addressing this precise issue, see L.M. Wasserman, *The Rights of Parentally-Placed Private School Students Under the Individuals with Disabilities Education Improvement Act of 2004 and the Need for Legislative Reform*, 2009 BYU EDUC. & L. J. 131, 155-62 (2009).

children, the additional cost incurred by M.L.'s parents in order to provide him with special education that includes religious and cultural acclimatization does not constitute a sufficient deterrent to their desire to provide their son with a religious education so as to infringe on their free exercise rights under the First Amendment.

As this Court suggested in *D.L.*, 706 F.3d 256, the school district's refusal to accede to the parents' request "may raise the overall cost of D.L.'s private education, but this does not offend D.L.'s constitutional rights. The Supreme Court has explained that a statute does not violate the Free Exercise Clause merely because it causes economic disadvantage on individuals who choose to practice their religion in a specific manner." *Id*. at 263 (citing *Braunfield*, 366 U.S. 599). This Court rightly concluded in *D.L.* that "[t]he right to a religious education does not extend to a right to demand that public schools accommodate Appellants' educational preferences," *id*. at 264, and should reach the same conclusion here.

CONCLUSION

If this Court reverses the District Court's decision, the burden on the hundreds of school districts in the Fourth Circuit will be great. Public schools suddenly will be forced into the business of providing religious instruction to some students with disabilities in private schools, requiring staff training, IEP adjustments and expanded liability given the employee objections the change will likely raise. If on the other hand, this Court affirms, the burden on schools will

remain consistent with the purpose of the IDEA and in keeping with the burdens assumed by parents who voluntarily place their children in private schools or supplement their secular educations with religious instruction—burdens consistently found not to violate the Constitution. For the foregoing reasons, the judgment below should be **AFFIRMED.**

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-1977 **Caption:** M.L. v. Bowers

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I certify that on April 5, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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