

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-

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INTERESTS OF AMICI CURIAE¹

The National School Boards Association (“NSBA”), founded in 1940, is a non-profit organization representing state associations of school boards, and the

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 is 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

function in their faith communities. Amici agree with the argument 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. Comms.*, 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)(2016). The FAPE requirement has been interpreted by the U.S. Supreme Court to obligate public schools to provide

Central to providing FAPE for a disabled student is the development of an IEP. 20 U.S.C. § 1414(d)(2)(16). The IEPs 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 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*, 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. 1411(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 An

his or her disabilities *Schaffer v. Weast*, 546 U.S. 49, 560 (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

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 the 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. State*, 2015 F. Supp. 2d 460, 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 of allowing him to function fully in his unique religious community and culture. This

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. Grasmire*, 754 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 in modern American society); see also *J.H. ex rel. J.D. v. Henrico Cty. 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").

²Appellants 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 e8.4(r)31(te)3..4(r)31(te)58.2(le)12v.6(a)12.t..4(r)31(te)58g7(o)8.3(u)8.8.3

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*, 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.

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. § 12(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 the 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

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educators willing to undergo such specialized training, they would add 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 instruction⁵ 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. §6.532 (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).

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 Co.*, 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 *Zobres* 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 *Zobres* 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 b

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 70506 (quoting *Hobbie v Unemployment Appeals Comm'n of Ill.*, 480 U.S. 136, 144 (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 taken by MCPS here (Appellees' Brief at 1013), 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.php>; Guidelines for Religious Activities for Students Fairfax County Public Schools, <http://www.fcps.edu/hr/eeer/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 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 cite *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), which struck down a state law requiring children to attend public schools.

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.

would not force them to surrender their religious beliefs or their right to control the

children, the additional cost incurred by M.'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.*, 2006 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 *Braunfeld*, 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



