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No. 03-3309

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

H.W., ET AL.

Plaintiffs-Appellees,

v.

HIGHLAND PARK BOARD OF EDUCATION,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of New Jersey

CORRECTED BRIEF OF AMICUS CURIAE AGUDATH ISRAEL OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national Orthodox Jewish organization, with constituents and affiliated chapters all across the United States. We have a long history of presenting or participating in *amicus curiae* briefs in cases affecting religious liberty in general, and the rights of Orthodox Jews in particular. Among our varied functions, we advocate the interests of the over 600 schools that are under the umbrella of Torah Umesorah-The National Society for Hebrew Day Schools, which educate over 150,000 students throughout the country. Addressing the educational needs of learning disabled children in our community is one of our particular concerns, and we have long advocated improving and expanding access to special education services for students attending religious schools.

The decision of this Court will likely have a direct and substantial impact on our constituents—in Highland Park, throughout the rest of New Jersey, and in any state where there are laws similar to the New Jersey statute at issue here. For many Orthodox Jewish parents of learning disabled children, the cost of paying for special education is far beyond their means. Some may choose to enroll their children in a public school setting and thereby avail themselves of the statutory guarantee of "FAPE"—a "free appropriate public education". Where, however, an

appropriate education is not available in a public school setting, and parents unilaterally place the child in a religious school setting, the position taken by Defendant-Appellant—which is based on a New Jersey state statute that prohibits special education placements in sectarian schools—would deny those parents reimbursement for their educational expenses. Even if the only appropriate educational placement were to be in a religious school, the position of Defendant-Appellant would deny the child the right to a government-funded education. As we will demonstrate below, that position is contrary to Federal law and to the United States Constitution.

The parties to this case, through their respective counsel, have consented to the filing of this brief.[1]

[1] We acknowledge and thank Leah Hershman, J.D. for her valuable contributions to this brief.

ARGUMENT

Appellant argues that A.W.'s placement in a sectarian school is a violation of N.J.S.A. 18A:46-14(h) because that statute allows placement only in "an accredited nonpublic school within the state… the services of which are nonsectarian." However, the court below determined that this provision applies only to a placement by the board of education and does not apply, as in this case, to unilateral placement of a child by a parent. The only other court to analyze the statute came to the same conclusion. *See L.M. v. Evesham Township Bd. Of Educ.*, 256 F.Supp.2d 290, (D.N.J. 2003). For the reasons set forth in these decisions, and in plaintiff-appellees' brief, we submit that the statute should indeed be read as applying only to board of education placements. [2]

[2] Appellant focuses on two ALJ decisions that interpret the statute otherwise: *Springfield Twp. Bd. of Educ. V. H.N.*, OAL Dkt. No. EDS 4636-00 (N.J. Oct. 6, 2000) ("*Springfield*") and *K.S. v. E. Brunswick Twp. Bd. of Educ.*, 92 N.J.A.R. 2d (EDS) 159 (N.J. July 14, 1992). However, as the court below correctly pointed out, ALJ decisions are in no way binding on the District Court.

But even if this Court concludes that N.J.S.A. 18A:46-14(h) should be construed as prohibiting funding of special education in a religious school setting even in cases of unilateral parental placements, the provisions of the Federal IDEA, as well as the

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Moreover, other ALJ decisions are consistent with the two district court rulings. *See e.g.*, *L.M. v. Evesham Township Bd. Of Educ.*, 256 F.Supp.2d 290, FN 10 (D.N.J. 2003) ("[T]here is no consistency among the ALJ decisions regarding whether [N.J.S.A. 18A:46-14] extends to unilateral parental placements."); *C.D. v. Wanaque Bd. of Educ.*, 93 N.J.A.R.2d 154, 1993 WL 476560 (1993); *L.M. v. Kennelon Bd. of Educ.*, OAL Dct. No. EDS9588-01, 2003 WL 722283 (2003).

Appellant cites selected statements of expert witnesses that acknowledged the benefits to A.W. of attendance at a sectarian school, and then extrapolates from those statements that A.W. was placed at Sinai "precisely because of the sectarian nature of the educational program offered at Sinai" (*Appellant's Brief* at 22). Appellant then proceeds to argue that because sectarian education was the primary goal of the placement at Sinai, the District Court judge's distinction between *Springfield* and the case at hand was erroneous. However, the District Court judge's basis for the distinction was that in *Springfield* there was no finding, or even allegation, that the in-district placement was inappropriate. That distinction holds true even if the primary motivation in selecting Sinai was its sectarian nature. The parents' motivation here is entirely irrelevant to the statutory analysis.

United States Constitution, would preclude such an outright ban.

We devote the pages that follow to a discussion of these points.

I. FEDERAL LAW PRE-EMPTS STATES FROM TOTALLY BARRING REIMBURSEMENTS TO STUDENTS IN SECTARIAN SCHOOLS

Under *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), even where compliance with a state law would not *per se* conflict with federal law, the courts can look at legislative intention in determining that a state provision conflicts with, and therefore is preempted by, a federal law. Thus, in *Geier*, the Supreme Court found that because the rule of state law (the tort cause of action in that case) would have stood "as an obstacle to the accomplishment and execution of" important means-related federal objectives, it is pre-empted. *529 U.S. at 833*.

In the case of education for disabled students, "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free." *School Comm. of Burlington v. Dept. of Ed. of Mass.*, 471 U.S. 359, 373 (1985). Furthermore, Congress clearly intended to include children attending religious schools within the orbit of IDEA, as evidenced by the law's specific references to the inclusion of religious schools in certain instances. *See e.g.,* 20 U.S.C. 1412(a)(10)(A)(i)(II), 20 U.S.C. 1412(a)(10)(A)(ii). Under *Geier*, the congressional intention to provide for an

appropriate and free education for all students would preempt any state laws, like New Jersey's, that purport to restrict otherwise eligible sectarian school students from taking advantage of the IDEA legislation.

Furthermore, the Supreme Court's ruling in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) would clearly support reimbursement for appropriate unilateral parental placements in sectarian institutions, even in the face of restrictive state requirements. Appellant seeks to limit the scope of *Florence* to the narrow circumstance where a unilateral placement violates only state standards for certification of teachers but in all other respects complies with applicable law. There is no indication that *Florence* calls for that unduly narrow reading. If anything, the opinion signals a broad reading by engaging the policy of IDEA to support its holding. The Court explicitly based its ruling on the statutory purpose inherent in Section 1401 ("IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of § 1401(a)(18) to bar reimbursement in the

circumstances of this case would defeat this statutory purpose." (citations omitted) *Id.* at 13). Similarly, in the present case, barring reimbursement for failure to comply with the state's "no sectarian schools" policy would defeat the statutory purpose of the IDEA.

It is no answer that the policy of IDEA could have been satisfied through placement in a nonsectarian private school setting. The language of the New Jersey statute, according to the position of Appellant, contains a ban on religious school special education placement and reimbursement that is absolute—even if there is no appropriate nonsectarian setting. Suppose, for example, there were a child in New Jersey who simply could not receive an appropriate education at any public or non-sectarian private school, but who could only receive an education that was in accordance with his IEP by attending a religious school. This is not merely a theoretical argument. We are aware of a student in Lakewood, New Jersey who suffers from a medical condition that requires him to be in a centrally-air conditioned building, and who cannot ride on a bus for more than 20 minutes without the possibility of becoming critically ill. The only centrally air

conditioned school building within 20 minutes of his home is a Jewish religious school, and the cost of centrally air conditioning a local public school building is prohibitively expensive. Yet under the Appellant's position, this child may not be placed in the religious school setting despite the absence of any reasonable and appropriate alternative.

Consider as well the case of a learning disabled student raised in an exclusively Yiddish-speaking home. It is surely possible that he or she, too, would only be able to receive an education in a school in which Yiddish was the language of instruction—most likely, a Jewish religious school. We can also envisage situations where pronounced cultural differences would make it all but impossible for certain students to receive an appropriate education in anything but a religious school environment. See *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 724 (1994) (Kennedy, J, concurring) ("The Satmar's way of life, which springs out of their strict religious beliefs, conflicts in many respects with mainstream American culture. They do not watch television or listen to radio; they speak Yiddish in their homes and do not read English-language publications; and they have a distinctive hairstyle and dress. Attending the Monroe-Woodbury public schools, where they were exposed to much

different ways of life, caused the handicapped Satmar children understandable anxiety and distress.")

The position of the Appellant, based on the New Jersey statute, is that these children must be denied an appropriate education altogether, since they cannot receive state funding for attending a sectarian institution. This is clearly contrary to the intent of IDEA and the Supreme Court's ruling in *Florence*.

II. THE FEDERAL CONSTITUTIONAL MANDATE OF RELIGIOUS NEUTRALITY PROHIBITS STATES FROM BARRING REIMBURSEMENTS TO STUDENTS IN SECTARIAN SCHOOLS

N.J.S.A. 18A:46-14(h), as construed by the Appellant, permits reimbursement to parents who enroll their child in nonsectarian private schools in instances where the State has failed to provide a FAPE, but prohibits reimbursement in identical circumstances to those parents who choose to enroll their child in a religious school. This classification facially discriminates on the basis of religion—only students who are enrolled in sectarian schools are disqualified from the benefit. As such, to survive a constitutional challenge, the statute "must undergo the most rigorous of scrutiny, . . . must advance interests of the highest order, and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 536 (internal citations omitted) (1993). See also *Davey v. Locke*, 299 F.3d 748, 752 (9th Cir. 2002), cert. granted,

Locke v. Davey, No. 02-1315, 123 S. Ct. 2075 (May 19, 2003). [3] Similar laws offering a benefit to all, but excluding some on the basis of religion, have been struck down as unconstitutional. *See McDaniel v. Paty*, 435 U.S. 618 (1978) (Tennessee law denying the benefit of holding the public position of delegate to clergy members), *Davey*, 299 F.3d at 754 (Washington law denying the benefit of a state scholarship to otherwise qualified individuals who were pursuing a degree in theology). [4]

The religious school exclusion does nothing to further the general purposes of the New Jersey legislation, which was

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[3] Agudath Israel of America has participated in the amicus curiae brief of the National Jewish Commission on Law and Public Affairs in the United States Supreme Court in support of the respondent in *Locke v. Davey*.

[4] This case is distinguishable from *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Regan v. Taxation With Representation of Wash*., 461 U.S. 540 (1983) much in the same way that *Davey* is. *Regan* and *Rust* stand for the proposition that a state may decline to subsidize the exercise of a constitutional right. However, those cases addressed circumstances in which the government posed as the speaker, and therefore had the right to encourage activities it believed were in the public interest. The challenged Washington statute in *Davey* and the New Jersey statute in this case are clearly not instances of the government acting as the speaker. Rather, here, the purpose of the statute is broader: to ensure that learning disabled children receive a free and appropriate education. *See Davey*, 299 F.3d at 752.

intended to comply with the federal IDEA. Rather, as we have demonstrated, reimbursement for placement in a sectarian school is quite consonant with the purposes of IDEA. Indeed, it is difficult, if not impossible, to imagine any compelling state interest in barring reimbursement to students attending sectarian schools. The only conceivable such interest would be to prevent a violation of the Establishment Clause of the U.S. Constitution. But as the court below noted, there is a long line of cases culminating in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), that have analyzed state funding of parents' or students' private decisions to enroll in sectarian schools and found that such programs pass constitutional muster.

As Justice Rehnquist commented in *Zelman:*

> our jurisprudence with respect to true private choice programs [in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals] has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their

> own choosing. Three times we have rejected such challenges.
>
> *Id. at 649*.

In *Zelman*, the Court found that the Cleveland voucher program "was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system " and was "entirely neutral with respect to religion." *Id at 649.*

Similarly, it is indisputable that the reimbursement provision of the IDEA was enacted for the valid secular purpose of providing educational assistance to students requiring special services, and not to enhance or inhibit religion. The aid provided for in the statute is entirely neutral with respect to religion. In fact, the aid in this case is even more attenuated than the indirect aid in Zelman. It is not an automatic government program that, directly or indirectly, provides education funds for qualifying participants. Rather, it is an available case-by-case legal remedy that retroactively reimburses a parent for expenses incurred by the parent without any guarantee that reimbursement

will be forthcoming (i.e., it requires a judicial finding that no FAPE was provided and that the unilateral placement was appropriate). *See School Comm. of Burlington v. Dept. of Educ. Of Mass.*, 471 U.S. 359 (1985). Thus, a claim that the reimbursement of expenses for a unilateral parent placement at a sectarian school violates the Establishment Clause is unequivocally foreclosed by the ruling in *Zelman*. [5]

Accordingly, since there is no compelling state interest in barring reimbursement for sectarian school tuition, the state may not bar reimbursements to students placed in sectarian schools.

[5] Although the court below established that the "[p]laintiffs in this case evaluated numerous schools, most of them non-sectarian, before choosing Sinai" (*Fn. 29*), we would submit that even if the sectarian nature of Sinai was the primary motivation for its selection, and, moreover, even if A.W.'s parents did not look at any non-sectarian schools whatsoever, per *Zelman*, there is no violation of the Establishment Clause—and, concomitantly, that refusal to fund such private decisions violates the Free Exercise Clause.

CONCLUSION

For the reasons set forth in appellees' brief, as well as those articulated in this *amicus curiae* brief, the District Court's decision should be upheld.

Dated: February 5, 2004

New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d), as the word processing system has determined the word count total to be 2,980.

Dated: February 5, 2004

New York, New York

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MORDECHAI BISER

CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit, having been admitted on January 2, 2002.

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Mordechai Biser

CERTIFICATE OF SERVICE

On February 5, 2004, I served all counsel of record, listed below, with the enclosed Motion to File Out of Time and Corrected Brief of Amicus Curiae by first class mail:

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