Case No. 06-3057

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNIFIED SCHOOL DISTRICT NO. 259,
Plaintiff-Appellant

v.

DISABILITY RIGHTS CENTER OF KANSAS.,
Defendant-Appellee,

On Appeal from the United States District Court
for the District of Kansas Case No. 04-1279-JTM
(Honorable J. Thomas Marten)

BRIEF OF *AMICI CURIAE* KANSAS ASSOCIATION OF SCHOOL BOARDS AND NATIONAL SCHOOL BOARD ASSOCIATION

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Dated: May 8, 2006

CORPORATE DISCLOSURE STATEMENT AND CERTIFICATION OF INTERESTED PARTIES

Pursuant to Federal Rule of Appellate Procedure 26.1, the Kansas Association of School Boards, Inc. ("KASB") states that it is a Kansas not-for-profit corporation organized pursuant to §501(c)(4) of the Internal Revenue Code. KASB has no parent corporation and/or stock owned by a publicly owned company. Pursuant to Circuit Rule 46.1, KASB states it has no financial interest in the outcome of this litigation. KASB is unaware of any additional parties, entities or attorneys–other than those previously listed by the parties–who are financially interested in the outcome of this litigation.

Pursuant to Federal Rule of Appellate Procedure 26.1, the National School Boards Association ("NSBA") states that it is a Illinois not-for-profit corporation organized pursuant to §501(c)(3) of the Internal Revenue Code. NSBA has no parent corporation and/or stock owned by a publicly owned company. Pursuant to Circuit Rule 46.1, NSBA states it has no financial interest in the outcome of this litigation. NSBA is unaware of any additional parties, entities or attorneys—other than those previously listed by the parties—who are financially interested in the outcome of this litigation.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia, and the U.S. Virgin Islands. NSBA represents over 95,000 of the nation's school board members who, in turn, govern the nearly 14,500 local school districts that serve approximately 48 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The Kansas Association of School Boards ("KASB") is a membership organization representing 297of the 300 school districts in Kansas. KASB's membership includes unified school districts, educational service entities providing services to school boards, and community colleges located solely within the state of Kansas. KASB provides, *inter alia*, educational policy, advocacy, insurance and legal services.

Both NSBA and KASB believe this case presents issues of statewide and national significance, meriting resolution by this Court. School districts nationwide have received requests for student records from disability protection and advocacy ("P&A") groups, claiming a right to access student records under federal laws authorizing them to investigate abuse and neglect of individuals with disabilities. Schools have denied these requests based on federal laws protecting the privacy of student records. However, the repetitious press for records by P&A groups results in disruption of educational activities and a drain on limited resources. This Court's ruling will affect the ability of school

districts to safeguard the confidentiality of student information in accordance with federal education privacy laws and settle the debate over which federal law controls.

Because the request for records in this case suggests that the Disability Rights Center of Kansas ("DRC") deems "abuse" and "neglect" could be based on the level of special education services provided, NSBA and KASB are also concerned Defendant's practices are an unauthorized attempt to oversee special education services to students. KASB and NSBA believe federal laws specific to special education and confidentiality of student records place this authority squarely and unambiguously in education agencies and prohibit DRC from gaining access to this information through pretextual recourse to broad P&A statutes.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing this action as moot and this Court, in the interest of judicial economy, can and should address the merits of the issues to avoid unnecessary delay in the resolution of this matter.

The release of education records related to students with disabilities is controlled by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. §1232g, and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 *et seq*. FERPA prohibits the disclosure of personally identifiable information contained in education records of all students in the absence of parental consent or a stated exception. IDEA, a comprehensive education law to ensure that students with disabilities receive a free, appropriate public education provides numerous procedural protections and strengthens the confidentiality restrictions contained in FERPA. Neither the

Developmental Disability Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. §§15001 *et seq*., the Protection and Advocacy for Individuals with Mental Illness ("PAIMI") 42 U.S.C. §§10801, *et seq.*, or the Protection and Advocacy for Individual Rights Act ("PAIR"), 42 U.S.C. §794e (collectively referred to hereafter as the "P&A statutes"), can be read to allow release of confidential information absent parental consent without violating the provisions of FERPA and IDEA.

FERPA and IDEA specifically govern the release of student records, and override the general provisions of the P&A statutes. To allow P&A groups the authority to use P&A statutes that do not reference public school programs to trump specific education statutes would subvert the intent of Congress and would force the Plaintiff and other school districts into the untenable position of violating two explicit education-related statutes, while expanding statutes that do not pertain to education beyond their intended reach. *Amici* urge this Court to stop P&A groups from misusing these laws as a legal sword to inflict on schools needless and duplicative oversight of the special education services provided by U.S.D. No. 259 and other public school districts.

To impute oversight authority into the P&A statutes would be contrary to Congress's intent under the IDEA which requires school districts to provide parents specific procedural safeguards and exclusive legal avenues for challenging the adequacy of special education services. Because P&A statutes do not address public education, special education or related services within their provisions, this Court should not read them to authorize investigations into the adequacy of services provided by public schools under the IDEA.

ARGUMENT

I. DRC's voluntary cessation of proceedings at the District Court does not render this case moot. This case involves issues of statewide and nationwide significance which will recur if not resolved by this Court.

Amici adopt the argument set forth by Plaintiff brief's regarding mootness and judicial economy. Nothing prevents DRC or other P&A organizations from making continued, similar requests, as it has in the past, for student records from U.S.D. No. 259 or any other school district. Recent opinions from courts in Connecticut, Washington and Wisconsin (see more discussion of these cases in section IV, *infra*) indicate requests of this nature from P&A groups are an emerging legal tactic throughout the nation that could result in lawsuits against school districts, imperiling the privacy of student records.

Although the student records requested in this case concerned only those students receiving extended homebound services, P&A groups, using the same argument, could make similar requests for detailed educational records for any and all children receiving special education. Currently, public schools in Kansas serve more than 65,000 children with disabilities. *Kansas Special Education Count* (KSDE 2006). Nationwide over 6.7 million children with disabilities were served under the IDEA during 2001. *25th Annual Report to Congress on Implementation of the IDEA* (2005). The potential number of requests for access to student records by P&A groups is enormous and will continue to increase unless the Court issues a substantive ruling halting the expansive misuse of P&A statutes. Without such a ruling, P&A groups will undoubtedly continue to interrupt educational activities and require schools to devote precious resources responding to them. (See pages 6-7 infra, for more discussion of this burdensome process.) Thus, the

need for an authoritative answer to the question of law is evident. Because this case presents purely a question of law with no factual disputes, judicial economy suggests this court should address the merits of this litigation.

II. FERPA and IDEA govern personally identifiable student information contained in student education records and contain no exception for disclosure to P&A organizations absent parental consent.

The request for student records in this case seeks to override two important federal education statutes prohibiting U.S.D. No. 259, and all other public school districts receiving federal funds, from disclosing confidential student records without individualized and specific parental consent. The district properly denied the request, citing FERPA and IDEA provisions restricting the disclosure of "personally identifiable information" from student records to third parties. *See* 34 C.F.R. §§ 99.3, 300.560-300.577.

A. FERPA provides comprehensive protection of student and family privacy rights by permitting schools to disclose student education information only under very limited circumstances.

FERPA is a comprehensive law, applicable only to education institutions, that deals exclusively with privacy of student records. Congress first enacted FERPA in 1974 for two reasons—"to assure parents of students access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." Joint Statement in Explanation of the Buckley/Pell Amendment, 120 Cong. Rec. 39,858, 39,862 (Dec. 13, 1974). To protect the privacy rights of parents and students attending educational institutions receiving federal funds, FERPA broadly mandates that schools which receive federal funding adopt and implement a policy to

maintain the confidentiality of "personally identifiable information" contained in "education records."[1] Unless an exception to FERPA applies, schools can allow disclosure of personally identifiable information contained in education records only with parental consent. The parties to this action have stipulated that no exception applies which would allow disclosure to DRC without parental consent.

Congress included exceptions defining where disclosure without parental consent is justified. These exceptions include, *inter alia*, disclosure to teachers, school officials, juvenile justice systems, some federal officials, accrediting organizations, for health and safety emergencies and in response to subpoenas. 20 U.S.C. §1232g(b)(1). Significantly, while Congress thought about what circumstances would justify nonconsensual disclosure, it did not include in FERPA any exception for P&A organizations. In the face of such conscious congressional decision-making in the exceptions to FERPA itself, DRC's argument that Congress intended to create additional exceptions by overriding FERPA strictures through the P&A statutes—at best only tenuously connected to special education services provided by public schools—is untenable.

This argument also is unsupportable given the regulatory requirements schools must adhere to in responding to third party requests for student information. Were this Court to accept DRC's position, P&A groups would be given a special right to circumvent these requirements even though no statutory language clearly authorizes this legal bypass. Under FERPA regulations, school districts or individual schools that

[1] FERPA and its implementing regulations specifically define "education records" and "personally identifiable information." 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3.

receive a request for student records may not disclose any information unless it determines that prior parental consent exists.[2] The consent must include the records to be disclosed, the purpose of the disclosure and the party to whom the disclosure may be made. 34 C.F.R. §99.30(b). If no such consent has been provided, the district has no obligation to seek parental consent on behalf of the requester. In the absence of consent, the district may only disclose the requested information by first determining that one or more of the enumerated exceptions applies.[3] The district must keep a log of each request for access; if personally identifiable information is released, the log must include the "legitimate interests" of the party obtaining the information. 34 C.F.R. §99.32(a). In light of the extensive process the FERPA regulations impose on disclosure of student information, it is difficult to sustain the notion that Congress sweepingly exempted P&A groups through statutes that do not relate to education records.

Although this process is extensive and burdensome to schools, they recognize that FERPA imposes a serious responsibility on them to safeguard student privacy; any misstep may result in harm to students and families as well as loss of federal funds. 20 U.S.C. §1232g(a)(1)(A). This Court should not further encumber schools by making the

[2] It should be noted that FERPA does not **require** a school to disclose information even if parental consent has been obtained. Schools may, as a matter of state law or local policy, have more stringent disclosure criteria than established by FERPA. Thus, DRC's reading of P&A statutes would also implicitly impose on schools a duty under federal law to disclose student information even if the schools' own policy or practice or state law prohibited disclosure.

[3] This step can prove especially difficult and time consuming for school support staff who often handle third party requests for student information and must ensure that they are complying with FERPA requirements and properly applying the statutory exceptions. In addition, school administrators frequently become involved in the decision whether or not to disclose and commonly seek legal advice on particularly troublesome requests that require complex interpretation of the exceptions.

task of appropriately safeguarding student privacy even more difficult by superimposing requirements from statutes that were never intended to apply to public schools.

B. IDEA reinforces FERPA's confidentiality provisions and ensures that parents are full participants in determining their children's individualized education programs.

While FERPA protects the privacy rights of all students with respect to information contained in their education records, students with disabilities have additional privacy rights under the confidentiality provisions of IDEA. IDEA regulations require that the confidentiality of personally identifiable information be protected at all stages of record maintenance, including disclosure, limiting disclosure to even the State Departments of Education or the United States Department of Education unless disclosure is specifically authorized by FERPA and its implementing regulations. Furthermore , IDEA regulations require education agencies that monitor IDEA implementation to develop stringent policies to protect the confidentiality of student records and to provide all school personnel collecting or using personally identifiable information with training regarding the policies and FERPA requirements. 34 C.F.R. §§ 300.571-300.572.Yet, under the reading of the statutes proposed by DRC, disclosure to an agency governed by the Department of Health and Human Services (HHS) would be permissible without any of the required protections.

In addition to the strong confidentiality provision in IDEA, nothing in the IDEA gives P&A groups access to student information unless they are providing direct legal representation to parents of students with disabilities. Rather, IDEA contains comprehensive procedures to ensure the rights of children with disabilities and their

parents are protected. These procedures help parents serve as the primary advocates for their children, and require the appointment of a trained surrogate parent if the child's parent is unknown. 20 U.S.C. §1415(b)(2). Specifically, parents have a right to be part of the IEP team that makes decisions about educational programming for their child, and a right to be part of the teams that make decisions about eligibility, evaluation and placement. 20 U.S.C. §§1414(b)(4), 1414 (c)(1), and 1414(d)(1)(B)(i). Procedural safeguards afforded parents under IDEA include the right to prior written notice whenever the school proposes or refuses to take any action regarding the evaluation, eligibility, placement or provision of a free appropriate public education under IDEA. This notice must include "sources for parents to contact to obtain assistance in understanding the provisions of [part B of IDEA.]" 20 U.S.C. §1415(c)(1)(C).

These sources could include P&A organizations available to represent parents of students with disabilities. For example, the Kansas State Department of Education prepares a sample notice of parental rights and procedural safeguards for school districts to provide to parents. That document, available at http://www.kansped.org/ksde/laws/prights/prights.html, informs parents that they may contact Families Together, a parent advocacy and training group, or the Disability Rights Center of Kansas if they have questions about their rights under IDEA. Other procedural safeguards provided to parents under the IDEA include the opportunity to present complaints to the State Department of Education, the opportunity to request mediation, and the right to request a due process hearing. 20 U.S.C. §1415 (d)(2)(E)(I) and (J). P&A organizations can certainly advocate for a children with disabilities, if the P&A

group is retained by parents to provide legal representation in a due process hearing. Under such circumstances, the P&A group could easily secure consent to access the education records of their clients.

Apart from direct representation, there is nothing in IDEA to suggest that P&A groups have sweeping authority to investigate the adequacy of educational services provided in public schools under IDEA. If Congress had wanted to give P&A groups access to specific information about students with disabilities for the purpose of conducting such investigations, Congress could have done so, but it did not. Instead, under IDEA, the responsibility to monitor compliance by local school systems is placed on the U.S. Department of Education and the State Department of Education (DOE). The focus of federal and state monitoring activities is to improve the educational results and functional outcomes for all children with disabilities. States are required to submit to DOE annual compliance reports that measure performance of local districts as to the provision of free appropriate education to children with disabilities, the effectiveness of their methods of identifying children with disabilities, the use of dispute resolution procedures, and the disproportionate representation of racial and ethnic groups in special education. States must also make this information public. 20 U.S.C. §1416.

III. The P&A statutes do not apply to special education and related services a child receives in a public school under IDEA.

The statutory language in the laws allowing P&A groups access to facilities and records make it patently clear that they were never intended to apply to special education and related services a child receives under IDEA at a public school. The services and

facilities which are subject to investigatory requests for information from designated advocacy organizations under P&A statutes are generally facilities or programs monitored by the U.S. Department of Health and Human Services. 45 C.F.R. §1386.19. None of these acts contain references to public schools as covered facilities, nor do they define educational services to include "special education" and "related services," the terms Congress has used since the 1970s to describe services received through special education programs.

The DD Act indicates its purpose is:

> to assure that individuals with developmental disabilities and their families participate in the design of and have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs authorized under this subchapter.

42 U.S.C. §15001(b).

The policy provisions of the DD Act include the following:

> It is the policy of the United States that all programs, projects, and activities receiving assistance under this subchapter shall be carried out in a manner consistent with the principles that—
>
> ******
>
> (10) families of children with developmental disabilities need to have access to and use of safe and appropriate child care and before-school and after-school programs, in the most integrated settings, in order to enrich the participation of the children in community life;"

42 U.S.C. §15001(c)(10).

The plain language of the act belies the suggestion that this act, while referencing community services, individual supports, child care, and before- and after-school programs, but not referencing public school programs in any way, intended to cover the

latter. Similarly, there is no reference to public schools, special education or related services in PAIMI or PAIR. The reason is obvious. The laws allowing the protection and advocacy service in a state access to facilities and records were never intended to apply to special education and related services a child receives under IDEA at a public school. The principle is well established that the plain meaning of a statute controls its interpretation. *See U.S. v. Turkette*, 452 U.S. 576, (1981); *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987) In this case, the statutory language is clear and unambiguous: public school special education services are not included.

Despite the clear omission of special education services from the coverage of P&A statutes, the request for student information in this case, premised on allegations of "abuse" and "neglect," involves nothing more than an attempt to impermissibly control the level of services provided to children with disabilities in homebound programs by gaining access to confidential student records. Not only does DRC lack statutory authority for its investigatory foray, to permit access to student records based on a naked averment of neglect and abuse would undermine the IDEA process where decisions are made by a team of professionals and the student's parents after considering all of the information and special circumstances required under 20 U.S.C. §1414(d)(1). Absent express statutory authority, bare claims of neglect or abuse cannot override the comprehensive scheme Congress created under the IDEA to ensure children with disabilities receive a free appropriate public education.

In summary, FERPA specifically protects the privacy rights of all students regarding personally identifiable information contained in education records, while IDEA

strengthens the privacy rights already accorded by FERPA. It is apparent that IDEA and FERPA provisions were intended to control lawful disclosure of student records. Allowing generalized P&A statutes to control over specific education statutes would supercede express congressional intent, contrary to established principles of statutory interpretation. "Even where there are two statutes on the same subject, the earlier being special and the later being general, the special act controls as effective and all matters coming within the scope of the special statute are governed by its provisions." *Glover Const. Co. v. Andrus*, 591 F.2d 554 (10th Cir. 1979).

IV. Other courts that have decided similar cases have generally agreed that the P&A statutes do not trump FERPA and IDEA.

Courts that have decided similar cases have generally rejected the interpretation of P&A statutes DRC has espoused in this case. In *Washington Protection and Advocacy System, Inc. v. Evergreen School District*, C03-5062 FDB (W. Wash. 2003), the district court denied the state P&A group's request for a preliminary injunction seeking student names, parent names and contact information for those participating in a special education program operated by the school district. As here, the Washington P&A system claimed it had probable cause to suspect abuse or neglect in the program based on complaints about a student's special education program, specifically that students were required to collect garbage as part of a work program for which they received credit.

The court denied the requested injunction in a thoughtful opinion noting, among other things, that the court "is not sufficiently satisfied that the [P&A statutes] override FERPA and IDEA." (*Id*. at p. 4). The Washington court relied in part on comments to

proposed regulations in which HHS specifically recognized that the DD Act did not give it the authority to override other federal laws in general, and FERPA in particular. The court ruled the P&A statutes did not override FERPA and IDEA and concluded that the information sought could not be characterized as "directory information" that the district could otherwise release under FERPA. *Evergreen*, C03-5062 FDB at 5-7, n.1.

In *Wisconsin Coalition for Advocacy, Inc. v. State of Wisconsin Department of Public Instruction*, 407 F.Supp.2d 988 (W.D. Wisc. 2005), the court held that an advocacy group was not entitled absent parental consent to access to student records relating to the use of a seclusion room as a disciplinary tool. The P&A group sought records the state education agency had gathered as part of an investigation. The court concluded nothing in the P&A statutes entitled the P&A group to unredacted student files. The court noted that if individuals allegedly subject to abuse in a school facility do not approach the P&A group individually, the group should advertise its services and encourage them to come forward.

Only one case involving a request for public school records, *State of Connecticut Office of Protection and Advocacy v. Hartford Board of Education*, 355 F. Supp. 2d 649 (D. Conn. 2005), has reached a dissimilar conclusion. In that case, the court concluded the P&A group was entitled to access to a transitional learning academy and parental contact information for certain students. This decision, currently on appeal to the Second Circuit Court of Appeals, is contrary to directives from the Family Policy Compliance Office of the U.S. Department of Education, the agency charged with enforcement of FERPA. That office has steadfastly held that schools cannot release "directory

information" about students if it is linked to "non-directory information." Most recently the agency stated:

> Please note that, under FERPA, a school may not disclose the names, addresses, and other "directory information" that is linked to non-directory information. For instance, a school may not disclose "directory information" on all students who are receiving services under IDEA or, like in the case before us, all children in the deaf education program.

Letter to Austin Independent School District, March 2, 2005, http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/tx030205.html

CONCLUSION

Within FERPA and IDEA, Congress provided specific and sufficient safeguards for students and parents with regard to special education. Thus, P&A statutes not intended to apply to special education and related services must yield to the statutes specifically enacted to provide protection. For the reasons expressed herein, *Amici* request judgment be entered in favor of the Plaintiff, USD 259.

Respectfully Submitted,

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CERTIFICATE OF DIGITAL COMPLIANCE

Pursuant to paragraph (d) of the 10th Circuit's October 20, 2004 Emergency Order as amended, I hereby certify that:

(1) every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and

(2) every document submitted in Digital Form or scanned PDF format has been scanned for viruses with the Program McAfee NetShield Version 7 and, according to the program, they are virus free.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the page limitation of Fed. R. App. P. 29(d) because:

   a. This brief contains 15 pages excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   a. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 13 point font - Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2006, the original and seven (7) copies of the Brief of *Amici Curiae* Kansas Association of School Boards and National School Board Association were caused to be delivered by a third party carrier to the Clerk of the Court of Appeals for the 10th Circuit, Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257, and that a copy of the same was caused to be mailed and electronically delivered to each of the following:

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