CASE NO. 15-1031

In the

United States Court of Appeals

For The Fourth Circuit

S.T.; S.J.P.T.; I.T.,

Plaintiffs-Appellants,

v.

HOWARD COUNTY PUBLIC SCHOOL SYSTEM; RENEE A. FOOSE, officially,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE
THE HONORABLE J. FREDERICK MOTZ, PRESIDING

MOTION OF COUNCIL OF PARENT ATTORNEYS AND ADVOCATES FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to Fed. R. App. P. 29, Council of Parent Attorneys and Advocates ("COPAA"), hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of Plaintiffs-Appellants S.T. ex rel. S.J.P.T. and I.T. (the "Parents"). This motion is accompanied by COPAA's proposed brief as is required by Fed R. App. P. 29(b).

ARGUMENT

A. Interests of COPAA

COPAA is an independent, nonprofit organization of attorneys, advocates, and parents in forty-eight states (including Maryland, Virginia, West Virginia, North Carolina and South Carolina) and the District of Columbia who are routinely involved in special education due process hearings throughout the country. COPAA does not undertake individual representation for children with disabilities, but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining a free appropriate public education ("FAPE") required by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full

participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. §1400(c)(1) (2006). Individuals with disabilities can be economically contributing members of society if they receive the education and support they need to utilize their strengths, enabling them to live and work independently.

COPAA brings to this Court a unique perspective of parents and advocates for children with disabilities and their experiences with the challenges faced by such children, whose success depends upon the enjoyment of all rights under federal law guaranteed to students, regardless of whether they receive special education. COPAA has been *amicus curiae* in the United States Supreme Court in *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484, 2492-93 (2009); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Bd. of Educ. of New York v. Tom F.*, 552 U.S. 1 (2007); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2006), in numerous cases in the United States Courts of Appeal, and was granted leave to file an *amicus curiae* brief out of time in the Fourth Circuit case *John Doe v. Bd. of Educ.*, Court of Appeals No. 13-2537. (Docket No. 65.)

This appeal presents a significant issue that affects the ability of children with disabilities and their families to receive a FAPE pursuant to the IDEA. The Memorandum and Order of the United States District Court for the District of

Maryland, District Judge J. Frederick Motz, dated January 5, 2015 ("Order"), raises a critical question: Is the determination of whether a school district has offered a FAPE based upon the facts known to all parties at the time that the IEP is created? COPAA's position is that the answer is yes, but the Order suggests, contrary to the IDEA and well-established case law, that the answer is no.

This issue is of profound importance to COPAA and its members, because it invokes parents' rights to notice and meaningful participation, and reliance interests. At the time the parents must choose whether to accept a school district's offered program and school placement, or to place the child elsewhere and sue the school district for tuition payment, parents have only the information provided by the school system at the IEP meeting upon which to rely. Therefore, the information known to the parents at that time, as to whether the recommended program and school placement are appropriate, creates considerable reliance interests for the parents. Further, to suggest, as the Order's conclusion does, that parents are required to "try out" a school district's school placement, even when they have been informed that it cannot provide their child the agreed-upon instruction and services, is directly contrary to the United States Supreme Court's holding in *Forest Grove*.

Based upon its experience, COPAA offers the Court a unique and important view on this issue. As such, COPAA respectfully requests that it be granted permission to submit the attached *amicus curiae* brief.

B. Why an Amicus Brief from COPAA Is Relevant and Desirable

The COPAA *amicus curiae* brief is both relevant and desirable. *See* Fed. R. App. P. 29(b)(2). The legal issue presented in the appeal is of great importance to COPAA and their members, because the Order calls into question critical procedural and substantive rights under the IDEA. COPAA offers the Court relevant matters not brought to Court's attention by the parties. *See Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986). COPAA explains how the Order erred: (1) in finding that a school placement is not part of the IEP; and (2) in suggesting that a child must "try out" a school placement that, the parents understood, could not provide the child the instruction and services on his IEP. COPAA will present a distinct and relevant analysis of the issues presented on appeal.

CONCLUSION

For the foregoing reasons, COPAA respectfully requests that the Court grant their motion to file the attached brief in support of Plaintiffs-Appellants.

Dated: April 15, 2015
New York, New York

Respectfully Submitted,

/s/ Caroline Heller

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CERTIFICATE OF SERVICE

I certify that on April 15, 2015 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTERESTS OF THE AMICUS

Council of Parent Attorneys and Advocates (COPAA), is an independent, nonprofit organization of attorneys, advocates, and parents in forty-eight states (including Maryland, Virginia, West Virginia, North Carolina and South Carolina) and the District of Columbia who are routinely involved in special education due process hearings throughout the country. The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. §1400(c)(1). Individuals with disabilities can be economically contributing members of society if they receive the education and support they need to utilize their strengths, enabling them to live and work independently. For that reason, COPAA is committed to ensuring that children with disabilities receive a free appropriate public education in the least restrictive environment as required by the Individuals with Disabilities Education Improvement Act ("IDEA").[1]

[1] Pursuant to Fourth Circuit Local Rule 29(c)(5), counsel for COPAA, Greenberg Traurig, LLP, states: (1) Greenberg Traurig, LLP authored the brief in whole with comments from COPAA; (2) Greenberg Traurig, LLP funded the preparation and submission of the brief as counsel for COPAA; and (3) no other person contributed money that was intended to fund the preparation or submission of the brief.

COPAA offers a unique perspective on an issue raised by a Memorandum and Order of the United States District Court for the District of Maryland, District Judge J. Frederick Motz, dated January 5, 2015 ("Order"), because the Order affects the ability of children with disabilities and their families to receive a free appropriate public education ("FAPE") pursuant to the IDEA. The Order raises a critical question: Is the determination of whether a school district has offered a FAPE based upon the facts known to all parties at the time that the IEP is created? If it is, as advocated by the Plaintiffs-Appellants, S.T. ex rel. S.J.P.T. and I.T., ("Parents") and COPAA, the Court should reverse the Order in so far as it held that Defendants-Appellees, the Howard County Public School System and Superintendent Renee A. Foose (collectively, "School District"), offered S.T. a FAPE. At the time of S.T.'s IEP meeting, the School District offered S.T. 46 weeks of instruction and services, but then recommended a school that did not provide 46 weeks of instruction and services. Had the District Court applied the correct law, it should have found that, for this reason, the School District did not offer S.T. a FAPE.

This issue is of profound importance to COPAA and its members because it invokes the parents' rights to notice and meaningful participation, as well as reliance interests. At the time the parents must choose whether to accept a school district's offered program and school placement or place the child elsewhere and

then sue the school district for tuition payment, parents only have the information provided by the school system at the IEP meeting upon which to rely. Therefore, the information as to the appropriateness of the recommended program and school placement known to the parents at that time creates considerable reliance interests for the parents. COPAA respectfully submits this brief in support of the Parents, and urges this Court to hold that, as a matter of law, whether an IEP is appropriate is judged based upon the program and school placement presented to the parents at the IEP meeting and to reverse the branch of the Order that found that the School District offered S.T. a FAPE.

II. SUMMARY OF ARGUMENT

In its Order, the District Court found that evidence in the record supported the ALJ's conclusion that the School District had offered S.T. a FAPE. The evidence that the ALJ and District Court relied upon was the testimony of School District witnesses that the school offered to the Parents at the October 2013 IEP meeting, Cornerstone Program at Cedar Lane School ("Cornerstone"), could provide S.T. with the 46 weeks of instruction and services on his IEP. (JA-81-82.)[2] In so holding, the District Court erred in two respects. First, the District Court failed to recognize that a school district must identify on the IEP the particular school at which the child is to receive instruction and services, which is

[2] References to the Joint Appendix filed in this case on April 8, 2015 shall hereinafter be referred to as "JA."

the law in this Circuit. *See A.K. ex. rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 681 (4th Cir. 2007). Had the District Court correctly applied this law, it would have had to determine whether, at the time of the IEP meeting on October 21, 2013, Cornerstone had a 46-week academic program. As set forth herein, the record reflects that, when the School District recommended Cornerstone at the IEP meeting, Cornerstone was only a 36-week program, and thus could not provide the 46 weeks of instruction and services on S.T.'s IEP.

Second, the District Court erred when it looked beyond the terms of the IEP—failing to determine the appropriateness of an IEP as of the time it was made—and relied upon the testimony of two School District witnesses that, sometime after the IEP meeting, the Cornerstone program changed into a 41-week program, with the possibility of bridge services. (JA-81-82.) Janet Zimmerman and Shannon Majoros testified in February of 2014, four months after S.T.'s IEP was developed, that Cornerstone's program was "now" an 11-month (41-week) academic program that might be able to offer additional "bridge services" to lengthen the 41-week academic program. (Administrative Decision of the Honorable Mary Shock dated March 4, 2014 at p. 37; District Court Docket No. 15-1 [JA-6].) However, the record reflects that, as of the date of the IEP meeting, Cornerstone was only a 36-week academic program. (Parents' Opening Brief at 6.) Thus, in relying upon the testimony of Mmes. Zimmerman and Majoros about

how Cornerstone had changed, the District Court erred in looking beyond the IEP that was developed with the Parents. Indeed, neither the ALJ nor the District Court should have relied upon this testimony in finding that the School District offered S.T. a FAPE.

In doing so, the import of the Order is that parents are required to "try out" a School District's school placement, even when they have been informed that it cannot provide their child with the agreed-upon instruction and services, hoping that the school will somehow change its program. This position flies in the face of the United States Supreme Court's holding that parents are not required to try out the school district's proposed program. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 240-43 (2009). Adoption of the Order would eviscerate one of the critical procedural safeguards in the Act: the statutory notice provision requiring that parents receive notice of and have the right to participate in the development of the IEP.

III. STATEMENT OF THE LAW

A. Standard of Review

This Circuit reviews *de novo* the District Court's resolution of pure questions of law. *J.H. ex rel. J.D. v. Henrico Cnty. Sch. Bd.*, 395 F.3d 185, 196 (4th Cir. 2005). It may only overturn the District Court's findings of fact if they are clearly erroneous. *Id*.

B. The IEP Is the IDEA's "Education Delivery System" for Providing Notice to Parents of the Program and School Recommended for Their Child

The express purpose of the IDEA is to "ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1)(A); *see Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 367 (1985). In exchange for receipt of federal funds, Maryland has agreed, and is required, to guarantee a FAPE to every child who has a disability that impedes access to education. 20 U.S.C. § 1412(a)(1)(A).

A FAPE is provided to a child with disabilities through the development of an IEP, which is both a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington*, 471 U.S. at 368. An IEP must be reasonably calculated to enable the child to receive educational benefits. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 187-88, 203 (1982). The IEP is required to identify both the services and a particular school at which the offered instruction and services are to be implemented. *See A.K.*, 484 F.3d at 681. An IEP that fails to offer a school, "as a matter of law… [is] not reasonably calculated to enable [the child] to receive educational benefits." *Id.* (citing *Rowley*, 458 U.S. at 207).

Parents are entitled to "participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a [FAPE] to such child . . . ." 20 U.S.C. § 1415(b)(1). The school district must provide the parents with "[w]ritten prior notice" of any proposals to initiate or change the child's services and placement. *See* 20 U.S.C. § 1415(b)(3).

C. Federal Courts Are Empowered to Determine Whether the School District Has Denied a Child a FAPE

Parents who contend that a school district has failed to comply with procedural safeguards and substantive requirements of the IDEA, which results in the denial of a FAPE to their child, are entitled to an impartial due process hearing. 20 U.S.C. § 1415(f)(1)(A). In Maryland, the impartial hearing is conducted before an administrative law judge ("ALJ"), and either party aggrieved by the final decision of the administrative law judge may seek review in federal court. *See* 20 U.S.C. § 1415(i)(2).

The IDEA requires that federal courts receive and review the records of the proceedings and "make 'independent decision[s] based upon a preponderance of the evidence. . . .'" *Rowley*, 458 U.S. at 206 (*citing* S. Conf. Rep. No. 94-455, p. 50 (1975)). Congress empowered federal courts to determine whether states have complied with the IDEA's procedural safeguards and substantive requirements, including whether the child's "[IEP] developed through the [IDEA's] procedures [was] reasonably calculated to enable the child to receive educational benefits."

Id. at 206-07. Because the IDEA requires courts to receive the record of the administrative proceeding, the IDEA implies that "due weight shall be given to these proceedings." *Id.* at 206.

Factual findings of the ALJ that are supported by the evidence in the record, and especially credibility determinations of witnesses, are accorded due weight by reviewing courts. *See Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 104-05 (4th Cir. 1991). The District Court need not defer to an ALJ's findings when its own review of the evidence indicates that the ALJ erroneously assessed the facts or misapplied the law to the facts. *Sarah M. v. Weast*, 111 F. Supp. 2d 695, 698 (D. Md. 2000); *see C.M. v. Bd. of Educ. of Henderson Cnty.*, 241 F.3d 374 (4th Cir. 2001) (reversing District Court and ALJs where "no error in the historical facts found by the ALJs, but… the ALJs misapplied the law to the facts….")

This Circuit and others have found that "[i]n evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself." *A.K.*, 484 F.3d at 682.[3] This is because:

[3] *See R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012) (the "IEP must be evaluated prospectively as of the time of its drafting…."); *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564-565 (3d Cir. 2010) ("a court should determine the appropriateness of an IEP as of the time it was made"); *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1316 (10th Cir. 2008) ("when analyzing the substantive compliance of an IEP, the court should restrict our examination to the written document"); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001) (the court must limit the evaluation of the IEP to the terms of the document "as presented in writing" to the parents); *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (school district must "offer formally an appropriate educational placement").

> [i]n order for this system to function properly, parents must have sufficient information about the IEP to make an informed decision as to its adequacy prior to making a placement decision. At the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents.

R.E., 694 F.3d at 186; *see A.K.*, 484 F.3d at 682 ("[e]xpanding the scope of a district's offer to include a comment made during the IEP development process would undermine the important policies served by the requirement of a formal written offer….").

Accordingly, when a school district offers a school placement that cannot implement the offered instruction and services at the time that the parents must decide whether to accept or reject the school placement offer, in this case at the IEP meeting, courts have found that the school district failed to offer the child a FAPE. *See R.E.*, 694 F.3d at 191-92.[4]

IV. THE DISTRICT COURT MISAPPLIED THE LAW

Here, the District Court failed to apply the correct law in determining whether the School District offered S.T. a FAPE. The District Court erred in two

[4] Cases in the Second Circuit are analogous because, while that Circuit has held that the IEP need not list a specific school, school districts are still required to recommend a school that can implement the instruction and services on the IEP. *See id.*; *D.C. ex rel. E.B. v. N.Y.C. Dep't of Educ.*, 950 F. Supp. 2d 494, 508 (S.D.N.Y. 2013) (holding department of education failed to offer the student a FAPE where the recommended school placement told the Mother that it could not implement a medical mandate on her son's IEP that he be educated in a seafood-free environment); *B.R. ex rel. K.O. v. N.Y.C. Dep't of Educ.*, 910 F. Supp. 2d 670, 676 (S.D.N.Y. 2012) (holding that DOE failed in its burden to show that the proposed public school placement could implement the student's IEP).

ways: (1) in failing to recognize that the recommended school placement is part of the IEP, resulting in a failure to consider whether, on October 21, 2013 at the IEP meeting, Cornerstone could provide S.T. 46 weeks of instruction and services; and (2) by relying upon the testimony of witnesses about how, four months after the IEP meeting, Cornerstone could provide a 41-week program with bridge services, thus failing to determine the appropriateness of an IEP as of the time it was made.

A. Whether the School District Has Offered a FAPE Must Be Judged on the Information Provided to the Parents at the IEP Meeting

The District Court correctly noted that an IEP is to be judged based upon the facts known to all parties at the time that the IEP is created. (JA-82.) It then stated that "[h]ere, the dispute is not over S.T.'s IEP, but whether Cornerstone can sufficiently implement it." (JA-82.) In doing so, the District Court failed to recognize the law of this Circuit that the school placement ***is*** part of the IEP. *A.K.*, 484 F.3d at 681. Thus, the fact that Cornerstone could not provide S.T. with the 46 weeks of instruction and services on his IEP at the time of the IEP meeting is the exact issue that the District Court should have addressed in evaluating whether the IEP offered S.T. a FAPE. *See R.E.*, 694 .3d at 185; *D.C.*, 950 F.Supp.2d at 503.

The record reflects that, at the October 21, 2013 IEP meeting, Cornerstone was only a 36-week academic program, thus could not provide S.T. with the 46 weeks of instruction and services on his IEP. (Parents' Initial Brief at 6.) There is no evidence in the record that the School District was informed at the October 21,

2013 IEP meeting that Cornerstone was, or would have, a 46-week academic program in place by the time that S.T. was to transfer to Cornerstone in December of 2013. In fact, the School District's own witness testified on January 9, 2014 that, as of that date three months after the IEP meeting, Cornerstone remained a 36-week academic program. (District Court Doc. No. 20-2 [JA-6].) Neither the ALJ nor the District Court sufficiently addresses this fact. Thus, based upon the facts known to the Parents when S.T.'s IEP was created, it is evident that S.T.'s IEP did not offer S.T. a FAPE, and the District Court erred in finding otherwise.

B. The District Court Erroneously Looked Beyond the Terms of the IEP

The ALJ and the District Court also erred in looking beyond the terms of the IEP and failing to determine the appropriateness of an IEP as of the time it was made. *See A.K.*, 484 F.3d at 682. Both the ALJ and the District Court relied upon the testimony of Mmes. Zimmerman and Majoros as to how Cornerstone had changed into a 41-week program with the possibility of bridge services. (JA-82.) In doing so, the ALJ and the District Court did not examine whether, at the time that the IEP was written, Cornerstone could provide S.T. with the 46 weeks of instruction and services on S.T.'s IEP. Indeed, the evidence on this point is that, to the contrary, on October 21, 2013, Cornerstone was only a 36-week academic program and, thus, could not provide S.T. with 46 weeks of instruction and services. (Parents' Initial Brief at 6.) The School District's recommendation of a

school that could not provide S.T. his instruction and services constitutes a deprivation of a FAPE.

For example, in *D.C.*, a case analogous to this one, the autistic child had a deadly allergy triggered by both the aroma and consumption of seafood. 950 F. Supp. 2d at 499. The parent and the department of education developed an IEP mandating that the child be educated in a seafood-free environment. *Id.* at 500. The department of education recommended a school placement after the IEP meeting (which is permitted in New York). *Id.* at 501. When the parent visited the school, the staff at the school told her that the school was not seafood-free and could not protect her son from exposure to seafood. *Id.* at 501-02. The parent placed her son in a private school that was seafood-free and sued the department of education for tuition funding for that school. *Id.* at 501-03. At the impartial hearing, the department of education presented witnesses from the school, who had not met the parent when she toured the school, who testified that the school was seafood-free and could accommodate the child's allergy. *Id.* at 505. Both an impartial hearing officer and, on appeal, the state review officer, found that the school was appropriate for the child based upon the testimony of the school witnesses that the school was seafood-free. *Id.* at 505-05. The court found that it was improper for the impartial hearing officer and state review officer to rely upon the testimony by the school staff that the school was seafood-free because the

parent had been provided contrary information at the time that she had to decide whether to place her son in the school. *Id.* at 510. The court found that reliance upon this testimony was improper:

> Prior to making a placement decision, a parent must have sufficient information about the proposed placement school's ability to implement the IEP to make an informed decision as to the school's adequacy. At the time the parent must decide whether to accept the proposed placement or unilaterally place a student elsewhere, the only information available to the parent about the proposed placement are the FNR and, if the parent visited the proposed placement, the information provided during the visit. The information a parent can glean from these two sources creates considerable reliance interests because the parent must decide, based solely on this information, whether to take the financial risk of unilateral placement.

Id. at 510-11.

The court noted that finding that a FAPE had been offered based upon such testimony would allow the department of education to engage in an unacceptable "bait and switch," "propos[ing] a placement that was not prepared to implement the IEP, leading a parent justifiably to place the child unilaterally" and then allowing the department of education to "defeat the parent's subsequent reimbursement claim by introducing evidence that the proposed placement hypothetically could have effected changes to implement the IEP." *Id.*

Similarly here, on the date of the October 21, 2013 IEP meeting, Cornerstone was only a 36-week academic program that could not provide S.T. with the 46 weeks of instruction and services on his IEP. (Parents' Initial Brief at

6.) The School District did not provide them with any different information. Thus, at the time that Parents had to decide whether to accept Cornerstone, the only information available to them was that Cornerstone was inappropriate. The ALJ and District Court erred in relying on the testimony from the School District's witnesses as to how Cornerstone had changed, because the Cornerstone school presented at the impartial hearing was ***not*** the Cornerstone school presented to the Parents; much like the "seafood-free" school presented at the impartial hearing in *D.C.* was not the seafood-serving school presented to the mother.[5] 950 F. Supp. 2d at 510-11. Were the Court to adopt the view of the ALJ and the District Court, it would be requiring parents to "try out" the school district's proposed program, which directly contradicts the Supreme Court's holding in *Forest Grove*. *See* 557 U.S. at 240-43.

[5] This case is also analogous to *V.S. ex rel. D.S. v. N.Y.C. Dep't of Educ.,* 25 F. Supp. 3d 295 (S.D.N.Y. 2014). In *V.S.,* the department of education offered the student a spot at P811Q@Marathon School (the "Marathon School".) *Id*. at 298. The parent visited the Marathon School and determined that, for various reasons, it was not an appropriate school for her child. *Id*. She enrolled the student in a private school and filed a due process complaint. *Id*. At the impartial hearing, the department of education alleged the student would have actually been placed at P811Q@Q822 ("Q822") and offered evidence as to why Q822 was appropriate. *Id*. An impartial hearing officer and, on appeal, the state review officer found that Q822 was appropriate for the student. *Id*. The District Court disagreed, holding that the "testimony regarding Q822 . . . should have been excluded as retrospective, that is, beyond the scope of the IEP and its implementation" because it was not the school offered to the parents. *Id*. at 300. Similarly here, the Cornerstone school program offered to the Parents at the IEP meeting (36 weeks) was different than the one defended at the impartial hearing (41 weeks with bridge services) and, as such, it was error for the ALJ and District Court to rely upon testimony about Cornerstone's new academic program.

The District Court suggests that adopting the Parents' argument here would "prohibit transferring a student to any new educational programs that were not in existence when the IEP was created." (JA-82.) Here, the Court need not opine on whether the school placement offered at the IEP meeting must be in existence at the time of the IEP meeting, as opposed to being in existence as of the date the that child is supposed to start receiving the agreed upon instruction and services. The only issue here is whether, based upon the information the Parents had at the IEP meeting, Cornerstone could provide S.T. with 46 weeks of instruction and services. Based upon what the Parents knew, it could not, thus the IEP did not offer S.T. a FAPE. As such, this Court should reverse the District Court on this issue and find that the School District did not offer S.T. a FAPE.

V. CONCLUSION

For the reasons set forth above, COPAA respectfully requests that the Court reverse the branch of the Order that found that the School District offered S.T. a FAPE.

Dated: April 15, 2015
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Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-1031: *S.T. et al. v. Howard County Public School System et al.*

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements:

1. Type-Volume Limitation: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because: this brief contains 4,082 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

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: this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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Respectfully submitted,

/s/ Caroline Heller

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