No. 07-541

IN THE

# Supreme Court of the United States

ALEXANDRIA CITY SCHOOL BOARD,
PETITIONER

*v.*

A.K., A MINOR BY HIS PARENTS AND NEXT FRIENDS J.K. AND E.S.,

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

John F. Cafferky
*Counsel of Record*
Andrea D. Gemignani

BLANKINGSHIP & KEITH
4020 University Drive,
Suite 300
Fairfax, Virginia 22030
(703) 691-1235

*Attorneys for Petitioner*

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

## QUESTIONS PRESENTED

I. Whether the Individuals with Disabilities Education Act, 20 U.S.C. §1414(d)(1)(A)(i)(VII) (2004) ("IDEA") demands that school districts offer an Individualized Education Program ("IEP") that not only describes the features of an educational program and the location of special education and therapy services within that program, but also lists a single, specific school site at which the program will be provided.

II. Whether a procedural defect in the preparation of a school district's proposed IEP, having no substantive effect on the provision of special education to a disabled student or the participation of his parents in the IEP process, nonetheless "as a matter of law" deprives the student of a "free appropriate public education" under IDEA, rendering the school district liable to reimburse parents for private school tuition which they pay after rejecting that IEP.

## TABLE OF CONTENTS

*Page*

# TABLE OF AUTHORITIES

*Page*

**CASES**

**STATUTES**

**RULES**



**REGULATIONS**

## OPINIONS BELOW

The opinion of the administrative hearing officer rendering judgment for the School Board, dated September 25, 2004 is unofficially reported at 105 LRP 13597, and reproduced in the Appendix at App. 49a-80a.

The opinion of the U.S. District Court for the Eastern District of Virginia granting the School Board's motion for judgment on the administrative record, dated December 20, 2005, is officially reported at 409 F. Supp. 2d 689, and reproduced in the Appendix at App. 32a-45a.

The majority and dissenting opinions of a panel of the U.S. Court of Appeals for the Fourth Circuit, dated April 26, 2007 and reversing the decision of the U.S. District Court, are officially reported at 484 F.3d 672, and reproduced in the Appendix at App. 1a-31a.

The decision of the U.S. Court of Appeals for the Fourth Circuit denying the School Board's Petition for Rehearing or Rehearing En Banc, dated July 23, 2007, is unofficially reported at 2007 U.S. App. LEXIS 18249, and reproduced in the Appendix at App. 46a-47a. The dissent of Circuit Judge Roger L. Gregory from that Court's denial of the School Board's Petition for Rehearing, dated July 27, 2007, is unofficially reported at 2007 U.S. App. LEXIS 18249, and reproduced in the Appendix at App. 47a-48a.

## JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit sought to be reviewed was entered

on April 26, 2007. On May 10, 2007, the School Board timely filed a Petition for Rehearing or Rehearing En Banc in the U.S. Court of Appeals for the Fourth Circuit. The order of the U.S. Court of Appeals for the Fourth Circuit denying Petitioner's Petition for Rehearing or Rehearing En Banc was entered on July 23, 2007. This Petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1(3) because it is being filed within 90 days of the denial of Petitioner's Petition for Rehearing in the court below. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

The relevant statutory provisions involved concern the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, *et seq.* (2004).[1] They include the section setting forth the content of an IEP, 20 U.S.C. § 1414(d)(1)(A), and specifically the term "location" as it is used in 20 U.S.C. §1414(d)(1)(A)(i)(VII); the definition of an "appropriate" education, 20 U.S.C. § 1401(9); and the provision concerning maintenance of educational "placement", 20 U.S.C. § 1415(j). These provisions are reproduced in the Appendix at App. 103a-106a.

---

[1] Unless otherwise stated, all IDEA references are to the statute as amended in 2004. This is the version of the statute referenced in the decision of the Court of Appeals below.

## STATEMENT

### I. Factual Background

In this action, the parents of a special education student ("A.K." or the "Student") contended that the School Board had not proposed an IEP offering a "free appropriate public education" for their son for the 2004-2005 school year, as required by IDEA. They therefore sued the School Board pursuant to IDEA to recover tuition that they had paid instead to educate him for that school year at a private boarding school (Riverview School).

Before the 2004-2005 IEP process had begun, the Parents had already decided to continue for that school year their earlier private placement of A.K. at Riverview School, signing a contract on April 8, 2004 to do so. (JA 311; *see also* JA 876)[2]. Unaware of the Parents' decision, School Board staff undertook an extensive process to prepare a 2004-2005 IEP. A team including School Board special education staff, Parents and at times Riverview School staff met to develop an IEP on May 21, May 29 and June 9, 2004. (JA 100, 379-80, 610). The School Board's resulting proposed IEP reflected substantial input and collaboration with both the Parents and Riverview School staff. (JA 379). All parties agreed that it fully and accurately described A.K.'s present level of performance, and contained agreed goals and objectives in nine different areas of academic and social functioning. *Id.*

---

[2] "JA" citations are to the Joint Appendix filed in the Court of Appeals.

The School Board's proposed IEP provided that educational placement for A.K. would be in a therapeutic "private day school" setting. (JA 379, 1103-04, 1108). As found by the District Court, and expressly agreed by the Court of Appeals, "'[p]rivate day school' placement is a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." App. 16a, n.1.

During the final IEP meeting, School Board staff suggested to the Parents two specific private day programs that could implement the IEP: Phillips School and Kellar School. (JA 620, 107). Both were therapeutic private day school programs in A.K.'s local community. School Board staff requested that the Parents consider both schools as private day placements for A.K. (JA 635). The Parents, however, immediately rejected both schools at the June 9, 2004 IEP meeting itself.[3]

---

[3] A.K.'s mother testified that when they were suggested at the June 9, 2004 IEP meeting:

> Q Right. What did you say about Phillips School?
> A I think I said that I did not think they were appropriate.
> Q When the name of Kellar School was referenced in the 2004 -- the June 9, 2004 IEP, did you also say that you thought that was inappropriate?
> A I think so.

(JA 1186; *see also* JA 1103-1104; 1108-1109).

IDEA requires public school districts to consider and fund private day or residential schools in cases where a student's individual needs require that level of service. *Florence County School District v. Carter*, 510 U.S. 7, 15 (1993) (school district must either offer an appropriate public school program or fund an appropriate private program). By definition such private schools are not run or controlled by the school division. They require an application and interview process in order to admit a student. (JA 630). Accordingly, though the Parents had not agreed to the IEP, School Board staff nonetheless sent applications to several private day schools, including Phillips and Kellar, in order to ensure that they had space to accept him and implement his proposed 2004-2005 IEP in the event that the Parents accepted it. (JA 152; JA 629-630; Administrative Record 16). Without waiting for the outcome of the referral or interview process, however – and consistent with their rejection of Phillips and Kellar Schools at the June 9, 2004 IEP meeting – Parents on July 2, 2004 rejected outright the School Board's proposed IEP. (JA 379).

In the meantime, in response to the School Board's referrals, Phillips and Kellar Schools let the Parents know that they appeared to have an appropriate program for A.K., and invited him and his Parents to visit in order to confirm that. (JA 630-631; JA 155, 156). The Parents, however, did not make A.K. available for any interviews. (JA 156). Instead, without engaging in that interview process, on July 9, 2005, the Parents filed for an administrative hearing under IDEA, rejecting the School Board's proposal for private day school placement without allowing the School Board the possibility of offering one specific school since they

refused to participate in the requested interviews. (JA 1274-75).

By letter of August 6, 2004, School Board staff again asked the Parents to cooperate with the interview process. (JA 156). The letter reiterated the availability of two appropriate schools, Phillips and Kellar, and indicated that interviews still needed to occur in order to finalize admission. *Id.* The Parents still did not make the Student available for interviews, and did not otherwise respond to the letter. Indeed, the Parents did not at any point bring A.K. for necessary interviews to either the Phillips or Kellar Schools. (JA 631-632; JA 1191; *see also*, JA 156). Instead, they returned him to Riverview School, where he spent the the 2004-2005 school year.

## II. Procedural History

In response to the Parents' July 9, 2004 request for an IDEA due process hearing, a three-day administrative evidentiary proceeding was held on September 13, 14 and 16, 2004. The Parents' claim was that the School Board's proposed IEP was substantively and procedurally inappropriate under IDEA, and that the School Board should therefore be required to fund the Student's residential placement at Riverview School.

In his September 25, 2004 decision, the administrative Hearing Officer determined that, "Both the federal regulations (34 C.F.R. 300.347) and the Virginia regulations (8 VAC 20-80-62 F) set forth the requirements for the contents of an IEP. The IEP prepared for AK by his IEP team for the 2004-2005

school year adequately fulfills these requirements." App. 76a-77a. With respect to identification of a single, specific school, the Hearing Officer stated:

> The private day placement envisioned by [ ] for [ ] was in a small, structured setting which would provide academic and related supplemental services such as counseling and therapy, This placement would assist [ ] in his transition into the local community, and constitute the least restrictive environment for him. The fact that [ ] did not specify a particular private day program suggests to me that [ ] wanted to give the parents as much flexibility as possible on this issue. Several private day possibilities were suggested, and the parents given the option of choosing the one which was most attractive to them. The fact that they found none of the possibilities attractive does not mean that the approach was not in accordance with the FAPE mandates. Thus I conclude that private day placement does provide FAPE.

App. 79a. Accordingly the Hearing Officer denied the Parents' claim for reimbursement of Riverview School. App. 79a-80a.

On March 1, 2005, the Parents filed an action in U.S. District Court for the Eastern District of Virginia pursuant to 20 U.S.C. § 1415(i)(2) for review of the Hearing Officer decision. On cross-motions for judgment on the administrative record, the District Court upheld the Hearing Officer's decision. App. 45a. The Court rejected the argument that the Student was denied a free appropriate public education ("FAPE")

because the School Board did not identify one specific proposed private school in the IEP itself. Relying upon authority from both the Fourth Circuit and other circuits, the District Court held that, "a recommendation for a child's educational placement means a recommendation to the actual educational program and not the particular institution where the program is implemented." App. 40a. The Court further held that the School Board complied with this requirement by offering a "private day school" placement in the IEP. App. 40a. Finally, the District Court closely examined the substance of the Phillips and Kellar programs, and determined that both were substantively appropriate for the Student. App. 43a-44a.

The Parents appealed the District Court decision to the U.S. Court of Appeals for the Fourth Circuit. By a 2-to-1 vote, a Panel of the Court of Appeals on April 26, 2007 reversed the District Court and Hearing Officer. The Panel accepted the District Court's finding that, "'[p]rivate day school' placement is a term of art describing an educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." App. 16a, n.1. The Panel nonetheless held that as a matter of law, IDEA requires IEPs to include not merely the type of educational placement, but the name of the individual school where the IEP would be implemented.

The Panel majority further held that because the School Board had not included the name of a specific

school on the IEP, it had substantively denied the Student an appropriate education. App. 13a, 15a. The Panel majority conceded that the Parents knew that the School Board had offered two specific facilities – Phillips and Kellar Schools – but nonetheless held that, "***as a matter of law*** *that because it* [i.e. the IEP] *failed to identify a particular school, the IEP was not reasonably calculated to enable A.K. to receive educational benefits.*" App. 13a. (emphasis added).

Circuit Judge Roger Gregory dissented from the Panel's decision and its reversal of the Hearing Officer and District Court, on the ground that any failure to write a specific school on the IEP itself was harmless procedural error. App. 20a, 28a-29a. He observed:

> Whether or not there was extensive discussion of the schools during the meeting, Susan Sullivan named the schools as possible locations at which A.K. might be educated. In A.K.'s case, this oral notice was equivalent to the written notice the IDEA requires: after Sullivan's suggestions were made, A.K.'s parents knew with a reasonable degree of certainty where ACPS proposed to educate their child the following school year. The Phillips and Kellar schools were the only ones named as possibilities by ACPS until the school district sent A.K.'s information to several other private day schools on July 6, and during the IEP meeting, A.K.'s parents understood them as such.

App. 23a-24a. He further observed:

> Both Phillips and Kellar requested interviews with A.K. during the summer in order to determine conclusively whether they could give him the assistance he required, but A.K.'s parents never brought him home to attend those interviews. A.K.'s mother testified that when the Phillips and Kellar schools were named as potential locations in the June 9 IEP meeting, she already had determined that both schools were inappropriate for her son. She understood those schools were suggested locations; she simply disagreed with their selection. It is difficult to understand how A.K. could have lost educational opportunity on account of the omission of the schools' names from his IEP when his parents understood both schools were under consideration and had already expressed that neither was appropriate for their son.

App. 26a. Thus the dissent concluded that, "Because A.K.'s parents were given notice that the Phillips and Kellar schools were locations under consideration, ACPS's failure to write this information on his IEP did not deny A.K. an educational opportunity." App. 25a. Finally, the dissent highlighted an important fact expressly found by the District Court, and not addressed or challenged in the majority Panel opinion: Substantively, both the Phillips and Kellar School programs would have provided an appropriate, educationally beneficial program for the Student. App. 28a.

The School Board timely petitioned the U.S. Court of Appeals for the Fourth Circuit for rehearing, or rehearing en banc, of the Panel decision. By order

dated July 23, 2007, the Court denied that petition. App. 46a-47a. Circuit Judge Gregory dissented from the Court's decision not to grant rehearing. He stated:

> Under our present jurisprudence, public school districts are vulnerable to those who could use the unclear state of the law to their advantage. In particular I worry that public schools could be liable for large sums because of errors that, as here, have no adverse impact on the quality of the educational program made available to the student. Regrettably, our public schools today face greater social challenges than before with ever shrinking financial resources; and we should be careful not to expose them to a greater burden than Congress intended them to bear.
>
> The IDEA was written to ensure the fair treatment of disabled students by the educational system, a noble goal that is worthy of our vigilance, but not to punish a school district's good faith efforts to comply with the statute, even if those efforts sometimes entail technical but harmless errors.

App. 48a.

## REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision that an IEP must not only describe the features of the special education program, but include the name of a specific school is not one applicable only to a narrow subset of cases under IDEA. Rather, inasmuch as it construes the statutory definition of "Individualized Education Program", it is

applicable literally to every special education student covered by IDEA. The decision here conflicts with the consistent regulatory guidance of the U.S. Department of Education, and the decisions of at least four other Circuits. On its face, it would invalidate as a matter of law most if not all of the hundreds of thousands of IEPs in the Fourth Circuit alone.

Furthermore, the decision of the Court of Appeals Panel's majority here, holding that the omission on an IEP form of any one item, even if discussed at an IEP meeting and known to parents, and not impacting the delivery of special education to a student, nonetheless as a matter of law substantively invalidates the IEP, significantly departs from the "harmless error" analysis widely applied by lower federal courts to procedural issues under IDEA. Almost all decisions of the federal courts of appeal have held that procedural errors that do not prevent parental participation in the IEP process, or substantively impact the delivery of special education services, do not deny FAPE. The Court of Appeals' majority decision here, by contrast, articulates a categorical "matter of law" approach.

In the thirty years since the effective date of IDEA's predecessor, this Court has not addressed or articulated a standard for determining whether or when an asserted procedural error in creating an IEP constitutes a deprivation of FAPE. As Circuit Judge Gregory pointed out in his dissent from the Court of Appeals' failure to grant rehearing of the Panel opinion below, that jurisprudence is now in disarray in the Fourth Circuit, and in conflict in a number of the other Circuits. The effect is that local school districts, such as

the School Board here, are put at considerable financial risk in attempting in good faith to provide special education for disabled students.

## I. The Individuals with Disabilities Education Act Does Not Mandate that an Individualized Education Program Designate a Specific School.

### A. The Court of Appeals' Decision Conflicts with Longstanding Authority from Other Circuits, as well as the Consistent Interpretation of the Department of Education, and the Sole Example Provided by the Legislative History.

IDEA is the federal statute governing the way local school districts nationwide provide special education services to primary and secondary-age students with disabilities. 20 U.S.C. §§ 1400, *et seq.* It was first enacted in 1975 as the "Education of All Handicapped Children Act" ("EHA"), P.L. 94-142, and was most recently amended in 2004 by the Individuals with Disabilities Education Improvement Act. The IDEA ensures that all children with disabilities are given access to a free and appropriate public education ("FAPE"), by authorizing federal financial assistance to States and to local school systems. 20 U.S.C. § 1412(a)(1).

One of IDEA's (and EHA's) core requirements has always been that school districts prepare and propose an Individualized Education Program, or "IEP", for each eligible student. This Court has described an IEP as, "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 Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 367-68 (1985) (citation omitted).

The Court of Appeals' decision here conflicts directly with established authority from other Circuits, and from the Fourth Circuit itself, holding that, "***An IEP is not location-specific***; the place at which an IEP is implemented may change without the IEP itself changing." *Leonard v. McKenzie*, 869 F.2d 1558, 1562-63 (D.C. Cir. 1989) (emphasis added); *Weil v. Board of Elementary and Secondary Educ.*, 931 F.2d 1069, 1072 (5th Cir. 1991); *Christopher P. v. Marcus*, 915 F.2d 794, 796 n.1 (2nd Cir. 1990); *A.W. v. Fairfax County School Board*, 372 F.3d 674, 683 (4th Cir. 2004); *Jennings v. Fairfax County School Board*, 35 IDELR 158 (E.D. Va. 2001) (reproduced in the Appendix at App. 81a-102a), *aff'd*, 2002 U.S. App. LEXIS 14372, at **14 (4th Cir. 2002) ("the district court correctly decided the legal issues before it. Accordingly, we affirm on the reasoning of the district court.")[4]; *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X . (PS79) v. New York City Board of Ed.*, 629 F. 2d 751, 754 (2nd Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981)

---

[4] This unreported case, decided in 2002 by a different panel of the U.S. Court of Appeals for the Fourth Circuit, involved the identical issue and arguments (and the same District Judge, same counsel, and one of the same schools), but reached a conclusion directly contrary to the Panel's . Because *Jennings* was decided prior to the effective date of Fed. R. App. 32.1(a), however, it was not addressed, or referenced, in the Panel's decision here.

("placement" means only the "general educational program"); *John M v. Board of Educ. of Evanston Township*, 2007 U.S. App. LEXIS 22146, at *10-15 (7th Cir. 2007) (same); The District Court had correctly relied upon these decisions in concluding that the School Board's IEP here was not required to identify an individual school.

The Court of Appeals' decision here cannot be reconciled with these and other decisions of many federal circuits interpreting and applying IDEA's "stay-put" provision, 20 U.S.C. § 1415(j). The Court of Appeals' decision in this case erroneously treats the foregoing subsection as unrelated to IDEA's provisions setting forth the required content of an IEP. 20 U.S.C. § 1414(d)(1)(A). These two IDEA provisions are, however, directly related. The "stay-put" requirement mandates that during the pendency of administrative or judicial proceedings, the student at issue must continue to receive a FAPE in his then-current "educational placement." 20 U.S.C. § 1415(j). Appropriate educational placement must by definition be in conformity with the provisions of a student's IEP. 20 U.S.C. § 1402(9)(D); 34 CFR 300.116(b)(2) ("child's placement" must be "based upon the child's IEP."). The contents of a student's IEP, in turn, are prescribed by 20 U.S.C. § 1414(d)(1)(A). The Courts of Appeal in *Leonard, Weil, Christopher P., John M., Concerned Citizens & Parents* and *A.W.* reached the results they did precisely because the student's IEP was ***not*** required to identify a single, specific school at which it would be implemented.

IDEA has been amended and reauthorized several times since its original adoption, including in

1991, 1997 and 2004. A central purpose of the 1997 amendments was to encourage school districts to educate disabled students in less restrictive environments by providing supportive services, therapies or accommodations in regular classes wherever possible. Individuals with Disabilities Education Act Amendments of 1997, §§ 601(c)(5) (A), (D).[5] In this context, the IEP content requirements were amended so that the "location" or place within the school could be specified. 20 U.S.C. § 1414(d)(1)(A)(vi) (1997), now codified at 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2004). The amendment itself did not define "location." Nonetheless the one and only example of "location" cited in the legislative history is consistent with the understanding of "location" in this subsection as referring to the location of services within an educational program, rather than location of the school within which an educational program would be provided. It states:

---

[5] The findings to the 1997 amendments provided in part:

> (5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by--
>
> (A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;
>
> * * *
>
> (D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate;

Individuals with Disabilities Education Act Amendments of 1997, §§ 601(c)(5) (A), (D).

> For example, the appropriate place for the related service may be the regular classroom, so that the child does not have to choose between a needed service and the regular educational program.

Senate Report S. 717, at 19 (May 9, 1997). At the same time, nothing in the legislative history to either the 1997 or 2004 reauthorizations of IDEA suggests that Congress intended to overturn the consistent administrative and judicial interpretations providing that IEPs are not required to identify a specific school. *See* Senate Report 105-17 (May 9, 1997); House Conference Report 108-779.

With regard to the terms of an IEP, the U.S. Department of Education has consistently interpreted "location" as specifying the type of environment (such as regular classroom, separate resource room, etc.) *within* the school, rather than the identity *of* a specific school:

> The ``*location*'' *of services in the context of an IEP generallyrefers to the type of environment that is the appropriate place for provision of the service.* For example, is the related service to be provided in the child's regular classroom or in a resource room?

64 Fed. Reg. 12605 (March 12, 1999) (commentary to regulations implementing 1997 amendments to IDEA) (emphasis added); 71 Fed. Reg. 46588, 46687 (Aug. 14, 2006) (commentary to regulations implementing 2004 amendments to IDEA). Both before and since the 1997 IDEA reauthorization, this administrative agency,

which is charged with implementing IDEA, has interpreted an IEP as not requiring designation of a specific school. *See Letter to Autin*, 20 Individuals with Disabilities Education Law Reporter ("IDELR") 1157 (U.S. Department of Education, Office of Special Education Programs ("OSEP") (1993); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994); *Letter to Green*, 22 IDELR 639 (OSEP 1995).

The Court of Appeals' decision here observes that the IDEA itself does not define "location" as that term is used in the section setting forth the content of an IEP, 20 U.S.C. §1414(d)(1)(A)(i)(VII). App. 11a, 21a. Where a statutory term is ambiguous or undefined, courts should defer to a reasonable interpretation by the administrative agency entrusted with enforcement of that statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843- 45 (1984)); *Honig v. Doe*, 484 U.S. 305, 326 n.8 (1988). An "ambiguous" statutory term is one, "capable of being understood in two or more possible senses or ways." *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001).

At a minimum, the meaning of "location" as used in 20 U.S.C. §1414(d)(1)(A)(i)(VII) clearly is susceptible of more than one interpretation. The Court of Appeals concluded by looking at the term itself that "location" must refer to the identity of a specific school because selection of a specific school "can" "could" or had the "potential" to affect the appropriateness of an educational program. App. 11a, 12a. In many situations, however, other federal circuits, and the U.S. Department of Education, have held that an IEP is not location-specific, and that the identity of a specific

school did ***not*** determine the appropriateness of the educational program offered. *Leonard*, 869 F.2d at 1562-63; *Weil*, 931 F.2d at 1072 ; *Christopher P.*, 915 F.2d at 796; *A.W.*, 372 F.3d at 683; *Letter to Autin*, 20 IDELR 1157; *Letter to Fisher*, 21 IDELR 992; *Letter to Green*, 22 IDELR 639. The Court of Appeals here failed to recognize that with respect to IEPs, both most other federal courts of appeal, and the regulatory agency responsible for administering the IDEA have consistently interpreted "location" to be the location of services ***within*** *an educational program*, rather than location ***of*** *the educational program itself.*

This situation is similar in this respect to that in *Honig*. This Court was there called upon to interpret and apply EHA's "stay-put" provision, which prohibits a "change of placement" during the pendency of legal proceedings.[6] With respect to that phrase, this Court noted:

> The EHA nowhere defines the phrase "change in placement," nor does the statute's structure or legislative history provide any guidance as to how the term applies to fixed suspensions. Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

---

[6] That statutory provision, then codified at 20 U.S.C. § 1415(e)(3), was recodified to 20 U.S.C. § 1415(j)(2004) as part of the 2004 reauthorization.

484 U.S. at 326 n.8. This Court therefore adopted the interpretation of the U.S. Department of Education. *Id.*

Likewise here, IDEA does not define "location", and its legislative history does not conclusively do so either. Without analysis or consideration of the Department of Education's position, the Court of Appeals simply assumed that the term referred to location of the school, rather than location of the services within the educational program. In the absence of any support in IDEA's text or legislative history for interpreting "location" exclusively as "school", it is the Department of Education's interpretation, not the court's own notion of education policy, which is entitled to deference.

### B. The Court of Appeals' Decision Ignores the Practical and Policy Considerations Associated with Tying Every IEP to a Particular School.

Though stating, "This is not how the IDEA is designed to work" (App. 14a), the Court of Appeals' decision here demonstrates little understanding of the way the IEP and placement process actually does work. IDEA, and the IEP process it includes, is intended to prescribe a general program of special education that allows each disabled student to receive educational benefit. At the same time, an IEP is not intended to prescribe every detail of that educational program. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982). Reading IDEA to require that each and every proposed IEP necessarily include the name of the specific school where it will be implemented ignores important IDEA

policies considerations recognized both by this Court and by lower courts.

For example, "the core of the statute . . . is the cooperative process that it establishes between parents and schools. . . The central vehicle for this collaboration is the IEP process." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). In the many cases where private school placement is a consideration, school districts necessarily rely upon cooperation from parents in that process in order to identify wherever possible an appropriate day school rather than a residential school. Doing so serves the important IDEA goal of educating students in the "least restrictive environment." 20 U.S.C. § 1412(a)(5).

The effect of the Court of Appeals' decision here, however, is to encourage parents not to participate fully in IDEA's IEP process in order to identify a less restrictive specific placement. In such private school cases – such as this one – public school staff do not have the ability unilaterally to commit private day or residential schools to enroll a student. As Judge Gregory noted in his dissent, and the majority does not dispute, offering a specific school requires that parents and student be willing to participate in the application and interview process. App. 26a, 30a n.3. The Court of Appeals' majority decision here permits parents to reject *as a matter of law* an IEP even before a school district has the opportunity to confirm the availability of a specific school through the interview process.

IDEA also envisions that school districts will have some degree of flexibility and discretion in responding to changing conditions in the operation of schools. *John*

*M.*, 2007 U.S. App. LEXIS 22146, at *12-13; *Concerned Parents & Citizens*, 629 F. 2d at 754. The categorical rule announced by the Court of Appeals here, however, ties the hands of school districts in many situations where students must move from one school to another, such as for disciplinary reasons, matriculating to a higher grade, or because a school or school program is opened, closed, or consolidated.

In *A.W.*, for example, the Fourth Circuit held that a student who had made threats against another student could – consistent with his existing IEP – be moved from one school, to an analogous program at a different school nearby, precisely because his IEP was not tied to a specific school. The Court of Appeals observed, "' educational placement' fixes the overall instructional setting in which the student receives his education, rather than the precise location of that setting." 372 F. 3d at 683. After carefully reviewing the language of IDEA and its implementing regulations, the Court concluded that, "consider[ing] the structure and goals of the IDEA as a whole, in addition to its implementing regulations, reinforces our conclusion that the touchstone of the term 'educational placement' is not the location to which the student is assigned but rather the environment in which the educational services are provided." *Id.* at 682. The same principle applies here.

Likewise in *John M.* the Seventh Circuit held that a student could – consistent with the "maintenance of educational placement" provision of IDEA – be transferred from middle school to high school when he reached the appropriate age limit for the former. The Court rejected the notion that enforcing his existing

IEP required continuing his placement in the particular school (there, a middle school) that he had been attending. 2007 U.S. App. LEXIS 22146, at *14-15.

In many other situations, Courts of Appeal have held that IDEA permitted a school district to transfer a special education student from one school to a similar program at another location, because the IEP and educational placement did not dictate a particular school. *See, e.g. Tilton v. Jefferson County Bd. of Educ.*, 705 F.2d 800, 804 (6th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984) (school closed for budgetary reasons); *Concerned Parents & Citizens*, 629 F. 2d at 754 (same); *Weil*, 931 F.2d at 1072 (existing school closed for reasons beyond school district's control); *McKenzie*, 869 F.2d 1572-73 (renewed availability of public program similar to private school program); *Letter to Green*, 22 IDELR 639 (private school became decertified); *Letter to Autin*, 20 IDELR 1157 (consolidation of schools); *Letter to Fisher*, 21 IDELR 992 (Department of Education ordered separate school closed to meet IDEA "least restrictive environment" requirements). If the specific school itself were a required part of the IEP, none of these changes would have been permissible, since each would have been contrary to the expressed terms of that IEP. *See John M*, 2007 U.S. App. LEXIS 22146, at *15 ("Generally the terms of this IEP should be enforced, without exception, as the stay-put relief.").[7]

---

[7] That is further compounded in states such as Virginia, where "changes in placement" may not be made without parental permission. 8 VAC 20-80-76(E)(1)(c) (2001).

The Panel majority below relied upon two decisions out of the Ninth Circuit, *Glendale Unified School District v. Almasi*, 122 F. Supp. 2d 1093 (C.D. Cal. 2000), and *Union School District v. Smith*, 15 F.3d 1519 (9th Cir. 1994), to support its holding that IDEA requires a school system to offer a specific school facility on the IEP. Both those cases, however, are ones in which the district's proposed IEP failed to specify not merely the particular school, but did not at all set forth a specific educational "placement" at issue. Thus in *Glendale*, the school system had offered "multiple placement types," including both a full-inclusion public school placement, and two different private day school programs. 122 F. Supp. 2d at 1105-6. The hearing officer had therefore found that the school district was offering a "wide range of diverse placements." *Id.* at 1107. Likewise in *Union School District*, the school division actually offered one kind of placement (a communicatively handicapped class in a public school setting), but later argued that an entirely different placement (a separate autism program) was appropriate. 15 F.3d at 1525. The Court of Appeals also relied upon the Sixth Circuit's decision in *Knable v. Bexley City School District*, 238 F.3d 755 (6th Cir. 2001). In *Knable*, however, the school system had failed to offer any IEP for an entire school year despite Parents' repeated requests that it develop one. 238 F.3d at 764-66. Fundamentally unlike any of these three decisions, here the school division did offer an IEP describing a single, discrete placement, "private day school", understood to have a detailed and specific set of educational characteristics.[8]

---

[8] The Court of Appeals agreed with the District Court that, "'[p]rivate day school' placement is a term of art describing an

In any event, to the extent those decisions require that every IEP a school district prepares, *by definition*, must set forth a specific, individual school, they represent, at most, a minority position. That an individual school may in some isolated situation be inappropriate does not warrant imposing on all school districts the requirement that *every* IEP name a particular school. In those few cases where parents believe that a school district's proposed program is inadequate due to the identity of the specific school, they always have resort to IDEA's administrative procedures for addressing the dispute, including a resolution meeting, mediation, or a due process hearing. *See* 20 U.S.C. §§ 1415(e), (f)(1)(A, B); *Letter to Flores*, 211 IDELR 233 (OSEP 1980). The effect of the Panel's decision here, however, is to invalidate as a matter of law literally every IEP that does not list a specific school, or omits any of the many other items listed in 20 U.S.C. § 1414(d)(1)(A) even where – as here – the substance of the educational programs offered is completely appropriate. This unnecessarily and unexpectedly exposes local school systems to substantial monetary claims under IDEA in every such case.

---

educational program which includes several characteristics such as a small overall student body size, small classes, small facility, extensive clinical support, the ability to work individually with a student, extensive behavioral management, and parental involvement." App. 16a, n.1.

## II. Technical Procedural Missteps in the Creation of an IEP that Do Not Prevent Parental Participation in the IEP Process, or Have an Effect on the Provision of an Appropriate Education, Cannot be the Basis for a Finding that a School Division has Substantively Denied a "Free Appropriate Public Education" under IDEA.

The IDEA contains myriad procedural requirements. These include, *inter alia*, procedures for identifying potentially disabled students, 20 U.S.C. §1412(a)(3); evaluating and reevaluating students, 20 U.S.C. §§ 1414(a), (b), (c); and those associated with preparing and implementing an IEP, 20 U.S.C. §§ 1414(d), (e), (f); 20 U.S.C. § 1412(a)(5).

In its first decision interpreting IDEA's predecessor statute 25 years ago, this Court held that where a student claims he was denied a FAPE, the court should consider, first, whether the school district complied with the Act's procedural requirements. *See Rowley*, 458 U.S. at 206-07.[9] This Court did not there, however, articulate any standard for determining when – or whether – a school district's failure to adhere to one of IDEA's many procedural requirements could by itself be grounds for holding that the school district had failed to offer a FAPE.

---

[9] This Court in *Rowley* set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the school district must have "complied with the procedures set forth in the Act." 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-07.

Nor have this Court's limited number of IDEA decisions since that time addressed the effect of procedural problems, including those involved with the creation of an IEP. Rather, several of this Court's decisions have involved situations where the *substance* of the educational program was alleged not to provide educational benefit. *E.g. Irving Independent School District v. Tatro*, 468 U.S. 883, 890 n.6 (1984) (case "presents the legal question of a school's substantive obligation under the 'related services' requirement of § 1401(17)"); *Florence County School District v. Carter*, 510 U.S. 7, 15 (1993) (affirming lower court rulings that parents could be awarded private school tuition reimbursement where school district proposed educational program and IEP goals were "wholly inadequate", even if private school did not comply with all IDEA procedures); *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999) (nursing service necessary for student to attend school at all). The other IDEA (or EHA) decisions of this Court have concerned practice and procedure issues under IDEA. These have included, for example, the burden of proof in administrative proceedings, *Schaffer v. Weast*, 546 U.S. 49 (2005); availability of reimbursement for expert witness fees, *Arlington School District Bd. of Educ. v. Murphy*, 126 S. Ct. 2455; 165 L. Ed. 2d 526 (2006); the effect of the "stay-put" provision, and mootness of certain claims, *Honig v. Doe*, 484 U.S. 305 (1988); resort to other federal statutes in addition to EHA, *Smith v. Robinson*, 468 U.S. 992 (1984); and the standing of parents to proceed in court pro se, *Winkelman v. Parma City School District*, 127 S. Ct. 1994; 167 L. Ed. 2d 904 (2007). None of this Court's decisions address a situation frequently presented in IDEA cases, i.e. that in which the substance of a proposed educational

program would be appropriate, but there are asserted procedural violations associated with the proposal.

That issue is squarely presented here. The Panel majority's holding here does not challenge the District Court's finding that substantively, both the Phillips and Kellar School programs would have provided educational benefit to A.K., as required by this Court's decision in *Rowley*. App. 42a-44a, 27a-28a. As Circuit Judge Gregory stated in his dissent here, even if the School Board's failure to include a specific school name on the IEP itself was an IDEA violation, it was at most a technical procedural error that did not substantively deprive the Student of any educational opportunity. App. 22a-31a.

The Panel majority, on the other hand, held that "as a matter of law," by failing to include the name of a specific school on the IEP, the school district had deprived the Student of a FAPE. The effect of the majority's ruling is that any procedural error in the creation of an IEP – including specifically the failure to include in the document itself any item listed in 20 U.S.C. §1414(d)(1)(A) – is necessarily a "substantive" IDEA violation that automatically invalidates the IEP, irrespective of whether it caused any actual educational harm or deprivation. This position is at odds both with the vast majority of decisions from the federal courts of appeal assessing the substantive impact of procedural violations, as well as the clearly-expressed policies underlying IDEA.

The Fourth Circuit's prior decisions themselves unambiguously held that procedural violations are grounds for finding a denial of FAPE only when the

violations result in an actual loss of educational opportunity. *See, e.g., Burke County Board of Education v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990); *DiBuo v. Board of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002) (rejecting *per se* rule invalidating IEP where procedural violations exist); *M.M. v. School Dist. of Greenville County*, 303 F.3d 523, 533-34 (4th Cir. 2002); *Board of Education of Montgomery County v. Brett Y*, No. 97-1936, 1998 U.S. App. LEXIS 13702, at *23 (4th Cir. June 26, 1998). For example in *M.M.*, the Fourth Circuit held that failure to offer a complete IEP was a "technical" and "procedural" IDEA violation that did not result in any prejudice, where parents would not have accepted the IEP in any event. 303 F.3d at 533-35.[10] Likewise in *Brett Y*, this Court held that though a proposed IEP recommended a school that required the student to interview to gain final acceptance, which did not occur by the beginning of school year, this was a procedural issue that did not deny FAPE. 1998 U.S. App. LEXIS 13702, at *23.

In contrast to the Panel majority's opinion here, two other Circuits have specifically held that lack of a specific school may be a "procedural" or "technical" matter, omission of which does not cause any substantive deprivation of FAPE. These include the Fifth Circuit, *White ex rel. White v. Ascension Parish*

---

[10] Relying upon the Sixth Circuit's decision in *Knable v. Bexley City School District*, 238 F.3d 755 (6th Cir. 2001), the Panel majority itself acknowledged the inconsistency between that holding and the Fourth Circuit's holding in *M.M. v. School Dist. of Greenville County*, 303 F.3d 523, 533-34 (4th Cir. 2002), repeatedly citing to *M.M.* as "*but cf.*", but never directly addresses or explains the reason for the inconsistency. App. 14a, 17a n.7.

*Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003), and the Eighth Circuit, *C.J.N. v. Minneapolis Public Schools*, 323 F.3d 630, 641 (8th Cir. 2002) ("the other purported deficiencies to which CJN directs our attention, such as the absence of a specifically identified "Public Separate Day School" in the March IEP (the IEP listed only the relevant setting level and not a precise location) are equally immaterial to our discussion given the February decision to enroll CJN in private school.").

In *White*, for example, the parents contended that the school district's proposed special education program deprived their child of a FAPE because they were not involved in selecting the particular school. The Fifth Circuit analyzed this issue as a "procedural" one. 343 F.3d at 379. The court described "location" as used in the IDEA provision concerning IEP contents is one of several "technical details" that are "primarily administrative" in nature. *Id.* Determining that it did not deprive the student of a FAPE, the court said:

> Ascension responds that "placement" does not mean a particular school, but means a setting (such as regular classes, special education classes, special schools, home instruction, or hospital or institution-based instruction). . . This is the better view.

343 F.3d at 380. The Fourth Circuit majority recognized in its decision here that in describing the lack of a particular school name on the IEP as "substantive", and depriving FAPE as a matter of law, it was departing from the Fifth Circuit's analysis in *White*. App. 12a. The School Board submits that – as the dissent below suggests, App. 26a – the lack of a

particular school name on the IEP is the type of procedural issue that should have been analyzed according to whether it denied the Student any educational opportunity.

Though argued by the School Board and discussed at length in the dissent, the Panel majority skirts almost entirely the issue of whether the absence of a school name on the IEP is a substantive, rather than a "technical," "administrative" or "procedural" matter. The majority's only treatment of it comes in a footnote, which states without authority that the omission of a school name is "substantive", and therefore no analysis of harmlessness can apply. (App. 17a-18a n.7). The Panel majority's position on this is clear. The Court asserts that though Parents knew that two specific schools (Phillips and Kellar) had been proposed, that fact was "not dispositive." App. 19a. The School Board respectfully suggests that the approach of the Fifth and Eighth Circuits, as well as the dissent below, considering these as procedural or technical details assessed for any substantive educational impact, is the proper one.

Furthermore, other courts of appeal have concluded that the absence of other particular IEP items prescribed by IDEA may amount to harmless procedural error. These include the Fifth Circuit, *Adam J. v. Keller Independent School Dist.*, 328 F.3d 804, 811 (5th Cir. 2003) (IEP's failure to include some required items, such as long-term goals, short-term objectives and current level of competency, were "procedural defects" that did not result in loss of educational opportunity or infringe parental opportunity to participate in IEP process); the Sixth

Circuit, *Nack v. Orange City School Dist.*, 454 F.3d 604, 612 (6th Cir. 2006) (lack of some IEP content required by 20 U.S.C.§ 1414(d)(1)(A), including educational baseline and measurement criteria, were "procedural flaws" that did not cause substantive harm); *Doe v. Defendant I*, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (failure to include some of "myriad of technical details that must be included in the written document" did not invalidate IEP, where known by administrators and parents, "even though it was not contained within the four corners of the IEP."); and the Seventh Circuit, *Hjortness v. Neenah Joint School District*, 2007 U.S. App. LEXIS 19744, *9-10 (7th Cir. 2007) (though school district should have convened second IEP meeting to review some IEP items not discussed in first meeting, "this procedural violation does not rise to the level of a denial of a free appropriate public education. The record does not support a finding that [the student's] parents' rights were in any meaningful way infringed."). Though becoming effective after the date of this IEP, the 2004 amendments to IDEA confirm Congress' intent that reimbursement be awarded only on substantive, not simply procedural grounds. 20 U.S.C. § 1415(f)(3)(E).[11]

---

[11] 20 U.S.C. § 1415(f)(3)(E) provides:

> (E) Decision of hearing officer.--
>
> (i) In general.--Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.
>
> (ii) Procedural issues.--In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural

Contrary to the holdings of these decisions, the analysis employed by the majority Panel decision here would invalidate as a matter of law any IEP in which any of the approximately twenty-four different items listed in 20 U.S.C. § 1414(d)(1)(A) are discussed at the IEP meeting, but not written on the IEP form. The effect on that decision is to render local school districts liable to reimburse parents for private school tuition in any such case. *See Florence County School District v. Carter*, 510 U.S. 7 (1993). That was not intended by Congress in amending the IDEA.[12]

While IDEA is a federal grant statute, its funding covers only a small fraction (less than 20%) of the per-pupil cost that local school districts face in providing

---

inadequacies--

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

[12] Thus, in addition to the many other practical and policy problems with the Panel's decision, as explained in detail above, the Panel's decision here is inconsistent with this Court's recent holding in *Arlington School District Bd. of Educ. v. Murphy*, 126 S. Ct. 2455; 165 L. Ed. 2d 526 (2006) that IDEA, as Spending Clause legislation, must unambiguously set forth any and all obligations by which the states will be bound when accepting federal IDEA funds.

special education to students with disabilities.[13] This Court recognized in *Murphy* that IDEA did not seek to address the goal of providing disabled students with an appropriate education without regard to "fiscal considerations." 126 S. Ct. at 2463; 165 L. Ed. 2d at 538.

Reimbursement of private school tuition is limited to situations where the parents establish that the school district is incapable of providing FAPE and that the private school placement is proper. 20 U.S.C. § 1412(a)(10)(C)(ii); *Carter*, 510 U.S. at 13-15. Those conditions serve the public interest that public funds not be spent to support inappropriate or unnecessary private placements. *See* 64 Fed. Reg. 12602 (March 12, 1999). Indeed, one specific purpose of the 1997 amendments to IDEA was to control government expenditures for students voluntarily placed in private schools by their parents. *Greenland School District v. Amy N.*, 358 F.3d 150, 152 (1st Cir. 2004); House Report No. 105-95 (1997), at 91-92.

As Circuit Judge Gregory pointed out in his dissents below, the decision of the Court of Appeals' majority in this case unfairly punishes local school districts for technical but harmless errors, rendering them subject to large sums for private tuition payments even in cases where an error in the preparation of an IEP has no effect on the substance of the education that a disabled student would receive. App. 48a. This case presents an opportunity to rectify the "unclear state of

---

[13] NSBA, *Federal Funding for Education*, at 2 (2006), *available at* http://www.nsba.org/site/docs/35100/35033.pdf

the law" to which he refers, and which the majority decision below has introduced. *Id.*

## CONCLUSION

For the foregoing reasons, the School Board's petition for a writ of certiorari should be granted.

Respectfully submitted,

John F. Cafferky
(*Counsel of Record)
Andrea D. Gemignani
BLANKINGSHIP & KEITH
4020 University Drive,
Suite 300
Fairfax, Virginia 22030
(703) 691-1235
Counsel for the Petitioner Alexandria City
*School Board*

October 22, 2007