SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF HARTFORD

S.C. 19768

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING INC., ET AL.

PLAINTIFFS-APPELLEES

V.

M. JODI RELL, ET AL.

DEFENDANTS-APPELLANTS

BRIEF OF *AMICI CURIAE*
NATIONAL DISABILITY RIGHTS NETWORK, ASSOCIATION OF UNIVERSITY CENTERS ON DISABILITIES, AUTISTIC SELF ADVOCACY NETWORK, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, NATIONAL ASSOCIATION OF COUNCILS ON DEVELOPMENTAL DISABILITIES, NATIONAL DOWN SYNDROME CONGRESS, AND STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES IN SUPPORT OF DEFENDANTS-APPELLANTS WITH ATTACHED APPENDIX

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STATEMENT OF ISSUES

Whether the Superior Court, by directing defendants to "focus their efforts on those disabled students who" (someone determines) "can profit from some form of elementary and secondary education," and by suggesting that defendants adopt uniform statewide policies that would reduce the provision of "unneeded special education services," acted in conflict with the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*

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Cases

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Other

Interest of the *Amici Curiae*[1]

Amici are disability rights organizations who are concerned that one aspect of the Superior Court's opinion—its discussion of the State's system of educating children with disabilities—disregards federal law and threatens to deny children with disabilities important educational benefits.

The following *amici* join this brief:

The **National Disability Rights Network** (NDRN) is the nonprofit membership association of Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies in the United States. P&A/CAP agencies are authorized under federal law to represent and advocate for, and investigate abuse and neglect of, individuals with disabilities.

The **Association of University Centers on Disabilities** (AUCD) is a nonprofit membership association of 130 university centers and programs in each of the 50 States and 6 Territories. AUCD members conduct research, create innovative programs, and prepare professionals to serve and support people with disabilities and their families.

The **Autistic Self Advocacy Network** (ASAN) is a national, private, nonprofit organization run by and for individuals on the autism spectrum. ASAN promotes public policies that benefit autistic individuals and others with developmental or other disabilities.

The **Disability Rights Education and Defense Fund** (DREDF), founded in 1979, is a leading national civil rights law and policy center directed by individuals with disabilities and

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[1] Pursuant to Practice Book § 67-7, *Amici* state: (a) no counsel for a party wrote this brief in whole or in part; (b) no such counsel, nor a party, contributed to the cost of the preparation or submission of this brief; and (c) no persons, other than *Amici*, their members, and their counsel, made such a monetary contribution.

parents who have children with disabilities.

The **Judge David L. Bazelon Center for Mental Health Law** is a national organization based in Washington, D.C., that advances the rights of adults and children with mental disabilities. The Center brought the landmark case, *Mills v. Board of Education*, and was instrumental in the passage of IDEA.

The **National Association of Councils on Developmental Disabilities** (NACDD) is the national nonprofit membership association for the Councils on Developmental Disabilities located in every State and Territory.

Founded in 1973, the **National Down Syndrome Congress** is the leading national resource for advocacy, support, and information for anyone touched by or seeking to learn about Down syndrome, from the moment of a prenatal diagnosis through adulthood.

The **State of Connecticut Office of Protection and Advocacy for Persons with Disabilities** ("OPA") is the federally authorized Protection and Advocacy System for people with disabilities in Connecticut.

Argument

Amici have no quarrel with the goals of this lawsuit, nor do we object to much of the Superior Court's decision. In one narrow but crucial respect, however, the Superior Court disregarded controlling federal law. Connecticut, like all states, receives federal funding under the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* That statute requires the State to provide a "free appropriate public education" to "***all*** children with disabilities residing in the State," 20 U.S.C § 1412(a)(1)(A) (emphasis added). The content of the free appropriate public education must be set forth in an "individualized education program" that is specially developed for each disabled child, through a detailed

process that is specifically set forth in the statute. 20 U.S.C. §§ 1412(a)(4), 1414(d). By directing defendants to "focus their efforts on those disabled students who" (someone determines) "can profit from some form of elementary and secondary education," Slip op. 80, the Superior Court's order contravenes the IDEA's requirement that *all* students with disabilities receive an appropriate education. And by suggesting that Connecticut should adopt uniform statewide policies that would reduce the provision of "unneeded special education services," *id.* at 84, the Superior Court's decision threatens to undermine the individualized process mandated by the IDEA.[2]

As a federal statute, the IDEA takes precedence over state law, including state constitutional provisions. See U.S. Const., Art. VI; *Hackett v. J.L.G. Properties, LLC*, 285 Conn. 498, 504, 940 A.2d 769, 774 (2008) (federal statute preempts state law); *United States v. Stevenson*, 834 F.3d 80, 87 (2d Cir. 2016) (federal statute preempts state constitutional provision). The Superior Court's special-education rulings must thus be overturned. Those rulings require conduct that is specifically barred by the IDEA, and they impose obligations that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Burton v. Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 552, 23 A.3d 1176, 1183–84 (2011) (internal quotation marks omitted). They are thus preempted.

We note that plaintiffs' post-trial briefs did ***not*** ask for the relief that we challenge here. Plaintiffs' clearest complaint regarding the education of students with disabilities involved the inability of poorer school districts, with high concentrations of such students, to bear the disparate financial burdens they face in complying with the IDEA. See Plaintiffs' Post-Trial

[2] The United States Department of Education has itself suggested that the Superior Court's decision conflicts with the IDEA. See Appendix A, *infra*.

Br. 31 (arguing that "schools in Connecticut are struggling to meet the needs of their special education students with the constrained resources that they have," and that this is especially true in the "focus districts"). Plaintiffs focused in particular on defendants' decision to pay for the lion's share of special education expenses through local, rather than state, funds—a decision that predictably shortchanges disabled students in poorer districts. See *id.* at 63 ("Leaving most of the responsibility of funding special education to districts, many of which are financially strapped in raising funds for education, is not a rational way to ensure the appropriate delivery of education services to these students."). The Superior Court could have—and, in our view, should have—addressed this problem by requiring the state to bear more of the cost of educating students with disabilities, while leaving intact the individualized determination of eligibility required by the IDEA. Instead, the court required the state to adopt policies that would screen disabled children out of the special education system altogether.

A. By Requiring Defendants to "Focus Their Efforts" on Some Disabled Students at the Expense of Others, the Superior Court's Ruling Conflicts with the Individuals with Disabilities Education Act

The Superior Court concluded that the State "spend[s] education money on those in special education who cannot receive any form of elementary or secondary education." Slip op. 74-75. Although the court did not point to a *single* example of a disabled Connecticut student who is incapable of being educated, it determined that spending resources on such hypothetical students is a "problem[]" that is "serious enough to warrant constitutional concern." *Id.* Based on its view that the law does not "require[] unthinking, expensive, and futile efforts in the name of education," *id.* at 79, the court directed defendants "to identify and focus their efforts on those disabled students who can profit from some form of elementary and secondary education." *Id.* at 80.

These holdings directly conflict with the IDEA. The statute does not permit states to decide that some students with disabilities cannot "profit" from education and to "focus their efforts" on other students. To the contrary, the statute requires states to provide each and every disabled child an education that is tailored to meet that child's unique needs. The IDEA explicitly requires states to "ensure" that "[a] free appropriate public education is available to ***all*** children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1)(A) (emphasis added). It defines "free appropriate public education" to mean "special education and related services" that are provided without charge, that include an "appropriate" education, and that conform with the student's IEP. 20 U.S.C. § 1401(9). The statute requires the IEP to include not just ***academic*** but also ***functional*** goals. 20 U.S.C. § 1414(d)(1)(A)(i)(II). It defines "special education" to mean "***specially designed*** instruction, at no cost to parents, to meet the ***unique needs*** of a child with a disability." 20 U.S.C. § 1401(29). And it defines "related services" to include an extensive array of ***non-academic*** supports that "may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A).[3]

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[3] The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.
20 U.S.C. § 1401(26)(A).

The statutory language could not be clearer. Rather than permitting a state to write off some children with disabilities as uneducable so that it may focus its efforts elsewhere, the IDEA requires states to provide an appropriate education to all disabled children. And rather than permitting a state to disclaim responsibility for "physical and occupational therapy" and other "social services" that do not directly "teach kids," cf. Slip op. 80, the IDEA requires states to provide those services where they enable children with disabilities to come to school and benefit from education.

The exclusion of children with disabilities from education was a central focus of the IDEA's drafters. When the statute was originally adopted in 1975 (then entitled the Education for All Handicapped Children Act), its text included a finding that "one million of the handicapped children in the United States are excluded entirely from the public school system." Pub. L. No. 94–142 § 3(a), 89 Stat 773 (Nov. 29, 1975). In describing the need for the legislation, the House Report on the bill observed that, according to then-current statistics, "1.75 million handicapped children [were] receiving *no* educational services at all." H.R. Rep. No. 94-332 at 11 (1975) (emphasis in original). Accord S. Rep. No. 94-168 at 8 (1975). Reviewing the statutory text in the light of these statements in the legislative history, the Supreme Court found "a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction ***for each child***." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982) (second emphasis added). Because Congress sought to guarantee all disabled children "meaningful access to the public schools," *Cedar Rapids Community School Dist. v. Garret F.*, 526 US 66, 79 (1999), the Court has specifically rejected an undue-cost defense

to that statute's mandate that all children with disabilities receive both an education and the supports necessary to enable them to benefit from it, see *id.* at 76-79.

Congress crafted the IDEA to incorporate key principles adopted in two federal district-court decisions, *Mills* v. *Board of Education of District of Columbia,* 348 F. Supp. 866 (DC 1972), and *Pennsylvania Assn. for Retarded Children* v. *Pennsylvania,* 334 F. Supp. 1257 (ED Pa. 1971) (*PARC*). See *Honig v. Doe*, 484 U.S. 305, 309-310, 324-325 (1988) (explaining that Congress adopted key principles from these "landmark" decisions); *Rowley*, 458 U.S. at 192-193 (same). In *Mills*, 348 F. Supp. at 870, each of the plaintiff children had been "excluded from all publicly supported education." Concluding that the exclusion violated the constitutional requirements of equal protection and due process, see *id.* at 874-875, the court entered an order barring the defendants from excluding the children from publicly funded educational services, see *id.* at 877-878. In *PARC*, 334 F. Supp. at 1264, the court's decree specifically addressed a state law that excluded from public school those children with intellectual disabilities who had been "certified as uneducable and untrainable." The decree enjoined the state from applying that law "so as to deny access to a free public program of education and training to any [intellectually disabled] child." *Id.* at 1265.

In refusing to permit states to deny a public education to children labeled "uneducable," Congress responded directly to the evidence in the legislative record. Congress heard testimony that "[a]ll children are educable, even the most severely impaired child," and that states thus should not be permitted to make "any distinction as to which children can be educated, and which children cannot be educated." *Extension of the Education for the Handicapped Act: Hearings Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor*, 94th Cong., 1st Sess. 40 (1975) (testimony of Frederick

Weintraub). See also *id.* at 67 (testimony of George Smith) (San Diego school superintendent testifying that "there is no person who is not educable"). As if anticipating the Superior Court's decision here, one witness characterized the assertion that children with the most severe disabilities "can't profit from an education" as nothing more than an "alibi." *Education for All Handicapped Children, 1975: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 94th Cong., 1st Sess. 84 (1975) (testimony of Dudley Koontz).

Indeed, testimony before Congress suggested that the exclusion from school of children labeled "uneducable" both rested on and reinforced race and class biases in the educational system. One witness submitted a copy of an academic paper, in which he argued that exclusion based on such labels often "provides an excuse for [teachers'] failure with that child or serves to reinforce [teachers'] biases." *Education for All Handicapped Children, 1973-74: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess., Part 2 at 706-707 (1973) (attachment to testimony of Oliver Hurley). More generally, he argued that teachers' reliance on such labels "has served to provide a rationalization for our failures as teachers of Black children, our failures as teachers of Brown children, our failures as teachers of Poor children" and "has been a smokescreen behind which our prejudices and biases could remain unchallenged, even unrecognized." *Id.* at 684.

The Superior Court's order that defendants "focus their efforts" on students who "can profit from" education is thus perverse. In the name of equitable treatment, it violates a key principle of a federal statute that itself promotes educational equity. That principle, in turn, is one Congress crafted to protect not just students with disabilities but also students who are

poor or members of racial minority groups—the ones who are most likely to lose out when states decide which children "can profit" from education.

B. The Superior Court's Order Circumvents the Individualized Procedures Mandated by the IDEA

Although the precise contours of its order are not completely clear on this point, the court suggested that defendants must create statewide standards for "[s]pecial education identification and intervention," Slip op. 86, that would reduce the provision of "unneeded special education services," *id.* at 84. Such standards would undermine the IDEA's detailed and individualized procedures for determining special-education eligibility. To the extent that the Superior Court's order is interpreted to require the state to adopt such standards, it stands as an obstacle to the accomplishment of Congress's objectives and is thus preempted.

In determining whether obstacle preemption exists, "it is not enough to say that the ultimate goal of both federal and state law is" the same. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). "A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Id.* The IDEA prescribes a very specific method for determining what children are eligible for special education and which services they are entitled to receive. That process involves an individualized evaluation of the child, with very detailed requirements. See 20 U.S.C § 1414(a)-(c). The evaluation is followed by the development of an IEP for the child. See 20 U.S.C. § 1414(d). The IDEA incorporates specific requirements for the content of the IEP, the make-up of the team that crafts the program, and the process for drafting and negotiating it. See *id.* The law also provides extensive procedural protections for parents who have disputes regarding the identification or placement of, or services provided to, their disabled children. See 20 U.S.C. § 1415. These protections include requirements that states provide administrative due process

hearings, with judicial review in state or federal court. See *id.*

As the Supreme Court recognized in its first case interpreting the IDEA, the statute's "elaborate and highly specific procedural safeguards" demonstrate that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process," as it did with the law's substantive requirements. *Rowley*, 458 U.S. at 205. The "Act's extensive procedural requirements" demonstrate a "congressional intent" to "require the States to adopt *procedures* which would result in ***individualized*** consideration of and instruction for each child." *Id.* at 189 (second emphasis added).

The Superior Court's decision undermines the individualized consideration that Congress demanded. Although the court suggested that the state is currently providing some "unneeded special education services," Slip op. 84, it did not identify a single child who is receiving such unneeded services. If a parent or child requests services that are, in fact, unnecessary, the proper path for addressing the problem is for the school district to resist that request and follow the individualized procedures set forth in the IDEA. But restrictive eligibility criteria that would attempt to address a supposed overuse of special education services on a statewide basis—particularly in the absence of any identified instance of the problem—subverts the statute's detailed individualized process. It thus stands as an obstacle to the accomplishment of Congress's purposes and is preempted.

Conclusion

The special-education portion of the Superior Court's judgment should be vacated in accordance with the arguments in this brief.

Respectfully submitted.

By: /s/

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on December 30, 2016:

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(4) the brief complies with all provisions of this rule; and

(5) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7 at the following addresses:

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