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August 23, 2005

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BY MESSENGER

Denise McNerney
Deputy Clerk (Merits Cases)
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Schaffer v. Weast, S. Ct. No. 04-698

Dear Ms. McNerney:

This letter responds to petitioners' August 12, 2005 request pursuant to Supreme Court Rule 32(3) for permission to lodge certain materials in the above-referenced case. Petitioners seek permission to lodge three documents with the Court:

- An August 9, 2005 "position statement" issued by the National Council on Disability (NCD);
- A May 25, 2005 letter from Steven Sullivan, Solicitor General of the State of Maryland, to Elaine Williams; and
- A 2000 brief filed in the U.S. Court of Appeals for the Fourth Circuit by the Civil Rights Division of the U.S. Department of Justice in an earlier appeal in this case.

The question presented by this case -- which party bears the burden of in due process hearings initiated pursuant to § 1415(f) of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. -- already has been the subject of extensive briefing by the parties and the numerous amici that have filed briefs in support of both sides. For several reasons, the Clerk should not request the additional materials that petitioners now propose to lodge with the Court.

NCD "Position Statement." The Solicitor General has filed an amicus brief in this case on behalf of the United States setting forth the position of the federal government on the question presented. The brief is joined by the Department of

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Education, the agency that is responsible for administering IDEA. See U.S. Br. 1. The NCD "position statement" does not shed any light on the position of the United States.

The NCD "position statement" appears to be an improper effort to submit an out-of-time and overlength amicus brief in this case. Indeed, the cover page of the "position statement" explicitly refers to "Schaffer v. Weast pending in the Supreme Court." Amicus briefs supporting petitioners were due April 29, 2005, the date that petitioners' opening brief was filed, and can be no longer than 30 pages in length. Because NCD's 48-page "position statement" was not issued until August 9, 2005, respondents were denied an opportunity to address it in their merits brief filed on June 24, 2005. It would be prejudicial to permit petitioners to lodge a 48-page "position statement" that is tantamount to an untimely and overlength amicus brief at this time. Moreover, petitioners' proposed two-step process of having a group formulate a "position statement" on a pending case and then lodging it with the Court would create an avenue for circumventing the rules governing amicus briefs in any case.

The NCD "position statement" largely rehashes the arguments made in petitioners' brief and the amicus briefs that were timely filed in support of petitioners. Those arguments fail for the reasons explained in respondents' brief, not to mention the amicus brief filed by the United States in this case -- on behalf of NCD and the rest of the Executive Branch. There is no reason to burden the Court with this duplicative, 48-page submission. */

* / The Solicitor General is singularly responsible for representing the interests of the United States before this Court. 28 U.S.C. § 518. Congress has not expressly conferred on NCD any independent litigating authority. See 29 U.S.C. § 781 (duties). In any event, even assuming NCD were authorized to submit its own views to this Court (NCD has filed amicus briefs in certain prior cases), the proper vehicle for doing so is the filing of a timely amicus brief pursuant to Rule 37, and not the lodging of a "position statement" that was not even formulated until weeks after the deadline for filing such an amicus brief has passed and that exceeds the page limits for amicus briefs.

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May 25, 2005 Letter. Petitioners have already referred to and quoted from the May 25, 2005 letter from Steven Sullivan, Solicitor General of the State of Maryland, to Elaine Williams, in their reply brief. See Reply Br. 8-9 n.14. Petitioners claim that the May 25, 2005 letter is "pertinent" to the federalism concerns raised by respondents, the United States, the States supporting respondents, and other amici that would stem from interpreting a Spending Clause statute -- such as IDEA -- that does not explicitly set forth a burden of proof as nonetheless silently placing the burden of proof on state and local educational agencies. As the May 25, 2005 letter itself explains, however, the Attorney General of Maryland chose not to file an amicus brief in this case in order to maintain the "impartiality" of the Maryland State Department of Education in providing dispute resolution services under IDEA.

The interest in remaining "impartial" in this case is of unique concern to Maryland -- as opposed to all other States -- because the Maryland State Department of Education oversees the adjudication of disputes under IDEA, including the dispute in this case, and potentially could be called upon to oversee a dispute resolution procedure in this case in the event that the case is remanded for still further proceedings. Accordingly, because the May 25, 2005 letter simply explains the Attorney General of Maryland's decision to stay out of this case in order to "maintain its impartiality," the letter is not pertinent to the overriding federalism concerns created by petitioners' position that IDEA should be interpreted to impose an unstated burden on state and local educators. Nor does it signal that Maryland does not share the federalism concerns set forth in respondents' brief and elaborated on in the amicus briefs filed by the United States and the States supporting respondents.

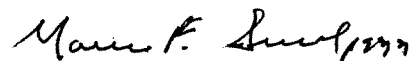
2000 Court of Appeals' Brief. Respondents assume that the 2000 brief filed by the Civil Rights Division -- not the Solicitor General -- on behalf of the Department of Justice in connection with the earlier Fourth Circuit appeal in this case is a part of the record that is available to this Court. In addition, as petitioners explained in their opening brief, the 2000 brief is publicly available on a Department of Justice website. In the event that the Court does not have access to the 2000 brief, however, respondents have no objection to the Clerk requesting copies of the brief for lodging with the Court.

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Thank you for your kind assistance in this matter.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Maree F. Sneed".

Maree F. Sneed

cc: All Counsel