No. 04-3102

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONALD FITZGERALD, *et al.*,

Plaintiffs-Appellants

v.

CAMDENTON R-III SCHOOL DISTRICT, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES

STATUTES (continued): **PAGE**

REGULATIONS:

REGULATIONS (continued): **PAGE**

MISCELLANEOUS:

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INTEREST OF THE UNITED STATES

The United States submits this brief as an *amicus curiae* pursuant to this Court's invitation to file a brief addressing the interpretation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. 1400 *et seq.*

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. 1331 because this lawsuit arose under the Constitution and laws of the United States, specifically the IDEA and the Declaratory Judgment Act, 28 U.S.C. 2201 *et seq.* The district court entered final judgment on August 18, 2004, and appellants Ronald and Joann

Fitzgerald (the Fitzgeralds) filed a timely notice of appeal on August 25, 2004. This Court exercises appellate jurisdiction pursuant to 28 U.S.C. 1291 because this is an appeal from a final judgment disposing of all claims against all parties.

STATEMENT OF THE ISSUE

The brief of the United States will address the following issue: Whether subsection 1412(a)(3), the "child find" provision of the IDEA, requires a school district to evaluate a child the school district suspects of having a disability if the child's parents refuse consent, remove the child from public school, and waive any claim to public educational benefits under the IDEA?

STATEMENT OF THE CASE

1. The IDEA establishes a statutory and regulatory framework to provide financial assistance to school districts to help them educate children with disabilities. To this end, a state is eligible for federal financial assistance under the IDEA if it "demonstrates to the satisfaction of the Secretary [of Education] that the State has in effect policies and procedures to ensure that the State meets [various conditions]." 20 U.S.C. 1412(a).[1] The State, for example, must demonstrate that it makes available "[a] free appropriate public education * * * to all children with disabilities residing in the State." 20 U.S.C. 1412(a)(1)(A). The State must also comply with the "child find" provision, which requires that "[a]ll children with

[1] The IDEA was amended in 2004, and the United States cites to the 2004 version of the Act. The amendments do not alter the analysis of the provisions of the IDEA at issue in this appeal for purposes of the United States' arguments.

disabilities residing in the State, including * * * children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and *evaluated*." 20 U.S.C. 1412(a)(3)(A) (emphasis added). In Missouri, home-schooled children are treated as children attending private or parochial schools for purposes of the IDEA. See Missouri State Plan for Special Education 87. The IDEA further provides that a public agency "conduct a full and individual *initial evaluation* * * * *before the initial provision of special education and related services* to a child with a disability." 20 U.S.C. 1414(a)(1)(A) (emphasis added). An educational agency "shall obtain an informed consent from the parent of such child before the evaluation is conducted." 20 U.S.C. 1414(a)(1)(D)(i).

Although States are required under the IDEA to make available a free appropriate public education to each student with a disability, parents are free to decline that public education. Thus, the IDEA "does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. 1412(a)(10)(C)(i).

2. Appellants are the parents of a child, S.F., who is currently being home-schooled. Appellees are Camdenton R-III School District, its superintendent, the Missouri Department of Education, and the Missouri Commissioner of Education.

Order 1-2.[2]

S.F. attended public school until the age of ten. During that time, the school district attempted to gain parental consent to evaluate S.F. because it suspected that he might have a disability that would qualify him for special education services. Thereafter, because of religious convictions, the Fitzgeralds withdrew S.F. from public school and commenced home schooling. The parents refused consent to an evaluation, but had S.F. evaluated privately. Furthermore, the Fitzgeralds provided special education services for S.F. through their own private resources and have not sought any monies or services from the state. Rather, they expressly waived S.F.'s right to a free appropriate public education, as well as their right to public reimbursement for any special education services that S.F. receives or has received privately. Order 2-3.

On December 10, 2002, after the Fitzgeralds withdrew S.F. from public school, the school district initiated a due process hearing pursuant to the procedures provided by the IDEA and state law and requested that the administrative hearing panel compel the parents to submit S.F. to an evaluation. Order 3. The Fitzgeralds refused to participate in the hearing, Order 4-5, instead filing a motion to dismiss the proceeding for lack of jurisdiction on the ground that S.F. was not enrolled in public school and was not seeking services. The panel

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[2] This brief uses the following abbreviations: "Order __" refers to the page number of the District Court's Order Denying Summary Judgment, 8/18/04. "Br. __" refers to the page number of the appellee brief filed by the Camdenton R-III School District.

denied the motion and convened a hearing on the school district's due process request. Again, the Fitzgeralds declined to participate at the hearing. The hearing panel unanimously found in favor of the school district and "granted [it] leave to evaluate the student as soon as is practical." Order 5.

On May 2, 2003, the Fitzgeralds filed a lawsuit in the Western District of Missouri, seeking to enjoin the evaluation of S.F. and to declare that the IDEA does not require the state to evaluate students whose parents desire no financial aid from the states in educating their children through private channels. The parties then cross-moved for summary judgment. The Fitzgeralds argued that, under the IDEA, the state cannot compel child evaluations if the parents have withdrawn the child from public school and are wholly funding their child's education. The School District contended that subsection 1412(a)(3) mandated that it evaluate all children, regardless of whether such children's education is being subsidized by the state.

3. The district court denied appellants' motion and granted summary judgment in favor of the school officials. The court construed the IDEA's "child find" provision as *requiring* the State to evaluate all children residing within its boundaries who might have a disability, including children attending private schools whose parents have waived their right to a free appropriate public education. See Order 6-9. Relying on the IDEA's implementing regulation governing initial evaluations for the provision of special education services, the court stated that "[o]nce a district determines that it has reason to suspect a child

has a disability the district *must* conduct a comprehensive evaluation to determine if that child is eligible under the IDEA." Order 7 (emphasis added). The district court ruled that S.F. must still be evaluated even though the Fitzgeralds had withdrawn him from public school. According to the district court, "[t]he fact that plaintiffs do not wish to accept services from the District is immaterial at this point. The only issue raised before the hearing panel was the District's due process request to evaluate S.F. because the District had reason to suspect he might have a disability." Order 8-9. Thus, the district court ruled that "the hearing panel correctly held that the District could proceed with an evaluation of S.F. despite plaintiffs' refusal to consent to an evaluation." Order 9.[3]

SUMMARY OF ARGUMENT

The district court incorrectly analyzed the IDEA and its implementing regulations. More specifically, the district court misinterpreted the IDEA and its regulations, and in doing so, effectively required the evaluation of children outside the relevant statutory provision. Here, S.F. – whose parents have refused consent to an evaluation, who has been removed from public school and is being privately educated, and whose parents have waived his right to any benefits under the IDEA – and other similarly situated children, are outside the scope of the evaluation

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[3] The district court also rendered various rulings regarding the Fitzgeralds' constitutional claims. Because this case can be decided on statutory grounds, it is not necessary for this Court to reach these claims. See *Clevenger* v. *Gartner*, 392 F.3d 977, 980 (8th Cir. 2004) ("Pursuant to the familiar rubric that courts do not unnecessarily decide constitutional issues, [the court] must initially resolve the statutory question before reaching and deciding the constitutional issues.").

procedure as contemplated by subsections 1412(a)(3) and 1414(a)(1)(A); because S.F. and other such children are outside the scope of the evaluation procedure, they are necessarily outside the override procedure of subsection 1414(a)(1)(D)(ii). Consequently, the override procedure is irrelevant to resolving this lawsuit.

Various courts persuasively have concluded that parents who are not seeking any educational aid from the state need not submit their child to a state-sponsored evaluation. If parents waive their child's right to state assistance in educating their child, then they likewise waive the evaluation required for the provision of state-funded education. Indeed, to hold otherwise in this case would be illogical: It would require the evaluation of a child to determine the eligibility for services that have already been declined, cannot be compelled, and will not be provided. This argument is supported by the position of the United States Department of Education in its recently proposed regulations.

STANDARD OF REVIEW

This Court exercises plenary review of grants of summary judgment and matters of statutory interpretation. See *Iowa 80 Group, Inc.* v. *IRS*, 406 F.3d 950, 952 (8th Cir. 2005); *Thomforde* v. *IBM Corp.*, 406 F.3d 500, 503 (8th Cir. 2005).

ARGUMENT

THE IDEA DOES NOT COMPEL STATE-SPONSORED EVALUATION IF PARENTS HAVE WAIVED A RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION

A. The Statutory Text Of The IDEA Counsels That State-Sponsored Evaluation Is Required Only For Children Who May Potentially Have Services Under The IDEA Made Available To Them

Contrary to the district court's ruling, the child find provision of the IDEA does not require a school district to evaluate a child whom it suspects of having a disability if the child's parents have refused consent to an evaluation, waived his right to any benefits under the IDEA, and are privately schooling him. Rather, the Act expressly limits the scope of evaluations under the child find provision to children who may receive services under the Act. A child like S.F.,whose parents have refused consent, who has been removed from public school and is being privately educated, and who has declined all benefits under the IDEA, has made clear that he will *not* avail himself of any such services and, hence, will not receive any such services. Accordingly, S.F. and all other children like him simply fall outside the scope of the evaluation provision of subsection 1412(a)(3).[4]

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[4] This does not mean that if a child lies within the scope of the evaluation provision that a school district is *required* to evaluate such children. Once a school district identifies and locates a child as potentially in need of special education and related services and offers to evaluate the child, and the parents then refuse consent to the evaluation, its child find obligations have been satisfied. As a result, although not relevant to this case for the reasons discussed n.5 *supra*, the Act's consent override procedure is *always* discretionary. See 20 U.S.C.

(continued...)

1. The Definition Of "Evaluate" In Subsection 1412(a)(3) Must Be Read In Conjunction With The Definition Of "Evaluation" In Subsection 1414(a)(1)(A)

In analyzing a statute, a court commences by examining the statutory language at issue. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Braswell* v. *City of El Dorado, Ark.*, 187 F.3d 954, 958 (8th Cir. 1999). Statutory provisions and terms should not be read in isolation; rather, various provisions of an act should be read in conjunction with other provisions of the act. See *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks omitted); see also *Hibbs* v. *Winn*, 124 S. Ct. 2276, 2285 (2004). In an analogous vein, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *CIR* v. *Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993); see also *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986).

The child find provision provides that within each participating state "[a]ll

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[4](...continued)
1414(a)(1)(D)(ii) ("If the parents of such child refuse consent for the evaluation, the agency *may* continue to pursue an evaluation by utilizing the mediation and due process procedures [provided in this Act], except to the extent inconsistent with State law relating to such parental consent.").

children with disabilities residing in the State * * * who are in need of special education and related services, are identified, located, and *evaluated*." 20 U.S.C. 1412(a)(3)(A) (emphasis added). Subsection 1412(a)(7) of the Act directs that evaluations under this provision must be performed as provided by Section 1414(a)(1). See 20 U.S.C. 1412(a)(7) ("Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title."). Accordingly, the term "evaluate" in subsection 1412(a)(3) must be read in conjunction with the term "initial evaluation" in subsection 1414(a)(1).

Subsection 1414(a)(1) provides that a state agency "shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b) of this section *before the initial provision of special education and related services* to a child with a disability under this part." (emphasis added). This subsection, thus, expressly ties evaluations to the provision of public educational benefits, thereby premising evaluations on the potential for the receipt of services under the Act. As explained, children whose parents refuse consent to an evaluation, who are being privately schooled, and whose parents have waived their child's claim to any benefits under the IDEA clearly will *not* receive "special education and related services" under the Act. As a result, the statute on its face does not require the evaluation of such children.

The purpose of the evaluation procedure is apparent in the statute; it also reflects common sense: The evaluation is intended to provide a basis for identifying the special educational needs of the child, which could then be used in

the development of a plan to serve the child at public expense. See 20 U.S.C. 1414(a)(1)(C)(ii); see also 20 U.S.C. 1414(c)(1)(B)(i) (evaluation data used to determine whether child is a child with a disability and child's education needs); 20 U.S.C. 1414(c)(2) (evaluation to be administered to produce information identified by the IEP Team). S.F. simply falls outside the evaluation process intended by the statute. His parents have not only refused consent to an evaluation, but also have withdrawn him from public school and declined any services under the Act. Since he will receive no such services, he is not among those the statute contemplates will receive an evaluation.

Proper focus on the nature of the evaluation process reflected in subsection 1414(a)(1)(A) further confirms that the evaluation procedure of the child find provision applies *only* to children who are candidates for special education and related services at public expense. S.F. is not such a child. Rather, he is outside the scope of the IDEA's initial evaluation because the Fitzgeralds have refused consent to an evaluation, have removed him from public school, are educating him privately, and have refused all public educational benefits under the IDEA or state law.

In this connection, subsections 1414(b) and 1414(c) contain a series of requirements completely inappropriate for someone who, like S.F., will not receive publicly provided special education. Those subsections delineate the evaluation procedure, specifically detailing the steps in an evaluation. For instance, subsection 1414(b)(2) provides that in conducting an evaluation "the local

education agency shall–(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" regarding "whether the child is a child with a disability" and the "content of the child's individualized education program." 20 U.S.C. 1414(b)(2)(A)(i)-(ii). Likewise, the local educational agency must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child." 20 U.S.C. 1414(b)(2)(B). The agency, however, must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C. 1414(b)(2)(C).

Subsection 1414(c) outlines additional requirements for the evaluation process, such as: reviewing existing evaluation data, information provided by the parents, various state assessments, and teacher observations. See 20 U.S.C. 1414(c)(1)(A). Based on this review, a decision is then made to "identify what additional data, if any, are needed to determine--" "(i) whether the child is a child with a disability * * * and the educational needs of the child;" "(ii) the present levels of academic achievement and related developmental needs of the child;" "(iii) whether the child needs special education and related services;" "(iv) whether any additions or modifications to the special education and related services are needed." 20 U.S.C. 1414(c)(1)(B). This regime simply makes no sense for privately educated children who have declined all benefits under the Act and, as a result, will not receive any publicly-funded special educational services.

To be sure, subsection 1412(a)(10)(A)(ii) contemplates that certain privately educated students are "evaluated" to ensure that provisions are made for such students that may require special educational services at public expense. However, contrary to the school district's assertion (Br. 7), Section 1412(a)(10)(A)(ii) does not contain a separate child find obligation, but merely states that the child find provision contained in Section 1412(a)(3) applies to children enrolled in private schools. See also 34 C.F.R. 300.451 (providing that school district's child find activities for private school children be in accordance with Sections 300.125 and 300.220, the Department of Education's regulations implementing Section 1412(a)(3)). Thus, this provision does not change the scope of a school district's obligations regarding evaluations; rather, subsection 1412(a)(10)(A)(ii) must be read in light of the requirements of subsection 1412(a)(3).

Moreover, as discussed above, there is a comprehensive statutory regime for evaluating a child under the Act, and nothing in the IDEA suggests that statutory "evaluations" may forego these requirements depending on the context. For Congress to enact such a detailed scheme regarding evaluations only makes sense as applied to a specific child who may receive services that result from the detailed evaluation procedure, and S.F. is not such a child.

In sum, the term "evaluate" in subsection 1412(a)(3) must be read in conjunction with the term "initial evaluation" in subsection 1414(a)(1). See *Food & Drug Admin.*, 529 U.S. at 133 (reading the terms of a statute in context and in relation to other terms of the statute). When read together, these provisions compel

the conclusion that the term "evaluate" only encompasses children who may receive special education and related services under the Act.[5]

2. The Regulations Of The IDEA Support This Interpretation

The regulations support this interpretation. The administrative interpretation of subsection 1414(a)(1)(A), provides that "[e]ach public agency shall ensure that a full and *individual evaluation is conducted for each child being considered for special education and related services under Part B of the Act*." 34 C.F.R. 300.320(a) (emphasis added). This implementing regulation anticipates that the evaluation provision of subsection 1412(a)(3)(A) only applies to children who are candidates for publicly provided special education and related services. A child not being considered for services under the IDEA is outside the evaluation requirement explained in these regulations. S.F. is such a child given that his parents refused consent to an evaluation, he was removed from public education and is being privately schooled, and his parents have declined any benefits under the IDEA.

3. This Purpose Of The IDEA Is Inconsistent With An Evaluation Of S.F.

Not only is this interpretation consistent with the statute and regulation, this interpretation of the child find provision is also entirely consistent with the IDEA's

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[5] Section 1414(a)(1)(D)(ii) provides a procedure for overriding parental objections to evaluation. But such a procedure only makes sense if there is a legitimate basis for the override. Because S.F. and other similarly situated children are outside the scope of the evaluation procedure, they are necessarily outside the override procedure.

legislative purpose. The purpose clause of the IDEA recites that one of the IDEA's purposes is "to ensure that all children with disabilities *have available to them* a free appropriate *public* education * * * designed to meet their unique needs. " 20 U.S.C. 1400(d) (emphasis added). As the Supreme Court put it, the IDEA "dispens[es] aid *not* to schools *but to individual handicapped children*." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993) (emphasis added). The IDEA, therefore, makes a *public* education *available* to a child with a disability; it does not, however, *oblige* a child with a disability to accept a public education – nor could it. See *Pierce* v. *Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-535 (1925) (ruling that parents can send their children to private schools).

Additionally, in enacting the IDEA, Congress intended to strengthen its response to the needs of children with disabilities that were not being met prior to its passage of the Education for All Handicapped Children Act, see 20 U.S.C. 1400(c)(2)(A), and also to address problems that often resulted from the lack of adequate public services, such as the financial burden that was imposed on families who were forced to find services outside the public school system, see 20 U.S.C. 1400(c)(2)(D). The IDEA was thus intended as a benefit to children with disabilities and their families who previously had no access to such services. It was manifestly not intended to force such services on those that decline them. See 20 U.S.C. 1400(c)(5)(C). No legitimate legislative purpose is served by requiring the evaluation of a privately-educated child suspected of having a disability when,

as here, the child's parents have removed both the benefits and the burdens of the IDEA.

4. A Contrary Interpretation Of The Child Find Provision Would Yield An Inconsistent Result

A contrary interpretation of the child find provision would also yield an inconsistent result: It would require an evaluation to determine eligibility for services that have already been refused, cannot be compelled, and will not be provided. Such results are to be avoided "if alternative interpretations consistent with the legislative purpose are available." *Rowley* v. *Yarnell*, 22 F.3d 190, 192 (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)); see also *United of Omaha* v. *Business Men's Assurance Co. of Am.*, 104 F.3d 1034, 1037 (8th Cir. 1997) (stating that in applying Missouri law that statutory constructions that yield absurd, unjust, or unreasonable results are to be avoided). The gravamen of the IDEA is to provide publicly-funded special education services to eligible children with disabilities via the evaluation procedure.

An evaluation would serve no purpose here. It is uncontested that parents remain free to decline benefits under the IDEA and that their decision to do so is not subject to challenge by the school district. See 20 U.S.C. 1414(a)(1)(D)(ii)(III). Thus, the school could not, for example, force the parents to allow the child to receive any of the services that may be suggested by the evaluation. *Letter to Cox*, 36 IDELR ¶ 66 (OSEP Sept. 24, 2001) (explaining that parents must consent to provision of initial services under the Act and that a school

district may not utilize the statute's due process procedures to override a parent's refusal to consent to the provision of services). Further, it is uncontested in this case that S.F.'s parents are aware that a free appropriate public education is available for their child and that they have knowingly waived this type of education for him. And it is beyond dispute that, as a result, the school district incurs no liability for the cost of S.F.'s private education. See 20 U.S.C. 1412(a)(10)(C)(i) (providing that a state is not required to pay for a child's education if the state has made a free appropriate public education available to the child, but "the parents elect[] to place the child in [a] private school or facility").[6]

Accordingly, it is simply illogical to construe the statute as requiring an evaluation for services that have been rejected. The State cannot compel S.F. to receive any such services, and the school district would incur no liability if such services were not provided. Indeed, "[t]o conclude otherwise would be to require a school district to waste scarce resources by going through the motion of assessing a child and offering a program when the parents have already stated definitively that the offer will ultimately be refused." *California State Educational Agency*, 41

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[6] Indeed, as this Court has made clear, parents are free to choose the education they think best for their child with a disability, but if they decline an appropriate public education under the IDEA and elect private or home school, the state is not obligated to fund the child's private education. See, *e.g.*, *Peter* v. *Wedl*, 155 F.3d 992, 1001-1002 (8th Cir. 1998) (Parents "have the constitutional right to choose the education that [their child] shall receive," but if parents exercise this right by sending their child to a private school or a home school, the state is not liable to "provide special education services to [their children]."); *Gill* v. *Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1037 (8th Cir. 2000); *Jasa* v. *Millard Pub. Sch. Dist. No. 17*, 206 F.3d 813, 815 (8th Cir. 2000).

IDELR ¶ 141 (Cal. 2004).

B. Courts Have Persuasively Rejected The View Taken By The District Court

The district court's application of the evaluation provision produced a result that conflicts with the judgments of other courts. For example, in *Gregory K.* v. *Longview School District*, 811 F.2d 1307, 1315 (9th Cir. 1987), the school district sought to impose testing on a child, despite the fact that the child was enrolled in a private educational program funded by his parents. The Ninth Circuit held that if the parents maintained their child in private school, the school district could not require a reassessment; however, if the parents wanted him to receive state-funded special education services, they would have to permit the evaluation. *Ibid.* Thus, *Gregory K.* correctly recognizes that evaluation is only required if parents are seeking public special educational services. *Haleyville City Board of Education*, 33 IDELR ¶ 19 (Ala. 2000), followed *Gregory K.* and aptly summarized the nature of the evaluation at issue: "[I]f the parents do not want public funding for the child's education, then they may keep the child out of public school and place him/her in private school (or home school) at their own expense and avoid evaluation altogether." See also *Yates* v. *Charles County Bd. of Educ.*, 212 F. Supp. 2d 470, 473 (D. Md. 2002) (recognizing that parents can "opt out of the IDEA process by waiving their entitlement to public benefits").

Similarly, in *California State Educational Agency*, 41 IDELR ¶ 141 (Cal. 2004), the hearing officer concluded that parents who placed their child in private school and declined all services under the IDEA were not subject to state-

sponsored evaluation:

> [S]chool districts cannot use child find as a tool to compel assessment when the parents have refused any public services. * * * If a parent refuses the school district's offer to assess, the purpose of child find has been met and the school district's child find obligation ends. * * * When the student is not interested in receiving a [free appropriate public education] in the public schools or any services under a service plan, it is illogical to allow districts to use its child find obligations to conduct assessments that which [sic] serve no purpose.

Precisely as in *California State*, the Fitzgeralds refused state aid to place S.F. in private school and could not be compelled to have him evaluated by the state.

C. The District Court's View Conflicts With The Department Of Education's Interpretation Of The IDEA Regulatory Scheme

The Department of Education's interpretation of the IDEA and its regulations evince the Department's understanding and implementation of this statutory and regulatory scheme. On June 21, 2005, the Secretary of Education published a Notice of Proposed Rulemaking promulgating new regulations under the IDEA. See 70 Fed. Reg. 35,782 (2005).[7] Section 300.300(a)(3) expressly provides that a parent waiving state aid in educating his child is not subject to state

[7] The comment period on the proposed regulations expired September 6, 2005. Although the proposed regulations were not final as of this writing, they reflect the Department's current interpretation and may well be adopted in final form. See *Vanscoter* v. *Sullivan*, 920 F.2d 1441, 1449 (9th Cir. 1990) (deferring to an agency's interpretation of a proposed regulation because it was reasonable and reflected the agency's view); *Peckham* v. *Board of Trustees of the Int'l Bhd. & Allied Trade Union*, 724 F.2d 100, 100 (10th Cir. 1983) ("bow[ing] to the expertise" of an agency's interpretation of a proposed regulation).

testing. See 70 Fed. Reg. 35,799.[8] Therefore, the court-ordered evaluation of S.F. is not authorized under the Department's interpretation.

The Department's interpretation is reasonable because the IDEA gives school districts no regulatory authority over private schools, nor does it require school districts to provide a free appropriate education to children enrolled in private or home schools. See 20 U.S.C. 1412(a)(10)(C)(i). Because this interpretation is reasonable, it should be upheld. See *In re Lyon County Landfill,* 406 F.3d 981, 984 (8th Cir. 2005) (deferring to an agency's interpretation because it was "plausible"); *Human Dev. Corp. of Metro. St. Louis* v. *United States Dep't of Health & Human Serv.*, 312 F.3d 373, 379 (8th Cir. 2002) (deferring to an administrative interpretation because it was "neither 'plainly erroneous' nor

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[8] As the proposed regulations make clear:

> [C]onsistent with the Department's position that public agencies should use their consent override procedure only in very rare circumstances, proposed 300.300(a)(3) would clarify that *a public agency is not required to pursue an initial evaluation of a child suspected of having a disability if the parent does not provide consent for the initial evaluation.* States * * * do not violate their obligations to locate, identify, and evaluate children with disabilities under the Act if they decline to pursue an evaluation to which a parent has failed to consent.
>
> In addition, paragraph (a)(3) would permit consent override *only for children who are enrolled in public school or seeking to be enrolled in public school. For children who are home schooled or placed in a private school by the parents at their own expense, consent override is not authorized.*

70 Fed. Reg. 35,799 (emphasis added).

'inconsistent with the regulation'"); *Wittler* v. *Chater*, 59 F.3d 95, 97 (8th Cir. 1995) (sustaining an agency's interpretation of a statute because it was "plausible"); *Missouri Dep't of Soc. Serv.* v. *United States Dep't of Educ.*, 953 F.2d 372, 375 (8th Cir. 1992) (affirming the Department of Education's interpretation of its regulation). Even if this Court thinks another interpretation is preferable, the agency's interpretation must be sustained if reasonable. See *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 689, 702 (1991) (instructing the federal courts that reasonable agency interpretations must be sustained, even if not "the best or most natural" interpretations); *St. Luke's Methodist Hosp.* v. *Thompson*, 315 F.3d 984, 987 (8th Cir. 2003) (holding that agency interpretations that are not clearly wrong must be sustained).

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7), I certify that the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL is proportionally spaced, has a typeface of 14 points, and contains 5,694 words, as determined using the word-counting feature of WordPerfect 9.0. I further certify that the diskettes submitted to Court and counsel and on which an electronic version of this brief is stored have been scanned and are virus free.

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Dated: October 3, 2005

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2005, I served copies of the foregoing brief by overnight delivery to counsel of record:

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