

21-1707, 21-1770

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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Minnetonka Public Schools, Independent School District No. 276,

Appellant/Cross-Appellee,

v.

M.L.K., a minor, by and through his Parents, S.K. and D.K.

Appellees/Cross-Appellants.

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On Appeal from the United States District Court  
for the District of Minnesota

Case No. 0:20-cv-01036

The Hon. Donovan W. Frank, Sr., U.S.D.J., Presiding

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**BRIEF OF *AMICI CURIAE*  
NATIONAL PARENTS UNION AND DYSLEXIA ADVOCATES  
IN SUPPORT OF APPELLEES/CROSS-APPELLANTS**

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## **Corporate Disclosure Statement**

In accordance with Federal Rule of Appellate Procedure 26.1, the *Amici Curiae* state that they are nonprofit organizations with no parent corporations and in which no person or entity owns stock.



## **IDENTITY, INTEREST, AND AUTHORITY TO FILE**

The National Parents Union is a private non-profit organization uniting parents of color, low-income parents, special needs parents, single parents, grandparents, formerly incarcerated parents, and parents in recovery with traditionally represented parent voices to advocate for equity in education for all children.

Dyslexia Advocates is a private nonprofit organization seeking to eliminate the inequities within the education system by promoting evidence-based approaches to literacy and reading remediation and supporting families with screening and assessment services, parent advocacy, and community education.

The *Amici* have a strong interest in this case as the Court's decision will powerfully impact the families that both organizations serve. Pursuant to Fed. R. App. P. 29(a)(2), the *Amici* have obtained the consent of all parties to file this brief.<sup>1</sup>

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned counsel hereby certifies that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *Amici Curiae*, or their counsel, made a monetary contribution to fund this brief's preparation or submission.

## SUMMARY OF ARGUMENT

The *Amici* write in support of M.L.K.’s argument that Congress intended to create a statute of limitations in the Individuals with Disabilities Education Act (IDEA) that allows parents of students with disabilities to seek relief for any special education violation occurring before the parents knew or should have known of the violation, as long as they file a complaint and request a due process hearing within two years of learning of the violation. This is the most defensible interpretation of the statute, and the failure to adopt the thoughtful analysis of the Third Circuit in *G.L. v. Ligonier Valley School District Authority*,<sup>2</sup> as the Ninth<sup>3</sup> and First Circuits<sup>4</sup> have done, would harm students and parents throughout the Eighth Circuit, including those represented by the *Amici*.

The *Amici* write, in particular, to describe the barriers that parents must overcome to identify program failures and bring claims to correct them as they face the elaborate process of having their children evaluated and served.<sup>5</sup> The IDEA provides a complex scheme for conducting evaluations and serving students.<sup>6</sup> The

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<sup>2</sup> 802 F.3d 601 (3d Cir. 2015).

<sup>3</sup> *Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936 (9th Cir. 2017).

<sup>4</sup> *Ms. S. v. Reg’l Sch. Unit 72*, 916 F.3d 41(1st Cir. 2019).

<sup>5</sup> See *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 205 (1982).

<sup>6</sup> See *Dombrowski v. Wissahickon Sch. Dist.*, CIVIL ACTION No. 01-5094, at \*1 (E.D. Pa. Sep. 30, 2003); *J.S. v. Attica Cent. Sch.*, 00-CV-513S, at \*14 (W.D.N.Y. Sep. 25, 2011); *Joseph M. v. Southeast Delco Sch. Dist.*, CIVIL ACTION No. 99-4645, at \*1 (E.D. Pa. Mar. 19, 2001).

institutional design of the IDEA relies on the active involvement of parents at every stage: from identifying the need for special education services; to forming an educational plan for appropriate special education services; to monitoring the continued efficacy of those services; to initiating the private enforcement mechanisms intended to ensure compliance with the requirements of the IDEA.<sup>7</sup> A statute of limitations analysis that fails to consider the significant barriers faced by parents in identifying legal claims under the IDEA and its remedial purpose<sup>8</sup> will thwart the will of Congress.

## ARGUMENT

### **I. THE IDEA GIVES PARENTS A CRUCIAL, AND EXTREMELY DIFFICULT, ROLE IN ITS IMPLEMENTATION**

Under the IDEA, in exchange for federal funds, states must agree to provide special education to qualifying children with disabilities.<sup>9</sup> Public school districts, known as Local Educational Agencies or LEAs, generally deliver special education on the states' behalf. The process begins when a child is suspected of having or is identified as having a disability under the IDEA. The LEA must evaluate all such children for potential special education eligibility.<sup>10</sup> The LEA is held to a detailed

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<sup>7</sup> LaToya Baldwin Clark, *The Problem with Participation*, 9 Mod. Am. 20, 24-26 (2013); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413, 1420-1424 (2011).

<sup>8</sup> *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 (2009).

<sup>9</sup> See 34 C.F.R. § 300.100.

<sup>10</sup> See 34 C.F.R. § 300.111.

set of regulations<sup>11</sup> that prominently feature the participation of parents in the evaluation and program development process. The premise of the IDEA is that parents and schools working together to design an individualized educational program (IEP) is the ideal way to reach the statute's goal of a free appropriate public education (FAPE) for every child.<sup>12</sup>

Parental involvement is critical for at least two reasons. First, the parents have the most intimate knowledge of the child, and second, parents are the parties who generally monitor compliance and bring any necessary enforcement actions where evaluation and programming are insufficient. To do so, they must be aware of the LEA's legal responsibilities, and understand the technical obligations involved in evaluating and ultimately serving the child. The procedural protections of the IDEA only work when parents are able to fully comprehend their children's needs and can enforce their rights without facing insurmountable barriers.

To enforce a child's right to be adequately evaluated, parents must know that the LEA is obligated to provide an evaluation that is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the child's disability category.<sup>13</sup> Parents must also know whether the LEA has met its obligation to use evaluation instruments that are

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<sup>11</sup> See *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017).

<sup>12</sup> *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 117 (3d Cir. 2014).

<sup>13</sup> 34 C.F.R. § 300.304(v)(6).

technically sound,<sup>14</sup> used for the purposes for which they are valid and reliable, and administered by trained and knowledgeable personnel in accordance with any instructions provided by the assessments' producers.<sup>15</sup>

After data about the child are developed, a group of school district employees and the parents of the child (known collectively as the IEP team), and other qualified professionals, as appropriate, review existing evaluation data on the child.<sup>16</sup> On the basis of that review, the IEP team must identify what additional data, if any, are needed to determine whether the child is a child with a disability under the IDEA and the educational needs of the child.<sup>17</sup>

The qualified professionals reviewing the evaluation data could include school psychologists, speech pathologists, literacy specialists, school social workers, occupational therapists, physical therapists, certified behavioral specialists, autism spectrum disorder experts, low-vision specialists, assistive technology experts, vocational rehabilitation experts, independent living skills specialists, and others. The data reviewed include all evaluations; information provided by the parents; classroom-based, local, or state assessments; and various observations.<sup>18</sup> Parents must be able to understand the information provided by

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<sup>14</sup> 34 C.F.R. § 300.304(b)(3).

<sup>15</sup> 34 C.F.R. § 300.304(c)(1).

<sup>16</sup> 34 C.F.R. § 300.305(a)(1).

<sup>17</sup> 34 C.F.R. § 300.305(a)(2).

<sup>18</sup> 34 C.F.R. § 300.305(a)(1).

these professionals and use it to make informed decisions as a part of the IEP team. Parents also must understand the evaluation data and information provided because parents may have a right to an independent educational evaluation (IEE) at public expense if they disagree with the evaluation performed by the LEA.<sup>19</sup>

If a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either request a due process hearing to show that its evaluation was appropriate, or ensure that an IEE is provided at public expense.<sup>20</sup> Parents with the necessary information and resources to identify the exact manner in which the evaluation is inappropriate are in the best position to avoid expensive litigation by negotiating effectively with the LEA, or to prevail at hearing. Parents who lack these resources will be “left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.”<sup>21</sup>

Upon request for an IEE, the public agency must provide parents with information about where an IEE may be obtained and the agency criteria for such evaluations.<sup>22</sup> Except for the criteria described in 34 C.F.R. § 300.502(e)(1), a public agency may not impose conditions or timelines on an IEE at public

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<sup>19</sup> See 34 C.F.R. § 300.502(b).

<sup>20</sup> 34 C.F.R. § 300.502(b)(2)(i)-(ii).

<sup>21</sup> *Schaffer v. Weast*, 546 U.S. 49, 60-61 (2005).

<sup>22</sup> 34 C.F.R. § 300.502(a)(2).

expense.<sup>23</sup> Parents who are not aware of these restraints on the LEA will face delays in acquiring an appropriate evaluation and education for their children, and ultimately in bringing their claims forth.

Upon completion of the assessments and other evaluation measures,<sup>24</sup> the IEP team<sup>25</sup> determines whether the child is a child with a disability under the law, as well as the educational needs of the child.<sup>26</sup> Notably, the team reviewing the data must include a representative of the public agency who is qualified to provide or supervise the provision of special education, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of the LEA's resources.<sup>27</sup> The IEP team also must contain an individual who can interpret the instructional implications of evaluation results.<sup>28</sup> At the discretion of the parent or the LEA, the IEP team can include other individuals who have knowledge or special expertise regarding the child.<sup>29</sup> Parents must know how the law shapes the composition of the IEP team to ensure that a team with the necessary knowledge is assembled.

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<sup>23</sup> 34 C.F.R. § 300.502(e)(2).

<sup>24</sup> A child on an IEP is re-evaluated every three years, but may be re-evaluated if the parent requests, though no more than yearly. (*See* 34 C.F.R. § 300.303).

<sup>25</sup> *See* 34 C.F.R. § 300.306(a)(1); 34 C.F.R. § 300.23.

<sup>26</sup> 34 C.F.R. § 300.306(a)(1).

<sup>27</sup> 34 C.F.R. § 300.321(a)(4).

<sup>28</sup> 34 C.F.R. § 300.321(a)(5).

<sup>29</sup> 34 C.F.R. § 300.321(a)(6).

Involving individuals with knowledge or special expertise in the IEP team may not be covered by the parents' health insurance policy, if they have one, or may not otherwise be easily accessible. To know whether the LEA has met its obligation to appropriately identify and ultimately serve the child, the parents must understand and apply the statutory categories of disability in the IDEA, apply the data from evaluation to those categories, potentially access and pay for the services of an independent expert, and correct any misapplication of the law by the LEA.

If the IEP team determines that a child qualifies for special education and related services, an IEP must be developed in accordance with §§ 300.320 through 300.324.<sup>30</sup> The parents must ensure that all of the educational needs identified in the evaluation are transferred to the IEP.<sup>31</sup> Skills that cannot be improved, or that will take some time to improve, should be addressed in the IEP with program modifications that will be provided to ensure access to the public school program.<sup>32</sup>

Educational and functional skills that can be improved should become measurable annual goals designed to meet the child's disability-related needs so the child can be involved in and make progress in the general education.<sup>33</sup> Parents

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<sup>30</sup> 34 C.F.R. § 300.306(c)(ii)(2).

<sup>31</sup> *See A.W. v. N.Y.C. Dept. of Educ.*, 287 F. Supp. 3d 420, 424 (S.D.N.Y. 2018) (“An appropriate educational program begins with an individualized education program...that accurately reflects the results of evaluations to identify the student's needs...”).

<sup>32</sup> *See* 34 C.F.R. § 300.320(a)(4).

<sup>33</sup> *See* 34 C.F.R. § 300.320(a)(2).



must know the difference between needs that must be addressed by educational goals and services and needs that can only be accommodated to ensure that skills that can be improved do, in fact, improve.

The measurable annual goals in the IEP must be appropriately ambitious in light of the child's circumstances.<sup>34</sup> They also should be written in a concrete matter, using terms that are specific, with baseline data and mastery standards that utilize objective criteria.<sup>35</sup> When objective baseline data are not included in the IEP, there is not a starting point from which to measure progress, limiting parents' ability to identify a failing educational program. Without an objective mastery standard, it is difficult to know whether the child's goal is appropriately ambitious, and whether progress is meaningful or the goal is met.<sup>36</sup>

The IEP must describe how the child's progress toward meeting the annual goals in the IEP will be measured, and when periodic reports on the child's progress will be provided.<sup>37</sup> LEAs must provide progress reports at least as often

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<sup>34</sup> See *Andrew F.*, 137 S. Ct. at 1000 (2017).

<sup>35</sup> See *South Carolina v. Chariho Reg'l Sch. Dist.*, 298 F. Supp. 3d 370, 388 (D.R.I. 2018) ("The IEP must include, at a bare minimum...objective criteria with which to measure progress toward those goals..."); *Escambia Cnty. Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248, 1275 (S.D. Ala. 2005) ("Vague and unmeasurable objectives are the handmaidens of stagnation...").

<sup>36</sup> *Benton*, 406 F. Supp. 2d at 1275 ("...a program cannot possibly confer an educational benefit to [the student] if his teachers and parents do not know where they are trying to take [him] and how they will know when he has arrived.").

<sup>37</sup> 34 C.F.R. § 300.320(a)(3).

as they provide report cards.<sup>38</sup> Progress reporting should be similarly concrete and responsive to the baseline data and mastery standards contained in the goals if progress on goals is to be measured, and parents must be alert to reporting that does not satisfy this standard.

The IEP must describe the special education, related services, and supplementary aids and services (based on peer-reviewed research to the extent practicable); program modifications; and supports for school personnel that the LEA will provide.<sup>39</sup> These interventions must enable the child to advance appropriately toward attaining the annual goals, be involved in and make progress in the general education curriculum, participate in extracurricular and other nonacademic activities, and be educated with other children.<sup>40</sup> If special education and related services provided beyond the normal school year are necessary to provide a free appropriate public education, then the LEA must ensure that the IEP includes individualized extended school year (ESY) services.<sup>41</sup> LEAs may not limit ESY services to particular categories of disability or unilaterally limit the type, amount, or duration of those services.<sup>42</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> 34 C.F.R. § 300.320(a)(4).

<sup>40</sup> *Id.*; *Andrew F.*, 137 S. Ct at 999 (“To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.”).

<sup>41</sup> 34 C.F.R. § 300.106.

<sup>42</sup> 34 C.F.R. § 300.106 (a)(3).

Once the IEP is completed, the IEP team determines<sup>43</sup> school placement based on the IEP's content.<sup>44</sup> Parents who are unaware that placement depends on the IEP's content run the risk that the IEP will be developed to fit the LEA's desired placement instead of the child's educational needs. To participate in the placement decision, parents must comprehend the evaluation data and their educational implications, and must have transparent information about the placement options available.

The essential function of an IEP is to set out a plan for academic and functional advancement.<sup>45</sup> Though the degree of advancement may differ for each child, it can be said absolutely that the degree of progress on goals must be markedly more demanding than merely more than *de minimis*.<sup>46</sup> When it appears that a student will not make the expected progress on annual goals, the LEA is required to convene an IEP meeting to revise the IEP, as appropriate, so that adequate progress may occur.<sup>47</sup>

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<sup>43</sup> See 34 C.F.R. § 300.116(a)(1).

<sup>44</sup> 34 C.F.R. § 300.116(b)(2).

<sup>45</sup> *Endrew F.*, 137 S. Ct at 999.

<sup>46</sup> *Id.* at 100.

<sup>47</sup> See 34 C.F.R. § 300.324(b)(ii).

Progress monitoring is essential to evaluating the effectiveness of a child's program.<sup>48</sup> Despite its importance, data collection remains a challenge for many teachers<sup>49</sup> and progress monitoring practices often fail to produce vital and meaningful data.<sup>50</sup> Without appropriate progress reporting, parents' opportunities to participate in the decision-making process can be significantly impeded which, as a matter of law, is a substantive violation of the child's rights.<sup>51</sup>

Parents must recognize an LEA's failure to report on progress as frequently as required, provide meaningful data on progress, and make available data that support conclusory claims that the child is making progress<sup>52</sup> if they are to enforce the essential promise of the IDEA. And they must somehow recognize reporting failures even before the LEA apparently has identified them, a dubious

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<sup>48</sup> Mitchell Yell and David Bateman, *Free Appropriate Public Education and Endrew F. v. Douglas County School System (2017): Implications for Personnel Preparation*, 42 *Teacher Educ. & Special Educ.* 6, 15 (2019).

<sup>49</sup> Lisa A. Ruble et al., *Special Education Teachers' Perceptions and Intentions Toward Data Collection*, 40 *J. Early Intervention* 177, 177 (2018), citing Ellen B. Mandinach and Edith S. Gummer, *Navigating the Landscape of Data Literacy: It IS Complex* (2012), available at <https://www.wested.org/resources/navigating-the-landscape-of-data-literacy-it-is-complex/>.

<sup>50</sup> Susan K. Etscheidt, *Progress Monitoring: Legal Issues and Recommendations for IEP Teams*, 38 *TEACHING Exceptional Children* 56, 56 (2006), citing Jane B. Pemberton, *Academic Progress as an Integral Part of Assessment*, 35 *TEACHING Exceptional Children* 16 (2003).

<sup>51</sup> 34 C.F.R. § 300.513(a)(2)(ii).

<sup>52</sup> See *J.P. v. Cnty. Sch. Bd. of Hanover Cnty.*, 447 F. Supp. 2d 553, 586 (E.D. Va. 2006) ("The mere fact that an educator writes 'sufficient progress' on an IEP does not make it so...").

proposition.<sup>53</sup> The record in the instant case contains a number of examples of progress reporting without any measuring of progress.<sup>54</sup> Nothing in the record suggests that M.L.K.'s sophisticated parents<sup>55</sup> recognized that the LEA failed to provide them with information they could use to monitor progress on annual goals. School districts have a natural advantage in information and expertise, which Congress addressed by obliging schools to safeguard the procedural rights of parents and to share information with them.<sup>56</sup> When parents' procedural rights are violated unbeknownst to them or they are denied information, they simply cannot rapidly bring claims about which they know little or nothing.

It is true that the LEA must provide a notice of procedural safeguards to parents at least one time per year<sup>57</sup> and make a copy available on the LEA's website.<sup>58</sup> That notice must include an explanation of all the procedural safeguards relating to IEEs, consent, access to records, due process and state complaints, mediation, educational settings in disciplinary matters, unilateral private school

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<sup>53</sup> See *Draper v. Atlanta*, 518 F.3d 1275, 1288 (11th Cir. 2008).

<sup>54</sup> See progress reporting on the 06/03/2015 IEP (App. 52-53), the 05/34/2016 IEP (*id.* at 57-58), the 10/13/2017 IEP (*id.* at 74), and the 10/23/2018 IEP (*id.* at 126).

<sup>55</sup> M.L.K.'s father has a bachelor's degree in accounting and finance. (Amin. Hrg. R. Doc. 13-3, 10). M.L.K.'s mother has a bachelor's degree in communication and English, and an MBA in finance and strategy. (*Id.* at 20).

<sup>56</sup> *Schaffer*, 546 U.S. 49 at 60.

<sup>57</sup> 34 C.F.R. § 300.504(a).

<sup>58</sup> 34 C.F.R. § 300.504(b).

placement, appeals, and attorneys' fees.<sup>59</sup> The procedural safeguards notice provides general information to the parents. However, it does little to help parents understand if *their* children have received appropriate evaluations and it does not identify whether *their* children are making adequate progress on annual goals that are responsive to need, measurable, and appropriately challenging in light of the child's circumstances.

Though parental vigilance is vital to the preservation and enforcement of the right to special education, that right cannot turn on parental vigilance.<sup>60</sup> An LEA's failure to timely identify and serve students with disabilities can permanently injure students, and parents should not be blamed for not being experts about learning disabilities or special education law.<sup>61</sup> Limiting the period of recovery in the IDEA's statute of limitations so that parents cannot bring claims for injuries that they could not reasonably know about does just that.

## **II. PARENTS FACE MULTIPLE SIGNIFICANT BARRIERS TO IDENTIFYING VIOLATIONS OF THE IDEA**

The IDEA is structured around extremely ambitious expectations for parental participation in developing an appropriate educational program for their child, in monitoring the efficacy of that program, and in identifying and

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<sup>59</sup> *See id.*

<sup>60</sup> *See G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625 (3d Cir. 2015); *M.C. v. Cent. Reg. Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

<sup>61</sup> *See Draper*, 518 F.3d at 1288.

prosecuting violations of the legal requirements of the IDEA. Yet parental participation is hampered by barriers related to lack of “sufficient knowledge to advocate effectively for their child.”<sup>62</sup> There is a significant information asymmetry between parents and LEAs. “Schools are repeat players in the IEP game with all of the resources and accumulated expertise that that entails. Parents, meanwhile, have only their own child, and while they have the right to engage with the school in each year's IEP meeting to discuss the appropriate level and type of services, each year's IEP will likely use the previous year's as an anchor against which adjustments will be made. The school's initial greater informational advantage therefore pervades all future interactions.”<sup>63</sup> This information asymmetry can affect a parent’s ability to recognize whether the LEA has adequately assessed the nature of a child’s disability; whether an IEP and educational placement are in fact providing a FAPE; and whether the LEA has engaged in a violation of the legal requirements of the IDEA. Although these barriers apply to all parents, they can be exacerbated by the additional challenges faced by many parents represented by the *Amici*.

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<sup>62</sup> Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 Yale L. J. 1802, 1828 (2008).

<sup>63</sup> Pasachoff, *supra*, at 1438.

## A. UNDERSTANDING THE NATURE OF THE CHILD'S DISABILITY

Parents must have a complete and accurate understanding of the nature of a child's disability and its educational implications to know if a child should be receiving special education services, and to assess whether a proposed IEP or placement is appropriate. The IDEA gives the LEA the responsibility for conducting such an evaluation, but the parents must be able to understand the information compiled by all of the LEA's professionals in order to assess the accuracy of the evaluation and apply it to the IEP.

No parent is likely to have the expertise to adequately perform this task, but some parents may encounter particular barriers. Parents who are not fluent in English,<sup>64</sup> or who have little formal education,<sup>65</sup> will have added challenges to understanding the contents of evaluation reports. In addition, parents of children with disabilities may be more likely than the general population to have disabilities themselves that make reading difficult (based on documented genetic links for learning disabilities, including dyslexia; cognitive disabilities; and other disabilities).<sup>66</sup>

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<sup>64</sup> Zach Rossetti et al., *Parent Perceptions of the Advocacy Expectation in Special Education*, 87 *Exceptional Children* 438, 450-451 (2021).

<sup>65</sup> Julie L. Fitzgerald & Marley W. Watkins, *Parents' Rights in Special Education: The Readability of Procedural Safeguards*, 72 *Exceptional Children* 479, 498 (2006).

<sup>66</sup> Fitzgerald & Watkins, *supra*, at 498 (citing studies documenting genetic links).



The low-income families represented by the *Amici* are not likely to have the resources to pay for a private evaluation of a child that might compensate for their relative lack of expertise so they can identify deficiencies in the LEA's assessment.<sup>67</sup> Although the IDEA does give parents the right to an IEE at public expense to challenge an evaluation, parents may not know of this right unless they are able to understand the notice of procedural safeguards that school districts must provide.<sup>68</sup> If parents are aware of this right and request an IEE, the LEA may request a due process hearing to show that its evaluation is appropriate. Thus, unless the LEA voluntarily grants an IEE, "a less wealthy parent would be forced to wait for the outcome of a due process hearing granting the outside evaluation at no cost to the parent. While waiting, however, precious months are wasted during which the child could be receiving services."<sup>69</sup> In addition, the lack of a private evaluation leaves parents without an objective basis to counter the LEA's assessment at the due process hearing, making it less likely that they will succeed at the hearing. In short, a parent needs an IEE to prove that an IEE is needed.<sup>70</sup>

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<sup>67</sup> Clark, *supra*, at 28 (also noting that wealth disparities that contribute to this problem disproportionately impact Black families. *Id.* at 28).

<sup>68</sup> See *discussion infra*, section II.C.

<sup>69</sup> Clark, *supra*, at 28.

<sup>70</sup> Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education*, 20 Am. U. J. Gender Soc. Pol'y & L. 107, 127 (2011).

The consequences of a faulty evaluation by an LEA are significant. In the instant case, inappropriate evaluation and identification left the student years behind in his reading skills.<sup>71</sup> Many families represented by *Amici* are affected by the well-documented over-identification of the “Emotional Disturbance” special education eligibility category among Black and American Indian students.<sup>72</sup> Congress noted in the findings and purposes section of the IDEA that: “African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.”<sup>73</sup> Annual reports by the Department of Education to Congress on the implementation of the IDEA continue to report such disparities.<sup>74</sup> This misidentification is of particular concern to the

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<sup>71</sup> See App. 569 (reading at a kindergarten level in the third grade).

<sup>72</sup> Amanda L. Sullivan, *Wading Through Quicksand: Making Sense of Minority Disproportionality in Identification of Emotional Disturbance*, 43 *Behav. Disorders* 244, 245 (2017) (citing studies showing such findings); Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 *Ariz. St. L.J.* 373, 389-391 (2016) (summarizing history of such findings); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 *Har. Civ. Rights-Civ. Libs. L. Rev.* 407, 411--417 (2001) (summarizing history of such findings).

<sup>73</sup> 20 U.S.C. § 1400(c)(12)(C).

<sup>74</sup> United States Department of Education, 41st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act 49 (2019) (available at <https://www2.ed.gov/about/reports/annual/osep/2019/parts-b-c/index.html>).

*Amici* because of the strong evidence of the negative consequences of the interventions and strategies used to educate students in this category.<sup>75</sup>

An accurate understanding of child's disability or disabilities is key not only to the evaluation of the child and the development of the IEP and placement, but also to assessing the adequacy of the child's progress over the course of his education. Therefore, the barriers described above to gaining such an understanding affect the parents' ability to identify violations of the IDEA on an ongoing basis. The consequences of the failure to properly evaluate, identify, and ultimately serve a child reach far beyond the school years, however. Illiteracy, for example, can result in lifelong effects on self-esteem,<sup>76</sup> mental health,<sup>77</sup> physical

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<sup>75</sup> L. Kate Mitchell, *We Can't Tolerate That Behavior in This School: The Consequences of Excluding Children with Behavioral Health Conditions and the Limits of the Law*, 41 N.Y.U. Rev. L. & Soc. Change 407, 417—418 (2017); Yael Cannon, Michael Gregory & Julie Waterstone, *A Solution Hiding in Plain Sight Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 Fordham Urb. L.J. 403, 413—415 (2013); Daniel Stewart & William Dikel, *Emotional/Behavioral Disorders and Special Education: Recommendations for System Redesign of a Failed Category*, 34 Hamline L. Rev. 589, 590—91 (2011).

<sup>76</sup> Mark E. Boyes et al. *Relationships between Reading Ability and Child Mental Health: Moderating Effects of Self-Esteem*, 53 Australian Psychol. 125, 126-127 (2018) (citing studies showing mixed results); Genevieve McArthur et al., *Low Self-Concept in Poor Readers: Prevalence, Heterogeneity, and Risk*, 4 Peer J. e2669 (2016) (distinguishing between self-esteem and self-concept).

<sup>77</sup> Boyes, *supra*, at 126; Shaun Goh Kok Yew & Richard O'Kearney, *Emotional and Behavioral Outcomes Later in Childhood and Adolescence for Children with Specific Language Impairments*, 54 J. Child Psychol. & Psychiatry 526 (2013); Julia M. Carroll et al., *Literacy Difficulties and Psychiatric Disorders: Evidence for Comorbidity*, 46 J. Child Psychol. & Psychiatry 524 (2005).

health,<sup>78</sup> high school completion,<sup>79</sup> further education,<sup>80</sup> and earnings.<sup>81</sup> The multiple barriers to understanding the nature of a child's disability make it extremely difficult for parents to identify violations of the IDEA—from the very beginning of their encounter with the special education system to the very end of their child's education—and the consequences of this difficulty can affect the child's life long after school is finished.

#### B. UNDERSTANDING THE RANGE OF EDUCATION OPTIONS AVAILABLE AND THE INFORMAL PRACTICES OF THE SPECIAL EDUCATION SYSTEM

Another area of significant information asymmetry between parents and LEAs is knowledge about the range of educational options and services that are available, as well as the informal practices governing an LEA's provision of special education services.<sup>82</sup> The individual nature of the rights conferred by the IDEA, and confidential nature of the IEP proceedings means that there are no

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<sup>78</sup> Darren A. Dewalt, et al., *Literacy and Health Outcomes: A Systematic Review of the Literature*, 19 J. Gen. Internal Med. 1228, 1238 (2004).

<sup>79</sup> Stephanie S. Daniel et al., *Suicidality, School Dropout, and Readings Problems Among Adolescents*, 39 J. Learning Disabilities 507, 511-513 (2006).

<sup>80</sup> Paul J. Gerber, *The Impact of Learning Disabilities on Adulthood: A Review of the Evidenced-Based Literature for Research and Practice in Adult Education*, 45 J. Learning Disabilities 31, 35-36 & 41 (2012) (summarizing evidence-based research finding negative effects on higher education).

<sup>81</sup> U.S. Department of Education, National Center for Education Statistics, NCES 1999-470, *Literacy in the Labor Force*, 110-142 & 66-268 (1999).

<sup>82</sup> Phillips, *supra*, at 1830-1831 (see also articles cited *id.* at 1830, n. 133).

public records of services that LEAs provide.<sup>83</sup> Unless a parent happens to be an educational professional, the most common source of such information is the social networks to which parents belong. “If there is no public information on services, parents are left to call on their own informational networks to determine what services to ask for and when bringing a claim is necessary to enforce their rights effectively.”<sup>84</sup> This knowledge is not limited to what a particular LEA is offering other children with similar disabilities, but extends to the best services being offered to children across the country.<sup>85</sup> This kind of information can be crucial in identifying violations of the IDEA.

Many of the parents represented by the *Amici* face additional barriers in accessing the social networks that serve as a source for this information. Studies show that lower-income parents have less of this kind of knowledge than wealthier parents.<sup>86</sup> Parents in lower-income families are more likely to have inflexible work schedules and less likely to have a parent who can stay home, making it difficult for them to form the connections to other parents and networks that serve as

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<sup>83</sup> Pasachoff, *supra*, at 1435-1437.

<sup>84</sup> *Id.* at 1437.

<sup>85</sup> *Id.*

<sup>86</sup> Pasachoff, *supra*, at 1438, n. 124 (citing N. Kagendo Mutua, *Policed Identities: Children with Disabilities*, 32 *Educ. Studies* 289, 292-93, 295 (2001) and Ellen Anderson Brantlinger, *Making Decisions About Special Education Placement: Do Low-Income Parents Have the Information They Need?*, 20 *J. Learning Disabilities* 94, 96-98 (1987)).

invaluable sources of information about child development, available special education services or other interventions, what other children in comparable situations are being offered, and similar types of information that can be crucial in identifying deficiencies in their child's IEP.<sup>87</sup>

The barriers to accessing these social networks faced by low-income families can be exacerbated for parents of color, who report feeling unwelcome and experiencing difficulties in forming social ties in school.<sup>88</sup> Scholars have identified a complex set of factors that contribute to feelings of isolation from or lack of connection to their child's school by parents of color.<sup>89</sup>

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<sup>87</sup> Clark, *supra*, at 28-30; Pasachoff, *supra*, at 1436—1440; Daniel J. McGrath & Peter Kuriloff, “*They’re Going to Tear the Roof Off This Place*”: *Upper-Middle-Class Parent School Involvement and the Educational Opportunities of Other People’s Children*, 13 *Educ. Pol’y* 603, 609-611 (1999).

<sup>88</sup>Stephen J. Caldas and Linda Cornigans, *Race/Ethnicity and Social Capital Among Middle- and Upper-Middle-Class Elementary School Families: A Structural Equation Model*, 25 *Sch. Community J.* 137, 141-142 (2015); Clark, *supra*, at 29; McGrath & Kuriloff, *supra*, at 614-618.

<sup>89</sup> See Regina R. Brandon, *African American Parents: Improving Connections with Their Child’s Educational Environment*, 43 *Intervention in School & Clinic* 116, 117 (2007) (summarizing studies identifying as relevant factors impacting parental participation: cultural and linguistic diversity, economics, family composition, parental educational level, school communication, interaction with teachers, interaction with the school, school success of children, and personal constraints such as “(a) lack of time, (b) lack of transportation, (c) lack of child care, (d) scheduling conflicts, and (e) lack of understanding of educational jargon.”); Caldas, *supra* n. (summarizing past studies documenting lack of connection between parents of color and schools; describing study of a sample of families concluding that being from a Black, Hispanic, or mixed race family was associated with diminished parent-parent and parent-school social capital).

In addition to barriers posed by the lack of access to valuable social networks, the same literacy challenges and lack of resources to hire private educational consultants that hinder the understanding of a child's disability apply to learning about the real-life context of an individual child's IEP and placement. All of these barriers compound the information asymmetries between parents that can impact a parent's ability to identify violations of the IDEA.

### C. UNDERSTANDING THE LAW

Although IDEA mandates that parents regularly be given notifications of procedural safeguards, those notices are hardly adequate to give parents the detailed knowledge necessary to identify violations of the IDEA. First, the notifications are extremely difficult to understand, typically written in language geared to reading levels that demand high levels of literacy. A 2006 study of parental rights notifications provided in all fifty states found that only 4% to 8% of them were at or below the recommended 7<sup>th</sup> to 8<sup>th</sup> grade reading level, and that the vast majority were at a 9<sup>th</sup> to 10<sup>th</sup> grade reading level or higher.<sup>90</sup> The literacy challenges faced by many parents represented by the *Amici* discussed above exacerbate this challenge. Second, the procedural safeguards notice does nothing to help the parents understand whether their child has been adequately evaluated, or is making adequate progress on annual goals.

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<sup>90</sup> Fitzgerald & Watkins, *supra*, at 506.

Realistically, then, parents who suspect a possible violation of the IDEA will only be able to proceed with a formal complaint if they can secure an attorney who can help turn general concerns into an understanding that their children's rights have been violated and those violations are actionable.<sup>91</sup> Many families, including the families represented by the *Amici*, are not able to do so. There is a nationwide shortage of attorneys in private or not-for-profit practices who have experience representing parents in IDEA cases.<sup>92</sup> Legal services organizations who offer assistance to parents in special education cases are overburdened and not available to many parents.<sup>93</sup> There is a documented correlation between higher family wealth and the likelihood of parents pursuing the IDEA's private enforcement mechanisms.<sup>94</sup> Although the IDEA provides for possible attorneys' fees for parents who prevail in an enforcement action,<sup>95</sup> this possibility does not guarantee representation for a low-income parent who cannot afford a retainer to engage an

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<sup>91</sup> Hyman et al., *supra*, at 135.

<sup>92</sup> Brief of Autism Society of America et al. as *Amici Curiae* Supporting Petitioner at 6-9, *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) (No. 05-983).

<sup>93</sup> Margaret Wakelin, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 Nw J. L & Soc. Pol'y 263, 277 (2008).

<sup>94</sup> Pasachoff, *supra*, at 1425-1426.

<sup>95</sup> 20 U.S.C. § 1414(i)(3)(B)(i)(I).



attorney, and does not cover the high cost of expert fees for educational consultants or other professionals needed to mount a successful case.<sup>96</sup>

### **III. THE DISTRICT COURT'S INTERPRETATION OF THE IDEA'S STATUTE OF LIMITATION IS INCONSISTENT WITH CONGRESSIONAL INTENT TO ENSURE ROBUST PARENTAL INVOLVEMENT IN IMPLEMENTING THE IDEA**

Congress intended to ensure robust parental involvement in implementing the IDEA to protect the educational needs of the child. When the education of children with disabilities was left entirely to the discretion of the public school districts, the majority of those children were left uneducated, undereducated, or entirely unable to attend to school,<sup>97</sup> and most families were not afforded the opportunity to take part in educational decisions regarding their child.<sup>98</sup> It was this pervasive problem that the IDEA was enacted to address.

Rather than detailing the precise substantive rights applicable to all affected children, Congress opted for individually tailored programs crafted by parents and educators to determine what is appropriate for each child.<sup>99</sup> Congress recognized

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<sup>96</sup> *Arlington Cen. Sch. Dist. v. Murphy*, 548 U.S. 291, 304 (2006); LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 Harv. C.R.-C.L. L. Rev 381, 420-421 (2018).

<sup>97</sup> See S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975) reprinted in 1976 U.S. C.C.A.N., 1425, 1429-32; H.R. Rep. No. 332, 94th Cong., 1st Sess. 2, 11-12 (1975).

<sup>98</sup> A History of the Individuals with Disabilities Education Act, United States Department of Education (2020) (available at <https://sites.ed.gov/idea/IDEA-History>).

<sup>99</sup> *Heldman v. Sobol*, 962 F.2d 148, 150 (2d Cir. 1992).

that such an unconventional approach would require extensive procedural safeguards to protect the rights of children with disabilities.<sup>100</sup> The IDEA’s “emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process...demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”<sup>101</sup>

Foremost among the procedural safeguards contained in the IDEA is the guarantee that parents may contest the identification, evaluation, educational placement, or provision of FAPE in an impartial due process hearing and, if dissatisfied with the outcome, bring an appeal in the courts.<sup>102</sup> Congress granted this right to “ensure that the parents would not be silenced by the very forces that had once excluded disabled children from public education.”<sup>103</sup> In this way, the IDEA is unusual among education programs created under the framework of cooperative federalism in that it creates an individually enforceable right to services.<sup>104</sup> No public actor is tasked with reviewing on its own initiative the

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<sup>100</sup> *Id.*; see *Honig v. Doe*, 484 U.S. 305, 310-12 (1988).

<sup>101</sup> *Rowley*, 458 U.S. at 205.

<sup>102</sup> *Heldman*, 962 F.2d at 150-51.

<sup>103</sup> *Id.*; *Goleta Union Elementary School Dist. v. Ordway*, 248 F. Supp. 2d 936, 942 (C.D. Cal. 2002).

<sup>104</sup> *Pasachoff*, *supra*, at 1422.

substance of individual children's IEPs;<sup>105</sup> it is the Act's private enforcement system that takes on this role.<sup>106</sup> In effect, Congress created a scheme in which parents are encouraged to act as private attorneys general in enforcing the IDEA.<sup>107</sup>

But functioning as private attorneys general in a complex enforcement scheme addressing oftentimes complex educational needs is a near-impossible burden for a most parents, including the parents that *Amici* represent. Nothing in the IDEA indicates that when Congress required states to provide adequate instruction to a child at no cost to parents, it intended that only some parents would be able to enforce that mandate.<sup>108</sup> An interpretation of the IDEA's statute of limitations that limits children's claims for educational relief to the two years before their parents file a request for a due process hearing (in the absence of any textual support), or the two years before their parents reasonably knew of a violation (disregarding the legislative history of IDEA's statute of limitations and the well-reasoned *G.L v. Ligonier* decision) will significantly undercut the very purpose of the IDEA.

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See *Buckhannon Board Care Home v. West Va. D.H.H.R.*, 532 U.S. 598, 623 (2001) (Ginsberg, J., dissenting).

<sup>108</sup> *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007).

## CONCLUSION

For these reasons, and in reliance on Appellees’/Cross-Appellants’ arguments showing that the IDEA imposes a deadline on the filing of claims once they are reasonably discovered but does not limit the redress available for timely-filed claims, the District Court’s decision interpreting the IDEA’s statute of limitations should be reversed.

Respectfully submitted,

Dated: July 21, 2021

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**CERTIFICATE OF SERVICE**

U.S. Court of Appeals Docket Nos. 21-1707, 21-1770

I hereby certify that on July 21, 2021, I electronically filed the foregoing:

**BRIEF OF *AMICI CURIAE***

**IN SUPPORT OF APPELLEES/CROSS-APPELLANTS**

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