21-1707, 21-1770

In The United States Court of Appeals For the Eighth Circuit

Minnetonka Public School, Independent School District No. 276,
Plaintiff-Appellant,

v.

M.L.K., by and through his parents, S.K. and D.K.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Case No. 0:20-cv-01036-DWF

BRIEF OF *AMICUS CURIAE* MINNESOTA SCHOOL BOARDS ASSOCIATION, THE MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS, AND THE MINNESOTA ADMINISTRATORS FOR SPECIAL EDUCATION IN SUPPORT OF PLAINTIFF-APPELLANT

Eric J. Magnuson (MN #66412)
Caroline M. Moos (MN #0400810)
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402–2015
Tel: 612–349–8500
ejmagnuson@robinskaplan.com
cmoos@robinskaplan.com

Roseann Schreifels (MN #0257278)
2634 Fulton Circle
Clearwater, MN 55320
Tel: (320) 267-1020
Rtschrei@outlook.com

Attorneys for Amicus Curiae Minnesota School Boards Association, the Minnesota Association of School Administrators, and the Minnesota Administrators for Special Education

Corporate Disclosure Statement

Amicus Curiae Minnesota School Boards Association, the Minnesota Association of School Administrators, and the Minnesota Administrators for Special Education are non-profit corporations with no parents or subsidiaries.

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Other Authorities

Statement Regarding Permission to File

Pursuant to Fed. R. Civ. App. P. 29(a), *Amicus Curiae* advise the Court that counsel for both Appellant and Appellee have consented to amici filing this brief.[1]

[1] No counsel to a party authored this brief in whole or in part. No party, or party's counsel, or any person, other than the amicus curiae, its members, or its counsel, contributed money to fund preparing or submitting the brief.

Interest of Amicus Curiae

The Minnesota School Boards Association (MSBA), Minnesota Association of School Administrators (MASA), and Minnesota Administrators for Special Education (MASE), are nonprofit organizations serving the interests of their members in matters of education and education policy. *Amici* have a strong interest in this case because the Court's decision will significantly impact Minnesota schools.

MSBA is a nonprofit association of public-school boards in Minnesota. MSBA's mission is to support, promote and strengthen the work of public-school boards. It provides information and services to its members and coordinates their relationships with other public and private groups.

MASA is a private nonprofit that serves as the leading voice for public education in Minnesota. It focuses on education policy in Minnesota and nationally, and seeks to empower education leaders through high quality professional learning, services and support.

MASE is a membership-based organization that promotes professional leadership for administrators. Its goal is to develop improved services for children with special educational needs through collaboration, communication, and policymaking.

Argument

I. Congress did not create a system for labelling, but a system for identifying and serving needs

Congress enacted the Education for All Handicapped Children Act (Public Law 94-142), later renamed and codified at 20 U.S.C. § 1400 *et. seq.* as the Individuals with Disabilities Education Act, to open school doors to children with disabilities, doors previously closed. 20 U.S.C. § 1400(c)(2). Congress determined the keystone for accomplishing this goal is the identification of the unique needs of each child with a disability. Once identified, public school districts are tasked with serving those needs by providing special education and supports. Rather than create a system of labels, Congress created a system for identifying and serving needs. 20 U.S.C. § 1400(d)(1)(A), § 1414(a)(1)(A), § 1414(a)(4), § 1414(d)(1)(A).

A. IDEA does not require use of the labels dyslexia and ADHD

IDEA does not require the use of labels. Instead, needs are the lynchpin to a child's eligibility, services, and supports under IDEA.

Congress' focus on the needs of the child is evident from the very definition of the term "child with a disability." 20 U.S.C. § 1401(3)(A) (defining the term "child with a disability" to mean a child with an impairment "who, by reason thereof, *needs*" special education and related services ") (italics added). In defining "special education" Congress again made needs the critical constituent. 20 U.S.C. § 1400(29) (defining "special education" to mean "specially designed instruction . . . to meet *the unique needs* of a child with a disability . . .") (emphasis added).

1. IDEA requires identification of needs

Needs are the loadstar of a child's special education. Congress mandated that before a child receives special education and supports, the school must complete an initial evaluation. 20 U.S.C. § 1414(a)(1)(A), § 1414(a)(4), § 1401(3). The school must conduct a full and individualized evaluation using a "variety of assessment tools and strategies" to gather relevant information about the child's unique needs. 20 U.S.C. § 1414(b)(2). The assessment must provide "relevant information that directly assists person in determining *the*

educational needs of the child." 20 U.S.C. § 1414(b)(3)(C) (emphasis added).

The decision "whether the child is a child with a disability . . . *and the educational needs* of the child" must be made by a team of qualified professionals and the parent. 20 U.S.C. § 1414(b)(4)(A) (emphasis added). Educational goals and other content of the child's individualized education program ("IEP") are designed to address those needs. 20 U.S.C. § 1414(b)(2)(A)(i).

2. IDEA dictates that needs drive services and supports

The child's needs drive the creation of the child's IEP. 20 U.S.C. § 1414(b)(4)(A), § 1414(d)(1)(A). Needs also drive periodic review and revision of the IEP. 20 U.S.C. § 1414(d)(4)(A)(ii)(requiring revision of the IEP, as appropriate to address lack of progress, reevaluation results, information from the parents, "*the child's anticipated needs,*" or other matters).

The child, and serving the child's unique needs, are the cornerstone of the system Congress sought to accomplish when it enacted IDEA in 1975. Labels were not.

In this case, the hearing officer premised the denial of FAPE determination on Minnetonka's failure to assign the labels dyslexia and ADHD to M.L.K.[2] The district court agreed.[3] Given that IDEA requires a school district to identify and serve the child's needs, and does not require labels, this was error.

Congress was clear that labels are not the touchstone, twice directing that labels cannot be demanded. IDEA's child "find" section states "[n]othing in this chapter requires that children be classified by their disability . . . ."20 U.S.C. § 1412(a)(3)(B). IDEA's section on IEPs enumerates the required IEP components, *see* 20 U.S.C. § 1414(d)(1)(A)(i)(I-VIII), omitting any requirement for inclusion of labels such as dyslexia or ADHD, and further stating:

> Nothing in this section shall be construed to require – that additional information be included in a child's IEP beyond what is explicitly required by this section . . . .

---

[2] *See,* Add. 041 ("However, this does not mean that, where a district has knowledge of significant disabilities impacting a student, it may leave those diagnoses out of its evaluations and off the student's IEP.")

[3] *See,* Add. 075 (Attributing the denial of FAPE to "[t]he District's failure to accurately identify and classify the Student's dyslexia and ADHD . . .")

20 U.S.C. § 1414(d)(1)(A)(ii)(I).

The decisions below are inconsistent with the decisions of other Circuit Courts. "The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [the child's] multiple disabilities." *Heather S. v. State of Wisconsin,* 125 F.3d 1045, 1055 (7th Cir. 1997). "The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate public education." *Lauren C. by and through Tracey K. v. Lewisville Ind. Sch. Dist.,* 904 F.3d 363, 377 (5th Cir. 2018) (quoting *Heather S.*, 125 F.3d at 1055).

B. This case provides an excellent example of IDEA's system at work

As Minnetonka's brief demonstrates, the school district identified M.L.K.'s needs and then employed a variety of approaches to find an appropriate way to meet those needs.

Educational professionals are not required to use the term dyslexia and generally do not use the term. That said, they do have the training and experience to recognize and identify children with dyslexia because of the needs they see arising from the dyslexia:

difficulty connecting the letters the child sees on the page with the sounds the letters make, difficulty breaking down spoken words into separate syllables, not recognizing words that rhyme, slow effortful reading which may be quite discrepant from the child's intelligence, difficulty in being able to recognize and write letters, among others. *See, e.g., What is a Specific Learning Disorder? - Dyslexia,* American Psychiatric Association, https://www.psychiatry.org/patients-families/specific-learning-disorder/what-is-specific-learning-disorder (last visited June 16, 2021). Minnetonka did not miss M.L.K's dyslexia. The needs arising out of dyslexia were specifically identified in M.L.K.[4] and the district provided research-based instructional strategies to address them.

[4] For example, as early as prekindergarten Minnetonka evaluated M.L.K. and identified that he was inconsistent in labeling letters and did not know the sounds of many letters, and already at that time provided 1:1 phonics support for these needs arising from his dyslexia. App. 10. Minnetonka's use of Orton-Gillingham instructional strategies with M.L.K. in early primary grades further evidences that it did not miss his dyslexia.

The U.S. Department of Education has opined on use of the label dyslexia, clarifying that IDEA does not prohibit the use of the term dyslexia in special education paperwork. *Dear Colleague Letter*, United States Department of Education, Office of Special Education and Rehabilitation Services (Oct. 23, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-dyslexia-10-2015.pdf ("Dear Colleague Letter"). Conversely, the agency did not state that schools are required to use the term dyslexia. Indeed, any such mandate issued through a Dear Colleague letter would constitute impermissible rulemaking outside of IDEA's required notice and comment provision. *See* 20 U.S.C. § 1406(d)(2).

Consistent with IDEA's procedural and substantive system, which is designed to help ensure each child's unique needs are identified and served, the agency noted that schools must not base decisions solely on a label or disability category. "The IDEA does not dictate the services or accommodations to be provided to individual children based solely on the disability category in which the child has been classified, or the specific condition underlying the

child's disability classification." Dear Colleague Letter at 3. In sum, focus on a disability label rather than on the child's unique needs is altogether inconsistent with the IDEA and the decision below erred by premising the denial of FAPE determination on Minnetonka not naming dyslexia and ADHD in M.L.K.'s paperwork.

C. Affirming the standard adopted by the district court will impose an unbearable burden on school districts

Schools across the nation serve children with dyslexia by meeting each child's unique needs arising out of the dyslexia, but generally do so without using the term dyslexia in special education paperwork. If the decision below were to be affirmed, setting a FAPE standard that a child with dyslexia should be reading at or near grade level and have dyslexia labelled in special education paperwork, the decision will stand as an invitation to litigation. A hallmark of dyslexia is an uncoupling of IQ and reading. For a child with severe dyslexia and many additional impairments impacting learning as M.L.K. has, a FAPE standard that looks to "close the gap" between the child's reading level and that of peers, or to achieve reading levels commensurate with the child's IQ, is an

impossible standard for schools to meet, and far exceeds Congress's FAPE definition, *i.e.*, an IEP "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 207. This high FAPE standard invites litigation.

Litigation harms children by diverting resources away from teaching and learning. In school year 2016-17, over 18,000 special education hearing requests were filed nationwide. *Highlights of GAO-20-22, A Report to Congressional Requesters,* (Nov. 2019), https://www.gao.gov/assets/gao-20-22.pdf. Almost one in four school districts will budget $50,000 or more for special education litigation, an amount generally sufficient to hire one additional experienced teacher. *School Leader Voices: Concerns and Challenges to Providing Meaningful IDEA-related Services During COVID-19*, National School Boards Association (2020), https://aasa.org/uploadedFiles/AASA_Blog(1)/Advocacy%20IDEA%20White%20Paper%20FINAL.pdf. In addition, litigation drives-up insurance premiums for school districts.

Equally important is the toll on school personnel; legal proceedings tie up staff, administrators, and related service

providers who need to pull records, meet with attorneys, participate in mediation, prepare for litigation, and participate in due process hearings. *Id.* Staff can lose confidence and joy in their work, and some school districts have lost dedicated teaching staff as a result of the toll special education litigation has taken on them personally. *Id.*

The decision below also increases the threat of private placements which are expensive for school districts. Minnetonka provided extensive direct specialized instruction for reading, yet the decision below still did not regard this as sufficient for FAPE. Parent advocates and parents could look to this decision as a basis for unilateral private placements. When parents unilaterally place their child at a private school, the school district bears the cost of the private school tuition if the district does not prevail at hearing. 20 U.S.C. § 1412(a)(10(C). Tuition costs for a child with a disability at a private school setting are nearly five times the costs to provide the educational services within the school district. *What Are We Spending on Special Education Services in the United States, 1999-2000,* at 12 (updated June 2004), https://www.air.org/sites/default/files/SEEP1-What-Are-We-Spending-On.pdf. Tuition at Groves Academy, a private

school that serves students with dyslexia and other learning disabilities, is $33,630 for the 2021-2022 school year, *see,* https://www.grovesacademy.org/our-school/tuition, an amount far in excess of costs for local school districts to educate the child.

Public schools are required by law to provide an appropriate education, not the best education money can buy. There simply are not adequate resources for any school district to meet the standard required by the decision below. Instead, public schools can and should be held to the standard that Congress established – an appropriate public education.

II. *Endrew F.* clarified the *Rowley* standard and did not create a new standard

A. In both *Rowley* and *Endrew F.* the Supreme Court refrained from substituting its own definition of FAPE for the one Congress created

Congress provided an express definition of FAPE at 20 U.S.C.A. § 1401(9). In *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), and again in *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017), the Supreme

Court declined to substitute a different definition for FAPE than the definition provided by Congress.

Rowley involved the education of a student with deafness. She had minimal residual hearing but was an excellent lipreader. Her parents requested a qualified sign-language reader in lieu of other services and supports being provided. The federal district court found that child was "remarkably well-adjusted" and that she performed "better than the average child in her class and [was] advancing easily from grade to grade," but that "she understands considerably less of what goes on in class than she could if she were not deaf" and thus "[was] not learning as much, or performing as well academically, as she would without her handicap." *Rowley*, 458 U.S. at 185 (quoting *Rowley v. Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist.*, 483 F.Supp. 528, 531-34 (1980)).

Given the disparity between the child's achievement and her potential, the lower court determined she was not receiving a FAPE, defined by the lower court as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other

children." *Rowley*, 458 U.S. at 185-186 (quoting *Rowley*, 483 F.Supp. at 534). This definitional standard for measuring FAPE required "that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children." *Id.*

On appeal to the Supreme Court, the parents and the United States, in its *amicus* briefing, contended that courts and hearing officers were free to set definitional standards for "appropriate education" because although IDEA contains a definition, the statutory definition is "not functional" and does not "adequately explain what is meant by "appropriate."

The Supreme Court rejected this contention, noting that Congress had provided express definitions for "free appropriate public education," "special education," and "related services," and these express definitions, coupled with other indicia in the statute, foreclosed courts and hearing officers from substituting their definition for FAPE for what Congress had provided in the Act. *Rowley*, 458 U.S. at 188-189. "Thus, if personalized instruction is

being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Rowley,* 458 U.S. at 189. The Supreme Court further determined that a child's educational programming meets IDEA's substantive requirement if the child's IEP sets out programming that is "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 207.

In *Endrew F.,* the Supreme Court again declined to substitute a definition for FAPE for the one Congress provided. In language "strikingly similar" to the *Rowley* lower court's proposed FAPE definition ("commensurate with the opportunities provided other children"), the parents in *Endrew F.* proposed a FAPE standard of "opportunities to achieve academic success . . . substantially equal to the opportunities afforded children without disabilities." *Endrew F.,* 137 S.Ct. 988, at 1001 (2017). As it had done in *Rowley,* the Court again declined to substitute its own definition of FAPE for the one provided by Congress. *Id*. Instead, the Court carried forward

Rowley's "general approach" to evaluating the adequacy of a child's educational programming. *Id.* at 999.

In this case, the parents advanced a FAPE standard similar to the standard rejected by the Supreme Court in *Rowley* and *Endrew F.* The parents contended that Minnetonka should have provided IEPs that offered M.L.K. the opportunity to close the gap between himself and peers and achieve reading levels commensurate with his intellectual ability. They argued that since M.L.K. had average intelligence, he should be reading at, or close to grade level. The hearing officer and district court accepted this contention, and found that Minnetonka had failed to provide FAPE. In so holding, the district court erroneously embraced a standard rejected by the Supreme Court in *Rowley* and *Endrew F.*

B. The decisions below erred by not following *Endrew F.* that the determination of FAPE must be made "in light of the child's circumstances"

Endrew F. carried forward the "general approach" to evaluating the adequacy of a child's educational programming established in

Rowley and added a gloss highlighting the importance of taking into consideration the child's unique needs. *Endrew 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." Id.* (emphasis added). This is because "focus on the particular child is at the core of the IDEA" and "instruction offered must be 'specially designed' to meet a child's '*unique* needs' through an '*[i]ndividualized* education program.'" *Endrew F.*, 137 S.Ct. at 999 (emphasis original) (quoting 20 U.S.C. § 1401(29)). The Court explained that assessing FAPE in light of the child's unique circumstances and needs is consistent with both *Rowley* and the IDEA.

> As we observed in *Rowley,* the IDEA 'requires participating States to educate a wide spectrum of handicapped children,' and 'the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.'

Endrew F., 137 S.Ct at 999 (quoting *Rowley*, 458 U.S. at 202).

In this case, the district court failed to follow the general approach laid out by the Supreme Court in *Endrew F.*, and instead

followed the approach that has been rejected in both *Rowley* and *Endrew F*. Instead of evaluating whether his IEPs offered services and supports reasonably calculated to enable M.L.K. "to make progress appropriate in light of [his] circumstances", *Endrew F.*, 137 S.Ct at 999, the district court evaluated whether the IEPs offered services aimed to allow him to "achieve academic success . . . substantially equal to the opportunities afforded children without disabilities." *Id*. at 1001 (quoting Pet. Br. at 40). The hearing officer determined that M.L.K. "will need intensive instruction in reading in order to have the chance *to read at, or closer to, grade level* as he ages." Add. 039. (emphasis provided). The district court affirmed, particularly noting that "Student's reading skills remained very limited and that he made little progress through the end of third grade, *despite average intellectual abilities*. . . ." Add. 075. (emphasis provided). While it articulated the admonition from *Rowley* and *Endrew F*. that the IDEA does not require grade level advancement, the district court looked to the disparity between M.L.K's intellectual ability and his academic achievement in reading and

erroneously applied the FAPE standard that the Supreme Court rejected in both *Rowley* and *Endrew F.*

As discussed in Minnetonka's brief, M.L.K. is a child with a complex constellation of needs. Rather than evaluate the adequacy of his IEPs "in light of [M.L.K.'s] circumstances," the district court focused on one area of need, reading, and applying the "substantially equal opportunity" and "commensurate with" standards rejected by the Supreme Court, determined that the IEPs were not appropriate because Minnetonka had not closed the gap despite M.L.K.'s average intellectual abilities. This analysis ignores the many other needs Minnetonka identified and served. The decision also ignores *Endrew F.'s* guidance that where a child has numerous significant impairments that give rise to many and varied needs, the benefits conferred from the special education and supports provided by the school may be modest, yet still constitute a FAPE. *Endrew F.* 137 S.Ct at 999.

C. Affirming the decision below will require additional cross-subsidies; districts simply do not have the money to provide a maximization standard of services

The FAPE decision below requires services far in excess of an "appropriate" education required by IDEA. While both educators and parents may agree that the intense level of services Minnetonka provided M.L.K. is ideal, and the additional services ordered for him is super ideal, the IDEA does not require the ideal, *Endrew F.*, 137 S.Ct. at 999, and any such high FAPE standard is beyond the financial capacity of the public school system.

Schools cannot provide this standard of services without increasing already high cross-subsidies. Special education costs are funded with a combination of state and federal categorical aids, third-party billing revenues, and state and local general education revenues. *Special Education Cross-Subsidies Fiscal Year 2019, Report to the Legislature,* Minnesota Department of Education (June 2020) https://education.mn.gov/MDE/about/rule/leg/rpt/2020Reports/. Special education costs far outrun special education revenues. *Id.*

Deficits are funded by shifting general fund money to cover excess special education and special education transportation costs[5]. *Id.*

These cross-subsidies are crippling school officials' ability to do their work. As examples, in fiscal year 2019 St. Cloud school district had cross-subsidies of over $12,500,000, or $1,146 per student, and Minneapolis schools had cross-subsidies of over $26,000,000 , or $1,223 per student. *Id.* For the Columbia Heights school district, the cross-subsidy was 10% of the district's entire budget, an amount large enough to fund more than 70 teaching positions. *Minnesota Schools Facing 'Crisis Level' in Special Education Funding*, Minneapolis Star-Tribune (Jan. 19, 2019), https://www.startribune.com/minnesota-schools-facing-crisis-level-special-education-funding-gap/504601631/. Cross-subsidies result in program cuts that affect all children, both children with disabilities and those without.

---

[5] Congress has never funded at the 40% mark set in IDEA, *see* 20 U.S.C. § 1411(a)(2)(A)-(B), instead falling below 20% of costs each year since 1981. *IDEA Funding Gap,* National Education Association (June 2020), https://www.nea.org/sites/default/files/2020-06/IDEA-Funding-Gap-FY2017-with-State-Table.pdf (last visited June 16, 2021).

The decision below required a maximization standard of services that far exceeds the "appropriate" public education Congress mandated in IDEA. School districts simply cannot deliver this high standard of service without hurting children through ever increasing cross-subsidies.

D. *Endrew F.* did not disturb the Supreme Court's long-standing practice of deferring to educators' judgment

The Supreme Court has a long-standing practice of deferring to educators' professional judgment in the complex matter of educating students with disabilities. Less than a decade after the passage of IDEA, the Court first stated this principle:

> [T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.

Rowley, 458 U.S. at 206. The Court reiterated this principle in *Endrew F.,* 137 S.Ct. at 1001.

Congress included safeguards in IDEA, and these safeguards make deference to the professional judgment of educators

particularly appropriate. Schools must ensure that personnel providing services to children with disabilities are appropriately prepared and trained. 20 U.S.C.A. § 1412(a)14(A). Specific qualification requirements pertain to special education teachers and providers of related services. 20 U.S.C.A. § 1412(a)14(B),(C). In assessing the needs of children with disabilities, schools must use "technically sound instruments," must use assessments and evaluation materials "for purposes for which the assessments or measures are valid and reliable," and must ensure assessments are administered by "trained and knowledgeable personnel" in accord with "instructions provided by the producer of such assessments." In designing IEPs, schools must use special education services based on peer-reviewed research to the extent practicable. 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV). Because Congress included safeguards in IDEA, courts should take particular care to refrain from stripping school professionals of the right to determine curriculum and other matters of educational policy.

1. The hearing officer erroneously usurped school professionals right to choose curriculum

The hearing officer largely based the denial of FAPE decision on her conclusion that Minnetonka did not use the Wilson Reading System early enough and at the right intensity level. In this, the hearing decision impermissibly usurped the right of Minnetonka's school professionals to determine curriculum and instructional strategies. This usurpation was particularly egregious given the educational professionals' judgment that M.L.K.'s attentional challenges, which required the teacher to redirect him at intervals of 60 to 120 seconds, made use of the Wilson Reading System contraindicated while his attentional needs where still presenting at a high level.

2. School districts in Minnesota and elsewhere have been successfully providing a FAPE to students with dyslexia without the use of the Wilson Reading System

Teaching strategies and curriculum to address reading needs, including those arising from dyslexia, existed long before the development of the curriculum of the Wilson Reading System.

Indeed, the first edition of the Wilson Reading System was not published until 1988. *See,* https://www.wilsonlanguage.com/about-our-work/history/ (last visited June 16, 2021).

Moreover, it is difficult to discern how Minnetonka's decision to use the Orton-Gillingham instructional method for dyslexia in early primary grades denied M.L.K. a FAPE when the Wilson Reading System required by the decisions below is itself a branded curriculum based on the Orton–Gillingham method of literacy instruction. *See, id.*

3. Requiring the use of specific curriculums places an unworkable burden on school districts

Court or hearing officer orders requiring a specific curriculum, or finding a denial of FAPE because a school did not use a specific curriculum or did not use it soon enough, will place an unworkable burden on schools. For example, most school districts in Minnesota do not use the Wilson Reading System and do not have access to teachers trained in it. In fact, Minnetonka currently may be the only school district in Minnesota ready and able to fully implement that

curriculum. A few other school districts in Minnesota may have a teacher with some level of training in the use of Wilson Reading System curriculum, but that certainly is not universal across Minnesota. Many rural districts do not have access to teachers trained in it at all.

As discussed previously, Congress built safeguards into the Act. Among these are the requirement that schools use specialized instructional methods that are based on "peer-reviewed research" to the extent practicable. 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV). Congress' safeguards ensure that schools use research-based methodologies, but refrain from infringing on the professional expertise of educators. A court or hearing officer may prefer a particular curriculum or even consider it ideal, but should limit any order to remedies that are consistent with the Act, i.e., an order may state that the instructional strategies utilized should be based on "peer-reviewed research," but should refrain from mandating specific curriculum.

III. Congress Provided a Two-Year Statute of Limitations for IDEA Claims

M.L.K. cross-appeals the district court's interpretation of the IDEA's statute of limitations. The parents filed their due process complaint on August 8, 2019. Add. 061. Relying on the limitations in the IDEA, Minnetonka sought to limit any compensatory education recovery to two years before that, August 2017. *Id.* at 063. But the parents seek compensatory education for services as far back as 2015, when M.L.K. began kindergarten. Siding with Minnetonka, the district court reversed the ALJ's decision and concluded any claims earlier than August 2017 were not subject to compensatory education. *Id.* at 069-070. This decision was based on the IDEA's language.

A. The IDEA sets a two-year statute of limitations.

Under the IDEA, there are limitations on claims that may be raised. The Act authorizes a complaint "which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the

alleged action that forms the basis of the complaint." 20 U.S.C. § 1415(b)(6)(B) (2018).

When interpreting a statute, courts begin with its plain language. *Braswell v. City of El Dorado, Ark.*, 187 F.3d 954, 958 (8th Cir. 1999). Courts presume that statutes say when they mean and mean what they say. *Special Sch. Dist. No. 1, Minneapolis Pub. Sch. v. R.M.M. by & through O.M.*, 861 F.3d 769, 774 (8th Cir. 2017). "This court has made it clear that we will not look beyond the text of the statute if its plain language is unambiguous." *United States v. Behrens*, 644 F.3d 754, 757 (8th Cir. 2011) (quotation omitted).

The district court correctly concluded that, because the parents filed their complaint on August 8, 2019, violations in the preceding two years were the subject of the suit, and not any alleged violations occurring before that. Accordingly, since any prior violations were outside the scope of the complaint, the court refused to award any relief—compensatory education—for those actions.

This comports with the plain language of § 1415(b)(6)(B), which requires that the violation must occur "not more than 2 years before." Because the language is unambiguous, the plain meaning

should prevail and further interpretation is unnecessary. *See Behrens*, 644 F.3d at 757.

B. The timeline for the due process hearing is not at issue

To cast doubt on the plain meaning of § 1415(b)(6)(B), M.L.K. contends that another provision of the IDEA alters the meaning of the two-year statute of limitations. In a later subdivision, the Act describes the "[t]imeline for requesting a hearing" as follows: "A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint . . . ." *Id.* § 1415(f)(3)(C) (2018).

At first glance, this provision appears similar to the earlier provision, although one appears forward looking and one looks backward. However, closer inspection of the context reveals the plain meaning of each is distinct. The first provision expressly limits a complaint to violations occurring in the two years prior to its filing. § 1415(b)(6)(B). The second provision, 20 U.S.C. § 1415(f)(3)(C) provides the timeline for a hearing on the complaint. But the issue

here is the scope of the complaint and recovery for compensatory education, which is described in § 1415(b)(6)(B). There is no allegation that the hearing was untimely, which would implicate § 1415(f)(3)(C). Thus, this Court need not examine an inapplicable provision of the statute—as M.L.K. suggests—to create an ambiguity.

Because the language of the statute clearly establishes a two-year limit on IDEA claims, deeper examination of the legislative history is not necessary nor appropriate. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

C. This Court has applied a two-year limitation and not adopted another approach

As the district court noted, this Court has consistently applied a two-year limit for IDEA claims. Add. 068. "Any claim of a breach falling outside of the IDEA's two-year statute of limitations would be untimely." *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1083 (8th Cir. 2020). *See also C.B. ex rel. B.B. v. Special Sch. Dist. No. 1,*

Minneapolis, Minn., 636 F.3d 981, 989 (8th Cir. 2011) ("Given the IDEA's two-year statute of limitations . . . ."); *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 428 (8th Cir. 2010) ("We also do not consider allegations regarding incidents beyond the two year statute of limitations applicable to IDEA claims . . . .").[6] And this Court has never expressed any concern that these two provisions are inconsistent, as M.L.K. suggests. *See E.M.D.H.*, 960 F.3d at 1084 ("Under these circumstances, we do not need to reach the issue of whether the IDEA's statute of limitations represents an occurrence rule or a discovery rule.").

Because of the plain language of the statute and this Court's precedent for a two-year limitation, further analysis is unnecessary. Yet, M.L.K. urges this Court to consider precedent from other circuits.

In 2015, the Third Circuit was the first Court of Appeals to "address[] the interplay between § 1415(f)(3)(C) and §

---

[6] The District of Minnesota has come to this same conclusion. *See Indep. Sch. Dist. No. 413, Marshall v. H.M.J. ex rel. A.J., M.N.*, 123 F. Supp. 3d 1100, 1113 (D. Minn. 2015) ("No party may recover for a violation occurring outside the two-year statute of limitations.").

1415(b)(6)(B)." *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 611 (3d Cir. 2015). G.L. sought compensatory education for injuries starting four years before he filed his due process complaint. *Id.* at 605-07. The school district argued that the IDEA "statute of limitations limits the scope of a child's remedy to those injuries that actually occurred in the two years before the filing of a complaint, no matter when the parent reasonably discovered the injury." *Id.* at 612. G.L. argued that either the two provisions combine to provide a "2+2" approach, limiting his recovery to four years, or that these provisions merely describe the "prima facie cause of action" and do not limit his remedy at all. *Id.* at 615.

After determining that the provisions were ambiguous and engaging in a lengthy analysis, the court concluded that the provisions do not cap recovery for compensatory education. *Id.* at 618. Instead, it reasoned that students may be "entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." *Id.* at 618-19. And the court

described the differing language in each provision as a "drafting error" needing remedy by Congress. *Id.* at 625.

Two years later, the Ninth Circuit decided *Avila v. Spokane Sch. Dist. 81*, 852 F.3d 936 (9th Cir. 2017). There, Avila filed a due process complaint in 2010, alleging violations beginning in 2006. The school district argued that any of Avila's claims from before 2008 were barred by the IDEA's two-year limitation. *Id*. The district court agreed and limited Avila's claim to compensatory education two years before they filed the complaint. *Id*. at 939.

The Ninth Circuit adopted the Third Circuit's approach in *G.L. Id.* at 941. It summarized the "various interpretations of the IDEA's statute of limitations: (1) the occurrence rule suggested by § 1415(b)(6)(B), under which the statute of limitations begins to run on the date the injury occurs; (2) the discovery rule provided in § 1415(f)(3)(C); or (3) the "2+2" rule." *Id.* Rejecting the "2+2" and occurrence rules, it reasoned that the discovery rule was what Congress intended. *Id.* at 942, 944. Ultimately, the court remanded that case to the district court to apply the discovery rule and

determine when the parents "knew or should have known." *Id.* at 945.

Courts typically reject statutory interpretations that presume Congress made a drafting error. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186–87 (2004) (rejecting an argument that Congress was ignorant of the meaning of the statutory language it used). Moreover, statutory interpretation can, at times, require a robust analysis of the context, intent, and legislative history of a law, as was done by the Third and Ninth Circuits. However, doing so when the statute's plain language presents no ambiguities is contrary to the canons of statutory interpretation and this Court's precedent. *See id.* at 183; *Behrens*, 644 F.3d at 757.

D. If the Court adopted M.L.K.'s theory, the repercussions would significantly burden schools

Public policy offers a strong incentive for this Court to maintain a two-year limitation. The intent of this section of the IDEA is to provide parents and schools an opportunity to resolve disagreements constructively and relieve schools of unnecessary paperwork burdens that do not improve outcomes. 20 U.S.C. §

1400(c)(9) (2018). To do this, the Act balances the rights of children and parents to a FAPE with the school's need for notice and fair opportunity to address the issues raised.

If this Court interprets the statute of limitations to be greater than two years, the administrative and financial burden on schools will be great. Schools are particularly concerned about an increased period of liability for compensatory education. Under an unlimited liability scenario, as permitted in the Third and Ninth Circuits, schools may be liable for years of compensation. This could be financially devastating for schools.

In the IDEA, Congress provided a structure for parents to raise their claims and have schools address them in a timely manner. A corresponding responsibility should falls on parents to raise these issues within a reasonable period – here, two years – or forfeit potential compensation for earlier claims. Doing so incentivizes parents to raise claims at the earliest possible time. And this is consistent with the procedural safeguards Congress enacted to require schools to timely address claims.

This Court has previously opined that a longer statute of limitations "would frustrate the federal policy of quick resolution of IDEA claims. . . . [C]hildren protected by the IDEA benefit greatly from quick resolution of disputes because lost education is a substantial harm, and that harm is exactly what the IDEA was meant to prevent." *Strawn v. Missouri State Bd. of Educ.*, 210 F.3d 954, 957 (8th Cir. 2000). A shorter statute of limitations is not only consistent with the language of the statute but the spirit and purpose of the IDEA to expeditiously resolve claims.

Amici respectfully urge this Court to affirm the district court's limitation of M.L.K.'s recovery for compensatory education—if any—to two years. Such an opinion vindicates the plain language of the IDEA and is consistent with its purpose.

Conclusion

There is no doubt that this child and this case evoke great sympathy. As educators and administrators, *amici* hope to help every student succeed and wish for positive outcomes in every case. But not every educational issue has a legal solution. The IDEA was not intended to impose comprehensive liability for an impossible situation on one school district. Schools must continue to be permitted to make reasoned educational decisions with the resources they have available.

June 21, 2021

By: /s/ Eric J. Magnuson

Eric J. Magnuson (MN #66412)
Caroline M. Moos (MN #0400810)
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402–2015
Tel: 612–349–8500
ejmagnuson@robinskaplan.com
cmoos@robinskaplan.com

Roseann Schreifels (MN #0257278)
2634 Fulton Circle
Clearwater, MN 55320
Tel: (320) 267-1020
Rtschrei@outlook.com

Attorneys for Amicus Curiae Minnesota School Boards Association, the Minnesota Association of School Administrators, and the Minnesota Administrators for Special Education

Certificate of Compliance

The undersigned counsel for *Amicus Curiae,* Minnesota School Boards Association, the Minnesota Association of School Administrators, and the Minnesota Administrators for Special Education, certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in 14 point Book Antiqua typeface, utilizing Microsoft Word 2016 and contains 6,392 words, including headings, footnotes, and quotations. In accordance with L. R. 28A(h), this brief has been scanned for viruses and is virus-free.

June 21, 2021

By: /s/ Eric J. Magnuson

Eric J. Magnuson (MN #66412)
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402–2015
Tel: 612–349–8500
ejmagnuson@robinskaplan.com

Attorneys for Amicus Curiae Minnesota School Boards Association, the Minnesota Association of School Administrators, and the Minnesota Administrators for Special Education

Certificate of Service

The undersigned counsel for *Amicus Curiae,* Minnesota School Boards Association, the Minnesota Association of School Administrators, and the Minnesota Administrators for Special Education, hereby certifies that on June 21, 2021, he electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. He certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

June 21, 2021

By: /s/ Eric J. Magnuson

Eric J. Magnuson (MN #66412)
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402–2015
Tel: 612–349–8500
ejmagnuson@robinskaplan.com

Attorneys for Amicus Curiae Minnesota School Boards Association, the Minnesota Association of School Administrators, and the Minnesota Administrators for Special Education

91650893.1