UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 18-3444, 18-3497

D.L., by his parents and next friends, Frances and MollyJayne Landon,

Appellants, Cross-Appellees,

v.

St. Louis Public School District,

Appellee, Cross-Appellant

AMICUS CURIAE BRIEF of Missouri School Boards' Association, Arkansas School Boards Association, Nebraska Association of School Boards, Associated School Boards of South Dakota, Iowa Association of School Boards, Minnesota School Boards Association, North Dakota School Boards Association, and National School Boards Association ("Amici Curiae"), in Support of Appellee, Cross-Appellant's Petition for Rehearing and Suggestions for Rehearing En Banc

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

CASE NO. 4:17-cv-01773-RWS

Attorney for Amici Curiae
Keith Robert Powell, No. 97-0549
Legal Department
Missouri School Boards' Association
2100 I-70 Drive Southwest
Columbia, Missouri 65203
Phone: (573)445-9920 /Facsimile: (573) 573-9981

(A) Rule 26.1 Statement

The Missouri School Boards' Association (MSBA) is formed under the Missouri Nonprofit Corporation Act, R.S.Mo. § 355.001 *et seq*. MSBA has neither a parent corporation nor stock. Sister-state *amici* and National School Boards Association are nonprofit corporations in their respective jurisdictions, all without parent corporations or stock.

(B) Table of Contents

(C) Table of Authorities

+ (denotes unpublished, noted per Local Rule 32.1A)

(D) Identity, Interest, and Authority

The Missouri School Boards' Association (MSBA) strives to assist school boards in whom "[a] trust is reposed … the execution of which is frequently attended with difficulty and embarrassment." *Consol. Sch. Dist No. 6 v. Shawhan*, 273 S.W. 182, 184 (Mo. Ct. App. 1925). School districts of Missouri exist pursuant to Mo. Const. Art. XI, § 1, and their governance and control is vested in the board of education of each school district. §§ 162.261, .471 R.S.Mo. "Any school board of the state of Missouri, when it deems it a matter of public interest, may by two-thirds vote of its members join the Missouri School Boards' Association …." § 162.011, R.S.Mo. MSBA's interest and authority to file comes from its Delegate Assembly's policy goals for the Individuals with Disabilities Education Act ("IDEA"):

> 1. Authorize and streamline the timely sharing of information among public school districts, medical providers, and state and local mental health and social services agencies to provide districts relevant information to appropriately educate students with special needs. …
>
> 4. Eliminate unnecessary administrative process requirements. [and]
>
> 6. Maintain safe learning environments for all students and staff.

Sister-state *amici* serve their respective states in a similar capacity, with amicus the National School Boards Association ("NSBA") as their national umbrella federation. The Arkansas School Boards Association, Nebraska Association of School Boards, Associated School Boards of South Dakota, Iowa Association of

School Boards, Minnesota School Boards Association, and North Dakota School Boards Association are nonprofit organizations representing members of school boards in their states, all of which serve children with disabilities under the IDEA.

Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,600 school districts serving nearly 50 million public school students, including an estimated 6.9 million students with disabilities. NSBA regularly represents its members' interests before Congress and federal courts, and has participated as amicus curiae in a number of cases involving issues concerning the interpretation and implementation of the IDEA.

Amici state that: (i) no party's counsel authored the brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. St. Louis City School District belongs to MSBA but has not contributed any extra money toward this brief.

(F) Argument

Federal courts widely recognize that courts must determine IDEA compliance through the lens of best judgments of the Individualized Education Program ("IEP") team, fairly examined for what they were at the time. The mere existence of a particular medically-diagnosed disability should not result in undue reliance on the student's private physician, after-the-fact, to determine appropriate educational services. *Amici* urge this Court to re-hear this case, applying this widely-recognized rule of law and the Supreme Court's directive for deference to educators, which the district court and panel failed to do.

It is a complex, prospective, and inherently imperfect exercise to create an IEP where medical and educational issues intersect. IDEA compliance must be judged through that lens, not through hindsight with data or opinions unavailable to the IEP team. This principle is broadly recognized:

- "An IEP must be evaluated as of the date it is offered. It cannot be evaluated on the basis of facts and circumstances which became known after that date."[1]
- "[D]etermination of an IEP's adequacy must view the IEP from the perspective of the time it was offered and not retrospectively."[2]

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[1] *Gill v. Columbia 93 Sch. Dist.,* 1999 U.S. Dist. LEXIS 24351, at *3 (W.D. Mo. Sep. 2, 1999), *citing, Fuhrmann v. East Hanover Bd. of Educ.,* 993 F.2d 1031, 1040 (3d Cir. 1993).

[2] *Daniel S. v. Council Rock Sch. Dist.,* 2007 U.S. Dist. LEXIS 81187, at *9 (E.D. Pa. Oct. 25, 2007), *citing, Carlisle Area Sch. v. Scott*, 62 F.3d 520, 534 (3d Cir. 1995).

- "[T]he proper question is whether the IEP was objectively reasonable at the time it was drafted."[3]

The Third Circuit, discussing *Fuhrmann*, said:

> Courts must be vigilant to heed Judge Garth's warning that "neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." 993 F.2d at 1040. The dangers inherent in this process of second-guessing the decisions of a school district with information to which it could not possibly have had access at the time it made those decisions are great. As appellants recognize, it indeed would be unfair "to adopt a rule under which [a] district would [be] financially penalized for an IEP that, while apparently appropriate at the time it was developed, turned out in hindsight to be inadequate."[4]

This crucial point, raised by the St. Louis School District, was not addressed by the panel and misapplied by the district court. Because the district court "improperly relied on testimony and evidence not available to the IEP team on November 7, 2016,"[5] its decision amounted to the "Monday Morning Quarterbacking" courts have warned against.

As the MSBA belief statement, *supra*, recognizes, IEPs benefit from "streamlin[ing] the timely sharing of information among public school districts [and] medical providers … to provide districts relevant information to appropriately

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[3] *J.P. v. W. Clark Cmty. Schs*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002), *citing, Adams v. State of Oregon,* 195 F.3d 1141, 1149 (9th Cir. 1999); *see also Sch. Dist. v. C.M.C.,* 2016 U.S. Dist. LEXIS 107005, at *18 (W.D. Pa. Aug. 12, 2016) ; *M.L. v. N.Y.C. Dep't of Educ.,* 943 F. Supp. 2d 443, 446 n.2 (S.D.N.Y. 2013).
[4] *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995).
[5] Appellee, Cross-Appellant's Brief at 37.

educate students with special needs." The Supreme Court has directed federal courts to determine whether a student is receiving "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances,"[6] and to defer to educators' IDEA judgments.

> The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue.[7]

The panel opinion would allow parties to take isolated slivers of information before the IEP Team and later augment them in Due Process proceedings to fault the IEP. This creates a strategic incentive to not "fully air" relevant information at IEP formation.

Here the private psychiatrist's recommendations were provided to the fifteen-person IEP team one business day in advance via a parent letter.[8] Had the psychiatrist's contribution been more directly and timely received, perhaps the discussion and outcome would have been different. But importantly, perhaps not. Medical opinion is only one element:

> [Student's doctor] had repeatedly recommended that Noah be placed in a residential setting. Nevertheless, the educational experts who designed the IEP in this case had the benefit of Noah's school and

[6] *Endrew F. v. Douglas Cnty. Sch. Dist.* 137 S. Ct. 988, 1001 (2017).
[7] *Id*.
[8] 326 F. Supp. 3d at 817.

> hospital records, including medical reports from his physicians. We cannot say under these circumstances that the omission of [student's doctor] from the "IEP team" or from the IEP conference was fatal to the adequacy of the plan, especially in light of the educational experts who were involved, including a school psychologist, a school social worker, a guidance counselor, the chair of the special education department, the director of school support services, and an academic representative from the high school, among others. [Student's doctor's] medical opinion was certainly relevant in terms of Noah's psychiatric needs, but there is no showing in the record that he had any particular educational expertise, and it is the latter to which the courts are required to defer.[9]

Here, the parents, who alone had first-hand knowledge of D.L.'s psychiatrist's treatments and opinions, were present and able to advocate with the IEP Team.[10] Also before the IEP team were judgments and experiences of others with expertise, experience, and opinion on D.L's access to education in light of all the conditions

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[9] *Lakin v. Birmingham Pub. Sch.,* 70 F. App'x 295, 297 (6th Cir. 2003); *see also, M.G. v. Williamson County Schools,* 720 Fed.Appx. 280 (6th Cir. 2018)(finding "educators' numerous assessments a better indicator of her need for special-education services than M.G.'s doctor's prescription); *M.B. v. Halton Southeastern Schools*, 668 F.3d 851 (7th Cir. 2011)("it is inappropriate to defer to the opinion of a single psychologist, particularly where that opinion is in conflict with the opinions of 'teachers and other professionals.'"), *citing Heather S. v. Wisconsin*, 125 F.3d 1045, 1057 (7th Cir.1997)("[T]he deference is to trained educators, not necessarily psychologists. While the latter certainly have a role to play, and can contribute meaningful insight to the evaluation of a student, the school district is required to bring a variety of persons familiar with a child's needs to an IEP meeting, including, specifically, teachers."); *Marshall Joint Sch. Dist. No. 2 v. CD,* 616 F.3d 632, 638 (7th Cir. 2010)("It was the team's position throughout these proceedings that physicians cannot simply prescribe special education for a student. Rather, that designation lies within the team's discretion, governed by the applicable rules and regulations. We agree.").

[10] *Endrew F.,* 137 S. Ct. at 1001.

and challenges he possessed – including "educational diagnosis" of OHI and awareness of *medical* autism. The IEP team had to consider all of this, per the IDEA.

Later the psychiatrist opined to the Missouri AHC (not the IEP Team), upon the appropriateness of the November 2016 IEP Team meeting outcome. Whatever the AHC heard beyond medical history and his vouching for his recommendations in the November 3 parent letter, was more than the IEP Team had. Properly, the AHC noted,

> In this case, Parents have, prior to this complaint, sought autism related services from the District and an educational diagnosis of autism. *Gill I* does not preclude them from subsequently seeking evidence of those issues to bolster their due process complaint. However, … we understand that the issue in this case is whether the program developed is reasonable based on the best information available to them at the time the IEP [was] developed.[11]

The AHC also noted that "much of Dr. Constantino's testimony was not information the District had access to when it offered the November 7, 2016 IEP."[12]

In court, a consequence of that *post hoc* evidence was the panel's use of it in reviewing the IEP: "*Both the psychiatrist's testimony* and D.L.'s original autism evaluation support a conclusion D.L.'s condition deteriorated when he transitioned to a non-preferred activity."[13] The discussion on page 18 reflects an understanding

[11] AHC decision at 35.
[12] AHC decision at 48.
[13] Panel Opinion at 17-18 (emphasis added).

of autism and associated behaviors which must to some degree be from the psychiatrist's AHC testimony – which the IEP Team lacked.

Amici support rehearing in this case so that the Court can apply the widely recognized limits on "Monday Morning Quarterbacking" for purposes of IDEA liability. *Susan N., supra*.

Respectfully submitted,

/s/ Keith Robert Powell (No.97-0549)
Missouri School Boards' Association
2100 I-70 Drive SW
Columbia MO 65203
powell@mosba.org
573-445-9920 ext. 339

Attorney for amici *curiae* Missouri School Boards' Association, Arkansas School Boards Association, Nebraska Association of School Boards, Associated School Boards of South Dakota, Iowa Association of School Boards, Minnesota School Boards Association, North Dakota School Boards Association, and National School Boards Association.

(G) certificates

The foregoing brief complies with 32(g)(1).

This brief has been scanned to be virus-free.

/S/ Keith Robert Powell (No. 97-0549)