No. 20-901

In the Supreme Court of the United States

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

O.W., BY NEXT FRIEND HANNAH W.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, AND MISSISSIPPI SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National School Boards Association ("NSBA") is a non-profit organization representing state associations of school boards and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern nearly 14,000 school districts serving nearly 50 million public school students, including an estimated 6.9 million students with disabilities. NSBA's mission is to promote equity and excellence in public education for all students through school board leadership. 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.

More than 750 public school districts in Texas are members of the Texas Association of School Boards Legal Assistance Fund ("TASB LAF"), which advocates the positions of local school districts in litigation with potential state-wide impact. TASB LAF is governed by members from three organizations: Texas Association of School Boards ("TASB"), Texas Association of School Administrators ("TASA"), and Texas Council of School Attorneys ("CSA"). TASB is a Texas non-profit corporation

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[1] In accordance with Rule 37, all counsel of record received timely notice of the intent to file this brief, which is being filed with the written consent of all parties. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or its counsel made a monetary contribution to the brief's preparation or submission.

whose members are the approximately 1,025 public school boards in the state of Texas. TASB's members, locally-elected boards of trustees, are responsible for the governance of Texas public schools. TASB's mission is to promote educational excellence for Texas school children through advocacy, leadership, and high-quality support services to school districts. TASA represents the state's school superintendents and other administrators responsible for implementing the education policies adopted by their local boards of trustees and for following state and federal law. CSA is comprised of attorneys who represent more than ninety percent of the Texas school districts.

The Mississippi School Boards Association ("MSBA") is a voluntary, nonprofit organization that represents members of the school boards of all 142 public school districts in Mississippi, all of which serve children with disabilities under the IDEA. The mission of MSBA is to support, promote, and strengthen the work of school boards and school districts throughout Mississippi.

Amici are concerned that the decision below will hamper school districts' efforts to provide students with proactive classroom accommodations in the general education environment under Section 504 before referring them for special education evaluations. It is essential that school districts have a reasonable time period between when a district has notice of a child with a disability and when it initiates a special education evaluation to determine whether a student's needs can first be met in the general education setting.

Based on the foregoing, Amici submit that the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") incorrectly found that Spring Branch Independent School District ("Spring Branch ISD" or "the District") failed to evaluate O.W. within a reasonable time period. Amici urge the Court to consider this case to resolve issues of considerable interest and import to the entire public education community.

SUMMARY OF THE ARGUMENT

Amici, NSBA, TASB LAF, and MSBA, file this brief in support of Spring Branch ISD's petition for the purpose of addressing the Fifth Circuit's decision interpreting the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et seq*. and its implementing regulations. Specifically, the Fifth Circuit misinterpreted the Child Find requirements of the IDEA, in conflict with precedent set by the Fifth Circuit itself and its sister courts of appeals, essentially eliminating the reasonable time period between a school district's notice of a suspected child with a disability and the commencement of a special education evaluation. The Fifth Circuit ignored the proactive and reasonable steps taken by Spring Branch ISD during the time period under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 ("Section 504"), thus gutting the purpose and effect of a separate and independent federal statute designed to protect the rights of individuals with disabilities.

ARGUMENT

I. THE FIFTH CIRCUIT DECISION MISCONSTRUES THE CHILD FIND REQUIREMENTS UNDER FEDERAL LAW.

A. The Fifth Circuit Improperly Merged the Broadly-Recognized Reasonable Suspicion and Reasonable Period Standards under the IDEA.

Under the IDEA, all children with disabilities residing in the state who are in need of special education and related services must be identified, located, and evaluated. 34 C.F.R. §300.111(a)(1)(i). This obligation is referred to as the Child Find Duty. The Child Find analysis under the IDEA involves two separate components. First, the school district must have a reasonable suspicion that the student has a disability and therefore may need special education and related services under the IDEA. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed.Appx. 887, 891 (5th Cir. 2012). When analyzing whether a school district had a "reasonable suspicion," courts generally consider the proactive intermediary measures the district has taken, if any, prior to receiving notice of the suspected disability.

Second, the school district must identify, locate, and evaluate a student within a reasonable time following their reasonable suspicion. *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th

Cir. 2018). When analyzing whether a school district has acted within a "reasonable time" following reasonable suspicion of disability, courts will look to the length of time of the intervening period and the diligence of the school district's steps to initiate the evaluation once the suspicion arises. *See, e.g.*, *id.* at 677–78. This reasonable time period affords school districts the opportunity to exercise professional judgment and collect sufficient data to carefully consider the student's present levels and potential need for special education services under the IDEA. *See Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. _____, 137 S.Ct. 988, 999 (2017); *Doe v. Cape Elizabeth Sch. Dep't*, 382 F.Supp.3d 83, 99 (D. Me. 2019) ("School staff considering a student's need for either an accommodation or special education services are not charting planetary motion with astronomical instruments, but are instead deciding how best to facilitate educational objectives for a unique child with particular issues in a particular school setting.")

Twice within the past decade, the Fifth Circuit has held that a school district has a reasonable period of time to refer a child for a special education evaluation once the school district is on notice of facts or behavior likely to indicate a disability. *Krawietz*, 900 F.3d at 677; *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 320 (5th Cir. 2017). This recognition of a reasonable delay before conducting an evaluation is consistent with other circuit courts of appeals. *See, e.g.*, *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1183, 1196 (11th Cir. 2018); *Mr. P. v. West Hartford Bd. of Educ.*, 885 F.3d 735, 750 (2d Cir. 2018); *M.G. v.*

Williamson Cty. Schs., 720 Fed.Appx. 280, 285 (6th Cir. 2018); *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. 2012).

According to the Fifth Circuit's opinion in this case:

> A delay is reasonable when, throughout the period between notice and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps.

961 F.3d 781, 793 (5th Cir. 2019). However, when the Fifth Circuit applied its articulation of the "reasonable time" analysis to the facts of this case, the Court only looked to the District's actions during the time period *before* the reasonable suspicion of disability had arisen at an October 8, 2014 meeting. At that meeting, the District determined that O.W. qualified for Section 504 accommodations and agreed to implement a behavior intervention plan. The Fifth Circuit centered its entire "reasonable time" analysis on the period of time leading up to the October 8, 2014 meeting, finding that the District had notice of acts or behaviors likely to indicate a disability prior to October 8, 2014 and was therefore required to evaluate O.W. instead of first attempting Section 504 accommodations.

This approach effectively eliminates the "reasonable time" period altogether and brings the Fifth Circuit into conflict with the other federal circuit courts to have addressed this issue. By looking exclusively to the steps taken by a district during the identification process, this new approach eliminates length of time as a relevant factor in direct contradiction with clear legal precedent. *See* Perry A. Zirkel, *The Fifth Circuit's Latest Child Find Ruling: Fusion and Confusion*, 377 Ed.Law Rep. 469 (July 23, 2020), https://perryzirkel.files.wordpress.com/2020/08 /zirkel-article-on-5th-circuits-child-find-ruling.pdf. This new standard creates dangerous precedent in the Fifth Circuit that directly contradicts the standards applied in sister courts and will cause significant confusion for school districts and courts alike as to what constitutes a "reasonable time." This Court's clarification is needed.[2]

B. The Fifth Circuit's Decision Precludes School Districts from Taking Reasonable Steps to Provide Educational Supports under Section 504 as Part of Child Find.

Requiring a school district to evaluate a student for special education *immediately* following

[2] A recent study from the United States Government Accountability Office highlights the confusing nature of child find implementation in the United States. *See Special Education: Varied State Criteria May Contribute to Differences in Percentages of Children Served*, U.S. GAO, April 2019, https://www.gao.gov/assets/700/698430.pdf.

notice of a suspected disability effectively prevents a school district from taking reasonable steps to provide an appropriate education with accommodations under Section 504, which may be suitable (and even superior) to meet a student's needs. The IDEA only requires school districts to timely evaluate students where a need or suspected need for special education or related services exists. *See D.G.*, 481 Fed.Appx. at 893; 20 U.S.C. §§ 1401(3)(A), 1412(a)(3)(A). The Child Find analysis requires school districts to determine not only whether a student has a disability, but also whether the student requires specialized instruction as a result of the disability. If a child does not need specialized instruction, and can instead be provided other interventions to meet their needs, an evaluation for special education would not be appropriate. [3]

Thus, where a school district can demonstrate that a student's needs can be appropriately met through alternative means—including the provision of Section 504 accommodations—the school district has fulfilled its Child Find obligations. *See D.K.*, 696 F.3d at 252. It follows that school districts must first be allowed the opportunity to implement such

[3] Special education means "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability." 34 C.F.R. §300.39(a)(1). "Specially designed instruction means adapting, as appropriate to the needs of an eligible child under [the IDEA], the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability; and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. §300.39(b)(3).

reasonable alternative means to determine whether the student requires specialized instruction. By removing the possibility of utilizing Section 504 during the Child Find process, the Fifth Circuit essentially nullifies the applicability of Section 504 altogether, except for those students who are first evaluated and determined not to be eligible for special education.

Section 504 and the IDEA are two separate and distinct federal laws. Whereas the IDEA is a federal law governing all special education services in the United States, Section 504 is a civil rights statute, requiring school districts receiving federal financial assistance not to discriminate against students with disabilities. Although they share similar goals and are often analyzed together by courts, these two laws provide somewhat different criteria for identification, eligibility, appropriate education, least restrictive environment, and due process procedures. Therefore, it is important that courts not allow the IDEA to overshadow Section 504 in importance—or to extinguish it altogether—as the Fifth Circuit has now done.

Similar to the IDEA, Section 504 requires an evaluation prior to initial placement or before any change of placement, as well as periodic re-evaluations. 34 C.F.R. § 104.35. To be eligible under Section 504, a student's Section 504 committee must determine (1) whether the student has a physical or mental impairment, and (2) if so, whether the impairment substantially limits one or more major

life activities. *See* 34 C.F.R. 104.3(j)(2)(ii). If the answer to both is "yes," the Section 504 committee will develop a Section 504 plan to provide the student the appropriate accommodations and supports in the general education setting.

Under Section 504, like the IDEA, school districts must provide services in the least restrictive environment appropriate to the student as outlined in a student's written education plan. 34 C.F.R. § 104.34. Whereas the IDEA provides individualized special education and related services to meet a student's unique needs, often in a more restrictive educational setting and/or with more intensive supports, a Section 504 plan provides services and changes to the learning environment to enable students to learn alongside their peers in the general education setting. While both laws aim to educate students with disabilities with their same-age peers to the maximum extent appropriate, Section 504's focus on in-class accommodations and access to the general education curriculum is paramount. By ignoring Section 504 accommodations, the Fifth Circuit effectively endorses the use of specialized instruction and/or the removal of students from general education where such instruction and/or removal may not be necessary or appropriate in direct contradiction of both Section 504 and the IDEA. *See further discussion infra at Section II.B.*

Not only does Section 504 play an integral role in ensuring that students receive the necessary supports to achieve success in their least restrictive

environment, but providing accommodations under Section 504 can also aid professionals in determining whether a student may have a disability requiring more intensive support through specialized instruction. Specifically, effective Section 504 accommodations equip professionals with research-based methods for identifying areas of weakness and provide teachers the opportunity to collect data related to the student's progress in the general education setting. This allows teachers to recognize early signs of learning or behavioral differences and to distinguish between those students who may actually need special education (i.e. specialized instruction) versus those students who simply need additional accommodations in the general education setting. Should a student's Section 504 team then decide to evaluate for special education services and the student is declared eligible under the IDEA, the school may utilize the accommodations provided and data collected in the general education setting during the evaluation process to determine the types of services and supports to include in the student's Individualized Education Program ("IEP"). Thus, Section 504 is not an avenue for avoiding or delaying a special education evaluation, but rather a valuable tool that may be utilized by educators to appropriately identify students under the IDEA, as well as provide the appropriate services based on real data from the classroom.

The Fifth Circuit even acknowledges that, "[w]e in no way suggest that a school district *necessarily*

commits a child-find violation if it pursues RTI[4] or § 504 accommodations before pursuing a special education evaluation." However, in application, the Court overlooked the District's reasonable steps to provide O.W. classroom accommodations under Section 504, with success, before resorting to a special education evaluation. 961 F.3d at 794. Thus, the Fifth Circuit *does* effectively find that the District *necessarily* committed a child-find violation solely by doing so.

Moreover, the court inappropriately equates RTI strategies with Section 504 accommodations. While Amici acknowledge that RTI strategies cannot be used to delay an evaluation, Section 504 accommodations certainly should not be ignored as a reasonable step in the Child Find process. *See* U.S. Dept. of Education, Office of Special Education and Rehabilitative Services, *Memorandum from Melody Musgrove to the State Directors of Special Education* (Jan. 21, 2011), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf (clarifying that RTI strategies cannot be used to delay or deny the provision of a special education evaluation if a disability and need for special education services is reasonably suspected). Further, while RTI and

[4] The IDEA allows schools to use "a process that determines if the child responds to scientific, research-based intervention," 20 U.S.C. § 1414(b)(6)(B), commonly known as "response to intervention" ("RTI") in determining the existence of a specific learning disability. Like Section 504 accommodations, RTI can be successful at bridging regular and special education and addressing a student's learning needs at the earliest possible time.

other regular education interventions are not absolutely mandated by a federal statute, the provision of accommodations to students with disabilities in the general education setting under Section 504 is. Courts, therefore, should treat RTI and Section 504 separately. Spring Branch ISD does not assert that it may avoid obligations to timely evaluate students by providing RTI, but rather that it must be allowed the opportunity to apply Section 504 federal rights and protections for students with disabilities.

In fact, the Fifth Circuit recognizes that there are situations where "intermediate measures are reasonably implemented before resorting to evaluation" but declines to extend that principle to the present case. The court focused solely on *D.K. v. Abington School District*, one of many cases addressing this issue, to suggest that intermediate measures were not reasonable. 696 F.3d at 252. The court's interpretation of *D.K.* is flawed for two reasons. First, in *D.K.*, the Third Circuit, unlike the Fifth Circuit here, considered the reasonable steps taken in its "reasonable suspicion"—not "reasonable time"— analysis, concluding that the proactive steps the district took to afford the student extra assistance *en route* to eventually identifying him as IDEA-eligible were reasonable. 696 F.3d at 252; *see* Zirkel, 377 Ed.Law Rep. at 469–70. The court's effort to distinguish the facts of *D.K.* from the present case is equally unpersuasive. While O.W. may not have been as young as the student in *D.K.*, other facts in the record demonstrate the appropriateness of the immediate measures taken by the District to

determine if special education testing was appropriate for O.W., including O.W.'s academic and behavioral improvements with the additional Section 504 accommodations, recommendations for Section 504 accommodations from a private provider, observed behaviors, and parental input suggesting that the behavior was not related to a disability and instead was caused by either his desire to return to his previous school or his lack of experience in a traditional school setting. ROA.2032, 2004-2005, 3038:9-12, 3063:15-25, 3064, 3065:1-3.

Rather, the instant case is more akin to *Durbrow v. Cobb County School District*, where the Eleventh Circuit held that a school district reasonably addressed a student's needs with a Section 504 plan and demonstrated individualized attentiveness and sensitivity to the student's difficulties. 887 F.3d at 1196 ("When a school district uses measures besides special education to assist struggling students, it is even less likely in breach of its child-find duty."). There, the Eleventh Circuit held that, even if the student's academic difficulties rendered him a child with a disability—which the record did not support—the school district fulfilled its Child Find duties by evaluating him within a reasonable time after first attempting to address the concerns through the Section 504 plan. *Id.* at 1196–97; *see also M.G.*, 720 Fed.Appx. at 285 (finding that school district effectively utilized general intervention strategies and a Section 504 plan to avoid liability for a Child Find violation); *Bd. of Educ. of Fayette Cty. v. L.M*, 478 F.3d 307, 314 (6th Cir. 2007) (recognizing school

district's efforts to provide additional supports to student prior to evaluating for special education).

Section 504 accommodations "are not a substitute for an evaluation once a school district 'is on notice of acts or behavior likely to indicate a disability.'" 961 F.3d at 794 (quoting *Krawietz*, 900 F.3d at 676). However, the record does not reflect any attempt by the District to use Section 504 to skirt its Child Find duties. Rather, similar to *Durbrow*, school district professionals, considering input from the student's parents, reviewed all of the information in light of the circumstances in which it was presented. *See Durbrow,* 887 F.3d at 1196. It was not unreasonable for the District to believe that O.W.'s challenges may be short-lived under the circumstances, or that they could possibly be addressed through additional general education supports. In fact, O.W.'s academic and behavioral improvements following the implementation of the Section 504 plan demonstrate the appropriateness of the District's decision, and the Fifth Circuit itself acknowledged that the Section 504 plan was reasonable. 961 F.3d at 794 n.12. Then, less than one week after it became evident to the District that O.W. may need more intensive special education supports, the District took immediate action and convened a meeting to recommend that O.W. be referred for a special education evaluation. *Id.* at 787.

Despite Congress's intent to provide students with disabilities an appropriate education in the least restrictive environment through *either* Section 504 or

the IDEA, depending on need, the Fifth Circuit's ruling effectively eliminates the ability of a school district to provide supports under Section 504 unless the school district first rules out the need for special education. Whereas school districts across the nation may continue to exercise professional judgment by providing students Section 504 accommodations before later identifying the student as eligible for special education under the IDEA, those in the Fifth Circuit now arguably are required to ignore any possible solutions under the less restrictive Section 504 accommodations and immediately move to evaluate a student under the IDEA. This decision essentially denies a student his or her rights and privileges under Section 504 that might very well have met the student's needs, thereby effectively nullifying a federal law. As this directly contradicts both federal law and legal precedent, this Court should recognize the important role of Section 504 and reject the inappropriate new standard set forth by the Fifth Circuit.

II. THE FIFTH CIRCUIT DECISION WILL HAVE GRAVE IMPLICATIONS FOR SCHOOL DISTRICTS PARTICIPATING IN THE CHILD FIND PROCESS.

The Fifth Circuit decision will have a detrimental impact on school districts throughout the circuit. And because the court's decision is inconsistent with the holdings of its sister courts, school districts in the Fifth Circuit are now held to a higher standard than those in other circuits across the

nation. First, the court's decision requires school districts within the Fifth Circuit to ignore federal requirements related to educating students in their least restrictive environment by forcing school districts to determine whether a student needs specialized instruction—often provided in a more restrictive setting—before allowing professionals to first consider whether less restrictive supports are sufficient. Further, the court's decision removes the ability of school districts in the Fifth Circuit to exercise professional judgment as to whether less restrictive supports should be attempted before proceeding with a special education evaluation and discourages, if not effectively eliminates, collaboration between important parties throughout the decision-making process. Finally, the Court's decision may have dire consequences relating to overidentification of students as students with disabilities in need of special education, a misstep with long-lasting, negative impacts.

A. Requiring Schools to Evaluate Students before First Attempting to Provide Accommodations under Section 504 Hinders the Ability to Provide FAPE in the Least Restrictive Environment.

A cornerstone of federal disability law is the requirement that students with disabilities receive their education, to the maximum extent appropriate, with nondisabled peers—i.e., in their "least restrictive

environment."[5] By requiring school districts to immediately evaluate students for special education before first attempting less restrictive measures like Section 504 accommodations, the Fifth Circuit directly contradicts federal requirements. The general education classroom is considered not only the least restrictive, but also the most preferred placement, and a school district must consider whether steps, such as providing supplementary aids and services, can be taken to allow the student to access their education in the general education setting. 34 C.F.R. §300.550; *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (developing a two-part test to determine whether the least restrictive environment requirement has been met: (1) can education in a regular classroom with support services be achieved, and (2) if not, has the school integrated the student to the maximum extent appropriate). Removal from the general education classroom should only occur when a student's disability is so severe that the student is unable to receive an appropriate education with supplementary aids and services in the general education setting. 34 C.F.R. § 104.34.

Despite the Fifth Circuit's suggestion to the contrary, a step that school districts should proactively consider—as Spring Branch ISD did—is whether the student may be able to access their

[5] While the term "least restrictive environment" is commonly associated with the IDEA, it is also mandated under Section 504. 20 U.S.C. § 1412(5)(B); 29 U.S.C. § 701; 34 C.F.R. §300.550 *et seq.*; 34 C.F.R. § 104.33.

education in their least restrictive environment through the implementation of Section 504 accommodations in the regular education classroom before implementing special education. As addressed above, unlike an IEP provided under the IDEA, a Section 504 plan, which centers around inclusion and equitable access, provides services and changes to the regular learning environment to enable students to learn alongside their peers rather than through specialized instruction or alternative placements. Specialized instruction necessarily removes the student from the general education curriculum and placement, as supports either inside or outside the general education classroom are provided. Therefore, Section 504 is an exceedingly important avenue to ensure that students receive FAPE in their least restrictive environment.

Likewise, the court's ruling, in effect, penalizes students suspected of having a disability by requiring school districts to deny these students available supports and services that may have met their needs—and which are already available to students without disabilities—in a less restrictive environment. As "no two children necessarily suffer[] the same condition or require[e] the same services or education," forcing school districts to evaluate students under the IDEA without first attempting less restrictive strategies treats students with disabilities different than those without disabilities. *Daniel R.R.*, 874 F.2d at 1044.

In conclusion, the Fifth Circuit's decision puts the requirements of Child Find in conflict with the concept of least restrictive environment. It directly contradicts the primary objective of federal disability law to educate students with disabilities to the maximum extent appropriate with their nondisabled peers and could have a potentially disastrous impact on a school district's ability to educate students in their least restrictive environment. *See* 20 U.S.C. § 1412(a)(5)(A); *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004) ("Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements."); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247; *Daniel R.R.,* 874 F.2d at 1044 (recognizing that "Congress created a strong preference in favor of mainstreaming").

B. The New Standard Set Forth by the Fifth Circuit Prevents Educators from Exercising Professional Judgment and Discourages Collaboration During the Identification Process.

This Court has consistently held that public schools are entitled to deference in matters concerning their particular expertise. *Endrew F.*, 137 S.Ct. at 1001; *Bd. of Educ. of Hendrick Husdon Central Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[E]ducation of the Nation's youth is primarily the responsibility of parents, teachers, and state and local

school officials, and not of federal judges."). As this Court has held, courts often "lack 'the specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Rowley*, 458 U.S. at 208 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)). Thus, recognizing "that judges lack the on-the-ground expertise and experience of school administrators," this Court has repeatedly "cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 686 (2010).

But, that is exactly what the Fifth Circuit did in finding that the District should have immediately evaluated O.W. without first attempting Section 504 accommodations. The holding, using hindsight and without the benefit of experience or context, unfairly second-guessed well-intentioned educators who exercised their professional judgment when determining which supports to employ during the Child Find process. And by creating a new Child Find standard in the Fifth Circuit, the court has intruded upon the province of educators and effectively forced school districts to ignore research-based strategies and interventions that could provide the student appropriate education in lieu of more specialized and possibly restrictive measures under the IDEA.

Specifically, the Fifth Circuit has denied educators a reasonable time period to utilize their

resources in the general education setting, including Section 504, and to exercise professional judgment regarding the effectiveness of these supports. This is particularly detrimental for students who are new to a school district or to students who are young. *L.M.*, 478 F.3d at 313 (acknowledging the negative impacts of evaluating students at a young age). This undermines the very purpose of a special education evaluation, which is to follow a structured and collaborative process steeped in knowledge and experience to ensure that all students with disabilities receive an appropriate education designed to meet their unique needs. *Daniel R.R.,* 874 F.2d at 1044 ("Schools must retain significant flexibility in educational planning if they are to truly address each child's needs.").

It is one thing for hearing officers or judges to review whether a student's educational program is reasonably calculated to provide the individual student a free appropriate public education ("FAPE"). *Endrew F.*, 137 S.Ct. at 999. It is quite another for non-educators to determine which of several instructional alternatives is likely to generate the most educational benefit for every student suspected of having a disability. Further, as explained above, the mere existence of a disability does not suggest, by itself, that a student requires specialized instruction under the IDEA. While a student may have a disability, the student may not need special education. Instead, a school district may be able to provide appropriate supports through Section 504 accommodations in the general education setting,

allowing students to remain with their same-aged peers.

Rather, educators, in collaboration with parents and specialists, must exercise professional judgment as to whether a student has a demonstrated need for more specialized instruction or if the student's needs may be better met through alternative, less restrictive measures. Such decisions typically involve complex methodological choices that fall outside of the expertise of hearing officers and judges. Thus, the new standard in the Fifth Circuit eliminating deference to professional judgment of educators and collaboration between members of a student's education team cannot stand.

C. This New Standard May Result in Over-Identification of Students with Disabilities Needing Special Education Services Throughout the Fifth Circuit.

The Court's decision increases the likelihood that school districts will overidentify students as IDEA-eligible. A determination that a student with a disability is eligible for special education services under the IDEA "is one of the most important, if not the most important, decisions that will ever be made in that person's life." Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 Vt. L. Rev. 71, 82 (1978).[6] School personnel are aware and

[6] In light of the recent statewide federal corrective action plan, it is now more critical than ever that Texas schools are correctly identifying students with disabilities in need of special

concerned about unnecessarily subjecting a child to negative consequences that may accompany identification in some situations. Specifically, research indicates, and Congress has reported,[7] that overidentification of racial minorities in special education remains a significant concern.[8] However, school districts can potentially reduce racial disparities in special education identification, especially for students with learning differences and behaviors difficulties, by offering Section 504 accommodations and other general education supports prior to hastily, and possibly improperly, labeling the student as eligible for special education services under the IDEA.

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education. U.S. Dep't of Educ., Office of Special Education and Rehabilitative Services, *Letter to Hon. Mike Morath* (Oct. 19, 2018).

[7] H.R. Rep. No. 108-77 at 91 (2003) (finding that overidentification of minorities as eligible for special education is a primary concern that "has significant adverse consequences").

[8] There are several explanations as to why certain minority populations, particularly African American males, are more likely to be over-identified, including the formal assessment measures typically utilized in evaluations, cultural differences, and implicit biases of the evaluators and other professionals. Ruby K. Payne, *A Framework for Understanding Poverty* 5, 27 (4th ed. 2005); Nicole M. Oelrich, *A New "IDEA": Ending Racial Disparity in the Identification of Students with Emotional Disturbance*, 57 S.D. L. Rev. 9, 10 (2012). Further, the Office of Civil Rights recently found that referrals for special education may involve "the subjective exercise of unguided discretion in which racial biases or stereotypes…may be manifested." U.S. Dep't of Educ., Office for Civil Rights Dear Colleague Letter Preventing Racial Discrimination in Education (Dec. 12, 2016).

A teacher or provider's ability to appropriately educate a student hinges on the proper identification of the student, whether as a student in need of special education services or as one whose needs can be met through general education supports. Without a collaborative, deliberative process, there is a risk that the student will not receive FAPE in their least restrictive environment.

And, while IDEA eligibility results in educational benefits and services, it can, in some cases, unfortunately result in a negative stigma and cause students to have lowered self-expectations and a decreased sense of self-worth. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 n.24 (3d Cir. 1993) (recognizing that "stigma, mistrust and hostility…have traditionally been harbored against persons with disabilities"). As students with disabilities may not receive the same curriculum as their peers in general education settings, an unnecessary special education classification may also limit a student's current academic, post-secondary, and future employment opportunities. Finally, research suggests that student drop-out and the school-to-prison pipeline—policies and practices of school districts that push students out of school and into the criminal justice system—disproportionately impacts students with disabilities. Nat'l Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities* (2015), https://ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf.

Over-identifying students as IDEA-eligible can also have drastic consequences for school districts. Requiring a school district to automatically evaluate every student immediately upon recognition of a disability, as the Fifth Circuit now requires, will drastically increase the demand placed on evaluators to evaluate students and potentially slow down the evaluation process for all students in the queue. An inflated uptick in students found eligible for special education also taxes school districts, which are required to create and implement an IEP for those students and fund the special education and related services outlined in the IEPs. *W.B. v. Matula,* 67 F.3d 484, 501 (3rd Cir. 1995) ("We are not unmindful of the budgetary and staffing pressures facing school officials, and we fix no bright-line rule as to what constitutes a reasonable time in light of the information and resources possessed by a given official at a given point in time.").

Utilizing general education measures proactively, including Section 504 plans, where appropriate, will benefit both students and school districts alike. Yet the new Child Find standard set forth by the Fifth Circuit provides no flexibility for school districts to ensure that students are not improperly deemed eligible for special education. School districts must be able to first attempt alternative measures, including the provision of Section 504 accommodations where appropriate, to determine if a need for special education truly exists. The Fifth Circuit's new Child Find standard prevents schools in its jurisdiction from doing so.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court grant the petition for *writ of certiorari*.

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