19-644

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

D.S,

Plaintiff-Appellant,

v.

Trumbull Board of Education,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (NEW HAVEN)
CIVIL ACTION NO. 3:18 CV-00163

BRIEF OF *AMICI CURIAE*
CONNECTICUT ASSOCIATIONS OF BOARDS OF EDUCATION
NATIONAL SCHOOL BOARDS ASSOCIATION
NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC.

IN SUPPORT OF AFFIRMANCE

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STATEMENT OF INTEREST[1]

The Connecticut Association of Boards of Education (CABE), organized in 1906, is a voluntary non-profit organization whose membership includes 155 of the 169 local and regional school districts of the state of Connecticut. CABE's mission is to provide high quality professional development, advocacy, and support to school board leadership teams to advance public education and promote achievement of all public school students through effective school board governance.

In addition to the interests described below, CABE's interest in this matter is also based upon its charge to provide school boards with the tools for success, including real time updates of relevant changes in law and regulations, to ensure district policies are in compliance, and to provide appropriate training for staff to ensure proper implementation of new laws.

CABE regularly represents its members before the Connecticut General Assembly, Congress, and state and federal administrative agencies as well as in the role of *amicus curiae* before federal and state courts. CABE has appeared as *amicus curiae* in many cases, including, but not limited to, matters involving collective bargaining, discipline of students for on and off campus behavior, bifurcated town/school board budgets, validity of school referenda votes, and equitable

[1] *Amici* submit this brief pursuant to Fed. R. App. P. 29(a)(2); all parties have consented to its filing. This brief was not authored in any part by counsel for either party, and no person or entity other than the *amici*, their members or counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

education funding and distribution, and has appeared before the Connecticut State Board of Education on issues such as alternative education for expelled students, the use of student test scores in teacher evaluations, and the independent educational evaluation process.

The National School Boards Association (NSBA), founded in 1940, 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 approximately 13,800 school districts serving nearly 50 million public school students, including an estimated 6.9 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 Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et. seq. (2019); 34 C.F.R. Part 300.

The New York State School Boards Association, Inc., (NYSSBA), is a not-for-profit membership corporation incorporated under the laws of the State of New York. Its membership consists of approximately ninety-three percent (93%) of all public school districts in New York State. Pursuant to Section 1618 of New York's Education Law, NYSSBA has the responsibility of devising practical ways and

means for obtaining greater economy and efficiency in the administration of public school district affairs and projects. Pursuant to this responsibility, NYSSBA often appears as *amicus curiae* before both federal and state courts, including this court, in proceedings that involve constitutional and statutory issues affecting the administration and operation of public schools, including the education of children with disabilities. NYSSBA fully supports the rights of children with disabilities to receive a free appropriate public education that addresses their unique educational needs. However, NYSSBA also has a significant interest in ensuring that its members are not subjected to legal obligations and liability that exceed federal and/or state statutory and regulatory requirements and protections. New York's law and regulations mirror the provisions of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations that pertain to the rights of parents to obtain a publicly-funded independent educational evaluation (IEE). Therefore, the issues before this court are of statewide significance to all school districts across New York.

Amici have a keen interest in this critical case, the outcome of which will directly impact all boards of education throughout the Second Circuit. A decision in favor of the plaintiff-appellant will significantly expand the scope of school district responsibilities and liability under the IDEA by affording parents of special education children the right to eschew all school district evaluations and require that

a school district pay for an IEE merely by requesting one. Such an outcome subverts the core framework and intent of the IDEA that parents and school districts work collaboratively to ensure the development of educational programming and delivery of appropriate services to children with disabilities, without undue delay. In addition, if the plaintiff- appellant prevails, any evaluation conducted by a school district would enable a parent to demand an unlimited number of publicly-funded IEEs even if unrelated to a child's actual or suspected disabilities and even if otherwise deemed unnecessary based on the child's identified needs and actual performance. Such an outcome would necessitate and significantly increase the diversion of already scarce resources[2] school districts must spend, without guarantee of improving programming or services to children with disabilities.

In accordance with Rule 29 of the Federal Rules of Appellate Procedure, *Amici* submit this brief with the consent of the parties to the action and in support of affirmance of the decision of the District Court below in favor of defendant-appellee, the Trumbull Board of Education.

[2] It is beyond question that the resources needed for the education of children with disabilities comprise a significant portion of every school district's yearly budget, and that the costs involved far exceed the limited amount of funding actually made available by Congress under the IDEA, despite a commitment to fully fund such costs. Generally, aid states make available to their school districts is insufficient to cover the shortfall.

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed R. App. P. 29(a)(5) because, excluding the portion of the document specifically exempted from count under Fed. R. App. P. 32(f), this document contains 4171 words.

2. This document complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is submitted in a proportionally spaced typeface using Word for Office 365, specifically Times New Roman 14-point font.

September 30, 2019

Respectfully Submitted

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STATEMENT OF THE ISSUE

I. Did the District Court properly determine that a parent's right to a publicly-funded independent educational evaluation (IEE) hinges on a connection between the IEE requested by the parent and an existing evaluation obtained by the school district with which the parent disagrees?

The *Amici* respectfully submit the answer is yes.

STATEMENT OF FACTS

Amici adopts the Defendant-Appellee's Counterstatement of the Facts: Page Proof Brief of Defendant-Appellee, Case 9-166, pages 10-26.

INTRODUCTION

This Court has an opportunity to issue a definitive ruling on a question of great importance to school boards and the students they serve under the Individuals with Disabilities Education Act, (IDEA), 20 U.S.C. §1400 et seq., 34 CFR Part 300, in Connecticut and throughout the Second Circuit. Specifically, the case concerns the reach of a parent's right to obtain an independent educational evaluation (IEE) at public expense and whether parents are entitled to obtain an unlimited number of publicly-funded IEEs in multiple assessment areas throughout the entire period of time their child is entitled to receive services under the IDEA.

Amici urge the Court to affirm the District Court's decision, which recognized that the parents' right to an IEE at public expense under the IDEA does not attach until a parent disagrees with an existing district evaluation; that applicable IDEA statues, regulations, and case law require the scope of an independent evaluation to fall within the contours of the underlying district evaluation; and that parents are entitled to only one IEE each time the district conducts an evaluation with which they disagree.

The primary purpose of the IDEA is to provide a free appropriate public education (FAPE) to children with disabilities and to ensure special education and related services are delivered to those children through appropriate educational programs that are developed based on, among other things, evaluation results. The

linchpin of the IDEA is the Individualized Education Program (IEP). IEPs are developed through collaboration, information sharing, and data-based decision-making by a team of parents and school staff. Evaluation data is the foundation for IEP development. *A Guide to the Individual Educational Program, Office of Special Education and Rehabilitative Services U.S. Department of Education (*July 2000*)*- https://www2.ed.gov/parents/needs/speced/iepguide/iepguide.pdf.

If the plaintiff-appellant prevails, parents and school districts who have worked together for years will at some point, find themselves in roles that may be more adversarial than cooperative. This is because a parent's right to obtain a publicly-funded IEE is contingent on the right of a school district to commence a due process proceeding to prove that its evaluation is appropriate. 20 U.S.C. § 1415(b)(1); 34 C.F.R. §300.502(b)(1)(i). Faced with unlimited requests for publicly-funded IEEs, school districts may choose to follow such a path, which will inevitably affect the IEP process and the prompt delivery of services to children with disabilities. As a result, deciding for the plaintiff-appellant in this case would turn the evaluation and IEP development process of the IDEA on its head and defeat the considerable efforts Congress has made over the years to discourage litigation and facilitate collaboration between parents and school districts so that children with disabilities receive appropriate educational services without delay.

ARGUMENT

I. THE DISTRICT COURT PROPERLY RULED THAT A PARENT'S RIGHT TO A PUBLICLY-FUNDED INDEPENDENT EDUCATIONAL EVALUATION (IEE) HINGES ON A CONNECTION BETWEEN THE IEE REQUESTED BY THE PARENT AND AN EXISTING EVALUATION OBTAINED BY THE SCHOOL DISTRICT WITH WHICH THE PARENT DISAGREES.

Factually, this case involves a parental request for multiple IEEs based on a disagreement by the plaintiff-appellant's parents over a functional behavioral assessment (FBA) obtained by the defendant-appellee exclusively related to the behavior of plaintiff-appellant. As more fully described in the defendant-appellee's brief, the requested IEEs included not only an FBA, but also comprehensive speech and language, occupational therapy, physical therapy, assistive technology, psychoeducational and central auditory processing disorder evaluations unrelated to the FBA. The plaintiff-appellant contend that parents have a right to request publicly-funded IEEs in any area of a child's suspected disability regardless of the nature and purpose of a district's evaluation. For the reasons that follow, such an argument finds no support in the IDEA or its regulations, and the district court below properly determined that "there must necessarily be a connection between the evaluation with which the parents disagree and the independent evaluation they request." D.S., By and Through his Parents and Next Friends, M.S. and R.S. v.

Trumbull Board of Educ., 357 F. Supp. 3d. 166 (D. Conn. 2019). The Decision of the District Court Below is Supported by the Parent-School District Collaborative Process Contemplated by Congress and Embedded Throughout the Various Provisions of the IDEA.

The IDEA, known originally as the Education of All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, 89 Stat. 773, was enacted to ensure that all children with disabilities have access to a "free appropriate public education" to meet their unique educational needs. 20 U.S.C. §1400(c). Through the IDEA, Congress established a framework in which parents and school districts work together to identify, evaluate, and provide services for eligible children with disabilities. The Supreme Court has recognized that Congress envisioned a collaborative process in the development and implementation of an eligible child's special education program. While acknowledging that IDEA has been referred to as the "model of cooperative federalism," the Court also noted, "[t]he core of the statute, however, is the cooperative process that it establishes between parents and schools." *Schaffer v. Weast*, 56 U.S. 49, 51-53 (2005). The central vehicle for that collaboration is the child's individualized education program (IEP), *Id*. at 52, which has been deemed to be the centerpiece of the statute's education delivery system for disabled children. "*Honig v. Doe*, 484 U.S. 305, 311 (1988)… The IEP is developed by a child's 'IEP Team' (which includes teachers, school officials, and the child's parents), in compliance with a detailed set of procedures, §1414(d)(1)(B)… that emphasize

collaboration among parents and educators and require careful consideration of the child's individual circumstances. §1414." *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (internal quotations omitted). Evaluations serve as the foundation of the special education IEP process. They provide information about whether a student is eligible for services or continues to need services, and if so, what services and supports are required in order to ensure that the student receives a free appropriate public education. Evaluations provide some of the most important data and information considered by the IEP team in developing an IEP for a student.

Parents were not included in developing the IEP of their child until the 1997 reauthorization of the IDEA. Since then, however, they have become an integral part of the IEP process and the IEP Team, 34 C.F.R. §300.321(a)(1), the group that (1) determines what additional data are needed as part of an evaluation of the child, 34 C.F.R. §300.501(b); (2) assesses the child's initial and ongoing eligibility for special education and related services, 34 C.F.R. §§ 300.301-311; and (3) makes decisions on the educational placement of the child, 20 U.S.C. 1414(f), 1415(b)(1); 34 C.F.R. §300.501(c). In addition, parents must be informed about and consent to evaluations, 20 U.S.C. § 1414(c)(3); 34 C.F.R. §300.300, have the right to examine all records related to their child, 34 C.F.R. §300.501(a), and have the right to obtain an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. 300.502.

With this collaborative framework as a backdrop, the right to obtain an IEE, in addition to the right to examine their child's records, enables parents to level the "natural advantage" that school districts normally have in information and expertise. *Schaffer v. Weast*, 546 U.S. at 60. In this sense, the purpose of the parent right to an IEE, as the Supreme Court noted in *Schaffer v. Weast*, is to ensure that parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." *Id*. at 61. However, when a parent seeks a publicly-funded IEE, this presumes that there is an existing district evaluation with which the parent disagrees, and the parent wishes to get a second opinion on the subject matter of that evaluation. As further indicated by the Supreme Court in *Schaffer v. Weast*, the IDEA regulations clarify that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." *Id*. The exercise of such a right is further subject to the right of a school district to initiate a due process hearing to show the appropriateness of its evaluation. 34 C.F.R. § 300.502(b)(2).

A. Under IDEA's Collaborative Framework, Parents Are Not Entitled to an IEE at Public Expense Until the School District has Conducted an Evaluation With Which the Parents Disagree.

In *N.D.S. v. Academy for Science and Agriculture Charter School*, Dkt. No. 18-CV-0711 (PJS/HB), 2018 U.S. Dist. LEXIS 200987; 2018 WL 6201725 (11th

Cir. Nov. 28, 2018) (slip op.), the charter school was faced with parents who, having consented to a triennial evaluation more than two years prior, began noticing physical and emotional challenges in their daughter following the student's suffering a concussion. Instead of seeking a reevaluation based on the effects of the concussion, parents instead filed an objection to an IEP that was more than two years old.

According to that court, "[a] school cannot be required to pay for an IEE unless 'the parent disagrees with an evaluation obtained by the [school][.]' §300.502(b)(1)." *Id.* at 2. Informing a school that, subsequent to an evaluation, a child's condition has changed is not the same thing as disagreeing with the evaluation."

In addressing the parental obligation to express a disagreement with the district's evaluation, the court noted:

> This is reflected in the regulations themselves, which closely tie the IEE to the school's evaluation—not only by making disagreement with an evaluation the trigger for an IEE, but by providing that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees." § 300.502(b)(5). This is also reflected in the Supreme Court's description of the purpose of the IEE:
> [The] IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition. *Schaffer*, 546 U.S. at 60-61. ("The parental right to an IEE is not an end in itself; rather, it serves the purpose of furnishing parents with the independent

> expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation."). (slip op. at 5).

The court went on to note that the parents' reliance on a district evaluation more than two years old to trigger their right to an IEE would unmoor the IEE from its purpose. The court concluded that the IEE in this context would not counter the district's natural advantage in information and expertise; rather it would address a topic about which the school district was likely to know less that the student's parents. Moreover, according to the court, parents in that situation would not need an expert to match the expertise of the opposition because there was no opposition to match. *Id*. at 6. In the present matter, the basis for the parental request for an IEE at public expense was not a disagreement with an evaluation conducted by the district, as is required by the IDEA regulation. 34 C.F.R. § 300.502(b)(1) ("A parent has the right to an independent educational evaluation at public expense if the parent *disagrees with an evaluation obtained by the public agency*, subject to the conditions in paragraphs (b)(2) through (4) of this section.") (emphasis added).

In this case, this court should uphold the decision of the District Court.

B. A Parent's Right to an IEE at Public Expense is Limited to the Scope of the Underlying Evaluation.

The District Court's decision that a parent's right to an IEE at public expense is limited to the scope of the underlying evaluation is correct and should be upheld.

While the IDEA does not itself define the term "evaluation," its implementing regulations provide that an "[e]valuation means procedures used in accordance with [34 C.F.R.] §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 C.F.R. § 300.15. Pursuant to the IDEA, once a school district believes a child may have a disability, the district must conduct an "initial evaluation" in order "to determine if the child is a child with a disability." 20 U.S.C. § 1414(a)(1)(B). Because such an evaluation must assess all the areas of a child's suspected disability, 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), its scope is necessarily comprehensive. So is the "triennial" evaluation that school districts must conduct of a child previously identified as a child with a disability at least once every three years, 20 U.S.C. § 1414(a)(2), and "not more frequently than once a year unless the parent and the school district agree otherwise, 20 U.S.C. § 1414(a)(2)(b); 34 C.F.R. §300.303. In addition, as more fully discussed in the defendant-appellee's brief, school districts also conduct evaluations of a more limited scope and purpose, including FBAs. See Proof Brief of Defendant-Appellee, pages 32-35. FBAs are used to determine the causes of a student's behavior, which is impeding learning, in order to develop a behavioral intervention plan (BIP) that will decrease the disruptive behavior and/or prevent it from happening again. See Proof Brief of

Defendant-Appellee, page 12, footnote 7, (discussion of the definition and use of a FBA).

In holding that "there must necessarily be a connection between the evaluation with which the parents disagree and the independent evaluation they request," D.S., By and Through his Parents and Next Friends, M.S. and R.S. v. Trumbull Board of Educ., 357 F. Supp. 3d 166 (D. Conn. 2019), the court correctly determined that while all assessments conducted to inform the IEP development of a child are "evaluations," subject to a parent's right to an IEE, not all assessments are comprehensive evaluations which require the district to "evaluate a child in all areas of suspected disability," pursuant to 20 U.S.C. § 1414(b)(3)(B); 34 CFR 300.304(c)(4).

The plaintiff-appellant argues that the only evaluation recognized in the IDEA framework is a comprehensive evaluation and that no legal basis exists for the District Court's distinction between "comprehensive" and "limited" evaluations. The plaintiff-appellant also contends that, per 34 CFR §300.304, every assessment of a student is an "evaluation" through which the district must explore all areas of a student's suspected disability, thereby triggering a parent's right to request IEEs at public expense in any area of suspected disability regardless of the nature and purpose of the district's evaluation the parent contests. For the reasons discussed above, such an argument vitiates the collaborative framework of the IDEA.

II. PARENTS ARE ENTITLED TO ONLY ONE PUBLICLY-FUNDED IEE FOR EACH EVALUATION WITH WHICH THE PARENT DISAGREES.

The plaintiff-appellant argues that without the right to a comprehensive *reevaluation at public expense* any time a school district performs any type of assessment, parents will be unable to participate meaningfully in the development of their child's IEP, and will be without recourse or redress when they disagree with district evaluations. For the reasons discussed above, these arguments are not supported by the collaborative framework and procedural rights created by the IDEA and its regulations, and emphasized time and again by courts interpreting it.

Furthermore, it is clear from the language and history of the IDEA regulations that parents are entitled to only one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees." 34 C.F.R. § 300.502(b)(5). The Department of Education (Department) added C.F.R. § 300.502(b)(5) as part of the 2006 amendments to the IDEA regulations, stating: "[s]ection 300.502, regarding independent educational evaluations has been revised as follows: A new § 300.502(b)(5) has been added to make clear that a parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts and evaluation with which the parent disagrees." 71 Fed. Reg. No. 156 46540, p. 46544 (Aug. 14, 2006).

In the comments to the regulations regarding section 300.502, the Department notes that "one commenter… asked whether a public agency can place limits on the frequency of an IEE (e.g. a single IEE in an evaluation cycle or in a child's school career). 71 Fed. Reg. No. 156, p. 46889 (Aug. 14, 2006). The Department responded:

> [we] do not believe that the parent should be limited to one IEE at public expense in a child's school career…. Nevertheless, ***we do believe that it is important to clarify that a parent is not entitled to more than one IEE at public expense when a parent disagrees with a specific evaluation of reevaluation conducted or obtained by the public agency***…. This regulatory provision is consistent with the statutory right with an IEE at public expense, while recognizing that public agencies should not be required to bear the cost of more than one IEE when a parent disagrees with an evaluation conducted or obtained by a public agency." *Id*. at 46690 (emphasis added).

Despite the clear language of the regulation, the plaintiff-appellant claims the right to a total of seven publicly-funded independent evaluations based on their disagreement with the defendant-appellee's May 2017 FBA. For the reasons discussed above, such a claim is misguided.

While the plaintiff-appellant's parents did communicate disagreement with the FBA, the request for multiple IEEs was presented in response to the defendant-appellee's proposed plan for the triennial evaluation scheduled in October 2017. Even though the defendant-appellee did not agree to the IEEs, in direct response to concerns of the parents, it decided to revise the upcoming triennial evaluation to include all of the areas covered by the IEE request. Despite the fact that the triennial

evaluation would have included assessments in every area for which an IEE was requested, consent for such evaluations was withheld by the plaintiff-appellant's parents and further collaboration to determine what educational programming would best meet plaintiff-appellant's needs was declined. Instead, litigation was commenced seeking publicly-funded IEEs.

The IDEA, at its very core, is about providing an appropriate education to students with disabilities. It is incumbent on districts and parents to focus on proper assessment and on developing and implementing individualized programming that ensures the delivery of services in the best interest of the student. Somewhere in the process of this litigation, the meaning and intent of this iconic statute was lost.

The District Court's decision was correct on all questions of law and fact and should be upheld. Parents have the right to obtain an IEE at public expense, but only subject to the limitations clearly expressed in the IDEA and its regulations.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request and urge this court to uphold the decision of the District Court below, and for any such further relief which the court might deem appropriate.

Dated September 30, 2019
Wethersfield, Connecticut

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Rebecca E. Adams, hereby certify that in accordance with F.R.A.P. 31 and 32(a)(7)(b), and L.R. App. P.25.1, a copy of the following document was served by CMECF on the following counsel and/or parties in interest entitled to service hereon:

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