17-14824

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

L.J., by his mother and next friend, N.N.J. and N.N.J.,

Plaintiff-Consolidated Defendant-Appellant,

—v.—

SCHOOL BOARD OF BROWARD COUNTY, FLORIDA,

Defendant-Consolidated Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus certifies that the "Joint Certificate of Interested Persons and Corporate Disclosure Statement" previously filed by the appellant, L.J. by his mother and next friend, N.N.J., is correct to the best of their knowledge and belief, but the following additional persons and corporation needed to be added:

1. Council of Parent Attorneys and Advocates, Inc.
2. Almazan-Altobelli, Selene, counsel for Amicus
4. Saideman, Ellen, counsel for Amicus

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1
Council of Parent Attorneys and Advocates who is Amicus Curiae, makes the following disclosure:

1. Amicus is not a publicly held corporation or other publicly held entity;

2. Amicus has no parent corporations;

3. Amicus does not have 10% or more of stock owned by a corporation.

/s/ Ellen Saideman________
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TABLE OF CONTENTS

Certificate of Interested Persons and Corporate Disclosure Statement……………………...……………………….............................…....i
Table of Authorities..iii
Interests of the Amici Curiae……………………………...…………………1
Summary of the Argument...2
Argument……………………………………………………...………………3

I. Congress Passed the IDEA to Ensure an Appropriate Education for All Children with Disabilities..3
   A. *Endrew F.* Addressed the FAPE Standard for Education 5
   B. As DOE Has Recognized, *Endrew F.* Applies to Implementation of IEPs..9

II. School Districts Must Address Maladaptive Behaviors with an Appropriate FBA and Behavior Plan and, if a Student Does Not Make Expected Progress, Must Use Data to Improve the Behavior Plan...9
   A. The Requirements for an Appropriate FBA are Well-Settled...9
   B. IDEA Requires that BIPs Address Behavior Through Positive Behavior Support 11
   C. When Maladaptive Behavior Continues Despite Implementation of a BIP, IDEA Requires that the BIP Be Revised Based on the Data Obtained from Implementation..13

III. A School District Is Not Excused from Implementing an IEP Because A Student's Disability Causes A Student to Miss School....14

Conclusion..17

TABLE OF AUTHORITIES

Federal Cases

Dandong v. Pinnacle Performance Ltd., 966 F. Supp. 2d 374 (S.D.N.Y. 2013) .. 15

Danielle G. v. N.Y. City Dep't of Educ., No. 06-CV-2152 (CBA), 2008 U.S. Dist. LEXIS 60192 (E.D.N.Y. Aug. 7, 2008) 12

Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190 (D. Haw. 2001) 15

E.D. v. Enter. City Bd. of Educ., 273 F. Supp. 2d 1252 (M.D. Ala. 2003) 17

Endrew F. v. Douglas County Sch. Dist. RE-1, 137 S. Ct. 988 (2017) .... *passim*

Harris v. District of Columbia, 561 F. Supp. 2d 63 (D.D.C. 2008) 12

Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769 (8th Cir. 2001) 16

Lamoine Sch. Comm. v. Ms. Z., 353 F. Supp. 2d 18 (D. Me. 2005) 16

Lauren G. v. West Chester Area Sch. Dist., 966 F. Supp. 2d 375 (E.D. Pa. 2012).15

Lauren P. v. Wissahickon Sch. Dist., 310 F. App'x 552 (3d Cir. 2009) 13

Lauren P. v. Wissahickon Sch. Dist., 2007 U.S. Dist. LEXIS 44945 (E.D. Pa. June 20, 2007) 13

S.M. v. Hendry County Sch. Bd., U.S. Dist. LEXIS 165406 (M.D. Fla. July 27, 2017) 8

Timothy W. v. Rochester, Sch. Dist., 875 F.2d 954 (1st Cir. 1989) 14

Federal Statutes

20 U.S.C. § 1400(c)(1) 1

20 U.S.C. § 1400(d)(1)(A) 5

20 U.S.C. §§ 1401(29),(14) 6

20 U.S.C. § 1412(a)(1) 6

20 U.S.C. § 1412(2)(A) 5

20 U.S.C. § 1412(a)(3) 15

20 U.S.C. § 1414 (2006) 7

20 U.S.C. § 1414(d)(1)(A)(i)(I)-(III) 7

20 U.S.C. § 1414(d)(1)(A)(i)(IV) 7, 12

20 U.S.C. § 1414(d)(3)(B)(i) 10, 11

20 U.S.C. § 1414(d)(4)(A) 9

20 U.S.C. § 1415(i)(2)(A) 8
20 U.S.C. § 1415(k)(1)(D)(ii) 11
42 U.S.C. § 1410(29)(A) 15

Other

Andrea Cohen, *National Association of School Psychology Fact Sheet on Positive Behavioral Supports*, http://www.nasponline.org/resources/factsheets/pbs_fs.aspx. 10

Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. (1973-74).......... 3

F. Charles Mace, *The significance and future of functional analysis methodologies*. 27 J. Applied Behavior Analysis, (1994).......... 11

George Sugai, et al., *Applying Positive Behavior Support and Functional Behavioral Assessments in Schools* http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1031&context=gse_fac, (2000) 10, 11

Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess. (1975).......... 4

H.R. Rep. No. 332, 94th Cong., 1st Sess. 11-12 (1975).......... 4

John O. Cooper, Timothy E. Heron, & William L. Heward, *Applied Behavior Analysis* (2nd ed.) (2007).......... 11

S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975) 4,5

STATEMENT OF INTEREST OF THE AMICUS

Council of Parent Attorneys and Advocates (COPAA) is an independent, nationwide nonprofit organization of attorneys, advocates, and parents in forty-nine states and the District of Columbia who are routinely involved in special education due process hearings throughout the country. COPAA's primary goal is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). Children with disabilities are among the most vulnerable in our society, and COPAA is particularly concerned with assuring a free appropriate public education in the least restrictive environment, as the Individuals with Disabilities Education Act (IDEA or Act) requires.[1]

COPAA 's interest in this case stems from its deep commitment to all children with disabilities to obtain needed special education services. COPAA filed a brief *amicus curiae* in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). COPAA seeks to have the decision implemented fully and consistently nationwide.

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[1] Pursuant to Fed. R. App. P. 29(5), *Amicus* certifies that (1) counsel for amicus authored the brief in whole with comments from COPAA members; and (2) no other person contributed money that was intended to fund the preparation or submission of the brief. FRAP 29(5).

Further, COPAA is also deeply concerned about the legal standard for evaluating whether a school district has denied a student a free appropriate public education by failing to implement an IEP.

Both parties have consented to this filing.

Amicus adopts the Statement of Facts contained in Appellant's Brief at 4-16.

Amicus adopts the Statement of the Issues contained in Appellant's Brief at 1.

SUMMARY OF ARGUMENT

The Supreme Court has recently made clear that the IEPs of children with disabilities must be "appropriately ambitious" to enable them to make progress in in light of their unique abilities. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). The Court explained that children with disabilities are to be challenged to reach their potential progress just as their non-disabled peers are, regardless of the severity of their disabilities. The Supreme Court instead held that IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.* 137 S. Ct. at 1001.

In evaluating whether a school district has denied a student a free appropriate public education (FAPE) by failing to implement an IEP, *Endrew F.* teaches that the failure needs to be assessed by the likely impact on the students'

ability to “make progress appropriate in light of the child’s circumstances.” *Id.* Further, for students with maladaptive behaviors to continue for a significant period of time despite a behavioral implementation plan (BIP), a school district violates the IDEA when it fails to revisit the BIP and use data to revise the BIP to make it more likely to improve the behavior. Finally, a school district is not excused from its obligation to implement an IEP because a student’s disability causes school aversion and, as a result, the student is absent from school. It is the school district’s obligation to address the school aversion and, if the student will not come to school, provides services at home or in another alternative setting.

ARGUMENT

I. Congress Passed the IDEA to Ensure an Appropriate Education for All Children with Disabilities

In the 1970s, Congress held hearings investigating the quality of educational instruction provided to children with disabilities. These hearings established that public school districts throughout the county had wholly excluded millions of children with a multitude of disabilities or placed those children in programs where they received no educational benefit. *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare,* 93d Cong., 1st Sess. (1973-74). At that time, statistics showed that "only 55 percent of the school-aged handicapped children and 22 percent of the pre-school-aged handicapped children [were]

receiving special educational services." Senator Randolph, *Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 94th Cong., 1st Sess., 1 (1975). Parents and educators discussed the widespread failure of states to provide the extent of supportive services necessary to meet the needs of children with varying degrees and forms of disabilities. Statistics compiled for Congress by the Office of Education at that time revealed that children of all ages and with a range of disabilities were affected. For example, pupils excluded or receiving inappropriate education included 82% of "emotionally disturbed" children; 82% of "hard-of-hearing" children; 67% of "deaf-blind" and "other multi-handicapped" children; and 88% of those classified "learning disabled." S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975) reprinted in 1976 U.S. C.C.A.N., 1425, 1429-32; H.R. Rep. No. 332, 94th Cong., 1st Sess. 11-12 (1975).

In light of these gross disparities regarding the access to educational programming for students with disabilities, Congress enacted Public Law 94-142, the Education for All Handicapped Children Act in 1975, which, following various amendments, is now known as IDEA. IDEA requires that state and local public education agencies enact policies and procedures to ensure that all students with disabilities receive a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them

for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

In enacting these acts, Congress did not merely require access. Congress mandated that children with disabilities receive a free appropriate public education. While IDEA itself fails to provide a substantive standard giving content to the term "appropriate," the statute itself says it will provide a "full educational opportunity to all handicapped children." *Id.* § 1412(2)(A). This goal is repeated throughout the legislative history. The Senate Report says that the Act "guarantee[s] that handicapped children are provided equal educational opportunity." S. Rep. No.94-168, at. 9 (1975), reprinted in 1975 U.S. C.C.A.N., at 1433. Numerous drafters of the legislation echoed the same. *See* 121 Cong. Rec. 19482-83 (1975) (remarks of Sen. Randolph); *id.*, at 19504 (Sen. Humphrey); *id.*, at 19505 (Sen Beall); *id.*, at 23704 (Rep. Brademas); *id.*, at 25538 (Rep. Cornell); *id.*, at 25540 (Rep. Grassley); *id.*, at 37025 (Rep. Perkins); *id.*, at 37030 (Rep. Mink); *id.*, at 37412 (Sen. Taft); *id.*, at 37413 (Sen. Williams); *id.*, at 37418-19 (Sen. Cranston); *id.*, at 37419-20 (Sen. Beall). The legislative history, thus, directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children.

A. *Endrew F.* Addressed the FAPE Standard for Education

IDEA provides federal assistance to states that educate children with disabilities. *Endrew F.*, 137 S. Ct. 988, 991 (2017). To receive the funds, states must provide FAPE to all eligible children. *Id.* (citing 20 U.S.C. § 1412(a)(1)). "The instruction offered must be 'specially designed' to meet a child's 'unique needs' through an '[IEP].'" *Id. at* 999 (quoting 20 U.S.C. §§ 1401(29),(14)).

In *Endrew F.*, the Supreme Court rejected the Tenth Circuit's low standard for a free appropriate public education (FAPE); that standard allowed a school district to meet the FAPE requirement by providing "merely more than *de minimis*" educational benefit. The Supreme Court instead held that: "The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F..,* 137 S. Ct. at 1001. The Court held emphasized that the IEP must be "appropriately ambitious," and the objectives must be "challenging." *Id.* at 999-1000.

Further, the Supreme Court emphasized the importance of compliance with IDEA's procedures. The Supreme Court rejected the argument that such provisions governing the IEPs required components "impose only procedural requirements – a checklist of items the IEP must address – not a substantive standard enforceable in court." *Id.* at 1000. As the Supreme Court explained, the "procedures are there for a reason." They provide insight into what it means to meet the unique needs of a child with a disability. *Id.*

As the Supreme Court recognized, the IEP is the roadmap to the child's academic and functional advancement, "constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Id.* at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I) -(IV), (d)(3)(A)(i)-(iv)). The IEP must be drafted in compliance with a detailed set of procedures, which emphasize collaboration among parents and educators and careful consideration of the child's individual circumstances. *See* 20 U.S.C. § 1414.

Every IEP must include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be measured. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(III). The IEP also must describe the "special education and related services . . . that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

If the parents of the child are dissatisfied with the IEP, or with the manner in which the IEP is implemented, they are entitled to an impartial due process hearing to be conducted by the State or local educational agency. *Walker Cty. Sch. Dist. v.*

Bennett, 203 F.3d 1293, 1294 (11th Cir. 2000) (citing 20. U.S.C. § 1415(f)). "Any party aggrieved by the result of the administrative proceedings in the state system" may bring a civil action in a district court. 20 U.S.C. § 1415(i)(2)(A). The court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *S.M. v. Hendry Cty. Sch. Bd.*, 2017 U.S. Dist. LEXIS 165406, at *34-36 (citing 20 U.S.C. § 1415(i)(2)(C)).

On December 7, 2017, the U.S. Department of Education released a helpful resource for parents, advocates and attorneys alike in its Questions and Answers (Q&A) on *Endrew F. v. Douglas County School District RE-1*, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-endrewcase-12-07-2017.pdf (last viewed Feb. 15, 2018). As the Q&A acknowledged, the Court's clarification of a school's substantive obligation under IDEA, "reinforced the requirement that 'every child should have the chance to meet challenging objectives.'" (Q&A No. 3). The use of the word "reinforced" by the Department demonstrates that the substantive standard clarified by the Court in *Endrew F* is a standard that schools should have been providing all along to every child with a disability. The guidance also makes clear that placement decisions must be "individualized determinations about what constitutes appropriate instruction and

services for each child with a disability and the placement in which that instruction and those services can be provided to the child" and "[t]here is no "one-size-fits-all" approach to educating children with disabilities." (Q&A No. 17).

B. As DOE Has Recognized, *Endrew F.* Applies to Implementation of IEPs

The DOE guidance makes clear that the IEP Team is expected to take action during the academic year if the student does not make the progress that the IEP Team expected and not merely wait until a year has passed with no or minimal improvement. It states, "if a child is not making expected progress toward his or her annual goals, the IEP Team *must revise, as appropriate, the IEP to address the lack of progress."* (Q&A 15) (emphasis added). The DOE guidance cites to the statutory requirement that the IEP team "revises the IEP as appropriate to address (I) any lack of expected progress toward the annual goals and in the general educational curriculum where appropriate." 20 U.S.C. § 1414(d)(4)(A). Thus, when a student does not make progress in improving challenging behavior, including school avoidance, the IEP Team must address that lack of expected progress.

II. School Districts Must Address Maladaptive Behaviors with an Appropriate FBA and Behavior Plan and, if a Student Does Not Make Expected Progress, Must Use Data to Improve the Behavior Plan

A. The Requirements for an Appropriate FBA are Well-Settled

The most crucial part of devising Behavior Intervention Plans (BIPs) is the Functional Behavior Assessment (FBA), which reveals information about the

antecedents, consequences, and frequency of challenging behavior. FBAs also help to identify any co-occurring variables. Conducting proper FBAs doubles the success rate of an intervention. Andrea Cohen, *National Association of School Psychology Fact Sheet on Positive Behavioral Supports*, http://www.nasponline.org/resources/factsheets/pbs_fs.aspx.

A functional behavior analysis is a specialized process in which specific environmental factors are manipulated systematically to confirm the hypothesized functional relationship between the occurrence of the problem behavior and those environmental factors. A school district must conduct a FBA "for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities." *See also* 20 U.S.C. § 1414(d)(3)(B)(i).

The FBA is a unique evaluation because it looks beyond the student's behaviors and focuses on identifying significant, student-specific social, affective, cognitive, and/or environmental factors associated with the occurrence and non-occurrence of the specific behaviors. George Sugai, et al., *Applying Positive Behavior Support and Functional Behavioral Assessments in Schools* http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1031&context=gse_fac, 8-9 (2000) (last viewed Feb. 15, 2018). The FBA presents a broad perspective,

and better understanding, of the function or purpose behind student behavior i.e. why a student engages in the behavior.

Function based interventions are more likely to be effective than those interventions that are not based on an FBA, and "premature efforts to treat problem behavior before seeking an understanding of the purposes it serves for a person can be inefficient, ineffective, and even harmful." John O. Cooper, Timothy E. Heron, & William L. Heward, *Applied Behavior Analysis* (2nd ed.) (2007). Research demonstrates that positive behavior supports are effective in reducing problem behavior in one-half to two thirds of the cases, and success rates nearly double when intervention is based on a prior functional assessment. F. Charles Mace, *The significance and future of functional analysis methodologies*. 27 J. Applied Behavior Analysis, 385-92 (1994).

B. IDEA Requires that BIPs Address Behavior Through Positive Behavior Support

IDEA mandates the use of positive behavioral supports where a child's behavior impedes the child's learning. 20 U.S.C. § 1414(d)(3)(B)(i). The development of behavioral intervention services stem from a FBA. 20 U.S.C. § 1415(k)(1)(D)(ii). Based upon the results of the FBA, a school district creates a BIP, which is a plan designed to manage the interfering behaviors. The BIP must include a "baseline measure of the problem behavior; ... intervention strategies; ... [and] a schedule to measure the effectiveness of the interventions ...." Sugai, *supra*.

The BIP develops strategies to address these behaviors based upon the FBAs analysis as to why the student exhibits the behaviors. Thus, the creation of the BIP is dependent upon the FBA, much as the creation of the IEP is dependent upon evaluations and observations.

Accordingly, the FBA and BIP assist parents and school officials at IEP meetings to select interventions and strategies that directly address the problem behavior. *Harris v. D.C.*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). Because the FBA provides information "central to formulating an IEP tailored to the needs of individual disabled children," "it plays an integral role in the development of an IEP" and has "a fundamental connection to the quality of a disabled child's education." *Id.*

The BIP and FBA must be incorporated into the IEP, which in turn must be provided to the child's parents in advance of the commencement of the school year. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV). An IEP's failure to provide an FBA and BIP to address behaviors impeding learning may itself constitute the denial of a FAPE. *See Danielle G. v. N.Y. City Dep't of Educ.,* No. 06-cv-2145(CBA), 2008 U.S. Dist. LEXIS 60192 (E.D.N.Y. Aug. 7, 2008), at *29-31 (reversing findings of IHO and SRO and holding that IEP's failure to include an FBA and BIP, among other deficiencies, deprived student of a FAPE); *Lauren P. v. Wissahickon Sch. Dist.*, No. 05-5196, 2007 U.S. Dist. LEXIS 44945, at *28-29 (E.D. Pa. June 20, 2007) (ordering

reimbursement of tuition where failure to create a BIP constituted denial of a FAPE), *aff'd in part, rev'd in part on other grounds,* 310 F. App'x 552 (3d Cir. 2009). This principle is supported by the official commentary to the federal regulations, which expressly states, "a failure to ... consider and address [behaviors impeding learning] in developing and implementing the child's IEP would constitute a denial of [a] FAPE to the child." 34 C.F.R. Part 300, Appendix A, Notice of Interpretation, Section IV, Question 38.

C. When Maladaptive Behavior Continues Despite Implementation of a BIP, IDEA Requires that the BIP Be Revised Based on the Data Obtained from Implementation

But having a BIP and collecting on behavior is insufficient if the maladaptive behavior continues. Thus, "If minimal progress occurs, the plan and possibly the assessment need to be reevaluated."[2] The student's Behavior Support Team is responsible for evaluating the BIP on a regular basis because, "[w]ithout regular evaluation there are no objective means by which to determine if an intervention has been successful or if the efforts of the team have been

[2] Laura A. Riffel, Writing Behavior Intervention Plans (BIP) based on Functional Behavior Assessments (FBA): Making Data Based Decisions to Change Behavior 14 (2007), *www.pbis.org/common/cms/files/pbisresources/fba2bip4chicagoriffel.doc* (last viewed Feb. 15, 2018).

worthwhile."[3] Thus, "[r]egular evaluation enables the team to make impartial, data-based decisions."[4]

Here, the BIP did not address the school refusal behavior. In light of the serious and prolonged school refusal behavior and its devastating impact on the student's ability to benefit from education, the BIP should have forthrightly addressed the school aversion. Further, if the school aversion continues despite the BIP created following an FBA, the District was required to go back to the drawing board and review the available data to figure out how the BIP may be changed so that it has a greater likelihood of improving the maladaptive behavior.

III. A School District Is Not Excused from Implementing an IEP Because A Student's Disability Causes A Student to Miss School

Congress recognized that students may be unable to attend school because of their disabilities, and nonetheless required school districts to provide education for children with disabilities,[5] not just those able to attend their local neighborhood schools. For that reason, Congress defined special education as including instruction conducted "in the home, in hospitals and institutions, and in other

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[3] *Id.* at 17.
[4] *Id.*
[5] The IDEA's first title was "The Education for All Handicapped Children Act." *See Timothy W. v. Rochester, Sch. Dist.,* 875 F.2d 954, 962-64 (1st Cir. 1989) ("the primary purpose of the Act was to remedy the then current state of affairs and provide a public education for *all* handicapped children") (emphasis in original).

settings." 42 U.S.C. § 1410(29)(A). Thus, a school district's obligation to provide special education and related services is not limited to services delivered at school.

School aversion, also known as school refusal or school avoidance, is a very serious problem for some children, causing them to miss months and even years of instruction. For some students, school districts first become aware that they have disabilities when they stop attending school or begin attending only sporadically. Courts, therefore, find that school districts that do not promptly evaluated such students to determine whether their non-attendance is caused by disabilities that interfere with their ability to learn have violated their "Child Find" obligation to identify, locate and evaluate all children with disabilities in the district pursuant to 20 U.S.C. § 1412(a)(3). *See, e.g., Lauren G. v. West Chester Area Sch. Dist.*, 966 F. Supp. 2d 375, 392-93 (E.D. Pa. 2012); *Dep't of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1197 (D. Hawaii 2001).

Students like L.D., who have already been identified as having disabilities qualifying for IDEA services, may also develop school aversion, as happened here. In such cases, the school district is obligated to address the school aversion in the students' IEPs in a manner "reasonably calculated to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. School aversion may stem from behavioral problems, and, in such cases, a Functional Behavioral

Analysis can assess the problem and help with the development of a Behavioral Improvement Plan (BIP) with the goal of returning the student to school.

School aversion can be complex. Sometimes students with learning disabilities may be concerned about their ability to participate in classes, and the more school they miss, the more reluctant they are to return to school. Tutoring to ensure that students can keep up with their peers may be indicated during the period of school aversion.

If after a period of time, a BIP has not succeeded in getting the child to return to school, the school district needs to reconvene the Team, review the data, and consider alternative approaches. The school district also needs to consider alternative means of providing instruction. In a small number of cases, residential educational placement may be appropriate because the student requires therapeutic treatment in a residential setting to be able to benefit from education. *See, e.g., Indep. Sch. Dist. No. 284 v. A.C.,* 258 F.3d 769, 779 (8th Cir. 2001); *Lamoine Sch. Comm. v. Ms.* Z., 353 F. Supp. 2d 18, 41 (D. Maine 2005).

In other cases, providing tutoring or instruction at home while the child refuses to attend school may be indicated. Thus, the U.S. District Court for the Middle District of Alabama found a substantive violation of IDEA because of the "IEP's failure to provide for educational services should [the student] fail to return to school on a regular basis." The court went on to find, "An IEP which omits any

discussion of how [the student] is to be educated if she cannot return to school on a full-time basis is not reasonably calculated to provide some educational benefit because there is no discussion of how she would be provided any educational and related services." *E.D. v. Enter. City Bd. of Educ.*, 273 F. Supp. 2d 1252, 1272 (M.D. Ala. 2003).

In this case, the district court erred in giving the school district a pass for its failure to provide the student with any education whatsoever for the majority of a school year, attributing the lack of education to the student's school aversion. Because it was undisputed that the student's non-attendance was due to his disability, the school district was required to both address the school aversion and also to ensure that the student had an opportunity to benefit from education even when he did not attend school. Thus, even if the school district had consistently implemented the BIP, frequently reviewed the data generated by the BIP and adjusted the BIP accordingly so it would be more likely to enable the student to return to school, it still fell short of its responsibility to educate the student by not taking steps to enable him to benefit from education and related services during the very prolonged period when he was not attending school. *See id.*

CONCLUSION

The evaluation and assessment procedures in IDEA are crucial for delivery of appropriate services, as well as meaningful parental participation in the IEP process.

Therefore, the violations that occurred in this case directly implicate the statute's primary purpose, which is to ensure that school districts accepting federal funds meet all the educational needs of students with disabilities. For this reason, Amicus respectfully submits that the Court should vacate the judgment of the district court and enter judgment in favor of Appellants.

Dated February 16, 2018

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 3960 words.

Dated: February 16, 2018

/s/ Ellen Saideman________
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CERTIFICATE OF SERVICE

I certify that on February 16, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below.

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