17-56328, 17-56418, 18-55205

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAY F.; SHARI L.; A. F., a minor,
by and through his guardian ad litem, Shari L.,

Plaintiffs-Appellees,

—v.—

WILLIAM S. HART UNION HIGH SCHOOL DISTRICT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CENTRAL CALIFORNIA, LOS ANGELES

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. AND THE CALIFORNIA ASSOCIATION FOR PARENT-CHILD ADVOCACY IN SUPPORT OF PLAINTIFF-APPELLEE JAY F.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates

California Association for Parent-Child Advocacy

1. No amicus is a publicly held corporation or other publicly held entity;

2. No amicus has parent corporations; and

3. No amicus has 10% or more of stock owned by a corporation.

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STATEMENT OF INTEREST

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. COPAA believes that effective educational programs for children with disabilities can be only be developed and implemented with collaboration between parents and educators as equal parties.

COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy. COPAA does not directly represent students but provides resources, training, and information to students, parents, advocates, and attorneys to assist them in obtaining the free appropriate public education (FAPE) to which students with disabilities are entitled under the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400 *et seq*.[1]

COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their

[1] "Improving educational results for children with disabilities is an essential element of [the U.S.] 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).

parents, and advocates in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. (ADA).

The California Association for Parent-Child Advocacy (CAPCA) is an all-volunteer organization engaging in legislative and policy advocacy on matters of concern to students with disabilities in California and their families. CAPCA was founded in 2003 when parents and advocates came together to resist proposals in the California legislature to drastically shorten the statute of limitations in special education cases and to prevent parents from prevailing in due process cases unless they could show that their school district was not capable of, rather than simply not planning to, meet their child's needs. CAPCA's professional and lay members participate extensively in the mediation and informal dispute resolution processes through which the vast majority of special education disputes are resolved in California

and in due process proceedings. Members include parents, students, nonattorney advocates, and lawyers.

CAPCA members have been alarmed in recent years to see more and more overreaching by the growing corps of lawyers specializing in representing school districts in special education matters. District firms have become increasingly aggressive in initiating due process proceedings, and in taking farfetched legal positions. Hearing officers regularly make findings based on documents and lay witnesses. Experts rarely attend IEP meetings, and at hearings, it is common for there to be areas which one side's experts address and the other does not. At no point has there been a rule in due process that if a parent presents expert evidence on a point and the district fails to provide contrary opinions from a qualified expert, the family automatically wins. Hearing officers regularly analyze complex records, including contemporaneous documents that are often more revealing than post hoc testimony, and often reach conclusions that differ from those of all opinion witnesses. Hearing officers and courts are not limited to compensatory education awards based on past failures to provide a free appropriate public education; they routinely address ongoing needs as

well. Moreover, the district court routinely resolved an educational issue before it—whether in light of the student's needs, his IEP needed to include dialectical behavioral therapy. As is common, the status of the case had changed by the time the district court rendered its opinion, and it ordered a remedy calculated to improve the student's prospects for success and reduce the likelihood of further conflict. The decisions in this case were well-grounded and deserve deference. Incentivizing school districts to contest administrative findings on weak grounds such as those district counsel raise here would raise costs for all parties, and delay needed educational services.

Amici[2] bring to the Court the unique perspective of parents, advocates, and attorneys for students with disabilities. Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure

[2] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amicus states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than Amicus and its members.

the FAPE guaranteed under the IDEA and other educational laws and policies. Indeed, the core of the IDEA is its goal that "all children with disabilities have available to them 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).

Appellees, Jay F., have given consent for the filing of this amici brief; undersigned counsel attempted on October 11, 2018 and October 16, 2018 to obtain consent from counsel for William S. Hart Union School District; on October 17, 2018 counsel for William S. Hart initially responded he was unable to respond until later in the week (after the brief would be filed); subsequently on the evening of October 17, 2018 counsel responded that he was unable to consent without further information. The Statement of Interest, as well as information on Circuit Advisory Committee Note Rule 29-3, was provided to counsel for William S. Hart Union School District early on October 18, 2018. At the time of this filing there was no further communication from counsel.

SUMMARY OF ARGUMENT

The district court did not err in holding that the verbal threats A.F. made in January 2015 were a manifestation of his disabilities, nor did it err in ordering William S. Hart Union School District to provide A.F. dialectical behavior therapy. Hart's arguments attacking the rulings defy Congressional intent and contravene IDEA precedent. Worse, they marginalize children with emotional disturbance, undermining IDEA protections that are critical to them achieving successful educational outcomes.

Hart asks the Court to reverse the district court's manifestation holding because A.F.'s parents did not offer expert testimony at his manifestation determination. According to Hart, if a parent does not bring an expert to a manifestation determination to rebut school staff, a court reviewing the determination must defer to the staff and sustain their conclusion that the child's actions were unrelated to his disabilities.

But nothing in the IDEA establishes that a parent needs an expert to rebut school staff at manifestation determinations. Indeed, such a holding would be at odds with references in Supreme Court

opinions regarding a family's burden of proof and right to expert fees under the IDEA. Instead, parents are justified in and authorized under state and local law to rely on other evidence such as the student's educational records and their own insights into their child. If parents were required to bring an expert to a manifestation determination to rebut school staff, the IDEA's protections against inappropriate disciplinary removals would be thwarted. Parents who cannot afford (or find) an expert would be unable to protect their child from a flawed removal decision. That result would be devastating for children with emotional disturbance such as A.F. for whom disciplinary removals can, and all too frequently do, derail their education.

Hart also attacks the district court's factual finding that A.F.'s verbal threats were related to his disabilities. But research supports the court's conclusion (based on the underlying record) that emotional disturbance and Attention Deficit Hyperactivity Disorder (ADHD) can manifest in problem behaviors like verbal threats of the sort made by A.F., and Hart has provided no evidence or research that would show that the court's findings were clear error.

Lastly, Hart argues that the district court erred in ordering dialectical behavior therapy because (1) the court found no past denial of FAPE and (2) dialectical behavior therapy is not an appropriate related service under the IDEA. Both arguments are troubling. First, even if a court does not find a past FAPE denial, the IDEA afford courts significant discretion when awarding relief, and the district court was well within its discretion to award prospective educational services that were necessary for A.F. to receive a FAPE. To hold otherwise would stifle district courts, and would limit their ability to resolve IDEA disputes.[3] Second, dialectical behavior therapy is an appropriate related service because A.F. requires the therapy to benefit from special education. Children with emotional disturbance have the same right to related services as other children with disabilities: if they need a service to benefit from school, they are entitled to it. Denying them services like dialectical behavior therapy would deprive them of supports that they need to become self-sufficient, independent adults.

[3] Further, Hart's suggestion that the record is devoid of a denial-of-FAPE finding is inaccurate. The Administrative Law Judge found that Hart denied A.F. FAPE by failing to timely evaluate him and by providing him an inappropriate evaluation. Those findings, too, support the district court's decision to order dialectical behavior therapy.

ARGUMENT

I. Manifestation determinations are an important bulwark for children with emotional disturbance.

For all students, particularly those with disabilities, continuity of education and instructional time are critical to making meaningful educational progress. However, a majority of our nation's schools rely on removal and a punishment model for discipline.

Removals harm students with disabilities, especially those who present with negative behaviors. Removals can derail their education both by disrupting educational progress and causing them to disengage from school. L. Kate Mitchell, *"We Can't Tolerate that Behavior in this School!": The Consequences of Excluding Children with Behavioral Health Conditions and the Limits of the Law*, 41 N.Y.U. Rev. L. & Soc. Change 407, 423 (2017). And the negative impact of removals extends beyond the classroom, since "[c]hildren who are suspended from school are more likely to academically underperform, drop out, and become involved in the juvenile justice system." *Id.* at 424. These adverse effects are even more prevalent among children with emotional disturbance because time away from school often exacerbates their social, emotional, and behavioral challenges. *See id.* at 423, 425.

Despite this data, children with emotional disturbance are nevertheless more likely to be suspended or expelled than other children.[4] Michael Gregory, *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 Fordham Urb. L.J. 403, 407 (2013). Indeed, "[t]hree quarters of students with emotional disturbance have been suspended or expelled at least once by the time they reach high school." *Id.* Burdened by disciplinary removals, these students suffer abysmal outcomes and roughly "forty-eight percent of [them] drop out between ninth and twelfth grades compared to thirty percent of all students with disabilities and twenty-four percent of all high school students." Mitchell, 41 N.Y.U. Rev. L. & Soc. Change at 426. Further, "fifty-eight percent of youth with . . . emotional disturbance are arrested within five years of leaving school, as opposed to thirty percent of all students with disabilities." Kevin Golembiewski, *Disparate Treatment*

[4] Although children with "emotional disturbance make up less than 5% of all special education students, they account for 35% of special education students who are subjected to disciplinary action." Left Out, Pushed Out, Placed Out and Worse: How Children with Serious Mental Health Problems Are Treated in our Schools—And How to Fix It, Bazelon Ctr. for Mental Health Law 2 (2011).

and Lost Opportunity: Courts' Approach to Students with Mental Health Disabilities Under the IDEA, 88 Temp. L. Rev. 473, 484 (2016).

However, Congress has addressed these harsh statistics and taken action to ensure that students are not suffering additional educational barriers resulting from their disabilities. Congress established that, if a child violates school rules in a manner that is related to her disability, rather than shunning her through a disciplinary removal, her school district must provide supports to address the underlying disability-related behaviors. *See* 20 U.S.C. § 1415(k)(E)(i); 34 C.F.R. § 300.530(e), (f).

This right to remain in school is secured through manifestation determinations—a procedure in which a child's Individualized Education Program (IEP) team determines whether the conduct in question was a manifestation of the student's disabilities at a "manifestation determination meeting." 20 U.S.C. § 1415(k)(E)(i). If there is a link between a child's disability and his behavior, the IEP team must act to address the behavior through the provision of programing and services. Given that disciplinary removals are a substantial barrier to successful educational outcomes, the

manifestation determination is an important bulwark for children, and remains a critical protection to combatting poor outcomes for students with emotional disturbances like A.F. If the procedures for manifestation determination are properly followed, students whose disabilities cause negative behaviors will not be shown the exit door, but rather will receive the supports that they need to improve their behaviors. 34 C.F.R. § 300.530(f).

II. A parent does not need to bring an expert to a manifestation determination to protect her child's rights.

Although Hart has attempted to prevent any inquiry by this Court into the appropriateness of the January 2015 manifestation determination meeting and its conclusions, underlying Hart's position is a troublesome position regarding a parent's ability to challenge the findings of a manifestation determination.

According to Hart, if a parent does not bring an expert to a manifestation determination to rebut school staff, a court reviewing the determination must defer to the staff and sustain their conclusion that the child's actions were not a manifestation of his disabilities. The district court properly rejected this argument. A parent does not need an expert to rebut school staff—she can rely on her child's educational

records, as well as her own input about her child's disabilities and behavior. A holding to the contrary would defy Congressional intent. Congress intended IDEA procedures like manifestation determinations to be cooperative and parent-friendly, not high-stakes showdowns between experts. *See Schaffer v. Weast*, 546 U.S. 49, 53 (2005) ("The core of the [IDEA] is the cooperative process that it establishes between parents and schools."); *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016) ("[T]he identification and assessment of children who have disabilities should be a cooperative and consultative process." (internal quotation marks omitted)).

A. Parents can rely on their child's educational records to rebut school staff.

The argument that a parent cannot successfully challenge the findings of a manifestation determination IEP team without engaging professional experts to support their positions is unsupported. On the contrary, it is well established and assumed that the manifestation determination team will consider the child's educational records as important evidence at a manifestation determination meeting. In fact, the IDEA directs IEP teams to focus on educational records, stating

that teams must "review all relevant information in [a] student's file . . . to determine" whether his disabilities caused his behavior. 20 U.S.C. § 1415(k)(E)(i); *see also* 34 C.F.R. § 300.530(e). IEP teams must consider, among other things, a child's IEP, school evaluations, disciplinary records, and independent educational evaluations. *See A.W. v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 685 (4th Cir. 2004) (relying on a child's educational evaluations and IEP documents to determine whether his behavior was a manifestation of his disabilities). These records explain the nature of a child's disabilities and how his disabilities affect him, thus providing important insight into the relationship between his disabilities and his behavior. *See* 34 C.F.R. § 300.304(b)(1) (stating that educational evaluations "gather relevant functional, developmental, and academic information about the child" that assists in understanding his disabilities).

Parents therefore need not arm themselves with an expert at a manifestation determination; they can rely on their child's educational records in advocating for him. If school staff opine that the child's behavior was not a manifestation of his disabilities but the child's records show otherwise, the parents do not need an expert to rebut the

staff. The records are sufficient. *See L.H. v. Hamilton Cty. Dep't of Educ.*, ___ F.3d ___, 2018 U.S. App. LEXIS 23070, at *26–27 (6th Cir. Aug. 20, 2018) (concluding that courts need not defer to school staff opinions in the face of contrary evidence).

This conclusion is compelled not only by the IDEA's focus on educational records but also by basic principles of evidence. It is well-established that record evidence can rebut and defeat expert or lay opinions. *See, e.g.*, *Miller v. Pezzani*, 35 F.3d 1407, 1426 (9th Cir. 1994) ("[W]here the evidence is as clear as that in this record, the court is not required to defer to the contrary opinion of plaintiffs' expert." (internal quotation marks omitted)); *Morello v. AMCO Ins. Co.*, 650 F. App'x 522, 523 (9th Cir. 2016) (affirming grant of summary judgment after concluding that the record rebutted the nonmovant's expert reports). Hart's argument that parents are wrong to rely on educational records instead of retaining private experts is hatched from no law or policy, and this Court should disabuse school districts of the notion that parents, relying on the processes Congress intended, cannot hope to

challenge findings that they disagree with absent the help of outside experts.[5]

B. Parents can also rely on their own insights about their children.

Educational records are not the only non-expert evidence that parents can use to rebut school staff opinions. Congress specifically articulated that parent opinion and input is critical in evaluating a child with disabilities' behavior in the discipline context. *See* 20 U.S.C. § 1415(k)(E)(i) (stating that IEP teams must consider parent input at manifestation determinations). Congress did so because it has long recognized, and research has confirmed, that parents have relevant and important information about their child's needs.

In drafting the IDEA, "Congress repeatedly emphasized . . . the importance and indeed the necessity of parental participation." *Honig v. Doe*, 484 U.S. 305, 311 (1988). The IDEA's "Findings and Purposes"

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[5] Because parents are not entitled to reimbursement of expert fees, *Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), Hart's position would up-end the entire system since parents would only have hope of challenging a school's opinions if they could afford to hire "professional" experts to counter school staff's opinions. This position is particularly troublesome given the IDEA's mandate that parents are equal participants in the IEP process, and that the IEP process is supposed to be "free" to parents.

section, for example, concludes that parent input is important to providing children an appropriate education. It states, "the education of children with disabilities [is] made more effective by . . . strengthening the role and responsibility of parents and ensuring that [parents] have meaningful opportunities to participate in the education of their children." 20 U.S.C. § 1400(c)(5)(B). Also, the IDEA "establishes various procedural safeguards that guarantee parents . . . an opportunity for meaningful input into all decisions affecting their child's education." *Honig*, 484 U.S. at 311.

Research confirms that parents possess relevant and important information about their child's educational needs. Studies show that parents' insights help teachers "better meet the needs of their students" and that "[i]nformation from parents can help teachers plan activities and set appropriate goal for students." Michelle LaRocque et al., *Parental Involvement: The Missing Link in School Achievement*, 55 Preventing School Failure 115, 117 (2011). This is unsurprising. It has long been recognized that "[p]arents usually know their children's needs, desires, strengths, weaknesses, personality, and history in nuanced ways." *See* Yael Zakai Cannon, *Current Issues in Special*

Education Advocacy: Who's the Boss?: The Need for Thoughtful Identification of Client[s] in Special Education Cases, 20 Am. U.J. Gender Soc. Pol'y & L. 1, 17 (2011).

As the Sixth Circuit noted in *L.H.*, "parents spend more time with the[ir] [children] and know the[m] better than any teacher." 2018 U.S. App. LEXIS 23070, at *27; *see also Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038, 1044 (9th Cir. 2013) ("Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know."). Knowing their child's disabilities as well as the behaviors that their child manifests at home, parents have significant knowledge about the extent to which their child's behaviors are attributable to his disabilities.

Hart's efforts to require parents to bring an expert to a manifestation determination meeting must fail.

C. Requiring parents to retain an expert for a manifestation determination would defy Congressional intent.

A holding embracing Hart's position that parents need an expert to rebut school staff would impose a de facto requirement on parents to

retain an expert for manifestation determinations. Parents would be able to protect their children from an inappropriate disciplinary removal only if they brought an expert to a manifestation determination. This would place an onerous burden on parents and defy Congressional intent.

Congress intended IDEA procedures to be cooperative interactions between parents and schools, not high-stakes showdowns between paid experts and school staff. *Schaffer*, 546 U.S. at 53 ("The core of the [IDEA] is the cooperative process that it establishes between parents and schools."); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 892 (9th Cir. 2011) (noting that the IDEA aims for "quick and efficient resolution of disputes"). But manifestation determinations would become costly and contentious proceedings if parents were required to arm themselves with an expert to rebut school staff's opinions, particularly at such an informal stage in the IEP process.

Further, Hart's expert requirement would thwart Congressional intent by curtailing the rights of low-income, and even many middle-class, parents. Congress designed the IDEA to ensure that all parents, regardless of their financial means, are able to advocate for their

children. *See* 130 Cong. Rec. S9079 (daily ed. July 24, 1984) (Senator Wicker noting that Congress sought to avoid "the economic resources of parents becom[ing] crucial to the protection of their children's rights"); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007) (Congress did not "intend[] that only some parents would be able to enforce [the IDEA's] mandate[s]."). But if parents were required to retain experts for manifestation determinations, a parent of limited means would be unable to enforce her child's IDEA rights. Experts are expensive, and parents cannot secure one on a contingency basis because the IDEA does not allow prevailing parents to obtain reimbursement for expert fees. *See Arlington*, 548 U.S. at 304.

This chilling of low-income parents' rights would be particularly troubling because one-quarter of students with IEPs have families with incomes below the poverty line and two-thirds have family with incomes of $50,000 or less. Elisa Hyman et al., *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L. 107, 112–13 (2011); *see also* Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457, 483–84 (2007).

But low-income parents would not be the only parents prejudiced by Hart's expert requirement. Even parents with financial means would have difficulty retaining an expert in time to participate in a manifestation determination meeting. The IDEA requires a school district to hold a manifestation determination within ten days of deciding to remove a child. 34 C.F.R. § 300.530(e). Based on Amici's experiences, locating and retaining an educational expert in just a few days is often impossible for parents. The scheme Hart asks this Court to uphold would make it virtually impossible for parents to prevail in a manifestation determination without support from district staff, and would violate key IDEA tenets.

III. Verbal threats can be a manifestation of emotional disturbance and ADHD.

Ultimately at issue is whether A.F.'s verbal threats against his classmates were related to either his emotional disturbance or ADHD. The district court had ample evidence that it was and did not commit clear error in reversing the ALJ's findings in its *de novo* review.

A. Children with emotional disturbance have social and emotional disabilities that can lead to problem behaviors.

Emotional disturbance is the IDEA "category of impairment under which students with mental health disabilities are typically classified." Golembiewski, 88 Temp. L. Rev. at 483. The IDEA defines "emotional disturbance" as a condition "exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance": (1) "an inability to learn that cannot be explained by intellectual, sensory, or health factors"; (2) "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers"; (3) "inappropriate types of behavior or feelings under normal circumstances"; (4) "[a] general pervasive mood of unhappiness or depression"; or (5) "[a] tendency to develop physical symptoms or fears associated with personal or school problems." 34 C.F.R. § 300.8(c)(4)(i).

Emotional disturbance can manifest in disruptive behaviors, including verbal threats. *See* Jeffrey A. Miller et al., *Using Multimodal Functional Behavioral Assessment to Inform Treatment Selection for Children with Either Emotional Disturbance or Social Maladjustment*, 41 Psychol. in the Sch. 867, 872 (2004) (stating that children with emotional disturbance "often have difficulties in school that lead to both

internalizing and externalizing behaviors"). Many children with emotional disturbance, for example, "have psychiatric disabilities [which] are likely to manifest as behavioral issues." David Weissbrodt et al., *Applying International Human Rights Standards to the Restraint and Seclusion of Students with Disabilities*, 30 Law & Ineq. 287, 291 (2012). And studies show that verbal threats are a common problem behavior among children emotional disturbance. *See* Sebastian G. Kaplan and Dewey G. Cornell, *Threats of Violence by Students in Special Education*, 31 Behavioral Disorders 107, 107 (2005).

B. Children with ADHD have neurological deficits that can cause impulsivity and problem behaviors.

ADHD is a condition that stems from neurological deficits. Rashmi Goel, *Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender*, 27 Law & Ineq. 1, 14–15 (2009). "Neurological studies suggest that a shortage of dopamine and norepinephrine in the brain leads to ADHD symptoms." *Id.* "Dopamine and norepinephrine are complementary neurological chemicals, each responsible for attention, cognitive processing, and a feeling of well-being." *Id.* Because of their shortages of these chemicals, "[c]hildren with ADHD have fundamental deficits in behavioral inhibition, which

result in . . . poor verbal and nonverbal working memory[;] difficulties regulating their affect, motivation and arousal[;] and poor goal-directed analytic and synthetic problem-solving abilities." Gerard A. Gioia, Peter K. Isquith, *New Perspectives on Educating Children with ADHD: Contributions of the Executive Functions*, 5 J. Health Care L. & Pol'y 124, 141 (2002).

Research shows that such behavior-regulation deficits can lead to "conduct problems and oppositional defiant behaviors." Dustin A. Pardini and Paula J. Fite, *Symptoms of Conduct Disorder, Oppositional Defiant Disorder, Attention-Deficit/Hyperactivity Disorder, and Callous Unemotional Traits as Unique Predictors of Psychosocial Maladjustment in Boys: Advancing an Evidence Base for DSM-V*, 49 J. Am. Acad. Child Adolescent Psych. 1134, 1135, 1138 (2010). Children with ADHD "are much more likely to be involved in delinquent behavior," and many exhibit "reckless behavior at school." Goel, 27 Law & Ineq. at 18.

IV. Even if a court does not find a past FAPE denial, it can award educational services that a child needs to receive FAPE.

Hart lastly argues that the district court exceeded its authority and abused its discretion in ordering dialectical behavior therapy[6] because the award of the therapy in response to A.F.'s clear behavioral needs was "[1] illogical, [2] implausible,[and] [3] without support in inferences that may be drawn from the facts in the record." Hart is wrong: first, the district court was well within its discretion to award an appropriate remedy (even prospectively) if such remedy was necessary for A.F. to receive a FAPE, and second, there is ample evidence in the record that A.F. requires dialectical behavior therapy.

A. Like all children with disabilities, children with emotional disturbance are entitled to related services that are individualized to their needs.

The IDEA "confers broad discretion" on courts when awarding relief to a child, and ordering services necessary to secure FAPE is an appropriate use of that discretion, *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985), and the district did not need to find a past denial of FAPE to award A.F. prospective educational services that are necessary to secure him FAPE.

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[6] Dialectical behavior therapy is a cognitive behavior intervention developed by Marsha Linehan, Ph.D., ABPP. It is a type of mental health service. *See* National Registry of Evidence-based Programs and Practices, https://www.samhsa.gov/nrepp.

Under the IDEA, a court can "grant such relief as [it] determines is appropriate" as long as its determination is based "on the preponderance of the evidence." 20 U.S.C. § 1415(i)(2)(C)(iii). Any relief that is "appropriate in light of the purpose of the [IDEA]"—to provide FAPE to children with disabilities—is permissible. *See Burlington*, 471 U.S. at 369. Therefore, if evidence shows that a child needs certain educational services to receive FAPE moving forward, a court may award the services. No finding of a past FAPE denial is necessary. The award would be based on the evidence, and it would be "appropriate in light of the purpose of the [IDEA]." *See id.*; 20 U.S.C. § 1415(i)(2)(C)(iii).

Indeed, awarding prospective educational services is consistent with Congress's goal of prompt dispute resolution. Recognizing that even brief denials of FAPE can have significant consequences, Congress designed the IDEA "to promote the speedy resolution of disputes." *See Rena C. v. Colonial Sch. Dist.*, 890 F.3d 404, 413 (3d Cir. 2018). An award of prospective educational services not only secures FAPE but also prevents educational disputes from lingering.

Each child with disabilities is entitled to related services under the IDEA. Related services are "developmental, corrective, and other

supportive services . . . as may be required to assist [the child] to benefit from special education" and participate in school. 20 U.S.C. § 1401(26)(A). They include, among other things, "speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, . . . social work services, school nurse services . . . , counseling services, . . . orientation and mobility services, and medical services." *Id.*

Like all IDEA services, related services must be individualized to a child's unique needs. *See Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) ("A focus on the particular child is at the core of the IDEA. The instruction offered must be '*specially* designed' to meet a child's '*unique* needs' . . . ." (emphases in original)). If, for example, a child has a rare speech disorder and as a result requires a unique form of speech and language therapy to participate in school, the child is entitled to the therapy. And if a child has a serious emotional disability and therefore requires frequent one-on-one psychological therapy to participate in school, the child is entitled to the therapy.

B. Dialectical behavior therapy addresses problem behaviors of the type A.F. presents with and therefore is an appropriate service for him.

Here, the district court ordered Hart to provide A.F. dialectical behavior therapy as a related service, thus concluding that A.F. requires the therapy to benefit from his education. Dialectical behavioral therapy is a research-based cognitive behavioral approach that focuses on developing problem-solving skills.

Hart resists providing A.F. dialectical behavior therapy, however, suggesting that it is not an appropriate related service because it is "most commonly administered in an in-patient setting" rather than in schools. *See* Hart Opening Brief at 37. But where a service is typically provided is irrelevant. The Supreme Court has made clear that a child is entitled to any related services necessary for him to benefit from education, regardless of whether the services are provided outside of schools.[7] *See Cedar Rapids Community Sch. Dist. v. Garret F.,* 526 U.S. 66, 79 (1999) (holding that a school district was required to provide 1:1 nursing services during school hours as a related service); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 895 (1984) (holding that a school

[7] And in any event, Hart recognizes that dialectical behavior therapy is and can be provided outside of an in-patient setting.

district was required to provide a clean intermittent catheterization during school hours as a related service).[8]

Moreover, Hart's assertions about dialectical behavior therapy not being a school-based methodology are unfounded; the therapy has been found to be an effective psychological service for school-age children, and it has been successfully used to treat adolescents with emotional disabilities like A.F. in the public school setting. *See, e.g.*, Dawn Catucci, *Dialectical Behavior Therapy with Multi-Problem Adolescents in a School Setting,* 30 N.Y. Sch. Psychologist 12 (2001); Jim Hanson, *School-Based DBT: Merging Mental Health and Behavioral Supports for High School Students at Tiers II & III: Dialectical Behavioral Therapy in the Public Schools*, Ga. Assoc. for Positive Behavior Support Conference (2016); James J. Mazza et al., *DBT Skills in Schools* (Guilford Press 2016).

Hart also emphasizes the lack of available dialectical behavior therapy providers in its geographic vicinity, a factor used by the Administrative Law Judge in denying A.F. the therapy. But if a child

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[8] Of course, Hart's argument is also troubling because it is circular. If Hart provided dialectical behavior therapy to children like A.F. rather than resisting doing so, the therapy would be more "commonly administered" at its schools.

needs a particular related service to benefit from education, his school district is required to provide that service even if it means developing new services or recruiting new staff. Otherwise, children with rare disabilities, such as deaf-blindness, could be denied FAPE simply because of where they live.

The district court therefore committed no error in awarding A.F. dialectical behavior therapy. The IDEA specifies that psychological services are related services, and it guarantees each child the related services that he requires to benefit from special education. *See* 20 U.S.C. § 1401(26)(A). If a child with an emotional disturbance needs an intensive psychological service like dialectical behavior therapy to participate in school, he is entitled to it. Children with emotional disturbance have the same IDEA rights as other children with disabilities; they are entitled to related services individualized to their needs.

Denying children like A.F. individualized related services like dialectical behavior therapy gives rise to a vicious cycle—one that *Amici* has seen all too often. When denied needed related services, a child with emotional disturbance lacks the support necessary to manage his

emotions and behavior at school. Inevitably, he violates school rules and receives a suspension. Then he receives another suspension. And another. Soon the child and his parents attend a manifestation determination, where the school district asserts that the child's behaviors are not related to his disabilities. The district removes the child, and he becomes disengaged from school.

CONCLUSION

This appeal has important implications for children with emotional disturbance. Reversing the district court's rulings for A.F. would undermine the IDEA's protections for such children and exacerbate their already abysmal educational outcomes. A holding that parents need an expert to rebut school staff at manifestation determinations would deprive many children with emotional disturbance of their IDEA rights. If a child's parents cannot afford or find an expert for a manifestation determination, the child could be removed from school at the discretion of school staff. Just as troubling, a holding that eliminates dialectical behavior therapy as a related service would deprive many children with emotional disturbance of the services that they need to benefit from school.

Dated October 18, 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 5,868 words.

Dated: October 18, 2018

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli

CERTIFICATE OF SERVICE

I certify that on October 18, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF as they are

registered users.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli