IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

MINNETONKA PUBLIC SCHOOLS,
INDEPENDENT SCHOOL DISTRICT NO. 276,

Plaintiff-Appellant,

—v.—

M.L.K., by and through his parents, S.K. and D.K,

Defendant-Appellee.

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., THE MINNESOTA DISABILITY LAW CENTER, THE INTERNATIONAL DYSLEXIA ASSOCIATION–UPPER MIDWEST BRANCH, AND DECODING DYSLEXIA–MINNESOTA IN SUPPORT OF APPELLEE/CROSS-APPELLANT

SELENE ALMAZAN-ALTOBELLI
COUNCIL OF PARENT ATTORNEYS
AND ADVOCATES, INC.
PO Box 6767
Towson, Maryland 21285
(844) 426-7224

CATHERINE M. REISMAN
REISMAN CAROLLA GRAN
& ZUBA LLP
19 Chestnut Street
Haddonfield, New Jersey 08033
(856) 354-0071

Attorneys for Amici Curiae

MINNESOTA SCHOOL BOARDS ASSOCIATION;
MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;
THE MINNESOTA ADMINISTRATORS FOR SPECIAL EDUCATION,

Amici on Behalf of Appellant(s).

MINNETONKA PUBLIC SCHOOLS,
INDEPENDENT SCHOOL DISTRICT NO. 276,

Plaintiff-Appellee,

—v.—

M.L.K., by and through his parents, S.K. and D.K,

Defendant-Appellant.

MINNESOTA SCHOOL BOARDS ASSOCIATION;
MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;
THE MINNESOTA ADMINISTRATORS FOR SPECIAL EDUCATION,

Amici on Behalf of Appellee(s).

Appellate Case: 21-1707 Page: 2 Date Filed: 07/22/2021 Entry ID: 5057485

CORPORATE DISCLOSURE STATEMENT

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

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
THE MINNESOTA DISABILITY LAW CENTER
THE INTERNATIONAL DYSLEXIA ASSOCIATION-UPPER MIDWEST BRANCH
DECODING DYSLEXIA-MINNESOTA

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.

s/ Catherine Merino Reisman
Catherine Merino Reisman

Attorney for Amici Curiae

TABLE OF CONTENTS

CORPORATE DISCLOSURE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

A. Federal Courts Consider the Plain Meaning of Statutory Language as Well as Statutory Purpose in Construing Federal Law 6

B. Because IDEA Places a Child Find Obligation on School Districts in Order To Locate and Serve All Children With Disabilities, the Discovery Rule Effectuates the Statutory Purpose 10

C. IDEA Limits the Timely Filing of a Due Process Complaint Only and Does Not Limit the Remedies That Can Be Considered by the ALJ 15

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Cases

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) 7

Avila v. Spokane Sch. Dist. 81, 852 F.3d 936 (9th Cir. 2017) 10, 11, 15, 16

Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) 7, 10

C.B. ex rel. B.B. v. Special Sch. Dist. No. 1, 636 F.3d 981 (8th Cir. 2011) 20

Drew v. Equifax Info. Servs., 690 F.3d 1100 (9th Cir. 2012) 15

Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) 2

Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009) ....*passim*

Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743 (2017) 2

G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015). ....*passim*

Indep. Sch. Dist. No. 276 v. M.L.K., No. 20-1036 (DWF/KMM), 2021 WL 780723 (D. Minn. Mar. 1, 2021). 19, 20

Indep. Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073 (8th Cir. 2020), *petition for cert. filed*, 20-905 (Dec. 31, 2020) 20

Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011) 7

King v. Burwell, 576 U.S. 473 (2015) 7

Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419 (8th Cir. 2010) 20

Lyons v. Michael & Assoc., 824 F.3d 1169 (9th Cir. 2016) 17

McDonnell v. United States, 136 S. Ct. 2355 (2016) 7

Merck & Co. v. Reynolds, 559 U.S. 633 (2010) 17

Ms. S. v. Reg'l Sch. Unit 72, 916 F.3d 41 (1st Cir. 2019) 10

Octane Fitness, L.L.C. v. ICON Health & Fitness, Inc., 572 U.S. 545 (2014)..........7

Payan v. Aramark Mgmt. Servs. L.P., 495 F.3d 1119 (9th Cir. 2007) 15

People for Ethical Treatment of Animals v. United States Dep't of Agric., 861 F.3d 502 (4th Cir. 2017)...7

Rosales v. United States, 834 F.3d 799 (9th Cir. 1987)..................................18, 19

Sch. Comm. of Burlington v. Dept. of Educ., 471 U.S. 359 (1996) 23

Sebelius v. Cloer, 569 U.S. 369 (2013) 7, 8, 9

Strategic Diversity, Inc. v. Alchemix Corp., 666 F.3d 1197 (9th Cir. 2012) 15

Sturgeon v. Frost, 136 S. Ct. 1061 (2016) 7

Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105 (9th Cir. 2016).11, 12

Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007).......................................4

Winter v. United States, 244 F.3d 1088 (9th Cir. 2001) 18

Federal Statutes

20 U.S.C. § 1400, *et seq.* ....*passim*

20 U.S.C. §1412(a)(3)...9

20 U.S.C. § 1415(b)(6)(B) 21, 22

20 U.S.C. § 1415(f)(3)(C) ....*passim*

20 U.S.C. § 1415(i)(2)(C)(iii) 22, 23

29 U.S.C. § 794 1

42 U.S.C. § 300aa-1, *et seq.* 8

42 U.S.C. § 1983 1

42 U.S.C. § 12131, *et seq.* 1

Federal Rules

Fed. Rule App. P. 29(c)(5) 1

Other Authorities

71 Fed. Reg. 46, 540, 46, 706 (Aug. 14, 2006) 22

150 Cong. Rec. S11851 (daily ed. Nov. 24, 2004) 22

David M. Driesen, *Purposeless Construction*,
48 Wake Forest L. Rev. 97 (2013) 7, 8

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 (2011) 13

Jennifer Rosen Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children in the Third Circuit*, 41 Fordham Urb. L.J. 599 (2013) 10, 11, 12, 13

Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457 (2007) 13

Kevin Hoagland-Hanson, *Comment: Getting Their Due (Process): Parents and Lawyers In Special Education Due Process Hearings In Pennsylvania*,
163 U. Penn. L. Rev. 1806 (2015) 14

Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. Va. L. Rev. 735 (2016) 13

William H. Blackwell & Vivian V. Blackwell, "*A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics*," Sage Open (Jan.-Mar. 2015) 14

STATEMENT OF INTERESTS OF THE *AMICI*[1]

Council of Parent Attorneys and Advocates (COPAA) is a national not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not undertake individual representation but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq*. COPAA also supports individuals with disabilities, their parents and advocates, in efforts 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 Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*. (ADA).

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* state 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 *Amici* and their members.

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has often filed as *amicus curiae* in the United States Supreme Court, including *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); and *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009), and in numerous cases in the United States Courts of Appeal.

The Minnesota Disability Law Center (MDLC) is a project of Mid-Minnesota Legal Aid (MMLA), which is designated by the Governor of Minnesota pursuant to federal statutes to serve as the Protection and Advocacy System for persons with disabilities in Minnesota. MMLA performs this function through the MDLC and works to advance the dignity, self-determination and equality of individuals with disabilities through direct legal representation, advocacy, education and policy analysis. As part of its Protection and Advocacy work, MDLC advocates for the rights of children with identified disabilities to receive special education services pursuant to federal and state law. MDLC provides comprehensive representation for these children, including individual and policy advocacy on special education issues.

The International Dyslexia Association-Upper Midwest Branch is a Minnesota not-for-profit corporation founded in 1949 with the mission of creating a future for all individuals who struggle with dyslexia to have richer, more robust lives

and access to resources they need. The International Dyslexia Association-Upper Midwest Branch promotes effective teaching approaches that align with the science of reading, support early identification of dyslexia, and advance wide dissemination of research-based knowledge about dyslexia.

Decoding Dyslexia-Minnesota is a Minnesota not-for-profit corporation engaged in empowering parents and other advocates seeking to improve the educational outcomes of dyslexic children. Decoding Dyslexia-Minnesota provides assistance to parents seeking guidance on their rights under IDEA and Section 504 as well as providing support for dyslexic children through events, speakers, and workshops.

Amici's interest in this case is their deep commitment to ensuring that all children with disabilities obtain needed special education services. *Amici* are concerned about the proper construction of IDEA's statute of limitations. Misapplication of the statute of limitations is particularly harmful for children in low-income families and those with parents who have limited education because too often their parents learn of the school districts' violations long after they have taken place. IDEA entitles these students to the relief that will make them whole. The district court committed reversible error in concluding that M.L.K. was not entitled to compensatory education for the District's failure to provide him with special education prior to August 2017. The court in essence applied an "occurrence

rule." Because an occurrence rule ignores the plain language of IDEA and subverts federal civil rights laws, the district court's holding on the statute of limitations should be reversed**.**

Appellees/Cross Appellants, M.L.K. have consented to this brief; Appellants/Cross-Appellees, Minnetonka Public Schools, Independent School District No. 276, have also provided consent for the filing of this brief.

SUMMARY OF ARGUMENT

For nearly 30 years, the Supreme Court has interpreted the IDEA broadly and advanced the position that Congress, in enacting the statute, did not intend to create a right without a meaningful remedy. *See Forest Grove*, 557 U.S. at 240 *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 532-33 (2007).

The District Court erred when it held that a single, two-year limitations period applied similarly to both due process filing and also to available remedies even for those parents who discovered the violation late. There are two distinct considerations under the IDEA. The first consideration is the statute of limitations period for timely filing a due process complaint. Once a determination has been made that a violation has taken place, the second consideration is the remedies available. The IDEA is clear that parents have two years from when they "knew or should have known about the alleged action that forms the basis of the complaint" to file a due process

complaint.[2] The district court erred in failing to apply the Discovery Rule explicitly provided by the statute. *Amici* further contend that the IDEA statute of limitations provisions limit the timely filing of a due process complaint only and do not limit the remedies that can be considered by the administrative law judge (ALJ) or court because students are entitled to be made whole when school districts violate their rights under IDEA.

Here, both the ALJ and the court found that the parents discovered the violation in August 2017; the parents learned then that the district had violated its Child Find violation with regard to their son during 2015-2017. Under the Discovery Rule, the parents had two years (until August 2019) to file their complaint for the period of time, 2015-2017. Yet, the district court barred the parents from receiving any relief for the period prior to August 2017. That decision failed to apply the Discovery Rule explicitly provided by the statute.

The Discovery Rule fits within the larger context of IDEA's goal of ensuring appropriate education for all children with disabilities. Here, the school district personnel, with all their training and experience, failed to evaluate M.L.K. for special education in all areas of suspected and demonstrated need, in violation of their legal obligation under IDEA. The student should not be denied a full

[2] 20 U.S.C. § 1415(f)(3)(C) is unambiguously labeled "Timeline for Requesting Hearing."

recovery for his lost education because his parents were unaware of the legal violation until August 2017. In the present case, as the Administrative Law Judge correctly determined, the parents became aware of their cause of action once they conducted their own research and investigation (beginning in Fall 2017) into why their child was not able to read after multiple years of ineffectual special education services from the District.

The Discovery Rule encourages school districts to vigorously pursue their child find obligations and ensure children with disabilities have a full and meaningful remedy as Congress intended. The district court's approach, by contrast, frustrates the Congressional mandate in IDEA to "enabl[e] each child with special needs to reach his or her full potential." *Id.* at 626. The two-year statute of limitations does not apply to the remedies available, especially for late-discovered claims. The Discovery Rule reflects the plain language of IDEA and allows parents to fully remedy harm for claims about which they knew or should have known.

ARGUMENT

A. Federal Courts Consider the Plain Meaning of Statutory Language as Well as Statutory Purpose in Construing Federal Law.

"When . . . statutory 'language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it

according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations omitted)). The Supreme Court's recent decision in *Bostock v. Clayton County* makes clear that statutes should be interpreted in accordance "with the ordinary public meaning of its terms at the time of its enactment." 140 S. Ct. 1731, 1738 (2020), *See also Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); *Octane Fitness, L.L.C. v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014); *People for Ethical Treatment of Animals v. United States Dep't of Agric.*, 861 F.3d 502, 509 (4th Cir. 2017).

At the same time, courts do not construe federal laws "in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs.*, 566 U.S. 93, 101 (2012)); *see also King v. Burwell*, 576 U.S. 473, 486 (2015); *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) (courts interpret statutes by considering purpose and context and by consulting any precedents or authorities that inform the analysis). This approach makes "statutes into more coherent schemes for the accomplishment of specified goals than they might otherwise be." David M. Driesen, *Purposeless Construction*, 48 Wake Forest L.

Rev. 97, 128 (2013).

As Professor Driesen notes:

> Coherence in turn helps legitimate law. To the extent we treat statutes as coherent schemes for accomplishing public ends, the law commands respect and obedience. Hence, when judges create rationales for statutory construction tying particular results to public objectives motivating congressional enactment, they increase the likelihood of faithful administration of the law, public acceptance of the law, and compliance with the law.

48 Wake Forest L. Rev. at 128. When the statutory language is unambiguous and the statutory scheme coherent and consistent, judicial inquiry ceases. *Sebelius*, 569 U.S. at 380.

Sebelius is instructive. In that case, the Court rejected a statutory interpretation of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1, *et seq.* (NCVIA) based upon inconsistency with plain language and statutory purpose. The Court rejected the federal government's proposed definition of the term "filed," because it is commonly understood that a claim is "filed" when it is delivered to and accepted by the appropriate court. *Sebelius*, 569 U.S. at 379. Further, the Court observed, the government's position would undermine the goals of the fee provision in the NCVIA. A stated purpose of the fee provision was to enhance the opportunity for individuals to present claims by making fee awards available for "non-prevailing, good-faith claims." *Id.* at 370

(citation omitted). The government's interpretation would have discouraged counsel from representing NCVIA petitioners, which would undermine the statutory purpose.

Following this precedent, in construing IDEA's statute of limitations, 20 U.S.C. §1415(f) (3) (C), and a school district's child find obligations, 20 U.S.C. §1412(a)(3), federal courts must consider both the plain meaning of the statute and the overall objective to ensure appropriate education for children with disabilities.

Here, the plain language of the statute provides that the parent "shall request an impartial due process hearing within 2 years of the date the parent or agency knows or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(C). So, the statute of limitations starts running from the date the parent "knew or should have known" of the violation.

Thus, if the parents here had been aware of the violation when it happened on August 1, 2015, then the parents would have been restricted to two years (2017) to file suit for the 2015 violation and receive a remedy for that harm. But because the parents were unaware of the violation until August 2017, the statute of limitations started running in 2017, and the parent has two years from the date of discovery to file suit about the missing educational

services from 2015-2016.

Under the district court's decision, it does not matter whether the parent learned about the violation in 2015 or 2017; either way the parent has just two years to file suit – until 2017 -- for the 2015 violation. That decision reads the language "knew or should have known" out of the statute. But *Bostock* teaches that the text of the statute governs, and the "knew or should have known" text mandates the use of the Discovery Rule in IDEA cases. Other circuit courts have held that IDEA's statute of limitations has established a Discovery Rule. *See Ms. S. v. Reg'l Sch. Unit* 72, 916 F.3d 41, 50 (1st Cir. 2019); *Avila v. Spokane Sch. Dist*. 81, 852 F.3d 936, 944 (9th Cir. 2017); *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625 (3d Cir. 2015).

B. Because IDEA Places a Child Find Obligation on School Districts in Order To Locate and Serve All Children With Disabilities, the Discovery Rule Effectuates the Statutory Purpose.

IDEA has an undisputed and well-recognized statutory purpose. For decades preceding passage of the Education for All Handicapped Children Act (IDEA's predecessor), "school districts routinely denied children with disabilities an adequate education. They provided no educational assistance or accommodations to disabled children in school, 'warehoused' children in institutions thereby segregating them from their non-disabled peers or excluded them from school altogether." Jennifer Rosen Valverde, *A Poor IDEA: Statute of*

Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children in the Third Circuit, 41 Fordham Urb. L.J. 599, 600-01 (2013). 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. IDEA, in response to these circumstances, "seeks 'to ensure that all children with disabilities have available to them a [FAPE]." *Avila*, 852 F.3d at 939 (quoting 20 U.S.C. §1400(d)(1)(A)).

Thus, IDEA "was designed to reverse a history of educational neglect" for children with disabilities. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1109 (9th Cir. 2016) (citing *Schaffer v. Weast*, 546 U.S. 49, 52 (2005)). "At the time of its passage, the need for institutional reform was pervasive: millions of children with a multitude of disabilities were entirely excluded from public schools, and others, while present, could not benefit from the experience because of undiagnosed – and therefore unaddressed – disabilities." *Id.* (citing 20 U.S.C. §1400(c)(2)). IDEA is designed to remedy these systemic problems by ensuring a free appropriate public education (FAPE) for all children with disabilities between the ages of three and twenty-one. *Id.* at 1110.

Critically, IDEA imposes a "child find" obligation on the states and

school districts.

> In order to provide a free appropriate public education to all children with disabilities States must, of course, first identify those children and evaluate their disabling conditions. Accordingly, the IDEA requires that every State have procedures in place that are designed to identify children who may need special education services. Id. § 1412(a)(3)(A). Once identified, those children must be evaluated and assessed for all suspected disabilities so that the school district can begin the process of determining what special education and related services will address the child's individual needs. See id. §§ 1412(a)(7), 1414(a)-(c). That this evaluation is done early, thoroughly, and reliably is of extreme importance to the education of children. Otherwise, many disabilities will go undiagnosed, neglected, or improperly treated in the classroom.

Timothy O., 822 F.3d at 1110; *see also Forest Grove*, 557 U.S. at 245.

The child find obligation is a "profound responsibility, with the power to change the trajectory of a child's life." *Ligonier*, 802 F.3d at 625. Therefore, "when a school district has failed in that responsibility and parents have taken appropriate and timely action under IDEA, then that child is entitled to be made whole with nothing less than a 'complete' remedy." 802 F.3d at 625 (citing *Forest Grove*, 557 U.S. at 244).

The Discovery Rule is particularly important for low and moderate income students as their parents face "major obstacles in obtaining proper educational programming and services for their children."[3] One-quarter of students with

[3] Valverde, 41 Fordham Urb. L.J. at 619.

IEPs have families with incomes below the poverty line, and two-thirds have family incomes of $50,000 or less.[4] Because so many of their parents may not even have a high school degree, they are more likely to learn late that school districts have denied their children a free appropriate public education. For these students, full compensatory educational relief can make an enormous difference in their lives. Studies have proven that "early, intensive prolonged intervention can affect language, cognition, and social development dramatically, which can narrow the socioeconomic performance gap in these key areas and provide benefits that last into adulthood."[5]

Even when parents learn that their children's rights have been violated, they are not well situated to file a due process complaint the next day. Success in due process often depends on having legal assistance, and it can take time to find an attorney able to help, particularly if the parent cannot afford legal assistance. Parents of students who were represented by counsel were far more likely to be successful in their IDEA claims than those without counsel.[6] Success

---

[4] 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).

[5] Valverde, 41 Fordham Urb. L.J. at 618.

[6] Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. Va. L. Rev. 735, 775 (2016) (over twelve years, North Carolina *pro se* parents prevailed on at least one issue in just 11.1% of the

also depends on having expert witnesses, and it can take time to find expert witnesses and for the witnesses to conduct evaluations. Thus, the Discovery Rule gives parents who learn late of the violation the time to find attorneys and experts and develop their cases.

IDEA's statutory purpose thus places the burden of Child Find on school districts, not parents, and, therefore, courts should apply the Discovery Rule for the Statute of Limitations. As discussed in the next section, the decision below undermines this statutory purpose. The district court incorrectly applied the Discovery Rule and ignored when the parents first knew or should have known about their claims. In so doing, the court ignored the statutory language and improperly limited M.L.K.'s recovery for the school district's child find violation. This holding is in direct conflict with both explicit statutory language and IDEA's purpose.

---

cases, while those with counsel were five times more likely to prevail on at least one issue (51.3%)); William H. Blackwell & Vivian V. Blackwell, "*A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics*," Sage Open (Jan.-Mar. 2015), *available at* http://journals.sagepub.com/ doi/pdf/10.1177/2158244015577669, at 13 (over an eight-year period in Massachusetts, parents with attorneys were much more likely to win than *pro se* parents); Kevin Hoagland-Hanson, *Comment: Getting Their Due (Process): Parents And Lawyers In Special Education Due Process Hearings In Pennsylvania*, 163 U. Penn. L. Rev. 1806, 1820 (2015) (over a five-year period, Pennsylvania parents who had legal counsel prevailed 58.75% of the time whereas *pro se* parents prevailed only 16.28% of the time).

C. IDEA Limits the Timely Filing of a Due Process Complaint Only and Does Not Limit the Remedies That Can Be Considered by the ALJ

When raising a statute of limitations defense, the burden is on the defendant to demonstrate that a reasonably diligent plaintiff would have discovered the violations. *Drew v. Equifax Info. Servs.,* 690 F.3d 1100, 1110 (9th Cir. 2012); *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1206 (9th Cir. 2012). This burden is appropriate because statutes of limitations are an affirmative defense, for which the defendant bears the burden of proof. *Payan v. Aramark Mgmt. Servs. L.P.*, 495 F.3d 1119, 1122-23 (9th Cir. 2007).

In the 2004 reauthorization of IDEA, Congress adopted, for the first time, a uniform federal statute of limitations, which states:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint . . . .

20 U.S.C. § 1415(f)(3)(C).

Based on this language, "Congress did not intend the IDEA's statute of limitations to be governed by a strict occurrence rule." *Avila*, 852 F.3d at 941. "If Congress intended a strict occurrence rule, there would have been no need to include the 'knew or should have known' language." *Id.* at 942.

Interpreting this provision in *Ligonier, supra*, the Third Circuit Court of Appeals correctly concluded that IDEA adopted the Discovery Rule for special

education claims. "When fashioning a statute of limitations, a legislature may choose as the date from which the limitations period begins to run either the date the injury actually occurred, an approach known as the 'occurrence rule,' or the date the aggrieved party knew or should have known of the injury, that is the 'discovery rule'." 802 F.3d at 613 (citing *Knopick v. Connelly*, 639 F.3d 600, 607 (3d Cir. 2011)). The Discovery Rule provides that the statute of limitation does not begin to run on "the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff *discovers* that he or she has been injured." *Id.* (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 (3d Cir. 1994)).

In *Avila*, the court recognized that parents' knowledge of a *fact* does not equate to knowledge of the *legal harm.* The "knew or should have known" date "stems from when parents know or have reason to know of an alleged denial of a free appropriate public education under the IDEA, not necessarily when the parents became aware that the district acted or failed to act." 852 F.3d at 944 (citing *Somoza v. N.Y. City Dep't of Educ.*, 538 F.3d 106, 114 (2d Cir 2008) and *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1288 (11th Cir. 2008)).

That IDEA language of "knew or should have known" indicates a Discovery Rule is consistent with court interpretations of other statutory provisions. The Discovery Rule applies, and the limitations period begins to run

when the plaintiff knows the *injury* that is the basis of the action. *Lyons v. Michael & Assoc.*, 824 F.3d 1169, 1171 (9th Cir. 2016). In *Lyons*, a debt collector filed a suit against the plaintiff on December 7, 2011. The debt collector violated federal law when it filed the lawsuit by suing the plaintiff in the wrong county, so she learned of the lawsuit when she received service of process in mid-January of 2012. She filed her case against the debt collector within a year of being served with process. This Court rejected the debt collector's argument that the statute of limitations began running on the date of filing because the Discovery Rule controlled. The plaintiff did not know, nor should she have known, of her injury (the violation of federal law) until she received service of process, rendering her complaint timely. *Id.* at 1171-72.

In *Merck & Co. v. Reynolds*, 559 U.S. 633, 638 (2010), in the securities law context, the Court explained what it means to "discover the facts constituting the violation." In order to have a claim for securities fraud, a plaintiff must know that there was a misrepresentation <u>*and*</u> that the wrongdoer made the representation knowingly (with scienter). *Merck* clarifies that the statute of limitations did not begin to run until the plaintiffs knew or should have known that the defendant acted with scienter.

The court thus found it would frustrate the very purpose of the Discovery Rule if the limitations period began to run regardless of whether a plaintiff had

discovered *all* the facts necessary to prove the claim, including. the mental state of the defendant, which "constitutes an important and necessary element of a [securities fraud] 'violation.'" *Id.* at 648. "A plaintiff cannot recover without proving that a defendant made a material misstatement *with an intent to deceive* not merely innocently or negligently." *Id.* at 649 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007)).

The Court explained:

> An incorrect prediction about a firm's future earnings, by itself, does not automatically tell us whether the speaker deliberately lied or just made an innocent (and therefore nonactionable) error. Hence, the statute may require "discovery" of scienter- related facts beyond the facts that show a statement (or omission) to be materially false or misleading.

Id. at 650. Thus, "the limitations period . . . begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have 'discover[ed] the facts constituting the violation' – whichever comes first." *Id.* at 653.

In considering the Discovery Rule, a plaintiff should not be charged with knowledge of a harm when the defendants are presumably experts and themselves did not have that knowledge. *Winter v. United States*, 244 F.3d 1088 (9th Cir. 2001) (where "not even the doctors knew of the probable general medical cause," a medical malpractice claim does not accrue); *see also Rosales v. United States*, 834 F.3d 799, 803-05 (9th Cir. 1987). In IDEA cases, parents

should not be charged with knowledge of the harm when the school officials assured the parents that the student did not have a disability under IDEA.

In the present case, the ALJ assessed the underlying facts of the cases and determined that the Discovery Rule applied when the parents began, in the fall of 2017, researching and investigating why their child was not able to read by the second grade even though the district had been providing special education services for years and the district had no answers for the lack of literacy. Through their efforts, the parents learned about dyslexia and other learning disabilities and eventually moved the District and their child towards a fuller understanding of the child's literacy needs. Therefore, the ALJ's determination of when the parents "knew or should have known" is based in the record, justifies the application of the Discovery Rule for the Fall of 2017, and allows the parents to recover compensatory education for the District's failures to ensure a full and comprehensive understanding of the Student's literacy issues during the period 2015-2017.

The Eighth Circuit precedent cited by the District Court does not address either the Discovery Rule or the statute of limitations period for remedies. The District Court cited three Eighth Circuit cases in determining that a two-year statute of limitations period applies to remedies under the IDEA. *See Indep. Sch. Dist. No. 276 v. M.L.K.*, No. 20-1036 (DWF/KMM), 2021 WL 780723, at *6 (D. Minn. Mar.

1, 2021). The Court cites *Independent School District No. 283 v. E.M.D.H.* to support its finding that a two-year limitations period applies to remedies. 960 F.3d 1073, 1083–84 (8th Cir. 2020), *petition for cert. filed*, 20-905 (Dec. 31, 2020). The salient question in this case is whether the parents timely filed their due process complaint following when they knew or should have known of the alleged violation. *Id.* at 1083. In contrast, the issue in *E.M.D.H.* was whether the two-year statute of limitations barred a suit involving continuing violation of the child find duty. *Id.* Thus, that case did not involve the Discovery Rule or the remedies period.[7]

The other Eighth Circuit cases the District Court cited as precedent merely mention the statute of limitations and do not reach a holding regarding its application, much less reach the question of the application of the statute of limitations to the remedies available.[8] These three cases cited by the District Court did not address the Discovery Rule and the appropriate remedies available for a claim that was discovered two years after the violation. Therefore, these cases are inapplicable to the issues at hand in this case.

---

[7] In fact, the court engaged in a discussion about the available remedies that recognized the broad discretion given to the court to determine the appropriate relief under the IDEA. *E.M.D.H.*, 960 F.3d at 1084.

[8] *See, e.g.*, *C.B. ex rel. B.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981, 989 (8th Cir. 2011) (mentioning the two-year statute of limitations period as the reason the plaintiff challenged school services for the previous two years); *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 428 (8th Cir. 2010) (discussing the two-year statute of limitation period in regard to allegations of inc
idents occurring outside that window).

The Third Circuit correctly determined that the two-year statute of limitations period at issue in the IDEA applies to the timely filing of a due process complaint and does not limit the remedies period to the same term. *Ligonier,* 802 F.3d at 625. The Third Circuit concluded that 20 U.S.C. § 1415(b)(6)(B) and § 1415(f)(3)(C), reflect the same statute of limitations. *Id.* at 625.

The Third Circuit noted that the school district is "the other partner" in the endeavor to educate a child with a disability and has "its independent duty to identify those needs within a reasonable time period and to work with the parents and the IEP team to expeditiously design and implement an appropriate program of remedial support." *Id*. So, when the school district falls down on the job and fails to meet its responsibilities "and parents *have* taken appropriate and timely action under the IDEA, then that child is entitled to be made whole with nothing less than a 'complete' remedy." *Id., citing Forest Grove*, 557 U.S. at 244 (emphasis in original). The Third Circuit held, "Compensatory education is crucial to achieve that goal, and the courts, in the exercise of their broad discretion, may award it to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." *Id.*

Additionally, the Third Circuit's holding is in line with the interpretation of the Department of Education[9] and the legislative purpose in creating a statute to ensure that children with unaddressed disabilities are able to be made whole.[10] The IDEA was designed to ensure that students with disabilities had a chance to reach their full academic potential by providing the appropriate compensatory education without the limitation of a narrow remedies window.

A two-year statute of limitations period for remedies under the IDEA for students whose parents discovered the violation two years after it initially occurred is incompatible with the remedial provision of the statute.[11] The IDEA states that the court "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). The Supreme Court has interpreted this provision as granting broad discretion to the courts to determine appropriate remedies for children with disabilities in an effort to provide a free and appropriate public education (FAPE).

---

[9] "The statute of limitations in section [1415](b)(6)(B)] of the Act is the same as the statute of limitations in section [1415](f)(3)(C)] of the Act." 71 Fed. Reg. 46, 540, 46, 706 (Aug. 14, 2006).

[10] An amendment sponsor clarified the application of a statute of limitations: "In this reauthorization, we also include a 2-year statute of limitations on claims. However, it should be noted that this limitation is not designed to have any impact on the ability of a child to receive compensatory damages for the entire period in which he or she has been deprived of services." 150 Cong. Rec. S11851 (daily ed. Nov. 24, 2004) (statement of Sen. Tom Harkin).

[11] Because in this case, the parents are only seeking compensatory education for the period 2015-2017, this Court need not address whether compensatory education for more than two years prior to the discovery date is available.

Forest Grove, 557 U.S. at 238 ("[W]hat relief is 'appropriate' must be determined in light of the Act's broad purpose of providing children with disabilities a FAPE."); *Sch. Committee of Burlington v. Dept. of Educ*., 471 U.S. 359, 369 (1996) ("The type of relief is not further specified, except that it must be 'appropriate.' Absent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act."). Limiting the courts to a two-year window for remedies for late discovered violations would undermine this broad grant of discretion and severely prejudice students with disabilities who are already experiencing adversity in the educational setting.

The District Court erred when it conflated the two-year statute of limitations period for timely filing a due process complaint as applicable to the remedies period of the IDEA for late discovered violations. The IDEA grants broad discretion to the court to determine the appropriate remedy to ensure that students with disabilities have the opportunity to reach their full academic potential. *See* 20 U.S.C. § 1415(i)(2)(C)(iii). Cutting off the available remedies for children with disabilities is against the purpose of the IDEA to establish FAPE and would severely limit the ability of these students to reach their full academic potential. Therefore, *Amici* urge the Eighth Circuit to adopt the broad remedial construct to ensure that underserved students with disabilities can be made whole in their pursuit of an appropriate education.

CONCLUSION

For all the reasons set forth above, the decision of the district court should be reversed.

Dated: July 21, 2021

Respectfully submitted,
s/ Catherine Merino Reisman
Catherine Merino Reisman
REISMAN CAROLLA GRAN & ZUBA LLP
19 Chestnut Street
Haddonfield, NJ 08033
856.354.0021
catherine@rcglawoffices.com

On the brief:
Selene A. Almazan-Altobelli
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, MD 21285

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER

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 5,664 words.

Dated: July 21, 2021

s/ Catherine Merino Reisman
Catherine Merino Reisman

CERTIFICATE OF SERVICE

I certify that, on July 21, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF.

s/ Catherine Merino Reisman
Catherine Merino Reisman

Attorney for *Amici Curiae*

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

July 22, 2021

Ms. Selene Almazan-Altobelli
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, MD 21285

Ms. Catherine Merino Reisman
REISMAN & CAROLLA
19 Chestnut Street
Haddonfield, NJ 08033

RE: 21-1707 Minnetonka Public Schools v. M.L.K.
21-1770 Minnetonka Public Schools v. M.L.K.

Dear Counsel:

The amicus curiae brief of the Council of Parent Attorneys and Advocates, Inc., The Minnesota Disability Law Center, The International Dyslexia Association – Upper Midwest Branch and Decoding Dyslexia – Minnesota, has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

NDG

Enclosure(s)

cc: Ms. Laura Tubbs Booth
Mr. Adam J. Frudden
Ms. Amy Jane Goetz
Mr. Eric John Magnuson

Ms. Caroline M. Moos
Mr. Christian Richard Shafer

District Court/Agency Case Number(s): 0:20-cv-01036-DWF
0:20-cv-01036-DWF