17-20750

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

RENEE J., as parent/guardian/next friend of C.J., a minor individual with a disability; CORNELIUS J., as parent/guardian/next friend of C.J., a minor individual with a disability,

Plaintiffs-Appellants,

—v.—

HOUSTON INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

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

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

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CASE NO. 17-20750

IN THEUNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RENEE J. ET. AL.
Plaintiffs-Appellants,
v.
HOUSTON INDEPENDENT SCHOOL DISTRICT
Defendant-Appellee.

CERTIFICATE OF INTERESTED PERSONS

The following statement is made pursuant to Federal Rules of Appellate Procedure 26 and 29(C) and 5TH Cir. R. 26.1.1. The undersigned counsel certifies that the following list of persons and entities as described in the fourth sentence of Rule 28.1.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae has no parent corporation, subsidiaries or affiliates that has issued shares to the public.

Amicus Curiae has no direct or indirect interest associated with the parties to this matter, or to their attorneys or counsel, though it and its members have a general interest in the issue and outcome of the case. COPAA has not contributed to the Appellants or their pursuit of this matter.

Amicus Curiae adopts the statements of the Appellant concerning the parties, trial judge(s), persons, firms, partnerships or corporations who have an interest in the outcome of the case.

Pursuant to 5th Cir. R.26.1.1, as this brief is filed by *amicus* and is a subsequent brief filed in this proceeding, the following is list of all entities known to have an interest in the outcome of this appeal "omitted from the certificate contained in the first brief filed and in any other brief that has been filed":

Amicus Curiae : Council of Parent Attorneys and Advocates, Inc., a non-profit organization.

Respectfully submitted, this the 9th day of April 2018.

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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 matters 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 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 for the provision of a free appropriate education, including appropriate transition services to prepare

[1] 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.

students with disabilities for further education, employment, and independent living. COPAA filed a brief *amicus curiae* in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). Accordingly, COPAA seeks to ensure the Supreme Court's decision in *Endrew F.* is implemented fully and consistently nationwide. Further, COPAA is aware that, because of the historically low rates of employment and lack of community integration for adults like C.J. who have autism, adequate transition planning and services are critically important for students with autism because they can make a profound difference in their futures.

Appellants, Renee J., have consented to this brief; Appellees, Houston Independent School District, have declined to consent. *Amicus* have moved for permission to file this brief.

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 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. *Id.*

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.* One area of the IEP measured for progress in light of the child's circumstances is transition planning which makes goals and provides services for reaching those goals in order to prepare students with disabilities for further education, employment, and independent living. To that end, transition goals must be based on "age appropriate transition assessments" of the child's current and future capabilities. 34 C.F.R. § 300.320(b)(1). And to ensure that these goals are realized, the IDEA also requires the IEP Team to list the services that the school district will provide to help the child accomplish them. *Id.* § 300.320(b)(2). Further, 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. Rather than engage in a blame game against parents of a child with a disability who is engaging in school aversion, 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. The *Endrew F.* Standard Reflects IDEA's Broad Remedial Purpose

A. IDEA Established an Enforceable Right to a Substantively Appropriate Education

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 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).

This legislation did not merely require access. Congress mandated that children with disabilities receive a free appropriate public education. IDEA states 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).

Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the first Supreme Court case to interpret IDEA, emphasized the definition of FAPE is directly tied to the explicit requirements in the statute. "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Id.* at 189. The "other items from the definitional checklist" require that instruction and services: (i) "be provided at public expense and under public supervision"; (ii) "meet the State's educational standards"; (iii) "approximate the grade levels used in State's regular education"; and (iv) "comport with the child's IEP." *Id.*

B. *Endrew F.* Emphasizes Strict Compliance with Statutory Mandates

The Supreme Court has consistently emphasized the importance of compliance with IDEA's procedures. In *Endrew F.* the Supreme Court explicitly rejected the argument that 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.*

Further, 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)). Therefore, 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).

Additionally, on December 7, 2017, the U.S. Department of Education (DOE) 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 Apr. 4, 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 "[t]here is no "one-size-fits-all" approach to educating children with disabilities." (Q&A No. 17).

II. *Endrew F.*'s Robust Standard for FAPE Requires Revision of this Court's Standard Set out in *Michael F.*

In March 2017, the Supreme Court issued a unanimous decision announcing a demanding standard for measuring whether a school district has provided a student with a free appropriate public education under IDEA. *Endrew F.*, 137 S. Ct. 988. The Supreme Court rejected the Tenth Circuit's standard that 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." *Id.* at 1001 (emphasis added). The Court emphasized that the IEP must be "appropriately ambitious," and the objectives must be "challenging." *Id.* at 999-1000.

This standard is markedly more robust than that previously required by the Fifth Circuit's *Michael F.* case which was referenced and relied upon repeatedly throughout the district court's decision. In *Michael F.*, this Court set out a four factor test: "(1) the program is individualized on the basis of student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997). The first, third, and fourth factors need to be revised in light of *Endrew F*.

The first factor, whether the program was individualized on the basis of the student's assessment and performance, now must require more than mere individualization. Under *Endrew F.*, it must also require that the goals be ambitious and the objectives challenging in light of the student's circumstances. *Endrew F.*, 137 S. Ct. at 1000.

The third factor, whether the services are provided in a coordinated and collaborative manner by the key stakeholders, also needs modification in light of

Endrew F. The Supreme Court made clear that the school district is expected to provide a "cogent and responsive explanation" in responding to a parent's request for education for his or her child. *Id.* at 1001. Thus, the school district must not only provide services in a coordinated and collaborative manner, but it must also provide a cogent and responsive explanation if it rejects a parent's request regarding the child's education. *Id.*

The fourth, whether positive academic and non-academic benefits were demonstrated is insufficient because it only asks that there be any benefit at all. The district court below relied on *Michael F.*, stating, "the IEP must be 'likely to produce progress, not regression or trivial educational advancement." *E.g.*, (R. 55, Opinion, p. 6) (quoting *Michael F.*, 118 F.3d at 248). *Michael F.*'s FAPE requirement of progress which is "not regression or trivial educational advancement" is virtually identical to the Tenth Circuit's "more than *de minimis*" standard expressly overruled by the Supreme Court's *Endrew F.* decision. *Endrew F.*, 137 S. Ct. at 1001. The terms "trivial" and "*de minimis*" are synonymous. *De Minimis* Definition, *available at* https://www.merriam-webster.com/dictionary/de%20minimis (last visited April 4, 2018).

C.G. v. Waller Indep. Sch. Dist., 697 F. App'x 816 (5th Cir. 2017) confirms that the four-factor test in *Michael F.* must be applied consistent with the Supreme Court's standard set out in *Endrew F.* Thus, this Court found that the district court's

"analysis of C.G.'s IEP [was] fully consistent with that [*Endrew F.*] standard and leaves no doubt that the court was convinced that C.G.'s IEP was 'appropriately ambitious in light of [her] circumstances.'" *Id.* at 819. Accordingly, *Waller* did not hold that *Endrew F.* made no difference in the Fifth Circuit; rather, it indicated that the district court had applied the four factors identified in *Michael F.* in a manner consistent with *Endrew F*. *Id.*

Here, the district court viewed this case through an inappropriate lens of "not regression or trivial educational advancement." Had the more demanding standard set out in *Endrew F.* been applied, the hearing decision should have been reversed, as the record reflects that the IEP was not reasonably calculated for the student to make the progress consistent with his unique circumstances.

III. The School District's Policy of Denying Home Instruction to Students with Psychological Disabilities Such as School Aversion Violates IDEA

Here, the district court relied on the school district's policy which excluded "psychological referrals" from home instruction. (R 55, Opinion at 8 & 8, n.1). But a blanket policy of excluding all psychological referrals from home instruction violates the IDEA's requirement that IEPs be individualized based on student need. *See* 20 U.S.C. § 1414(d). Further, such a policy adversely affects students whose school avoidance stems from psychological problems and causes them to miss extensive periods of schooling.

Moreover, 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,[2] 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 settings." 20 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. Further, IDEA does not exclude students with psychological impairments from home instruction. *E.g. Tindell v. Evansville-Vanderburgh Sch. Corp.*, 805 F. Supp. 2d 630 (S.D. Ind. 2011) (finding home instruction appropriate for a student who had such severe anxiety that he was unable to attend classes outside the home).

Additionally, as the DOE guidance on *Endrew F.* makes clear, 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 any or trivial 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

[2] 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).

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.

Meeting to address the lack of progress or inability to serve a student is critical when a student with a disability is experiencing school aversion because this can cause the child 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 evaluate 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).

However, students like C.J., 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 Intervention Plan (BIP) with the goal of returning the student to school.

Moreover, school aversion can be complex, and the longer school aversion continues, the more difficult it is for students to return. For example, sometimes students may be concerned that, having already missed school, they will be less able to participate in classes, and, therefore, 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, revise the BIP and/or 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.,* I*ndep. 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). Here, the

school district did not reconvene the team until the end of April, after the student already had not attended school for the entire months of February, March, and April. 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 an "IEP's failure to provide for educational services should [the student] fail to return to school on a regular basis." *E.D. v. Enter. City Bd. of Educ.*, 273 F. Supp. 2d 1252, 1272 (M.D. Ala. 2003). 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." *Id.*

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 an entire semester of a school year (5 months), blaming the parents for the student's school aversion in failing to return C.J. to school, even when it was undisputed that the student's non-attendance was due to his disability (R. 55, Opinion, p. 2).[3] As the district court recapped: "In November 2014, C.J.'s behavior began to deteriorate. . . . In January

[3] *Amicus* is unable to cite to the PageID number in the record on appeal because the record is sealed and available only to the parties pursuant to a Protective Order. Accordingly, *Amicus* cites to the page number of the district court opinion as shown in Docket Entry 55 of the district court's record.

2015, C.J.'s mother complained to the school that C.J. was being harassed and bullied, including by his teacher's assistants [and] [s]he complained that the harassment had caused C.J. to 'melt down' the day before. . . ." *Id.*[4] It is further undisputed that C.J. believed that he was being bullied and was reluctant to attend school due to his fear of being bullied, and that the parents had a good faith belief that their son was the subject of bullying at the school. It is further undisputed that the school district did not meet to discuss C.J.'s absenteeism and formally deny C.J.'s parents request to provide homebound school services to educate C.J. at home until April 30, 2015. (R.55, Opinion, pp. 2-3).

The school district was required to address both the school aversion and to also ensure that C.J. had an opportunity to benefit from education, even when C.J. did not attend school. The school is not permitted to bury its head in the sand refusing to address C.J.'s known educational and behavioral needs for five months, and then blame C.J.'s unsophisticated and unrepresented parents for C.J.'s failure to attend school when he was deteriorating behaviorally. Yet, both the school district

[4] For a student who is already eligible under the IDEA and whose absences adversely affect learning, the duty to address the absences in the IEP may exist regardless of whether they stem from a disability. The IDEA regulations at 34 C.F.R. § 300.324(a)(2)(i) require a district, in the case of a child whose behavior impedes the child's learning or that of others, to consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See Lakeland Sch. Dist.*, 58 IDELR 150 (SEA PA 2011).

and the district court did just that, blaming C.J.'s parents for not "tak[ing] advantage of the education they offer—this is the parent's role."[5] (R. 55, Opinion, p. 19) ("Schools are not required to force or motivate students to take advantage of the education offer they offer—this is the parents' role."); (R. 55, Opinion, p. 9) ("The record evidence amply supports the hearing officer's finding that 'the student's educational program . . . was available but not accessed by the student and the student's family.").

If a student is consistently absent and his non-attendance is affecting his ability to receive the services in his IEP, the district must take steps to address the issue. The school district's failure to do so may amount to an IEP implementation failure. *Joaquin v. Friendship Pub. Charter Sch.*, No.: 14-01119 (RC), 2015 U.S. Dist. LEXIS 117579, at *25 (D.D.C. Sept. 3, 2015) (concluding that, although a teenager's sporadic attendance impeded a charter school's ability to implement his IEP, the school was responsible for the student's failure to receive postsecondary transition services). The district court's reliance on *Marc V. v. N.E. Indep. Sch. Dist.*,

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[5] While both the school district and district court rely on the *Austin Ind. Sch. Dist. v. Robert M.*, 168 F. Supp. 2d 635, 640 (W.D. Tex. 2001) case for support for the proposition that "[s]chools are not required to force or motivate students to take advantage of the education they offer—this is the parents' role," the *Robert M.* case is about a gifted child who was *not* entitled to special education under the IDEA, and is therefore inapposite here, as C.J., a child with autism, is undisputedly eligible under IDEA. *See Fort Bend Indep. Sch. Dist. v. Z.A.*, No. 4:13-cv-01063, 2014 U.S. Dist. LEXIS 188170, at *65-66 (S.D. Tex. Jan. 29, 2014), *rev'd on other grounds sub nom. Fort Bend Indep. Sch. Dist. v. Douglas A.*, 601 F. App'x 250.

455 F. Supp. 2d 577, 594 (W.D. Tex.), *aff'd*, 242 F. App'x 271 (W.D. Tex. 2006) is misplaced, as the parents in that case had refused to allow the school district to speak to the student's doctor, thereby denying the school district access to credible information about the student's needs. Further, that case did not involve a blanket policy denying home instruction to students with psychological disabilities.

Moreover, the school district cannot shirk its responsibility to C.J. merely by blaming C.J.'s parents for his lack of attendance over the course of five months. *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038, 1045 (9th Cir. 2013) (An agency cannot blame a parent for its failure to ensure meaningful procedural compliance with IDEA because IDEA's protections are designed to benefit the student, not the parent); *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055-56 (9th Cir. 2012) ("The ASD has an affirmative duty to review and to revise, at least annually, an eligible child's IEP. See e.g., 20 U.S.C. § 1414(d)(2)(A), (4)(A); 34 C.F.R. §§ 300.323(a), 300.324(b)(1). Nothing in the statute makes that duty contingent on parental cooperation with, or acquiescence in, the state or local educational agency's preferred course of action."); *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1501 n.4 (9th Cir. 1996) (rejecting district's argument that attempted to shift blame to parents and affirming district court conclusion that district's plan failed to provide FAPE); *Justin G. v. Bd. of Educ.*, 148 F. Supp. 2d 576, 586 (D. Md. 2001) (where parties did not dispute that the school district had failed to develop an

IEP for the student, finding that parents' conduct did not justify denial of tuition reimbursement); *Briere v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242, 1254 (D. Vt. 1996) (rejecting district's argument that parent was to blame for IDEA violation); *A.D. v. Sumner Sch. Dist.*, 166 P.3d 837, 847 (Wash. Ct. App. 2007) (rejecting school's argument that parents were somehow to blame for procedural violations of IDEA). Further, given that the parents had genuine concern about their son being bullied, it was incumbent on the school district to address the school safety issues.

Consequently, because the school district fell short of its responsibility to educate C.J. 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, C.J. was denied FAPE as he was clearly not being provided an educational program which was "reasonably calculated to enable [C.J.] to make progress appropriate in light of [his] circumstances." *See Id.*; *Endrew F.*, 137 S. Ct. at 1001.

IV. An Inappropriate Transition Plan Denies a Student FAPE

IDEA emphasizes transition services. *See* Erik W. Carter et al., *Predictors of Postschool Employment Outcomes for Young Adults with Severe Disabilities*, 23 J. of Disability Policy Studies 50, 50 (2012) ("[A] central purpose of special education is to prepare students with disabilities for further education, employment, and independent living as part of a national policy aimed at ensuring equality of

opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.") (internal quotation marks omitted) (hereinafter Carter I). IDEA thus provides that once a child has reached the age of sixteen (or earlier if state law requires it), the child's IEP Team must use develop a "transition plan" which "must" include "[a]ppropriate measurable postsecondary goals" in areas such as training, education, and employment. 34 C.F.R. § 300.320(b)(1). These goals must in turn be based on "age appropriate transition assessments" of the child's current and future capabilities. *Id.*

To ensure that these goals are realized, IDEA also requires the IEP Team to list the services that the school district will provide to help the child accomplish them. *Id.* at § 300.320(b)(2); *see also Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.*, 655 F. App'x 423, 438 (6th Cir. 2016). IDEA's Part B regulations at 34 C.F.R. § 300.43(a) define transition services as a coordinated set of activities for a child with a disability that:

> (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
>
> (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes:
> (i) Instruction;
> (ii) Related services;

> (iii) Community experiences;
> (iv) The development of employment and other post-school adult living objectives; and
> (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

34 C.F.R. § 300.43(a).

IDEA's transition planning mandate was created due to congressional concern that high-school-age students in special education remained at risk of dropping out of school or otherwise leaving the school setting unprepared for adult life and responsibility. The legislative history of IDEA shows there was a "heighten[ing of] the IDEA's transition services requirement," because "transition services were of great importance." *Forest Grove Sch. Dist. v. Student*, No. 3:12-cv-01837-AC, 2014 WL 2592654, at *27 (D. Or. June 9, 2014). Thus, when Congress reauthorized the Act in 2004, it reiterated that transition services "are an *essential* tool which prepare 'special education students to leave high school ready to be full productive citizens, whether they choose to go on to college or a job.'" *Id.* at *77 (quoting 150 Cong. Rec. S11653-01, S11656 (Nov. 19, 2004) (Conf. Rep. accompanying 1350) (Statement of Sen. Dodd)) (emphasis added). And these provisions "are not optional." *Carrie I. v. Dep't of Educ.*, 869 F. Supp. 2d 1225, 1243-44 (D. Haw. 2012). Indeed, providing adequate transition services to students with disabilities is critical as it is "their last chance for a successful transition from high school into higher education, the working world, or independent living." Dean Hill Rivkin,

Legal Advocacy and Education Reform: Litigating School Exclusion, 75 Tenn. L. Rev. 265, 275 (2008).[6] IEP teams, therefore, must carefully consider where each student is heading after school and to determine what services are needed to assist the student in reaching his or her post-school goals.

As detailed by the district court's decision, C.J.'s transition plan provided by the school district included "a goal of having C.J. research information about becoming a law-enforcement officer." (R. 55, Opinion, p. 11). Specifically:

> The transition steps included the following specific goals: to research the field of law enforcement and report three careers of interest in that field; to identify and demonstrate examples of 3 work habits necessary to be successful in the field of law enforcement; and to research 3 colleges that have degree programs in law enforcement/criminal justice and identify three steps needed to apply.

(*Id.* at pp. 11-12). Other specific goals included that:

> C.J. will attend career events offered by the school, district, and online research; when given invitations to participate with peers'

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[6] Other studies "reveal the pervasiveness of dismal employment outcomes for individuals with severe disabilities," Erik W. Carter et al., *Factors Associated with the Early Work Experiences of Adolescents with Severe Disabilities*, 49 Intellectual & Development Disabilities 233, 233 (2011), such that "the prevailing transition bridge could be readily characterized as a 'bridge to nowhere' for substantial numbers of youth with severe disabilities," Carter I, *supra*, at 50 (citation omitted). Together, these factors explain why adults with more severe disabilities are significantly more likely to live in poverty. Nicholas Certo et al., *Seamless Transition and Long-Term Support for Individuals with Severe Intellectual Disabilities,* 33 Research & Practice for Persons with Severe Disabilities 85, 88 (2008) ("Adults with severe intellectual disabilities are three times more likely than their non-disabled peers to live in poverty with household incomes of $15,000 or less.").

> performances, field trips, career events, and CBI, C.J. will participate in campus events; and C.J. will employ strategies to help self regulate his frustration.

(*Id.* at p. 12).

While C.J. does have an interest in law enforcement, such a career and transition steps outlined in his IEP are wholly inappropriate and unrealistic post-secondary goals for his Transition Plan to prepare him for future employment and independent living given his behavioral struggles and abilities. This is easily confirmed by the district court's additional findings that "the record as whole does show C.J. continued to struggle with issues created by his disabilities, including . . . frustration . . . [being] easily overwhelmed, would refuse to comply with classroom rules or adult directives, and seemed unaware of common social boundaries or the idea of personal space." (R. 55, Opinion, p. 21). A goal of becoming a law enforcement officer is therefore not an "appropriate" goal for C.J.'s unique circumstances (as required by *Endrew F.*) because C.J.'s disabilities result in his inability to control his frustration, comply with classroom rules and adult directives, and be aware of common social boundaries of personal space. As such, C.J.'s unique circumstances make such a career choice an untenable one.

Further, the record reflects that C.J.'s parents, who were members of the IEP team, seriously questioned the goal of a career in law enforcement as they thought the goals fed an unhealthy obsession with law enforcement and, therefore, were

counterproductive. At no point does the district court decision grapple with the parents' good faith opposition to the law enforcement goal. *Endrew F.* teaches that the school district must provide a cogent reason for rejecting a parent's concern. *See* 137 S. Ct. at 1001. The district court failed to address whether the choice of the law enforcement goal was appropriate in light of the student's individual circumstances and the parents' strong opposition.

Moreover, while the district court cites to C.J.'s progress in his alternative curriculum (the Unique curriculum) as evidence that C.J. was receiving FAPE, the Unique curriculum is not the general education curriculum required for a student to achieve a high school diploma, a necessary step for a person to become a law enforcement officer[7], nor does an alternative curriculum enable C.J. to attend college to pursue a degree in law enforcement. Because C.J.'s Transition Plan is centered around both of these goals—becoming a law enforcement officer and researching colleges that provide a degree in law enforcement, C.J.'s Transition Plan did not provide him with appropriate goals and services to meet his individual needs and prepare him for employment and independent living. And like all other aspects of special education programming, transition services must be provided to meet the

[7] A person may also qualify if he has a high school equivalency certificate or has an honorable discharge after 24 months of service with the U.S. military. Tex. Admin. Code 37§ 217.1(a). Both the high school equivalency certificate and the honorable discharge are very unlikely, if not impossible, for C.J.

individual needs of each eligible student, and if they are not, the failure to provide appropriate transition services results in a loss of educational opportunity which is a denial of FAPE. *Letter to Hamilton*, 23 IDELR 721 (OSEP 1995); *Gibson*, 655 F. App'x at 439. Accordingly, C.J.'s Transition Plan resulted in a denial of FAPE.

CONCLUSION

For the foregoing reasons, COPAA respectfully requests that the Court reverse the judgement of the district court granting summary judgment for the school district and grant judgment in favor of C.J. or remand for further proceedings.

Date: April 9, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(c)(7), 29(d) and 32(a)(7)

The undersigned certifies that this brief is presented in Times New Roman font 14, in compliance with the Court's Rules.

The undersigned also certifies that the sections of the brief application to the length requirements contain 6,098 words in compliance with the Court's Rules, as measured by Word 2010, the word processing program used to create the brief.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on the 9th of April 2018 I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system to:

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No. 17-20750 Renee J., et al v. Houston Indep School District
USDC No. 4:16-CV-2828

Dear Ms. Almazan-Altobelli,

We have reviewed your Amicus Brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

The paper copies of your brief/record excerpts must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief/record excerpts filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief/record excerpts directly from your original file without any header.

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Amanda Sutton-Foy

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cc: Mr. Andrew Cuddy
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