20-50003

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

LEIGH ANN H., As parent/guardian/next friend of K.S. and K.S. Individually, an Individual with a Disability,

Plaintiff-Appellant,

—v.—

RIESEL INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

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

BRIEF FOR A*MICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

LEIGH ANN H., et. al.
Plaintiffs-Appellants,
v. Case No. 20-50003
RIESEL INDEPENDENT SCHOOL DISTRICT
Defendant-Appellee.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order 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. Attorneys for Appellants and other putative *Amicus* are independent members of COPAA, an organization which opens membership to attorneys who are interested in and/or represent parents and children with disabilities. COPAA has not contributed in any way to the Appellants or their pursuit of this matter.

Amicus Curiae adopts the statements of the Appellants and Appellees 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* the following is a list of all entities known to have an interest in the outcome of this appeal which has been "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,

A non-profit organization.

Respectfully submitted, this the 29th day of April 2020.

/s/Selene Almazan-Altobelli
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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 with disabilities, adequate transition planning for appropriate post-secondary outcomes and services aligned to support reaching those post-secondary outcomes are critically important for students with disabilities because they can make a profound difference in their futures.

Both parties have consented to this brief; Amicus adopts the Statement of the Case contained in Appellants' Brief at pp. 2-13.

SUMMARY OF ARGUMENT

The Supreme Court has 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. 34 C.F.R. § 300.320(b)(2). In this case, the school district failed to provide the student with either appropriate post-secondary goals or appropriate transition services to meet the student's unique needs.

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).

Board of Education of Hendrick Hudson School District 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). Moreover, once a child has reached the age of sixteen (or earlier if state law requires it which Texas does at age fourteen), 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).

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.

II. AN INAPPROPRIATE TRANSITION PLAN DENIES A STUDENT FAPE

A. Transition Plans Must be Uniquely Tailored to Support Appropriate Post-Secondary Goals of Employment and Independent Living

IDEA emphasizes transition services. "[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." 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) (internal quotation marks omitted) (hereinafter Carter I). IDEA thus provides that once a child has reached the age of sixteen (or earlier if

required by state law), 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 Renee J. v Houston Indep. Sch. Dist.,* 913 F.3d 523, 532-33 (5th Cir. 2019): *Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ*., 655 Fed. Appx. 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*, 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).[2] IEP teams, therefore, must carefully consider where each student is heading after school to determine what services are needed to assist the student in reaching his or her post-school goals.

B. K.S.'s Transition Plan was Not Appropriate in Light of his Unique Circumstances and Needs

1. K.S.'s Post-Secondary Goals were Inappropriate

As detailed by the Magistrate Judge's Report and Recommendation (hereinafter "Report"),[3] K.S.'s transition plan provided post-secondary goals of "enrollment in an institution of higher learning, the pursuit of a degree in criminal justice, and employment as a game warden." (Report, p. 4). While it is appropriate for a transition plan to engage a student's expressed future employment interests, that is not sufficient without goals and objectives that provide the student with a sold pathway to their postsecondary life. Thus, in *Renee J. v. Houston Indep. Sch. Dist.,*

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[2] 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 for substantial numbers of youth with severe disabilities," Carter I, *supra*, at 50 (citation omitted).

[3] The District Judge's Order Adopting Report and Recommendation did not discuss Appellant's objections to the Report and Recommendation, nor did it really discuss the Report's findings with regard to K.S.'s transition plan. Accordingly, *Amicus's* focus is directed to the Report.

this Court only found the transition plan for a student with an expressed interest in being a police officer appropriate because the transition plans "attempted to engage his principal future employment interest while developing basic life skills necessary for post-secondary life." 913 F.3d at 534. The District of Massachusetts found an IEP inadequate because the school district "impermissibly conflate[d] enabling [the student's] broad vision statement (i.e., the long term goal of attending college and working with computers) with its statutory obligation to provide appropriate measurable goals developed according to timely transition assessments." *See Dracut Sch. Comm. v. Bureau of Special Educ. Appeals of Mass. Dep't of Elem. & Secondary Educ.,* 737 F. Supp. 2d 35, 51 (D. Mass. 2010).

While K.S. self-reported an interest in becoming a game warden, the record reflects that that K.S. did not even know what the job entailed (AR 2050), and there were no transition related plans for him to learn or investigate that career and educational path. As part of transition planning, for example, it would have been appropriate to have a goal for K.S. to investigate the job of game warden to determine what the job entailed.

K.S.'s parent was understandably concerned that this goal of a career as a game warden, a career that requires a collegiate degree in criminal justice as outlined in his IEP, was unrealistic in light of her son's disability and his experiences in high school. K.S. had an extensive history of disciplinary referrals and behavioral

outbursts. K.S. had multiple suspensions, numerous aggressive confrontations with individuals in positions of authority, and engaged in a physical assault which led to a banning of K.S. from his high school campus as well as a Manifestation Determination Review which yielded a disciplinary change in educational placement to an alternative learning center. (ROA.1541-1555; 2291; 2580; 7845).

That K.S. lacked an understanding of what the occupation of a game warden actually entailed coupled with his extensive history of disciplinary referrals and confrontations with individuals in authority should have been critical considerations when assessing the appropriateness of K.S.'s post-secondary goals as outlined in his transition plan. However, the Report failed to even *mention* these facts, much less consider them, when analyzing the appropriateness of K.S.'s transition plan.

2. K.S.'s Transition Plan did Not Include Appropriate Assessments and Necessary Information

The record also reflects that RISD failed to conduct age-appropriate assessments upon which to build K.S.'s post-secondary goals, as the IDEA requires. Had such assessments been done, it would have been apparent that the post-secondary goals, without any goals or objectives for the basic life skills necessary for him to reach his aspirational post-secondary goals, were not appropriate in light of his unique circumstances—i.e. behavioral and mental health challenges. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). Instead, in developing K.S.'s post-secondary goals, RISD relied merely upon K.S.'s relayed interest in becoming a game warden

as he had expressed in a vocational interest interview and the ESTR-J, a vocational survey. (ROA.982). While true that vocational interest interviews and surveys technically satisfy the criteria for permissible transition assessments, they should have been only one piece of the information considered in developing K.S.'s transition plan as these vocational interest interviews and surveys fail to satisfy IDEA's requirement that the transition assessments be *age-appropriate*. Vocational interest surveys and interviews are age-appropriate only for younger students just beginning the transition process to help identify possible areas of post-secondary interests upon which to build post-secondary goals, not for students like K.S. who are at the end of their high school career. *See generally,* David Test, Nellie Aspel, & Jane Everson *Transition methods for youth with disabilities*, Upper Saddle River, NJ: Pearson Education Inc. (2006).; *see also* Jay Rojewski, *Career assessment for adolescents with mild disabilities: Critical concerns for transition planning,* Career Development for Exceptional Individuals, Vol. 25, Issue 1, pp.73-95 (2002).

For college-bound students with disabilities, it is critical that transition plans include specific instruction to assist them in making the transition from high school to college, where they will need to have the self-advocacy skills necessary to obtain the reasonable accommodations that they need to be successful in school. *See* Lynn A. Newman, Joseph W. Madaus & Harold S. Javits, *"Effect of transition planning activities on postsecondary support receipt by students with disabilities,"* 82

Exceptional Children 497 (2016). This study found that having postsecondary accommodations specified on high school transition plans "significantly increased the odds of students with disabilities at 2-year colleges seeking and using both disability specific and generally available postsecondary supports." *Id.* at 509. It also found that it is critical for transition planning to include educating students about the supports available to them, both as members of the student body and as students with disabilities. Too often, students with disabilities in college do not access the services they need to be successful; "there are a myriad of reasons that postsecondary students do not access services, including fear of stigma, lack of self-advocacy skills, not believing that services are needed, and lack of knowledge about available services or how to access them." *Id.* These reasons need to be addressed in transition planning. *Id.* at 510.

Further, transition planning can educate high school students about "the impact of their disability and how it might affect the need to request services at the college level, including disability-based services." And some students require more detailed direct instruction in requesting reasonable accommodations. *Id.* Too many students with disabilities do not make use of these services in college, and, as a result, drop out. *Id.* at 511.

3. K.S.'s Parental Input and Expert Opinions were Not Appropriately Considered

Here, the record reflects that K.S.'s parent, who was a member of the IEP team, seriously questioned the appropriateness of the post-secondary goals of obtaining a degree in criminal justice and becoming a game warden. K.S.'s parent reported that K.S. only had a 54 percent ability to independently perform employment-related tasks independently and only a 13 percent ability to independently perform education related tasks independently. (ROA.879). K.S., whose sole input RISD relied upon in developing the transition plan, self-reported quite differently. K.S. claimed that he was 100 percent able to independently perform employment related tasks and that he was 75 percent able to independently perform education related tasks. K.S.'s parent noted many other concerns related to his education and employment related abilities including that K.S. "does not obey rules and is not mature for his age." (ROA.879). Conversely, K.S. presented an opposite (and unrealistic) view of himself, self-reporting that he was "currently successfully employed" and that he "can respond appropriately to authority figures." (ROA.863). K.S.'s disciplinary history indicates that his parent's assessment of his skills and abilities was more accurate than his own assessment.

Ultimately, neither RISD, nor the district court, considered K.S.'s Parent's input, input which was critical to understanding, and supporting, K.S.'s unique post-secondary employment and education-related needs. However, *Endrew F.* teaches

that the school district must provide a cogent reason for rejecting a parent's concern. *See* 137 S. Ct. at 1001. RISD did not, nor did the Report address, whether the post-secondary criminal justice degree and game warden goals were appropriate without any additional goals or objectives directed to preparing K.S. for the rigors of college in light of the R.S.'s Parent's strong opposition and RISD's failure to consider that Parental input.

Although the district court did not address R.S.'s Parent's input and concerns, the Report did address K.S.'s expert, Dr. Bloom. Dr. Bloom opined that due to his assessments and interviews of K.S., as well as R.S.'s academic and behavioral deficiencies, the transition plan and post-secondary goals contained therein were not appropriate for K.S. (Report, pp. 30-31). Critical of Dr. Bloom's opinions regarding the appropriateness of K.S.'s post-secondary goals, the Report dismisses K.S.'s expert on the basis that Dr. Bloom "did not conduct his own assessment of K.S.," that "Dr. Bloom did not speak to K.S. or his teachers before writing his report," and that "Dr. Bloom did not observe K.S. in the educational or employment setting either." (Report, p. 31-32). The district court's criticisms of Dr. Bloom's report and opinions are both factually and legally incorrect.

Most importantly, the district court failed to note that Dr. Bloom had in fact met and assessed K.S prior to Dr. Bloom's testimony, so he did do his own assessment of K.S. and was able to discuss the results at the hearing. Although this

interview with K.S. followed Dr. Bloom's initial report, Dr. Bloom did find that his interview with K.S. provided information consistent with the full educational records and prior evaluations that he had reviewed, and, thus, confirmed his initial report. (ROA.12234-5). Further, Dr. Bloom was qualified as an expert in his field of transition plans and services for students with disabilities. (ROA.12234).

That Dr. Bloom did not teach and observe K.S. in an educational setting prior to giving his opinions on the appropriateness of K.S.'s transition plans and that RISD's teachers who opined that the plan they developed is appropriate, is a common reality for many parent/student-side experts. Unfortunately, the district court repeated the common error seen in many cases in which it dismissed the testimony of parents and their experts while being overly deferential to the school district's witnesses. This is evident as the Report did not even address K.S.'s Parent's concerns and dismissed Dr. Bloom's opinions on the basis that "multiple district staff all testified they believed the goals were appropriate based on their experience with K.S."

Giving overwhelming deference to school district witnesses over the student's parent or student's expert simply because the school district witnesses are more numerous, testify in conformity with each other, and have spent more time at school with the student can result in a flawed conclusion by the court because, as the Sixth Circuit has explained, "it is hard to ignore the partisan motive of [school district]

teachers and staff, who are effectively parties in this case." *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 794 (6th Cir. 2018). Naturally, the "multiple district staff" are not going to testify that the transition plan they are responsible for developing and implementing was inappropriate for K.S. Likewise, as the Sixth Circuit explained, opinions of parents and their experts should not be disregarded merely because school staff claim to know the child's educational needs best:

> The crux of this argument is that the district court should have deferred to the opinions of HCDE's teachers and staff because they had spent far more time with L.H. and were more familiar with his academic record and individual idiosyncrasies, so they knew best how he should be educated. If the law were that a court must defer to the opinions of those who spend the most time with the student and presumably know him best, then there would be no place for experts. Moreover, parents could never prevail because the student's teachers will always spend more time with the student or know the student better than the parents' hired experts. On the other hand, the parents spend more time with the student and know the student better than any teacher. Taking HCDE's argument to this ultimate end, the district court would actually defer to the student's parents, who surely know the student the best, regardless of any expertise.

L.H., 900 F.3d at 794. As the Sixth Circuit observed, if the length of time with the child determines the credibility of the witness, then the parent who lives with the child would always be more credible than the school staff. *Id.*

In fact, school districts commonly bar their doors to parental experts or limit the amount of time that parental experts can spend in observation. *See L.M. v. Capistrano Unified School District*, 556 F.3d 900, 905 (9th Cir. 2009) (holding that 20 minute limit on classroom observation by parent's expert did not violate IDEA).

Thus, rather than criticize K.S.'s parent's expert for not having educational access to K.S. before rendering his opinion, and dismissing K.S.'s parental concerns, without even discussing them, the district court and RISD should have given due weight to the opinions of K.S.'s parent, who actually knows her child best, when determining whether the transition plan and post-secondary goals were appropriate to address K.S.'s unique needs.

4. K.S.'s Transition Plan did Not Include Appropriate Transition Services

Finally, even assuming *arguendo* that K.S.'s post-secondary goals were sufficient, which they were not, like all other aspects of special education programming, transition services must then be provided to meet the individual needs of each eligible student. If they are not, the failure to provide appropriate transition services results in a loss of educational opportunity, which in itself is a denial of FAPE. *Letter to Hamilton*, 23 IDELR 721 (OSEP 1995); *Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ*., 655 Fed. Appx. 423, 439 (6th Cir. 2016). Here, the district court determined that K.S. received appropriate transition services to support the post-secondary goals of obtaining a degree in criminal justice and becoming a game warden based solely on the fact that "K.S. was enrolled in several courses of study and received accommodations in his IEP." Specifically, the Report stated, "K.S. was enrolled in several courses of study and received accommodations in his

IEP, so there can be no credible argument that K.S. did not receive any transition services." (Report, p. 32).

This reasoning by the district court that K.S.'s transition services are appropriate simply because he took classes and received accommodations in his IEP is a conclusory statement devoid of any legal analysis. The district court could have very well said that "because the child has an IEP with accommodations, the child has received a FAPE." But virtually every IEP provides for students to take some classes, and most, if not all, provide some accommodations. IDEA's requirement of transition planning and transition services means more is required; student-specific goals and objectives and accompanying services are mandated to put a student on a pathway that could yield post-secondary success.

As noted above, this Court held the transition plan in *Renee J.* was appropriate because, in addition to the student's aspirational goal of becoming a police officer, it also included more basic transition goals, including "'work[ing] part time while attending school,' attending a 'community college or trade school,' [and], 'independently prepar[ing] for work each day, including dressing, making his bed, making his lunch, and accessing transportation." *Renee J.*, 913 F.3d at 533.

In fact, the Pennsylvania Middle District recently held that a school district is required to provide an explanation of how and why the specific transition services provided to the student are appropriate:

> The District maintains that the Hearing Officer overlooked the many services that Matthew did receive, including development of pre-vocation skills in the classroom, "such as cooking, using money for purchases, how to contact and use community resources such as transportation, following multi-step directions, and increasing his understanding of community and household sight words, making a simple meal, and following one or two step recipes in support of his independent." (*Id.*). Further, "once he moved up to High School, the Student also participated at work sites located outside the District, including the library and local supermarket." (*Id.*).
>
> The Court finds no basis for the District's argument. **In its brief, the District does nothing more than provide a list of services and educational opportunities which it provided to Matthew. More specifically, the District fails to address *how* and *why* what it provided to Matthew was appropriate under his circumstances.** For example, the District states "[h]is transition services were appropriate for him" but the District fails to further explain that statement. (*Id.*). In sum, the District fails to address how the Hearing Officer's conclusion — that Matthew's IEP itself was deficient, *in light of the services he received* — is incorrect and instead, the argument it presents in its brief is conclusory and lacking in factual support or law.

Matthew B. v. Pleasant Valley Sch. Dist., No. 3:17-CV-2380, 2019 U.S. Dist. LEXIS 190226, at *30-32 (M.D. Pa. Oct. 31, 2019) (emphasis added). The court found that the district's IEP was deficient because it did not explain how it would help the student attain the goal of receiving training so that he could pursue supported employment when he graduated. *Id.* at 34.

Similarly, in *District of Columbia Public Schools*, 115 LRP 40497 (SEA DC 05/15/15), the hearing officer found that while a student's transition plan listed his interests in becoming a mechanic, a business professional, or a basketball player, there was nothing specific in the plan "about how the Student might actually

become" any of those things. *Id*. The hearing officer therefore concluded that the transition plan was deficient given the absence of a concrete plan for the student to achieve his goals and the failure to provide transition services that related to the student's expressed vocational choices. *Id.*

Likewise, in this case, neither RISD, nor the district court have put forth any cogent explanation of *how* and *why* what it provided to K.S. in the form of educational courses and IEP accommodations was appropriate under his circumstances to meet his post-secondary goals of obtaining a degree in criminal justice and becoming a game warden. Additionally, the district court did not review whether the IEP provided K.S. with adequate preparation for him to be successful in college, including teaching him self-advocacy skills so that he could navigate obtaining accommodations in college. Moreover, the district court did not even analyze the accommodations to determine whether the same accommodations would be available for him in a college setting or whether he would need to learn new skills before he could be successful in the college environment. Because colleges provide accommodations in response to the requirements of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and not IDEA, the accommodations available in college may be different from those provided under the IDEA in high school. Thus, the district court erred in merely providing a conclusory assertion that the IEP and its accommodations were

sufficient without analyzing the IEP to determine whether it provided transition services that would prepare K.S for life after high school.

Accordingly, RISD has failed to provide K.S. with a transition plan sufficient to meet K.S.'s unique needs, and therefore, has denied him a FAPE.

CONCLUSION

For the foregoing reasons, COPAA respectfully requests that the Court reverse the judgement of the district court grant judgment in favor of K.S. or remand for further proceedings.

Dated: April 29, 2020

Respectfully submitted,
/s/ Selene Almazan-Altobelli
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CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 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 5,640 words.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli

CERTIFICATE OF CONFERENCE

In accordance with 5th Cir. R. 27.4, the undersigned certifies that on April 23, 2020, consent to file an amicus curiae brief was sought from parties' counsel. Both parties provided consent.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli

CERTIFICATE OF SERVICE

I certify that on April 29, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli