No. 20-40315

In the United States Court of Appeals for the Fifth Circuit

D.H.H., A MINOR STUDENT WITH DISABILITIES, BY AND WITH AND THROUGH HER PARENT/GUARDIAN/NEXT FRIEND ROB ANNA H.; ROB ANNA H., PARENT/GUARDIAN/NEXT FRIEND OF D.H.H., A MINOR STUDENT WITH DISABILITIES,

Plaintiffs-Appellants,

v.

KIRBYVILLE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Texas

MOTION OF DISABILITY RIGHTS TEXAS AND COUNCIL OF PARENT ATTORNEYS AND ADVOCATES FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

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Attorneys for Amici Curiae

Disability Rights Texas and Council of Parent Attorneys and Advocates respectfully request that the Court grant them leave to file a Brief of *Amici Curiae* in support of Plaintiffs-Appellants Rob Anna H. as parents and next friend of D.H.H. This motion is accompanied by the brief of Disability Rights Texas and Council of Parent Attorneys and Advocates as required by Fed. R. App. P. 29(a)(3).

Movant has sought the parties' consent to the filing. The Appellants have consented, but the Appellee has not consented.

ARGUMENT

A. Interests of DRTx

Disability Rights Texas (DRTx) is a nonprofit organization mandated to protect the legal rights of people with disabilities by the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001, *et seq.*, the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 1081, *et seq.*, and the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act of 1973, 29 U.S.C. § 794(e). DRTx is the designated "protection and advocacy" system for the State of Texas. In accordance with its federal mandate, DRTx has the authority to, among other things, pursue administrative, legal, and other

appropriate remedies to protect the rights of persons with disabilities. 42 U.S.C. § 6042(2); 42 U.S.C. § 10805(a)(1).

A significant portion of DRTx's work is representing students with disabilities and their families throughout the state of Texas to secure appropriate education services from public schools. DRTx is interested in this matter because of the implications that this Court's decision will have for students with disabilities who are not eligible for special education under the IDEA but are still entitled to receive a free appropriate education under Section 504 of the Rehabilitation Act.

B. Interests of COPAA

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch.

22, § 1,17 Stat. 13 (codified as amended at 42 U.S.C. § 1983), Section 504 of the Rehabilitation Act of 1973, (codified at 29 U.S.C. § 794) and the Americans with Disabilities Act (codified at 42 U.S.C. § 2101, *et seq*.

COPAA 's interest in this case stems from its deep commitment to all children with disabilities who are entitled to receive a free appropriate education under Section 504 of the Rehabilitation Act.

C. Why an *Amici* Brief from DRTx and COPAA is Relevant and Desirable

The DRTx and COPAA *Amici Curiae* brief is both relevant and desirable. The legal issues presented by this appeal are of great importance to Disability Rights Texas and COPAA and their members because they implicate the rights of students with disabilities to receive a free appropriate education under Section 504. DRTx and COPAA offer relevant matters not brought to the attention of the Court by the parties and will present a distinct and relevant analysis of the issues presented on appeal.

DRTx and COPAA respectfully request that they be permitted to participate as *Amici Curiae* to address the significant differences of Section 504 and the Individual with Disabilities Education Act, including the eligibility determinations for each.

CONCLUSION

For the foregoing reasons, Disability Rights Texas respectfully request that the Court grant their motion to file the accompanying brief in support of Plaintiff-Appellants.

Respectfully submitted this the 13th day of July, 2020.

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CERTIFICATE OF CONFERENCE

In accordance with 5th Cir. R. 27.4, the undersigned certifies that on July 10, 2020, consent to file an amicus curiae brief was sought from parties' counsel. Appellants provided consent, Appellees declined to provide consent.

By: */s/ L. Kym Davis Rogers*

CERTIFICATE OF SERVICE

I certify that on July 13, 2020, the foregoing document was served on all parties through their counsel of record through the CM/ECF system.

By: */s/ L. Kym Davis Rogers*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this motion is presented in Century size 14 font, in compliance with the Court's Rules.

The undersigned also certifies that the motion contains 598 words in compliance with the Court's Rules, as measured by Word for Office 365, the word processing program used to create the brief.

By: */s/ L. Kym Davis Rogers*

No. 20-40315

United States Court of Appeals

for the

Fifth Circuit

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BRIEF FOR *AMICI CURIAE* DISABILITY RIGHTS TEXAS AND COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF PLAINTIFFS

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

This amici curiae brief is submitted in support of Plaintiffs-Appellants. The following amici curiae and their counsel have an interest in this brief:

Amici Curiae:	Disability Rights Texas Council of Parent Attorneys and Advocates
Counsel:	Selene Almazan-Altobelli COUNCIL OF PARENT ATTORNEYS AND ADVOCATES L. Kym Davis Rogers DISABILITY RIGHTS TEXAS

July 13, 2020 */s/ L. Kym Davis Rogers*

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STATEMENT OF INTEREST

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In accordance with its federal mandate, DRTx has the authority to, among other things, pursue administrative, legal, and other appropriate remedies to protect the rights of persons with disabilities. 42 U.S.C. § 6042(2); 42 U.S.C. § 10805(a)(1). A significant portion of DRTx's work is representing students with disabilities and their families throughout the state of Texas to secure appropriate education services from public schools. DRTx is interested in this matter because of the implications that this Court's decision will have for students with disabilities who are not eligible for special education under the IDEA but are still entitled to receive a free appropriate education under Section 504 of the Rehabilitation Act.

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only be developed and implemented with collaboration between parents and educators as equal parties.

COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, § 1,17 Stat. 13 (codified as amended at 42 U.S.C. § 1983), Section 504 of the Rehabilitation Act of 1973, (codified at 29 U.S.C. § 794) and the Americans with Disabilities Act (codified at 42 U.S.C. § 12101, *et seq*.) COPAA 's interest in this case stems from its deep commitment to all children with disabilities who are still entitled to receive a free appropriate education under Section 504 of the Rehabilitation Act.

Appellants have consented to this filing; Appellees did not provide consent to this filing.

Amici adopts the Statement of the Cases contained in Appellants' Brief at 2. *Amici* adopts the Statement of the Issues contained in Appellants' Brief at 2.

RULE 29(A)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici curiae certify that (A) no party's counsel authored this brief in whole or part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person, other than amici curiae, its members, or its

counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE CASE

As this Court's decision may affect the legal rights of students with disabilities who are denied access to services under Section 504 because they do not qualify for services under the IDEA, *Amici* submit this brief to further detail the significance of the district court's failure to consider the Section 504 claims of the Plaintiffs-Appellants independent of the IDEA claims. *Amici* urge the Court to firmly reject the district court's misapplication of *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 992 (5th Cir. 2014) and remand this case for proper determination of the remedies available to D.H.H. under Section 504 of the Rehabilitation Act.

ARGUMENT

I. SECTION 504 AND THE INDIVIDUALS WITH DISABILITY EDUCATION ACT (IDEA) ARE DIFFERENT STATUTES WITH DIFFERENT PURPOSES WITH DIFFERENT ELIGIBILITY STANDARDS.

IDEA creates a comprehensive standard and procedural framework by which students with disabilities will be educated in a meaningful way while Section 504 is a civil rights statute designed to end unlawful discrimination against individuals with disabilities, including students in public schools. Because the statutes were

developed at different times, and with different purposes in mind, the mechanisms and remedies that have developed for each are distinct.

The Supreme Court has observed the profound differences in the two statutes stating, "the IDEA guarantees individually tailored educational services, while Title II [of the Americans with Disabilities Act and § 504 promise non-discriminatory access to public institutions." *Fry v. Napoleon Community School*, 137 S. Ct. 743, 756 (2016). IDEA was enacted with a narrower focus than Section 504, targeting students with specifically identified disabilities who need specialized instruction because of their disabilities. 20 U.S.C.A. § 1401(3)(i)(ii). Thus, the statutes set out different eligibility criteria, with the result that all students eligible for special education under IDEA are protected by Section 504, but there are many students who do not qualify for IDEA services who are protected from discrimination by Section 504. As a result, a student who is not eligible for IDEA services may nonetheless be protected from discrimination under Section 504. Because the two statutes are distinct, the District Court erred in dismissing D.H.H.'s Section 504 claim on the ground that the district had prevailed in obtaining a determination that D.H.H. was not eligible for special education under IDEA.

A. Section 504 is distinct from the IDEA because it addresses discrimination and offers remedies not available under IDEA.

Section 504 of the Rehabilitation Act was passed on September 26, 1973 and is codified at 29 U.S.C. § 701. It was the first federal civil rights law directed at the protection of people with disabilities. Section 504 is an antidiscrimination statute which provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794. Because public schools receive federal funds, they are subject to the requirements of Section 504.

The scope of Section 504 is much broader than IDEA, which is limited to education, particularly for specific disability-related areas. Thus, while IDEA may set the "basic floor of opportunity," Section 504 may require more. To achieve that end, inclusive in Section 504 is the ability to pursue damages to make victims of discrimination whole, and also to disincentivize discrimination at an institutional level. As such, the purpose and scope of remedy for these statutes differ.

B. Section 504 ensures access for children with disabilities in the school setting.

Section 504 prohibits discrimination against students with disabilities. Section 504 applies to school districts that receive federal funding, and was enacted because Congress found that individuals with disabilities should "enjoy full inclusion and

integration in the economic, political, social, cultural, and educational mainstream of American Society." 29 U.S.C.A. § 701(a)(3)(F). The Unites States requires that all programs, projects, and activities that receive federal assistance shall carry out its activities in a way that include, integrate, and allow full participation of individuals with disabilities. 28 U.S.C.A. § 701(c)(3).

Under Section 504, a school district is required to provide a free appropriate public education (FAPE) to each qualified student with a disability regardless of the nature or severity of the disability. 34 C.F.R. § 104.33(b)(1). Substantively, Section 504's FAPE requires "the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons *as adequately as the needs of nonhandicapped persons are met*." 34 C.F.R. § 104.33(b)(1) (emphasis added). Thus, Section 504's FAPE requirement calls for application of the equality standard that this Court rejected in *Board of Educ. v. Rowley*, 458 U.S. 176, 198-199 (1982) for IDEA FAPE claims. *See* Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 Tex. J. C.L. & C.R. 1, 11 (2010).[1]

[1] Additionally, a non-IDEA eligible student's 504 plan may only include accommodations related to "regular" education, as he is not entitled to or subject to "special" education. A school may no more impose special education on a student that does not need it than it may deny special education to an eligible child.

School districts do have defenses to obligations under Section 504, and are excused from "tak[ing] any action that . . . would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164 (2015).

C. The IDEA requires school districts to provide FAPE to certain children with disabilities.

IDEA confers upon students with disabilities "an enforceable substantive right to public education . . .." *Honig v. Doe,* 484 U.S. 305, 310 (1988). As the Supreme Court has explained, the statute "represents an ambitious federal effort to promote the education of handicapped children, and was enacted in response to Congress' perception that a majority of handicapped in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 178 (1982). IDEA provides detailed requirements for the development of an appropriate IEP for every student and powerful procedural protections when school districts fail to follow statutory and regulatory directives. In 2015-16, more than six million students with disabilities had IEPs.[2]

IDEA "requires school districts to provide the individualized services necessary to get a child to that floor [of access to education]," but what sets IDEA

[2] U.S. Dep't of Educ., Office of Civil Rights, Civil Rights Data Collection 2015-16 https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2015_16 (last visited July 10, 2020).

apart from Section 504 is that school districts must meet that mandate "regardless of the costs, administrative burdens, or program alterations required." *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013). Thus, the Supreme Court has rejected cost as a basis for denying a ventilator-dependent student continuous one-on-one nursing services during the school day, finding that cost was not a factor in construing the term "related services" in the IDEA context, *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 77 (1999).

Beyond the substantive requirements for programming contained within IDEA it also confers upon courts and administrative hearing officers broad equitable authority to provide appropriate educationally related relief. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009). Such relief "would include a prospective injunction directing the school officials to develop and implement at public expense an [appropriate] IEP." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1980). For those children whose parent have the means and the opportunity to provide special education and/or related services for their children while pursuing an IDEA remedy, relief could include reimbursement of funds spent on unilateral placements and services. *Id.; Forest Grove*, 557 U.S. at 240; *Leggett v. Dist. of Columbia*, 793 F.3d 59, 63-64 (D.C. Cir. 2015) (awarding placement at residential school that met student's needs when school district failed to identify alternative appropriate placement). For children whose parents are unable to afford or find

alternative services, relief includes compensatory education. *L.O. v. N. Y. C. Dep't of Educ.*, 822 F.3d 95, 124 (2d Cir. 2016); *M.S., ex rel., J.S. v. Utah School of Deaf and Blind* , 822 F.3d 1128, 1136 (10th Cir 2016); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016) (remanding for calculation of compensatory education to ensure that student is in educational position he would have achieved absent the denial of FAPE).

FAPE has a statutory definition under the IDEA that requires a student's individualized education program be developed and "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 207 (1982). The individualized education program "must aim to enable the child to make progress." *Endrew F. ex rel. Joseph F. v. Douglas Co. School Dist. RE-1*, 137 S.Ct. 988, 999 (2017). Therefore, FAPE under the IDEA must provide special education that is designed to meet the unique requirements and needs to prepare the child for the future outside of school, meaning her education, employment, as well as her ability to live independently.

D. There are many children with disabilities who are not eligible for IDEA services who are nonetheless protected by Section 504.

Section 504 and the IDEA have different eligibility criteria, and thus as this Court has noted, "students may qualify for special services under IDEA and also for protection under § 504, some students may qualify for § 504 protection but not

qualify for special services under IDEA." *Estate of Lance,* 743 F.3d at 991 (5th Cir. 2014) (quoting *Ellenberg v. New Mexico Military Inst.*, 572 F.3d 815, 818 (10th Cir. 2009)).

Section 504 defines an individual with a disability as a student that (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C.A. § 12102(2)(A). Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working. reading, concentrating, thinking, and communicating. 42 U.S.C.A. § 12102(2)(A). In 2008, Congress expanded the definition of disability in the Americans with Disabilities Amendments Act, which in turn expanded the definition and broadened eligibility under Section 504. 42 USCA § 12102(4). Congress made it clear that students with disabilities are not required to show that their disability impacts their educational performance. Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. Nat'l Ass'n Admin. L. Judiciary 611, 618 (2012). The Supreme Court's recent decision in *Bostock v. Clayton County*, No. 17-1681, 17-1623 and 18-107, 2020 U.S. Lexis 3252, at *13 (June 15, 2020) makes clear that statutes should be interpreted in accordance "with the ordinary public meaning of its terms at the time of its enactment." Federal courts must also interpret statutes in context, "and

with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (quoting *Davis v. Mich. Dep't of* Treasury, 489 U.S. 803, 809 (1989)); *see also King v. Burwell*, 135 S. Ct. 2480, 2492 (2015); *G.L. v. Ligonier Valley School Dist. Authority*, 802 F.3d 601, 618 (3d Cir. 2015) (interpreting IDEA's statute of limitations). This approach "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Heuso v. Barnhart*, 948 F.3d 324, 333 (6th Cir. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)).

In contrast, IDEA sets out a different definition of disability than that provided by Section 504. IDEA enumerates specific disabilities that a student must have in order to qualify for IDEA services: "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C. § 1401(3)(A)(i). The child must not only have one of the qualifying disabilities but must also "by reason thereof need[] special education and related services." 20 U.S.C. § 1401(3)(A)(ii).

Thus, the most significant difference for eligibility under Section 504 and IDEA is that a student qualifying for special education must demonstrate a need for special education as a result of the disability. This means a need for specialized instruction and indicates that the child's disability is impacting the child's performance in school. Courts routinely hold that students who have disabilities under § 1401(3)(A)(i) are not eligible for IDEA and special education because they simply do not need special education and related services. *See, e.g., Alvin Indep. Sch. Dist. v. A.D. ex rel Patricia F.*, 503 F.2d 378, 384 (5th Cir. 2007) (student with ADHD was not eligible for IDEA because he did not need special education); *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1109 (9th Cir. 2007) (student not eligible for IDEA; 504 plan was appropriate way to meet her needs). As the First Circuit stated, a child who needs only accommodations or services that are not part of special education to fulfill the objective of the need inquiry does not "need" special education. *Doe v. Cape Elizabeth School District*, No. 15-1155, 2016 WL 4151377 (1st Cir. 2016) at *11.

In contrast, eligibility under Section 504 requires an impact on a major life activity and does not require an adverse impact on education. Leona E. Filis, *Navigating the Fight for Legal Rights of Students with Disabilities Utilizing Section 504, Idea, and Special Education*, Hous. Law, 22, 23 2018.

Because the IDEA and Section 504 have different eligibility standards, school districts have determined that there are more than one million students[3] who are "504-only," meaning that they fall under the protection of Section 504 and not IDEA. Put simply, the IDEA serves a different function and provides different protections – often to different children. Title II of the ADA and § 504 "aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs . . . In short, the IDEA guarantees individually tailored educational services, while Title II and § 504 promise non-discriminatory access to public facilities and federally funded programs." *Id.*

The Office for Civil Rights of the U.S. Department of Education, the federal agency responsible for enforcement of Section 504 in the education setting, has repeatedly confirmed that Section 504 eligibility does not require an impact of the disability on learning, and is independent of IDEA eligibility. *See, e.g.*, Stokes County (NC Schs.), 117 LRP 2203 (OCR Sept. 23, 2016) (finding that school district personnel incorrectly told a parent that eligibility under Section 504 requires a disability that impedes learning); Irvine (CA) Unified School District, 353 IDELR 192 (OCR Jan. 31, 1989) (finding that district's conclusion that student did not

[3] U.S. Dep't of Educ., Office of Civil Rights, Civil Rights Data Collection 2015-16 https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2015_16 (last visited July 10, 2020).

qualify for special education under the IDEA was not dispositive of Section 504 eligibility which requires the student to show that his disability substantially limits a major life activity).

II. THE DISTRICT COURT ERRED IN FINDING THAT D.H.H.'S SECTION 504 CLAIMS FAIL BECAUSE HER IDEA CLAIMS FAIL.

The district court denied D.H.H.'s Section 504 claims because the court concluded that D.H.H. was not eligible for special education under IDEA. The court erred in conflating eligibility under the two statutes, when the statues clearly set out different criteria for eligibility, as demonstrated above.

The magistrate judge's report on dispositive motions concluded that D.H.H. was not eligible for special education, and because "her Section 504 claims arise from the same factual content and seeks the same relief as her IDEA claim, the undersigned determines that she has not successfully shown that she was excluded from the benefits or services of special education." ROA. 1894. The district court adopted the magistrate judge's report and entered a Judgment holding that D.H.H.'s Section 504 claim fails because the IDEA claim fails, and the Section 504 claim arises from the same factual content and seeks the same relief. ROA. 1920-21.

The magistrate judge's Report addressing post-judgment motions restates the issue slightly, concluding that because D.H.H.'s behavioral issues did not affect her educational performance, she was not eligible for special education under Section

504. 1990. The district court again adopted the magistrate judge's Report and held that KCISD met its obligations under Section 504 by properly evaluating D.H.H. in accordance with the IDEA. ROA. 2002.

Both the magistrate judge and the district court determined that because IDEA eligibility claim failed, her Section 504 claims must also fail. This holding necessarily ignores the significant differences in the eligibility standard for Section 504. In his second Report, the magistrate judge specifically notes that D.H.H. was not eligible for special education because her behavioral issues did not adversely impact her educational performance. As discussed *supra*, there is no requirement that a student's disability impact her educational performance under Section 504. Additionally, the magistrate judge's Report fails to acknowledge that services other than special education are available under Section 504.

The district court's Order adopting the Report on the post-judgment motions again demonstrates a misunderstanding of the law when the court finds that KCISD satisfied its obligations under Section 504 by evaluating D.H.H. for special education. While a district may use an IDEA evaluation to assist in the identification of students eligible for Section 504, simply conducting the evaluation without holding a Section 504 meeting to determine eligibility under the Section 504 criteria is not sufficient. As noted by the magistrate judge and adopted by the district court, D.H.H. was not eligible for special education under the IDEA because it was found

that her disability did not impact her educational performance. As discussed above, this would not have prevented her from receiving FAPE under Section 504.

Moreover, the district court's reliance on *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 992 (5th Cir. 2014) is misplaced. In *Estate of Lance*, this Court addressed the school district's liability under Section 504 when the student had been found eligible under the IDEA and was receiving special education. The Court concluded that the Section 504 FAPE claim failed in this case because the school district met its obligations to provide FAPE through compliance with the IDEA and the provision of special education services. *Id*. at 992-93. The Court specifically noted several of the limitations of this holding: there may be other basis for claims under Section 504 and, most importantly for this case, "a School District would never be able to invoke the sufficiency of its implemented IEP for students who qualify under Section 504 but do not qualify under IDEA-there would be no IEP to implement." *Id*. at 993.

Here, D.H.H. did not qualify for special education, and there was no IEP to implement. As this Court explained in *Estate of Lance*, students who are not eligible for IDEA may qualify for Section 504, and the school district cannot point to implementation of services under the IDEA to show compliance with Section 504.

CONCLUSION

For the foregoing reasons, and the reasons stated in Plaintiffs-Appellants' Brief, this Court should reverse the judgment of the district court.

Date: July 13, 2020

Respectfully submitted,

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/s/L. Kym Davis Rogers

CERTIFICATE OF SERVICE

I certify that on July 13, 2020, the foregoing document was served on all parties through their counsel of record through the CM/ECF system.

/s/ L. Kym Davis Rogers

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

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 3754 words.

/s/ L. Kym Davis Rogers