Docket No. 16-10613

In the

United States Court of Appeals

For the

Fifth Circuit

DALLAS INDEPENDENT SCHOOL DISTRICT,

Plaintiff-Appellant,

v.

MICHELLE WOODY, as Next of Friend to K.W.,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Northern District of Texas, No. 3:15-cv-01961-G · Honorable A. Joe Fish

BRIEF AMICUS CURIAE FOR THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF APPELLEES

SELENE ALMAZAN-ALTOBELLI, ESQ.
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
(844) 426-7224 ext. 702 Telephone
selene@copaa.org

CATHERINE MERINO REISMAN, ESQ.
REISMAN CAROLLA GRAN LLP
19 Chestnut Street
Haddonfield, New Jersey 08033
(856) 354-0071 Telephone
catherine@rcglawoffices.com

Attorneys for Amicus Curiae Council of Parent Attorneys and Advocates

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CASE NO. 16-10613

IN THEUNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DALLAS INDEPENDENT SCHOOL DISTRICT

PLAINTIFF-APPELLANT

V.

MICHELLE WOODY, AS NEXT OF FRIEND TO K.W.,

DEFENDANT-APPELLEE

CERTIFICATE OF INTERESTED PERSONS

Dallas Independent School District v. Michelle Woody, as next of friend to K.W. Case No. 3:15-cv-01961-G. 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. Attorneys for Appellee and 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 to the Appellees or their pursuit of this matter.

Amicus Curiae adopts the statements of the Appellee and 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 Advocate, Inc., a non-profit organization.

Respectfully submitted, this the 23rd day of November 2016.

/s/SeleneAlmazan-Altobelli_
SELENE ALMAZAN-ALTOBELLI
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844-426-7224, ext. 702
selene@copaa.org

/s/ Catherine Merino Reisman
Reisman Carolla Gran LLP
19 Chestnut Street
Haddonfield, New Jersey 08033
856.354.0071
catherine@rcglawoffices.com

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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 4,555 words in compliance with the Court's Rules, as measured by Word 2010, the word processing program used to create the brief.

/s/ Selene Almazan-Altobelli
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844.426.7224 ext. 702
selene@copaa.org

CERTIFICATE OF SERVICE

I certify that on November 23, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below. I also identify that I have sent the primary counsel for Appellants and Appellees a courtesy and supplemental copy in paper form to these addresses:

Roy T. Atwood
Texas Bar No. 01428040
ATWOOD GAMEROS, LLP
4514 Cole Ave., Suite 1500
Dallas, Texas 75205

Dianna D. Bowen
THOMPSON & HORTON, LLP
500 Akard Street, Suite 2550
Dallas, Texas 75201

Janet Little Horton
THOMPSON & HORTON, LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

/s/ Selene Almazan-Altobelli
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844.426.7224 ext. 702
selene@copaa.org

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Council of Parent Attorneys and Advocates (COPAA), is an independent, nonprofit organization of attorneys, advocates, and parents in forty-three states (including Texas, Louisiana and Mississippi) and the District of Columbia who are routinely involved in special education due process hearings throughout the country. The primary goal of COPAA 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) (2006). Individuals with disabilities can be economically contributing members of society if they receive the education and support they need to utilize their strengths to enable them to live and work independently. For that reason, COPAA is committed to ensuring that children with disabilities receive a free appropriate public education ("FAPE") in the least restrictive environment as required by the Individuals with Disabilities Education Improvement Act ("IDEA"). COPAA's interest in this case is its deep commitment to all children with disabilities to obtain needed special education services. The bedrock of the IDEA is that appropriate special education services are determined based on

individual consideration of a disabled child's needs, through the development of an Individualized Education Program (IEP).

Appellees have consented to this filing; Appellants conditioned their consent to COPAA's filing this brief upon Appellees' counsel consenting to allow an out of time amicus filing in support of Appellants. Appellees declined to agree, therefore, amicus curiae does not have consent from Appellants.

COPAA respectfully submits this brief in support of the Parents, and urges this Court to uphold the District Court's ruling that Dallas Independent School District failed to timely provide a free appropriate public education to K.W. as well as the finding that the failure to file to defend its assessment waives any defense it may have to the parent's entitlement to an IEE at public expense through the provider of her choosing.

STATEMENT PURSUANT TO FED R. APP. P. 29(c)(5)

COPAA and its counsel independently authored and submitted this Brief. COPAA has no relationships or involvements as identified in Fed. R. App. P. 29(c)(5).

FACTUAL BACKGROUND

Amicus adopts fully by reference herein the Statement of the Case in the Brief for Appellee at 2-14.

ARGUMENT

I. An Appropriate IEP is Integral to Achievement of IDEA's Significant and Substantive Educational Rights

A. Congress Passed IDEA to Address Well-Documented Discrimination in Public Education for Children with Disabilities

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 extent of 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 handicapping conditions 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." *Senate Report, S. Rep. No. 168, 94th Cong.*, 1st Sess. 5-8 (1975) reprinted in 1976 U.S. Code Cong. & Ad. News, 1425, 1429-32; *House Report, H.R. Rep. No. 332*, 94th Cong., 1st Sess. (1975), at 11- 12.

In light of the gross disparities Congress found 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 through various amendments has become the IDEA. The 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).

B. IDEA Creates Substantive Standards for an Appropriate Education

In enacting these laws, Congress did not merely require access to education. Congress mandated that children with disabilities receive a free appropriate public education. IDEA's goal is to provide a "full educational opportunity to all handicapped children." *Id.* § 1412(2)(A) (2012). Legislative history repeatedly reflects this goal. 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.Code Cong. & Admin.News, at 1433. Numerous drafters of the legislation expressed the same aspiration. *See* 121 Cong.Rec. 19482-19483 (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 *214 37030 (Rep. Mink); *id.*, at 37412 (Sen. Taft); *id.*, at 37413 (Sen. Williams); *id.*, at 37418-37419 (Sen. Cranston); *id.*, at 37419-37420 (Sen. Beall)..

Seven years after passage of the EHA, the Supreme Court held that IDEA requires "personalized instruction . . . with sufficient supportive services to permit the child to benefit from the instruction," provided that the instruction and services (i) are "provided at public expense and under public supervision;" (ii) "meet the State's educational standards;" (iii) "approximate the grade levels used in the

State's regular education;" and (iv) "comport with the child's IEP." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 189 (1982); *see also* 20 U.S.C. § 1401(8).

While this definition has been called "cryptic," *Rowley*, 458 U.S at 188 the test of free appropriate public education is whether the student is likely to receive educational benefit. As the *Rowley* majority held:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S., at 200-201.

Importantly, in footnote 23, the Court sets forth independence and self-sufficiency as the goals of the free appropriate public education:

> This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states:

> "The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society."
>
> The desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that state educational programs would confer educational benefits upon such children.

458 U.S., at 201 [citations omitted].

C. IDEA Mandates Provision of an IEP to Meet the Statute's Substantive Educational Standards

The IEP is the primary vehicle for ensuring that a child's educational program is individually tailored based on the child's unique abilities and needs, enabling the student to achieve these goals. *See* 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.345-300.350. A child's IEP describes, among other elements, the child's present levels of educational performance, measurable annual goals for addressing the child's educational needs that result from the child's disability and the individualized instruction and services that will be provided to help the child. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §300.347. The IEP drives educational placement decisions, which must be based upon the program of special education and related services contained in the child's IEP. 20 U.S.C. §1414(d); 34 C.F.R. §

300.552(b). IDEA mandates review and revision of the student's IEP at least annually. 20 U.S.C. §1414(d)(4)(A)(i).

The failure to make a timely offer of an IEP has a substantive impact on the student if the student's education within the school district "would have been different if school officials had fulfilled their statutory responsibilities on time." *Leggett v. District of Columbia*, 793 F.3d 59, 68 (D.C. Cir. 2015). In this case, DISD *never* made a final offer of FAPE to K.W. *See Appellee's Br.* at 13, ¶ 23. Given K.W.'s well-documented special education needs, the failure to propose an IEP in a timely[1] manner amounted to a substantive deprivation of FAPE. *Leggett*, 793 F.3d at 68.

II. Failure to Consider an Independent Educational Evaluation Resulted in a Deprivation of FAPE for K.W.

A. Current and Thorough Evaluations Form the Backbone of an Appropriate IEP

In 2004 Congress found expanded on the purpose for the Act and asserted that the IDEA also existed "to ensure that the rights of children with disabilities and parents of such children are protected," 20 U.S.C. § 1400(d)(1)(A)(2004), and

[1] DISD does not contest the district court's finding that it never offered K.W. an IEP for the 2013-2014 school year (ROA.572). Further, DISD never finalized the prospective offer of FAPE made on May 22, 2014 because the Admission Review and Dismissal Committee never reconvened to consider the IEE prepared by Dr. McCallon at DISD's expense.

"to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities." *Id.,* § 1400(d)(3)(2004). Along these lines, Congress clarified that the procedures set out in the law were not perfunctory, but were set out because Congress intended that all evaluations would be genuinely considered in the planning process, *id.,* as would the concerns of the parent. *Id.*

Intrinsic to the provision of FAPE to children is the accumulation of information concerning the child and his levels of functioning, behavior and disability. District evaluations are the universal cornerstone in this area, and are, accordingly, specifically regulated. *See* 20 U.S.C. § 1414 (2004); 34 C.F.R. § 300.122, 300.300-300.311(2006).

For example, all districts must ensure that, beyond assessment in areas of known disability, "the child is [also] assessed in all areas of suspected disability." 20 U.S.C. § 1414(b)(3)(2004); *see also* 20 U.S.C. § 1412(a)(6)(B)(2004); 34 C.F.R. § 300.304(c)(1)-(7)(2006). Additionally, "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. . . ." *Id*. In doing so, District evaluations require a wide-range of assessments to address eligibility and "the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education

curriculum…." 20 U.S.C. § 1414 (b)(2)(2004); *see also* 34 C.F.R. § 300.304(b)(1)-(3)(2006).

B. IDEA Grants Parents and Children the Right to an IEE

The entirety of 20 U.S.C. Section 1414 makes clear that appropriate and timely district evaluations are one of the driving forces behind the promise of the IDEA. Appropriate, timely, and parentally understood assessment is so critical that Congress set out procedures for remedying when parents and IEP teams were denied the critical information to which they were entitled to under the act. See 20 U.S.C. § 1414(a-c). Under the IDEA, if a parent disagrees with a district's evaluation(s), they have the right to seek a publicly independent educational evaluations of their child. 20 U.S.C. § 1415(b)(1)(2004); 34 C.F.R. § 300.502(b)(1) and (2)(2006).[2] Federal law provides:

> (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.
>
> (2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.
>
> (3) …

---

2 The IDEA requires that private evaluations must be considered by the IEP team and by the ALJ. *See* 34 C.F.R. § 300.502(c)(2006).

> (ii) *Public expense* means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with §300.103.

34 C.F.R. § 300.502(a).[3] In essence, the IEE functions as a publicly funded "second opinion" for when there are concerns with any district evaluation or there is a failure to fully or timely evaluate "all areas of need." 20 U.S.C. § 1414(b)(3)(B)(2004). This procedure was created so as to, again, ensure that IEP teams have all of the assessment and data that they need in order to be enabled to develop appropriate educational programs for students.

Parents can seek an IEE if they just disagree with a school's evaluation, or they may be concerned with the tests used and their appropriateness, or that it fails to answer necessary questions. Parents may object to the often limited scope of school assessment or that the district staff failed to focus on critical questions. Though parents must disagree they are not required to define that disagreement or their objection. 34 C.F.R. § 300.502(b)(4)(2006). Parents are not required to provide prior notice of their intent to seek an evaluation. That being said, a parent's request for an IEE does not automatically entitle the student to one. For example, once school districts demonstrate that their assessors followed proper procedures and adhered to the requirements of 20 U.S.C. Section 1414, students are rarely

3 The ALJ may independently order an IEE. 34 C.F.R. § 300.502(d).

awarded an IEE at public expense.[4]

The Supreme Court has explained the importance of this safeguard:

> [P]arents … play a significant role in the IEP process. . . . They also have the right to an 'independent educational evaluation of the[ir] child.' . . . The regulations clarify this entitlement by providing that a 'parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.' . . . IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

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4 In 2003 a study was done of the available IEE cases and OSEP policy statements. Etscheidt, Susan, "Ascertaining the Adequacy, Scope, and Utility of District Evaluations," Exceptional Children, Vol. 69, No. 2, pp. 227-247 (Council for Exceptional Children 2003)("Etscheidt"). It shows a system that works as the ALJs and courts concentrated on three identified factors: (1) whether the district had complied with the IDEA technical requirements for evaluations; (2) whether the scope of the evaluation was sufficient; and (3) the utility of the evaluation in development of the IEP. *Id.* The "comparison served both to validate the [IDEA] criteria and to highlight the consistency of evaluation recommendations from various professional organizations." *Id.* at 239. The "legal standards uncovered in the case analysis mirror the professional standards." *Id.* Etscheidt found that courts sustained district evaluations when they were properly done under both legal and ethical standards and were adequate for designing the child's program, and in turn, allowed public IEEs for evaluations which failed to address the child's needs or IDEA's mandates, or were limited in scope.

Schaffer, 546 U.S. at 60-61. The 11th Circuit, in rejecting a challenge to the requirement that IEEs be publicly funded, underscored the necessity of this parental right:

> The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP. . . . Without public financing of an IEE, a class of parents would be unable to afford an IEE and their children would not receive, as the IDEA intended, "a free and appropriate public education" as the result of a cooperative process that protects the rights of parents.

Phillip C. v Jefferson Cty. Bd. of Educ., 701 F.3d 691, 698 (11th Cir. 2012) (internal citations omitted).

Though "[t]he criteria under which the [IEE at public expense] is obtained, including the location of the evaluation and the qualifications of the evaluator, must be the same as the criteria the public agency uses when it initiates an evaluation. . . ," 34 C.F.R. § 300.502(e)(1), school districts are prohibited from imposing other conditions on the IEE. *Id.* at § 300.502(e)(2).

C. The District Must Respond to a Parent's Request for an IEE by Providing the IEE or Filing Due Process Without Unnecessary Delay; It Has No Other Option.

In 1997-1999, the broadest change in the IEE process in thirty-seven years clarified that the burden for seeking a hearing on a denial of public payment rested on the school. The IEE right remained in 20 U.S.C. § 1415(b) but the federal

regulations were clarified to streamline the process and prevent stale-mate situations—like the one at issue below—where school districts did nothing in response to the family's request. Instead, the most recent IEE changes require that school districts file a hearing request to dispute a parent's entitlement to an IEE thereby ensuring that the burden of pleading and proof at hearing with regard to appropriateness of district assessments rests on the district. This was to protect children and avoid unnecessary litigation while the child often sat unevaluated. It now provides:

> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
>
> > (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
> >
> > (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant … that the evaluation obtained by the parent did not meet agency criteria.

34 C.F.R. § 300.502(b)(2006).

The regulatory history went further and explicitly addresses the type of situation that arose below:

> The purpose of requiring the public agency to either initiate a due process hearing if it wishes to challenge a parent's request for an IEE, or otherwise provide an IEE at public expense, is to require public agencies to respond to the IEE requests and to ensure parents are able to obtain an IEE as set forth in section 615(b)(1) of the Act. ***There is no corresponding need to specify that a parent also has the right to initiate a due process hearing since <u>if a public agency does not do so it must provide the IEE at public expense</u>***.

64 Fed. Reg. 12607 (March 12, 1999)(explaining regulation in final version) (emphasis supplied).

It is clear that "[u]nless a public agency chooses to initiate a due process hearing in accordance with paragraph (b) of this section, the agency must respond to the parent's request by insuring an independent educational evaluation is provided at public expense in a timely manner." 62 Fed. Reg. 55098 (Oct. 22, 1997)(comments with <u>proposed</u> rule change). Thus "[a] parent's right to a publicly-funded IEE is subject only to the agency's right to request a due process hearing to show that its evaluation is appropriate."[5] Further, this limited course of action school districts have upon a parental request for an IEE must be acted upon

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5 The IEE provision was initially added in 45 C.F.R. § 121a.503(1977). It was later re-codified at 34 C.F.R. § 300.503(1980). *See* 45 Fed. Reg. 30803 (May 9, 1980) and 45 Fed. Reg. 86301 (Dec. 30, 1980) establishing nomenclature changes for the Department of Education). In earlier iterations, Section 300.503(b) stated that the agency "may" seek a hearing, but this phrasing led to situations wherein many school districts simply did nothing in response to the open-ended language. This led to unfortunate delay which frustrated the overall process of IEP development, and prompted the most recent updates to the law replacing "may" with "must."

quickly. *See Phillip C. ex rel A.C. v. Jefferson Cnty Bd. of Ed.*, 701 F.3d 691, 697 (11th Cir. 2012) (Noting, in reference to the state's Notice of Procedural Safeguards, that the an IEE is to be publicly funded unless the District seeks due process "without unnecessary delay".).

Under IDEA and state law, though school districts may seek due process, *see* 20 U.S.C. § 1415(b)(2004), there simply is no provision which allows the District to just say no to IEE funding, or just tell the parents it concluded that it has a defense to funding: the school district here had to either fund the IEE or file to defend its assessments.

D. The District's Failure to Either Fund the IEE or File Due Process Without Unnecessary Delay Waived Its Right to Object to the IEE

Though there are exceptions that can justify school district delay in response to a parental request for an IEE, there is a universally accepted need for haste and certainty for children in whether they will receive an IEE to assist in the IEP planning process, and failures to act without delay have been interpreted as waiving a school district's right to challenge a student's right to an IEE. *See, e.g., Los Angeles Unified Sch. Dist.*, 111 LRP 48178 (SEA CA 2011)(holding that a 90-day delay in denying parents' request for publicly funded IEE was unreasonable given district's failure to communicate with the parents during that time or explain the reason for the delay)*; Los Angeles Unified Sch. Dist.*, 57 IDELR 55 (SEA CA

2011) (holding that a request just one week before the 24-day winter break meant the district was entitled to take time after the break to review its assessments and determine whether to grant the parents' request)*; and Los Angeles Unified Sch. Dist.*, 48 IDELR 293 (SEA CA 2007) (holding that the district erred in waiting for the parents to file a due process complaint rather than funding or filing)

Where there are delays or where the district does not seek a hearing, courts have routinely held that this waived its defenses and have often ordered reimbursement or payment for IEEs. This was the case in the Eleventh Circuit which recently held this in *Jefferson Cnty Bd. of Educ. v. Lolita S.*, 581 Fed. App'x 760 (11th Cir. Sept. 11, 2014). There, because the school board failed to timely file due process, the 11th Circuit held that "it cannot now defend its evaluation or challenge the IEE." *Id.* at *4. This Court found that the school board had "waived its opposition to the reimbursement claim by choosing not to file its own due process request." *Id.* at *2. The Eleventh Circuit also upheld this concept that failure to file to defend a school district assessment rendered the school district liable for reimbursement of IEE expenses incurred by a family in the absence of school district funding. *Jefferson Cnty Bd. of Educ. v. Lolita S.*, 977 F. Supp. 2d. 1091, 1277 (N.D. Ala. 2013)("The procedure was to file, without unnecessary delay, its own request for a due process hearing . . . As the hearing officer correctly found [] because the Board 'chose not to file its own due process request

to [] to demonstrate that the neuropsychologist did not follow the agency criteria,' the Board 'shall reimburse the parent for that evaluation.'"). Similarly, in *Pajaro Valley Unified School District v. J.S.*, the court found that the school district's unexplained and unnecessary delay in filing for due process waived the school district's right to contest the student's request for an IEE and warranted a judgment in favor of student. No. C06-0380 PVT, 2006 WL 3734289, at *3 (N.D. Cal. Dec. 15, 2006) (holding a three month delay was unacceptable). *See also Evans v. Dist. No. 17 of Douglas County*, 841 F.2d 824, 830 (8th Cir. 1988)(reimbursement ordered because the LEA "never initiated a hearing as required by [IDEA]"); *Bd. of Educ. of Murphysboro Cnty. Unit Sch. Dist. 186 v. Ill. of St. Bd. of Educ.*, 41 F.3d 1162, 1169 (7th Cir. 1994)(dicta) ("the school district could have contested this independent evaluation … but it did not"); *Hudson v Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987)(holding the school district could contest the parent's evaluation if "it convinces the administrative reviewers and the district court that its initial evaluation was correct.").

But since many families with children with disabilities simply do not have the means to pay for their own evaluation, there are legal distinctions in whether a school district fails to respond to a request for an IEE and does not file or whether the school district fails to respond to a request for an IEE and then responds inappropriately to a family's demand for reimbursement for an IEE. Clearly delays

in acting in response to a parent's request for an IEE are discouraged—particularly where the delay impacts the student's ability to obtain the assessment, itself, as opposed to reimbursement for such an independent assessment. See *Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961, 972 (5th Cir. 2016) (holding that a delay of three or four months before taking action to reimburse an IEE is different than one relating to the obtaining of an IEE because "such a delay does not have the same effect (or even any effect) on a child's educational plan as failing to take action on an initial request for an IEE does.").

In any case, courts do not countenance school district's defying the most recent regulations and failing to respond appropriately to family requests for an IEE—either the assessment itself or for reimbursement of said assessment. However, courts tend to be much harsher when the failure to respond impacts the ability of the parent and IEP team to have *any* access to the Congressionally mandated "second opinion."

IV. CONCLUSION

For the reasons stated above and in appellees' brief, COPAA respectfully requests that this Court uphold the Order of the district court.

Date: November 23, 2016

Respectfully submitted,

s/Selene Almazan-Altobelli
SELENE ALMAZAN-ALTOBELLI
Legal Director

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844-426-7224, ext. 702
selene@copaa.org

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 4,555 words in compliance with the Court's Rules, as measured by Word 2010, the word processing program used to create the brief.

/s/ Selene Almazan-Altobelli
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844.426.7224 ext. 702
selene@copaa.org

CERTIFICATE OF SERVICE

I certify that on November 23, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below. I also identify that I have sent the primary counsel for Appellants and Appellees a courtesy and supplemental copy in paper form to these addresses:

Roy T. Atwood
Texas Bar No. 01428040
ATWOOD GAMEROS, LLP
4514 Cole Ave., Suite 1500
Dallas, Texas 75205

Dianna D. Bowen
THOMPSON & HORTON, LLP
500 Akard Street, Suite 2550
Dallas, Texas 75201

Janet Little Horton
THOMPSON & HORTON, LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

/s/ Selene Almazan-Altobelli
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844.426.7224 ext. 702
selene@copaa.org