19-644

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

D. S., by and through his parents and next friends,
M.S. and R.S.,

Plaintiff-Appellant,

—against—

TRUMBULL BOARD OF EDUCATION,

Defendant-Appellee.

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

BRIEF OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., NATIONAL DISABILITY RIGHTS NETWORK AND DISABILITY RIGHTS CONNECTICUT IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

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

Council of Parent Attorneys and Advocates
National Disability Rights Network
Disability Rights Connecticut

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*[1]

Council of Parent Attorneys and Advocates (COPAA) is a national not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties, as provided for in the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400, *et seq*. (2017). COPAA does not undertake individual representation but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under IDEA.

COPAA also supports individuals with disabilities, their parents and advocates, in safeguarding the civil rights guaranteed to those individuals under federal laws. *See COPAA v. DeVos*, 2019 WL 1082162, 2019 U.S. Dist. LEXIS 36318 (D.D.C. March 7, 2019) (vacating the Delay Rule); *NFB, NAACP, COPAA*

[1] Pursuant to Federal Rule of Appellate Procedure 29, *amici* certify that all parties have consented to the filing of this brief. *Amici* likewise certifies that no party's counsel in this matter authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amici* and their members and counsel contributed money intended to fund the brief's preparation or submission.

v. DeVos, 1:18-cv-01568-TDC (D.Md.) (challenge to material changes to Office for Civil Rights Processing Manual as arbitrary and capricious); *J. N., COPAA v. Oregon Department of Education, et. al,* 6:19-cv-00096-AA (D. Oregon) (challenging use of shortened school days for students with disabilities violates IDEA, ADA and Section 504).

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court[2] and in numerous cases in the United States Courts of Appeal. COPAA and its members have direct experience with evaluations and Independent Educational Evaluations at public expense (IEEs) in many states, including Connecticut, New York and Vermont.

The National Disability Rights Network (NDRN) is the non-profit membership association of protection and advocacy (P&A) agencies that is located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in various settings. The P&A system is the

[2] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

nation's largest provider of legally-based advocacy services for persons with disabilities.

NDRN has filed as *amicus curiae* in the United States Supreme Court[3] and in numerous cases in the United States Courts of Appeal.

Disability Rights Connecticut (DRCT) is an independent non-profit organization, designated in April 2017 by the Governor of Connecticut, to serve as the state's P&A.[4] DRCT offers legal representation, advocacy, information and referral to both adults and children with disabilities throughout Connecticut on the full range of legal issues related to their disabilities, including treatment, civil rights, community integration, and special education.

DRCT's work on behalf of Connecticut students with disabilities includes advocacy at school meetings, filing administrative complaints, and representation at all levels of due process including mediation, hearings, and appeals to state and federal court. DRCT's guiding principles include providing "representation to students at risk of a more restrictive setting due to the lack of appropriate *evaluation*, programming, or supports . . ." (emphasis added).[5]

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[3] *Endrew F.*,137 S. Ct. 988; *Fry*, 137 S. Ct. 743; *Forest Grove*, 557 U.S. 230; *Tom F.*, 552 U.S.; *Arlington*, 548 U.S. 291; *Schaffer v. Weast*, 546 U.S. 49 (2005); *Winkelman*, 550 U.S. 516.

[4] Connecticut General Statutes Annotated (C.G.S.A.) §46a-10a.

[5] *See* https://www.disrightsct.org/focus-areas

DRCT staff frequently use IEEs and have found IEES to be one of the most important procedural safeguards for many thousands of Connecticut students in a data driven system that relies heavily on evaluations and other data.[6]

Amici COPAA, NDRN, and DRCT write to support the position of the Appellants-Plaintiffs and asks this Court to reverse the decision below and hold that a parent is entitled to an IEE unless the school meets its burden of proof to establish that its evaluation was "appropriate in light of the child's circumstances." *See Endrew F.*, 137 S Ct. at 999.

Amici have moved for leave to file this brief of Amici Curiae.

SUMMARY OF ARGUMENT

The IDEA established "a substantive right to a 'free appropriate public education' for eligible students with disabilities." *Endrew F.*, 137 S. Ct. at 993. Concerned that schools "all too often denied such children appropriate educations without in any way consulting their parents," Congress emphasized "the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." *Honig v. Doe*, 484 U.S. 305, 311 (1988). The Act established "various procedural safeguards that guarantee parents both an

[6] There are 74,708 students with disabilities in Connecticut according to the most recent data available from the CT State Department of Education. http://edsight.ct.gov/SASPortal/main.do

opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Id.* at 311-12. One of the most critical of the parents' procedural rights is the right to Independent Educational Evaluation (IEE) at public expense. 20 U.S.C. § 1415(b)(1) (2017); 34 C.F.R. § 300.502(b). This right 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." *Schaffer,* 546 U.S. at 60-61.

Amici have seen firsthand the crucial importance of IEEs for parents in securing a free appropriate public education (FAPE) for their children. Evaluations are the foundation for FAPE. It is the evaluations that are used to determine, in the first place, whether a student is eligible for special education services under IDEA, then to develop the Individualized Education Program (IEP), and then, with subsequent reevaluations, to assess whether the student is making appropriate progress and whether the student has any new or additional educational needs. If the parent disagrees with the school regarding eligibility or FAPE, hearing officers and courts rely upon evaluations to decide the dispute.

Often, for the parents to have meaningful participation in the educational process, they need to have an expert evaluator who can guide them in determining whether the school's evaluation has accurately assessed their student and determined "all areas of suspected disability," and who can make

recommendations for necessary educational and related services. 20 U.S.C. § 1414(b)(3)); *see also* 20 U.S.C. § 1212(a)(6)(B); 34 C.F.R. § 300.304(c)(1)-(7). An IEE provides parents with this expertise when the parents disagree with the school's evaluation. The parents can then use this evaluation in the education planning process to guide them and the school staff in crafting an IEP that is reasonably calculated to enable their child to make appropriate progress in light of the child's circumstances. *Amici* have seen that the IEE often obviates disagreements, as in many cases it assures parents that the school correctly determined eligibility or is providing FAPE or persuades school staff to find the student eligible or provide more appropriate services.

In those cases where parents and the schools disagree and the parents employ IDEA's dispute resolution process, the IEE is essential for a fair due process procedure, particularly for those parents who lack the economic means to retain their own experts. Many families with students with disabilities are poor[7] or struggling to provide basic necessities for their families, and many are also faced with additional expenses to meet the health care and other needs of their children with disabilities. Without an IEE, they do not have "a realistic opportunity to

[7] Evaluations can be quite expensive. Hence, many middle class families lack the means to fund their own independent evaluations, as well.

access the necessary evidence" to prevail at due process, and they are "without an expert with the firepower to match the opposition." *Schaffer,* 546 U.S. at 61.

The pertinent regulations[8] set out a very straightforward test for determining whether a parent is entitled to an IEE: the parent must disagree with the school's evaluation, and, if the parent disagrees, the school must provide the IEE at public expense unless it shows that its own evaluation is appropriate or that the parent's evaluation failed to meet important criteria. 34 C.F.R. § 300.502(b)(1)&(2). The regulation places the burden of bringing a suit and the burden of proof on the school to avoid delaying the IEE process and interfering with the IEE right. *Amici* submit that the proper test for whether a school's evaluation is appropriate is the same test set out for FAPE by the Supreme Court in *Endrew F.*: was the evaluation "appropriate in light of the child's circumstances" at that time? Thus, if the school performed a limited evaluation when a broader evaluation was required because of the child's circumstances, the parent is entitled to an IEE at public expense.

[8] Although IEEs are referenced in 20 U.S.C. § 1415, the detailed procedures are contained in regulation.

ARGUMENT

I. BECAUSE EVALUATIONS ARE THE FOUNDATION FOR A FREE APPROPRIATE PUBLIC EDUCATION, IEES ARE CRITICAL FOR PARENTS

Evaluation and assessment data form the foundation of educational planning and dispute resolution processes, ensuring that a student's IEP is appropriate when developed and evaluating whether a student made progress commensurate with his or her abilities. All students with suspected disabilities experience the same type of referral and assessment procedures under the Act. Prior to any eligibility determination or programming offer, schools are obliged to conduct "a full and individual initial evaluation." 20 U.S.C. § 1414(a)(1)(A). The statute and regulations provide detailed requirements for evaluations, including that each evaluation "use a variety of assessment tools and strategies to gather functional, developmental, and academic information," use technically sound instruments, are "not discriminatory on a racial or cultural basis," and are administered by "trained and knowledgeable personnel." *See* 20 U.S.C. § 1414(b); 34 C.F.R. § 300.304; see *also* 34 C.F.R. § §300.122, 300.300-300.311. School 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); *see also* 34 C.F.R. § 300.304(b)(1)-(3).

Significantly, the evaluation must ensure that the child is "assessed in all areas of suspected disability." 20 U.S.C. § 1414(b)(2)(B); *see also* 20 U.S.C. § 1412(a)(6)(B); 34 C.F.R. § 300.304(c)(1)-(7). Additionally, "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. . . ." *Id*. The school must conduct a multi-disciplinary comprehensive evaluation that addresses all areas of known or suspected disability. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

Because each child's educational needs and disabilities are not static but change over time, IDEA provides for periodic reevaluations as well as reevaluation before determining "the child is no longer a child with a disability." 20 U.S.C. § 1414(c) & (c)(5). A reevaluation must take place at least once every three years, unless the school and the parents agree that it is unnecessary. 34 CFR §300.303(b). The parents or a teacher may request a reevaluation. 34 C.F.R. §300.303(a)(2). Further, the public agency must ensure that a reevaluation occurs if it "determines that the educational or related service needs, including improved academic achievement and functional performance of the child warrant a reevaluation." 34 C.F.R. § 300.303(a)(1).

As prompt provision of special education is essential for FAPE, the regulations specifically provide that the initial evaluation "[m]ust be conducted

within 60 days of receiving parental consent for the evaluation" unless the state establishes a different timeframe.[9] 34 C.F.R. § 300.301(c)(i)&(ii).

Because comprehensive and accurate evaluations are its driving force, IDEA specifically affords parents the right to "obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1). To ensure a "free appropriate public education," 20 U.S.C. § 1400(d)(1(1), parents who disagree with the school's evaluation have the right an IEE at public expense. *Id.*; 34 C.F.R. § 300.502(b)(1) & (2). The IDEA requires that IEEs and other parent-initiated evaluations must be considered by the IEP team and may be presented as evidence at a due process hearing. *See* 34 C.F.R. § 300.502(c). Because IDEA promises that a child's appropriate public education be "free," its procedural safeguards include the parental right "to obtain an independent educational evaluation of the child" at *public* expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(1) and (2).

The first regulations promulgated under IDEA's predecessor statute,[10] provided the right to publicly funded IEEs. Congress has amended the EHA, now IDEA, eight times and administrative agencies have issued three sets of

[9] Connecticut has established a 45 school day time limit. Reg. Conn. State Agencies § 10-76d-13.

[10] In 1991, Congress amended the Education of the Handicapped Act, 91 Pub. L. No. 230, 84 Stat. 175 (1970) ("EHA") and the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) and renamed the statute IDEA, Pub. L. No. 102-119, § 1, 105 Stat. 587, 587 (1991).

comprehensive regulations. All of these statutory and regulatory amendments, across six different administrations, have reaffirmed the right to a publicly funded IEE.

The term IEE means as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i). Just like the school's evaluation, the IEE will use "a variety of assessment tools and strategies" to gather information about the student. 20 U.S.C. § 1414(b)(2)(A). An IEE is a second opinion when there are concerns with the evaluation or the failure to fully evaluate the student in "all areas of need." *See* 20 U.S.C. § 1414(b)(3)(B). The parental notice of rights "shall include a full explanation of the procedural safeguards ... available under this section and under the *regulations promulgated by the Secretary relating to ... independent educational evaluation."* 20 U.S.C. § 1415(d)(2)(A) (emphasis supplied).

Federal regulations provide:

> (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) …

> (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).[11]

It is no exaggeration to say that the entire special education system is rooted in evaluations. Evaluation serves as the basis for determining a student's eligibility for services, as the foundation for developing the IEP that is appropriately ambitious in light of a child's circumstances, and as the benchmark from which a student's progress will be measured. 20 U.S.C. § 1414(b)(4) &(d)(3)(A)(iii). And when the parents disagree with the school on the special education needs of their child, hearing officers and courts focus their attention on the evaluations of the student in reaching their decisions. Because evaluations play a central role in the delivery of an appropriate education, the right to an IEE is crucial.

II. IDEA GRANTS PARENTS AND CHILDREN THE RIGHT TO AN IEE TO ENSURE MEANINGFUL PARENTAL PARTICIPATION IN THE EDUCATIONAL PLANNING PROCESS

The IDEA "emphasize[s] collaboration among parents and educators." *Endrew F.*, 137 S. Ct. at 994. It "provide[s] for meaningful parental participation in all aspects of a child's educational placement." *Honig v. Doe*, 484 U.S. at 324. In listing the required members of the IEP team, the statute lists parents first. *See*

[11] A hearing officer may independently order an IEE. 34 C.F.R. § 300.502(d).

20 U.S.C. § 1414(d)(1)(B). For parents to be able to participate meaningfully in the IEP process, they need access to independent experts who can evaluate their children and make recommendations for their educational programs.

Parents may seek an IEE for many reasons. They may simply disagree with a school's evaluation: for example, a parent might think that the child has a learning disability when the school's evaluation has identified an intellectual impairment. They may be concerned with the testing instruments used: for example, a parent might think that a nonverbal child needs assessments designed particularly for nonverbal children or that a child not fluent in English needs assessments geared to a Spanish speaker. Parents may object to the limited scope of a school assessment or the failure to address or answer critical questions, as did the parents in this case.[12]

Regardless of the circumstances, though, the right to an IEE is a critical part of the IEP planning process. The Eleventh Circuit, in rejecting a challenge to the requirement that IEEs be publicly funded, underscored the necessity of this parental right in the IEP planning stages, holding that:

> 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

[12] *See, e.g., Letter to Baus*, 65 IDELR 81 (OSEP 2015) (hereinafter Letter to Baus)(parent entitled to IEE to cover gaps in assessments).

> 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).[13]

The Supreme Court has highlighted the importance of the IEE to student's due process rights, holding that:

> [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 '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.*

Schaffer, 546 U.S. at 60-61 (emphasis added).

Although the IDEA's core is "the cooperative process it establishes between parent and schools," school officials, who are professionals trained in special education, have "a natural advantage." *Schaffer*, 546 U.S. at 53. For parents to

[13] A 2003 study of the available IEE cases and OSEP policy statements 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 publicly-funded IEEs for evaluations that failed to address the child's needs or IDEA's mandates, or were limited in scope. Susan Etscheidt, *Ascertaining the Adequacy, Scope, and Utility of District Evaluations,*69:2 Exceptional Children. 227-247 (2003).

participate meaningfully in IEP team meetings, they need to be seen as equal partners, which requires access to independent professionals to evaluate their children and inform them about their children's educational needs. The parents' opinions about their child's needs is based on years of intimate living with their child and seeing the impact of their child on the child's ability to grow, learn, and develop. Parents are their child's first teachers, so they have experienced firsthand educating their child, from teaching first skills to working together on homework and other educational activities. Despite this unparalleled fount of knowledge about their child, schools often dismiss the parent's perception as being biased or lacking in the specialized educationally related knowledge base needed to be true partners. The IEE, an evaluation by an independent, highly qualified professional, provides parents with an important counterweight to the school's evaluation.

At IEP meetings, a parent often sits alone at the conference table with six or more school personnel, who have come with an agenda, sometimes new evaluations, and often a draft IEP. The parent feels outnumbered and sometimes intimidated from speaking up. The meeting is almost always run by a school administrator who guides the meeting through the agenda, often without providing an opportunity for the parent to speak fully.

Although parents knows their child and the child's struggles in school very well, most parents are unfamiliar with "the technical language of psycho-

educational testing and educational interventions," used by the school with the result that they find themselves "shunted aside during the IEP process as they are bombarded with professional terminology in which they are not conversant."[14] Parents are also often unfamiliar with IDEA's requirements. As one parent noted, "What is really hard is we go in there and . . . the special education director . . . knows the rules and regulations, everybody else knows the rules and regulations."[15] Parents find it "difficult to know if the services offered for their children were really appropriate without adequate knowledge."[16]

Parents need access to expert evaluation and analysis to understand, review, supplement, and have confidence in the evaluative material considered at the IEP meeting and in the educational program designed for the student. Rightly or wrongly, many parents believe that school staff, as "gatekeepers" of the funds needed to serve their children, make decisions based on the school district's budget rather than their children's unique educational needs.[17] The IEE provides a counterbalance to budgetary constraints on an appropriate educational program,

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[14] Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin L. Judiciary 423, 434 (2012).
[15] Jeannie F. Lake & Bonnie S. Billingsley, *An Analysis of Factors that Contribute to Parent-School Conflict in Special Education*, 21 Remedial & Special Educ. 240, 245 (2000).
[16] *Id.* at 249.
[17] *Id.* at 246.

and, perhaps more importantly, provides reassurance to the parent that the program is truly designed to meet the student's needs.

III. IDEA GRANTS PARENTS AND CHILDREN THE RIGHT TO AN IEE TO SAFEGUARD RIGHTS TO A FAIR DUE PROCESS HEARING, PARTICULARLY FOR FAMILIES WITHOUT ECONOMIC MEANS

IEEs play a significant role in due process cases when families and schools cannot reach consensus about a student's needs through the IEP process. Thus, the United States Department of Education (ED) deems information provided by an IEE to be so critical to dispute resolution that the regulations expressly authorize administrative tribunals to "request an independent educational evaluation as part of a hearing on a due process complaint, the cost of [said] evaluation [being] at public expense." 34 C.F.R. § 300.502(d) (2017).

Hearing officers and courts frequently rely on IEEs in special education disputes. Judicial reliance on IEEs makes plain how important they are in the process. *See, e.g., Culley v. Cumberland Valley Sch. Dist.,* 758 Fed. Appx. 301, 304-05 (3d Cir. 2018)(IEE established student's eligibility for special education due to severe Crohn's disease); *S.H. ex rel Durrell v. Lower Sch. Dist.*, 792 F.3d 248, 254 (3d Cir. 2013) (IEE determined student did not have a learning disability, leading to a child's removal from special education); *Horne v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146, 159 (D.D.C. 2016) (IEE determined student had an emotion disability, qualifying for eligibility under IDEA); *M.P. v.*

Santa Monica Malibu Unified Sch. Dist., 633 F. Supp. 2d 1089, 1101-03 (C.D. Cal. 2008) (IEE provided evidence student was eligible under IDEA because of ADHD); *Pajaro Valley Unified Sch. Dist. v. J.S.*, 47 IDELR 12 (N.D. Cal. Dec. 15, 2006)(school evaluation that concluded student was not eligible for special education did not adequately explore pervasive developmental disability and nonverbal learning disabilities); *In re Student with a Disability*, #19-016 (N.Y. IHO), available at https://www.sro.nysed.gov/common/sro/files/Decisions/2019/pdfversion/19-016.pdf at 13 (Mar. 28, 2019)(awarding compensatory education based on testimony of IEE neuropsychologist, among other things).

In such cases, the IEEs lead to changes in the student's eligibility for IDEA services and, for those who are eligible, changes in the educational and related services provided to these students, and remedies such as compensatory education. Without the IEEs, the students would have been wrongly denied IDEA services at all, wrongly placed in special education, provided inadequate and inappropriate special education services, and denied remedies for violations of their rights.

As these cases demonstrate, an IEE can provide powerful evidence at a due process hearing and in subsequent appeals. As the Supreme Court recently made clear, t once the parents have provided a school with an IEE, the school will need to provide "cogent and responsive explanation" for its decision whether to reject the IEE's recommendations. *Endrew F.*, 137 S. Ct. at 1002.

For large numbers of parents, an appropriate evaluation is simply unaffordable, and, without public funding, unavailable. Even obtaining an IEE at public expense is "very difficult for a parent without financial resources to exercise this right,"[18] and a large number of parents lack those resources. ED has found that about one-fourth of children eligible for special education have family incomes below the poverty line and as many as two-thirds have family incomes of $50,000 or less,[19] leaving them without the resources to pay thousands of dollars for evaluations.[20] Many may not even know of their right to an IEE, which is often buried in the lengthy "procedural safeguards" document.[21] Too often parents find that schools refuse to provide IEEs, or, even if the schools agree to an IEE, they often, among other things, "limit the scope of the evaluation.,"[22] As one commentator noted:

> Unfortunately, "the vast majority of parents whose children require the benefits and protections provided in the IDEA lack knowledge about the educational resources available to their child and the sophistication to mount an effective case against a [district refusal to provide an IEE or to restrict an IEE]." Thus, the parents who need an expert the most will likely be unable to obtain one, and in effect, the

[18] Elisa Hyman, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L. 107, 127 (2011).
[19] Chopp, supra n. 15 at 437, n. 59.
[20] Leslie Reed, Comment, *Is A Free Appropriate Public Education Really Free? How the Denial of Expert Witness Fees Will Adversely Impact Children with Autism*, 45 San Diego L Rev. 251, 299 (2008)
[21] Chopp, supra n.15, at 436.
[22] *Id.*

> level playing field imagined by Congress is now increasingly uneven.[23]

The district court's assurance that "parents are free to fund their own independent evaluation and to bring the results to the attention of the school district in the formulation of an individual educational program" is of no help to the many parents who do not have the funds to do so. *D. S v. Trumbull Bd. of Educ.*, 357 F. Supp. 3d 166, 177 (D. Conn. 2019). Without access to publicly funded IEEs, these parents are unable to obtain a FAPE for their children. While they may be able to find an attorney to represent them on ether pro bono or on a contingency, expert fees are not recoverable as part of costs under IDEA. *See Arlington*, 548 U.S. 291 at 293-94. Without a publicly funded IEE, "parents are left to challenge the government without a realistic opportunity to access the necessary evidence" and also "without an expert with the firepower to match the opposition." *Schaffer*, 546 U.S. at 61.

[23] Ashlie D'Errico Surrur, *Placing the Ball in Congress' Court: A Critical Analysis of the Supreme Court's Decision in* Arlington Central School District Board of Education v. Murphy, 27 J. Nat'l Admin. L. Judiciary 547, 600 (2007).

IV. TO MAKE THE RIGHT TO AN IEE MEANINGFUL, IDEA REGULATIONS PROVIDE PARENTS ARE ENTITLED TO IEES UNLESS THE SCHOOL ESTABLISHES THAT ITS EVALUATION IS APPOPRIATE IN LIGHT OF THE CHILD'S CIRCUMSTANCES AT THE TIME

For the right to an IEE to be meaningful for parents, it needs to be available to them. The federal regulations provide just one requirement for the parent and give the school just one way to avoid paying for the IEE. All the parent has to do is disagree with the school's evaluation. 34 C.F.R. § 300.502(b)(1); *see also Jefferson County Bd. of Educ. v. Lolita* S., 581 Fed. Appx 760, 765 (11th Cir. 2014).

While the school can ask for the parent's reason for objecting to its evaluation, it cannot require the parent to provide an explanation. 34 C.F.R. § 300.502(b)(4). That makes sense because the parent, who usually has no expertise, may not know what is wrong with the school's evaluation until after an expert, the IEE evaluator, reviews the school's evaluation. Thus, the Third Circuit held that a parent was not required to disagree with the school's evaluation before getting the IEE because such a requirement "would render the regulation pointless because the object of parents' obtaining their own evaluation is to determine whether grounds exist to challenge the District's." *Warren G. v. Cumberland Cty. Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999).

A school may avoid public funding for an IEE by demonstrating at a hearing that its evaluation was appropriate, or the parent's evaluation did not meet certain

criteria. 34 C.F.R. § 300.502(b)(3). The only dispute in this case is whether the school's evaluation, the Functional Behavioral Analysis, was the appropriate evaluation at that time. As the Supreme Court has noted, "the word "appropriate" is inherently context-dependent. *See* Webster's Third New International Dictionary 106 (1993) (defining "appropriate" as "specially suitable: fit, proper")." *Sossamon v. Texas*, 563 U.S. 277, 286 (2011).

The Supreme Court has recently explained how the term appropriate is measured in the IDEA context: "appropriate in light of [the student's] circumstances." *Endrew F.*, 137 S. Ct. at 1002.

This test works just as well in the context of evaluations as it does in the context of FAPE. It adequately addresses the district court's concerns; if the only evaluation that is appropriate in light of the child's circumstances is a vision examination, then the school is only required to fund a vision exam. *See D.S.*, 357 F. Supp. 3d at 176-77. But if the school narrowed its evaluation to a vision exam when the child's circumstances (including all areas of suspected disability), at that time necessitated other assessments, then the school must provide IEEs in those areas.

This test is consistent with the ED's regulation and opinion letters (issued by the Office of Special Education Programs (OSEP)). OSEP letters have addressed

this issue. OSEP has issued several opinion letters on this issue.[24] Those letters, discussed more fully *infra.,* provide that, when a parent disagrees with a school's evaluation and contends that evaluation is necessary in an area that was not tested, a school must fund the IEE unless *the school* prevails at a due process hearing and establishes that its evaluation is complete and suitable for the particular student in question.

OSEP guidance letters are entitled to deference under the specific and exacting standards announced by the Court in *Kisor v. Wilkie,* 2019 WL 2605554 (June 26, 2019) for deference to administrative regulations under *Auer v. Robbins*, 519 U.S. 452 (1997),[25] and its predecessor, *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945). To qualify for deference under *Kisor*: (a) the regulation in question has to be: genuinely ambiguous even after a court has resorted to all the standard tools of interpretation, 2019 WL 2605554,at *8; (b) the agency's reading of the regulation must be reasonable, *id.*; (c) the character and context of the agency interpretation must entitle it to controlling weight, *id.* at *9; (d) the

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[24] *Letter to Baus,* 65 IDELR 81 (OSEP 2015); *Letter to Carroll*, 68 IDELR 279 (OSEP 2016); *Letter to Anonymous*, 55 IDELR 106 (OSEP 2010); *Letter to McDonald*, 113 LRP 49958 (OSEP 2012)

[25] *Auer* deference provides that courts defer to agencies interpreting their own regulations. By contrast, deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) has to do with judicial deference to agency interpretations of statutes enacted by Congress. Because the issue in this case is the interpretation of 34 C.F.R. §300.502(b)(2), *Auer* and *Kisor* deference applies.

interpretation must be the agency's authoritative or official position, *id*.; (e) the agency's interpretation must implicate the agency's substantive expertise, *id*.; and (f) the agency's reading of the regulation must reflect a fair and considered judgment and not create unfair surprise. *Id.* at *10.

The relevant OSEP letters are clearly entitled to deference under the standards announced in *Kisor*. First, the regulation in question, 34 CFR §300.502, turns on subsection (b)(2)(i) that states that the school can file a due process complaint "to request a hearing to show that its evaluation is appropriate." The district court asserts that "in any event, because the regulations are not ambiguous, there is no basis for judicial deference to these letters as authoritative agency interpretations to the extent they are contrary to what the regulations provide." *D.S.*, 357 F. Supp. 3d 166, 178, fn 3. The district court fails to explain how it arrived at the conclusion that the regulations are not ambiguous. This determination flies in the face of the Supreme Court characterizing the use of the term "appropriate" in the context of FAPE as "cryptic." *See Endrew F.*, 137 S. Ct. at 995, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. v. Rowley*, 453 U.S. 176, 188 (1982). Further, as Justice Kavanaugh points out in his concurrence in *Kisor*, the term "appropriate" is ambiguous; he described it as "broad and open-ended," therefore "afford[ing] agencies broad policy discretion."2019 WL 2605554, at *34. Nothing in the federal special education regulations or statutes provides a

functional, clearly applicable definition of the term "appropriate" in regard to a school's evaluation. Without such a clear functional definition, the term remains unclear, subject to varying interpretations, and ambiguous.[26]

The second *Kisor* test is whether the agency's reading is reasonable. Here, the agency's reading, contained in *Letter to Baus*, is that parents have the right to seek an IEE where the school has failed to evaluate the student in all areas of suspected disability. In that school have the obligation to evaluate a student in all areas of suspected disability, 20 U.S.C. §1414(b)(3)(B), empowering parents to secure an IEE at public expense when the school fails to do so is entirely reasonable. As explained above, the entire edifice of special education has comprehensive and accurate evaluation as its foundation. The IEE, in this case, permits parents to fill in the needed evaluative material when the school has failed in its obligation to do so.

The third *Kisor* test is that the character and context of the agency interpretation must entitle it to controlling weight. According to the U.S. Department of Education website, "OSEP policy documents provide information,

[26] The trial court's statement ends with the phrase "to the extent they are contrary to what the regulations provide." This statement borders on the tautological. No agency interpretation of its own regulations that is contrary to the text of the regulation is entitled to deference. Indeed, the second and fifth tests of *Kisor* -- that the agency's reading must be reasonable and fair -- both ensure that the agency's reading of the regulation is consistent with the regulation.

guidance and clarification regarding implementation of the Individuals with Disabilities Education Act (IDEA) through two types of issuances: Policy Support Documents and Policy Letters." https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html (last accessed on June 27, 2019). Further, "OSEP's policy letters provide written guidance and clarification regarding implementation of the IDEA. OSEP typically issues these letters in response to specific questions raised by parents, educators, representatives of advocacy organizations, state educational agencies, early intervention programs and their providers, and other interested parties." *Id*. Policy letters going back to 2001 are on the website and early ones will be supplied upon request. Fourteen such letters were issued in 2018. OSEP letters are narrowly constructed and are firmly based on statutory or regulatory authority. As such, the OSEP letters are clearly of the character and context that entitle them to controlling weight.

The fourth *Kisor* test is that the interpretation must be the agency's authoritative or official position. As noted above, the ED website states unequivocally that the OSEP letters are the agency's official position on the questions presented.

The fifth *Kisor* test is that the agency's interpretation must implicate the agency's substantive expertise. The statute makes plain that the Office of Special Education Programs is "the principal agency in the Department [of Education] for

administering and carrying out [the IDEA] and other programs and activities concerning the education of children with disabilities." 20 U.S.C. § 1402(a). OSEP is the central repository of the federal government's substantive expertise on matters of special education. Evaluations are the beating heart of special education, so there can be no doubt that OSEP's letters concerning evaluations implicate the agency's substantive expertise.

The final *Kisor* test is the agency's reading of the regulation must reflect a fair and considered judgment and not create unfair surprise. That *Letter to Baus* is the fair and considered judgment of OSEP is made plain by the substance of the letter, which clearly lays out the legal basis and the logic for the agency's official position. The letter was issued in February 2015. There was nothing in the trade press at the time to indicate that the interpretation was a surprise. Indeed, *Special Education Connection*, the primary trade publication in the field, initially reported on the publication of *Letter to Baus* on March 10, 2015 in an article that raised no alarms and expressed no surprise. *See* Attachment.

The Supreme Court's recent decision in *Kisor* sets the standard for judicial deference to agency interpretations of its own regulations. OSEP's *interpretive letters* clearly pass the *Kisor* test. For that reason, the decision of the district court on this issue needs to be reversed.

As the OSEP opinions make clear, if the school object to the IEEs on the ground that its own assessment was appropriate, and sufficiently thorough and comprehensive, given the student's needs at the time, and the parent's requested IEE is unnecessary, the school has the right to defend its evaluation as appropriate in a due process hearing, but it bears the burden of proof as the moving party in showing that its own evaluation was appropriate, including appropriately comprehensive. *See* 34 C.F.R. § 300.502(b)(2)(ii)(2)(requiring the school to demonstrate that its evaluation was appropriate); *Schaffer, 5*46 U.S. at 62 (placing the burden of proof on the moving party in a due process hearing).

There is nothing in *case law*, statute or regulations to indicate that a parent cannot disagree with the specific evaluation done by the school because it is not sufficiently comprehensive or does not address all the areas of need. Thus, in *Letter to Carroll,* OSEP said that the parents have the right to seek an IEE "even if the reason for the parent's disagreement is that the public agency's evaluation did not assess the child in all areas related to the suspected disability." 68 IDELR 279, at 1 . OSEP explained, "The IDEA affords a parent the right to an IEE at public expense and does not condition that right on a public agency's ability to cure the defects of the evaluation it conducted prior to granting the parent's requests for an IEE." *Id.* at 2.

By giving parents the right to an IEE in areas not included in the school's evaluation, OSEP's opinions incentivize schools to provide comprehensive and thorough evaluations for all students in the first instance. Otherwise, schools could easily provide skimpy and incomplete evaluations and wait to provide comprehensive evaluations for the small number of parents who complain. Further, because providing education promptly to students with disabilities is critically important, the regulations specifically provide timeframes for doing evaluations. 34 C.F.R. § 300.301(c). To allow schools a second chance to do their own evaluations when parents disagree would greatly enlarge the time for the school's evaluation and delay the time for the parents to obtain an IEE and, ultimately, for the student to receive FAPE.

CONCLUSION

Amici respectfully ask this Court to reverse the decision below. The "elaborate and highly specific procedural safeguards embodied in IDEA is the mechanism from which a substantively appropriate education results." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). The publicly funded IEE is a vital tool for ensuring appropriate eligibility and services. The proper question is whether the school's evaluation was appropriate given the child's circumstances at the time of the evaluation. Here, the school's evaluation was not appropriate given the child's circumstances; therefore, the parents have a right to an IEE at public expense.

Respectfully submitted, this 3rd day of July 2019.

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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 Amici brief is proportionately spaced, has a typeface of 14 points and contains 6,869 words.

Dated: July 3, 2019

/s/ Ellen Saideman
Ellen Saideman

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on July 3, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/s/ Ellen Saideman
Ellen Saideman