UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-644 Caption [use short title] D.S. v. Trumbull

Motion for: Leave to File Amicus Brief in support Rehearing or ReHearing Enbanc

Set forth below precise, complete statement of relief sought:

Leave for the Council of Parent Attorneys and Advocates to file a brief amicus curiae

MOVING PARTY: Council of Parent Attorneys and Advocates **OPPOSING PARTY:** D.S.

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Ellen Saideman **OPPOSING ATTORNEY:** Leonid Traps (for plaintiffs-appellants)

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Court- Judge/ Agency appealed from: District Court of Connecticut/Judge Meyer

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know Mr. Driscoll

Mr. Traps

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

Ellen M. Saideman **Date:** 10/8/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

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Attorneys for Amicus Curiae

No. 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,

v.

TRUMBULL BOARD OF EDUCATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Pursuant to Fed. R. App. P. 29, **Council of Parent Attorneys and Advocates** ("**COPAA**") hereby respectfully move for leave to file the attached brief as *amicus curiae* in support of Defendants-Appellees who have filed a petition for rehearing or rehearing en banc. This motion is accompanied by *Amicus*'s proposed brief as is required by Fed R. App. P. 29(b).

ARGUMENT

A. Interests of Proposed Amicus Curiae

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 does not represent children 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 the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400, et seq. COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. ("ADA").

COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court in *Fry v. Napoleon Community Schools, cert. granted*,

136 S. Ct. 2540 (2016); *Forest Grove School District. v. T.A.*, 557 U.S. 230 (2009); *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Central School District Board. of Education v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City School District*, 550 U.S. 516 (2006), and in numerous cases in the United States Courts of Appeal.

First, amicus COPAA joins with Defendant-Appellee Trumbull Board of Education in seeking rehearing on the issue of a statute of limitations for requests for Independent Educational Evaluations at public expense (IEEs). Second, amicus COPAA seeks rehearing en banc on the Panel's limitation of IEEs to initial evaluations and triennial reevaluations because there is nothing in the Individuals with Disabilities Act (IDEA) to support such a narrowing. i

Based upon their experience, *Amicus* offers the Court a unique and important view on these issues. *Amicus* therefore respectfully request that they be granted permission to submit the attached *amicus curiae* brief.

B. <u>Why An Amicus Curiae Brief from COPAA is Relevant and Desirable</u>

This *amicus curiae* brief from COPAA is both relevant and desirable. *See* Fed. R. App. P. 29(b)(2). The legal issues presented in the appeal are of great importance to COPAA and their members because they work with many children who use the protections of an IEE in order to secure a free appropriate public education (FAPE). *Amicus* offers the Court relevant information not brought to

Court's attention by the parties. *See Neonatology Assocs., P.A. v. Comm'r,* 293 F.3d 128, 133 (3d Cir. 2002). *See also Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986).

Amicus explains how the Panel's decision presents a question of exceptional importance to students and their families that warrants rehearing or rehearing *en banc*. *Amicus* explain how this decision would apply to virtually all students with IEEs and the Panel's limitation of IEEs to initial evaluations and triennial reevaluations is contrary to language of the statute.

CONCLUSION

For the foregoing reasons, COPAA, respectfully request that the Court grant their motion to file the attached brief in support of Defendant-Appellee's petition for rehearing or rehearing en banc.

Respectfully Submitted,
/s/ Ellen Saideman
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on the 8th day of October 2020. I certify that all participants are registered CM/ECF users.

/s/ Ellen Saideman
Ellen Saideman

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

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

The undersigned also certifies that the sections of the Motion application to the length requirements contains 663 words in compliance with the Court's Rules, as measured by Word 2010, the word processing program used to create the brief.

/s/ Ellen Saideman
Ellen Saideman

19-644

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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

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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INTEREST OF *AMICUS*

Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization and is the premier national organization representing parents of students with disabilities and their advocates and attorneys. COPAA brings to the Court the unique perspective of parents and advocates who often rely on Independent Educational Evaluations (IEEs) to advocate for special educational services for children with disabilities.

SUMMARY OF ARGUMENT

The questions before the Panel were whether (1) a May 2017 filing that disagreed with an October 2014 comprehensive assessment was timely in light of the expressed two-year statute of limitations period contemplated in 20 U.S.C. § 1415(f)(3)(C); and (2) whether a disagreement over a March 2017 Functional Behavioral Assessment (FBA) could trigger a parent's rights to not only an IEE in the area of FBA, but also a right to comprehensive IEEs.

In its decision, the Panel rejected the school district's concession that an FBA was an evaluation that triggered an IEE at public expense and concluded that an FBA is not an evaluation under the IDEA because it does not assess "***all*** areas of [] disability." *D.S. v. Trumbull Bd. of Educ.*, No. 19-644, 2020 U.S. App. LEXIS 29624 at *19, 22 (2d Cir. Sept. 17, 2020). The Panel held that "an 'evaluation' means an 'initial evaluation' or a 'reevaluation,'" and concluded that only the

initial or a triennial evaluation would trigger a parent's right to an IEE at public expense. *Id.* at *23-24.

This Court should grant rehearing *en banc* not only because it decided an issue that neither party asked it, but also the Panel's decision raises two questions of exceptional importance that will otherwise adversely affect many thousands of students. First, the Panel's decision that the statute of limitation for requesting IEEs is "adjustable'" is unsupported by IDEA which provides clear notice of a two-year statute of limitations and is unworkable. Second, the Panel's decision that students are not entitled to IEEs for the many thousands of evaluations done outside the initial and triennial evaluations is, too, unsupported by the statute and would in practice be devastating since IDEA contemplates parents and school districts will continue to make educational decisions based on such evaluations. The Panel's ruling would leave all students without the opportunity to obtain an IEE for such evaluations, leaving them "without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition," *Schaffer v. Weast*, 546 U.S. 49, 61 (2005).

BACKGROUND

Since the very first iterations of the law, IDEA has contemplated the need for outside experts to assist parents and school districts in clarifying the presentation and needs of students. *Compare* Public Law 94-142 § 615(b) *with* 20

U.S.C. § 1415(b)(1) *and* 34 C.F.R. § 300.502. This protection in the law has remained because it provides an important check in the Individualized Education Program planning process, as well as provides a sometimes necessary tool for students when programming disagreements trigger IDEA's due process procedures that enables parents to have "the firepower to match the opposition." *Shaffer,* 546 U.S. at 61.

COPAA members frequently seek IEEs to get a second opinion and to better understand the needs and presentation of the students. While private evaluators often confirm the findings of school district evaluations, sometimes an independent evaluator will reach different conclusions or may just have different recommendations for the student. But because of the nature of educational planning, and because Congress contemplated that ongoing assessment would be necessary, with a minimum of every three years, but also more often in some cases, the Panel erred in reading into the law a limitations on IEEs that provides protections to families only *some* of the time, and that would not provide clear notice to parents of the applicable statute of limitations laws unlike the rest of the IDEA.

ARGUMENT

I. THE PANEL'S REJECTION OF A TWO-YEAR STATUTE OF LIMITATIONS CONCERNING IEES AND CREATING AN "ADJUSTABLE" TIMEFRAME IS UNSUPPORTED BY IDEA.

The District Court held that the parents' request for a comprehensive IEE was time-barred because it was more than two years after the last comprehensive evaluation and that, regarding the timely request regarding the 2017 FBA, the parents were limited to an IEE in the area of FBA. *D.S. v. Trumbull Bd. of Educ.*, 357 F. Supp. 3d 166, 169-70 (D. Conn. 2019), *rev'd*, No. 19-644, 2020 U.S. App. LEXIS 29624 (2d Cir. Sept. 17, 2020).

The Panel found that the District Court's decision "misconstrue[d] the process by which a parent receives an IEE at public expense" because the parent is not required to file a due process complaint to obtain an IEE at public expense. 20 U.S. App. LEXIS, at *37. Instead, the Panel held that IDEA does not provide a statute of limitations at all for a parent's right to disagree with an evaluation. Instead, it found that "[a]s a practical matter, a parent's right to disagree with an evaluation and obtain an IEE at public expenses is tethered to the frequency with which the child is evaluated." *Id.* at *39. Thus, it set an "adjustable" statute of limitations period for claims regarding requests for IEEs that provides for a three years period for students "evaluated according to the default evaluation timeline," but shorter if students are evaluated more frequently than three years. *Id.* at *39-40.

But this "adjustable" statute of limitations is unworkable. School districts are not required to set a specific re-evaluation schedule for each student, so there is

no way for a parent to know the deadline for requesting an IEE. The Panel's decision will give school boards a third option in response to the a family's request for an IEE at public expense (not identified in 34 C.F.R. § 300.502(b)(2)), namely to propose an earlier reevaluation rather than fund an IEE. This practice would be at odds with guidance from the Department of Education and would essentially water down the procedural independent check on school district assessments that the IEEs are supposed to provide.

Amicus COPAA agrees with Defendant-Appellee Trumbull Board of Education that the Panel's determination will yield confusing and unreasonable results.[1] It will lead to more litigation and to more difficulty for parents seeking appropriate educational services for their children. This system is unworkable, and the Panel's decision must be revisited via *en banc* review.

II. THE PANEL'S *NOSTRE SPONTE* DETERMINATION THAT IEES ARE ONLY AVAILABLE TO CHALLENGE INITIAL EVALUATIONS OR TRIENNIAL REEVALUATIONS STRIPS PARENTS OF A VITAL RIGHT AND IS UNSUPPORTED BY LAW OR LEGISLATIVE HISTORY

Because evaluations are essential to providing the parents with "a realistic opportunity to access the necessary evidence" and an "expert with the firepower to

[1] While the two-year statute of limitations applies to the disagreement with the evaluation, if the parent disagrees and the school district then refuses to fund an IEE without requesting a hearing, a separate two-year statute of limitations applies to that refusal.

match the opposition," *Schaffer*, 546 U.S. at 61, the Panel's decision limiting the right to an IEE to initial and triennial evaluations eliminates an important right that has been frequently used by many parents within the Second Circuit. The Panel's decision misunderstands universal special education practices regarding evaluations.

While IDEA provides for triennial reevaluations, it also makes clear that a reevaluation can be conducted any time it is requested by a parent or a teacher although, if more frequent than annually, agreement by both the school district and parent. 20 U.S.C. § 1414(a)(2). Further, the statute was amended in 2004 to provide that even the triennial evaluation does not require unnecessary evaluations for the sake of being comprehensive; if no additional data is needed, no evaluation is required unless the parents request one. 20 U.S.C. § 1414(c)(4); *see also* 20 U.S.C. § 1414(a)(2)(B)(ii).

Thus, the type and frequency of evaluations is driven by the student's needs, Parents and school districts routinely collaborate in deciding which evaluations are administered when. They often agree to specific, targeted evaluations to address specific needs of a student, and leave comprehensive assessment covering all areas for the three-year mark. Such specific, targeted evaluations often include FBAs, reading assessments, speech and language evaluations, or central auditory processing evaluations.

Such targeted evaluations make sense, especially given that IEPs are developed annually, and current evaluations may be important for developing appropriate IEPs. Students can develop quite rapidly, and students' needs may change for a wide range of reasons. A time-consuming and costly comprehensive evaluation is unnecessary when all parties agree that a deep dive into a specific issue is needed. The parent's interest in the reliability, accuracy, and impartiality of these targeted evaluations is just as strong as it is for comprehensive initial or triennial evaluations.

The Panel's framing also creates problems for IEE requests in the context of a comprehensive evaluations. Parents often disagree with specific evaluations (or the absence of specific evaluations) and do not require a complete re-do of the entire comprehensive evaluation. Thus, case law reflects that IEEs have been granted for targeted evaluations rather than being reserved for comprehensive evaluations. *See, e.g., M.Z. v. Bethlehem Area Sch. Dist.*, 521 Appx. 74, 76 (3d. Cir. 2013) (IEE speech and language evaluation required), *see also C.W. v. Capistrano Unified Sch. Dist.*, 784 F.3d 1237, 1240 (9th Cir. 2015) (addressing a fee issue in the context of a case about an IEE in occupational therapy conducted separate and after comprehensive triennial assessments were completed).

Permitting IEEs only for comprehensive evaluations, as the Panel ruled, makes no logical sense, given that targeted evaluations are used to develop IEPs

transition plans, and behavior plans, and that IEPs are typically developed at least annually, with annual goals. *See* 20 U.S.C. § 1415(d)(1)(A)(i)(II). Limiting the ability of parents to obtain IEEs to triennial evaluations would make it impossible for parents to have an "expert with the firepower to match the opposition" to challenge IEPs based on targeted evaluations.

The IEE at public expense is a critical right of parents and essential to their meaningful participation in developing annual IEPs for their children. IDEA expressly provides that an "educational agency ... shall establish ... procedures ... to ensure that ... parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education," that "shall include ... [a]n opportunity ... to obtain an independent educational evaluation of a the[ir] child." 20 U.S.C. 1415(a) and (b)(1). An IEE, requested by parents who are dissatisfied with the school district's assessment of their child, is conducted by an expert chosen by the parents, who independently evaluates whether a school's initial assessment of the child is accurate. *See School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 368 (1985).

In *Schaffer*, the Supreme Court confirmed that Congress intended that a publicly funded IEE be provided to parents in appropriate circumstances. Referring to Section 1415(b)(1), the Court stated that the Department of Education's regulations "clarify this entitlement" and Congress's intent to provide

parents "the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." *Id*. (quoting 34 C.F.R. 300.502(b)(1) (2005)).

Thus, "Congress addressed" parents' need for accurate information about their child's disability to allow parents to be informed and participate fully in the development of their child's IEP, by "ensur[ing] parents access to an expert who can evaluate all the materials that the school must make available." *Id.* at 60-61. The Court explained that Congress recognized that "[s]chool districts have a 'natural advantage' in information and expertise" and wanted to ensure that parents were "not left to challenge the government ... without an expert with the firepower to match the opposition." *Id.* at 60-61. Thus, the Court recognized that the IDEA provides "the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.'" *Id.* at 60 (quoting 20 U.S.C. 1415(b)(1) and 34 C.F.R. 300.502(b)(1) (2005)).

The Panel decision rewrites the statute and substantially curtails the parents' right to an IEE. The statute sets out numerous requirements for evaluations that apply to all evaluations conducted by a school district, not just initial and triennial evaluations. For example, it requires that all evaluations "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C. § 1414(b)(2).

It requires that the school district obtain informed consent from parents prior to conducting any evaluation. 20 U.S.C. § 1414(a)(1)(D) & (c)(3). These requirements apply to all evaluations, not just initial and triennial evaluations.

Furthermore, although appellate courts may challenge a party's concession of a legal argument, that power should be used sparingly. The Panel relied on *Roberts v. Galen of Virginia,* 525 U.S. 249, 253 (1999), but that case does not support deciding an issue of substantial importance to thousands of children that was not before the Court. In *Galen*, the Court found that the party's concession supported its decision: "Although the concession of a point on appeal by the respondent is by no means dispositive of a legal issue, we take it as further indication of the correctness of our decision today . . . " 525 U.S. at 249. The Panel's reliance on *United States v. Linville*, 228 F.3d 1330 (11th Cir. 2000), is also misplaced, as that decision provided in a footnote, "We are not required to accept such a concession when the law and record do not justify it." *Id,* at 1331 n.2. Thus, *Linville* indicates that an appellate court must examine the law and the record before rejecting a party's legal concession. Here, neither the law nor the record undermine the Trumbull Board of Education's concession.

There are strong policy reasons for a court to abstain from reaching out to issues not presented on appeal. Parties concede issues to promote the efficiency of

the judicial process, to avoid litigating issues that are well settled, and to focus the court on the issue needing resolution. For that reason, the Supreme Court stated:

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence.

Singleton v. Wulff, 428 U.S. 106, 120 (1976).

In sum, the Panel markedly narrowed the term "evaluation" as used in the IDEA, despite the fact that both parties, other federal courts,[2] and the Unites States Department of Education had previously determined that such a restricted definition was inconsistent with the statute. Such a significant ruling, changing settled law in such a major way, without the opportunity for the parties to brief and argue the issue, calls for review by the full panel of the Second Circuit Court of Appeals.

[2] *See Harris v. District of Columbia*, 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008) (FBA is an evaluation). *See also Cobb Cnty. Sch. Dist. v. D.B.*, 1:14-CV-02794-RWS, 2015 U.S. Dist. LEXIS 129855 (N.D. Ga. Sept. 28, 2015)(same).

CONCLUSION

For this reason, as well, it is proper for the full panel of the Second Circuit Court of Appeals to rehear this matter.

Respectfully submitted, this 8th day of October 2020.

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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 amicus brief is proportionately spaced, has a typeface of 14 points and contains 2,597 words.

Dated: October 8, 2020

/s/ Ellen Saideman
Ellen Saideman

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on October 8, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/s/ Ellen Saideman
Ellen Saideman