NO. 08-50830

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EL PASO INDEPENDENT SCHOOL DISTRICT,
Plaintiff-Appellant

v.

RICHARD R., as next friend of R.R., MARK BERRY,
Defendants-Appellees

R.R., by his next friend, E.R.,
Plaintiff-Appellee

v.

El Paso Independent School District,
Defendant-Appellant

On Appeal From The United States District Court
Western District Of Texas, El Paso Division

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AND NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF BRIEF OF EL PASO INDEPENDENT SCHOOL DISTRICT SUPPORTING REVERSAL OF DECISION BELOW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

II.
INTEREST OF AMICUS CURIAE

Over 770 public school districts in Texas are members of Amicus Curiae Texas Association of School Boards ("TASB") Legal Assistance Fund, which advocates the positions of local school districts in litigation with potential state-wide impact. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("CSA"). These governing organizations are concerned about the negative effect that the district court's disregard of the Individuals with Disabilities Education Act's clear preference for resolving disputes short of the adversarial process, the intent and purpose of the resolution session and the parent's failure to cooperate will have upon the school districts of Texas. The TASB Legal Assistance Fund, therefore, has paid all costs associated with the preparation of this brief. This brief is assumed to be opposed by Appellees as request for agreement was made to counsel for Richard R. and Mark Berry, but not responded to. Accordingly, a motion for leave to file has been filed.

The Texas Association of School Boards ("TASB") is a non-profit, unincorporated association of the public school districts of the State of Texas. Approximately 1,047 public school districts in the state, through their elected

between parents and school districts and that promotes resolution of disputes as early as possible.

III.
SUMMARY

requirement is legitimatized by case law or statute. Further, at this stage of the proceedings where the parent was refusing to settle, there was no evidence that the parent was the "parent of a child with a disability." As such, no attorneys' fees could have been awarded, therefore the parent was without justification for refusing the settlement agreement on the basis argued. The parent's uncooperative actions also were ignored by the district court and the hearing officer. The holding of the district court will serve to frustrate the purposes of the IDEA and the policies of the Texas Education Agency, will needlessly increase school district legal expenditures and place parents and schools into needless adversarial positions, promoting efforts to obtain attorneys' fees rather than improve services for students with disabilities. In all respects, the decision of the district court should be reversed.

changes because the parents unilaterally removed their child from the school district." *Id.* at 831.

In a subsequent decision following the 8th Circuit's adoption of the "Evans rule," a district court denied reimbursement to parents who unilaterally changed the placement of their child to a private school:

> Plaintiffs contend that Gail and Carl D.'s request for administrative review of the January 1993 IEP constituted notice sufficient to satisfy the Evans Rule. The argument fails because the Evans Rule requires that notice be provided before parents unilaterally withdraw their u 221.044J55

concerns. *The process begins with a complaint to the school district*, followed by a due process hearing at which the parents are able to voice their concerns to an impartial hearing officer of the state educational agency as *determined by state law*. (emphasis addedP addedP addenhl/AMCID

more formal adversarial system. The Texas Education Agency's Commissioner's Rules Concerning Special Education Services states:

> "It is the policy and intent of TEA to encourage and support the resolution of any dispute … at the lowest level possible and in a prompt, efficient, and effective manner. Possible options for resolving disputes include, but are not limited to:
>
> (1) meetings of the student's ARD committee;
> (2) meetings or conferences with the student's teachers;
> (3) meetings or conferences with campus administrators, the special education director of the district . . ."

See 19 Tex. Admin. Code § 89.1150 (2008).

Despite the common-law developing a favorable viewpoint of allowing a school district an opportunity to cure a parent's complaint, along with the statutory changes made in 1997 regarding notice prior to removing a child from public school and placing them in private school, and the policy of the Texas Education Agency for resolution at the "lowest" level, the United States Department of Education, prior to the Act's amendments in 2004, was less receptive. The changes made to the Act in 2004, however, vitiated the Department's reluctance to impose a required opportunity for the school district to resolve the matter.

2. **Pre-IDEA 2004 Executive Agency Rulings Disfavored Mandatory Resolution.**

The United States Department of Education ("USDOE"), prior to the Act's 2004 reauthorization issued letter rulings calling into question state statutes and

regulations requiring that due process hearings be disallowed if a parent had not first presented their complaint to the school district's IEP team[3] for resolution. In *Lillbask v. Sergi,* 193 F.Supp. 2d 503 (D. Conn. 2002), the federal court upheld the validity of the Connecticut state statute requiring such a presentment even when the USDOE had written an opinion letter rejecting the state law as being contradictory to the then wide-open allowance for due process hearings to occur. Despite the court's ruling upholding the law, the USDOE persisted in its position, threatening to deny Connecticut its right to its share of the federal financial allotment to Connecticut to conduct its Part B-IDEA program. *See Appendix A to this Brief, "Letter to Sergi from Asst. Sec. Pasternack," Sept. 25, 2002.* In light of that threat, Connecticut capitulated and removed the requirement from its law. *See Lillbask v. State of Conn. Dept. of Educ.*, 397 F.3d 77, 89 (2nd Cir. 2005).

Around the same time, Texas Education Agency promulgated rules providing for a similar requirement for a parent to present to the ARD-IEP team any complaint prior to a due process hearing being held. *See* Texas Proposed Rule §89.1152 (not adopted). Again, the USDOE, in letter opinion, held that such a requirement would not be permitted under the IDEA. *See Appendix to this Brief, "Letter to Lenz from Stephanie Lee, Director," OSEP, March 6, 2002.* Such

[3] In Texas, the IEP team is called the Admission, Review and Dismissal (ARD) team. *See* 20 Tex. Admin. Code § 89.1050.

e. Attorneys' fees of undisclosed amount.

(Administrative Record, "AR" 231).

At the resolution meeting, the school district offered the following relief:

a. A full and individual evaluation;

b. Appropriate notices of procedural rights;

c. Proper compliance with applicable federal and state laws regarding the provision of prior written notice;

d. Convene an ARD IEP meeting; and

e. Attorneys' fees of $3,000. (Record "R" 497-501).

The parent refused this offer, despite its 1:1 correspondence with the request for relief. The parent ultimately received no more than the relief requested from, or offered by, the school district. The district court wrongly justified the parent's refusal to settle on the grounds that the offered settlement would not O7 -0.7e undse

execute a legally binding agreement that is enforceable in any state court of competent jurisdiction or, in a district court of the United States, or, by the TEA if the state has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to the state enforcement mechanisms. *See* 20 U.S.C. §1415(f)(B). Because the school district offered all of the relief that could be granted by the hearing officer in an enforceable agreement, there was no justification to reject its terms.[4]

There is no credible law or evidence that El Paso ISD's settlement offer would not have been enforceable under the Act. The district court's adoption of the Appellees' argument that the settlement document needed to be in the form of a consent decree is illogical and at odds with the very statute and regulation at issue and case law. The only basis for holding that the settlement offer must be in the form of a consent decree would be to ensure that a non-existent action for attorneys' fees could be created, unrelated to any purpose that proper educational services for the student would be provided.[5] This of course has been rejected by the United States Supreme Court. *See Buckhannon Bd. and Care Home v. West Va. Dep't. of Health and Human Res.* Res.

(2001); *Lewis v. Cont'l. Bank Corp.*, 494 U.S. 472, 480-81, 110 S.Ct. 1249, 1251 (1990). Attorneys' fees, in fact, are particularly eschewed under the IDEA at the stage of litigation where the resolution session is at issue. The Act specifically excludes any attorney fee award for attendance at a resolution session, even though a parent's attorney is allowed to participate in that process. *See* 20 U.S.C. §1415(i)(3)(D)(iii) (attorneys' fees not allowed for resolution meeting attendance).

It was clear in the requests made by the Appellees, however, that an award of attorneys' fees was the primary objective sought since all of the requested and obtained relief for the child was granted by the school district before the due process hearing even began. (AR 310, AR 174-175, AR 7-9; R 394, R 405). The parent's refusal to cooperate at the resolution session and the failure of the hearing officer to hold that the parents failed to present an Article III case or controversy effectively denied the school district's "opportunity" to resolve the issues.

Courts should give effect, if possible, to every clause and word of a statute, avoiding any construction which implies that the legislature was ignorant of the meaning of the language it employed. *See Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 394 (1883). *See also* George Costello, *Statutory Interpretation: General Principles and Recent Trends*, CRS Report for Congress, (March 30, 2006). It would be a basic violation of statutory construction as well as common

sense to conclude that a school district could offer all of the relief requested in a mandatory meeting where the statute provides that the school district is to be provided the "opportunity to resolve the complaint" but then be forced to proceed to hearing simply because the parent refuses to sign an agreement which provides for that same relief. The district court erred by neglecting to acknowledge that El Paso ISD was not provided the "opportunity" allowed under the Act when the parent rejected the resolution which mirrored the request for hearing.

In this case, the school district satisfied not only one of the prerequisite actions created by the Act and designed to eliminate the need for litigation, but two. Prior to the resolution session, the school district provided a "written notice" to the parent, stating that there was no case in controversy because the school district was willing to provide all of the relief requested. (AR 197-207; R 497). The school district then reiterated its offer at the resolution session. (R 393, R 497-501).

The legislative history to IDEA 2004 makes clear that the newly-mandated requirement for the district to respond to the complaint with this "written notice" was designed as a means of decreasing the need for a due process hearing. The Senate Report states "The Committee is hopeful that such a written response from the school may, in fact, help a parent to resolve a disagreement, and eliminate the

school district was prevented by the parents from conducting its own evaluation of the child prior to the due process complaint or the due process hearing (and the school district is always entitled to conduct its own evaluation), such relief, even if requested, could not have been granted in the absence of a showing of eligibility. *See Andress v. Cleveland Indep. Sch. Dist.*, 64 F.2d 176 (5th Cir. 1995) (school district always entitled to evaluate student for eligibility under the Act) and *Collingsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3rd Cir. 1998) (no relief available unless child is eligible under the Act).

The Seventh Circuit, addressing a very similar case, held that an attorneys' fee request in the face of a school district's offer to provide all of the relief requested did not justify a continuation of the litigation. *Bingham v. New Berlin School District*, 550 F.3d 601, 602-603 (7th Cir. 2008). In *Bingham*, the parents alleged a violation of the IDEA and requested that the school district reimburse them for the cost of the student's private school. *Id.* at 602. The school district, prior to the hearing, tendered a check for the full amount of the reimbursement requested. *Id.* The parents accepted payment but did not withdraw the due process request. *Id.* The district filed a motion for summary judgment and the hearing officer concluded that because of the payment, "there remains no actual existing controversy that this tribunal has the authority to adjudicate. The continuation of

a *non-moving party*. *Id.* at 1004. *See also Petrovich v. Consolidate High School District #230*, 939 F.Supp. 884 (N.D. Ill. 1997) (denying attorneys' fees where an attorney made a demand on behalf of a student who had been served under IDEA in a previous school district, but never requested any sort of evaluation or services in his current school before a disciplinary incident precipitating his expulsion, and then gave the district only five days to meet his demands, one of which was a high school diploma); *Patricia E. v. Bd. Of Educ. of Community High Sch. Dist. #155*, 894 F.Supp. 1161, 1166 (N.D. Ill. 1995) (holding that while plaintiffs are free to resort to administrative action under the provisions of IDEA, they cannot expect to recover fees and costs when their efforts contributed nothing to the final resolution of a problem which could have been achieved without resort to the administrative process); *Combs v. School Board of Rockingham County*, 15 F.2d 357 (4th Cir. 1994) (denying attorneys' fees and stating that school boards cannot be expected to be clairvoyant and must be given adequate notice of problems if they are to remedy them).

While the offer made by the school district to grant the relief requested should be sufficient to find that no attorneys' fees could have been awarded for this action, the relief granted by the hearing officer fails to provide a basis for an

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 5429 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styled requirements of Fed. R. App. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using Word 2003 in 14 point Times New Roman, *or*

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____
Attorney for Amicus Curiae
Texas Association of School Boards
Legal Assistance Fund and the
National School Boards Association

Dated:_____

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2009, two true and correct copies of the Brief of Amicus Curiae Texas Association of School Boards Legal Assistance Fund and National School Boards Association In Support Of Brief Of El Paso Independent School District Supporting Reversal of Decision Below and one copy of a disc containing a computer readable copy of the Brief were served by U.S. Mail, certified, return receipt requested on,

CM/RRR#7008 1830 0001 8618 9453

Joe R. Tanguma
Elena M. Gallegos
Todd A. Clark
Walsh, Anderson, Brown, Aldridge &
Gallegos, P.C.
P.O. Box 168046
Irving, Texas 75038

CM/RRR#7008 1830 0001 8618 9460

Charles Mark Berry
4171 N. Mesa, Suite B-202
El Paso, Texas 79902

CM/RRR#7008 1830 0001 8618 9477

Mr. Colbert N. Coldwell
Guevara, Rebe, Baumann, Coldwell &
Reedman, L.L.P.
Attorneys at Law
4171 N. Mesa, Suite B-201
El Paso, Texas 79902

/s/_____
Christopher P. Borreca

NO. 08-50830

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EL PASO INDEPENDENT SCHOOL DISTRICT,
Plaintiff-Appellant

v.

RICHARD R., as next friend of R.R., MARK BERRY,
Defendants-Appellees

R.R., by his next friend, E.R.,
Plaintiff-Appellee

v.

El Paso Independent School District,
Defendant-Appellant

On Appeal From The United States District Court
Western District Of Texas, El Paso Division

APPENDIX TO BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AND THE NATIONAL SCHOOL BOARDS ASSOCIATION

NOW COMES Amicus Curiae Texas Association of School Boards Legal Assistance Fund and The National School Boards Association pursuant to Fifth Circuit Rule 47.5 and FED. R. APP. P. 32.1(B), files and attaches the following

cases or materials cited within its Brief of Amicus Curiae which may not be available in a publicly accessible electronic database:

1. *D.S. v. Neptune Township Board of Education*, 264 F. App'x 186 (3rd Cir. 2008).
2. "Letter to Sergi from Asst. Sec. Pasternack," Sept. 25, 2002.
3. "Letter to Lenz from Stephanie Lee, Director," OSEP, March 6, 2002.

437155