No. 20-901

In the
Supreme Court of the United States

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

O.W., BY NEXT FRIEND HANNAH W.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, AND MISSISSIPPI SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF

The National School Boards Association (NSBA) is a non-profit organization representing state associations of school boards and the Board of Education of the U.S. Virg in Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern nearly 14,000 school districts servin g nearly 50 million public school students, including an estimated 6.9 million students with disabilities. NSBA s mission is to promote equity and excellence in public education for all students through school board leadership. NSBA regularly represents its members interests before Congress and federal courts and has participated as amicus curiae in a number of cases involving issues concerning the interpretation and implementation of the IDEA.

More than 750 public sch ool districts in Texas are members of the Texas Association of School Boards Legal Assistance Fund (TASB LAF), which advocates the positions of local school districts in litigation with potential state-wide impact. TASB LAF is governed by members from three organizations: Texas Association of School Boards (TASB), Texas Association of School Administrators (TASA), and Texas Counc il of School Attorneys (CSA). TASB is a Texas non-profit corporation

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[1] In accordance with Rule 37, all counsel of record received timely notice of the intent to file this brief, which is being filed with the written consent of all parties. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or its counsel made a monetary contribution to the brief s preparation or submission.

whose members are the ap proximately 1,025 public school boards in the state of Texas. TASB s members, locally-elected boards of trustees, are responsible for the governance of Texas public schools. TASB s mission is to promote educational excellence for Texas school children through advocacy, leadership, and high-quality support services.0094iwpoools.

Based on the foregoing, Amici submit that the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) incorrectly found that Spring Branch Independent School District (Spring Branch ISD or the District) failed to evaluate O.W. within a reasonable time period. Amici urge the Court to consider this case to resolve issues of considerable interest and import to the entire public education community.

SUMMARY OF THE ARGUMENT

Amici, NSBA, TASB LAF, and MSBA, file this brief in support of Spring Branch ISD s petition for the purpose of addressing the Fifth Circuit s decision interpreting the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and its implementing regulations. Specifically, the Fifth Circuit misinterpreted the Child Find requirements of the IDEA, in conflict with precedent set by the Fifth Circuit itself and its sister courts of appeals, essentially eliminating the reasonable time period between a school district s notice of a suspected child with a disability and the commencement of a special education evaluation. The Fifth Circuit ignored the proactive and reasonable steps taken by Spring Branch ISD during the time period under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (Section 504), thus gutting the purpose and effect of a separate and independent federal statute designed to protect the rights of individuals with disabilities.

Cir. 2018). When analyzing whether a school district has acted within a reasonable time following reasonable suspicion of disab ility, courts will look to the length of time of the intervening period and the diligence of the school district s steps to initiate the evaluation once the suspicion arises. See, e.g., id. at 677 78. This reasonable time period affords school districts the opportunity to exercise professional judgment and collect suffi cient data to carefully consider the student s present levels and potential need for special education services under the IDEA. See Endrew F. v. Douglas Cty. Sch. Dist. RE-1 , 580 U.S. _____, 137 S.Ct. 988, 999 (2017); Doe v. Cape Elizabeth Sch. Dep t , 832 F.Supp.2d 23, 29 (D. Me. .9(te sccommod(d potw [(ev

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Williamson Cty. Schs. , 720 Fed.Appx. 280, 285 (6th Cir. 2018); D.K. v. Abington Sch. Dist ., 696 F.3d 233 (3d Cir. 2012).

According to the Fifth Circuit s opinion in this case:

> A delay is reasonable when, throughout the period between notice and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps.

961 F.3d 781, 793 (5th Cir. 2019). However, when the Fifth Circuit applied its articulation of the reasonable time analysis to the facts of this case, the Court only looked to the District s actions during the time period before the reasonable suspicion of disability had arisen at an October 8, 2014 meeting. At that meeting, the District determined that O.W. qualified for Section 504 accommodations and agreed to implement a behavior intervention plan. The Fifth Circuit centered its entire reasonable time analysis on the period of time leading up to the October 8, 2014 meeting, finding that the District had notice of acts or behaviors likely to indicate a disability prior to October 8, 2014 and was therefore required to evaluate O.W. instead of first attempting Section 504 accommodations.

notice of a suspected disability effectively prevents a school district from taking reasonable steps to provide an appropriate education with accommodations under Section 504, which may be suitable (and even superior) to meet a student s needs. The IDEA only requires school districts to timely evaluate students where a need or suspected need for special education or related services exists. See D.G., 481 Fed.Appx. at 893; 20 U.S.C. §§ 1401(3)(A), 1412(a)(3)(A). The Child Find analysis requires school districts to determine not only whether a student has a disability, but also whether the student requires specialized instruction as a result of the disability. If a child does not need specialized instruction, and can instead be provided other interventions to meet their needs, an evaluation for special education would not be appropriate. [3]

Thus, where a school district can demonstrate that a student s needs can be appropriately met through alternative means including the provision of Section 504 accommodation s the school district has fulfilled its Child Find obligations. See D.K., 696 F.3d at 252. It follows that school districts must first be allowed the opportunity to implement such

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[3] Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. 34 C.F.R. §300.39(a)(1). Specially designed instruction means adapting, as appropriate to the needs of an eligible child under [the IDEA], the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child s disabi lity; and to ensu re access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.39(b)(3).

reasonable alternative means to determine whether the student requires specialized instruction. By removing the possibility of utilizing Section 504 during the Child Find process, the Fifth Circuit essentially nullifies the applicability of Section 504 altogether, except for those students who are first evaluated and determined not to be eligible for special education.

Section 504 and the IDEA are two separate and distinct federal laws. Whereas the IDEA is a federal law governing all special education services in the United States, Section 504 is a civil rights statute, requiring school districts receiving federal financial assistance not to discrimina te against students with disabilities. Although th ey share similar goals and are often analyzed together by courts, these two laws provide somewhat different criteria for identification, eligibility, appropriate education, least restrictive environment, and due process procedures. Therefore, it is important that courts not allow the IDEA to overshadow Section 504 in importance or to extinguish it altogether as the Fifth Circuit has now done.

Similar to the IDEA, Section 504 requires an evaluation prior to initial placement or before any change of placement, as well as periodic re-evaluations. 34 C.F.R. § 104.35. To be eligible under Section 504, a student s Section 504 committee must determine (1) whether the st udent has a physical or mental impairment, and (2) if so, whether the impairment substantially

life activities. See 34 C.F.R. 104.3(j)(2)(ii). If the answer to both is yes, the Section 504 committee will develop a Section 504 plan to provide the student the appropriate accommodations and supports in the general education setting.

Under Section 504, like the IDEA, school districts must provide services in the least restrictive environment appropriate to the student as outlined in a student s written educatio n plan. 34 C.F.R. § 104.34. Whereas the IDEA provides individualized special education and related services to meet a student s unique needs, often in a mo re restrictive educational setting and/or with more intensive supports, a Section 504 plan provides services and changes to the learning environment to enable students to learn alongside their peers in the general education setting. While both laws aim to educate students with disabilities with their same-age peers to the maximum extent appropriate, Section 504 s focus on in-class accommodations and access to the general education curriculum is paramount. By ignoring Section 504 accommodations, the Fifth Circuit effectively endorses the use of specialized instruction and/or the removal of students from general education where such instruction and/or removal may not be necessary or appropriate in direct contradiction of both Section 504 and the IDEA. See further discussion infra at Section II.B.

Not only does Section 504 play an integral role in ensuring that students receive the necessary supports to achieve success in their least restrictive

environment, but providing accommodations under Section 504 can also aid professionals in determining whether a student may have a disability requiring more intensive support through specialized instruction. Specifically, effective Section 504 accommodations equip professionals with research-based methods for identify ing areas of weakness and provide teachers the opportunity to collect data related to the student s progress in the general education setting. This allows teachers to recognize early signs of learning or behavioral differences and to distinguish between those students who may actually need special education (i.e. specialized instruction) versus those students who simply need additional accommodations in the general education setting. Should a studen t s Section 504 team then decide to evaluate for special education services and the student is declared eligible under the IDEA, the school may utilize the accommodations provided and data collected in the general education setting during the evaluation process to determine the types of services and supports to include in the student s Individualized Education Program (IEP). Thus, Section 504 is not an avenue for avoiding or delaying a special education evaluation, but rather a valuable tool that may be utilized by educators to appropriately identify students under the IDEA, as well as provide the appropriate services based on real data from the classroom.

The Fifth Circuit even acknowledges that, [w]e in no way suggest that a school district necessarily

commits a child-find violation if it pursues RTI [4] or § 504 accommodations before pursuing a special education evaluation. However, in application, the Court overlooked the District's reasonable steps to provide O.W. classroom accommodations under Section 504, with success, before resorting to a special education evaluation. 961 F.3d at 794. Thus, the Fifth Circuit does effectively find that the District necessarily committed a child-find violation solely by doing so.

Moreover, the court inappropriately equates RTI strategies with Section 504 accommodations. While Amici acknowledge that RTI strategies cannot be used to delay an evaluation, Section 504 accommodations certainly should not be ignored as a reasonable step in the Child Find process. See U.S. Dept. of Education, Office of Special Education and Rehabilitative Services, Memorandum from Melody Musgrove to the State Directors of Special Education (Jan. 21, 2011), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf (clarifying that RTI strategies cannot be used to delay or deny the provision of a special education evaluation if a disability and need for special education services is reasonably suspected). Further, while RTI and

[4] The IDEA allows schools to use a process that determines if the child responds to scientific, research-based intervention, 20 U.S.C. § 1414(b)(6)(B), commonly known as response to intervention (RTI) in determining the existence of a specific learning disability. Like Section 504 accommodations, RTI can be successful at bridging regular and special education and addressing a student's learning needs at the earliest possible time.

other regular education interventions are not absolutely mandated by a federal statute, the provision of accommodations to students with disabilities in the general education setting under Section 504 is. Courts, therefore, should treat RTI and Section 504 separately. Spring Branch ISD does not assert that it may avoid obligations to timely evaluate students by providing RTI, but rather that it must be allowed the opportunity to apply Section 504 federal rights and protections for students with disabilities.

In fact, the Fifth Circuit recognizes that there are situations where intermediate measures are reasonably implemented before resorting to evaluation but declines to extend that principle to the present case. The court focused solely on D.K. v. Abington School District, one of many cases addressing this issue, to suggest that intermediate measures were not reasonable. 696 F.3d at 252. The court's interpretation of D.K. is flawed for two reasons. First, in D.K., the Third Circuit, unlike the Fifth Circuit here, considered the reasonable steps taken in its reasonable suspicion not reasonable time analysis, concluding that the proactive steps the district took to afford the student extra assistance en route to eventually identifying him as IDEA-eligible were reasonable. 696 F.3d at 252; see Zirkel, 377 Ed.Law Rep. at 469 70. The court's effort to distinguish the facts of D.K. from the present case is equally unpersuasive. While O.W. may not have been as young as the student in D.K., other facts in the record demonstrate the appropriateness of the immediate measures taken by the District to

district s efforts to prov ide additional supports to student prior to evaluating for special education).

Section 504 accommodations are not a substitute for an evaluation once a school district is on notice of acts or beha vior likely to indicate a disability. 961 F.3d at 794 (quoting Krawietz , 900 F.3d at 676). However, the record does not reflect any attempt by the District to use Section 504 to skirt its Child Find duties. Rather, similar to Durbrow , school district professionals, considering input from the student s parents, reviewed all of the information in light of the circumstances in which it was presented. See Durbrow, 887 F.3d at 1196. It was not unreasonable for the District to believe that O.W. s challenges may be short-lived under the circumstances, or that they could possibly be addressed through additional general education supports. In fact, O.W. s academic and behavioral improvements following the implementation of the Section 504 plan demonstrate the appropriateness of the District s decision, and the Fifth Circuit itself acknowledged that the Section 504 plan was reasonable. 961 F.3d at 794 n. 12. Then, less than one week after it became evident to the District that O.W. may need more intensive special education supports, the District took immediat e action and convened a meeting to recommend that O.W. be referred for a special education evaluation. Id. at 787.

Despite Congress s intent to provide students with disabilities an appropriate education in the least restrictive environment through either Section 504 or

the IDEA, depending on need, the Fifth Circuit s ruling effectively eliminates the ability of a school district to provide supports under Section 504 unless the school district first rules out the need for special education. Whereas school di stricts across the nation may continue to exercise professional judgment by providing students Section 504 accommodations before later identifying the student as eligible for special education under the IDEA, those in the Fifth Circuit now arguably are required to ignore any possible solutions under the less restrictive Section 504 accommodations and immediately move to evaluate a student under the IDEA. This decision essentially denies a student his or her rights and privileges under Section 504 that might very well have met the student s n eeds, thereby effectively nullifying a federal law. As this directly contradicts both federal law and legal precedent, this Court should recognize the important role of Section 504 and reject the inappropriate new standard set forth by the Fifth Circuit.

II. THE FIFTH CIRCUIT DECISION WILL HAVE GRAVE IMPLICATIONS FOR SCHOOL DISTRICTS PARTICIPATING IN THE CHILD FIND PROCESS.

The Fifth Circuit decision will have a detrimental impact on school districts throughout the circuit. And because the court s decision is inconsistent with the holdings of its sister courts, school districts in the Fift h Circuit are now held to a higher standard than those in other circuits across the

nation. First, the court s decision requires school districts within the Fifth Circuit to ignore federal requirements related to educating students in their least restrictive environment by forcing school districts to determine whether a student needs specialized instruction often provided in a more restrictive setting before a llowing professionals to first consider whether less restrictive supports are sufficient. Further, the court s decision removes the ability of school districts in the Fifth Circuit to

environment. [5] By requiring school districts to immediately evaluate students for special education before first attempting less restrictive measures like Section 504 accommodations, the Fifth Circuit directly contradicts federal requirements. The general education classroom is considered not only the least restrictive, but also the most preferred placement, and a school district must consider whether steps, such as providing supplementary aids and services, can be taken to allow the student to access their education in the general education setting. 34 C.F.R. §300.550; Daniel R.R. v. State Bd. of Educ. , 874 F.2d 1036, 1048 (5th Cir. 1989) (developing a two-part test to determine whether the least restrictive environment requirement has been met: (1) can education in a regular classroom with support services be achieved, and (2) if not, has the school integrated the student to the maximum extent appropriate). Removal from the general education classroom should only occur when a student s disability is so severe that theoccsevere that the

education in their least restrictive environment through the implementation of Section 504 accommodations in the regular education classroom before implementing special education. As addressed

In conclusion, the Fifth Circuit s decision puts the requirements of Child Fi nd in conflict with the concept of least restrictive environment. It directly contradicts the primary obje ctive of federal disability law to educate students wi th disabilities to the maximum extent appropriate with their nondisabled peers and could have a potentially disastrous impact on a school district s abilit y to educate students in their least restrictive environment. See 20 U.S.C. § 1412(a)(5)(A); L.B. ex rel. K.B. v. Nebo Sch. Dist. , 379 F.3d 966, 976 (10th Cir. 2004) (Educating children in the least restrictive environment in which they can receive an appropriate educ ation is one of the IDEA s most important substantive requirements.); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. , 118 F.3d 245, 247; Daniel R.R.,

school officials, and not of federal judges.). As this Court has held, courts often lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy. Rowley, 458 U.S. at 208 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez , 411 U.S. 1, 42 (1973)). Thus, recognizing that judges lack the on-the-ground expertise and experience of school administrators, this Court has repeatedly cautioned courts in various contexts to resist substit ut[ing] their own notions of sound educational policy for those of the school authorities which they review. Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez , 561 U.S. 661, 686 (2010).

But, that is exactly what the Fifth Circuit did in finding that the District should have immediately evaluated O.W. without first attempting Section 504 accommodations. The holding, using hindsight and without the benefit of experience or context, unfairly second-guessed well-intentioned educators who exercised their professional judgment when determining which supports to employ during the Child Find process. And by creating a new Child Find standard in the Fifth Circuit, the court has intruded upon the province of educators and effectively forced school districts to ignore research-based strategies and interventions that could provide the student appropriate education in lieu of more specialized and possibly restrictive measures under the IDEA.

Specifically, the Fifth Circuit has denied educators a reasonable time period to utilize their

resources in the general education setting, including Section 504, and to exercise professional judgment regarding the effectiveness of these supports. This is particularly detrimental for students who are new to a school district or to students who are young. L.M. ,

concerned about unnecessarily subjecting a child to negative consequences that may accompany identification in some situations. Specifically, research indicates, and Congress has reported, [7] that overidentification of racial minorities in special education remains a significant concern. [8] However, school districts can potentially reduce racial disparities in special education identification, especially for students with learning differences and behaviors difficulties, by offering Section 504 accommodations and other general education supports prior to hastily, and possibly improperly, labeling the student as eligible for special education services under the IDEA.

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education. U.S. Dep t of Educ., Office of Special Education and Rehabilitative Services, *Letter to Hon. Mike Morath* (Oct. 19, 2018).

[7] H.R. Rep. No. 108-77 at 91 (2003) (finding that overidentification of minorities as eligible for special education is a primary concern that has significant adverse consequences).

[8] There are several explanations as to why certain minority populations, particularly African American males, are more likely to be over-identified, including the formal assessment measures typically utilized in evaluations, cultural differences, and implicit biases of the evaluators and other professionals. Ruby K. Payne, A Framework for Understanding Poverty 5, 27 (4th ed. 2005); Nicole M. Oelrich,

A teacher or provider s ability to appropriately educate a student hinges on the proper identification of the student, whether as a student in need of special education services or as one whose needs can be met through general education supports. Without a collaborative, deliberative process, there is a risk that the student will not receive FAPE in their least restrictive environment.

And, while IDEA eligibility results in educational benefits and services, it can, in some cases, unfortunately result in a negative stigma and cause students to have lowered self-expectations and a decreased sense of self-worth. Oberti v. Bd. of Educ ., 995 F.2d 1204, 1217 n.24 (3d Cir. 1993) (recognizing that stigma, mistrust and hostility have traditionally been harbored against persons with disabilities). As students with disabilities may not receive the same curriculum as their peers in general education settings, an unnecessary special education

Over-identifying students as IDEA-eligible can also have drastic consequences for school districts. Requiring a school district to automatically evaluate every student immediately upon recognition of a disability, as the Fifth Circuit now requires, will drastically increase the demand placed on evaluators to evaluate students and potentially slow down the evaluation process for all students in the queue. An inflated uptick in students found eligible for special education also taxes school districts, which are required to create and implement an IEP for those students and fund the special education and related services outlined in the IEPs. W.B. v. Matula, 67 F.3d 484, 501 (3rd Cir. 1995) (We are not unmindful of the budgetary and staffing pressures facing school officials, and we fix no bright-line rule as to what constitutes a reasonable time in light of the information and resources possessed by a given official at a given point in time.).

Utilizing general education measures proactively, including Section 504 plans, where appropriate, will benefit both students and school districts alike. Yet the new Child Find standard set forth by the Fifth Circuit provides no flexibility for school districts to ensure that students are not improperly deemed eligible for special education. School districts must be able to first attempt alternative measures, including the provision of Section 504 accommodations where appropriate, to determine if a need for special education truly exists. The Fifth Circuit s new Child Find standard prevents schools in its jurisdiction from doing so.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that this Court grant the petition for writ of certiorari .

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