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education funding and distribution, and has appeared before the Connecticut State Board of Education on issues such as alternative education for expelled students, the use of student test scores in teacher evaluations, and the independent educational evaluation process.

The National School Boards Association (NSBA), founded in 1940, is a non-profit organization representing state associations of school boards and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 school districts serving nearly 50 million public school students, including an estimated 6.9 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

a school district pay for an IEE merely by requesting one. Such an outcome subverts the core framework and intent of the IDEA that parents and school districts work collaboratively to ensure the development of educational programming and delivery

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed R. App. P. 29(a)(5) because, excluding the portion of the document specifically exempted from count under Fed. R. App. P. 32(f), this document contains 4171 words.

2. This document complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is submitted in a proportionally spaced typeface using Word for Office 365, specifically Times New Roman 14-point font.

September 30, 2019

Respectfully Submitted

/s/ Rebecca Adams Rieder, Esq.

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STATEMENT OF FACTS

Amici adopts the Defendant-Appellee's Counterstatement of the Facts: Page

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INTRODUCTION

This Court has an opportunity to issue a definitive ruling on a question of great importance to school boards and the students they serve under the Individuals with Disabilities Education Act, (IDEA), 20 U.S.C. §1400 et seq., 34 CFR Part 300, in Connecticut and throughout the Second Circuit. Specifically, the case concerns the reach of a parent's right to obtain an independent educational evaluation (IEE) at public expense and whether parents are entitled to obtain an unlimited number of publicly-funded IEEs in multiple assessment areas throughout the entire period of time their child is entitled to receive services under the IDEA.

Amici urge the Court to affirm the District Court's decision, which recognized that the parents' right to an IEE at public expense under the IDEA does not attach until a parent disagrees with an existing district evaluation; that applicable IDEA

linchpin of the IDEA is the Individualized Education Program (IEP). IEPs are developed through collaboration, information sharing, and data-based decision-making by a team of parents and school staff. Evaluation data is the foundation for IEP development. *A Guide to the Individual Educational Program, Office of Special Education and Rehabilitative Services U.S. Department of Education (July 2000)-* <https://www2.ed.gov/parents/needs/speced/iepguide/iepguide.pdf>.

If the plaintiff-appellant prevails, parents and school districts who have worked together for years will at some point, find themselves in roles that may be more adversarial than cooperative. This is because a parent's right to obtain a publicly-funded IEE is contingent on the right of a school district to commence a due process proceeding to prove that its

ARGUMENT

I. THE DISTRICT COURT PROPERLY RULED THAT A PARENT'S RIGHT TO A PUBLICLY-FUNDED INDEPENDENT EDUCATIONAL EVALUATION (IEE) HINGES ON A CONNECTION BETWEEN THE IEE REQUESTED BY THE PARENT AND AN EXISTING EVALUATION OBTAINED BY THE SCHOOL DISTRICT WITH WHICH THE PARENT DISAGREES.

Factually, this case involves a parental request for multiple IEEs based on a disagreement by the plaintiff-appellant's parents over a functional behavioral assessment (FBA) obtained by the defendant-appellee exclusively related to the behavior of plaintiff-appellant. As more fully described in the defendant-appellee's brief, the requested IEEs included not only an FBA, but also comprehensive speech and language, occupational therapy, physical therapy, assistive technology, psychoeducational and central auditory processing disorder evaluations unrelated to the FBA. The plaintiff-appellant contend that parents have a right to request publicly-funded IEEs in any area of a child's suspected disability regardless of the nature and purpose of a district's evaluation. For the reasons that follow, such an argument finds no support in the IDEA or its regulations, and the district court below properly determined that "there must necessarily be a connection between the evaluation with which the parents disagree and the independent evaluation they request." D.S., By and Through his Parents and Next Friends, M.S. and R.S. v.

Cir. Nov. 28, 2018) (slip op.), the charter school was faced with parents who, having consented to a triennial evaluation more than two years prior, began noticing physical and emotional challenges in their daughter following the student's suffering a concussion. Instead of seeking a reevaluation based on the effects of the concussion, parents instead filed an objection to an IEP that was more than two years old.

According to that court, “[a] school cannot be required to pay for an IEE unless ‘the parent disagrees with an evaluation obtained by the [school][.]’ §300.502(b)(1).” *Id.* at 2. Informing a school that, subsequent to an evaluation, a child's condition has changed is not the same thing as disagreeing with the evaluation.”

In addressing the parental obligation to express a disagreement with the district's evaluation, the court noted:

This is reflected in the regulations themselves, which closely tie the IEE to the school's evaluation—not only by making disagreement with an evaluation the trigger for an IEE, bu69 i aasang to t12.1 (t c)3J0.071 Tc -0.71 Tw [(n)

expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation."). (slip op. at 5).

The court went on to note that the parents' reliance on a district evaluation more than two years old to trigger their right to an IEE would unmoor the IEE from its purpose. The court concluded that the IEE in this context would not counter the district's natural advantage in information and expertise; rather it would address a topic about which the school district was likely to know less than the student's parents. Moreover, according to the court, parents in that situation would not need

While the IDEA does not itself define the term “evaluation,” its implementing regulations provide that an “[e]valuation means procedures used in accordance with [34 C.F.R.] §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” 34 C.F.R. § 300.15. Pursuant to the IDEA, once a school district believes a child may have a disability, the district must conduct an “initial evaluation” in order “to determine if the child is a child with a disability.” 20 U.S.C. § 1414(a)(1)(B). Because such an evaluation must assess all the areas of a child’s suspected disability, 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4), its scope is necessarily comprehensive. So is the “triennial” evaluation that school districts must conduct of a child previously identified as a child with a disability at least once every three years, 20 U.S.C. § 1414(a)(2), and “not more frequently than once a year unless the parent and the school district agree otherwise, 20 U.S.C. § 1414(a)(2)(b); 34 C.F.R. § 300.303. In addition, as more fully discussed in the defendant-appellee’s brief, school districts also conduct evaluations of a more limited scope and purpose, including FBAs. See Proof Brief of Defendant-Appellee, pages 32-35. FBAs are used to determine the causes of a student's behavior, which is impeding learning, in order to develop a behavioral intervention plan (BIP) that will decrease the disruptive behavior and/or prevent it from happening again. See Proof Brief of

In the comments to the regulations regarding section 300.502, the Department notes that “one commenter... asked whether a public agency can place limits on the frequency of an IEE (e.g. a single IEE in an evaluation cycle or in a child’s school career). 71 Fed. Reg. No. 156, p. 46889 (Aug. 14, 2006). The Department responded:

[we] do not believe that the parent should be limited to one IEE at public expense in a child’s school career.... Nevertheless, we do believe that it is important to clarify that a parent is not entitled to more than one IEE at public expense when a parent disagrees with a specific evaluation of reevaluation conducted or obtained by the public agency... This regulatory provision is consistent with the statutory right with an IEE at public expense, while recognizing that public agencies should not be required to bear the cost of more than one IEE when a parent disagrees with an evaluation conducted or obtained by a public agency.” *Id.* at 46690 (emphasis added).

Despite the clear language of the regulation, the plaintiff-appellant claims the right to a total of seven publicly-funded independent evaluations based on their disagreement with the defendant-appellee’s May 2017 FBA. For the reasons discussed above, such a claim is misguided.

While the plaintiff-appellant’s parents did communicate disagreement with the FBA, the

evaluation would have included assessments in every area for which an IEE was requested, consent for such evaluations was withheld by the plaintiff-appellant's parents and further collaboration to determine what educational programming would best meet plaintiff-appellant's needs was declined. Instead, litigation was commenced seeking publicly-funded IEEs.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request and urge this court to uphold the decision of the District Court below, and for any such further relief which the court might deem appropriate.

Dated September 30, 2019
Wethersfield, Connecticut

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CERTIFICATE OF SERVICE

I,

I further certify that an electronic copy was uploaded to the Court's electronic filing system. Six hard copie