

19-1510

In the United States Court of Appeals
For the Third Circuit

M.S. and S.S., o/b/o H.S.,
Appellant,

v.

CORPORATE

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STATEMENT OF INTEREST

The New Jersey School Boards Association (NJSBA) is a legislatively designated body corporate, with corporate succession, established by the New Jersey Legislature in 1914 pursuant to *N.J.S.A. 18A:6-45*. The Association is comprised of a membership that includes each board of education in New Jersey. Pursuant to *N.J.S.A. 18A:6-47*, the Association “may investigate such subjects relating to education in its various branches as it may think proper, and it shall encourage and aid all movements for the improvement of the educational affairs of this State.” NJSBA represents nearly 4,800 school board members who govern the 581 public school districts serving 1.4 million public school students. NJSBA’s mission is to provide training, advocacy, and support to advance public education and promote the achievement of all students through effective governance.

As such, the Association has discerned an interest in this matter as the outcome could directly affect all boards of education in New Jersey because those boards are required to adopt, revise, and oversee the implementation of policies pertaining to the provision of special education services, specifically the procedures, mandated by state and federal codes, by which independent educational evaluations are requested and provided. Moreover, NJSBA maintains a direct interest in this matter because it has been charged by its board of directors to ensure that boards throughout the state are informed of policy changes and fully

understand the proper implementation of revised, or newly adopted policies.

Because NJSBA serves as a direct, and only legislatively approved, source of policy information, it is important that NJSBA be granted leave to appear as *amici curiae* to provide the court with statewide perspective as any ruling on this issue will certainly impact the provision of special education services throughout this state.

NJSBA regularly represents its members' positions regarding education policy before the New Jersey State Legislature as well as *amici curiae* before the federal courts and New Jersey State Courts. NJSBA gJTj -0.0(t)-B(af)-4.5((2)5((6)8)8.0(F)410

in numerous cases involving issues under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400 et seq. (2019).

The Pennsylvania School Boards Association (PSBA), organized in 1895, is a voluntary non-profit association whose membership includes nearly all of the 500 local school districts and 29 intermediate units of this Commonwealth, numerous area vocational technical schools, and community colleges, and the members of governing boards of those public school entities. PSBA is dedicated to promoting excellence in school board governance through leadership, service, and advocacy for public education, which in turn benefits taxpayers and the public interest in the education of Pennsylvania’s youth. PSBA endeavors to assist state and federal courts in selected cases bearing upon important legal issues of statewide or national significance, by offering the benefit of its statewide and national perspective, experience, and analysis relative to the many considerations, ramifications, and consequences that should inform the resolution of such cases.

The Delaware School Boards Association (“DSBA”) is a voluntary, non-profit organization of school boards that seek to further public education and assist board members in carrying out their responsibilities. Founded in 1946, DSBA’s current membership consists of 16 local school boards of education and the State Board of Education which, together, represent 96 school board members throughout Delaware. DSBA’s members regularly develop and implement district-

COMBINED CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of *Fed. R. App. P.* 29(a)(5) because, excluding the parts of the document exempted by *Fed. R. App. P.* 32(f), this document contains 6,312 words.

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(s)_____

Attorney for _____ Dated: _____

I. Summary of Argument

This Court has an opportunity to issue a definitive ruling in an area of importance to public school districts and the students they serve under the Individuals with Disabilities Education Act, (IDEA), 20 U.S.C. §1400 et seq.: whether a school district is obligated to request a due process hearing upon receipt of a parent's request for an Independent Educational Evaluation (IEE) at public expense, when no evaluation has yet been completed because parents withdrew consent for the school district's reevaluation and thus no evaluations exist with which the parents could disagree. *Amici* urge the Court to affirm the District Court's recognition that a parent's right to request an IEE at public expense hinges on a disagreement with the district's reevaluation, conducted pursuant to the collaborative and deliberative process contemplated by the IDEA. The cornerstone of the IDEA is the Individualized Education Program (IEP) developed through collaborative and cooperative educational planning and decision-making by parents and school staff. The foundation for the design of the IEP is evaluation and assessment data. A ruling that parents may vitiate the collaborative framework designed to develop an IEP, by withholding consent for an evaluation (in this case, a reevaluation), then demanding an IEE at public expense, would run counter to the intent of the IDEA and impinge upon the collaborative process. Before parents can resort to an IEE to gain so-called equal "firepower," as described by the Supreme

assessment data provided by the parents, and without the evaluation that the IDEA

sufficient to address the parents' concerns for H.S. Notably, the parents initially agreed with this plan.

The day after the reevaluation planning meeting, the parents expressed their regrets regarding the IEP team's proposed reevaluation plan by withdrawing consent to the assessments and demanding an IEE consisting of a neuropsychological assessment. Following the parents' revocation of consent for the proposed assessments, the parties made several attempts to convene an IEP meeting to discuss the parents' IEE demand; however, that meeting was delayed several times with the meeting taking place three weeks after the reevaluation planning meeting. Ultimately, the parties were unable to reach an agreement and Hillsborough declined to provide or pay for the neuropsychological assessment. Hillsborough took no further action to obtain consent.

The parents now assert that because the district declined to either pursue parental consent through a due process proceeding or pay for an IEE they are entitled to reimbursement for the private IEE they obtained at a cost of \$4,400. They argue that a New Jersey school district has only two options when faced with a parental demand for an IEE: provide the IEE; or file a due process petition within twenty days. In the absence of Hillsborough's election of either option, parents claim an entitlement to reimbursement of their IEE.

In support of their position, parents cite *Schaffer* for the proposition that when parents request an IEE, the public agency must either file a due process complaint to request a hearing to demonstrate that the agency's evaluation is appropriate or ensure that an IEE is provided at public expense (*Pl 2nd corrected brief* at 12-13). However, the parents' narrow reading of *Schaffer* misconstrues the context of the Court's holding in that case. of readibah. ensu an222 0 Td (ca

The *Schaffer Court* was also concerned with the administrative burden placed on school districts, noting:

“[m]oreover, there is reason to believe that a great deal is already spent on the administration of the Act. Litigating a due process complaint is an expensive affair, costing schools approximately \$8,000 to \$12,000 per hearing. See Department of Education, J. Chambers, J. Harr, & A. Dhanani, *What Are We Spending on Procedural Safeguards in Special Education 1999-2000*, p 8 (May 2003) (prepared under contract by American Institutes for Research, Special Education Expenditure Project). *Id.* at 59.

The parents here are asking the court to provide a path for an end-run around the collaborative evaluation framework laid out in IDEA, which is certainly an administrative concern that could increase litigation. (“The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401 of this title shall obtain informed consent from the parent of such child before conducting the evaluation.” 20 U.S.C. § 1414

(D)(i)(I).)

B. Parents Do Not Gain Matching “Firepower” By Obtaining an IEE at Public Expense When they Have Prevented the School District From Reaching Any Conclusion.

The parents’ demand in this case conflicts with the requirements of the IDEA regulation, its state counterpart, and the dictates of *Schaffer*, which, as noted above, explains that the purpose of the IEE at public expense is to ensure that parents, in contesting a district’s assessment, “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.” 546 *U.S.* at 61. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017).

New Jersey provides additional guidance pursuant to *N.J.A.C.* 6A:14-3.8 as follows:

(b) As part of and

conduct the mandated triennial reevaluation when the parent foreclosed the district's ability to complete it by withdrawing consent to mutually agreed upon assessments. To hold that parents have the right to an IEE simply because they disagree with the reevaluation plan rewards parental refusal

The federal regulation establishing the roles and duties of both the parents and the school

the district had never formed an opinion as to behavioral and learning issues that developed in the child following a concussion. Therefore, because the district had no advantage in information or expertise, having never formed an opinion, the parent had no need to counter it.

The court's rationale is equally applicable to the present matter. Because the district has not reevaluated H.S., it has no superior knowledge of the child and therefore, the parents have no need to counter non-existent district expertise by asserting a right to an IEE at public expense.

In *Albright v. Mt. Home Sch. Dist.*, No. 3:17-CV-3075, 2018 WL 5794164 (W.D. Ark. Nov. 5, 2018) (slip op.), a parent asserted that the school district violated her procedural rights when it ignored her refusal to consent to a functional behavioral assessment of her daughter. That court concluded, “[e]very court to consider the IDEA’s reevaluation requirements has concluded if a student’s parents want [her] to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.” (citing *G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1263-64 (11th Cir. 2012)).

New Jersey regulations, specifically *N.J.A.C. 6A:14-3.8(b)* expressly limits the team’s review to existing evaluation data and specifies the elements an IEP team must consider during the reevaluation process. Clearly, the state’s regulatory

intent was to preclude the IEP

*action, the district **may** request a due process hearing* according to N.J.A.C. 6A:14-2.7(b) to obtain consent (emphasis added).

As noted above and in the spirit of collaboration, parents could have sought to mediate, sought a resolution meeting, or proceeded to a due process hearing. Instead, parents demanded an IEE at district expense, while simultaneously denying the district ability to conduct the assessments previously agreed upon by the full IEP team. By withholding consent for the school district's reevaluation, the parents have chosen not to use the collaborative tools available to them, and insisted on a publicly funded IEE, excluding the district's evaluation from the process. The parents' actions here appear to manipulate procedures intended to obtain their desired outcome instead of working collaboratively with the district to achieve an appropriate one. Had parents allowed the process to run its proper course, they could have objected to the district's reevaluation and demanded an IEE if dissatisfied with its conclusions.

In the decision below, the District Court relied on *R.L. ex rel. Mr. L v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222, 235 (D. Conn. 2005) for the proposition that a school district need not apply for a due process hearing when the request for an IEE is invalid. That court cited with approval the District Court of Connecticut conclusion stating, "[w]hen there is no disagreement as to the agency's own evaluation, then there is no need for a due process hearing to determine whether that evaluation is appropriate." *Id.* at 234. Parents assert that

such reasoning is inapplicable because Connecticut has declined to impose a 20-

the concern that the Department of Education was unduly limiting parental access to IEEs, the Responses note, “The commenters asserted that a parent should have a right to an independent educational evaluation in circumstances where he or she requests an initial evaluation or reevaluation, but it is not conducted by the school district.” The Department disagreed, responding:

In regard to the concern the Department is limiting a parent’s right to an independent evaluation when the school district has not conducted an evaluation, the Federal regulations at 34 C.F.R. § 300.502 (b)(1) state in relevant part: “[a] parent has the right to an independent educational evaluation at public expense if the parent disagrees *with an evaluation obtained by public agency ...*” (Emphasis in original.)

With respect to a reevaluation, the response indicates that where a parent makes a request for an assessment, “[i]f a school district decides not to conduct assessments as part of a reevaluation, in accordance with *N.J.A.C. 6A:14-3.8(b)3*, the parent may request, and the school district must obtain, an assessment.” *N.J.A.C. 6A:14-3.8(b)3* in turn requires the IEP team to review existing evaluation data. Therefore, under these facts, where the data the parents sought to include in the reevaluated plan did not exist, the parents are not entitled to an IEE.

In addition, the New Jersey Department of Education has published an informational guide for parents entitled *Parental Rights in Special Education* (PRISE), which informs parents as to their rights in respect to their child with special needs. That guide indicates that parents of children who are being

reevaluation may seek an IEE, but they must disagree with the district's evaluation.

016a

The facts here are clear that the parents did not file an objection to the school district's December 2014 reevaluation. There is no evidence that the parents notified Hillsborough of any dissatisfaction with the June 2017 reevaluation upon its "completion," nor could there be such evidence because that reevaluation was terminated based on the parents withdrawal of consent to assess H.S.

In *N.D.S. v. Academy for Science and Agriculture Charter School*, Dkt. No. 18-CV-0711 (PJS/HB), 2018 U.S. Dist. LEXIS 200987; 2018 WL 6201725 (11th Cir. Nov. 28, 2018) (slip op.), the charter school was faced with parents who,

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, but by providing that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees." § 300.502(b)(5). This is also reflected in the Supreme Court's description of the purpose of the IEE:

[The] 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. ("The parental right to an IEE is not an end in itself; rather, it serves the purpose of furnishing parents with the independent 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

Haddonfield is distinguishable. There, the district completed the agreed upon reevaluation assessments, then filed for due process to assert that its evaluation was appropriate. In that factual context, all procedural elements had been satisfied and it was then incumbent on the district to timely file a due process petition. Such is not the case here.

In *Northern Highlands Regional Board of Education v. C.E. and A.E. ex rel. C.E.*, EDS 10891-16, Final Decision (January 19, 2017), <http://njlaw.rutgers.edu/collections/oal>, 080a during an IEP meeting, parents requested an IEE. However, the facts do not indicate whether the IEP meeting was a triennial reevaluation meeting. Accordingly, the factual context is unclear as to whether the district's obligation to pursue due process was discretionary. Regardless, the decision does not address the parents' contention here that such a filing is mandatory, therefore the decision's reasoning is inapplicable to the present matter.

In *Monroe Township Board of Education v. T.L. ex rel. I.L.*, OAL Dkt. No. EDS 13275-16, Final Decision (November 29, 2016), 087a the district completed the evaluation, and then filed for due process to defend its evaluation in light of the parent's request for an IEE. Again, it was clear that the school district completed the evaluation prior to filing for due process. Here, the district was in the process of completing the reevaluation, accordingly, the three cases relied upon by the ALJ

are inapposite. It is uncontroverted that, at the time Plaintiffs made their request, Hillsborough had not yet finished an evaluation. (ECF No. 12-3, Exs. 4, 7.). As such, there is no evaluation or reevaluation with which Plaintiffs disagree, accordingly, they were not entitled to an IEE at district expense. *See T.P. ex rel. T.P. v. Bryan Cty. Sch. Dist.*, 792 F.3d 1284, 1293 (11th Cir. 2015).

The three cases relied on by the ALJ in the initial decision do not address the question of whether a school district must pursue due process in response to a request for an IEE submitted by the parents before the district completes a reevaluation of an eligible student. Therefore, because neither those administrative decisions nor the initial decision itself are responsive to that narrow question they should be discounted.

CONCLUSION

Based on the foregoing, and the reasons explained in Appellee's Brief, *amici* respectfully request that this Court affirm the decision below.

Respectfully submitted,

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