No. 14-35081

In the United States Court of Appeals
For the Ninth Circuit

D.A., MOTHER OF M.A.; J.A., FATHER OF M.A,
PLAINTIFFS-APPELLANTS,

v.

MERIDIAN JOINT SCHOOL DISTRICT NO. 2,
DEFENDANT-APPELLEE

On Appeal from the United States District Court
For the District of Boise, Idaho
D.C. No. 1:11-cv-00426-CWD (Honorable Candy W. Dale)

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, ASSOCIATION OF ALASKA SCHOOL BOARDS, ARIZONA SCHOOL BOARDS ASSOCIATION, CALIFORNIA SCHOOL BOARDS ASSOCIATION AND ITS EDUCATION LEGAL ALLIANCE, IDAHO SCHOOL BOARDS ASSOCIATION, MONTANA SCHOOL BOARDS ASSOCIATION, NEVADA ASSOCIATION OF SCHOOL BOARDS, OREGON SCHOOL BOARDS ASSOCIATION AND WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION SUPPORTING APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae National School Boards Association and its joint amici aver that they each do not issue stock and are not a subsidiary or affiliate of any publicly owned corporation.

STATEMENT OF AUTHORSHIP

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amici Curiae National School Boards Association and its joint amici aver that:

(i) Neither party's counsel in this matter authorized this amicus curiae brief;

(ii) Neither of the parties or their respective counsel contributed money to fund this amicus curiae brief; and

(iii) No person other than the amici, or their members or counsel, contributed money to fund this amicus curiae brief.

DATED: October 14, 2014

/S/ Francisco M. Negrón, Jr.
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This proposed brief is submitted on motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

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. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students.

The Association of Alaska School Boards (AASB) is an organization representing school boards in Alaska. Its membership consists of more than 330 individual board members responsible for students who attend Alaska's public schools. AASB advocates for children by assisting school boards in providing quality public education, focused on student achievement.

The Arizona School Boards Association (ASBA) is a private, non-profit, non-partisan organization that provides training, leadership and essential services to public school governing boards statewide. More than 240 governing boards, representing nearly 1 million Arizona students, are members of ASBA. Its mission is promoting elected local governance of public education and continuous improvement of student success.

The California School Boards Association is the non-profit education association representing the state's elected officials who govern public school districts and county offices of education. With a membership of nearly 1,000 educational agencies statewide, CSBA advocates for effective policies that advance the education and well-being of the state's more than 6 million school-age children. CSBA's Education Legal Alliance is a consortium of school districts that pursues and defends a broad spectrum of statewide public education interests before state and federal courts and state agencies.

The Idaho School Boards Association (ISBA) is a non-profit, service organization providing policy services, legislative advocacy, leadership support and quality, cost-efficient board training to association members. Representing more than 500 locally elected school board members, ISBA strives to improve public education through leadership and services to local school boards for the benefit of students and for the advocacy of public education.

The Montana School Boards Association (MTSBA) promotes and defends each Montana community's ownership of its public schools, exercised through constitutionally-empowered boards of trustees elected by and accountable to the communities in which they serve. MTSBA provides its membership, encompassing virtually all the state's locally elected boards of trustees, with services and other resources designed to ensure the success of public schools throughout Montana.

The Nevada Association of School Boards (NASB) is dedicated to strengthening public schools through local citizen control. NASB coordinates programs and procedures pertaining to the policy organization and administration of the seventeen school districts in the State of Nevada, constant improvement of public school education in the State of Nevada, closer cooperation among the boards of trustees of the several school districts of the State of Nevada; and obtains information for and provides assistance individually to the boards of trustees and the members thereof.

The Oregon School Boards Association (OSBA) is composed of 1,400 locally-elected public officials who serve on school district, charter school, education service district and community college boards. Collectively, they oversee the education of 970,000 students. OSBA provides its members access to significant expertise, experience and resources related to public education and board service. OSBA's primary mission is to serve as the collective voice for all Oregon public school boards.

The Washington State School Directors' Association (WSSDA) coordinates programs and procedures pertaining to policy making and to control and management among the school districts of the state as provided by law, and provides leadership and advocacy for the continual improvement of a public education system which assures effective learning for all students.

Together the *amici* represent the governing boards responsible for providing quality education to the vast majority of the children attending public schools within the states in this Circuit in accordance with federal and state laws. *Amici* have a strong interest in ensuring that this Court interprets those laws in keeping with the intent of Congress and state legislatures and in a manner that permits public schools to meet their responsibilities fairly and effectively to all children, including those with disabilities, within the constraints imposed by limited public school budgets.

The issue at stake in this case directly affects the number of students to whom public schools must provide special education and related services under the Individuals with Disabilities Education Act (IDEA). The expansive position advocated by Appellants and their *amici*, if adopted by this Court, could greatly swell the number of students receiving these costly services well above the approximately 1.13 million children (3-21 years of age) for whom the school districts represented by the state *amici* provide a free appropriate public education. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, Table 204.70, Number and percentage of children served under Individuals with Disabilities Education Act (IDEA), Part B, by age group and state or jurisdiction: Selected years, 1990–91 through 2011–12, *available at* http://nces.ed.gov/programs/digest/d13/tables/dt13_ 204.70.asp. *Amici* seek to

inform this Court of considerations in addition to those put forth by Appellee that may assist the Court in reaching a decision consistent with the purpose of the IDEA to assist children whose disabilities adversely affect their educational performance in school.

SUMMARY OF ARGUMENT

Eligibility under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. (2014), is an individualized determination that cannot be based solely upon a student's autism diagnosis. Although a student with autism may experience difficulty in the educational setting, IDEA eligibility will not attach unless the disability creates a non-trivial, adverse impact upon the student's educational performance and the student demonstrates a need for special education services in order to benefit from his education. *See* 20 U.S.C. § 1401(3)(A)(i)-(ii) (2014); *see also*, IDAHO STATE DEP'T OF EDUC., IDAHO SPECIAL EDUCATION MANUAL 2007, at 44 (Rev. 2009) ("IDAHO MANUAL").

The existence of a disability by itself is clearly not sufficient to receive specialized instruction and related services under the IDEA. Every student with a disability arguably would benefit from such instruction and services, but serving all students with a disability has never been the aim of the IDEA. In its seminal 1982 decision in *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, the U.S. Supreme Court ruled that the IDEA was intended to serve primarily those

students who need special education to "open the door of public education." 458 U.S. 176, 192 (1982). It is inconsistent with the IDEA then to find a student eligible for special education when that student has met all the requirements to graduate from high school with a standard diploma, having performed successfully in general education classes.

Here, Appellants argue that their son, M.A., should be found eligible to receive special education and related services under the IDEA due to certain characteristics associated with autism, suggesting that autism by itself creates the necessary showing of an adverse impact upon educational performance. This argument ignores the multi-faceted definition of disability under the IDEA. The district court appropriately rejected the Appellants' argument, noting that M.A.'s overall history of strong grades and performance in school far outweigh his limited struggles in nonacademic areas. Appellants suggest incorrectly that the lower court based its decision on grades alone, and that such an approach will exclude all high-functioning autistic students from services under the IDEA. Under their approach, courts would have to ignore the full import of the definition of disability under the IDEA, which requires an individualized determination of an adverse educational impact and actual need for special education services.

For these reasons, *amici* urge this Court to find that the existence of a disability by itself is not sufficient for a determination of eligibility under the

IDEA; that grades, while not determinative of eligibility, are an important consideration in finding a student ineligible; and that the district court was correct to find that M.A. was ineligible under the IDEA.

ARGUMENT

I. AN AUTISM DIAGNOSIS BY ITSELF DOES NOT ENTITLE A STUDENT TO IDENTIFICATION AS A STUDENT WITH A DISABILITY UNDER THE IDEA.

A. IDEA eligibility is a multi-faceted determination that cannot be based upon a student's autism diagnosis alone.

Although a child may be diagnosed with a particular disability and may even experience some effects of that disability in the educational setting, he is not eligible for services under the IDEA unless that disability creates an adverse impact on the student's educational performance and the student needs special education to benefit from his or her education. *See* 20 U.S.C. § 1401(3)(A)(i)-(ii) (2014); *see also* Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 458 (2004) ("A disability is not qualifying and eligibility does not attach, despite a medical diagnosis, unless the disability 'adversely affects a child's educational performance.'"). This means some children who may experience difficulties as a result of their disability may nonetheless be ineligible to receive special education and related services under the IDEA. *See* U.S. DEP'T OF EDUC., PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING

SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES, at 48 (2002) ("Not every student with a disability in elementary, middle or high school receives special education services… [a student may not receive special education services if] his or her disability does not impair [his or her] ability to learn to such a degree that special education services are necessary.").

A child is only eligible to receive special education and related services under the IDEA if he qualifies as a "child with a disability." 20 U.S.C. § 1401(3)(A). The test for determining eligibility is multi-faceted; a particular medical diagnosis is only one part.[1] The IDEA and its implementing regulations define the term "child with a disability" as a child:

> "[W]ith mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as 'emotional disturbance'), orthopedic impairments, *autism*, traumatic brain injury, other

[1] In *Springer v. Fairfax Cnty. Sch. Bd.*, the Fourth Circuit provided a good summary of the IDEA's eligibility criteria and the interplay among the three-prongs of the eligibility test. 134 F.3d 659 (4th Cir. 1998). The court noted that eligibility is a multi-factor consideration that requires more than just a demonstration that a student may exhibit behaviors consistent with a particular diagnosis. *Id.* at 663-666. The Court held that a child who was socially maladjusted was not entitled to eligibility because the evidence did not indicate the child had a "serious emotional disturbance" that adversely impacted his educational performance. *Id.* at 666. The Court stated, "even if [the plaintiffs] had been able to demonstrate that [the child] exhibited one or more of the five qualifying characteristics [of serious emotional disturbance] for a long period of time and to a marked degree, the [plaintiffs] still have failed to establish the critical causal connection between this condition and the educational difficulties [the child] experienced, the final step in proving a serious emotional disturbance." *Id.* .

> health impairments, or specific learning disabilities; and (ii) *who, by reason thereof, needs special education and related services*."

20 U.S.C. § 1401(3)(A)(i)-(ii) (2014); 34 C.F.R. § 300.8(a)(1) (2014) (emphasis added). This definition makes clear that even if a child has been diagnosed with one of the IDEA's enumerated impairments, he will not be eligible unless he has a demonstrated "need" for special education. The IDEA's implementing regulations further require that a child demonstrate that his disability "adversely affects" his "educational performance" in order to qualify for special education and related services. 34 C.F.R. § 300.8(c)(1)(i) (2014).

The IDEA does not specifically define "adversely affect" or "educational performance," leaving the states with the responsibility of providing substance to these two terms. *See J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 (2d Cir. 2000) ("However, neither the IDEA nor the federal regulations define the terms 'need special education' or 'adverse effect on educational performance,' leaving it to each State to give substance to these terms."). In this case, the Idaho special education regulations adopt the IDEA's eligibility criteria. To demonstrate eligibility for special education services, the Idaho Manual's "three-prong test for eligibility" must be satisfied:

> 1) The eligibility requirements established by the state for a specific disability are met;

2) The disability must have an adverse impact on the student's education; **and**

3) The student must need special education in order to benefit from his or her education.

IDAHO MANUAL at 44.

The Idaho regulations define "adverse effect on educational performance" to mean that a student's disability creates "harmful or unfavorable influences…on the student's academic or daily life activities." *Id*. at 44-45. If the student can show that his autism results in such an "adverse effect" on his or her "educational performance," the student must then demonstrate a "need" for special education to benefit from his or her education. A student will "need" special education when the student requires specialized instruction to access the general education curriculum "so that he or she can meet Idaho Content Standards that apply to all students." *Id*. at 45.

Several other jurisdictions in the Ninth Circuit[2] have adopted a multi-factor analysis consistent with the IDEA and its implementing regulations. These state

[2]*See* WASH. ADMIN. CODE § 392-172A-01035 (2014): ("(1)(a) Child with a disability or as used in this chapter, a student eligible for special education means a student who has been evaluated and determined to need special education because of having a disability in one of the following eligibility categories: Intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an emotional behavioral disability, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, multiple disabilities, or

rules are consistent in their approach: where a student has a designated impairment but does not meet the other requirements for eligibility, he is not entitled to special education and related services under the IDEA.

B. IDEA special education and related services are intended to address the learning deficiencies caused by a student's disability, not to treat the student's underlying disability.

Despite M.A.'s significant educational achievements, Appellants emphasize M.A.'s intermittent struggles with socialization and communication as factors determinative of his eligibility for special education and related services under the IDEA. These characteristics may support a diagnosis of autism but do not satisfy

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for students, three through eight, a developmental delay and who, because of the disability and adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations, and needs special education and related services."); ARIZ. STATE DEP'T. OF EDUC., EVALUATION AND ELIGIBILITY TECHNICAL ASSISTANCE MANUAL: PROCESSES AND PROCEDURES – FROM REFERRAL TO DETERMINATION OF ELIGIBILITY 2012, at 9 ("A child can only be determined eligible for special education services if the child's disability meets the eligibility criteria in the definition of a child with a disability, the disability impacts learning and there is a need for specially designed instruction."); ALASKA STATE DEP'T OF EDUC., ALASKA SPECIAL EDUCATION HANDBOOK 2014, at 16-17 ("Alaska regulation 4 AAC 52.130: 'Criteria for determination of eligibility' specifies the eligibility criteria for determination of eligibility in 14 categories. Teams should remember: disability alone is insufficient grounds for determining eligibility; under 4 AAC 52.130, a student must '…require special facilities, equipment, or methods to make the child's education program effective.' Eligibility teams must determine three things: 1. Whether the student has a disability (34 CFR § 300.301 (2014)) which adversely affects their educational performance; all disability categories have documentation requirements (see 4 AAC 52.130); 2. Whether the student requires special education and/or related services (4 AAC 52.130); 3. The educational needs of the student (34 CFR § 300.301) (2014).").

the remaining two elements of the IDEA's definition for a "child with a disability." The statute requires school districts to provide students with a "basic floor of opportunity," to access the general curriculum, not to cure or remediate all effects of a child's disability.

As defined by the Supreme Court in *Rowley*, special education is "educational instruction specially designed to meet the unique needs of the handicapped child, supported by services as are necessary to permit the child 'to benefit' from the instruction." 458 U.S. at 188-89. The Supreme Court noted that Congress' intent in providing special education services under the Education for All Handicapped Children Act (IDEA's precursor) was not to "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children,'" but "to open the door of public education to handicapped children on appropriate terms." *Id.* at 189-90, 192. If, as Appellants contend, a student is eligible under the IDEA when the student has no academic needs, has been successful in general education classes, and has been able to achieve a standard diploma, IDEA eligibility would go beyond "open[ing] the door of public education" to "maximiz[ing] potential" by seeking to *eliminate* all effects of the student's disability, something clearly beyond the purposes of the statute.

In *Forest Grove Sch. Dist. v. T.A.*, the district court emphasized that a school district's responsibility under the IDEA is "to remedy the learning related symptoms of a disability, not to treat the underlying disability, or to treat other, non-learning related symptoms." 675 F. Supp. 2d 1063, 1068 (D. Or. 2009). In holding that the school district was not liable for the costs incurred by the parents who unilaterally placed their son in a private school to treat his drug and behavioral problems, the district court noted that "[a school] district certainly cannot begin treating a student's underlying medical disability, whether it be ADHD or some other mental or physical disability. That responsibility rests with the parents and medical professionals." *Id*. On appeal, this Court upheld the district court. *Forest Grove Sch. Dist. v. T.A.*, 638 F.3d 1234, 1241 (9th Cir. 2011). It instructed courts to evaluate whether, considering all relevant factors, a parent's non-disability reasons for seeking special education services for his or her student "so outweighed the disability reasons as to make reimbursement inequitable." *Id*. at 1239. As applied to the current case, equitable considerations suggest that to order identification for this student would be tantamount to requiring the school district to treat his disability regardless of his success in school.

II. WHILE GRADES ALONE MAY NOT BE A DETERMINING FACTOR FOR INELIGIBILITY, A STUDENT'S OVERALL SUCCESS IN THE GENERAL EDUCATION SETTING NEGATES A FINDING OF ELIGIBILITY.

A. IDEA eligibility is not appropriate where a student's disability does not create any adverse impact on his or her academic performance in the general education curriculum.

It is the clear intent of the IDEA that a student cannot qualify as eligible for services without an adverse impact on academic performance. For example, when school officials are evaluating whether a student's disability adversely impacts his or her educational performance, the IDEA requires that school officials "use a variety of assessment tools and strategies to gather relevant *functional, developmental, and academic information*, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability." 20 U.S.C. § 1414(b)(2)(A) (2014) (emphasis added). The IDEA, however, does not permit a student's nonacademic struggles alone to qualify the student for special education and related services.

Only one circuit has found that a student who struggles with behavioral or emotional issues may still be eligible for special education under the IDEA despite a strong academic record. *Mr. I. and Mrs. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 12 (1st Cir. 2007) ("It does not follow…that a child without 'academic

needs' is per se ineligible for IDEA benefits, especially when the state has conditioned eligibility on a standard that explicitly takes 'nonacademic areas' into account."). Other courts have expressly declined to interpret educational performance in this way, emphasizing that grades and academic performance are intended to be the guiding principle in IDEA eligibility determinations. *See, e.g.*, *A.J. v. Board of Educ.*, 679 F. Supp. 2d 299, 309 (E.D.N.Y. 2010) (stating that a student's academic performance must be the "principal, if not only, guiding factor" in determining whether a student's disability adversely affects his or her educational performance); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010) (holding that educational performance requires "proof of an adverse impact on *academic* performance, as opposed to social development or integration.").

If a student performs well in the general education curriculum despite the challenges imposed by his disability, specialized educational instruction under the IDEA would be inappropriate for addressing his unique needs. *See* Lisa Lukasik, *Asperger's Syndrome and Eligibility under the IDEA: Eliminating the Emerging 'Failure First' Requirement to Prevent a Good Idea from Going Bad*, 19 VA. J. SOC. POL'Y & L. 252, 274 ("The regulatory qualification—that in order to be recognized as a disabling condition for purposes of the Act a disability must negatively impact performance at school—aligns with the IDEA's purpose because

if a disability does not have any negative impact on school, the child does not require the individualized services and protections afforded by the IDEA in order to succeed and receive an appropriate education there."). Instead, a student's individual needs may be better served through accommodations provided under Section 504 of the Rehabilitation Act of 1973. *See* Robert A. Garda Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1101 (Summer 2005) ("Not all services provided by schools to disabled students are special education. A child with cystic fibrosis may need respiratory therapy, a child with spina bifida may need catheterization services, and a child with diabetes may need monitoring of meals, but these services are not special education, and these children are not eligible under the IDEA. . .Rather, these children typically receive services under Section 504 of the Rehabilitation Act of 1973, a nondiscrimination statute that works in tandem with the IDEA.").

It is also inappropriate to label students who achieve academic success, such as M.A., as in need of special education because this needlessly distinguishes them from their non-disabled peers. The IDEA requires that those students with disabilities who do need special education be educated with non-disabled students to the greatest extent appropriate. 20 U.S.C. § 1412(a)(5) (2014). To accept the extraordinary expansion of IDEA eligibility to encompass students without

academic needs as proposed by Appellants would be contrary to this admonition not to segregate students unnecessarily when they can achieve educational success in the general curriculum.

Rather than considering a student's documented ability to succeed without special education and related services, Appellants' approach, if adopted by this Court, would define a student's entire educational performance by discrete weaknesses in certain nonacademic areas, such as the ability to interact and communicate with peers in certain social situations. Appellants' Opening Brief, at 44. Appellants' position misconstrues the state definition of "educational performance" to argue that a student is eligible to receive special education services under the IDEA if he or she is struggling in ***either*** academic or nonacademic areas and ignores the concomitant need for adverse impact. The Idaho Manual states that:

> Educational performance includes both academic areas (reading, math, communication, etc.) **and** nonacademic areas (daily life activities, mobility, pre-vocational and vocational skills, social adaptation, self-help skills, etc.). Consideration of **all facets** of the student's condition that adversely affect educational performance involves determining any harmful or unfavorable influences that the disability has on the student's academic or daily life activities.

IDAHO MANUAL at 44-45 (emphasis added). This definition seeks to view a child's educational performance in a holistic sense rather than to focus on discrete symptoms or characteristics that are present as a result of the disability but are not

adversely affecting the child's ability to access educational opportunities. Appellants oddly move away from this inclusive approach to a disjunctive interpretation of "nonacademic areas;" they suggest that if a student shows an adverse effect in *only* nonacademic areas, he is still eligible under the IDEA. However, the Appellants' interpretation clearly goes against the plain meaning of the definition. The definition uses "and," not "or." While it later talks about considering "academic or daily life activities," this consideration cannot be read as separate from the first part of the definition which requires an adverse educational impact.[3]

[3] In *Springer,* the Fourth Circuit cautioned that attaching IDEA eligibility any time a student experiences difficulties in non-academic areas would inappropriately stretch the bounds of the IDEA and place undue burdens on school districts. The Court stated:

> "Indeed, the regulatory framework under IDEA pointedly carves out 'socially maladjusted' behavior from the definition of serious emotional disturbance. This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities." 134 F.3d at 664.

B. Consideration of grades properly accounts for the student's academic and non-academic performance in accordance with the IDEA.

Contrary to the assertions of Appellants and their *amici*, the district court's discussion of M.A.'s grades in its eligibility determination does not conflict with the IDEA's understanding of the term "educational performance" because grades are a measure of a student's academic and non-academic performance. District Court Opinion at 24. Colloquially, grades are often synonymous with the terms "academic performance" or "academic record." However, nothing in the IDEA or the Idaho definition of educational performance requires or suggests that grades be deemed to measure exclusively a student's "academic performance." [4] A course grade, particularly in elective classes, provides a wealth of information not only about a student's bare subject matter knowledge but also about a student's nonacademic abilities. *See Hood v. Encinitas Union Sch. Dist.,* 486 F.3d 1099,

[4] As previously discussed, the IDEA leaves the term "educational performance" undefined, requiring states to provide substance to this term. *See e.g., J.D. ex rel. J.D. v. Pawlet Sch. Dist.,* 224 F.3d 60, 66 (2d Cir. 2000). Idaho defines "educational performance" as both a student's performance in academic areas, defined as "reading, math, communication, etc." and nonacademic areas, defined as "daily life activities, mobility, pre-vocational and vocational skills, social adaptation, self-help skills, etc." IDAHO MANUAL at 44. Because grades reflect more than just a student's ability to master content in core curriculum classes, the term "grades" must be viewed as encompassing consideration of academic and non-academic areas.

1107 (9th Cir. 2007) ("Grades and educators' assessments [are important] when determining whether a child…is reaping some educational benefit in the general classroom.") An average to above average course grade reflects that a student can move about the school building in a timely manner to get to class, understand and synthesize spoken and written language, manage stress and emotions, organize materials, conduct himself in a manner conducive to learning in the classroom environment, interact with others and adapt to changes without warning. In elective classes that emphasize life and pre-vocational skills, such as M.A.'s Broadcasting or Web Design class, students are often required to collaborate with peers in group projects, prepare and deliver a speech in front of an audience, and develop computer skills that can be utilized in post-graduate employment. Success in these classes requires the student to develop and utilize certain nonacademic skill sets.

Studies conducted on the meaning and interpretation of student grades confirm that teachers consider both a student's academic and nonacademic performance when they make grading decisions. Teachers indicated in interviews with researchers across multiple studies that grading decisions are rarely based upon a student's knowledge and mastery of course material alone.[5] *See* Lawrence

[5] Some researchers caution that the consideration of nonacademic factors in grading decisions can make student grades a less reliable measure of student

H. Cross and Robert B. Frary, *Hodgepodge Grading: Endorsed by Students and Teachers Alike*, 12(1) APPLIED MEASUREMENT IN EDUCATION 53 (1999), 54-55; Jennifer Randall & George Engelhard, Jr., *Examining Teacher Grades Using Rasch Measurement Theory*, 46(1) JOURNAL OF EDUCATIONAL MEASUREMENT 1, 2 (Spring 2009). Student grades are rather a reflection of content mastery in combination with nonacademic factors such as attitude, effort, and behavior. *Id.* The general education curriculum is not a vacuum that consists of only pure academic content mastery. To participate and succeed in the general education core curriculum and in elective classes, students like M.A. need to possess sufficient academic and nonacademic skills.

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performance due to the subjective nature of measuring nonacademic performance. *See* Rick Wormeli, *Accountability: Teaching Through Assessment and Feedback, Not Grading*, 34(3) AM. SECONDARY EDUC. 14, 22 (Summer 2006) ("There is no legally defensible, objective way to measure a student's effort, integrity, and initiative.") Despite this criticism, teachers still indicate that they believe nonacademic factors are a necessary and important component of their grading criteria. *See* James H. McMillan & Suzanne Nash, *Teacher Classroom Assessment and Grading Practices Decision Making*, Paper presented at the Annual Meeting of the National Council on Measurement in Education 28 (New Orleans, LA, April 2000) ("Many teachers [view] effort as enabling achievement or as part of achievement, so that it became an important contributor to determining grades."); Thomas R. Guskey, *Bound by Tradition: Teachers' View of Crucial Grading and Reporting Issues*, Paper presented at the Annual Meeting of the American Educational Research Association 13 (San Francisco, CA, April 2009) ("High school teachers especially believe that demonstrations of responsibility—e.g., turning in assignments on time—and other work habits— e.g., class participation and completing homework assignments—are vital aspects [of] learning and need to be considered.").

In affirming the Hearing Officer's determination that M.A.'s autism does not adversely affect his educational performance, the district court noted there was "no element of the manifestations of M.A.'s autism that was not observed, considered, reviewed and testified to." District Court Opinion, at 25. As part of its eligibility determination, the district court considered M.A.'s strong record of grades and classroom achievements as well as the evidence of M.A.'s struggles with certain nonacademic skills. The district court acknowledged that M.A.'s autism can impact "his ability to appropriately interact with peers, work outside of established routines, and remain fully engaged in the classroom environment." District Court Opinion, at 24-25. The district court also referenced the observations of M.A.'s mother, the evaluation of an independent behavioral specialist, and the testimony of M.A.'s assigned peer mentor, who all described M.A.'s struggles in social settings and in developing certain life skills. *Id.* at 25. However, after reviewing all evidence of M.A.'s educational performance, the District Court determined that "M.A. possessed sufficient academic and nonacademic skills to participate, and in some cases to excel, in the general curriculum." *Id.* at 26. Because the district court properly considered M.A.'s academic and nonacademic performance as part of its eligibility determination, this Court should not overturn the district court's finding that M.A. is ineligible for special education services under the IDEA.

III. REMOVING THE "ADVERSELY AFFECTS EDUCATIONAL PERFORMANCE" LIMITATION WOULD ALLOW ANY STUDENT WITH A DISABILITY ENUMERATED IN THE IDEA TO ACCESS SPECIAL EDUCATION AND RELATED SERVICES.

A. Granting IDEA eligibility on the basis of a trivial adverse impact effectively would remove the "adversely affects educational performance" limitation from the IDEA and the Idaho eligibility regulations.

This case raises the question of how severely a disability must impact a student's educational performance in order for eligibility for IDEA services to attach. This determination is important because if, as Appellants assert, any impact is sufficient, then every student with a disability enumerated in the statute likely will be eligible for IDEA services. Public schools will be inundated with students with disabilities who are entitled to IDEA services to address needs that are primarily non-educational. This result will demand that schools expend significant additional resources in a manner not contemplated by the IDEA and beyond the capacity of already strained school district budgets to sustain.

Appellants cite to *Mr. I.*, 480 F.3d 1, for the proposition that a student's disability does not have to create a "significant" impact on a student's educational performance in order to find there has been an adverse impact. In *Mr. I*, the First Circuit held that a student's Asperger's Syndrome adversely impacted her educational performance by causing "poor pragmatic language skills and social understanding difficulties," although she had above average grades and

nondisruptive classroom behavior. *Id.* at 17-18. The First Circuit rejected the argument that a disability must create a significant or substantial impact on a student's educational performance for it to be considered adverse. *Id.* at 16. The First Circuit's interpretation is incorrect, as it begs the question: what purpose does the "adversely affects" eligibility requirement serve if it is unlimited in its scope and breadth? If *any* effect satisfies the requirement, is every student with a disability eligible for special education services under the IDEA? If so, the three-prong eligibility test becomes superfluous.

Although there is limited judicial precedent on this issue, decisions[6] have recognized that allowing any trivial-level of impact to qualify as an "adverse effect" completely eliminates the "adversely affects a child's educational performance" requirement from the IDEA and state eligibility regulations. These cases have held that some qualification on the term "adversely affects" is necessary for the requirement to carry any significance. In *Marshall Joint Sch. Dist. No. 2 v.*

[6] Several decisions from state education agencies and cases from the Ninth Circuit indicate that a significant, rather than trivial, limitation is required to satisfy the term "adverse effect." For example, in *Los Alamitos United School District*, 26 IDELR 1053, 1063 (Cal. SEA 1997), a hearing officer determined a child was ineligible for services under the IDEA because the child's ADD did not limit her educational performance in a "significant way." In *R.B. v. Napa Valley Unified Sch. Dist.*, the Ninth Circuit upheld a hearing officer's determination that the child's inappropriate behavior resulting from her disability was not to such a marked degree over a long period of time that it adversely affected her educational performance, making the child ineligible for IDEA services. 496 F.3d 932, 946 (9th Cir. 2007).

C.D., the Seventh Circuit held that to satisfy the "adversely affects" standard, the question "is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it does." 616 F.3d 632, 637 (7th Cir. 2010). Despite some evidence that a student's Ehlers-Danlos Syndrome caused the student some pain and fatigue at school, the Court held that the student's disability did not adversely impact his educational performance because there was no "substantial" evidence to support this conclusion. *Id.* at 638.

Other circuits have held that to satisfy the "adversely affects" standard, there must be a showing that the student's disability has more than a trivial effect on the student's educational performance. In *Doe ex rel. Doe v. Board of Educ.*, the court held that a student did not qualify for special education services because his emotional problems did not "significantly" impede his educational performance. 753 F. Supp. 65, 70 (D. Conn. 1990). Similarly, in *Ashli C. v. Hawaii*, the district court held that a "slight impact" on educational performance is insufficient to demonstrate that a student's disability adversely affects his or her educational performance. No. 05-00429 HG-KSC, 2007 U.S. Dist. LEXIS 4927, at *27 (D. Haw. Jan. 23, 2007). The court noted that when a student is only experiencing a slight impact on his or her educational performance, it cannot be said that the student is truly "harmed." *Id.* at *26. As the above-referenced case law makes

clear, without any limitation on the term "adversely affects," a student with even a minimally harmful disability would be able to satisfy the requirement. If this is the case, the "adversely affects" requirement is nothing more than a placeholder in the IDEA, and afforded no weight.

B. The "adversely affects a child's educational performance" limitation is necessary to ensure that only those children who truly need special education services receive them.

To ensure that special education is based upon the unique needs of each child and is limited to only those students who need special education to access public education, the "adversely affects a child's educational performance" limitation must be afforded the recognition it deserves as one of the IDEA eligibility requirements. There are many reasons why the IDEA limits access to special education and related services, even for students who have may have been formally diagnosed with a disability.

Children do not receive special education and related services based upon their disability classification. The IDEA was passed "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services *designed to meet their unique needs* and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A) (2014) (emphasis added).

To meet this objective, special education decisions are not made using a "cookie-cutter approach," but rather are made after carefully considering the unique needs and abilities of an individual student. *See* Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 UC DAVIS J. JUV. L. & POL'Y 217, 220 (Summer 2005). In *Marshall Joint Sch. Dist.*, the Seventh Circuit noted that "a physician cannot simply prescribe special education; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local educational agency." 616 F.3d at 640-41.

This individualized determination process is particularly important for children diagnosed with Autism Spectrum Disorder, a disability classification that refers to a wide range of symptoms, skills, and levels of impairment.[7] Although two children may both be diagnosed with Autism Spectrum Disorder, each child may require drastically different services and interventions in order to receive a free appropriate public education. For some high-functioning children like M.A., accommodations under Section 504 may be more appropriate to address the effects of Autism Spectrum Disorder than special education and related services under the

[7] *See* Catherine Lord, Edwin H. Cook, Bennett L. Leventhal, and David G. Amaral, *Autism Spectrum Disorders*, 28 NEURON 355, 355 (November, 2000) ("Autism is a heterogeneous condition; no two children or adults with autism have exactly the same profile…these disorders vary in pervasiveness, severity, and onset.").

IDEA. Concerns that the district's court's decision will result in the exclusion of all high-functioning children with autism are overblown given the IDEA's requirement that eligibility determinations be made on an individualized basis.

Additionally, Congress has expressly indicated its concern that the IDEA be interpreted to prevent the over-identification of students with disabilities. In the legislative history for the IDEA and its precursor, members of Congress expressed their concerns that any federal special education legislation must be structured in a way that minimizes the probability that children will be misclassified as needing special education. *See* S. REP. NO. 94-168, at 26-27 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1450 (stating that Senate Labor and Public Welfare Committee members were "deeply concerned…about the practices and procedures which result in classifying children as having handicapping conditions when, in fact, they do not have such conditions."); H.R. REP. NO. 108-77, at 84 (2003) ("The overidentification of children as disabled and placing them in special education where they do not belong hinders the academic development of these students. Worse, the misidentification takes valuable resources away from students who truly are disabled."). Leading up to the most recent reauthorization of the IDEA in 2004, the House Committee on Education and the Workforce specifically addressed concerns about over-identification under the IDEA. *Overidentification Issues within the Individuals with Disabilities Education Act and the Need for*

Reform: *Hearing before the Comm. on Educ. and the Workforce*, 107th Cong. (2001).

Congress' concern regarding over-identification may be particularly well-founded for children who exhibit behaviors consistent with Autism Spectrum Disorder. Reports have shown that the rate of diagnoses of autism in children has skyrocketed in the last several decades. *See* Seligmann, *supra*,at 249-50 ("Recent reports by the Center for Disease Control of an examination of records from 1996 in Atlanta found a tenfold increase in the prevalence of autism."). One proposed explanation for this increase in identification is the introduction of autism as a qualifying disability under the IDEA in 1991 and the accompanying availability of services. *Id.* at 251. If IDEA services were to become more widely available as the result of the elimination of the "adversely affects" requirement, the number of students identified with disabilities could climb even higher. Such a disfavored result would be possible only by disregarding the IDEA's three-pronged determination of eligibility.

CONCLUSION

Amici respectfully request that this Court find that a student cannot be found eligible for IDEA services unless the student meets all parts of the eligibility test, including a demonstration of a significant educational impact and a need for

special education services. Otherwise many students would be found eligible due to an impermissible expansion of the eligibility definition, which would open the floodgates of the IDEA. *Amici* ask this Court to uphold the determination of the district court that M.A. is ineligible to receive special education and related services under the IDEA because his disability does not adversely impact his educational performance.

Respectfully Submitted,

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Dated: October 14, 2014

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DATED: October 14, 2014

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For Amici Curiae
National School Board Association and Joint Amici

9th Circuit Case Number(s) 14-35081

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