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.

HILLSBOROUGH TOWNSHIP PUBLIC SCHOOL DISTRICT,
Appellee.

On Appeal from the United States District Court
OF New Jersey (Martinotti, J.), Civil Action No. 3:18-cv-2335

BRIEF OF AMICI CURIAE NEW JERSEY SCHOOL BOARDS ASSOCIATION NATIONAL SCHOOL BOARDS ASSOCIATION PENNSYLVANIA SCHOOL BOARDS ASSOCIATION DELAWARE SCHOOL BOARDS ASSOCIATION

IN SUPPORT OF AFFIRMANCE

Cynthia J. Jahn, Esq., General Counsel

NEW JERSEY SCHOOL BOARDS ASSOCIATION
413 West State Street
Trenton, New Jersey 08618
(609) 695-7600

Counsel for Amici Curiae
July 31, 2019

CORPORATE DISCLOSURE STATEMENT

The New Jersey School Boards Association is a legislatively designated body corporate, established pursuant to *N.J.S.A.* 18A:6-45. In addition, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, no *Amici* issues stock or is a subsidiary or affiliate of any publicly owned corporation.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

STATEMENT OF INTEREST 7

STATEMENT OF AUTHORSHIP 10

COMBINED CERTIFICATE OF COMPLIANCE 11

I. Summary of Argument 12

II. Argument 13

A.Under IDEA's Collaborative Framework, Parents Are Not Entitled to an IEE at Public Expense Until the School District has Conducted an Evaluation With Which the Parents Disagree……13

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 ……18

III. CONCLUSION 322

APPENDIX ……VOLUME I

TABLE OF AUTHORITIES

Cases

Albright v. Mt. Home Sch. Dist., No. 3:17-CV-3075, 2018 U.S. Dist. LEXIS 190732 (W.D. Ark. Nov. 5, 2018).....22

Endrew F. v. Douglas County Sch. Dist. RE-1, 137 S.Ct. 988, 999 (2017).....17

G.J. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1263-64 (11th Cir. 2012).....22

N.D.S. v. Acad. for Sci. & Agric. Charter Sch., No. 18-CV-0711 (PJS/HB) (D. Minn. Nov. 28, 2018).....21

R.L. ex rel. Mr. L v. Plainville Bd. of Educ., 363 *F. Supp. 2d* 222, 235 (D. Conn. 2005).....24

S.S. and M.S. o/b/o H.S. v. Hillsborough Twp. Public Sch. Dist. No. 3:18-cv-2335-BRM-DEA, 2019 WL 396956 (DNJ Jan. 31, 2019).....12

Schaffer v. Weast, 546 U.S. 49, 61 (2005).....11

Suffield Bd. of Ed v. L.Y., No. 3:12-CV-1026 (JCH), 2014 U.S. Dist. LEXIS 2294.....20

T.P. ex rel. T.P. v. Bryan Cty. Sch. Dist., 792 F.3d 1284, 1293 (11th Cir. 2015)...30

Statutes

20 U.S.C. §§ 1400 et seq. (2019).....7

Education of All Handicapped Children Act of 1975 11

N.J.S.A. 18A:6-45 5

N.J.S.A. 18A:6-47 5

Other Authorities

Parental Rights in Special Education 26

What Are We Spending on Procedural Safeguards in Special Education 1999-2000 16

Administrative Decisions

Haddonfield Board of Education v. S.R. ex rel. P.R., OAL Dkt. No. EDS 05392, Final Decision (June 24, 2016).....18

Monroe Township Board of Education v. T.L. ex rel. I.L., OAL Dkt. No. EDS 13275-16, Final Decision (November 29, 2016).....28

Northern Highlands Regional Board of Education v. C.E. and A.E. ex rel. C.E., EDS 10891-16, Final Decision (January 19, 2017) 28

State Regulations

N.J.A.C. 6A:14-2.3 ..... 18, 22

N.J.A.C. 6A:14-2.5(c).....14

N.J.A.C. 6A:14-2.6 22

N.J.A.C. 6A:14-2.7(b).....23

N.J.A.C. 6A:14-3.4(f) 18

N.J.A.C. 6A:14-3.8(b)3.....25

N.J.A.C. 6A:3.4(g).....18

N.J.A.C. 6A:32-3 23

Federal Regulations

34 C.F.R. § 300.300(c).....20

34 C.F.R. § 300.502(b)(1)..... 13, 27

34 C.F.R. § 300.502(b)(5).....27

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 has previously appeared as *amici curiae* in matters concerning student conduct and off campus behavior and extracurricular activities.

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 local school districts serving nearly 50 million public school students, including approximately 6.9 million students with disabilities. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress, as well as federal and state courts, and has participated as *amicus curiae*

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-

wide policy on issues related to student extracurricular activities and codes of conduct.

The Hillsborough School District and parents have consented to the filing of this brief. Parents, however, have reserved the right to file an objection pursuant to *Fed. R. App. P.* 29(a)(3) regarding a sufficient showing of interest upon review.

STATEMENT OF AUTHORSHIP

Pursuant to *Fed. R. App. P.* 29(a)(4)(e), *amici* state that no party authored this brief, either in part or in whole. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

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.

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

(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

Court in *Schaffer v. Weast*, 546 U.S. 49, 61 (2005), there must be something for their firepower to equal.

II. Argument

Amici adopt the facts and procedural history as stated by the District Court of New Jersey in the decision below, *S.S. and M.S. o/b/o H.S. v. Hillsborough Twp. Public Sch. Dist.* No. 3:18-cv-2335-BRM-DEA, 2019 U.S. Dist. LEXIS 15136 *; 2019 WL 396956 (DNJ Jan. 31, 2019) (Slip op.).

A. Under IDEA's Collaborative Framework, Parents Are Not Entitled to an IEE at Public Expense Until the School District has Conducted an Evaluation With Which the Parents Disagree.

Through the IDEA, first passed in 1975 as the Education of All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, 89 Stat. 773, Congress established a framework in which families and public schools work together to identify, evaluate, and provide services for eligible students with disabilities.

In *Schaffer v. Weast*, 56 U.S. 49 (2005), the Supreme Court clearly recognized that Congress envisioned a collaborative process in the development and implementation of an eligible child's IEP. While acknowledging that IDEA has been referred to as the "model of cooperative federalism," *Id.* at 51, the Court also noted, "The core of the statute, however, is the cooperative process that it

establishes between parents and schools." *Id.* at 53. The central vehicle for that collaboration is the IEP. *Id.* at 52.

The Court then summarized the duties of both school districts and parents to illustrate Congress's intent to allocate specific duties to each party. The intent was to reasonably distribute such duties, to balance them and to ensure parent involvement in the process.

The *Schaffer* Court found no congressional intent in the IDEA to alter the default rule that the party seeking to change the status quo bears the burden of proof. *Id.* at 56. The Court also considered and rejected the parents' assertion that the burden should be placed on the party with better access to the facts, as IDEA's procedural protections ensured that the schools had no unique informational advantage. *Id.*at 61. *Amici* assert that such a principle should be applied to the present matter to ensure that a backup safeguard such as the IEE cannot be used to preempt and displace the efficient and orderly process that is intended to be the default.

In the present matter, the parents ask the court to disregard the collaborative framework established by the IDEA to enable them to deny consent for the school district's evaluation, then to obtain an independent educational evaluation (IEE) at public expense. A ruling to this effect would turn the IDEA's carefully structured process on its head and allow IEP development and planning using only

assessment data provided by the parents, and without the evaluation that the IDEA presumes the school district is normally in the best position to conduct quickly and without unnecessary diversion of critical resources.

In the present matter, the basis for the parental request for an IEE at public expense was not a disagreement with an evaluation conducted by the district, as is required by the IDEA regulation, 34 C.F.R. § 300.502(b)(1) ("A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.") as well as its New Jersey counterpart, *N.J.A.C.* 6A:14-2.5(c)("Upon completion of an initial evaluation or reevaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a reevaluation provided by a district board of education."). The basis of the parents' request for an IEE, as indicated in an email from the parents making the request, was a concern about their son's academic performance, and a recent diagnosis of panic attacks and anxiety. After the parents notified the Hillsborough Board of Education of the student's condition, a meeting was convened to plan the student's reevaluation in light of the change in circumstances. During the meeting, the parents raised the issue of a neuropsychological assessment, but the team ultimately decided that the district's reevaluation would include psychological and other assessments that would be

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.

In *Schaffer*, where the Court was asked to determine whether school districts should always bear the burden of proof in a due process hearing, the Court took pains to note that Congress balanced the parties' various burdens when it revised the IDEA. The general rule, the Court noted, is that the party seeking to change the status quo would typically bear the burden of proof. In response to Schaffer's argument that the burden of proof should lie with the party with better access to information, the Court recited a number of procedural protections, including a parent's access to an IEE, to ensure that the school district had no "unique informational advantage." *Ibid* at 61. Ultimately, the court concluded that the general rule pertaining to burdens of proof should apply, and that the party bringing the petition should carry that burden. Parents now seek to cherry pick the Court's critically reasoned review of a legislative balancing of the burdens of proof to impose a duty on school district that does not exist.

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 any reevaluation, the IEP team shall determine the nature and scope of the reevaluation according to the following:

1. The IEP team shall review *existing evaluation data* on the student, including:

i. Evaluations and information provided by the parents;

ii. Current classroom based assessments and observations; and

iii. Observations by teachers and related services providers….

(c) Prior to conducting any assessment as part of a reevaluation of a student with a disability, the district board of education shall obtain consent from the parent according to *N.J.A.C.* 6A:14-2.3.

1. Individual assessments shall be conducted according to *N.J.A.C.* 6A:14-3.4(f)1 through 5 or 3.4(g), as appropriate (emphasis added).

In the present matter, the school district has not preemptively foreclosed the parents' access to an IEE at public expense. The school district was seeking to

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 to collaboratively work with school districts in developing IEPs for their children, in contravention of what Congress intended the IDEA to accomplish. Allowing the parents to demand an IEE at public expense while withholding consent to reevaluation bypasses the school district's intended primary role in evaluations and deprives the entire process of information the district's evaluation is supposed to contribute. That scheme does not comport with the balanced burdens envisioned by *Schaffer*.

In the initial decision in the present matter, the ALJ relied on the Appellate Division decision in *Haddonfield Board of Education v. S.R. ex rel. P.R.*, OAL Dkt. No. EDS 05392, Final Decision (June 24, 2016), holding that the school district's determination, pursuant to a triennial revaluation, that additional assessments were unnecessary did not deprive the parents of the right to demand an IEE. *Haddonfield* is distinguishable in that the school district in that decision asserted that because the student's triennial evaluation required no additional assessments to determine continued eligibility or special education services, an evaluation had not been conducted. Therefore, according to the district, because no evaluation had been conducted, the parents were not entitled to an IEE. The

Appellate Division however, correctly determined that the district's reevaluation *had been conducted* -- it consisted of the district's review of current information and was not dependent on the conduct of additional assessments. Consequently, the Appellate Division concluded that the district improperly denied the parent's request for an IEE.

On this point, *amici* offer additional persuasive authority from the District of Connecticut in a matter in which a parental demand for an IEE was at issue.

> Under IDEA regulations, a district requesting a reevaluation may override the parent's refusal of consent by filing for a due process hearing. *See* 34 C.F.R. § 300.300(c). *However, the district has no duty to do so*. Outside the statutory triennial evaluation requirement, declining to pursue a reevaluation does not violate IDEA procedure. At the June 2011 meeting, the PPT relied on data from 2009. *See* B-89 at 1. Hence, from a purely procedural standpoint, neither Suffield's failure to perform a reevaluation, nor its decision not to file for a due process hearing to override the parents' refusal of consent to the requested testing, violates the IDEA. *Suffield Bd. of Ed v. L.Y.*, No. 3:12-CV-1026 (JCH), 2014 WL 104967, at *8 n.2 (D. Conn. Jan. 7, 2014) (slip op. at 8-9). (*Emphasis added*.)

The IDEA and its implementing regulations establish procedures designed to produce an informed, appropriate program for a student eligible for services. Those procedures place obligations on each party, with the law and attendant regulations, both state and federal, working cohesively to provide a process that will result in an educational program appropriate for the individual student.

The federal regulation establishing the roles and duties of both the parents and the school district regarding reevaluations, 34 *C.F.R.* 300.300(c), sets forth the obligations of each party, in pertinent part, as follows:

(c) Parental consent for reevaluations.

(1) Subject to paragraph (c)(2) of this section, each public agency –

(i) Must obtain informed parental consent, in accordance with § 300.300(a)(1), prior to conducting any reevaluation of a child with a disability.

(ii) If the parent refuses to consent to the reevaluation, the public agency *may, but is not required* to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section (emphasis added).

By allowing the district to pursue due process to obtain parental consent instead of requiring such action, this federal regulation provides that a school district's decision to initiate procedures to override parental denial during the reevaluation process is discretionary.

The purpose of an IEE, according to *N.D.S. v. Acad. for Sci. & Agric. Charter Sch.*, No. 18-CV-0711 (PJS/HB), 2018 U.S. Dist. LEXIS 200987 (D. Minn. Nov. 28, 2018), is to allow the parent to counter the "'natural advantage' in information and expertise" possessed by the school district. *Schaffer* at 60. Accordingly, in *N.D.S.*, the court determined that the parents were not entitled to an IEE at public expense after having refused to consent to a reevaluation because

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 team from considering new information at this stage of the process. This limitation is evidence of New Jersey's carefully considered balancing of the equities inherent in the collaborative nature of the IEP development process.

The parents' inability to request an IEE at this juncture does not leave them without recourse. According to 14-3.8(c), "[p]rior to conducting any assessment as part of a reevaluation of a student with a disability, the district board of education shall obtain consent from the parent according to *N.J.A.C.* 6A:14-2.3." However, if the parent is dissatisfied with the reevaluation plan, the parent can withhold consent, seek mediation pursuant to *N.J.A.C.* 6A:14-2.6, seek a resolution meeting, or file a due process petition pursuant to 14-2.7.

In turn, 14-2.3 provides, in pertinent part, as follows:

> (a) Consent shall be obtained:
> 1. Prior to conducting any assessment as part of an initial evaluation;
> 2. Prior to implementation of the initial IEP resulting from (a)1 above;
> 3. Prior to conducting any assessment as part of a reevaluation, except that such consent is not required if the district board of education can demonstrate that it had taken reasonable measures, consistent with (k)7 below, to obtain such consent and the parent failed to respond;
> 4. Prior to the release of student records according to *N.J.A.C.* 6A:32-3….
>
> (c) When a parent refuses to provide consent for implementation of the initial IEP, no IEP shall be finalized and the district board of education may not seek to compel consent through a due process hearing….*For those areas set forth in (a)1, 3 and 4 above, if a parent refuses to provide consent and the district and the parent have not agreed to other*

> *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-day limitation period as in New Jersey. However, parents' argument misconstrues the point.

The terms of *N.J.A.C.* 6A:14-2.5(c), consistent with the IDEA regulation, expressly authorize the parent to request an IEE "upon completion of an initial evaluation or reevaluation…." Here it is important to note that New Jersey revised this regulation in 2015 to add the language clarifying the process. In 2014, the provision read: "(c) A parent may request an independent evaluation if there is disagreement with any assessment conducted as part of an initial evaluation or a reevaluation provided by a district board of education." 002a[1] However, this code provision was revised in January 2015 as follows: "(c) Upon *completion of an initial evaluation or reevaluation*, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a reevaluation provided by a district board of education." (Emphasis added.) 006a This revision illustrates the New Jersey's intent to clarify that a parent's right to request an IEE is predicated on the district's completion of an evaluation or reevaluation.

Further support for this position can be found in the public comments and the state department of education's responses thereto. 010a There, in response to

[1] References to pages designated by an "a" refer to documents contained in the Appendix

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, 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). 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, 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 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 that the student's parents. Moreover, according to the court, parents in that situation would not need an expert to match the expertise of the opposition because there was no opposition to match.

Similarly, in this matter, the parents are requesting an IEE in an area in which the school district has not expressed an opinion. The district has no superior knowledge because it has not assessed H.S. in the area of concern expressed by the parents. Once the district conducts the assessment, it is possible that the district and parents could agree that the district's assessments were sufficient. Moreover, both could agree that the assessments were insufficient and that additional information would be necessary. The parents short-circuited that possibility by withdrawing consent to assess H.S. and then demanding an IEE at public expense. Awarding parents the right to an IEE at public expense under these facts would place the district at an informational disadvantage or require additional litigation to obtain a court ordered consent and would therefore upset the carefully balanced collaboration required by the IDEA.

With regard to the firmness of the twenty-day deadline for the District to file a due-process petition, the first case cited by petitioner, *Haddonfield Board of Education v. S.R. ex rel. P.R.*, OAL Dkt. No. EDS 05392, Final Decision (June 24, 2016), concerned a school district's due process filing that was late by seven days because the school was closed for spring break. The ALJ determined that the IDEA provided no additional time for extenuating circumstances. In that instance, the parents were unhappy with the district's assessments. 071a

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 decisions 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, a*mici* respectfully request that this Court affirm the decision below.

Respectfully submitted,

/s/ Cynthia J. Jahn, Esq.
General Counsel
New Jersey School Boards Association
413 West State Street
Trenton, N.J. 08618
(609) 278-5254

Carl Tanksley, Jr., Esq.

On the Brief

July 31, 2019