No. 18-815

In The
Supreme Court of the United States

T.B., JR., by and through his Parents, T.B., SR. AND F.B.,
Petitioner,

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION; PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS; DR. KEVIN M. MAXWELL, in his official capacity as Chief Executive Officer of Prince George's County Public Schools,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Andrew W. Nussbaum
Counsel of Record
NUSSBAUM LAW, LLC
Post Office Box 132
Clarksville, Maryland 21029
(410) 740-6666
Andy@NussbaumLawLLC.com

Counsel for Respondents *Dated: January 25, 2019*

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED BY PETITIONER FOR REVIEW

1. Under this Court's decision in *Forest Grove School Dist. v. T.A.,* 557 U.S. 230 (2009), may a disabled student who was, for a period of years, deprived entirely of an appropriate education as guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. §1400, *et seq.* ("IDEA"), be left entirely without any remedy?

2. May an undisputed and "inexcusable" violation of IDEA's Child Find requirement be entirely without remedy based on the lower court's finding that the student's precipitous educational decline and failure was solely attributable to the student himself, where the student was, for years, and despite 16 parental requests for an evaluation and special education, not evaluated and not identified as an eligible disabled student under IDEA, and not provided any appropriate special education supports to address his disabilities?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

RULE

STATEMENT OF THE CASE

A. INTRODUCTION

The Petitioner, T.B., Jr., by and through his parents ("Petitioner," "Student," or "T.B." hereinafter), repeatedly mischaracterizes the nature of this case by using hyperbolic, exaggerated, and tabloid-style rhetoric, and emotionally charged themes, such as alleging that the Court of Appeals found, in essence, that the Petitioner was "a hopeless case who, due to his perceived personal faults, never could have made educational progress… " (Petition for a Writ of Certiorari ("Pet.") 1); that the Petitioner was "written off" by concluding that he would "inevitably fail" (Pet. 6); that the Respondent School System was allowed to "escape all liability" (Pet. 24); and that the Petitioner was deprived of a legal remedy. Pet. i and 30. Rather, the outcome of this case is the result of the *evidence* that was presented at the hearing before the Administrative Law Judge ("ALJ") and the *record* developed at that fact-finding proceeding.

In a due process hearing arising under the Individuals with Disabilities Act ("IDEA"), the parents clearly have the burden of proof[1] and pursuant to the IDEA, the parents here had to show that an IDEA violation "impeded the child's right to a free appropriate public education;" significantly impeded the parents' opportunity to participate in the decisionmaking process; or "caused a deprivation of educational benefits." 20 U.S.C. §1415(f)(3)(E)(ii). As noted by the Court of Appeals, in IDEA due

[1] *Schaffer v. Weast*, 546 U.S. 49 (2005).

process hearings, as throughout the federal system, "deference to the original finder of fact" is the "rule, not the exception." Pet. App. 16a, quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985). In *Anderson*, this Court noted that the "rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.* at 574. Simply stated, the ALJ in this case, who was in the position to make determinations of credibility and had the experience and expertise of hearing these matters, clearly found and determined that the Petitioner did not "establish by a preponderance of the evidence that the Student was denied a free appropriate public education" under the IDEA. Pet. App. 133a. That finding and determination was affirmed by the District Court and the Court of Appeals.

As noted in the opinion of the Court of Appeals, the record before the ALJ in this matter "is devoid of any credible evidence that an unaddressed disability caused T.B.'s educational difficulties and [is] replete with credible evidence that T.B. himself was the cause. … Poor motivation and poor performance do not always and invariably lie at the feet of teachers and schools. Students themselves also have to try." Pet. App. 23a. Perhaps even more significantly, the concurring opinion, by Chief Judge Gregory, while rejecting any notion that the Student or his parents bear any responsibility, nevertheless also concluded that the "[Petitioner] failed to present sufficient evidence at the due process hearing to

establish that T.B. was denied" a free, appropriate, public education ("FAPE") under the IDEA. Pet App. 24a. In reviewing the record before the ALJ, the concurring opinion further found:

> Educational experts who *could have supported* the [independent educational evaluation's] finding that T.B. had a previously undiagnosed learning disability, and established a link between the long-term denial of special education services and T.B.'s failure to attend school due to frustration and anxiety, *either failed to provide helpful testimony or did not testify at all*. No witness challenged in any meaningful way [the School System's] self-serving conclusion that its failures had no impact on T.B.'s lack of academic progress. No evidence effectively refuted the conclusion that T.B. did not have a learning disability, or demonstrated that T.B.'s frustration at school led to his emotional problems and school avoidance. No one testified as to why T.B. did not attend the self-contained program or otherwise accept the much delayed compensatory services offered to him.

Pet. App. 31a. (Emphasis added).

Thus, the Panel unanimously agreed that the evidence before the ALJ below was insufficient to support the Petitioner's claims that the School

System violated the IDEA and that the Petitioner was entitled to a remedy.

B. PROCEDURAL POSTURE AND PROCEEDINGS BELOW

The Petitioner's parents initiated an administrative due process hearing request under the IDEA, on several issues, one of which was whether the Petitioner was denied a FAPE under the IDEA, and if so, whether he was entitled to compensatory education as a remedy. Pet. App. C. (67a, *et seq*.). The ALJ conducted a six day hearing, where he heard testimony from 21 witnesses, including 12 of the Petitioner's teachers, and received 103 exhibits from both parties. The ALJ issued a lengthy decision wherein he reviewed the record, made 67 findings of fact, and concluded that the Petitioner did not "establish by a preponderance of the evidence that the Student was denied" a FAPE. Pet. App. 133a. He further concluded that the Petitioner was not entitled to compensatory education[2]. *Id.*

The Petitioner filed an appeal to the United States District Court for the District of Maryland, which affirmed the ALJ on the issue of the alleged denial of FAPE. Pet. App. B (33a, *et seq*.) The Petitioner then appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court. Pet. App. A. (1a, *et seq*.). Chief

[2] Another issue before the ALJ was a request for reimbursement for an independent educational evaluation, which was not before the Court of Appeals.

Judge Gregory wrote a concurring opinion. Pet. Ann. 24a.

The Petitioner then filed a Petition for Rehearing or Rehearing *En Banc*, which was denied, with no Judge requesting a poll on the Petition for Rehearing *En Banc*. Pet. App. D (135a – 136a).

C. STATEMENT OF FACTS

The Petitioner's Factual Background, Pet. 13, ignores numerous relevant factual findings made by the ALJ below and, instead, is set forth as it might have been presented in closing argument before the ALJ. The ALJ below made 67 well-reasoned, detailed and specific findings of fact, amply supported by the record. Of particular relevance and importance are the following.

At a meeting held on November 7, 2012, the School's IEP team reviewed all available information and discussed whether certain specific testing was appropriate for the Petitioner. After reviewing the Student's academic history and receiving information from the Student's mother and school staff members, the team concluded that his difficulties were not the result of a learning disability or any condition requiring special education services; and therefore, further assessments were not warranted at that time. Pet. App. 83a (Finding 13). A parent-teacher conference was held on January 16, 2013, where the topics included the Student's apparent lack of motivation and his failure to come to class and to do work. *The*

Petitioner acknowledged that he simply was not trying. Pet. App. 83a, 84a (Findings 15 and 16).

During 9th grade, the Student was repeatedly absent from school and when he was in school, he skipped certain classes. Pet. App. 84a (Finding 18). Significantly, Petitioner's father attributed his very frequent absences to illness, family illness, or funerals, but never to anxiety or any other emotional condition. Pet. App. 84a (Finding 19). During 9th and 10th grades, Petitioner was frequently absent, did not consistently attend class, or do assigned work, and his poor grades resulted from those problems. Pet. App. 84a through 87a. (Findings 20 through 40). More than 90% of the Student's absences in 9th and 10th grades were unexcused. Pet. App. 87a (Finding 41).

Sometime in the beginning of April, 2014, while in 10th grade, T.B. stopped going to school at all. Although the Petitioner states that he was "unable to attend school due to his emerging emotional disability" (Pet. 16), the ALJ found that the Parents did not inform the School System of any reason for the Student's absences and certainly did not suggest that they were due to anxiety, depression, or any other reason. Pet. App. 87a (Findings 42 and 43). In September and October, 2014, the father sent emails to the School System making conflicting claims as to why the Petitioner was not attending school, such as noise in the school, asthma, or panic attacks. Pet. App. 88a (Finding 50).

In January, 2015, after the filing of the due process complaint, the School System determined that additional testing was warranted, and on March 12, 2015, an IEP team found that the Student was eligible for special education services under the category of Emotional Disability due to anxiety which prevented him from regularly attending school. Pet. App. 89a through 90a (Findings 52-58). The team also agreed that compensatory services for one calendar year should be provided to permit the Petitioner to recover any lost instructional opportunity. The services would consist of five fee-waived credit recovery courses and a one-on-one tutor at School System expense. At the IEP meeting, the Parents stated that they were pleased with the offer and believed it would motivate the Student to obtain his high school diploma. Pet. App. 90a (Finding 59).

On April 4, 2015, a central IEP meeting was convened and the Transition Program, housed at Dr. Henry A. Wise, Jr. High School,[3] was recommended as a placement for the Student. Pet. App. 91a (Finding 63). The Student never attended the Transition Program, and the Parents never told the School System why he did not attend. Pet. App. 91a (Finding 65). The ALJ specifically found that the Transition Program at Wise would have provided T.B. with a FAPE. Pet. App. 91a (Finding 67). The ALJ commented that:

> … it is notable that the Student has not attended the proposed placement at Wise. Although occurring after the due

[3] The "Jr." refers to Dr. Wise; the school is a high school.

> process request, the failure to attend the Transitions Program at Wise is nonetheless analytically significant. It tends to corroborate the view the either the Student, or his Parents, or both, are not interested in the Student receiving academic services from [the School System], whether in a general education or a special education setting.

Pet. App. 130a.

Moreover, the Parents:

> have not shown or even intimated that the recommended placement is not appropriate or calculated to give a FAPE. In addition, the only expert evidence on the issue came from Mr. Tepe [a school psychologist] who testified that the placement at Wise was indeed appropriate and would provide FAPE. *The Parents provided no testimony or other evidence as to why the Student is not attending the Transition Program at Wise and accepting the compensatory services provided in the current IEP.*

Id. (Emphasis added).

The Court of Appeals found relevant and significant other facts from the record before the ALJ. The Court noted that it was "apparent that the Student had in the past gotten – and was capable of

again earning decent grades if he applied himself." Pet. App. 18a. The Court also cited evidence from the record that virtually "every teacher … testified that the Student was capable of performing satisfactory work but that his frequent absences and failure to do assignments necessarily led to poor or failing grades." *Id.* The Court then quoted from the testimony provided by a number of his teachers, at Pet. App. 18a – 19a.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION IS NOT CONTRARY TO *FOREST GROVE* OR DECISIONS IN OTHER CIRCUITS AND IT DOES NOT ALLOW SCHOOL DISTRICTS TO "ESCAPE ALL LIABILITY."

The Petitioner argues that the Court of Appeals' opinion below is "directly contrary" to this Court's decision in *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009), because this Court held that families of students "who are deprived of the appropriate education guaranteed by IDEA are entitled to 'an adequate remedy' for the violation." Pet. 24 (emphasis added). First, the issue raised by the Petitioner here was not properly raised below and was not considered or decided by the Court of Appeals. Second, the Petitioner is simply incorrect in arguing that *Forest Grove* requires a different result here.

A. THE PETITIONER DID NOT PROPERLY RAISE THIS ISSUE BELOW.

This Honorable Court has frequently held that this Court is a "court of review, not of first view." *E.g., Byrd v. U.S.*, 584 U.S. ___, 138 S.Ct. 1518, 1527 (2018); *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005). The Court of Appeals below did not even cite *Forest Grove,* let alone consider and decide the issue now raised by the Petitioner. In fact, the case was not cited in the Petitioner's opening brief in the Fourth Circuit and was only referenced once in the reply brief. Clearly, a party waives an issue by failing to present it in its opening brief. Fed.R.App.P. 28(a)(8)(A). *See, e.g., Brown v. Nucor Corp.*, 785 F.3d 895, 918 (4th Cir. 2015); *Grayson O Co. v. Agadir International LLC*, 856 F.3d 307, 316 (4th Cir. 2017), and cases cited by both opinions. Therefore, since the issue was not properly raised below and not considered by the Court of Appeals, it is not properly before this Court.

B. THE DECISION BY THE COURT OF APPEALS IS NOT INCONSISTENT WITH *FOREST GROVE.*

As a substantive matter, the Petitioner erroneously asserts that *Forest Grove* requires a different outcome than the result reached by the Court of Appeals. The issue in *Forest Grove* was whether the IDEA Amendments of 1997 "categorically prohibit reimbursement for private-education costs if a child has not 'previously received

special education and related services under the authority of a public agency.'" 557 U.S. 230, 232. The Court held that the amendments "impose no such categorical bar." *Id.* Significantly, in that case, this Court noted that after considering "the parties' evidence, including the testimony of numerous experts," the hearing officer who decided the administrative due process hearing found that the student's disability "adversely affected his educational performance and that the School District failed to meet its obligations under IDEA… ." *Id.* at 235. As a result of that finding, the hearing officer ordered the school district to reimburse the parents for the cost of private school tuition. The District Court, on appeal, set aside the reimbursement award, based on the 1997 Amendments to the IDEA. The Ninth Circuit reversed. Because the "Courts of Appeals that have considered this question have reached inconsistent results," this Court granted *certiorari* to determine whether the amendments to the IDEA established a "categorical bar" to tuition reimbursement under those circumstances. *Id.* at 236-237.

Here, contrary to the situation in *Forest Grove*, the ALJ found that there was *no evidence* that the School System's actions adversely affected the Petitioner's educational performance. To the contrary, the ALJ expressly determined that the School System's "failure to promptly schedule testing in this case did not establish a failure to provide FAPE," because "the entirety of the record before me establishes that the Student simply does not want to go to school." Pet. App. 104a-105a. Furthermore, "no evidence supports the view that, had testing

been promptly provided, the Student would have regularly attended school." Pet. App. 105a.

The Petitioner argues that lower federal courts have "routinely held" that the "denial of a free appropriate public education to a child eligible for services under the IDEA constitutes irreparable harm." Pet. 26. Although the cases cited in the Petition at 26 and 27 may have used the term "irreparable harm," *none* of those cases involved a due process hearing where the fact-finding hearing officer found that the parents had failed to meet their burden of proof in demonstrating that the school system denied the student a FAPE, as was the outcome here.

Although the Petitioner argues that the School System was allowed to "escape all liability" and that he was "left without an adequate remedy," Pet. 24, it is clear that such is not the case. As noted in the concurring opinion below, there was no expert witness testimony supporting the Petitioner's contentions that the Student had a previously undiagnosed learning disability or that there was a link between the denial of special education services and his failure to attend school due to alleged frustration and anxiety. Instead, the Petitioner's expert witnesses either "failed to provide helpful testimony or did not testify at all." Pet. App. 31a. The Petitioner presented no witness to challenge the School System's evidence that its actions had no impact on the Student's lack of academic progress, that the Student did not have a learning disability, or that his frustration at school led to his emotional problems and school avoidance. *Id.* Moreover, there

was no testimony as to why the Student did not attend the recommended Wise Transition Program that would have met his needs or accept the compensatory services, both of which were offered by the School System. *Id.* The time for presenting such supporting evidence and testimony was at the hearing before the ALJ. However, the Petitioner failed to present that evidence, which is the reason that no "adequate remedy" was ordered here. No relief was ordered, because no entitlement to relief was established.

II. THIS CASE DOES NOT INVOLVE THE QUESTION OF WHETHER A SCHOOL SYSTEM CAN "ESCAPE LIABILITY BY BLAMING A DISABLED STUDENT."

At every stage of the appeal in this case, the Petitioner has attempted to attribute the outcome to something other than the lack of evidentiary support for his position before the ALJ. In the District Court, the Petitioner argued that the ALJ "grievously erred" by concluding "that [the Student] was essentially, beyond help – that, even if [the Student] had been promptly evaluated and had been given the proper supports, [the Student] would not 'have regularly attended school.'" Pet. App. 57a. The District Court rejected that allegation by noting:

> Certainly, the Court is concerned about the notion that any child could be considered "beyond help" and, *without context*, would be troubled by the ALJ's conclusion that the "Student simply does not want to go to school," and that

> "whether with or without an IEP, and even with an IEP providing a small, self-contained special education classroom setting with only 8-12 students in the class, the Student will not go to school." [JA 31]. *In a vacuum,* it is not difficult to imagine that if a child receives help in middle school, such help could lessen discouragement and the child's later reluctance to go to school. *But this Court is not reviewing this matter in a vacuum and cannot discard the informed opinions of T.B.'s educators and the credibility findings of the ALJ*, who had the advantage of hearing the testimony.

Pet. App. 57a-58a. (Emphasis added).

In the Court of Appeals, as in his Petition filed in this Court, the Student argued that the School System and the Court wrongly used a "blame the student" approach, Pet. 34, thus absolving the School System of all liability. As noted in the Court's majority opinion, responding to the concurring opinion: "While our concurring friend suggests that the ALJ and the majority place all the blame in this case on T.B. and his parents and absolve [the School System] of all responsibility, … that is simply incorrect." Pet. App. 10a.

The Petitioner quotes the ALJ's use of the word "inexcusable" to suggest that there was evidence of a violation of the IDEA by the School System, but read in context, it is clear such is not the

case. First, although the ALJ found that the School System's failure to timely respond to requests for evaluation was "inexcusable," he noted, in the same sentence, that "no evidence supports the view that, had testing been promptly provided, the Student would have regularly attended school." Pet. App. 105a. Furthermore, the ALJ found that "the evidence is overwhelming that … the Student's difficulties were indeed due to his utter lack of motivation and his repeated truancy," and not to an unaddressed disability. Pet. App. 133a. The ALJ expressly concluded that "the Parents have not met their burden to establish a violation of any Child Find requirement" under the IDEA. Pet. App. 133a.

The ALJ extensively reviewed the testimony of all of the witnesses and concluded that the testimony of the Petitioner's father did not "support the … claim of a denial of FAPE, because it was "frequently shifting or contradicted by other testimony and documentary evidence" and that his "testimony on almost every factual matter was unreliable and subject to frequent revision." Pet. App. 119a – 120a. With regard to the Petitioner's experts, the ALJ found a "situation where the opinions of the Parents' experts are in a jumble." Pet. App. 127a. He placed little weight on their testimony and concluded that they did not "establish that the Student was entitled to special education services during the time period at issue or that he did not receive a FAPE." Pet. App. 128a.

The Court of Appeals also noted that the Petitioner was not "neglected throughout his time" in the School System. His "teachers had been in

touch with his parents regarding his academic shortcomings, but … such attempts at a dialogue were often rebuffed." Pet. App. 12a.

It is abundantly clear that the decisions of the ALJ, the District Court, and the Court of Appeals[4] were all based on the *evidence* submitted to the ALJ, as fact-finder, and not on notions of "blame" or "fault." The Court of Appeals, after noting that "deference to the original finder of fact" is "the rule, not the exception," Pet. App. 16a, quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-76 (1985), concluded that the ALJ's review in this case was "anything but cursory" and that he went "out of his way to exhaustively determine whether there was any scenario in which special education would have been of any assistance to T.B. within the ambit of the IDEA." Pet. App. 16a.

In the Petition filed with this Court, the Student suggests that he is:

> but one example of the great many students who, if their increasing academic and emotional struggles are not timely and appropriately addressed, will gradually, but inexorably, disengage from the learning process through decreasing work completion, increasing absenteeism, school anxiety, and even behavioral problems …

Pet. 29.

---

[4] Both the majority and concurring opinions agree on this point.

However, the record before the ALJ simply does not provide any support for the suggestion that the Petitioner is such a student and the place for presenting such evidence was before the ALJ, not this Court.

The Petitioner suggests that the IDEA does not "permit a court to deprive a student of a legal remedy" (Pet. 30), but the Student suffered no such deprivation in the exhaustive reviews before the ALJ, District Court or Court of Appeals that preceded the Petition currently before this Court. As has been found consistently, no "remedy" was provided because the Petitioner failed to present evidence supporting his entitlement to a remedy.

The Petitioner criticizes the Court of Appeals' analysis that a procedural violation of the IDEA may not entitle a student to relief where the violation did not result in educational harm to the student (Pet. 32), arguing that "*all* such cases found that a school district's statutory violation may be excused only where the student was provided an *appropriate, effective IEP* despite the procedural violation." Pet. 32 (emphasis in original). However, that statement is incorrect. In *Alvin Independent School District v. A.D.*, 503 F.3d 378 (5th Cir. 2007), for example, the student was found to be ineligible under the IDEA and thus, had no "appropriate, effective IEP." The issue in all cases cited by the Petitioner was not whether there was in place an "appropriate, effective" IEP, but rather, was there evidence that the alleged violation resulted in educational harm to the student. In the instant matter, the ALJ found that the evidence did not support such a finding.

The analysis by the Court of Appeals, as well as by the District Court and the ALJ, focused on the *evidence*, not on blame or fault. It is not the province of a reviewing Court to substitute its interpretation of the evidence for that of the fact-finder. *See, e.g., Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206 (1982). This case does not merit or require review by this Honorable Court.

CONCLUSION

For the aforegoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Andrew W. Nussbaum
NUSSBAUM LAW, LLC
P.O. Box 132
Clarksville, Maryland 21029
410-740-6666
FAX – 301-621-5273
Andy@NussbaumLawLLC.com

Counsel for the Respondents

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

20 U.S.C. §1415(f)(3):

(E)Decision of hearing officer

(i)In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii)Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I)

impeded the child's right to a free appropriate public education;

(II)

significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III)

caused a deprivation of educational benefits.

(iii)Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F)Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

Federal Rules of Appellate Procedure:

Rule 28 (a)(8):

(a) APPELLANT'S BRIEF. The appellant's brief must contain, under appropriate headings and in the order indicated:

***

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);