No. 20-1377

IN THE
Supreme Court of the United States

WILLIAM V. AND JENNY V.,

Petitioners,

v.

COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIDGET ROBINSON
Counsel of Record

WALSH GALLEGOS TREVINO
KYLE & ROBINSON P.C.
P. O. Box 2156
Austin, Texas 78768
Telephone: (512) 454-6864
Facsimile: (512) 467-9318
brobinson@wabsa.com

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether Petitioners waived arguments on appeal by failing to properly brief them before the District Court.

II. Whether certiorari should be granted to review the Fifth Circuit's order affirming judgment of the United States District Court in favor of the School District.

LIST OF PARTIES

Petitioners are:

(1) William V.

(2) Jenny V.

Respondent is:

(1) Copperas Cove Independent School District

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions and Statutes

Rules

Other Authorities

STATUTORY AND REGULATORY PROVISIONS INVOLVED

34 C.F.R. § 300.8(a)(1):

Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

20 U.S.C. § 1412(a)(3)(A) & (B):

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

§ 1415(f)(3)(E)(ii):

(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.

TEX. EDUC. CODE § 38.003(b):

(b) In accordance with the program approved by the State Board of Education, the board of trustees of each school district shall provide for the treatment of any student determined to have dyslexia or a related disorder.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The case was brought under the Individuals with Disabilities Education Act ("IDEA"). Petitioners' Statement of the Case is misleading and self-serving and omits substantial portions of record evidence. Respondent offers the following complete and undisputed Statement of Facts:

1. 2015-2016 School Year

During the 2015-2016 school year, W.V. was a seven-year-old first grader. ROA.2358. W.V. transferred into CCISD from the Cleveland County Schools in North Carolina, which had provided him with a Full and Individual Evaluation ("FIE") and found him eligible for special education due to a speech impairment. ROA.2337.

On October 26, 2015, CCISD held an Admission Review and Dismissal ("ARD") Committee meeting and continued W.V.'s speech impairment eligibility, consistent with the North Carolina FIE. ROA.2326-2341; ROA.1910; ROA.1938; ROA.3079:4-17.

On April 14, 2016, W.V.'s ARD Committee met for an Annual Review of W.V.'s Individualized Education Program ("IEP") at the parent's request to review W.V.'s present levels of performance. ROA.2358-2379.[1] Although W.V. came in at a kindergarten level, by this ARD, he had improved to the beginning of first grade level in reading as evidence of progress, and was soon to be at grade level for the following

[1] Petitioners did not challenge the Special Education Hearing Officer's determination that W.V.'s present levels of performance contained enough detail for CCISD to develop an appropriate IEP for W.V. ROA.135-136; ROA.186-187; ROA.2359-2360, ROA.2371.

school year. ROA.2359-2360; ROA.2371; ROA.2277. The ARD Committee also reviewed W.V.'s progress in speech and he was able to articulate his sounds in conversational speech with 85% accuracy. ROA.2359. The ARD committee narrowed W.V.'s IEP goals and objectives to target the "ch," "th," and "sh" sounds. ROA.2362.

On April 18, 2016, Mrs. V. requested special education testing for a Specific Learning Disability ("SLD"). ROA.2775:3-22; ROA.2415. On April 28, 2016, the District issued a "Notice of Action," declined Mrs. V.'s request for the testing and confirmed that W.V. (1) was successful in existing interventions; and (2) had made a whole year's growth already, improving from the beginning of kindergarten level to the beginning of first grade level. ROA.2277-2278; ROA.2809:10-2811:22.

In a letter dated May 10, 2016, provider Jenna L. Silakoski at the Department of the Army recommended W.V. be evaluated for dyslexia. ROA.1385. Within a week, on May 16, 2016, CCISD agreed to evaluate W.V. for dyslexia while noting that W.V. had "made a year of growth in less than a year of instruction." ROA.2279-2280; ROA.2811:16-2813:22. Mrs. V. consented to allow CCISD to collaborate with Sylvan Learning Center and Mrs. V. was "pleased" with the decision to evaluate for dyslexia. ROA.2279; ROA.1918; ROA.2287-2288; ROA.2833:14-2834:25. On May 31, 2016 W.V.'s ARD reviewed the dyslexia evaluation, Mrs. V. participated, and the ARD Committee mutually agreed to dyslexia services beginning the following school year. ROA.2380-2387; ROA.2867:17-2869:14; ROA.2872:5-20. W.V. met grade level standards and was promoted to the next grade level. ROA.2610-2611; ROA.2871:22-2872:2.

2. 2016-2017 School Year

W.V.'s program provided daily dyslexia services for the 2016-2017 school year with the use of the Wilson program and W.V. reportedly made "big gains." ROA.2881:5-12; ROA.2890:1-9; ROA.2925:11-25; ROA.156-157. Dyslexia services were provided each day for 45 minutes after lunch and after school. ROA.2925:11-25; ROA.143; ROA.156.

The Wilson Program is for struggling readers, including students with dyslexia. ROA.2884:11-22; ROA.2545-2563; ROA.2895:8-24; ROA.2907:3-23. W.V. received dyslexia services the entire school year and progressed from a level 1.1 through level 2.5. ROA 5121-5122; ROA.2907:24-2910:11. As a result of the Wilson Assessment of Decoding and Encoding ("WADE"), W.V. made progress at 88 percent in Reading and 85 percent in Writing on Steps 1 and 2, and was recommended to move to Step 3. ROA 5121-5122; ROA.2911:16-21; ROA.2913:5-2915:3. Services continued following the due process hearing. ROA.2914:10-2915:3.

W.V. attended general education Reading and Writing for 90 minutes a day, during which time he received a schedule of mini lessons in a whole group of students, small groups in the classroom, and rotations of students at stations. ROA.2924:6-20. W.V. was also provided general education Reading Response to Intervention ("RtI") Tier 1 to target reading fluency. ROA.2536-2544; ROA.2926:13-2927:8; ROA.2933:17-24. Tier 1 interventions were provided through one-on-one instruction and small groups, plus a phonics program was provided through whole group instruction. ROA.2928:5-2929:3. From November of 2016 through March 24, 2017, W.V.'s reading

accuracy rate, as captured through implementation of RtI with the Fundations intervention tool, reported a growth from below 90 percent to 95 percent. ROA.2564; ROA.2569; ROA.2960:1-20. W.V.'s comprehension was reported at 6/6 (6 out of 6) on May 2, 2016 (ROA.2576); at 6/7 on September 1, 2016 (ROA.2571); and 7/7 in November of 2016 (ROA.2566). W.V. earned a "B" in the class. ROA.2964:5-13; ROA.156-157.

W.V.'s listening comprehension level based on targeted general education interventions, the Fountas & Pinnell ("F&P"), was considered high, and his oral vocabulary was above average. ROA.2930:3-25. W.V.'s F&P data reflected growth from a level "D," which corresponds to beginning of the year first grade, through level "J," which correlates to beginning of the year second grade. ROA.5129; ROA.2983:1-12; ROA.5129; ROA.2979:1-19. W.V.'s RtI data overall showed growth with respect to several reading abilities, including accuracy and comprehension. ROA.2564; ROA.2569-2570; ROA.2960:1-20; ROA.2566, ROA.2571; ROA.2576; ROA.2930:3-25.

After CCISD completed a review of existing evaluation data of W.V. in September of 2016, the ARD Committee agreed to complete a comprehensive reevaluation of W.V., to which Mrs. V. consented. ROA.2281-2283; ROA.2285; ROA.2388-2395.

W.V. received speech services from Wendy Bramble, CCISD's nationally-certified Speech-Language Pathologist during the 2016-2017 school year, who reported on W.V.'s progress. ROA.2622-2625; ROA.2673-2674; ROA.3114:2-16; ROA.3116:19-23; ROA.3090:18-3091:9; ROA.2647-2648; ROA.3092:19-25; ROA.3091:10-3092:16. The

speech pathologist, who also served as W.V.'s case manager, prepared the IEP paperwork, considering the student's needs, and communicating with teachers, the school nurse, and the counselor. ROA.3364:1-25. Speech services provided to W.V. were consistent with his IEP at the rate of thirty minutes, five times per six-week grading period. ROA.3362:12-3363:2. W.V. demonstrated mastery of his first speech IEP objective in November of 2016 and mastery continued as of May 25, 2017. ROA.3119:12-24.

W.V.'s speech pathologist evaluated him in Communication and administered the GFTA-2 as part of the reevaluation requested by W.V.'s ARD Committee in September of 2016. ROA.3079:4-3080:3; ROA.1939. W.V. demonstrated one medial error as a result of the administration of the GFTA-2. ROA.3080:6-16; ROA.1939. W.V. was demonstrating an "f" for the "th" sound in the middle position of words. ROA.3109:20-3110:1. W.V. did not demonstrate other errors in conversational speech. ROA.3110:2-13. In providing direct speech services for an entire school year, and as part of her evaluation, Bramble did not observe new or additional speech errors that had not been previously targeted in W.V.'s IEP, and school staff did not raise other concerns. ROA.3363:10-3365:14.

W.V.'s speech expert, Sydney Perricone, concluded that the student's receptive and expressive communication abilities were in the average range. ROA.1321; ROA.1324-1325; ROA.3139:11-15; ROA.3138:16-24. Perricone did not consult with CCISD officials, including with the District's speech-language pathologist, but only consulted with Mrs. V. ROA.3144:15-3145:2. Perricone concluded that W.V.'s

articulation errors "inconsistently" occurred. ROA.3142:2-3. Perricone also agreed that the GFTA-2 assessment administered by the District is an appropriate evaluation, and that she spent a short amount of time administering her articulation test, as did Bramble, as it is considered a relatively short test. ROA.3147:6-3148:23. Perricone failed to establish that any speech errors actually had an adverse impact on W.V.'s educational performance. ROA.162-163.

Thelene Scarborough has over thirty years of experience in education with over twenty years experience as an educational diagnostician, and was employed by CCISD as a credentialed educational diagnostician in the State of Texas. ROA.2644-2646; ROA.3164:9-3165:20; ROA.3187:19-23. Scarborough attended W.V.'s ARD meetings in September of 2016, and agreed to a reevaluation of W.V. with Mrs. V.'s consent. ROA.2388-2395.

CCISD's reevaluation that was completed on November 16, 2016, included all of the areas to be assessed by the ARD Committee and administered by Scarborough. ROA.1920-1928; ROA 1937-1950; ROA.3199:20-3200:7. CCISD's reevaluation assessed broad areas of cognitive functioning and also included a number of subtests, and Scarborough selected the Woodcock-Johnson Tests of Cognitive Abilities, Fourth Edition ("WJ-IV COG"), and the Woodcock Johnson Tests of Oral Language, Fourth Edition ("WJ-IV OL"). ROA.3200:1-7; ROA.1942-1948. The tests are appropriate for W.V., were administered to best reflect accurately W.V.'s aptitude and achievement levels, and are considered current and reliable tests. ROA.3201:6-3202:14.

W.V.'s scores in the broad areas of cognitive functioning were all average or above average, and W.V. did not meet the pattern of strengths and weaknesses criteria for a learning disability. ROA.1933; ROA.1943-1944. As part of the cognitive assessment, Scarborough noted a score of 84 in a Phonological Processing subtest that was administered under the Auditory Processing broad ability. ROA.3192:12-23; ROA.1942. Scarborough's evaluation explains that Auditory Processing is the cognitive ability to perceive, analyze, and synthesize auditory information. ROA.1944; ROA.3195:9-23.

W.V. did not perform well on the rapid-naming, or long-term retrieval part of phonological processing, which was the narrow ability in which W.V. received an 84 as a score in the Auditory Processing broad area. ROA.3195:10-3196:6; ROA.1942. Scarborough noted that W.V.'s long-term retrieval was intact and in the average range, as noted in the Long-Term Retrieval score of 102 in the evaluation, and so she determined to further investigate phonological processing abilities with the subtests of segmentation and sound awareness. ROA.1942-1943; ROA.3196:8-21. Segmentation informs the Auditory Processing component of the cognitive testing and looks at whether W.V. can take the whole word and break it into parts or individual sounds. ROA.3197:4-23. Sound Awareness considers W.V.'s abilities in rhyming and producing words that rhyme, and considers W.V.'s ability to delete sounds, which would also be abilities that inform a student's Auditory Processing abilities. ROA.3198:1-18. W.V. scored in the average or above average range in subtests of both Segmentation and Sound Awareness, as part of the student's Auditory Processing

composite. ROA.1942-1944. W.V.'s Auditory Processing broad ability was also assessed with the KTEA-3 Phonological Processing test, and his score was reported at 92, in the average range. ROA.1185; ROA.1946; ROA.3198:20-3199:19. Scarborough also administered the subtest of Nonword Repetition, which resulted in a grade equivalent of 2.9 (second grade, nine months) and with a score in the average range of 100. (ROA.2092).[2]

The District's evaluation by Scarborough also assessed broad areas of academic functioning, and included subtests in narrow abilities, and selected and administered the Woodcock-Johnson Tests of Achievement, Fourth Edition ("WJ-IV ACH"), the Woodcock-Johnson Tests of Oral Language ("WJ-IV OL"), Fourth Edition, and the Kaufman Test of Achievement, Third Edition ("KTEA-3"). ROA.3202:15-3205:25; ROA.1944-1948. Other informal assessments examined areas of physical/health, sociological, emotional/behavior, and assistive technology, and the reevaluation did not result in a recommendation of a disability or need for special education in those areas. ROA.1920-1991.

After the evaluation was completed, CCISD attempted several times to convene a meeting of W.V.'s ARD Committee to review the student's evaluation, from November 2016 into January of 2017. ROA.2430-2443; ROA.2795:14-19; ROA.2802:10-2803:1. W.V. and J.V. filed their Request for Due Process Hearing on January 13, 2017. ROA.183. On January 24, 2017, CCISD invited W.V.'s parents to a resolution meeting,

---

[2] Even W.V.'s expert, Lesli Doan, admitted this was an appropriate test to administer under the broad area of Auditory Processing. ROA.3258:14-17.

and provided a legal representation resource letter and copy of the procedural safeguards. ROA.2444-2467.

On February 13, 2017, CCISD filed a counterclaim, seeking to find the District's evaluation appropriate. ROA.216-222. At the same time, to resolve the dispute, CCISD offered a speech/language independent evaluation. ROA.2799:6-15. Instead, the parents sought a private assessment by Lesli Doan, Doctor of Philosophy, referred to in the hearing as Dr. Doan. W.V.'s ARD Committee met on February 27, 2017 to review the District's reevaluation and the private assessment by Doan. ROA.2404-2410. While the parent provided Doan's report, the parent declined to sign consent for CCISD to exchange information with Doan. ROA.2406-2407. At this ARD, the committee also reviewed W.V.'s grades, which for the first semester of the 2016-2017 school year were Language Arts 82, Reading 89, Math 82, Science 89, and Social Studies 94. ROA.2405. On the date of the ARD, W.V.'s grades were reported as Language Arts 82, Reading 86, Math 80, Science 94, and Social Studies 95. ROA.2405.

The ARD Committee reviewed the District's Full and Individual Reevaluation that was completed on November 16, 2016. ROA.2405; ROA.3125:8-24. CCISD's speech pathologist reviewed the communication/language portion of the reevaluation and reported to the ARD Committee W.V.'s growth in communication abilities. ROA.3126:15-3127:6; ROA.1938-1939; ROA.1938-1939; ROA.2406; ROA.3124:15-3126:14. Using the same standardized test as in prior school years, the GFTA-2, W.V.'s speech pathologist reported: (1) W.V.'s mastery of the articulation skills (ROA.3127:22-25); (2) W.V. was able to correct his articulation errors independently

and was using accurate speech sounds in conversation (ROA.3128:5-9); (3) W.V.'s confidence in small groups was improving, and W.V. started modeling for other students in the group who were doing articulation sounds (ROA.3128:13-23); and (4) overall W.V. could effectively and clearly communicate with teachers and peers. ROA.145; ROA.2406; ROA.3128:10-23.

The ARD Committee reviewed W.V.'s evaluation in the other areas the District assessed and the evaluation that Scarborough compiled, along with the student's progress in Reading and Math, in interventions, and with dyslexia services. ROA.2405-2407; ROA.2967:1-18.

Due to evaluation data and W.V.'s progress, the ARD Committee determined that W.V. no longer met special education eligibility as a student with a speech impairment. ROA.2407. The evaluation did support W.V.'s continued need for dyslexia services and those services continued to be addressed in general education with accommodations. ROA.2409; ROA.2914:10-ROA.2915:11. Stay-put required continuation of W.V.'s special education speech therapy services, but regardless of stay-put, W.V. continued to receive accelerated instruction through RtI, and daily dyslexia services. ROA.2379; ROA.2384; ROA.2407. W.V.'s program also continued to include the following general education accommodations: extra time for completing assignments; the opportunity to repeat and explain instructions; seating near the teacher; reminders to stay on task; all material read to him except Reading passages; and peer to read materials. ROA.2382-2383. On March 7, 2017, the District offered to reconvene W.V.'s ARD meeting and provided information regarding Independent

Educational Evaluation ("IEE") procedures. ROA.2471-2486; ROA.2804:1-2805:25. However, the family did not request a speech IEE. ROA.2808:3-8.

3. Due Process Hearing Request

Petitioners requested a due process hearing on January 17, 2017. ROA.182. The issues were whether the District denied violated its Child Find duty, failed to comply with IDEA's procedural requirements, conducted an inappropriate FIE, and developed an IEP that did not meet W.V's unique needs. ROA.127. The District counterclaimed, seeking to establish that its FIE was appropriate and that the District was not required to provide Petitioners with an IEE. ROA.130.

A hearing was held May 30-31, 2017 before Special Education Hearing Officer ("SEHO") Sharon Cloninger. ROA.128. The SEHO denied all relief requested by Petitioners. ROA.170-172. The SEHO did not find Petitioners' experts or evidence sufficient to meet their burden of proof. ROA.127-172. The SEHO conclusively determined that the District "had no reason to suspect Student had an SLD which might result in a need for special education services." ROA.159. The SEHO also found that W.V.'s dyslexia services were effective. ROA.159-160. Ultimately, the SEHO concluded that "Petitioner did not meet his burden of proof to show the District violated its Child Find duty by failing to timely identify or evaluate Student as a child with an eligible disability in need of special education and related services." ROA.161. In December of 2017, W.V.'s mother and W.V. moved to Raeford, North Carolina, due to the father's military deployment. ROA.4806; ROA.3872; ROA.3883.

B. PROCEDURAL BACKGROUND

Petitioners appealed. ROA.14-30. Meanwhile, Petitioners moved out of state; thus, prospective relief became moot, leaving only claims for compensatory services. ROA.4414-4418. On May 31, 2018, CCISD filed its Motion for Judgment on the Administrative Record or Alternative Motion for Summary Judgment. ROA.4496-4543. Petitioners also filed a Motion for Judgment on the Administrative Record or Alternatively Motion for Summary Judgment. ROA.4544-4606.

On August 27, 2018, District Judge Robert Pitman adopted, in part, United States Magistrate Judge Jeffery Manske's Report and Recommendation on several pending motions. Judge Pitman granted Appellant's Motion for Leave to Amend, but only as to their claim for compensatory education. ROA.4813. Plaintiffs' Amended Complaint was filed on September 14, 2018. ROA.4814-4830. The case was then transferred to the Honorable Alan D. Albright. ROA.4831.

United States Magistrate Judge Manske issued a Report and Recommendation on October 15, 2018, recommending that CCISD's Motion for Judgment on the Administrative Record or Alternative Motion for Summary Judgment be granted. ROA.4906-4933. The Magistrate Judge concluded that (1) CCISD did not violate any procedural requirements of the IDEA; (2) CCISD created an IEP reasonably calculated to enable W.V. to receive educational benefits; (3) Petitioners failed to establish error in the SEHO's decision; and (4) Petitioners' dispositive motion should be denied. ROA.4906-4933. On October 29, 2018, Petitioners filed Objections to the Report and Recommendation, CCISD responded, and Petitioners replied. ROA.4934-5010. The

District Court adopted, in part, the Magistrate Judge's recommendations. ROA.5011-5020. The District Court rendered judgment in CCISD's favor on December 10, 2018. ROA.5021.

Petitioners appealed the judgment. ROA.5032-5033. The Court of Appeals for the Fifth Circuit, *per curiam*, remanded the case to the District Court, holding that the record did not permit meaningful appellate review because the District Court did not consider whether W.V. demonstrated an educational need for special education services and did not consider whether W.V. made progress under the accommodations he was receiving. *William V. As Next Friend of W.V. v. Copperas Cove Indep. Sch. Dist.,* 774 F. App'x 253, 254 (5th Cir. 2019) ("*W.V. v. CCISD I*").

On remand, the District Court again rendered judgment in the School District's favor. ROA.5061-5084, ROA.5087. The District Court concluded that W.V. demonstrated an educational need for services but he did not suffer an injury because CCISD had not denied him services and he demonstrated "substantial educational progress." ROA.5083.[3] Petitioners appealed the District Court's decision in the School District's favor. ROA.5085-5086.

The Fifth Circuit again affirmed the judgment in favor of the District. (Petitioners' Appendix "Pet. App." A). The Court of Appeals rejected Petitioners' arguments that the District Court (1) failed to properly weigh evidence regarding W.V.'s progress; (2) ignored their contention that the School District did not employ

[3] CCISD maintains that it did not violate the IDEA when it declined to classify W.V. as a student with an SLD. (Pet. App. B, p. 11).

research-based programs; (3) misapplied factors established in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 252 (5th Cir. 1997) ("the *Michael F.* factors"); and (4) failed to hold that the School District committed procedural violations of the IDEA. Petitioners failed to show reversible error and the Fifth Circuit affirmed the judgment in favor of the School District.

REASONS FOR DENYING PETITION

Pursuant to Rule 10 of the Court's Rules, review on a petition for a writ of certiorari will be granted only for compelling reasons. *See* U. S. Supreme Court Rule 10. The Court should deny the Petition in this case because the underlying decision does not conflict with the decision of another court of appeals nor does the decision decide an important federal question in a way that conflicts with relevant decisions of the Court. Moreover, this case does not involve an important question of federal law that "has not been, but should be, settled by this Court." *See* U. S. Supreme Court Rule 10. Contrary to Petitioners' assertions, the courts of appeal are not "in disarray" and this case does not "cleanly present[]" any issue worthy of the Court's review.

A. IDEA Framework

Public school districts are charged with providing students with disabilities protected under the IDEA with a free appropriate public education ("FAPE"). 20 U.S.C. § 1412(a)(1), (5). The intent of the IDEA "was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Bd. of Educ. of the Hendrick Hudson Cent.*

Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 192, 102 S. Ct. 3034, 3043 (1982). The focus of the IDEA has been to provide access, and for schools to design and implement a program that provides an opportunity for a student to receive some educational benefit. *Id.* The Supreme Court has stated that, 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." *See Endrew F. v. Douglas County School District RE-1,* __U.S.__, 137 S. Ct. 988, 999 (2017). Nothing in the IDEA, however, requires a school district to guarantee progress or a particular educational outcome. *Endrew F.,* 137 S. Ct. at 998, 1000-01; *Michael F.,* 118 F.3d at 247-48.

To demonstrate a denial of a FAPE, a plaintiff must prove: (1) the school district failed to comply with procedures in the IDEA, or (2) the IEP was not reasonably calculated to enable the student to receive educational benefit. *Rowley,* 458 U.S. at 206-208, 102 S. Ct. at 3051. To guide the courts to determine whether an IEP has provided a FAPE, the Fifth Circuit has adopted a four-part test that considers whether: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment ("LRE"); (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) positive academic and non-academic benefits are demonstrated. *Michael F.,* 118 F.3d at 253; *Richardson Indep. Sch. Dist. v. Michael Z.,* 580 F.3d 286, 294 (5th Cir. 2009). The fourth factor is "one of the most critical factors

in this analysis" even when an IEP is not found to be individualized. *R.P. v. Alamo Heights Indep. Sch. Dist.,* 703 F.3d 801, 813-15 (5th Cir. 2012).

B. Petitioners Waived Arguments On Appeal

In Petitioners' first issue, they attempt to circumvent the Fifth Circuit's findings that they forfeited arguments on appeal by failing to raise them before the District Court. (Pet. App. A, p. 8). In their briefing before the District Court, Petitioners sought to avoid application of the *Michael F.* factors, declining to analyze them. ROA.4544-4567; ROA.4607-4617; ROA.4776-4787; ROA.4934-4965. Instead, Petitioners maintain that the *Michael F.* factors are not dispositive and courts are not required to apply them. *See, e.g.,* ROA.4937. According to Petitioners, failing to brief "nondispositive factors" should not result in waiver of those arguments on appeal. (Pet. Brf., pp. 13-15).

There is no dispute that the first time Petitioners acknowledged the *Michael F.* factors in any substantive way was in briefing before the Fifth Circuit. (Pet. Brief, p. 15). On appeal, Petitioners argued that the District Court misapplied three of the four *Michael F.* factors. Petitioners admittedly did not "directly address" the first factor before the District Court – namely, whether W.V.'s program was individualized. Citing *Rittinger v. Healthy All. Life Ins. Co.,* 914 F.3d 952, 955 (5th Cir. 2019), the Fifth Circuit correctly concluded that the issue had been forfeited. (Pet. App. A, p. 8).

The Fifth Circuit also found lacking any independent argument on the fourth factor – whether W.V. benefitted from his IEP. (Pet. App. A, p. 8). Petitioners likewise

failed to demonstrate clear error in the District Court's conclusion that the IEP was effectuated in a collaborative manner because the record established that Petitioners were extensively involved in forming and executing W.V.'s IEP. (Pet. App. A, p. 8).

Now, before this Court, Petitioners again seek to revive arguments previously waived and inadequately briefed. The cases cited by Petitioners are not directly on point. For example, Petitioners cite *United States v. DiFrancesco,* 449 U.S. 117, 142, 101 S. Ct. 426, 440 (1980), which has nothing to do with waiver of arguments on appeal. Circuit courts resoundingly agree that issues not properly raised and briefed before a district court are waived on appeal, even when the issue involves a discretionary factor. *DeJoria v. Maghreb Petroleum Expl., S.A.,* 804 F.3d 373, 384 (5th Cir. 2015) (arguments regarding discretionary factors waived on appeal); *United States v. Whitfield,* 590 F.3d 325, 346 (5th Cir. 2009) ("...a party waives any argument that it fails to brief on appeal."); *United States v. Cruz-Ramos,* 987 F.3d 27, 40 (1st Cir. 2021) (it is not on the appeals court "to construct a party's arguments for him"; party waived issue); *Moll v. Telesector Res. Grp., Inc.,* 760 F.3d 198, 204 (2d Cir. 2014) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (internal brackets and quotation marks omitted)); *Grayson O Co. v. Agadir Int'l, LLC,* 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by ... failing to develop its argument — even if its brief takes a passing shot at the issue.") (brackets and internal quotation marks omitted)).

Allowing Petitioners to revive issues previously waived also runs afoul of the IDEA. For example, the IDEA prohibits a party seeking a due process hearing from raising issues at the hearing that were not specified in the request for hearing, unless the other party agrees otherwise. 20 U.S.C. § 1415(f)(3)(B); 24 C.F.R. § 300.511(d).

In the case *sub judice*, Petitioners maintained that CCISD denied W.V. a FAPE. Since 1997, courts within the Fifth Circuit have used the *Michael F.* factors to guide them in evaluating whether an IEP provided a FAPE. *Michael Z.,* 580 F.3d at 294. Petitioners never challenged the efficacy of the *Michael F.* factors and, instead, chose to ignore them in proceedings leading up to their Fifth Circuit appeal.

The Fifth Circuit correctly determined that Petitioners waived any argument that W.V.'s IEP was not individualized and otherwise failed to overcome findings by the SEHO, the Magistrate Judge, and the District Court that W.V. made academic progress and that W.V.'s IEP was effectuated in a collaborative manner. (Pet. App. A, p. 8). Even if those arguments were not waived, Petitioners can show no harm as the District Court and Fifth Circuit still evaluated the record evidence, considered and weighed the *Michael F.* factors, and concluded that Petitioners failed to meet their burden to show a denial of a FAPE. (Pet. Appx A, p. 8; Pet. App. B, pp. 14-23). Nothing in the Petition justifies reopening issues waived and properly settled due to inadequate argument and evidence presented by Petitioners.

C. CCISD's Classification Of W.V. Did Not Cause A Cognizable Injury

In Petitioners' second issue, Petitioners argue for the first time that CCISD's failure to qualify W.V. for special education constituted a "change in placement"

resulting in a *per se* injury. (Pet. Brf., pp. 15-19). Petitioners did not raise this in briefing before the District Court. *See* ROA.4543-4616; ROA.4775-4785. This Court has long held that it is "a court of review, not of first view." *Cutter v. Wilkinson,* 544 U.S. 709, 719, 125 S. Ct. 2113, 2120 (2005). Because Petitioners never before claimed that W.V.'s lack of special education classification constituted an impermissible change in placement resulting in a *per se* injury, the Court should not consider it.

Even if this issue were not waived, Petitioners ignore significant record evidence and findings that, while W.V. was not given the SLD special education label due to his dyslexia, he was provided continuous services that allowed him to make substantial progress. (Pet. App. B, p. 23). Petitioners cite no record evidence or legal authority justifying reconsideration of the District Court's conclusion that W.V. did not suffer a cognizable injury. (Pet. App. B, p. 23). The Fifth Circuit properly affirmed the District Court's conclusion that, although CCISD did not find W.V. eligible under the SLD special education classification, it continued providing W.V. with dyslexia and special education services and the District kept W.V.'s IEP in place months after the decision was made by CCISD that W.V. did not need one. (Pet. App. B, p. 23). Thus, because W.V. continued to receive services, W.V.'s classification did not result in the loss of educational opportunities or cognizable injury. (Pet. App. B, p. 23). The District Court instead found that the "record is permeated with evidence that W.V.'s education was specifically designed to meet his needs and provided services that permitted him to benefit from the instruction. ... [and] W.V. made substantial educational progress as a result of the IEP implemented by the District." (Pet. App. B, p. 23). Applying the

clear error standard of review to the District Court's findings, the Fifth Circuit properly concluded that it would not "upend the district court's conclusions merely because Appellants believe it should have weighed the evidence differently." (Pet. App. A, p. 7). That is precisely what Petitioners ask of this Court.

Petitioners advocate for a rule that any misclassification of a student would result in a *per se* violation of the IDEA resulting in a cognizable injury, despite record evidence that the School District, in fact, provided the student a FAPE. None of the cases cited by Petitioners support this approach. For example, in *R.B. v. Mastery Charter Sch.,* 762 F.Supp.2d 745, 757-760 (E.D. Pa. 2010), upon which Petitioners rely, the district court held that a change in placement results when there is "an absolute termination of a child's special education program, and purportedly termination of a LEA's responsibility to provide FAPE." In *S. P. v. E. Whittier City Sch. Dist.,* 735 F. App'x 320 (9th Cir. 2018), the school district's IDEA violation was not harmless because no evaluation had been done or considered for the student's hearing impairment. In the case at bar, W.V. was assessed and, despite the lack of the SLD label, continued to receive services and demonstrated progress while a student in CCISD. (Pet. App. B, p. 23). Stay-put required continuation of W.V.'s special education speech services, but regardless of stay-put, W.V.'s accelerated instruction through RtI, and daily dyslexia services continued. ROA.2379; ROA.2384; ROA.2407. Even the *S.P.* Court recognized that the IDEA does not require school districts to classify students by a disability or

create an appropriate label to identify a student with a disability. 20 U.S.C. § 1412(a)(3)(B); *S.P.,* 735 F. App'x at 322. The Fifth Circuit has similarly observed:

> ... the Child Find provision itself suggests that diagnostic labels alone should not be determinative when considering whether a remedy furthers IDEA's purposes.... The position that the diagnostic label affixed to a child should determine whether she has prevailed under the IDEA "reflects a preoccupation with *labels* that [IDEA] do[es] not share."

Lauren C. by and through Tracey K. v. Lewisville Indep. Sch. Dist., 904 F.3d 363, 376 (5th Cir. 2018) (emphasis in original) (quoting *Angela L. v. Pasadena Indep. Sch. Dist.,* 918 F.2d 1188, 1195 (5th Cir. 1990)).

While requiring resident disabled children to be "identified, located, and evaluated," 20 U.S.C. § 1412(a)(3)(A), IDEA's Child Find provision specifies that "[n]othing in this chapter requires that children be *classified by their disability*" provided that each disabled child "is regarded as a child with a disability under this subchapter." 20 U.S.C. § 1412(a)(3)(B) (emphasis added). *Lauren C.,* 904 F.3d at 376.

This case also does not merit review because it does not decide an important federal question in a way that conflicts with relevant decisions of the Court and does not involve an important question of federal law that "has not been, but should be, settled by this Court." *See* U. S. Supreme Court Rule 10. For example, the decisions regarding W.V.'s classification were based upon Texas law and policy that has since been amended.

Texas developed comprehensive procedures for the identification of students with dyslexia which, as they applied in the case at bar, were found in the 2014 version of the state's *Dyslexia Handbook – Revised 2014: Procedures Concerning Dyslexia and*

Related Disorders ("the 2014 *Dyslexia Handbook"*). ROA.1407-1589. The 2014 *Dyslexia Handbook* was approved by the Texas State Board of Education ("SBOE") and had the force of law.[4] The CCISD's reliance on the 2014 *Dyslexia Handbook* in classifying W.V. and providing services and interventions do not implicate any important question of federal law. Moreover, even if the 2014 version of the *Dyslexia Handbook* remained in effect, "Congress left the choice of educational policies and methods where it properly belongs—in the hands of state and local school officials. Our task is not to second-guess state and local policy decisions; rather, it is the narrow one of determining whether state and local school officials have complied with the Act." *Daniel R.R. v. State Bd. of Educ.,* 874 F.2d 1036, 1048 (5th Cir. 1989).

In the case at bar, at every stage of the proceedings, CCISD was found to have provided W.V. an appropriate education, despite the lack of the SLD label, and he demonstrated educational progress. (Pet. App. A; Pet. App. D, p. 9). The Fifth Circuit properly affirmed the District Court's determination that the program CCISD provided to W.V. did not cause an injury and nothing in the Petition warrants reconsideration.

D. Petitioners' Challenges To The Application Of Proper Legal Standards Are Not Worthy Of Review

In their next issue, Petitioners ask the Court to consider "how much regression or lack of progress need be shown" to establish a denial of a FAPE and maintain that

[4] State law mandates that Texas school districts follow the procedures and implement programs approved by the SBOE, as set out in the 2014 *Dyslexia Handbook*. ROA.1466 (citing TEX. EDUC. CODE § 38.003(b)); ROA.1475 (citing 19 Tex. Admin. Code § 74.28(b) & (c)). The *Dyslexia Handbook* was updated in 2018.

school districts should carry the burden of proof on that issue. (Pet. Brf., p. 19). Again, however, Petitioners did not make this argument before the District Court and it was waived. In fact, Petitioners readily acknowledged in Plaintiffs' Motion for Judgment on the Administrative Record or Alternatively Motion for Summary Judgment that "Plaintiffs, as the party challenging the IEP, have the burden of proof." ROA.4546, citing *Schaffer v. Weast,* 546 U.S. 49, 126 S. Ct. 528 (2005). Petitioners' new and inconsistent arguments in the Petition before this Court are not worthy of consideration. Petitioners offer neither legal argument nor authority requiring the Court to revisit *Schaffer v. Weast,* which assigned to Petitioners the burden of proof on all issues in this matter. *Schaffer v. Weast,* 546 U.S. at 62, 126 S. Ct. at 537.

In addition, the Court is not required to re-weigh and interpret the facts regarding W.V.'s progress. The SEHO, Magistrate Judge, and District Court reviewed the evidence following a robust special education due process hearing. The Fifth Circuit properly reviewed the District Court's factual findings for clear error. (Pet. App. A, p. 4, 7, 8, 9). Understanding their dilemma in overcoming clear error review, Petitioners advocate for a "modified *de novo*" review, which would require the Fifth Circuit to re-weigh the evidence regarding W.V.'s progress. (Pet. Brf., pp. 22-23).

Contrary to Petitioners' assertions, appellate courts are not in "disarray" over whether the clear error standard of review is appropriate in evaluating a student's progress in an administrative appeal such as this. For this proposition, Petitioners cite only one First Circuit case, *Johnson v. Boston Public Schools,* 906 F.3d 182 (1st Cir.

2018). However, even in *Johnson*, the First Circuit applied the clear error standard to the issues of whether the student's IEP was appropriate and whether the student made educational progress. *See Johnson v. Boston Public Schools,* 906 F.3d at 195. ("We see no clear error in ... the conclusion that N.S. in fact made meaningful educational progress...").

Petitioners' reliance on *Johnson* does not support their effort to secure *de novo* review of the District Court's factual determinations regarding W.V.'s progress. The Fifth Circuit, in the case *sub judice*, properly applied the standards regarding educational progress as articulated in *Endrew F.,* in which this Court stated that, 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.,* 137 S. Ct. at 999. This Court observed in *Endrew F.* that nothing in the IDEA requires a school district to guarantee progress or a particular educational outcome. *Endrew F.,* 137 S. Ct. at 998, 1000-01; *Michael F.,* 118 F.3d at 247-48. Petitioners offer no substantive legal argument or analysis to warrant reconsideration of the District Court and Fifth Circuit's application of *Endrew F.* standards to the facts presented here. (*See* Pet. App. A, p. 5; Pet. App. B, 15).

Petitioners seek to upend well-established standards of review in IDEA cases that challenge a student's IEP. However, appellate courts are uniformly mindful of this Court's admonitions in *Rowley* that courts may not "substitute their own notions of sound educational policy for those of the school authorities which they review."

Rowley, 458 U.S. at 206, 102 S. Ct. at 3051. Appellate courts review legal questions *de novo* and factual questions for clear error. *Klein Indep. Sch. Dist. v. Hovem,* 690 F.3d 390, 395 (5th Cir. 2012). A party attacking the school district's educational program bears the burden of demonstrating non-compliance with the IDEA at all times. *Michael Z.,* 580 F.3d at 292, n.4.

A presumption exists in favor of the local public school district's plan for educating the child. *Teague Indep. Sch. Dist. v. Todd L.,* 999 F.2d 127, 132 (5th Cir. 1993); *White v. Ascension Parish Sch. Bd.,* 343 F.3d 373, 377 (5th Cir. 2003). The party challenging an educational placement "must show why the IEP and placement were insufficient under the IDEA." *A.A. v. Northside Indep. Sch. Dist.,* 951 F.3d 678, 684 (5th Cir. 2020). Courts give "due weight" to the state administrative proceedings. *Teague Indep. Sch. Dist. v. Todd L.,* 999 F.2d at 131. Particular deference is given where the hearing officer's administrative findings are "thorough and careful." *C.M. v. Dep't of Educ., State of Hawai'i,* 476 F. App'x 674, 676 (9th Cir. 2012).

Under clear error review, a factual finding may be reconsidered only when the court is "left with the definite and firm conviction that a mistake has been committed." *Renee J. v. Houston Indep. Sch. Dist.,* 913 F.3d 523, 528 (5th Cir. 2019) (quoting *Guzman v. Hacienda Records & Recording Studio, Inc.,* 808 F.3d 1031, 1036 (5th Cir. 2015)). Petitioners offer no legal argument or authority that warrants disturbing these standards which were properly applied by the District Court and the Fifth Circuit.

With respect to W.V.'s educational progress, the record established that W.V. enrolled in CCISD with significant deficits that were properly addressed through speech therapy services, reading interventions, and other general education accommodations. The fact that W.V. may not have been on par with his peers did not equate to lack of progress or lack of educational benefit. *See Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d 341, 349-350 (5th Cir. 2000). CCISD was not required to guarantee that W.V. achieve maximum mastery of his goals and objectives within a prescribed period of time. *See D.B. v. Houston Indep. Sch. Dist.,* 2007 WL 2947443, at *11 (S.D. Tex. 2007) ("It is not necessary for a student to improve in every area to obtain an educational benefit from his IEP. Nor is a school district required to 'cure' a disability.") (internal citations omitted); *Roland M. v. Concord Sch. Comm.,* 910 F.2d 983, 992 (1st Cir. 1990) ("the issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law … an IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.").

This case is analogous to *Houston Indep. Sch. Dist. v. Bobby R.,* in which the Fifth Circuit determined that passing grades and advancement from grade to grade was a proper indicia of academic progress. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349-350 (5th Cir. 2000). The record in *Bobby R.* contained evidence that the

student's abilities and grades improved, he was passing his classes, and the improvements were not trivial. Therefore, no error was shown in the SEHO's and district court's decisions in favor of the school district. *Id.* Like Petitioners here, the plaintiff in *Bobby R.* offered expert opinion downplaying the academic progress demonstrated. However, such evidence "at best, support an argument that the IEP developed for [the student] did not maximize his educational potential," which is not required under the IDEA. *Bobby R.,* 200 F.3d at 350; *see also, R.S. v. Highland Park Indep. Sch. Dist.,* 951 F.3d 319 (5th Cir. 2020) and *A.A. v. Northside Indep. School Dist.,* 951 F.3d 678 (5th Cir. 2020).

Throughout the proceedings, Petitioners attempted to discount evidence concerning grades and grade-level advancement as measures of progress. However, the evidence established that W.V. received an educational benefit from CCISD, as demonstrated by the abundant record evidence of increased skills, passing grades, grade-level advancement, progress in the Wilson and Fundations programs, success with all RtI interventions, F&P data, and anecdotal evidence from W.V.'s teachers. ROA.4535-4536, ¶¶ 3-7. W.V. demonstrated appropriate progress in the identified targeted areas of his IEP goals and objectives related to articulation skills and in the area of reading as a result of general education support, targeted RtI, and dyslexia services provided by CCISD. There is no dispute that W.V.'s behaviors did not impede his learning and he demonstrated average behavior functioning. ROA.148; ROA.1201-1202; ROA.1238; ROA.1941. The Fifth Circuit properly affirmed the District Court's determination that, because Petitioners failed to prove a denial of FAPE due to a lack

of progress in any academic or non-academic area, they did not meet this element of their FAPE claims.

This Court should deny the Petition. CCISD complied with the IDEA and provided W.V. with a FAPE. W.V.'s FIE was appropriate and CCISD timely and properly evaluated, identified, and placed W.V. Contrary to the District Court's decision, CCISD did not violate IDEA's procedural requirements. CCISD also did not commit any substantive violations. The Fifth Circuit properly affirmed the District Court's determination that Petitioners were not entitled to relief. There is no reversible error and Petitioners' criticisms of the findings and conclusions of the SEHO, the United States Magistrate Judge, the District Court, and the Fifth Circuit do not warrant review.

CONCLUSION

For the reasons above, the Petition should be denied.

Respectfully submitted,

BRIDGET ROBINSON
Counsel of Record

WALSH GALLEGOS TREVINO
KYLE & ROBINSON P.C.
P. O. Box 2156
Austin, Texas 78768
Telephone: (512) 454-6864
Facsimile: (512) 467-9318
brobinson@wabsa.com

Counsel for Respondent