No. _____

In the
Supreme Court of the United States

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

O.W., BY NEXT FRIEND HANNAH W.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 23, 2020

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QUESTION PRESENTED

Is a public school district's use of Section 504 accommodations a reasonable step in the process of complying with its Child Find obligation under the Individuals with Disabilities Education Act?

RELATED PROCEEDINGS

Spring Branch Indep. Sch. Dist. v. O.W., 2018 WL 2335341 (S.D. Tex. Mar. 29, 2018)

Spring Branch Indep. Sch. Dist. v. O.W., 938 F.3d 695 (5th Cir. 2019), *withdrawn on reh'g*

Spring Branch Indep. Sch. Dist. v. O.W., 961 F.3d 781 (5th Cir. 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Spring Branch Independent School District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1) on rehearing is published at 961 F.3d 781. The original opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 266) is published at 938 F.3d 695. The district court's memorandum and opinion (Pet. App. 38) is unpublished but available at 2018 WL 2335341.

JURISDICTION

The court of appeals entered its judgment on June 12, 2020. Pet. App. 1. The court denied a timely petition for rehearing en banc on July 30, 2020. Pet. App. 266. On March 19, 2020, this Court entered its standing order that extends the deadline to file a petition for writ of certiorari in this case to December 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

20 U.S.C. § 1412(a)(3)(A)

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.

34 C.F.R. § 300.111(a)(1)

> **(a)** ***General.***
>
> **(1)** The State must have in effect policies and procedures to ensure that -
>
> > **(i)** 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 disability, and who are in need of special education and related services, are identified, located, and evaluated; and
> >
> > **(ii)** A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

29 U.S.C. § 794(a)

(a) PROMULGATION OF RULES AND REGULATIONS

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

34 C.F.R. § 104.33(a-b)

(a) General. A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless

of the nature or severity of the person's handicap.

(b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

STATEMENT OF THE CASE

This case involves the intersection in the schoolhouse of two complementary federal disability statutes, the Individuals with Disabilities Education Act (the IDEA) and Section 504. Specifically, on the road to identifying a new student, O.W., as a student with a disability who needed special education services, Spring Branch Independent School District (SBISD or the District) first provided O.W. accommodations under Section 504. As explained below, the district court and Fifth Circuit found the District's use of Section 504 accommodations was unreasonable and unreasonably delayed its compliance with its Child Find obligation under the IDEA.

A. Course of proceedings and disposition of the case.

This case arises under the IDEA, 20 U.S.C. § 1415(i)(2)(A) as an appeal of a special education hearing officer's decision in *O.W. b/n/f Hannah W. vs. Spring Branch Independent School District*, Docket No. 068-SE-1015. ROA.15-132. O.W. filed a special education "due process hearing" request seeking an order requiring the Spring Branch Independent School District (the District) to pay for his placement in a private school, among other relief. ROA.283-290. After an evidentiary hearing, a Texas Education Agency (TEA) Hearing Officer issued a decision finding the District failed to comply with its Child Find obligation because it failed to timely identify O.W. as a "child with a disability" and failed to properly implement the

Individualized Educational Plan[1] (IEP) it developed. ROA.269-272; RE at Tab 6. As relief, the hearing officer ordered SBISD to reimburse the parent for two years of private school expenses. ROA.272; RE at Tab 6. The district court affirmed. ROA.4123-4142. On appeal, a panel of the Fifth Circuit reversed, in part, affirmed, in part, and remanded. *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d 695 (5th Cir. 2019) (*O.W. I*), *opinion withdrawn and superseded on reh'g by Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781 (5th Cir. 2020) (*O.W. II*). The District filed a petition for rehearing en banc on October 19, 2019. The Texas Association of School Boards Legal Assistance Fund filed an amicus brief in support of the District. The Court requested a response to the petition, which was filed on December 6, 2019. The panel treated the petition as a petition for panel rehearing and, on June 12, 2020, issued a substituted opinion that reached the same result. *See generally O.W. II*.

B. Statement of relevant facts.

After four years of private schooling, O.W.'s parents enrolled him in the District for fifth grade. ROA.956. The parents provided a letter from O.W.'s psychiatrist documenting an Attention Deficit Hyperactivity Disorder (ADHD) diagnosis and a recommendation for

[1] An IEP is a written statement of educational services for a disabled child developed in an Admission, Review, and Dismissal Committee meeting. 20 U.S.C. §§ 1401(14), 1414(d); 34 C.F.R. § 300.320.

Section 504[2] services. ROA.2032, 3063:15-25, 3064, 3065:1-3.

O.W. immediately began exhibiting behavioral problems, such as cursing, making racial slurs, creating violent drawings, and yelling obscenities. ROA.2023. O.W.'s mother did not suggest the behavior was related to a disability, but rather explained he was trying to get sent back to his private school. ROA.3038:9-12.

On September 16, 2014, Ms. W. received a Section 504 "Notice of Rights." ROA.2015. Ms. W. also signed a "Notice and Consent for Initial Section 504 Evaluation" to determine whether O.W. qualified for Section 504. ROA.2009. On September 19, 2014, SBISD sent the family notice that a Section 504 meeting would be convened on October 1, 2014, to consider O.W.'s eligibility under Section 504. ROA.2008, 2250:9-10.

While SBISD was collecting information for the Section 504 evaluation, it implemented regular education interventions available to all students. ROA.2267:16-20; ROA.2017, 2267:21-25, 2268:1-2, 6-8; ROA.2019 (documenting "what already has been done to help this student" as of 10/1/14); ROA.2268:9-11.

Just before the scheduled Section 504 meeting, Ms. W. provided SBISD with a 2½ year old psychological

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[2] Section 504 of the Rehabilitation Act prohibits discrimination against students with disabilities in programs receiving Federal financial assistance. The Section 504 regulations applicable to educational programs generally require school districts to provide a free appropriate public education (FAPE) to eligible students. 34 C.F.R. § 104.1 *et seq*.

report. ROA.1874-1885. The meeting was postponed, until October 8, 2014, to allow the District's Licensed Specialist in School Psychology (LSSP) to attend and review the evaluation for the Committee. ROA.2001-2002, 2008, 2019, 2267:4-11. The Committee agreed O.W. was an eligible student with a disability under Section 504 and recommended accommodations. ROA.2004-2005. In addition, a personalized behavioral intervention plan, titled "[O.W.]'s Success Chart," was developed to track O.W.'s problematic behaviors every thirty minutes and to provide positive behavioral supports. ROA.1993-1998 (sample behavioral charts). At the time of the meeting, O.W. was failing all content classes. ROA.2001. SBISD implemented the Section 504/behavioral intervention plan and O.W.'s behavior improved. ROA.1970, 2274:23-24. Moreover, in the first nine-week grading period, O.W. passed all but two classes. ROA.1715, 1886.

On January 9, 2015, O.W. hit a staff member in the back with his jacket. ROA.2021. Less than one week later, on January 13, 2015, O.W. physically assaulted his teacher, "kicking her and hitting her with a closed fist." ROA.2021. SBISD immediately convened another Section 504 meeting, and recommended O.W. be referred for a special education evaluation. ROA.2000 (1/15/15 Section 504 meeting).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's opinion in this case conflicts with the decisions of four other circuit courts of appeal and opens a circuit split on the important question of whether a public school district may comply with its Child Find obligation under the IDEA by using Section

504 accommodations as part of its Child Find efforts. This Court should grant this petition in order to resolve the circuit split.

A. The IDEA's Child Find requirement.

In order to ensure that children in need of special education services are timely identified and provided the services they require, the IDEA imposes a Child Find obligation on school districts. "Child Find" refers to the duty to identify, locate, and evaluate all children in the District who: (1) either have disabilities or are suspected of having disabilities; *and* (2) need special education as a result. 34 C.F.R. § 300.111(a)(1)(i). If a school district unreasonably delays in meeting its Child Find obligations, it may rise to the level of a procedural violation of the IDEA. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249-50 (3d Cir. 2012).

Thus, the courts of appeals have held that the touchstone of Child Find jurisprudence is the concept of reasonableness. *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007). The reasonableness standard balances both the needs of the student and the reality that a school district often needs time in which to assess a child's needs.

B. The courts of appeals afford school districts a reasonable period of delay in which to comply with their Child Find obligations.

The Third and Eleventh Circuits hold a school district acts reasonably when it first attempts to address a student with a disability's needs using accommodations under Section 504. The Second and

Sixth Circuits both hold a school district cannot be held liable for a Child Find violation absent a showing of negligence. The Fifth Circuit's rule – finding the District violated Child Find by unreasonably delaying O.W.'s referral to special education because it used Section 504 accommodations before referring him – directly conflicts with the holdings of the Third and Eleventh Circuits and is in irreconcilable tension with the holdings of the Second and Sixth Circuits.

The Third Circuit: In *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995), the Third Circuit held that, implicit in the Child Find requirement, school districts are afforded a reasonable period of delay in which to comply with their obligations. If a school district does not unreasonably delay in complying with its obligation under Child Find, it cannot be held liable for a Child Find violation. Confirming its standard, in *D.K. v. Abington School District*, 696 F.3d 233 (3d Cir. 2012), the court held that a school district was entitled to a reasonable period of delay in complying with its Child Find obligation. Specifically, the court found that the school district did not violate its Child Find obligation when it delayed referral for years while using regular education interventions to assess the student. The Third Circuit's reasonable period of delay rule is mature and has been applied for a quarter of a century now.

The Eleventh Circuit: Expressly relying on the Third Circuit's decision in *D.K.*, in *Durbrow v. Cobb County School District*, 887 F.3d 1182 (11th Cir. 2018), the Eleventh Circuit found a school district properly

addressed a student's needs with a Section 504 plan, thus, negating the possibility of a Child Find violation.

The Second Circuit: In *Mr. P. v. West Hartford Board of Education*, 885 F.3d 735, 750 (2d Cir. 2018) (citations omitted), the Second Circuit held a Child Find "claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." Under the Second Circuit's rule, a Child Find plaintiff must show that the school district acted negligently in order to impose liability.

The Sixth Circuit: The Sixth Circuit echoes the Second Circuit's rule. Specifically, in *M.G. v. Williamson County Schools*, 720 F. App'x 280 (6th Cir. 2018), the Sixth Circuit held a school district should not be held liable for a Child Find violation absent a finding of negligence.

C. The Fifth Circuit's decision conflicts with the holdings of the other circuits and eliminates the reasonable period of delay afforded to school districts to comply with their Child Find obligations and presents the ideal vehicle for resolving the circuit split.

The Fifth Circuit has now issued, in the past three years, three published opinions addressing the reasonableness of a school district's delay in the context of Child Find. *See O.W. II* at 793. The latest decision – the one in this case – departs significantly from the route taken by its sister circuits.

1. The Fifth Circuit's Child Find jurisprudence.

The Fifth Circuit's first two opinions, *Dallas Independent School District v. Woody*, 865 F.3d 303 (5th Cir. 2017) and *Krawietz v. Galveston Independent School District*, 900 F.3d 673 (5th Cir. 2018) that bear on Child Find both relied on the Third Circuit's decision in *D.K. v. Abington School District*, 696 F.3d 233 (3d Cir. 2012). Not surprisingly, *D.K.*, *Woody*, and *Krawietz* all endorse the view that a school district has a reasonable period of time in which to make a referral to special education – *i.e.*, all three contemplated some temporal delay that was reasonable. *Woody*, 865 F.3d at 320 (holding schools must evaluate "within a reasonable time after the school district is on notice of facts or behavior likely to indicate a disability.").

That is because, as the Third Circuit observed in *D.K.*, ". . . schools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment." 696 F.3d at 252 (omission added). The Third Circuit's commonsense observation recognizes the practical reality that schools are full of children, all of whom exhibit different behaviors and needs and come to school with different experiences and expectations. While reaching different results, the Fifth Circuit's first two opinions recognized this fact. *Compare Woody*, 865 F.3d at 320 (explaining the district took time to determine its obligations), *with Krawietz*, 900 F.3d at 677 (explaining the district did

nothing different until after a due process hearing request).

In *Woody*, the Fifth Circuit held an 89-day delay between notice and referral was reasonable where the district "spent the period 'requesting and gathering information on [the student] in an effort to classify her and determine its obligations [ ] ….". *See O.W. II* at 793 (quoting *Woody*, 865 F.3d at 320) (internal quotations and insertion in original, omission added). The *Woody* Court expressly endorsed the Third Circuit's opinion holding ". . . a student must be referred for an evaluation 'within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.'" *Woody*, 865 F.3d at 320 (quotations in original, omission added). The *Krawietz* Court repeated the standard, but in contrast, ". . . found a four-month delay unreasonable where, during the relevant time period, the school district 'failed to take any appreciable steps toward complying with its Child Find obligation.'" *See O.W. II* at 793 (quoting *Krawietz*, 900 F.3d at 677) (internal quotations in original, omission added).

2. The Fifth Circuit erred by eliminating the period of reasonable delay afforded to a school district in Child Find cases.

In O.W., the Fifth Circuit attempted to harmonize its prior opinions, *Woody* and *Krawietz*, explaining:

> Taken together, *Krawietz* and *Woody* stand for the proposition that the reasonableness of a delay is not defined by its length but by the steps taken by the district during the relevant

> period. A delay is reasonable when, throughout the period between notice and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a delay is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps.

See O.W. II at 793. Consequently, "reasonable time" in the context of delay is determined by consideration of the actions the school district takes during the delay. *See id*. That makes sense in theory; however, the Fifth Circuit's decision negates the reasonable time – *i.e.*, the very concept of delay – that it, as well as its sister circuits, previously recognized.

Specifically, the Fifth Circuit analyzed the reasonable time period by looking only to the District's actions taken *prior* to the date of notice. *See O.W. II* at 794. That is directly contrary to *D.K.*, *Woody*, and *Krawietz*, all of which make clear that the analytical focus comes *after* the date on which the school district has reason to suspect a disability. In fact, one scholar of special education jurisprudence criticized the original panel opinion noting that:

> This new approach to the second, "reasonable period" dimension of child find warrants careful attention. In this case, the court's application of this approach is subject to question. Rejecting rather than crediting the district for moving to a more formal, systematic step on October 8, the court appeared to negate any period at all, conflating it into the "reasonable suspicion"

> dimension of child find and focusing on the district's steps prior to rather than 'during the relevant period.

See Perry A. Zirkel, *Special Education Legal Alert*, October 2019, https://perryzirkel.files.wordpress.com/2019/10/zirkel-legalalert-october-2019.pdf. And, because on rehearing the panel continued to look to actions that occurred prior to the notice date, Professor Zirkel's commentary remains apt with respect to the substituted opinion. In fact, Professor Zirkel concluded as much when analyzing the Fifth Circuit's substituted opinion:

> The interrelated errors in the court's analysis cumulatively amounted to conflating, or fusing, the reasonable-suspicion and reasonable-time components of child find, thus causing confusion as to the meaning and application of the second component, which is whether the time between reasonable suspicion and evaluation initiation is reasonable.

Perry A. Zirkel, *The Fifth Circuit's Latest Child Find Ruling: Fusion and Confusion* at 469, Education Law into Practice (2020). Professor Zirkel's analysis highlights the problem with the Fifth Circuit's opinion, which now puts school districts in Texas, Louisiana, and Mississippi in a different position than districts located in jurisdictions governed by other circuit courts of appeals, most notably those located within the Second, Third, Sixth, and Eleventh circuits.

Indeed, the Fifth Circuit's analysis largely rests on the observation that:

> We agree with the hearing officer that by October 8, 2014, the School District should have known that general behavior interventions were not working and that relying exclusively on § 504 accommodations, in lieu of evaluation, would only delay providing O.W. the assistance he needed. Accordingly, we conclude the continued use of behavioral interventions was not a proactive step toward compliance with the School District's child find duties and that, therefore, a child find violation occurred.

See O.W. II at 795. In other words, the Fifth Circuit equated the failure of general education interventions prior to the October 8 date of notice with a failure to do anything after the October 8 date of notice. This fails to account for the fact that, even if the District had simply continued with regular education interventions, under *Woody* and *Krawietz* – and the decisions of every other court of appeals – it was still entitled to a reasonable delay in referring O.W. to special education – *i.e.*, continuing what it was doing does not equate to a *per se* Child Find violation. It is only a violation if there is an unreasonable period of time after the date of notice during which the district continues "business as usual" prior to referral. By reversing the analytical window, the Fifth Circuit eliminated the very concept of reasonable delay.

What is more, the Fifth Circuit's rationale still ignores the proactive steps the District took. Most significantly, as the Fifth Circuit recognized on rehearing, after the trigger date the District used a new strategy that included formal accommodations and

interventions under Section 504, a complementary federal disability protection statute. And those steps showed success. As the Fifth Circuit noted, between August 26 and October 6, O.W. was disciplined 8 times. *See O.W. II* at 787. Following the October 8 Section 504 meeting the District implemented a formal behavior intervention plan (BIP) under Section 504. *O.W. II* at 787. In the month following the implementation of the BIP, O.W. was disciplined just 1 time. *O.W. II* at 787. In November, the second month of the BIP, O.W. was disciplined 3 times. *O.W. II* at 787. In December, not at all. *O.W. II* at 787. And, in January, when O.W. was disciplined 2 times for new, physically aggressive behaviors, the District immediately referred him to special education. *O.W. II* at 787. The Fifth Circuit's characterization of this as "minimal impact" fails to appreciate that the implementation of the Section 504 plan succeeded in cutting O.W.'s discipline referrals in half. *See O.W. II* at 787.

While the original opinion did not address the District's post-notice efforts under Section 504, (*see O.W. I*, 938 F.3d at 706-07), on rehearing, the Fifth Circuit addressed the existence of Section 504 (as distinct from RtI), but still failed to appreciate the importance of Section 504. Section 504 is a federal disability protection statute that provides a qualifying student with a protected legal status and enforceable rights. *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 750-51 (2017) (explaining the related and, sometimes, overlapping nature of the IDEA and Section 504).

Importantly, Section 504's implementing regulations make clear that it requires "regular or special education" to meet the needs of disabled students with the least restrictive means possible – a core goal of the IDEA. *See* 34 C.F.R. §§ 104.33 – 104.34 (2000); *see also Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997) (recognizing the importance of providing educational services in the least restrictive environment). Specifically, like the IDEA, section 104.33(a) obligates recipients of federal funding to provide a "free and appropriate public education" to disabled students. *Id.* And section 104.33(b) defines an appropriate education as ". . . the provision of regular or special education and related aids and services . . .") (omissions added). *Id.*

Here, the Fifth Circuit found O.W.'s behavior – prior to the implementation of Section 504 accommodations – should have put the District on notice that the as yet untried use of Section 504 accommodations would not work. This formulation requires a school district to assume that accommodations under a complementary federal disability statute will not work and, instead, rush to the more restrictive provision of special education. The Fifth Circuit has eliminated Section 504 as a proactive step, thus, eliminating its use as a viable option. As a consequence, a school district that tries to accommodate a student's disabilities by using Section 504, violates Child Find if the Section 504 accommodations ultimately are unsuccessful.

If the law as it now stands is that a school district may not address a student's needs by using Section 504

accommodations, then it begs the question – what would constitute a reasonable step aside from requesting consent for an IDEA evaluation. And there is no longer a period of reasonable delay. This puts the Fifth Circuit's jurisprudence into conflict with itself and with that of its sister courts.

3. The Fifth Circuit's decision is not only wrong, it conflicts with the holdings of its sister circuits.

The Third Circuit case that was the font of the Fifth Circuit's Child Find jurisprudence illustrates the problem with the Fifth Circuit's approach. In *D.K.*, the Third Circuit observed "[i]t would be wrong to conclude that the School District failed to identify D.K. as a challenged student when it offered him substantial accommodations, special instructions, additional time to complete assignments, and one-on-one and specialist attention en route to eventually finding a disability." 696 F.3d at 252 (alteration added). In assessing reasonableness, the Third Circuit further looked to the fact that the school district's actions provided "precisely the types of special measures D.K.'s neurologist recommended after diagnosing him with ADHD." *Id.* at 253. In other words, the Third Circuit's focus was appropriately on post-notice actions. Similarly, O.W.'s private psychiatrist recommended Section 504 accommodations, which the District provided. ROA.2004-2005; *see also O.W. II* at 786; ROA.2052; ROA.3065:1–3. And when, after a period of initial success, O.W.'s behaviors escalated to physical aggression, the District referred him to special education. All within 99 days, including weekends, and

the Thanksgiving, Christmas, and New Year's holidays. That was reasonable. In fact, the District acted in substantially less time than was at issue in *D.K.*

The Fifth Circuit distinguished *D.K.* by relying on the fact that it involved a very young student. *See O.W. II* at 784. But that misses critical aspects of the Third Circuit's holding – most notably that the district's two-years long efforts with regular education prior to referral were "proactive steps." *D.K.*, 696 F.3d at 252. A plain reading of the language from *D.K.* cited by the Fifth Circuit shows the primary thrust of the holding is that the IDEA does not compel a rush to judgment. With a young child, a district may properly use regular interventions and Section 504 as proactive steps for years. With an older elementary age student such as O.W., the temporal period may shrink, but it should certainly encompass at least a single semester. And that is the length of time the District used the proactive steps of RtI and Section 504 before referring O.W. to special education. Because the Fifth Circuit's opinion fails to afford the District even that brief window, it conflicts with *D.K.*

It also conflicts with the Eleventh Circuit's decision in *Durbrow*, where that court recognized that the continued use of Section 504 accommodations for nearly a whole school year after the student's grades declined would have precluded a finding that the district violated Child Find because it was addressing the student's needs through alternative means. 887 F.3d at 1196.

It also conflicts with the rules of the Second Circuit and Sixth Circuit that a Child Find violation must rest

on the district's negligence in failing to order testing or the lack of rational justification for not evaluating. 720 F. App'x at 285. Here, trying Section 504 for a short period of time was rational. This is especially true in light of the Fifth Circuit's conclusion the District's Section 504 plan itself was reasonable. *See O.W. II* at 794, n.12. Using accommodations under a complementary federal disability statute is not negligent.

What the Fifth Circuit's holding means is that, if regular education interventions have failed prior to the notice date, then the school district labors under a duty to make an immediate referral in order to avoid committing a Child Find violation. Of course, in virtually every situation before a child is referred for a special education evaluation, the school district will have used regular education. As a practical matter, the reasonable time period that the Fifth Circuit previously recognized – along with its sister courts of appeals – no longer exists within the Fifth Circuit.

The consequences of this new articulation of the rule are enormous. Especially when considered in light of the fact that many children, even those with disabilities, will exhibit behavioral issues or academic challenges at some point that will not require special education. Rather, their needs can, and should be, addressed through regular education interventions or Section 504 accommodations. But, under the Fifth Circuit's articulation and application of the rule, neither step is reasonable. That will lead to subjecting some students to unnecessary evaluations. And the Fifth Circuit now requires that educators forgo

exercising their professional judgment and, instead, anticipate that anything other than special education will fail.

4. This case is an excellent vehicle for resolving the circuit split.

The Third Circuit, in particular, has developed Child Find jurisprudence that stretches back a quarter of a century. The Second, Sixth, and Eleventh Circuits have all relied on the Third Circuit's reasonable period of delay standard. In fact, until this case, the Fifth Circuit did, too. Given the maturity of the Third Circuit's rule, there is virtually no prospect that the Third Circuit, or those that have followed it, will change its rule. And, with the Fifth Circuit denying en banc rehearing, there is every indication that the Fifth Circuit will continue to apply its new rule. The circuit split will not go away.

What is more, Child Find was litigated at every step of the proceedings in this case. Consequently, there is no prospect that the Court will determine that the record is lacking necessary factual development. In other words, the Court will not find itself deciding this case on an alternative ground.

This Court should accept this case to clarify that the proactive steps that dictate reasonableness are those that come after notice of a disability and, also, to hold that the short-term use of Section 504 accommodations en route to an ultimate finding of eligibility is a reasonable, proactive step.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 23, 2020