

No. 20-905

---

---

In the  
Supreme Court of the United States

---

INDEPENDENT SCHOOL DISTRICT NO. 283,

*Petitioner,*

v.

E.M.D.H. EX REL. L.H. AND S.D.,

*Respondent.*

---

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

---

**BRIEF IN OPPOSITION**

---

AMY J. GOETZ  
SCHOOL LAW CENTER, LLC  
452 Selby Avenue  
Suite 2E  
Saint Paul, MN 55101

ROMAN MARTINEZ  
*Counsel of Record*  
CAROLINE A. FLYNN  
JAMES A. TOMBERLIN  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004  
(202) 637-3377  
roman.martinez@lw.com

*Counsel for Respondent*

---

---

## QUESTION PRESENTED

The Individuals with Disabilities Education Act (“IDEA”) has a two-year statute of limitations applicable to claims asserting a school district’s failure to identify and evaluate a child with a disability. Here, the school district repeatedly failed to identify and evaluate respondent E.M.D.H. to determine whether she was eligible for special education, beginning in the spring of 2015 and continuing through multiple school years. In June 2017, E.M.D.H. sought a due process hearing before the state education agency based on the school district’s repeated failures to comply with its child-find obligation, as well as its more fundamental failure to provide her with a free appropriate public education as the IDEA requires. The state administrative law judge, the federal district court, and the Eighth Circuit all rejected the school district’s argument that E.M.D.H.’s child-find claims were time-barred in their entirety.

The question presented is whether the Eighth Circuit correctly held that “at least some” of E.M.D.H.’s child-find claims were not time-barred, because the school district repeatedly violated its child-find obligation and claims for some of those violations “accrued within the applicable period of limitation.”

## TABLE OF CONTENTS

	<b>Page</b>
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	iii
INTRODUCTION .....	1
STATEMENT OF THE CASE .....	4
A. Statutory Background .....	4
B. Factual Background .....	6
C. Proceedings Below .....	10
REASONS FOR DENYING THE PETITION.....	13
I. Petitioner Misinterprets The Eighth Circuit’s Decision .....	14
II. Petitioner’s Mischaracterization Of The Decision Below Undermines All Of Its Arguments For Certiorari.....	20
A. There Is No Split On The Question Presented .....	20
B. The Eighth Circuit’s Analysis Of The Statute Of Limitations Is Correct .....	24
III. This Case Is A Poor Vehicle For Review .....	29
A. The Eighth Circuit’s Holding Can Be Affirmed On Two Alternative Grounds .....	30
B. Even If The Child-Find Claims Were Time-Barred In Full, That Would Not Affect The Remedies Awarded .....	32
CONCLUSION .....	35

**TABLE OF AUTHORITIES**

**Page(s)**

**CASES**

<i>Artis v. District of Columbia</i> , 138 S. Ct. 594 (2018).....	23
<i>Avila v. Spokane School District 81</i> , 852 F.3d 936 (9th Cir. 2017).....	30
<i>B.B. v. Delaware College Preparatory Academy</i> , 803 F. App'x 593 (3d Cir. 2020).....	21, 22
<i>C.B. v. Special School District No. 1</i> , 636 F.3d 981 (8th Cir. 2011).....	19
<i>D.K. v. Abington School District</i> , 696 F.3d 233 (3d Cir. 2012).....	20, 21
<i>Draper v. Atlanta Independent School System</i> , 518 F.3d 1275 (11th Cir. 2008).....	30
<i>Durbrow v. Cobb County School District</i> , 887 F.3d 1182 (11th Cir. 2018).....	22, 23
<i>Andrew F. v. Douglas County School District RE-1</i> , 137 S. Ct. 988 (2017).....	5
<i>Evan H. v. Unionville-Chadds Ford School District</i> , No. 07-4990, 2008 WL 4791634 (E.D. Pa. Nov. 4, 2008) .....	21

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
<i>Figueroa v. District of Columbia Metropolitan Police Department, 633 F.3d 1129 (D.C. Cir. 2011)</i> .....	18, 25, 27
<i>Forest Grove School District v. T.A., 557 U.S. 230 (2009)</i> .....	6, 29, 33
<i>Fry v. Napoleon Community Schools, 137 S. Ct. 743 (2017)</i> .....	5
<i>G.L. v. Ligonier Valley School District Authority, 802 F.3d 601 (3d Cir. 2015)</i> .....	21, 23
<i>Hamer v. City of Trinidad, 924 F.3d 1093 (10th Cir.), cert. denied, 140 S. Ct. 644 (2019)</i> .....	16, 17, 25, 27, 28
<i>Jana K. v. Annville-Cleona School District, 39 F. Supp. 3d 584 (M.D. Pa. 2014)</i> .....	23, 28
<i>Ledbetter v. Goodyear Tire &amp; Rubber Co., 550 U.S. 618 (2007)</i> .....	25
<i>In re Minnetonka Public Schools v. M.L.K., No. 20-1036, 2021 WL 780723 (D. Minn. Mar. 1, 2021)</i> .....	3, 19
<i>In re Mirapex Products Liability Litigation, 912 F.3d 1129 (8th Cir. 2019)</i> .....	13, 18
<i>Mr. P. v. West Hartford Board of Education, 885 F.3d 735 (2d Cir.), cert. denied, 139 S. Ct. 322 (2018)</i> .....	22

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
<i>National Railroad Passenger Corp. v. Morgan,</i> 536 U.S. 101 (2002).....	17, 25
<i>P.P. v. West Chester Area School District,</i> 585 F.3d 727 (3d Cir. 2009) .....	25
<i>Poly-Med, Inc. v. Novus Scientific Pte. Ltd.,</i> --- F. App'x ---, 2021 WL 37449 (4th Cir. Jan. 5, 2021).....	16, 17
<i>Reid v. District of Columbia,</i> 401 F.3d 516 (D.C. Cir. 2005).....	33
<i>Reyes v. Manor Independent School District,</i> 850 F.3d 251 (5th Cir. 2017).....	23

**STATUTES**

20 U.S.C. § 1412(a)(1) .....	5
20 U.S.C. § 1412(a)(3)(A) .....	5, 25
20 U.S.C. § 1414(a).....	5
20 U.S.C. § 1414(a)(1)(B) .....	5
20 U.S.C. § 1414(b).....	5
20 U.S.C. § 1414(c).....	5
20 U.S.C. § 1414(d).....	5
20 U.S.C. § 1415(a).....	33

**TABLE OF AUTHORITIES—Continued**

	<b>Page(s)</b>
20 U.S.C. § 1415(b)(6) .....	5
20 U.S.C. § 1415(b)(6)(B) .....	6
20 U.S.C. § 1415(d)(1)(A)(i).....	31
20 U.S.C. § 1415(d)(2)(E)(i).....	31
20 U.S.C. § 1415(f) .....	5
20 U.S.C. § 1415(f)(3)(C) .....	1, 6, 25, 30
20 U.S.C. § 1415(f)(3)(D).....	6
20 U.S.C. § 1415(f)(3)(D)(ii) .....	31
20 U.S.C. § 1415(i)(2) .....	5
20 U.S.C. § 1415(i)(2)(C)(iii) .....	6

**OTHER AUTHORITIES**

71 Fed. Reg. 46,540 (Aug. 14, 2006) .....	26
Kyle Graham, <i>The Continuing Violations Doctrine</i> , 43 Gonz. L. Rev. 271 (2008).....	16, 17, 18
H.R. Rep. No. 108-77 (2003) .....	27
Elad Peled, <i>Rethinking the Continuing Violation Doctrine</i> , 41 Ohio N.U. L. Rev. 343 (2015).....	17
S. Rep. No. 108-185 (2003).....	27

## INTRODUCTION

Beginning in eighth grade and continuing through high school, respondent E.M.D.H. suffered from serious mental conditions that severely impacted her ability to attend school and learn in a classroom. For years, petitioner Independent School District No. 283 refused to properly evaluate E.M.D.H. to determine whether she qualified for special education and related services. The Minnesota Department of Education and the courts below held that petitioner's neglect of E.M.D.H. violated its "child find" duty under the Individuals with Disabilities Education Act ("IDEA"). They also found that petitioner denied E.M.D.H. a IDEA-mandated free appropriate public education ("FAPE") for years.

Petitioner does not seek review of the merits of those determinations. Instead, it argues only that E.M.D.H.'s attempt to recover for the child-find violation is time-barred under the IDEA's two-year statute of limitations, 20 U.S.C. § 1415(f)(3)(C). Petitioner asserts that the child-find claim accrued in May or June 2015—that is, around the time petitioner *first* began violating its child-find duty—and that her parents' complaint and request for a hearing slightly over two years later (on June 27, 2017) was too late. As a result, petitioner argues, E.M.D.H. cannot recover for a child-find violation *at all*—even though petitioner kept violating its child-find obligation throughout the two-year period immediately preceding her parents' hearing request.

The Eighth Circuit rejected petitioner's untenable position. It ruled that where a child-find violation is repeated well into the limitations period, a student can seek relief for those violations that take place *in*



*the two years preceding her complaint.* As the Eighth Circuit explained, “because of the District’s continued violation of its child-find duty, *at least some* of the Student’s claims . . . accrued within the applicable period of limitation.” Pet. App. 18a (emphasis added).

In seeking certiorari, petitioner characterizes the Eighth Circuit’s analysis as adopting the “continuing violations doctrine” to hold “that a district’s continued violation of its child-find duty may make *an otherwise time-barred claim timely.*” Pet. 13 (emphasis added) (citation omitted). According to petitioner, the Eighth Circuit held that because some of the child-find violations occurred within two years of when E.M.D.H.’s parents brought their complaint, they are entitled to obtain relief for *all* of those violations—even those occurring outside the two-year period.

But petitioner mischaracterizes the decision below. The Eighth Circuit did not hold that a student can recover for child-find violations occurring outside the limitations period. Rather, the court expressly stated that “[a]ny claim of a breach falling outside of the IDEA’s two-year statute of limitations would be *untimely.*” Pet. App. 18a (emphasis added).

In misinterpreting the Eighth Circuit’s analysis, petitioner appears to conflate two distinct concepts that are both sometimes characterized using the “continuing violation doctrine” label. Under the first version of the doctrine—which this brief calls the “sweep-in version”—a court considers conduct from *outside* the limitations period and packages it together with conduct *inside* the limitations period to form a single violation that, taken as a whole, is deemed timely. That is the version of the continuing violation doctrine attacked by the petition.

But there is also the “repeated violations” version of the doctrine, which operates very differently (and has different ramifications). Under that version, an ongoing course of conduct is viewed as a series of discrete, repeated violations—some violations occurring outside the limitations period, and some occurring within it. Crucially, though, only the violations that accrue *within* the limitations period are deemed timely and actionable. This repeated-violations version of the doctrine is what the Eighth Circuit applied here, when it held that “at least *some*” of E.M.D.H.’s child-find claims were timely. Pet. App. 18a (emphasis added). Indeed, that is how the Eighth Circuit’s holding has been interpreted by the only district court to have applied it thus far. *See In re Minnetonka Pub. Schs. v. M.L.K.*, No. 20-1036, 2021 WL 780723, at \*6 (D. Minn. Mar. 1, 2021).

Once petitioner’s mischaracterization of the Eighth Circuit’s decision is corrected, all of its arguments for certiorari fall away. There is no split of authority. Four circuits apply the repeated-violations doctrine in enforcing the IDEA’s statute of limitations. Nor does the Eighth Circuit’s ruling lead to the dire policy consequences that petitioner and its amici describe. Applying the repeated-violations doctrine does not enable parents of a child with a disability to sit on a child-find claim for years and recover for that violation way down the road. Instead, under the Eighth Circuit’s rule, families will only be able to recover for their school district’s previous two years of IDEA violations.

Indeed, it is *petitioner’s* position—which no court of appeals has adopted—that would have terrible policy implications. Petitioner evidently believes that if a student fails to seek an IDEA hearing within two

years of when a district *first begins* violating the statute, she is forever barred from seeking any relief—even if petitioner continues to violate the IDEA for years afterward. Under petitioner’s view, a school district could flout its child-find obligation for the entirety of a child’s K-12 education, and so long as the parents do not request a hearing by second grade, the family cannot get relief for the many subsequent years of lost education. There is no way the IDEA countenances that result, which would fully immunize districts from ongoing liability for repeated IDEA violations after two years.

Even if the Court were willing to overlook the absence of a split or any conflict with a decision of this Court, this case would be an exceedingly poor vehicle for review of the question presented. The Eighth Circuit’s statute-of-limitations ruling can be affirmed on either of two alternative grounds, embraced by the administrative law judge and the district court, respectively. And even if the child-find claims are held untimely in their entirety, that unlikely result would have no effect on the relief awarded to E.M.D.H. for petitioner’s multiple IDEA violations—including its denial of a FAPE. The only consequence of this Court’s review would be to unduly prolong E.M.D.H. and her parents’ legal battle to get the special education and other services that petitioner has wrongfully refused to provide for years.

Certiorari should be denied.

## **STATEMENT OF THE CASE**

### **A. Statutory Background**

The IDEA “offers federal funds to States in exchange for a commitment: to furnish a ‘free appropriate public education’—a FAPE—to all

children with certain physical or intellectual disabilities.” *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017); *see also* 20 U.S.C. § 1412(a)(1). To meet this commitment, school districts are required to create an individualized education program (“IEP”) for each child with a qualifying disability; the IEP must be reasonably calculated to enable the child to make progress appropriate in light of her circumstances. 20 U.S.C. § 1414(d); *see also* *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

To implement this “substantive obligation” to provide a FAPE, *Endrew F.*, 137 S. Ct. at 999, the IDEA also imposes important procedural responsibilities on school districts. This includes the “[c]hild find” obligation: the IDEA’s requirement that “[a]ll children with disabilities residing in the State . . . who are in need of special education and related services, are *identified*, located, and *evaluated*.” 20 U.S.C. § 1412(a)(3)(A) (emphasis added). The IDEA also establishes procedures that a school district must follow in conducting an initial evaluation to determine a student’s eligibility for special education. *Id.* § 1414(a)-(c). Either the district or the parents may initiate an evaluation. *Id.* § 1414(a)(1)(B).

The IDEA also sets forth procedures for adjudicating and remedying statutory violations. Parents must present a complaint and request a “due process hearing” before a state educational agency. *Id.* §§ 1415(b)(6), 1415(f). An administrative hearing officer conducts the hearing, and the parties may seek review of that decision in federal district court. *Id.* § 1415(i)(2).

If the court concludes that a child's IDEA rights were violated, it may award "such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(C)(iii). That provision "confers broad discretion on the court" to craft equitable remedial awards "in light of the Act's broad purpose of providing children with disabilities a FAPE." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 237-38 (2009). This includes the authority to award equitable monetary relief in the form of reimbursement for past or future educational expenses, called "compensatory" relief. *See id.* at 237-43; Pet. App. 20a-21a.

In 2004, Congress amended the IDEA to impose a two-year statute of limitations. 20 U.S.C. § 1415(f)(3)(C); *see also id.* § 1415(b)(6)(B). The statute establishes a discovery rule: "A parent or agency shall request an impartial due process hearing within 2 years of the date the parents or agency *knew or should have known* about the alleged action that forms the basis of the complaint." *Id.* § 1415(f)(3)(C) (emphasis added).

Congress also provided two statutory exceptions to that timeline. The two-year period does not apply if "the parent was prevented from requesting the hearing due to" (1) "specific misrepresentations by the [district] that it had resolved the problem forming the basis of the complaint," or (2) "the [district's] withholding of information from the parent that was required under this subchapter to be provided to the parent." *Id.* § 1415(f)(3)(D).

### **B. Factual Background**

E.M.D.H. is a student in Independent School District No. 283 in St. Louis Park, Minnesota. She is exceptionally bright and gifted. But she also suffers

from generalized anxiety disorder, autism spectrum disorder, panic disorder with associated agoraphobia, attention deficit hyperactivity disorder, and severe recurrent major depressive disorder. Pet. App. 3a. Beginning around eighth grade and continuing into her high school years, these conditions manifested in the form of an extreme fear of school—rendering E.M.D.H. unable to consistently attend her classes for any significant period of time. *Id.* For years, petitioner knew that her absences were the result of serious mental health conditions. *Id.* at 3a-4a. Petitioner’s response, however, was to do nothing: It took the view that E.M.D.H.’s inability to learn in a classroom was not her school’s responsibility, because she had been a high-achieving student when she was able to attend. *Id.* at 13a-15a, 17a. Petitioner’s prolonged failure to evaluate E.M.D.H., its determination that she did not have a qualifying disability once it evaluated her, and its refusal to provide her with special education services led her parents to seek relief under the IDEA for a denial of a FAPE and other violations.

In the spring of eighth grade (spring 2015), E.M.D.H.’s conditions caused her to be frequently absent. *Id.* at 3a-4a, 26a. Petitioner understood that E.M.D.H.’s absences were due to mental health issues, and in May 2015, her parents informed the school they were placing their daughter in a psychiatric day-treatment facility, where she remained for a month. *Id.* at 25a-26a, 45a-46a. Petitioner nonetheless failed to initiate an evaluation to determine whether E.M.D.H. had a disability requiring special education. Instead, her teachers gave her incompletes and petitioner dis-enrolled her from the district. Pet. App. 4a.

E.M.D.H. re-enrolled and transitioned to high school, where her difficulties became even more severe and obvious. In the summer before E.M.D.H.'s ninth-grade year (fall 2015 to spring 2016), E.M.D.H.'s mother told her new high-school guidance counselor that E.M.D.H.'s previous absences stemmed from anxiety and school phobia. Pet. App. 4a. But the counselor did not initiate an evaluation. *Id.* at 4a, 26a. E.M.D.H.'s attendance was again irregular, and in November 2015, she returned to the day-treatment facility. *Id.* Petitioner again dis-enrolled her. *Id.*

E.M.D.H. returned to school, but her struggles continued. In April 2016, high school staff held an internal meeting to discuss evaluating E.M.D.H. for special education, but they did not make the referral. *Id.* at 4a, 26a-27a. Instead, staff told E.M.D.H.'s parents (incorrectly) that only parents could initiate the evaluation process. *Id.* at 4a. Staff also told the parents that if E.M.D.H. received special education she would be removed from her honors classes. *Id.* Petitioner dis-enrolled E.M.D.H. again later that spring, and she was admitted to a hospital in-patient program that summer. *Id.* at 4a, 27a.

E.M.D.H. nonetheless moved on to tenth grade (fall 2016 to spring 2017). In the fall, petitioner created a "Section 504" accommodation plan for her—in clear recognition that she had conditions that substantially interfered with her learning—but still did not propose an evaluation of her eligibility for special education under the IDEA. *Id.* at 4a-5a, 27a.<sup>1</sup>

---

<sup>1</sup> "Section 504" refers to Section 504 of the Rehabilitation Act, another statute protecting children with disabilities in the school setting.

She stopped attending classes again, and petitioner dis-enrolled her a fourth time. *Id.* at 5a.

In January 2017, E.M.D.H. and her mother again met with school staff. *Id.* at 5a, 28a. Once again, staff indicated that special education was not appropriate for her academically gifted daughter. *Id.* E.M.D.H. attended only one day of school that semester, and petitioner dis-enrolled her a fifth time in February 2017. *Id.*

Finally, on April 28, 2017, her parents asked petitioner to evaluate E.M.D.H. to determine her eligibility for special education. *Id.* But petitioner did not complete that evaluation until October 2017. *Id.* at 6a, 30a. Meanwhile, in May 2017, her parents paid a doctor to conduct a comprehensive psychological evaluation; that doctor diagnosed E.M.D.H. with major depressive disorder, autism spectrum disorder, ADHD, and generalized anxiety disorder with panic and OCD features and features of borderline personality disorder. *Id.* at 5a, 28a-29a. On June 14, 2017, petitioner provided a procedural safeguards notice to E.M.D.H.'s mother explaining her rights under the IDEA. *Id.* at 29a. Then, on June 27, 2017, the parents filed a complaint and requested a due process hearing before the Minnesota Department of Education. *Id.* at 18a, 33a.

In November 2017, during E.M.D.H.'s junior year, petitioner shared the results of its evaluation with E.M.D.H.'s parents; it concluded that she did not have a qualifying disability. Pet. App. 6a, 31a. E.M.D.H.'s parents were forced to hire a team of doctors and other experts to conduct an independent evaluation to confirm their daughter's previous diagnoses and recommend special education. *Id.* at 6a, 31a-32a. Given petitioner's obstinacy, her parents also hired a



private tutor to provide educational services to E.M.D.H. at home. *Id.* at 19a.

### **C. Proceedings Below**

1. In their June 2017 complaint, E.M.D.H. and her parents alleged that petitioner violated the IDEA by failing to identify and properly evaluate E.M.D.H. (the “child-find” violation), by failing to find her eligible for special education, and by failing to provide such education and related services, thereby denying her a FAPE. Pet. App. 33a-34a; Dkt. 76-9 at 849-52 (Complaint and Request for Expedited Hearing).<sup>2</sup> The complaint alleged that petitioner violated its child-find duties “over the past two and a half years” (from spring of eighth grade through ninth and tenth grades). Dkt. 76-9 at 851.

In March 2018, a state administrative law judge issued a thorough decision agreeing with E.M.D.H. and her parents across the board. Pet. App. 6a-7a, 34a-35a. The ALJ found that petitioner violated its child-find obligation; failed to conduct a proper evaluation; wrongly deemed E.M.D.H. ineligible; and denied her a FAPE from spring 2015 up to the decision date. *Id.* The ALJ ordered petitioner to recognize E.M.D.H. as eligible for special education and develop an IEP for her. *Id.* at 7a, 34a. The ALJ also ordered, as a compensatory remedy, that petitioner reimburse the parents for the cost of private tutoring from November 2017 through the decision date, continue to pay for private services

---

<sup>2</sup> Citations in the form of “Dkt. \_\_\_” refer to documents filed below in No. 18-cv-00935 (D. Minn.). Citations in the form of “CA8 \_\_\_” refer to documents filed below in Nos. 19-1269 & 19-1336 (8th Cir.).

until E.M.D.H. earned enough credits to graduate, and pay for her tutor and psychiatrist to attend IEP meetings. *Id.* at 7a, 21a. In addition, the ALJ ordered petitioner to reimburse the parents for the May 2017 and November 2017 evaluations. *Id.* at 7a, 19a.

The ALJ rejected petitioner's contention that the IDEA's statute of limitations barred the child-find claims. Dkt. 2 at 42-43 (ALJ Order). Petitioner argued that the child-find violation happened in "the spring of 2015"—when E.M.D.H. stopped attending eighth grade and first required treatment at a facility—but that the parents did not file their complaint until June 27, 2017, slightly over two years afterward. ALJ Order 43; *see also* Dkt. 88 at 48 (Dist.'s Mem. of Law in Supp. of Mot. for J. on the Administrative R.) (recounting petitioner's argument). The ALJ rejected this argument based on Section 1415(f)(3)(C)'s discovery language, because there was no evidence showing "the Parents knew or should have known about the School District's obligation to conduct child find and make a proposal to evaluate" back in the spring of 2015. *Id.*

2. Petitioner sought judicial review. The district court affirmed all of the ALJ's determinations regarding petitioner's IDEA violations, and it largely affirmed the ALJ's decision on the proper remedy, limiting one aspect of the compensatory relief. Pet. App. 23a. On the statute-of-limitations issue—which petitioner again raised only in connection with the child-find violation, *see id.* at 43a-44a—the district court found that Section 1415(f)(3)(D)'s second statutory exception rendered all of E.M.D.H.'s child-find claims timely, because petitioner failed to provide the required procedural safeguards notice to the parents when it should have. *Id.* at 44a-45a.

Both sides appealed. As relevant here, petitioner reprised its argument that the child-find claims were “time-barred in full” because the parents should have known of petitioner’s child-find violation “[a]s of the spring of 2015,” or “not later than June 12, 2015.” CA8 Appellant/Cross-Appellee Br. 56, 61-63 & n.17 (Apr. 16, 2019); *see also* Dkt. 88 at 48-51 (arguing in the district court that the child-find claim accrued on May 26, 2015). E.M.D.H. argued that the district court erred in limiting the compensatory relief.

In a unanimous opinion, the Eighth Circuit held in favor of E.M.D.H. on all issues, including by reinstating the compensatory relief in full. Pet. App. 3a. Like the district court, the Eighth Circuit agreed with the ALJ that E.M.D.H. was eligible for special education and that petitioner committed multiple procedural and substantive IDEA violations, including denying E.M.D.H. a FAPE for nearly three years. *Id.* at 9a-18a.

The Eighth Circuit resolved petitioner’s statute-of-limitations challenge on a different basis, however. The court first “[a]ssum[ed]”—without deciding—that “the parents knew or should have known they had a child-find claim when the Student was an eighth-grader” (i.e., around the spring of 2015). *Id.* at 18a. The court also recognized that “[a]ny claim of a breach falling outside of the IDEA’s two-year statute of limitations period would be untimely.” *Id.* But the court found that petitioner did not violate its child-find obligation *only* in eighth grade. Rather, “the District staff responsible for identifying the Student in the ninth and tenth grades likewise failed to fulfill their child-find obligation.” *Id.*

The child-find violation, the Eighth Circuit explained, “was not a single event like a decision to

suspend or expel a student; instead the violation was repeated well into the limitations period.” *Id.* Citing another case for the proposition that “breaches of continuing or recurring obligations’ give rise to new claims with their own limitation periods,” the Eighth Circuit held that “because of the District’s continued violation of its child-find duty, *at least some* of the Student’s claims of breach of that duty accrued within the applicable period of limitation.” *Id.* (emphasis added) (quoting *In re Mirapex Prods. Liab. Litig.*, 912 F.3d 1129, 1134 (8th Cir. 2019)).

### **REASONS FOR DENYING THE PETITION**

The decision below presents no basis for review. Most importantly, the petition—and its question presented—are based entirely on an inaccurate characterization of the Eighth Circuit’s ruling. The court did *not* hold that petitioner’s ongoing child-find violation rendered E.M.D.H.’s otherwise time-barred claim timely. Rather, the Eighth Circuit ruled that E.M.D.H. could recover under the IDEA for those child-find violations that took place during the two years immediately preceding her request for a due process hearing. That ruling presents no conflict with a decision of any other court of appeals. To the contrary, three other circuits have adopted the same approach, and none has rejected it.

Petitioner’s merits arguments are likewise misguided—because they attack a straw-man position the Eighth Circuit never adopted. Moreover, even if the Eighth Circuit were wrong on the merits, review would still not be warranted, as petitioner’s statute-of-limitations challenge fails for the two alternative reasons adopted by the ALJ and the district court below. And even if E.M.D.H.’s child-find

claims were held untimely in their entirety, that unlikely result would not affect any of the equitable relief she was awarded in this case—all of which is independently supported by other IDEA violations that petitioner does not challenge in this Court.

### **I. PETITIONER MISINTERPRETS THE EIGHTH CIRCUIT’S DECISION**

Petitioner characterizes the Eighth Circuit as holding “that a district’s ‘continued violation of its child-find duty’ may make an *otherwise time-barred claim timely*.” Pet. 13 (emphasis added) (citation omitted). In other words, petitioner interprets the decision below to hold that even if the child-find claim first accrued sometime in the spring/early summer of 2015, the parents were entitled to file their complaint on June 27, 2017 (more than two years later) and recover for *all* of petitioner’s 2015-2017 conduct—because petitioner’s continued violation of its child-find obligation rendered *all* of the child-find claims entirely timely. *Id.* at 2, 7-8, 13-14, 17.<sup>3</sup> Petitioner argues that this purported use of the “continuing violation doctrine” is problematic because it creates an unwritten “exception” to the statute of limitations in Section 1415(f)(3)(C). *Id.* at 2. Petitioner further argues that the Eighth Circuit’s rule would mean that a continuing child-find claim can never be time-barred, no matter how long ago the violation first happened—such that a district “could be on the hook for violations that took place over a decade earlier,

---

<sup>3</sup> Before the district court, petitioner said that the accrual date was May 26, 2015; before the Eighth Circuit, petitioner said the claim accrued in “spring of 2015” or “not later than June 12, 2015.” *See supra* at 12.

perhaps when a student who is now in high school was in elementary school.” *Id.* at 22; *see also id.* at 19.

All of this mischaracterizes the Eighth Circuit’s decision. The court of appeals did *not* hold that E.M.D.H. could recover for child-find violations that occurred outside the limitations period. Rather, the court held that only “*some*” of E.M.D.H.’s child-find claims were timely—those based on petitioner’s conduct postdating June 25, 2015, two years before E.M.D.H. filed her complaint—but that she could not recover for petitioner’s child-find violations that occurred *before* that point.

The Eighth Circuit explained that even if the two-year statute had run on E.M.D.H.’s claim that petitioner committed a child-find violation “when [she] was an eighth-grader [i.e., during the 2014-2015 school year]” that was not petitioner’s only violation: “the District staff responsible for identifying the Student *in the ninth and tenth grades* likewise failed to fulfill their child-find obligation.” Pet. App. 18a (emphasis added). Thus, the child-find violation “was repeated well into the limitations period.” *Id.* So while E.M.D.H.’s “claim of a breach falling outside of the IDEA’s two year statute of limitations”—i.e., her claim based on eighth grade—may have been “untimely,” “*some of [her] claims* of breach of that duty accrued *within* the applicable period of limitation.” *Id.* (emphasis added). And because about only a month of petitioner’s multi-year child-find violations were time-barred—or even just a couple of weeks, given petitioner’s concession that that the claim might have first accrued on June 12, 2015, *see supra* at 12—the Eighth Circuit naturally determined that the excluded portion of the child-find claims

should have no effect on the remedies awarded. *See* Pet. App. 18a-21a.

In advancing its contrary interpretation, petitioner latches onto the Eighth Circuit’s use of the phrase “continued violation,” *id.* at 18a, and argues that the court must have adopted the “continuing violation doctrine.” *See, e.g.*, Pet. i, 2, 10. Petitioner describes that doctrine as “mak[ing] otherwise time-barred claims timely, because the clock does not start running on the plaintiff’s time to file suit until the last asserted occurrence of [the illegal] practice.” *Id.* at 7 (alteration in original) (internal quotation marks omitted).

Crucially, though, petitioner conflates two different concepts that are (sometimes) both given the “continuing violation doctrine” label. *See* Kyle Graham, *The Continuing Violations Doctrine*, 43 *Gonz. L. Rev.* 271, 275, 279-80 (2008); *Hamer v. City of Trinidad*, 924 F.3d 1093, 1100-03 (10th Cir.) (explaining the distinction between the two), *cert. denied*, 140 S. Ct. 644 (2019); *Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, --- F. App’x ---, 2021 WL 37449, at \*4 (4th Cir. Jan. 5, 2021) (same). The first version of the doctrine—the “sweep-in version”—“aggregates wrongs to permit recovery for harm suffered *outside* of the limitations period.” Graham, *supra*, at 283 (emphasis added); *see also Poly-Med*, 2021 WL 37449, at \*4. In other words, the sweep-in version “tethers conduct from both inside and outside the limitations period into one single violation that, taken as a whole, satisfies the applicable statute of limitations [period].” *Hamer*, 924 F.3d at 1100. The sweep-in version thus “permits a plaintiff to recover for wrongdoing transpiring outside of the limitations period, which is saved from the limitations bar

because of its connection to more recent misconduct.” Graham, *supra*, at 280. The paradigmatic example of when this sweep-in theory is appropriate is a hostile work environment claim under Title VII of the Civil Rights Act of 1964. See *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105, 117-18 (2002). Petitioner’s argument is that the Eighth Circuit embraced the sweep-in version of the continuing violation doctrine here. See, e.g., Pet. 2-3, 13, 19.

In reality, however, the Eighth Circuit embraced the second version of the continuing violations theory—“the ‘repeated violations’ doctrine.” *Hamer*, 924 F.3d at 1100. That version “*divides* what might otherwise represent a single, time-barred cause of action into several separate claims, at least one of which accrues within the limitations period.” *Id.* (quoting Graham, *supra*, at 275). In other words, the court “regards each act of infringement as a separate, independently actionable event, which restarts the limitation period”—meaning that a plaintiff “may recover damages attributable to any wrongful act or omission for which the limitation period has not lapsed.” Elad Peled, *Rethinking the Continuing Violation Doctrine*, 41 Ohio N.U. L. Rev. 343, 353 (2015); see also *Poly-Med*, 2021 WL 37449 at \*4 (explaining that the repeated-violations doctrine “operates to save the later arising claims, even if the statute of limitations has lapsed for the earlier events”).<sup>4</sup> The paradigmatic example is an action for

---

<sup>4</sup> Courts and commenters sometimes call the repeated-violations version “the ‘modified’ continuing violation doctrine,” *Hamer*, 924 F.3d at 1100 n.4; see Graham, *supra*, at 283; *Poly-Med*, 2021 WL 37449, at \*4 n.2, or the “‘separate accrual’ rule,” Peled, *supra*, at 353.



an ongoing nuisance; while the plaintiff would be unable to recover for harm caused by the nuisance before the applicable limitations period, he would not be precluded from recovering for harm caused by the nuisance within the limitations period. Graham, *supra*, at 282.

These “two types of continuing violations” are “frequently confused and conflated,” even though the “two approaches are in fact quite different in both purpose and effect.” *Id.* at 275. As the D.C. Circuit has explained in applying the repeated-violations version, labeling such situations a “continuing violation” can be “something of a misnomer,” as the theory is really that there has been “a series of repeated violations.” *Figueroa v. District of Columbia Metro. Police Dep’t*, 633 F.3d 1129, 1135 (D.C. Cir. 2011).

Here, it is evident from the face of the opinion that the Eighth Circuit was employing the repeated-violations version. *See* Pet. App. 18a (describing the child-find violation as “not a single event” but rather “repeated”); *id.* (explaining that although claims outside the two-year period “would be untimely,” “some of” the claims “accrued within the applicable period of limitation”). The Eighth Circuit’s *Mirapex* citation confirms that interpretation; the court described *Mirapex* as noting that “breaches of continuing or recurring obligations’ give rise to *new* claims with *their own* limitation periods.” Pet. App. 18a (emphasis added) (citation omitted); *see also In re Mirapex Prods. Liab. Litig.*, 912 F.3d 1129, 1132, 1134-35 (8th Cir. 2019) (rejecting the plaintiff’s attempt to invoke the repeated-violations version). And the Eighth Circuit had previously adhered to similar reasoning in another IDEA case applying

Section 1415(f)(3)(C). *See C.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981, 989 (8th Cir. 2011) (noting that “[g]iven the IDEA’s two-year statute of limitations . . . [the student] challenged the special education services provided by the School District in fourth and fifth grade,” even though he alleged that the services were insufficient in earlier grades).

Notably, the only court to have applied this aspect of the Eighth Circuit’s decision to date has interpreted the decision just like respondent does here—as adopting the repeated-violations theory. *In re Minnetonka Pub. Schs. v. M.L.K.*, No. 20-1036, 2021 WL 780723, at \*6 (D. Minn. Mar. 1, 2021) (describing the decision below as holding that “[a]ny claim of a breach falling outside of the IDEA’s two-year statute of limitations would be untimely” but that “some claims accrued within limitations period” (alteration in original) (citation omitted)). So too has one ALJ. Sixth Prehearing Order 6 & n.15, *In re A.T. v. Osseo Public Schs., Indep. Sch. Dist.* 279 (Minn. Off. of Admin. Hearings for the Dep’t of Educ. Feb. 1, 2021) (citing the Eighth Circuit’s decision when allowing parents to proceed on claims that accrued within the limitations period, even though “the Parents[] did not promptly litigate a similar claim that accrued [outside the limitations period]”). Indeed, one of petitioner’s own amici acknowledged to the Eighth Circuit at the rehearing stage that the repeated-violations theory was a “possible” reading of the decision below. CA8 Minn. School Bds. Ass’n Amicus Br. in Supp. of Reh’g En Banc 9 n.4 (July 20, 2020).

As best as respondent is aware, *no* court or adjudicator has adopted petitioner’s view that the Eighth Circuit’s ruling instead adopts the sweep-in theory.

## II. PETITIONER'S MISCHARACTERIZATION OF THE DECISION BELOW UNDERMINES ALL OF ITS ARGUMENTS FOR CERTIORARI

Petitioner is thus incorrect to argue that the Eighth Circuit adopted a rule making “otherwise time-barred claims timely” and creating an unwritten “exception” to Section 1415(f)(3)(C)’s two-year period. Pet. 13. Once petitioner’s mischaracterization of the decision is understood, it is clear that certiorari is not warranted.

### A. There Is No Split On The Question Presented

The courts of appeals uniformly agree with the Eighth Circuit’s approach. Three other circuits—the Second, Third, and Eleventh—have employed the repeated-violations doctrine to find IDEA claims timely based on violations occurring within the two-year period preceding the parent’s complaint. The decisions petitioner cites from the Third and Fifth Circuits do not show any conflict with that approach at all. And petitioner points to *no* court of appeals decision adopting its own preferred position: that a child-find claim (or other IDEA violation) should be forever barred, even if it persists well into the two-year limitations period, if a school district *first* violates the law outside the two-year period.

1. The Third Circuit has regularly applied the repeated-violations doctrine to deem IDEA claims timely when a district continues violating its obligations during the limitations period, even if those violations began earlier. In *D.K. v. Abington School District*—a case petitioner cites—the student claimed child-find and denial-of-FAPE violations

from 2004 through 2007. 696 F.3d 233, 242-44 (3d Cir. 2012). The Third Circuit “delimit[ed] the time period to which D.K.’s claims apply” to only the two years preceding the parents’ complaint in January 2008. *Id.* at 244; *see id.* at 248. However, the court did *not* find the claims time-barred entirely (as petitioner’s theory here would require). *Id.* at 244, 248-52, 254.<sup>5</sup>

The Third Circuit reaffirmed its commitment to the repeated-violations theory in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601 (3d Cir. 2015), also cited by petitioner. There, the court explained that if a parent does not file a complaint within two years of discovery of the violation, then “*all but the most recent two years* before the filing of the complaint will be time-barred.” *Id.* at 620-21 (emphasis added). *G.L.* merely rejected the sweep-in version of the continuing violation doctrine. *Id.* at 625 (explaining that parents may not “attempt to *sweep* both timely and expired claims *into a single ‘continuing violation’ claim* brought years later” (emphasis added)). But the court’s analysis plainly allowed claims based on violations within two years of the filing of the complaint.

The Third Circuit squarely adhered to the repeated-violations approach again in *B.B. v.*

---

<sup>5</sup> The *D.K.* court cited a district court case rejecting “the continuing violation or equitable tolling doctrines.” 696 F.3d at 248 (quoting *Evan H. v. Unionville-Chadds Ford Sch. Dist.*, No. 07-4990, 2008 WL 4791634, at \*5 (E.D. Pa. Nov. 4, 2008)). But *Evan H.* rejected the *sweep-in* version of the doctrine: Like the Eighth Circuit below, the court limited the student’s claims to events within the two years preceding the complaint, and only rejected the student’s request for a compensatory remedy based on prior years. 2008 WL 4791634, at \*1-3, \*5.

*Delaware College Preparatory Academy*, 803 F. App'x 593 (3d Cir. 2020). The district court had deemed the student's claims for IDEA violations untimely simply because the school had committed similar violations outside the two-year limitations period. *Id.* at 595. The court of appeals reversed. Rebuking the district court for employing the same reasoning petitioner urges here, the Third Circuit explained that the student was not “seek[ing] to ‘sweep . . . expired claims into a single “continuing violation,”” but merely seeking to recover for independently cognizable violations within the two-year period preceding the complaint. *Id.* at 597 (omission in original) (citation omitted).<sup>6</sup>

The Second and Eleventh Circuits have also employed repeated-violations reasoning to find child-find claims timely even when the first violation occurred outside the limitations period. In *Mr. P. v. West Hartford Board of Education*, the Second Circuit expressly affirmed the district court's determination that although the family could not base its child-find claim on the school district's conduct *before* the two-year period, the district's continued failure to identify the student *during* the two-year period was still actionable. 885 F.3d 735, 747 n.7, 750 (2d Cir.), *cert. denied*, 139 S. Ct. 322 (2018). Similarly, in *Durbrow v. Cobb County School District*, the Eleventh Circuit found that IDEA claims based on the district's failure

---

<sup>6</sup> Petitioner mistakenly cites *B.B.* in support of its alleged circuit split, quoting language from the opinion stating that the “IDEA is not subject to the continuing violation doctrine.” Pet. 11 (quoting 803 F. App'x at 595). That quoted language is part of the Third Circuit's paraphrase of the *district court's* ruling—which the Third Circuit *reversed*.

to fulfill its child-find and FAPE obligations during the limitations period were timely, even though the district *first* failed to identify the child more than two years earlier. 887 F.3d 1182, 1188, 1192-93 (11th Cir. 2018).

2. Petitioner’s central argument for certiorari is that the Eighth Circuit’s decision conflicts with rulings from the Third and Fifth Circuits. But as just discussed, the Third Circuit has consistently adhered to the repeated-violations approach—including in the decisions petitioner invokes as embodying the split. *See G.L.*, 802 F.3d at 620-21 (indicating that claims based on violations within “the most recent two years” were not time-barred); *see also Jana K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 598-99 & n.18 (M.D. Pa. 2014) (applying the repeated-violations version and explaining that *D.K.* rejected the sweep-in version).

The Fifth Circuit decision petitioner invokes, *Reyes v. Manor Independent School District*, 850 F.3d 251 (5th Cir. 2017), is even further afield. Pet. 11-12. That case has nothing to do with (and does not mention) the continuing-violation doctrine; the Fifth Circuit stated only that “nothing in the IDEA . . . incorporates general state tolling provisions” like the tolling statute applicable to persons “of unsound mind” at issue in that case. *Reyes*, 850 F.3d at 255. But the repeated-violations doctrine does not “toll” anything. *See Artis v. District of Columbia*, 138 S. Ct. 594, 601 (2018) (“toll” usually means “that the limitations period is suspended . . . then starts running again when the tolling period ends”). The IDEA’s two-year period begins when the claim accrues (more specifically, when the parents knew or should have known of the violation), and it does not

stop running; it's just that multiple violations start their own two-year periods. So *Reyes*, too, presents no conflict with the decision below.

3. For these reasons, petitioner's alleged split rests on a mischaracterization of the Eighth Circuit's decision and is entirely illusory. Indeed, petitioner has failed to point to a single court of appeals adopting its own preferred rule—that a family cannot recover for child-find violations committed during the two-year limitations period, just because a district first violated its obligation before that period.

Even if there were some uncertainty about the nature of the Eighth Circuit's holding, certiorari would still be unwarranted. The sole district court to interpret the decision below agrees with respondent's interpretation, which also aligns with prior circuit precedent. *See supra* at 18-19. To the extent the Eighth Circuit's analysis is ambiguous, the Court should wait to see how the Eighth Circuit applies it in future cases. Intervention at this point is premature and unnecessary.

### **B. The Eighth Circuit's Analysis Of The Statute Of Limitations Is Correct**

1. This widespread consensus among the courts of appeals is not surprising—because the Eighth Circuit got it right. A child-find violation is not a single, one-off event, but rather a series of violations that repeat until the school fulfills its obligation to identify and properly evaluate the student. As a result, families may rightly recover for those violations occurring within the two-year period immediately preceding their complaint.

Section 1415(f)(3)(C)'s limitations period begins running from the date the parent knew or should have

known about the alleged “action” that violates the IDEA. 20 U.S.C. § 1415(f)(3)(C). To determine when petitioner’s unlawful “action” occurred, it is necessary to consider the nature of a child-find violation itself, focusing on the statutory language creating the obligation. *See Morgan*, 536 U.S. at 110-11, 115; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623-24 (2007).

The relevant IDEA provision requires States to “ensure” that “[a]ll children with disabilities residing in the State . . . who are in need of special education and related services[] are identified, located, and evaluated.” 20 U.S.C. § 1412(a)(3)(A). As the statutory text indicates, a district’s child-find obligation is not a one-time-only requirement to act, but rather a continual obligation to “ensure” these children are found while they remain in the system. *See P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009) (“School districts have a continuing obligation under the IDEA . . . to identify and evaluate all students who are reasonably suspected of having a disability.”). As a result, a failure to identify and evaluate the child is repeated until the child is properly evaluated.<sup>7</sup>

2. Petitioner does not meaningfully contend otherwise. Nearly all of its merits arguments are founded on the incorrect premise that the Eighth Circuit held timely child-find violations occurring

---

<sup>7</sup> A child-find violation is thus analogous to other kinds of statutory violations that courts have found qualify for the repeated-violations doctrine. *See, e.g., Hamer*, 924 F.3d at 1097 (Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act); *Figueroa*, 633 F.3d at 1134-35 (overtime provisions of the Fair Labor Standards Act).



*outside* the two-year period. Petitioner argues that this amounts to an “exception” to Section 1415(f)(3)(C)’s statute of limitations, and that exceptions should not be implied when Congress provided for two explicit exceptions in Section 1415(f)(3)(D). Pet. 14-15. Whatever the strength of this reasoning when it comes to the sweep-in version of the continuing violations theory, it has zero purchase when it comes to the repeated-violations version. The Eighth Circuit did not create an “exception” to the two-year period—it merely found that violations occurring within that period were timely.

Petitioner also asserts that the U.S. Department of Education “disagrees with the Eighth Circuit’s interpretation,” pointing to the preamble accompanying the Department’s final rule implementing the 2004 IDEA amendments. Pet. 15. In the relevant portion, the Department rejected a commenter’s suggestion that its regulation “allow extensions of the statute of limitations when a violation is continuing.” 71 Fed. Reg. 46,540, 46,697 (Aug. 14, 2006). But it appears the commenter was asking the Department to adopt the *sweep-in* version—since the commenter was requesting an “extension[]” of the limitations period that the repeated-violations version does not confer. At the very least, the Department’s position on the actual question presented in this case is unclear.

Petitioner also invokes the legislative history of the 2004 IDEA amendments. Pet. 2, 16. But to the extent that history is illuminating at all, it is entirely consistent with the Eighth Circuit’s approach. The cited House report reveals the committee’s concern about schools being hit with claims about “issues that

occurred in an elementary school program when the child may currently be a high school student”; parents waiting to bring actions “many years after discovering a concern”; and parents “chang[ing] their mind” and suing way down the line. H.R. Rep. No. 108-77, at 115-16 (2003). The Eighth Circuit’s approach would not allow any of those things to happen; families can only recover for the previous two years of violations, nothing more.

And petitioner’s reliance on the Senate committee report is especially curious, because the report expressly advocates for the Eighth Circuit’s approach. The Senate report explains that “where the issue giving rise to the claim is more than two years old *and not ongoing*, the claim is barred,” but “where the conduct or services at issue *are ongoing to the previous two years*, the claim for compensatory education services may be made on the basis of the most recent conduct.” S. Rep. No. 108-185, at 40 (2003) (emphasis added).

Finally, in petitioner’s sole merits argument relevant to what the Eighth Circuit actually held, petitioner notes that it is “not uncommon” for statutes to specify that an ongoing failure to comply with the law can amount to multiple separate violations. Pet. 16 (citing statutes). But as petitioner’s hedged phrasing acknowledges, that is not uniformly the case, and courts routinely find that the repeated-violations theory applies in statutory regimes that do not so specify. *See, e.g., Hamer*, 924 F.3d at 1103-04; *Figueroa*, 633 F.3d at 1134-35.

3. In urging this Court to grant review, petitioner and its amici spill pages of ink on policy arguments, asserting that the opinion below will have “grave, negative consequences” for schools. Pet. 2-3, 18-25;

*see, e.g.*, Nat'l Sch. Bds. Ass'n et al. Amicus Br. 4-6 (Jan. 13, 2021). They argue that the Eighth Circuit's approach "allows a parent to sit on a claim for years before filing a complaint," eliminates any possibility of repose, and forces districts to litigate the wisdom of their special education decisions many years down the line (when memories and records may be harder to come by). Pet. 19, 22-23.

But again, the Eighth Circuit's application of the *repeated-violations* doctrine simply does not implicate those concerns. Under the Eighth Circuit's sensible approach, if an IDEA violation remains ongoing, Section 1415(f)(3)(C) essentially operates as a lookback period: Parents can recover for IDEA violations during the preceding two years, but no more. *Cf. Hamer*, 924 F.3d at 1097. A court will have no need to determine a district's liability for events many years in the past, and parents will still have incentive to bring their claims as quickly as possible (so as to fully correct conditions and recover). This approach hardly "eviscerate[s]" the IDEA's limitations period. Pet. 25.

Rather, it is *petitioner's* position—that no child-find claim can ever be brought if more than two years elapse after the district first violates its obligation, even if the violation continues for years afterward—that leads to "preposterous" consequences that are "contrary to both law and logic." *Jana K.*, 39 F. Supp. 3d at 598. Petitioner's approach would immunize school districts from liability and allow them to continue to violate their child-find obligations with impunity throughout a child's entire education. A district could violate its child-find duties from kindergarten through the student's freshman year, and so long as the parents do not ask for a hearing by

second grade, they would be forever unable to recover for the many subsequent years of the district's neglect. That, of course, would eliminate the school's incentives to fix the problem after the first two years.

Congress plainly did not intend that result, which runs directly contrary to the IDEA's broad remedial scheme, as well as to Congress's specific recognition of "the paramount importance of properly identifying each child eligible for services." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009). Indeed, this Court has previously rejected a school district's reading of another IDEA amendment that would "immuniz[e] a school district's refusal to find a child eligible for special-education services." *Id.* Petitioner's illogical and unjust reading of Section 1415(f)(3)(C) is equally flawed.

### **III. THIS CASE IS A POOR VEHICLE FOR REVIEW**

Given the absence of a split or any conflict with a decision of this Court, the Eighth Circuit's adherence to the repeated-violations doctrine does not warrant review. But even if it did, this case would be a terrible vehicle. The answer to the question presented is not dispositive of E.M.D.H.'s child-find claims—which are timely, in their entirety, on either of two alternative grounds. Nor would reversal of the Eighth Circuit's statute-of-limitations holding have any effect on the relief actually awarded in this case. The Court should not address the Section 1415(f)(C) issue in a case where the statute of limitations makes no real-life difference.

### A. The Eighth Circuit's Holding Can Be Affirmed On Two Alternative Grounds

E.M.D.H.'s child-find claim is timely—in its entirety—on two separate bases recognized by the ALJ and the district court below.

*First*, as the ALJ concluded, E.M.D.H.'s full child-find claim is timely under a correct application of the discovery rule set forth in Section 1415(f)(3)(C). 20 U.S.C. § 1415(f)(3)(C) (a parent must request a due process hearing “within 2 years of the date the parent . . . *knew or should have known* about the *alleged action* that forms the basis of the complaint” (emphasis added)). The ALJ rightly held that there was no evidence E.M.D.H.'s parents knew or should have known that petitioner had failed in its obligation to identify and evaluate their daughter any earlier than April 2017, when they requested petitioner to conduct an evaluation. ALJ Order 43.

Recognizing that “famil[ies] should [not] be blamed for not being experts about learning disabilities,” courts have held that an IDEA claim does not start running if a “family did not have the facts necessary to know that [the student] had been injured” by the district. *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1288 (11th Cir. 2008). It is not enough for E.M.D.H.'s parents to have been aware that petitioner had not evaluated their daughter or that she had mental health conditions; the parents needed to know that petitioner had an obligation to identify and evaluate potential students with a disability and that this obligation had been triggered in their daughter's case. *Cf. Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936, 944 (9th Cir. 2017) (“[T]he ‘knew or had reason to know date’ stems from when

parents know or have reason to know of an alleged [violation of] the IDEA, not necessarily when the parents became aware that the district acted or failed to act.”). As the ALJ found, there was no evidence that those things were true back in E.M.D.H.’s eighth-grade year. ALJ Order 43.

The Eighth Circuit left this issue open by “[a]ssuming” that “the parents knew or should have known they had a child-find claim when the Student was an eighth-grader.” Pet. App. 18a. But the court expressed no doubt about the ALJ’s reasoning on this score. This remains a straightforward alternative ground for deeming timely all of E.M.D.H.’s child-find claims.

*Second*, and as the district court concluded, all of the child-find claims are timely under the second statutory exception in 20 U.S.C. § 1415(f)(3)(D). Pet. App. 44a-45a.

Section 1415(f)(3)(D)(ii) states that the two-year period “shall not apply” if a “parent was prevented from requesting the hearing due to . . . the [district’s] withholding of information from the parent that was required under this subchapter to be provided to the parent.” Section 1415(d)(1)(A)(i), in turn, requires districts to provide a procedural safeguards notice “upon initial referral or parental request for evaluation.” That notice must inform the parents of “the opportunity to present and resolve complaints, including . . . the time period in which to make a complaint.” 20 U.S.C. § 1415(d)(2)(E)(i).

The district court concluded that petitioner should have provided the notice to E.M.D.H.’s parents when it discussed a special education referral with them in April 2016 and January 2017—but it did not provide

the notice until June 14, 2017. Pet. App. 45a; *see also id.* at 26a-29a. “By withholding this critical information from the Parents, the District ‘denied [the Parents] the knowledge necessary to request a due process hearing.’” *Id.* at 45a (alteration in original) (citation omitted); *see also* ALJ Order 43 (“There is no evidence Parents knew about their right to request a hearing prior to April 2017.”). Although the Eighth Circuit had no need to reach this issue, the district court’s analysis is correct and provides an independent basis for affirmance.

**B. Even If The Child-Find Claims Were Time-Barred In Full, That Would Not Affect The Remedies Awarded**

In any event, the timeliness of the child-find claims had zero impact on the bottom-line judgment in this case.

As discussed above, the Eighth Circuit recognized that eliminating some of E.M.D.H.’s child-find claims on statute-of-limitations grounds had no effect on the appropriate relief. *See supra* at 15-16. That makes perfect sense, given that petitioner violated its child-find obligation for over two and a half years, and only about a month’s worth of those violations would be time-barred if petitioner were correct that the claim originally accrued on May 26, 2015 (and maybe just two weeks of violations, if petitioner’s alternative June 12, 2015 date is used). *See supra* at 12.

But even if—as petitioner argues—the child-find claims must be wiped out altogether because E.M.D.H.’s parents did not lodge their complaint within two years of petitioner’s very first violation, there is no reason to believe this result would have any effect on the remedies awarded, either. Again,

petitioner raised a statute-of-limitations challenge only as to the child-find claims.<sup>8</sup> But the equitable relief granted by the ALJ and affirmed by the Eighth Circuit was fully justified based on petitioner’s other IDEA violations—including its substantive denial of a FAPE. Petitioner raises no arguments to the contrary.

Eliminating the procedural child-find violations from the case cannot relieve petitioner of its court-ordered obligation to provide E.M.D.H. with a FAPE going forward. *See* Pet. App. 13a-16a, 20a. Nor does petitioner have any substantial basis to argue that the “compensatory education” relief awarded—i.e., the obligation to reimburse the parents for private tutoring costs from November 2017 through the date of the ALJ’s decision, and to pay for those costs until E.M.D.H. earns enough credits to graduate—would be affected. *Id.* at 19a-21a. That compensatory relief was necessarily tied to petitioner’s failure to provide E.M.D.H. with a FAPE. *See* 20 U.S.C. § 1415(a); *Forest Grove*, 557 U.S. at 237-38 (noting broad remedial authority to remedy FAPE violations); *Reid v. District of Columbia*, 401 F.3d 516, 518, 523 (D.C. Cir. 2005) (approving “compensatory education” as an “equitable remedy” for a FAPE violation (citation omitted)).

Accordingly, the Eighth Circuit repeatedly emphasized the compensatory remedy’s connection to the multi-year FAPE deprivation. Pet. App. 21a (explaining that compensatory relief is meant to “put the Student in the education position she would have been [in] had [petitioner] appropriately provided a

---

<sup>8</sup> Pet. App. 16a-18a, 43a-44a; CA8 Appellant/Cross-Appellee Br. 56-63 (Apr. 16, 2019); Dkt. 88 at 48-51.



FAPE”); *id.* (ordering petitioner to pay for the tutoring services “only so long as the Student suffers from a credit deficiency caused from the years she spent without a FAPE”); *see also id.* at 20a. Just because petitioner’s FAPE violation is in some ways factually intertwined with its child-find violation does not mean that having an actionable claim for the latter is a legal prerequisite to receiving equitable relief for the former.

Finally, petitioner’s obligation to reimburse the parents for the May 2017 comprehensive psychological evaluation (\$2,430) and the cost of their additional private evaluation in November 2017 (\$21,208) would be unaffected as well. The Eighth Circuit found that petitioner’s obligation to reimburse these expenses was tied to its failure to conduct a timely and proper evaluation of E.M.D.H. after her parents requested one in April 2017. Pet. App. 19a.

\* \* \*

At every turn, petitioner shirked its obligations to E.M.D.H. and her family. Petitioner then fought tooth and nail for years to avoid any responsibility to remedy those violations and provide E.M.D.H. with special education services going forward. Even as far back as March 2018, the ALJ found that petitioner had “unreasonably protracted this matter.” ALJ Order 27. Granting certiorari would unduly prolong these proceedings even further—to the considerable prejudice of E.M.D.H. and her parents, who just want to focus on getting E.M.D.H.’s education back on track so she can graduate high school. And all for nothing—because this purely academic question will have no effect on the bottom line. Further review is unwarranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

AMY J. GOETZ  
SCHOOL LAW CENTER, LLC  
452 Selby Avenue  
Suite 2E  
Saint Paul, MN 55101

Respectfully submitted,

ROMAN MARTINEZ  
*Counsel of Record*  
CAROLINE A. FLYNN  
JAMES A. TOMBERLIN  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004  
(202) 637-3377  
roman.martinez@lw.com

*Counsel for Respondent*

March 25, 2021