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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

In this case, the Eighth Circuit confronted the following scenario: Petitioner, a school district, did not identify respondent, a student, as someone who should receive special education services. More than two years later, that is, after the expiration of the limitations period specified in the Individuals with Disabilities Education Act (IDEA), her parents raised a "child find" claim, arguing that the district had not met its duty to identify her as a student with disabilities. Yet the Eighth Circuit held that she could recover for that claim because—in its own words—the violation "continued" into the two-year statutory

window. Pet. App. 18a. That was not just wrong, it deeply conflicts with two other courts of appeals.

The practical effect of the Eighth Circuit's application of the continuing violation doctrine to the IDEA is that its two-year statute of limitations now imposes no real limitation at all. It does not serve the function Congress enacted it to serve: to encourage claims to be raised close in time to a school's decision, when the school can do something in response to improve the student's education.

This exception to the limitations period conflicts with the text of the IDEA (and its specific statutory exceptions) and with decisions of courts of appeals which have rejected the continuing violation doctrine and the notion of unwritten exceptions to its statute of limitations. As amici point out, left undisturbed, the decision below will allow parents to sue based on long-ago—perhaps uncontroversial—placement decisions as if they were brand-new violations. *See* Br. Amicus Curiae of Minnesota Ass'n of Sch. Administrators 9 ("MASA Amicus Br."). No placement decision, no matter how remote, will be safe from second-guessing. That, in turn, will make more work for already burdened educators, incentivize harmful, just-in-case overidentifications, and sour parent-teacher relations. *See* Br. Amici Curiae AASA et al. 17-22 ("AASA Amicus Br."); Br. Amici Curiae of Nat'l Sch. Bds. Ass'n et al. 16-18 ("NSBA Amicus Br.").

This Court should grant certiorari.

ARGUMENT

I. THE DECISION BELOW CREATES A SPLIT.

To sidestep the division among the circuits on the application of the continuing violation doctrine to the IDEA's statute of limitations, respondent accuses petitioner of misreading the decision below. But it is respondent who makes that mistake. The Eighth Circuit both referred to a "continuing" violation and did not limit the scope of relief petitioner could receive on the child find claim at issue here. Pet. App. 18a. The decision below thus *did* apply an equitable exception, allowing the petitioner to seek relief for a decision made outside of the limitations period on the theory that the violation continued into the limitation period.

1. The federal courts of appeals are split two-to-one on whether courts may read equitable exceptions such as the continuing violation doctrine into the IDEA's two-year statute of limitations. *See* Pet. 10-14.

In the Third and Fifth Circuits, courts may not apply equitable doctrines, like the continuing violation doctrine, that would have the effect of allowing plaintiffs to bring claims based on actions that occurred outside of the statutory window. The Third Circuit has repeatedly explained that plaintiffs cannot use the guise of a "continuing violation" to bring claims "years later" "without satisfying one of the [IDEA's] two statutory exceptions." *G.L.* v. *Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625 (3d Cir. 2015) (quoting *D.K. ex rel. Stephen K.* v. *Abington Sch. Dist.*, 696 F.3d 233, 248 (3d Cir. 2012)). The Fifth Circuit has also rejected the application of equitable exceptions in the

IDEA context. *See Reyes ex rel. E.M.* v. *Manor Indep. Sch. Dist.*, 850 F.3d 251, 255 (5th Cir. 2017).

In contrast, the Eighth Circuit below relied on the "continued violation" doctrine to conclude that a child find claim rooted in a decision not to identify a student that took place before the two-year statutory window was nevertheless "repeated well into the limitations period" and thus timely. Pet. App. 18a.

2. Respondent disclaims this split by arguing that there are two flavors of the continuing violation doctrine, one that is equitable (the "sweep-in" version) and one that is not (the "repeated violations" version). Opp. 16-17. On respondent's telling, the decision below adopted the latter version and did not split with courts that reject the application of equitable doctrines to the IDEA's limitations period. There are two problems with this: Respondent misinterprets the decision below and, in any event, both versions of the doctrine are equitable.

The Eighth Circuit expressly referred to a "continued violation of [the District's] child-find duty." Pet. App. 18a. It recognized that if the "breach" of that duty had occurred "outside of the IDEA's two-year statute of limitations," then it "would be untimely." *Id.* But "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.* That is, the court applied the continuing violation doctrine to find that the breach—the decision that respondent was not entitled to special education services—"continued" into the limitations period and saved a claim that would otherwise be untimely. *Id.*

This straightforward reading is confirmed by the scope of relief at issue. The decision below did not limit its consideration to events that occurred during the two years before respondent filed her claim. Just the opposite: It concluded that the district breached its obligation outside of the two-year window, but nevertheless affirmed *all* of the relief that the district court awarded, even though the district court had fashioned its relief on the understanding that "the statute of limitations should not apply" at all. *Id.* at 45a; *see id.* at 16a-21a.

Respondent attempts to elide this issue by suggesting that because "only a month" of the claims were time barred the Eighth Circuit appropriately concluded that there was "no effect on the remedies awarded." Opp. 15-16. But the Eighth Circuit did not say so. Indeed, it engaged in no analysis whatsoever as to the appropriateness of the award relative to the actions that the district actually took within the statutory period. *See* Pet. App. 18a-21a. There is simply no indication that the decision below employed respondent's "repeated violations" gloss. Opp. 16–17.

That might be because the neat distinction respondent would draw between the so-called "sweep-in" and "repeated violations" version is not based in courts' practice. As one of respondent's very sources explains, "few courts * * * have recognized that two types of continuing violations exist." Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271, 283 (2008). Tellingly, none of the decisions respondent invokes as consistent with the decision here explicitly invoke the repeated-violations doctrine, let alone actually apply it. *See Mr. P* v. *W. Hartford Bd. of Educ.*,

885 F.3d 735, 750 (2d Cir. 2018); *Durbrow* v. *Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1193 (11th Cir. 2018); *D.K.*, 696 F.3d at 251; *B.B. ex rel. Catherine B.* v. *Delaware Coll. Preparatory Acad.*, 803 F. App'x 593, 597 (3d Cir. 2020); *G.L.*, 802 F.3d at 626.

Regardless, respondent is wrong to claim that the "repeated violations" version of the continuing violation doctrine is not equitable. Courts and commenters—including several respondent relies on—understand the continuing violation doctrine to be an equitable doctrine. *See* Elad Peled, *Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims*, 41 Ohio N.U. L. Rev. 343, 363 (2015) ("The continuing violation doctrine is frequently associated with equitable tolling."). Even respondent acknowledges that the Third Circuit has grouped the continuing violation doctrine with "equitable tolling doctrines." *D.K.*, 696 F.3d at 248; Opp. 21 n.5. Thus, even if the decision below adopted the repeated-violations version of the doctrine, it adopted an equitable exception to the IDEA's two-year statute of limitations that the Third and Fifth Circuits do not permit.

In the end, the distinction between respondent's rival continuing violation doctrines make no difference here. As another of respondent's authorities makes clear, "[i]n both of its forms, the continuing violations doctrine achieves * * * the rescue of an otherwise time-barred claim or claims." Graham, *supra*, at 279. That damages might, in respondent's view, be limited to a two-year period is no comfort when Congress made clear that the claim is time-barred.

Moreover, the fact that respondent spends so much time clarifying the phantom doctrine the decision below was embracing only underscores that courts are confused as to whether and how the doctrine applies. That confusion is evidence for—not against—the need for this Court's intervention and clarification. And there is no reason to defer consideration since the issue is a pure question of law that has been well ventilated by lower court decisions. *See, e.g.*, *Bd. of Educ. of City Sch. Dist. of City of New York* v. *Tom F. ex rel. Gilbert F.*, 552 U.S. 1 (2007) (mem.) (per curiam) (two-to-one split on IDEA question); *Ocasio* v. *United States*, 136 S. Ct. 1423 (2016) (one-to-one split); *Nichols* v. *United States*, 136 S. Ct. 1113 (2016) (one-to-one split).

II. THE DECISION BELOW IS WRONG.

However characterized, the Eighth Circuit's decision below effectively replaced the IDEA's two-year statute of limitations with, at minimum, an open-ended statute of limitations that allows for claims to be brought anytime after a district commits an initial violation. That understanding is at odds with the views of the Department of Education, the structure of the statute, and the nature of child development.

1. As respondent must acknowledge, the Department of Education has rejected the applicability of a continuing violation doctrine in the IDEA context. The Department of Education has said that the exceptions to the IDEA's statute of limitations "do not include when a violation is continuing." *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,540, 46,697 (Aug. 14, 2006).

Respondent suggests that the Department meant to reject only the sweep-in version of the doctrine. Like the Eighth Circuit below, however, the Department did not make that distinction. Moreover, the Department's statement shows that it conceived of the continuing violation doctrine just as petitioner does: as an "exception[]" to the statute of limitations—and one that it ultimately rejected. *Id.*

2. A child find violation should not be understood to necessarily repeat every day until it is remedied. For one, the statute pins the running of the limitations period to the "alleged *action* that forms the basis of the complaint," not to inaction. 20 U.S.C. § 1415(f)(3)(C) (emphasis added). Pinning the running of the statute of limitations to each day that a district takes no action where there are no allegations that any other change disrupted the status quo would be contrary to this language.

At least one court has explicitly rejected respondent's theory that a child-find breach automatically recurs every day after an initial violation. The court in *Jefferson County Board of Education* v. *Lolita S.*, 977 F. Supp. 2d 1091, 1124 (N.D. Ala. 2013), rejected that argument, concluding that if "violations occurring during the statutory bar continue on each day following that violation," "then no statute of limitations would be enforceable, because every violation would continue past the statutory bar." Instead, a court must look at "what occurred" during the two years prior to filing to determine whether a child find violation occurred during that period. *Id.*

Respondent's caselaw agrees. The cases that respondent offers as consistent with the decision below

do not actually assume—as the Eighth Circuit did—that once the district had initially violated its child find obligation that "the violation was repeated well into the limitations period." Pet. App. 18a. In *Mr. P*, for example, the Second Circuit analyzed whether the school district's affirmative actions during the statutory window gave rise to a child find violation. *See* 885 F.3d at 750-752. So, too, in *B.B.*, where the Third Circuit evaluated the District's "distinct" conduct within the statutory period. 803 F. App'x at 597.

This approach makes sense. A denial of services when no action has been taken or intervening circumstance has changed is merely the *effect* of a prior incorrect decision, not a separate violation of the statute. The effects of a prior violation are not violations in and of themselves. *See Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 258 (1980).

And for good reason. To conclude that a child find violation arises anew every day without any additional evidence would be to misunderstand child development. *See* MASA Amicus Br. at 11-12 n.4. Students' educational needs are not frozen in amber. Many students need special education services one year and then no longer need them the next. As a result, it is not true that a student who should have been identified as disabled in middle school necessarily should have been identified in high school, too. *See id.*

In this way, a failure to provide educational accommodations is different from other failures to accommodate that respondent invokes. While a public sidewalk without curb cuts, for example, may exclude wheelchair users every day it continues to exist unmodified, *see Hamer* v. *City of Trinidad*, 924 F.3d

1093, 1103 (10th Cir. 2019); Opp. 25 n.7, an educational environment may not, because students' educational needs, unlike sidewalks, constantly shift.

The structure of the IDEA's exceptions confirms this understanding. If a violation automatically recurred every day after a district's initial eligibility decision, there would be no need for IDEA's two enumerated exceptions to the statute of limitations. *See* Pet. 17.

III. THE DECISION BELOW WILL HAVE SERIOUS, NEGATIVE CONSEQUENCES.

Contrary to respondent's characterization, Petitioner repeatedly said that the decision below concluded "that a child-find violation occurs anew every day until the student receives services." *Id.*; *see also id.* at 7, 19. Petitioner did so because *either* of respondent's conceptions of the continuing violation doctrine will have disastrous consequences for teachers, school districts, and the students they serve.

Indeed, for most of the policy concerns petitioner identified it does not matter at all which of respondent's continuing violation doctrines the court below adopted. The effect is the same: Districts will be forced to guard themselves against litigation stemming from long ago decisions; sitting on claims is incentivized; and schools will be pressured into over-identifying students.

Even if respondent is correct that under the decision below plaintiffs may only recover for the preceding two years, that rule "effectively provides a perpetual end-run around the statute of limitations." MASA Amicus Br. at 10. While, unlike the sweep-in version of the doctrine, it saves schools from unbridled

liability for years-old violations, it still makes it so any years-old decision can be challenged if nothing else has changed. This "open-ended limitations period" means that schools will be indefinitely on the hook for two years of damages stemming from an undisturbed placement decision made years earlier. *Id.* at 13, 15. And parents still have incentives to wait to file claims, since—under respondent's repeated-violations version—a family that files a complaint less than two years after the initial violation could be able to recover less than someone who waits at least two years to file.

There will be no repose for school districts either. Teachers will still feel the need to document every interaction because each day an old decision is not changed is the start of another potential lawsuit. *See* NSBA Amicus Br. at 11. This constant threat of litigation will strain parent-teacher relations. *See* MASA Amicus Br. at 10-11. Plus, all this time devoted to prospective litigation will take away from educators' ability to serve their students. *See id.* at 9-10.

With the benefit of hindsight, parents will be able to second-guess placement decisions made years earlier and recover, at minimum, two full years' worth of educational expenses—even when all agreed at the time that the placement decision was correct. *See id.* at 3, 9. And by the time claims are raised, "evidence may be stale, heels may be dug in, and it may be harder to correct the course of a student's education." NSBA Amicus Br. at 16.

As amici point out, schools will face pressure to overidentify students for special education. *See* AASA Amicus Br. at 17-22; MASA Amicus Br. at 12-13; NSBA Amicus Br. at 17-18. If any decision can lead

to liability years down the line, educators will feel pressure to err on the side of identifying students—even though doing so is at odds with best practices that attempt targeted interventions before identifying a student. *See* AASA Amicus Br. at 8-9.

In addition, respondent's concerns are overblown. If a school district takes "action" affirmatively to change its identification decision parents will have the statutory two-year window to challenge that decision. 20 U.S.C. § 1415(f)(3)(C). They likewise would be able to challenge a district's failure to act if they allege a material change in circumstances that should have led the district to respond. *See Mr. P*, 885 F.3d at 751 (change in circumstances can trigger obligation to act).

2. As a last-ditch effort, respondent argues (at 32-34) that the remedy would be the same if Petitioner were to prevail here. But that argument underscores the absurdity of respondent's position. The fact that respondent thinks this Court could wipe out an entire claim and not change the remedy at all makes clear that for all respondent's talk of the court below cabining its discussion to the prior two years, it actually awarded damages for the entirety of the violation.

Without citing anything for support, respondent argues that the relief awarded on the FAPE claim would be unaffected by a finding that the child-find violation is time-barred. But, as respondent acknowledges (at 34), FAPE claims and child find claims are factually intertwined. So, at minimum, if the Court were to grant cert and reverse, it would likely be necessary to remand for reconsideration of the award.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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