No. 22-_____

In The

Supreme Court of the United States

A.W. on behalf of N.W., and N.W.,

Petitioners,

v.

PRINCETON PUBLIC SCHOOLS BOARD OF EDUCATION and MICKI CRISAFULLI, Individually and as Director of Special Education,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

MATTHEW S. SLOWINSKI
Counsel of Record
SLOWINSKI ATKINS LLP
290 W. Mt. Pleasant Ave.
Suite 2310
Livingston, NJ 07039
(973) 740-2228
mss@slowinskiatkins.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. May a school district condition its provision of special education and related services to a disabled child under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* ("IDEA"), on a parent's agreement to *prospectively* waive the child's federal statutory rights and civil rights?

2. What steps must a parent take to invoke procedural safeguards under the IDEA, 20 U.S.C. 1415(f)(1)(B)(iv), to void an educational placement and settlement agreement (EPSA), within three days of execution?

3. When an EPSA between a school district and parent (on behalf of a disabled child) states it is governed by state law, is a federal court bound to follow State Supreme Court precedent in deciding whether exculpatory provisions in the EPSA waiving the child's prospective rights including state statutory and common law rights, are enforceable?

PARTIES

Petitioner A.W., appearing on behalf of herself and her minor daughter, N.W., was the plaintiff in the district court proceedings and appellant/cross-appellee in the court of appeals proceedings. Respondents, Princeton Public Schools Board of Education and Micki Crisafulli, individually and as director of special education, were the defendants before the district court and appellees/cross-appellants in the court of appeals proceedings. Petitioner, N.W., turned 18 during the court of appeals proceedings and appears individually as well as by and through her parent A.W. There are no corporate parties.

RELATED CASES

- *A.W. o/b/o N.W. v. Princeton Public Schs. Bd. of Educ.*, Docket No. EDS 03738-17, Agency Docket No. 2017-25766, New Jersey Office of Administrative Law. Final decision entered May 17, 2018.
- *A.W. o/b/o N.W. v. Princeton Public Schs. Bd. of Educ.*, No. 3:17-cv-11432, U.S. District Court for the District of New Jersey (interlocutory appeal from agency decision of September 28, 2017 in Docket No. EDS 03738-17). Judgment entered December 14, 2018.
- *A.W. o/b/o N.W. v. Princeton Public Schs. Bd. of Educ. and Micki Crisafulli*, No. 3:18-cv-13973, U.S. District Court for the District of New Jersey. Judgment entered July 10, 2020.
- *A.W. o/b/o N.W. v. Princeton Public Schs. Bd. of Educ. and Micki Crisafulli*, Case No. 20-2433. U.S. Court of Appeals for the Third Circuit. Judgment entered March 15, 2022.
- *A.W. o/b/o N.W. v. Princeton Public Schs. Bd. of Educ. and Micki Crisafulli*, Case No. 21-1502. U.S. Court of Appeals for the Third Circuit. Judgment entered March 15, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, A.W., a single adoptive parent for N.W., and N.W., individually, a psychiatrically disabled student, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a), is unpublished but available at *A.W. ex rel. N.W. v. Princeton Pub. Schs. Bd. of Educ.*, 2022 U.S. App. Lexis 8885. The opinions of the United States District Court for the District of New Jersey (S. App. 1), and the New Jersey Office of Administrative Law (NJOAL) (S. App. 36), are unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 15, 2015. (Pet. App. 1). Petitioners' timely request for panel rehearing and rehearing *en banc* was denied on April 11, 2022. (Pet. App. 15). This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

I. U.S. Constitution, Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or endorse any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. 42 U.S.C. 1983 – Civil action for deprivation of rights (Section 1983)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

III. Relevant IDEA provisions

The IDEA, 20 U.S.C. 1400 *et seq.*, requires that public schools receiving federal funds for special education services provide each child having a disability with a "free and appropriate public education" (FAPE).

20 U.S.C. 1401(9). The special education services must be "provided in conformity with the individualized education program [IEP] required under" the IDEA. *Id.*

A school district's obligation to provide a FAPE continues until the student reaches the age of twenty-one. 20 U.S.C. 1412(a)(1)(A).

Under the IDEA, public schools are required to have "policies and procedures in place to ensure that all children residing within the State who are in need of special education and related services, are identified, located and evaluated, including children who attend private and public schools, highly mobile children, migrant children, and children who are wards of the state. 20 U.S.C. 1412(a)(3); 34 C.F.R. 300.111(i).

The IDEA includes a procedural safeguards section, 20 U.S.C. 1415, which contains provisions pertaining to settlement of due process petitions. 20 U.S.C. 1415(f)(1)(B)(iii). These include the following:

> **(iv) Review period**
>
> If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

20 U.S.C. 1415(f)(1)(B)(iv).

In turn, clause (iii) of this section 1415(f) states:

> **(iii) Written settlement agreement**
>
> In the case that a resolution is reached to resolve the complaint at a [resolution] meeting

described in clause (i), the parties shall execute a legally binding agreement that is

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

20 U.S.C. 1415(f)(1)(B)(iii).

STATEMENT OF THE CASE

In the wake of the Uvalde tragedy, youth mental health concerns have emerged as a top priority in our country. The death tolls from Uvalde and previous school shootings are unfathomable. Yet those tolls pale, in comparison, to the number of adolescents who die each year by suicide, the second leading cause of death for adolescents.[1] Our country is experiencing a youth mental health crisis.[2]

[1] Even before COVID-19, suicide was reported as the second-leading cause of death among people aged 10-34 and the CDC reported that youth mental health was already declining. New CDC data illuminate youth mental health threats increasing further during the COVID-19 pandemic (available at www.cdc.gov/media/releases/2022/p0331-youth-mental-health-covid-19) (last visited June 28, 2022).

[2] The Crisis of Youth Mental Health (available at www.nami.org/Blogs/From-the-CEO/April-2022/The-Crisis-of-Youth-Mental-Health) (last visited June 28, 2022).

The socio-emotional development of the nation's youth happens in our schools. Public school districts are required under the IDEA to identify emotionally disturbed students and provide them with special education and related services to promote their development and transition to life as adults. The U.S. Department of Education reports, however, that the percentage of students classified as eligible for special education as emotionally disturbed has been steadily declining every year since 2008, for example, from 7.10% of students in 2008 to 5.45% in 2018.[3]

Conversely, the Center for Disease Control reports that mental health concerns have been steadily increasing among youth, with the number of adolescent suicides nearly tripling between 2007 and 2017.[4] Statistics also reflect that the percentage of students who drop out of school is highest for children with emotional disturbance (27%), as compared with any other disability category.[5] These statistics speak to a strong

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[3] OSEP Releases Fast Facts: Children Identified with Emotional Disturbance, U.S. Dept. of Educ. (May 6, 2020) (available at /sites.ed.gov/osers/2020/05/osep-releases-fast-facts-children-identified-with-emotional-disturbance/) (last visited June 28, 2022).

[4] Death Rates Due to Suicide and Homicide Among Persons Aged 10-24: United States, 2000-2017 (available at www.cdc.gov/nchs/products/databriefs/db352.htm) (last visited June 28, 2022).

[5] The Condition of Education, 2022, Chapter 2, Students with Disabilities, at p. 5 (available at nces.ed.gov/programs/coe/pdf/2022/cgg_508.pdf) (last visited June 28, 2022).

need for change and increased levels of educational services for emotionally disturbed children.

This Court furthered these prospects in 2017, when it heightened the bar on the level of educational benefit the IDEA demands in *Endrew v. Douglas County School Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988 (2017). That same year, in *Fry v. Napoleon Community Schools*, 580 U.S. ___, 137 S. Ct. 743 (2017), this Court opened the doors of the federal courts to discrimination and civil rights claims of emotionally fragile youth, holding exhaustion of administrative remedies is not necessarily required for such claims, for example, as in *Fry*, where the youth asserted a need for a service dog in school.

The same year this Court decided *Endrew* and *Fry*, this case arose. The paradigm arising here shows how the progress of *Endrew* and *Fry* can be subverted as a practical matter. As here, public school districts may withhold special education services for emotionally disturbed children and then invoke their power and control over these services, as a carrot suspended before desperate parents, to extract unconscionable waivers of the child's future federal statutory rights and civil rights, rendering *Endrew* and *Fry* irrelevant.

The United States Court of Appeals for the Third Circuit endorsed this practice: it upheld as enforceable an EPSA with terms blanketly waiving all future rights of an emotionally disturbed youth even when enrolled in the public school district. Public school districts now have a Third Circuit-approved template

that they may use to demand unconscionable waivers of minor's future statutory rights, civil rights, and common law rights, as a pre-condition to providing educational services – a big step backwards for disabled students and their families at a time when more support and adherence to *Endrew*'s standards are needed.

A. Legal Background

In 1972, Congress conducted an investigation into how disabled children were faring in our public schools. It found that most children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (quoting H.R. Rep. No. 94-332 at 2 (1975)).

In response, Congress passed the Education for All Handicapped Children Act in 1975. Pub. L. No. 94-142, 89 Stat. 773 (1975). In 1990, this law was amended and renamed as the Individuals with Disabilities Act. Pub. L. No. 101-476 (1990).

Under the Act, states are required to provide children with disabilities a free appropriate public education (FAPE) in exchange for receiving federal funds for special education programs. *Rowley*, 458 U.S. at 775. The IDEA is one of the federal government's largest

grant programs, with states receiving over $12 billion in funds annually.[6]

To provide a FAPE, public schools are expected to collaborate with parents to develop IEP's detailing the special education and related services the school will provide tailored to each disabled child's unique needs. *Rowley*, 458 U.S. at 181; 20 U.S.C. 1414(b)(4). Public schools are required to review a child's IEP "periodically, but not less than annually, to determine whether the annual goals for the child are being achieved." 34 C.F.R. 330.324(b)(i). Under the Act, an IEP must be in effect, for each child with a disability, "[a]t the beginning of each school year." 34 C.F.R. 300.323.

In some cases, due to the severity or nature of the child's disability, the IEP may call for a placement other than in public school, for example, in a private school or special school for children with disabilities, if such a placement is warranted to provide a FAPE. The U.S. Department of Education has reported that, for the school year 2018-2019, the percentage of emotionally disturbed students placed in separate schools (12%), was four times higher than any other disability

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[6] The U.S. Department of Education reported 12.8 billion dollars in grants to states under the IDEA for fiscal year 2021 and another 16.2 billion dollars toward education for the disadvantaged. U.S. Dept. of Ed., FY 2021 Agency Financial Report, Financial Highlights Section (Nov. 19, 2021) (available at www.ed.gov/about/reports/annual/2021report, Fig. 10, p. 20) (last visited June 28, 2022).

category (3%)[7] illustrating the heightened needs of this student population.

As disagreements may arise as to how the IDEA is implemented in each case, Congress provided a procedural mechanism, *i.e.*, the due process petition, to resolve them. 20 U.S.C. 1415(f)(1)(A). When a due process petition is filed, a state administrative hearing officer is charged with deciding whether the school district has met the Act's requirements. 20 U.S.C. 1415(b)(6).

The IDEA sets forth detailed procedural safeguards that govern the IDEA process including as to IEP's, changes in placement, and the handling of due process petitions. 20 U.S.C. 1415 ("Procedural Safeguards" Section). One protection involves stay put; under the stay-put provision, the IDEA requires that, when a due process petition is filed and remains pending, the child must remain placed – or "stay put" – in the placement in effect at the time the petition was filed. 20 U.S.C. 1415(j).

Mediation and informal resolution procedures are also laid out in the Procedural Safeguards section of the Act. 20 U.S.C. 1415(e). The IDEA states that, if the parties reach agreement and settle a due process petition, both the parent and authorized school district representative are required to sign, and then there is a Review Period of three business days after execution

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[7] OSEP Fast Facts, *ante*, footnote 3.

during which either party may void the agreement. 20 U.S.C. 1415(f)(1)(B)(iv).

The IDEA was amended and reauthorized twice since *Rowley*: in 1997 and in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

In 1997, Congress declared a higher goal for the IDEA, toward "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. 1400(c)(1). The 2004 amendments further increased these goals by requiring, for example, that IEPs describe services for children over age fifteen that assist them in transitioning to post-secondary education, employment, and as appropriate, independent living. 20 U.S.C. 1414(d)(1)(A)(i)(VIII).

B. Factual Background

Petitioner, N.W. experienced significant early life trauma as an adopted child and was classified under the IDEA as emotionally disturbed in August 2015, when 11 years old. In August 2015, A.W. filed her first due process petition seeking a special placement for N.W., and in November 2015, the Princeton Public Schools District (PPS), placed N.W. in a private school (*i.e.*, "Fusion"), but did not provide N.W. with an IEP. (S. App. 37-38).

In February 2017, A.W. filed a subsequent due process petition asking for an IEP to be in place by the

start of the next (2017-2018) school year. It was established in June 2017 that Fusion was N.W.'s stay-put placement during the proceedings. (S. App. 3).

By September 2017, A.W. had neither a hearing date nor an IEP for N.W., and PPS refused to pay for the classes Fusion had selected for N.W. (S. App. 3). A.W. asked for an IEP meeting to resolve the conflict, but PPS was unwilling to have a meeting. (S. App. 3). Having no viable placement at the start of the school year, N.W. was traumatized, and though financially constrained, A.W. enrolled N.W. in another private school for children with disabilities at her own expense. (S. App. 5).

Two attempts were made to settle this conflict in the fall of 2017. Both failed because A.W. did not agree to PPS's terms which required: as a condition of supporting N.W.'s special education placement, PPS insisted that A.W. needed to *prospectively* waive N.W.'s statutory rights to an IEP, to a FAPE, and to file for due process should A.W. disagree with PPS regarding N.W.'s placement the following year. (S. App. 5-6). After those attempts failed, a hearing was scheduled for March 2, 2018. (S. App. 7).

On March 2, 2018, the parties appeared before the NJOAL. The Administrative Law Judge (ALJ) requested further settlement attempts. (S. App. 9). At this point, A.W. had carried the entire cost of N.W.'s special education placement for the 2017-2018 school year and N.W. still had no IEP or special education services provided by the school district. (S. App. 8).

At this time, PPS agreed to reimburse A.W. for N.W.'s past tuition costs but also sought to negotiate its future obligations to N.W. as well, asking again that A.W. "disenroll" N.W. from the school district and prospectively waive her rights. (S. App. 9). When A.W. objected to prospective waivers, PPS offered a "savings clause"; specifically, PPS insisted that A.W. had to waive N.W.'s prospective rights while N.W. was enrolled in the special education school, but it assured A.W. that she could re-enroll N.W. in the public school district at any time and upon doing so, PPS would offer an IEP and the agreement would be void. (S. App. 9).

On March 2, 2018, PPS then prepared an EPSA with the following terms. Paragraph 1 set forth the payment terms, requiring that PPS reimburse A.W. for N.W.'s tuition costs for the past school year and provide special education tuition payments in monthly installments totaling up to $45,000 over the next school year. (S. App. 50).

Next, paragraph 2 was drafted to state:

> It is understood that all of the District's obligations under any law; including but not limited to the [IDEA], Section 504, the New Jersey Law Against Discrimination [NJLAD], and the American with Disabilities Act [ADA]; shall terminate on June 30, 2019 and the District's sole financial and educational obligations are the financial terms set forth in this agreement. [Pet. App. 50].

The parties had discussed that the savings clause would be in paragraph 4; however, paragraph 4 was written as follows:

> During the course of this agreement, N.W. shall be dis-enrolled from the District and the District will not offer an IEP or supervise N.W.'s placement at [the special education school]. However, during the course of this agreement, should [said school] no longer be appropriate and N.W. seeks to return to the District, the District will provide evaluations and an IEP for placement at a program within the District. But the District's sole financial obligations to N.W. shall be what is set forth in paragraph 1. [S. App. 50-51].

The last phrase of the savings clause that had been promised to A.W. (*i.e.*, that the agreement would be void upon reenrollment), was missing; this paragraph also was revised over the parties' oral discussions to limit alternative placements to "within the District" and to cross-reference PPS's "sole financial obligations" to paragraph 1. (S. App. 9, 26, 51).

Paragraph six then states that, "in consideration of the above," N.W. prospectively releases PPS and all its agents, employees, etc., through the next sixteen months (June 30, 2019), under any law including the IDEA, the ADA, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 *et seq.* ("Section 504" or "RA"), the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g ("FERPA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 *et seq.* ("Title VII"), 42

U.S.C. 1983 ("Section 1983"), 42 U.S.C. 1988, and any New Jersey statute or regulation. (S. App. 51).

Continuing, paragraph 6 states that Petitioners were prospectively waiving, through June 30, 2019, "their right to institute any actions against [PPS]" including due process petitions or civil rights complaints. (S. App. 52).

Paragraph 20 of the EPSA states that it "shall be interpreted, enforced, and governed under the laws of the State of New Jersey." (S. App. 55). When this agreement was drafted, N.W. was fourteen years old. (S. App. 2).

Three copies of this document were printed and presented for A.W. to sign on March 2, 2028, while she was simultaneously, expressly assured of the statutory, three-day review period. (S. App. 56). No representative from PPS signed that day. (S. App. 56).

Within three business days, A.W. wrote to PPS and asked that PPS correct paragraph 4 (*i.e.*, the savings clause), to reflect the assurances made to her on March 2, 2018, *i.e.*, that upon re-enrollment in the public school district, the agreement would be void. (S. App. 47-48). A.W. concluded her letter by stating:

> To preserve our rights, we are invoking 20 U.S.C. 1415(f)(iv), to void the stipulation of settlement dated 3/2/2018 subject to these very limited requests for clarification. [S. App. 48].

On March 22, 2018 and March 26, 2018, PPS representatives signed the EPSA without A.W.'s corrections. (S. App. 56). Thereafter, PPS enforced the EPSA against N.W. "as written." (S. App. 15).

N.W.'s psychiatric condition thereafter deteriorated; she had panic attacks and repeatedly passed out at school followed by suicide attempts and several psychiatric hospitalizations, and she dropped out of school in February 2020, in eleventh grade. In April 2020, N.W. was placed in a psychiatric residential treatment center (RTC). (S. App. 17). A.W. was foreclosed from filing for due process from PPS on account of court orders below enforcing the EPSA (S. App. 27); due to financial constraints, N.W.'s placement at the RTC was prematurely terminated. In the last eight months, at eighteen years old, she had four suicide attempts and five psychiatric hospitalizations.

C. Proceedings Below

1. On April 3, 2018, A.W. filed an application with the NJOAL seeking equitable reformation of the EPSA in accordance with her three-day review letter. (S. App. 14). On April 24, 2018, PPS countered with a motion to enforce the EPSA "as written." (S. App. 15).

2. On May 17, 2018, the NJOAL rejected A.W.'s reformation request and held the EPSA must be enforced "as written." (S. App. 15). The NJOAL declared all the prospective waivers in the EPSA applied even if N.W. re-enrolled in the public school district. (S. App.

44). The NJOAL's opinion did not acknowledge A.W.'s three-day review letter. (S. App. 39).

3. On September 18, 2018, A.W. filed this lawsuit before the U.S. District Court for the District of New Jersey as an appeal from the NJOAL's decision. Among other claims, A.W. asserted that the EPSA "as written" – prospectively waiving all N.W.'s statutory rights, civil rights and common law rights – was unenforceable as contrary to New Jersey state and federal public policy. (S. App. 31).

4. On July 10, 2020, the U.S. District Court for the District of New Jersey declared the EPSA to be fully enforceable and a bar to N.W.'s claims. (S. App. 31-33). The district court did not consider the IDEA's three-day review period. (S. App. 27). The district court rejected New Jersey Supreme Court cases cited by Petitioners in support of their claim that the EPSA violated New Jersey public policy, stating such cases were "not IDEA cases dealing with similar waiver provisions." (S. App. 31). Petitioners appealed on July 12, 2020.

5. On March 15, 2022, the United States Court of Appeals for the Third Circuit affirmed the district court. The Third Circuit addressed A.W.'s three-day review letter for the first time but considered it ineffective. (Pet. App. 10). The Third Circuit stated that the EPSA was enforceable and not against public policy "with one exception" – for waiving future claims under anti-discrimination laws which it severed from the agreement. (Pet. App. 7). The Third Circuit entered

judgment against Petitioners and ordered that the EPSA itself be placed on the public record.

6. Petitioners timely moved for panel rehearing and rehearing *en banc* which was denied on April 11, 2022. The Order denying rehearing reflects Senior Circuit Judge Julio M. Fuentes voted for panel rehearing and did not concur in the panel's opinion of March 15, 2022. (Pet. App. 16).

REASONS FOR GRANTING THE WRIT

I. This Court Regularly Grants Review To Clarify The IDEA Which Has A Wide Impact On Students With Disabilities, Their Families, And Schools

Since *Rowley*, this Court has recognized the IDEA's importance by repeatedly providing guidance on its proper operation. *See, e.g., Winkelman ex rel. Winkelman v. Parma Cty. Sch. Dist.*, 550 U.S. 516 (2007) (parents' right to prosecute IDEA claims on their own behalf); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (entitlement to expert fees); *Schafer ex rel. Schafer v. Weast*, 546 U.S. 49 (2005) (burden of proof in administrative hearings); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (entitlement to certain services for children with disabilities); *Honig v. Doe*, 484 U.S. 305 (1988) (breadth of provision mandating child to "stay put" pending resolution of placement dispute).

On several occasions, this Court has also addressed issues relating to tuition reimbursement under the IDEA. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

In 2017, this Court heightened the bar on the level of educational benefits the IDEA demands in *Endrew*, 137 S. Ct. at 988, and clarified when exhaustion of administrative remedies is excused in pursuing school-based civil rights and discrimination claims in *Fry*, 137 S. Ct. at 743.

The IDEA has a widespread impact upon disabled students, their families, and schools throughout the nation: approximately 15 percent of total public-school enrollment are classified as eligible to receive special education services, reflecting approximately 7.2 million students as of 2020-2021.[8]

Being the parent of a child with a disability involves serious emotional and practical challenges; while even the process of developing an IEP is itself very demanding, when a conflict ensues and the parent is faced with the hardship of filing a due process petition, the stress and challenges are augmented exponentially.

No parent placed in these extenuating circumstances should be asked to make the choice: either waive all your child's future rights under the IDEA,

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[8] The Condition of Education, 2022, Chapter 2, *ante*, footnote 5, at p. 5.

ADA, Section 504, civil rights laws, and common law rights, including your child's basic, statutory right to receive a FAPE, or the school district will not provide an IEP or other necessary special education services for your child. This is not a choice but a Hobson's choice, a form of extortion, where a disabled child's dire educational needs are being used, as a carrot, to extract unconscionable waivers.

II. The Third Circuit's Decision Conflicts With Decisions Of This Court And Other Federal Appellate Decisions

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held there can be no prospective waiver of federally protected civil rights. *Id.* at 51-52 (as to employee's rights under Title VII). *See also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273–274 (2009) ("a substantive waiver of federally protected civil rights will not be upheld"); *Zedner v. United States*, 547 U.S. 489, 490 (2006) (prospective waiver of speedy trial rights ineffective).

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), this Court further declared that agreements that operate to prospectively waive a party's right to pursue statutory remedies are invalid as contrary to public policy. *Id.* at 637 n.19. The United States Court of Appeals for the Third Circuit adhered to this Court's prospective waiver doctrine in *Williams v. Medley Opportunity Fund*,

965 F.3d 229, 238 (3d Cir. 2020) (holding arbitration agreement operating to prospectively waive statutory remedies was unenforceable). Other appellate courts have similarly followed *Mitsubishi Motors Corp.* to decline to enforce agreements operating to prospectively waive federal statutory rights or remedies. *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017); *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009); *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021).

The federal statutory rights of a minor under the IDEA, the ADA, Section 504, and FERPA, and a minor's civil rights under Section 1983 – a vehicle for enforcing the Fourteenth Amendment (U.S. Const. Amend. XIV) – are as worthy of protection under the prospective waiver doctrine as the commercial interests at stake in *Mitsubishi Motors Corp.*, 473 U.S. at 614, the speedy trial rights at stake in *Zedner*, 547 U.S. at 490, and the employment rights at stake in *Alexander*, 415 U.S. at 36. No viable rationale exists for applying a different standard to a minor's civil rights (and thus, a minor's equal protection and due process rights), and statutory rights and remedies under federal remedial laws.

Instead, excepting a minor's rights from the prospective waiver doctrine on the basis that the matter arises from an IDEA petition offends the pledges States make when receiving IDEA funds from the federal government. The IDEA "offers States federal funds to assist in educating children with disabilities"

(*Endrew*, 580 U.S. ___, 137 S. Ct. at 993 (2017)), and "[i]n exchange for the funds, a State pledges to comply with a number of statutory conditions." *Id.* These conditions include providing a FAPE "to all eligible children." *Id.* The IDEA states that this duty to provide a FAPE shall continue until the student reaches the age of twenty-one, 20 U.S.C. 1412(a)(1)(A), and IEP's must be provided at the start of each school year.

Having received federal funding to implement the IDEA for "all eligible children," school districts should not be permitted to demand that parents release them from prospective statutory obligations as a condition of receiving IEP's and educational services for their children which are statutorily required under the IDEA to provide a FAPE.

The Court of Appeals for the Third Circuit ordered that the EPSA involved here be placed on the public record. This is significant as *amici curiae* previously have been unsuccessful in seeking to gain access to educational placement and settlement agreements on the ground that the terms of these agreements are protected by student confidentiality. *See*, *e.g.*, *L.R. v. Camden City Pub. Sch. Dist.*, 213 A.3d 912, 238 N.J. 547 (2019) (six *amici curiae* appeared in a public interest group's appeal seeking, unsuccessfully, access to such agreements). If the Third Circuit's opinion is allowed to stand with the present EPSA on the public record, it will serve as a template for school districts to demand unconscionable waivers of minor's future statutory rights as a pre-condition to

providing educational services subverting, as a practical matter, Congressional objectives under the IDEA and this Court's precedent in *Endrew* and *Fry*, via non-adherence to this Court's prospective waiver doctrine.

III. The United States Court Of Appeals For The Third Circuit Is Exceptional As The Only Federal Appeals Court Condoning Prospective Waivers Of Minors' Federal Statutory Rights Which Other Courts And Jurists Disagree With

To uphold the prospective waivers in the EPSA, the Third Circuit Court of Appeals relied upon a prior Third Circuit case from 1997, *i.e.*, *D.R. v. East Brunswick Board of Education*, 109 F.3d 896 (3d Cir. 1997). (Pet. App. 6).

In *D.R.*, the court enforced a limited cost-sharing agreement in an IDEA case that related to allocating private-school tuition expenses over two years. *Id.* at 899. In doing so, the majority opinion stated: "we emphasize that our holding is limited to the facts of this case and *should not be read to extend beyond this case and this agreement*." *Id.* at 898 (emphasis added). However, both the U.S. District Court and the Third Circuit Court of Appeals applied *D.R.* to sanction the blanket waivers of IDEA rights, federal civil and statutory rights, and state statutory and common law rights expressed in the instant EPSA. To the undersigned's knowledge and despite extensive research, no other

federal appellate court or federal district court has issued an opinion agreeing with, or aligned with, the majority decision in *D.R.*, let alone with its extension as here, to allow a school district to contract away its future statutory obligations under the IDEA and other federal and state statutes and seek to forever terminate its obligations to an emotionally-disturbed youth when fourteen years old.

Conversely, in *D.R.* itself, Senior United States Circuit Judge Anthony Scirica dissented. Judge Scirica opined that prospective waiver of IDEA rights contravenes federal public policy. He declared: the "IDEA creates certain rights to educational assistance that cannot be waived by the guardians of a handicapped child and certain duties that cannot be bargained away by school boards." *Id.* at 902 (Scirica, Circuit Judge, dissenting). The *D.R.* majority responded that public policy arguments *were not before it* (109 F.3d at 902 n.3), but *D.R.* has been relied upon for that very premise as we see here and often, in practice, by school boards.

Other courts have disagreed with *D.R.* and the premise that a minor's future statutory rights can be waived in exchange for IDEA services. In *Woods v. New Jersey Dept. of Educ.*, 796 F. Supp. 767 (D.N.J. 1992), the court held that a voluntary stipulation of settlement agreement did not bar an action against a school board, because the board still had a duty to comply with the IDEA and provide a FAPE. *Id.* at 776. The district court in *D.R.* relied upon *Woods* to hold that "a school board cannot discharge its duty by virtue of a

settlement agreement [and] a settlement agreement does not allow a school board to contract around or out of IDEA." *D.R. by M.R. v. East Brunswick Bd. of Educ.*, 838 F. Supp. 184, 193 (D.N.J. 1993). Significantly, the Third Circuit in *D.R.* did not overrule *Woods*, which remains persuasive precedent. *See also Charlene R. v. Solomon Charter Sch.*, 63 F. Supp. 3d 510, 518-519 (E.D. Pa. 2014) (discussing limited nature of *D.R.*; contractual principles apply but only to extent they "do not conflict with the IDEA and its purposes"); *Y.G. v. Riverside Unified Sch. Dist.*, 774 F. Supp. 2d 1055, 1064-1065 (C.D. Ca. 2011) (questioning blanket waivers under IDEA).

An IDEA settlement was also addressed in *Gaskin v. Commonwealth*, 389 F. Supp. 2d 628 (E.D. Pa. 2005). In the *Gaskin* settlement, statutory rights were not waived in *futuro*; the opposite was involved. The settlement stated there would be future compliance with the IDEA, compliance monitoring, and expanded opportunities for complaint investigation. *Id.* at 631-636. The district judge approved the settlement only because "the sweep of the release is not overly broad and does not extinguish the rights of parents to otherwise vindicate federal or state-provided rights through due process hearings." *Id.* at 628. The *Gaskin* settlement was later declared enforceable in *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247 (3d Cir. 2014). Although that settlement contemplated future compliance, the Third Circuit panel cited *Blunt* to uphold the instant

EPSA which was interpreted to waive future due process rights. (Pet. App. 6).

Given the exceptional reach of *D.R.* to endorse prospective waivers of minors' federal statutory rights, its application conflicts with this Court's precedent (as in Point II), and consequently, the Third Circuit's opinion is internally inconsistent and inexplicable. Citing to *Alexander*, 415 U.S. at 36, the opinion recognizes that "prospective waivers of rights under federal non-discrimination statutes are unenforceable." (Pet. App. 8). Both the ADA and Section 504 are non-discrimination statutes. *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 114-115 (3d Cir. 2018) (Section 504 and the ADA are aimed at "eradicating *discrimination* against individuals with disabilities"); *CG v. Commonwealth*, 734 F.3d 229, 234 (3d Cir. 2013) ("the ADA and RA prohibit and provide a remedy for discrimination").

Yet, when expressing its holding, the opinion states: "we hold that, with one exception, the waivers are not void as contrary to public policy." (Pet. App. 7). The Third Circuit then held that "[t]he agreement stands because the discrimination waivers are severable" (Pet. App. 8), and that, "[t]he rest of the waivers are left in tact," and "only the prospective discrimination waivers in paragraph 6 are void, and the rest of the [EPSA] is enforceable." (Pet. App. 9). However, denial of FAPE under the IDEA is a form of discrimination, as it "deprives disabled students of a benefit that non-disabled students receive simply by attending

school in the normal course." *CG*, 734 F.3d at 235. The opinion refers to paragraph 2 of the EPSA, and construes this paragraph as providing that "PPS's obligation to N.W. ends on June 30, 2019" (when N.W. was fifteen years old), but omits this termination of rights provision in expressing its holding regarding prospective discrimination waivers. (Pet. App. 6, 9).

Another inconsistency in the Third Circuit's opinion involves its treatment of civil rights claims. The Third Circuit rejected cases Petitioners had cited on the reasoning they "do not involve waivers of IDEA *or civil rights.*" (Pet. App. 7, n.1). The panel cited *Alexander*, 415 U.S. at 51-52, as mandating there can be no prospective waivers under Title VII of the Civil Rights Act of 1964. (Pet. App. 8). The panel then upheld, as enforceable, prospective waivers of N.W.'s *civil rights* under *Title VII of the Civil Rights Act*, Section 1983, and 42 U.S.C. 1988. (Pet. App. 8, 12-13; *cf.* S. App. 51).

This Court's intervention is necessary to address this conflict and uncertainty in federal appellate jurisprudence. Given the inconsistencies in the Third Circuit's opinion, its reliance upon *D.R.* as condoning prospective waivers of future statutory rights including civil rights and under the IDEA, and its express approval of the EPSA here "with one exception," invariably without this Court's intervention, school boards will rely upon the EPSA as a template to extract unconscionable waivers of minor's future statutory and civil rights in IDEA matters. The emotionally disturbed

population of students who require special education placements four times more frequently than any other disability category will most likely be harmed by this practice. (*See* footnote 7, and surrounding text).

IV. The Third Circuit's Decision Rendered The IDEA's Procedural Safeguard Provided Under 20 U.S.C. 1415(f)(iv) A Nullity

Congress expressly set forth detailed Procedural Safeguards for disabled students and their families under Section 1415 of the Act. 20 U.S.C. 1415. Among these, Congress provided safeguards pertaining to the execution of settlement agreements, expressly requiring that a school district representative and parent both execute any such agreements, and each party shall be granted a three-day review period to consider a settlement agreement and void it after execution. 20 U.S.C. 1415(f)(1)(B)(iv).

On March 2, 2018, Petitioners were expressly assured of, and relied upon, their statutory review period when asked to sign the EPSA in triplicate, and then, within three days, they voided the agreement subject to corrections necessary to align the agreement with representations made at the time of signing. (S. App. 47-48). Neither the NJOAL, nor the U.S. District Court, acknowledged the three-day review period granted under the IDEA's procedural protections and enforced the EPSA "as written" on March 2, 2018.

For the first time on appeal, the Third Circuit addressed Petitioners' letter. The Third Circuit described Petitioners' letter as follows: "[t]he record indicates that within three business days of her signing the settlement agreement, A.W. purported to conditionally void the settlement agreement, subject to inclusion of th[e] clause" that waivers would be void upon re-enrollment in the public school district. (Pet. App. 10). Later in its opinion, the Third Circuit observed that "A.W. wrote multiple times to PPS to ask for a modification of paragraph 4 to include a clause voiding the waivers upon reenrollment or clarification that PPS understood paragraph 4 this way." (Pet. App. 12). The Third Circuit then held this notice was ineffective on the ground A.W. "did not take explicit steps to void the agreement" (Pet. App. 10), and allegedly "permitted the [school] board to approve the settlement." (Pet. App. 12).

If express written notice within three business days is not sufficient to invoke the procedural protections of 20 U.S.C. 1415(f)(1)(B)(iv), it begs the question: what steps are sufficient? What steps must parents take if they discover, within the three-day review period, that an EPSA has been massaged with nuanced "school law" language to defeat their child's rights, *e.g.*, as here, to blanketly waive prospective rights whether in private or public school? If a parent expressly rescinds in writing and is still deemed as giving "permission to approve," how does this implement the IDEA's safeguards?

This case underscores the drastic impact the guarantee of a three-day review period may have on a family. A.W. signed the EPSA in triplicate – without a corresponding signature by a public-school representative – based on assurances that N.W.'s rights would be preserved in the future and that, upon reenrollment, the EPSA and all its prospective waivers would be void. (S. App. 9). Based on nuanced language inserted in the moment on March 2, 2018, coupled with dismissal of A.W.'s corrections in her three-day letter, the EPSA was transformed to effect a blanket waiver of N.W.'s prospective rights even when enrolled in public school – the opposite of what had been promised. The situation was traumatizing for A.W. and her family. N.W., an adoptee who endures deep seated feelings of grief and rejection, felt once again ousted and ostracized by her school community.

This Court's intervention is necessary to ensure that the IDEA's procedural protections are clearly defined for the benefit of disabled children, their families, school districts, and administrative agencies charged with overseeing and approving educational placement agreements.

V. The Third Circuit's Opinion Contravenes *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) Which Requires Federal Courts To Apply State Law In Deciding State Law Issues

The EPSA states it is governed by New Jersey state law. (S. App. 55). Thus, the Third Circuit had a

judicial duty to adhere to *Klaxon*, 313 U.S. 487 (1941), and adjudicate N.W.'s state law claims with reference to the law of the forum state, *i.e.*, New Jersey.

Under the IDEA, the states are free to enact laws providing greater protections for minors than required by the Act, and New Jersey has done so. *Geis v. Board of Educ. of Parsippany-Troy Hills*, 774 F.2d 575, 583 (3d Cir. 1985). As one example, while federal law places the burden of proof on parents in due process hearings (*Schafer*, 546 U.S. at 49), in New Jersey, the burden of proof and burden of production in administrative hearings are placed on school districts. N.J.A.C. 18A:46-1.1. Thus, New Jersey law and public policy must be separately considered to fairly adjudicate N.W.'s claims.

The Third Circuit's decision directly conflicts with New Jersey Supreme Court precedent. The Third Circuit opined that the EPSA operated to prospectively waive N.W.'s state tort claims. (Pet. App. 12-13). However, in *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 187 N.J. 323 (2006), the New Jersey Supreme Court held that it is against New Jersey public policy to enforce a release waiving a child's future tort claim, even when knowingly executed by the parent. 187 N.J. at 389. *Hojnowski* held that protecting the best interests of minors under the *parens patriae* doctrine is an important interest calling for considerable protections for minors (*id.* at 387) and based on the protections New Jersey "historically has afforded to a minor's claims" (*id.* at 386), such exculpatory agreements are unenforceable. *Id.* at 389.

Although cited by Petitioners on their state law claims, neither the Third Circuit Court of Appeals nor the U.S. District Court even mentioned *Hojnowski*. Nor did the lower courts cite historical New Jersey Supreme Court precedent which establishes state public policy: *i.e.*, to strike down, as unenforceable, exculpatory agreements that operate to prospectively waive statutory obligations (*Vitale v. Schering-Plough Corp.*, 174 A.3d 973, 231 N.J. 234 (2017) (waiver of prospective Workers' Compensation claim violates public policy); *McCarthy v. NASCAR, Inc.*, 226 A.2d 713, 48 N.J. 539 (1967)); or which arise out of unequal bargaining power. *Carvalho v. Toll Bros. & Developers*, 675 A.2d 209, 143 N.J. 565 (1996).

Regarding New Jersey Supreme Court precedent, the Third Circuit selectively applied only *Rodriguez v. Raymours Furniture Co.*, 138 A.3d 528, 225 N.J. 343 (2016), which struck down a waiver provision seeking to shorten the statute of limitations for filing a claim under the NJLAD. *Id.* at 365. The Third Circuit applied *Rodriguez*, 225 N.J. at 343, to declare the EPSA unenforceable, in part, for prospectively waiving NJLAD claims. (Pet. App. 8).

Other than applying *Rodriguez* to NJLAD claims, the Third Circuit characterized New Jersey Supreme Court precedent and public policy as "poor analogs" for deciding this matter on the grounds they did not involve IDEA rights or civil rights. (Pet. App. 7 n.1). However, the due process petition here arose not only under the IDEA, but under New Jersey education laws which provided expanded protections over the IDEA.

And, the EPSA's provisions prospectively waived not only N.W. federal statutory and civil rights, but N.W.'s state statutory rights (S. App. 51), and – as interpreted by the Third Circuit – N.W.'s prospective common law rights in tort as well. (Pet. App. 12-13).

New Jersey public policy does not permit school districts to extract waivers from parents of minors' future educational rights, disavowing statutory obligations owed to disabled children including rights to receive IEPs, to receive FAPE, and to file for due process. Not only are these basic statutory obligations owed to children in furtherance of important public-policy interests, but unequal bargaining power is self-evident with the balance of power heavily tilting in favor of the school district with each day that it delays and denies services over which it has exclusive control.

This outcome is underscored by the position of the New Jersey Department of Education (NJDOE). Analogously, when the COVID-19 pandemic required transition to remote learning, the NJDOE became aware that school districts were seeking to require that parents execute waivers of present or future claims as a condition of implementing students' IEP's in the remote setting; the NJDOE issued guidance that such practices were illegal. *See* NJDOE Broadcast, "*Parental Waivers for the Delivery of Remote or Virtual Special Education and Related Services*," April 30, 2020 (available at nj.gov/education/broadcasts/2020) (last visited July 12, 2021).

The IDEA expressly grants the States license to establish their own policies to further the education of disabled children within their borders, with the IDEA setting the floor, not the ceiling. The Third Circuit Court of Appeals invaded the province of the State of New Jersey in enforcing this EPSA which contravenes established New Jersey Supreme Court precedent. This Court's intervention is necessary to ensure that State law is properly considered in ascertaining the educational rights of disabled minors under State law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW S. SLOWINSKI
Counsel of Record
SLOWINSKI ATKINS LLP
290 W. Mt. Pleasant Ave.
Suite 2310
Livingston, NJ 07039
(973) 740-2228
mss@slowinskiatkins.com

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