No. _____

In the
Supreme Court of the United States

HEATHER B., NOZAR NICK S., AS PARENT AND NEXT FRIEND OF S.S.,
Petitioner,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT; PEARLAND INDEPENDENT SCHOOL DISTRICT; TEXAS EDUCATION AGENCY,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

SONJA D. KERR
Counsel of Record
CATHERINE M. MICHAEL
CONNELL MICHAEL KERR, LLP
9600 Great Hills Trail
Suite 150
Austin, Texas 78759
(512) 637-1083
sonja@cmklawfirm.com
catherine@cmklawfirm.com

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Individuals with Disabilities Education Act (IDEA) requires states and school districts to identify, locate and evaluate children with disabilities including those attending private schools. 20 U.S.C. § 1412(a)(3)(A), 20 U.S.C. § 1412(a)(10)(A). The IDEA requires each state and school district to have policies and procedures and a practical method in place to ensure that children are timely identified, a duty known as Child Find.

The question presented is:

1. Whether parents of a previously IDEA eligible blind student attending a private school bear any responsibility to give notice of their child's needs to a state or school district as a pre-condition for a state or school district's compliance with its affirmative Child Find obligation under the IDEA?

RELATED PROCEEDINGS

Heather B., Parent, Nozar Nick S., Parent and Guardian of S.S., a Minor v. Houston Independent School District, Pearland Independent School District; Texas Education Agency, 2022 WL 4299727 (5th Cir. 2022).

Heather B., et al v. Houston Independent School District, et al., 2021 WL 1215848, (S.D. Texas, March 31, 2021)

Heather B., et al v. Houston Independent School District, et al., 2021 WL 1216883 (S.D. Texas, March 9, 2021)

Heather B., et al v. Houston Independent School District, et al., 2019 WL 13027519 (S.D. Texas, September 30, 2019)

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Petitioner Heather B. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1) on rehearing is unpublished. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1) is unpublished but available at 2022 WL 4299727. The district court's affirmance of a magistrate's recommendation and report for Pearland Independent School District (Pearland ISD) and the Texas Education Agency is (Pet. App. 17) unpublished but available at 2021 WL 1215848. The district court's magistrate's recommendation and report (Pet. App. 19) is unpublished but available at 2021 WL 1216883. The district court opinion granting judgment for Houston Independent School District (Houston ISD) (Pet. App. 49) is unpublished but available at 2019 WL 13027519. The Texas Education Agency hearing officer opinion in *S.S. v. Pearland Independent School District, TEA Dkt. No. 249-SE-0617,* (Pet. App. 59) is unpublished. The Texas Education Agency hearing officer opinion in *S.S. v. Houston Independent School District*, TEA Dkt. No. 248-SE-0617, (Pet. App. 76) is unpublished.

JURISDICTION

The court of appeals entered its judgment on September 19, 2022. (Pet. App. 1.) The clerk of court granted an extension of time to file for rehearing. (Pet. App. 86.) The Court denied a timely petition for

rehearing *en banc* on October 24, 2022. (Pet. App. 84.) This Court has jurisdiction under 28 U.S.C. § 1254(1)

RELEVANT STATUTORY PROVISIONS

20 U.S.C. § 1412(a)(3)(A)

> (a) In General. A State is eligible for assistance under this part for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:
>
> (3) CHILD FIND
>
> (A) In general
>
> All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(10)(ii)(I)

(ii)(I) the requirements of paragraph (3) relating to child find shall apply with respect to children with disabilities in the State who are enrolled in private,

including religious, elementary schools and secondary schools.

34 C.F.R. § 300.111(a)(1)

> (a) General.
>
> (1) The State must have in effect policies and procedures to ensure that –
>
> > (i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated; and
> >
> > (ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

STATEMENT OF THE CASE

S.S. has been blind from birth. She was originally identified as eligible for special education services in preschool. But, after her parents moved her to private preschools, S.S. lost her IDEA eligibility. This case involves the failure of two school districts and the Texas Education Agency to put in place a practical method to locate, identify and timely re-evaluate S.S. as required by the Individuals with Disabilities Education Act's, "Child Find" requirement. Instead,

during the 2016-2017 school year, (the very time S.S. remained in need of special education services), the Texas Education Agency had in place an illegal 8.5% "cap" discouraging schools from identifying children with disabilities. A hearing officer, the district court, and the Fifth Circuit Court of Appeals placed the responsibility of Child Find on S.S.'s parents. The Fifth Circuit erroneously held the parents failed to give school officials sufficient notice about S.S. This is contrary to the affirmative "Child Find" duty the IDEA requires and thus creates a circuit split.

A. Course of proceedings and disposition of the case.

This case arises under the IDEA, 20 U.S.C. § 1415(i)(2)(A).

On June 7, 2017, the parents filed a special education due process hearing against each district; to wit, *S.S. v. Houston Independent School District,* Docket No. 248-SE-0617, ROA.460 and *S.S. v. Pearland Independent School District*, Docket No. 249-SE-0617. ROA.468. *Heather B.* claimed a Child Find violation, asked for S.S.'s prior eligibility to be restored, and for an Individual Education Plan (IEP). The family also sought private school tuition and related expenses.

On October 24, 2017, the TEA hearing officer issued a decision in favor of Houston ISD. (Pet. App. 76) On December 8, 2017, the same TEA hearing officer issued a decision in favor of Pearland ISD. (Pet. App. 59)

S.S. appealed to the Southern District of Texas and added the Texas Education Agency as a defendant. The district court affirmed the hearing officer in favor of

Houston ISD. (Pet. App. 49) A magistrate recommended affirming the finding of the hearing officer in favor of Pearland ISD and the Texas Education Agency. (Pet. App. 19) The district court affirmed the magistrate holding for Pearland ISD and the Texas Education Agency. (Pet. App. 17)

The Fifth Circuit affirmed the district court. (Pet. App. 1)

Heather B. timely filed a rehearing *en banc*, which the Fifth Circuit denied. (Pet. App. 86, 84)

B. Statement of relevant facts.

From 2003-2004 until May 2017, the Texas Education Agency had in place an illegal 8.5% cap on identification of children with disabilities under the IDEA. ROA.2562-2563. TEA had no specific method in place to identify, evaluate and track blind children in Texas. (Pet. App. 46) ("…there is no policy or procedure at the state level that allows for the identification and tracking of all visually impaired students in the state.")

Born blind, S.S. became IDEA eligible in 2010, and Houston ISD initially provided her an Individualized Education Program in preschool. (Pet. App. 2-3). She was also placed on a statewide registry maintained by the Texas School for the Blind and Visually Impaired-the (TSBVI)'s VI Registry. ROA.2582; ROA.2580-2581. But it wasn't "anybody's job" to connect the Texas Registry List of blind children to the individual districts. (Pet. App. 46, n.9); ROA.1231-1232 (Testimony of Dr. Pogrund)

In 2010, due to poor public school educational services and hospitalization, S.S.'s parents moved her to a local private preschool. ROA.2584-2585. They asked Houston ISD for special education services on November 9, 2010. ROA.2591; Houston ISD never provided them. ROA. 2585, ¶4; ROA.2699-2700; ROA.6044-6045; 6047. So, the parents paid for all her private school services from spring 2010 forward. ROA.2585; ROA.8246-8247.

Four years later, in June, 2014, the family moved from Houston ISD to Pearland ISD but S.S. continued to attend her private school in Houston. (Pet. App. 23)

Dorothy Vetrano, Teacher of the Visually Impaired for Houston had never provided direct services to a student in a private school. ROA.6051:6-12.

(2015-2016) Third Grade

In third grade, the parents met several times with S.S.'s private school concerning safety and vision issues. S.S. needed help with uneven terrain, curbs and crossing streets as she repeatedly fell. ROA.2585. S.S. could not see the black board at school. ROA.2585-2586. The parents met with the private school principal, sharing with her S.S.'s preschool IDEA paperwork. The principal contacted Houston ISD and assured the family the school was waiting to hear from Houston ISD. ROA.2585. No one affiliated with Houston ISD informed the parents to look to Pearland ISD for services. ROA.1909.

On January 21, 2016, the parents emailed both Pearland ISD (where they lived) and Houston ISD (where S.S. went to private school). The email read:

> Dear Dr. Terry and Ms. Yancy: Good morning. We received your contact information from Cecilia Robinson (Region 4 Education Service Center).[1] We have a 9 year old daughter, [S.S.] that is low vision (legally blind, limited peripheral vision, nystagmus). She attends a private school in Houston, but we live in Pearland. We are interested in having her receive vision services, but do not know how to go about doing so and which school district would be able to help. We had [S.S.] evaluated at the New England Low Vision Clinic (Perkins) this past summer and they highly recommended an O & M evaluation and vision aids for the classroom. If either or both of you could advise us how to move forward we would greatly appreciate your assistance. (Pet. App. 24, Pet. App. 63-64); ROA.2625; ROA.2586, ¶12.

The parents' 2016 email to the school districts followed the parents' efforts to find help. At their own expense, the parents had S.S. evaluated at Perkins School for the Blind in New England, confirmed a permanent vision loss by a Texas ophthalmologist (Dr. Modi), and paid for a neuropsychological evaluation by Dr. Valerie Van Horn Kerne. (Pet. App. 23, Pet. App.

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[1] In November of 2015, the parents had also contacted TEA's Region 4 Education Service Center. ROA.4303; RE at Tab 6. The Texas Education Agency's Region 4 Education Service Center was also a Texas Education Agency contractor and one of the agencies listed on the 2008 consent form the parents signed when S.S. was originally placed on the VI Registry. ROA.2582.

63); ROA.4303, ROA.2595-2605 (Perkins); ROA.2606-2608 (Modi); ROA.2609-2623 (Kerne).[2]

Pearland ISD failed to respond to the January 2016 email. (Pet. App. 4) Pearland ISD's view was that parents were partially responsible to implement Child Find. ROA.2186-2187. But Pearland ISD staff were to contact an inquiring parent. ROA.2188-2190. Yancy didn't forward the parents email to anyone before she left the district in March 2016. (Pet. App. 66) Pearland ISD contended the parents had the duty to follow up when Pearland ISD staff didn't respond. (Pet. App. 37) ("Pearland ISD only discovered the email when parents re-emailed on May 15, 2017"); (Pet. App. 66, ¶ 20). The parents didn't follow up with Pearland ISD at that time because the parents believed from Houston ISD that "either school district could do the evaluation." ROA.2194:12-21.

Houston ISD responded to the January 2016 email from S.S.'s parents and in May 2016, decided S.S. no longer qualified for services despite her previous IDEA eligibility, and the reports from Perkins, Dr. Modi, and Dr. Kerne. ROA.2586. At a subsequent June 7, 2016, meeting, Houston ISD told the parents that whether S.S. attended private or public school, she wasn't IDEA eligible. (Pet. App. 25).

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[2] Perkins also referred the family back to the Texas School for the Blind and Visually Impaired (TSBVI). The Texas School for the Blind and Visually Impaired is a statewide school but is physically located in Austin, Texas, far from Houston/Pearland geographically. The parents did contact TSBVI. ROA.2585, ¶9.

At the same June 7, 2016, meeting, Houston ISD refused the parents' first oral request for an Independent Educational Evaluation (IEE) at public expense. ROA.2586, ¶16. ("We asked if this was the time to ask for an Independent Educational Evaluation but we were told no.")

(2016-2017) (Fourth Grade)

In the fall of 2016, S.S. began fourth grade at another private school, the Joy School in Houston. ROA.2587. TSBVI staff invited Houston ISD to a daylong observation of S.S. and told Houston ISD staff they believed S.S. qualified as a student with a visual impairment. (Pet. App. 25); ROA.2587.

On October 7, 2016, Dorothy Vetrano, Houston ISD's teacher of the Visually Impaired (TVI) emailed the parents saying S.S. would qualify for "V[ision] I[mpaired] services" and there should be an Individualized Education Program meeting. ROA.2636; ROA.2587.

On December 30, 2016, S.S. was featured in the *Houston Chronicle's* "Denied" series with the heading: "In Texas, Even Blind Children Cannot Get Special Education Services." (Pet. App. 25); ROA. 2587; ROA.2672-2675.

On January 19, 2017, seven months from the summer 2016 meeting, Houston ISD finally held a meeting to develop an Individualized Education Program for S.S. Houston ISD staff later testified that it considered S.S. to be special education eligible by the time of this meeting. ROA.6029; ROA.5429.

Still, by January 2017, no Individualized Education Plan had been developed for S.S.; Houston ISD said SS was not eligible. (Pet. App. 25) The parents asked Houston ISD again for an Independent Education Evaluation at public expense. (Pet. App. 25); ROA.2587. This time, Houston ISD agreed. But more delay occurred as the parents had difficulty obtaining an evaluator. ROA.2587.

Between March and April 2017, Emily Gibbs, Pearland ISD's teacher of the visually impaired completed an evaluation of S.S. Houston ISD paid for this. (Pet. App. 26) The lower court agreed that Pearland ISD knew of S.S. during the 2017 Gibbs evaluation period but concluded this was not enough notice. (Pet. App. 26-27, 34-35, 38-39).[3] The Fifth Circuit held Pearland ISD had no "notice" about S.S. despite teacher Gibbs' involvement. (Pet. App. 14)

In May of 2017, the parents obtained counsel and wrote both districts again to confirm whether S.S. was IDEA eligible or not. (Pet. App. 26)[4] Houston ISD then issued a Prior Written Notice that the ***sole*** reason S.S. was not eligible as a result of the January 2017 meeting, was because the parents had requested an IEE. ROA.2587-2588, ¶¶ 22-23. Pearland's Special Education Director, Pam Wilson, responded

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[3] Pearland ISD did not appeal that point; still, the Fifth Circuit absolved it of liability. (Pet. App. 14).

[4] The parent did not know that Pearland ISD actually had some responsibility until after getting counsel. ROA.1912. Mr. S. was surprised; he would have asked earlier if he had known rather than self-funding her education. ROA.1912-1913.

acknowledging the email to Ms. Yancy from the year before had been received by Pearland but had not been forwarded to anyone at Pearland ISD and so Pam Wilson had not seen it until May 15, 2017. (Pet. App. 27).

On May 15, 2017, the parents wrote Pearland ISD and clearly stated that they had placed S.S. in private school because they didn't know of Pearland's responsibility – "everyone told us that HISD was responsible for her because her private school was located in Houston. But, if she could receive what she needed in a public school, of course, we would be willing to have her in public school." ROA.2856.

On May 22, 2017, the Texas legislature (S.B. 160) finally banned the Texas Education Agency's 8.5% illegal cap on finding children eligible for special education. ROA.2685; ROA.2457; ROA.3149.

On June 1, 2017, the Pearland ISD staff met with the parents. ROA.1911. Initially, Pearland ISD claimed the parents had to enroll S.S. before they could receive an IEP for her. ROA.1911. Emily Gibbs attended the meeting but refused to provide the parents with a copy of her evaluation of S.S. because, [even though it was an IEE sought by S.S.'s parents], it "belonged" to HISD. ROA.2588.

S.S. Files for Hearings June 7, 2017 (Prior to Fifth Grade)

On June 7, 2017, S.S. requested a due process hearing against both Houston ISD and Pearland ISD. (Pet. App. 27). On June 20, 2017, almost two weeks

after the hearing request, and without any additional testing, Pearland ISD ***subsequently*** agreed S.S. was IDEA eligible. (Pet. App. 68); (Pet. App. 27); ROA.7485-7486.

(2017-2018) (Fifth Grade)

Starting fourth grade, S.S. continued to struggle. She needed 42 point font for assignments when typing, 36 point font to read, and 14-16 point font for longer typing. ROA.7520, ROA.7492. S.S.'s reading speed decreased due to eye fatigue and it was recommended she receive Braille instruction. ROA.7587; 7492. S.S. required orientation and mobility – that is, cane techniques, street crossing, identifying landmarks and tools, and locker support. ROA.7486-7487. S.S. needed assistive technology: access to computer or laptop with a Qwerty keyboard, VizioBook, CCTV, Monocular, Dome Magnifier, Large print materials 14 point, Access to a reading stand, Books on audio, Screen Reader, and Speech to text on an iPad. S.S. was also to have vision goals, including Braille for reading and Writing. ROA.7516-7517. Another goal was to improve her use of magnification devices and to improve use of social skills to be sure she knew with whom she was speaking. ROA.7517-7518.

Thirteen days after the hearing request, Pearland ISD agreed as of June 20, 2017, that S.S. was IDEA eligible. (Pet. App. 27).

As of August 27, 2017, the Pearland IEP meeting was completed. ROA.7490; ROA.7908:5-11.

But Pearland ISD did not complete an IEP for S.S. until September 27, 2017. (Pet. App. 28).

In early October, 2017, Pearland ISD finally issued a notice refusing to pay for S.S. to attend private school. ROA.7911.

On January 11, 2018, the United States Department of Education notified the Texas Education Agency the number of children being identified for special education in Texas had reduced as a result of the 8.5% illegal cap. ROA.2562-2563.

While the IHO found that Pearland ISD's belated Individual Education Plan was appropriate for S.S., the record shows that S.S. tried the IEP in the fall of 2018, lasted one day and failed to return. A licensed psychologist recommended she not be required to go to public school and be allowed to return to private school. ROA.2691-2693; ROA.2459-2456. S.S.'s request to the Texas Education Agency for assistance in December of 2018 went unanswered. ROA.2687-2688.

In August 2018, the parents received an undated letter from Pearland ISD indicating that a child could be evaluated for purposes of Child Find. Had the parents received this earlier, the parents would have known to contact Pearland ISD earlier. ROA.2747; ROA.2746, ¶2.

In 2019, the Texas Education Agency submitted its plan for IDEA funds for the 2019-2020 school year. It asked for conditional approval and admitted the first date it could ensure Child Find would be June 30, 2021. ROA.2524.

In December 2018, the winter of S.S.'s sixth grade year, given no answer from the entities in Texas, the parents gave notice and moved to Massachusetts.

ROA.2710-2715. S.S. remains in private school out of state placed by her resident Massachusetts school district. Her level of need was described as "high" warranting the separate day school. ROA.2738. As a sixth grader, she needed instruction in shoe tying, zipper use, work organization; her plan included Braille instruction, orientation and mobility training (using a cane), and counseling. ROA.2729. The family sold their Pearland home in December 2019 but prefers to live in Texas. They moved because they could not get appropriate services for S.S. ROA.2746-2747.

The Hearing Decisions Issue in Fall of Fifth Grade

The hearing officer ruled for Houston ISD and Pearland ISD. (Pet. App. 76) (October 24, 2017); (Pet. App. 59) (December 8, 2017); ROA.4305; ROA.1807. Having exhausted administrative remedies, S.S. appealed the final decisions to the district court. The district court affirmed the hearing officer. (Pet. App. 49, Pet. App. 19, Pet. App. 17.) The Fifth Circuit affirmed the district court. (Pet. App. 1.)

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's opinion in this case holds parents responsible for the IDEA statutory duty of Child Find. This conflicts with the decisions of at least five other circuit courts of appeal. It creates a circuit split on the critical question of whether parents have the Child Find duty, rather than states and school districts. The IDEA and all other circuits place the duty on the state and school districts. This Court should grant this petition in order to resolve the circuit split

and to ensure that the circuit courts are consistent with this Court's own jurisprudence. For in *Forest Grove Sch. Dist. v. T.A.,* 577 U.S. 230, 245, 129 S. Ct. 2484, 174 L.Ed 2d 168 (2009), this Court made very clear that the school district – not the parents – has the affirmative duty of Child Find, describing it as one of "paramount importance." *Id.* at 129 S. Ct. 2495. This Court has ***never*** held that the parent must do the school district's job of Child Find –identify, locate, and evaluate all children who might have disabilities including those in private school. That is why this writ should be granted.

A. The IDEA's Child Find requirement.

The IDEA places a Child Find obligation on school districts and states. "Child Find" refers to the agency obligation to identify, locate, and evaluate all children in a school district who: (1) either have disabilities or are suspected of having disabilities; and (2) need special education as a result. 34 C.F.R. § 300.111(a)(1)(i). The statute requires that each state agency have a "practical method" in place to ensure that children suspected of having disabilities are "identified, located and evaluated."

Texas lacks a policy or procedure at the state level to identify and track all visually impaired students. (Pet. App. 46); ROA.4319. The Fifth Circuit's decision acknowledged that the Child Find duty applies to children attending private schools in the state of Texas. (Pet. App. 9)

B. The 5th Circuit has placed the Child Find duty on Parents

Despite this Court's decision in *Forest Grove*, and other circuit's jurisprudence as well as its own, the 5th Circuit's decision places the responsibility for Child Find referral primarily on the parents.

The Fifth Circuit ignored specific and obvious evidence that should have put the districts and the Texas Education Agency on notice of S.S.:

- Houston ISD was in possession of S.S.'s initial preschool evaluation in 2010 concluding she was IDEA eligible and gave her an Individual Education Plan. (Pet. App. 3).
- S.S. was on the Texas Registry for Visually Impaired as of July 10, 2008. (Pet. App. 46). The parents did not learn she was no longer on the TSBVI registry until September 22, 2016. ROA.2580-2582.
- The parents move to Pearland ISD in 2014 was sufficient notice to Pearland that she might need special education (because she had previously been determined IDEA eligible and thus would be a resident of Pearland ISD who would have a disability or be suspected of having a disability) (Pet. App. 3)
- The parents gave written notice to both Houston ISD and Pearland ISD on January 21, 2016 requesting help. (Pet. App. 4)

- In the fall of 2016, S.S. was featured in an article in the Houston Chronicle concerning the state's 8.5% cap on special education services. (Pet. App. 25)

- The parents gave written notice again in May 2017, to both Houston and Pearland. (Pet. App. 39)

The Fifth Court did not examine what proactive steps either the Texas Education Agency or Houston or Pearland failed to take to comply with their duty to have a practical method of identifying, locating and evaluating S.S. instead focusing on what the parents did or did not do and only then how the governmental entities "responded."

- The Texas Education Agency lacked a practical method to locate S.S., a previously identified blind child attending a private school; there was "no policy or procedure at the state level that allows for the identification and tracking of all visually impaired students in this state." (Pet. App. 46)

- The Texas legislature had banned the state's illegal 8.5% cap but not until 2016-2017. (Pet. App. 43); ROA.3149; ROA.341.

- The districts had no arrangement to notify each other of students moving into or out of their districts. (Pet. App. 46, n. 9)

- The Pearland ISD relied upon a primarily parent-based referral Child Find system; parents should contact Pearland ISD and then

> follow-up if they had not heard. ROA.2186-2187. Pearland ISD staff were to contact an inquiring parent. ROA.2188-2190. But Yancy didn't forward the parents email to anyone before she left the district in March 2016. (Pet. App. 66) Pearland ISD contended the parents had the duty to follow up when Pearland ISD staff didn't respond. (Pet. App. 37) ("Pearland ISD only discovered the email when parents re-emailed on May 15, 2017"); (Pet. App. 66, ¶ 20).

The District Court actually even claimed that the IDEA's Child Find duty to locate children in private schools was simply impossible: (Pet. App. 35).

> Plaintiffs' argument that Pearland ISD should have done something to determine that SS lived within Pearland ISD after June 14, 2014 places *an unreasonable and impossible burden* on the District to know, at all times, the identity and location of all students within the District. While the wording of the Child Find provision in the IDEA may suggest that there is such a burden, no Court has held that the burden is as high as that argued for by Plaintiffs in this case. (Emphasis added.)

The Fifth Circuit's standard prior to this case has never imposed an affirmative notice duty on the parents. In *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018), the Court relied upon the district "having notice" – suspecting – the child might have a disability and/or be eligible. And in *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303 (5th Cir. 2017), it explained that a parent delay – after the

school district has notice-could impact a remedy. Even district courts in Texas prior to the instant decision have held that the parent does not have the duty to refer; *only* the district has the affirmative duty to identify, locate and evaluate. *C.C. Jr. v. Beaumont Indep. Sch. Dist*., 2015 U.S. Dist. LEXIS 192513 (E.D. Tex. 2015).

Only now has the Fifth Court suggested that parents must be the primary source of notice to a district. This may be a result of the view that children in private schools are "not present" in the public schools, and thus can only come to the attention of school officials if parents request help. But no other circuits have so held and that is decidedly not the law.

C. The courts of appeals have uniformly placed the affirmative Child Find duty on states and school districts, not on parents.

The Fifth Circuit's decision in this case departs significantly from the route taken by its sister circuits, especially, the Third, Sixth, Eighth, Ninth and the D.C. Circuit.

Third Circuit

The Third Circuit has held that a child's entitlement to special education does not rest on the vigilance of the parents. *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist*., 81 F.3d 389, 397 (3d Cir. 1996). As one Pennsylvania Court explained the 3rd Circuit standard, a father's failure to request an evaluation could not diminish the District's Child Find duties because it was the District's "nondelegable responsibility" to propose an evaluation in light of the child's emotional issues

and declining academic performance. *Jana K. ex rel. Tim K. v. Annville-Cleona School Dist.*, 39 F. Supp. 3d 584, 602 (M.D. Pa 2014).

Fourth Circuit

While it did not award a remedy, the Fourth Circuit has held that a district violated Child Find when it denied a parent's repeated requests for a special education evaluation for a student who was unwilling to attend school. *T.B., J.R. v. Prince George's County Board of Education*, 897 F.3d 566 (4th Cir. 2018) (concurring opinion of Judge Gregory noting that he could "not agree that the blame lies with the student or his parents.")

Sixth Circuit

Consistent with the other circuits, the Sixth Circuit has explicitly held that the IDEA imposes a Child Find duty on states to require school districts to have policies and procedures in place to identify, locate and evaluate children with disabilities who may need special education and related services. *Board of Education of Fayette County, Kentucky v. L.M.,* 478 F.3d 307, 313 (6th Cir. 2007); *Lakin v. Birmingham Public Schools,* 70 F. App'x 295 (6th Cir. 2003) (failure to comply with the IDEA's Child Find provisions may alone be sufficient reason to reimburse an aggrieved party for the costs of a private placement); *Doe v. Nashville Pub. Sch.*, 133 F.3d 384, 387-88 (6th Cir. 1998). The State of Ohio has held that even if a parent fails to ask for IDEA services, the school district is not excused from a failure to evaluate the student because

of its Child Find duty. *Toledo City Schs.,* 66 IDELR 174 (SEA OH 2015).

Indeed, the Sixth Circuit early on explained that the school system has an "affirmative obligation" to seek out and evaluate all potentially eligible children whose parents live within the jurisdiction, regardless of whether such children are enrolled in private institutions within or without the jurisdiction. *Robertson County School System v. Patrick King, Jr.,* 99 F.3d 1139 (6th Cir. 1996) (unpublished).

Eighth Circuit

The Eighth Circuit has explicitly held that Child Find is the affirmative duty of school districts. In *R.M.M. v. Minneapolis Pub. Sch. Special Sch. Dist. No. 1*, 2017 WL 2787606 (D. Minn. 2017), aff'd *Spec. Sch. Dist. No. 1, Minneapolis Pub. Sch. v. R.M.M.*, 861 F.3d 769 (8th Cir. 2017), the Eighth Circuit held that a school district's "passive efforts" were deficient. The District Court explained and the Eight Circuit affirmed:

> Courts around the country, including this one, have recognized that the IDEA's child find requirement imposes an "affirmative duty" on school districts. This duty is the sole responsibility of the school districts – it may not be discharged simply by passing the burden on to private educators or parents. The reason for this is self-evident – private school officials and parents may be unwilling or unable to recognize the need for an evaluation and are under no duty to assist the district. Here the passivity of

> the School District's child find activities evidenced an abrogation of its responsibilities that the IDEA simply does not permit." *Id.* at *15-16.

Similarly, in Independent Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073 (8th Cir. 2020), the Eighth Circuit held that a school district had breached its Child Find duty where a bright student with mental health issues had chronic absenteeism. The school's duty to identify the child as disabled was not excused because the parents had "not yet" requested an evaluation of their child. *Id.* at 1083. The Court found the delay between when the teachers "knew" and the parents themselves requested an evaluation to be an improper delay and violation of Child Find by the school district.

Ninth Circuit

The Ninth Circuit has long held that school districts cannot foist upon parents the districts own legal affirmative duties. *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1485 (9th Cir. 1992), superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B) (parent leaving an IEP meeting did not protect school from violation); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1209 (9th Cir. 2008) (failure to fully evaluate found where school gave referral and parents didn't follow up). The educational agency simply cannot abdicate its affirmative duties under the IDEA. *Anchorage School District v. M.P.,* 689 F.3d 1047 (9th Cir. 2012).

In the context of Child Find, the Ninth Circuit has held that a child's unilateral placement outside of the district of residence does not absolve the resident district of its Child Find duties. Nor does it place any duty on the parent to give notice. In *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1183 (9th Cir. 2010), cert. denied,132 S. Ct. 996 (2012), the Court held the school liable for a denial of a free appropriate public education (FAPE) for the time *prior* to when a parent specifically asked for an evaluation. Following up, in *Bellflower Unified Sch. Dist. v. Lua*, 832 Fed. Appx. 493, 495-496 (9th Cir 2020), the 9th Circuit held that a school district must evaluate a child residing in its district for purposes of making a free appropriate public education (FAPE) available to her, even if she is enrolled in a private school in another district. It also recognized that the district where the private school is located is responsible for Child Find. 34 C.F.R. § 300.131.

The Ninth Circuit has not placed any duty on the parent of a private school child to give notice to either school district, the resident district or the district where the private school was located, each of whom has Child Find duties.

Tenth Circuit

The Tenth Circuit has held that the Child Find obligation requires schools to "proactively identify, locate and evaluate students with disabilities who may need special education or other academic supports." *D.T. by and through Yasiris T. v. Cherry Creek School District No. 5*, 55 F.4th 1268, 1273 (10th Cir. 2022). The Court issued no mandate requiring parents to take

any particular action to ensure the school was "notified" about a potentially disabled child.

D.C. Circuit

The D.C. Circuit's standard is that the IDEA imposes an affirmative obligation on school systems to ensure that all children residing in the state and who are in need of special education and related services are identified, located and evaluated. *Reid v. District of Columbia*, 401 F.3d 516, 518-519 (D.D. C. 2005). The Circuit has held that school districts may not ignore disabled students' needs nor may they "await" parental demands before providing special education instruction. *D.L. v. District of Columbia*, 109 F. Supp. 3d 12 (D.D.C. 2015) (the District failed to identify preschoolers for special education; they refused to accept and act on referrals from primary referral sources).

D. The Fifth Circuit's decision wrongly shifts Child Find onto parents of children in private schools and presents the ideal vehicle for this Court to resolve a circuit split because no other circuits so hold.

The Fifth Circuit's current decision departs dramatically from the approach taken by its sister circuits and even from its own decisions because it is based on parent blame.

In prior circuit opinions, *Krawietz v. Galveston Independent School District*, 900 F.3d 673 (5th Cir. 2018), *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1389 (2021), *D.C. v. Klein Indep. Sch. Dist.*,

860 Fed. Appx. 894 (5th Cir. 2021), the Court emphasized that Child Find is an affirmative duty and "mandate" of the school district. In those cases, involving children who were enrolled in a public school, the Fifth Circuit did not place any duty on the parents to "find" their own child or to give notice to the district that the child might be disabled.

But in this case, the Fifth Circuit has literally shifted the burden of Child Find to the parents when, as here, the child is attending a private school. In each instance, the Court faulted the parents and ignored the school's duties as discussed below. The Ninth Circuit has emphatically clarified that "FAPE" is a duty of the school district and not the parents. That is, schools cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents. *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1209 (9th Cir. 2008). The educational agency simply cannot abdicate its affirmative duties under the IDEA. *Anchorage School District v. M.P.,* 689 F.3d 1047 (9th Cir. 2012) (finding school's failure to update IEP could not be blamed on parents' reliance on stay-put during litigation).

1. The Parents had no Child Find duty to give Pearland ISD notice.

The Fifth Circuit lays the blame on the parents about "notice" to Pearland ISD. It claims that S.S.'s move to Pearland ISD in June of 2014 did not give the district "notice" so that she could be identified, located and evaluated. It ignores completely the testimony of Pearland ISD's special education director that it was the parents' job to contact and re-contact the district;

the Pearland ISD's "Child Find" system was mostly based on parent referral, rather than the district having a system to find S.S. (Pet. App. 13).

Next, the Fifth Circuit blamed the parents for not giving "sufficient notice" when asking for help from Pearland ISD in their January 21, 2016, email. Without any clear notice of their rights at the time, the Fifth Circuit claims the parents didn't fulfill their unknown duty to "follow up to ask PISD specifically to perform its own evaluation." (Pet. App. 13)

Finally, the Fifth Circuit even blames the parents for not giving effective notice to Pearland ISD because the intended recipient of the January 21, 2016, email, Ms. Yancy, a Pearland ISD employee didn't take action on the email. (Pet. App. 13). Thus, the Fifth Circuit has held that parents must not only make a written request for help in order to have their child "found" but they have a "duty" to follow up to be sure that school employees actually do their job of Child Find. (Pet. App. 13).

This is clearly inconsistent with the IDEA's affirmative statutory duty placed on states and school districts to "proactively" find children who have disabilities.

2. The Parents had no duty to ensure Child Find for Houston ISD

The Fifth Circuit erroneously held that despite being eligible in preschool, after years of receiving no special education services, when the parents wrote to both Houston ISD and Pearland ISD in January 2016, the parents didn't use the right language because they

"affirmed their desire to keep S.S. in private school." (Pet. App. 4) Then after Houston ISD delayed from January 2016 until July 31, 2017, the parents were "at fault" for not signing forms about additional evaluations for S.S. (Pet. App. 5) And despite asking in January of 2016 and again in May of 2017, for S.S. to have an IEP proposed for a public school, the Court faulted the parents for a "disagreement" between the parties and for disagreeing with an IEP not offered until September 27, 2017. (Pet. App. 6) This is simply not the law. Parents have no duty to even ask. Parents have no duty to notify. Only school districts have the duty to "find" a child. This is particularly true, where as here, Houston ISD knew that S.S. was previously an IDEA eligible child as a preschooler but allowed her to "get lost" in the system when she moved to private school.

The Court even misconstrues the events of the meeting on June 7, 2016, a date that was clearly within the June 2017 due process request. On that date the parents asked for an Independent Educational Evaluation (IEE) at school expense. Houston ISD refused. (Pet. App. 10). A refusal by a school district to provide an IEE is a delay that cannot be placed on the parents. That delay cannot be the parents; the Houston ISD refused, not the parents.

Finally, it is not true that Houston ISD engaged in proactive steps in the fall of 2016. Rather, the Texas School for the Blind and Visually Impaired observed S.S. in the fall of 2016 and told Houston ISD that S.S. was IDEA eligible. ROA.2587, ¶¶ 16-17). In short, Houston ISD erroneously refused the IEE in June of

2017 and did not offer to pay for an IEE until January 19, 2017. This seven-month delay was not a proactive step; it was a delay tactic, plain and simple. It cannot be laid at the feet of the parents. Houston ISD's Dorothy Vetrano, Teacher of the Visually Impaired told the parents S.S. was eligible as of October 2016. Houston ISD should have offered eligibility, an Individual Education Plan or at least referred her to Pearland ISD. It didn't. This unconscionable delay is not on the parents' shoulders because Houston ISD admitted that S.S. was IDEA eligible in October 2016.

3. Parents had no responsibility to fulfill Texas Education Agency's duty to have a practical system of Child Find for blind children.

The Fifth Circuit now insulates the state educational agency by ignoring the Texas wide 8.5% illegal Child Find cap and the abundance of evidence that there simply was no system to find, track and ensure services to blind children in Texas. (Pet. App. 15-16). The Texas Education Agency had and has no practical method – i.e. use of the TSBVI Blind Registry to "keep track" of S.S. as she was identified in preschool and then moved to private schools. That is a violation of the IDEA.

The IDEA doesn't require parents to invent the statewide system or to substitute for an inadequate system. This is especially true, where, as here, the Texas Education Agency had told the entire state of Texas to reduce identifying children with disabilities. That duty is entirely on the Texas Education Agency, not the parents of S.S.; the statute provides:

> (2) The State must have in effect policies and procedures to ensure that –
>
> > (iii) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated; and
>
> (iv) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

Nowhere does the statute state: "And parents have the duty to first notify and then re-notify the school district and state of their child's need for evaluations and special education services and to ensure a practical method of Child Find."

The Court is wrong and must be reversed.

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

The Fifth Circuit's decision required S.S.'s parents to give better "notice" to the entities that were required to "identify, locate and evaluate S.S." and to do so in the absence of a practical method of Child Find all during a time when Texas had an illegal 8.5% cap on

finding children with disabilities. This conflicts with the holdings of other circuits.

Each of the circuits to examine Child Find laid the duty on the doorstep of the school district or the State, not the parents.

The D.C. Circuit has explained that schools may not await "parental demands for special education; they have a duty to not ignore disabled children's needs. *Reid v. District of Columbia*, 401 F.3d 516, 518-519 (D.D. C. 2005); *D.L. v. District of Columbia*, 109 F. Supp. 3d 12 (D.D.C. 2015) (granting class action status on school district's failure to have affirmative child find process for preschoolers).

The Eighth Circuit affirmed a district court's finding that Child Find cannot be a "passive" activity or be placed onto the parents. In *R.M.M. v. Minneapolis Pub. Sch. Special Sch. Dist. No. 1*, 2017 WL 2787606 (D. Minn. 2017), aff'd *Spec. Sch. Dist. No. 1, Minneapolis Pub. Sch. v. R.M.M.*, 861 F.3d 769 (8th Cir. 2017), the District Court explained and the Eight Circuit affirmed that:

> Courts around the country, including this one, have recognized that the IDEA's child find requirement imposes an "affirmative duty" on school districts. This duty is the sole responsibility of the school districts – it may not be discharged simply by passing the burden on to private educators or parents. The reason for this is self-evident – private school officials and parents may be unwilling or unable to recognize the need for an evaluation and are under no

> duty to assist the district. Here the passivity of the School District's child find activities evidenced an abrogation of its responsibilities that the IDEA simply does not permit." *Id.* at *15-16.

The Ninth Circuit has repeatedly held that an agency can't push onto the parents – abdicate – its own affirmative duties. *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1485 (9th Cir. 1992), superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B) (parent leaving an IEP meeting did not protect school from violation); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1209 (9th Cir. 2008) (failure to fully evaluate found where school gave referral and parents did not follow up); *Anchorage School District v. M.P.,* 689 F.3d 1047 (9th Cir. 2012) (failure to update IEP). In *Bellflower Unified Sch. Dist. v. Lua*, 832 Fed. Appx. 493, 495-496 (9th Cir 2020), the 9th Circuit held that a school district must evaluate a child residing in its district for purposes of making a free appropriate public education (FAPE) available to her, even if she is enrolled in a private school in another district. It has not placed any duty on the parent of a private school child to give "sufficient" notice to either school district, the resident district or the district where the private school was located, each of whom has Child Find duties.

In short, as the Third Circuit has held for years, a child's entitlement to special education cannot rest on the vigilance of the parents. *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996)

But, according to the Fifth Circuit parents of children with disabilities who attend private school in Texas, Louisiana and Mississippi are now responsible for Child Find, not school districts. That is simply not the law because the statute itself requires proactive affirmative efforts to find children with disabilities, including those who are attending private schools. Notably, while the Fifth Circuit made passing reference to *Spring Branch Indep. Sch. Dist. v. O.W.*, *supra*, and *Dallas v. Woody*, it ignored its own earlier circuit decisions that established the Child Find duty as an *affirmative one* for school districts and the State of Texas. (App. 9-10). It then simply focused on the "notice" aspect of Child Find and shifted onto the parents the duty to provide the school district with notice, criticizing the parents' acts or failure to act while wholly ignoring the duties of the educational agencies. (App. 10).

The consequences of this decision are enormous. It means that children with disabilities in private schools – unlike children with disabilities in public schools – can no longer rely on the IDEA's provision that they be identified, located and evaluated by school districts or the state through some type of meaningful practical method. It means that by choosing to attend a private school, parents are automatically choosing to carry the burden to give "sufficient" notice (apparently more than emails to school officials, contacting five state agencies) and must use special language that they may not know to ensure that their child is "found."

The IDEA requires states and school districts to identify children attending private schools. After

identification, these children may receive "reduced" special services from public schools known as proportionate share services. 20 U.S.C. § 1412(a)(10)(A)(i)(I). The Fifth Circuit's analysis will lead to many thousands of students never being identified; without identification such children will not be able to access the proportionate share services the IDEA envisions at private schools.

Further, this ruling will also be used to ignore the needs of homeless children and children in juvenile facilities who are presumably to be protected by the same statutory provision. 20 U.S.C. § 1412(a)(10)(a).

F. This case is an excellent vehicle for reviewing the circuit split.

No circuit, until now, has held that the parents have the duty of Child Find. The Third, Sixth, Eighth, Ninth, and D.C. Circuit have all repeatedly explained that the IDEA places duties on school districts and states, not parents. Until this case, so did the Fifth Circuit. Given the finding of the Fifth Circuit and its denial of en banc rehearing, there is every indication that the Fifth Circuit will continue to apply its new approach – that parents of children in private schools have a duty to give notice of Child Find rather than requiring schools to abide by the statutory language requiring affirmative proactive Child Find approaches.

Child Find was litigated at every step of the proceedings in this case. Consequently, there is no prospect that the Court will determine that the record lacks factual development. The Court cannot decide this case on any alternative ground; the die is cast – in

the Fifth Circuit, the parents of a child with a disability who attends private school must shoulder the Child Find duty. Parents of children with disabilities attending private school but residing in other states will not.

This Court should accept this case to ensure that the statutory duty of Child Find is carried out equally for all children with disabilities, whether they attend public or private schools. It must reverse the Fifth Circuit's serious error that the burden of Child Find must land on the backs of parents of children with disabilities simply because they are attending private schools.

CONCLUSION

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

Respectfully submitted,

SONJA D. KERR
Counsel of Record
CATHERINE M. MICHAEL
CONNELL MICHAEL KERR, LLP
9600 Great Hills Trail, Suite 150
Austin, Texas 78759
(512) 637-1083
sonja@cmklawfirm.com
catherine@cmklawfirm.com

Counsel for Petitioner

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