

No. _____

**In The
Supreme Court of the United States**

◆

M.C., A MINOR, BY AND
THROUGH HIS PARENT D.C.,

Petitioner,

v.

OREGON DEPARTMENT OF EDUCATION,

Respondent.

◆

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

◆

PETITION FOR A WRIT OF CERTIORARI

◆

DONNA JO CONINGSBY
Self-represented Petitioner
2400 SW Sandalwood Ave.
Beaverton, OR 97005
(425) 241-3600
donna_coningsby@frontier.com

QUESTIONS PRESENTED

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (“IDEA”) authorizes parents to initiate a due process complaint to adjudicate a dispute “with respect to any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education (“FAPE”) of the child.” 20 U.S.C. § 1415(b)(6)(A).

The IDEA also authorizes the parent to initiate a non-adjudicative administrative state complaint with a state education agency (“SEA”) to resolve whether a public agency has violated any of the requirements of the IDEA in 20 U.S.C. §§ 1411-1419, or regulations implementing the IDEA, 34 C.F.R. § 300. If a state chooses to adopt a process for appealing an SEA’s state complaint decision, “such process may not waive any of the requirements in 34 C.F.R. §§ 300.151 through 300.153,” the Minimum State complaint procedures. 71 Fed. Reg. 46607 (2006).

The questions presented are:

1. Did the court of appeals err in affirming the district court’s conclusion that the SEA’s failure to resolve a parent’s state complaint in violation of the minimum state complaint procedures cannot be adjudicated in a due process complaint even though the state complaint dispute is “a matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education (“FAPE”) of the child” under 20 U.S.C. § 1415(b)(6)(A)?

QUESTIONS PRESENTED – Continued

2. Did the court of appeals err in failing to recognize that, even if the SEA's failure to resolve the parent's state complaint in violation of the minimum state complaint procedures cannot be adjudicated in a due process complaint, the parent has a private right of action in federal court against the SEA?

3. Can the SEA escape liability for the SEA's failure to resolve the parent's state complaint in violation of the minimum state complaint procedures based on claim preclusion where preclusion is predicated on an earlier state court judgment obtained by the SEA through a state process for appealing the SEA's state complaint decision that did not meet the requirements of the minimum state complaint procedures?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE.....	3
A. Legal Background.....	4
B. Factual Background.....	5
C. Proceedings Below	8
REASONS FOR GRANTING THE WRIT	12
I. The Courts Of Appeals Disagree Over The Scope Of A Due Process Complaint And Whether SEAs Can Be Held Accountable In A Private Action.....	13
A. The Circuit Split Is Ripe For Resolu- tion	15
II. No Court Has Yet Decided Whether A State Court Judgment Dismissing An IDEA State Complaint Can Preclude A Parent's Right To Bring An IDEA Due Process Complaint	18
III. The Question Presented Is Important To Students With Disabilities, Their Families, And Schools	19
A. Other Enforcement Mechanisms of the IDEA Have Failed	20

TABLE OF CONTENTS – Continued

	Page
B. Lack of Enforcement Exacerbates Disparities in the Education of Students in Families Experiencing Poverty	22
C. This Court Regularly Grants Review to Clarify the IDEA	22
IV. This Case Is An Excellent Vehicle For Resolving The Questions Presented	23
V. The Ninth Circuit Failed To Consider That The Federal Minimum State Complaint Regulations At Issue In This Case Should Be Given The Effect Of Law	25
CONCLUSION	26

APPENDICES

Opinion of the U.S. Court of Appeals for the Ninth Circuit, dated August 15, 2017	App. 1
Opinion and Order of the U.S. District Court for the District of Oregon, dated September 13, 2016	App. 4
Order of the U.S. Court of Appeals for the Ninth Circuit, dated January 26, 2018	App. 26
Order of Dismissal of the Court of Appeals of the State of Oregon, dated October 14, 2015.....	App. 28
Order Denying Reconsideration of the Court of Appeals of the State of Oregon, dated November 23, 2015	App. 31

TABLE OF CONTENTS – Continued

	Page
Order Allowing Review and Accepting Continuing Payment of Deferred Filing Fees of the Supreme Court of the State of Oregon, dated March 31, 2016.....	App. 33
Order Dismissing Review as Improvidently Allowed of the Supreme Court of the State of Oregon, dated September 23, 2016.....	App. 35
Appellate Judgment of the Court of Appeals of the State of Oregon, dated October 14, 2015.....	App. 37
34 C.F.R. § 300.152 Minimum State complaint procedures	App. 41

TABLE OF AUTHORITIES

	Page
CASES	
<i>Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy</i> , 548 U.S. 291 (2006).....	23
<i>Bd. of Educ. v. Rowley</i> , 458 U.S. 176 (1982)	3, 22
<i>Burlington Sch. Comm. v. Dep't of Educ.</i> , 471 U.S. 359 (1985)	3
<i>Cedar Rapids Cmty. Sch. Dist. v. Garret F.</i> , 526 U.S. 66 (1999)	23
<i>Chavez Rel. M.C. v. New Mexico Public Education</i> , 621 F.3d 1275 (10th Cir. 2010)	10, 12, 13, 14
<i>Compton Unified Sch. Dist. v. Addison</i> , 54 IDELR ¶ 71, 598 F.3d 1181 (9th Cir. 2010), <i>cert. denied</i> , Jan. 9, 2012.....	14, 15
<i>District of Columbia Court of Appeals v. Feldman</i> , 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983)	11
<i>Endrew F. v. Douglas County School District</i> , 137 S.Ct. 988, 197 L.Ed.2d 335 (2017)	3, 23
<i>Florence Cty. Sch. Dist. Four v. Carter</i> , 510 U.S. 7 (1993).....	23
<i>Forest Grove Sch. Dist. v. T.A.</i> , 557 U.S. 230 (2009).....	23
<i>Honig v. Doe</i> , 484 U.S. 305 (1988).....	23
<i>Gadsby v. Grasmick</i> , 109 F.3d 940 (4th Cir. 1997).....	14
<i>Great Western Mining & Mineral Co. v. Rothschild LLP</i> , 615 F.3d 159, 2010 WL 3035466 (3d Cir. 2010)	12

TABLE OF AUTHORITIES – Continued

	Page
<i>L.H. v. Hamilton Cty. Dep’t of Educ.</i> , 64 IDELR ¶ 207 (E.D. Tenn. 2014).....	14
<i>Morgan Hill Concerned Parents Ass’n v. Cal. Dep’t of Educ.</i> , 61 IDELR ¶ 13 (E.D. Cal. 2013)	14
<i>O.J. v. Bd. of Educ. v. Union Cty.</i> , 61 IDELR ¶ 158 (E.D. Tenn. 2013).....	14
<i>P.W. v. Delaware Valley Sch. Dist.</i> , 53 IDELR ¶ 289 (E.D. Pa. 2009).....	14
<i>Porter v. Board of Trustees of Manhattan Beach</i> , 307 F.3d 1064 (9th Cir. 2002).....	18
<i>Rooker v. Fidelity Trust Co.</i> , 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923)	11
<i>Schaffer ex rel. Schaffer v. Weast</i> , 546 U.S. 49 (2005).....	23
<i>United States v. Mead Corp.</i> , 533 U.S. 218 (2001)	26
<i>Winkelman ex rel. Winkelman v. Parma Cty. Sch. Dist.</i> , 550 U.S. 516 (2007).....	23

STATUTES

Individuals with Disabilities Education Act (IDEA),	
20 U.S.C. § 1400 <i>et seq.</i>	<i>passim</i>
20 U.S.C. § 1411-1419	3
20 U.S.C. § 1411(e)(2)(B)(i).....	3, 4
20 U.S.C. § 1412(a)(1).....	2
20 U.S.C. § 1412(a)(4).....	2
20 U.S.C. § 1412(a)(5).....	2
20 U.S.C. § 1412(a)(11)(A)(i)	2
20 U.S.C. § 1412(a)(14)(E).....	3, 4

TABLE OF AUTHORITIES – Continued

	Page
20 U.S.C. § 1414(b)(4).....	3
20 U.S.C. § 1414(d)(1)(B).....	3
20 U.S.C. § 1415(b)(3).....	14
20 U.S.C. § 1415(b)(6).....	18
20 U.S.C. § 1415(b)(6)(A).....	2, 14
20 U.S.C. § 1415(e)	4
20 U.S.C. § 1415(f)	4
20 U.S.C. § 1415(f)(3)(F)	3, 4
20 U.S.C. § 1416(a)(1)(C).....	2
28 U.S.C. § 1254(1).....	1

REGULATIONS

34 C.F.R. Part 300	2
34 C.F.R. § 300 <i>et seq.</i>	<i>passim</i>
34 C.F.R. § 300.149	2
34 C.F.R. §§ 300.151-153	<i>passim</i>
34 C.F.R. § 300.152	5
34 C.F.R. § 300.327	3
34 C.F.R. § 300.613	11

OTHER AUTHORITIES

71 Fed. Reg. 46600 (2006).....	3, 5, 16
71 Fed. Reg. 46607 (2006).....	4, 25
Eloise Pasachoff, <i>Special Education, Poverty, and The Limits of Private Enforcement</i> , 86 Notre Dame L. Rev. 1413 (2011)	22

TABLE OF AUTHORITIES – Continued

	Page
IDEA Series, <i>Federal Monitoring and Enforcement of IDEA Compliance</i> , National Council on Disability, February 7, 2018.....	20
Perry A. Zirkel, <i>State Education Agencies as Defendants under the IDEA</i> , West's Ed. Law Rep., v. 336, pp. 667-675.....	13
Perry A. Zirkel, <i>The Complaint Procedures Avenue of the IDEA</i> , Journal of Special Education Leadership 30(2), September 2017.....	18
Perry A. Zirkel, <i>A Comparison of the IDEA's Dispute Resolution Processes: Complaint Resolution and Impartial Hearings</i> , 326 EDUC.L.REP. 1 (2016).....	19
U.S. Department of Education, <i>2017 State Determination Letters on State Implementation of IDEA</i> , July 12, 2017	21
U.S. Department of Education, National Center on Education Statistics, <i>Fast Facts, High School Graduation Rates, By State, 2014-2015</i>	21
U.S. Department of Education, Office of Special Education and Rehabilitative Services, <i>Dear Colleague Letter: Dispute Resolution</i> (April 15, 2015).....	5, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner M.C. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit (App. 1) is unpublished. The opinion and order of the United States District Court for the District of Oregon (App. 4) is unpublished but is available at 65 IDELR ¶ 159 (D. Or. 2016).

JURISDICTION

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit was entered on August 15, 2017 (App. 1). Petitioner's request for rehearing and rehearing en banc was denied on January 26, 2018 (App. 26). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, requires that public schools receiving federal funds for special education services provide each child with a disability a "free

appropriate public education,” in conformity with an “individualized education program” that meets the requirements of the IDEA and takes place in the “least restrictive environment.” 20 U.S.C. §§ 1412(a)(1), (4) and (5). A state education agency (“SEA”) is obligated to enforce the IDEA as a condition of eligibility for federal education funding under the IDEA Part B, 20 U.S.C. § 1400 and 34 C.F.R. Part 300.

As part of its obligation, the IDEA imposes on SEAs the responsibility for ensuring that “the requirements of this subchapter are met,” 20 U.S.C. § 1412(a)(11)(A)(i). The IDEA further requires “States” to monitor local education agencies (“LEAs”) and to enforce “this subchapter,” 20 U.S.C. § 1416(a)(1)(C).

The implementing regulations of the IDEA also specify conditions that the “State” must meet to be eligible for assistance under Part B of the IDEA, 34 C.F.R. § 300 *et seq.* One of the conditions is that the state’s SEA is responsible for general supervision, including “ensuring that the requirements of this part,” i.e., Part 300, 34 C.F.R. § 300, “are carried out.” 34 C.F.R. § 300.149. In Oregon, the SEA is the Oregon Department of Education (“ODE”).

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (“IDEA”) authorizes parents to initiate a due process complaint to adjudicate a dispute “with respect to any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education (“FAPE”) of the child.” 20 U.S.C. § 1415(b)(6)(A).

The IDEA also authorizes the parent to initiate a non-adjudicative administrative state complaint to resolve whether a public agency has violated any of the requirements of the IDEA in 20 U.S.C. §§ 1411-1419, or regulations implementing the IDEA, 34 C.F.R. § 300 *et seq.*, including 34 C.F.R. § 300.152, the Minimum State complaint procedures (App. 41). Authorization for the state complaint is found in 20 U.S.C. § 1411(e)(2)(B)(i), 20 U.S.C. § 1412(a)(14)(E), 20 U.S.C. § 1415(f)(3)(F), 71 Fed. Reg. 46600.

STATEMENT OF THE CASE

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, public schools must provide children with disabilities a “free appropriate public education.” Under the IDEA, parents of a disabled child collaborate with the school to develop an individualized education program, or IEP. The IEPs are required to be updated annually and “tailored to the unique needs” of each child with a disability. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982); *see also* 20 U.S.C. §§ 1414(b)(4), (d)(1)(B); 34 C.F.R. § 300.327. Each IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County School District*, 137 S.Ct. 988, 999, 197 L.Ed.2d 335 (2017).

Congress recognized, however, that “this cooperative approach would not always produce a consensus.” *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 368 (1985). To resolve disputes, the IDEA authorizes

administrative and judicial review as noted in the relevant statutory provisions already referenced, including due process complaints, 20 U.S.C. § 1415(f), and state complaints, 20 U.S.C. § 1411(e)(2)(B)(i), 20 U.S.C. § 1412(a)(14)(E), 20 U.S.C. § 1415(f)(3)(F). The IDEA also authorizes mediation of disputes, 20 U.S.C. § 1415(e).

A. Legal Background

The United States Department of Education (“USDoE”) has provided clarification over the years to help states determine how to implement the dispute resolution mechanisms authorized by the IDEA.

Regarding state complaints, the USDoE has acknowledged that the regulations are silent about whether a State complaint decision may be appealed, stating, “we believe States are in the best position to determine what, if any, appeals process is necessary to meet each State’s needs, consistent with State law.”

The USDoE cautioned that “[i]f a State chooses, however, to adopt a process for appealing a State complaint decision, such process may not waive any of the requirements in 34 C.F.R. §§ 300.151 through 300.153,” the Minimum State complaint procedures. 71 Fed. Reg. 46607 (2006).

Regarding both due process and state complaints, the USDoE has stated that a parent can use both even when the subject of the complaint involves the same dispute. The only limitation is that “when the parent files both a due process complaint and a State

complaint on the same issue, the State must set aside any part of the [state] complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the [state] complaint that is not a part of the due process hearing must be resolved using the State complaint procedures in § 300.152.” 71 Fed. Reg. 46601 (2006).

In 2015, concerned that states were filing due process complaints against parents to prevent the State complaint process from moving forward, the USDoE observed that such state actions “unreasonably limit parents’ dispute resolution options, and force parents either to participate in a potentially more adversarial, lengthy, and costly due process complaint and hearing.” The USDoE also noted that “some parents may have opted to file a State complaint rather than a due process complaint precisely because of the time, expense, and complexity associated with the latter. Based on this, the Department strongly believes that it is in the best interest of parents and school districts to respect parents’ choice of forum for resolution of their disputes.”¹

B. Factual Background

Petitioner M.C. was diagnosed at age six with Attention Deficit Hyperactivity Disorder (“ADHD”) and a

¹ U.S. Department of Education, Office of Special Education and Rehabilitative Services, *Dear Colleague Letter: Dispute Resolution* (April 15, 2015), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl04152015disputeresolution2q2015.pdf>.

non-specific mood disorder. These disorders impair M.C.'s ability to access the general curriculum at school. M.C. was found eligible for special education services under the IDEA in first grade under the Other Health Impairment ("OHI") and Emotional Disturbance ("ED") categories.

M.C. has continuously attended public school in the Beaverton School District, one of the school districts supervised by the Oregon Department of Education, since first grade. Except for the sixth-grade year, M.C. has received services under an annual IEP since that time in a self-contained classroom with varying amounts of mainstreaming.

In third grade, the school and the parent agreed to change M.C.'s IEP goal to mainstreaming instead of continuing his exclusive placement in a self-contained classroom. By fourth grade, the goal had not yet been reached even though M.C. had demonstrated that he was non-disruptive and highly intelligent. The parent was concerned that the extremely large classroom sizes (e.g., 40 fourth graders in M.C.'s regular education classroom resulting from severe budget cuts and teacher layoffs during third and fourth grade) were impeding efforts to mainstream, especially since M.C. was receiving very few services to integrate him into the large regular education classrooms. The parent was concerned that M.C. was not receiving a free appropriate public education ("FAPE") in the least restricted environment ("LRE") as required under the IDEA.

At the beginning of fifth grade the parent requested a reevaluation of M.C. for suspected autism. M.C.'s doctor and teachers had long suspected that M.C. had Asperger's Syndrome which contributed to his difficulties in being integrated into the regular education classroom. The school agreed to reevaluate M.C. for autism, and the parent signed the consent and records release forms to begin the process. After much delay, the school provided the reevaluation reports to the parent at the last minute, just before the start of the eligibility meeting. The parent was dismayed that the school not only withheld the reports from her, but instead provided them to M.C.'s doctor, forcing her to get information from M.C.'s doctor second-hand in advance of the eligibility meeting. The parent was also dismayed at the lack of professionalism demonstrated by the school personnel when she learned from M.C.'s doctor that the school psychologist made derogatory comments to the doctor about the parent.

Ultimately, the school and parent agreed not to identify M.C. as eligible for special education services under the autism category due to his verbal communication skill. M.C. continued to be eligible for special education services under the OHI and ED categories. By the end of the fifth grade, the parent and school agreed to change the IEP to full mainstreaming in the regular education classrooms to enable M.C. to attend sixth grade in an option school in the Beaverton School District that had smaller class sizes.

In sixth grade, M.C. developed severe school refusal problems. The option school did not have the

resources to provide M.C. with the services he needed despite several attempts by the parent to identify and obtain such services from the school. M.C. missed nearly an entire year of school. At the end of the school year, the parent and school modified the IEP to return M.C. to a self-contained classroom in his neighborhood school for seventh grade. Now in ninth grade, M.C. remains placed in the self-contained classroom in his neighborhood school but with a significant amount of mainstreaming in the regular classrooms.

C. Proceedings Below

The parent requested reimbursement for the school's consultations with M.C.'s doctor during the fifth-grade reevaluation. When the school refused, the parent filed a state complaint with the ODE alleging violations of the procedural safeguards and the failure to provide FAPE. Among other allegations, the parent alleged that the school failed to provide her with access to M.C.'s reevaluation reports in advance of the IEP meeting, failed to provide proper notice and informed consent and failed to ensure parent participation in the development of the IEP. The failure to provide FAPE was based on the failure to reimburse the parent for the school's consultations with M.C.'s doctor since the cost of the reevaluation is part of FAPE and is to be provided at no cost to the parent.

The ODE refused to order the school to take corrective action and issued a state complaint decision that followed nearly verbatim the inaccurate characterization

of the facts of the dispute prepared by the school's attorney rather than the evidence of contemporaneous communications that occurred as documented in the parent's email communications with the school. The parent filed a petition for judicial review of the ODE's state complaint decision under Oregon's administrative procedure for judicial review of agency orders. The parent alleged that the ODE failed to resolve the state complaint in accordance with the requirements in 34 C.F.R. §§ 300.151 through 300.153, the Minimum State complaint procedures (App. 8-App. 9). The ODE failed to review all relevant information, failed to make an independent determination, and failed to address each of the parent's allegations against the school in the state complaint. However, the ODE obtained a dismissal of the parent's petition for judicial review of the ODE's state complaint decision at summary judgment by arguing that the IDEA did not apply since the records release that the parent signed was a common law contract, and the consultations with M.C.'s doctor, while concededly not at the parent's direction, were for her benefit and not part of the reevaluation. The state court judge further ruled that because the parent was an attorney,² that she would be bound more strictly to the terms of the records release than non-attorney parents.

The parent appealed the state court judgment of dismissal to the Oregon court of appeals on numerous grounds, including the failure of the state court judge to review whether the ODE failed to resolve the state complaint in accordance with the requirements

² The parent has a small part-time patent law practice.

in 34 C.F.R. §§ 300.151 through 300.153, the Minimum State complaint procedures, a claim that the parent had explicitly included in her petition for judicial review of the ODE's state complaint decision not to order the school to take corrective action. Because the parent also filed a motion for a new trial on the same grounds, the court of appeals ruled that the appeal was untimely, and the appeal was dismissed without a ruling on the merits (App. 28-App. 30).

While the state appeal of the state complaint was pending, the parent filed a due process complaint against both the school and the ODE for the fifth and sixth grade violations of the IDEA. The parent again alleged that the ODE failed to resolve the state complaint in accordance with the requirements in 34 C.F.R. §§ 300.151 through 300.153. The administrative law judge ("ALJ") presiding over the due process complaint refused to allow the due process complaint against the ODE to proceed, relying on the Tenth Circuit's holding in *Chavez Rel. M.C. v. New Mexico Public Education*, 621 F.3d 1275 (10th Cir. 2010). Since the ODE was not responsible for providing direct services to M.C., the ALJ ruled that the claims against the ODE were dismissed. The parent appealed the ALJ's decision to the district court by filing this case against the ODE. The parent settled the remaining claims against the school in a compensatory education settlement for the sixth-grade failures. In the settlement, the school agreed to remain subject to any ODE-ordered corrective action for the fifth-grade failures should the parent succeed in obtaining relief against the ODE for its failure to resolve the state complaint in accordance

with the minimum state complaint procedures in 34 C.F.R. §§ 300.151 through 300.153 (App. 8-App. 9).

In an opinion and order, the district court dismissed the parent's case against the ODE on a motion to dismiss for failure to state a claim (App. 4). The district court held that the claim that the ALJ erred in dismissing ODE from the due process hearing fails to state a claim (App. 18), that the *Rooker-Feldman* doctrine³ barred consideration of the claims against the ODE (App. 19), and that the claims against the ODE were precluded (App. 23) by the state court judgment (App. 40) dismissing the petition for judicial review of the ODE's state complaint decision. The district court also held that the claim that the ODE violated FERPA ("Family Education Rights Privacy Act") was dismissed (App. 23). However, the parent did not allege violations of FERPA, but rather violations of the provisions of FERPA that are incorporated into the IDEA regulations at 34 C.F.R. §§ 300.613, Access Rights. Lastly, the district court held that the parent's claims against the ODE were dismissed with prejudice and leave to amend denied because any amendment would be futile (App. 24).

The Ninth Circuit affirmed.⁴ In its memorandum disposition (App. 1), the Ninth Circuit held that the

³ *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

⁴ The Ninth Circuit did not address the *Rooker-Feldman* holding and neither did the ODE in their brief with the court. The parent argued that the *Rooker-Feldman* doctrine does not bar jurisdiction when the legal injury is caused by the adverse party and

parent failed to allege a legal theory or facts sufficient to state a plausible claim against the ODE, citing the written notice provisions of the IDEA that the district court relied on when citing the *Chavez* case. The Ninth Circuit also held that the parent's claims relating to the failure of the ODE to resolve the state complaint in accordance with the minimum state complaint procedures in 34 C.F.R. §§ 300.151 through 300.153 were claim precluded due to the earlier state court judgment of dismissal of the petition for judicial review of the ODE's state complaint decision (App. 40).

Petitioner sought rehearing and rehearing en banc. The Ninth Circuit denied these requests (App. 26).

REASONS FOR GRANTING THE WRIT

The courts of appeals disagree over the scope of a due process complaint under the IDEA and whether an SEA can be subject to a due process complaint for its failure to enforce and monitor the IDEA statutory and regulatory scheme, including its failure to resolve a state complaint in accordance with the minimum state complaint requirements in 34 C.F.R. §§ 300.151 through 300.153. In addition, the lower courts are in disarray over whether an SEA can be held accountable in a private action under the IDEA.

No court has yet ruled whether a state court judgment dismissing a state appeal of an SEA's state

not the state court judgment. *Great Western Mining & Mineral Co. v. Rothschild LLP*, 615 F.3d 159, 2010 WL 3035466 (3d Cir. 2010).

complaint decision can preclude a parent's right to bring a due process complaint where the state court judgment was obtained without complying with the minimum state complaint procedures in 34 C.F.R. §§ 300.151 through 300.153.

This Court should use this case – which cleanly presents the legal issues on a well-developed set of facts – to resolve the conflict over these important questions regarding the due process complaint, and to determine the important question of whether a state court judgment dismissing a state appeal of an SEA's state complaint decision can preclude a parent's right to bring a due process complaint.

I. The Courts Of Appeals Disagree Over The Scope Of A Due Process Complaint And Whether SEAs Can Be Held Accountable In A Private Action

There is conflict between the circuits as to the scope of the due process complaint and whether a due process complaint can be lodged against an SEA, or only against an LEA. *State Education Agencies as Defendants under the IDEA*, West's Ed. Law Rep., v. 336, pp. 667-675.⁵

For example, in the *Chavez* case relied upon to dismiss the parent's action in district court, the Tenth Circuit exempted the New Mexico SEA from being held accountable in a due process hearing because it did not

⁵ From Professor Perry A. Zirkel's compilation of SEA case-law, <https://perryzirkel.files.wordpress.com/2017/01/sea-case-law-compilation.pdf>

provide “direct services” to the child. But other courts have ruled the opposite, upholding the parent’s IDEA claim against an SEA, if not at due process then at least as a private right of action for the SEA’s failure to meet their obligation to monitor, implement or enforce the IDEA. *P.W. v. Delaware Valley Sch. Dist.*, 53 IDELR ¶ 289 (E.D. Pa. 2009); *Morgan Hill Concerned Parents Ass’n v. Cal. Dep’t of Educ.*, 61 IDELR ¶ 13 (E.D. Cal. 2013); *O.J. v. Bd. of Educ. v. Union Cty.*, 61 IDELR ¶ 158 (E.D. Tenn. 2013); *L.H. v. Hamilton Cty. Dep’t of Educ.*, 64 IDELR ¶ 207 (E.D. Tenn. 2014); *Gadsby v. Grasmick*, 109 F.3d 940, 955 (4th Cir. 1997) (“language and structure of [the] IDEA suggest that either or both entities [the SEA or LEA] may be held liable for the failure to provide a [FAPE].”⁶

With regard to the scope of due process hearings, the Ninth Circuit has rejected the argument that the scope of due process hearings is narrow because of the reference to the written notice provisions of the IDEA, as relied on by the Tenth Circuit in *Chavez*. The Ninth Circuit explained that “the jurisdictional requirements for an IDEA complaint are clearly set out in 20 U.S.C. § 1415(b)(6)(A), apart from the notice provisions of 20 U.S.C. § 1415(b)(3). Section 1415(b)(6)(A) states that a party may present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child.” The notice requirements of 20 U.S.C. § 1415(b)(3) do not cabin this broad jurisdictional mandate.” *Compton Unified Sch. Dist. v. Addison*, 54 IDELR ¶ 71, 598 F.3d 1181, 1185 (9th Cir. 2010), *cert. denied*, Jan. 9, 2012 (citations omitted). The

⁶ *Id.*, at Page 9.

district court and ALJ refused to consider *Compton* in the parent's case because *Compton* involved a due process complaint against an LEA, not an SEA.

A. The Circuit Split Is Ripe For Resolution

The questions presented regarding the scope of a due process complaint and whether SEAs can be held accountable in a private action for failure to implement and enforce the IDEA has had sufficient time to percolate in the forty years since the passage of the original Act and in the decades since the enactment of key amendments in 1997 and 2004 that affect the dispute resolution mechanisms. While not all courts of appeals have weighed in on the issue, the question is important enough to parents and their disabled children that the Court should act now.

The answer to the questions presented depend in part on an interpretation of the IDEA dispute resolution mechanisms over which there is much confusion judging by the disarray in the decisions of the lower courts on this issue. Given that the course of litigation under the IDEA proceeds slowly over many years while leaving families of disabled children in limbo, the Court should resolve these questions now.

Moreover, without this Court's intervention, the ability of a parent of a child with a disability to advocate on his or her behalf will vary greatly depending on the state in which he or she lives. While part of that variability is by design in allowing states to implement their own procedures for state complaints, the USDoE

has made it clear that state complaints must be resolved in compliance with the requirements of the minimum state complaint procedures in 34 C.F.R. §§ 300.151 through 300.153, and that those procedures cannot be waived. 71 Fed. Reg. 46607 (2006). Because state complaints offer parents faster and less expensive resolution of disputes over the education of their disabled children, this Court should provide the guidance necessary to ensure that parents can use state complaints without fear of impairing their rights under the IDEA.

In this case, because the state court ruled that the records release form that schools ask parents to sign was a “contract,”⁷ and that the parent was more strictly bound to that “contract,” due to her occupational status as an attorney, the ability of this parent to advocate on behalf of M.C. has been compromised. While the parent has continued to sign off on some documents related to M.C.’s special education services out of necessity, she has done so with much trepidation that she will unknowingly be signing away her rights to the procedural safeguards and due process that other parents of disabled children are entitled to. The Court should provide guidance to this parent and others in similar situations to ensure that they can advocate for their children without fear of impairing their rights under the IDEA.

⁷ Since the records release form is a mandated form required by the Family Education Rights Privacy Act and signed only by the parent, it is doubtful that it is actually a contract.

In addition, superficial and shoddy resolution of state complaints by SEAs forces parents to use the much more expensive and time consuming due process complaint procedures. As already noted, the USDoE has determined that it is in the best interest of parents and school districts to respect parents' choice of forum for resolution of their disputes.⁸

Resolving the conflict among the circuits as to the scope of a due process complaint, whether the SEA can be held accountable for its failure to properly resolve state complaints through either the due process complaint or private action, will provide parents, educators and state agencies much-needed guidance regarding their rights and obligations in a way that ensures that disputes are resolved fairly, promptly and in accordance with the IDEA statutory and regulatory scheme enacted by Congress and the USDoE.

⁸ See n.1, April 15, 2015 *Dear Colleague Letter* from OSERS.

II. No Court Has Yet Decided Whether A State Court Judgment Dismissing An IDEA State Complaint Can Preclude A Parent's Right To Bring An IDEA Due Process Complaint.

Whether a state court judgment dismissing a state appeal of an SEA's state complaint decision can preclude a parent's right to bring a due process complaint is an important question of federal law that has not been, but should be, settled by this Court.

The rights of parents and their disabled children under the IDEA are of exceptional importance. As noted elsewhere in this petition, to enable parents to enforce those rights the IDEA requires states to provide two separate dispute resolution mechanisms, the administrative state complaint under 34 C.F.R. §§ 300.151 through 300.153, and the due process complaint under 20 U.S.C. § 1415(b)(6). While there have been few courts that have weighed in on the use of the state complaint process to resolve disputes,⁹ the USDoE regulations direct, and the Ninth Circuit has held, that parents can use one or both types of complaints to enforce the IDEA. *Porter v. Board of Trustees of Manhattan Beach*, 307 F.3d 1064 (9th Cir. 2002), at 1067.

But the question of whether federal courts can dismiss a parent's appeal from a dismissal of a due

⁹ *The Complaint Procedures Avenue of the IDEA*, Journal of Special Education Leadership 30(2) September 2017, <https://perryzirkel.files.wordpress.com/2013/08/zirkel-article-re-sea-complaint-procedures.pdf>.

process complaint in federal court on claim preclusion grounds related to a state judgment dismissing a state appeal of an SEA's state complaint decision is one of first impression. While a majority of states have not established an appeal process for directly appealing an SEA's state complaint decision, those that do usually permit appeal using the state's administrative procedures for judicial review of agency orders, such as the process that the parent used in this case.¹⁰

Therefore, the resolution of this question will help guide any state that has established an appeal process and provide guidance to other states that have yet to do so. Most importantly, it will provide parents with more certainty in their ability to resolve disputes with their disabled child's school in an efficient, timely and cost-effective manner using the state complaint, rather than draining them of resources and duplicated effort that would necessarily have to be applied to filing a due process complaint so as not to lose valuable rights under the IDEA.

III. The Question Presented Is Important To Students With Disabilities, Their Families, And Schools.

While all parents and schools would prefer to resolve disputes amicably and without the need for the dispute resolution mechanisms of the IDEA, the

¹⁰ Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes: Complaint Resolution and Impartial Hearings*, 326 EDUC.L.REP. 1 (2016), n.87, Page 13.

reality is that they are needed to promote the collaboration required to develop an IEP that meets the needs of students and their families. A strong enforcement mechanism is necessary. That states openly disregard the procedural safeguards and the minimum state complaint procedures, as happened in this case, sends the wrong message to families of children with disabilities, weakens enforcement and emboldens SEAs and LEAs to disregard other requirements of the IDEA.

A. Other Enforcement Mechanisms of the IDEA Have Failed.

On February 7, 2018, the National Council on Disability (“NCD”), an independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families, submitted a report to President Trump entitled “Federal Monitoring and Enforcement of IDEA Compliance.”¹¹ The report lists numerous concerns over the lack of enforcement over several decades since the IDEA came into existence, including the continued lack of monitoring by the USDoE:

It is disturbing that very little has actually changed since the passage of IDEA more than 40 years ago with regard to the use of monitoring as an effective tool to drive compliance

¹¹ Available online at https://www.ncd.gov/sites/default/files/NCD_Monitoring-Enforcement_508_0.pdf.

with the law and systemic change that is demonstrated to have an effect on student learning and outcomes. . . . No state has ever been designated as “needing substantial intervention. . . .” [The USDoE] does not make use of its authority to withhold federal funds when a state is noncompliant with the law. OSEP [Office of Special Education Programs] has not made any referrals to DOJ for enforcement under IDEA.¹²

Lack of state enforcement is related to lack of federal enforcement, since the latter emboldens states to continue the status quo even if their track records are dismal with respect to educating and graduating students, including disabled students, and meeting the requirements of the IDEA. In Oregon for example, the state has been determined as being in need of assistance to meet the requirements of IDEA for over two years, the lowest determination before intervention is required.¹³ Oregon has ranked near the very bottom in the nation in public high school graduation rates for many years.¹⁴

¹² *Id.*, at Page 47.

¹³ U.S. Department of Education, *2017 State Determination Letters on State Implementation of IDEA*, July 12, 2017, available online at <https://sites.ed.gov/idea/files/ideafactsheet-determinations-2017.pdf>.

¹⁴ U.S. Department of Education, National Center on Education Statistics, *Fast Facts, High School Graduation Rates, By State*, 2014-2015, available online at <https://nces.ed.gov/fastfacts/display.asp?id=805>.

B. Lack of Enforcement Exacerbates Disparities in the Education of Students in Families Experiencing Poverty.

Because of the lack of federal monitoring and compliance and state enforcement, the role of private enforcement, primarily by parents acting as private attorneys general, takes on more urgency. Parents already have an enormous task parenting a child with a disability. Parents experiencing poverty are especially disadvantaged when it comes to enforcing the IDEA. This leads to enforcement disparities that only exacerbate existing socioeconomic disparities in education. Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413 (2011). It is no wonder that so many litigated cases under the IDEA involve reimbursement for private school tuition – only the wealthier families can even consider such an option and have the means to initiate litigation. The rest of us must make do with the public school system. Requiring states to at least provide parents with a less expensive dispute resolution process that complies with the minimum state complaint procedures in 34 C.F.R. §§ 300.151 through 300.153 is sorely needed. Given the lack of federal monitoring and enforcement and the indifference of the states, it is up to the courts to ensure that states are held accountable.

C. This Court Regularly Grants Review to Clarify the IDEA.

Since *Rowley*, this Court has recognized the IDEA's importance by repeatedly providing guidance on its

proper operation. *See, e.g., Endrew F. v. Douglas County School District*, 137 S.Ct. 988, 999, 197 L.Ed.2d 335 (2017) (Each IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances); *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); *Schaffer ex rel. Schaffer 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 authorizing child to "stay put" pending resolution of placement dispute).

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

IV. This Case Is An Excellent Vehicle For Resolving The Questions Presented.

This case presents an ideal vehicle for this Court to resolve the disarray among the circuits and lower courts in determining whether an SEA's failure to resolve a parent's state complaint in violation of the minimum state complaint procedures can be adjudicated

in a due process complaint or in a private right of action in federal court against an SEA.

This case also presents an ideal vehicle for this Court to resolve the related question of whether the due process complaint and private action can be claim precluded by a state court judgment obtained by the SEA through a state process for appealing the SEA's state complaint decision that does not meet the requirements of the minimum state complaint procedures.

The reason this case is an ideal vehicle is the completeness of the record. For example, in addition to filing a petition for judicial review of ODE's state complaint decision using the state's administrative petition for judicial review of agency orders, the parent appealed the state court's dismissal of the petition to the Oregon Court of Appeals (App. 28-App. 32, App. 37) and the Oregon Supreme Court (App. 33-App. 36). Although the parent was ultimately unsuccessful, the Oregon Court of Appeals Order of Dismissal (App. 28-App. 30) and Appellate Judgment (App. 37-App. 38) make it clear that, because of the ODE's action to curtail the judicial review of the ODE's state complaint decision through summary judgment, there was no trial and therefore no adjudication of whether the ODE complied with the requirements of the minimum state complaint procedures in 34 C.F.R. §§ 300.151 through 300.153. The difficulties encountered by the parent in pursuing the state court judicial review and subsequent appeal of the ODE's state complaint decision only underscore the need for a state complaint and state complaint appeal process that meets the requirements of the minimum state complaint procedures in

34 C.F.R. §§ 300.151 through 300.153, which requirements cannot be waived as directed by the USDoe. 71 Fed. Reg. 46607.

Because it is so difficult for parents to navigate the state complaint and state appeals process it is unlikely that another case with as complete a record as this one will present itself to the Court for review in the foreseeable future.

The Ninth Circuit's decision is final, and resolution of the questions presented will be outcome determinative. If the Court holds that the Ninth Circuit properly affirmed the district court's dismissal, then M.C.'s case is over. If this Court determines that M.C.'s claim against the ODE is not claim precluded, it could decide whether an SEA's failure to resolve a parent's state complaint in violation of the minimum state complaint procedures can be adjudicated in a due process complaint or in a private right of action in federal court against an SEA, and remand the case to the Ninth Circuit for remand to the district court or the ALJ as appropriate.

V. The Ninth Circuit Failed To Consider That The Federal Minimum State Complaint Regulations At Issue In This Case Should Be Given The Effect Of Law.

The minimum state complaint procedures, 34 C.F.R. §§ 300.151 through 300.153, were subject to notice and comment rule-making as set forth in the Federal Register, 71 Fed. Reg. 46600 through 71 Fed. Reg. 46607. As such, 34 C.F.R. §§ 300.151 through

300.153 should be given the effect of law. *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”). Giving the minimum state complaint procedures, 34 C.F.R. §§ 300.151 through 300.153 the effect of law will allow parents to bolster the flagging enforcement efforts of the USDoE to help those most affected by the IDEA – their disabled children.

◆

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DONNA JO CONINGSBY

Self-represented Petitioner

2400 SW Sandalwood Ave.

Beaverton, OR 97005

(425) 241-3600

donna_coningsby@frontier.com

April 26, 2018