No. 20-905

IN THE

Supreme Court of the United States

INDEPENDENT SCHOOL DISTRICT NO. 283,
Petitioner,

v.

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

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

BRIEF OF AMICI CURIAE AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION; ASSOCIATION OF EDUCATIONAL SERVICE AGENCIES; ARKANSAS ASSOCIATION OF EDUCATIONAL ADMINISTRATORS; AND MINNESOTA ADMINISTRATORS FOR SPECIAL EDUCATION IN SUPPORT OF PETITIONER

Sachi Schuricht
Alexandra Bursak
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Thomas M. Bondy
Counsel of Record
Zachary Hennessee
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
tbondy@orrick.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici care deeply about this case because their members serve on the front lines of shaping and providing educational services to all children, including more than 6 million school-aged children with disabilities. They experience firsthand the practical implications of the Individuals with Disabilities Education Act's statute of limitations on local education systems and the children they serve.

AASA, the School Superintendents Association, was founded in 1865 and is the professional organization for more than 13,000 educational leaders in the United States and globally. Throughout its more than 150 years, AASA has advocated for the highest quality education for all students and provided programming to develop and support school system leaders. Its members include chief executive officers, superintendents, senior level school administrators, professors, and aspiring school system leaders. AASA members champion public education and children's causes in their districts and nationwide.

The Association of Educational Service Agencies (AESA) is a professional organization serving over 500 regional educational service agencies in 35 states. These agencies provide support services such as leadership development, professional

---

[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

development, and technology support to their member school districts. AESA members reach over 80% of the nation's public school districts, over 83% of private schools, over 80% of certified teachers, more than 80% of non-certified school employees, and well over 80% of public and private school students.

The Arkansas Association of Educational Administrators (AAEA) is a united alliance of diverse school leaders and an effective force for the highest quality public education for all children. Its mission is to ensure high standards of leadership by providing quality professional development, influencing education legislation and policy, stimulating and fostering support, and building successful coalitions. AAEA strives to be recognized by state and federal policy makers as a leader in education and advocate for children.

Minnesota Administrators for Special Education (MASE)'s members work on behalf of students with disabilities in Minnesota. They include special education directors and administrators in public and private schools statewide. MASE's goal is to promote high-quality leadership in special education. It supports studies and information sharing to develop improved services for students with disabilities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The task of public schools could not be more important: They are responsible for providing each of the millions of students they serve the best education

possible. Realizing this goal requires personalized instruction for all students, including those with disabilities. That, in turn, depends on input from teams of professionals, collaboration with students' families, data-driven monitoring and assessment, and carefully tailored interventions. School districts are committed to promptly delivering special education services to students who need them, but the detrimental effects of overidentifying students for those services mean that districts must also be careful not to rush to judgment.

The Eighth Circuit's decision will undermine school districts' ability to provide the personalized education they now deliver. The court engrafted the judge-made "continuing violation" doctrine onto the statute of limitations codified in the Individuals with Disabilities Education Act (IDEA), effectively erasing the two-year filing requirement Congress enacted. Now, in the Eighth Circuit, virtually any IDEA complaint filed within two years of a student's graduation could be timely, even when the student's parents suspected the alleged violation many years earlier.

If the decision below stands, school districts will have to prepare for an ever-growing legion of lawsuits seeking recompence for years of alleged IDEA violations. But their options are limited; without a meaningful statute of limitations, school districts will be caught between a rock and a hard place. On the one hand, if districts continue to adhere to the careful educational best practices they currently employ, they will face potentially limitless liability. Districts' budgets, which are already underfunded and strained by IDEA litigation, will be stretched even thinner,

educator attrition (an unfortunate consequence of IDEA lawsuits) will increase, and the parent-educator relationships that are vital to ensuring the success of students in special education will be strained.

On the other hand, districts may feel pressured to mitigate this prospect of runaway liability by more aggressively placing students into special education at the first sign of difficulty. Doing so, however, will undermine highly successful educational best practices, and could lead to the overidentification of students for special education. Either way, the greatest victims will be the very students the IDEA is intended to benefit. The Court should grant review to prevent the considerable harm that is threatened by the Eighth Circuit's aberrant ruling.

ARGUMENT

Congress established a clear two-year statute of limitations in the IDEA. 20 U.S.C. § 1415(f)(3)(C); *see id.* § 1415(b)(6); Pet. 14-17. That time bar applies to all complaints filed under the Act, including for alleged violations of the "child-find" obligation—the mandate for school districts to "identif[y], locate[], and evaluate[]" all children with disabilities in their district, 20 U.S.C. § 1412(a)(3)(A), in order to ensure those children receive a "free appropriate public education," *id.* § 1412(a)(1)(A). Congress enacted two, and only two, equitable exceptions to that two-year deadline: It does not apply where a school district makes "specific misrepresentations" that it has resolved a problem, or where it withholds required information from parents. *Id.* § 1415(f)(3)(D).

The plain text of the IDEA thus bars complaints, like the one in this case, filed over two years after complainants knew or should have known of the basis for their child-find action, provided that neither statutory exception applies. But rather than hew to "the basic … rule that courts must give effect to the clear meaning of statutes as written," *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992), the Eighth Circuit grafted the judge-made "continuing violation" exception onto the statutory limitations rule. Under the continuing violation exception, any child-find claim is functionally exempt from the limitations period because it "continue[s]" from the moment a complainant knows or should know of the violation up until a school district "finds" the student. Pet. App. 18a.

As other courts have recognized, the continuing violation exception threatens to "eviscerate the limitations period" in the IDEA, *VanDenBerg v. Appleton Area Sch. Dist.*, 252 F. Supp. 2d 786, 792-93 (E.D. Wis. 2003), frustrating Congress's careful efforts to avoid actions brought "many years after discovering a concern," H. R. Rep. No. 108-77, at 115-16 (2003). *See* Pet. 19-20. The Eighth Circuit's adoption of the exception runs counter to the IDEA and the judicial consensus, and it will harm students in its districts. Best educational practices require time, care, and the exercise of professional judgment. But the continuing violation exception pressures districts to choose between facing exposure to extensive liability or forgoing these educational best practices—both at the expense of the students they serve.

I. Under Existing Best Practices, School Districts Dedicate Substantial Resources To Identify And Meet Each Student's Educational Needs.

Over 50.7 million students throughout the United States rely on public schools for their education,[2] roughly 6 million of whom are served under the IDEA.[3] 3.2 million dedicated teachers, joined by administrators and other educators, instruct them in everything from math to art, and support each student in their academic, social, and emotional development.[4] Public educators are striving now, as they always do, to ensure that every student in their care receives the best education possible.

Providing quality education to all students is a demanding charge; doing so requires sound, research-based methodology and the exercise of professional judgment. Educators have thus adapted their methods over time, seeking out the approaches that work best. In the past, for instance, schools would commonly identify students in need of additional support under the IDEA through a "discrepancy" model—that is, disabilities were identified by looking for a difference between IQ scores and academic progress, as

---

[2] *See* Nat'l Ctr. for Educ. Stat., *Fast Facts*, https://tinyurl.com/btqc2lm (last visited Jan. 21, 2021).

[3] *See* Nat'l Ctr. for Educ. Stat., *Digest of Education Statistics*, https://tinyurl.com/y4hwykz8 (last visited Jan. 21, 2021).

[4] *See Fast Facts*, *supra* n.2.

measured by standardized tests.[5] As a practical matter, the focus was on identifying students as eligible for special education under the rubric of the IDEA. But educators realized that labeling a student as IDEA-eligible did not necessarily ensure student success.[6] Using the discrepancy model also meant that students would receive assistance only after they fell behind in testing. The model was thus dubbed "wait to fail."[7]

So teachers, administrators, and researchers developed more proactive methods in response—and Congress took note. Congress amended the IDEA in 2004 to empower states to use one such method, Response to Intervention (RTI), alongside previously available tools to identify and assist students in need. *See* 20 U.S.C. § 1414(b)(6)(A) ("local education agenc[ies] shall not be required" to consider "severe discrepancy"); *id.* § 1414(b)(6)(B) (local education agencies may rely on "scientific, research-based intervention"). As the Department of Education recognized, "[m]odels that incorporate RTI represent[ed] a shift in special education toward goals of better achievement and improved behavioral outcomes for children with [special learning disabilities]."

---

[5] *See* Patrick S. O'Donnell & David N. Miller, *Identifying Students with Specific Learning Disabilities: School Psychologists' Acceptability of the Discrepancy Model Versus Response to Intervention*, 22 J. Disability Pol'y Stud. 83, 83, 84 (2011).

[6] David P. Prasse, RTI Action Network, *Why Adopt an RTI Model?*, https://tinyurl.com/yyxzrjx3 (last visited Jan. 21, 2021).

[7] *See* Susan M. Printy & Sean M. Williams, *Principals' Decisions: Implementing Response to Intervention*, 29 Educ. Pol'y 179, 182 (2015).

Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,647 (Aug. 14, 2006).[8]

RTI and the related Multi-Tiered Systems of Support (MTSS) model provide a student-centered and systematic approach to students' individual needs. These tiered intervention models combine routine, proactive monitoring with research-based interventions in academic, social, emotional, and behavioral areas of need.[9] When individual students show early signs of increased needs, they receive gradually more intensive assistance—first in small groups and then, if needed, in one-on-one settings.

On the ground, RTI and MTSS depend on teachers' and staff members' careful observation and interventions. Educators oversee systematic monitoring

---

[8] *See* U.S. Dep't of Educ., *Multi-Tiered Systems of Support*, https://tinyurl.com/y5o7l6do (last visited Jan. 21, 2021) (noting increased academic achievement and decreased problem behaviors under RTI); *see also* Printy & Williams, *supra* n.7, at 181-82 (citing evidence of RTI's relative advantages and success); O'Donnell & Miller, *supra* n.5, at 89-90, 92 (demonstrating that school psychologists and teachers prefer RTI).

[9] *See generally* Letter from Ruth E. Ryder, Acting Dir., Off. of Special Educ. Programs, U.S. Dep't of Educ. to Perry Zirkel, Univ. Prof. of Educ. & Law, Lehigh Univ. 2 (Aug. 22, 2016), https://tinyurl.com/yy2uoeo5 (describing "core characteristics" of RTI); U.S. Dep't of Educ., *Multi-Tiered Systems of Support*, *supra* n.8 (summarizing key features of MTSS); Ctr. on Multi-Tiered Sys. of Supports, *Essential Components of MTSS*, https://tinyurl.com/y4x4egp5 (last visited Jan. 21, 2021) (describing core components of MTSS as screening, progress monitoring, multi-level prevention, and data-based decision-making).

and assistance efforts.[10] They also pay personal attention to their students. Teachers and staff look for whether, for instance, a student has been acting differently than usual, or whether a student's grades or attention are slipping. Educators then make case-by-case decisions about whether the student needs additional interventions, which are informed by the best available research, input from teams of specialists and professionals, conversations with the student's family, and the educators' own professional judgment.

The process is all the more complex because schools must balance several sensitive considerations. For one, educators must—and do—avoid delaying intensive interventions under the IDEA for the students who need them. RTI and MTSS work in conjunction with, not instead of, other interventions under the IDEA. But on the other hand, overidentifying students as disabled can have significant consequences. Indeed, the IDEA and its implementing regulations recognize that general education settings are beneficial for nearly all students. *See* 20 U.S.C. § 1400(c)(5)(A) (finding that "[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made effective by … ensuring their access to the general education curriculum in the regular classroom, to the

---

[10] *See, e.g.*, Charles A. Hughes & Douglas D. Dexter, *Response to Intervention: A Research-Based Summary*, 50 Theory Into Practice 4, 6-7 (2011) (describing sample RTI program and the monitoring and screening performed by educators); Jason E. Harlacher et al., RTI Action Network, *Distinguishing Between Tier 2 and Tier 3 Instruction in Order to Support Implementation of RTI*, https://tinyurl.com/guao2yw (last visited Jan. 21, 2021) (providing detailed description of MTSS implementation).

maximum extent possible"); 34 C.F.R. § 300.114(a)(2) (requiring that children with disabilities receive their education with their nondisabled peers "[t]o the maximum extent appropriate").

Schools are also committed to avoiding "significant disproportionality" in special education. Disproportionality refers to the "overrepresentation of students of color in special education,"[11] a problem schools already face.[12] Disproportionate identification of minority students for special education "causes short-term and long-term harm," both academic and social, for inappropriately identified students.[13]

Schools must walk a fine line between ensuring that minorities are not overidentified on the one hand, and fulfilling their legal obligation to identify and evaluate all students in need of special education on the other.[14] Preventing the overrepresentation of minority students in special education involves "teams of professionals who have regular

---

[11] Nat'l Ctr. for Learning Disabilities, *Significant Disproportionality in Special Education: Current Trends and Actions for Impact* 2, https://tinyurl.com/y68ejrn3 (last visited Jan. 21, 2021).

[12] U.S. Dep't of Educ., *Fact Sheet: Equity in IDEA* (Dec. 12, 2016), https://tinyurl.com/y3sx34ak; *see* Nat'l Ctr. for Learning Disabilities, *Significant Disproportionality in Special Education*, *supra* n.11, at 2, 4.

[13] Nat'l Ctr. for Learning Disabilities, *Significant Disproportionality in Special Education*, supra n.11, at 2, 4.

[14] Amanda L. Sullivan & Daniel Osher, *IDEA's Double Bind: A Synthesis of Disproportionality Policy Interpretations*, 84 Exceptional Children 395, 397-98, 405-07 (2019).

conversations with family members to best assess the full situations of students," "universal and evidence-based assessments to measure student learning and monitor" their progress over time, and "developing relationships with families and creating an open dialogue with parents and families to better understand a student's familial, social, and cultural background."[15] The process is an intensive one, matched to the gravity of its consequences for students.

Critically, delivering each student the best education possible also requires parental involvement. School districts aim to obtain early, and meaningful, input from students' parents. Parents have unique information about a student's experiences and needs—they know how their child behaves and the personal challenges the student faces in their home life.[16] Only when schools gain such insight from parents can they incorporate it into a student's educational plan.

Ultimately, finding the right balance in students' educations requires carefully executing these many "difficult responsibilities." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 63 (2005) (Stevens, J., concurring). It takes time and care; personalized education does not happen overnight. *Cf.* 71 Fed. Reg. at 46,658 (recognizing variance "in terms of the length of time required for the intervention to have the intended effect on a child's progress"). School districts

---

[15] Nat'l Ctr. for Learning Disabilities, *Significant Disproportionality in Special Education*, *supra* n.11, at 7.

[16] *Id.*

nonetheless remain committed to delivering such education because it is how their students do best.

II. The Continuing Violation Exception Harms Students.

Application of the "continuing violation" doctrine to the IDEA creates a lose-lose situation for school districts and, importantly, their students. Whether districts continue to follow their current best practices or adjust their practices in response to the Eighth Circuit's decision, the outcome will undermine districts and students alike.

A. School districts will face the prospect of enhanced liability if they continue with existing best practices.

The decision below presents school districts with a choice. On the one hand, districts could adhere to the careful processes that they currently employ for educating all students and identifying students for special education. The Eighth Circuit's decision, however, creates significant uncertainty about the legal exposure that districts face by doing so: If parents can file complaints many years after learning of a child-find violation, districts will have to operate under the threat of compounded liability from years of unremedied harm—to the detriment of district budgets, teacher retention, relationships between families and educators, and, ultimately, students themselves.

First, the financial consequences. Vitiating the IDEA's statute of limitations will likely have a substantial effect on school districts' budgets, as they

must plan for a significant uptick in due process complaints and the possibility of ballooning liability. IDEA litigation has always been expensive; districts have been ordered to reimburse private school tuition and provide compensatory education to the tune of hundreds of thousands of dollars. *E.g., Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 715 (3d Cir. 2010) (noting that district established a $200,000 fund for student's compensatory education); *M.M. v. N.Y.C. Dep't of Educ.*, 26 F. Supp. 3d 249, 253, 259-60 & n.5 (S.D.N.Y. 2014) (upholding reimbursement of $9,950 per month of private tuition). On top of that, districts have faced six-figure attorneys' fee awards. *See* 20 U.S.C. § 1415(i)(3)(B)(i); *e.g.*, *J.P. ex rel. Peterson v. Cnty. Sch. Bd. of Hanover Cnty.*, 641 F. Supp. 2d 499, 525 (E.D. Va. 2009) (awarding $307,150.20 against district for parents' attorneys' fees).

Without a meaningful statute of limitations to serve as a "practical[]" limitation on liability, *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 610, 620 (3d Cir. 2015), districts will face even greater exposure. Consider the costs they could be held liable for: The national average for one year of private school tuition is $11,173,[17] and residential schools for students with special needs now charge up to $119,720 per year.[18] On the other side of the ledger, districts receive only $1,739 annually under the IDEA per

[17] Private School Review, *Average Private School Tuition Cost*, https://tinyurl.com/m86zrpl (last visited Jan. 21, 2021).

[18] Masters in Special Education Program Guide, *The 50 Best Private Special Needs Schools in the United States*, https://tinyurl.com/y89aztkd (last visited Jan. 21, 2021).

child served.[19] Districts consequently struggle to pay for IDEA judgments; as one superintendent put it, "[w]e cannot afford even one major compensatory education decision."[20] The Eighth Circuit's statute of limitations rule increases districts' exposure to such decisions. With compensatory claims untethered from Congress's two-year deadline, schools could face claims for an entire education's worth of private services. It would not take many such claims, or even more modest ones, to threaten public schools' already-stretched budgets.[21]

IDEA proceedings are burdensome even when districts prevail. Districts must prepare teachers and special education professionals to testify, and they must hire substitutes to replace school personnel while the latter participate in legal proceedings that the school must fund.[22] The decision below will exacerbate these burdens by inviting claims based on events from years earlier. Districts will struggle to rebuff even meritless lawsuits when memories have faded, evidence is stale (if preserved at all), and educators are unavailable to testify (perhaps having left

---

[19] IDEA Money Watch, *Federal Appropriations for IDEA Part B, Section 611 (children ages 3-21)*, https://tinyurl.com/yy2mpvf4 (last visited Jan. 21, 2021).

[20] Sasha Pudelski, AASA, The Sch. Superintendents Ass'n, *Rethinking Special Education Due Process* 10 (Apr. 2016), https://tinyurl.com/y5utnjk6.

[21] *See, e.g.*, Michael Leachman et al., Ctr. on Budget & Policy Priorities, *A Punishing Decade for School Funding* (Nov. 29, 2017), https://tinyurl.com/yca8q6oh (noting dramatic decline in state funding for public schools); *see also* Pet. 24-25.

[22] Pudelski, *supra* n.20, at 3, 14.

the school district altogether). *See Gabelli v. SEC*, 568 U.S. 442, 448 (2013). Districts will be pressured to fastidiously "document every step they take with every child"—precisely the sort of "unnecessary" record-keeping Congress sought to eliminate with its passage of the statute of limitations—thus diverting energy and resources from educating students. H.R. Rep. No. 108-77, at 115-16; *see* Pet. 23-24.

The Eighth Circuit's decision also threatens to increase attrition rates for teachers and staff. Research shows that participation in due process hearings causes a substantial number of special education professionals to transfer out of districts or leave the profession entirely.[23] As IDEA hearings become more numerous and sprawling in the wake of the Eighth Circuit's decision, the burdens on educators will correspondingly rise.

Finally, due process hearings engender distrust and animosity between educators and families. These relationships are critical to the success of children in special education. Researchers have concluded that due process hearings result in "[m]utual dissatisfaction"[24] between the parties—no matter who prevails—and that the proceedings have a "toxic effect"

---

[23] *Id.* at 12-13; Kathleen S. Mehfoud & Kathleen Sullivan, Nat'l Sch. Bds. Ass'n, *IDEA at 40+ Part Two: Due Process, Exhaustion, and Mediation: The Expansion of Litigiousness and a Proposal for a Reset* 5 (2017), https://tinyurl.com/y6y8fary.

[24] Pudelski, *supra* n.20, at 3.

on the relationship between parents and teachers.[25] Yet, students' needs "cannot be effectively addressed" when parents and educators are at loggerheads.[26] Avoiding this contentious dynamic was one of the primary reasons Congress enacted the two-year statute of limitations. *See* Pet. 21 (discussing H.R. Rep. No. 108-77, at 115-16).

This is a zero-sum game. All the time, money, and energy that districts expend in anticipating and conducting legal proceedings must be redirected away from districts' primary goal of educating all children. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 31, 36 (1st Cir. 2006) (recognizing these costs come "at the expense of other educational benefits for other schoolchildren"). As the President's Commission on Excellence in Special Education explained nearly two decades ago, these disputes "divert parent and school time and money, and waste valuable resources and energy that could otherwise be used to educate children with disabilities."[27] Relaxing the statute of limitations and inviting long overdue claims several years after they were discovered exacerbates this problem, exposing districts to heightened liability if they continue to adhere to best practices of tiered

---

[25] Chris Borreca, *The Litigious Mess of Special Education*, The Atlantic (May 1, 2012), https://tinyurl.com/y3639xb4 (discussing the cottage industries that have developed around IDEA hearings and litigation).

[26] Pudelski, *supra* n.20, at 9.

[27] President's Comm'n on Excellence in Special Educ., *A New Era: Revitalizing Special Education for Children and Their Families* 40 (2002), https://tinyurl.com/y4tg4dld.

intervention, attention to disproportionality, and active parent-teacher collaboration.

B. Alternatively, school districts may face pressure to overidentify students for special education.

On the other hand, districts may in effect be forced to aggressively place students into special education in order to avoid the new prospect of open-ended liability. This, too, has serious downsides. Overemphasis on the placement of students into special education undermines educational best practices, risks overinclusion of minority students in special education, and undermines the central purpose of the IDEA.

First, aggressive special education placement is at odds with educational best practices like RTI and MTSS, which require measured, individualized interventions for struggling students. Each tier of RTI, for instance, involves weeks if not months of hands-on instruction, coupled with periodic monitoring and assessment.[28] The duration of each tier, and benchmarks for moving from one tier to the next, are "largely a matter of professional discretion,"[29] which

---

[28] "The current recommended time period for measuring response to Tier 1 instruction is 8-10 weeks." Hughes & Dexter, *supra* n.10, at 7. Tier 2 involves weekly or monthly assessments and typically lasts between eight and 15 weeks. Harlacher, *supra* n.10. Tier 3 is even more involved, and may last for 20 weeks or more. *Id.*

[29] Perry A. Zirkel, *Response to Intervention and Child Find: A Legally Problematic Intersection?*, 84 Exceptional Children 368, 381 (2018).

is "informed directly by student performance data."[30]

This detailed, time-consuming process already entails some risk of exposing schools to child-find liability.[31] Indeed, school districts sometimes acquiesce to requests for special education placement and services that they "consider[] to be unreasonable" simply to avoid the costs of litigation.[32] With the Eighth Circuit's decision, however, each additional month a district spends teaching and monitoring a student without identifying them under the IDEA could mean thousands of additional dollars in liability years down the road. School districts may therefore feel forced to ignore the professional judgment of their educators and staff and forego or truncate the RTI process.

Forcing districts to undercut RTI is bad for general and special education students alike. RTI and other MTSS interventions are associated with increased academic performance and decreased behavioral problems, which enhance the quality of the

---

[30] John M. Hintze, *Conceptual and Empirical Issues Related to Developing a Response-to-Intervention Framework*, *in* 9 Journal of Evidence-Based Practices for Schools 128, 133 (Mark D. Shriver & T. Steuart Watson eds., 2009).

[31] *See* Jose L. Martín, RTI Action Network, *Legal Implications of Response to Intervention and Special Education Identification*, https://tinyurl.com/mqcd97y (last visited Jan. 22, 2021) (discussing the "tightrope schools walk" in making "effective use of regular education interventions while also respecting parent rights and child-find obligations under IDEA").

[32] Pudelski, *supra* n.20, at 3; *see generally* Colin Ong-Dean, *Distinguishing Disability, Parents, Privilege, and Special Education* 63-95 (2009) (discussing parents' incentives to push for early diagnoses and special education services for children).

regular education environment.[33] And, as Congress recognized when it amended the IDEA to permit RTI, RTI can help students "learn to perform effectively in the regular education environment without the need for special education services," and can "reduc[e] the amount or intensity of services needed for children who ultimately do get appropriately referred for special education." S. Rep. No. 108-185, at 22 (2003).[34]

Aggressive special education placement also risks leading to increased "significant disproportionality" of minority students in special education. Appropriate educational and placement decisions take time and care—schools analyze data, assess student progress, and seek input from teachers, parents, and various specialists to avoid unwarranted special education placement of minority (and all other) students. *See supra* § I. None of this will be feasible, however, where school districts feel pressured to place children into special education at the first sign of a problem. Thus, there is a risk that by pressuring school districts to overemphasize placing students into special education, an unfortunate side effect could be to increase disproportionality.

An increase in disproportionality will have significant consequences. Misidentification of students in special education causes "short-term and long-term

---

[33] *See* U.S. Dep't of Educ., *Multi-Tiered Systems of Support*, *supra* n.8.

[34] *See* Sullivan & Osher, *supra* n.14, at 405 (discussing the "potential of high-quality RTI to reduce referrals and identification for special education").

harm, specifically for students of color."[35] Misidentified students "risk being exposed to a less rigorous curriculum, lower expectations, and fewer opportunities to successfully transition to postsecondary education," as well as "suffering from a loss of self-esteem, … greater stigma, … increased racial separation in classrooms,"[36] and diminished psychological well-being.[37] And misidentifications are often permanent: "Once misidentified, students are likely to stay in the special education program for the remainder of their academic career."[38]

Increased disproportionality will also undermine districts' ability to provide special education services. The IDEA requires that districts with significant disproportionality reserve 15 percent of their federal special education funds for coordinated early intervening services. 20 U.S.C. §§ 1418(d)(2), 1413(f); 34 C.F.R. § 300.646(d). Reducing federal funds available to special education is problematic given that Congress has consistently failed to allocate even half of the funding it originally pledged to help schools educate students

---

[35] Nat'l Ctr. for Learning Disabilities, *Significant Disproportionality in Special Education*, *supra* n.11, at 4.

[36] *Id.*

[37] Charles Hughes & Douglas D. Dexter, RTI Action Network, *The Use of RTI to Identify Students with Learning Disabilities: A Review of the Research*, https://tinyurl.com/kk6geb3 (last visited Jan. 21, 2021).

[38] Nat'l Ctr. for Learning Disabilities, *Significant Disproportionality in Special Education*, *supra* n.11, at 4.

with special needs.[39] Worse, reserved funds that are not expended are forfeited to the Department of Education.[40]

Ultimately, the Eighth Circuit's incentivization of more aggressive placement of children into special education is at odds with the central goal of the IDEA—to ensure that each student can learn in the environment best suited for him or her. It bears emphasizing that the purpose of the IDEA is not to maximize special education. *See Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017) (observing that the "Act prefers" that children are "fully integrated in the regular classroom"). Rather, the IDEA seeks to ensure that all students who need special education receive it, but no more.[41] And Congress has amended the statute multiple times to ensure that students were not being overidentified for special education. *See, e.g.*, S. Rep. No. 108-185, at 22 (expressing concern that "too many children"—especially minority children—were "being identified as

---

[39] Amanda Litvinov, *How Congress' Underfunding of Special Education Shortchanges Us All*, Nat'l Educ. Ass'n (May 19, 2015), https://tinyurl.com/y6ex78an; *see* Valerie Strauss, *Congress Broke a Promise to Properly Fund a Law Protecting Students with Disabilities. Here Are the Serious Consequences*, Wash. Post (July 23, 2019), https://tinyurl.com/y2bkravv (noting that the federal government currently funds just 14.7 percent of the costs of implementing the IDEA).

[40] *See* Letter from Alexa Posny, Acting Dir., Off. of Special Educ. Programs, U.S. Dep't of Educ. to John Andrejack, Mich. Dep't of Educ. 3 (June 1, 2010), https://tinyurl.com/y3juawgm.

[41] *See* Sullivan & Osher, *supra* n.14, at 407 (recognizing the "competing legal obligations" of IDEA—to avoid under-inclusion on the one hand, and to avoid over-inclusion on the other).

needing special education"); H.R. Rep. No. 108-77, at 106 (same).[42]

The decision below upsets this delicate balance, in effect forcing school districts to choose between potentially limitless liability or aggressive placement of students into special education at the expense of educational best practices. The result is bad for school districts, bad for educators, and, most importantly, bad for students.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Sachi Schuricht
Alexandra Bursak
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Thomas M. Bondy
Counsel of Record
Zachary Hennessee
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
tbondy@orrick.com

February 11, 2021

---

[42] *See also* Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 Ariz. St. L.J. 373, 379 (2016) (noting that "Congress has long been aware of the problem of over-identification" and has passed "several IDEA amendments targeting the issue").