CASE NO. 15-30164

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SETH B., by and through D.B. AND C.B,
and DONALD B. And CHERYL B.,

Plaintiffs-Appellants,

v.

ORLEANS PARISH SCHOOL BOARD,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA (NEW ORLEANS), HONORABLE NANNETTE JOLIVETTE BROWN, PRESIDING,
CASE NO.: 2:13-CV-06068-NJB-DEK

BRIEF OF COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC (COPAA) AS *AMICUS CURIAE* IN SUPPORT OF THE POSITION OF THE APELLANTS-PLAINTIFFS

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CERTIFICATE OF INTERESTED PERSONS

Seth B., by and through his parents and next friends, Donald B. and Cheryl B., Donald B. and Cheryl B. v. Orleans Parish School Board, Case No. 2:13-CV-6068. The following statement is made pursuant to Federal Rules of Appellate Procedure 26 and 29(C) and 5TH Cir. R. 26.1.1. The undersigned counsel certifies that the following list of persons and entities as described in the fourth sentence of Rule 28.1.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae has no parent corporation, subsidiaries or affiliates that has

issued shares to the public.

Amicus Curiae has no direct or indirect interest associated with the parties to this matter, or to their attorneys or counsel, though it and its members have a general interest in the issue and outcome of the case. Attorneys for Appellant and Amicus are independent members of COPAA an organization which opens membership to attorneys who are interested in and/or represent parents and children with disabilities. COPAA has not contributed to the Appellants or their pursuit of this matter.

Amicus Curiae adopts the statements of the Appellee and Appellant concerning the parties, trial judge(s), persons, firms, partnerships or corporations who have an interest in the outcome of the case.

Pursuant to 5th Cir. R.26.1.1, as this brief is filed by *amicus* and is a subsequent brief filed in this proceeding, the following is list of all entities known to have an interest in the outcome of this appeal "omitted from the certificate contained in the first brief filed and in any other brief that has been filed":

Amicus Curiae : Council of Parent Attorneys and Advocate, Inc., a non-profit organization.

Respectfully submitted, this the 1st day of May, 2015.

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** Designates the decisions below and the regulations at issue.

I. STATEMENT OF IDENTITY OF *AMICUS CURIAE*

The Council of Parent Attorneys and Advocates Inc. ("COPAA") is a not-for-profit national organization comprised of persons with disabilities, parents and children, related professionals and their attorneys and advocates who advocate on behalf of children with disabilities. One of the statutes which COPAA focuses on in protection of the rights of children who receive special education services is the Individuals with Disabilities Education Act (IDEA), a federal statute that seeks to ensure that children with disabilities receive a Free Appropriate Public Education ("FAPE"). COPAA believes that the key to effective education programs for children with disabilities lies in collaboration between parents and their children and educators as equal parties but with overlapping rights and duties. COPAA provides training and resources for parents, advocates and attorneys to help each child obtain the FAPE guaranteed by IDEA. The primary rights of parents and children under IDEA start in the evaluation process with a right to an Independent Education Evaluation ("IEE") to supplement the evaluations conducted by the public agency.

Through this experience and the experiences of its members, COPAA has seen the historic and critical importance of the evaluation of students and the need for parents and children to have access to meaningful IEEs. Adequate evaluation

is vital to ensure that children with disabilities receive the high-quality education to which all children are entitled. The IEE also plays an essential role in the IDEA dispute resolution process as it provides the professional independent assessment of the child that is often essential to IDEA decision making. Children require a clear and fair access to an established dispute resolution mechanism when the school agency declines to allow the publicly funded IEE or to pay for it once it is tendered, in procedures which mandate that the IEE be funded unless the district affirmatively seeks a hearing to prove its defenses "without unnecessary delay." *See* 34 C.F.R. § 300.502(b)(2)(2006). This explicit allocation of the burden of bringing a suit and the burden of proof to lie with the district denying funding was made in 1997-1999 based on a concern that forcing parents to seek due process for reimbursement delayed the IEE process and interfered in the IEE right.

COPAA and its members have direct experience in many states, including Louisiana, Texas and Mississippi in assessment of children, and in the IEE. As *amicus,* COPAA's interest is to offer this Court its experience including the use of publicly-funded IEEs in the provision of FAPE, and in how the due process system for resolving this dispute has been implemented nationally and with the direction of the United States Department of Education. COPAA writes to support the

position of the Appellants-Plaintiffs and seeks this Court reverse the decision below, as *Amicus* believe that the procedure used conflicts with the IEE process and is inconsistent with the application of the IEE in many jurisdictions including in other states in the Fifth Circuit.

The Appellants and Appellees have consented to the motion and the filing of this brief.

II. STATEMENT PURSUANT TO FED R.APP.P.29(C)(5)

COPAA and its counsel independently authored and submitted this Brief. COPAA has no relationships or involvements as identified in Fed. R. App. P. 29(c)(5).

III. SUMMARY OF ARGUMENT

Parents have been permitted the right to publicly-funded IEEs with the first regulations passed under the EHA by the then U.S. Department of Health, Education and Welfare.[1] The EHA, now IDEA, has been amended eight times and there have been three sets of comprehensive regulations with other amendments, across six different administrations, all of which have reaffirmed the right to a publicly-funded IEE. Under the federal and Louisiana regulations, the IEE is shared with the IEP Team and considered in determining the child's eligibility and services.[2] The IEE is an essential right of the parents. *See Schaffer v. Weast*, 546 U.S. 49, 60-61 (2005). In protecting this right the IDEA due process mechanism

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1 *See* 20 U.S.C. § 1415(b)(1)(B)(1975).

2 34 C.F.R.§ 300.502(c)(2006); Louisiana Administrative Code, Title 28, Part

found in 20 U.S.C. § 1415 (2004) is used to resolve disputes over its need and funding, and since 1999 federal regulations provide that the agency must bring a due process hearing to address any of these disputes "without unnecessary delay." 34 C.F.R. § 300.502 (2006). This was a clarification to protect the IEE right of children and eliminate the practice of agencies simply objecting and waiting to see if parents would sue it for reimbursement. *E.g.*, 64 Fed. Reg. 12607 (March 12, 1999). This obligation to pay or seek due process is also reflected in Louisiana policy and regulations, and in every known state in the Fifth Circuit and the United States.

Here, over a course of more than a year and two school years, the Family sought a publicly funded IEE but the OPSB rejected funding contending it had determined that the tendered evaluation did not meet all its "criteria" by complete adherence to Louisiana Bulletin 1508's requirements addressing all types of preliminary evaluation tasks such as vision and hearing screening, testing interventions and all types of assessments. OPSB did not seek a due process hearing to obtain administrative endorsement of its unilateral determination not to pay for the IEE. There is no IDEA procedure supporting that failure and its actions meant that under the IDEA process it failed to act "without unnecessary delay."

XLIII, LR 34:2017, Chapter 5, § 503(C)(1) (2008) ("Section 503").

The IEE procedure fits within the IDEA dispute resolution mechanism as one of the explicit obligations on an educational agency to seek a hearing to present and sustain a defense to the IEE. The failure to seek due process invokes the sole question in a reimbursement case as to whether this failure was an unnecessary delay and has been determined by the United States Department of Education in policy letters and by many states as a waiver of the defenses to an IEE. The ALJ and District Court erred in their approach and legal analysis by ignoring and rejecting OPSB's failure to seek due process. The IEE system operates on the agency's election to come forward with a hearing complaint or to pay for the IEE, and does not permit an educational agency to simply refuse funding. This threshold obligation was breached and *Amicus* ask the Court reverse.[3]

[3] COPAA understands that the National Disability Rights Network ("NDRN") and the National Federation of the Blind have sought this Court's leave to participate as *Amici Curiae*. In order to avoid unnecessary duplication COPAA adopts and identifies its endorsement of portions of their arguments, should such leave be granted. COPAA adopts NDRN and NFB's brief sections II, III, A, and B on the issues that the "criteria" used by OPSB were excessive and interfere in the right to an IEE and that Bulletin 1508 which regulates many different aspects of all possible evaluations is excessive and unnecessary for an IEE. These assume a parent objects to everything done by the district, whereas the IEE is a second opinion on those portions of the evaluation to which the parent objects. A parent should be able to select the necessary portions of the multidisciplinary evaluation that require reassessment.

IV. STATEMENT OF THE CASE

Amicus adopts the Appellants' Statement of the Case.

To frame this brief, Appellant S.B. is a student with a disability entitled to special education under the Individuals with Disabilities Education Act ("IDEA"). *S.B. v. Orleans Parish School Dist.*, 64 IDELR 301, *1 (E.D. La. 2015). ROA.1028. S.B.'s parents, D.B. and C.B. requested an Independent Educational Evaluation at public expense in an email to Appellee Orleans Parish School District (also "OPSB" or "the District") on August 25, 2011. ROA.650. The District responded on September 6, 2011, indicating that it approved the request and the IEE should adhere to the Louisiana Bulletin 1508, Pupil Appraisal Handbook ("Bulletin 1508"). 64 IDELR 301, *2. Ultimately, the parents proceeded with the IEE and sent a report in April 2012. *Id. See* ROA.650-689. On May 7, 2012, the District claimed the IEE did not comply with Bulletin 1508 and would pay for the evaluation. ROA.703. The Family again requested reimbursement in January 2013 and on February 28, 2013, the District informed the Family that it was denying reimbursement. *Id. See* ROA.715. OPSB never sought an IDEA due process hearing to support its denials. *Id.*

The Family filed a due process request on April 30, 2013, seeking reimbursement for the IEE. *Id*. In the Parents' case, OPSB moved for dismissal and the ALJ found that compliance with Bulletin 1508 was required, on OPSB's defense. The ALJ found it lacked jurisdiction to award reimbursement where the IEE was not in compliance with the agency criteria. *In re: Student with a Disability*, 61 IDELR 269 (La. SEA 2013). *See* ROA.1563.

The Family appealed by filing an action in the District Court. ROA.8. OPSB moved for summary judgment arguing that it complied with IDEA by *inter alia* approving the Family's request for an IEE within eight days and notifying the Family that its IEE must comply with Bulletin 1508 criteria. ROA.99. The Family contested the application of Bulletin 1508 criteria and the District's later failure to seek a hearing to support its refusal to fund the IEE. ROA.481; ROA.763. The Family filed for summary judgment. ROA.1022. OPSB asserted that the Family bore the burden of persuasion because they contested its reimbursement decision and the Family argued *inter alia* that OPSB should bear the burden of proving it properly denied reimbursement, that requiring full compliance with Bulletin 1508 was inconsistent with their right to a publicly funded IEE, that disputed facts existed regarding application of Bulletin 1508 criteria to IEEs and that OPSB

failed to seek due process. ROA.785; ROA.1028. The Family also argued that OPSB violated IDEA by failing to provide adequate written notice of Bulletin 1508's provisions, that requiring parents to pay upfront for IEEs makes the right to IEEs unavailable to the majority of parents and that OPSB's cap of $3000 on IEEs is inconsistent with the right to IEEs. *Id.*

The Court received additional evidence[4], including affidavits, exhibits and evaluation results, as there had been no administrative trial as otherwise provided in 20 U.S.C. § 1415(h)(2)(2004). *See* 64 IDELR 301 *9 n. 66. According to the District Court, its "decision is based on a preponderance of the evidence, so the existence of a disputed issue of material fact will not necessarily defeat the motion." 64 IDELR 301 at *4.[5] The Court found that the Family, as the party

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[4] *See* 20 U.S.C. § 1415(i)(2)(C)(2004).

[5] It is not clear to *Amicus* whether the District Court considered this a "bench trial", or its *de novo* review under IDEA permitting "additional evidence" under 20 U.S.C. § 1415(i)(2)(C)(ii) (2004). There is a significant and a qualitative difference in a case resolved administratively as a question of law on a motion and one which has an administrative trial for review as addressed in *Alvin Ind. Sch. Dist. v. A.D.*, 503 F.3d 378 (5th Cir. 2007) and the other cases of this Court assessing the district court's review. *See also Teague Ind. Sch. Dist. v. Todd*, 999 F.2d 127, 131 (5th Cir. 1993) and *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997). *Amicus* believe that parents (and districts) are entitled to a trial under IDEA with the opportunity to confront, cross examine and compel witnesses. 20 U.S.C. § 1415(h)(2)(2004). Here, no such procedure was followed and the District Court's premise for making contested findings on summary judgment without a

seeking relief before the ALJ, bore the burden of persuasion at the administrative level and further allocated the burden of persuasion to the Family, as the party seeking relief therein. *Id.* at *5. It found the Family did not meet their burden to prove they were entitled to reimbursement for the IEE based on its analysis that the IEE did not comply with Bulletin 1508 criteria. *Id.* at *6. The District Court rejected the Family's argument that "by failing to request a due process hearing following their requests for an IEE at public expense, and again following their requests for reimbursement, OPSB waived its right to object to reimbursing Plaintiffs for the cost of the IEE." *Id.* at *8.

V. ARGUMENT AND CITATION OF AUTHORITY

A. Children and Parents Are Protected By IDEA

The Family have a right to "FAPE." 20 U.S.C. § 1401(9)(2004); 34 C.F.R. § 300.17 (2006). *See Rowley* v. *Hendrick Hudson Cent. Sch. Dist*, 458 U.S. 176, 203 (1982); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007). "These rights are interpreted by "[t]he goals of IDEA [which] include 'ensur[ing] that all

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trial as stated in *Teague* and its progeny do not seem to apply. *Amicus* urge a resolution which does not reach this issue but remain concerned with any process which enforces the same standard of review regardless as to whether there was an administrative trial or not.

children with disabilities have available to them a free appropriate public education' and 'ensur[ing] that the rights of children with disabilities and parents of such children are protected.'" *Winkelman* at 523.

The IDEA hearing procedures are designed to protect the rights of children. *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Schaffer v. Weast*, 546 U.S. 49, 52 (2005). In 2004 Congress found one purpose for the Act was "to ensure that the rights of children with disabilities and parents of such children are protected," 20 U.S.C. § 1400(d)(1)(A)(2004), and "to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities." *Id.,* § 1400(d)(3)(2004). All evaluations must be considered, *id.,* as must the concerns of the parent. *Id.*

Intrinsic to the provision of FAPE to children is the accumulation of information concerning the child and his levels of functioning, behavior and disabilities. District evaluations are specifically regulated. *See* 20 U.S.C. § 1414 (2004); 34 C.F.R. § 300.122, 300.300-300.311(2006). District evaluations require a wide-range of assessments to address eligibility and "the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum…." 20 U.S.C. § 1414 (b)(2)(2004); *see also* 34 C.F.R. § 300.304(b)(1)-(3)(2006).

Further, all districts must ensure that "the child is assessed in all areas of suspected disability." 20 U.S.C. § 1414(b)(3)(2004); *see also* 20 U.S.C. § 1412(a)(6)(B)(2004); 34 C.F.R. § 300.304(c)(1)-(7)(2006). Additionally, "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. . . ." *Id*. The district must conduct a multi-disciplinary comprehensive evaluation that addresses all areas of known or suspected disability. 20 U.S.C. § 1414(b)(3)(B)(2004); 34 C.F.R. § 300.304(c)(4)(2006).

B. IDEA Grants Parents and Children the Right to an IEE

As appropriate district evaluations are a driving force behind the promise of IDEA, a "free" education provides for not just agency evaluations, but for publically funded independent assessments of the child. If parents disagree with a district's evaluation(s), they have the right to seek independent educational evaluations of their child. 20 U.S.C. § 1415(b)(1)(2004); 34 C.F.R. §

300.502(b)(1) and (2)(2006).[6] Federal law provides:

> (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.
>
> (2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.
>
> (3) …
>
> > (ii) *Public expense* means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with §300.103.

34 C.F.R. § 300.502(a).[7] The IEE is a "second opinion" for when there are concerns with the evaluation or the failure to fully evaluate "all areas of need."[8] The parental notice of rights and procedures the OPSB must provide "shall include a full explanation of the procedural safeguards ... available under this section and under the *regulations promulgated by the Secretary relating to ... independent*

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[6] The IDEA requires that private evaluations must be considered by the IEP team and by the ALJ. *See* 34 C.F.R. § 300.502(c)(2006).

[7] The ALJ may independently order an IEE. 34 C.F.R. § 300.502(d).

[8] *See* 20 U.S.C. § 1414(b)(3)(B)(2004).

educational evaluation." 20 U.S.C. § 1415(d)(2)(A)(2004)(emphasis supplied). When one looks at the Notice of Procedural Safeguards or the § 503(B) (or as similarly stated in Bulletin 1706 which also contain the IDEA/special education procedures), these all state that an IEE is to be publicly funded unless the District seeks due process "without unnecessary delay," and as § 503(B)(2) provides "demonstrates in a hearing pursuant to §§ 507 through 513 that the evaluation did not meet agency criteria." Louisiana Administrative Code, Title 28, LR 34:2071, § 503)(Bulletin 1706, pp. 43-44) (Exhibit 1)(cited part). Louisiana also publishes "Educational Rights for Children with Disabilities", (La. DOE 2013) as its Notice of Procedural Safeguards pursuant to 34 C.F.R. § 300.504(2006) which is identical in identifying the right to funding unless the agency timely seeks due process. (Exhibit 2 at 1, 11-12).These all implement the IEE right through a requirement the school seek a hearing.[9] *See Phillip C. ex rel A.C. v. Jefferson Cnty Bd. of Ed.*, 701 F.3d 691, 697 (11th Cir. 2012).

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[9] § 503 tracks 34 C.F.R. § 300.502(2006) and is found in Bulletin 1706. Bulletin 1508 also has a section on the IEE at Chapter 1, § 115(H), pp. 17-18, which authorizes "maximum allowable charges for specific tests," conflicting with the position that all tests and tasks must be undertaken. It has an IEE written request requirement not found in the law and it is silent on an explicit exception to the duty to seek due process when the school claims its criteria were not meet. The IEE is funded if "the LEA does not initiate due process to show that its evaluation is appropriate." *Id.* at 18. This fails to endorse the just say no response.

Parents can seek an IEE if they just disagree with a school's evaluation, or they may be concerned with the tests used and their appropriateness, or that it fails to answer necessary questions. Parents may object to the often limited scope of school assessment or that the district staff failed to focus on critical questions.[10] Though parents must disagree they are not required to define that disagreement or their objection. 34 C.F.R. § 300.502(b)(4) (2006). Parents are not required to provide prior notice of their intent to seek an evaluation. *See In re: Letter to Kerry*, 18 IDELR 527 (OSEP 1991). If they do not, the "undue delay" clearly applies when the IEE is presented.

The Supreme Court has explained the importance of this safeguard:

> [P]arents … play a significant role in the IEP process. . . . They also have the right to an 'independent educational evaluation of the[ir] child.' . . . The regulations clarify this entitlement by providing that a 'parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.' . . . IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

[10] *See, e.g., In re: Letter to Baus*, 59 IDELR 81 (OSEP 2015)(parent entitled to IEE to cover gaps in assessments).

Schaffer, 546 U.S. at 60-61. The 11th Circuit, in rejecting a challenge to the requirement that IEEs be publicly funded, underscored the necessity of this parental right:

> The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP. . . . Without public financing of an IEE, a class of parents would be unable to afford an IEE and their children would not receive, as the IDEA intended, "a free and appropriate public education" as the result of a cooperative process that protects the rights of parents.

Phillip C. v Jefferson Cty. Bd. of Educ., 701 F.3d 691, 698 (11th Cir. 2012)(internal citations omitted).[11]

[11] In 2003 a study was done of the available IEE cases and OSEP policy statements. Etscheidt, Susan, "Ascertaining the Adequacy, Scope, and Utility of District Evaluations," Exceptional Children, Vol. 69, No. 2, pp. 227-247 (Council for Exceptional Children 2003)("Etscheidt"). It shows a system that works as the ALJs and courts concentrated on three identified factors: (1) whether the district had complied with the IDEA technical requirements for evaluations; (2) whether the scope of the evaluation was sufficient; and (3) the utility of the evaluation in development of the IEP. *Id.* The "comparison served both to validate the [IDEA] criteria and to highlight the consistency of evaluation recommendations from various professional organizations." *Id.* at 239. The "legal standards uncovered in the case analysis mirror the professional standards." *Id.* Etscheidt found that courts sustained district evaluations when they were properly done under both legal and ethical standards and were adequate for designing the child's program, and in turn, allowed public IEEs for evaluations which failed to address the child's needs or IDEA's mandates, or were limited in scope.

Though "[t]he criteria under which the [IEE at public expense] is obtained, including the location of the evaluation and the qualifications of the evaluator, must be the same as the criteria the public agency uses when it initiates an evaluation. . . ," 34 C.F.R. § 300.502(e)(1), school districts are prohibited from imposing other conditions on the IEE. *Id.* at § 300.502(e)(2). *See also Gresham-Barlow Sch. Dist.*, 113 LRP 22781 (SEA Or. 2013)("[D]istricts may not impose conditions, timelines, or other limitations on parents' access to an IEE."); *In re: Letter to LoDolce*, 50 IDELR 106 (OSEP 2007)(agency criteria must not limit the evaluation and except for explicit regulatory requirements in Section 300.502 "may not impose conditions or timelines related to obtaining an [IEE].").

C. The District Must Respond to a Parent's Request for an IEE by Providing the IEE or Filing Due Process Without Unnecessary Delay; It Has No Other Option.

In 1997-1999, the broadest change in the IEE process in thirty-seven years clarified that the burden for seeking a hearing on a denial of public payment rested on the school. The IEE right remained in 20 U.S.C. § 1415(b) but the federal regulation was clarified to require the hearing request to dispute payment and to ensure that the burden of pleading rested on the district. This was to protect

children and avoid unnecessary litigation while the child often sat unevaluated. It now provides:

> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
>
>> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
>>
>> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant … that the evaluation obtained by the parent did not meet agency criteria.

34 C.F.R. § 300.502(b)(2006).

The regulatory history makes clear that "[u]nless a public agency chooses to initiate a due process hearing in accordance with paragraph (b) of this section, the agency must respond to the parent's request by insuring an independent educational evaluation is provided at public expense in a timely manner." 62 Fed. Reg. 55098 (Oct. 22, 1997)(comments with proposed rule change).

> The purpose of requiring the public agency to either initiate a due process hearing if it wishes to challenge a parent's request for an IEE, or otherwise provide an IEE at public expense, is to require public agencies to respond to the IEE requests and to ensure parents are able to obtain an IEE as set forth in section 615(b)(1) of the Act. ***There is no corresponding need to specify that a parent also has the right to***

> ***initiate a due process hearing since <u>if a public agency does not do so it must provide the IEE at public expense</u>.***

64 Fed. Reg. 12607 (March 12, 1999)(explaining regulation in final version) (emphasis supplied). Thus "[a] parent's right to a publicly-funded IEE is subject only to the agency's right to request a due process hearing to show that its evaluation is appropriate."[12] *In re: Letter to Kerry*, 18 IDELR 527 (OSEP 1991). *See also In re: Letter to Gramm*, 17 IDELR 216 (OSEP 1990)(the publicly funded IEE is an important procedural safeguard of children even if it imposes financial burdens on the school district).

Where, as here, the school district refuses to fully compensate the parents' for an IEE based on its belief that the IEE does not conform to its criteria, it ***"must, without unnecessary delay, initiate a hearing to demonstrate that the evaluation obtained by the parent did not meet [its criteria]."*** *In re: Letter to Petska*, 35 IDELR 191 at *2 (OSEP 2001)(involving cost criteria)(emphasis added). Under IDEA though school districts may seek due process, *see* 20 U.S.C. §

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[12] The IEE provision was initially 45 C.F.R. § 121a.503 (1977), then it was re-codified at 34 C.F.R. § 300.503 (1980). *See* 45 Fed. Reg. 30803 (May 9, 1980) and 45 Fed. Reg. 86301 (Dec. 30, 1980)(establishing nomenclature changes for the Department of Education). Section 300.503(b) stated that the agency "may" seek a hearing and in many jurisdictions this led to unfortunate delay.

1415(b)(2004), there simply is no provision which allows the District to just say no to IEE funding, or just tell the parents it concluded that it has a defense to funding.

A process that would permit the district, in its sole discretion, to deny payment for an IEE based on its unilateral belief that the IEE does not meet its criteria "is inconsistent with the with the process required by 34 C.F.R. § 300.502(b)(2)." *In re: Letter to Petska*, 35 IDELR 191 at *2*; see, e.g., Red Clay Consolidated Sch. Dist.,* 108 LRP 52265 (Del. SEA 2005). Even where a district objects to the evaluator as unlicensed or not meeting agency criteria, "[i]f the agency chooses not to initiate a due process hearing, it must ensure that the parent is reimbursed for the evaluation." *In re: Letter to Parker*, 41 IDELR 155 (OSEP 2004); *see, e.g. Dixon Unified Sch. Dist.*, 114 LRP 29153 (Cal. SEA 2014). Thus, the parent's request for an IEE creates the affirmative obligation of the agency to either provide the funding or seek a hearing and bear the burden to prove its defenses. There is no provision allowing the district to just say no and ultimately force the parents to sue for payment and still raise its defenses, as this approach was rejected in the elimination of "may" in the 1999 final IEE regulations.

D. The District's Failure to Either Provide the IEE or File Due Process Without Unnecessary Delay Waived Its Right to Object to the IEE

Requiring the Family to bear the burden of enforcing a right guaranteed by the Act circumvents the IDEA mandate that OPSB bears the burden of pleading its claim, and of coming forward with the evidence and the burden of proof on the IEE. By waiting and not seeking a hearing, OPSB was able to argue that the Family were the "plaintiffs" and therefore had the burden of proof under *Schaffer v. Weast*, 546 U.S. 49 (2007). Here it not only shifted tall the burdens despite the plain text of the rule but this appears to have been outcome determinative as the decisions stated that the Family did not prove the right to funding, a standard not found in the IEE process. There is no IDEA based rationale to allow a district to delay for into two school years and then force this shift. If a district denies the IEE on criteria outside the explicit limits in the Act, it must establish in its own timely hearing what these are and why they demand this refusal.

The case law provides for the publicly-funded IEE by properly concentrating on the appropriateness of the district assessment <u>and/or</u> its affirmatively seeking approval of limiting criteria, or the failure of the public agency to seek due process. These recognize that there is a need for haste and certainty for many children in whether they will receive the IEE. Many families with children with disabilities

simply do not have the means to pay for their own evaluation. Where there are delays or where the district does not seek a hearing, courts have routinely held that this waived its defenses and have often ordered reimbursement or payment for IEEs. The Eleventh Circuit recently held this in *Jefferson Cnty Bd. of Educ. v. Lolita S.*, __ Fed. App'x __, 64 IDELR 34, Case No. 13-15170 (11th Cir. Sept. 11, 2014)[13]. There, because the school board failed to timely file due process, the 11th Circuit held that "it cannot now defend its evaluation or challenge the IEE." *Id.* at *4. This Court found that the school board had "waived its opposition to the reimbursement claim by choosing not to file its own due process request." *Id.* at *2. *See Pajaro Valley Unified Sch. Dist. v. J.S.*, 47 IDELR 12 (N.D. Cal. 2006)(district's "unexplained and unnecessary delay in filing for a due process hearing waived its right to contest student's request for an [IEE].").[14]

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[13] The Eleventh Circuit affirmed *Jefferson Cnty Bd. of Educ. v. Lolita S.*, 977 F. Supp. 2d. 1091, 1277 (N.D. Ala. 2013)("The procedure was to file, without unnecessary delay, its own request for a due process hearing. … Thus it did not follow the procedure for challenging the request for an IEE … set forth in 502(b)(4)(i)-(ii). As the hearing officer correctly found … because the Board 'chose not to file its own due process request to … to demonstrate that the neuropsychologist did not follow the agency criteria,' the Board 'shall reimburse the parent for that evaluation.'").

[14] *See also Evans v. Dist. No. 17 of Douglas County*, 841 F.2d 824, 830 (8th Cir. 1988)(reimbursement ordered because the LEA "never initiated a hearing as required by [IDEA]"); *Bd. of Educ. of Murphysboro Cnty. Unit Sch. Dist. 186 v.*

Where, as here, the district denies reimbursement on the basis that the IEE does not comply with its criteria; a failure to timely bring due process is fatal to its claims. The Delaware case *Red Clay Consolidated Sch. Dist.*, 108 LRP 52265 (Del. SEA 2005) is an example. There, the district claimed that the IEE did not meet its criteria. The hearing officer ordered the district to reimburse finding that the "District was required to either promptly pay for the Evaluator's evaluation or, if it believed that the evaluation did not meet agency criteria, initiate a due process hearing 'without unnecessary delay.' The District did neither for more than four months. In these circumstances, the District's delay violates § 300.502(b)(2)." *Id.* at *2.[15] Similarly, in *Dixon Unified School District*, 114 LRP 29153 (Cal. SEA 2014), after the parents requested an IEE, the school negotiated with the parents' evaluator until the evaluator withdrew. The parents then hired the evaluator to conduct the IEE and filed due process. The ALJ rejected the district's argument

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Ill. of St. Bd. of Educ., 41 F.3d 1162, 1169 (7th Cir. 1994)(dicta) ("the school district could have contested this independent evaluation … but it did not"); *Warren G. v. Cumberland Sch. Dist.*, 190 F.3d 80 (3rd Cir. 1999)(the "public agency may initiate a hearing ..."); *Hudson v Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987)(thrust of regulation is school can "challenge the parent's evaluation," … "if it convinces the administrative reviewers and the district court that its initial evaluation was correct.")

[15] *See also Cincinnati City Schools*, 114 LRP 50642 (Ohio SEA 2014)(district's burden to prove its criteria and that criteria are reasonable).

that it did not unreasonably delay as it had been negotiating in good faith, as this is not the standard, and held the remedy for unnecessary delay is reimbursement. *Id.* at *13.

E. Many Other State Administrative Courts, Including Those in the Fifth Circuit, Routinely Order Payment for the IEE as a Remedy for a District's Failure to Bring Due Process

The requirement to timely proceed to a hearing is well grounded in circuit, district and administrative decisions. Many state administrative courts, including those in the Fifth Circuit, routinely order payment for the IEE as a remedy for a district's failure to bring due process. *See, e.g., Nicole L. v. Brownsville Indep. Sch. Dist.*, 42 IDELR 134 (Tex. SEA 2004) (parents entitled to IEE where district failed to provide IEE or file for due process within two months); *Crowley Ind. Sch. Dist.*, 112 LRP 31349 (Tex. SEA 2012) (student entitled to IEE because school district "neither provided an evaluation, nor attempted to defend the appropriateness of [the evaluation it] provided."); *Fayette Cnty Sch. Dist. v. B.J.M*, Docket No. OSAH-DOE-IEE-0728166-56 at *4 (Ga SEA June 15, 2007) (four month delay before District's filing of its due process was unreasonable; "the only appropriate remedy is that Defendant be provided the IEE at public expense")(Exh. 5); *DeKalb Cnty Sch. Sys.*, 4 ECLPR 285 (Ga. SEA 2001)(summary judgment for

parents where school district responded to IEE request by stating it would decide whether to pay after IEE performed, violating its duty to file due process or provide IEE); *Fullerton Sch. Dist.*, 58 IDELR 177 (Cal. SEA 2012) (Where district tried to obtain parents' agreement to its assessment plan, its failure to provide the IEE or file due process justified reimbursement); *Los Angeles Unified Sch. Dist.*, 111 LRP 48178 (Cal. SEA 2011)(three month delay from IEE request to denial was unreasonable; appropriateness of district's assessment would not substitute for its obligation to file due process); *Los Angeles Unified Sch. Dist.*, 48 IDELR 293 (Cal. SEA 2007)(delay of 74 days in response to parents' IEE request was unnecessary and unreasonable); *St. Helena Unified Sch. Dist.*, 109 LRP 45045 (Cal. SEA 2007)(where district scheduled an IEP meeting in response to IEE request, putting burden on the student to request the IEE again, its failure to file due process supported public IEE); *K.B. v. Haledon Bd. of Educ.*, 54 IDELR 230 (D.N.J. 2010)(where board failed to file for due process plaintiffs were entitled to public IEE); *St. James Independent Sch. Dist.*, 109 LRP 28138 at *11 (Minn. SEA 2009)("where there was no external impediment to obtaining the IEE, 90 days was an unreasonable delay of either proceeding the IEE or seeking a due process hearing to defend its [evaluation]."); *Regional Sch. Unit #61*, 111 LRP 48320 at *9 (Me. SEA 2011)(Although appropriate to respond to IEE request by trying "to

resolve the matter by offering to conduct further assessments," once "the negotiations broke down," the district was required to bring due process. Its failure entitled the parent to IEE.); *Sherwood Sch. Dist.*, 104 LRP 42096 (OR SEA 2004)(three month delay was unreasonable); *Bd. of Educ. of the Monticello Central Sch. Dist.*, 37 IDELR 143 (NY SEA 2002)(delay of 20 months until presented with bill for IEE was unreasonable; court need not consider appropriateness of its evaluation.); *Hampden-Wilbraham Regional Sch. Dist.*, 37 IDELR 20 (Mass. SEA 2002)(district's failure to provide IEE or file due process within five days, as required by its notice to parents of their IEE rights, entitled parents to IEE; HO did not have discretion in fashioning alternative remedy); *Coeur D'Alene Sch. Dist.*, 35 IDELR 261 (Idaho SEA 2001)(parents entitled to IEE where district's due process request was filed after the 10 day period specified in its parental rights; district not permitted to argue that its evaluation was appropriate).

By *Amicus*' count courts in a dozen states, including Texas, have stated that the failure to affirmatively seek a hearing is a waiver of the defenses and/or a breach of the "unnecessary delay" obligation. The holdings or dicta in the Circuit Courts of Appeal confirm this, as do the USDOE opinion letters. Though there is no justification for OPSB not to have sought a hearing, even if the reimbursement

claim is erroneously resolved on the IEE criteria rather than on unnecessary delay, the District, not the Family should bear the burden of coming forward and of proof on the issue of whether the IEE failed to meet agency criteria and whether its criteria were valid. The court in *Los Angeles Unified Sch. Dist.* held that the student (who filed the complaint) had the burden to show he requested the IEE at public expense due to disagreement with district assessments. The District then had the burden to show that it filed a due process complaint without unnecessary delay, and that its assessments were appropriate. 48 IDELR 293 at * 9 (citing *Schaffer v. Weast*, 546 U.S. 49 (2005)). "[W]hen a parent requests and IEE, and the district neither files its own due process complaint nor provides the IEE, the burden of proof is on the district to demonstrate that the parent's privately obtained IEE did not meet the agency criteria…" *Id.* at 10. There, parent had not yet obtained IEE so its failure meant there were no allowable defenses. *Id.*

F. The District's Actions Are Not Supported By Louisiana Law, Or Its Own Notices Of Procedures It Provides Parents

Here, the Family sought an IEE and sent their report.[16] OPSB notified the parents on May 7, 2012 and again in 2013 that it contended the IEE did not meet Bulletin 1508 criteria, but failed to bring due process. OPSB never filed and after a year forced the Family to sue for reimbursement. This is a primary example of the delay the regulations should to clarify in 1997-1999. This student should not have had to wait a year, or for his parents to file a complaint, as OPSB had the duty to act "without unnecessary delay." Many parents are unable to also afford counsel, or to "sue" their district, and allowing OPSB to sit idle to avoid payment based on its unilateral objections creates a class of students it simply can stonewall. As the 11th Circuit opined in *Phillip C. ex rel A.C. v. Jefferson Cnty Bd. of Ed.*, 701 F.3d 691 (11th Cir. 2012), this is inconsistent with the meaning of the IEE right

[16] There was also delay caused by the "criteria" of Bulletin 1508. These arise from the comprehensive initial evaluation guidelines covering all areas of suspected disability. *Amicus* agree with the Seth B.'s position that every IEE need not meet every evaluation criteria, as the IEE is not a process which requires ritualistic replication in areas that are not in dispute. OPSB's first objection was the lack of a second vision and hearing screening but why should parents replicate vision and hearing testing if this is not an issue? Plainly OPSB believed Seth's vision was adequate or it could not have conducted its evaluation. Nevertheless, OPSB's claim was that since this was missing from the IEE, S.B. breached its criteria. This is a waste of time and resources which burdens the IEE. Parents must be able to evaluate the areas in dispute, not retest those with which they agree. We

and its application to all children with disabilities, regardless of their means or ability to seek due process.

Additionally, there is nothing in Section 503, or the parents' rights form or brochure, or even in Bulletin 1508 which allows this conduct. There is nothing in the IEE state and federal rules that supports that by waiting OPSB could shift all the burdens to the parents. The Louisiana rules and IDEA require that OPSB seek a hearing. Even if the parents are not represented, the agency seeking the hearing results in the appointment of an impartial hearing officer who must ensure that the agency proves its evaluation and criteria are appropriate. Thus IDEA protects even the *pro se* child.

CONCLUSION

Amicus respectfully seek this Court reverse. The "elaborate and highly specific procedural safeguards embodied in IDEA is the mechanism from which a substantively appropriate education results." *Rowley*, 458 U.S. at 205-06. The publicly-funded IEE is a vital tool in the quiver of information for deciding eligibility and services. It has worked for thirty-seven years and for the past sixteen years it has been clear that agencies are required to pay for the evaluation unless they promptly seek a hearing to contest it. The District Court allowed OPSD to

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do not x-ray a child's arm when he sprains his ankle.

ignore its threshold duty and wait to be sued to then raise defenses it should have pled in its own complaint a year earlier. The threshold question was whether OPSD complied with IDEA and sought a hearing without unnecessary delay. As it did not, this Court should reverse.

Respectfully submitted, this 1st day of May, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULES 29(c)(7), 29(d) and 32(a)(7)

The undersigned certifies that this brief is presented in Times New Roman font 14, in compliance with the Court's Rules.

The undersigned also certifies that the sections of the brief application to the length requirements contain 6856 words in compliance with the Court's Rules, as measured by Word 2010, the word processing program used to create the brief.

This 1st day of May, 2015.

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CERTIFICATE OF SERVICE

I certify that on May 1, 2015 the foregoing document was served on all parties or their counsel of record through the CM/EMCF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below. I also identify that I have sent the primary counsel for Appellants and Appellees a courtesy and supplemental copy in paper form to these addresses:

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APPENDIX OF *AMICUS CURIAE*

Amicus Curiae respectfully provide the Court with the following material cited in their brief:

The Appendix contains:

1. Louisiana Administrative Code, Title 28, Part XLIII, LR 34:2017, Chapter 5, § 503 (2008)(Section 503)(cited section)

2. Louisiana's Educational Rights of Children with Disabilities (La. 2013) (https://www.louisianabelieves.com/academics/students-with-disabilities) (cited section)

3. *In re: Letter to Petska*, 35 IDELR 191 (OSEP 2001)

4. *Fayette Cnty Sch. Dist. v. B.J.M*, Docket No. OSAH-DOE-IEE-0728166-56 (Ga SEA June 15, 2007)