CASE NO. 15-1155

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MR. AND MRS. DOE individually and as parents and next friends of JANE DOE, a minor,
Plaintiffs-Appellants,

v.

CAPE ELIZABETH SCHOOL DEPARTMENT
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE
No. 13:407-P-L

Brief In Support Of Appellants and Reversal on Behalf of *Amicus Curiae* Council of Parent Attorneys and Advocates

ELLEN SAIDEMAN
Bar No. 1168723
Law Office of Ellen Saideman
7 Henry Drive
Barrington, Rhode Island 02806
401-258-7276

SELENE ALMAZAN-ALTOBELLI
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844-426-7224, ext. 702

Attorneys for *Amicus Curiae,* Council of Parent Attorneys and Advocates

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UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
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No. 15-1155 Caption: *Doe v. Cape Elizabeth School Department*
Pursuant to FRAP 26.1
Council of Parent Attorneys and Advocates who is Amicus Curiae, makes the following disclosure:

1. Amicus is not a publicly held corporation or other publicly held entity;

2. Amicus has no parent corporations;

3. Amicus does not have 10% or more of stock owned by a corporation.

_____*/s/*_____
ELLEN SAIDEMAN

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I. STATEMENT OF IDENTITY OF AMICUS CURIAE

Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of attorneys, advocates, and parents in forty-eight states (including Maine, Massachusetts, New Hampshire, and Rhode Island), the District of Columbia, and Puerto Rico, who are routinely involved in special education due process hearings throughout the country. The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. §1400(c)(1) (2006). Individuals with disabilities can be economically contributing members of society if they receive the education and support they need to utilize their strengths to enable, enabling them to live and work independently. For that reason, COPAA is committed to ensuring that children with disabilities receive a free appropriate public education in the least restrictive environment as required by the Individuals with Disabilities Education Improvement Act ("IDEA").[1]

[1] Pursuant to Local Rule 29(c)(5), counsel for COPAA, Selene Almazan-Altobelli and Ellen Saideman, states: (1) Selene Almazan-Altobelli and Ellen Saideman authored the brief in whole with comments from COPAA members; and (2) no person other than COPAA contributed money that was intended to fund the

COPAA offers a unique perspective on an issue raised by a Memorandum and Order of the United States District Court for the District of Maine, District Judge Jon Levy, dated December 29, 2014 ("Order"), because the Order affects the ability of children with disabilities and their families to receive a free appropriate public education ("FAPE") pursuant to the IDEA. The Appellants and Appellees have consented to the motion and the filing of this brief.

SUMMARY OF ARGUMENT

Under the Individuals with Disabilities Education Act, 20 U.S.C. §1401, *et. seq*. (IDEA), a student qualifies for special education services under the Specific Learning Disability (SLD) category if she meets two basic criteria, both found in the IDEA's regulations. First, there must be evidence that the child "does not achieve adequately for the child's age or fails to meet State-approved grade-level standards in one or more of the eight listed areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards." 34 C.F.R. § 300.309(1). In this case, it was Jane Doe's reading fluency skills that were implicated in one of the eight areas of disability. However, under the IDEA regulations a deficit in just one area is enough for Jane to be classified as needing specialized instruction: special education. 34 C.F.R. §

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preparation or submission of the brief. United States Court of Appeals for the First Circuit, Federal and Local Rules of Appellate Procedure, Rule 29.

300.309(1)(v). Second, although federal courts may defer to the state review officer's decision and thus give the proceedings an appellate attribute, the manner of review does not convert civil actions brought under the IDEA actions into appeals in the face of explicitly clear statutory language that they are original civil actions. The district court, once it agreed to hear additional evidence then accepted and adopted the factual findings in the administrative decision without addressing the additional evidence presented by Appellants.

ARGUMENT

I. THE IDEA WAS ENACTED TO ENSURE THAT ALL CHILDREN WITH DISABILITIES RECEIVE A FREE APPROPRIATE PUBLIC EDUCATION.

The IDEA requires that state and local public education agencies that receive federal funds to enact policies and procedures which ensure that all students with disabilities have the right to a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A).

> The IDEA declares that, as a condition for receiving federal funds, states must provide all disabled children with a FAPE. See 20 U.S.C. §§ 1401(8), 1412(a)(1)(A). The primary vehicle for delivery of a FAPE is the child's IEP. The IEP must include, at a bare minimum, the child's present level of educational attainment, the short- and long-term goals for his or her education, objective criteria with which to measure progress toward those goals, and the specific services to be offered. See id. § 1414(d)(1)(A); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993)

Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 23 (1st Cir. 2008)**.** The IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *Id.* To provide a FAPE in compliance with the IDEA, a state educational agency receiving federal funds must evaluate a student, determine whether that student is eligible or remains eligible for special education and services, conduct and implement an IEP, and determine an appropriate educational placement of the student. 20 U.S.C. § 1414.

In order to receive a free appropriate public education ("FAPE"), a student must be determined eligible for special educational services. *See Ms. S. v. Vashon Island Sch. Dis.t*, 337 F.3d 1115, 1125 (9th Cir. 2003) ("a state must demonstrate that it has policies and procedures in place to ensure that all eligible children receive a FAPE"). The IDEA confers upon students with disabilities, an enforceable substantive right to public education in participating States, regardless of the nature of the disability. *See Honig v. Doe,* 484 U.S. 305, 310 (1988); *A.W. v. Jersey City Pub. Sch.,* 341 F.3d 234, 248 (3d Cir. 2003).

II. Congress Mandated Evaluation and Assessment for Specific Learning Disabilities.[2]

After identifying the child's needs, a school district must provide measurable annual goals and services to meet each of these needs. *See* 34 C.F.R. §300.320(a)(2) (IEP must contain goals to address needs); 34 C.F.R. §300.320(a)(4) (IEP must contain statement of special education and related services and supplementary aids and services to enable child to advance appropriately toward attaining annual goals). These IDEA provisions regarding evaluation and services each fall into the context of the IDEA's evaluation requirements and the IEP requirements. [3]

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[2] Congress reauthorized and amended the IDEA in 2004. The Act was approved with overwhelming bipartisan support. *See* Press Release by the Committee on Education and the Workforce, *House Approves Final Special Education Bill*, November 19, 2004. "Today, just as when the IDEA was initially enacted, '[t]he number one goal of the Individuals with Disabilities Education Act is to ensure that all our children have the opportunity to learn.'" Norm Coleman, Rep. Minnesota, Press Release November 20, 2004. The reaffirmation of the IDEA aims to empower schools, teachers, and parents to accomplish the original goals of the IDEA.

[3] Numerous articles have discussed the need for thorough special education evaluations. See, e.g., Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering,* 20 Am. U. J. Gender, Soc. Pol'y & L. 107, 115 (2011) ("[I]n some districts, children do not receive thorough and adequate evaluations, and district employees are bound by blanket policies and even moratoria. Thus, the entire process breaks down. Poor families suffer most from this phenomenon.") (footnotes omitted); Terry Jean Seligmann, *Sliding Doors: The Rowley Decision, Interpretation of Special Education Law, and What Might Have Been,* 41 J.L. & EDUC. 71, 79 (2012) ("There are few disputes over special education services that can be resolved without the aid of expert evaluations."); Sanu Dev, Note,

Both federal and Maine state law define a specific learning disability as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations . . . ." *See* 34 C.F.R. § 300.8(c)(10); Maine Unified Special Education Regulations (MUSER)§VII.2(L)(2)(c)(i)(II). This general definition, however, does not establish the test used to qualify students for special education and related services under the SLD category. The eligibility question posed by the IDEA is clear: does the student have one of the disabilities listed in 20 U.S.C. § 1401(3)(A)(ii) (which includes "specific learning disabilities"), and "by reason thereof need special education and related services?" 20 U.S.C. § 1401(3)(A)(ii).

Under the IDEA, a student qualifies for special education services under the SLD category if she meets two basic criteria, both found in the IDEA's regulations. First, there must be evidence that the child "does not achieve adequately for the child's age or fails to meet State-approved grade-level standards in one or more of the eight listed areas, when provided with learning experiences and instruction

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Implications of the Parental Right to Unilaterally Revoke Consent of Services on the Rights of a Child with Learning Disabilities Under the Individuals with Disabilities Education Act, 8 Rutgers J.L. & Pub. Pol'y 745, 772-73 (2011) ("If students have a right to a minimally adequate education, then all students, including those who were formally characterized as students with disabilities, should be entitled to an evaluation to determine the most appropriate alternative education program to ensure that they continue to receive an education.").

appropriate for the child's age or State-approved grade-level standards." 34 C.F.R. § 300.309(1). In this case, it was Jane Doe's reading fluency skills that were implicated in one of the eight areas of disability. Importantly, under the IDEA regulations, a deficit in just reading fluency is enough for Jane to be classified as needing specialized instruction: special education. 34 C.F.R. § 300.309(1)(v). Next, there must be evidence that the student "exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability**,** using appropriate assessments, consistent with §§ 300.304 and 300.305 . . . ." 34 C.F.R. § 300.309(a)(2)(ii).[4] The district court's failure to fully analyze the ample evidence

[4] Section VII.2.L(2)(a)(ii) of the Maine Unified Special Education Regulations (MUSER) requires an additional requirement not found anywhere in the IDEA or in its implementing regulations. The MUSER regulations require the existence of a "psychological processing disorder" for a student to be found eligible for IDEA services under the category of SLD. The IDEA requires this: whether Jane is currently achieving adequately for her age in the area of reading fluency skills when provided only with "learning experiences and instruction appropriate" for her age, *i.e.,* general education instruction. As presented both at the hearing level and in the proceedings before Judge Levy, Appellants easily met his standard found in the IDEA. However, Maine has established an additional requirement. While states are certainly able to offer additional protections to students with disabilities, or student who may require special education and related services, states are not permitted to offer a lower bar or standard than federal law. *See Reg'l Sch. Unit 51 v. Does,* 2013 WL 357793 *31, n.12 (D. Me. Jan. 29, 2013) ("to the extent that state law confers less protection to disabled students than the IDEA, the IDEA controls"); *Town of Burlington v. Massachusetts Dep't of Educ.*, 736 F.2d 773, 785 & n.9 (1st. Cir. 1984) (discussing "cooperative federalism" inherent in the IDEA

of Jane's specific learning disability (reading fluency) presented at the administrative hearing and the additional evidence presented at the district court level was clearly erroneous.

III. The IDEA hearing procedures are designed to protect the rights of children.

Since its inception, the IDEA requires an administrative hearing procedure. These hearing procedures are designed to protect the rights of children. *Schaffer v. Weast*, 546 U.S. 49, 52 (2005); *Honig v. Doe*, 484 U.S. 305, 311 (1988). 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, as must the concerns of the parent. *Id.* Under the Act, a party aggrieved by a decision in the impartial due process hearing may seek review in federal court. 20 U.S.C. § 1415(i)(2) (2004).

"Congress expressly rejected provisions [of the Act] that would have… severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by the evidence, the Conference Committee

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and enforceability of state regulations designed to supplement federal law only so long as they are "in compliance with the federal Act").

explained that courts were to make "'independent decision[s] based upon the preponderance of the evidence'" from the records of the proceeding and, if submitted, additional evidence. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowle*y, 458 U.S. 176, 206 (1982) (*quoting* S. Rep. No. 94-455, at 5 (1975), *reprinted in* U.S.C.C.A.N. 1503, 1503); *see* 20 U.S.C. § 1415(i)(2). Thus, "in a review of an IDEA due process hearing, courts give 'less deference than is conventional in review of other agency actions.'" *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 438 (9th Cir. 2010) (quoting *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472 (9th Cir. 1993.))

IDEA provides that a federal court reviewing an administrative decision related to special education "shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(C).

The First Circuit Court of Appeals has interpreted this provision as follows:

> We construe "additional" in the ordinary sense of the word, *Perrin v. United States*, 444 U.S. 37, 42 (1980), to mean supplemental. Thus construed, this clause does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely inconsistent with the usual meaning of "additional." We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires. [citation omitted]. We have found no legislative history to guide us on the construction to be given "additional evidence." A trial court must make an independent ruling based on the preponderance of the evidence, but the Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial. The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the

> administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing.

Town of Burlington v. Department of Educ. of the Commonwealth of Massachusetts, 736 F.2d 773, 790-791 (1st Cir. 1984); *see also Doe v. Regional Sch. Dist. No. 21*, 2011 U.S. Dist. Lexis 91522 (D. Maine Aug. 16, 2011); *Pollack v. Reg'l Sch. Unit No. 75*, 2014 U.S. Dist. LEXIS 157700, 6 (D. Me. Nov. 3, 2014). ("Where the Court, rather than a jury, will be reviewing the Plaintiffs' IDEA claim, the danger of unfair prejudice or confusion of the issues is low.")

In *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1473 (9th Cir. 1993), the Ninth Circuit adopted the *Burlington* standard for admission of additional evidence in cases under IDEA. Following *Ojai*, the Ninth Circuit recently explained:

> IDEA's requirement that courts consider additional evidence is grounded in the somewhat unusual nature of judicial review under the Act. In *Ojai*, we observed that "judicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." [*Ojai*,] 4 F.3d at 1471. Under IDEA, "the federal court has a continuing obligation to ensure that the state standards themselves and as applied are not below the federal minimums.... [which] persists despite any state administrative rulings on federal law or state recodifications of federal law." *Town of Burlington*, 736 F.2d at 792. The requirement that federal courts consider additional evidence when evaluating state administrative rulings implements the intent that federal courts enforce the minimum federal standards IDEA sets out.

E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings, 652 F.3d 999, 1005 (9th Cir. Cal. 2011).

This Court has said:

> However, "judicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993); *see also Kerkam v. McKenzie*, 862 F.2d 884, 887, 274 U.S. App. D.C. 139 (D.C. Cir. 1988) ("[T]he district court's authority under [the IDEA] to supplement the record below with new evidence, as well as Congress's call for a decision based on the 'preponderance of the evidence,' plainly suggest less deference than is conventional [in other administrative appeals]."). As a result, in an IDEA case, a district court "essentially conduct[s] a bench trial based on a stipulated record," *Ojai*, 4 F.3d at 1472, but must nevertheless give due deference to the findings of the administrative hearing officer, *see id*. at 1471-72. We then review the district court's ruling as we would following any other bench trial.

Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 79, 85(1st Cir. 2012). The Court in this instant case, agreed to the submission of additional evidence, then promptly disregarded its application to the matter.

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 *Marshall Joint Sch. Dist. No. 2 v. C.D.,* 616 F.3d 632 (7th Cir.2010); *Alvin Ind. Sch. Dist. v. A.D.*, 503 F.3d 378 (5th Cir. 2007). The district court agreed to accept additional evidence yet failed to analyze it.

Although federal courts may defer to the state review officer's decision and thus give the proceedings an appellate attribute, the manner of review does not convert the IDEA, 20 U.S.C.S. § 1400 et seq., actions into appeals in the face of explicitly clear statutory language that they are original civil actions. *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 382, (4th Cir. 2000).[5] *See also, Jonathan H. v. Souderton Area Sch. Dist*., 562 F.3d 527, 529 (3d Cir. 2009) ("We begin by observing that an IDEA action filed in federal district court is properly characterized as an original "civil action," not an "appeal." *See* 20 U.S.C. §1415(i)(2)(A)"). The district court in this matter simply adopted the factual findings of the administrative hearing decision, despite the fact that the district court had available additional evidence on Jane's reading fluency. This evidence was not available at the time of the administrative hearing; therefore, the district court granted and accepted additional evidence regarding Jane's reading fluency during the proceedings. This additional evidence described Jane's ongoing difficulties with reading fluency in the ninth grade and her poor performance on assessments that were directly related to her reading fluency. The additional evidence supported the contention that Jane had inadequate achievement on the criteria needed to determine the existence of a specific learning disability. The

[5] "The United States' system of federalism dictates that courts characterize Individuals with Disabilities Education Act, 20 U.S.C.S. § 1400 et seq., actions as original civil actions instead of as appeals." *Kirkpatrick* at 382.

district court failed to analyze the additional evidence as required by the IDEA and case law. The district court therefore acted as an appellate reviewer rather than making determinations based on additional evidence, and a preponderance of the evidence, presented in an original civil action. This Court should reverse the district court's decision and remand it to make its decision based on the additional evidence and make a finding regarding Jane's reading fluency.

IV. CONCLUSION

The evaluation and assessment procedures in the IDEA are crucial for delivery of appropriate services. Therefore, the violations that occurred in this case directly implicate the statute's primary purpose, which is to ensure that school districts accepting federal funds meet all the educational needs of students with disabilities. For this reason, Amicus respectfully submits that this Court should vacate the judgment of the district court and remand to the district court to reach a finding on whether Jane has a reading fluency disability, considering the additional evidence submitted to the court.

Dated: May 3, 2015

Respectfully submitted,

____/s/_____
Selene Almazan-Altobelli
Fed Bar No. 10506
Legal Director
Council of Parent Attorneys
And Advocates
P.O. Box 6767
Towson, Maryland 21285
selene@copaa.org
844-426-7224, ext. 702

____/s/_____
Ellen Saideman
R.I. Bar No. 6532
Law Office of Ellen Saideman
7 Henry Drive
Barrington, Rhode Island 02806
esaideman@yahoo.com
401-258-7276

Attorneys for *Amicus Curiae,* Council of Parent Attorneys and Advocates

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Dated May 3, 2015

Respectfully submitted,

_____/s/_____
Selene Almazan-Altobelli
Fed Bar No. 10506
Legal Director
Council of Parent Attorneys
And Advocates
P.O. Box 6767
Towson, Maryland 21285
selene@copaa.org
844-426-7224, ext. 702

____/s/_____
Ellen Saideman
R.I. Bar No. 6532
Law Office of Ellen Saideman
7 Henry Drive
Barrington, Rhode Island 02806
esaideman@yahoo.com
401-258-7276

Attorneys for *Amicus Curiae,* Council of Parent Attorneys and Advocates

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on the 3RD day of May 2015. I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to:

Richard L. O'Meara
Murray, Plumb & Murray
75 Pearl Street, PO Box 9785
Portland, Maine 04104-5085

Eric R. Herlan
Drummond, Woodsum & MacMahon
84 Marginal Way
Suite 600
Portland, Maine 04101-2480

_____*/s/*_____
ELLEN SAIDEMAN
Bar No. 1168723
Law Office of Ellen Saideman
7 Henry Drive
Barrington, Rhode Island 02806
esaideman@yahoo.com
401-258-7276