IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 11-14859-E

JEFFERSON COUNTY BOARD OF EDUCATION

Appellant,

v.

PHILLIP AND ANGIE C.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA, HON. L. SCOTT COOGLER, PRESIDING, CIVIL ACTION NO.: 2:07-cv-00756-LSC

AMICUS CURIAE BRIEF OF THE COUNCIL OF PARENTS ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF THE FINAL DECISION OF THE DISTRICT COURT

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CERTIFICATE OF INTERESTED PERSONS

The following statement is made pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c) and 11TH Cir. R. 26.1:

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 formal 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.

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 11th 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* is:

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

Respectfully submitted, this the 21st day of February, 2012.

s/Jonathan A. Zimring

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I. STATEMENT OF IDENTITY OF *AMICUS CURIAE*

The Council of Parent Attorneys and Advocates Inc. ("COPAA") is a not-for-profit national organization of persons with disabilities, parents and friends of children with disabilities, their attorneys and advocates. COPAA believes that the key to effective education programs for children with disabilities lies in collaboration between parents and educators as equal parties but with each having overlapping rights and duties. COPAA provides training and resources for parents and attorneys to help each child obtain the free appropriate public education ("FAPE") guaranteed by the Individuals with Disabilities Education Act ("IDEA"). As a national voice for special education rights and advocacy, COPAA's primary goal is to protect the educational and civil rights of student's with disabilities. 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 parent's and children to have access to effective and meaningful Independent Educational Evaluations ("IEE"). It has supported the professionalism of the IDEA assessment process, which Congress has determined is essential to provide appropriate educational services to children with disabilities.

COPAA and its members have direct experience in many states, including Alabama, Florida and Georgia in seeking, securing and utilizing the IEE. The IEE

ensures parents access to impartial and specialized evaluators to supplement assessments from school district personnel.

As *Amicus,* COPAA's interest is to offer this Court its experience on the IEE issue including the use of publicly-funded IEEs in the provision of FAPE, aiding in the protection of the rights of children with disabilities. The IEE provides an essential balance in the parent-school relationship to ensure FAPE by permitting input from independent professionals. COPAA members understand that publicly-funded IEEs have brought to bear necessary expertise and researched-based scientific practices for children and generally enhanced parent-school collaboration. COPAA also has insight into other issues this appeal raises including "collaborative federalism" of the IDEA, the doctrine that has led all of the states in the Eleventh Circuit to adopt long-standing regulations permitting publicly-funded IEEs.

COPAA's authority to file this brief is based on COPAA's Motion for Leave to File *Amicus Curiae*, filed with 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. STATEMENT OF THE ISSUES

Since the passage of the Education of All Handicapped Children's Act of 1975 ("EHA")[1] the Act has provided for the publicly-funded IEE and has permitted the due process system to resolve disputes over them. The primary issue here is whether the District Court was correct in recognizing and enforcing a child's right to a publicly-funded IEE, supplemental and curative to inappropriate publicly-funded evaluations provided by schools. Ancillary issues include:

A. May Jefferson County under IDEA's "collaborative federalism" ignore Alabama's educational regulations which mirror the federal regulation that allows the publicly-funded IEE and the use of the due process system to resolve disputes?

B. Was the District Court correct when it applied *Chevron* deference to hold that the federal regulation was a valid exercise of agency discretion?

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[1] 20 U.S.C. §§ 1400 *et seq.,* 89 Stat. 773 (1975).

C. May Jefferson County disregard its Notice of Procedural Safeguards which notifies the parents of their right to publicly-funded IEEs, and challenge that right when a parent utilizes it.

D. Was the District Court correct when it held that IDEA's due process system can be used to resolve IEE disputes?

E. May Appellant ignore its duty to exhaust administrative remedies to raise new issues and new claims only on its appeal to the district court?

IV. SUMMARY OF ARGUMENT

The Appellant Jefferson County Board of Education (sometimes "Jefferson County" or "LEA"[2]) seeks to eliminate a core right of children by attacking the free or publicly-funded IEE. Its arguments fundamentally misconstrue almost every settled practice on this right and disregards its own practices, policies, rules and notices. The District Court's conclusion affirms the validity of the federal regulation and Alabama law.

Jefferson County builds from its misperception of the IEE right to ignore Alabama law, regulations, and model procedural safeguard notices even though Alabama's approach is consistent with federal law and identical to those from Florida and Georgia. IDEA provides a *system* of federal and state regulation. Alabama

[2] 20 U.S.C. § 1401(19)(2004).

requires LEAs fund IEEs when their evaluations are inappropriate and provides that disputes over IEEs be resolved through the Alabama administrative hearing process.

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.[3] 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 Alabama regulations, the IEE is shared with the IEP Team and considered in determining the child's eligibility and services.

The claim of Appellant that there is no right to a hearing for the evaluation, arguing that only questions of FAPE may be subject to due process ignores the plain wording concerning the scope of the hearing in 20 U.S.C. § 1415(b)(6)(2004). The United States Supreme Court and this Court have recognized that this "broad" statement of issues available to the hearing process fulfills the necessary role of ensuring prompt resolution while protecting the child. E.g., *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523(2007).

The claim that the United States may not validly permit

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[3] *See* 45 C.F.R. Part 121a (1977), regulating 20 U.S.C. §§ 1400 *et seq.,* P.L. 94-142, 89 Stat. 773 (1975). *See* 42 Fed. Reg. 42473(Aug. 23, 1977).

a publicly-funded IEE where the parent's disagree with the LEA's evaluation is contrary to the long history of this right. The IEE is only provided when the LEA contests its need and the school can demonstrate its existing evaluation is appropriate. Further, it is a valid exercise of federal regulatory authority. Moreover, these are claims that Appellant should have exhausted before the ALJ in the administrative proceeding.

V. ARGUMENT AND CITATION OF AUTHORITY

A. Children and Parents Are Protected By IDEA

Appellees Phillip C. *et al* (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*, 550 U.S. at 523. "The fundamental objective of the IDEA is to empower disabled children to reach their fullest potential by providing a free education tailored to meet their individual needs." *Cory D. v. Burke Cty Sch. Dist.*, 285 F. 3d. 1294, 1298 (11th Cir. 2002). These rights are interpreted by "[t]he goals of IDEA [which] include 'ensur[ing] that all 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). In developing the IEP, all evaluations must be considered, *id.,* as must the concerns of the parent. *Id.*

Children receive public evaluations and reevaluations which are used to determine eligibility and their needs. 20 U.S.C. §§ 1414(a)(1)(evaluations), 1414(a)(2)(reevaluations). Evaluation criteria are explicit as the assessments are used to collaboratively consider the services and eligibility. *Id.*,§ 1414(b)(1)-(4). During consideration of new evaluations, all the existing data must be reviewed, *id.* § 1414(c), reevaluations are done upon the request of the teacher or parent, *id.*, § 1414(a)(2)(A)(ii), and must be done before a change in eligibility. *Id.*, § 1414(c)(5). It cannot be gainsaid that accurate and appropriate evaluations are a driving force behind the promise of IDEA. It is by inference and design that IDEA provides for not just LEA evaluations, but for funded appropriate independent assessments of the child.

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

> Parents ... play a significant role in the IEP process. ... They also have the right to an "independent educational evaluation of their child." *Ibid.* 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." 34 CFR § 300.502(b)(1) (2005). 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.

Schaffer at 61. In allocating the burdens in hearings between parents and LEAs, the Supreme Court endorsed the precise provision Appellant challenges.

The parent has a "right to obtain an independent educational evaluation." 20 U.S.C. § 1415(b)(1)(2004). The regulations provide the conditions and procedures which make this is available to all families, regardless of their resources. 34 C.F.R. § 300.502 (2006). The notice Appellant provides "shall include a full explanation of the procedural safeguards ... available under this section and under the *regulations promulgated by the Secretary relating to ... independent educational evaluation."* 20 U.S.C. § 1415(d)(2)(A)(2004)(emphasis supplied). Underlying this right is the long standing balance of school and parent identified in the IEE process.

> (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 shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria

34 C.F.R. § 300.502(a)(2006). The challenged provisions provide:

> (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. ...
>
> (2) If a parent requests an independent educational evaluation at public expense the public agency must, without unnecessary delay either—
>
> (i) Initiate a hearing under Sec. 300.507 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 under Sec. 300.507 that the evaluation obtained by the parent did not meet agency criteria.

Id., § 300.502(b).[4] "Whenever an IEE is at public expense, the criteria under which the evaluation is obtained, including the qualifications of the evaluator, must be the same as the criteria the public agency uses when it initiates an evaluation." *Id.,* §

[4] In 1999 the broadest change in the thirty-four years since the first regulations shifted the burden for seeking a hearing to the school. This was to protect the children and avoid unnecessary litigation while the child often sat unevaluated. *See* 64 Fed. Reg. 12607 (March 12, 1999).

300.502(e)(2). *See In re: Letter to Imber*, 19 IDELR[5] 352 (OSEP 1991), quoting, *In re: Letter to Rambo*, 16 EHLR 1078 (OSEP 1989). The IEE must be considered by the IEP Team. 34 C.F.R. § 300.502(c)(2006). Parents can seek an IEE if they question the existing evaluation. This can be based on its validity, 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 assessments or that the LEA staff failed to focus on critical questions.

The IEE is a "second opinion" as it arises only when there are problems with the evaluation or the school failed to fully evaluate "all areas of need."[6] 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")[7]. It shows a system that works as the ALJs and courts concentrated on three identified factors: (1) whether the district had complied with

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[5] The IDEA Disability Education Law Reporter.

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

[7] A data base from June 1997 through 2002 was searched looking at 50 decisions from 14 states. *Id.* at 229.

the IDEA technical requirements for evaluations;[8] (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.

Etscheidt recognized the case law provides for the publical-funded IEE by properly concentrating on the appropriateness of the district assessment or the failure of the LEA to seek due process. *Id.,* at 239-241. *See Evans v. Dist. No. 17 of Douglas County*, 841 F.2d 824, 830 (8th Cir. 1988)(parents entitled to reimbursement because the LEA "never initiated a hearing as required by [IDEA]"); *Bd. of Educ. of Murphysboro Cnty. Unit Sch. Dist. 186 v. Ill. of St. Bd. of Educ.*,41 F.2d. 1162, 1169 (7th Cir. 1994)("parents disagreed with the school district's May 1991 triennial reevaluation ... they were entitled to an independent evaluation of Marjorie at public

[8] IDEA has specific evaluation requirements. *See* 20 U.S.C. §§ 1414(b)(3)(2004); (b)(2)(A)(2004)(variety of assessment strategies must be used and "functional" information).

expense."); *Warren G. v. Cumberland Sch. Dist.*, 190 F.3d 80 (3rd Cir. 1999)("We ... agree that plaintiffs are entitled to be reimbursed for the 1993 IEEs."); *Pajaro Valley Unified School District v. J.S.*, 2006 U.S. Dist. LEXIS 90840 *10(N.D. Cal. 2006)(failure to seek a hearing is a waiver).

C. The Essential Role of the Publicly-Funded IEE

Appellant's basic error is its failure to recognize the importance of the public IEE in ensuring it provides FAPE. First, it is essential that children be appropriately evaluated as this often controls eligibility, direct services, the scope of related services and how we assess the program and track progress. The EHA was passed with Congressional concerns over failures in assessment and over the misclassification of children.[9] Evaluations structure the initial eligibility and placement process.[10] Children can receive different evaluations embedded in the Act's multidisciplinary evaluation.[11] The IEE comes after the school's evaluations[12] and allows the IEP Team to focus on the psychological or occupational therapy or language or assistive technology, or other areas of parental concern.

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[9] 20 U.S.C. § 1414(b)(3)(A)(2004).

[10] 20 U.S.C. § 1414(a)(1), (4)(2004).

[11] 20 U.S.C. § 1414(b)(2)(A), (B)(2004).

[12] 34 C.F.R. § 300.502(b)(5)(2004).

The IEE is provided to the IEP Team. 34 C.F.R. § 300.502(c)(1)(2006). It provides significant access to independent medical and related service professionals unrelated to parental resources, insurance or economic status. It allows assessment in medical and allied health areas often beyond school expertise but important to designing appropriate specialized instruction. The second opinion can encourage reliance on the available assessments. It requires disclosure in exchange for funding, and as App. Brf at 44-45 suggests, the IEE may undercut the parent's position when used in a hearing by either side. If one views the IDEA right as the Supreme Court and this Court instruct, as protecting the child's right to FAPE, it is a core check and balance on the evaluation and decision making system. Effective IEEs can resolve disputes at the IEP table and often are vehicles to avoid litigation.[13] It may also

[13] Appellant argues that the IEE right promotes litigation. App. Brf. 38-39 text and n. 62. This is vigorously contested by *Amicus*. *If* there is litigation, it promotes fair decision making based on a full picture of the child's needs, as was recognized in *Schaffer*. Children only evaluated by school districts can contribute to parents who are intimidated or inherently distrust the process but who are not equipped to present alternatives to the IEP Team. They may have school evaluators diagnosing their children with serious impairments with who they have no client/patient relationship.

When parents receive an IEE by an independent professional, they can more effectively understand and advocate for the services the child requires. If the school evaluations are appropriate, they may be confirmed and this should aid in an informal resolution by the IEP Team. If the IEE differs, or as is often the case,

provide conflicting information, but this is available to the Team and the judge. The judge may also order an IEE at public expense in a hearing when necessary. *Id.*, § 300.502(e)(2006).[14]

D. "Collaborative Federalism" Requires the Public IEE

The IDEA "is frequently described as a model of 'cooperative federalism.'" *Schaffer,* 546 U.S. at 52 (quoting *Little Rock School Dist. v. Mauney,* 183 F.3d 816, 830 (C.A.8 1999)). It "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Rowley,* 458 U.S. at 183. "This model of 'cooperative federalism' offers funds in exchange for the acceptance of certain standards for the education of handicapped children." *GARC v. McDaniel*, 716 F.2d 1565, 1569 (11th Cir. 1983).

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resolves issues unexplained in the school's assessments, this should make the Team reassess the situation. Competent professionals should always be reviewing the work and science of other evaluators. Finally, the IEE creates a vehicle for collaborative resolution when the parties are polarized and can provide a way to break the ice when a cooperative final resolution seems impossible.

[14] Jefferson County has not challenged the portion of the regulation which places the duty of funding on it when the ALJ seeks an IEE. Certainly, IDEA supports publicly-funded IEEs when the hearing officer questions the adequacy of the district's evaluation or requires better information to determine FAPE.

Such laws "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York v United States,* 505 U.S. 144, 167 (1992). IDEA requires states to certify that local agencies are meeting state educational standards. *Schaffer*, at 53 (quoting 20 U.S.C. §§ 1412(a)(11), 1412(a)(15)(A)). In turn, "[l]ocal educational agencies can receive IDEA funds only if they certify to a state educational agency that they are acting in accordance with the State's policies and procedures. § 1413(a)(1)." *Schaffer* at 532 (parenthetical omitted). IDEA's definition of FAPE that the program must meet "state standards" incorporates this approach. 20 U.S.C. § 1401(9)(B)(2004). As a "central hallmark" of the IDEA,, the Act ensures "basic compliance ... but states supply the machinery to effectuate" these rights. *Burlington Dept. of Educ. v. Com. of Mass.*, 736 F.2d 773, 783-785 text and n. 6 & 8 (1st Cir. 1984), *aff'd* 471 U.S. 359(1985).

Yet state rules or practice cannot breach children's rights. *GARC*, 716 F.2d 1565(invalidating state policy restricting school to 180 days, rather than considering the duration of the program), *Helms v. McDaniel*, 657 F.2d 800 (5th Cir. Unit B 1980)(invalidating practice of allowing board review of administrative decisions), and *Honig,* 484 U.S. 305 (adopting *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1980)(Act creates limits on a school's ability to discipline children).

The IEE is deeply rooted within "collaborative federalism." Under 20 U.S.C. § 1415(b)(8)(2004) states develop "model" Notices of Procedural Safeguards for use by schools. Alabama instructs parents:

> **INDEPENDENT EDUCATIONAL EVALUATION**
>
> You have the right to an independent educational evaluation at public expense if you disagree with an evaluation obtained by your education agency. However, your education agency may request a due process hearing to show that its evaluation is appropriate.

"Special Education Rights," Alabama Department of Education (11/3/10)(Appendix 1). This is in concert with Alabama's regulatory scheme which guarantees that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an individual evaluation(s) (e.g. OT, PT, achievement) obtained by the public agency." Ala. Adm. Code § 290-8-9-.02(4)(c)(2009)(parenthetical in original). Alabama provides explicitly for due process hearings to contest the IEE. *Id.* at § 290-8-9-.02(4)(d). Alabama provides for the same broad spectrum of hearings as IDEA. *See* Ala. Adm. Code § 290-8-9-.08(9)(c) (hearings when a "parent or the public agency disagrees with any matter relating to a proposal or refusal to initiate or change the identification, evaluation, educational placement of a child or the provision of FAPE to a child.").

The United States, Alabama, and Jefferson County in its notice of procedural safeguards provided to its parents, tell them they have a "right" to publicly-funded IEEs at Appellant's expense, and the right to an Alabama due process hearing in the event that Jefferson County determines that it will contest the IEE. It is this system that Appellant challenges in the absence of having raised this claim to the United States, or to Alabama, or when it accepts funds and agreed to protect parent's rights.

When Appellant attacked the federal regulation in the trial court it argued that it was because "of its obtrusive and duplicative nature (and its de facto preemptive effect with regard to the state and local pronouncements that are specifically required by § 1415(b)(1). ... Moreover, § 300.502 cannot survive without subordinating and preempting state and local regulatory authority." Doc.-30, pp.55-6, cited in Doc-52, pp. 61-2 (Magistrate R & R)(parenthetical in original). The Magistrate Judge rejected this noting there was no authority for Jefferson County's contention, Doc.-52, p. 62. Collaborative federalism is the foundation for the Alabama regulation and its compliance with IDEA, and it is Appellant's current arguments which are in derogation of "state and local pronouncements."

The other states of this Circuit have long used this same federal/Alabama approach. Georgia and Florida have almost identical procedures and notices. Fl. Admin. Code ch. 6A-6 (Procedural Safeguards) extends the duty for the agency to

provide notice of due process rights and IEEs. *Id.*, §§ 6A- 6.03311(2),(7) and (9). § 6A-6.03311(6) regulates IEEs and subsection 6A-6.03311(7) provides that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district." (Appendix 2). In Georgia, the model form is almost word-for-word to the Alabama parent's rights notice on IEEs, (Addendum 3), and GaDOE r. § 160-4-7-.09(4) (2010) provides for the free public IEE unless the district seeks an administrative hearing and prevails. (Appendix 4).

Under "cooperative federalism," the Alabama rule is dispositive of Appellant's claims.

E. Established Standards of Statutory Construction Supports the District Court

1. The Act as a Whole Supports the Public IEE

The rules of statutory construction support the District Court's analysis. In addressing the requirements of the Act, one must look to IDEA as a whole and the intention of the legislation. *Winkelman,* 550 U.S. at 523, citing *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006); *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context with the view to their place in the overall

statutory scheme"). IDEA recognizes this includes full parent participation and adequate evaluation. As demonstrated, the evaluation/reevaluation system and the importance of the right to access to a free evaluation all support the rights found in Section 300.502. The Act creates a system of publicly-funded evaluations with a specific statutory reference to the right to an IEE. Parental evaluations have to be considered and the IEE has to be provided in determining eligibility, FAPE and placement. Thus the IDEA statutory scheme supports the publicly-funded IEE.

2. Congress was Aware of the Regulations, Policy Letters and Case Law Providing for the Public IEE

The second supportive arm of statutory construction is that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, ___, 129 S. Ct. 2484, 2492 (2009) quoting *Lorillard v. Pons,* 434 U.S. 575, 580 (1978). If Congress had intended to reverse these understandings it would have done so explicitly. *MidAtlantic Nat'l Bank v. N.J. Dep't. of Envtl. Prot.*, 474 U.S. 494, 501 (1986). As demonstrated above, the long standing regulatory mandate, as well as the existing case law enforced this right over a course of three decades. The statutory right has remained unchanged. The Department of Education and the states have also uniformly upheld the right to the

public IEE. *See In re: Letter to Rambo*, 16 EHLR 1078 (OSEP 1989)(right to IEE); *In re: Letter to Imber*, 19 IDELR 352 (OSEP 1991)(right to IEE and criteria for IEE); *In re: Letter to Scheinz*, 34 IDELR 34 (OSEP 2000)(behavioral assessments can be IEE); *In re: Letter to Fisher*, 23 IDELR 565(OSEP 1995) (assistive technology subject to public IEE); *In re: Letter to Petska*, 35 IDELR 191 (OSEP 2001)(right to IEE and LEA can set certain criteria); *In re: Letter to Parker*, 41 IDELR 155 (OSEP 2004)(right to IEE and validity of criteria); *Myles S. v. Montgomery Board of Education*, 824 F.Supp. 1549(M.D. Ala. 1993)(IEE reimbursement on assessment for extended school services); *In re: Jim Thorpe Area Sch. Dist.*, 29 IDELR 320 (Pa. SEA 1998); *In Re: Mason Community School District,* 36 IDELR 50 (Iowa SEA 2001); *In re: Grapevine Colleyville Independent School District*, 28 IDELR 1276 (Texas SEA 1998)(failure to address critical need supports public IEE); *In re: Metropolitan State Hospital*, 37 IDELR 240 (Calif. SEA 2002).

F. Appellant Failed to Exhaust Its Claims

IDEA requires parties exhaust administrative remedies. *Ass'n for Retarded Citizens of Ala. v. Teague,* 830 F.2d 158 (11th Cir.1987)(dismissing class action for failure to exhaust); *N.B. v. Alachua Cty. Sch. Dist.*, 84 F.3d 1376, 1384 (11th Cir. 1996); *Babciz v. Sch. Bd. of Broward Cty.,* 135 F.3d 1420 (11th Cir. 1998) (failure to exhaust damage claim as the issues arose under IDEA); and *M.T.V. v. DeKalb Cty.*

Sch. Dist., 446 F.3d 1153, 1158-1159 (11th Cir. 2006) (failure to exhaust retaliation claim). Claims not timely raised are waived. *Doe v. State of Alabama*, 915 F.2d 651, 660 n.6 (11th Cir. 1990). Where a claim is withdrawn, it is waived. *Id.*

> Key reasons for requiring the exhaustion of administrative remedies are as follows: 1) to permit the exercise of agency discretion and expertise on issues requiring these characteristics; 2) to allow the full development of technical issues and a factual record prior to court review; 3) to prevent deliberate disregard and circumvention of agency procedures established by Congress; and 4) to avoid unnecessary judicial decisions by giving the agency the first opportunity to correct any error.

N.B., at 1378-79 (quoting *Teague*).

Appellant breaches each of the *Teague* criteria. The administrative pleading that 20 U.S.C. § 1415(c)(2)(B)(2004) requires was Appellant's "Response to Request for Due Process Hearing," (September 29, 2006), amended by "Supplemental Response to Request of Due Process," (October 13, 2006). Neither identify a challenge to the federal or Alabama regulations, nor the issue stated in this Court that IDEA "does not confer on parents any right to be reimbursed," App. Brf. at 1, nor that Section 300.502 is "void and uneforceable," App. Brf. at 2, nor the "*Chevron"* deference question, App. Brf. at 2-3.[15] Appellants closing administrative argument

[15] IDEA 2004 added 20 U.S.C. § 1415(c)(2)(b)(I)(2004) requiring the LEA to file a written response to the complaint if it had breached the duty to provide

reenforces the limits of its case by explaining that "[p]ut another way, the contention here is not that the Board unreasonably or unlawfully failed to provide an independent evaluation, but that it failed to pay for a unilaterally obtained evaluation obtained without prior notice to the Board." "Post-Hearing Memorandum and Closing Argument of the Jefferson County Board of Education," (February 13, 2007) p. 34. Appellant told the ALJ that the "regulatory scheme governing payment for IEE's is undeniably founded on a commonsensical 'request and response' communication model that serves important statutory objectives and practical purposes." *Id.* at 35. Though Appellant raised its "FAPE-only" hearing contention before the ALJ, it failed to provide notice, plead or exhaust claims it raised for the first time to the district court. These include its primary contention on appeal that publicly-funded IEEs conflict with the Act and are beyond the authority of the Department to regulate.

Applying this Court's four-part approach, Appellant's choice not to raise these claims eliminated the opportunity for Alabama and/or its ALJ to correct the process. The federal courts have no explanation for Appellant's conduct and no reason to conclude this was not a deliberate attempt to circumvent the procedures established

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"prior written notice" under 20 U.S.C. § 1415(b)(3)(2004). This response "shall" include an explanation of why the agency proposed or refused to take the action raised in the complaint," and "a description of the factors that are relevant to the agency's proposal." *Id.*, § 1415(c)(2)(B)(I)(i)(aa) and (dd).

by Congress or a litigation strategy it lost. Additionally, in its argument before the ALJ, Appellant endorsed the regulatory system of public IEEs, and raised a factual challenge to the IEE which it lost and a legal challenge asserting that IEEs require prior notice, which it has also lost and appears to have abandoned.[16]

The current case arose with the family understanding from Jefferson County that it had a "right" to a publicly-funded IEE and that Appellant had a duty to seek due process to prove its evaluation was appropriate if an IEE was requested. When IDEA "obliged schools to safeguard the procedural rights of parents," it also required that "[t]hey must be ... notified in writing of the procedural safeguards available to them under the Act." *Schaffer*, 546 U.S. at 50-1. *See* 20 U.S.C. § 1415(d)(1)(2004); 34 C.F.R. § 300.504(a), (b)(2006). These must contain a "full explanation" of "all procedures." *Id.*

Parents are often unrepresented in the IDEA system and have a special need to receive clear and accurate notice of their rights and the procedures they may follow. This ensures their informed and active participation. *See Rowley* at 205-06; *Honig* at 305, 308, 311. *Amicus* also believe that this notice is a foundation to the collaborative

[16] The claim that parents must give notice of their intention to seek an IEE has been rejected. *Lauren G. v. Columbia County School District*, 31 IDELR 27 (3d Cir. 1999); *Illinois State Board of Educ.*, 401 F.3d 1162, 1169 (7th Cir. 1994); *Hudson v. Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987).

model of team decision making IDEA provides. A fundamental and perhaps irreconcilable breach of the opportunity for cooperation between parents and schools will arise when parents learn that they cannot rely on the rights the LEA says they have when they use them. This rift is exacerbated in litigation when the LEA does not raise its claims in the first instance but only on appeal to the district court.

Jefferson County's contentions arose only on *de novo* appeal when its initial litigation tactics were unavailing. Appellant may not claim that only parents must be mindful of exhaustion obligations, as IDEA 2004 clarified that hearings can be brought by schools or parents.[17] This LEA cannot in the same case use the Act, ignore it, then restructure a new challenge after the first fails, conflicting with its first position and with its long established statement of the procedures and rights which apply. This Court should recognize that the integrity of the administrative hearing process requires prompt and timely notice of the LEA's reasons for rejecting the requested action and that exhaustion applies to the LEA, as well as the parent.

G. The Act Provides A Necessarily Broad Right to Due Process

Appellant contends that the ALJ cannot hear an IEE case. This is contrary to IDEA, the holdings of the Supreme Court and this Court, and the procedures Alabama

[17] *See* 20 U.S.C. § 1415(b)(6)(2004).

provides. Appellant's proposed limitation on the broad hearing in the IDEA dispute resolution system would emasculate the utility of these procedures.

Essential to IDEA is an effective dispute resolution process. Appellant's argument tries to hamstring the IEE requirement that the LEA seek a hearing to avoid the IEE. Yet "[s]chool districts may also seek such hearings, as Congress clarified in the 2004 amendments. See S. Rep. No. 108-185, p 37 (2003)." *Schaffer* at 54. "The statute also empowers parents to bring challenges based on a broad range of issues." *Winkelman* at 530. "[T]he IDEA's broad complaint provision affords the 'opportunity to present complaints with respect to *any* matter *relating* to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child.' 20 U.S.C. § 1415(b)(6)." *M.T.V. v. DeKalb County,* 446 F.3d 1153, 1158 (11th Cir. 2006)(emphasis in original)(rejecting contention that administrative hearing is waived as IDEA did not explicitly create retaliation claim as the allegation fell within § 1415(b)(6)). Hearings are available when "a party objects to the adequacy of the education provided, the construction of the IEP, or some related matter." *Winkelman* at 526. "These provisions confirm that IDEA, through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made" *Id.* at 531. Additional to this broad mandate, Appellant provides no explanation

concerning the statutory right to adjudicate matters related to "evaluations" but that this somehow does not reach the IEE. Finally, Alabama provides that its administrative courts may hear IEE cases, an inconvenient truth to Appellant's case.

H. The District Court Properly Applied Section 1406 and *Chevron* Deference Principals[18]

The place to start is with Jewfferson County's tortured construction of 20 U.S.C. § 1406, as somehow evidencing a restriction on the existing regulatory scheme and therefore invalidating a right which has stood since before the first enforcement date of the EHA on September 1, 1978. *See* App. Brf, pp. 33, 34. This provision actually endorses the IEE regulation.

Section 1406 permits the Secretary of Education to issue regulations if these are "necessary to ensure compliance" with "specific requirements" of the Act, which do not violate the IDEA, and do not "lessen the protections" provided children as found in the regulations in 1983, unless there is a clear Congressional intention to do so. *Id.*, § 1406 (a), (b)(1),(2) and (3). The protections of the public IEE meet all these criteria.

[18] Appellants appear to have abandoned the spending clause argument.

The initial regulation at 45 C.F.R. §§ 121a.503(a)(ii),(b)(1977) required the publicly-funded IEE. *See* 42 Fed. Reg. 42473, 42494 (Aug. 23, 1977)[19]. As in the 1999 and 2006 versions, a hearing was available for the agency to show its evaluation was appropriate. *Id.*, § 121a.503(b). For Section 1406 purposes, this was the status of the law in 1983. *See* 34 C.F.R. § 300.503(a)-(c)(1983).[20]

Section 1406 was a Congressional rejection of a strong push to alter the entire regulatory scheme in 1982 which it had opposed. *See* H.R. Rep, 98-410, at 21 (1983).[21] Thus Congress in 1975[22] and again in 1983 emphasized the right of the agency to regulate to further implement the Act, as long as children's existing rights were protected. The EHA therefore incorporated and protected the public IEE in 1983 through Section 1406. Consistent with Section 1406, a publicly-funded IEE is in harmony with the evaluation and IEE rights in the Act which along with the regulations pre-dated 1983, falling within the protections of Section 1406.

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[19] The EHA provided for regulation at 20 U.S.C. § 1417 (1975).

[20] The chapter was recodified after the creation of the Department of Education. *See* 45 Fed. Reg. 77368 (Nov. 21, 1980).

[21] *See* EHA Amendments of 1983, P.L. 98-199 (1983).

[22] *See* 20 U.S.C. § 1415(b)(1)(B)(1975)("The procedures required by this section shall include but not be limited to – ... An opportunity for the parents or guardian ... to obtain an independent educational evaluation of the child.")

Next in its belated attack on Section 300.502, the Appellant misconstrues the District Court's straightforward application of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *See* App. Brf, pp. 32-43. *Amicus* believe that deference to the United States on its long standing IEE regulation is warranted.

The District Court properly quoted *Chevron* (and *Sierra Club v. Johnson*, 541 F.3d 1257, 1264 (11th Cir. 2008) for the two-step analysis for assessing the deference to be given the United States's regulation. A court first looks to whether Congress has "directly spoken to the precise question at issue. *Id.,* at 842-43. If it is silent or ambiguous, "the question ... is whether the agency's answer is based on a permissible construction of the statute." *Id.,* at 843. This provides for the court to look at the design of the statute as a whole. *Georgia D.M.A. v. Shalala*, 8 F.3d 1565, 1567 (11th Cir. 1993). "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron* at 844. A court "'need not conclude that the agency construction was the only one it permissibly could have adopted' or even that we would have interpreted the statute the same way the agency did." *Johnson* at 1265 quoting and citing *Chevron* at 843 n. 1. The "[a]gency interpretation ... is controlling unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Dawson v. Scott*, 50 F.3d 884, 887 (11th Cir.

1995)(quoting *Chevron* at 844). The consistency of the agency's interpretation is a factor in the extend of deference. *Shalala* at 1567. Thus where the Act provides that state agencies shall maintain procedures that allow an "opportunity for parents ... to obtain an [IEE] of the child," §§ 1415(a), (b)(1), and LEA evaluations are publicly-funded under a system in which services must be both free and appropriate, it seems beyond cavil that 300.502 is within the agency's reasonable implementation of the IDEA. This is true when one understands that Congress could not prevent a parent from providing a private evaluation of their child and the only purpose of the provision within the Act is to address the public evaluation. Thus, as the statute is ambiguous on who pays for the "public" IEE, the regulation is a valid resolution of that ambiguity.

Even in the source of the EHA in *Mills* lies a right to receive a funded "independent medical, psychological and educational evaluation." *Mills v. Board of Educ. of D.C.*, 348 F.Supp. 866, 880-881 (D.D.C. 1972).[23] As with the IEP, due process and confidential rights found in *Mills* which were corner posts of the EHA, the public IEE shares this foundation.

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[23] This is after the school's evaluation, which the EHA/IDEA regulations adopted. *Id.*, at 879.

The next arm of *Chevron* is whether this is a reasonable choice. *Id.*, at 843. This includes a review of the consistency of approach and interpretation. *United States v. Baxter Int. Inc.*, 345 F.3d 866, 887 (11th Cir. 2003); *Shalala* at 1567. The public IEE provision has existed for thirty-four years protecting a child's right. It has become embedded in state regulations and parental rights. It is essential if the Act is to balance parental rights and LEA obligations. The mandate of IDEA remains that programs must meet the needs of *all* children, and this is fully supported by access to a publicly-funded IEE. There is no basis for asserting that it is unreasonable in an Act designed to afford appropriate and free services to the child, or that it is in conflict with other rights of children. It cannot be said to conflict with securing appropriate instruction or with the importance of the IEP process, as the IEE is provided to both the IEP Team and if necessary to the judge, in order for reasoned and pedagogically appropriate decisions to be made.

CONCLUSION

Amicus respectfully urge the Court affirm. The publicly-funded IEE is a vital tool in the parents, LEA and IEP Team's collective quiver of information and resources for deciding eligibility and appropriate services. It has worked for thirty-four years. The District Court reached the right conclusion in rejecting the report of

the magistrate judge on this issue and securing to the family this right embedded in the Act, federal regulation and state practice.

This 21st day of February, 2012.

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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 6941 words, also in compliance with the Court's Rules, as measured by Wordperfect 4, the word processing program used to create the brief.

This 21st day of February, 2012.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 11-14859-E

JEFFERSON COUNTY BOARD OF EDUCATION

Appellant,

v.

PHILLIP AND ANGIE C.,

Appellees.

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Appellant and Appellee foregoing proposed brief by placing a copy in the United States Mail, with proper postage affixed to and a courtesy copy by email and electronic filing pursuant to the Court's rules to:

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APPENDIX OF *AMICUS CURIAE*

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

Appendix

1. "Special Education Rights," Alabama Department of Education (11/3/10).

2. Fl. Admin. Code ch. 6A- 6.03311(2),(7) and (9).

3. Portion of Georgia Model Notice of Procedural Safeguards

4. GaDOE r. § 160-4-7-.09(4) (2010)