Docket No. 16-35687

In the

United States Court of Appeals

For the

Ninth Circuit

J. K. and J. C., on behalf of themselves and on behalf of K.K-R., a minor,

Plaintiffs-Appellants,

v.

MISSOULA COUNTY PUBLIC SCHOOLS,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the District of Montana (Missoula), No. 9:15-cv-00122-RWA · Honorable Richard W. Anderson

BRIEF OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES (COPAA) AND DISABILITY RIGHTS MONTANA (DRM) IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates
Disability Rights Montana

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

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INTERESTS OF THE AMICI

Council of Parent Attorneys and Advocates (COPAA) is an independent, nationwide nonprofit organization of attorneys, advocates, and parents in forty-three states and the District of Columbia who are routinely involved in special education due process hearings throughout the country. COPAA's primary goal 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). Children with severe disabilities are among the most vulnerable in our society and COPAA is particularly concerned with assuring a free appropriate public education in the least restrictive environment, as the Individuals with Disabilities Education Act (IDEA or Act) requires.[1] Counsel for both parties, appellants and appellees, have consented to this filing of an amicus brief in appellants' behalf.

COPAA's interest in this case is its deep commitment to all children with disabilities to obtain needed special education services, recognizing that all areas

[1] Pursuant to Fed. R. App. P. 29(5) counsel for COPAA states: (1) Selene Almazan-Altobelli, Catherine Merino Reisman and David M. Grey authored the brief in whole with comments from COPAA members; and (2) no other person contributed money that was intended to fund the preparation or submission of the brief. Fed. R. App. P. 29(5).

of a student's educational needs is the heart of the identification of children under the IDEA**.**

Disability Rights Montana (DRM) is the designated Protection and Advocacy System (P&A) and Client Assistance Program (CAP) organization for the Montana. DRM is responsible for protecting the civil, legal and human rights of persons with disabilities in the 9th Circuit and is mandated by various federal laws, including the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 15041 to 15045; the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801-10807, 10821-10827; and the Vocational Rehabilitation Act, 29 U.S.C. § 732 (CAP), § 794e (P&A for Individual Rights) and § 2201 *et seq.* (Assistive Technology Advocacy Center). DRM provides advocacy and legal assistance to students with disabilities and is concerned that the restrictive statutory interpretation proposed by Appellee will prevent children with disabilities from identification for and receipt of special education and related services as well as preventing children who have already been identified for services from receiving complete remedies for violations of their educational rights.

SUMMARY OF ARGUMENT

For nearly 30 years, the Supreme Court has interpreted the IDEA broadly and advanced the position that Congress, in enacting the statute, did not intend to create a right without a meaningful remedy. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

Here the district court erred by failing to assess when the parents knew or should have known that K.K.-R. had a qualifying disability under IDEA and that she needed special education. These are the elements of K.K.-R's child find cause of action.

The plain language of the statute makes clear that IDEA's statute of limitations starts to run when the parents knew or should have known about the facts which give rise to their cause of action (discovery rule), not when the events occurred (occurrence rule). Application of the discovery rule fits within the larger context of IDEA's goal of ensuring appropriate education for all children with disabilities. After all, if school district personnel, with all their expertise failed to find K.K.-R. eligible for special education, her parents, likewise should not be charged with knowledge of facts necessary to establish their cause of action.

The approach used by *Amici* encourages school districts to vigorously pursue their child find obligations and ensure children with disabilities have a full and meaningful remedy as Congress intended. The district court's approach, by

contrast, frustrates the Congressional mandate in IDEA to "enabl[e] each child with special needs to reach his or her full potential." *G.L. v. Ligonier Valley Sch. Dist.*, 802 F. 3d 601, 626 (3d Cir. 2015).

ARGUMENT

A. Federal Courts Consider the Plain Meaning of Statutory Language as Well as Statutory Purpose in Construing Federal Law

"When . . . statutory 'language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-297 (2006) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (citations omitted)). Thus, federal courts proceed with the understanding that, unless otherwise defined, statutory terms should be interpreted in accordance with their ordinary meaning. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013); *see also Octane Fitness, LLC v. ICON Health and Fitness*, 134 S. Ct. 1749, 1756 (2014).

At the same time, courts do not construe federal laws "in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Serv., Inc.*, 132 S. Ct. 1350, 1357 (2012)); *see also Kasten v. Saint-Gobain*

Performance Plastics Corp., 563 U.S.1, 7 (2011) (courts interpret statutes by considering purpose and context, and consulting any precedents or authorities that inform the analysis). This approach makes "statutes into more coherent schemes for the accomplishment of specified goals than they might otherwise be." David M. Driesen, *Purposeless Construction*, 48 Wake Forest L. Rev. 97, 128 (2013).

As Professor Driesen notes:

> Coherence in turn helps legitimate law. To the extent we treat statutes as coherent schemes for accomplishing public ends, the law commands respect and obedience. Hence, when judges create rationales for statutory construction tying particular results to public objectives motivating congressional enactment, they increase the likelihood of faithful administration of the law, public acceptance of the law, and compliance with the law.

48 Wake Forest L. Rev. at 128. When the statutory language is unambiguous and the statutory scheme coherent and consistent, judicial inquiry ceases. *Sebelius*, 133 S. Ct. at 1895.

Sturgeon, *supra*, interpreting the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 (ANILCA), *et seq.* is instructive. ANILCA set aside 104 million acres of land in Alaska for preservation. It also specified "that the Park Service could not prohibit on those lands certain activities of particular importance to Alaskans." 136 S. Ct. at 1066. The plaintiff in *Sturgeon* challenged a National Park Service regulation banning the use of hovercraft on certain lands in

Alaska. He argued that "ANILCA created an Alaska-specific exception to the Park Service's general authority over boating and related activities in federally managed preservation areas." *Id.* at 1068. This Court held that the Park Service had the authority to enforce regulations on both "public" and "non-public" property in Alaska, as long as those regulations were nationally applicable. The Court rejected this interpretation.

The Court noted that the reading of the statutory phase adopted below "may be plausible in the abstract, but it is ultimately inconsistent with the text and context of the statute as a whole." *Id.* At 1070. This is because the interpretation under review would preclude the Park Service from applying Alaska-specific regulations to non-public lands in that state. *Id.* However, ANILCA is full of Alaska-specific exceptions reflecting "the simple truth that Alaska is often the exception, not the rule." *Id.* At 1071. "Yet the reading below would prevent the Park Service from recognizing Alaska's unique conditions." *Id.*

Similarly, in *Sebelius*, the Court rejected a statutory interpretation of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1, *et seq.* ("NCVIA") based upon inconsistency with plain language and statutory purpose. The Court rejected the federal government's proposed definition of the term "filed," because it is commonly understood that a claim is "filed" when it is delivered to and accepted by the appropriate court. 133 S. Ct. at 1893. Further, the

Court observed, the government's position would undermine the goals of the fee provision in the NCVIA. A stated purpose of the fee provision was to enhance the opportunity for individuals to present claims by making fee awards available for "non-prevailing good faith claims." *Id.* at 1893 (citation omitted). The government's interpretation would have discouraged counsel from representing NCVIA petitioners, which would undermine the statutory purpose.

Following this precedent, in construing IDEA's statute of limitations [20 U.S.C. §1415(f)(3)(C)] and a school district's child find obligations, federal courts must consider the plain meaning of the statute and the overall objective to ensure appropriate education for children with disabilities.

B. To Ensure Provision of an Appropriate Education to All Children, IDEA Creates Critical "Child Find" Duties for School Districts

IDEA has an indisputable and well-recognized statutory purpose. For decades preceding passage of the Education for All Handicapped Children Act (IDEA's predecessor), "school districts routinely denied children with disabilities an adequate education. They provided no educational assistance or accommodations to disabled children in school, 'warehoused' children in institutions thereby segregating them from their non-disabled peers, or excluded them from school altogether." Jennifer Rosen Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income*

Children in the Third Circuit, 41 Fordham Urb. L.J. 599, 600-601 (2013). In the 1970s, Congress held hearings investigating the quality of educational instruction provided to children with disabilities. These hearings established that public school districts throughout the county had wholly excluded millions of children with a multitude of disabilities or placed those children in programs where they received no educational benefit.

Thus, IDEA "was designed to reverse a history of educational neglect" for children with disabilities. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1109 (9th Cir. 2016) (citing *Schaffer v. Weast*, 546 U.S. 49, 52 (2005)). "At the time of its passage, the need for institutional reform was pervasive: millions of children with a multitude of disabilities were entirely excluded from public schools, and others, while present, could not benefit from the experience because of undiagnosed – and therefore unaddressed – disabilities." *Id.* (citing 20 U.S.C. § 1400(c)(2)). IDEA attempts to remedy these systemic problems by ensuring a free appropriate public education (FAPE) for all children with disabilities between the ages of three and twenty-one. *Id.* at 1110.

Critically, IDEA imposes a "child find" obligation on the states and school districts:

> In order to provide a free appropriate public education to all children with disabilities States must, of course, first identify those children and evaluate their disabling conditions. Accordingly, the IDEA requires that every State have

> procedures in place that are designed to identify children who may need special education services.
>
> [20 U.S.C.] § 1412(a)(3)(A). Once identified, those children must be evaluated and assessed for all suspected disabilities so that the school district can begin the process of determining what special education and related services will address the child's individual needs. *See id.* §§ 1412(a)(7), 1414(a)-(c).
>
> That this evaluation is done early, thoroughly, and reliably is of extreme importance to the education of children. Otherwise, many disabilities will go undiagnosed, neglected, or improperly treated in the classroom.

822 F.3d at 1110; *Forest Grove*, 557 U.S. at 245.

The child find obligation is a "profound responsibility, with the power to change the trajectory of a child's life." *G.L.*, 802 at 625. Therefore, "when a school district has failed in that responsibility and parents have taken appropriate and timely action under IDEA, then that child is entitled to be made whole with nothing less than a 'complete' remedy. 802 F.3d at 625 (citing *Forest Grove*, 557 U.S. at 244).

As discussed in the next section, the decision below undermines this statutory purpose. The district court incorrectly imputes knowledge to the parents that K.K.-R. fit IDEA's definition of disability and that they knew she needed special education. In so doing, the court ignored the statutory language and improperly limited K.K.-R's recovery for the school district's child find violation.

This holding is in direct conflict with both explicit statutory language and IDEA's purpose.

C. The District Court Erred in Holding that Parents Knew or Should Have Known All Facts Relevant to the IDEA Claim as of August 2009

1. An IDEA Cause of Action Accrues When the Plaintiff has Notice of All Elements of the Claim

When raising a statute of limitations defense, the burden is on the defendant to demonstrate that a reasonably diligent plaintiff would have discovered the violations. *Drew v. Equifax Info. Servs.,* 690 F.3d 1100, 1110 (9th Cir. 2012); *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1206 (9th Cir. 2012). This is appropriate because statutes of limitations are an affirmative defense, upon which the defendant bears the burden of proof. *Payan v. Aramark Mgmt. Servs., L.P.*, 495 F.3d 1119, 1122-1123 (9th Cir. 2007).

In the 2004 reauthorization of IDEA, Congress adopted, for the first time, a statute of limitations, which states:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint . . . .

20 U.S.C. § 1415(f)(3)(C). Interpreting this provision in *G.L, supra*, the Third Circuit Court of Appeals correctly concluded that IDEA adopted the "discovery rule" for special education claims. "When fashioning a statute of limitations, a

legislature may choose as the date from which the limitations period begins to run either the date the injury actually occurred, an approach known as the 'occurrence rule,' or the date the aggrieved party knew or should have known of the injury, that is the 'discovery rule'." 802 F.3d at 613 (citing *Knopick v. Connelly*, 639 F.3d 600, 607 (3d Cir. 2011)). The discovery rule provides that the statute of limitation does not begin to run on "the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff *discovers* that he or she has been injured." *Id.* (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 (3d Cir. 1994)).

In general, in claims arising under federal law, the discovery rule applies and the limitations period begins to run when the plaintiff knows the *injury* that is the basis of the action. *Lyons v. Michael & Assoc.*, 824 F.3d 1169, 1171 (9th Cir. 2016). In *Lyons*, a debt collector filed a suit against the plaintiff on December 7, 2011. The debt collector violated federal law when it filed the lawsuit, by suing Lyons in the wrong county. Lyons learned of the lawsuit when she received service of process in mid-January of 2012. She filed her case against the debt collector within a year of being served with process. The debt collector argued that the statute of limitations began running on the date that it filed the initial collection action. This Court rejected that argument, because the discovery rule controlled. Lyons knew or should have known of her injury (the violation of federal law)

when she received service of process, rendering her complaint timely. *Id.* at 1171-1172.

In *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010), in the securities law context, the Court explained what it means to "discover the facts constituting the violation." *Id.* at 638. In order to have a claim for securities fraud, a plaintiff must know that there was a misrepresentation *and* that the wrongdoer made the representation knowingly (with scienter). *Merck* clarifies that the statute of limitations did not begin to run until the plaintiffs knew or should have known that the defendant acted with scienter.

This is because the mental state of the defendant "constitutes an important and necessary element of a [securities fraud] 'violation.'" *Id.* at 648. "A plaintiff cannot recover without proving that a defendant made a material misstatement *with an intent to deceive* – not merely innocently or negligently." *Id.* at 649 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007)). It would frustrate the very purpose of the discovery rule if the limitations period began to run regardless of whether a plaintiff had discovered *all* of the facts necessary to prove the claim. *Id.*

The Court explained:

> An incorrect prediction about a firm's future earnings, by itself, does not automatically tell us whether the speaker deliberately lied or just made an innocent (and therefore nonactionable) error. Hence, the statute may require "discovery" of scienter-

> related facts beyond the facts that show a statement (or omission) to be materially false or misleading.

Id. at 650. Thus, "the limitations period . . . begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have 'discover[ed] the facts constituting the violation' – whichever comes first." *Id.* at 653.

In considering the "discovery" rule, a plaintiff should not be charged with knowledge of a harm when the defendants are presumably experts and did not have that knowledge. *Winter v. United States*, 244 F.3d 1088 (9th Cir. 2001) (where "not even the doctors knew of the probable general medical cause," a medical malpractice claim does not accrue); *see also Rosales v. United States*, 834 F.3d 799, 803-805 (9th Cir. 1987).

2. In this Case, the Cause of Action Only Accrued When Plaintiffs Discovered that K.K.-R. Should Have Been Eligible for Special Education

In this case, the district court committed a crucial error in imputing to the parents knowledge of K.K.-R.'s need for special education as early as August of 2009, years before the expert educators knew that she was IDEA-eligible. 2016 U.S. Dist. LEXIS 99579, at *17. All the parents knew in 2009 was that K.K.-R. had been diagnosed with a disability, but not that she might qualify for and need special education. Nor did the educators, charged with a "child find" duty, reach that conclusion.

To be IDEA-eligible, a student must have a qualifying disability *and*, by reason of that disability, need special education and related services. 20 U.S.C. § 1410(A)(ii); 34 C.F.R. § 300.8(a)(1). "Special education" has a specific statutory and regulatory definition – "specially designed instruction, . . .to meet the unique needs of a child with a disability." 20 U.S.C. § 1402(29); 34 C.F.R. § 300.39(a)(1). "Specially designed instruction" means "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology or delivery of instruction (i) to address the unique needs of the child that result from the child's disability; and (ii) to ensure access of the child to the general curriculum." 39 C.F.R. § 300.39(b)(3).

Disability by itself, without a need for specially designed instruction, does not qualify a child for special education under IDEA. *See, e.g., L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1175 (9th Cir. 2016) (child with a disability "does not qualify for special education services if support provided through the regular school program is sufficient"); *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1109 (9th Cir. 2007) (student not eligible for IDEA because accommodation plan could meet her needs); *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007) (student with attention deficit hyperactivity disorder not eligible under IDEA because he did not need special education).

Without any analysis, the district court affirmed the hearing officer's conclusion that "parents knew or should have known about the action that forms the basis of their complaint as early of August of 2009." 2016 U.S. Dist. LEXIS 99579, at *17. The district court should have assessed whether K.K.-R.'s parents knew or should have known she had a qualifying disability under IDEA and that she needed special education. An examination of the timeline reveals that there is nothing in the record to support the inference that the parents knew or should have known that K.K.-R. *needed special education* that early. Indeed, the district court found that MCPS did not violate its child find duty "because it did not know or have reason to suspect that she was a student with a disability in need of special education and related services." *Id.* If educational experts charged with "child find" duties could not reasonably have known of K.K.-R.'s eligibility, it is impossible to conclude that her parents knew or should have known of her eligibility.

In August 2009, Dr. Aytes, a psychiatrist, diagnosed K.K.-R with "major depressive disorder, recurrent, ADHD, impulsive and hyperactive-type, anxiety disorder not otherwise specified and possible somatoform disorder. Dr. Aytes prescribed ADHD medication." *Id.* at *9. Parents undoubtedly had notice that K.K.-R. had disabilities. District's personnel had the same notice. There is no indication anywhere that Dr. Aytes, or anyone else, told parents that K.K.-R. needed specially designed instruction or special education.

As in *G.L.,* this Court should decline the school district's invitation to impose what is, in effect, a two-year remedy cap on K.K.-R.'s claims. When a school district has failed in its child find responsibility, and parents have taken appropriate and timely action under IDEA, "then the child is entitled to be made whole with nothing less than a 'complete' remedy." 802 F.3d at 625 (citing *Forest Grove*, 557 U.S. at 244). "Compensatory education is crucial to achieve that goal, and the courts, in the exercise of their broad discretion, may award it to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." *Id.*

In this case, by excluding claims prior to October 1, 2012, the hearing officer and the district court left the school district's child find violations unremedied. This reading of IDEA, leaving "parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services." *Forest Grove*, 557 U.S. at 245; *see also Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015).

CONCLUSION

The district court committed reversible error in concluding that K.K.-R.'s claims prior to October 1, 2012 were time-barred. The decision below, which ignores the plain language of the Act and subverts federal civil rights laws, should be reversed.

FEBRUARY 17, 2017

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,776 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times Roman, 14-point typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin E. Largent