19-644-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

D.S., BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, M.S. AND R.S.,
Plaintiff-Appellant,

v.

TRUMBULL BOARD OF EDUCATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Connecticut, No. 18-cv-163
Before the Honorable Jeffrey A. Meyer

MOTION OF ADVOCATES FOR CHILDREN ET AL. FOR LEAVE TO FILE AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, NY 10007
(212) 937-7294

July 3, 2019

Pursuant to Federal Rule of Appellate Procedure 29, Advocates for Children, Legal Services NYC, Mobilization for Justice, Inc., New York Legal Assistance Group, and New York Lawyers for the Public Interest, respectfully move for leave to file a brief amicus curiae supporting plaintiff-appellant and reversal. Plaintiff consents to the filing of this brief; the defendant neither consents nor opposes the filing of the brief.

Proposed amici curiae are advocacy and legal-services organizations committed to protecting the rights of children with disabilities to receive a quality education in public schools. In the course of representing children and their families in proceedings under the Individuals with Disabilities Education Improvement Act (IDEA)—particularly children who come from low-income families— proposed amici have developed a keen understanding of the importance of the procedural protections the statute provides, including the few provisions ensuring that all families, regardless of their private resources, are able to fully participate in the process the IDEA establishes for securing students a free appropriate public education. Proposed amici have vast experience both with obtaining and using independent educational evaluations (IEEs) in those proceedings, and in ensuring that those IEEs are publicly funded consistent with the statute. They are thus well situated to facilitate the Court's understanding of the consequences of unduly constraining the availability of publicly funded IEEs.

As this Court and the Supreme Court have long recognized, the Individuals with Disabilities in Education Act (IDEA) establishes rigorous "procedural safeguards to 'guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education.'" *Board of Educ. of Pawling Cent. Sch. Dist. v. Schutz*, 290 F.3d 476, 481 (2d Cir. 2002) (quoting *Honig v. Doe*, 484 U.S. 305, 311-312 (1988)). IEEs are central to the proper functioning of those safeguards. Parents—particularly those with limited means and limited support from outside advocates—rely on IEEs to educate themselves about their children's needs and functional limitations, as well as about the appropriateness of school district recommendations for school placements or programs. For many parents, IEEs are essential to ensuring that their participation in the process is in any way meaningful—rather than entirely reliant on the school district's conclusions and unilateral decisions. And while Congress envisioned that the process for determining a child's educational placement or program would be cooperative, it is often adversarial, with the independent educational evaluator playing a critical mediating role.

This case presents important questions about the continuing availability of evaluations for children who—as the statute expressly contemplates—rely on public funding for IEEs. The proposed amicus brief explains the critical role that publicly funded IEEs play in ensuring that children with special educational needs

are provided with the appropriate education the IDEA mandates and that the parents of those children are provided with the meaningful opportunity to participate in the process of designing and implementing their children's educational plans. It then explains why affirmance of the district court's unduly narrow rule will impede fulfillment of Congress's objectives in enacting (and re-enacting) the IDEA. Amici respectfully submit that this brief will assist the Court in deciding the issues presented in this appeal.

CONCLUSION

The motion for leave to file the proposed brief amicus curiae should be granted.

Respectfully submitted.

/s/ Alan Schoenfeld
ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, NY 10007
(212) 937-7294
(212) 230-8888

Counsel for Amici Curiae

July 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2019, I electronically filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Alan Schoenfeld
ALAN SCHOENFELD

July 3, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the volume limitations of Fed. R. App. P. 27(d)(2)(A) because this motion contains 532 words.

I further certify that this motion complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because the motion has been prepared in the proportionally spaced typeface Times New Roma, 14-point font, using Microsoft Word 2016.

/s/ Alan Schoenfeld
ALAN SCHOENFELD

July 3, 2019

19-644-cv

UNITED STATES COURT OF APPEALS
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Before the Honorable Jeffrey A. Meyer

BRIEF OF ADVOCATES FOR CHILDREN OF NEW YORK, LEGAL SERVICES NYC, MOBILIZATION FOR JUSTICE, INC., NEW YORK LAWYERS FOR THE PUBLIC INTEREST, AND NEW YORK LEGAL ASSISTANCE GROUP AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, NY 10007
(212) 937-7294

July 3, 2019

CORPORATE DISCLOSURE STATEMENT

Amici curiae state that they are non-governmental corporations with no corporate parents; they do not issue stock.

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INTEREST OF AMICI CURIAE[1]

Amici are advocacy and legal-services organizations committed to protecting the rights of children with disabilities to receive a quality education. In the course of representing children and their families under the Individuals with Disabilities Education Improvement Act (IDEA)—particularly children who come from low-income families—amici have developed a keen understanding of the importance of the procedural protections the statute provides, including the few provisions ensuring that all families, regardless of their private resources, are able to fully participate in the process for securing students a free appropriate public education. The availability of publicly-funded independent educational evaluations (IEEs) is central to the purpose of the IDEA and fulfillment of its aims.

For over forty years, **Advocates for Children of New York** (AFC) has worked with low-income families to secure quality public education services for their children, including children with disabilities. AFC provides a range of direct services, including advocacy for students and families in individual cases, and also pursues institutional reform of educational policies and practices through advocacy and litigation. AFC routinely advocates for the rights of children and their families under the IDEA and therefore has a strong interest in its proper interpretation.

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[1] No counsel for a party authored this brief in whole or in part; no person or entity other than amici or their counsel made any monetary contribution toward its preparation or submission. Amici have moved for leave to file this brief.

The mission of **Legal Services NYC (LSNYC)** is to advance society's promise to its most vulnerable members that they will have equal access to our legal system. LSNYC is the largest provider of free civil legal services in New York City and serves residents of New York City on a wide range of legal matters including public school education, focusing on advocacy for students with disabilities to ensure their receipt of appropriate special-education services often through representation without fee to low-income students with disabilities and/or their parents in IDEA due process proceedings. LSNYC share a profound concern that the educational rights of students with disabilities be protected especially with regard to the parent's due process rights to a second opinion through an IEE.

Mobilization for Justice, Inc. (MFJ), formerly MFY Legal Services, offers free legal assistance to low-income individuals throughout New York City to resolve a wide range of civil legal problems, providing assistance to more than 10,000 New Yorkers each year. MFJ works to promote positive change and justice, focusing on four key areas: disability and aging rights, children's rights, housing, and economic justice. In its children's rights practice, MFJ represents low-income parents of students with disabilities seeking appropriate special education evaluations and services under the IDEA. MFJ has a strong interest in the proper interpretation of the IDEA as it affects the rights of the low-income families the organization serves.

Founded in 1976, **New York Lawyers for the Public Interest (NYLPI)** is a community-driven civil rights organization that advocates for New Yorkers with disabilities through its Disability Justice Program. Through individual and systemic cases and campaigns, NYLPI represents low-income parents and their children with disabilities to ensure the children receive the free, appropriate public education guaranteed by the IDEA, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and state and local laws. Many of NYLPI's clients lack the financial means to obtain independent educational evaluations themselves; public funding is the key to allowing their participation in decision-making and advocacy for the educational rights of their children. In particular, without publicly funded neuropsychological evaluations that are comprehensive and available in appropriate languages, our clients will have enormous—and often insurmountable—difficulty obtaining vital educational services for their children.

New York Legal Assistance Group (NYLAG) is a not-for-profit law firm founded in 1990 to provide free civil legal services to low income New Yorkers who would otherwise be unable to afford or receive legal assistance. NYLAG assists the poor and near poor in New York City in accessing legal rights of vital importance. NYLAG's clients include, among others, seniors, immigrants, victims of domestic violence, Holocaust survivors, and at-risk children. With regard to children, NYLAG represents them in special education cases and SSI appeals.

ARGUMENT

As this Court and the Supreme Court have long recognized, the Individuals with Disabilities in Education Act (IDEA) establishes rigorous "procedural safeguards to 'guarantee parents … an opportunity for meaningful input into all decisions affecting their child's education.'" *Board of Educ. of Pawling Cent. Sch. Dist. v. Schutz*, 290 F.3d 476, 481 (2d Cir. 2002) (quoting *Honig v. Doe*, 484 U.S. 305, 311-312 (1988)). Independent Educational Evaluations (IEEs) are central to the proper functioning of those safeguards. Parents—particularly those with limited means and limited support from outside advocates—rely on IEEs to educate themselves about their children's needs and functional limitations, as well as about the appropriateness of school district recommendations for school placements or programs. For many parents, IEEs are essential to ensuring that their participation in the process is in any way meaningful—rather than entirely reliant on the school district's conclusions and unilateral decisions. And while Congress envisioned that the process for determining a child's educational placement or program would be cooperative, it is often adversarial, with the independent educational evaluator playing a critical mediating role.

This case presents important questions about the continuing availability of evaluations for children who—as the statute expressly contemplates—rely on public funding for IEEs. Amici, who represent children from low-income families

in IDEA proceedings, have vast experience both with obtaining and using IEEs in those proceedings, and in ensuring that those IEEs are publicly funded consistent with the statute. They are thus well situated to facilitate the Court's understanding of the consequences of unduly constraining the availability of publicly funded IEEs. This brief proceeds in two parts. First, we explain the critical role that publicly funded IEEs play in ensuring that children with special educational needs are provided with the appropriate education the IDEA mandates, and that the parents of those children are provided with the meaningful opportunity to participate in the process of designing and implementing their children's educational plans. Second, we explain why affirmance of the district court's unduly narrow rule will impede fulfillment of Congress's objectives in enacting (and re-enacting) the IDEA.

I. IEEs Are Critically Important For Underserved And Under-Resourced Students And Parents

Parental participation is a primary goal of the IDEA and essential to its proper functioning. In drafting the IDEA, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process … as it did upon the measurement of the resulting [individualized education program (IEP)] against a substantive standard." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005). The IDEA promotes and facilitates teamwork between parents, schools,

and educational experts in the development of the IEP. This holistic and cooperative engagement is the "core of the statute." *Id.* ("The core of the statute [] is the cooperative process that it establishes between parents and schools … [t]he central vehicle for this collaboration is the IEP process.").

"As the Supreme Court has emphasized, the IDEA is solicitous of parents' participatory rights, including an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *J.E. v. New York City Dep't of Educ.*, 229 F. Supp. 3d 223, 234 (S.D.N.Y. 2017) (internal quotation marks omitted). The courts' use of the word "meaningful" is, well, meaningful. Parental participation is meant to be informed, engaged, and iterative. The statute does not intend for parents to be supine or responsive, but rather active and educated participants in shaping their children's educations. *See, e.g.*, *id.* ("Predetermination, therefore, by a district of a child's IEP without meaningful parental input undermines the fundamental goal of the IDEA, which is to give parents a meaningful voice in the educational upbringing of their children."). The IDEA's public-funding provisions ensure that the right of meaningful participation is enjoyed by all parents, regardless of their means. *See Schaffer*, 546 U.S. at 60-61 ("[The] IDEA … ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are

not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.").

Independent educational evaluations (IEEs) are critical to ensuring meaningful parental participation in the IEP process. As the Supreme Court has recognized, "[s]chool districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them." *Schaffer*, 546 U.S. at 60. IEEs are intended to even the power and information asymmetry between school districts and parents. By providing parents with information critical to understanding their child's needs and participating in the process, IEEs "maximize parental involvement in the education of each handicapped child." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 182 n.6 (1982); *see also Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007); 20 U.S.C. § 1414 (a); 34 C.F.R. § 300.502(b)(1). This is particularly the case for families without resources, who lack the means necessary to secure private assessments of their child. *See Phillip C. ex rel. A.C. v Jefferson Cty. Bd. of Educ.*, 701 F.3d 691, 698 (11th Cir. 2012) ("The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP. … Without public financing of an IEE, a class of parents would be unable

to afford an IEE and their children would not receive, as the IDEA intended, 'a free and appropriate public education' as the result of a cooperative process that protects the rights of parents."); *see also The Ohio State University Dispute Resolution in Special Education Symposium Panel*, 30 Ohio St. J. on Disp. Resol. 89, 114 (2014) (describing IEEs as "a critical tool when representing families without resources").

Parents turn to IEEs for a variety of reasons. In some cases, parents seek an IEE because they believe the school has not evaluated a child in all areas of suspected disability or even identified the student's disability. *See, e.g.*, *Warren G. ex rel. Tom G. v. Cumberland Cty. Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999) (IEE uncovered specific areas of the plaintiff's learning disabilities which school evaluation had not discovered); *Quackenbush v. Johnson City School Dist.*, 716 F.2d 141, 143 (2d Cir. 1983) (IEE revealed the need to classify child as learning disabled); *Plainville Bd. of Educ. v. R.N. ex rel. H*, 2012 WL 1094640, at *2 (D. Conn. Mar. 31, 2012) (IEE revealed the child had an adjustment disorder); *Hiller v. Board of Educ. of Brunswick Cent. Sch. Dist.*, 687 F. Supp. 735, 737 (N.D.N.Y. 1988) (IEE revealed child had more extended writing and attention problems than previously realized); *see* Harris, *At 12, He Reads at a First-Grade Level: How New York Failed T.J.*, N.Y. Times, Oct. 5, 2018 (IEE revealed student's intellectual disability after school evaluations had incorrectly diagnosed a speech and language

impairment). Or the parents may request an IEE to determine the appropriateness of the type of services required. *See, e.g.*, *M.B. v. City Sch. Dist. of New Rochelle*, 2018 WL 1609266, at *6 (S.D.N.Y. Mar. 29, 2018) (discussing an IHO-ordered IEE after the district failed to account for an autism diagnosis in the educational plan). Sometimes, parents seek an IEE to ensure that the school's evaluators are properly qualified. *See, e.g.*, *A.S. ex rel. S. v. Norwalk Bd. of Educ.*, 183 F. Supp. 2d 534, 547 (D. Conn. 2002) (IEE appropriate where record showed that district-conducted evaluations were cursory and inappropriate). The common thread running through parents' resort to this process is a desire to fully understand—and meaningfully participate in—the identification of their children's needs and functional limitations, and the formulation of an appropriate educational placement and plan so that their children can progress in school and receive a free and appropriate public education (FAPE).

IEEs can reveal a student's need for services and supports that the school district had not previously provided due to a failure to evaluate all areas of disability or inadequate evaluations. *Compare D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F. Supp. 2d 435, 440-441 (N.D.N.Y. 2010) (discussing an IEP for a child whose IEE revealed he required intensive, multisensory instruction in basic skills), *with Genn v. New Haven Bd. of Educ.*, 219 F. Supp. 3d 296 (D. Conn. 2016) (discussing an IEP for a child whose phonological awareness needs were

only discovered through an in-depth IEE), *with Y.N. v. Bd. of Educ. of Harrison Cent. Sch. Dist.*, 2018 WL 4609117, at *2 (S.D.N.Y. Sept. 25, 2018) (discussing an IEP for a child whose dyslexia and need for intensive services were uncovered by an IEE), *with Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1116 (9th Cir. 2016) (discussing denial of FAPE where district failed to assess student for autism until parents obtained IEE and showed he required alternative services). The IEE serves as a meaningful check to ensure that each child receives an educational program specific to that child—even in cases where children have the same or similar diagnoses. *Compare A. v. Hartford Bd. of Educ.*, 2016 WL 3950079, at *5 (D. Conn. July 19, 2016) (IEP for an autistic child including a home component after an IEE found a "desperate need of home-based programming"), *with M.B.*, 2018 WL 1609266, at *2 (discussing an IEP for a child as including adapted physical education, bilingual speech therapy, and occupational therapy after IEE uncovered an autism diagnosis), *with J.E.*, 229 F. Supp. 3d at 236-237 (FAPE denied for a child where district failed to consider parent's point of view that a 6:1:1 placement was not appropriate, a 2:1 placement was necessary, and a 1:1 school was addressing the child's needs).

The IEE serves a critical role in resolving conflicts of all types. As noted, disagreement over educational recommendations comes in a multitude of forms, including the exact nature of a child's disabilities and the evolution of children's

needs over time. The flexibility of the IEE renders it an effective tool in providing information to parents and resolving a range of conflicts without imposing financial hardship on parents. *See* Harris, *supra* (describing a scenario in which a publicly-funded independent evaluation revealed a serious underlying diagnosis that had gone unnoticed after the Education Department year after year failed to conduct a required triennial evaluation); Alderman, *What to Do if You Suspect Learning Disability*, N.Y. Times, Feb. 19, 2010 (describing the benefits of independent evaluations as providing greater chance for parental involvement, and a greater likelihood that "[i]ndependent testers [will] spend more time with your child and may be more creative in their approach").

After an initial evaluation, it may become clear to parents that some students with disabilities need an evaluation more tailored towards their individualized needs. If the standard articulated by the district court is adopted, a parent would not be able to challenge the initial evaluation because they believe the initial evaluation was too narrowly targeted. Congress has noted that numerous legitimate disagreements with an initial evaluation may arise if the initial evaluator is not culturally competent or does not provide an exam with necessary breadth or scope to adequately evaluate or diagnose the child. *See* 34 C.F.R. § 300.306(c)(1)(i) (clarifying that IEP procedures must "[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input,

and teacher recommendations, as well as information about the child's physical condition, *social or cultural background*, and adaptive behavior") (emphasis added); *Rowley*, 458 U.S. at 194 n.18 (describing the IDEA's predecessor the Education of the Handicapped Act as "establish[ing] procedures to insure that testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as *not to be racially or culturally discriminatory*") (emphasis added). Restricting parental access to due process hearings simply because their disagreement does not fall within the narrow confines of an already-insufficient evaluation disproportionately disadvantages children of families already lacking cultural and financial competency.

The cost of private evaluators regularly ranges from $200-7,600, and sometimes exceeds $10,000. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 314 (2006) (Breyer, J., dissenting). Without the option of IEEs to ensure that the student was fully evaluated, many parents will be left with no independent check on a school district's limited evaluation at all, preventing them from meaningfully participating in the educational development of their child, discouraging parental involvement, and cutting off a key source of valuable information for educators. Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L.

Judiciary 423, 435 (2012) ("An outside evaluation can be an important way for parents to challenge the expertise of school districts with independent experts of their own … giving parents access to an expert in their child's disability for free should reduce disparities between wealthy and poor parents"); Raj & Suski, *Endrew F.'s Unintended Consequences*, 46 J.L. & Educ. 499, 522 (2017) ("IEEs can provide valuable insight and powerful leverage for parents who are able to secure them").[2] Indeed, without the option of IEEs to check a school district's limited evaluation, the disparity in the special education services provided to students whose parents can pay for private evaluators and those who cannot will only become greater.

In New York City alone, more than 40% of the city's 200,000 students with IEPs did not receive the specialized instruction to which they were legally entitled

[2] It bears emphasizing that, for all their indispensability in IDEA proceedings, IEEs are still, by definition, *independent*. The evaluator is not a retained expert, and cannot be expected to advocate for the parent or child. "It is unlikely that the independent evaluator will help parents understand evidence or prepare to challenge the school district's experts. Also, there is no guarantee that this independent evaluator will testify at the due process hearing, and no guarantee that he will do so at public expense. If provided, the IEE guarantees nothing more than an independent evaluation and the accompanying report." Surur, *Placing the Ball in Congress' Court: A Critical Analysis of the Supreme Court's Decision in Arlington Central School District Board of Education v. Murphy*, 27 J. Nat'l Ass'n Admin. L. Judiciary 547, 600-01 (2007). In view of their limited but critically important function, preserving the availability of IEEs is all the more essential to proper operation of the statute.

in 2015-2016. *See* Harris, *Thousands of City Children Not Getting Special Education Help*, N.Y. Times, Nov. 1, 2017. With nearly one fourth of the country's disabled children living in poverty and two thirds in households with incomes less than $50,000, severely restricting public funding for IEEs carries dire real-world consequences for countless families, many of whom already find navigating the system "a draining battle." Harris, *supra*; *see generally* U.S. Dep't of Educ., Office of Special Educ. Programs, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2* (NLTS2), p. 3-10 (Aug. 2003) (prepared by SRI Int'l); U.S. Dep't of Educ., Office of Special Educ. Programs, *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households*, 28 (Sept. 2002) (prepared by SRI Int'l).

II. IEEs Must Be Available In Appropriate Situations To Fulfill The IDEA's Mandate

The standard for when parents may obtain a publicly funded IEE has been interpreted flexibly by the courts, reflecting the individualized nature of IDEA proceedings and the needs of a diverse student and parent population. *Compare R.L. ex rel. Mr. L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222, 234 (D. Conn. 2005) (disagreement defined as being foreclosed only by active agreement), *with Warren G. ex rel. Tom G. v. Cumberland Cty. Sch. Dist.*, 190 F.3d 80, 87 (3d Cir.

1999) (disagreement defined broadly, including when the parents failed to express disagreement prior to obtaining their own evaluation), *with Edie F. ex rel. Casey F. v. River Falls Sch. Dist.*, 243 F.3d 329, 335 (7th Cir. 2001) (disagreement defined as not including a benchmarked result in school), *with N.D.S. by & Through de Campos Salles v. Acad. for Sci. & Agric. Charter Sch.*, 2018 WL 6201725, at *5-*7 (D. Minn. Nov. 28, 2018) (disagreement as being bound primarily by timing). A flexible application of the standard for what constitutes "disagreement" with a district-conducted evaluation (the criterion for obtaining an IEE) allows for a discerning implementation of the IDEA that responds closely to the individualized needs of each child. *See* 34 C.F.R. § 300.502(b)(1).

Limiting the availability of an IEE to a specific articulated disagreement with an existing evaluation ignores the fact that the school district holds virtually all the cards in determining whether to conduct an evaluation in the first place, as well as the timing and scope of those evaluations. This leads to precisely the situation the Supreme Court disparaged in *Schaffer* and other cases, where it emphasized that parents ought not be "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." 546 U.S. at 60-61. To take just one example: A Functional Behavioral Assessment (FBA) is a comprehensive behavioral assessment that determines "why the student engages in behaviors that impede

learning and how the student's behavior relates to the environment." 8 N.Y.C.R.R. § 200.1(r). It is so critical to the IEP process that failure to conduct one constitutes a "serious procedural violation because it may prevent the CSE [Committee on Special Education] from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all." *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012). School districts, however, have been known to not routinely conduct FBAs. *See* N.Y.S. Dep't of Educ. Decision, *Advocates for Children of New York v. New York City Dep't of Educ. & Success Academy Charter Schools* (Feb. 15, 2019) (decision of State Education Department affirming that the NYC DOE must address students' behavior using FBAs and Behavior Intervention Plans). Under the district court's rule—which restricts publicly funded IEEs to circumstances where the parent interposes a specific disagreement with an evaluation the school district has conducted—a parent reliant on public funding would have no way to obtain an independent FBA unless the school district had conducted an FBA, which, as discussed above, rarely happens. The IEP resulting from this process is almost certain to be deficient, and the district court's inflexible rule, if affirmed, would provide parents with no recourse.

Indeed, a rigid standard such as the one defined by the district court encourages dilatory and counterproductive behavior. It incentivizes school

districts to conduct extremely limited evaluations so that parents will have nothing to "disagree" with. Under that standard, if a school district conducted an evaluation pertaining to only one of a child's several disabilities, the parent would be unable to obtain public funding for an assessment and educational plan that accounted for that child's other disabilities. School districts may thus be inclined to limit the range of their own evaluations so that parents will be forced into accepting those limited evaluations by default—exacerbating the already problematic tendencies of schools to artificially suppress the number of students receiving special education. *See, e.g.*, Samuels, *Special Education is Broken*, Education Week, Jan. 8, 2019 ("Texas was called out earlier [in 2019] by the U.S. Department of Education for failing to identify and evaluate its students properly, thus keeping its special education enrollment numbers artificially low.").

The IDEA envisions a readily available process for resolution of the myriad disagreements that will naturally arise between parents and schools. IEEs are one of the main routes through which resolution occurs. Application of an unduly rigid standard for publicly funded IEEs would inhibit their use and effectively cripple parents' ability to stay involved in their child's education. "Publicly-funded IEE[s] [] serve the 'crucial function' of guaranteeing the meaningful participation of the parents throughout the remainder of the IEP and placement process" regardless of the wealth or education of a parent. *Luo v. Owen J. Roberts Sch. Dist.*, 2016 WL

6831122, at *7 (E.D. Pa. Oct. 27, 2016). This is especially the case for low-income parents, who do not have the resources to pay for private evaluations. Parents without means should not be restricted from participation for inability to pay—which is the likely reality if the district court's standard is adopted.

CONCLUSION

For the reasons set forth above, amici respectfully request that the Court reverse the judgment of the district court.

Respectfully submitted.

/s/ Alan Schoenfeld
ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, NY 10007
(212) 937-7294
(212) 230-8888

Counsel for Amici Curiae

July 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2019, I electronically filed the foregoing Amicus Brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Alan Schoenfeld
ALAN SCHOENFELD

July 3, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,163 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Alan Schoenfeld
ALAN SCHOENFELD

July 3, 2019