Case No. 14-55800

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Timothy O. & Amy O. Individually, Timothy O. as GAL for his Minor Child L.O.

Appellants,

v.

Paso Robles Unified School District

Appellee.

On Appeal From The United States District Court,
For the Northern District of California
Honorable Jesus G. Bernal, Presiding
U.S. District Court Case No. CV 12-06385-JGB (JEMx)

BRIEF OF *AMICUS CURIAE* CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF DEFENDANT-APPELLEE PASO ROBLES UNIFIED SCHOOL DISTRICT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae California School Boards Association's Education Legal Alliance avers that it does not issue stock and is not a subsidiary or affiliate of any publicly owned corporation.

STATEMENT OF AUTHORSHIP

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amicus Curiae California School Boards Association avers that:

(i) Neither party's counsel in this matter authored this amicus curiae brief;

(ii) Neither of the parties or their respective counsel contributed money to fund this amicus curiae brief; and

(iii) No person other than the amicus, or its members or counsel, contributed money to fund this amicus curiae brief.

Dated: March 13, 2015.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

Rules

Regulations

Other Authorities

I. IDENTITY OF *AMICUS CURIAE* AND STATEMENT OF INTEREST

This brief is filed with consent of all parties. *Amicus Curiae* is the California School Boards Association's (CSBA) Education Legal Alliance (ELA).

The CSBA is a collaborative group of virtually all of California's more than 1000 school districts and county offices of education. CSBA provides its members with a wide range of services, including policy analysis, legal advocacy, legislative representation, professional development, and information services.

As part of the CSBA, the ELA helps insure that local school boards retain the authority to exercise fully the responsibilities vested in them by law to make policy and fiscal decisions for their school districts. The ELA represents its members by addressing legal issues of statewide concern to school districts. The ELA's activities include joining in litigation where the interest of public education is at stake.

As public school districts and county offices of education, CSBA members have a strong interest in the outcome of this case. Appellants' interpretation of the law regarding special education, if followed, would negatively impact the operation of CSBA's member school districts and related education agencies, as well as other public education agencies within the jurisdiction of the Court of Appeals for the Ninth Circuit, which are all charged with the obligation to provide

free appropriate public education based on the unique needs of all eligible students with disabilities.

II. SUMMARY OF ARGUMENT

Amicus Curiae submits this brief in support of Defendant-Appellee Paso Robles Unified School District (District), seeking this Court to affirm the decision of the United States District Court for the Central District of California.

The District acted in full accordance with federal and state law in assessing and serving Student, and we respectfully ask this Court to uphold the careful and thorough decisions of the U. S. District Court and the Office of Administrative Hearings (OAH). The District was proactive and responsive to Student's unique needs in developing Student's initial individualized education program (IEP) and in offering increased services to Student as his development progressed. Student obtained meaningful educational benefit from his individualized programs.

Professional discretion in educational decision-making is critical for school districts, and it is worthy of Courts' respect and deference.

Appellants' language and behavior toward public school officials are unnecessary and distract from the necessary focus on serving children appropriately. Appellants' pursuit of a specific label for special education eligibility is misplaced and at odds with federal and state law on special education.

Federal and state law direct that school districts must offer and provide free appropriate public education to all eligible special education students based on their unique individual needs. The District met this directive.

The eligibility category on a Student's IEP – the label provided for an eligible student with a disability – should not be a triable legal issue, and we respectfully ask this Court to find that it is not. Current inconsistency in administrative decisions on eligibility classification is resulting in wasteful litigation and distracting from the law's guidance on providing all eligible special education students with free appropriate public education tailored to their unique needs.

III. ARGUMENT

A. The District acted in full accordance with federal and state law in assessing and serving Student at all times, and we ask this Court to uphold the careful and thorough[1] decisions of the U. S. District Court and OAH's Administrative Law Judge (ALJ).

The District assessed Student in all areas of suspected disability. (ER 35-41, 97-98, 106-107.) The District determined appropriately through professional

[1] "A court 'treat[s] a hearing officer's findings as thorough and careful when the officer participates in the questioning of witnesses and writes a decision contain[ing] a complete factual background as well as a discrete analysis supporting the ultimate conclusions'" (ER 32: U. S. District Court citing *R. B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942-43 (9th Cir. 2007)) "In this case, the ALJ presided over the nine-day hearing and was actively involved in questioning. In the 58 page decision, the ALJ provides detailed factual background and analysis, as well as cites to the relevant facts to support her legal conclusions. Accordingly, the Court gives due weight to the ALJ's findings and conclusions that are well-reasoned and supported." (ER 32: Statement of U.S. District Court, also citing *See W.H. ex rel. B.H. v. Clovis Unified School Dist.*, (E.D. Cal. June 8, 2009) No. 08-0374, 2009 WL 1605356 at *14) The U.S. District Court's decision itself in this matter is 52 pages and thoroughly and carefully analyzed all issues, including assessments, IEPs, goals and objectives, and educational benefits.

observation in the initial assessment that Student did not exhibit signs of autism and exhibited outward social and communicative behaviors such that additional assessment for eligibility based on autism was not warranted prior to Student's initial IEP. (ER 35-37, 97-98.) The District carefully considered Dr. Linda Griffin's psychological assessment of Student completed for the Tri-Counties Regional Center, provisionally indicating pervasive developmental disorder not otherwise specified (PDD-NOS) and recommending additional assessment in 18 to 24 months. (ER 37, 61-63, 98.) Student's private assessor, Dr. B.J. Freeman, who diagnosed Student with autism approximately 14 months later, also opined that a diagnosis of autism would have been inappropriate at Student's age prior to the initial IEP. (ER 74.)

Most vital, the District developed an IEP that provided a program and services with goals and objectives to address all of Student's unique needs. (ER 11-17, 44-49, 69-78, 102-107.) The ALJ dedicated six single-space pages to analyzing Student's IEP goals in all areas of need for 2009-2010 and determined that they were appropriate. (ER 69-74.) The ALJ found criticisms from Student's expert witnesses unwarranted and unpersuasive. (ER 70-74.) Parents participated actively in the development of the IEP; the District appropriately considered their input; and Parents agreed to the initial IEP. (ER 62-64, 74.) Student's program would not have been different if Student was diagnosed with autism or if autism

was Student's eligibility category. (ER 69, 77, 102.) Student's Parents desired a program with a parent participation component and one that would lessen Student's separation anxiety, and the District offered and provided a program with those components. (ER 46, 65.) Student obtained meaningful benefit from his educational program. (ER 15-17, 44-49, 66, 69-77.)

B. The District was proactive and responsive to Student's unique needs in offering increased services to Student.

The District offered a more intensive program for 2010-2011 after observing Student's progress and development in the initial preschool program. (ER 17, 19-21, 65-66.) Again, the ALJ carefully reviewed all components of the 2010-2011 placement and services and determined that "the evidence established that the District's annual goals met Student's unique needs related to his disability, whatever its label, the placement was also appropriate to meet his needs, and the classroom was the LRE [least restrictive environment] for him. He clearly received educational benefit this school year." (ER 23-27, 49-54, 78-91.) A change in Student's eligibility category would not have made a difference in the program offered and provided to Student. (ER 40, 54-56, 92.) The program was tailored to Student's unique needs as federal and state law require. (ER 23-27, 49-50, 54-56, 92.)

C. Professional discretion is critical for school districts in educational decision-making, and it is worthy of Courts' respect and deference.

The U. S. Supreme Court's interpretation of the IDEA is founded on respect for professional public educators; reviewing courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, (1982) 458 U.S. 176, 206. *Rowley* established that, as long as a school district provides an appropriate education, methodology is left to the district's discretion. (*Rowley*, 458 U.S. at p. 208; see also, *Adams v. Oregon*, (9th Cir. 1999) 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer Sch. Dist. No. 24J* (D. Or. 2001) 155 F. Supp.2d 1213, 2132; *San Rafael City Schools* (OAH 2012) 112 LRP 12088)

Courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods; "Courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992-93, citing *Rowley*, supra, 458 U.S. at p. 202; see also *San Rafael City Schools*, *supra*, 112 LRP 12088.) Courts should not increase procedural hoops for school districts as Appellants' and their amicus curiae contend. Such action would needlessly

complicate the process of serving students with special needs and create additional costs and burdens for school districts without benefitting children.

D. Appellants' language and behavior toward public school officials are unnecessary and distract from the necessary focus on serving children appropriately.

Appellants' disrespectful characterization of experienced district professionals – "[b]ut that is not how things are done in Paso Robles;" "side-step;" "in their minds;" "bush-league procedure;" – are inaccurate and illustrate an unwarranted lack of respect for the expertise and commitment of school district staff members. The ALJ carefully analyzed and detailed the credibility of District witnesses, their extensive professional experience with students with special needs and autism, their careful communications with Student's parents, and their dedicated focus on Student's unique needs and to ensuring he obtained meaningful benefit from his educational program. (ER 60-95.) The ALJ also thoroughly analyzed the criticisms of Student's private assessors of Student's IEP goals and objectives and found their criticisms unpersuasive, lacking in credibility, contradictory, and without knowledge or observation of Student's school setting. (ER 69-74, 87.) Student's private assessors offered judgments on a school district's program without ever having observed it. (ER 27, 46, 87 (ALJ at 87: "It was obvious during the due process hearing that neither Ms. Sullivan, nor Dr. Freeman was knowledgeable about the District's programs for children with IEPs. It

appeared that they were rendering their opinions about the programs Student had participated in both school years based on a perception that they were standard preschool classes for typically developing children that were not using methodologies that would address his needs as a child with autistic-like behaviors.".)

The ALJ also carefully detailed unfortunate complications from uncooperative behavior of Student's Parents. (ER 81, 83-84, 91-92; ALJ at 84: "Parents failed to share information from their private assessors and service providers, did not sign the February 3, 2011 request for assessment until many months later, and failed to subsequently make Student available so Mr. Peck could complete the District's assessment in the fall of 2011. This lack of cooperation with the District certainly contributed to the District's delay in finding Student eligible for special education as a child with autism.".)

It is absolutely vital for this Court to demonstrate appropriate respect for the well-reasoned professional judgment of public educators and the very thorough and careful decisions of the ALJ and the U.S. District Court documenting their credibility.

E. Appellants' pursuit of a specific label for special education eligibility is misplaced and at odds with federal and state law on special education.

The IDEA and California law require no specific label for special education eligibility. Although federal and state law identify criteria to guide IEP teams in determining whether a student is eligible for special education services, the criteria do not require that a specific eligibility category be specified in a student's individualized education plan.

With respect to federal law, "[n]othing in [the IDEA] requires that children be classified by their disability so long as each child who has a disability listed in [section 1401] and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under [the IDEA]." (20 U.S.C. § 1412(a)(3)(B); see also 34 C.F.R. § 300.111(d).) A student's eligibility category may have consequences for funding, the availability of outside services, statistical reporting, and other purposes, but if an IEP delivers a FAPE, the accuracy of the category under which it is delivered is not an issue for judicial review under the IDEA. (*San Rafael City Schools, supra,* 112 LRP 12088 citing *B.B. v. Perry Township School Corp.* (S.D.Ind. 2008, July 11, 2008, Nos. 1:07-cv-0323; 1:07-cv-0731) 2008 WL 2745094, p. 8 [nonpub. opn.].)

The U.S. Department of Education has advised "a child's entitlement is not to a specific disability classification or label, but to a free appropriate public

education." (*Letter to Fazio* (OSEP 1994) 21 IDELR 572, 21 LRP 2759.) This Circuit has affirmed that principle: "The district court correctly determined that IDEA does not give a student the legal right to a proper disability classification." (*Weissburg v. Lancaster School District*, (9th Cir. 2010) 591 F.3d 1255, citing 20 U.S.C. § 1412(a)(3) ("Nothing in [the IDEA] requires that children be classified by their disability so long as each child who has a disability listed in [§ 1401] and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under [the IDEA]."(Note that *Weissburg* affirms the principle above concurrent with a holding that on the facts of the case reviewed, a change in eligibility classification had a substantive impact for determining prevailing party for attorney's fees purposes.) The Seventh Circuit concluded that a special education student's eligibility category "is all beside the point," reasoning that "[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education." (*Heather S. v. State of Wisconsin*, (7th Cir. 1997) 125 F.3d 1045, 1055. See also *Pohorecki v. Anthony Wayne Local School District*, (N.D. Ohio 2009) 637 F.Supp.2d 547 ("The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself.").)

Under California law, Education Code section 56345 identifies mandatory components of an individualized education program. Identification of a student's specific eligibility category is not among them.

F. Eligibility category on a Student's IEP should not be a triable legal issue, and we respectfully ask this Court to find that it is not.

As explained above, neither the IDEA nor California law requires special education students to be identified by disability category in their IEPs. Nevertheless, parents often have an intense interest in the specific category of eligibility of their child, and, clearly, disputes on this issue have been litigated. A lack of a clear legal framework for litigating such disputes has led to some inconsistency in OAH decisions.

On one hand, there are a number of OAH cases that find that mistakes in eligibility classifications do not constitute a denial of FAPE so long as the student's services would not have changed:

> [Student] contends that District erred in determining that he is eligible to special education as speech and language impaired, and instead contends that he is eligible under the category of autistic-like behavior. Eligibility is at the heart of a school district's offer as it defines or focuses on a student's deficits and the unique needs rising from those deficits that should be addressed in the educational setting. However, a dispute regarding the category of eligibility may not result in a denial of FAPE if there would be no difference in the services offered. Where multiple deficits are involved, districts may find more than one category of eligibility to be applicable. Under the IDEA, the determination of eligibility for special education is not made by a school administrator or psychologist. Instead, the law requires that decision to be made by the student's IEP team. In addition to the legal

> criteria with specified categories of eligibility and definitional boundaries, there is also room for the team to weigh a variety of factors. (*Student v. Berkeley Unified School District*, (OAH 2008) Case No. 2007080099 at ¶66; see also *Student v. Lancaster Elementary School District*, (OAH 2008) Case No. 2007070251 at p.16, ¶8 ("Student was not denied a FAPE when an additional eligibility category of OHI was not added to his IEP. It is not Student's category or categories of eligibility that are determinative, but the actual offer of placement and services and whether or not the placement and services address the unique needs of Student that determines whether FAPE has been offered."); *San Ramon Valley Unified School District v. Student*, (OAH 2009) Case No. 2009061134 at p. 8, ¶30 ("[S]pecial education law requires that, once a student is deemed eligible under any category, all of the student's unique needs must be addressed whether they relate to that category or not. The District would have been under the same obligation to address Student's autism-related educational needs if it had found him eligible only as mentally retarded.").)

On the other hand, OAH has also held that a student was denied FAPE when he was not identified as a student with autistic-like behaviors. In *Student v. Orange Unified School District* (OAH 2011) Case No. 2010100716 (2012 WL 2478389 (C.D. Cal.), OAH found that the district failed to assess the student in all areas related to his suspected disability, a failure which "resulted in the deprivation of educational benefit for Student since he did not receive any services resulting from being eligible under the category of autistic-like behaviors. . . ." It is important to emphasize that even in this case OAH did not hold that the misidentification itself constituted the denial of FAPE; rather, it was the district's failure to identify the student's needs in that case and its subsequent failure to provide necessary behavioral services that resulted in the denial of FAPE.

Even though the decisions above can be harmonized, inconsistencies nonetheless reflect difficulties OAH faces when wrestling with the issue of eligibility classification. Eligibility classification is not a procedural issue because it is not mandated by the IDEA and it is thus unrelated to the formation or development of an IEP except for the requirement that a student first be qualified under any of the disability categories. Yet, eligibility classification is also not a substantive issue because the eligibility category itself does not dictate the services offered. A district is obligated to address an eligible Student's unique needs regardless of the eligibility category. As this issue of eligibility classification is neither procedural nor substantive, and it is leading to confusion and distraction from the appropriate focus on placement and services and costly litigation, we ask this Court not only to affirm the careful decisions of the ALJ and the District Court but also to find that eligibility classification is not a triable legal issue under the IDEA.

IV. CONCLUSION

CSBA respectfully requests that the Court affirm the judgment of the U. S. District Court upholding the decision of the Administrative Law Judge in this case.

Dated: March 13, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rule of Appellate Procedure 29. The brief's type size and type face comply with Federal Rules of Appellate Procedure 32(a)(7)(B). The brief contains 3,105 words, excluding the portions exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). Counsel relies upon the word count provided by their word-processing software in making this certification.

Dated: March 13, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2015, I electronically filed the foregoing BRIEF OF AMICUS CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF DEFENDANT-APPELLEE PASO ROBLES UNIFIED SCHOOL DISTRICT 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.

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