

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Nos. 06-1368; 06-1422

MR. I, AS PARENT AND NEXT FRIEND OF LI, A MINOR;
MRS. I, AS PARENT AND NEXT FRIEND OF LI, A MINOR,

Plaintiffs – Appellees/Cross-Appellants

v.

MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 55,

Defendant – Appellant/Cross-Appellee

On Appeal from a Judgment of the United States
District Court for the District of Maine

**BRIEF OF AMICI CURIAE AUTISM SOCIETY OF MAINE, COUNCIL
OF PARENT ADVOCATES AND ATTORNEYS, DISABILITY RIGHTS
CENTER AND NATIONAL DISABILITY RIGHTS NETWORK**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1, the non-governmental amici curiae file this corporate disclosure statement. The Autism Society of Maine (ASM), the Council of Parent Attorneys and Advocates (COPAA), the Disability Rights Center (DRC), and the National Disability Rights Network (NDRN), are all non-profit corporations. They have no parent corporations and are not publicly traded.

INTEREST OF THE AMICI CURIAE

Autism Society of Maine

The Autism Society is a non-profit corporation whose mission is to promote the general welfare of persons with autism spectrum disorders through advocacy, research, and education. The Autism Society of Maine was created to address this mission on behalf of those residents of Maine with autism spectrum disorders. The Autism Society of Maine believes that the hearing officer's decision in this case would have a substantially adverse effect on access to appropriate special education services by students with autism spectrum disorders. The Autism Society of Maine is Maine's largest group devoted specifically to advocacy on behalf of persons with autism spectrum disorders. The Autism Society of Maine therefore has a substantial interest in the resolution of this issue.

Council of Parent Attorneys and Advocates

COPAA is a nonprofit organization of attorneys, advocates and parents established to improve the quality and quantity of legal assistance for parents of children with disabilities. COPAA represents the interests of all students with disabilities. Its primary objective is to integrate the unique strengths of parents, advocates and attorneys to improve the availability and quality of legal assistance to students. COPAA's interest in this case is its deep commitment to all children

with disabilities to obtain needed special education services including children who may be progressing academically but who have a wide variety of non-academic educational needs, recognizing the totality of education is the heart of the identification of children under the Individuals with Disabilities Education Act.

Disability Rights Center

The Disability Rights Center (DRC) is Maine's federally funded Protection and Advocacy agency. Congress provides the DRC with funding and a mandate to protect and advocate for the rights of people with developmental disabilities, mental illnesses, and other disabilities. Protection and Advocacy agencies are the nation's largest providers of legal services to special education students. The DRC is the largest provider of legal services to special education students in the State of Maine. As a cross-disability organization charged by Congress to represent the rights of students with disabilities, the DRC has a substantial interest in ensuring that the needs of all special education students are met, including those with non-academic needs. Therefore, the DRC has an interest in the outcome of this issue.

National Disability Rights Network

The National Disability Rights Network ("NDRN") is the membership association of protection and advocacy ("P&A") agencies, which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are

authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2005, P&As served over 73,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

This case is of particular interest to NDRN because of our commitment to securing appropriate school services and programs for children with all types of disabilities. This case highlights the fact that to truly ensure all children have access to public education, services must be provided for the full spectrum of educational needs.

SUMMARY OF ARGUMENT

The District Court did not err in finding that L.I. is eligible for special education. The Court properly analyzed the facts using the process Congress intended for making eligibility determinations. The definitions of “special education” and “educational performance” the Court applied are an accurate reflection of the law as it is currently and as it has historically been defined.

ARGUMENT

I. Students with a wide range of disabilities, including emotional and behavioral disabilities, have been a focus of the Individuals with Disabilities Education Act (I.D.E.A.) since its inception.

The purpose of the I.D.E.A.¹ when initially enacted, and as subsequently amended, is quite simple -- to secure for children with disabilities access to school by providing the services they need to make meaningful progress. It would be impossible for Congress to prescribe a specific formula to determine exactly what each child with a disability requires. Instead, it established a process by which eligibility and other decisions are determined based on information from a variety of sources that take into account the unique needs of each individual child. In order

¹ To improve readability, the statute will be referred to throughout this brief as the Individuals with Disabilities Education Act or I.D.E.A (20 U.S.C. §1400 *et seq.*) The statute was known as the Education for All Handicapped Children Act or E.H.C.A when originally enacted and the Individuals with Disabilities Education Improvement Act or I.D.E.I.A. when amended in 2004.

to accomplish this, the statute provides a diverse selection of services to eligible children. Individual Education Planning (IEP) teams,² including parents and professionals who know these children best, are charged with the responsibility to make these critical determinations. *See* 20 USC § 1414(b)(4).

While it would be much simpler to apply an eligibility formula, that inputs data from a student's test results, Congress intentionally chose a two-step team process instead. *See* 20 USC § 1401(3) and 20 USC § 1414(b)(4). Congress understood that a process approach was essential in order to achieve the goal of preparing students with disabilities for independent, productive adult lives.³

The themes and principles that have provided the philosophical underpinnings of the I.D.E.A. since it was initially introduced are reflected its most recent reauthorization and the very recently issued final federal regulations.⁴ For some students, the services required to access an education are academic, for some functional (e.g. instruction regarding daily living skills), for other students they are behavioral or social (*see, e.g. Honig v. Doe*, 484 U.S. 305 (1988)) and for still

² Known in Maine as PETs

³ "Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom to the maximum extent possible, in order to—... (ii) be prepared to leave productive and independent adult lives to the maximum extent possible." 20 U.S.C. § 1400(c)(5)

⁴ To be codified at 34 C.F.R. § 300 *et. seq.* Available at <http://www.ed.gov/legislation/FedRegister/finrule/2006-3/081406a.html>.

others, they are squarely practical (*see, e.g., Cedar Rapids Community School Dist. v. Garret F.*, 526 U.S. 66, (1999))

For example, for a child with significant cognitive impairments, educational goals can consist of mastering activities of daily living, such as dressing or feeding – goals that most children master in their families without “formal” instruction. For children with emotional disabilities, educational goals can consist of learning to make eye contact or to interact with a group of classmates – again goals that other children may achieve with help from their parents and their peers. But that is precisely the point: some children with disabilities need to learn and relearn these skills, thus making these objectives a significant part of their IEPs. Congress’s intention to include these goals in the broad definition of “educational performance” has survived each revision of the Act.

The protections provided within the eligibility process allow this individualization to occur and guard against misidentification of students who are not properly eligible. The School District’s effort to restrict the scope of inquiry to the impact of the child’s disability on academic performance is completely contrary to Congress’s intent. If that had been a primary focus of the law, the I.D.E.A. would have looked very different when it was first conceived, and as does today.

This broader meaning of education and educational performance was recognized years ago in *Timothy W. v. Rochester, N.H., School Dist.*, 875 F.2d 954 (1st Cir. 1989) when the First Circuit addressed the question of Congress's intent with regard to education of students with disabilities. What is education to look like for students whose disability created barriers to educational success that are not traditionally academic?

The educational consultants who drafted Timothy's individualized education program recommended that [his] special education program should include goals and objectives in the areas of motor control, communication, socialization, daily living skills, and recreation. The special education and related services that have been recommended to meet Timothy W.'s needs fit well within the statutory and regulatory definitions of the Act."⁵

Congress has not deviated from these themes, and if anything has reinforced them in its most recent amendments.

A. The legislative history of the I.D.E.A. demonstrates Congress's intention that children with a wide variety of disabilities are entitled to special education services.

A brief review of the legislative history of the I.D.E.A. is necessary in order to understand Congress's intent when it was first passed. At the time the legislation was proposed, Congress was responding to a documented history of

⁵ "...The courts have also made it clear that education for the severely handicapped under the Act is to be broadly defined. In *Battle*...the court stated that under the Act, the concept of education is necessarily broad ... and "[w]here basic self help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point... and the fact that such a child "may never achieve the goals set in a traditional classroom does not undermine the fact that his brand of education (training in basic life skills) is an essential part of [the Act's] mandate." *Id.* at 970.

mistreatment of students with disabilities by the public school systems, mistreatment that often took the form of complete exclusion from school.⁶ In order to rectify this broadly based problem, Congress created broad entitlements. Passage of the Act was the culmination of Congressional attempts, begun in 1966, to address the national failure to provide disabled children "educational opportunity that has been long considered the right of every other American child"⁷ by progressively increasing federal responsibility for such education.

At regional hearings held in 1973 and 1974, the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare documented through copious testimony that handicapped children were excluded from school, denied necessary services, and subjected to educational neglect.⁸ Parents and educators discussed the widespread failure of states to provide the breadth of supportive services necessary to meet the needs of children having disabilities ranging from

⁶ "...for years handicapped children of this country have been kept in the dark, deprived of a full free public education." 121 Cong. Rec. H. 37027 (daily ed., Nov. 18, 1975) (statement of Rep. Gude).

⁷ 121 Cong. Rec. S. 20427 (daily ed., Nov. 19, 1975) (statement of Sen. Randolph)

⁸ *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. (1973-74) ("Senate Hearings")*

mild to severe.⁹ Services discussed included, but were not limited to, specialized diagnostic evaluations, speech therapy, individualized tutoring, behavior-help and self-care skills training programs.¹⁰ Obviously, these services address needs not traditionally thought of as “academic” or even “educational,” but Congress realized that for children with disabilities, these services were essential if meaningful progress was to be made.

Statistics compiled for Congress by the Office of Education at that time revealed that children of all ages and with a range of handicapping conditions were affected. For example, pupils excluded or receiving inappropriate education included: 82% of “emotionally disturbed” children; 82% of “hard-of-hearing” children; 67% of “deaf-blind” and “other multi-handicapped” children; and 88% of those classified “learning disabled.”¹¹ David Bartley, Speaker of the Massachusetts House of Representatives, testified that “[c]hildren have been denied an education because of their adjudged incorrigibility or maladaptive behavior or because many local communities have long resisted measures to

⁹ Senate Hearings at 399 (orthopedically disabled); 796 (hard of hearing); 833 (speech impaired and deaf); 805, 807 (learning disabled); 812 (cerebral palsy); 403-11 (mentally retarded); 1213 (emotionally disturbed); 394, 397, 793 (autistic).

¹⁰ Senate Hearings, at 45, 87, 790, 797, 809, 813, 833.

¹¹ *Senate Report, S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975)* reprinted in 1976 U.S. Code Cong. & Ad. News, 1425, 1429-32 [“*Senate Report No. 168*”] at 8; *House Report, H.R. Rep. No. 332, 94th Cong., 1st Sess. (1975) House Report No. 332*”]; at 11- 12.

inaugurate publicly supported curriculums for the handicapped as a misguided economic measure." ¹²

At the time of the initial hearings, Congress was aware of two prominent federal actions, *Pennsylvania Association for Retarded Children ("PARC") v. Pennsylvania*, 343 F.Supp. 279 (E.D. Pa. 1972); *Mills v. District of Columbia Board of Education*, 348 F.Supp. 866 (D.D.C. 1972). These cases, specifically addressing the needs of students with mental retardation and mental illness, established the principle that exclusion is unconstitutional.¹³ Senator Kennedy referred to the *Mills* decision in commenting on the need to protect handicapped pupils, including those with emotional disabilities, from being improperly excluded from school.¹⁴ Senator Mondale spoke to the need to perform an individualized analysis of need and not establish "across the board" standards:

Recent court decisions, however, have made it clearer than ever that we have not only a moral but also a legal obligation to provide the opportunity for every handicapped citizen to reach his or her highest educational potential... The bill would also insure that each handicapped child be treated as an individual with unique strengths and weaknesses, and *not as a member of a category of children all presumed to have the same needs.* *Senate Hearings on S.6* at 1153-54.

¹² Senate Hearings at 346.

¹³ Senate Report at 6-7.

¹⁴ Senate Hearings at 342.

The witness testimony and data collection efforts centered on very basic and varied issues of educational access over a wide array of potential skill areas. The ability of students to perform well on standardized assessments of reading and arithmetic is certainly important and is possible for many children with disabilities, but was not at the heart of the witnesses' testimony when the I.D.E.A. was first passed. Serving children's whose educational programs must incorporate functional and social/emotional goals, in addition to or instead of traditional academics, continues as a major thrust of the I.D.E.A. today.¹⁵

B. There is no legal basis for the School District's position that a disability must have a "significant" adverse impact on a student's educational performance in order for the student to be eligible for services under the I.D.E.A.

As a counterpoint to the broad array of services it provides, Congress crafted a rigorous eligibility determination process in order to reserve those services for

¹⁵ The Committee's reliance on these cases also helped provide the basis for the understanding that while the EHCA may have been created, in part, as Spending Clause legislation, it has its roots in the Equal Protection Clause.

See Smith v. Robinson, 468 U.S. 992, 1010(1984) "...Congress also recognized that in a series of "landmark court cases," the right to an equal education opportunity for handicapped children had been established. S.Rep. No. 94-168, p. 6 (1975), U.S.Code Cong. & Admin.News 1975, p. 1425. *See also id.* at 13 ("It is the intent of the Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws"), U.S.Code Cong. & Admin.News 1975, p. 1437. The EHCA was an attempt to relieve the fiscal burden placed on States and localities by their responsibility to provide education for all handicapped children. 20 U.S.C. §§ 1400(b)(8) and (9). At the same time, however, Congress made clear that EHCA is not simply a funding statute. The responsibility for providing the constitutionally required education remains on the States. S.Rep. No. 94-168, at 22.

students from within the group it intended the Act to serve. It is not the case that students with a trivial level of impairment can be found eligible through this process.

The I.D.E.A. eligibility analysis consists of two parts. First, whether or not the student's impairment is such that he or she meets the criteria for one of the thirteen eligibility categories. Second, whether or not he or she requires special education and related services "by reason thereof." *See* 20 USC § 1414(b)(4).¹⁶ The phrase "adverse effect" does not appear in the statute and only appears in the regulations in certain of the thirteen categories.¹⁷ Therefore, if Congress had intended to use "adverse effect" as an essential part of the eligibility determination process, it would have had to include it in the statute within the definition of "child with a disability" so that it applied equally to all potentially eligible students. *See* 20 U.S.C. § 1401(3)(A). As recently as the 2004 amendments, Congress did not

¹⁶ The School District implies that "adverse effect" is a significant criteria in the eligibility determination, rendering its definition equally significant. (Brief of Appellant at 23) Actually, adverse effect plays a minor role if at all in this determination, and the actual analysis is generally decided by the presence or absence of the need for special education.

¹⁷ For example, the definition of specific learning disability describes a "a disorder that may manifest itself in an imperfect ability..." (34 C.F.R. §300.8(c)(10).

In the "Analysis of Comments and Changes" section of the final regulations (page 32) the United States Department of Education's Office of Special Education and Rehabilitative Services (OSEP) specifically rejected a suggestion that it define "adverse effect" in one of the eligibility categories. The clarification was not necessary, OSEP believed, because the significant aspects of the eligibility analysis are: 1) whether the student's impairment qualifies him or her for inclusion in one of the eligibility categories (e.g. Deafness) and 2) whether the child needs special education and related services because of that impairment -- not the severity or lack of an "adverse effect." It is not necessary for the child to fail or be retained in order to qualify.

elect to make that change. The analysis it chose is more nuanced, individualized and disability specific than this.

During the eligibility determination process, information is gathered from a variety of sources, the IEP team meets and analyzes data and reports by team members about the student's performance. If additional evaluative information is required, the evaluations take place at this step in the process. The IEP team then determines whether or not the student meets the criteria for one or more of the categories of disabilities, some of which include a durational requirement. If the student meets that requirement, the IEP team then decides whether or not the student's disability results in a "need for special education services." *See* 20 USC § 1401(3)(A)(ii)

The statute does not include any general requirement that a disability be "significant" in order for a student to be found eligible. To impose this requirement is to judicially rewrite the statute. However, the protections inherent in the process outlined above prevent students with very mild disabilities from being found eligible, because the categorical requirements that that define each disability sort those out. For example: "emotional disturbance" means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree..." so only children with quite significant disabilities are actually eligible. *See* 34 C.F.R. 300.8(c)(4)(i).

If the impact of the disability on the student's educational performance is relatively minor when compared with other eligible students, relatively little in the way of special education and related services will be needed. There is no requirement that the services an eligible student requires to access to an education be extensive or costly.¹⁸

If this Court were to adopt the School District's proposed standard that a student must demonstrate a "significant negative impairment" in order to be found eligible, students would often have to fail and perhaps fail again in order to get the help they need. The I.D.E.A. has never required that a student must fail a subject or fail to advance from grade to grade, in order to establish eligibility. This position is maintained and reinforced in I.D.E.A. 2004 and its implementing regulations.¹⁹

Another indication that children are not required to fail in order to be eligible for services is demonstrated by the fact that Congress re-wrote the statute in 2004 to remove the requirement that the "IQ- achievement discrepancy test" for specific learning disability be used in all cases. Instead Congress allowed the use

¹⁸ From the coldest, purely economic standpoint, a minimal expenditure for a student in his or her early years is often a very profitable investment in terms of that student's later independence.

¹⁹ "... Children advancing from grade to grade. (1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade." 34 C.F.R 300.301(c)

of a “response to intervention” approach that provides services first to see whether improved performance results. *See*, 20 U.S.C. 1414(b)(6). If this is not effective at improving performance, the student may be found eligible for special education. Similarly, Congress allows IDEA funds to be used to provide services to students who are not yet eligible, in the hopes that they will be successful. *See* 20 U.S.C. §1413(f).

II. The Impact That A Requirement of “Significant Negative Impact” Would Have On Students With Disabilities

It is enough that the School District’s proposed threshold would harm students who manage to do well academically despite other impairments. This is particularly true for students with disabilities on the Autism Spectrum. However, it would also impact many other students who currently depend on special education to get by in school and would require those who manage to obtain passing grades because they are intellectually gifted or exceptionally hard working to fail quite substantially before they could get help. *Corchado v. Board of Education Rochester City*, 86 F.Supp. 2d 168 (W.D. NY, 2000) (student with IQ in the “very superior range,” as well as learning and other disabilities, achieving at average level qualifies for services under IDEA despite the fact that he was receiving “some educational benefit.”)

It is both more logical and consistent with the intent of the Act to encourage students with disabilities to develop methods to work successfully with these disabilities, as will be required when they enter the workplace, than it does to make them demonstrate that these impairments dictate their success.²⁰

III. The School District's proposed "Educational Performance" definition is narrower than the federal law allows.

Like the federal law, Maine's definition of educational performance includes both academic and non-academic elements.²¹ The School District's discussion of the Maine's "Learning Results" bears on only one of five aspects of this definition. Educational performance also includes non-academic areas and extra curricular activities.²² In keeping with the original legislative intent of the I.D.E.A., if a student's impairment has an adverse effect on his or her educational performance with regard to daily life activities and, as a result, he or she requires specialized

²⁰ "...The purposes of this chapter are... to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living..." 20 U.S.C. 1400(d)(1)(A)

²¹ "The term "educational performance" includes academic areas (reading, math, communication, etc.), non-academic areas (daily life activities, mobility, etc.), extracurricular activities, progress in meeting goals established for the general curriculum, and performance on State-wide and local assessments. M.S.E.R. §2.7

²² Extracurricular and non-academic activities are covered by the federal regulations. In fact, 34 CFR 300.107(a) was enhanced in the revised regulations to provide additional guidance about how students with disabilities are to be included in non-academic and extra curricular activities.