### No. 21-887

### InThe

MIGUEL LUNA PEREZ,

Petitioner,

V

STURGIS PUBLIC SCHOOLS, ET AL.

Respondents.

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#### **INTEREST OF AMICI CURIAE**<sup>1</sup>

The National School Boards Association (NSBA), founded in 1940, is a non-profit organization representing state associations of school boards and the Board of Education of the U.S. Virgin Islands. NSBA advocates for equity and excellence in public education through school board leadership. Public schools serve millions of public school students, regardless of their disability. NSBA regularly represents its members' interests before federal and state courts, and has participated as amicus curiae in numerous cases addressing the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq.

The Michigan Association of School Boards (MASB) is a voluntary, nonprofit association of local and intermediate boards of education throughout the State of Michigan, whose membership consists of boards of education of over 600 local school boards and intermediate school boards in the state. The mission of the Michigan Association of School Boards is to provide high-quality educational leadership services for all Michigan boards of education, and to advocate for an equitable and exceptional public education for all students.

<sup>&</sup>lt;sup>1</sup> Letters of consent are on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *amici curiae*, its members or its counsel make a monetary contribution to the brief's preparation or submission.

### INTRODUCTION AND SUMMARY OF ARGUMENT

IDEA's longstanding exhaustion requirement must be interpreted in the context of its collaborative framework. Congress requires exhaustion in disputes about Free Appropriate Public Education (FAPE) for students with disabilities to encourage use of IDEA's reticulated procedures over litigation in federal courts, an expensive and contentious forum by comparison. Allowing circumvention of IDEA's procedures to provide direct access to federal courts forfeits the benefits of the administrative scheme Congress designed for resolving disputes about the appropriate programs and services of students with disabilities.

#### **ARGUMENT**

## I. THE STATUTE'S PLAIN TEXT REQUIRES COLLABORATION THROUGH AND INCLUDING EXHAUSTION.

The cornerstone of the IDEA is collaboration between families and schools to ensure that every eligible student with a disability receives a FAPE. IDEA's longstanding exhaustion requirement is an essential element in maintaining this approach. Mandatory exhaustion of the IDEA's administrative remedies, in the ordinary course, is less expensive and less contentious than litigation, and offers a more informed and efficient approach to remedying special education disputes comprehensively. If parents can

initiate litigation immediately, the benefits of the administrative remedies Congress designed to ensure quick resolution of educational disputes concerning students with disabilities will be significantly undermined, delaying resolution of students' educational programs.

The IDEA's emphasis on collaboration between schools and parents is apparent in the statute's plain language. See, e.g., 20 U.S.C. § 1414(b)(2)(A) ("In conducting the evaluation [to determine if the child is a child with a disability], the local educational agency shall . . . use a variety of assessment tools and strategies to gather relevant functional. developmental, and academic information, including information provided by the parent, that may assist in determining [whether the child has a disability and the content of the child's Individualized Education Program ("IEP").]"); § 1414(b)(4)(A) ("[T]he determination of whether the child is a child with a disability . . . shall be made by a team of qualified professionals and the parent of the child . . . . "); § 1414(d)(1)(B) (The IEP Team consists of the parents of the child with a disability, at least one regular education teacher, at least one special education teacher or provider, and a representative of the local education agency.); § 1414(d)(3)(A)(ii) ("In developing each child's IEP, the IEP Team . . . shall consider . . . the concerns of the parents for enhancing the education of their child"); § 1415(e) (providing for mediation of disputes between parents and the local education agency to resolve due process complaints); §

1415(f)(3)(E)(ii) (providing that a procedural violation may rise to a failure to provide a free appropriate misstep public education if the procedural "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child[.]"); § 1415(f)(1)(B)(i) (providing that before a due process hearing can be held, the local education agency "shall convene a meeting with the parents and the relevant member or members of the IEP Team . . . where the parents of the child discuss their complaint . . . and the local education agency is provided the opportunity to resolve the complaint[.]").

The statute's plain language presumes and requires collaboration through and including exhaustion of the IDEA dispute resolution process. Such collaboration allows the parents, student, and school to engage in an interactive and constructive process, creating a comprehensive and integrated education program that is tailored to meet the child's unique needs while preserving the relationships essential for effective delivery of special education and related services.

Given the emotional intensity that accompanies both educating and advocating for students with special needs, disputes naturally arise. Congress designed and modified IDEA to require these disputes to be exhausted through the statute's carefully designed administrative procedures before litigation becomes an option. IDEA's exhaustion requirement ensures that: 1) an IEP Team, including the parents,

has met to discuss the educational needs of the child. to consider available services and placements that might meet those needs, and to develop individualized educational goals for the child and benchmarks to assess attainment of those goals; 2) the parties have engaged in a resolution session or mediation to resolve any disagreements regarding the education of a student with a disability prior to the commencement of a due process hearing; and 3) in the event a due process hearing is necessary, an impartial state official trained in special education matters has reviewed, and ruled on, those disagreements. See 20 U.S.C. §§ 1414(d)(1), 1415(f)-(g). By requiring exhaustion before proceeding to litigation, Congress created a process that ensures efficient dispute resolution and the ability for parents and schools to continue their partnership with the least disruption 46661 (2006) ("Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal dispute resolution process."); 71 Fed. Reg. 46701 (2006) ("[T]he resolution process offers a valuable chance to resolve disputes before expending what can be considerable time and money in due process hearings."). That process, which must be completed before an administrative hearing occurs under the IDEA's accelerated timelines, is described in greater detail below.

## 1. The Mandatory Resolution Meeting or Mediation Encourages Collaborative Solutions to Disputes.

To further the goal of quickly and cooperatively resolving educational disputes, the IDEA mandates that the parties participate in a resolution session after the due process complaint is filed. 20 U.S.C. §1415(f)(1)(B); 34 C.F.R. § 300.510(a). In fact, this meeting can be avoided only if both parties agree in writing to waive it, or they pursue mediation instead, and must be convened within 15 days of the school district (local educational agency, or "LEA") receiving notice of the complaint. *Id.* To ensure that the meeting is collaborative and not adversarial, a school's attorney may not attend unless the parent brings an attorney. 20 U.S.C. §1415(f)(1)(B)(i)(III); 34 C.F.R. § 300.510(a)(1)(ii).

The resolution meeting is an informal process at which the participants discuss the parents' concerns

and brainstorm ways to address those concerns within the parameters of the IDEA. If the parents and school cannot come to an agreement, the parents may continue to a hearing, where a hearing officer trained in the requirements of the IDEA will build an administrative record and issue a ruling.

The IDEA places such great emphasis on this resolution meeting that the regulations authorize a school district to request that the hearing officer dismiss the complaint in its entirety if the parent declines to participate. 34 C.F.R. § 300.510(b)(4). Recognizing IDEA's emphasis on resolving these matters short of a hearing, hearing officers have exercised their authority to dismiss complaints when parties do not act in good faith to resolve their issues. See, e.g. Marinette Sch Dist., 47 I.D.E.L.R. (LRP) 143 (S.E.A. WI 2007) (dismissing a party's due process complaint where the party refused to participate in a resolution meeting unless the other signed a confidentiality agreement); Beaverton -12

incurred after rejecting a settlement offer if the offer was more favorable to the parent than the result of the hearing. 34 C.F.R. § 300.517(c)(2).

programming, services, and placement of the student. Conversely, litigation can extend across multiple school years. Notably, the school retains its duty to provide special education and related services to the student at issue in litigation, yet litigation naturally interferes with the collaborative environment necessary to meet the student's needs.

# 3. Exhaustion Permits Local Education Agencies to Remedy Problems Within the Collaborative Framework.

The IDEA's administrative scheme is designed, in part, to allow local and state education agencies to discover and remedy problems in the administration of the complex requirements of special education programs without the cost of frequent litigation. <sup>2</sup> Students served under the IDEA have individualized education programs (IEPs), which must include at least eight elements describing the child's current functioning, goals, and more. <sup>3</sup> The child's program

<sup>&</sup>lt;sup>2</sup> See Mary C. Stablein, An IDEA Gone Out of Control: Covington v. Knox County School Board, 45 How. L.J. 643 (2002).

<sup>&</sup>lt;sup>3</sup> A student's IEP must contain:

must be provided in the least restrictive environment (LRE). 20 U.S.C. §1412(a)(5). To meet the LRE

a statement of the child's present levels of academic achievement and functional performance;

a statement of measurable annual goals, including academic and functional goals;

a description of how the child's progress toward meeting the annual goals will be measured and when periodic

litigation regularly, existing problems will inevitably be exacerbated, and students will suffer.

B. Exhaustion Promotes Judicial Efficiency Through the Creation of a Thorough Administrative Record.

The IDEA's hearing procedures result in the creation of an administrative record, thereby promoting judicial efficiency in cases that do result in litigation. The purpose of ex

A well-developed administrative record assists the court by providing a comprehensive picture of the child's assessed needs, the efforts of the school to meet those needs, the basis for the parents' concerns, the reasons explaining the denial of parental requests, the resources available to provide needed services, and other factors that may have influenced the hearing officer's decision. That assistance is invaluable to a court of general jurisdiction.<sup>5</sup>

## C. The Civil Litigation Process Undermines the IDEA's Collaborative Framework.

In 1984, Chief Justice Warren Berger lamented, "Our [legal] system has become too costly, too painful, too destructive, too inefficient for a truly civilized people." Though there has been an undeniable shift

<sup>&</sup>lt;sup>5</sup> Federal district courts hearing IDEA cases frequently cite extensively to the administrative record. *See, e.g., Doe v. Cape Elizabeth Sch. Dept.*, 382 F.Supp.3d 83 (D. Me. 2019); *Regional Sch. Unit No. 51 v. Doe*, 920 F.Supp.2d 168 (D. Me. 2012); *Elida Local Sch. Dist. Bd. of Educ. v. Erickson*, 252 F.Supp.2d 476 (N.D. Ohio 2003).

<sup>&</sup>lt;sup>6</sup> Arthur Perlstein, *Issues in Pretrial Litigation:* Forward: Pretrial Litigation,

away from trials in recent decades, that shift has not reduced the adversarial, lengthy, and costly nature of litigation. The "pain" of litigation now comes primarily in the pretrial phase of discovery disputes and dispositive motions. <sup>7</sup> Civil litigation can be an expensive endeavor that drags litigants through costly and extensive pre-trial discovery and numerous procedural hearings, which increases costs for both parties, before any consideration of the case's merits begins.

Yet during the pendency of active litigation between a family and a school system, the latter retains its duty to provide special education and related services to the student at its center. While the parties and their attorneys exchange discovery requests, appear for scheduling conferences, argue motions, and bill their hours, the child whose education is at issue often is receiving services from the LEA. The parents and school staff must continue to interact and work through daily challenges. Litigation naturally interferes with the collaborative

quoting Chief Justice Warren Burger,

environment necessary to meet the student's needs. Its adversarial design directly conflicts with the IDEA's collaborative process.

### 1. Discovery Under Rule 26 Impedes the IDEA's Collaborative Scheme.

Discovery rules that govern civil litigation create a "hide the ball" mentality that defies Congress's intent that parents and local education agencies share information about the needs of a student with a disability, the design of special education, and the availability of resources. See Fed. R. Civ. P. 26. For example, the IDEA promotes the sharing of medical and psychological documentation

The IDEA's administrative process, on the other hand, limits discovery to an exchange of documents and witness lists days before the hearing, eliminating the need for months-long discovery. The IDEA simply requires parties to exchange all the evaluations and recommendations upon which they intend to rely at hearing, 34 C.F.R. § 300.512(b); each party then has the right to prohibit the introduction of

necessary or appropriate for a child on the one hand, and more expensive and traumatic litigation on the other, often choose the former to preserve staff and resources to serve the child and all students.

The Court should not lose sight of the fact that litigation remains available to the parties in the rare instances in which the IDEA administrative process cannot remedy the issues pr

attorney's fees. Perez v. Sturgis Public School

assessment of disabling conditions in children.

20 U.S.C. § 1401(26).

The breadth of related services is further defined by regulation. For example, psychological services provided to IDEA-eligible students go beyond typical curriculum-related matters and expressly extend to "[p]lanning and managing a program of psychological services, including psychological counseling for children and parents," and "[a]ssisting in developing positive behavioral intervention strategies." 34 C.F.R. § 300.34(c)(10)(v), (vi). Related services extend to training and counseling parents regarding child development and helping them to acquire "the necessary skills that will allow them to support implementation of their child's IEP . . . . . 34 C.F.R. § 300.34(c)(8)(i). The availability of extensive related services reveals that the IDEA's remedies are not exhausted by provision of prospective educational accommodations, especially where psychological damage or other mental health needs are alleged.

Extensive statutory rights drive the need for wide-ranging relief to enforce them. The IDEA's language in that regard is unconstrained, permitting the award of "such relief as the court determines is appropriate" 20 U.S.C. § 1415(i)(2)(C)(iii) when a hearing officer's decision is appealed to a district court. The meaning of "appropriate" has since been expansively defined by the courts and in the

Department of Education regulations implementing the IDEA.

Compensatory educational services are the primary form of relief typically granted in IDEA FAPE cases. Ferren C. v. School Dist. of Philadelphia, 612 F.3d 712, 717 (10th Cir. 2010). Those services "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA." Id. at 718, quoting Reid v. District of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005).

Such relief can take either a compensatory or equitable form. As to the former, awards of the prospective costs of private placements are available under the IDEA. "Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs." Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456 (2nd Cir. 2015) (quoting Miener v. Missouri, 800 F.2d 749, 753 (8th Cir. 1986)). Accordingly, in lieu of awards of public educational services, a court or IDEA hearing officer may order a school district to pay for services from a private school or educational provider. Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1285, 1290 (11th Cir. 2008), cert. denied 562 U.S. 937 (2010). Relief has also been provided by ordering funds for future education to be placed in escrow account. Doe v. East Lyme Bd. of Educ., 962 F.3d 649, 653-54 (2nd Cir. 2020).

Reimbursement of the costs of unilateral, appropriate parental private educational placements

of students is also a well-established IDEA remedy. The IDEA regulations specifically provide for it:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that and that the enrollment private placement is appropriate. A parental may be found to placement appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

34 C.F.R. § 300.148(c). See also Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985) (recognizing a pre-regulation IDEA-based right to tuition reimbursement for certain unilateral parental private educational placements); Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) (tuition reimbursement available to unilateral private

placements reasonably calculated to provide educational benefit where the school does not meet state standards).

Related service awards can be similarly compensatory. Where transportation is found to be a related service, parents who drive their students to school have been awarded ongoing payment for that service at market rate. *Hurry v. Jones*, 734 F.2d 879, 883-84 (1st Cir. 1984). Payment or reimbursement for various therapeutic services is also routinely awarded. *See, e.g., T.Y. v. New York City Dep't of Educ.*, 213 F.Supp.3d 446, 464 (E.D.N.Y. 2016); *Cobb Co. Sch. Dist. v. A.V.*, 961 F.Supp.2d 1252, 1262 (N.D. Ga. 2013); *Dep't of Educ. v. M.F.*, 840 F.Supp.2d 1214, 1224 (D. Haw. 2011).

administrative process is ordinarily resolved by settlement. Little is left uncompensated under the IDEA's remedial framework.

In all but the most extraordinary IDEA cases, expedited access to the courts before full exhaustion of administrative remedies is simply unnecessary. In Charlie F. v. Board of Education, 98 F.3d 989 (7th Cir. 1996), the Seventh Circuit noted that monetary damages in IDEA-related judicial actions are often redundant to those available through the administrative process. A child's parent could seek monetary damages

at least in part to pay for services (such as counseling) that will assist his recovery of self-esteem and promote his progress in school. Damages could be measured by the cost of these services. Yet the school district may be able (indeed, may be obliged) to provide these services in kind under the IDEA. If it turns out that the school is *not* obliged to provide such services, that may be because Charlie's parents have exaggerated what happened in fourth grade, the consequences of those events, or both." *Id.* at 992.

The IDEA administrative process ordinarily fully resolves the educationally related injuries at issue, does so in a manner that maintains relationships

critical to the educational process, and is rapid enough to mitigate the emotional distress attendant to educational deficits and their resolution. This efficiency is borne out by recent statistics concerning the filing and resolution of IDEA due process hearing complaints. In the U.S. and outlying areas, from the 2010-2011 to the 2020-2021 school years, 23,567 due process complaints were filed. Of those, only 1,293 proceeded to full adjudication — even under the IDEA's expedited timelines.8

\* \* \*

Congress designed the IDEA administrative process to be collaborative, effective, efficient, and aimed at preserving relationships where possible. Routinely permitting judicial litigation to be initiated before the administrative process is exhausted will unnecessarily inject a lengthy, adversarial proceeding into due process complaints. The cost of settling concurrent IDEA administrative claims and federal claims will increase. It will force every school district to insist on a waiver of claims under other federal statutes. Under such circumstances, it is easy to imagine IDEA's administrative procedures being used primarily to support or avoid lengthy civil litigation, to the detriment of both the child's educational

<sup>&</sup>lt;sup>8</sup> CADRE, IDEA Dispute Resolution Data Summary for U.S. and Outlying Areas: 2010-2011 to 2020-2021, https://www.cadreworks.org/resources/cadrematerials/2020-21-dr-data-summary-national.

interests and the relationships between schools and families. Under most circumstances, the process that results will be longer, and less likely to result in a quick and efficient determination of the child's appropriate education program.

#### CONCLUSION

For the foregoing reasons, the judgments of the lower courts should be affirmed.

Respectfully submitted.

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December 15, 2022