

**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*

¹² Senate Hearings at 346.

¹³ Senate Report at 6-7.

¹⁴ Senate Hearings at 342.

member of a category of children all presumed to have the same needs.
Senate Hearings on S.6 at 1153-54.

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.

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.

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 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

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.

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 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

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)

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 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

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.

with regard to daily life activities and, as a result, he or she requires specialized instruction in this area, the standard has been met regardless of whether or not those items are included in the Learning Results.

Contrary to the school district's assertions, there is no requirement in the federal law that the areas of educational performance be areas assessed by the district, or that the student demonstrate an impairment in more than one area of educational performance. To apply these standards to the eligibility analysis would limit it beyond what is allowed by the I.D.E.A. and its implementing regulations.

In addition, the recent amendments to the I.D.E.A. forcefully reiterate the importance of transition services—those services necessary to help a student prepare successfully for work, post secondary education, and independent living, demonstrating that performance in non-academic areas is as important as that in traditional academic ones. *Yankton School District v. Schramm*, 93 F.3d 1369, FN 6 (8th Cir.1996) “...Under the statute, success in high school due in part to the special education services she receives, should not prevent her from receiving whatever transition services she may need to be equally successful in college.” Students may remain eligible due exclusively to their need for these types of services when these services qualify as “special education.” The narrow

description of educational performance the school district presents omits this important issue.²³

IV. *Rowley* is not applicable to the eligibility determination process.

The School District inappropriately attempts to insert the educational benefit analysis from *Bd. of Educ. v. Rowley*, 458 U.S.176 (1983) into this discussion of eligibility. As has been confirmed by courts, *Rowley* is a case about the level of service required for students who already eligible and who have an IEP, not those requesting eligibility. The *Rowley* educational benefit standard in some circuits is quite circumscribed, and this fact would be very useful to the school district in bolstering support for its desired “significant negative impact’ standard. However, courts have held firm on the distinction between: 1) whether a student requires services when he or she has not previously received them, and 2) whether a student already receiving services is receiving enough of them. These are very different questions.) *Mary P. v Illinois State Board of Ed*, 919 F Supp., 73, 1180-81 (N.D. Ill., 1996)

²³ The term "transition services" means a coordinated set of activities for a child with a disability ...that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation... is based on the individual child's needs, taking into account the child's strengths, preferences, and interests...includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. 20 U.S.C. §1401(34)

V. The determination of a student’s “need for special education” requires an individualized fact-based analysis.

What is included in the definition of “special education” and when a student “needs special education” are matters that have been repeatedly addressed by Congress, OSEP and the courts. The services that L.I. requires (tutoring, social/pragmatics training and counseling) qualify as special education in certain circumstances.

A. Regulatory Intent

OSEP has clarified that the services that a student receives while on tutoring, when he or she cannot return to school for behavioral reasons, must meet the same quality standard as those provided in school. (“Tutoring must be provided by a highly qualified special education teacher, in a manner consistent with 34 C.F.R. 300.156 and 300.18.”) As this service consists of instruction by a special education teacher in a different setting than the regular classroom, it qualifies as “specialized instruction” and is therefore special education. A student who is otherwise qualified²⁴ will qualify as “needing special education” if tutoring is required in order for that student to participate in his or her education.²⁵

²⁴ For example, meets the requirements of the disability specific categories and age requirements.

²⁵ “.. Specialized instruction is “... adapting, as appropriate to the needs of an eligible child under this part the content, methodology or delivery of instruction—(i) to address the unique needs of the child 34 CFR 300.39(a)(3) that result from the child’s disability ; and (ii) to ensure access of the child to the general education curriculum, so that the child can meet the educational

B. Judicial Interpretation

A variety of interventions, focused on skills other than academics, have been found by the courts to constitute special education. For example, courts have found that counseling and social skills training may be considered special education when the student's disabilities require that it be provided outside of the regular education setting. *See e.g., Bd. of Educ. of Montgomery County v. S.G.*, 2006 WL 544529 (D. Md. Mar. 6, 2006) (student whose mental health disability, required unaltered academic instruction be provided outside of the regular education setting, in order for her to obtain the counseling necessary for her to attend school “needs special education;” the fact that the student can access education in a therapeutic setting is irrelevant.) *See also Los Gatos –Saratoga Joint Union High School District*, 41 IDELR 227 (SEA CA 2004)(student with depression who required counseling outside the school setting in order to attend school “needs special education” because regular education counseling was provided only on campus”); and 34 CFR 300.39 (b)(3) 34 CFR 300.39 (b)(3) *Venus I.S.D. v. Daniel S.*, 2002 WL 550455 (N.D. Tex. 2002) (Unreported) (academically gifted student who required behavioral supports and social skills training in order to allow him to remain in class “needs special education” despite the fact that he was passing.)

standards within the jurisdiction of the public agency that apply to all children.” 34 CFR 300.39 (b)(3)

Similarly, a student with mental health needs who did well academically in a one to one tutoring setting, but not in the regular classroom qualifies for special education because an alternate setting is required in order for her to make progress. *Dighton-Rehoboth Reg. Sch. Dis.*, 45 IDELR 146, 154 (SEA Maine 2006) (“The ability to attend class on a daily basis, to behave appropriately, to participate in group learning and class discussions, and to interact with teachers and peers both in and outside of class are all skills that are fundamental to the educational experience, the purpose of which, for students with disabilities, is to “develop students individual educational potential... as well as to equip students with disabilities with the knowledge and skills to ‘be prepared to lead productive and independent adult lives, to the maximum extent possible,’ 20 U.S.C §682(c)(5)(A).”)

As with other aspects of this comprehensive statute, it would be much simpler to place certain services in the category of “related services” and others in “special education.” But the I.D.E.A. requires that sometimes simplicity must be sacrificed for the sake of individualization.

VI. Congress has consistently been concerned that students with disabilities are accurately identified and has acted accordingly.

A. Legislative Intent

During the most recent re-authorization, Congress was concerned not that too many students were becoming eligible for special education, but that the wrong

students were. The discussion about misidentification of students with disabilities was focused on a special concern about students from certain subgroups (race, ethnicity)²⁶ and students whose learning problems were due to the failure of schools to provide quality instruction.²⁷

In response, it was determined that at least four safeguards would be included within the statute to make sure that the students who received special education services were the students that Congress intended to be covered by the Act.²⁸ One solution adopted was the inclusion of “early intervening services.” As

²⁶ “Minority children are much more likely to be placed in the emotional disturbance category because of behavioral characteristics associated with the cultural context in which a child is raised. A major factor is the role of teacher referral. In some studies, teachers refer more than 80 percent of children who are placed in a high-incidence category. To the extent that teachers are not prepared to manage behavior or instruct those with learning characteristics that make them “at risk” in general education, minority children will be more likely to be referred.”

A New Era: Revitalizing Special Education for Children and Their Families, Report of the President’s Commission on Excellence in Special Education (2002) at Section 2. [“President’s Commission on Excellence in Special Education Report”] This Commission was established pursuant to Executive Order Executive Order 13227.

Available at <http://www.ed.gov/inits/commissionsboards/whspeiaeducation/reports/info.html>.

²⁷ “To prevent the wrong children from being served, the Commission recommends that current regulations be modified so that the student’s response to scientifically based instruction is part of the criteria for diagnosing the existence of SLD.” President’s Commission on Excellence in Special Education Report at Section 2.

²⁸ A cap on the number of students who could be found eligible, a potential solution that was included in the 1970’s and purposely removed from the statute later on, was considered by the House during the 2004 reauthorization and once again purposefully rejected with the understanding that it would not resolve the problem of mis-identification of students.

“I am pleased that the conference report removed a cap on the number of students that schools may identify as having a disability. The Federal Government should fulfill its obligation to provide for the education of every disabled child, not according to some arbitrary ceiling.”(Conference Report, House, Rep. Holt, H10019, November 19,2004)

mentioned above, the I.D.E.A. now allows local school districts to use a certain percentage of special education funds to provide academic and behavioral supports to students who are not or not yet I.D.E.A. eligible in an attempt to prevent them from requiring special education due to inadequate instruction or discrimination. This is in keeping with its intention that a student need not fail in order to receive the support services he or she needs and that students who need extra help are not unnecessarily identified for special education. See 20 U.S.C. §1413(f).

A second solution adopted in I.D.E.A. was the method by which students were identified as learning disabled. For many years, the IQ- achievement discrepancy model had been the primary method used to determine eligibility for children thought to have specific learning disabilities. When Congress amended the statute in 2004 to reduce dependence on this model, the goal was to replace it (as feasible) with one that analyzes whether or not the student responds to a series of high quality academic interventions before being found eligible for special education. This method was deemed more reliable than the IQ- achievement discrepancy model at discriminating between students who truly had learning disabilities and those who suffered only from poor instruction. *See*, 20 U.S.C. 1414(b)(6).

Third, the Committee specifically revised the evaluation procedures to ensure that foreign-born adopted children without disabilities are not unnecessarily

found eligible for special education.²⁹ Fourth, the reauthorized statute contains a number of changes intended to improve teacher training. This was added because one of the causes of misidentification was believed to be some teachers' inability to meet the needs of students with disabilities who require some additional support, but who do not actually require special education. As a result, these students are referred to special education inappropriately in order to obtain the support they cannot (but should) receive through general education. Conference Report, Senate, Sen. Reed, S 11655, November 19, 2004.

A concrete, numerical cap, or a standard that requires a student's ability to drop to a specific, very low level before obtaining services is contrary to the principles underlying the I.D.E.A.'s thirty year history and its most recent reauthorization. Instead, Congress thoughtfully considered other methods to ensure that students are accurately identified, selecting an approach that focused on more precise data collection and improved educational quality.

B. Relevant Data

²⁹ "The committee has revised the "Additional Requirements" section in 614(b)(3) *to provide local educational agencies more clarity in the procedures they should use in selecting and administering tests and other evaluations to determine a child's eligibility under IDEA*. In particular, tests and evaluations should be provided and administered, to the extent practicable, in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally. (S.Rep. 108-185, 108th Conf. 1st Sess. 2003, Sen. Gregg, November 3, 2003) (emphasis supplied)

Current identification rates remain below the 1975 cap of 12%, demonstrating that the eligibility determination process Congress created is actually working. According to the most recent child count data of I.D.E.A. eligible students ages 6-21 (2004), the population most commonly thought of as “special education,” the national average is 9.16%.³⁰ Maine’s average percentage is 11.91%. There were 4 other states at that time with a rate equal to or higher than Maine’s³¹ and others near this level.³² So, in 2004, both Maine and the national average fell below the 1975 threshold of 12%. According to the data available, Maine is not out of step with the rest of the nation in its eligibility rates currently, nor with the rates discussed in 1975. However, there is no data regarding the impact that the District Court’s decision has had or will have on eligibility rates in Maine, providing no evidence on which to support any changes to the eligibility standard. The decision was issued less than a year ago so data has not yet been collected, and a number of factors could impact eligibility rates beyond the

³⁰ From the 26th Annual Report to Congress (2004), Table 1-12, as published at https://www.ideadata.org/arc_toc6.asp#partbCC

³¹ District of Columbia (13.96%), Rhode Island (12.58%), West Virginia(12.45%), New Jersey (11.91%)

³² Massachusetts, Oklahoma, Indiana, Missouri, Nebraska, New Hampshire and South Carolina.

eligibility standard itself.³³ As discussed above, the decision is unlikely to have an impact on eligibility rates because it does not depart from current law. As “adverse effect” was not defined previously in Maine and it is currently defined only in one other state (Vermont), IEP teams in Maine were not working from guidance that set the bar above or below that set by the District Court prior its decision. Without this data, it is impossible to predict that the District Court’s decision will result in higher identification rates.

Policy changes that could impact eligibility rates should not occur until there is data supporting such change. If the allowable rate is set too low or too concretely, children who legitimately require services to benefit from their education may be harmed. Therefore, any rules established in this regard must be developed with great care and careful consideration.

VII. Conclusion

The school district’s proposed eligibility threshold and new limits on the “need for special education” and “educational performance,” as well as its elevation of “adverse effect” to a level not intended by Congress, will limit access to special education services to many students who truly require them to succeed. It will subvert the process carefully crafted by Congress by inserting an arbitrary

³³ For example, demographic shifts within and outside of the state, changes in funding formulae that could increase or decrease a local district’s incentive to serve students prior to referring for special education, availability of and access to health care, among others.

limit. When we wait for these students to fail before they can be found eligible, we risk losing the many skills and strengths they have to offer. As Congress has demonstrated, there are other, far more precise and proactive ways to ensure that special education funds are reserved for the students for whom they were intended.

For the reasons set forth in this brief, as well as those included in the brief of Appellees/Cross –Appellants Mr. and Mrs. I, *Amici* respectfully request that this Court affirm the decision of the District Court with regard to those issues on appeal by the Appellant School District. *Amici* further request, respectfully, that this Court reverse the decision of the District Court regarding the issue of reimbursement of costs for L.I.’s placement at the Community School, on Cross Appeal by Appellee/Cross-Appellant.

DATED at Augusta, Maine this 16th day of August, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of Appellees/Cross-Appellants Mr. And Mrs. I, one paper copy and one electronic copy on disk, were served upon the counsel of record by first-class mail, postage prepaid, addressed as follows:

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. 32 (A)(7)

This brief complies with the type-volume limitation of Fed. R. App. 32 (a)(7)(B) because it contains 6137 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word, Times New Roman, 14 font.

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