

In the United States Court of Appeals for the Ninth Circuit

BUTTE SCHOOL DISTRICT NO. 1,
Plaintiff-Appellee,

v.

C.S. and STUART MCCARVEL, in his capacity as originator of
the C.S. due process complaint,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

**BRIEF FOR AMICI CURIAE THE NATIONAL CENTER FOR
LEARNING DISABILITIES, THE DIVISION FOR LEARNING
DISABILITIES, THE ADVOCACY INSTITUTE, THE COUNCIL
FOR LEARNING DISABILITIES, AND THE LEARNING RIGHTS
LAW CENTER IN SUPPORT OF APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, this disclosure is made on behalf of Amici Curiae the National Center for Learning Disabilities, the Division for Learning Disabilities, the Advocacy Institute, the Council for Learning Disabilities, and the Learning Rights Law Center:

1. No amici is a publicly held corporation or otherwise publicly held.
2. No amici has parent corporations.
3. No amici has 10% or more of stock owned by a corporation.

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INTEREST OF AMICI CURIAE

The National Center for Learning Disabilities (NCLD) is a parent-founded and parent-led non-profit organization. NCLD's mission is to improve the lives of the one in five children and adults nationwide with learning and attention issues by empowering them and advocating for equal rights and opportunities. NCLD works to create a society in which every individual possesses the academic, social, and emotional skills needed to succeed in school, at work, and in life. NCLD has more than forty years of experience providing essential information to parents, professionals, and individuals with learning disabilities and attention issues; promoting research and programs to foster effective learning; and advocating for policies to protect and strengthen educational rights and opportunities.

NCLD generates policy recommendations and engages in advocacy by (1) implementing national campaigns to advance important and systemic change, (2) educating and engaging policymakers at the national, state, and local levels, (3) leading knowledge-building initiatives to drive the policy debate and build consensus around best practices for children and adults with learning and attention issues,

and (4) engaging young adults in leadership and advocacy through leadership development initiatives that can help them become strong advocates for themselves and their peers as they navigate the transition into adulthood.

The Division for Learning Disabilities (DLD) is one of 17 special interest groups of the Council for Exceptional Children (CEC). Since early 1983, DLD has worked on behalf of students with learning disabilities and the professionals who serve them to meet the needs of millions of school-aged children and youth currently identified as having specific learning disabilities in the United States.

DLD's membership consists of teachers, psychologists, clinicians, administrators, higher education professionals, parents, and others. DLD's major purposes include: (a) promoting the education and general welfare of persons with learning disabilities, (b) providing a forum for discussion of issues facing the field of learning disabilities, (c) encouraging interaction among the many disciplinary groups whose research and service efforts affect persons with learning disabilities, (d) fostering research regarding the varied disabilities subsumed in the term "learning disabilities" and promoting dissemination of research

findings, (e) advocating exemplary professional training practices to insure the highest quality of services in the field of learning disabilities, and (f) promoting exemplary diagnostic and teaching practices in a context of tolerance for new and divergent ideas.

From time to time, the executive board of DLD examines current issues in learning disabilities and states DLD's position about them. The purpose of stating DLD's positions is to inform the membership of DLD as well as the general public, including other educators and policy makers.

The Advocacy Institute is a not-for-profit organization dedicated to the development of products, projects, and services that improve the lives of children and adults with disabilities. The Institute believes effective educational programs for children with disabilities can be developed and implemented only with collaboration between parents and educators as equal parties. For two decades, the Institute has developed products, implemented projects, and provided services to support the free appropriate public education (FAPE) of the nation's seven million children and youth with disabilities.

The Council for Learning Disabilities (CLD) is an international organization composed of professionals who represent diverse disciplines. It is committed to enhancing the education and quality of life for individuals with learning disabilities across their lifespan. CLD accomplishes this by promoting and disseminating evidence-based research and practices related to the education of individuals with learning disabilities. In addition, CLD fosters collaboration among professionals and advocacy for policies that support individuals with learning disabilities at local, state, and national levels.

CLD's vision statement is that all individuals with learning disabilities are empowered to achieve their potential. The CLD Standards and Ethics state that there must be a high level of professional competence that will yield positive outcomes by supporting appropriate identification procedures, providing opportunities for students with even the most significant learning disabilities to receive FAPE with concomitant supports and intensive interventions when necessary, ensuring meaningful inclusive opportunities and thus

promoting high levels of achievement and quality of life across the lifespan.

The Learning Rights Law Center (LRLC) is a non-profit public interest law firm that seeks to achieve education equity for low income and disadvantaged students in the public education system. LRLC changes the lives of at-risk students who have disabilities, face discrimination, or are involved in the foster or juvenile justice systems by providing free legal services, education advocacy, and community training.

LRLC believes that every child has a right to learn. Since 2005, LRLC has been promoting and protecting the individual right to education for children in Southern California. The focus of LRLC's direct legal representation and education advocacy is to get low income and disadvantaged children the education services and support they need to succeed in school. The purpose of LRLC's education training and community outreach programs is to empower families and provide a basis for true grassroots education reform. LRLC envisions a world in which all children may pursue a meaningful and equitable education

that provides them with a brighter future and the means to become successful adults.

Collectively, Amici provide a unique perspective on the special education issues raised in this appeal. They not only have significant expertise on learning disabilities but also work directly with families and educators, assisting them with addressing the needs of children with learning disabilities.

Amici are interested in this appeal because too often, they have observed school districts approach children with learning disabilities like C.S. as a homogenous group, failing to comprehensively evaluate them, identify their unique needs, and provide them appropriate, individualized services.¹

¹ No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than Amici and their members, contributed money to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA) requires school districts to perform comprehensive evaluations of children with disabilities. This requirement is critical for children like C.S. who have a specific learning disability. Children with learning disabilities present with a variety of learning challenges and unique needs. Without understanding the nuances of a child's learning disability, school districts cannot develop a reasonably calculated educational program for him—any program developed without such an understanding amounts to guesswork.

Here, Butte School District made no effort to understand C.S.'s learning disabilities, thus failing to take the first basic step required to provide him an appropriate program. That failure doomed his educational program and violated the IDEA.

ARGUMENT

I. Children with learning disabilities are a diverse group—they present with a variety of learning challenges and unique needs.

More children qualify for services under the IDEA based on a specific learning disability than any other category of disability.² More than two million special education students are classified as having a learning disability—35% of all special education students.³ They are a diverse group.

The IDEA defines specific learning disability broadly: it includes any “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations”⁴ This broad definition captures children with a variety of learning challenges who require different interventions and have different strengths.

² *Children and Youth With Disabilities*, U.S. Dep’t of Educ. Nat’l Ctr. for Educ. Statistics (Aug. 4, 2019), https://nces.ed.gov/programs/coe/indicator_cgg.asp.

³ *Id.*

⁴ 34 C.F.R. § 300.8(c)(10).

Children with learning disabilities have deficits in different skill areas, and the etiology of the deficits is non-specific, meaning that each child's deficits are unexpected and unexplained. Some have deficits that impact their reading comprehension, some their reading fluency, some their writing, some their math-calculation skills, and so on. Learning disabilities “are relatively specific neurological” conditions which affect a child’s “ability to take in, retain, recall, comprehend, analyze, process . . . , or express (either verbally or in writing) information, concepts, and ideas.”⁵ When a child has a learning disability, “one or more parts of [her] [neurological] system do not function as efficiently or effectively as the other parts.”⁶ For example, a child might have a learning disability in reading because of inefficiencies in the way his brain processes visual information and assigns meaning to letters, causing him to read slower than his peers.

A few of the most common types of specific learning disabilities are:⁷

⁵ Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 Akron L. Rev. 1, 12–14 (1999).

⁶ *Id.* at 16–17.

⁷ *Id.*

- **Dyslexia.** Dyslexia is a specific learning disability in reading that “makes it hard to learn to read accurately and fluently.”⁸ Children with dyslexia often have difficulty decoding words—that is, matching letters to sounds and blending the sounds together to sound out words.⁹
- **Dyscalculia.** Dyscalculia is a specific learning disability in math that makes it difficult “to understand concepts related to numbers and do tasks like add and subtract.”¹⁰ Children with dyscalculia can have deficits in working memory (the ability to hold numbers in their mind while performing multi-step math problems), number sense (the ability to understand quantities, the relationships between single items and groups of items, and mathematical symbols), and math calculation (the ability to apply math concepts to a problem).¹¹
- **Dysgraphia.** Dysgraphia is a specific learning disability in writing that affects a child’s handwriting, typing, and spelling.¹² Children with dysgraphia may struggle with forming letters,

⁸ *Dyslexia Fact Sheet*, Understood.org (Aug. 4, 2019), <https://www.understood.org/en/learning-attention-issues/child-learning-disabilities/dyslexia/dyslexia-fact-sheet>.

⁹ *Decoding: What It Is and How It Works*, Understood.org (Aug. 4, 2019), <https://www.understood.org/en/learning-attention-issues/child-learning-disabilities/reading-issues/decoding-what-it-is-and-how-it-works>.

¹⁰ *Dyscalculia Fact Sheet*, Understood.org (Aug. 4, 2019), <https://www.understood.org/en/learning-attention-issues/child-learning-disabilities/dyscalculia/dyscalculia-fact-sheet>.

¹¹ *Understanding Dyscalculia*, Understood.org (Aug. 4, 2019), <https://www.understood.org/en/learning-attention-issues/child-learning-disabilities/dyscalculia/understanding-dyscalculia>.

¹² *Dysgraphia: What You Need to Know*, Understood.org (Aug. 4, 2019), <https://www.understood.org/en/learning-attention-issues/child-learning-disabilities/dysgraphia/understanding-dysgraphia>.

spacing letters correctly, writing in a straight line, holding and controlling a writing tool, and making letters the correct size.¹³ Most students with dysgraphia also struggle with communicating their knowledge in written expression.

Because learning disabilities can affect a variety of skills, even children classified with the same disability often have different needs. For instance, a child with dyscalculia who struggles with working memory has different needs than a child with dyscalculia who struggles with number sense. Strategies for addressing working-memory deficits include breaking learning tasks into several small parts, using graphic organizers and other aids that help organize information, and repeating information and directions during lessons.¹⁴ The strategies for addressing number-sense deficits are much different. They include using objects to provide a concrete example of how numbers work, instructing the child to tap out numbers, and drawing out math problems (i.e., if the problem is $2+3$, draw two apples, a plus sign, and three more apples).¹⁵

¹³ *Id.*

¹⁴ *How to Help Kids with Working Memory Issues*, Child Mind Institute (Aug. 4, 2019): <https://childmind.org/article/how-to-help-kids-with-working-memory-issues/>.

¹⁵ *10 Multisensory Techniques for Teaching Math*, Understood.org (Aug. 4, 2019), <https://www.understood.org/en/school->

Dyslexia, too, captures children with a variety of learning needs. Some students with dyslexia struggle to read (decode) words but once they have read a word, their comprehension and memory for meaning is excellent. Some students with dyslexia, however, can decode words with speed and accuracy but struggle with comprehension, necessitating re-reading and note-taking to understand, remember, and use what they have read. And other students with dyslexia can develop adequate reading and comprehension skills but struggle with the physical act of writing, sentence structure and grammar, word retrieval, and creating a coherent narrative based on reading material.¹⁶

Lastly, since learning disabilities affect only discrete learning skills, children with learning disabilities differ not only in their needs but also in their profile of strengths.¹⁷ Numerous factors influence a

learning/partnering-with-childs-school/instructional-strategies/10-multisensory-techniques-for-teaching-math.

¹⁶ The nuances of dyslexia are particularly relevant here since C.S.'s mother expressed concern to Butte School District that C.S. had dyslexia and an expert identified C.S. as having a specific learning disability in reading comprehension, but the District nevertheless failed to recognize C.S.'s learning disability, much less identify the nuances of it. *See Appellants Brief at 7–8.*

¹⁷ Notably, learning disabilities do not affect cognitive ability. Many children with learning disabilities have average or superior intelligence. *See Understanding Learning and Attention Issues, The*

child’s potential for growth, including social intelligence, creativity, emotional regulation, and work ethic.¹⁸ Each child with a learning disability possesses a unique blend of these attributes,¹⁹ so each child has a distinct pattern of strengths that can be leveraged to overcome the effects of her disability.

II. Identifying the precise nature of a child’s learning deficits and how they affect his access to education is critical to developing an appropriate educational program.

Simply saying that a child has a learning disability or recognizing that she has learning deficits is not enough—school districts must know

Nat’l Ctr. for Learning Disabilities (Sep. 5, 2019), <https://www.nclld.org/understanding-learning-and-%20attention-issues#ch1howcommon> (“Children with dyslexia, ADHD, and other kinds of learning and attention issues are as smart as their peers.”).

¹⁸ Christine Kerres Malecki and Stephen N. Elliott, *Children’s Social Behaviors as Predictors of Academic Achievement: A Longitudinal Analysis*, (17)1 Sch. Psych. Q. 1, 19–21 (2002) (finding a correlation between social intelligence and academic achievement); Paulo A. Graziano et al., *The Role of Emotion Regulation and Children’s Early Academic Success*, 45(1) J. Sch. Psych. 1, 3 (2007) (concluding that emotional regulation influences educational achievement); Ian J. Deary et al., *Intelligence and Educational Achievement*, 35 Intelligence 13, 19 (2007) (identifying a correlation between general intellectual ability and educational achievement).

¹⁹ See Marshall H. Raskind et al., *Patterns of Change and Predictors of Success in Individuals with Learning Disabilities: Results from a Twenty-Year Longitudinal Study*, 14(1) Learning Disabilities Research & Practice 35, 36 (1999) (finding that a group of people with learning disabilities exhibited different blends of “success attributes”).

the specific learning skills that the child's disability affects. This requires a comprehensive evaluation which assesses the child in all areas of suspected need.²⁰ Absent such an evaluation, any educational interventions that the district provides the child are mere guesswork.

Take, for example, a child who has an above average IQ, is classified as having a learning disability, and is reading four years below grade level. A variety of learning deficits could contribute to the child's struggles.²¹ She could have deficits in reading decoding, stemming from dyslexia.²² Alternatively, she could have deficits in processing speed, resulting in slow, labored reading and struggles with comprehension.²³ Or she could have a nonverbal learning disability which affects her ability to comprehend reading passages that include social dialogue.²⁴ To create and implement an effective program for this child, her school district must identify which of these deficits, alone or

²⁰ 34 C.F.R. § 300.304(c)(4).

²¹ *Learning and Thinking Differences that Cause Difficulties with Reading*, Understood.org (Sep. 5, 2019), <https://www.understood.org/en/learning-attention-issues/child-learning-disabilities/reading-issues/how-various-learning-and-attention-issues-can-cause-trouble-with-reading>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

in combination with each other, are contributing to her struggles, because each deficit requires different types of intervention.²⁵ If the district glosses over the nuances of the child’s learning profile—as the Butte School District did with C.S.—and simply provides supplemental instruction or reading tutoring, the child’s educational progress is left to chance.

All the more so for students with learning disabilities like C.S. who demonstrate both academic and behavioral or social/emotional challenges. Those students may have multiple disorders which interact, affecting their access to learning in unique ways. Learning disabilities often co-occur with other brain-based disorders, such as attention deficit/hyperactivity disorder (ADHD), executive-functioning challenges, language disorders, and anxiety. For example, studies show that as many as 45% of all students with learning disabilities also have ADHD.²⁶ In addition, children with learning disabilities often experience frustration in school which leads to emotional dysregulation, anxiety, depression, and behavior challenges.

²⁵ *Id.*

²⁶ See George J. Dupaul et al., *Comorbidity of LD and ADHD: Implications of DSM-5 for Assessment and Treatment*, 46(1) *Journal of Learning Disabilities* 43–51 (2013).

In short, for a child like C.S., a comprehensive evaluation is critical. Identifying the child’s distinct learning challenges is necessary to develop a reasonably calculated educational program.

III. In failing to investigate C.S.’s unique learning needs, Butte School District denied him the comprehensive evaluation required by the IDEA.

The IDEA requires school districts to assess children “in all areas of suspected disability.”²⁷ Thus, it demands a robust evaluation process, recognizing that school districts must understand a child’s unique needs to provide FAPE. School districts must:

- “Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child”;²⁸
- Consider “information provided by the parent”;²⁹
- “Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”;³⁰
- Ensure that “[a]ssessments and other evaluation materials include those tailored to assess specific areas of educational need”;³¹ and

²⁷ 20 U.S.C. § 1414(b)(3)(B).

²⁸ 34 C.F.R. § 300.304(b)(1).

²⁹ *Id.*

³⁰ 34 C.F.R. § 300.304(b)(3).

³¹ 34 C.F.R. § 300.304(c)(2).

- Ensure that the “evaluation is sufficiently comprehensive to identify all the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been placed.”³²

When a child presents with significant deficits in learning skills, as C.S. did while attending Butte School District, the evaluation must include measures designed both to determine whether the child has a learning disability and to identify the nature of his learning needs. The IDEA sets forth detailed requirements for evaluations of children suspected of having a learning disability, including that school districts review the child’s educational history, observe him, and document his specific challenges.³³ The IDEA even identifies specific methods for evaluating for learning disabilities: using measurements that show “a severe discrepancy between intellectual ability and achievement;” using “a process based on the child’s response to scientific, research-based

³² 34 C.F.R. § 300.304(c)(6).

³³ See 34 C.F.R. §§ 300.309 (setting forth factors that districts must consider when assessing for a learning disability), 300.310 (requiring observation of the child), 300.311 (requiring documentation of the child’s learning profile).

intervention” (often referred to as “response to intervention,” or “RTI”); and using “other alternative research-based procedures.”³⁴

When using the severe discrepancy approach, an evaluator typically administers an IQ test along with standardized achievement measures. The evaluator compares the child’s achievement in skills such as reading and math to her performance on IQ measures to determine whether there is a severe discrepancy between cognition and achievement. Every state sets its own criteria and specific procedures for identifying a severe discrepancy, using a calculation that includes test scores, student age, and other criteria, and that sets forth a threshold for discrepancy.³⁵

When using a data-based approach—response to intervention, or RTI—a school district analyzes the student’s response to various levels of instruction. The district considers progress monitoring and assessment data to determine whether the child is making sufficient progress compared to her peers. “If the child receives progressively

³⁴ 34 C.F.R. § 300.307; *see also* Assistance to States for Education of Handicapped Children: Procedures for Evaluating Specific Learning Disabilities, 42 Fed. Reg. 250, 65082–65085 (1977).

³⁵ Assistance to States for Education of Handicapped Children: Procedures for Evaluating Specific Learning Disabilities, 42 Fed. Reg. 250, 65082–65085 (1977).

targeted and intensive instruction and support and is still demonstrating a dual discrepancy—not progressing at a rate similar to [he]r peers and demonstrating achievement below [he]r peers—and there are no other factors that explain low achievement, then it may be determined that specialized instruction and supports in special education are needed to ensure meaningful progress.”³⁶

Finally, there are two primary ways that school districts might implement alternative research-based procedures, often described as “patterns of strengths and weakness” (PSW). First, an evaluator can administer “a series of cognitive assessments that are meant to evaluate a child’s strengths and weaknesses across various cognitive domains that are related to areas of achievement.”³⁷ This method is based on the premise that children with learning disabilities demonstrate distinct patterns of cognitive functioning. Second, an evaluator can “compare a child’s academic scores across the areas of oral expression, listening comprehension, written expression, basic

³⁶ Meghan Whittaker and Matthew Burns, *Evaluation for Specific Learning Disabilities: Allowable Methods of Identification & Their Implications*, Nat’l Center for Learning Disabilities (Sep. 7, 2019), www.nclld.org/SLDeligibility.

³⁷ *Id.*

reading skills, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving.”³⁸ If the “child performs at or above grade level in a certain number of areas and below grade level others,” she may be eligible for special education under the specific-learning-disability category.³⁹

Here, C.S. demonstrated a severe discrepancy between his intellectual disability and academic achievement, yet Butte School District did not investigate whether the discrepancy evidenced a specific learning disability.⁴⁰ Indeed, even putting aside the discrepancy, the District had a duty to make an effort to understand the specific nature of C.S.’s learning deficits, but based on the record, it made no such effort.⁴¹ The District thus failed to take the first basic step required to provide C.S. an appropriate program. The district court excused this failure, in part, by noting that the District provided C.S. “more than 4

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See* ER1168–1174.

⁴¹ The District had this duty regardless of whether C.S.’s mother opposed a specific-learning-disability classification. “A FAPE, as required by the IDEA, must be tailored to the unique needs of each individual child,” and a district cannot tailor a program to a child’s unique needs if it does not understand those needs. *See Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 894 (9th Cir. 2001).

hours per week of special education services.”⁴² But merely providing a child some special education services is insufficient—the services must be tailored to the child’s unique needs.⁴³

CONCLUSION

Children with learning disabilities can vary greatly in their strengths, deficits, and needs. Two children with learning disabilities cannot be assumed to need the same types of special education services or perform in the same ways. Instead, the approach to evaluation and planning must be unique and individualized. When school districts gloss over a child’s unique learning deficits, the child’s educational program becomes guesswork. The IDEA demands more. It demands a reasonably calculated program, not one that is left to chance.

⁴² Dist. Ct. Op. at 18.

⁴³ See *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017).

Respectfully submitted,



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Kevin Golembiewski, Esquire

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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