

**No. 19-35473**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LAYNA CROFTS,

*Plaintiff-Appellant*

and

JEREMY SANDERS

*Plaintiff*

v.

ISSAQUAH SCHOOL DISTRICT NO. 411

*Defendant-Appellee*

and

MELISSA MADSEN and RON THIELE,

*Defendants*

On Appeal from the United States District Court  
for the Western District of Washington  
No. 2:17-cv-00375-TSZ Hon. Thomas S. Zilly

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**BRIEF OF *AMICUS CURIAE*  
WASHINGTON STATE BRANCH OF THE INTERNATIONAL DYSLEXIA  
ASSOCIATION  
IN SUPPORT OF PLAINTIFF/APPELLANT**

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### DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the following disclosure is made on behalf of the Washington Branch of the International Dyslexia Association (WABIDA). WABIDA is not a publically held corporation or other publically held entity, has no parent corporations and does not have 10% or more of stock owned by a corporation.

Date: April 14, 2021

CEDAR LAW, PLLC

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## **STATEMENT OF INTEREST OF *AMICUS CURIAE***

The Washington State Branch of the International Dyslexia Association (WABIDA) is a non-profit organization dedicated to helping people living with dyslexia, together with their families and the communities that support them, in Washington, Idaho, and Western Montana. In furtherance of this dedication, WABIDA provides public information, training, and support to professionals, families, and dyslexic individuals regarding dyslexia. It actively advocates for and engages in public educational efforts to provide appropriate evaluation of and treatment for dyslexia. For example, WABIDA prepared the Washington State Dyslexia Resource Guide in coordination with the State of Washington's Office of the Superintendent of Public Instruction (OSPI). WABIDA provides local conferences, workshops, and resources to increase public awareness of dyslexia. Its members are actively engaged in special education services, including evaluation, treatment, and the provision of reasonable accommodations for students with dyslexia at all levels of education.

## ARGUMENT

### **I. THE DECISION IN THIS CASE DEPRIVES CHILDREN WITH AND SUSPECTED OF HAVING DYSLEXIA ACCESS TO EVALUATION INFORMATION NECESSARY TO DEVELOP AN APPROPRIATE INDIVIDUAL EDUCATION PLAN**

It is important to emphasize here that the issue is not about the eligibility classification. Many disabled children are legitimately classified under more than one eligibility criteria, and it is possible to provide an appropriate IEP for a child who has been determined eligible under a technically incorrect eligibility category, so long as the child has been appropriately evaluated in all areas of suspected disability. It is the failure to evaluate, not an incorrect classification, that lead to a denial of FAPE. A school district can correctly and appropriately identify a student's qualifying eligibility category under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. §§ 1400 *et. seq.*, (IDEA) while simultaneously neglecting to fully evaluate the child.

#### **A. The Ninth Circuit has held that an evaluation is not appropriate if a school district fails to assess a child for a particular disorder when it is on notice that the child may have that disorder**

In addition to identifying the presence of the elements delineated within an eligibility category, special education evaluations must be sufficiently comprehensive to identify the special education needs of an eligible child. 20 U.S.C. § 1414(b)(4)(A). Thus, school districts must ensure that children are

assessed in “all areas related to the suspected disability” and that the evaluation is “sufficiently comprehensive to identify all of the student’s special education needs whether or not commonly linked to the disability category in which the student has been classified.” 34 C.F.R. § 300.304(c)(4), (c)(6). For an evaluation to be sufficiently comprehensive, the Ninth Circuit has clearly articulated that when “a school district is on notice that a child a child may have a particular disorder it must assess the child for that disorder.” *Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d 1105, 1121 (9th Cir. 2016). Although a child does not require a specific diagnosis for eligibility, and parents can not dictate areas of assessment, (*see Avila v. Spokane Sch. Dist.* 81, 686 F. App’x 384 (9th Cir. 2017) (unpublished)), it has been clearly established that when a particular disorder is suspected the school district must evaluate for that disorder. *Timothy O.*, 882 F.3d at 1121,22.

Consider by analogy, the case of a person seeking eligibility for treatment at a weight loss clinic. To receive care, the person must first demonstrate excess weight through the application of the standard Body Mass Index (BMI) calculation that compares weight to height. If the body mass compared to the height yield a certain number and other factors (such as pregnancy) are ruled out, and some impact to health is identified (such as high blood pressure or respiratory disorders), the person is found eligible for services as an overweight person. If a person meets



eligibility for services, the clinic must then develop a weight loss intervention plan. However, the mere presence of a high BMI and an impacted area of health does not indicate the type of intervention plan the person will need. While generally a person will respond to a combination of increased exercise and calorie restriction, sometimes a person needs only one or the other. However, for example, if it is suspected that a person has a thyroid disorder, the interventions may require something beyond a program of increased exercise and calorie restriction. A prescription for thyroid specific medicine may be necessary. Without testing the suspicion, the team will not have a comprehensive picture of the person's needs despite having correctly found him eligible services. Thus, regardless of whether eligibility has been established, where there is reason to suspect a particular disorder, that particular disorder must be investigated. *Timothy O.* 882 F.3d at 1122.

**B. Because dyslexia is a particular disorder that falls within the eligibility category “Specific Learning Disability,” the school district was obligated to assess for suspected dyslexia.**

As set forth in 20 U.S.C. § 1401(3), “Specific Learning Disability” is one of the thirteen enumerated qualifying eligibility categories under the IDEA. 20 U.S. Code Section 1401(30) defines the eligibility category ‘Specific Learning Disability’ as follows:

- (A) In General. The term “specific learning disability” means a disorder in 1 or more of the basic psychological processes

involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

- (B) Disorders Included. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Thus, beyond enumerating dyslexia as a particular disorder that falls within the eligibility category of “Specific Learning Disability”, dyslexia is not defined by the IDEA. However, dyslexia is clearly identified as a particular disorder falling within that eligibility category. Thus, because the school district had reason to suspect dyslexia, it was obligated to assess that particular disorder.

**II. WHERE IT IS SUSPECTED THAT A CHILD HAS DYSLEXIA, AN IEP TEAM CANNOT DETERMINE THE CHILD’S METHODOLOGICAL NEEDS OR APPROPRIATE RATE OF PROGRESS WITHOUT CONFIRMING OR RULING OUT THE PRESENCE OF THIS PARTICULAR DISORDER**

The case before the Court today is not the case of a school district asserting its unilateral right to determine methodology. This case is a case of the school district refusing to even consider what methodology would be appropriate in educating the student because the school refused to even assess the student for dyslexia, despite suspecting the child had that particular disorder.

In the seminal case *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 207 (1982), the Supreme Court recognized that “the primary responsibility for formulating the education to be afforded to a handicapped child, and for choosing

the educational method most suitable to the child's needs was left by the IDEA to the state and local educational agencies *in cooperation with the parents or guardians of the child.*" *Rowley*, 458 U.S. at 207(emphasis added).

Although, the *Rowley* court stated that "it seems highly unlikely that Congress intended courts to overturn a State's choice of *appropriate* educational theories," *Id.* at 208, it only leaves "questions of methodology to the State," **after** "a court determines that the requirements of the IDEA have been met" *Id.* Thus, in a void, if a student is capable of making progress in two different methodologies, courts have long held that the determination of methodology should be an issue left to the states. (That is, if our friend will make progress in his weight loss goals through running or swimming, he can protest neither). However, where the evidence demonstrates that a specific methodology is critical to enable a student to make meaningful, non-trivial progress appropriate to her circumstances, the issue is no longer one of methodology but one of whether a FAPE has been provided. (If our friend needs thyroid medication to remediate his unwanted weight gain, thyroid medicine will be an integral component of an appropriate weight loss plan.)

The warning to courts not to second guess a school district's choice of educational methodology does not mean the court should ignore its obligation to enforce the IDEA. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1214 (3rd Cir. 1993). District courts are still tasked to determine whether the evidence demonstrated that

the educational method chosen by the school district enabled the child in question to learn, or whether an evaluation was appropriately comprehensive to identify any disorder specific needs. *Rowley*, 458 U.S. at 206-07. An IEP team cannot create an IEP that addresses a child's needs without having information on the contours of her dyslexia.

Children eligible under the disability category of Specific Learning Disability are not a homogenous group. They are a diverse group with divergent needs that depend on their individual profile. Likewise, children with Specific Reading Disabilities are also a diverse group. Some of these children will qualify for a diagnosis of dyslexia and some will not. The District Court's order puts parents advocating for their children in a circular bind. It holds school districts are only required to evaluate for a broad category of eligibility and do not have to evaluate for suspected dyslexia, but also states that "absent a showing that dyslexia-specific methods are necessary to ensure that a child with dyslexia receives an appropriate education" school districts may reject those methods. The District Court however declines to explain how, without an evaluation of a student's dyslexia the school district (in cooperation with the parents) can identify a student's dyslexia related needs, including appropriate methodology or appropriate progress.

To return to our friend at the weight loss clinic, if a reasonable suspicion of a thyroid disorder is not evaluated, how will a need for thyroid treatment be identified or ruled out? Supposing research shows that in order to appropriately progress in weightloss goals, a person with a thyroid disorder might need thyroid medicine. Although given just exercise and calorie restriction it is possible that the patient might lose some weight, it will not remediate the weight gain from the thyroid disorder, and he will more likely than not remain overweight. He may begin to feel helpless, unworthy, lose motivation or become depressed.

**A. Peer reviewed research shows that students with dyslexia need to be instructed using specific methods**

In creating an individual education plan, it is necessary to know specifically which type of reading difficulty on which one's intervention must focus. Jack Fletcher et al., *Assessment of Reading and Learning Disabilities A Research Based Intervention Oriented Approach*, 40 J. OF SCH. PSY. 27-63 (2002). For example, intervention for children whose primary difficulty is accurate and fluent word identification will certainly require different essential elements of instruction than those for children who can read words accurately, but have difficulty constructing the meaning of text. See *Id.* This cannot be determined without a comprehensive inquiry into the nature of the child's reading disorder.

Research shows that for students with dyslexia to make appropriate progress, they must be instructed using specific methodologies. These methodological needs

are recognized in the Washington State Dyslexia Resource Guide which identifies best practices as using a methodology that is simultaneous and multimodal<sup>1</sup>, with a systematic and cumulative organization of the materials, explicit direct instruction, with both a synthetic and analytic approach to phonics. Office of the Superintendent of Pub. Instruction et al., *Washington State Dyslexia Resource Guide*, pp. 27-29, (2011). Scientifically based research shows that appropriate instruction for students with dyslexia is a program of engaging, systematic, and explicit instruction in each critical component of reading as well as spelling and writing. See e.g. J.K. Torgeson, *Lessons Learned from Research on Interventions for Students who have Difficulty Learning to Read*, in THE VOICE OF EVIDENCE IN READING RESEARCH (P. McCardles & V. Chhabra, 2004); Louise Spear-Swerling, *Structured Literacy and Typical Literacy Practices: Understanding Differences to Create Instructional Opportunities*, 51 TEACHING EXCEPTIONAL CHILDREN, 201, 202-03 (2018). These instructional methodologies are often referred to collectively as “Structured Literacy.”

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<sup>1</sup> Although the term ‘multisensory’ is used in the Dyslexia Resource Guidelines, the term ‘Multimodal’ is now preferred to underscore that instruction must occur in the context of teaching reading and writing. This switch has been effected by the academic community to avoid unwanted implications of endorsement of methods such as ‘vision therapy,’ which have been proven ineffective in the treatment of dyslexia and are not appropriate.

**B. Peer reviewed research shows that dyslexic students provided with appropriate interventions exhibit progress that is significant and rapid.**

Over the past 45 years, scientifically based research shows that dyslexic students provided with teaching methodologies tailored to their needs yields appropriate progress that is significant and rapid. For example, one study conducted found that a group of elementary students with dyslexia achieved around a year's worth of growth with only eight weeks of intensive one-on-one reading instruction (two 50 minutes session daily) and closed the achievement gap with their peers. J.K. Torgesen et al., *Intensive Remedial Instruction for Children with Severe Reading Disabilities: Immediate and Long Term Outcomes from Two Instructional Approaches*, 34 J. LEARNING DISABILITIES, 33, 33-37 (2001).

Another study showed that children given an average of 60 hours of appropriate small group instruction improved their skills in phonemic decoding, text reading accuracy, reading comprehension, and reading fluency solidly into the average range. J.K. Torgeson, *Lessons Learned from Research on Interventions for Students who have Difficulty Learning to Read*, in THE VOICE OF EVIDENCE IN READING RESEARCH (P. McCardles & V. Chhabra, 2004). In a third study, children with moderate reading impairments and intelligence around the 30th percentile began with reading fluency scores below the 1st percentile and reading comprehension scores around the 8th percentile after being provided with only 50

hours of intervention attained phonemic coding and reading comprehension skills solidly in the average range. *Id.* These are only a few of several peer-reviewed studies that indicate significant and rapid progress with the application of appropriate interventions.

**C. The research-based interventions that meet the needs of student with dyslexia are different from those that are typically provided to children with other reading disabilities**

The research-based interventions that meet the needs of students with dyslexia are quite different from those that are typically taught to prospective teachers and that are consistent with the research. Graham Drake & Kate Walsh, Nat'l Council on Teacher Quality, *2020 Teacher Prep Review: Program Performance in Early Reading Instruction* (2020). Not only do the research-based interventions provide instruction that is more explicit and systematic than is frequently provided, but they are also delivered much more intensively. Typical literacy programs, such as Fountas and Pinnell's Leveled Literacy Intervention, do not include most of the key components of Structured Literacy. Louise Spear-Swerling, *Structured Literacy and Typical Literacy Practices: Understanding Differences to Create Instructional Opportunities*, 51 TEACHING EXCEPTIONAL CHILDREN, 201, 202-03 (2018). Typical literacy program texts "often lend themselves more to guessing at words based on pictures and sentence context" and



not towards explicit instruction when a student cannot correctly decode a word, which is not appropriate for dyslexic readers. *Id.*

When provided with interventions based on scientific evidence it is estimated that up to 98 percent of children will successfully learn to read. Emily Solari et. al, *Brick by Brick: A Series of Landmark Studies Pointing to the Importance of Early Reading Intervention*, THE READING LEAGUE JOURNAL (2021). Without information on child's suspected dyslexia, it is likely that an inappropriate intervention will be used, lowering or eliminating the chance for the child to succeed.

### CONCLUSION

For the foregoing reasons, WABIDA respectfully requests that this Court reverse the Orders of the District Court.

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for The United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 14, 2021.

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