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WASHINGTON SUPREME COURT

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In re the Marriage of:

CHRISTIAN T. METCALF,

*Petitioner,*

v.

DONNA M. COCHENER,

*Respondent.*

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AMICUS MEMORANDUM OF DISABILITY RIGHTS  
EDUCATION AND DEFENSE FUND (DREDF) AND CIVIL  
RIGHTS LAW SECTION OF THE FEDERAL BAR  
ASSOCIATION IN SUPPORT OF REVIEW

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## **I. IDENTITY AND INTEREST OF AMICI**

Disability Rights Education & Defense Fund (DREDF) is a national nonprofit disability civil rights law and policy organization dedicated to protecting and advancing the civil and human rights of people with disabilities. DREDF was founded in 1979 by adults with disabilities and parents of disabled children, and is led by members of these communities.

A significant portion of DREDF's work is directed at securing and advancing the educational entitlements of children with disabilities under laws including the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), and Section 504 of the Rehabilitation Act. DREDF leads a Parent Training and Information Center funded by the U.S. Department of Education that helps parents and guardians advocate for appropriate education and services for their disabled children.

DREDF has an interest in supporting participation and advocacy by parents and guardians seeking appropriate

educational services and supports for their children with disabilities. DREDF has deep expertise in the federal and state statutory schemes that govern the education of disabled children. These laws encourage parental participation and advocacy as a matter of public policy. DREDF knows from research and practice that parental participation and advocacy are associated with educational benefits for children with disabilities, but that parents who advocate for their children nevertheless face discrimination and retaliation, and are unfairly stereotyped as “difficult.”

The Civil Rights Law Section of the Federal Bar Association is non-partisan, volunteer group of more than 600 attorney Federal Bar Association members who practice in, or are interested in, federal civil rights law, including disability rights law. Its membership includes attorneys who represent both plaintiffs and defendants, individuals and institutions, and public and private clients. It seeks amicus participation in this

case to promote the development of sound laws and policies in the civil rights field, consistent with its organizational purpose.

## **II. STATEMENT OF THE CASE**

Amici rely generally on the facts contained in the parties' briefs. The children "have complex medical and educational histories." CP 949. Child L. has "a history of developmental disorders that affect his communication and behavior," with diagnoses of "apraxia of speech, sensory processing disorder, coordination disorder, attention deficit hyperactivity disorder ('ADHD'), social pragmatic communication disorder, language disorder, and autism spectrum disorder ('ASD')." *Id.* L. now has an Individualized Education Plan (IEP) under the Individuals with Disabilities Education Act (IDEA). Child E. "has challenges organizing movement and with the development of his large motor skills," and "diagnosed with generalized anxiety disorder and ADHD." CP 950. E. attends private school and receives services under an Individual Services Plan (ISP). The



services and accommodations sought by petitioner father were supported by expert testimony below.

### **III. ARGUMENT**

#### **A. Parental Participation and Advocacy Are Central to the Legal Framework Governing the Education of Students with Disabilities Like the Children Here.**

Parent participation and advocacy are core to the delivery of appropriate educational services to students with disabilities. In 2004, Congress enacted codified findings regarding the education of disabled children which included:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by ... strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home[.]

20 U.S.C. § 1400(c)(5). In enacting and reauthorizing the IDEA, Congress set out a detailed framework of procedural requirements, including many which exist to ensure that parents can participate in and advocate for the educational services provided to their children.

State and federal courts have long recognized the importance of robust parental participation in educational planning for students with disabilities. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-206 (1982) (“Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.”); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 527 (2007) (describing IDEA’s “provisions for expansive review and extensive parental involvement”); *Amanda J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 882, 892 (9th Cir. 2001) (parents “represent the best interests of their child,” are “most familiar with the child’s needs,” and can provide information “which only they are in a position to know”).

For a time, both children in this matter were placed by their parents at a private school and had ISPs rather than IEPs; since 2020, one child attends public school with an IEP, and the other

continues to have an ISP. While private schools are not required to follow all rules set out in the IDEA, parents of children with ISPs have rights to participation and advocacy regarding educational services. Services to children parentally placed in private school are funded by local educational agencies (LEA), 20 U.S.C.A. § 1412, and parents have a right to “timely and meaningful consultation” regarding “the design and development of special education and related services for the children.” 34 C.F.R. § 300.134. The ISP “must, to the extent appropriate, be developed, reviewed, and revised consistent with the requirements related to the IEP team and parent participation.” U.S. Dep’t of Educ., *The Individuals with Disabilities Education Act: Provisions Related to Children With Disabilities Enrolled by Their Parents in Private Schools* (Mar. 2011), 11.<sup>1</sup> In making decisions about services, the LEA must engage in “timely and meaningful consultation and give due

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<sup>1</sup> Available at: <https://www2.ed.gov/admins/lead/speced/privateschools/idea.pdf>.

consideration ... to the views of representatives of parentally placed private-school children with disabilities.” *Id.* at 12.

Thus, whether a child has an ISP or IEP, public policy favors parental participation and advocacy. Such participation is also a protected activity under the Americans with Disabilities Act. 42 U.S.C. § 12203; *Barker v. Riverside Cty. Office of Educ.*, 584 F.3d 821, 827 (9th Cir. 2009). Given this settled public policy favoring parental participation in the education of disabled children, coupled with the prohibition on retaliation, the weighing of parental advocacy by a state court as a negative factor in assigning educational rights raises serious concerns.

**B. Research Shows that Children with Disabilities Benefit From Parental Participation and Advocacy in Their Educational Programs and Services.**

Abundant research demonstrates the importance of parental participation and advocacy in the education of children with disabilities. Parental advocacy is associated with positive effects like improved services, academic development, and better quality of life.

Parental advocacy is necessary for ensuring that children receive the services they need to maximize their developmental potential... [A]dvocacy can result in improved services for the child and better quality of life for the family. ... At the macro level, parental advocacy can promote legislative changes, improved public awareness and community education, and more funding directed at disability services and research.

A. Conley Wright & S. Taylor, *Advocacy by parents of young children with special needs: Activities, processes, and perceived effectiveness*, 40:5 *Journal of Social Service Research* 591-605 (2014);<sup>2</sup> accord Bilal A. Dameh, *The Impact of Parent Involvement Practices in Special Education Programs*, *Culminating Projects in Education Administration and Leadership* 11, 32 (2015) (research shows that parent participation results in positive outcomes for children with disabilities, including maintenance of treatment gains and more effective

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<sup>2</sup> Available at: <https://core.ac.uk/download/pdf/37020075.pdf>.

strategies for resolving problems);<sup>3</sup> James Austin, *The Role of Parents as Advocates for the Transition Rights of Their Disabled Youth*, 20:4 Disability Studies Quarterly 15 (2000) (citing studies demonstrating role of parents in transition services).<sup>4</sup>

Using hierarchical regression analyses, we found that parental advocacy activities were significantly and strongly associated with service receipt after controlling for youth functioning and family demographic factors. Youth whose parents are less involved in advocacy activities might be at-risk for service disparities.

Burke Lee, *et al.*, *The Role of Parental Advocacy in Addressing Service Disparities for Transition-aged Youth on the Autism Spectrum*, Autism (May 2022).<sup>5</sup>

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<sup>3</sup> Available at: [https://repository.stcloudstate.edu/edad\\_etds/11](https://repository.stcloudstate.edu/edad_etds/11).

<sup>4</sup> Available at: <https://dsq-sds.org/article/view/265/279>).

<sup>5</sup> Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9010347/>.

**C. Research Shows That Parents of Children with Disabilities Who Engage in Educational Advocacy Face Unwarranted Discrimination and Retaliation and Are Often Stereotyped as “Difficult.”**

Research also shows that many parents struggle to be considered and included in determining educational services. Dameh, *supra*. (describing studies in which families reported that their choices were not included in the services provided, professionals did not include them, and school-based services were ineffective and did not consider their child’s specific needs).<sup>6</sup>

Various studies have found that communication between schools and parents is dissatisfying and centered on conflict. Other findings indicate that even when meetings are attended, parents have little influence in actual decision-making. Lake and Billingsley (2000) analyze factors that contribute to parent–school conflict in special education including: discrepant views of the child, service delivery, devaluing by schools, communication, and level of trust. Trust is also a concern for parents who have children diagnosed with autism spectrum disorder.

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<sup>6</sup> Available at: [https://repository.stcloudstate.edu/edad\\_etds/11](https://repository.stcloudstate.edu/edad_etds/11).

Jessica K. Bacon & Julie Causton-Theoharis, *‘It should be teamwork’: a critical investigation of school practices and parent advocacy in special education*, *International Journal of Inclusive Education* (2012) (citations omitted);<sup>7</sup> accord Dameh, *supra* (“60% [of parents interviewed] noted significant communication problems with teachers such as not being heard or not receiving updates...”).

In many cases, research shows, parental participation and advocacy is resisted and rejected by educators and professionals, leaving parents alienated, excluded, and stereotyped:

According to Dr. Peter Blanck, professor of disability and education policy at Syracuse University,

a body of well-recognized research and practice shows that, despite the protections of the IDEA and other civil rights laws such as the ADA, the Rehabilitation Act, . . . parents of children with disabilities often do not feel, or deliberately are not made to feel, accepted and engaged in special

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<sup>7</sup> Available at: <https://www.researchgate.net/deref/http%3A%2F%2Fdx.doi.org%2F10.1080%2F13603116.2012.708060>.



education decision-making processes

...

Expert Report of Peter Blanck, *Silva v. Palmdale Sch. Dist.*, No. LA CV17-03138 JAK (AGRx) (C.D. Cal.2017).

Research shows that there are often significant disputes that arise from parent involvement. Studies cited by Dr. Blanck... describe parents' views of dis-enfranchisement in advocating for their child with a disability, ... belief that they are not viewed as true partners in the education decision-making process, and... feeling ... their relationship with the educators and professionals is adversarial and alienated. For example, school staff will frequently react ... by avoiding further interaction with the parents in question. Moreover, parents who advocate for their children are often perceived by schools as bad or difficult parents....

Rosa K. Hirji, *Alleging Retaliation on Behalf of Students with Disabilities*, American Bar Association (July 2019).<sup>8</sup>

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<sup>8</sup> Available at: <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/summer2019-alleging-retaliation-on-behalf-of-students-with-disabilities/>.

**D. The Trial Court Failed to Consider Relevant Federal Law and Policy in Making Its Findings, Requiring Remand.**

The trial court failed to consider federal policy in favor of parental education advocacy. Petitioner Metcalfe (the father) explained the importance of parental advocacy to the trial court, and specifically argued that his advocacy was protected under federal law:

During the 2018-2019 school year, Respondent communicated frequently with Spruce Street teachers and staff via email and in person meetings regarding [L's] behavioral and instructional needs, methodologies used in instructing [L], and Respondent's concerns about privately contracted behavioral therapists' work with [L] in the classroom. Administrators and teachers did not always welcome Respondent's advocacy and there were disagreements about the frequency and character of Mr. Metcalfe's communications about [L.'s] education. Respondent's communications ... were related to [L's] disabilities and educational needs, and Respondent's advocacy for them, and thus were protected activity.

CP 549.

Ignoring the applicable federal scheme that governs the education of children with disabilities, CP 560-606, respondent

instead characterized petitioner’s advocacy for his son as “abusive use of conflict.” CP 595; *see* CP 604-605. Respondent ignored the issue of protected advocacy and portrayed all of petitioner’s advocacy as just bad parenting.

Likewise, the trial court failed to consider the underlying federal policy favoring parental advocacy and accepted mother’s negative characterization of petitioner’s advocacy. The trial court made no attempt to determine whether petitioner’s actions were protected parental advocacy, consistent with the federal laws, before relying on such advocacy as a basis for essentially finding that petitioner was a bad parent. *See Final Order and Findings on Petition to Change a Parenting Plan, Residential Schedule or Custody Order (“Final Order”),* CP 952-53.

The trial court’s failure to assess father’s advocacy in light of the federal statutory scheme is particularly troubling here, where the record shows—and the judge acknowledged—that father did not yell, use profanity, or move in an intimidating manner. *Id.* Father’s advocacy was consistent with the existing

systems, procedures, and service plans. His advocacy regarding L.'s use of a calculator was supported by the child's applicable service plan, and later father's expert opinion. Ex. 106 at 8. The judge's description of this advocacy as "outrageous," *see id.*, suggests a lack of appreciation of the applicable federal scheme.

Contrary to the Unpublished Opinion of the Court of Appeals, DREDF does not state that federal law on education somehow trumps or supersedes a state law parenting order. *Cf. Unpublished Opinion* at 19-20. Rather, DREDF asserts that the federal law on education should be duly considered by the trial courts in making such orders.

As the Second Circuit stated in *Taylor v. Vt. Dep't of Educ.*, a case cited by the appellate court below, while the federal education laws "leave intact a state's authority to determine who may make educational decisions on behalf of a child," this applies "*so long as a state does so in a manner consistent with the federal statutes.*" 313 F.3d 768, 772 (2d Cir. 2002) (Sotomayor, J.) (emphasis added). Similarly, the Court in

*Burlington* states that while the “shading and tinting of the details” are largely left to the states, federal law on education is meant to draw the “procedural and substantive contours of education for disabled children.” *Burlington Sch. Comm. v. Dep’t of Educ.*, 736 F.2d 773, 785 (1st Cir. 1984). And, state courts regularly consider federal law and policy in other contexts related to parenting, such as dependency. *See In re Hicks/Brown*, 500 Mich. 79, 86 (2017) (finding that child welfare department failed its duty under the state probate code because it failed its duty under the ADA to reasonably accommodate the parent’s disability); *see also Matter of Lacey L.*, 32 N.Y.3d 219, 231 (2018) (holding that while permanency proceedings in state court have “distinct purposes and procedures,” family court “should not blind itself to the ADA’s requirements placed on [child welfare] and like agencies”).

Here, the trial court did not consider the applicable federal scheme and made no attempt to determine whether petitioner’s advocacy was protected activity before (mis)characterizing that

advocacy as a parenting defect. The findings upon which respondent relies cannot resolve the question of protected federal advocacy because the finder of fact ignored the relevant federal law and policy in making those very findings. Further proceedings are necessary.

#### IV. CONCLUSION

For all these reasons the Court should grant review, reverse the trial court's *Final Order* and remand the matter to the trial court for further proceedings consistent with federal law.

This memorandum contains 2478 words (or less), excluding the parts of the brief exempted from the word count by RAP 18.17.

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## CERTIFICATE OF SERVICE

The undersigned certifies that on the 13th day of November, 2022, true and correct copies of this amicus brief and the *Motion for Leave to Memorandum of Amicus Curiae* were served on the parties as follows:

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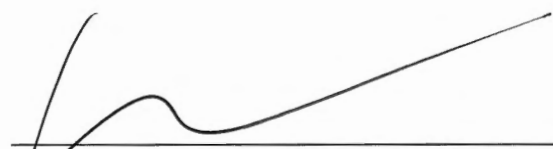
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