NO. 12-1252

IN THE
Supreme Court of the United States

JEFFERSON COUNTY BOARD OF EDUCATION,

Petitioner,

v.

PHILLIP C. AND ANGIE C.,
ON BEHALF OF THEIR SON A.C.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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June 2013

QUESTION PRESENTED

The Individuals with Disabilities Education Act requires that covered educational agencies provide certain procedural safeguards to children with disabilities and their parents, including the opportunity "to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1). The Secretary of Education has issued regulations specifying, in relevant part, that a parent "has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency," 34 C.F.R. § 300.502(b)(1), unless the public agency initiates a hearing "to show that its evaluation is appropriate." *Id.* § 300.502(b)(2)(i). The question presented is:

Whether the court below properly held that respondents were entitled to reimbursement by the school board for the cost of an independent educational evaluation of their child.

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioner Jefferson County Board of Education (the Board) seeks a writ of certiorari to challenge the validity of two aspects of 34 C.F.R. § 300.502(b). The Secretary of Education issued § 300.502(b) to implement the provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(b)(1), that guarantees the parent of a disabled child an opportunity to obtain an independent educational evaluation (IEE) of the child if the parent disagrees with the public agency's evaluation. The Board challenges the provision of the regulation providing that, under certain conditions, IEEs be provided "at public expense," § 300.502(b)(1), and the procedure set forth in § 300.502(b)(2)(i) for a public agency to avoid paying for an IEE by initiating a hearing "to show that its evaluation is appropriate."

Because the Board has failed to identify a single decision from any court adopting the Board's argument, because the Board concedes that the petition presents "questions of first impression" that are "not likely" to be raised again, Pet. 36, and because the decision below is correct, the Board's petition should be denied.

STATEMENT

Statutory Background. The IDEA, 20 U.S.C. § 1400, *et seq.*, was originally enacted in 1975, based on Congress's determination that children with disabilities were routinely denied educational opportunities afforded to children without disabilities. The IDEA seeks to ensure that each child with a disability receives a comprehensive evaluation of his or her unique needs, and a "free appropriate public education" (FAPE). 20 U.S.C. § 1412(a)(1)(A). Enacted in part under the Spending Clause, the IDEA imposes certain conditions on states and local school districts in

return for federal money. *See, e.g.*, Alabama Exceptional Child Education Act, Ala. Code § 16-39-1, *et seq.*

A hallmark of the IDEA is its guarantee of parental procedural safeguards, including the right "to obtain an [IEE] of the child." 20 U.S.C. § 1415(b)(1). The IDEA's implementing regulations, originally promulgated in 1977, provide that, upon request for an IEE, a public agency must provide parents with the "agency criteria applicable for independent education evaluations." 34 C.F.R. § 300.502(a)(2). The IEE regulations guarantee parents "the right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency," *id.* § 300.502(b)(1), unless the public agency initiates a due process hearing "to show that its evaluation is appropriate." *Id.* § 300.502(b)(2)(i).[1] The IEE regulation has been substantially the same since 1977, and the right to an IEE at public expense has long been recognized as an important procedural safeguard to effectuate Congress's desire to assure meaningful educational opportunities for the disabled. *Schaffer v. Weast*, 546 U.S. 49, 60-61 (2005).

Facts and Proceedings Below. A.C. resides with his parents and attends school in Jefferson County, Alabama. A.C. is eligible for special education services. Pet. App. 185. During the 2005-2006 school year, A.C. was enrolled in kindergarten. The school system evaluated A.C. through a variety of formal and informal assessments. *Id.* at 191.

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[1] The 1999 version of 34 C.F.R. § 300.502(b) applies in this case. The regulation was amended in October 2006 to its current version, but the differences between the 1999 and 2006 versions are not material to the issues raised in the petition. *See* Pet. App. 2 n.1.

A.C.'s parents disagreed with the school system's evaluations. *Id.* at 196-97. In part, A.C.'s parents believed that their child was capable of functioning at a much higher level than did the school system staff. *Id.* at 197-98.

Dissatisfied with the school system's assessments, in March 2006, A.C.'s parents had their child evaluated at Mitchell's Place, a facility that specializes in evaluating autistic and developmentally delayed children. *Id.* at 181, 198-99. The total cost of the evaluation was $1,007.50, a portion of which was covered by the parents' insurance. *Id.* at 202. A.C.'s parents requested that the Board reimburse them for the remainder of the cost of the IEE. The Board did not provide any agency criteria applicable for IEEs, as required by § 300.502(a)(2), and the Board did not file a due process hearing complaint to show that its evaluation was appropriate, as required by § 300.502(b)(2)(i). The Board simply refused to pay for the IEE.

A.C.'s parents requested a due process hearing, alleging, in relevant part, that the Board's failure to pay for the IEE violated their rights under the IDEA. *Id.* at 179. The Board asserted that it had no obligation to pay for the IEE because the parents had not provided prior notice of their intent to obtain an IEE or expressed a specific disagreement with the school system's evaluation. *Id.* at 181.

An administrative hearing was held over four non-consecutive days in late 2006 and early 2007. *Id.* at 182. On March 9, 2007, the Hearing Officer issued a decision holding, in relevant part, that A.C.'s parents "are entitled to payment for the independent educational evaluation of their child by Mitchell's Place." *Id.* at 211-12.

The Hearing Officer rejected the Board's contention that A.C.'s parents had not expressed disagreement with its evaluations, finding as a matter of fact that "the parents expressed their disagreement with the school system's assessments on numerous occasions." *Id.* at 212. The Hearing Officer also rejected the Board's argument that a parent must express disagreement with a school district evaluation prior to obtaining an IEE, finding that "the weight of authority is to the contrary." *Id.* at 214 (citing cases). Finally, the Hearing Officer rejected the Board's argument that "a school system should not be required to pay for an [IEE] without first receiving notice of it," finding that "the relevant federal regulatory body" had considered the argument and rejected it. *Id.* at 215 (citing administrative decisions). The Hearing Officer did not address the questions presented in the Board's petition, because the Board did not challenge the validity of 34 C.F.R. § 300.502(b) in the due process hearing.

A.C.'s parents brought an action in federal district court to enforce the Hearing Officer's ruling and to seek attorney's fees. Pet. App. 6. The Board counterclaimed to appeal the administrative decision. In its counterclaim, the Board asserted that the Secretary exceeded his authority in promulgating § 300.502(b).

The district court affirmed the decision in relevant part, rejecting the Board's assertion that 34 C.F.R. § 300.502(b) is invalid and finding A.C.'s parents entitled to reimbursement for the cost of the IEE. First, the court found that the Secretary has the authority to issue regulations necessary to ensure compliance with the IDEA, Pet. App. 34 (citing 20 U.S.C. § 1406(a)), and that the statute guarantees the parents of a child with a

disability the opportunity "'to obtain an independent educational evaluation of the child.'" *Id.* at Pet. App. 35 (quoting 20 U.S.C. § 1415(b)(1)). Second, the district court found that, because the IDEA is silent as to public funding of IEEs, the regulation is entitled to *Chevron* deference and is a reasonable interpretation of the statute. *Id.* at 37. Third, the district court rejected the Board's claim, under the Spending Clause, that the State accepted IDEA funds without sufficient notice that IEEs may have to be provided at public expense, observing that "a federal regulation requiring public funding for IEEs has been in place since 1977 and codified by the State of Alabama" in its own regulation. *Id.* at 40.

The court of appeals affirmed. *Id.* at 14. In rejecting the Board's challenge to the Secretary's authority, the court relied primarily on 20 U.S.C. § 1406(b)(2), which requires the Secretary to preserve any IDEA regulation protecting children with disabilities that existed as of July 20, 1983. Because the regulations in effect on that date provided parents the right to an IEE at public expense, the court found that § 1406(b) provides clear authority for the regulation at issue. The court found further support for the regulation in the fact that "Congress reauthorized the IDEA in 1990, 1997, and 2004 without altering a parent's right to a publicly financed IEE," Pet. App. 10, and the court found "clear Congressional intent for reimbursement based on the statutory scheme of the IDEA." *Id.* at 11. Finally, the court held that "even if some ambiguity existed within the statute regarding reimbursement," the Secretary's construction of the statute would be entitled to *Chevron* deference and the regulation is a reasonable interpretation of the IDEA. *Id.* at 13.

The Board sought panel rehearing and rehearing en banc. No judge requested a vote on whether to rehear the case en banc and the petition was denied. *Id.* at 167.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Conflict with the Decision of Any Other Court, and the Board's Novel Theory Does Not Warrant this Court's Review.

The Board rightly does not contend that the decision below conflicts with the decision of any other court.[2] Indeed, courts have applied § 300.502(b) for more than thirty years without questioning its validity.[3] And this

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[2]The Board notes that a magistrate judge recommended that the district court in this case declare the regulation invalid, but the district court rejected that recommendation.

[3]*See, e.g.*, *M.Z. ex rel. D.Z. v. Bethlehem Area Sch. Dist.*, 2013 WL 1224091 (3d Cir. Mar. 27, 2013); *Council Rock Sch. Dist. v. Bolick*, 462 F. App'x 212 (3d Cir. 2012); *Ruffin v. Houston Indep. Sch. Dist.*, 459 F. App'x 358 (5th Cir. 2012); *M.M. v. Lafayette Sch. Dist.*, 681 F.3d 1082, 1085 (9th Cir. 2012); *G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258 (11th Cir. 2012); *K.L.A. v. Windham Se. Supervisory Union*, 371 F. App'x 151, 154 (2d Cir. 2010); *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009); *C.S. ex rel. Sundberg v. Governing Bd. Of Riverside Unified Sch. Dist.*, 321 F. App'x 630, 631 (9th Cir. 2009); *P.R. v. Woodmore Local Sch. Dist.*, 256 F. App'x 751 (6th Cir. 2007); *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 796 (2d Cir. 2002); *Edie F. ex rel. Casey F. v. River Falls Sch. Dist.*, 243 F.3d 329 (7th Cir. 2001); *Indep. Sch. Dist. No. 284 v. A.C., by & through her Parent, C.C.*, 258 F.3d 769 (8th Cir. 2001); *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583 (3d Cir. 2000); *Kirkpatrick v. Lenoir Cnty. Bd.*

(continued...)

Court has discussed the regulation without expressing any such reservations. *See Schaffer*, 546 U.S. at 60. These facts, standing alone, demonstrate that the questions presented in the petition are neither sufficiently important nor recurring to justify this Court's review. *See* Sup. Ct. R. 10.

II. The Petition Is Wrong on the Merits.

The petition does little more than rehash the merits arguments rejected by the courts below. The Board's disagreement with the outcome of its novel challenge to the validity of § 300.502(b) does not warrant review.

A. Section 300.502(b) Is a Valid Exercise of the Secretary of Education's Regulatory Authority.

Section 300.502(b) properly implements the IDEA for several reasons. First, the IDEA grants the Secretary the authority to issue regulations necessary to ensure compliance with the statute, 20 U.S.C. § 1406(a), and the IDEA guarantees the parents of a child with a disability the opportunity "to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1). Although the statute does not explicitly require that IEEs be provided "at public expense," there would be no need for legislation guaranteeing parents the right to obtain an IEE at their own expense because parents could, of course, already pay for an IEE themselves. Moreover, publicly-funded IEEs are one of the procedural safeguards at the core of the IDEA. *See Schaffer*, 546 U.S. at 60 (explaining parents' need for accurate information about their child's

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[3](...continued)
of Educ., 216 F.3d 380, 387 (4th Cir. 2000).

disability and recognizing the right to an IEE at public expense).

Second, the IDEA requires the Secretary to preserve any regulatory protections for disabled children that existed as of July 20, 1983. 20 U.S.C. § 1406(b)(2). Because the regulations in effect on that date provided for IEEs at public expense, *see* 34 C.F.R. § 300.503 (1983) *quoted at* Pet. App. 8 n.5, the IDEA not only authorized the Secretary to issue a regulation addressing payment of IEEs, it required the Secretary to preserve parents' right to an IEE at public expense.

Third, Congress reauthorized and amended the IDEA in 1990, 1997, and 2004, but each time chose not to alter the regulation requiring IEEs at public expense and providing public agencies a procedure to avoid paying for IEEs by showing that the public evaluation is appropriate. As this Court has long recognized, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

Finally, even if some ambiguity existed in the statute regarding public funding of IEEs, the Secretary's construction of the statute would be entitled to *Chevron* deference because the regulation is a reasonable interpretation of the IDEA. *See Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that when a statute is "silent or ambiguous" on a particular point, courts should defer to an agency's reasonable interpretation of the statute). As the court below explained, the IDEA's text, this Court's precedents,

the IDEA's legislative history, and well-accepted canons of statutory construction all confirm that providing parents with a publicly funded IEE if they disagree with the school system's assessment is critical to achieving the goals of the IDEA. Pet. App. 7-14.

B. The Decision Below Is Consistent with this Court's Precedents.

The Board suggests that the decision below conflicts with this Court's decisions in *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006). Pet. 8, 11. The Board is incorrect.

In *Sandoval*, this Court held that there was no private right of action to enforce regulations imposing liability for disparate impact discrimination under Title VI of Civil Rights Act of 1964, where the statute did not provide individuals with the right to sue on that basis. 523 U.S. at 293. Here, however, the IDEA expressly provides parents with a right of action to enforce the provisions of the statute and specifically authorizes parents to file a complaint "with respect to any matter relating to the . . . evaluation . . . of the[ir] child." 20 U.S.C. § 1415(b)(6)(A). *Sandoval* is thus inapposite.

In *Murphy*, the Court held that expert's fees in IDEA cases are not costs recoverable from the State under the IDEA's fee-shifting provision, because Spending Clause legislation that attaches conditions to a State's acceptance of federal funds must provide clear notice of those conditions. 548 U.S. at 296 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)). The Board argues that the decision below conflicts with *Murphy* by allowing parents to indirectly extract from the Board expert witness

fees that *Murphy* held could not be recovered directly. Pet. 11. First, the cost of an IEE is different than the costs associated with having an expert testify at a hearing. Justice Ginsberg's concurring opinion in *Murphy* specifically recognizes that Congress has already authorized payment for some consultant "fees and testing expenses" through the provision of a publicly funded IEE. 548 U.S. at 307 and n 3. Second, the Board's argument ignores the fact that Alabama law entitling parents to publicly-funded IEEs states that the evaluations may be admitted as evidence in a due process hearing. Ala. Admin. Code § 290-8-9-.02(4)(e). Finally, the Board does not argue that it was given insufficient notice that it might be responsible for reimbursing parents for the cost of an IEE. Even if it did, that argument would fail—the Board cannot reasonably claim not to have had notice about a federal regulation that has existed since 1977 and that the State of Alabama has adopted in its regulations on special education. *See* Ala. Admin. Code § 290-8-9-.02(4)(d) ("A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public education agency."). The decision below upholding § 300.502(b) as within the scope of the Secretary's authority under the IDEA is wholly unrelated to—and therefore not in conflict with—the notice issue addressed in *Murphy*.

C. The Board's Objection to Using the Due Process Hearing Procedure to Determine Liability for the Cost of IEEs Ignores the Text of the Statute.

The Board claims that due process hearings are available only to resolve "disagreements regarding the appropriateness or implementation of instructional

services" and "have no place" in determining financial liability for IEEs. Pet. 25. The court below did not address this implausible argument, and the Board does not cite a single case holding that due process hearings are unavailable to resolve disputes over payment for IEEs. Indeed, the IDEA provides "[a]n opportunity for any party to present a complaint . . . with respect to any matter relating to the identification, evaluation, or educational placement of the child." 20 U.S.C. § 1415(b)(6)(A). Because a parent's request for reimbursement for an IEE, or a school system's effort to avoid paying for an IEE by showing the appropriateness of its evaluation, are related to the evaluation of the child, the due process hearing procedure is available to whichever party invokes it. *See, e.g.*, *M.M. v. Lafayette Sch. Dist.*, 681 F.3d at 1085 (reviewing issue arising from due process hearing over IEE reimbursement); *Holmes*, 205 F.3d at 587 (3d Cir. 2000) (same).

III. The Board's Policy Arguments Do Not Provide a Basis to Grant the Petition.

The Board argues that this Court should grant the petition and reverse the decision below because providing IEEs at public expense encourages litigation by affording parents an opportunity to receive a second opinion regarding their child's needs. The Board claims that IEEs have become "little more than litigation ordnance," and their "deleterious effect" is "incalculable." Pet. 7, 36. Such concerns are best directed at Congress. If Congress shared the Board's concern about public funding of IEEs, it could eliminate that procedural safeguard by amending the statute. Congress has not done so during the three decades that § 300.502(b) has been in effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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