No. 10-886

# In the Supreme Court of the United States

COMPTON UNIFIED SCHOOL DISTRICT, PETITIONER

*v.*

STARVENIA ADDISON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTION PRESENTED

Whether an allegation that a school district has violated the "child find" provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1412(a)(3)(A), may be considered in a due process hearing under the IDEA.

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

1. a. The Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. 1400 *et seq.*, provides federal grants to States to fund special education and related services for children with disabilities, and it conditions those grants on compliance with specific standards and procedures. The Act requires recipients of federal funding to ensure that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. 1412(a)(1)(A). A "free appropriate public education" must include the special education and related services

necessary to meet each child's unique needs, as set forth in an individualized education program (IEP) developed by the local school district in consultation with the child's parents. 20 U.S.C. 1401(9), 1414(d). The Act also contains a "child find" provision that requires recipients of federal funding to ensure that "[a]ll children with disabilities residing in the State * * * regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. 1412(a)(3)(A).

The IDEA requires States and local school boards "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." 20 U.S.C. 1415(a). Specifically, parents must receive written notice when the local school district "(A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 20 U.S.C. 1415(b)(3). In addition, the State must make available an "impartial due process hearing" to resolve disputes between parents and state or local school officials. 20 U.S.C. 1415(f)(1)(A). To initiate the due process hearing procedure, the child, the child's parents, or the school district may file a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6)(A). The complaint must "set[] forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. 1415(b)(6)(B). The hearing

is held before a state administrative law judge or other qualified hearing officer, see 20 U.S.C. 1415(f)(3)(A), and any party aggrieved by a final administrative decision may obtain judicial review by bringing a civil action under the IDEA in federal district court or in an appropriate state court, 20 U.S.C. 1415(i)(2)(A).

b. The Secretary of Education administers the IDEA and has the authority to promulgate regulations to ensure compliance with the Act. 20 U.S.C. 1406. The Secretary has adopted regulations providing that "[a] parent or a public agency may file a due process complaint on any of the matters described in [34 C.F.R.] 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child)." 34 C.F.R. 300.507. Section 300.503(a) provides that notice must be given to parents of a child with a disability before the school district "[p]roposes" or "[r]efuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of [a free appropriate public education] to the child."

2. Petitioner is a school district in Los Angeles County, California. Respondent Starvenia Addison was enrolled in the regular education program in the school district through the tenth grade. At the end of ninth grade, she received D's in her academic subjects and scored below the first percentile in standardized reading and mathematics tests. In the fall of the tenth grade (the 2003-2004 school year), she failed all of her academic subjects. Addison's mathematics teacher reported to the school counselor that she "was quiet, did not work in groups, did not complete warm-up assignments, and did not 'get it'"; that she colored with crayons instead of doing class work; and that she was emotionally

withdrawn. Addison's English teacher said that her "work was gibberish and incomprehensible in all areas of study including reading, writing, listening, and speaking"; that she "was 'like a stick of furniture'"; and that she urinated on herself and played with dolls in class. Addison's social-studies teacher said that she "was a slow learner" who "did not participate in class, and doodled and copied things out of magazines instead of completing in-class written assignments." Pet. App. A59-A63.

The school counselor had personal knowledge of Addison's emotional difficulties because he sometimes "accompanied [her] and helped her enter the classroom." On these occasions, the counselor observed that Addison was "fidgety, anxious, and had quickened speech." At some time during Addison's tenth-grade year, the counselor contacted her mother, respondent Gloria Allen. When Allen expressed "reluctance to have [Addison] 'looked at," however, the counselor "decided not to 'push.'" Neither the counselor nor any other school personnel convened a student study team meeting to discuss Addison's behavioral difficulties or "otherwise explained the range of interventions or services available to" Addison or her mother. Pet. App. A60, A63-A65.

In March 2004, the counselor referred Addison to Shields for Families, an organization under contract with the school district to provide mental-health services to students. Shields for Families began providing counseling services to Addison. After interviewing Addison, Allen, and school personnel, the organization recommended that Addison receive tutoring and that she be assessed for learning disabilities and have an IEP. Petitioner did not act on that recommendation. Pet. App. A64.

At the end of the tenth grade, Addison failed all her academic subjects but one (in which she received a D), failed the California high-school exit examination, and once again scored below the first percentile in reading and mathematics on standardized tests. Petitioner promoted her to the eleventh grade without referring her for an assessment or other intervention. Pet. App. A65.

In September 2004, as Addison was beginning the eleventh grade, Allen requested an IEP meeting and a behavioral assessment. Addison was assessed in December, and in January 2005, an IEP team concluded that she was eligible for special education services under the IDEA. The IEP team also recommended that Addison be referred for a mental-health assessment, but petitioner made no such referral. Early in the next school year, the IEP team met again, and Addison was reassessed to determine whether she was eligible for special education services for emotional disturbance. Pet. App. A65-A74.

3. In November 2005, Allen filed a complaint requesting a due process hearing. Pet. App. A55. After a four-day evidentiary hearing, an administrative law judge (ALJ) found that, by the time Addison was in tenth grade, petitioner "knew or had reason to know" that she "was eligible for special education and related services." *Id.* at A91. The ALJ concluded that petitioner had denied Addison a free appropriate public education and had failed in its child-find requirements from the fall of 2003, when Addison began the tenth grade, until January 2005, when she was first deemed eligible for special education services. *Id.* at A88-A91. The ALJ further determined that petitioner had denied Addison a free appropriate public education by unjustifiably delaying her assessment after Allen's request for an as-

sessment in the fall of 2004 (*id.* at A91-A92); that the assessment, when it did take place, was inappropriate because it failed to assess Addison in "the social and emotional domain" (*id.* at A91); and that the services provided to Addison under the January 2005 IEP were substantively inappropriate (*id.* at A92-A95). The ALJ ruled that Addison was entitled to an independent assessment, a referral for a mental-health assessment, and compensatory education in the form of tutoring. *Id.* at A99-A100.

4. Petitioner brought an action in federal district court, contending that the ALJ lacked jurisdiction to consider whether the school district's failure to identify Addison as a child with a disability violated the IDEA. The district court granted judgment on the pleadings to respondents. Pet. App. A25-A52. The court disagreed with petitioner's argument that IDEA due process hearings are unavailable when a parent asserts claims based on a school district's "neglect, rather than a refusal to act." *Id.* at A39. That argument, the court explained, "conflicts with the clear language of the IDEA and federal regulations * * * and would lead to the illogical and unjust conclusion that [respondents] have a recognized right under the IDEA but no means to enforce (and, ultimately, no remedy for) violations of that right." *Id.* at A42.

Petitioner suggested that respondents' interpretation of the IDEA would allow parents "to assert claims of educational malpractice against school districts." Pet. App. A50. The district court disagreed, observing that its decision in this case was "heavily fact-based" and that "the IDEA violation committed by [petitioner] resulted not from its educators and administrators failing to detect [Addison's] disabilities, but their delay in as-

sessing and classifying those disabilities—which they *had* observed." *Ibid.* The court emphasized that petitioner "continued to disregard [its] child-find duties even after [its] own psychologist recommended a Department of Mental Health assessment." *Ibid.* It therefore concluded that "this case does not at all involve" a claim of mere "educational malpractice." *Ibid.*

5. The court of appeals affirmed. Pet. App. A1-A22.

a. Petitioner argued that an IDEA due process hearing is not available to consider a claim that a school district has failed to act. According to petitioner, the jurisdictional scope of such a hearing is limited by the IDEA's notice provision, 20 U.S.C. 1415(b)(3), which requires notice to parents when a school district "proposes" or "refuses to initiate or change, the identification, evaluation, or educational placement of the child." The court of appeals rejected that argument. Pet. App. A6-A7. It emphasized that 20 U.S.C. 1415(b)(6)(A), which provides for due process hearings, "states that a party may present a complaint 'with respect to *any matter* relating to the identification, evaluation, or educational placement of the child.'" Pet. App. A7 (quoting 20 U.S.C. 1415(b)(6)(A)). The court concluded that petitioner's contrary interpretation would produce "absurd results" and explained that a reading of the IDEA "'that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.'" *Id.* at A6 (quoting *Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484, 2495 (2009)).

The court of appeals went on to explain that, even if petitioner were correct that due process hearings have

jurisdiction only over school officials' refusals or proposals to act, the claim in this case would still be cognizable. Pet. App. A7 n.2. Petitioner's "deliberate indifference" and "wilful inaction in the face of numerous 'red flags'" concerning Addison's suspected disability, the court stated, constituted a "refusal to evaluate" her. *Id.* at A8 n.2.

b. Judge Smith dissented. Pet. App. A9-A22. He emphasized that Section 1415 requires States to establish procedures to protect the IDEA rights of parents and children. *Id.* at A11-A13. "By requiring that the *states* develop and maintain procedures governing initiating a due process hearing," he argued, "Congress instructed the courts that we are to give deference to the states." *Id.* at A13. And California's Education Code, in Judge Smith's view, permits parents to initiate the due process hearing procedures "under circumstances where the school district has refused to initiate the identification, assessment, or educational placement of a child." *Id.* at A13. Because petitioner had not "refused" to initiate the identification or assessment of Addison, Judge Smith concluded that respondents had no private right of action to seek a remedy for petitioner's failure to act. *Id.* at A13-A18.

**DISCUSSION**

The court of appeals correctly held that a parent may invoke the IDEA's due process hearing procedures in order to assert a claim that a school district has violated the statute's child-find requirement. That decision does not conflict with any decision of this Court or any other court of appeals, and it does not warrant this Court's review. Even if the question presented otherwise warranted review, this case would be an inappropriate vehi-

cle for considering it because it is doubtful that petitioner could prevail even under the standard it proposes. The petition for a writ of certiorari should therefore be denied.

### A. An Administrative Law Judge Conducting An IDEA Due Process Hearing Has Jurisdiction To Consider Claims That A School District Has Violated The Child-Find Requirement

The IDEA's "child find" provision requires States to ensure that "[a]ll children with disabilities residing in the State * * * and who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. 1412(a)(3)(A). The provision governing due process complaints permits a parent "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) (emphasis added); see 20 U.S.C. 1415(f)(3)(B) (issues that may be considered in a due process hearing are limited to those identified in the complaint). Because a claim that a child was not "identified [or] evaluated," in violation of Section 1412(a)(3)(A), is a "matter relating to the identification [or] evaluation * * * of the child," 20 U.S.C. 1415(b)(6)(A), it follows that such a claim may be raised in a due process complaint and considered in a due process hearing.

Petitioner asserts that the IDEA's due process procedures are available only to address school authorities' affirmative *refusal* to act, not their *failure* to act. In the courts below, petitioner based that argument on Section 1415(b)(3), which requires school officials to provide parents with written notice whenever the school officials "propose[] to initiate or change; or refuse[] to

initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 20 U.S.C. 1415(b)(3). As the court of appeals recognized, however, nothing in that provision purports to limit the topics that may be raised in a due process complaint or in the due process hearing. Pet. App. A6-A7. Rather, the IDEA prescribes that a due process complaint can encompass "any matter" pertaining to the child's "identification, evaluation, or educational placement." 20 U.S.C. 1415(b)(6)(A).

In this Court, petitioner relies (Pet. 23) upon 20 U.S.C. 1415(b)(7)(A)(ii), which specifies certain information that must be included in a due process complaint. In particular, a complaint must include "a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem." 20 U.S.C. 1415(b)(7)(A)(ii)(III). Petitioner also points to provisions in regulations stating that a parent may file a due process complaint "on any of the matters described in [34 C.F.R.] 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of [a free appropriate public education] to the child)." Pet. 26 (quoting 34 C.F.R. 300.507(a)(1)). Paragraphs 300.503(a)(1) and (2), like 20 U.S.C. 1415(b)(3), provide that school officials must give written notice to parents before the school district "[p]roposes to initiate or change" or [r]efuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of [a free appropriate public education] to the child." 34 C.F.R. 300.503(a)(1) and (2). According to petitioner (Pet. 21-26), those statutory and regulatory provisions operate to limit due process complaints to

matters that have been the subject of a written notice of a proposal or refusal by the school district to take an action.

Petitioner's argument is flawed in three respects. First, petitioner's argument fails to take account of the statutory provision of most direct relevance, which, as explained, permits parents to file a complaint on "*any* matter relating to the identification, evaluation, or educational placement of the child." 20 U.S.C. 1415(b)(6)(A) (emphasis added); accord 34 C.F.R. 300.507(a)(1). As this Court has recognized, "[r]ead naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (internal quotation marks and citation omitted). Although the provision on which petitioner now relies—Section 1415(b)(7)(A)(ii)(III)—refers to a "proposed initiation or change," nothing in that provision suggests that a due process hearing is available only after a school district has made a proposal. Indeed, even under petitioner's restrictive reading, a due process hearing may consider a claim that a district has improperly *refused* to initiate or change the identification, evaluation, or placement of a child—*i.e.*, that it has made no proposal at all.

In most cases, of course, school officials will have provided written notice of a proposed action before a parent has occasion to resort to the due process complaint procedures. The IDEA contemplates an ongoing, cooperative process involving children, parents, and school officials, beginning with the officials' obligation to identify all children with disabilities, and continuing through the evaluation of the individual child, the development of an IEP, and the provision of a free appropriate public education. See 20 U.S.C. 1412(a)(3), 1414.

Thus, the written notice that ordinarily precedes a due process complaint will often be the culmination of a series of interactions among the child, the school and its experts, and the parents. The most natural reading of Section 1415(b)(7)(A)(ii)(III) and of the regulations that parallel it is that, when a school district has given written notice of a proposed action, a parent should identify that proposed action when filing a due process complaint. But a due process complaint may raise matters that predate a written notice or are not themselves the subject of a written notice, as long as those matters occurred within the appropriate statute of limitations. See 20 U.S.C. 1415(b)(6)(B). The failure of the district to provide a written notice thus does not preclude a parent from seeking a due process hearing.

Second, petitioner's interpretation would yield perverse consequences that Congress could not have intended. The IDEA's child-find provision imposes an obligation on school districts to make sure that "[a]ll children with disabilities * * * who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. 1412(a)(3)(A). That obligation exists whether or not a parent requests that a child be identified. See *Reid* v. *District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005) ("School districts may not * * * await parental demands before providing special instruction."). Under petitioner's theory, if a district recognized a child as having a disability but then proposed an inadequate IEP, the parents could challenge the IEP in a due process hearing. But if the district committed the more fundamental statutory violation of failing to recognize the child's disability in the first place, a parent who became aware of the district's failure would be unable to seek a due process hearing.

As this Court observed in *Forest Grove School District* v. *T.A.*, 129 S. Ct. 2484 (2009), an interpretation of the IDEA "that left parents without an adequate remedy *when a school district unreasonably failed to identify a child with disabilities* would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services." *Id.* at 2495 (emphasis added).

Significantly, the logic of petitioner's theory is not limited to violations of the child-find requirement. For example, under petitioner's reading of the statute, if a child had an IEP that prescribed certain services, but the school district simply failed to provide those services, the child's parents would be unable to seek a due process hearing because the district would not have given a formal notice of any particular refusal to act. That result would seriously undermine the procedural protections that Congress sought to establish for children with disabilities and their parents.

Third, the implicit premise of petitioner's argument is that a school district can "refuse" to initiate the identification of a child only by making some affirmative statement of its unwillingness to identify the child as having a disability; in other words, a district's "refusal" may not take the form of inaction. The ordinary meaning of the word "refuse," however, encompasses a passive failure to act. See *Webster's Third New International Dictionary of the English Language* 1910 (1993) ("to show * * * a positive unwillingness to do or comply with * * * <*refused* to answer the question> <motor *refused* to start>"); cf. *Gasho* v. *United States*, 39 F.3d 1420, 1432 n.12 (9th Cir. 1994) (distinguishing "passive refusal to cooperate" in a search from "physical resistance that interferes with a search"), cert. denied,

515 U.S. 1144 (1995); *United States* v. *Williams*, 952 F.2d 1504, 1516 (6th Cir. 1991) (discussing a criminal defendant's "passive refusal to cooperate" in an investigation). Thus, even if petitioner were correct that a due process complaint may be based only on an action that the school district "proposes" or "refuses," a parent would still be able to file a complaint alleging that a district violated the child-find requirement by failing to act.

**B. The Decision Below Does Not Conflict With Any Decision Of This Court Or Any Other Court Of Appeals**

1. Petitioner does not contend that the decision below conflicts with the decision of any other court of appeals, and it does not. To the contrary, although no other court of appeals has expressly addressed the question whether claims of child-find violations are within the jurisdiction of a due process hearing, at least two courts of appeals have considered such claims on the merits. See *P.P.* v. *West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009) (finding no violation because school officials had no notice of suspected disability); *Board of Educ.* v. *L.M.*, 478 F.3d 307, 313 (6th Cir.) (parents seeking to prove violation of child-find obligation "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate") (quoting *Clay T.* v. *Walton County Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997)), cert. denied, 552 U.S. 1082 (2007). Many district courts have considered such claims as well. See, *e.g.*, *A.P.* v. *Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 224-227 (D. Conn. 2008) (finding no violation where school officials screened child and did not diagnose a disability), aff'd, 370 Fed. Appx. 202 (2d Cir. 2010); *N.G.*

v. *District of Columbia*, 556 F. Supp. 2d 11, 26-27 (D.D.C. 2008) (finding violation where school officials failed to evaluate student despite steep decline in academic performance, psychiatric hospitalization, suicide attempt, and diagnoses of clinical depression and ADHD); *Jamie S.* v. *Milwaukee Pub. Sch.*, 519 F. Supp. 2d 870, 889 (E.D. Wis. 2007) (finding violation based on numerous instances in which school officials failed to identify and assess, on a timely basis, students for whom there was "a reasonable belief that special education [might] be appropriate") (internal quotation marks and citation omitted); *Department of Educ.* v. *Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Hawaii 2001) (finding violation where school officials had reason to suspect student was a child with a disability based on "numerous incidents or 'warning signs' of an emotional impairment"). And at least one district court, in considering whether a parent could be excused from exhausting administrative remedies, has held that a parent has the right to assert a claim for a violation of the child-find requirement in a due process hearing. See *Lindsley* v. *Girard Sch. Dist*, 213 F. Supp. 2d 523, 535-536 (W.D. Pa. 2002).

2. Petitioner suggests that the decision below conflicts with two decisions of this Court, but that is incorrect. First, petitioner argues (Pet. 19-21) that it was given insufficient notice that it might be subject to a due process hearing for failure to comply with the child-find requirements of the Act. Its argument relies on *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291 (2006), in which this Court held that conditions on the receipt of federal funds must be set forth "unambiguously" in a statute. *Id.* at 296. But the text of the IDEA unambiguously requires recipients of fed-

eral funding to identify and evaluate "[a]ll children with disabilities." 20 U.S.C. 1412(a)(3); see 34 C.F.R. 300.111(c)(1). Allowing parents to enforce that requirement in due process hearings is consistent with *Arlington* because it "does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe." *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 534 (2007). In any event, the IDEA also unambiguously provides that parents may file a due process complaint with regard to "any matter relating to the identification [or] evaluation * * * of the child. 20 U.S.C. 1415(b)(6)(A). Petitioner therefore had adequate notice not only of its obligation to identify and evaluate Addison as a child with a disability, but also of the possibility that its failure to comply with that requirement could be the subject of a due process hearing.

Second, petitioner asserts (Pet. 27) that permitting parents to challenge a school district's failure to identify and evaluate a child with a disability would conflict with this Court's holding in *Board of Education* v. *Rowley*, 458 U.S. 176 (1982), that school officials may comply with the IDEA by providing children with disabilities a "basic floor of opportunity" through special education services "reasonably calculated" to "confer some educational benefit." *Id.* at 200-201, 204. But while *Rowley* addressed the substantive standards to be applied in determining whether a school district has denied a free appropriate public education, the Court in that case said nothing about the scope of issues that may be raised in a due process hearing. Permitting parents to assert claims for violations of the child-find requirement in a due process complaint is therefore fully consistent with *Rowley*.

3. Notwithstanding the lack of a conflict, petitioner argues that this Court should grant plenary review because of what petitioner calls the "exceptional importance" of the question presented (Pet. 28) and because, it says, a circuit conflict is unlikely to occur for several years (Pet. 29-30). According to petitioner, the decision below has "enlarge[d] the scope of due process hearing procedures" (Pet. 29), and it will take several years before another such case reaches a court of appeals. As the cases cited above indicate, however, numerous courts have already adjudicated claims similar to this one, and there is no evidence to support petitioner's contention that the decision below will expand the use or scope of due process hearings under the IDEA. If the decision below is indeed as consequential as petitioner contends, it is likely that the issue will arise in another court of appeals. Review by this Court at this time would be premature.

### C. This Case Is An Inappropriate Vehicle For Considering The Question Presented

1. Petitioner asserts (Pet. 21) that a "due process complaint may only be brought where there is an actual dispute regarding a school district's proposal to act or refusal to act." This case is not an appropriate vehicle for considering that claim, however, because it involves a "proposal" made by petitioner. The judgment below could therefore be affirmed even if petitioner were correct.

Petitioner and respondents engaged in an interactive process to address Addison's behavioral and educational difficulties for more than two years before Allen initiated the due process procedures in November 2005. That process began with Addison's teachers' reports to

the counselor in 2003 and the counselor's own observations of Addison during that school year; it continued with the mental-health provider's recommendation in April 2004 and Allen's request in September 2004 that Addison be evaluated; and it was followed by the decision to develop an IEP in January 2005 and the continuing meetings of the IEP team in the fall of 2005. Pet. App. A55; see *id.* at A61-A76. During that period, Allen received at least two written notices from petitioner—a proposed assessment plan in November or December 2004, and the decision to draft an IEP in January 2005. *Id.* at A67-A68, A70-A73. Thus, the due process complaint was filed only after petitioner had given Allen written notice of a "proposal" for action.[*]

The matters raised in the due process complaint were directly related to the subject matter of the notices. Allen and Addison claimed, and the ALJ concluded, that the IEP was inappropriate, and that petitioner was not providing Addison a free appropriate public education, in part because the IEP failed to compensate for petitioner's long delay in identifying Addison as a child with a disability in need of special education services. Pet. App. A97-A98. Because the ALJ held that the delay violated the child-find provisions of the Act and "relat[ed] to the identification [or] evaluation * * * of a child with a disability, or the provision of [a free appropriate public education] to the child," it was properly the subject of the due process complaint and

[*] In addition, petitioner's failure to comply with its child-find obligations can readily be characterized as a refusal to identify Addison as having a disability. See pp. 13-14, *supra*; Pet. App. A8 n.2 (stating that petitioner's conduct was "more than sufficient to demonstrate its unwillingness and refusal to evaluate Addison").

hearing. See 34 C.F.R. 300.507(a)(1); see also 20 U.S.C. 1415(b)(6)(A).

2. Petitioner also argues (Pet. 26) that the IDEA should not be construed to allow what petitioner describes as "educational malpractice" claims, but this case does not present that issue. The availability of such claims depends on the substantive standard governing an allegation that a school district has violated the statute. Petitioner, however, did not challenge the merits of the ALJ's conclusion that it had violated its child-find obligations. Instead, it raised "only one issue" in the district court: "whether the ALJ correctly determined that she had *jurisdiction* to consider whether [petitioner's] failure to identify [respondent's] disabilities is a violation of the IDEA." Pet. App. A27 (emphasis added). Neither court below considered the substantive legal standard to be applied in adjudicating claims that school officials have failed to identify a child with a disability or otherwise violated the child-find provisions of the IDEA.

Whether or not parents are permitted to initiate due process procedures for violation of the child-find requirements, school districts already are subject to claims that their educational decisions fail to comply with the IDEA. See, *e.g.*, Pet. App. A92-A95 (concluding that Addison's IEP was substantively inappropriate because it was not based upon an adequate assessment of Addison, it failed to provide her sufficient support in small group settings, and it was not reasonably calculated to provide her with an educational benefit). As this Court has made clear, review of those decisions is deferential because the IDEA leaves to state and local school officials, in cooperation with parents, the "primary responsibility for formulating the education to be accorded

a handicapped child, and for choosing the educational method most suitable to the child's needs." *Rowley*, 458 U.S. at 207.

Here, as the district court explained, the ALJ's finding of a child-find violation was "heavily fact-based." Pet. App. A50. Notably, the ALJ rejected respondents' claim that petitioner should have identified Addison as a child with a disability and evaluated her in the ninth grade, solely on the basis of her poor grades and standardized test scores. *Id.* at A59-A61, A89. In contrast, the ALJ ruled that petitioner had violated the child-find obligation beginning in the tenth grade because the school counselor "knew or should have suspected that [Addison] required an assessment to determine special education eligibility," based upon her "worsening academic performance and unusual and disturbing behavioral manifestations." *Id.* at A89, see *id.* at A61-A63. As the district court explained, petitioner's liability arose not from school officials' failure to detect Addison's disability, but rather from their "delay in assessing and classifying those disabilities—which they *had* observed," and their continuing "disregard" even in the face of a recommendation from petitioner's own psychologist. *Id.* at A50; see *id.* at A7-A8 n.2 (court of appeals noting petitioner's "wilful inaction in the face of numerous 'red flags'"). Petitioner makes no effort to challenge that fact-bound conclusion, and it does not merit this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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